

L.N. 406 of 2021

**CONSUMER AFFAIRS ACT
(CAP.378)**

Digital Content and Digital Services Contracts Regulations, 2021

IN EXERCISE of the powers conferred by article 7 of the Consumer Affairs Act, the Minister responsible for consumer affairs, after consultation with the Consumer Affairs Council, has made the following regulations: -

1. (1) The title of these regulations is the Digital Content and Digital Services Contracts Regulations, 2021. Citation, commencement and scope.

(2) These regulations shall come into force on 1st January 2022.

(3) The scope of these regulations is to transpose and implement Directive (EU) 2019/770 of the European Parliament and of the Council of 20th May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, 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.

2. (1) For the purposes of these regulations, unless the context otherwise requires: Interpretation.

"Act" means the Consumers Affairs Act; Cap. 378.

"consumer" means any natural person who, in relation to contracts covered by these regulations, is acting for purposes which are outside that person's trade, business, craft, or profession;

"compatibility" means the ability of the digital content or digital service to function with hardware or software with which

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digital content or digital services of the same type are normally used, without the need to convert the digital content or digital service;

"digital content" means data which is produced and supplied in digital form;

"digital environment" means hardware, software and any network connection used by the consumer to access or make use of digital content or a digital service;

"digital service" means:

(a) a service that allows the consumer to create, process, store or access data in digital form; or

(b) 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;

"durable medium" means any instrument which enables the consumer or the trader to store information addressed personally to that person in a way that is accessible for future reference, for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;

"functionality" means the ability of the digital content or digital service to perform its functions having regard to its purpose;

"goods with digital elements" means any tangible movable items that incorporate, or are inter-connected with, digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions;

"integration" means the linking and incorporation of digital content or a digital service with the components of the consumer's digital environment in order for the digital content or digital service to be used in accordance with the requirements for conformity provided for by these regulations;

"interoperability" means the ability of the digital content or digital service to function with hardware or software different from those with which digital content or digital services of the same type are normally used;

"personal data" means personal data as defined in point (1) of Article 4 of Regulation (EU) 2016/679;

"price" means money or a digital representation of value that is due in exchange for the supply of digital content or a digital service;

"trader" means any natural or legal person, irrespective of whether privately or publicly owned, that is acting, including through any other person acting in that natural or legal person's name or on that person's behalf, for purposes relating to that person's trade, business, craft, or profession, in relation to contracts covered by these regulations.

(2) Definitions and expressions used in these regulations shall have the same meaning assigned to them in the Act, and in the case of any conflict between the definitions and expressions in the regulations and in the Act, the definitions and expressions in these regulations shall prevail, limitedly for the purposes of these regulations and to the extent that these regulations apply.

3. (1) These regulations shall apply to any contract where the trader supplies or undertakes to supply digital content or a digital service to the consumer and the consumer pays or undertakes to pay a price. Applicability.

(2) These regulations shall also apply where the trader supplies or undertakes to supply digital content or a digital service to the consumer, and the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer are exclusively processed by the trader for the purpose of supplying the digital content or digital service in accordance with these regulations or for allowing the trader to comply with legal requirements to which the trader is subject, and the trader does not process that data for any other purpose.

(3) These regulations shall also apply where the digital content or digital service is developed in accordance with the consumer's specifications.

(4) With the exception of regulations 4 and 12, these regulations shall also apply to any tangible medium which serves exclusively as a carrier of digital content.

(5) These regulations shall not apply to digital content or digital services which are incorporated in or inter-connected with goods within the meaning of the definition of "goods with digital elements" in regulation 2, and which are provided with the goods

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under a sales contract concerning those goods, irrespective of whether such digital content or digital service is supplied by the seller or by a third party. In the event of doubt as to whether the supply of incorporated or inter-connected digital content or an incorporated or inter-connected digital service forms part of the sales contract, the digital content or digital service shall be presumed to be covered by the sales contract.

(6) 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;

S.L. 528.03.

(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;

S.L. 330.07.

