THE ITALIAN IMPLEMENTATION OF THE SALE OF GOODS DIRECTIVE AND THE DIGITAL CONTENTS AND SERVICES DIRECTIVE: BETWEEN CRITICAL ISSUES AND NOVELTIES

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This contribution analyses the Italian legislature's implementation of the two "twin" directives, Directive (EU) 2019/770 (Digital Content and Services Directive, DCSD) and Directive (EU) 2019/771 (Sale of Goods Directive, SGD). A critical examination of the major new aspects introduced by Legislative Decrees nos. 170/2021 and 173/2021 reveals missed opportunities to ensure a framework capable of addressing the changes brought about by new technologies. This shortcoming is particularly evident given the legislature's stated commitment to the ecological transition, yet a lack of effective measures to address issues like "planned obsolescence". Furthermore, even in one of the most important innovations – namely, the explicit recognition of the economic and commercial value of data (so-called "data monetisation") – the legislature failed to clarify whether personal data can be regarded as consideration in contracts, and neglected to coordinate this regulation with existing data protection law. These reflections lead to the conclusion that due to a merely formalistic implementation of the EU framework, the Italian system governing the sale of goods is already ill-equipped to adequately respond to the challenges posed by digital commerce.

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1. INTRODUCTION

Technology has imposed significant changes on society, business models and, most importantly, on current legal systems. Recognising this, the European Union has long understood the importance of establishing an effective legal framework to meet the challenges of the digital world, ensuring both consumer protection and technological innovation. Given the key role that new technologies play, in fact, the European Commission has consistently focused on addressing the mistrust of consumers and professionals towards the online environment, often viewed as fraught with risks and uncertainties.[1]

As a result, the realisation of the Digital Single Market has become one of the European Commission's top priorities. In less than a decade, numerous legislative measures have been adopted, all within the context of the European Digital Strategy. Each of these measures addresses a particular aspect of the digital market, yet they share a common goal: to strike the right balance between providing the highest level of consumer protection and avoiding overregulation, which could otherwise impede technological development.[2]

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[1] Recital 4 of the 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 (SGD), Official Journal, L 136, 22 May 2019, states that "[t]he full potential of the internal market can only be unleashed if all market participants enjoy smooth access to cross-border sales of goods including in e-commerce transactions. The contract law rules on the basis of which market participants conclude transactions are among the key factors shaping business decisions as to whether to offer goods cross-border. Those rules also influence consumers' willingness to embrace and trust this type of purchase."

[2] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM(2015) 192 final, 6 May 2015, includes measures aimed at creating better access to digital goods and services across Europe for both consumers and businesses, underlining that the absence of consistent EU-wide criteria creates entrance barriers, hinders competition, and reduces predictability for investors throughout Europe. According to the Commission's intentions, a functioning European internal market for all digital goods is

This contribution aims to examine the changes introduced in European private law in response to new technologies, with specific attention to the Italian legal system.[3] By focusing on the most controversial aspects of Italy's implementation, the analysis will highlight the missed opportunities by the national legislature, concluding that the current Italian framework is still not fully equipped to meet the challenges posed by the digital world.[4]

essential, as the fundamental freedoms of free movement of services and goods, established in Articles 56 and 34 TFEU, can be particularly implemented via the Internet. See Giannone, D.; Santaniello, M., *Governance by indicators: the case of the Digital Agenda for Europe*, Information, Communication & Society, *vol*. 22, no 13, 2019, pp. 1889–1902; Billestrup, J.; Stage, J., *E-government and the Digital Agenda for Europe: A Study of the User Involvement in the Digitalisation of Citizen Services in Denmark*, in: Marcus, A. (ed.), *Design, User Experience, and Usability: User Experience Design for Diverse Interaction Platforms and Environments*, Springer, Cham, 2014, pp. 71–80; Duhăneanu, M.; Marin, F., *Digital agenda for Europe – risks and opportunities in a digital economy*, Quality – Access to Success, *vol*. 15, pp. 57–66.

[3] See Kötz, H., *European Contract Law*, 2nd edn., Oxford University Press, Oxford – New York, 2017, pp. 1–16; De Franceschi, A. (ed.), *European Contract Law and the Digital Single Market: The Implications of the Digital Revolution*, Intersentia, Cambridge – Antwerp – Portland, 2016, pp. 1–17.

