

# SALE OF GOODS WITH DIGITAL ELEMENTS: THE OBLIGATION TO SUPPLY UPDATES IN ITALIAN LAW

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UDK: 347.71:004.7(450:4EU)  
347.44:004.7(450:4EU)  
339.1:346.58(450)  
339.923:061.1>(4)EU  
DOI: 10.3935/zpfz.74.56.5  
Pregledni znanstveni rad  
Primljeno: veljača 2024.

*This paper addresses the transposition of Directive (EU) 2019/771 (Sale of Goods Directive, SGD) into Italian law, specifically focusing on the rules concerning goods with digital elements and software updates. The paper explores the rationale behind these innovative provisions, distinguishing between the legal concepts of “update” and “upgrade”. It further elaborates on the Italian transposition of the SGD provisions regarding updates, clarifying the legal nature of the obligation to supply updates under Italian law, as well as its main characteristics. The impact of these provisions in Italy is examined both from a B2C and B2B perspective. The B2C perspective considers the potential extension of the legal relationship between the seller and the consumer to third-party update suppliers. The B2B perspective examines the possibility of extending the obligation to provide updates to non-consumer contracts involving goods with digital elements, by applying the principle of integrative good faith.*

*Key words: goods with digital elements; obligation to supply updates; digital consumer protection*

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## 1. INTRODUCTION

The Sale of Goods Directive (SGD)<sup>1</sup> and the Digital Content and Services Directive (DCSD)<sup>2</sup> significantly contribute to the digitalisation of European contract law, alongside reshaping the *acquis communautaire*.<sup>3</sup> Specifically, the SGD provisions regarding updates to goods with digital elements are regarded as “groundbreaking” by European scholars.<sup>4</sup>

While the EU is rapidly advancing towards the digitalisation of contract law, the Italian legislature continues to maintain the law of obligations and contracts largely unchanged, as though the Italian Civil Code (c. c.)<sup>5</sup> were impermeable to digital innovations.<sup>6</sup> Provisions concerning blockchain and smart contracts have yet to find a place in the Code.<sup>7</sup> Even the most recent Civil Code amendment proposals, which have been heavily criticised by Italian scholars, do not aim to adapt contract law to digital developments.<sup>8</sup>

Nevertheless, integrating the innovations introduced by the “twin directives” into the Italian system of contract law is desirable, as these directives provide the only set of rules concerning the supply of smart goods, digital content, and digital services in Italy. As such, they will be crucial for interpreting contracts, including from a B2B perspective.

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<sup>1</sup> 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, Official Journal, L 136, 22 May 2019.

<sup>2</sup> 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, Official Journal, L 136, 22 May 2019.

<sup>3</sup> Schulze, R.; Zoll, F., *European Contract Law*, 3rd edn., Nomos, Baden-Baden, 2021, p. V. See also Recital 5 SGD and Recital 5 DCSD.

<sup>4</sup> Staudenmayer, D., *Article 8: Objective requirements for conformity*, in: Schulze, R.; Staudenmayer, D. (eds.), *EU Digital Law: Article-by-Article Commentary*, Nomos, Baden-Baden, 2020, p. 110.

<sup>5</sup> *Regio Decreto* of 16. 3. 1942, Gazzetta Ufficiale no. 81/1942, last amended by *Decreto legislativo* no. 149 of 10 October 2022 (*Codice civile*, c. c.).

<sup>6</sup> Italian private digital law lies outside the c. c., as shown by Tosi, E., *Diritto privato delle nuove tecnologie digitali*, Giuffrè, Milano, 2021.

<sup>7</sup> Rigazio, S., “Smart contracts” e tecnologie basate su registri distribuiti nella L. 12/2019, *Il diritto dell’informazione e dell’informatica*, vol. 37, no. 2, 2021, p. 369.

<sup>8</sup> Lastly, *Disegno di legge* S. 1151/2019 – XVIII Legislatura presented to the *Senato della Repubblica* on 19 March 2019.

The purpose of this paper is to foster a dialogue between EU rules on the sale of goods with digital elements – specifically those relating to updates – and the Italian law of contract and obligations. Several issues arising from this dialogue will be addressed.

