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EU CONSUMER SALE LAW AND THE CHALLENGES OF THE DIGITAL AGE. AN ITALIAN PERSPECTIVE

Laura Bugatti*

Abstract

The 2019/771/EU Directive aims to make the EU Consumer Sale Law fit for the digital age and pushes towards a modernisation of sale rules within the framework of maximum harmonisation. The article aims to provide a comprehensive overview of the new Sale law regime introduced by the EU in 2019, from the Italian perspective. In particular, it moves from some preliminary remarks on the Directive's scope of application and the subject matter covered by the new sale rules, followed by an examination of the new substantial sales rules concerning the conformity of goods, the seller's liability, including time limits, and the consumer's remedies for defective goods. Recalling the freedom recognised to Member States by the Directive, the article includes, as a paradigmatic example, the description of the main and most meaningful Italian transposition technique and choices. Some unavoidable remarks on the adequacy of the new legal regime to address the new challenges and innovative economic models that are going to prevail in the digital environment conclude the analysis.

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Keywords

Consumer sale law - 2019/771/EU Directive - Conformity of goods - Seller's liability - consumer remedies

1. Sale rules face digitalisation: an introduction

Directive 2019/770/EU (Digital Content Directive – hereinafter DCD) and 2019/771/EU (Consumer Sales Directive – hereinafter SGD) can be considered as twin directives as both address Business to Consumer (hereinafter B2C) contracts. The DCD regulates certain aspects of contracts for the supply of digital content and digital services, while the SGD covers the sale of movable goods, including goods with digital elements,[1] whether the contract is concluded on or off premises.

Both Directives represent legislative responses to the needs of the digital economy in the area of B2C commerce[2] and, more broadly, they constitute two important steps towards new European contract law legislation which is intended to be more in tune with the 'Digital Single Market'[3]. The Digital Single Market Strategy set out by the Commission has shed light on the need to introduce changes in the EU legal landscape in order to adapt the rules to the 'digital revolution'. In the SGD, the

[1] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services and Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC and repealing Directive 1999/44/EC. The Directives' transposition by the EU Member States was expected by 1 July 2021

[2] Both Directives are part of a broader package of European regulatory measures aimed at modernising the main consumer protection rules, also in light of the digital single market strategy set out in Communication COM(2015)192FIN: https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4653

[3] On the evolution of European Contract Law, see C Amato, 'Dal diritto europeo dei contratti 1.0 agli smart contracts' in R Cerchia (eds), *Percorsi di diritto comparato* (Milano 2021) 33 ff.; R Schulze, 'Redrafting Principles of European Contract Law' (2020) 9 EuCML 5, 179.

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extension of the notion of goods to items with digital elements, the requirements of 'interoperability' and 'compatibility' in the conformity's assessment, the rules concerning 'updates' and the notion of 'digital environment' are just a few examples of the transformation taking place as a reaction to digitalisation.

More broadly, the Directives aim to strike the right balance between achieving a high level of consumer protection and promoting the competitiveness of enterprises, thus contributing to the correct functioning of the internal market[4]. Due to the adoption of the SGD, consumers and sellers within the (digital) single market will benefit from a uniform set of rules on the sale of goods.

In order to create a common set of rules in cross-border commerce, - increasing the confidence of consumers, on the one hand, and reducing the costs of cross-border contracting on the other hand -, the SGD moves from minimum to maximum harmonisation[5] (art. 4); therefore, within the scope covered by the Directive, the rules concerning the sale of movable good in B2C relationships would be the same in each Member State[6]. In fact, as a maximum harmonisation instrument, the SGD imposes

[4] See rec. 2 SGD.

[5] The trend towards maximum harmonisation is becoming more and more common in European legislation in general and in European consumer law in particular. This is a diversion from the previous policy underpinning consumerism legislation which was generally based on a minimum harmonisation approach that allowed Member States to go beyond the standard of protection set by European rules in favour of the consumer. Thus far, even the replaced Dir. 1999/44/EC tends to focus on minimum harmonisation, setting a minimum level of protection and leaving room for different and higher standards of consumer protection across national jurisdictions (see P Rott, 'Minimum Harmonisation for the Completion of the Internal Market? The Example of Consumer Sales Law' (2003) 40 Common Mark. Law Rev. 1107 ff). Notwithstanding the aim of enhancing consumer protection, this approach has created significant fragmentation of the EU rules applicable to the sales of goods: subject to minimum standards, national legislation has started to diverge even on essential issues, including the absence or existence of a hierarchy of remedies. Therefore, the revised choice towards full harmonisation made in the SGD represents a response to the need to overcome the current fragmentation on some essential elements of sale rules. In fact, among the European priorities is the necessity to achieve a genuine digital single market as well as to ensure legal certainty (rec. 3 SGD), especially in online and off-line cross-borders sales, in order reduce the costs of cross-border contracting as well as to enhance the confidence of consumers.

[6] The debate about the need to introduce a common set of rules in cross-border sales is not new. Because differences between MSs' contract laws are perceived by the Commission as an obstacle to trade within the EU market, the European Commission issued in 2011 a proposal for a regulation on an optional Common European Sales Law (CESL). The CESL was meant to stimulate trade by encouraging cross-border sales and to enhance consumer trust in the purchasing of goods abroad.

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on Member States an obligation not to deviate from EU law standards by maintaining or introducing in their jurisdictions more or less stringent provisions, unless otherwise provided in this Directive (art. 4 SGD).

Although the protection standards imposed by the SGD should have increased as compared to Directive 1999/44/EC (as announced in rec. 10), this will not preclude the risk that some Member States will be required to reduce their higher level of protection [7]. Despite the declared aim to achieve fully harmonised national sale

Consumers were to benefit from increased choice and enterprises – SMEs in particular – would have found it easier to extend their market shares. The aim of this optional regulation was to harmonise the MSs' contract laws and, in particular, sales law, not by requiring amendments to pre-existing national contract law but by creating within each MSs' national law a second and alternative harmonised regime for contracts covered by its scope. The CESL would contain a single set of pan-EU rules which would exist in parallel to MSs' contract laws; its application was intended to be on a voluntary basis upon express agreement of the parties. In 2014, the Commission officially placed the CESL proposal on the list of proposals to be modified or withdrawn, and the CESL proposal was finally withdrawn in favour of the adoption of the two Directives concerning the sale of goods and the supply of digital content and digital services. See Proposal for a Regulation on a Common European Sales Law, COM (2011) 635 final, 11 October 2011. The failure of CESL raises two reflections: on the one hand, it highlights the EU Commission's willingness to reach the highest level of harmonisation; on the other side, it states the inadequacy of the political context to achieve this result. From this perspective, full harmonisation in the SGD represents a compromise.
On CESL, see H Beale, 'The Future of European Contract law in the Light of the European Commission's Proposals for Directives on Digital Content and Online Sales' (2016) Revista d'Internet, Dret I Política; E Hondius, 'Towards an Optional European Sales Law' (2011) Eur. Rev. Priv. Law 709 ff.; O Lando, 'Comments and Questions Relating to the European Commission's Proposal for a Regulation on a European Sales Law' (2011) Eur. Rev. Priv. Law 717 ff.; L Niglia, *The Struggle for European Private Law* (Hart Publishing 2015).

[7] '*Regarding the sale of consumer goods, one of the main effects of Directive 2019/771 will be to reduce the level of consumer protection in many MMs. In particular, national legal systems can no longer grant the consumer the right to terminate the contract immediately (except for the first 30 days after delivery)'*. JM Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771' (2019) 5 EuCML 194, 201; RM Rafael, 'The Directive Proposals on Online Sales and Supply of Digital Content (Part I): will the new rules attain their objective of reducing legal complexity?' (2016) 23 Revista d'Internet, Dret I Politica 1, 7. Moreover, the SGD and the DCD '(..) *directives are of a maximum harmonisation standard, which not only precludes Member States from deviating from the level of consumer protection established by the directives, but also commits the EU Member States to a particular approach in establishing consumer rights with regard to the quality of goods, digital content and digital services which leaves no room for innovation to the Member States. This is particularly regrettable, because both directives are characterised by a rather traditional approach*'. C Twigg-Flesner, 'Conformity of Goods and Digital Content/Digital Services' in E Arroyo Amayuelas and S Cámara Lapuente (eds), *El Derecho privado en el nuevo paradigma digital* (Marcial Pons, 2020), 49 ff.; JM Carvalho, 'Introducción a las nuevas Directivas sobre contratos de compraventa de bienes y contenidos o servicios digitales' in E Arroyo Amayuelas and S Cámara Lapuente (eds), *El*

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legislation, the SGD recognises that Member States have the freedom to regulate several relevant aspects. Among the most significant are: the extension of the scope of application to non-consumers (e.g. small- and medium-sized enterprises -SMEs); the extension of the scope of application of the law in cases of 'mixed contracts'; the equation of platform operators with sellers in specific circumstances; and the possible exclusion of living animals and second hands goods sold at public auction from its scope of application. Moreover, the SGD is intended to provide for a fully harmonised regime only with regards to certain aspects of contracts for the sale of goods, including rules on requirements for conformity, remedies available to consumers in the event of lack of conformity and the main modalities for the exercise of remedies. Consequently, national rules on the legality of goods, damages and general contract law aspects (such as: formation, validity, nullity or effects of contracts, consequences of the termination of the contract and specific aspects regarding repair and replacement not regulated in this Directive) are not affected by the EU sale rules[8]. This wide freedom attributed to Member States may cast doubts on the fully harmonising nature of the Directive and its capability to reach its main goal of ensuring a consistent and coherent legal framework with regard to the sale of goods within Europe.

Concerning the Italian transposition of the Directive, the Italian legislature adopted on 4 November 2021 the d. lgs. n.170/2021[9]. Since the SGD is largely a modernisation of Directive 1999/44/EC which was transported into the Italian Consumer Code (from now on, it. Cons. Code) in 2005, the SGD was implemented in Italy by amending arts. 128–135 of the it. Cons. Code.

Derecho privado en el nuevo paradigma digital, cit.: '*En cuanto a la venta de bienes de consumo, uno de los principales efectos de la DCV será la reducción del nivel de protección de los consumidores en muchos Estados miembros*' (p. 46).

[8] In particular, see rec. 18 SGD which includes more specifications. See also A De Franceschi, 'Consumer's Remedies for Defective Goods With Digital Elements' (2021) 12 JIPITEC 143, 151 ff.: recalling the freedom recognised to MSs by the Directive, the A. defines the SGD harmonisation as a "'*tendential" full harmonization*' (p. 151).

[9] Decreto legislativo 4 novembre 2021, n. 170, *Attuazione della direttiva (UE) 2019/771 del Parlamento europeo e del Consiglio, del 20 maggio 2019, relativa a determinati aspetti dei contratti di vendita di beni, che modifica il regolamento (UE)2017/2394 e la direttiva 2009/22/CE, e che abroga la direttiva1999/44/CE. (21G00185)*, in *Gazz. Uff.* n. 281, 25-11-2021.

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This paper shall focus on the new substantial sales rules, in particular, the conformity of goods (§ 4), the seller's liability (§ 5), including time limits (§ 6), and the consumer's remedies for defective goods (§ 7). Some preliminary remarks on the Directive's scope of application (§ 2) and the subject matter covered by the new sale rules (§ 3) may also be of some help.

2. The scope of application: resistance to the B2C model?

The SGD's scope is limited to the relationship between consumers and sellers (art. 3 SGD). The notions of 'consumer'[10] and 'seller'[11] are consistent with traditional notions[12] .

It is nonetheless acknowledged today that the line between B2C and Business to Business (herein after B2B) contracts is more blurred than ever. First, the assumption that B2B contracts imply equality in bargaining power has been questioned. The dualistic scenario characterised by the presence of B2C and B2B relationships has been enriched by the consideration of B2B contracts. In fact, '*Small and medium size enterprises often lack specific expertise, experience, information and bargaining power, in a way very*

[10] Art. 2(2) SGD.

[11] Art. 2(3) SGD.

[12] The definition of consumer provided by art. 2(2) SGD is consistent with the definition found in other Directives, including the Consumer Rights Directive. The repealed 1999/44/EC Directive provided a narrowed notion: 'Any natural person who, in the contracts covered by [the] Directive is acting for purposes which are not related to his trade, business or profession' –Art. 1(2)(a). The inclusion of the craft is not intended to cover the '"*consumers" "do-it-self activities*' but '*it refers to the professional craftsmen*'; and D Staudenmayer, '*sub.* Art. 3' in R Schulze and D Staudenmayer (eds), *EU Digital Law: Article by Article Commentary* (Nomos/C.H. Beck/Hart Publishing, 2020) at 62. On the definition of consumer provided in Dir. 44/1999/EC and compared to the wider definition provided in the Consumer Rights Directive, see G Howells, C Twigg-Flesner and T Wilhelmsson, *Rethinking EU Consumer Law* (Routledge, 2018): '*The CRD did not amend the definitions of key terms such as "consumer" in earlier directives such as the CSD. In practical terms, however, Member States can apply the slightly wider definition from the CRD to these national rules implementing earlier directives to ensure consistency*' (p. 174). On the notion of Consumer in the It. Cons. Cod. see L Delogu, 'Leggendo il Codice del consumo alla ricerca della nozione di consumatore' (2006) Contr. e impr. Europa 87.

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similar to consumers'[13]. Therefore, SMEs need the same protection as consumers when dealing with more powerful counterparties. This unbalanced situation explains the potential extension of EU consumer protection to small businesses (B2b).

Second, a praxis is required to consider the diffusion of transactions that do not exclusively serve a private or business purpose (i.e., mixed situations). Dual-purpose contracts are contractual agreements concluded for purposes that are partly within and partly outside the private individual's trade. These situations may create uncertainty as to the applicable legal framework. As of now, the European Court of Justice (hereinafter CJEU) has ruled in favour of a restrictive interpretation of 'consumer' whenever legal regimes about jurisdiction come into question. The protective rule which permits the consumer to sue and be sued in a court where s/he is domiciled is not applicable in the case of a mixed situation '*unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect*'[14]. By contrast, taking into account the substantial law regime, substantive EU law has generally adopted the 'predominant use' criterion: in the case of dual-purpose contracts in which the contract is concluded for purposes partly within and partly outside the person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer[15].

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[13] MW Hesselink, 'SMEs in European Contract Law', in K Boele-Woelki and W Grosheid, *The Future of European Contract Law* (Kluwer Law International, 2007) 349 ff., at 359.

[14] Case C-464/01 *Johann Gruber v Bay Wa AG* [2005] ECR I-00439, para 39. G Howells, 'The Scope of European Consumer Law' (2005) 3 Eur. Rev. Contract Law 360, 361 ff., points out that: '*The removal of contracts having a non-negligible trade or business requirement should logically be restricted to the particular context of the Convention. However, there must be a temptation for the European Court of Justice simply to transfer this logic to the definition of consumer in the substantive acquis. This would be wrong, but for non-specialists the subtleties between the different functions of the definition may be lost*'. See also Case C-630/17 *Anica Milivojević v Raiffeisenbank St. Stefan-Jagerberg-Wolfsberg eGen* [ECLI:EU:C:2019:123]; Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited* [ECLI:EU:C:2018:37]).

[15] Considering EU hard law, see as an example recital 17 of Directive 2011/83/EU. With regards to EU soft law, see DCFR, art. 1:105 (1). (1) – 'A "consumer" means any natural person who is acting *primarily* for purposes which are not related to his or her trade, business or profession'; *Acquis Principles*, art. 1:201: '*Consumer means any natural person who is mainly acting for purposes which are outside this person's business activity'*. JM Carvalho, 'Introducción a las nuevas Directivas sobre contratos de compraventa de bienes y contenidos o servicios digitales' in E Arroyo Amayuelas and S Cámara Lapuente (eds), *El Derecho privado en el nuevo paradigma digital*, cit., 31, 33 and 34. See J M Carvalho, 'Sale

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Consumer law and its rationale grounded in the B2C traditional scheme, has also been recently challenged by the collaborative economy. The rise of platforms into the digital market[16] has introduced new business models onto the scene which involve three different subjects: (a) service providers acting in their professional capacity (professional service providers) or as private individuals (peer service providers); (b) users; and (c) online collaborative platforms which enable the intermediation between providers and users to facilitate the transactions. Platforms might perform different kind of activities, and they could be subject to market access requirements (e.g., business authorisation, licencing requirements, tax regulation) depending on the nature of such activities. Prior authorisation is not required as long as the platform provides an Information Society Service (ISS), that is, a service normally provided for remuneration at a distance by electronic means for the processing and storage of data at the individual request of a recipient of services[17].