(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;

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

(7) Without prejudice to sub-regulation (5), where a single

contract between the same trader and the same consumer includes in a bundle elements of supply of digital content or a digital service and elements of the provision of other services or goods, these regulations shall only apply to the elements of the contract concerning the digital content or digital service.

(8) Regulation 18 shall not apply where a bundle within the meaning of Directive (EU) 2018/1972 includes elements of an internet access service as defined in point (2) of Article 2 of Regulation (EU) 2015/2120 of the European Parliament and of the Council or a number-based interpersonal communications service as defined in point (6) of Article 2 of Directive (EU) 2018/1972:

Provided that without prejudice to Article 107(2) of Directive (EU) 2018/1972, the effects that the termination of one element of a bundle contract may have on the other elements of the bundle contract shall be governed by national law.

(9) If any provision of these regulations conflicts with a provision of a European Union act governing a specific sector or subject matter, the provision of that other European Union act shall take precedence over the provisions of these regulations.

(10) European Union law on the protection of personal data shall apply to any personal data processed in connection with the contracts referred to in sub-regulation (2). In particular, these regulations shall be without prejudice to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), the Data Protection Act and the Processing of Personal Data (Electronic Communications Sector) Regulations. In the event of conflict between the provisions of these regulations and European Union law on the protection of personal data, the latter prevails.

Cap. 586.
S.L. 586.01.

(11) These regulations shall be without prejudice to any other applicable law on copyright and related rights, including the Copyright Act and any regulations made thereunder.

Cap. 415.

(12) The provisions of 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 which shall only apply to contracts concluded from that date.

4. (1) The trader shall supply the digital content or digital service to the consumer. Unless the parties have agreed otherwise, the trader shall supply the digital content or digital service without undue

Supply of
digital content
or digital
service.

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delay after the conclusion of the contract.

(2) The trader shall have complied with the obligation to supply when:

(a) the digital content or any means suitable for accessing or downloading the digital content is made available or accessible to the consumer, or to a physical or virtual facility chosen by the consumer for that purpose;

(b) the digital service is made accessible to the consumer or to a physical or virtual facility chosen by the consumer for that purpose.

Conformity of the digital content or digital service.

5. The trader shall supply to the consumer digital content or a digital service that meets the requirements set out in regulations 6, 7 and 8, where applicable, without prejudice to regulation 9.

Subjective requirements for conformity.

6. In order to conform with the contract, the digital content or digital service shall, in particular, where applicable:

(a) be of the description, quantity and quality, and possess the functionality, compatibility, interoperability and other features, as required by the contract;

(b) be 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 his acceptance;

(c) be supplied with all accessories, instructions, including on installation, and customer assistance as required by the contract; and

(d) be updated as stipulated in the contract.

Objective requirements for conformity.

7. (1) In addition to complying with any subjective requirement for conformity, the digital content or digital service shall:

(a) be fit for the purposes for which digital content or digital services of the same type would normally be used, taking into account, where applicable, any existing Union and national law, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct;

(b) be of the quantity and possess the qualities and performance features, including in relation to functionality, compatibility, accessibility, continuity and security, normal for

digital content or digital services of the same type and which the consumer may reasonably expect, given the nature of the digital content or digital service and taking into account any public statement made by or on behalf of the trader, or other persons in previous links of the chain of transactions, particularly in advertising or on labelling unless the trader shows that:

(i) the trader was not, and could not reasonably have been, aware of the public statement in question;

(ii) by the time of conclusion of the contract, the public statement had been corrected in the same way as, or in a way comparable to how, it had been made; or

(iii) the decision to acquire the digital content or digital service could not have been influenced by the public statement;

(c) where applicable, be supplied along with any accessories and instructions which the consumer may reasonably expect to receive; and

(d) comply with any trial version or preview of the digital content or digital service, made available by the trader before the conclusion of the contract.

(2) The trader shall ensure that the consumer is informed of and supplied with updates, including security updates, that are necessary to keep the digital content or digital service in conformity, for the period of time:

(a) during which the digital content or digital service is to be supplied under the contract, where the contract provides for a continuous supply over a period of time; or

(b) that the consumer may reasonably expect, given the type and purpose of the digital content or digital service and taking into account the circumstances and nature of the contract, where the contract provides for a single act of supply or a series of individual acts of supply.

