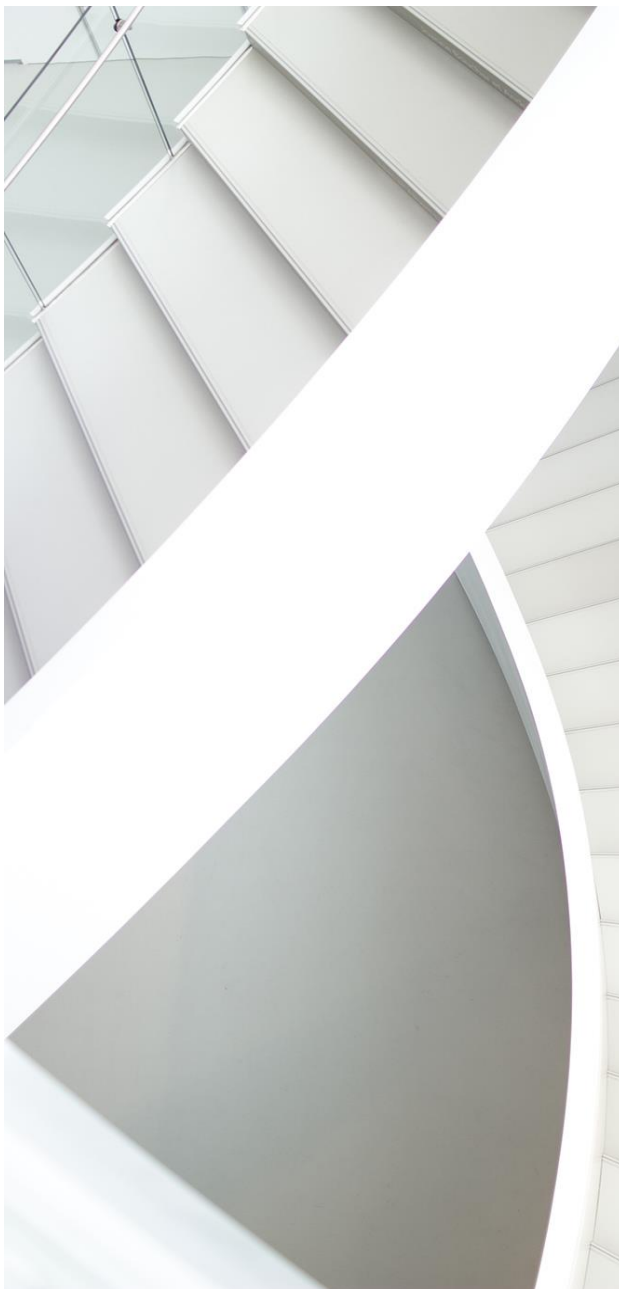

New system of guarantees concerning the supply of digital content and digital services to consumers

Legal flash: Consumer law
June 15, 2021



[Royal Decree 7/2021](#), of April 27, 2021, transposed two European Union Directives concerning consumer contracts: (i) Directive (EU) 2019/770, on certain aspects concerning contracts for the supply of digital content and digital services; and (ii) Directive (EU) 2019/771, on certain aspects of contracts for the sale of goods.

The two directives share some content and have common objectives: harmonizing certain aspects concerning contracts for the sale of goods and contracts for the supply of digital content and digital services to consumers, to achieve a true digital single market, reinforce legal certainty and reduce the cost of these types of transactions.

Transposing the two directives into Spanish law involves making important amendments to Royal Legislative Decree 1/2007 (November 16), approving the consolidated text of the Spanish Consumer Protection Act (“TRLGDCU”).

In this legal flash, we highlight the most important amendments to TRLGDCU and their impact on consumer contracts, particularly in relation to: (i) contracts for the sale of goods with digital elements, and (ii) contracts for the supply of digital content and digital services.