First, the context of the SGD provisions governing the obligation to supply updates will be examined, and their implementation in Italian law will be analysed. A definition of “update”, absent in both directives, will be provided, and its key features will be explored.

Next, the impact of these rules on Italian contract law will be analysed from both a subjective (B2C) and an objective (B2B) perspective. From the subjective perspective, the European legislator regulates the obligation to supply updates as a bilateral obligation, placing this duty on the seller, despite the fact that updates are typically conceived, developed, and supplied by other actors in the commercial chain. Although the rationale is to make the enforcement of consumer law easier by identifying a single entity for consumers to refer to, this choice may create practical problems in both the performance of the obligation to supply updates and the exercise of satisfactory remedies. For these purposes, the seller must rely entirely on a third party, who is usually economically and contractually stronger. It is, therefore, necessary to explore whether this bilateral relationship can become multilateral through the operation of national law, or whether a direct contract between the consumer and the supplier of updates could be envisioned alongside the sales contract.

From the objective perspective, the seller’s duty to provide updates arises because the object of the contract involves goods with digital elements. This raises the question of whether the explicit provision of an update obligation for smart goods in consumer contracts will impact non-B2C contracts. The principle of integrative good faith will be crucial in this regard.

## 2. OVERVIEW OF THE OBLIGATION TO SUPPLY UPDATES IN THE SALE OF GOODS DIRECTIVE

### 2.1. Issues due to the lack of rules on updates

An innovative Sale of Goods Directive was necessary due to the digital evolution of B2C exchanges. Nowadays, smart goods (or goods with digital elements, as per the SGD and the DCSD), which were not addressed in the 1999 Consumer Sales Directive (CSD)<sup>9</sup>, have become widespread in Europe.

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<sup>9</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees,

Thanks to their embedded software, smart goods can perform a wider variety of functions compared to their “analogue” counterparts and require constant monitoring to ensure proper functioning.<sup>10</sup> Usually designed to meet a range of consumers’ personal needs, smart goods may process consumer data to perform their functions.<sup>11</sup> For the same purpose, smart goods are usually connected to the Internet, which exposes them to cybersecurity-related risks and serious violations of consumers’ rights to privacy.

Although the CSD was applicable to contracts for the sale of goods with digital elements, as these are considered movable goods, the absence of specific rules led to several issues in consumer protection. No right for consumers to obtain updates was envisaged, and no protection was provided against non-conformity caused by updates.<sup>12</sup>

The lack of specific rules on updates also resulted in the perceived arbitrariness of hi-tech companies, which could retain control over goods even after delivery.<sup>13</sup> Through terms and conditions, producers could grant themselves the power to decide whether to make updates available to all consumers or only to purchasers of newer models, and to determine the features, timing, and manner of the updates. A presumption of consent to updates could operate, meaning that consumers would have to expressly opt out by selecting a setting that would restore their freedom of choice within the product’s settings.<sup>14</sup> This situation, in the most egregious cases, led to planned obsolescence techniques.<sup>15</sup>

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OJ L 171, 7. 7. 1999; on this, see 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 dei beni di consumo*, CEDAM, Padova, 2000.

<sup>10</sup> Recital 28 SGD.

<sup>11</sup> For a U.S. perspective, see Rustad, M. L., *How the EU’s General Data Protection Regulation Will Protect Consumers Using Smart Devices*, *Suffolk University Law Review*, vol. 52, no. 2, 2019., pp. 227–271.

<sup>12</sup> See Vereecken, J.; Werbrouck, J., *Goods with Embedded Software: Consumer Protection 2.0 in Times of Digital Content?*, in: Wei, D.; Nehf, J. P.; Marques, C. L. (eds.), *Innovation and the Transformation of Consumer Law*, Springer, Singapore, 2020, pp. 67–109. Defects caused by updates cannot be considered as existing “at the time the goods were delivered” (Article 3(1) CSD).

<sup>13</sup> Recital 31 SGD.

<sup>14</sup> Failing to select this setting option results in the software proceeding autonomously to perform updates as and when released by developers.