[4] See Schulze, R.; Staudenmayer, D. (eds.), *Digital Revolution: Challenges for Contract Law in Practice*, Nomos, Baden-Baden, 2016; Busch, C., *The Rise of the Platform Economy: A New Challenge for EU Consumer Law?*, EuCML – Journal of European Consumer and Market Law, *vo*l. 5, no. 1, 2016, pp. 3–9; Twigg-Flesner, C., *Innovation and EU Consumer Law*, Journal of Consumer Policy, *vol*. 28, no. 4, 2005, pp. 409–432; Katyal, N. K., *Disruptive Technologies and the Law*, The Georgetown Law Journal, *vol*. 102, no. 6, 2014, pp. 1685–1689; Benöhr, I., *EU Consumer Law and Human Rights*, Oxford University Press, Oxford – New York, 2013, pp. 9–44; Micklitz, H.-W. (ed.), *The Many Concepts of Social Justice in European Private Law*, Edward Elgar, Cheltenham – Northampton, 2011; Morais Carvalho, J., *Sale of Goods and Supply of Digital Content and Digital Services-Overview of Directives 2019/770 and 2019/771*, EuCML – Journal of European Consumer and Market Law, *vol*. 8, no. 5, 2019, pp. 194–201; Morais Carvalho, J.; Farinha, M., *Goods with Digital Elements, Digital Content and Digital Services in Directives 2019/770 and 2019/771*, Revista de Direito e Tecnologia, *vol*. 2, no. 2, 2020, pp. 257–270; De Franceschi, A., *Italian Consumer Law after the Transposition of Directives (EU) 2019/770 and 2019/771*, EuCML – Journal of European Consumer and Market Law, *vol*. 11, no. 2, 2022, pp. 72–76.

2. THE LEGISLATIVE DECREE NO. 170/2021 AND THE UPDATING OF THE REGULATION OF CONTRACTS FOR THE SALE OF GOODS

With Legislative Decree No. 170/2021[5], the Italian legislature made comprehensive amendments to Chapter I, Title III, Part IV of the Consumer Code[6], replacing Articles 128 to 135 in their entirety and adding Articles 135-*bis* to 135-*septies*.

From a subjective point of view, this intervention regulates sales contracts concluded between consumers and sellers. While the national legislator once again missed the opportunity to include legal persons within the definition of "consumer"[7], it has aligned the Italian definition of "seller" with what is provided in other language versions. However, the decision to maintain this definition[8], rather than adopting the more generic term "professional", is open to criticism. The European framework, which the Italian decree seeks to implement, applies not only to sales contracts *stricto sensu* but also to a variety of other contractual arrangements treated similarly.[9] Given that several different cases expressly fall within the scope of this regulation, the term "seller" seems partial, imprecise, and insufficient, whereas the broader term "professional" might have been more appropriate.

Moreover, the legislator has made use of the opportunity, granted to Member States, to extend the regulation to platform providers when they act for purposes within the framework of their professional activities and are the consumer's contractual counterparty for the provision of digital content or digital services.[10] However, one particularly delicate aspect of the digital economy has

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5 Legislative Decree (*Decreto Legislativo*) of 4 November 2021, no. 170.

6 Legislative Decree (*Decreto Legislativo*) of 6 September 2005, no. 206.

7 The definition is given in Article 128(2)(b), which in turn refers to the definition of "consumer" in Article 2(1)(b) of the Consumer Code. See Gobbato, M., *La tutela del consumatore: Clausole vessatorie, commercio elettronico e Codice del consumo*, Halley Editrice, Matelica, 2007; Arcidiacono, D., *Consumatori attivi: Scelte di acquisto e partecipazione per una nuova etica economic*a, Franco Angeli, Milano, 2013; Zambon, A., *Primi argomenti per una filosofia del diritto dei consumatori*, Edizioni ETS, Pisa, 2020.

8 The definition is contained in Article 128(2)(c) of the Consumer Code.

9 *Cf.* Article 128 of the Consumer Code.