In most cases, the collaborative platforms connect the service providers of the underlying service and the end users, offering additional services in order to intermediate between the two parties. A sale of goods is one of the traditional economic transactions that the platforms facilitate in the digital environment; for example, second-hand e-commerce is increasing – due as well to the consumer interest in sustainability and the COVID-19 pandemic situation – and a lot of platforms are gaining space in the digital single market within this framework (e.g., see eBay, Vinted, Etsy, Depop, etc. in Europe).

In this scenario, defining the type of contract concluded between the party offering the good and the user who purchases it is an easy task, similar to the case of a sale transaction taking place in an on/off-line environment. In contrast, the possibility to apply consumer protection law is not taken for granted[18]. In the traditional scheme

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of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771' (2019) 5 EuCML, 194, 196.

[16] C Busch, H Schulte-Nölke, A Wiewiórowska Domagalska and F Zoll, 'The Rise of the Platform Economy: A New Challenge for EU Consumer Law?' (2016) 1 EuCML 4.

[17] Dir. 200/31/EC art. 2(a) and Dir. 2015/1535 art. 1(1)(b).

[18] A Quarta, 'Narratives of the Digital Economy: How Platforms are Challenging Consumer Law and Hierarchical Organisation' (2020) 20 Global Jurist 2, 26.

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and assuming information asymmetries, the consumer is on the demand side of the market and is contracting with professional traders and, therefore, deserves special protection as the weaker party. Conversely, in the emerging platform-based economy, consumers frequently offer services and goods worldwide to other consumers without thereby turning into professionals[19]. A new market player is thus gaining space in the internal (digital) market: a consumer, defined as a natural person acting for purposes which are outside his trade, business, craft or profession, who is, however, acting as a seller or a service provider rather than a buyer. As noted elsewhere, '*in the C2C market "some consumers temporarily put on the hat of business and offer their products to other people*"[20], turning into "*hybrids acting on different sides of the market*"[21] *and becoming (producers + consumers =) prosumers*'[22]. The rise of prosumers in the digital environment may test the tightness of the current regulatory previsions in the frame of consumer protection.

Indeed, in the peer-to-peer economy which is increasingly blurring the distinction between professional and personal spheres, it is necessary to understand whether a seller is acting in a professional capacity (B) or as a private individual (C) in order to identify the regulatory framework applicable to the transaction[23].

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[19] A Quarta, 'Narratives of the Digital Economy: How Platforms are Challenging Consumer Law and Hierarchical Organisation', cit., who noted that '*These dual roles [producer and consumer] and the ease of shuttling between them derive from the fact that providing services does not necessarily require an entrepreneurial organization'*.

[20] T Theurl and E Meye, 'Cooperatives in the Age of Sharing' in K Riemer, S Schellhammer and M Meinert (eds), *Collaboration in the Digital Age – How Technology Enables Individuals, Teams and Businesses*, (Springer International Publishing, 2019) 196.

[21] T Theurl and E Meye, 'Cooperatives in the Age of Sharing', cit., 196.

[22] On the 'prosumer' in the new digital era of European contract law, see V Mak, *Legal Pluralism in European Contract Law* (Oxford University Press 2020) spec. at 118 ff.; C Amato, 'Il processo di armonizzazione del diritto contrattuale in Europa: dal più al meno' in A Saccoccio and S Cacace (eds), *Sistema Giuridico Latinoamericano, Summer School (Brescia, 9-13 luglio 2018*) (Giappichelli 2019) spec. at 212 ff.

[23] This distinction also has an impact on the legal regime applicable to the platform–seller relationship. It is worth mentioning that the relationships between the platforms and business users (P2B) is regulated by Reg. (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (in [2019]186 *OJ* L 11, 7, p. 57–79*),* which aims to ensure the fair and transparent treatment of business

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The European Commission[24] and the CJEU[25] have identified some exemplifying criteria in order to recognise on a case-by-case basis the professional nature of a trader. From a practical point of view, it is often very difficult for a buyer to understand whether or not his/her counterparty selling a good through an on-line platform is acting for purposes related to his trade, business, craft or profession. Consequently, the lack of clarity on certain platforms as to whether providers act as a business or a private person might create confusion about the applicability of

users by online platforms. Nevertheless, the EU Commission has already proposed two legislative initiatives to upgrade rules governing digital services in the EU: Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act DSA) and amending Directive 2000/31/EC, COM/2020/825 final and Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act - DMC), COM/2020/842 final. As underlined by the EU: '*Together they form a single set of new rules that will be applicable across the whole EU to create a safer and more open digital space*'. In particular, the two proposals have as main goals: '1.*to create a safer digital space in which the fundamental rights of all users of digital services are protected; 2. to establish a level playing field to foster innovation, growth, and competitiveness, both in the European Single Market and globally'* (EU Commission, *The Digital Services Act Package*). Both DSA and DMA has been finally adopted in July 2022.

[24] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European agenda for the collaborative economy {SWD(2016) 184 final}, COM(2016)356 fin.: the EU Commission has identified some factors which in combination suggest that a party acting as a provider could be considered as a professional; for example, frequency of the service, profit-seeking motive and the level of turnover.

[25] According to the principle stated in the judgment *Kamenova* (CJEU, 4 October 2018, C- 15/17, *Komisia za zashtita na potrebitelite v Evelina Kamenova*, ECLI:EU:C:2018:808), in order to understand the nature of the trader, it should be verified, case by case, '*whether the sale on the online platform was carried out in an organised manner, whether that sale was intended to generate profit, whether the seller had technical information and expertise relating to the products which she offered for sale which the consumer did not necessarily have, with the result that she was placed in a more advantageous position than the consumer, whether the seller had a legal status which enabled her to engage in commercial activities and to what extent the online sale was connected to the seller's commercial or professional activity, whether the seller was subject to VAT, whether the seller, acting on behalf of a particular trader or on her own behalf or through another person acting in her name and on her behalf, received remuneration or an incentive; whether the seller purchased new or second-hand goods in order to resell them, thus making that a regular, frequent and/or simultaneous activity in comparison with her usual commercial or business activity, whether the goods for sale were all of the same type or of the same value, and, in particular, whether the offer was concentrated on a small number of goods. (…) the criteria set out in the preceding paragraph of this judgment are neither exhaustive nor exclusive, with the result that, in principle, compliance with one or more of those criteria does not, in itself, establish the classification to be used in relation to an online seller with regard to the concept of "trader"*' (paragraphs 37 and 38).

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consumer rights protection[26]. Aware of this issue[27], the EU legislature has introduced additional specific information requirements for contracts concluded in the marketplace; in particular, the provider of an on-line marketplace shall inform the consumer '*in a clear and comprehensible manner and in a way appropriate to the means of distance communication* (…) *whether the third party offering the goods, services or digital content is a trader or not',* and in the case of a non-trader, the platform should provide a statement that the EU consumer protection law is not applicable to the contract concluded[28]. This solution is not flawless[29]. First, the provider of online marketplaces is not required to verify the legal status of the provider of the underlying service and releases the information to the consumer only on the basis of the declaration of that third party. Second, this new duty to provide information is not sufficient to ensure a coherent legal framework for the sale of goods in the digital single market as it leaves the door open for Member States (hereinafter MSs) to apply different criteria in order to qualify the seller as professionals or not, thus jeopardising the goal of the uniformity of the European digital single market.

[26] European Commission, 'Key Findings about Problems Consumers Face in the Collaborative Economy' (2018).

[27] European Commission, 'A New Deal of Consumer' (2018).

[28] Art. 6a(b) Directive (EU) 2019/2161 and rec. 24-28 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules in (2019) 328 OJL 18, p 7–28. Such an omission would be relevant as a misleading omission in the legal framework of the Unfair Commercial Practice Directive: that commercial practice shall be regarded as misleading pursuant to art. 7 because '*it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise*'. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), in (2005) 149 OJL 11, 6, p. 22–39. On this point, see D Staudenmayer, '*sub.* Art. 3' in R Schulze and D Staudenmayer (eds), *EU Digital Law: Article by Article Commentary*, cit., at 64.

[29] C Cauffman, 'New EU Rules on Business-to-Consumer and Platform-to-Business Relationships', cit.

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Even if the SGD is based on the traditional scope of application of earlier consumer protection laws (B2C) in accordance with the evolution of European contract law, the Directive does not propose to restrict its scope to pure consumer contracts[30]. Instead, the SGD leaves wide discretion to MSs in the definition of the scope of application. However, even this choice raises some criticisms.

In particular, the SGD confers on MSs the freedom to extend the application of the SGD to B2B contracts when one of the parties is a natural or legal person that is not a consumer within the meaning of the Directive, such as non-governmental organisations, start-ups or SMEs (rec. 22 SGD)[31]. Even if the SGD expressly proposes the adoption of an extensive definition of consumer, in the case of dual-purpose contracts – in which the trade purpose is so limited as not to be predominant in the overall context of the contract – the SGD leaves MSs free to determine '*whether, and under which conditions, that person should also be considered as a consumer*'. Contrary to the previous EU orientation which was based on the 'predominant use' criterion which directly included such a person in the notion of consumer, MSs under the SGD are completely free to qualify that person as a consumer or not and to define the conditions which underline such a choice[32]. In addition, this option underestimates the fact that consumers today often decide to use a good with digital elements not only for leisure but also partially for professional reasons. The digital revolution and the effects of the COVID-19 pandemic on smart work are making it even more

[30] MW Hesselink, 'Towards a Sharp Distinction between B2B and B2C? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive' (2009) 18 Eur. Rev. Priv. Law 18, 57.

[31] Rec. 21: 'Member States should also remain free to extend the application of the rules of this Directive to contracts that are excluded from the scope of this Directive, or to otherwise regulate such contracts. For instance, Member States should remain free to extend the protection afforded to consumers by this Directive also to natural or legal persons that are not consumers within the meaning of this Directive, such as non-governmental organisations, start-ups or SMEs'.

[32] See JM Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771', cit., at 196; JM Carvalho, 'Introducción a las nuevas Directivas sobre contratos de compraventa de bienes y contenidos o servicios digitales', cit., 33 and 34; C Cauffman, 'New EU Rules on Business-to-Consumer and Platform-to-Business Relationships' (2019) 26 Maastricht J. Eur. Comp. Law 4, 469, 479.
As already indicated by some scholars, this potential restriction on the notion of consumer could generally lead to discrepancies across Europe, '*while at the same time undermining the internal market and an effective protection of consumers*': JM Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771', cit., at 196.

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difficult to disconnect the private and personal sphere from the work sphere[33]. Finally, the SGD recognised the freedom of MSs to extend the scope of application to platform providers who are not direct contractual parties with the consumers.

2.1 The Italian interpretation of the scope of the SGD

Concerning the italian transposition of the SGD, the d.lgs. n. 170/2021 adopted the traditional definition of consumer, that is 'any natural person who is acting for purposes which are outside that person's trade, business, craft, or profession'[34] .

In the case of consumers' sales of goods[35], the Italian legislature did not extend the scope to other parties, such as small enterprises[36]. Moreover, the direct reference to the traditional definition of consumer (fn. 15) leads to the conclusion that the Italian contractor should not be considered as a consumer in the case of dual-purpose

[33] JM Carvalho and M Farinha, 'Goods with Digital Elements, Digital Content and Digital Services in Directive 2019/770 and 2019/771' 2020 2 Rivista de Direito e Tecnologia 2, 257, 261 and 262.

[34] In the transposition law, the Italian legislator has directly recalled the notion of consumer set up by art. 1, para 3, lett. a), it. Cons. Cod., according to which consumer means any natural person who is acting for purposes which are outside that person's trade, business, craft or profession.

[35] See C Amato, 'The Influence of the CJEU's opinions on the Italian Courts in the Application of the Unfair Commercial Practices Directive' in A Mancaleoni and E Poillot (a cura di), *National Judges and the Case Law of the Court of Justice of the European Union* (Roma-Tre Press 2021) 223; S Orlando, 'L'estensione della disciplina delle pratiche commerciali scorrette tra professionisti e "microimprese"' in G Vettori (ed), *Il contratto dei consumatori, dei turisti, dei clienti, degli investitori e delle imprese deboli. Oltre il consumatore* (vol. I, CEDAM, Padova, 2013) 181 ff.

[36] A different choice has been made by the Italian legislator in implementing the European rules concerning misleading and aggressive commercial practices. According to art. 18, d)-bis, it. Cons. Cod., SMEs – as defined by - are included in the scope of Dir. 2005/29/EU: see C Amato, 'Brevi osservazioni riguardo il contributo italiano alla crescita del diritto contrattuale europeo: della nozione di consumatore' in L Antoniolli, GA Benacchio and R Toniatti (eds), *Le nuove frontiere della comparazione, Atti del Primo convegno nazionale SIRD* (Trento, 2012), 315 ff. (with particular regards to the notion of consumer under the Dir. 2011/83)

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contracts in which the trade purpose is so limited as to not be predominant in the overall context of the contract[37].

By the same token, the notion of seller is consistent with the previous legal regime of Dir. 1999/44/EC. Considering the platform-based economy, the concept of trader expressly includes the Digital Platform Provider acting for purposes related to her/his own business and as the direct contractual partner of the consumer for the sale of goods[38]. In some instances, platforms offer more than ISS (see *supra*) and directly provide the underlying service. In this business model, the platforms – eventually subjected to the sector-specific regulation and requirements traditionally applied to services providers[39] – represent the direct counterparty of the consumer. If the platform directly sells goods to consumers, there is no doubt that the platform provider fits perfectly into the notion of 'seller'. Nevertheless, the EU law moves forward with rec. 23 SGD which recognises the freedom of MSs to also qualify the digital platform provider as a seller when it is not acting '*as the direct contractual partner of the consumer*'. According to this option, the platform should be considered liable to the consumer in the case of lack of conformity of goods, either jointly with the seller who provided the underlying service in its professional capacity[40] or as the sole party responsible in the event of peer-to-peer (C2C) transactions. Rec. 23 seems to recall the *Wathelet*[41] ruling that restricted the legal principle affirmed in the judgement to platform intermediaries. In that decision, the CJEU dealt with a triangular relationship and held that the notion of 'seller' within the meaning of the Consumer Sale Directive

[37] Cfr. G De Cristofaro, *Difetto di conformità al contratto e diritti del consumatore* (Cedam, Padova 2000) at 38.

[38] Rec. 23; art. 128, para 2, lett. c) it. Cons. Cod.

[39] *Asociacion Professional Elite Taxi v. Uber System Spain*, ECLI:EU:C:2017:981.

[40] JM Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771', cit, 7 and 8.

[41] CJEU Case C-149/15 *Sabrina Wathelet v. Garage Bietheres & Fils SPRL* [2016] ECLI:EU:C:2016:840; JC Carvalho, 'Online Platforms: Concept, Role in the conclusion of Contracts and current Legal Framework in Europe' (2020) 12 Cuadernos de Derecho Transnacional 1, 863, 869; I Domurath, 'Platforms as Contract Partners: Uber and Beyond' (2018) 25 Maastricht J. Eur. Comp. Law 5, 565. See also G Howells, C Twigg-Flesner and T Wilhelmsson, *Rethinking EU Consumer Law* (Routledge 2018) spec. at 174 and 175.

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1999/44/EC also covers traders acting as intermediaries on behalf of a private individual who fails to inform the consumer that the owner of the goods for sale is not a professional, irrespective of whether the intermediaries are remunerated or not.

Italy has not chosen this option; in the d. lgs. n. 170/2021, there is no reference to the possibility of considering the platform as the seller when it has not made clear to the consumer its mere intermediary role. As a consequence, it excluded the application of the sales' rules to platform providers who do not fulfil the requirements to be qualified as sellers. If the seller uses an intermediary platform to sell goods, no additional liability on the intermediary platforms can be foreseen and, therefore, only the professional seller can be considered responsible to consumers for the supply and conformity of goods.