<sup>15</sup> See De Franceschi, A., *Planned Obsolescence challenging the Effectiveness of Consumer Law and the Achievement of a Sustainable Economy: The Apple and Samsung Cases*, *EuCML – Journal of European Consumer and Market Law*, vol. 7, no. 6, 2018, pp. 217–222.

Faced with this state of affairs, the twin directives provide a notion of goods with digital elements. Their main feature is the interdependence between the tangible movable element and the integrated digital element, such that without the latter, the goods cannot perform their intended functions.<sup>16</sup> Within the limits set by the SGD, both the tangible movable element and the embedded digital element are the seller's responsibility under the sales contract.<sup>17</sup>

The SGD grants consumers the right to receive updates for a certain period after delivery for the embedded digital elements supplied with the goods.<sup>18</sup> In principle, consumers retain the right to choose not to install updates.<sup>19</sup>

## 2.2. Notion of “update”

The SGD does not define “updates”, but it is clear in outlining their characteristics. Starting from the notion of “digital content” (Article 2(1) DCSD and Article 2(6) SGD), it can be argued that the supply of updates consists of making available to all relevant users a set of data produced and supplied in digital form, serving a specific objective.

When discussing the supply of an entire embedded digital element, the data should either represent digital content or be capable of supplying a digital service embedded within the goods. However, when dealing with updates and upgrades, the set of data should be able to: a) integrate itself into the embedded digital element; b) modify or replace part of the data already available at the time of delivery; and c) adapt or renew certain features/functions of the smart goods concerned.

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<sup>16</sup> Recitals 15 and 16 SGD.

<sup>17</sup> On these limitations, we share the view supported by Rott, P., *The Digitalisation of Cars and The New Digital Consumer Contract Law*, JIPITEC – Journal of Intellectual Property, Information Technology and E-Commerce Law, vol. 12, no. 2, 2021, pp. 156–168, and by Staudenmayer, D., *The Directives on Digital Contracts: First Steps Towards the Private Law of the Digital Economy*, European Review of Private Law, vol. 28, no. 2, 2020, pp. 219–250.

<sup>18</sup> This will be the case if the digital element: a) is interconnected with the good in such a way that the absence of the digital element would prevent the good from performing its functions (Article 2(5)(b) SGD), and b) the digital element is provided together with the good under the sales contract.

<sup>19</sup> See 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; De Franceschi, A., *La vendita di beni con elementi digitali*, Edizioni Scientifiche Italiane, Napoli, 2019, p. 95.

A relevant distinction in the SGD emerges concerning the objectives to be achieved through updates.<sup>20</sup>

Articles 6 and 7 SGD differentiate between contractually agreed updates (“updates as stipulated in the sales contract”) and corrective updates (“updates, including security updates, that are necessary to keep goods in conformity”). The former belong to subjective conformity criteria (Article 6(d) SGD), whereas the latter fall under objective conformity criteria (Article 7(3) and (4) SGD).

The SGD does not explicitly specify the purposes of contractually agreed updates. At first glance, these updates appear to be fully left to the parties’ autonomy.<sup>21</sup> However, upon closer examination, it becomes clear that this autonomy is not absolute. This distinction affects the notion and content of both types of updates.

First, it is important to consider that the purpose of corrective updates is to maintain the conformity of goods with digital elements over time, as well as to preserve an adequate level of security (Article 7(3) SGD). Sellers cannot avoid ensuring that consumers are supplied with conformity updates for all digital elements provided as part of the sales contract. Furthermore, no express agreement is necessary for consumers to receive “conformity updates”, as they fall under the objective conformity criteria.

All this demonstrates that “contractually agreed updates” cannot be limited to merely maintaining the conformity of goods with digital elements over time but must provide something more.

Unless their sole purpose is to maintain conformity over time for a period longer than that provided by the SGD, contractually agreed updates should be understood as “upgrades” in the IT sense, i.e., updates of an evolutionary nature that enhance the digital functionalities of the goods or provide new versions of the embedded software.

Conversely, “conformity updates” consist of all updates whose only objective is to maintain the “digital conformity” of goods during the period stipulated by the SGD.<sup>22</sup> After clarifying this key distinction, this paper will now turn to the topic of conformity updates.<sup>23</sup>

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<sup>20</sup> This is also the case under the DCSD; see Staudenmayer, *op. cit.* (fn. 4), p. 113.