10 Article 128(2)(c) of the Consumer Code, implementing Recital 23 SGD and Recital 18 of the 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 (DCSD), Official Journal, L 136, 22 May 2019.

not been addressed: the clarification of the contractual role assumed by online platforms. This is a critical issue, as digital platforms often present themselves as mere intermediaries, thereby avoiding responsibility for fulfilling pre-contractual information obligations or ensuring proper contractual performance, even when they act as active parties.[11] To remedy this legislative gap, it has been suggested in the literature that the rule stating that, for the purposes of assessing the conformity of goods with the contract, "public statements made by or on behalf of the seller, or by other persons involved in previous stages of the chain of commercial transactions, including the manufacturer, particularly in advertising or on the label"[12], should also apply to platforms when, although not involved in the contractual relationship, they facilitate the transfer of goods or services from the seller to the end user.[13]

Despite the importance of this issue, the Italian legislature's failure to address it from the outset has generated considerable uncertainty regarding the qualification of contractual parties in the context of the digital economy – where legal certainty is needed to increase consumer confidence in new technologies.

From an objective point of view, the legislation applies to any contract of sale, understood as any agreement under which the seller transfers (or undertakes to transfer) ownership of goods to the consumer, who pays (or undertakes to pay) the price.

One notable change is the expanded definition of "goods", which now reflects the digital context. The previous term "consumer goods" has been replaced with the more general term "material goods". This category now includes tangible goods, including water, gas, and, unlike previous legislation, electricity, provided they are packaged in a specific volume or quantity. It also includes live animals and, finally, "goods with digital elements".

In the new legislation, the seller's primary obligation remains to deliver goods that conform to the sales contract. However, the concept of "conformity" has been adapted to account for the "disruptive effect of technology". Under the new rules, the "functionality", "interoperability", "compatibility", and "durability" of goods – i.e., the ability of a good to maintain its specific functions and

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[11] It is now recognised that platforms, even when acting as mere intermediaries, provide information that affects the expectations of end users regarding the qualities and characteristics of the goods. *Cf.* Stone, B., *The Everything Store: Jeff Bezos and the Age of Amazon*, Transworld, New York, 2013.

[12] See Article 129(3)(d) of the Consumer Code.

[13] De Franceschi, A., *La vendita di beni con elementi digitali*, Edizioni Scientifiche Italiane, Napoli, 2019, pp. 67 *et seq.*

performance through normal use – must all be assessed to determine whether the good is in conformity.[14]

Regarding goods with digital elements, the trader, in addition to the above requirements, must also guarantee to the consumer the supply of updates, including security updates, necessary to maintain the conformity of the goods with the contract.[15] As a result, the non-supply, incompleteness, or defectiveness of the updates must be considered, in all respects, as a new case of lack of conformity.[16]

One provision that raises several concerns is the exclusion of the seller's liability for lack of conformity when the consumer consciously chooses not to perform the updates.[17] In other words, where the consumer refuses to install the necessary updates provided by the trader within a reasonable time, the trader's liability for lack of conformity of the goods is excluded.

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[14] "Functionality" is defined as the ability of the good to perform all of its functions given its purpose; "interoperability" concerns the ability of the good to function with hardware or software other than those with which goods of the same type are normally used; and "compatibility" refers to the ability of the good to function with hardware or software typically used with goods of the same type, without the need to convert the goods, hardware, or software. The "durability" requirement was introduced by the European legislator to ensure a longer lifespan for goods, aiming to promote the transition toward more sustainable consumption patterns and a circular economy. See Mak, V.; Lujinovic, E., *Towards a Circular Economy in EU Consumer Markets – Legal Possibilities and Legal Challenges and the Dutch Example*, EuCML – Journal of European Consumer and Market Law, *vol.* 8, no. 1, 2019, pp. 4–12.

[15] It should be noted that the duration of this obligation varies depending on the type of sales contract. For an in-depth study, see Toscano, G., *Nuove tecnologie e beni di consumo: il problema dell'obsolescenza programmata*, Actualidad Juridica Iberoamericana, no. 16, 2022, pp. 372–387.

[16] The seller will be liable for lack of conformity caused by the installation of an update only if the digital element itself was due under the contract of sale. Additionally, any lack of conformity resulting from an incorrect update is a source of liability for the seller only if the installation was carried out by the seller or under their supervision, or if it the consumer installed the update incorrectly due to unclear instructions provided by the trader or, in the case of goods with digital elements, by the supplier of the digital content or service. This provision particularly refers to the issue of "planned obsolescence". *Cf. ibid.*

[17] *Cf.* Article 130(3) of the Consumer Code, which provides that if the consumer does not install updates within a reasonable time pursuant to paragraph 2, the seller is not liable for any lack of conformity resulting solely from the absence of the relevant update, provided the seller has informed the consumer of the availability of the update and the consequences of non-installation, and the consumer's failure to install the update or its incorrect installation is not due to shortcomings in the seller's instructions.