3. The subject matter of the SGD

3.1. The broad definition of 'sales contract' and the case of mixed contracts

Consistent with the mediatory logic that pervades the EU's terminological choices, SGD confirms a broad definition of 'sale of good'[42] in accordance with the objectives and principles set out in the Directive itself[43]. As stated in art. 2, n. 1, 'sales contract' means any contract under which a seller transfers or undertakes to transfer the ownership of goods to the consumer and the latter pays or undertakes to pay the price[44]. Thus, the SGD does not establish a line among different kinds of contracts,

[42] In this sense, it departs from Directive 1999/44/EC, which did not propose any definition of 'sale', leaving its scope somewhat imprecise.

[43] According to EU law a 'contract of sale' constitutes an autonomous concept whose key characteristics are the obligation to deliver a product in exchange for the payment of the relative price.
In the sense of moving beyond the 'typological' perspective, see P Perlingieri, 'Apertura e coordinamento dei lavori', in aa.vv., *L'attuazione della direttiva 99/44/CE in Italia e in Europa. La tutela dell'acquirente di beni di consumo. Atti del Convegno internazionale* (CEDAM, 2002), 19, at 31: '(…) non è il tipo contrattuale che conta, è importante l'interesse regolato, il fenomeno sostanziale, fatto da tante circostanze che non possono essere tutte previste (…)'.

[44] See art. 2, n. 1, SGD. In contrast to the definition of a sales contract in the Consumer Rights, no express mention of the inclusion of a 'contract having as its object both goods and services' is made

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leaving MSs free to decide what types of agreements should be included in the notion of 'sale'.

This wide notion of 'sale contract' is not a novelty in Italian consumer legislation. As already stated in art. 128 and art. 45, lett. e) it. Cons. Cod.[45], the Italian notion of sale continues to include not only contracts that can be ascribed to the general notion of sale[46] but also barter contracts, supply contracts, contract for services, and all other contracts intended to supply consumer goods to be manufactured or produced.

The SGD promotes the opportunity to include under the scope of the Directive specific contracts with a work or service component. In particular, art. 3(2) and Recital 17 state that contracts for the supply of consumer goods to be manufactured or produced, including under the consumer's specifications, are equated to contracts of sale. As expressly stated in the Directive, the installation of consumer goods also falls within the scope of the SGD, provided that the installation forms part of the contract of sale and has to be carried out by the seller or under the seller's responsibility[47].

Unlike the Consumer Rights Directive (art.2(5)), contracts having as an *'object both goods and services*' are not expressly included in the SGD's definition of a sale contract. Under the current wording of Recital 17 SGD, the SGD leaves to MSs the freedom to

by the SGD: see art. 2(5) Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, in *OJ* L 304 22.11.2011, p. 64.

[45] On the comparison between the notion of 'bene di consumo' and 'bene' according respectively to Articles 128 and 45 cod. cons., as amended in 2014, see M Siragusa, 'sub art. 45, Definizioni' in AM Gambino e G Nava (a cura di), *I nuovi diritti dei consumatori. Commentario al d. Lgs. N. 21/2014* (Giappichelli 2014) 8 ff.

Given the frequency with which used goods are exchanged by consumers for new goods, the appropriateness of extending the objective scope of application of the provisions to the barter contract is underlined by A Ciatti, 'L'ambito di applicazione' in M Bin e A. Luminoso (eds), *Le garanzie nella vendita dei beni di consumo*, *Trattato di diritto commerciale e diritto pubblico dell'economia* diretto da F Galgano, vol. XXI, (Padova, 2003) 117 ff., 125.

[46] 'A contract of sale consists in an agreement to transfer the ownership a good or of a right in exchange for a price' (art. 1470 Italian Civil Code).

[47] See spec. rec. 17 and 34 SGD; art. 8 ('*Incorrect installation of goods*') SGD.

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determine whether contracts which include elements of both a sale of goods and the supply of services should be classified in their entirety as a sales contract[48]. This is a crucial aspect because such a discretionary power reflects the need to regulate an expanding phenomenon which is dictated by the increasing spread of mixed contracts in which the seller not only transfers or undertakes to transfer the ownership of goods to the consumer but is also bound to an obligation to provide a service upon or after delivery (e.g., assistance and maintenance services). Such an undertaking may not merely be ancillary to the transfer of goods but may acquire a significant importance in the agreement. This phenomenon is likely to increase due the inclusion of 'goods with digital elements' within the scope of the SGD (see further on, at 3.2). Under specific circumstances, the digital content or digital service will be covered by the sales contract and the provision of additional services, such as installation[49] or updating of goods with digital elements[50], may become frequently included in the sale contract.

Considering the increased significance of service components for sales contracts in a digitalised market, it is fundamental to provide guidance in the case of mixed contracts to determine whether a contract is a sale or a service contract for the purpose of creating a legal framework intelligible for the consumer.

The repealed Directive 1999/44/EC regulated similar issues as it included in the notion of sale contracts those contracts for the supply of consumer goods to be manufactured or produced as well as providing for the extension of lack of conformity to installation, whether included in the contract of sale or not[51]. Apart from these types of mixed contracts which expressly fall within the scope of the Directive, the general interpretative criterion in the case of mixed contracts required consideration of whether the transfer of ownership of the goods constituted the main

[48] '(…) Where a contract includes elements of both sales of goods and provision of services, it should be left to national law to determine whether the whole contract can be classified as a sales contract within the meaning of this Directive': rec. 17 SGD.

[49] See art. 131 it. Cons. Cod.

[50] Art. 130 it. Cons. Cod.

[51] Similar provisions were included under the repealed Directive 1999/44/EC at art. 1, para 4 and art. 2, para 5.

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purpose of the contract. Under the repealed Consumer Sale Directive, the CJEU[52] addressed in the *Schottelius v Seifert* case the question of whether installation and ancillary service elements should be included under the consumer sales legal regime. In this decision, the Court emphasised that in order to apply the sales disciplines to a mixed contract, the provision of services must be ancillary to the performance of the sale[53]. As already noted elsewhere, this principle is questionable: '*While this focus on the principal obligation constitutes a satisfying test in theory, it may lead to significant legal uncertainty in more complex contractual arrangements in which principal and ancillary contractual duties may be difficult to tease apart*'[54].

The possibility given to national legal systems to expressly set the conditions for classifying contracts that also involve the provision of services as sale contracts may

[52] On the service–sale dichotomy in the CJEU's case law, see K Erler, *Implied Warranties for Digital Products? The Interplay of Intellectual Property and Sales Law in the EU and US*, TTLF Working Papers, 2019, in part. at 64 ff.

[53] In *Schottelius* Case (C-247/16, *Heike Schottelius v Falk Seifert*, ECLI:EU:C:2017:638), the CJEU set up important principles to define contracts involving the supply of a service that falls under the discipline of Directive 1999/44/EC .
In the case at stake, in 2011, Mrs Schottelius's husband engaged the services of Mr Seifert, a contractor, to renovate the swimming pool in the couple's garden. Mrs Schottelius is the owner of the garden and of the pool. As part of the contract, Mr Seifert sold several products to the couple, such as the cleaning system and the pump, and completed the renovation of the pool. Along with the contract, the contractor issued a warranty in favour of Mrs Schottelius's husband, and after the termination of the work, the husband assigned all his rights under the warranty to his wife. After the completion of the renovation work, the pool was put into use and a number of defects (in particular, affected the cleaning system and the pump) became apparent. The couple requested that the contractor repair the defects without success.
Against this factual background, even if the CJEU denied its jurisdiction over the facts of the case, it stated that the contract for the renovation of the pool falls outside the scope of Directive 1999/44/EC. According to the CJEU judgement, the contract must be considered as a contract of work rather than a sales contract with an ancillary installation clause; even though the filter and the pump were installed by the same contractor, the principal obligation under the contract was the renovation of the pool.
The Court referred to the preparatory documents relating to Directive 1999/44/EC and to the UN Convention on Contracts for the International Sale of Goods of 1980 as the basis of its judgment.
Among scholars, see LA Reventós, 'Transmisión onerosa de un producto y su conformidad con el contrato: una relectura de la STJUE de 7 de septiembre de 2017(Asunto 247/16, Schottelius)' (2018) 16 Revista Electrónica De Direito 2, 43.

[54] P Hacker and M-S Schäfer, 'European Union Litigation' (2018) 14 Eur. Rev. Contract Law 1, 64, at 66.

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help to overcome the uncertainties related to the sale–service dichotomy as well as to eventually provide a better definition of the criterion for the 'ancillarity' of performance. Unfortunately, the Italian law implementing the SGD has not included any general provision concerning the legislative rules applicable to mixed contracts. This is a missed opportunity to codify the legal regime applicable to B2C mixed contracts which have as object both goods and services, thereby leaving a gap in our legal system.

3.1.1. New patterns of consumption in the sharing economy: the diminishing importance of the SGD

As seen before, the scope of application of the SGD is expressly limited to exchange contracts which transfer the right of ownership to a consumer; rights *in rem* or rights *in personam* (e.g., the temporary supply of goods or the sharing of tools) are not covered by the SGD[55]. Consequently, a product lease or a product as a service fall outside the subject matter of the Directive. This restriction may fully be accepted within the traditional 20th century economic model of consumer sales regulated by Dir. 1999/44/EC in which consumers were focused on owning property. However, some doubts arise about the compatibility of this traditional approach with the current economic situation characterised by the emergence of the innovative model of the sharing economy[56]. Today, new patterns of consumption are arising in which the interest of consumers with reference to certain consumer goods slips from the acquisition of property to the use of goods. Digitalisation, the inclination towards

[55] '*This limitation to certain types of supply contract is regrettable, but it is another indicator of the rather traditional approach of this Directive. In particular, the omission of contracts involving the temporary supply of goods (i.e., hire or leasing) is surprising, not least in view of the growth of the business models based on sharing, as well as the focus on the circular economy and "servitisation", but also because such alternative forms of supply will be important particularly for consumers with limited financial resources*': C Twigg-Flesner, 'Conformity of Goods and Digital Content/Digital Services', cit.

[56] E Van Gool and A Michel, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: a Critical Analysis', Winner(s) Ius Commune Prize, 2021: '(…) *trends connected to the emergence of more sustainable consumption patterns in Europe diminish the importance of the directive's subject matter. Sales of consumer goods are increasingly replaced by alternatives (such as leasing) or bundled with ancillary services*'.

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saving[57] and the attention to sustainable consumption (especially in the case of underutilised goods such as cars and accommodations) are increasing the consumer's propensity towards sharing. This shift is likely to increase with the rise of digital platforms, which – by reducing transactional costs and facilitating the interactions between providers and users – boost the ability of consumers to access goods without owning them[58].

Within such an emerging economy which offers an alternative to the traditional consumption of products and promotes the use of goods over their ownership, the traditional approach adopted by the SGD turns out to be too narrow, thus dramatically decreasing the importance of the Directive's subject matter. The risk is that the lost opportunity to align the normative datum to the emerging praxis will have a negative impact on consumer protection as well as on the need to achieve a high level of harmonisation in this field[59], partially shaving off the objectives of the Directive.

3.1.2. Payment of the price: a missed opportunity to include virtual currency as a means of payment?

The new EU sale rules exclusively cover contracts in which '*the consumer pays or undertakes to pay the price thereof*' (art. 2(1)). Unlike the SGD which does not provide a definition of 'price', the twin DCD in art. 2(7) expressly includes in the notion of 'price' both money and a 'digital representation of value' that is due in exchange for the supply of digital content or a digital service. Digital representation of values should include electronic vouchers or e-coupons (a coupon released by the trader at the end of a transaction that can be used by the same consumer as a mean of payment for a

[57] C Veith et al., 'An Empirical Analysis of the Common Factors Influencing the Sharing and Green Economies' (2022) 14 Sustainability 771.

[58] ECORL, 'Comparative Study on Sharing Economy in EU and ECORL Consortium Countries' (2016) https://www.ecorl.it/documenti/Risultati/comparative-study-on-sharing-economy.pdf

[59] E Van Gool and A Michel 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: a Critical Analysis', cit., 4.

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next purchase) as well as virtual currency to the extent recognised by national law[60]. Such an extension is justified by the frequent and increasing use of digital representation of values in commercial practice and – as expressly stated in the Directive – to avoid the risk that '*Differentiation depending on the methods of payment could be a cause of discrimination and provide an unjustified incentive for businesses to move towards supplying digital content or a digital service against digital representations of value*' (Recital 23)[61].

Unlike the DCD, the SGD does not provide a specific definition of the meaning of a 'payment of price'; this choice seems to reflect a willingness not to extend the notion of price beyond a sum of money in government-issued currency. In fact, in the last attempt to align the two directives, the EU legislature decided to adopt this different regime given the lesser use of digital representation of values in sale of goods transactions compared to their use in the supply of digital content/services[62].

This solution is highly questionable: even if at present payments in virtual currency are undoubtedly more popular in the case of the supply of digital content and digital

[60] This is justified by the reluctance of some MSs to recognise virtual currency under the EU: D Staudenmayer, '*sub* art. 3', in R Schulze and D Staudenmayer (eds), *EU Digital Law: Article by Article Commentary*, cit., at 67.

[61] See A Janssen, 'Smart Contracting and The New Digital Directives: Some Initial Thoughts' (2021) JIPITEC 196, 201 ff.: '*with the increasing popularity of virtual currencies as a means of payment, this is the only way to prevent companies from escaping the requirements of the Digital Content Directive by demanding "virtual currencies payments" with consumers'*.
To be noted that the DCD scope of application is also open in a case in which the consumer does not pay a price but provides or undertakes to provide personal data to the trader (rec. 24 – art. 3). This specification is in line with the increasing popularity in the digital market of data transfer as a means of payment, for example, in the use of social media, even if it has raised some concern over compatibility with the GDPR rules. On the use of personal data as counter-performance, see D Staudenmayer, '*sub* art. 3', in D Staudenmayer and R Schulze, *EU Digital Law: Article-by-Article Commentary* cit., at 67. Z Efroni, *Gaps and Opportunities: The Rudimentary Protection to 'Data-Paying Consumers' under New EU Consumer Protection Law* (Weizenbaum Series, 4, Weizenbaum Institute for the Networked Society - The German Internet Institute, 2020), https://doi.org/10.34669/wi.ws/4; J Morais Carvalho and M Farinha, 'Goods with Digital Elements, Digital Content and Digital Services in Directive 2019/770 and 2019/771', cit., at 262 and 263. On the GDPR: 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) in (2016) 119 OJL 4, 5, 1–88; see D Staudenmayer, *EU Digital Law: Article-by-Article Commentary*, cit., spec. at 71 ff.

[62] R Schulz and D Staudenmayer (eds), *EU Digital Law: Article by Article Commentary*, cit., at 67

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services, in the near future there could be an increased use of this means of payment in the area of consumer sales, especially with regard to goods with digital elements. As already noted by some scholars, this constitutes a '*missed opportunity to further harmonise the aquis communautaire in a meaningful way*' and, in the near future, it will probably lead to the need for a preliminary judgement from the CJEU in order to clarify if the purchase of goods for virtual currencies falls under the SGD rules[63]. This is not only necessary to ensure the effective and uniform application of European Union legislation and to prevent divergent national interpretations but also to safeguard consumers. It is important to avoid a narrow notion of price (that is, a traditional currency) which, under the SGD, may induce sellers to move towards selling goods to consumers for virtual currency in order to evade the application of the consumers sale's rules, thus undermining the entire set of rules on consumer protection[64].

3.2. The innovative definition: goods with digital elements

The definition of 'good' brings significant novelties to the SGD.

First, in accordance with the European wording, the Italian reference to 'consumer good' before the recent reform which limited the object of the contract under art. 128

[63] A Janssen, 'Smart Contracting and The New Digital Directives: Some Initial Thoughts', cit., at 201 ff.

[64] A Janssen, 'Smart Contracting and The New Digital Directives: Some Initial Thoughts', cit.

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ss it. Cons. Cod. has disappeared in favour of the syntagm 'tangible[65] movable[66] item' (recital 12 and art. 2(5) SGD). The definition of consumption goods used in Dir. 1999/44/EC has been questioned by Italian scholars since it was transposed into the it. Cons. Code. It is well known that the term 'consumer' does not characterise a particular kind of product or the specific functionalities of goods, but is instead connected with the parties to the contractual relationship[67]. Thus, the abandonment of the linguistic expression 'consumer goods' does not produce any consequences on the scope of the sale rules.