Main amendments to consumer law: new system for contracts for the sale of goods with digital elements and contracts for the supply of digital content and digital services with consumers

As a supplement to our previous [legal-flash](#), in which we covered the general changes introduced by Royal Decree-Law 7/2021 ("RDL 7/2021") concerning the purchase of physical goods by consumers, in the following sections, we summarize the specific new developments introduced by the reform of TRLGDCU in relation to contracts for the sale of goods with digital elements and contracts for the supply of digital content and digital services:

➤ **Expansion of the scope applicable to guarantees and after-sales services: contracts for the sale of goods with digital elements and contracts for the supply of digital content and digital services signed with consumers**

Before the reform introduced by RDL 7/2021, TRLGDCU established a guarantee and after-sales service system that only applied to contracts for the sale of physical goods between businesses and consumers. The reform broadens the scope of application of this system, extending it for the first time to: (i) **contracts for the sale of goods with digital elements**, and (ii) **contracts for the supply of digital content and digital services**.

- (i) **Goods with digital elements** are movable tangible assets that include digital content or digital services, or that are interconnected with that digital content and those services, and their absence would prevent those goods from carrying out their function.
- (ii) **Contracts for the supply of digital content and digital services** are those where a business supplies digital content or services to consumers, and the consumers pay a price or provides personal data as consideration.

➤ **New system for consumer contracts for the supply of goods with digital elements and for the supply of digital content or digital services that are not provided on physical media**

The reform of RDL 7/2021 establishes a legal system that applies to the supply of goods with digital elements and to the supply of digital content or digital services to consumers. In this context, **goods with digital elements** will be supplied through the transfer of their physical possession or control to the consumer without any undue delay and within a maximum of 30 calendar days after the contract's signing date. **Digital content or digital services** must be supplied without undue delay after the contract's signing date.

The new wording of TRLGDCU also establishes that the supply obligation of the business is considered met when:



- (i) The digital content or any adequate means for accessing or downloading the digital content is made available to the consumer, or is accessible to the consumer or for the physical or virtual installation chosen by the consumer for that purpose.
- (ii) The digital service is accessible to the consumer or for the physical or virtual installation chosen by the consumer for that purpose.

The burden of proof concerning compliance with these obligations will be on the business.

> **Non-compliance with the obligation to supply goods with digital elements or to supply digital content or digital services to consumers**

If **the business does not meet its supply obligation**, the consumer can require the business to do so within an additional period that is appropriate for the circumstances arising in each case.

If **the business does not meet its supply obligation**, the consumer can request that the digital content or digital services be supplied without undue delay or within the additional period of time agreed by the parties.

If the business continues to breach its obligation to make the delivery or supply, the consumer will be entitled to terminate the contract.

However, the consumer will be entitled to directly terminate the contract **for the sale of goods with digital elements or the supply of digital content and digital services** when:

- (i) The business has refused to supply the goods with digital elements or has stated that it will not supply the digital content or digital services to the consumer, or refusal to supply is understood based on the circumstances.
- (ii) The parties have agreed, or it is clear under the circumstances, that it is essential for the consumer that the delivery of goods with digital elements or the supply takes place before a certain date.

Subjective requirements of conformity

The reform of TRLGDCU extends to the guarantee system that, until now, was only established for the consumer in cases of the sale of physical goods. The guarantee system granted to the consumer comes into effect when the object delivered or supplied to the consumer is not in line with the contract. From a subjective standpoint, to conform to the contract, the goods with digital elements and digital content or digital services must:



- **Match the description**, type of good, amount and quality and must possess the functionality, compatibility, interoperability **and the other characteristics established in the contract**.
- **Be appropriate for the consumer's specific purposes** that have been communicated to the business, if the business accepted them before entering into the contract.
- **Be delivered or supplied together with all accessories and instructions**, including those relating to installation or integration and customer assistance, as stated in the contract.
- **Be supplied with updates** in the case of goods with digital elements, **and be updated** in the case of digital content and digital services, as established in the contract.

Objective requirements of conformity

From an objective standpoint, to conform to the contract, the goods with digital elements and digital content or digital services must also:

- **Be appropriate for the purposes for which** the goods with digital elements and digital content or digital services of the same type **are normally used**, considering technical standards and codes of conduct in the sector's industry.
- **Be of the quality and in line with the description of the sample or model** of the product or conform to the **test or presented example** of the digital content or digital service that the business made available to the consumer before the contract was signed.
- Be delivered or supplied together with **the accessories and, particularly, with the packaging and the instructions** that the consumer may reasonably expect to receive.
- Present the **amount and possess the qualities and characteristics, particularly those relating to the durability of the product, accessibility and the continuity of the digital content or digital service**, as well as the functionality, compatibility and security that are normally present with respect to goods with digital elements, or digital content or digital services of the same type that the consumer may reasonably expect.
- **Supply the digital content or the digital services in line with the most updated version available at the time the contract is signed**, unless otherwise agreed.