This provision reflects the trend among European and national legislators toward making consumers more responsible. Consumers are no longer viewed as helpless and entirely at the mercy of professionals but rather as informed individuals, equipped with the necessary tools – especially information – to make economic choices that best meet their needs. Therefore, once the professional has made the updates and instructions available to the consumer and informed them of the consequences of non-installation, the legislator leaves the consumer free to decide whether or not to proceed.

This rationale also seems to justify the further rule that excludes liability for lack of conformity when the consumer, although specifically informed that the good deviates (due to a particular characteristic) from the objective requirements of conformity, nevertheless chooses to proceed with the purchase.[18] Even in this situation, the consumer, if adequately informed, is deemed capable of deciding whether or not to enter into the sales contract. However, considering the serious consequences of such a choice for the consumer (who will subsequently be unable to invoke the seller's liability for lack of conformity), the legislator wants to ensure that the consumer fully understands the situation. To this end, the consumer must expressly and separately accept this deviation at the time of concluding the sales contract.[19]

Upon closer inspection, however, the objective of granting the consumer freedom of choice, while also making them responsible for their decisions, does not seem to have been fully achieved. In light of the significant negative consequences faced by the consumer – whether from failing to install updates or from the inability to assert the professional's liability later – it is difficult to argue that these choices are made entirely freely.[20]

Exercising the discretion granted to Member States, the Italian legislator also eliminated the consumer's previous obligation to notify the seller of a lack of conformity within two months of discovering the defect.[21] This choice

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18 Article 130(4) of the Consumer Code.

19 The former provision, which stipulated that no lack of conformity existed if the consumer, at the time of the conclusion of the contract, was aware of the defect or could not reasonably have been unaware of it, or if the lack of conformity depended on the materials supplied by the consumer, has been removed (Article 129(3) of the Consumer Code).

20 There is concern that consumers may have a duty to install updates, particularly when they are necessary to ensure security. In such cases, consumer's failure to install updates could negatively affect other parties who interact with the goods whose digital content or services have not been updated.

21 This obligation was previously stipulated in Article 132(2) of the Consumer Code.

aligns perfectly with the overall rationale behind the regulatory intervention: to ensure the greatest possible protection for the consumer. As of 1 January 2022, the seller can no longer exonerate themselves from liability by proving that the buyer knew or could not reasonably have been unaware of the defect using ordinary diligence. Instead, the seller must prove that the consumer was specifically informed and expressly accepted that the goods deviated from certain objective requirements of conformity. As a result, under the new provisions, the seller is liable for any lack of conformity present at the time of delivery and manifested within two years thereafter. In the case of contracts involving goods with digital elements or services, the seller is liable for any lack of conformity that occurs during the entire period of delivery, even if it exceeds two years. In any event, a lack of conformity is presumed to have existed at the time of delivery if it becomes apparent within one year after delivery, as opposed to the previous six-month period. This reversal of the burden of proof places the responsibility on the seller to demonstrate that the defect was not present at the time of delivery.[22]

3. THE LEGISLATIVE DECREE NO. 173/2021 AND THE NEW REGULATION OF CONTRACTS FOR THE PROVISION OF DIGITAL CONTENT AND SERVICES

With Legislative Decree No. 173 of 4 November 2021, the Italian legislator implemented Directive (EU) 2019/770 on the supply of digital content and services to consumers. As this is a matter that had never been regulated before,

[22] For a discussion of remedies available to the consumer in cases of non-conforming goods, see Howells, G., *Reflections on Remedies for Lack of Conformity in Light of the Proposals of the EU Commission on Supply of Digital Content and Online and Other Distance Sales of Goods*, in: De Franceschi, A. (ed.), *European Contract Law and the Digital Single Market: The Implications of the Digital Revolution*, Intersentia, Cambridge – Antwerp – Portland, 2016, pp. 145–162; Smits, J., *The new proposal for harmonised rules for the online sales of tangible goods: conformity, lack of conformity and remedies: in-depth analysis*, European Parliament, Brussels, 2016; Twigg-Flesner, C., *Disruptive Technology – Disrupted Law? How the Digital Revolution Affects (Contract) Law*, in: De Franceschi, A. (ed.), *European Contract Law and the Digital Single Market: The Implications of the Digital Revolution*, Intersentia, Cambridge – Antwerp – Portland, 2016, pp. 145–162; De Cristofaro, G., *Difetto di conformità al contratto e diritti del consumatore: L'ordinamento italiano e la direttiva 99/44/CE sulla vendita e le garanzie deei beni di consumo*, CEDAM, Padova, 2000. Notably, the Italian legislature has recognised the possibility of "partial termination", though limited to the sale of consumer goods (see the new Article 135-*quater* (3) of the Consumer Code).

