

November 28 2022

Portuguese transposition of EU directive on consumer contracts

PLMJ | Corporate & Commercial - Portugal

CARLA GÓIS COELHO,
DIANA BEATRIZ CAMPOS



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Introduction

Decree-Law 84/2021⁽¹⁾ entered into force on 1 January 2022 to incorporate into Portuguese law:

- the EU Sale of Goods Directive;⁽²⁾ and
- the EU Digital Content and Services Directive.⁽³⁾

This article highlights the main changes that the decree-law makes to the rules on the sale of movable consumer goods.⁽⁴⁾

Consumer rights

Decree-Law 84/2021 established a general principle of conformity of goods according to a set of subjective and objective requirements. Failure to comply with any one of these requirements results in the goods not being considered to be in conformity.

One of the changes that has been made to the current rules constitutes a potential limitation on exercising consumer rights. Now, when a trader is sued on the basis of statements made in advertising or labelling of goods, it is possible for that trader to exclude its liability if it can demonstrate that:

- it was not and could not have been aware of those statements;
- the statements were corrected at the time of the conclusion of the contract; or
- the consumer's decision to contract was not influenced by those statements.

When faced with a lack of conformity, the consumer has the right to:

- have the goods repaired or replaced;
- have the price reduced proportionally; or
- terminate the contract.

The law now expressly establishes a clear hierarchy between these rights. The consumer is entitled to have the item brought into conformity by choosing to have it repaired or replaced unless this is impossible or involves disproportionate costs. The rights to a price reduction or to terminate the contract may be exercised if:

- the trader has either not repaired the item at all or has not replaced it in accordance with the law – for example, free of charge, within a reasonable time and without inconvenience to the consumer;
- the trader declares that it will not remedy the lack of conformity;
- the lack of conformity continues or recurs after an attempted repair;
- a new lack of conformity occurs;
- the lack of conformity is particularly serious; or
- the lack of conformity leads to the loss or deterioration of the item for a reason not attributable to the consumer.

Moreover, the consumer has no right to terminate the contract if the trader demonstrates that the lack of conformity is minor.

There is also a "right to reject" whereby the consumer may choose between immediate replacement of the item or termination of the contract where there is a lack of conformity that becomes apparent within 30 days of delivery.

Time limits for exercising consumer rights

Decree-Law 84/2021 extended the trader's liability period in the event of a lack of conformity, which is also known as the "guarantee period". In the case of new movable property, it was extended from two years from the date of delivery of the property to three years from this date. As regards second-hand goods, the guarantee period may be reduced to up to one-and-a-half years by agreement between the parties; under the previous rules, the reduction was up to one year.

If the consumer opts to repair the item in question, an additional guarantee period of six months is now provided for each repair, up to a maximum of four repairs. This means that if the item is subject to four repairs, it will have a maximum guarantee period of five years.

The consumer's obligation to report any lack of conformity within a certain period has been removed. However, communication of the lack of conformity remains the point of reference to calculate the period within which the consumer may exercise their right of action, which expires after two years therefrom.

Burden of proof

Another change is that the warranty period (three years) does not coincide with the period during which there is a (rebuttable) legal presumption that the lack of conformity existed at the time of delivery. This presumption operates during the first two years following delivery of the item unless this is incompatible with the nature or characteristics of the lack of conformity. After the first two years from delivery, the consumer must then prove not only the lack of conformity, but also that the lack of conformity existed at the time the item was delivered. It may be difficult for the consumer to prove the lack of conformity and this may hinder or even prevent them from exercising their rights during the third year of the guarantee period.

Producer responsibility

The solution provided in Decree-Law 67/2003 of a system of objective liability (regardless of fault) of the producer is maintained. Under this system, any consumer who purchased an item with a non-conformity

may choose to hold the producer directly liable for the repair or replacement of the item, unless:

- this is legally or physically impossible;
- this would be disproportionate; or
- the grounds for opposition by the producer are met.

These grounds now also accommodate the reality inherent to the supply of digital content and services.

Another change is that the consumer can only demand the repair or replacement of a reconditioned item directly from the producer where the producer is responsible for the reconditioning of the item.

Availability of parts and after-sales service

Decree-Law 84/2021 establishes the obligation of the producer to make available the parts necessary for the repair of goods purchased by the consumer for a period of 10 years after the last unit of the item in question has been placed on the market.

It also establishes the trader's obligation to:

- guarantee after-sales assistance in the case of movable goods subject to registration (eg, cars); and
- inform the consumer, at the time of the conclusion of the contract, of the existence and duration of the obligation to make parts available and of the duty to guarantee after-sales assistance.

Penalties

Provision is made for a system of administrative offence penalties. The Food and Economic Security Authority and the Institute of Public Markets, Real Estate and Construction, IP⁽⁵⁾ have powers to:

- supervise compliance with the law;
- bring administrative offence proceedings; and
- apply fines and additional penalties.

Comment

It is still too early to assess the application of Decree-Law 84/2021, particularly as it only applies to contracts made after 1 January 2022. However, consumer rights have been strengthened. For example,

consumers have gained:

- the right to reject;
- the extension of the warranty period to three years and the provision of an additional six-month warranty for each repair; and
- a right to after-sales assistance and the availability of parts by the producer.

As a result of this, it is expected that there will be an increase in consumer litigation. Moreover, the legislature has tempered the solutions for the protection of consumer rights with rules that seek to achieve balance in the consumer/trader relationship that will certainly cause controversy. These include:

- the possibility of excluding the liability of the trader for public statements made by third parties;
- the non-existence of a presumption of lack of conformity as from the third year after the delivery of the movable goods; and
- the combination of this rule with the additional warranty in case of repair.

The evolution of consumer law will also be impacted by the imminent revision of Directive 85/375/EEC on liability for personal injury or damage to property resulting from defective products. This directive has been in force for 37 years and a revision is already under discussion through the proposal for a directive of the European Parliament and of the Council of 28 September 2022.

For further information on this topic please contact Carla Góis Coelho or Diana Beatriz Campos at PLMJ by telephone (+351 213 197 300) or email (carla.goiscoelho@plmj.pt or diana.beatrizcampos@plmj.pt). PLMJ website can be accessed at www.plmj.com.

Endnotes

(1) The provisions of Decree-Law 84/2021 apply to contracts concluded after 1 January 2022 (the date of entry into force of the decree-law), with the exception of contracts of long-lasting performance relating to digital services of continuous supply. In the case of the latter, the new rules apply to digital content/services that are supplied from the date of entry into force of the decree-law.

(2) Directive (EU) 2019/771.

(3) Directive (EU) 2019/770.

(4) The decree-law also deals with immovable goods, but this article focuses on movable consumer goods.

(5) The role of this second institution is limited to the rules applicable to immovable property.