In addition, in the case of contracts for the sale of goods with digital elements or the supply of digital content or digital services, **the business must communicate and supply to the consumer or user all updates**, including those relating to security, **that are necessary to maintain conformity** during the following periods:

- If involving an instantaneous supply, the reasonable period for the consumer or user based on the type and purpose of the goods with digital elements or digital content or digital services, considering the circumstances and the nature of the contract.
- If involving a continuous supply, the period established in the supply contract.
- When the contract for the sale of goods with digital elements establishes a continuous supply that is equal to or less than three years, a three-year period from the delivery date of the good with digital elements.

Accordingly, **if the consumer does not install updates** within a reasonable period, **the business will not be liable** for any lack of conformity solely caused by the absence of the relevant update, **if the following conditions are met:**

- The consumer has received information regarding the availability of the update and the consequences of not installing it.
- Not installing the update or the improper installation by the consumer or user is not due to deficiencies in the instructions provided by the business.

Finally, a business **will not be liable** for any lack of conformity when, at the time the contract is signed, **the consumer is specifically informed** that a certain characteristic of the goods with digital elements or digital content or digital services deviates from the objective conformity requirements and the consumer has expressly and separately accepted that deviation.

> **New remedies available to consumers in the case of non-conforming digital service and digital content contracts**

The reform extends to the system of legal guarantees available to consumers in the case of a lack of conformity with the contract, which had only been available until now for sales of physical goods, service contracts and consumer digital content subscriptions. Although the list of remedies making up the legal guarantee (the remedies involving conformity adjustments and price reductions or contract termination) are the same as those that already existed for the sale of physical goods, **the new TRLGDCU expands the cases in which a consumer**, in a situation in which there is a lack of conformity with the contract and separate from the repair and replacement remedies, can directly require a proportionate reduction of the price or contract termination.



Specifically, although the general standard that a consumer cannot terminate the contract when the lack of conformity is of little importance is maintained, the reform of TRLGDCU adds an exception to this general rule: in cases in which the consumer **has provided personal data** as consideration for the contract, the consumer **can demand termination** even when the lack of conformity is of little importance.

The reform of TRLGDCU also creates **new obligations for businesses and consumers in the case of the termination** of contracts for the sale of goods with digital elements and the supply of digital content or digital services.

Among other things, the business must:

- (i) Reimburse the consumer for all amounts paid under the contract, unless the digital content or digital services were in conformity for a period of time before the contract termination. In this case, the business will reimburse the consumer only for the proportional part of the price paid that corresponds to the period of time during which the digital content or digital services were not in conformity.
- (ii) The business must meet the consumer or user personal data protection obligations established in [Regulation \(EU\) 2016/679 General Data Protection Regulation](#), and [Act 3/2018 \(December 5\) on Personal Data Protection and Digital Rights Guarantees](#).
- (iii) The business must abstain from using any content, other than the personal data provided or created by the consumer or user when using the digital content or digital services supplied by the business, except when that content meets any of the following conditions:
 - It has no use outside of the context of the digital content or services supplied by the business.
 - It is exclusively related to the consumer's activity when using the digital content or digital services supplied by the business.
 - It has been integrated with other data by the business and cannot be disaggregated or can only be disaggregated through disproportionate efforts.
 - It has been generated jointly by the consumer and other people, and other consumers can continue to use the content.
- (iv) The business must also make available to the consumer, at the latter's request, any content other than the personal data that the consumer or user has provided or created when using the digital content or digital services supplied by the business, except in the cases established in the previous three conditions.



Among other obligations, the consumer or user must:

- (i) Abstain from using the digital content or digital services and making them available to third parties after the contract termination. The business can prevent this use by making that digital content or those digital services inaccessible to the consumer or by blocking the user's account.
- (ii) Return, at the request and at the expense of the business, the physical media without any undue delay, when the digital content has been supplied on such physical media.