its transposition entailed the introduction of an entirely new Chapter I-*bis* into the Consumer Code, comprising Articles 135-*octies* to 135-*vicies ter.*

This framework, which limits its scope to contracts where a trader provides (or undertakes to provide) digital content or a digital service to a consumer who, in turn, pays (or undertakes to pay) a price, follows (almost) slavishly the provisions already set out in the digital goods framework, insofar as they are compatible.

Among the major novelties in the Italian system is, first and foremost, the issue of the legal nature of contracts for the provision of digital content or services. In this regard, since the legislature did not take the trouble to clarify the nature of such contracts, different interpretative theories have arisen in the literature. These theories alternatively classify such relationships as contracts for the provision of services or as particular cases of contracting.[23] Those who adhere to the first reconstruction emphasise the periodic nature of the service provision, given that the supply does not conclude with a single act but occurs continuously over a period. This approach highlights clear similarities with the concept of administration, a typically ongoing relationship defined in Article 1559 of the Civil Code as "the contract by which one party undertakes, in exchange for a price, to perform periodic or continuous services of things for the benefit of the other."[24] However, critics of this approach argue that it presupposes the delivery of a thing in all cases, an element that would be lacking in the supply of digital services or content.[25]

The second thesis, on the other hand, considers it more accurate to classify these relationships within the framework of tender contracts under Article 1655 of the Civil Code, which states a tender contract is "a contract by which one party undertakes, with the organisation of the necessary means and at its own risk, to perform a work or a service in exchange for monetary consideration". According to this view, contracts for the provision of digital content or services are characterised by the provision of necessary infrastructure, maintenance,

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[23] *Cf.* Bocchini, R., *Il contratto di accesso ad Internet*, in: Bocchini, R. (ed.), *I contratti di somministrazione di servizi*, Giappichelli, Torino, 2006, pp. 102–121. For a clear overview of the positions in doctrine, see De Franceschi, *op. cit.* (fn. 13), pp. 47 *et seq.*

[24] Among those who adhere to this approach, see Ferri, G. B.; Nervi, A., *Il contratto di somministrazione*, in: Lipari, N.; Rescigno, P. (eds.), *Diritto civile*, Giuffrè, Milano, 2009, pp. 86 *et seq.*; Longobucco, F., *Rapporti di durata e divisibilità del regolamento contrattuale*, Edizioni Scientifiche Italiane, Napoli, 2012; Battelli, E., *Il contratto di accesso ad Internet*, Media Laws, no. 1, 2021, pp. 129–157.

[25] Batelli, *op. cit.* (fn. 24), p. 138.

and technological updates to the purchaser. Consequently, the service is better qualified as a contract of tender.[26]

The most innovative element for contract law, however, concerns the updating of the traditional definition of "price" as a sum of money. In this perspective, the national legislator acknowledges the need to regulate the various digital payment systems now widely used in practice, and Article 135-*octies* (2)(g) now encompasses any digital representation of value as consideration for the supply of digital content or services.[27] Moreover, the concept of "data monetisation", i.e. the economic value of personal data, appears to have been expressly codified. In other words, the provisions of this new chapter of the Consumer Code also apply where, in return for the supply of digital content or services, the consumer pays (or is obliged to pay) not a sum of money but their personal data.[28]

However, despite the undeniable importance of this development, the national legislature, upon closer inspection, has not explicitly qualified personal data as consideration. This omission has given rise to doubts and discussions in the literature as to whether a purchaser's personal data can truly be considered an instrument of payment. Article 135-*octies* (4) merely acknowledges a long-standing practice outside the legal system – where "free" services are "paid for" with personal data – and the undeniable economic value that personal data hold for entrepreneurs. However, it stops short of explicitly stating that personal data

[26] Albertini, L., *I contratti di accesso ad Internet*, Giustizia civile, *vol*. 47, no. 1-II, 1997, p. 103.