Second, the notion of 'good' is enriched by the inclusion of 'goods with digital elements'[68]. The attention paid by the SGD to this specific type of product clearly

[65] When transposing Directive 1999/44/EC, the Italian legislator followed the opinion of the majority of scholars and deleted the reference to the 'materiality of the goods', thus including the supply of intangible goods, such as software, in the concept of consumer goods; see A Ciatti, 'L'ambito di applicazione', cit., at 121 e 122; A Ciatti, 'L'ambito di applicazione *ratione materiae* della direttiva comunitaria sulla vendita e le garanzie dei beni di consumo', cit., 445; C Iurilli, 'Le garanzie legali e commerciali nella vendita dei beni di consumo. Riflessioni in ordine a taluni aspetti relativi al recepimento della direttiva n. 99/44' (2002) 6 Giust. Civ. 2, 271, 281 ff. *Contra*, in the direction of the exclusion of intangible goods, see A Zaccaria and G De Cristofano, 'La vendita dei beni di consumo', cit., 18 ff. (with the exclusion of *software*: 19 and 20); G De Cristofaro, *Difetto di conformità al contratto e diritti del consumatore*, cit., at 41 ff. For a critical analysis, see, in particular, F Addis, '*sub* art. 128' in G Vettori (ed), *Codice del Consumo* (2007) 863, at 875; G De Cristofaro et al., *Commentario breve al diritto dei consumatori: Codice del consumo e legislazione complementare* (CEDAM 2013), at 823.

[66] The exclusion of immovable items is not new in the Italian legal system: when Directive 1999/44/EC was transposed, the European choice to restrict the applicability of the provisions to movable goods was confirmed. On the other hand, some academics were in favour of extending the objective scope of application to immovable goods: F Bocchini, 'La vendita di cose mobili' in P. Schlesinger (fondato da), FD Busnelli (diretto da), *Il Codice Civile. Commentario* (Milano, 2004) 346; R Carleo, '*sub* art. 1519 bis, comma 2, lett. b)', in S Patti (eds), *Commentario sulla vendita dei beni di consumo*, (Giuffrè 2004) 25, at 29 and 30; F Ricci, '*sub.* Art. 128', cit., 22; cfr. A Luminoso, 'Chiose in chiaroscuro in margine al d. legisl. N. 24 del 2002' in M. Bin and A Luminoso (eds), L*e garanzie nella vendita dei beni di consumo, Tratt. Dir. comm. e Dir. pubb. dell'econ*., cit., 64.

[67] See, A Luminoso, *La compravendita* (Giappichelli 2009) at 318; F Bocchini, *La vendita di cose mobili*, cit, 341; A Zaccaria and G. De Cristofano, *La vendita dei beni di consumo* (CEDAM 2003) at 17 and 18; F Addis, *sub* art. 128 in G Vettori (eds), *Codice del Consumo*, cit.; G De Cristoforo et al., *Commentario breve al diritto dei consumatori: Codice del consumo e legislazione complementare* (CEDAM 2013) 823; R Carleo, '*sub* art. 1519 bis, comma 2, lett. b)', cit., 30.

[68] Art. 2(5)(b) SGD - art. 128, para 2, lett. e), n. 2 it. Cons. Cod. See K Sein and G Spindler, 'The new Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's Obligation to Supply – Part 1' (2019) 15 ERCL 271; P Kalamees, 'Goods with Digital Elements And The Seller's Updating Obligation' (2021) 2 JIPITEC, 132 and 133; K Sein, '"Goods

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reflects the new digital economy and the expansion of the smart goods' market. Today, many consumer goods are smart or connected products, that is, a combination of tangible hardware and embedded digital content or services (such as software, sensors and electronic components) as well as connectivity systems. This is the case, for example, with smartphones, smartwatches and fitness trackers, SmartTVs, connected cars with devices linked to other devices within the vehicle or outside the car (e.g., navigation leave alerts, payment from dash, warn on traffic, safety and collision alerts and automobile diagnostic alerts) and smart fridges which monitor if a product is running low and make it easy to place an order at the grocery store. These are very complex products with heterogeneous components that often involve one or more third parties[69].

Recall the notion set up by the SGD that 'goods with digital elements' are '*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*'[70]. The SGD must, therefore, apply when (a) the digital content or digital service is embedded into the product as an integrant or inter-connected part of it and (b) The functionality of the good strictly depends on the functionality of the digital content or digital services[71]. The digital content or service incorporated in or interconnected with the goods must also be provided together with those goods as a result of the sale contract[72]. Whether or not the supply of the incorporated or

with digital elements" and the Interplay with Directive 2019/771 on the Sale of Goods', 2020, available at SSRN: https://ssrn.com/abstract=3600137 or http://dx.doi.org/10.2139/ssrn.3600137

[69] C Wendehorst, 'Sale of goods and supply of digital content – two worlds apart? Why the law on sale of goods needs to respond better to the challenges of the digital age' (2016): < https://www.europarl.europa.eu/cmsdata/98774/pe%20556%20928%20EN_final.pdf >

[70] Art. 128, para 2, let. e, n. 2, It. Cons. Cod.

[71] See J Sénechal, '*sub* art.2', in R Schulze and D Staudenmayer (eds), *EU Digital Law: Article by Article C* cit.: '*This is to be ascertained by a "negative test": if the absence of the digital content or digital service would prevent the goods from performing their functions, the goods in question fall under the definition of "goods with digital elements". How the concept of "function" is to be understood in this context is, however not described in either Art. 2 No. 3 itself or in the recitals. The decisive aspect may primarily concern the type of use and the purposes of the goods as they would normally be used or as specified in the contract*' (p. 48). See also P Rott., 'The Digitalisation Of Cars And The New Digital Consumer Contract Law' (2021) 2 JIPITEC, 156 ff. at 158 and 159.

[72] Art. 128, para 3, it. Cons. Cod.

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interconnected digital content or service is included in the sales contract should depend on the agreement's terms. In particular, the inclusion of the digital elements could be either explicitly required by the terms of the contract, or they may be expected for goods of the same type, taking into account also any public statement made by or on behalf of the seller or other persons in previous links of the chain of transactions, including the producer[73]. For example, in the case of a purchase of a smart TV, the buyer will probably expect to find connectivity with the main video-streaming applications throughout specific interfaces (e.g., Netflix app and Amazon Video); by contrast, the consumer may not expect to have access to the relevant video streaming services without directly entering into another contract for the provision of the services with the provider (e.g., Netflix or Amazon Video subscription). The only case in which the consumer would consider access to streaming services to be included within the same contract is when the seller advertised the availability of the streaming services as part of the sale of the smart TV[74].

The digital content or digital service can be pre-installed in the good, or it can be subsequently downloaded onto a different device interconnected to the good (rec. 15 SGD). The incorporated or interconnected digital content or digital service can be supplied directly by the seller or it can be provided by a third party under the sales contract (art. 3(3) SGD). In the latter case, the seller is solely responsible to the consumer; the latter does not have the burden of dealing with several suppliers (see further on, at V.2).[75]

By contrast, in the case of a sale of goods for which functionality *does not depend* on any digital content, the supply of the digital content or service will eventually be

[73] Rec. 15 SGD.

[74] K Sein and G Spindler, 'The new Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's obligation to Supply – Part 1' (2019) 15 ERCL 3, 257, 272; J M Carvalho, 'Introducción a las nuevas Directivas sobre contratos de compraventa de bienes y contenidos o servicios digitales' in E Arroyo Amayuelas and S Cámara Lapuente (eds), *El Derecho privado en el nuevo paradigma digital*, cit., at 36.

[75] See P Rott, 'The Digitalisation Of Cars And The New Digital Consumer Contract Law', cit., at 159, who defines the the introduction of 'one-stop mechanism' as '*the most important feature of the Directive*'.

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performed under a separate contract, likely falling within the scope of the DCD[76]. For example, if a consumer bought a smartphone with a pre-installed app to monitor weather conditions or a smart bedtime toy connected with a storytelling app to download, both applications would be considered to be a part of the smart good in question and subject to the same legal regime (sales law). If the buyer of a smartphone should later decide to install a game application that was separately bought or to buy software independently from a purchased laptop, the SGD does not apply to the game app or software[77].

In the event of doubt as to whether the supply of incorporated or interconnected digital content or digital services forms part of the sales contract, the digital content or digital service is presumed to be covered by the sales contract (Articles 3(4) sentence 2 DCD, 3(3) SGD). If the good is a physical tangible medium which exclusively serves as a carrier of the digital content, such as DVDs, CDs, USB sticks and memory cards, the DCD – instead of the SGD - should be applied (art. 3(3) and Recital 20 DCD, art. 3(4)(a) and Recital 13 SGD)[78]. Although the application of sale rules to both tangible mediums and digital content would probably have been intuitively the most understandable for the consumer[79], such a choice would not be the best option. This is because it would not reflect the minor value of the tangible medium compared to the digital content stored on it and would undermine the

[76] About the uncertainty in establishing the scope of application of the Directives and, in particular, the determination of what is covered by the DCD, see C Amato, 'Internet of Bodies: Digital Content Directive and Beyond' (2021) 12 JIPITEC 186.

[77] P Kalamees, 'Goods with Digital Elements and The Seller's Updating Obligation', cit. See also P Rott, 'The Digitalisation Of Cars And The New Digital Consumer Contract Law', cit., at 160, who underlines that '*The exceptional character of the exclusion of third party digital content and services from the sales contract suggests that the separation must be "genuine" rather than an artificial separation of contracts that circumvents the general one-stop concept of the Sale of Goods Directive*'; K Sein, 'The Applicability of the Digital Content Directive and Sales of Goods Directive to Goods with Digital Elements', (2021) 30 Juridica Int'l 23 ff.

[78] These new provisions have been implemented in the Italian legislative framework (under art. 128, para 3 and 4, lett. a, it. Cons. Cod.) without significant additions.

[79] According to EU legislation, the extent to which the DCD rules apply to the tangible medium if the medium serves exclusively as carriers of the digital content should '*meet the expectations of consumers and ensure a clear-cut and simple legal framework for traders of digital content*': rec. 20 DCD.

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principle of '*neutrality as regards the distribution channel*'[80], leading to the application of different legal regimes to the distribution of the same digital content (for instance, a music album would be treated differently depending on whether it is supplied on a CD or via online-streaming)[81].

These new provisions clearly aim to set the boundaries between the DCD's and SGD's range of application[82]; yet it is not always easy to draw a clear line between the supply of goods with digital elements (sale contract) and the supply of goods (sale contract) *and* of digital content/services (supply of digital content/service contract), nor is it simple to define when a good exclusively carries a digital component. For example, the Internet of Bodies (IoB) has increased the use for non-medical purposes of (micro)chips and sensors which are available commercially, such as an insertable payment chip which allows the buyer to provide contactless payment just by putting a hand near the contactless card reader, a chip implant as a replacement for a key, insertable devices that vibrate whenever an earthquake anywhere in the world happens and whether someone is facing north. Many other commercial self-insertable implants are already available on the market. Yet the qualification of such devices for the purpose of the application of SGD and DCD directives remains somehow problematic. Can these implantable chips be qualified as goods with digital elements? Or are they the tangible medium used to exclusively carry the digital content/service?[83]

Although uncertainty is never desirable, it is never completely avoidable in the field of new technologies given the novelty of the Internet of Things (IoT) and IoB applications and their rapid and unpredictable evolution. For the current purpose of

[80] See rec. 19 DCD: '*(…) As there are numerous ways for digital content or digital services to be supplied, such as transmission on a tangible medium, downloading by consumers on their devices, web-streaming, allowing access to storage capabilities of digital content or access to the use of social media, this Directive should apply independently of the medium used for the transmission of, or for giving access to, the digital content or digital service*'.

[81] In this sense, see R Schulze and D Staudenmayer (eds), *EU Digital Law: Article by Article Commentary*, cit., 74 and 75.

[82] In particular, see art. 3(3) SGD.

[83] C Amato, 'Internet Of Bodies: Digital Content Directive And Beyond', cit.

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the application of the SGD/DCD, agreement terms might play a pivotal role in the case-by-case definition of the applicable legal regime.

3.3. MSs' discretion: living animals and second-hand goods sold at public auction

The SGD pays particular attention to the sale of living animals and second-hand goods (art. 3(5) SGD).

With regard to living animals, the SGD leaves room for MSs to have discretionary power to choose whether to extend the application of the sale rules to these cases.

The Italian legislature has taken the chance to expressly extend the notion of goods to living animals (Article 128, para 2, letter e), n. 3 it. Cons. Cod.)[84]. This is in accordance with the interpretative approach recently developed by courts and expressed in the majority of opinions by academics[85]. Profiting from the wide definition of 'consumer good' provided by the it. Cons. Cod (at art. 3), courts are in favour of equating pets with consumer goods, arguing that the natural person who buys a pet (or companion animal) to satisfy the emotional needs of daily life and which is unrelated to the trade or professional activity that he or she may run should be qualified as a 'consumer'. By the same token, anyone who sells a pet in the exercise of trade or other professional activity should be qualified as a 'seller' pursuant to the it. Cons. Code; moreover, a pet defined as a 'movable thing' in the sense of the law constitutes a 'consumer good'[86].

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[84] R. Senigaglia, 'Riflessioni sullo stato giuridico degli animali di affezione e sue ricadute in materia di vendita e responsabilità civile' (2021) Il diritto di famiglia e delle persone, 1772 ff.

[85] A relevant number of Italian scholars have already expressed the same view: A Zaccaria and G De Cristofano, *La vendita dei beni di consumo*, cit., 24; G De Cristofaro, *Difetto di conformità al contratto e diritti del consumatore* (Padova, 2000) 44, fn 39; A Ciatti, 'L'ambito di applicazione', cit., at 124.
Among scholars who previously expressed themselves in these terms, see A Ciatti, 'L'ambito di applicazione *ratione materiae* della direttiva comunitaria sulla vendita e le garanzie dei beni di consumo' (2020) Contratto e Impresa – Europa, 433, at 446 ff. Cfr. A Maniaci, 'Vendita di animali: vizi, difetti e rimedi' (2004) XII(1) Contratti 1122 ff.

[86]'Cass. Civ., II section, 25 September 2018, n. 22728' in (2019) 6 Corriere Giur. 777, comment by S Cherti, 'Vendita di animali: gli animali da compagnia sono "beni di consumo"' in (2019) 2 Nuova Giur. Civ., 268, annoted by L Delogu and L Olivero, 'Animali d'affezione e garanzia per vizi tra codice civile e di consumo'; in (2019) 1 Contratti, 19, annoted by M Faccioli, 'L'applicabilità della

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As regards second-hand goods[87], art. 3(5)(a) allows MSs to exclude a sale contract for second-hand goods sold at public auction from the scope of the SGD.

Italian law has extended the SGD regime to all second-hand goods. The new provision under art. 128, para 5 (replacing the previous rule codified under art. 128, para. 3[88] with minor changes) confirms the applicability of the new European discipline on contracts for the sale of second-hand goods, taking into consideration the time of previous use and limited to defects which do not result from the normal use of the product[89]. The SGD regime also applies to second-hand goods sold at a public auction[90] where the seller has not informed the consumer – in a clear and comprehensive manner – about the fact that the consumer sales rules does not apply in that particular situation[91].

Finally, there are no legislative changes on sale contracts for water, gas and electricity. According to the repealed Directive 1999/44/EC on consumer sales, water, gas and electricity are considered to be goods if marketed in a limited volume or ascertained quantity (art. 2(5)(a) SGD; article 128, para 2, letter e), n. 1)[92].

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disciplina sulla vendita dei beni di consumo alla vendita di animali'; in (2019) 1 Danno e Resp. 70 (1), annoted by F Bertelli, 'Applicabilità del codice del consumo alla compravendita di animali'.

[87] Concerning the importance of increasing the confidence of consumers in the market of second-hand goods in order to contribute to the circular economy, see K Kryla-Cudna, 'Sales Contracts and the Circular Economy' (2020) 6 Eur. Rev. Priv. Law 1207.

[88] '*Le disposizioni del presente capo si applicano alla vendita di beni di consumo usati, tenuto conto del tempo del pregresso utilizzo, limitatamente ai difetti non derivanti dall'uso normale della cosa*': previous art. 128, para 3, it. Cons. Cod.

[89] These specifications have been retained despite their uselessness or obviousness, as repeatedly emphasized by scholars: v., *ex multis*, A Ciatti, 'L'ambito di applicazione', cit., at 133.

[90] By transposing the specification included in the Directive, the wording of the new Italian rule expressly includes (but does not limit) second-hand goods which are sold at public auction (see art. 128, para 5, it. Cons. Cod.).