<sup>21</sup> Recital 28 SGD.

<sup>22</sup> Staudenmayer, *op. cit.* (fn. 4), p. 114.

<sup>23</sup> For an overall analysis, see Kalamees, P., *Goods with Digital Elements and the Seller’s Updating Obligation*, JIPITEC – Journal of Intellectual Property, Information Technology and E-Commerce Law, vol. 12, no. 2, 2021, pp. 131–142.

### 3. THE IMPLEMENTATION OF SALE OF GOODS DIRECTIVE PROVISIONS CONCERNING UPDATES IN ITALY

The SGD was implemented in Italy through Legislative Decree (*Decreto legislativo*, D. lgs.) No. 170 of 4 November 2021<sup>24</sup>, which amended Articles 128 *et seq.* of the Italian Consumer Code (*Codice del consumo*, c. cons.).<sup>25</sup>

In terms of updates, D. lgs. No. 170/2021 is not significantly different from the SGD. The margins of manoeuvre were limited by Article 4 SGD, which provides for a level of maximum harmonisation, except for express derogations. Nonetheless, a few notable innovations may have a systematic impact.

Whereas the SGD regulates updates and upgrades within the objective and subjective conformity criteria respectively, Italy decided to maintain upgrades within the conformity criteria, which were implemented in a single provision (Article 129 c. cons.), while shifting conformity updates into a new and separate provision (Article 130 c. cons.).

The introduction of updates led Italian scholars to describe conformity in the SGD as “second-generation conformity”.<sup>26</sup> The shift further emphasises the dynamic aspects of updates, which are fully projected into the future, beyond the point of sale. Updates represent a legal duty “towards the future” and require ensuring that goods maintain certain qualities over time.

Article 130 c. cons. places the duty to inform and supply updates solely on the seller, downplaying the role attributed to third parties by the SGD.

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<sup>24</sup> D. lgs. no. 170 of 4 November 2021, “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 direttiva 1999/44/CE”, *Gazzetta Ufficiale*, no. 281/2021. Its provisions took effect on 1 January 2022 and apply to contracts concluded thereafter. For a general overview, see 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. For more detailed analysis, see De Cristofaro, G. (ed.), *La nuova disciplina della vendita mobiliare nel Codice del consumo: La direttiva (UE) 2019/771 relativa ai contratti per la fornitura di cose mobili stipulati da professionisti con consumatori ed il suo recepimento nel diritto italiano (d.lgs. 4 novembre 2021, n. 170)*, Giappichelli, Torino, 2022.

<sup>25</sup> D. lgs. no. 206 of 6 September 2005, “Codice del consumo, a norma dell’articolo 7 della legge 29 luglio 2003, n. 229”, *Gazzetta Ufficiale*, no. 235/2005 (*Codice del consumo*, c. cons.).

<sup>26</sup> See Addis, F., *Spunti esegetici sugli aspetti dei contratti di vendita di beni regolati nella nuova direttiva (UE) 2019/771*, *Nuovo Diritto Civile*, vol. 5, no. 2, 2020, pp. 5–27.



### 3.1. The obligation to inform of the availability of updates

According to Article 130 (2) c. cons., the seller “shall keep the consumer informed of the available updates”.

The Italian legislator has framed the obligation to notify the consumer of the availability of updates, as provided by Article 7(3) SGD, as a proper obligation to inform. Its aim is to ensure consumers’ awareness concerning updates.

This is not a pre-contractual obligation to inform but is rather one that must be fulfilled throughout the execution of the contract at the appropriate time, shortly before updates are made available.<sup>27</sup> For the benefit of consumers, the information should be provided in Italian, in a clear and comprehensible manner.<sup>28</sup> Since the information should be suitable for the means of communication used, it should ideally be provided directly on the device.<sup>29</sup>

As for the content of the duty to inform, Article 130(3) c. cons. suggests that the seller shall inform the consumer of the availability of updates, the reasons they are being made available, their main contents, the consequences of failing to install them, and all necessary instructions for consumers to proceed with the installation autonomously.