[27] For an in-depth study on digital currencies, see Barrière, F., *The Payment with Bitcoins and other Virtual Currencies – Risks, liabilities and regulatory responses*, in: De Franceschi, A.; Schulze, R. (eds.), *Digital Revolution – New Challenges for Law: Data Protection, Artificial Intelligence, Smart Products, Blockchain Technology and Virtual Currencies*, C. H. Beck – Nomos, München, 2019, pp. 327–340.

[28] This does not include cases where such data are processed by the trader exclusively for the purpose of providing the digital content or service, or to comply with legal obligations to which the trader is subject, provided the data are not processed for purposes other than those intended. On the economic value of data, see also Najjar, M. S.; Kettinger, W. J, *Data Monetization: Lessons from a Retailer's Journey*, MIS Quarterly Executive, *vol*. 12, no. 4, 2013, pp. 213–225; Hanafizadeh, P.; Harati Nik, M. R., *Configuration of Data Monetization: A Review of Literature with Thematic Analysis*, Global Journal of Flexible Systems Management, *vol*. 21, no. 1, 2020, pp. 17–34; Parvinen, P.; Pöyry, E.; Gustafsson, R.; Laitila, M.; Rossi, M., *Advancing Data Monetization and the Creation of Data-based Business Models*, Communications of the Association for Information Systems, *vol*. 47, 2020, pp. 25–49.

constitute consideration, and it does not address the delicate issue of coordinating this new regulation with data protection laws.[29]

Faced with this lack of clarity, efforts have been made in the literature to resolve the issue through interpretation. According to authoritative scholars, it may not be desirable to recognise personal data as consideration. Instead, it would be preferable to construct a contractual model consisting of two distinct but interconnected transactions within a unified economic exchange.[30] This would imply that when the contract facilitates the circulation of the consumer's personal data – where the consumer is always guaranteed control over their data, as recognised by law – the consumer would enjoy double protection: as a "person" whose data are processed (for purposes beyond what is necessary for the performance of the contract) and as a "contracting party" to a legal transaction (the contract for the supply of digital content or services).[31]

Italian jurisprudence had already raised the question of whether it was appropriate to classify services offered by platforms as free, given the exchange of personal data. In 2018, the Italian Antitrust Authority (Autorità Garante della Concorrenza e del Mercato) initiated preliminary proceedings against Facebook Inc. and Facebook Ireland Limited for unfair commercial practices. Facebook claimed that its service was provided free of charge (referring to the notion of technical-objective gratuitousness, as no pecuniary consideration

[29] There are those who do not believe that personal data can be understood as consideration, particularly since neither the rule nor the new chapter explicitly refers to data as "consideration". In this sense, see Grisafi, R., *Il dato personale come presunto corrispettivo economico e le nuove fonti di integrazione eteronome del contratto nella fornitura di contenuti e servizi digitali: Il caso della disciplina della garanzia di conformità*, Judicium, 16 June 2022, https://www.judicium.it/il-dato-personale-come-presunto-corrispettivo-economico-e-le-nuove-fonti-di-integrazione-eteronome-del-contratto-nella-fornitura-di-contenuti-e-servizi-digitali-il-caso-della-disciplina-della-garanzi/ (25 November 2022). Camardi, C., *Contratti digitali e mercati delle piattaforme: Un promemoria per il civilista*, Jus Civile, no. 4, 2021, pp. 870–919, argues that Article 135-*octies* of the Consumer Code seems to identify two different types of supply contracts, depending on the type of consumer's counter-performance.

[30] See *ibid*., pp. 887–888. In the same vein, see Ricciuto, V., *La patrimonializzazione dei dati personali: Contratto e mercato nella ricostruzione del fenomeno*, Il diritto dell'informazione e dell'informatica, vol. 34, no. 4/5, 2018, pp. 689–726.