The consumer or user will be entitled to:

- (i) Not receive payment claims for any use of the digital content or digital services during the period before the contract termination in which the digital content or digital services were not in conformity.
- (ii) Recover the digital content created through the use of the digital content or digital services without any charge and without any impediment by the business, within a reasonable period and in a format habitually used and electronically legible.
- (iii) Terminate the contract if its modification negatively affects access to the digital content or digital services, or their use, unless that negative affect is of minor importance, without any charge and within 30 calendar days from the date on which the information was received or from the date on which the business modifies the digital content or digital services if taking place afterwards.

> New chapter added to TRLGDCU concerning the modification of the digital content or digital services and the termination of the contract due to the modification of the digital content or digital services

The reform includes important new developments concerning the modification of digital content or digital services. In particular, the new TRLGDCU introduces the **possibility for the business to modify the digital content or digital services** beyond what is necessary to maintain conformity, if the contract establishes that the supply of the digital content or digital services, or access to them, must be guaranteed during a period of time. For this to happen, the following requirements must be met on a cumulative basis:

- (i) The contract must allow that modification and provide a valid reason.
- (ii) The modification must be made without any additional cost for the consumer.
- (iii) The consumer must be informed of the modification in a clear and comprehensible manner.



- (iv) If the consumer is entitled to terminate the contract, the consumer must be informed reasonably in advance and on durable media of: (i) the characteristics and the time of the modification, (ii) the consumer’s right to terminate the contract, and (iii) the possibility of maintaining the digital content or digital services without that modification.

The consumer will be entitled to terminate the contract if the modification negatively affects access to the digital content or digital services, or their use, unless that negative effect is of minor importance.

> **New periods applicable to contracts for the sale of goods with digital elements and to contracts for the supply of digital content and digital services: longer periods benefiting consumers**

Under the new regulation, TRLGDCU introduces different periods applicable to the guarantee system for contracts for the sale of goods with digital elements and contracts for the supply of digital content and digital services. The following table compares the most relevant applicable periods.

Type	Term
Term of the legal guarantee	<p><u>If concerning a supply contract consisting of a single transaction or individual transactions</u>, two years from the supply date.</p> <p><u>If concerning a contract for continuous supply</u>, during the entire supply period.</p> <p><u>If concerning a contract for the sale of goods with digital elements</u> (with continuous supply of less than three years), three years from the delivery date of the good.</p>
Period of presumption for the preexistence of non-conformity, unless proven otherwise by the business	<p><u>If concerning a supply contract consisting of a single transaction or individual transactions</u>, one year from the supply date.</p> <p><u>If concerning a contract for continuous supply</u>, during the entire supply period.</p> <p><u>If concerning a contract for the sale of goods with digital elements</u> (with continuous supply of less than three years), three years from the delivery date of the good.</p>
Statutory limitation period for taking action relating to non-conforming goods with digital elements and digital content or digital services	<p>Five years as from the date the non-conforming situation is determined.</p>



> **Entry into force**

The reform of TRLGDCU will enter into force on January 1, 2022. Articles 126 and 126 bis, on the system for modifying digital content and digital services, and on the termination of contracts due to modifications to digital content and digital services, will only be applied to contracts signed from that date.

So now what? Next steps

- > For more information than that provided in this document regarding the new system for digital content and digital services under TRLGDCU and its impact on relationships with consumers, please contact Cuatrecasas.
- > Compliance with regulations concerning consumer contracts is an essential part of a business's day-to-day operations, particularly for those that market digital consumer products and services. Knowledge of legislative changes and their adaptation concerning relationships with consumers will lead to strategic competitive advantages in the market.
- > The reform of TRLGDCU also brings about other questions in addition to those summarized in this document and raises issues that must be resolved effectively to avoid or mitigate future risks involving consumer contracts. This is particularly the case with matters relating to the entry into force of the reform and its possible effects on contracts signed with consumers before January 1, 2022.
- > Our team of lawyers specializing in consumer law and new technologies advise clients to ensure they understand the changes and their effects on relationships with consumers, so that the terms and conditions of consumer contracts can be adapted to avoid possible penalties arising from not meeting the applicable law.
- > We accompany our clients in all legal phases of consumer contracts, helping them to design, adapt and integrate the contractual terms and conditions most appropriate for their interests in line with the law, including appropriate planning and training to foresee possible risks and prevent non-compliance.



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