[91] '*Le disposizioni del presente capo si applicano alla vendita di beni usati, tenuto conto del tempo del pregresso utilizzo, limitatamente ai difetti non derivanti dall'uso normale della cosa, anche nel caso in cui siano venduti in aste pubbliche qualora non siano state messe a disposizione dei consumatori informazioni chiare e complete circa l'inapplicabilità delle disposizioni del presente capo*': art. 128, para 5, it. Cons. Cod.

[92]The exclusion of water, gas and electricity depends on the particular public relevance of these goods, which are considered to be basic necessities, which postulates an autonomous regulation concerning

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As in Dir. 1999/44/EC, the SDG excludes the application of the new sale discipline to any goods sold by way of execution or otherwise by authority of law (art. 3(4)(b) SGD). The Italian implementation confirms such an exclusion and enlarges it to national peculiarities[93].

4. Seller liability under the SGD and the conformity of goods

According to SGD, the seller's duty is not limited to providing the consumer with ownership of the goods but also includes the delivery of conforming goods. The seller is liable to the consumer for any lack of conformity of the good, the digital content or the digital services incorporated or interconnected to the good and provided under the same sales contract.

The SGD establishes legal rules regarding the conformity of goods (arts. 5–9 SGD) by explicitly codifying the distinction between 'subjective' and 'objective' criteria for conformity (arts. 6 and 7 SGD)[94]. Even if the subject requirements are mentioned in the SGD before the objective requirements, the latter represent the baseline standard which must be met in all instances, irrespective of what is required by the contract. By contrast, the subjective conformity criteria upon which the parties have expressly

distribution modalities and users' rights: in this sense see. E Capobianco, L Mezzasoma, G Perlingieri (a cura di), *Codice del consumo annotato con la dottrina e la giurisprudenza,* (2018), *sub* art. 128, 669; G De Cristofaro et al., *Commentario breve al diritto dei consumatori: Codice del consumo e legislazione complementare* (CEDAM 2013), 824; R Carleo, '*sub* art. 1519 bis, comma 2, lett. b)*'* cit., 41 ff. For a critical view of such exceptions see Schlechtriem, 'Riflessioni per l'armonizzazione del diritto della vendita al consumatore attraverso la direttiva dell'Unione europea sulla vendita dei beni di consumo', in Patti (a cura di), *Annuario del diritto tedesco* (Milano, 2001) 129, at 135, fn 11.

[93] The reference is to the national specification '*anche mediante delega ai notai, o secondo alter modalità previste dalla legge*': The justification of such an exclusion has to be traced back to the circumstances of the sale rather than to the nature of the good**:** E. Capobianco, L. Mezzasoma, G. Perlingieri (a cura di), *Codice del consumo annotato con la dottrina e la giurisprudenza,* 2018, *sub* art. 128, 669; see, also, R. Carleo, '*sub* art. 1519 bis, comma 2, lett. b)*',* cit., 37 ff..; G De Cristofaro, *Difetto di conformità al contratto e diritti del consumatore* (Cedam 2000) at 45 and 46. Cfr. F Addis, *sub* art. 128 in G Vettori (a cura di), *Codice del Consumo*, cit., according to which the exceptions in Article 128, nn1, 2, and 3 (see now Art. 128, para2 lett. e (1) e para 4, let. b) are perhaps justified by the fact that the sale does not take place in *'perfect competitive market* conditions' (876)

[94] These subjective and objective conformity requirements have been transposed without significant changes into the Italian legal system, art. 129, para 2 and para 3, it. Cons. Cod.

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agreed supplements the objective conformity requirements. The fulfilment of both the objective and subjective conformity requirements ensures the overall conformity of the goods to the contract.

4.1. Objective conformity requirements

The purpose of the objective requirements is to set minimum requirements concerning the quality of the goods which apply regardless of whether the parties have specified the characteristics and qualities of the goods sold[95]. The legal standard of quality can only be increased by the parties in the case of specific negotiation[96].

Art. 7 refers to two main requirements arising from the application of legal rules and supplementing the contractual will. First, the goods must be '*fit for the purposes for which goods 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*'.

Second, if the seller provides the consumer with a sample or model before the sales contract is concluded, the good must meet that quality and correspond to the description.

Pursuant to art. 7, if applicable, the goods shall '*be delivered along with such accessories, including packaging, installation instructions or other instructions, as the consumer may reasonably expect to receive*' (c) and '*possess the qualities and other features, including in relation to durability, functionality, compatibility and security normal for goods of the same type and which the consumer may reasonably expect given the nature of the goods and taking into account any public statement made by or on behalf of the seller, or other persons in previous links of the chain of transactions, including the producer, particularly in advertising or on labelling*' (d).

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[95] C Amato, 'Responsabilità da inadempimento dell'obbligazione', cit.

[96] C Twigg-Flesner, 'Conformity of Goods and Digital Content/Digital Services', cit., 20, who underlines that '*(…) the objective baseline standard should be a mandatory minimum requirement (…) One justification for this is that consumers rarely have the expertise and skills to negotiate with a trader about what levels of quality to expect from goods/digital content/digital services. An even stronger justification is the fact that many consumer transactions involve no negotiation, nor even an opportunity for negotiation, at all (…)'* (p. 53).

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Such objective legal requirements become part of the contract, and they are presumed to be reasonably expected by the consumer[97]. Reasonableness should be ascertained in an objective manner, '*having regard to the nature and purpose of the contract, the circumstances of the case and to the usages and practices of the parties involved*' (Rec. 24 SGD). Such an analysis cannot be conducted as an abstract exercise; it should rely on the specific circumstances of the sale contract at stake[98]. Reference to public statements (as in the repelled Dir. 1999/44/EC) is also fundamental, considering the power of advertising in shaping consumer expectations (see *infra*).

4.2. Subjective conformity requirements

According to art. 6 SGD, subjective conformity criteria are the terms of the contract as agreed upon by the parties in their private relationship, that is, elements covered by specific terms of the contract or, in the case of distance and off-premises contracts, by pre-contractual information which represents an 'integral part' of the contract (pursuant to art. 6(1) and (5), Dir. 2011/83/EU).

In more detail, goods are subjectively compliant if they correspond to description, type, quantity and quality. The SGD also lists some innovative and important conformity elements which might be included in the contract terms with respect to goods with digital elements: reference is made to the functionality of the good, compatibility, interoperability and other features. Second, the conformity of goods is assessed by taking into consideration the '*fitness for a particular purpose*' requirement; the conformity of goods is ensured if the goods are explicitly required by the consumer for a particular purpose at the time of the conclusion of the contract and that purpose is explicitly accepted by the seller. The acceptance of the seller ensures that the consumer's specific request is not unilaterally imposed on the seller[99]. Nevertheless,

[97] JM Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771', cit.

[98] See C Twigg-Flesner, 'Conformity of Goods and Digital Content/Digital Services', cit., who highlights the '*context-sensitive*' nature of this assessment.

[99] D Staudenmayer, '*sub* art. 7' in R Schulze and D Staudenmayer (eds), *EU Digital Law: Article by Article Commentary,* cit., 120.

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the SGD does not specify the degree of precision required for the consumer's request to be valid, nor does it make explicit that the seller's consent must be evaluated based on the information received from the consumer. These specifications might help in a case of uncommon purposes required by a consumer.

Goods are deemed to be in conformity if the parties have agreed to deliver the goods with all accessories and instructions, including installation as agreed in the contract.

Finally, if the contract refers to updating the goods, goods with digital elements shall be supplied with all the updates as stipulated in the sale contract. The parties may agree to include upgrades which enhance the digital elements connected to or incorporated into the good, improving the functionalities of the digital content or digital service elements, adapting them to technical developments, protecting them against new security threats, and so on[100]. Both the omission to provide such updates as well as defective or incomplete updates are considered as a lack of conformity of the good.

5. Towards the 'absolute' liability of the seller

The conformity requirements set out in articles 6 and 7 SGD establish precise criteria which aim to determine the content of the seller's obligation; they define what is included in the sale contract, as well as the prodromic steps that allow assessment at the time of performance of whether and how the obligation should be performed.

As the analysis of conformity requirements has shown, the unitary notion of conformity to the contract[101] and the objective requirements for conformity under the SGD have broadened the seller's obligation as compared to the sale rules set out by the repealed Dir. 1999/44/EC.

[100] Rec. 28 SGD.

[101] On the unitary notion of lack of conformity, cf. M Bin, 'La non conformità dei beni nella convenzione di Vienna sulla vendita internazionale' (1990) 44 Riv. trim. Dir. proc. Civ. Civile 755.

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First, the content of the seller's obligations has been better specified, considering precise standards and expectations with which the goods must comply. The new directive has taken a further step towards standardisation by referring to the regulatory or technical standards or to the applicable self-regulatory codes of conduct to assess whether the good is fit for the purpose which goods of the same type would normally be used. Moreover, the SGD contains a list of performance features, namely durability, functionality, compatibility and interoperability of the goods, which better define certain purposes and expectations which must be relevant in the assessment of the conformity of goods with digital elements. As in Dir. 1999/44/EC, public statements made by the seller or on his/her behalf contribute to delineate and objectify the quantity and qualities that should be considered as necessary for goods of the same type and which, therefore, the consumer may reasonably expect to receive (see further on, at V.1)

Second, the inclusion of goods with digital elements under the notion of consumer good has expanded the seller's liability in the case of lack of conformity of the digital element provided under the same sale contract (see further on, at V.2).

Finally, under the SGD, the seller can bear the responsibility for acts beyond the transfer of ownership of the goods sold to the consumer. The sellers' obligation is increasingly extended to post-sale services. These not only include the correct installation of goods, as also stated in the repealed Dir. 1999/44/EC; the omission to provide updates may also constitute a non-conformity of the goods sold with digital elements (see further on, at V.3).

5.1. Towards a higher level of standardisation of the obligation

Art. 7(1) SGD introduces a new parameter in the assessment of the objective conformity requirement (in addition to that provided in the corresponding rule of Dir. 1999/44/EC - art. 2(2)(c)). In order to assess if the goods are fit for their purposes (as compared to goods of the same type), EU national law, technical

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standards and sector-specific industry codes of conduct must be taken into account[102]. The technical previsions (issued at both the national and European levels) typify the seller's conduct according to qualitative standards (e.g., goods specification or safety features) as well as quantitative standards. Therefore, the seller's exemption from liability is strictly limited[103].

The inclusion of goods with digital elements within the SGD's scope has led to legislation that tailors some rules on non-conformity to the peculiar characteristics of the digital content and digital services. In consideration of the digital dimension of the goods, the relevant purpose and the expectation criteria in the assessment of conformity have been revisited. In particular, the notion of conformity in the SGD has been enriched with reference to the characteristics of durability, functionality, compatibility and interoperability in addition to the safety of the goods. In accordance with the definitions provided by the SGD, 'durability' means '*the ability of the goods to maintain their required functions and performance through normal use*' (art. 2, n. 13 SGD), while 'functionality' means "*the ability of the goods to perform their functions having regard to their purpose*" (art. 2, n. 9 SGD). 'Compatibility' refers to '*the ability of the goods to function with hardware or software with which goods of the same type are normally used, without the need to convert the goods, hardware or software*' (art. 2, n. 8 SGD). As an example, a smartphone is reasonably expected to communicate with connected common devices, such as Bluetooth earrings or a car's hands-free device. Interoperability is defined as '*the ability of the goods to function with hardware or software different from those with which goods of the same*

102 This addition recalls the multilevel layout of the product liability framework and the product safety legislation, as set by the New Legislative Framework (NLF) and by the European Standardization System: see C Amato, 'Internet Of Bodies: Digital Content Directive, And Beyond', cit.; Id., 'Responsabilità da inadempimento dell'obbligazione', in E Navarretta (eds), *Codice della responsabilità civile* (Giuffré 2021) spec. at 93 ff.

[103] See *funditus* C Amato, 'Responsabilità da inadempimento dell'obbligazione', cit., spec. at 93 ff.

Identifying objective criteria for smart goods, especially with regards to those based on AI, is a complicated task; nevertheless, the criteria of conformity pursued in art. 7(1) '*do not contribute significantly to concretising the concept of objective conformity'* in case of an AI system: M Ebers, '*Liability for Artificial Intelligence and EU Consumer Law'* (2020) JIPITEC 218.

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type are normally used' (art. 2, n. 10 SGD). This is the case with smart light bulbs connected to other smart home devices[104].

The inclusion of these characteristics in the conformity assessment, together with the duty to update (see further on, at V.3), might constitute a valid ally to fight the 'technological obsolescence' phenomenon. On the one hand, a minimum durability for the goods is explicitly required as an objective requirement of conformity and must, therefore, be ensured by the seller irrespective of whether there is a contractual agreement on this issue; on the other hand, the ability of the goods to function with other hardware or software avoids their premature replacement[105].

In order to define the content of the seller's obligation, the new SGD confirms (as in the repealed Dir. 1999/44/EC) the relevance of the public statements made by the seller or on the seller's behalf or by other persons in previous links of the chain of transactions; these are expressly included as an assessment element of the conformity of the goods[106]. Indeed, the consumer's decision is often influenced by the seller's public statements, which usually aim to highlight special characteristics of the goods that make them different and more attractive compared to goods of the same type[107]. The choice of making such declarations relevant in defining the content of the seller's obligation can thus be supported. For example, if a consumer buys a laptop, he/she probably does not expect that the Microsoft 365 package is available to him/her just because he/she bought the device. In order to have access to Word, Excel or PowerPoint functionalities, the consumer must conclude a separate subscription to the service directly with Microsoft. Nevertheless, if the purchase of the laptop has been advertised with Microsoft 365 included, the buyer is entitled to have access to

[104] See also R Gonzalez-Usach et al., 'Interoperability in IoT', in G Kaur and P Tomar (eds), *Handbook of Research on Big Data and the IoT,* IGI Global, 2019, 149 ff.

[105] E Van Gool and A Michel, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis', cit., which also extended the notion of durability to 'reparability'.

[106] Similar to the prevision in art. 2(4) Dir. 1999/44/EC.

[107] E Bellisario, '*sub* art. 1519-ter, 2º comma, lett. c)' in S Patti (eds), *Commentario sulla vendita dei beni di consumo* (Giuffrè 2004) at 113; C Caricato, 'sub art. 1519-ter, 4º comma)' in S Patti (eds), *Commentario sulla vendita dei beni di consumo,* cit., 146, at. 156.

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that ancillary digital service and, consequently, seller liability is extended to the digital element.

The SGD also restate three cases in which the seller is not bound to public statements[108]: (a) The seller does not have positive knowledge of the public statements nor could the seller have reasonably known about them; (b) The statement has been corrected '*in the same way as, or in a way comparable to how, it had been made*'. This means that the details concerning the requirements to correct are clearly aimed to ensure that the statement has reached the same target audience as the public statements[109]; (c) The decision-making process of the consumer has not been influenced by the public statements (e.g., the consumer was not aware or did not care about the public statements).

5.2. Goods with digital elements: the lack of conformity of digital content or digital service

The inclusion of goods with digital elements under the scope of the SGD clearly reflects the need to ensure effective consumer protection, thereby establishing a '*one-stop-only policy*' for the consumer[110]. In the case of a lack of conformity for a smart product (e.g., connected car), it is often very difficult, if not impossible, for a consumer to recognise whether the defect comes from the good or from its digital component. Splitting the legal framework by submitting the car to sale rules and the navigator alert system to digital content provisions or recognising that the consumer has the option to choose remedies under both legal regimes (rules on goods and rules

[108] Art. 7(2) SGD.

[109] D Staudenmayer, '*sub* art. 8' in R Schulze and D Staudenmayer (eds), *EU Digital Law: Article by Article Commentary,* cit., at 146.

[110] A Janssen, 'Smart Contracting and The New Digital Directives: Some Initial Thoughts', cit., 202.