(3) Where the consumer fails to install, within a reasonable time, updates supplied by the trader in accordance with sub-regulation (2), the trader shall not be liable for any lack of conformity resulting solely from the lack of the relevant update, provided that:

(a) the trader informed the consumer about the availability of the update and the consequences of the failure of

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the consumer to install it; and

(b) the failure of the consumer to install or the incorrect installation by the consumer of the update was not due to shortcomings in the installation instructions provided by the trader.

(4) Where the contract provides for a continuous supply of digital content or digital service over a period of time, the digital content or digital service shall be in conformity throughout the duration of that period.

(5) There shall be no lack of conformity within the meaning of sub-regulation (1) or (2) if, at the time of the conclusion of the contract, the consumer was specifically informed that a particular characteristic of the digital content or digital service was deviating from the objective requirements for conformity laid down in sub-regulation (1) or (2) and the consumer expressly and separately accepted that deviation when concluding the contract.

(6) Unless the parties have agreed otherwise, digital content or a digital service shall be supplied in the most recent version available at the time of the conclusion of the contract.

Incorrect integration of the digital content or digital service.

8. Any lack of conformity resulting from the incorrect integration of the digital content or digital service into the consumer's digital environment shall be regarded as lack of conformity of the digital content or digital service if:

(a) the digital content or digital service was integrated by the trader or under the trader's responsibility; or

(b) the digital content or digital service was intended to be integrated by the consumer and the incorrect integration was due to shortcomings in the integration instructions provided by the trader.

Third party rights.

9. Where a restriction resulting from a violation of any right of a third party, in particular intellectual property rights, prevents or limits the use of the digital content or digital service in accordance with regulations 6 and 7, the consumer shall be entitled to the remedies for lack of conformity under regulation 13.

Liability of the trader.

10. (1) The trader shall be liable for any failure to supply the digital content or digital service in accordance with regulation 4.

(2) Where a contract provides for a single act of supply or a series of individual acts of supply, the trader shall be liable for any

lack of conformity under regulations 6, 7 and 8 which exists at the time of supply, without prejudice to point (b) of regulation 7(2):

Provided that the trader shall only be liable for any lack of conformity that becomes apparent within two years from the time of supply, without prejudice to point (b) of regulation 7(2).

(3) Where the contract provides for continuous supply over a period of time, the trader shall be liable for a lack of conformity under regulations 6, 7 and 8, that occurs or becomes apparent within the period of time during which the digital content or digital service is to be supplied under the contract.

11. (1) The burden of proof with regard to whether the digital content or digital service was supplied in accordance with regulation 4 shall be on the trader. Burden of proof.

(2) In cases referred to in regulation 10(2), the burden of proof with regard to whether the supplied digital content or digital service was in conformity at the time of supply shall be on the trader for a lack of conformity which becomes apparent within a period of one year from the time when the digital content or digital service was supplied.

(3) In cases referred to in regulation 10(3), the burden of proof with regard to whether the digital content or digital service was in conformity within the period of time during which the digital content or digital service is to be supplied under the contract shall be on the trader for a lack of conformity which becomes apparent within that period.

(4) Sub-regulations (2) and (3) shall not apply where the trader demonstrates that the digital environment of the consumer is not compatible with the technical requirements of the digital content or digital service and where the trader informed the consumer of such requirements in a clear and comprehensible manner before the conclusion of the contract.

(5) The consumer shall co-operate with the trader, to the extent reasonably possible and necessary, to ascertain whether the cause of the lack of conformity of the digital content or digital service at the time specified in regulation 10(2) or (3), as applicable, lay in the consumer's digital environment. The obligation to co-operate shall be limited to the technically available means which are least intrusive for the consumer. Where the consumer fails to cooperate, and where the trader informed the consumer of such requirement in a clear and comprehensible manner before the conclusion of the contract, the burden of proof with regard to whether the lack of conformity existed

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at the time specified in regulation 10(2) or (3), as applicable, shall be on the consumer.

Remedy for failure to supply.