### 3.2. Updates as an obligation and its main features

According to Article 130 c. cons., sellers must supply consumers with all available updates, including security updates, necessary to maintain the conformity of goods within the period prescribed by law.<sup>30</sup>

Article 130 c. cons. expressly refers to the (Italian) notion of obligation.<sup>31</sup> A closer look shows that the performance required of the seller is oriented

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<sup>27</sup> De Franceschi, *op. cit.* (fn. 19), p. 95.

<sup>28</sup> Articles 5 and 9 c. cons.

<sup>29</sup> Staudenmayer, *op. cit.* (fn. 4), p. 127.

<sup>30</sup> According to *ibid.*, pp. 119 *et seq.*, the DCSD “does not oblige the trader to create or provide updates himself”. This is not stipulated in either Article 5 or Article 8(2) DCSD. The trader must “ensure that the consumer is [...] supplied with updates”. Instead, the Italian transposition of the SGD charges the seller with the obligation to “supply updates”, and not with the obligation to “ensure that the consumer is supplied with”. In both cases, updates “will in practice mostly be provided by a third party”, as the seller “normally cannot create the updates themselves but has to rely on the developer of the digital content or digital service”.

<sup>31</sup> Conversely, Twigg-Flesner, C., *Conformity Of Goods and Digital Content/Digital Services*, in: Arroyo Amayuelas, E.; Cámara Lapuente, S. (eds.), *El derecho privado en el*



toward achieving a future result, which is maintaining conformity over time through updates. In contrast, a guarantee in Italian sales law involves a passive role in which the seller assumes the risk of the absence of a quality present or not present in the good at the time the contract is concluded. A sales guarantee does not generally imply a duty to ensure the future presence of qualities in the good.<sup>32</sup> It cannot be regarded as a guarantee “in the proper sense” since there is no principal obligation to guarantee, neither future nor potential.<sup>33</sup>

The implementation of the SGD marks the end of a long-standing debate in Italian doctrine concerning the legal nature of conformity to contract, favouring the view that it qualifies as an obligation.<sup>34</sup>

From an objective perspective, the obligation to supply updates could be fungible or non-fungible, depending on the public availability of its code. A non-fungible obligation arises when updating can only be performed by the owner of the IP rights to the software, as in this case, according to the parties’ assessment, such performance cannot be indifferently performed either by the debtor or by a third party. Conversely, a fungible obligation applies when dealing with open-source software, which can be updated by anyone with the necessary IT skills, as its source code is public.

The obligation to supply updates should be considered a two-sided duty: “to do” and, eventually, “to supply” a specific set of data to consumers.

The “to do” side of the obligation involves first checking the proper functioning of the embedded digital element, analysing malfunction reports sent by users, verifying the existence of flaws in IT security, or detecting any other visible or non-visible bugs (e.g., issues in the processing of data collected via the goods). If defects in the digital element are found, it will be necessary to determine what needs to be improved to restore conformity. After that, the development stage begins, during which updates are created, and their proper

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*nuevo paradigma digital*, Marcial Pons, Madrid, 2020, p. 69, states that “there is no obligation on the seller either to inform the consumer about or supply the update himself [...]. As the digital content/service element of goods with digital elements will often be supplied by a third party, the seller’s obligation is to make sure that information about updates, and the updates themselves, can reach the consumer”.

<sup>32</sup> See Luminoso, A., *Riparazione o sostituzione della cosa e garanzia per vizi nella vendita: Dal Codice civile alla Direttiva 1999/44/CE*, *Rivista di Diritto Civile*, vol. 47, no. 6, 2001, pp. 837–862.

<sup>33</sup> Personal guarantees are ancillary obligations and require the existence of a “principal obligation” (Article 1936 c. c.).

<sup>34</sup> Bertelli, F., *Le dichiarazioni di sostenibilità nella fornitura di beni di consumo*, Giappichelli, Torino, 2022, p. 187.

functioning – including the correct integration of both new and old functionalities into the goods involved – should be verified.

Finally, the seller will inform consumers of the availability of updates and supply them to all relevant users.