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on digital content/service)[111] would have led to a confusing scenario[112]. Nevertheless, the inclusion of goods with digital elements under the scope of the SGD has a great impact on traditional sales law, not only because the traditional exchange of ownership of a good for payment comes along with a long-term supply of the digital element but also because of the involvement of third parties. This involvement causes an extension of the seller's liability to the ancillary digital services, even if a third party (e.g., the software producer) is the one who provided the digital service and the seller has very limited control over that performance. As already mentioned, the seller is liable for the digital element which is interconnected with the good and necessary for its functioning if it is provided with the good under the sale contract. Consequently, the extension of seller liability to the digital element mainly depends on the pre-contractual information given to the buyer and on the specific content of the contract. As stated in Recital 16 SGD, the seller might '*expressly*' agree that the consumer purchases a smartphone without a specific operating system; the consumer shall thus conclude a separate contract with a third party for the supply of the digital element. In this scenario, the supply of the operating system falls outside the scope of the SGD, and in case of lack of conformity of the digital element, the seller's liability is excluded. As noted elsewhere, '*the term "expressly" will be the pivotal point in the future: just mentioning the information in the standard terms and conditions would not meet the test of "expressly". Also, just giving a QR-code with more information would not be sufficient (..)*'[113]. In order to ensure proper consumer protection, clear information should be given to the consumer; if not, the buyer will obviously expect that the seller is liable for the '*whole smart phone*'.

Moreover, the inclusion of goods with digital elements under the SGD burdens the seller with an additional post-sale obligation – that is, updating duties (see further on, at V.3) – which cause a further extension of the seller's liability.

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[111] ELI (European Law Institute), *Statement on the European Commission's Proposed Directive on the Supply of Digital Content to Consumers* (2016), 11 and 12.

[112] K Sein and G Spindler, 'The New Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's Obligation to Supply – Part 1', cit., at 270.

[113] K Sein and G Spindler, 'The New Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's Obligation to Supply – Part 1', cit., at 274; K Sein, '"Goods with Digital Elements" and the Interplay with Directive 2019/771 on the Sale of Goods', cit.

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5.3. Post-sale obligations: incorrect installation of goods and updating duties

As already mentioned, the seller's liability is increasingly extended to after-sales services. In particular, the correct installation of goods according to art. 8 SGD as well as the updating of the goods with digital elements pursued to art. 7(3) SGD represent a significant part of the seller's responsibility to provide goods in conformity with the contract.

First, as under the repealed directive 1999/44/EC, the content of the seller's obligation is expanded by equating the defective installation of consumer goods with a lack of conformity[114]. In particular, a non-conformity of the good resulting from its incorrect installation will be regarded as a lack of conformity of the good as such if the post-sale installation was included in the sale contract and carried out by the seller or under the seller's authority. A typical case might be the purchase of a washing machine to be connected to the water supply, provided that the contract includes the installation as a duty of the seller. The notion of installation should also include the assembly as long that is required by the nature and function of the good. In the case of goods with digital elements, the installation of the digital content or service is usually required in order to allow the buyer to use it[115].

In the case of goods that need to be installed by the consumer, the consumer is protected against incorrect installation if the incorrect installation was due to shortcomings in the installation instructions provided to him/her by the seller or by the supplier of the digital content or digital service.

[114] A. Venturelli, 'Rimedi a favore dell'acquirente per la difettosa installazione di un bene di consumo' (2006) Obb. e contr. 1006, 1008; A. Zaccaria e G. De Cristofaro, *La vendita dei beni di consumo. Commento agli artt. 1519 bis - 1519 nonies del codice civile introdotti con il d. legisl. 2 febbraio 2002, n. 24, in attuazione della Direttiva 1999/44/CE* (Padova, 2002) 41; C. Amato, *Per un diritto europeo dei contratti con i consumatori. Problemi e tecniche di attuazione della legislazione comunitaria nell'ordinamento italiano e nel Regno Unito* (Giuffrè, 2003) 361.

[115] Rec. 43 SGD.

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Second, goods with digital elements include new after-sale obligations for the seller, who is expected to update them[116]. The seller's obligation to update the goods is a ground-breaking and crucial issue. On the one hand, goods must be supplied with updates as stipulated by the sale contract; on the other hand, even in the absence of a contractual agreement to update (art. 6(d) SGD – art. 129, para 2, lett. D it. Cod. cons), the seller has the duty to ensure that the consumer is informed of and supplied with updates, including security updates (art. 7(3) SGD – art. 130, para 2 it. Cons. Cod.). In fact, such goods often need to be updated in order to conform to the contract.

In the IoT and IoB era, the duty to provide the agreed updates and – most importantly – the presence of an objective update obligation should be linked to the need to limit the ever-increasing problem of technology obsolescence. The updating regime which binds the seller to provide the updates needed to ensure that the goods with digital elements remain in conformity might contribute to tackling the problem of 'planned obsolescence' which frequently exists with smart goods (i.e., technologies are rendered outdated as soon as they are updated) and even postpone 'technological obsolescence', lasting the lifespan of a good with a digital element. This is fundamental to decreasing the environmental impact of smart goods, to reduce waste and, in general, to positively affect the sustainable consumption of goods with digital elements[117].

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[116] P Kalamees, 'Goods with Digital Elements and the Seller's Updating Obligation', cit.

[117] In contrast, see the planned obsolescence phenomenon, according to which the company designs a product with the intention to speed up its expiration, thereby forcing the consumer to buy a new one. This is, for example, the case with some important companies in the smartphone/computer industry which pushed consumers to install updates that slow down their devices as soon as a new model hits the market: such behavior has been judged to be an unfair commercial practice in Italy and France: Italian Competition Authority, 25 September 2018, PS11039, *Apple*; Italian Competition Authority, 25 September 2018, PS11039, *Samsung*; Italian Competition Authority, 25 September 2018, PS11039, *Samsung*. A De Franceschi, 'Planned Obsolescence challenging the Effectiveness of Consumer Law and the Achievement of a Sustainable Economy: The Apple and Samsung Cases' (2018) 7 EuCML 6, 217 ff.; Id., 'Consumer's Remedies for Defective Goods with Digital Elements' (2021) 12 JIPITEC 143; Id., *La vendita di beni con elementi digitali*, (Napoli, 2019), spec. at 17 ff.; HW Micklitz, 'Squaring the Circle. Reconciling Consumer Law and the Circular Economy' in E Terryn and B Keirsbilck (eds), *Circular Economy and Consumer Protection*, (Cambridge/Antwerp/Portland, 2019) 323; G Toscano, 'Nuove tecnologie e beni di consumo: il problema dell'obsolescenza programmata' (2022) 16 Actualidad Jurídica Iberoamericana 374.

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From this prospective, the content as well as the duration of the updating obligation are crucial aspects of the sales discipline.

The seller's legal obligation is restricted to updates necessary to keep the goods in conformity, and it shall not be extended (unless otherwise agreed) to the upgrades intended to enhance or improve the functionalities of the digital content or digital service elements connected or incorporated into the good or to introduce additional features[118].

The updating obligation is a continuing one, and its duration depends on the nature of the contract. In the case of a one-off contract (i.e., the digital element is provided through a one-off act), the seller should ensure that the consumer is provided with updates for the period of time that the consumer may reasonably expect. Once again, the reasonable expectation of the consumer is based on the type and purpose of the goods and digital elements as well as on the circumstances and nature of the contract. If a consumer buys a connected storyteller toy, s/he will probably not expect any update of the digital element incorporated in the toy; on the contrary, in the case of the purchase of an expensive navigator system, the consumer may reasonably expect the software to be updated for more than a couple of weeks[119]. The updating timeframe must, therefore, be separately determined in each singular case, taking into account the expectations of an average buyer as well as the nature of the good[120]. This rule ensures a flexible assessment of the duration of the updating obligation according to the wide variety of smart goods[121]. However, even if this solution is justified by the need to embrace a fast-developing technology, it introduces a high level of uncertainty, which might increase the number of disputes between consumers and sellers. Although an abandonment of the idea of setting a precise timeframe because

[118] C Twigg-Flesner, 'Conformity of Goods and Digital Content/Digital Services', cit., 20; P Kalamees, 'Goods with Digital Elements and the Seller's Updating Obligation', cit., 133.

[119] Kalamees, 'Goods with Digital Elements and the Seller's Updating Obligation', cit.; COM(2015), spec. at 14.

[120] E Dubovitskaya, 'Kauf von Waren mit digitalen Elementen Fortschritt und Rechtsunsicherheit im Verbrauchsgüterkaufrecht' (2022) MMR.

[121] P Kalamees, 'Goods with Digital Elements and the Seller's Updating Obligation', cit.; C Twigg-Flesner, 'Conformity of Goods and Digital Content/Digital Services', cit., 20.

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it is incompatible with the heterogeneous and unstable reality of smart goods, this high degree of uncertainty might be reduced through the provision of specific guidelines, once again connected to the standardisation of the smart goods available on the market. The assessment could either anchor the determination of the duration of the updating obligation to more specific parameters, including the life-cycle of the good, the price, the material used for the good's production or the seller's public statements, or be based on a pre-fixed minimum period (e.g., not less than two years)[122] or on an average timeframe established for a category of products with similar characteristics and features and based on the kind of update (e.g., is it or is it not a security update).

While the rules on liability related to the obligation to update for one-off contracts is somehow unclear, in the case of contracts for the supply of digital elements as an obligation seems easy to define. If the purchase of a smartwatch includes a weekly supply of individually adapted training plans[123], the updating obligation is extended for two years from the time the goods with the digital elements were delivered. If the parties to the contract have agreed on a period longer than two years for the supply of digital content or digital services, the seller has an obligation to deliver updates in accordance with the extended contractual period.

The seller is not obliged to directly provide the updates; nevertheless it must ensure that the consumer is informed, even if this is done by a third party (usually the developer of the digital element)[124].

Although sellers often do not have direct control over a third party's updating performance, they still remain liable for the constant supply of updates[125]. Under the

[122] See rec. 31 SGD.

[123] Rec. 14 SGD.

[124] In this context, the possibility for users of smart goods to gain access to data generated by them and to share this data with third parties to provide aftermarket services, as planned in the Data Act, would be particularly relevant: COM (2022) 68: Proposal for a Regulation Of The European Parliament And Of The Council on harmonised rules on fair access to and use of data (Data Act).

[125] This is not always an easy task for the seller. The seller may be the most informed professional party, but may not have any direct influence over the developer/producer in order to persuade them

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SGD, the duty to update is not imposed by means of additional direct liability upon the producer/supplier of the digital content; the update obligation is balanced with the seller's right of redress pursuant to art. 18 SGD. If the omission to provide updates depends on the breach of the developer in previous links in the transaction's chain, the seller has remedies and relevant legal actions against that party.

6. Time limits on the seller's liability: liability periods, limitation periods, burden of proof and obligation to notify

The SGD regulates the different time limits on consumer remedies in case of lack of conformity of goods[126].

First of all, the SGD fixes precise liability periods, that is, a period of time during which the lack of conformity of the good must exist or become apparent in order to entitle the buyer to exercise the remedies. The seller is liable for a lack of conformity that exists at the time of delivery; moreover, the seller's liability remains subject to the condition that such lack of conformity becomes apparent within a certain timeframe. In particular, the seller shall be liable to the consumer for any lack of conformity which exists at the time of delivery and which become apparent within two years of that time or within a longer time fixed by national laws (art. 10 SGD)[127]. For goods with digital elements, the liability of the seller also covers a lack of conformity of the digital content or the digital services (art. 10(2) SGD). The minimum liability period

to directly provide the update to the consumer. If the developer/producer does not cooperate, the seller has no chance to fulfil the obligation to update (although the seller has the right of redress).

[126] On time limits, including the comparison between SGD and DCD rules, see B Gsell, 'Time limits of Remedies under Directives (EU) 2019/770 and (EU) 2019/771 with Particular Regard to Hidden Defects' in E Arroyo Amayuelas and S Cámara Lapuente (eds), *El Derecho privado en el nuevo paradigma digital* (Colegio Notarial de Cataluña Marcial Pons 2020), 101 ff.; C Amato, 'Responsabilità da inadempimento dell'obbligazione', cit.

[127] This flexibility recognized to MSs, even if it 'serves the purpose of a high standard of consumer protection because Member States with longer liability periods can retain them to the benefit of the consumer' is going to frustrate the maxim of the harmonisation nature of the SGD: B Gsell, 'Time Limits of Remedies under Directives (EU) 2019/770 and (EU) 2019/771 with Particular Regard to Hidden Defects', cit.

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of two years is applicable to the purchase of smart goods for which the sales contract provides for a single act of supply of the digital content or digital services (e.g., the consumer buys a smart TV). Adapted rules apply when the contract provides for the continuous supply of the digital elements. When the sale contract provides for a continuous supply of the digital content or digital services for more than two years, the seller shall be liable according to that time period (typical examples of continuous supply include the supply of traffic data in a navigator system[128], the functioning of apps in a smartphone and the cloud connection for a gaming console)[129]. For example, if the seller promised that traffic data would be provided for four years, then the seller would be liable for the lack of conformity within the entire contractual timeframe of supply.

Art. 10(4) and (5) SGD provides guidance to MSs concerning the limitation periods[130], that is, the period within which consumers must exercise their rights. National limitation periods are not subjected to any harmonisation under the SGD, and MSs are free to maintain or introduce their own legislation on limitations. Nevertheless, the SGD aims to prevent national rules from constraining the consumer's remedies for defects that have become apparent within the liability period. In order to avoid the liability period not curtailed by national limitation periods (expressly introduced in national law or, at least, the two-year European liability period), the MSs shall ensure that consumers are allowed to exercise their rights for any lack of conformity that becomes apparent, at least during that liability period. This means that if an MS has chosen to implement the EU minimum liability period of two years or has not explicitly provided for a liability period, the limitation period should be longer than two years[131] or it should not begin to run in an early stage (e.g., from the time of

[128] Rec. 14 SGD

[129] Dubovitskaya, 'Kauf von Waren mit Digitalen Elementen', cit.

[130] On the connection between a limitation period and a period of liability with reference to the interpretation of Directive 1999/44/EC, see CJEU 13.7.2017, C-133/16, *Ferenschild*, ECLI:EU:C:2017:541.

[131] FM Corvo López, 'Estudio de Derecho Comparado sobre las garantías en la venta de bienes de consumo en España y Portugal a la luz de la Directiva (EU) 2019/771' (2020) 1 CDT 159; F Zoll, '*sub* art.11' in R Schulze and D Staudenmayer (eds), *EU Digital law: Article by Article Commentary,* cit., at. 207: who, referring to the similar provisions in the DCD, highlights that '*the limitation period must not ended before the minimum two-years period*'; B Gsell, 'Time Limits of Remedies under Directives (EU)

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delivery). This is in place to ensure that the limitation period will not expire before the defect becomes apparent; even if the lack of conformity becomes apparent at the end of the two-year liability period, the consumer will have enough time to exercise his/her remedies. Accordingly[132], the Italian legislature has introduced a limitation period of 26 months from the delivery of the good in order to allow consumers to exercise related remedies in case of defects not intentionally concealed by the seller[133].

In the case of second-hand goods, MSs may provide that the seller and the buyer are entitled to agree on a shorter liability and limitation period of at least one year; for example, this is the choice made in Italy[134].

The seller is liable for the lack of conformity unless s/he succeeds in proving the correctness of the performance and, thus, the conformity of the goods. In compliance with Dir. 1999/44/EC[135], the SGD provides for a shift in the burden of proof[136] from the buyer to the seller. In case of a reversed burden of proof, consumers shall allege lack of conformity while professionals shall prove that any lack of conformity existed at the time of delivery/supply.

The SGD extends the period for the reversed burden of proof in favour of the consumer from six months (as stated in the repealed Dir. 1999/44/EC, art. 5(3)) to

2019/770 and (EU) 2019/771 with Particular Regard to Hidden Defects', cit., 112 ff.. Cfr. B Zöchling-Jud 'Das neue Europäische Gewährleistungsrecht' (2019) GPR 15.

[132] '*Notwithstanding paragraphs 1 and 2 of this Article, Member States may maintain or introduce only a limitation period for the remedies provided for in Article 13. Member States shall ensure that such limitation period allows the consumer to exercise the remedies laid down in Article 13 for any lack of conformity for which the seller is liable pursuant to paragraphs 1 and 2 of this Article, and which becomes apparent during the period of time referred to in those paragraphs*': art. 10 (5) SGD.

[133] Art. 133, para 3, it. Cons. Cod.

[134] art. 133, para 4, it. Cons. Cod.

[135] See CGUE C-497/13 *Froukje Faber contra Autobedrijf Hazet Ochten BV*, ECLI:EU:**C**:2015:357. F P Patti, 'Tutela effettiva del consumatore nella vendita: il caso "Faber"' (2016) Nuova Giur. Civ. Comm., 10 ff.