12. (1) Where the trader has failed to supply the digital content or digital service in accordance with regulation 4, the consumer shall call upon the trader to supply the digital content or digital service. If the trader then fails to supply the digital content or digital service without undue delay, or within an additional period of time, as expressly agreed to by the parties, the consumer shall be entitled to terminate the contract.

(2) Sub-regulation (1) shall not apply, and the consumer shall be entitled to terminate the contract immediately, where:

(a) the trader has declared, or it is equally clear from the circumstances, that the trader will not supply the digital content or digital service;

(b) the consumer and the trader have agreed, or it is clear from the circumstances in which the contract was concluded, that a specific time for the supply is essential for the consumer and the trader fails to supply the digital content or the digital service by or at that time.

(3) Where the consumer terminates the contract under sub-regulation (1) or (2), regulations 14 to 17 shall apply accordingly.

Remedies for lack of conformity.

13. (1) In the case of lack of conformity, the consumer shall be entitled to have the digital content or digital service brought into conformity, to receive a proportionate reduction in the price, or to terminate the contract, under the conditions set out in this regulation.

(2) The consumer shall be entitled to have the digital content or the digital service brought into conformity, unless this would be impossible or would impose costs on the trader that would be disproportionate, taking into account all the circumstances of the case, including:

(a) the value the digital content or the digital service would have if there was no lack of conformity; and

(b) the significance of the lack of conformity.

(3) The trader shall bring the digital content or digital service into conformity pursuant to sub-regulation (2) within a reasonable time from the time that the trader has been informed by the consumer about the lack of conformity, free of charge and without any significant inconvenience to the consumer, taking account of the nature of the

digital content or digital service and the purpose for which the consumer required the digital content or the digital service.

(4) The consumer shall be entitled to either a proportionate reduction of the price in accordance with sub-regulation (5) where the digital content or the digital service is supplied in exchange for a payment of a price, or the termination of the contract in accordance with sub-regulation (6), in any of the following cases:

(a) the remedy to bring the digital content or the digital service into conformity is impossible or disproportionate in accordance with sub-regulation (2);

(b) the trader has not brought the digital content or the digital service into conformity in accordance with sub-regulation (3);

(c) a lack of conformity appears despite the trader's attempt to bring the digital content or the digital service in conformity;

(d) the lack of conformity is of such a serious nature as to justify an immediate price reduction or the immediate termination of the contract; or

(e) the trader has declared, or it is clear from the circumstances, that the trader will not bring the digital content or the digital service into conformity within a reasonable time, or without significant inconvenience for the consumer.

(5) The reduction in price shall be proportionate to the decrease in the value of the digital content or the digital service which was supplied to the consumer compared to the value that the digital content or the digital service would have if it was in conformity:

Provided that where the contract stipulates that the digital content or the digital service shall be supplied over a period of time in exchange for the payment of a price, the reduction in price shall apply to the period of time during which the digital content or the digital service was not in conformity.

(6) Where the digital content or the digital service is supplied in exchange for the payment of a price, the consumer shall be entitled to terminate the contract only if the lack of conformity is not minor. The burden of proof with regard to whether the lack of conformity is minor shall be on the trader.

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Exercise of the right of termination.

14. The consumer shall exercise the right to terminate the contract by means of a statement to the trader expressing the decision to terminate the contract.

Obligations of the trader in the event of termination.

15. (1) In the event of termination of the contract, the trader shall reimburse the consumer for all sums paid in terms of the contract:

Provided that, in cases where the contract provides for the supply of the digital content or the digital service in exchange for a payment of a price and over a period of time, and the digital content or the digital service had been in conformity for a period of time prior to the termination of the contract, the trader shall reimburse the consumer only for the proportionate part of the price paid corresponding to the period of time during which the digital content or digital service was not in conformity, and any part of the price paid by the consumer in advance for any period of the contract that would have remained had the contract not been terminated.

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(2) In respect of personal data of the consumer, the trader shall comply with the obligations applicable in terms of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) and the Data Protection Act.