Updates are not necessarily provided to consumers when non-conformity has already manifested. Since their purpose is to maintain conformity over time, updates may be supplied before non-conformity occurs, such as when bugs are detected by providers but have not yet been noticed by consumers, perhaps because they do not regularly use the affected feature of the smart good.<sup>35</sup> There may also be cases where no updates are needed, for example, if the embedded digital element remains in conformity until required by law.

However, in all cases, surveillance of the embedded digital element by the seller is required. The seller must verify that the digital elements remain in conformity with the contract and act if necessary. Indeed, updates are necessary to maintain conformity, not necessarily to repair a non-conformity. The core of this obligation is the “surveillance phase” for which sellers are responsible, aimed at maintaining conformity over time. Sellers must oversee conformity regardless of the need for updates.

The threshold for the relevance of non-conformity is anticipated, as the failure to carry out all monitoring and preparatory activities may, in itself, result in non-conformity if consumers become aware of this failure, even if it has not yet objectively manifested in the good (e.g., if consumers hear about a bug in the digital element through news reports, but that bug has not yet manifested itself in their good with digital elements and updates have not yet been provided).<sup>36</sup>

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<sup>35</sup> The limitation of responsibility provided by Article 130(3) c. cons. (Article 7 (4) SGD) also applies if the non-conformity that updates aim to avoid has not yet manifested in the good. If through surveillance and supply the seller avoids a “future” non-conformity by fulfilling the core of their obligation (which is preventing non-conformity through updates), and consumers do not proceed with the installation, consumers will not be able to complain of non-conformity that the update was intended to remedy, even if it only becomes apparent afterward.

<sup>36</sup> This distinction allows for the differentiation between primary remedies (repair/replacement) and updates. Primary remedies are subsequent and contingent obligations, which rest on the seller only in case of non-conformity. Updates, on the other hand, are preventive and necessary; obligation to supply them rests on the seller regardless of non-conformity.

#### 4. B2C SUBJECTIVE-BASED ISSUES

Goods with digital elements constitute the “node” of a network of contracts, as they require consumers to conclude several contracts to perform all their functions.<sup>37</sup> Moreover, once operational, these goods can serve as means of communication with third-party suppliers of goods and services.<sup>38</sup> A plurality of legal relationships amassed in a single technological instrument may generate opacity from the consumer’s perspective.<sup>39</sup>

The legislator seeks to avoid this opacity through the category of goods with digital elements, which helps to “untie the knot” by regulating contracts for the supply of the good and their embedded digital elements as bilateral contracts.

The “goods rules solution” has prevailed<sup>40</sup>: both the supply and conformity of goods and their embedded digital elements lie, under certain conditions, solely with the seller, even though digital elements are provided by third parties.

Consumers should not, in principle, need to conclude contracts with third parties to obtain the embedded digital elements.<sup>41</sup> But, in practice, the supply of goods with digital elements is an objectively multi-party transaction, as the supply of embedded digital elements usually implies that consumers must “consent to a licensing agreement with a third party in order to benefit from

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<sup>37</sup> De Franceschi, *op. cit.* (fn. 19), p. 91. Usually, B2C contracts involving goods with digital elements involve consumers purchasing from retailers (e.g., MediaMarkt) goods with digital elements produced and operated by third parties (e.g., Samsung). Consumers will need to conclude contracts for each software/app installed on the device, even if already included in the sales contract.

<sup>38</sup> See 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. For an “early” example, see Busch, C., *Does the Amazon Dash Button Violate EU Consumer Law? Balancing Consumer Protection and Technological Innovation in the Internet of Things*, *EuCML – Journal of European Consumer and Market Law*, vol. 7, no. 2, 2018, pp. 78–80.

<sup>39</sup> It could be difficult for consumers to identify their contractual counterparts, i.e., to easily understand who is bound to provide them access to the embedded digital content or services, and to which digital element. It may also be challenging to identify against whom remedies should be exercised in the event of non-conformity.

<sup>40</sup> Sein, K.; Spindler, G., *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*, *European Review of Contract Law*, vol. 15, no. 3, 2019, p. 257.