[136] On the burden of proof, see H Gonçalves de Lima, 'Burden of proof of (lack of) conformity in Directive 2019/770: A comparison with Directive 2019/771' in *Yearbook of the NOVA Consumer Lab – 2*, (2020) 91 ff.

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one year (art. 11 SGD). MSs have the freedom to extend the period during which defects are deemed to have already been present at the moment of delivery to a maximum of two years. This is a step towards a higher level of protection for the consumer: even if the six-month presumption under the repealed Sale Directive was only a minimum requirement, the majority of MSs have opted to not extend this period of time[137]. For goods with digital elements, if the sales contract provides for a continuous supply of the digital content or digital service, the reversed burden of proof on conformity of the digital element lasts for the time during which the digital content or digital service is to be supplied under the sales contract[138]. After one year (or the extended period as defined by national law), the non-conformity of the goods is no longer presumed; this means that within the second year from the date of delivery, the buyer has to prove that the goods are subjectively or objectively non-conforming. As noted elsewhere, the different rule governing the continuous supply of digital content/services with an extended burden of proof on the seller is justified by the fact that in the case of continuous supply the digital content or digital service does not leave the sphere of influence of the trader permanently becoming subject to the only sphere of influence of the consumer[139].

Finally, it is worth mentioning that like the repealed Dir. 1999/44/EC, the SGD allows MSs to introduce an obligation upon the consumer to promptly notify the seller of defects within two months of detecting the defect (art. 12 SGD) in order to benefit from consumer rights (art. 12 SGD). Contrary to the repealed art. 132, para 2, it. Cons. Cod., the Italian transposition law did not maintain the option to impose a notification period of two months[140].

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[137] See H Gonçalves de Lima, 'Burden of Proof of (lack of) Conformity in Directive 2019/770: A Comparison with Directive 2019/771', cit., at. 117 and 188, who reports the effect of the new rules on MSs' legislation and the related impact on the level of consumer protection.

[138] On the burden of proof see H Gonçalves de Lima, 'Burden of Proof of (lack of) Conformity in Directive 2019/770: A Comparison with Directive 2019/771', cit.

[139] B Gsell, 'Time Limits of Remedies under Directives (EU) 2019/770 and (EU) 2019/771 with Particular Regard to Hidden Defects', cit., at 118.

[140] A. De Franceschi, Italian Consumer Law after the Transposition of Directives (EU) 2019/770 and 2019/771 (2022) 2 EuCML 72, at 75.

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6.1. The seller's liability and the cooperative model

The main obligation of the seller, that is, to provide conforming goods according to the specific standards set up by law, is balanced by the relevance of the consumer's behaviour. This is evident when considering the sellers' liability and post-sale obligations.

In case of smart goods, the obligation to update is mitigated by the implementation of a cooperative model. Under the SGD, an antagonist buyer–seller model has been replaced through the enhancement of the consumer's duty of cooperation: the seller shall ensure that the consumer is informed and supplied with updates, while the consumer is entitled to install them within a reasonable time[141]. If the consumer fails to install the relevant updates, any liability for lack of conformity that could have been foreseen does not fall upon the seller if both of the following conditions are met: '(a) the seller informed the consumer about the availability of the update and the consequences of the failure of the consumer to install it; and (b) 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 to the consumer'[142].

On the other hand, pursuant to art. 8(b) SGD (incorrect installation) the seller would not be liable if the lack of conformity of the good results from an incorrect installation that was carried out directly by the consumer, if this was not due to deficiencies in the installation instructions provided by the seller or by the supplier of the digital content or digital service.

6.2. Party autonomy and exclusionary provisions

Party autonomy might play a crucial role in defining and limiting the extension of the seller's liability; as already noted (see *retro sub* 3.2 and 5.2), if goods with interconnected or incorporated digital content or digital service are purchased, the parties might

[141] On the 'reasonable time' requirement, see Helena Gonçalves de Lima, 'Burden of Proof of (lack of) Conformity in Directive 2019/770: A Comparison with Directive 2019/771', cit., at 106.

[142] Art. 7(4) SGD; art. 130, para 3, it. Cons. Cod.

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expressly agree that the consumer is only buying the 'material' good (e.g., the smartphone[143]). In this case, only the purchase of the material part of the good will be part of the sales contract, thus falling within the SGD regime. As a result, the seller will not be liable for the conformity of the digital element.

In the complex scenario of smart goods, the seller will be encouraged to exclude the digital element with a specific contractual term, especially when there has been no direct control in providing, supplying and/or updating the digital content or digital service[144]. In order to protect the consumer's reasonable expectation, his/her consent becomes of paramount importance. As noted elsewhere, '*In order to protect the reasonable expectations of the consumers the courts should set high standards for the 'express agreement' excluding the liability of the seller for the inter-connected digital service, especially in cases where such exclusion would come as a surprise for a reasonable consumer*'[145].

In addition, the SGD opens up the possibility that the parties might exclude the applicability of the objective conformity requirements under specific circumstances. A lack of conformity could not be foreseen if, at the time of the conclusion of the sales contract, (a) the consumer was specifically informed that a particular characteristic of the goods deviated from the objective requirements for conformity (e.g., the good is characterised by a particular defect or something usually included is

[143] As in the second example given in rec. 16 SGD

[144] See P Rott, 'The Digitalisation Of Cars And The New Digital Consumer Contract Law', cit.: '*There is a tension between this rule and the mandatory nature of the Sale of Goods Directive under Article 21 SGD. The exceptional character of the exclusion of third party digital content and services from the sales contract suggests that the separation must be "genuine" rather than an artificial separation of contracts that circumvents the general one-stop concept of the Sale of Goods Directive*'.

[145] K Sein, 'The Applicability of the Digital Content Directive and Sales of Goods Directive to Goods with Digital Elements', cit.

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missing[146]) and (b) the consumer expressly and separately accepted the deviation when concluding the sales contract (art. 7(5) SGD, Art. 130, para 4 it. Cons code)[147].

The standard set by art. 7(5) SGD for deviating from the objective conformity requirement, that is, the 'expressly' and 'separately accepted' deviation, seems to be a stricter parameter than the 'express agreement' required under rec. 16 CSD. Consumers should be aware of what they have agreed to and be able to make a conscious decision. For that purpose, the mention of the deviation in the standard terms and conditions would not be sufficient. As mentioned in Rec. 36 SGD, express acceptance should be made through other statements or agreements[148] and by way of active and unequivocal conduct[149]. In an online transaction, acceptance could be made by ticking a box, pressing a button or activating a similar function[150], while other common forms of online contracting, such as shrink-wrap agreements, would not fulfil the condition of art. 7(5) SGD[151].

[146] Rec. 36 SGD, which refers, as an example, to the sale of second-hand goods.

147 Cfr. rec. 49 DCD: Spindler, 'Umsetzung der Richtlinie über digitale Inhalte in das BGB' (2021) MMR Zeitschrift für IT-Recht und Recht der Digitalisierung 451 ff. This reference is not to be found in the SGD, which provides that in the event of deviation from the objective requirements (rec. 36 and art. 7(5) SGD), that the consumer is specifically informed and expressly and separately accepts that deviation.

[148] In this regard, it would be useful to recall the transparency obligation of the Unfair Terms Directives and the related CJEU jurisprudence: D Staudenmayer, '*sub* art. 8' in R Schulze and D Staudenmayer (eds), *EU Digital Law: Article by Article Commentary,* cit., at 167.

[149] De Franceschi, *La vendita di beni con elementi digitali*, cit., according to which: '*Essa (l'accettazione, ndr) dovrà pertanto avvenire in forma espressa o in forma tacita, in entrambe i casi in modo tale da non lasciare spazio a dubbi in merito alla volontà di accettare siffatta deroga*'. See also B Zöchling-Jud, 'Das neue europäische Gewährleistungsrecht für den Warenhandel', cit., 120

[150] This is explained in the DCD, rec. 49, according to which: '*Both conditions could, for instance, be fulfilled by ticking a box, pressing a button or activating a similar function*'.

[151] R Schulze and D Staudenmayer (eds), *EU Digital Law: Article by Article Commentary,* cit.

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7. Consumer remedies

As a general rule, the seller is liable for any lack of conformity which exists at the time the goods were delivered and which becomes apparent within two years of delivery. In the event of a lack of conformity, the consumer is entitled to have the goods brought into conformity, receive a proportionate reduction in the price or terminate the contract. The new legal provisions follow the traditional hierarchy of remedies: specific performance of the contractual obligations by repair or replacement is classified as a primary remedy, while reduction of the price and termination of the sale contract are relegated to the status of secondary remedies. This hierarchy of remedies reflects a general bias in favour of the preservation of the contract by giving the seller an opportunity to 'cure' the defect[152]. The primary right to proper performance, with particular regard to repair, is also justified according to the need to '*to encourage a sustainable consumption and a longer product durability for the purpose of the realization of a circular and more sustainable economy*'[153].

The choice between repair and replacement rests on the consumer, unless the remedy chosen would be impossible[154] or, in comparison to the other remedy, would impose

[152] J. Vanherpe, 'White Smoke, but Smoke Nonetheless: Some (Burning) Questions Regarding the Directives on Sale of Goods and Supply of Digital Content' (2020) 2 Eur. Rev. Priv. Law 251, 266.

[153] A De Franceschi, 'Consumer's Remedies For Defective Goods With Digital Elements' (2021) 12 JIPITEC 2, 143, 144; Id., Italian Consumer Law after the Transposition of Directives (EU) 2019/770 and 2019/771, cit., at 76; S Pagliantini, *Il diritto private europeo in trasformazione. Dalla direttiva 771/2019/UE alla direttiva 633/2019/UE e dintorni* (Giappichelli 2020) 40 ff; see also rec. 48 SGD: '*As regards bringing goods into conformity, consumers should enjoy a choice between repair or replacement. Enabling consumers to require repair should encourage sustainable consumption and could contribute to greater durability of products (…);* rec. 32 SGD '*Ensuring longer durability of goods is important for achieving more sustainable consumption patterns and a circular economy (...)*'; European Commission, *A New Circular Economy Action Plan for a Cleaner and More Competitive Europe,* 11 March 2020, COM(2020) 98 final. Critically, see P Weingerl, 'Sustainability, the Circular Economy and Consumer Law in Slovenia' (2020) 9 EuCML 3, 129; E Terryn, 'A Right to Repair? Towards Sustainable Remedies in Consumer Law' (2019) 27 Eur. Rev. Priv. Law 4, 851.
Nevertheless, a more sustainable choice would have been to put repair before resolution. In fact, the repair remedy '*should encourage sustainable consumption and could contribute to greater durability of product'* (ec. 48 SGD).

[154] This could be a case of lack of conformity of 'goods with digital elements' when the defective part is the digital one and the final seller has no means to bring the supplier of the digital service/content to directly intervene in order to bring the goods into conformity: see F De Franceschi, 'Consumer's Remedies For Defective Goods With Digital Elements', cit.

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disproportionate costs on the seller, taking into account all the circumstances, including the value the goods would have had if there were no lack of conformity, the significance of the lack of conformity and whether the alternative remedy could be provided without significant inconvenience to the consumer (art. 13(2) SGD – art. 135 bis, para 2, it. Cons. Cod.). In accordance with the repealed Directive 1999/44/EC, the SGD limits the proportionality test to 'relative proportionality', specifying that a remedy would be disproportionate if it imposes costs on the seller which are unreasonable in comparison with the alternative remedy, thus excluding the case of '*absolute lack of proportionality', i.e."where the cost of the method chosen by the buyer, even if it is the only method possible, is inherently disproportionate"*[155]. Nevertheless, the new sales rules directly recognise that the seller has the right to refuse the repair or replacement of the defective goods if this is impossible or disproportionate (art. 13(3) SGD – art. 135-bis, para 3, it. Cons. Cod.). Therefore, the statement affirmed in *Weber* (see fn 155), according to which the seller does not have the right to refuse the only primary remedy available, has been overcome. The new disposition allows the seller to avoid the risk of incurring disproportionate costs when the only remedy available involves excessive expense in comparison with the value of the good or the entity with the lack of conformity: in the event of the seller's refusal, the consumer may find protection under secondary remedies.

Any repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer given the nature of the goods and the purpose for which the consumer required the goods (art. 14 SGD – art. 135-ter it. Cons. Cod.). According to the SGD, the 'reasonable time' is intended to be "*the shortest*

[155] See CJEU 16 June 2011, Joined Cases C-65/09 & C-87/09, *Gebr. Weber GmbH v. Jürgen Wittmer* and *Ingrid Putz v. Medianess Electronics GmbH*, according to which: '*It is consequently apparent that the European Union legislature intended to give the seller the right to refuse repair or replacement of the defective goods only if this is impossible or relatively disproportionate. If only one of the two remedies is possible, the seller may therefore not refuse the only remedy which allows the goods to be brought into conformity with the contract'* (par. 71). By contrast, Paragraph 439(3) of the BGB has given the seller the right to refuse the type of subsequent performance chosen by the buyer not only when that '*type of performance would result in disproportionate cost in comparison to the alternative type of performance ("relative lack of proportionality"), but also where the cost of the method chosen by the buyer, even if it is the only method possible, is inherently disproportionate ("absolute lack of proportionality")*'. See A Johnston and H Unberath, 'Joined Cases C-65/09 & C-87/09, Gebr. Weber GMBH v. Jürgen Wittmer and Ingrid Putz v. Medianess Electronics GMBH, Judgment of the Court of Justice (First Chamber) of 16 June 2011 - Case Note' (2012) 49 Common Mark. Law Rev. 2, 793; C Amato, 'Responsabilità da inadempimento dell'obbligazione', cit., spec. at 92 and 93.

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possible time necessary for completing the repair or replacement", considering the "*nature and complexity of the goods, the nature and severity of the lack of conformity, and the effort needed to complete repair or replacement*"". In order to objectively interpret the notion of reasonable time, the SGD has invited MSs to define fixed periods that could generally be considered reasonable for repair or replacement regarding specific categories of products[156]. The Italian implementation law confirms the general provision and require the seller to bring the goods into conformity within a '*congruo periodo*' (adequate period) from the moment the seller has been informed by the consumer of the lack of conformity; nevertheless, the Italian transposition law has not provided fixed time limits. This choice can be appreciated for two reasons: first, considering the multifaceted reality, it is particularly hard to establish *ex ante* and, in the abstract, a fixed timeline, even considering specific products as the object of inquiry[157]; second, a rigid and fixed time system is incompatible with the extrajudicial nature of the primary remedies[158].

According to the essential nature of the primary remedies – that is, gratuitousness – specific performance of the contractual obligations through repair or replacement shall be free of charge, which means '*free of the necessary costs incurred in order to bring the goods into conformity, particularly the cost of postage, carriage, labour or materials*' (art. 2, n. 14 SGD; art. 128, para 2, let. p) it. Cons. Cod.). If necessary, the consumer shall make goods available to the seller[159], while the seller is obliged to take back the replaced

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156 R. 55 SGD.

157 A. De Franceschi, 'Consumer's Remedies For Defective Goods With Digital Elements', cit.

158 '*... al rigore dei termini perentori è preferibile l'elasticità dei termini rimessi alla valutazione delle parti", in order to "evitare l'irrigidimento connesso ad una procedimentalizzazione del passaggio dai rimedi primari a quelli secondari, che, lungi dal facilitare il soddifacimento in natura dell'interesse del compratore, lascia trapelare piuttosto una certa insofferenza per i rimedi ripristinatori (…)*': S Mazzamuto, *Il contratto di diritto europeo* (Giappichelli 2020) at 472 and 473.

159 A De Franceschi, 'Consumer's Remedies for Defective Goods with Digital Elements', cit.: '*(…)* [Art. 14 SGD] *does not necessarily imply that the consumer has to return the goods to the seller. This will be the case where repair or replacement has to be executed on a durable good which was installed in the consumers' premises (e.g. a lift). Here, the consumer will merely have to allow the seller or his auxiliary to have access to his premises so that he can bring the good into conformity. Therefore, making the goods available to the seller is a prerequisite for the execution of the "primary" remedies. This does not apply if the good was destroyed due to reasons for which the consumer is not responsible*'.

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goods at his/her own expense. In line with CJEU jurisprudence[160], the seller under the new provisions is not only obliged to bear the costs needed to deliver substitute goods free of defects as originally agreed but also has the obligation to remove the defective goods and to instal the replacement or repaired goods, or, alternatively, the seller is obliged to bear the costs of such removal and installation[161].