(3) The trader shall refrain from using any content other than personal data, which was provided or created by the consumer when using the digital content or the digital service supplied by the trader, except where such content:

(a) has no utility outside the context of the digital content or the digital service supplied by the trader;

(b) only relates to the consumer's activity when using the digital content or the digital service supplied by the trader;

(c) has been aggregated with other data by the trader and cannot be disaggregated or only with disproportionate efforts; or

(d) has been generated jointly by the consumer and others, and other consumers are able to continue to make use of the content.

(4) Except in the situations referred to in paragraphs (a), (b) or (c) of sub-regulation (3), the trader shall, at the request of the consumer, make available to the consumer any content other than

personal data, which was provided or created by the consumer when using the digital content or the digital service supplied by the trader. The consumer shall be entitled to retrieve that digital content free of charge, without hindrance from the trader, within a reasonable time and in a commonly used and machine-readable format.

(5) The trader may prevent any further use of the digital content or the digital service by the consumer, in particular by making the digital content or digital service inaccessible to the consumer or disabling the user account of the consumer, without prejudice to sub-regulation (4).

16. (1) After the termination of the contract, the consumer shall refrain from using the digital content or digital service and from making it available to third parties.

Obligations of the consumer in the event of termination.

(2) Where the digital content was supplied on a tangible medium, the consumer shall, at the request and at the expense of the trader, return the tangible medium to the trader without undue delay. If the trader decides to request the return of the tangible medium, that request shall be made within fourteen (14) days of the day on which the trader is informed of the consumer's decision to terminate the contract.

(3) The consumer shall not be liable to pay for any use made of the digital content or digital service in the period, prior to the termination of the contract, during which the digital content or the digital service was not in conformity.

17. (1) Any reimbursement that is owed to the consumer by the trader, pursuant to regulation 13(4) and (5) or 15(1), due to a price reduction or termination of the contract shall be carried out without undue delay and, in any event, within fourteen (14) days of the date on which the trader is informed of the consumer's decision to invoke the consumer's right for a price reduction or to terminate the contract.

Time limits and means of reimbursement by the trader.

(2) The trader shall carry out the reimbursement using the same means of payment that the consumer used to pay for the digital content or digital service, unless the consumer expressly agrees otherwise and provided that the consumer does not incur any fees as a result of such reimbursement.

(3) The trader shall not impose any fee on the consumer in respect of the reimbursement.

18. (1) Where the contract provides that the digital content or the digital service is to be supplied or made accessible to the consumer over a period of time, the trader may modify the digital content or

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digital service beyond what is necessary to maintain the digital content or digital service in conformity in accordance with regulations 6 and 7, if the following conditions are met:

(a) the contract allows, and provides a valid reason for, such a modification;

(b) such a modification is made without additional cost to the consumer;

(c) the consumer is informed in a clear and comprehensible manner of the modification; and

(d) in the cases referred to in sub-regulation (2), the consumer is informed reasonably in advance on a durable medium of the features and time of the modification, and of the right to terminate the contract in accordance with sub-regulation (2), or of the possibility to maintain the digital content or the digital service without such a modification in accordance with sub-regulation (4).

(2) The consumer shall be entitled to terminate the contract if the modification negatively impacts the consumer's access to or use of the digital content or the digital service, unless such negative impact is only minor. In that case, the consumer shall be entitled to terminate the contract free of charge within thirty (30) days of the receipt of the information or of the time when the digital content or the digital service has been modified by the trader, whichever is later.

(3) Where the consumer terminates the contract in accordance with sub-regulation (2), regulations 14 to 17 shall apply accordingly.

(4) Sub-regulations (2) and (3) shall not apply if the trader has enabled the consumer to maintain without additional cost the digital content or the digital service without the modification, and the digital content or the digital service remains in conformity.

Right of redress.

19. Where the trader is liable to the consumer because of any failure to supply the digital content or the 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, the trader shall be entitled to pursue remedies against the persons liable in the chain of commercial transactions.

Mandatory nature.

20. (1) Unless otherwise provided for in these 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 the digital service in accordance with regulation 18 is brought to the consumer's attention by the trader, shall not be binding on the consumer.

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

21. (1) 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. Penalties and right of appeal.

(2) 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 (20) 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 (6) months from the judgement of the Civil Court.