<sup>41</sup> This is a “one-stop mechanism” inspired by product liability law, as stated by Rott, *op. cit.* (fn. 17).

the digital content or the digital service”.<sup>42</sup> Contracts with those third parties are usually synallagmatic, involving the provision of the consumer’s personal data for purposes of economic exploitation.

The “goods rules solution” leaves third-party digital suppliers in the background and affects the obligation to supply updates. Sellers supplying embedded digital elements under sales contracts will be personally bound to supply all relevant updates as well.<sup>43</sup>

What stands out is that the legislator has chosen to place the responsibility for updates on individuals who do not normally produce or supply them. If embedded digital elements are sold together with goods under the sales contract, the obligation to supply updates will fall on the seller, even if the digital elements and updates are operated by third parties. This may undermine the consumer’s claim to obtain updates, as it will be easy for the seller to oppose their inability to supply updates on the grounds that only third parties can develop them.

This raises two key questions: is placing these duties on the seller, without considering third parties, consistent with Italian law of obligations? Would it be possible for Member States, via their national contract law, to “expand” this contractual relationship to include third-party suppliers, so that consumers are better protected and have contractual remedies against them as well?

#### **4.1. Consistency with Italian law of contract and obligations**

From the perspective of Italian law of obligations, the obligation to supply updates is one of many obligations in which the debtor’s performance aims at a result that is not, and cannot be, conceived as a result of their own conduct.

Proof can be found in Article 1381 c. c., which regulates the “promise of the obligation or the act of a third party”. Under this provision, debtors may bind themselves by ensuring that third parties take on a particular obligation or perform a specific act. There is no legal obstacle to charging sellers for acts undertaken by third parties – such as updating the embedded digital element – without requiring the third parties to be directly obligated to the consumers.

Further consistency is found in Article 1180 c. c., which does not allow creditors to refuse performance by third parties unless there is an objective interest in the debtor’s personal performance. Therefore, even if sellers are personally

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<sup>42</sup> Recital 15 SGD.

<sup>43</sup> See Sein, K., *The Applicability of the Digital Content Directive and Sales of Goods Directive to Goods with Digital Elements*, *Juridica International*, vol. 30, 2021, pp. 23–31.

bound to supply updates, consumers would not be able to hold the sellers in breach if the updates are provided by third parties, especially if the sellers are unable to supply them directly.<sup>44</sup>

In light of these provisions, the obligation to supply updates appears consistent with the general principles of Italian law of obligations. Moreover, the rules governing the sale of goods with digital elements largely rest on traditional sales rules.

However, this leads to a sense of inadequacy, as jurists expect different situations to be regulated differently.<sup>45</sup>

Although the rules on the sale of goods with digital elements claim to be designed with a focus on the object of contract (i.e., not just any good, but a good with a digital element), they are, in fact, based on models that emphasise the right transferred through the contract. If these rules were truly developed with the object of the contract in mind, remedies against producers and software developers should have been permitted, and the obligation to supply updates should have been attributed both to them and to sellers. Instead, the principle of the relativity of contracts is reinforced, even though it should arguably be overcome in smart goods sales law. Without the cooperation of digital providers, smart goods would be unusable, and no updates could be supplied.

#### 4.2. Foreclosure effect towards contracts between consumers and third-party suppliers

The Italian transposition of the twin directives potentially creates a foreclosure effect against the formation of contracts between consumers and third-party suppliers of embedded digital elements when such elements are to be provided by sellers under sales contracts.

According to Article 135-*novies* c. cons. (implementing Article 3 DCSD), the provisions implementing DCSD do not apply to embedded digital elements supplied to consumers together with goods under sales contracts involving goods with digital elements, regardless of whether the digital elements are supplied by sellers or by third parties. As a result, DCSD remedies are not available to consumers of smart goods for any embedded digital elements provided alongside

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<sup>44</sup> Regarding Articles 1180 and 1381 c. c., see Bianca, C. M., *Diritto civile: Vol. 4: L'obbligazione*, Giuffr , Milano, 2019.

<sup>45</sup> This sense of inadequacy is well-expressed by Twigg-Flesner, *op. cit.* (fn. 31).

goods under a sales contract. If goods with digital elements are supplied under a contract of sale, the DCSD does not apply.