Finally, following the rule established by the CJEU in the *Quelle* Case (C-404/06, 2008), a seller who has provided defective goods may not require the consumer to pay for normal use of the non-conforming goods until their replacement with new goods (art. 135-ter, para 4)[162].

The consumer can access secondary remedies only under specific circumstances which have been enriched in the new provisions[163]. Some of the criteria depend on the limits of the exercise of primary remedies (i.e., impossibility and disproportion)[164], while others are merely a way of fulfilling the obligation to restore. The consumer shall be entitled to either a proportionate reduction in price or to the termination of

[160] CJEU Joined Cases C-65/09 & C-87/09, *Gebr. Weber GmbH v. Jürgen Wittmer and Ingrid Putz v. Medianess Electronics GmbH.*

[161] Art. 135-ter, para 3, it. Cons. Cod.

[162] CJEU Case C-404/06 *Quelle AG* v. *Bundesverband der Verbraucherzentralen und Verbraucherverbände*, ECLI:EU:C:2008:231 (2009) Europa e diritto privato, 191, with comment of L Mangiaracina, 'La gratuità della sostituzione del prodotto difettoso nella direttiva 1999/44/CE: la normativa tedesca al vaglio della Corte di Giustizia'; see also C Schneider and F Amtenbrink, '"Quelle": The possibility for the seller to ask for a compensation for the use of goods in replacement of products not in conformity with the contract' (2018) Revue européenne de droit de la consummation 301 ff..; S Mazzamuto, *Il contratto di diritto europeo*, cit., at 475.
'*This leaves an open door to claims by the seller if the replaceable good is in conditions which are not compatible with a "normal use". When this is not the case, the seller may ask for compensation for the loss of value of the replaced good. As the SGD did not expressly regulate such cases, it will be necessary to refer to Member States' national law. This shall also apply when the good was meanwhile sold or modified by the consumer*': F De Franceschi, 'Consumer's Remedies for Defective Goods with Digital Elements', cit.

[163] S Mazzamuto, *Il contratto di diritto europeo*, cit., at 469.

[164] S Mazzamuto, *Il contratto di diritto europeo*, cit., 479: *'(…) l'impossibilità e la sproporzione dei costi costituiscono, prima ancora che criteri di gerarchizzazione, limiti alla responsabilità del venditore impegnato nel ripristino*',

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the sales contract[165] in cases in which the seller has not completed repair or replacement or has not completed repair or replacement free of charge within a reasonable period of time without significant inconvenience to the consumer and providing for or bearing the cost of the removal of the defective goods and the installation of the new goods where needed, or the seller has refused to bring the goods into conformity due to the impossibility or disproportion of the primary remedies (a) or a lack of conformity appears despite the attempt of the seller to bring the goods into conformity (b). In addition, the consumer is entitled to access secondary remedies if the lack of conformity is of such a serious nature as to justify an immediate price reduction or termination of the sales contract (c). The rationale for this provision is peculiar: different from the mentioned criteria, the seriousness of the defect does not necessarily preclude the possibility of a good's replacement; in this case, the shift to the second level of the hierarchy of remedies is primarily justified by the fact that the consumer's trust in the seller might be irreversibly compromised due to the seriousness of the defect[166]. Finally, the effectiveness of the secondary remedies, both the right to termination of the contract and the right to a price reduction, is ensured if the seller has declared that the goods will not be brought into conformity within a reasonable time or without significant inconvenience for the consumer (d), or this is clear from the circumstances.

Concerning the new remedy of the price reduction, art. 15 SGD specifies the parameters of the price reduction calculation in terms of the difference between the value of the defective good received by the consumer and the value of a similar good without any lack of conformity[167]. This criterion reflects the need to preserve the synallagmatic balance between the parties' obligations as originally stated in the contract. Notwithstanding the advantages associated with the parameters of the proportional calculation, the determination of the price reduction might continue to

[165] For the Italian legal system see art. 135-bis, para 4 and 5 and 135 *quater*, it. Cod. Cons

[166] See S Mazzamuto, *Il contratto di diritto europeo*, cit., at 476, who defined the outcome of this criterion as a '*sanzione per il venditore*'.

[167] The previous wording of the italian rule was 'Nel determinare l'importo della riduzione o la somma da restituire si tiene conto dell'uso del bene' (previus art. 130, para 8, it. Cons. Cod.). It has been changed to be in accord with art. 15 SGD.

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generate in the praxis some doubts and uncertainties, especially with regards to goods with digital elements[168].

7.1. Termination of contract

Some aspects of novelty concern the discipline of the termination of the sale contract.

First, the consumer shall exercise the right to terminate the sales contract by means of a statement to the seller expressing the decision to terminate the sales contract (art. 16(1) SGD– art. 135- quarter it. Cons. Cod.). This rule overcomes the doctrinal and jurisprudential debate concerning the nature of the remedy, confirming that the right may be invoked out of court by the consumer and without the cooperation of the seller[169].

Furthermore, art. 16(3) SGD deals with the situation in which the lack of conformity is related only to some goods delivered under the same sale contracts. In this situation, the new discipline confers on the consumer the power to obtain not necessarily total but partial termination of the contract. The consumer has the choice to remain bound only in relation to the obligations properly performed by the professional rather than to reject the entire contract, if this reflects the consumer's best interest[170].

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[168] F De Franceschi, 'Consumer's Remedies For Defective Goods With Digital Elements', cit., 148 e 149.

[169] In the silence of Dir. 1999/44/EC and in the light of the Italian transposition (which ambiguously provided that the consumer could 'request' termination), the doctrine and case law debate on the nature of termination for lack of conformity is recalled, considered by some as a judicial remedy (with reference to the general discipline of the contract and, in particular, to the judicial character of the institution of termination pursuant to Article 1453 of the Civil Code), by the majority as a potestative right with an extrajudicial character (cfr. M. Paladini, *L'atto unilaterale di risoluzione per inadempimento* (Giappichelli 2013) 133 ff.; F Bocchini, 'La vendita di cose mobili' in Schlesinger-Busnelli *Commentario* (2nd ed, Giuffre` 2004) 457 ff.; Bianca, 'La vendita di beni di consumo. Artt. 128-135', cit., 183 ff.). For a reconstruction of this debate, see C Sartoris, 'La risoluzione della vendita di beni di consumo nella Dir. n. 771/2019 UE' (2020) 3 Nuova giur. civ. comm. 702, 707; also see G Caporali, 'Le Direttive nn. 770 e 771. Qualche osservazione in tema di e-commerce e tutela dei consumatori' (2021) 25 Federalismi.it, at 48 and 49.

[170] For a comment, see C Sartoris, 'La risoluzione della vendita di beni di consumo nella Dir. n. 771/2019 UE', cit., 710 ff; L Arnau Raventós, 'Remedios por falta de conformidad en contratos de

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The consequences of the return of defective goods are regulated by the new sale rules: the consumer will return the goods to the seller; the seller will bear the costs for the return or will reimburse the consumer for the price paid for the goods upon receipt of the goods or upon evidence provided by the seller of restitution for the goods (art. 16(3) SGD; art. 135 quarter, para 4, it. Cons. Cod.)[171]. The Italian legislature has not clarified the modalities for return and reimbursement[172], and uncertainties may arise with regards to the modalities and the means of payment at the seller's disposal, which might be different from those originally used by the consumer. With regards to the seller's duty to reimburse, doubts may arise related to the possibility of including not only the delivery cost but also any expenses associated with removal of the goods in compliance with an extensive interpretation of art. 135-ter, para 3, it. Cons. Cod.[173] Finally, the SGD leaves MSs free to regulate the consequences of termination other than those provided for in this Directive. It is up to the MSs to define what happens in case of a decrease in the good's value exceeding depreciation because of regular use or in case of loss or destruction of the goods[174].

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compraventa y de suministro de elementos digitales con varias prestaciones' in EA Amayuelas and S Cámara Lapuente (eds), *El derecho privado en el nuevo paradigma digital*, cit., 79, spec. at 90 ff.

[171] See J Vanherpe, 'White Smoke, but Smoke Nonetheless: Some (Burning) Questions Regarding the Directives on Sale of Goods and Supply of Digital Content', cit: '*Under the SGD, termination leads to a reversal of the performance of all obligations: the disappointed consumer must first return the good and the seller – whose (in)actions lay at the basis of the contract's termination – must only subsequently reimburse the price. This sequence of events is arguably unfair*' (p. 268).

[172] The SGD recognizes to MSs the freedom to determinate the modalities for return and reimbursement in a case of termination of the sale contract (art.16 (3) SGD).

[173] F De Franceschi, 'Consumer's Remedies for Defective Goods with Digital Elements', cit., 149.

[174] For instance, the Italian legislator has not taken a position, thereby losing the opportunity to settle the doctrinal debate on this issue, which sees the voice of those who consider applicable the principle according to which the impossibility of restitution in integrum would not allow the exercise of the resolutory remedy in deference to the general provision of art. 1492, para 3, Civil Code and in the light of the need to safeguard the balance between contractual obligations (see CM Bianca, 'La vendita dei beni di consumo', cit., 200) opposed to the voice of those who believe that it is not possible to introduce a further hypothesis of exclusion of the resolution not expressly provided for by European and domestic consumer law and which would result in an unjustified reduction in the level of consumer protection (Zaccaria and G De Cristofano, 'La vendita dei beni di consumo', cit., 97; Ruscello, 'Le garanzie post vendita nella direttiva 1999/44/CE del 25 maggio 1999', (2021) Studium Iuris, 837).

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In any event, under the previous rule, if the lack of conformity was minor, the consumer was not entitled to terminate the contract. The burden of proof concerning the 'minor' nature of the lack of conformity was on the seller. The European legislature has deliberately kept the broad reference to a 'minor' defect in conformity, leaving space to the MSs to interpret what 'minor' means according to their own legal traditions. The Italian legislature has recalled the traditional general notion of '*lieve entità*' without providing any further interpretative criteria; as a consequence, doubt remains as to whether the 'minor entity' is to be interpreted objectively considering the objective value of the good[175] and/or subjectively, also taking into consideration the consumer's interest[176].

8. Final remarks

The SGD aims to set EU consumer protection on a new track which takes into consideration the new features of the digital single market. In particular, the EU Digital Single Market is featured by the growing technical nature of the new (smart) products and the complexity of contractual sale relationships. Such complexity

[175] L. Garofalo ed A. Rodeghiero, 'Commento all'art. 1519-quater, commi 7, 8 e 10', in L. Garofalo et. Al., *Commentario alla disciplina della vendita dei beni di consumo: artt. 1519 bis-1519 nonies cod. civ. e art. 2 d.lgs. 2 febbraio 2002 n. 24* (Cedam, 2003), 386 ff., at 439: '*posto che, letteralmente, la "lieve entità" del difetto rimanda al bene, in sé e per è considerato, e non appunto all'interesse del consumatore, parrebbe logico arguire che dettorequisito – lungi dal richiedere un autonomo accertamento centrato sui riflessi riverberati dall'inadempimento del venditore sull'economia generale del contratto – esiga nulla più che una valutazione oggettiva del difetto*'.

[176] In the sense that minor entity is to be interpreted subjectively, taking into consideration (also) the consumer's interest, see A Zaccaria and G De Cristofano, 'La vendita dei beni di consumo', cit., 94 ff.; F Bocchini, *La vendita di cose mobili*, cit.
The reference could be to art. 1455 c.c., *Importanza dell'inadempimento*: on the notion of '*non scarsa importanza dell'inadempimento'*: see G Mirabelli, *Dei contratti in generale, nel Commentario al codice civile* (Utet, 1961) 476 ff.; R Scognamiglio, 'Dei contratti in generale, nel Trattato di diritto civile', diretto da Grosso e Santoro Passarelli (Giuffre` 1966), 266 ff.; A Belfiore, voce 'Risoluzione del contratto per inadempimento' in *Enc. del dir.*, XL, (Giuffre` 1989), 1307 ff.; G Collura, *Importanza dell'inadempimento e teoria del contratto* (Giuffre 1992); R. De Michel, 'Adempimento dopo la domanda di risoluzione e valutazione della non scarsa gravità dell'inadempimento' (1994) Giur. it. 1209 ff.; Costanza, 'Rifiuto legittimo della prestazione da parte del creditore e gravita` dell'inadempimento' (1997) I Giust. civ. 1379 ff.; Convento, 'Osservazioni sulla gravita` dell'inadempimento per la risoluzione del contratto (art. 1455 c.c.)' (2008) I Foro pad. 294 ff.
Concerning the notion of 'lieve entità', see C Sartoris, 'La risoluzione della vendita di beni di consumo nella Dir. n. 771/2019 UE', cit.: '*Sotto questo profilo, la nuova norma appare maggiormente in linea sia con il presupposto dell' "inadempimento essenziale" richiesto dall'art. 25 della Convenzione di Vienna sulla vendita internazionale dei beni 13, sia con il parametro della "non scarsa importanza" dell'inadempimento di cui all'art. 1455 cod. Civ*' (705 and 706).

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weakens even further the bargaining position of the consumer[177]; under the SGD, the buyer' s fragility is balanced to some extent by the choice to introduce stricter liability for the seller by increasing the standardisation of the content of his/her obligations.

Even if the SGD aims to make the sales of goods law fit for the challenges of the digital age and pushes towards modernisation of the EU Consumer Sale Law, within the framework of a maximum harmonisation – even through the introduction of an 'absolute' liability of the seller – seems not to provide a fully satisfactory answer to the new challenges and the innovative economic models which are going to prevail in the digital environment. The traditional patterns of EU consumer law are persistent.

First, based on the traditional scope of earlier consumer protection laws (B2C), the SGD emphasises a narrow notion of a consumer which a) lacks an adequate response to the new features of the market actors and b) seems not to catch the new paradigm of the platform-based economy, which has blurred the distinction between professionals and consumers, resulting in the emergence of prosumers, and which is mainly characterised by the prevalence of trilateral contractual relationships.

Furthermore, the EU legislation remains obsolete and inadequate to address the emerging model based on the sharing economy, '*as well as the focus on the circular economy and «servitisation »*'[178]. These new economic forces have reshaped the traditional patterns of ownership and consumer behaviour in favour of access to goods for limited use purposes. Notwithstanding this shift, the SGD subject matter remains expressly limited to exchange contracts that transfer the right of ownership to a consumer, thus denying the possibility to attract product lease or product as a service under the sale rules. This approach creates a gap in consumer protection, especially with regards to consumers with limited financial resources who are the main category

[177] V Mak, *The New Proposal for Harmonised Rules on Certain Aspects concerning Contracts for the Supply of Digital Content. In-Depth Analysis* (European Union 2016) at 21.

[178] Twigg-Flesner, 'Conformity of Goods and Digital Content/Digital Services', cit., 55, who recalls the COM (2015) 614 final and COM (2019) 190 final for the profile of circular economy; V Mak and E Terryn, 'Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment through Consumer Law' (2020) J Consum Policy 43 with reference to the '*servitisation*' phenomenon.

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that resorts to these alternative forms of access to goods (temporary supply – eg., leasing).

The main aspect of innovation in the SGD is the inclusion of 'goods with digital elements' in the framework of the sale slaw. This is clearly a response to the increasing diffusion of the IoT and the IoB in the single market, which requires particular consideration. This creates a strict relation between the SGD and the DCD regimes. Even if SGD and DCD are intended as twin directives, some interpretative uncertainties concerning their respective scopes of application still prevail. This is in part unavoidable; in the case of smart goods, the digital features are fast developing and it is sometimes hard to set boundaries defining whether a digital element is provided under the sales relationship or not. This might lead to weaknesses in the application of the legal rules, conferring particular relevance to the content of the contract alongside the consumer expectations, and increasing the need for Court interventions.

Finally, it is worth mentioning that even if the IoT objects are clearly within the scope of application of the SGD, the Directive does not make any reference to the non-personal data generated by the smart goods and the power of the buyer to get access and share that data with third parties (eg., to provide aftermarket services and updates)[179]. Concerning this issue, the SGD regime will need to be read and interpreted in the light of the Data Act, if implemented, which aims to empower users to transfer their data, creating more control for businesses and individuals over the data generated through smart goods.

[179] In contrast see art. 16 (4) DCD: in the event of termination of the contract '*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 digital service supplied by the trader*'.

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