[31] Camardi, *op. cit.* (fn. 29), p. 889, also states that "[i]t should follow that the obligations placed upon the trader benefiting from the availability of data, and the 'circumstances' that the trader must guarantee, are also those necessary to satisfy the consumer's rights to maintain control of their data, as provided by the GDPR".

was requested).[32] However, the Authority disagreed, sanctioning Facebook for providing misleading information. Specifically, users were not made aware, upon registering, that their personal data would be collected and processed for commercial purposes. This omission was found to unduly influence consumers' choices, as the company failed to inform them of the economic value it derived from profiling the collected data.[33]

Thus, while attributing economic value to personal data is not new to legal professionals, the current shift is significant. Previously, in order to protect consumers who provided "only" their personal data (instead of a sum of money) in exchange for digital services, the gratuitousness of such transactions was simply denied.[34] Now, with the express recognition of the economic value of data, it is no longer possible to classify a contract as gratuitous merely because no sum of money was exchanged. This development signifies the definitive departure from a general theory of goods centred on the (albeit unwritten) requirement of materiality.[35] As noted by scholars, "the contractual activity related to the phenomenon of personal data is governed, due to the so special nature of the

[32] On tangible and intangible assets, see Resta, G., *Diritti esclusivi e nuovi beni immateriali*, UTET Giuridica, Torino, 2010, pp. 20 *et seq*.; Gambaro, A., *I beni*, Giuffrè, Milano, 2012.

[33] Tommasi, S., *The 'New Deal' for Consumers: Towards More Effective Protection?*, European Review of Private Law, *vol*. 28, no. 2, 2020, p. 328, observed that "personal data constitute the new currency in the network and that some contracts, through the screen of gratuity, seem to attribute only advantages to the consumer, which, in reality, is the true depleted subject."

[34] According to Codiglione G. G., *I dati personali come corrispettivo della fruizione di un servizio di comunicazione elettronica e la "consumerizzazione" della privacy*, Il diritto dell'informazione e dell'informatica, *vol*. 33, no. 2, 2017, p. 420, "the element of non-gratuitousness in the service provided by *social networks* thus allows the relationship between the user and the provider to be viewed from a consumer-oriented perspective, particularly aimed at guaranteeing freedom of choice in the market for *consumer communication services*, and therefore directed at countering concentrations and dominant positions".

[35] On the onerousness of contracts involving the provision of personal data, see Rodotà, S., *Tecnopolitica: La democrazia e le nuove tecnologie della comunicazione*, Laterza, Roma, 2004, pp. 150 *et seq*.; Caterina, R., *Cyberspazio, social network e teoria generale del contratto*, AIDA – Annali Italiani del Diritto d'Autore, della cultura e dello spettacolo, 2011, pp. 93–101; Perlingieri, P., *L'informazione come bene giuridico*, Rassegna di diritto civile, no. 2, 1990, pp. 326–354; Schwartz, P. M., *Property, Privacy, and Personal Data*, Harvard Law Review, *vol*. 117, no. 7, 2004, pp. 2056–2128; Winegar, A. G.; Sunstein, C. R., *How Much Is Data Privacy Worth? A Preliminary Investigation*, Journal of Consumer Policy, *vol*. 42, no. 3, 2019, pp. 425–440.

asset, by two legal frameworks, as a result of the coexistence, within that contractual relationship, of both relative and absolute subjective situations: the law of obligations and an absolute right of personality".[36] Thus, "in reasoning this way, by recognising the existence of a separate element in relation to the person who holds it, though still attributable to them, it becomes possible to justify the power to dispose by contract of those same immaterial personality rights."[37]

4. CONCLUSION AND FINAL REMARKS

The increasing market presence of goods interconnected or integrated with digital elements, and the growing demand for the provision of content or services online, have, on the one hand, raised entirely new issues – such as the problem of so-called "planned obsolescence" – and, on the other hand, presented questions long known to jurists, but from new perspectives.

The Italian legislative intervention that updated the regulation on the sale of consumer goods, attempting to adapt traditional legal categories to the demands of the digital world, is certainly to be welcomed. This new framework aims to strengthen the liability of traders by introducing additional information obligations and more detailed conformity requirements for goods, while also seeking to increase consumer confidence in the digital market to fully unlock its potential.

However, as evident from the preceding analysis, it seems that the national legislature has, perhaps aided by the maximum harmonisation of the twin directives, limited itself to passively transposing the requirements of the EU legislator without aligning them with the pre-existing legal system. More critically, it has missed opportunities to make necessary changes or introduce innovations. This is particularly apparent in cases where the EU legislator left decisions to the discretion of Member States, such as whether to extend the protection granted to consumers in the regulation of sale of goods with digital elements to legal persons. In Italy, unlike in other legal systems, this suggestion was not adopted, and the definition of "consumer" remains restricted exclusively to natural persons.

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[36] Ricciuto, V., *I dati personali come oggetto di operazione economica: La lettura del fenomeno nella prospettiva del contratto e del mercato*, in: Galgano, N. Z. (ed.), *Persona e mercato dei dati: Riflessioni sul GDPR*, Cedam Wolters Kluwer, Padova, 2019, p. 100.

[37] *Ibid*. For further consideration, see Tarasco, A. L.; Giaccaglia, M., *Facebook è gratis? "Mercato" dei dati personali e giudice amministrativo*, Il diritto dell'economia, *vol*. 66, no. 2 (102), 2020, pp. 265–304.

Another example of the legislature's passivity concerns the inclusion of "durability" as a criterion for evaluating whether a good conforms with the contract. While this was a significant step toward fostering a circular economy and promoting ecological transition, it is insufficient to achieve that goal. A more effective measure would have been to prioritise repair over replacement. Under the current regulation, when there is a lack of conformity, the consumer is free to choose between repair or replacement of the goods (if feasible and not disproportionate), a choice left entirely to the consumer's discretion, allowing them to opt for the remedy that best suits their needs.

While this approach partially restores the consumer's freedom of choice, which can be constrained by a hierarchy of remedies for non-conforming goods, it does not fully align with the ecological goals of European policy. Those objectives would have been better served if the legislator had placed greater emphasis on repair, requiring consumers, for example, to first attempt repair and only request replacement repair is not possible (e.g., if the item is irreparable or the costs would be excessive).

Additionally, when it comes to secondary, particularly price reduction, the instrument seems ill-suited for cases – now common – where no monetary consideration was given for the supply of the digital content or service, but instead personal data. In such instances, it remains unclear how a consumer's request for a proportional price reduction (in this case involving the transfer of personal data) could be realised.

Ultimately, it must be acknowledged that legislative intervention in this area was necessary, particularly given the increasing integration of goods with digital elements in Italy. However, in the rush to regulate a sector that is rapidly evolving, the national legislature seems to have engaged in a purely formalistic transposition of European directives, failing to provide necessary clarifications (such as the legal nature of contracts for the provision of digital content and services).

This situation reveals the "double face" of maximum harmonisation: while the regulatory technique undoubtedly enhances consumer protection, it may also encourage Member States to engage in merely formal transpositions, neglecting to integrate the new rules with their national legal systems. This is the case in Italy, where doubts remain as to whether the national legal system, even after the new legislation, is adequately prepared to address technological advancements and the new challenges these will pose to private law in the coming years.[38]

[38] See Quarta, A.; Smorto, G., *Diritto privato dei mercati digitali*, Le Monnier Università, Firenze, 2020.

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Sažetak

Ludovica Sposini*

TALIJANSKA IMPLEMENTACIJA DIREKTIVE O KUPOPRODAJI ROBE I DIREKTIVE O DIGITALNOM SADRŽAJU I USLUGAMA: IZMEĐU KRITIČNIH PITANJA I NOVINA

Ovaj rad analizira talijansku implementaciju dviju direktiva "blizanki": Direktive (EU) 2019/770 (Direktiva o digitalnom sadržaju i uslugama, DCSD) i Direktive (EU) 2019/771 (Direktiva o kupoprodaji robe, SGD). Kritičko ispitivanje glavnih novina koje su uvedene Zakonodavnim dekretima br. 170/2021 i 173/2021 otkriva propuštene prilike da se uspostavi regulatorni okvir sposoban za suočavanje s promjenama koje donose nove tehnologije. Ovaj je nedostatak posebice izražen u tome što su izostale učinkovite mjere za rješavanje problema poput "planirane zastarjelosti", unatoč zakonodavčevoj deklariranoj predanosti ekološkoj tranziciji. Nadalje, čak i u jednoj od najvažnijih inovacija – naime, izričitom priznanju gospodarske i komercijalne vrijednosti podataka (tzv. monetizacija podataka) – zakonodavac nije uspio razjasniti mogu li se osobni podatci smatrati protučinidbom u ugovorima, niti je uskladio novo uređenje s postojećim pravom zaštite podataka. Ove refleksije dovode do zaključka da je talijansko uređenje kupoprodaje robe, zbog formalističke implementacije europskoga pravnog okvira, već nesposobno adekvatno odgovoriti na izazove koje donosi digitalna trgovina.

Ključne riječi: pravna priroda ugovora o isporuci digitalnog sadržaja ili usluga, monetizacija podataka, potrošačeva obveza obavještavanja o neusklađenosti robe, neusklađenost robe

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