Article 135-*vicies ter c. cons.* (implementing Article 4 DCSD) stipulates that, in matters governed by the DCSD, no other provisions granting consumers a different level of protection than that provided by the directive may apply. Similarly, Article 135-*septies c. cons.* applies the same principle in matters governed by the SGD.

These provisions suggest that consumers may not seek protection or remedies from third-party suppliers of embedded digital elements provided under sales contracts. When digital content is supplied along with goods under a sales contract, consumers may only pursue remedies against sellers, not against third-party suppliers. The remedies available under the sales contract are enforceable exclusively against the sellers; and DCSD remedies do not apply to the relationship between consumers and third-party suppliers of digital elements when those elements are included in the sales contract.

As a result, any effort to establish a contractual relationship between consumers and third-party suppliers, based on an “extension” of the effects of the sales contract, appears to be blocked by these provisions. The impact of the twin directives on Italy’s national law of obligations could be significant: unless third-party suppliers voluntarily commit to providing remedies, a strict interpretation of these provisions may deprive consumers of any remedy against third-party suppliers for updates to embedded content when such content is provided under a sales contract. It may even prevent the formation of contracts between consumers and those third-party suppliers altogether.

### **4.3. Updates by third-party suppliers as stand-alone contracts?**

Given the above, it is necessary to determine whether contracts for the supply of updates to embedded digital elements, concluded between consumers and third parties, can be conceived and what their legal regime would be.

The twin directives allow Member States to apply general contract and obligations law to all matters not governed by the directives themselves. This is also provided for in the Italian implementing provisions. For any unrelated matters, Articles 135-*septies* and 135-*vicies ter c. cons.* refer to Italian Civil Code provisions concerning “the formation, validity, and effectiveness of contracts, including the consequences of contract termination and the right to damages”.

When examining how updates work, it becomes evident that embedded digital element providers typically make updates available to all owners of

goods with digital elements under their management. These updates are communicated to consumers via software notifications, with sellers rarely involved in the process. Once the consumer accepts the update, the supplier is obliged to provide it, and consumers do not pay to obtain updates.

There are no obstacles to considering this transaction as a stand-alone contract. However, if contracts for the supply of updates are deemed to fall under the DCSD, then Article 135-*novies* c. cons. would apply, and consumers would be unable to exercise remedies against third-party update suppliers. This is because the legislature intended to limit consumer remedies to those available against sellers.

The question then arises as to whether these contracts are subject to the provisions implementing the twin directives, or if they fall outside the directives' scope, allowing general contract law to apply.

It is also worth considering whether updates, viewed in isolation, qualify as digital content under the DCSD's scope of application.

While the definition of digital content is broad and includes all data produced and supplied in digital form, the DCSD assumes that such data must form a "functional whole" and be capable of representing digital content or providing digital services. In contrast, the data that make up updates cannot function independently; they only work when connected to the relevant digital element. Without that connection, updates lack functional individuality and cannot operate on their own.

If updates are not regarded as digital content or services, contracts for the supply of updates would not differ from any other contract not falling under the DCSD's scope of application.

Moreover, the DCSD only regulates contracts in which traders supply or undertake to supply digital content or services to consumers who pay or undertake to pay a price as counter-performance<sup>46</sup>, or where consumers provide or undertake to provide a data counter-performance, such as personal data used for economic exploitation.

If consumers are not required to provide a monetary or data counter-performance to receive updates for goods with digital elements from third-party suppliers, there would be no reason not to view these updates as independent contracts governed by general contract law, rather than as ancillary obligations under the sales contracts.

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<sup>46</sup> See Sein; Spindler, *op. cit.* (fn. 40). For open-source digital elements, see Sein, *op. cit.* (fn. 43).



The absence of a counter-performance – whether monetary or in the form of data transfer for economic purposes – would mean the DCSD does not apply. For example, iPhone owners do not pay for iOS updates, and in such cases, the gratuitous nature of updates could allow these contracts to fall outside the DCSD’s scope, as long as they are genuinely free.

In this context, privacy policies and consents should be scrutinised, as the economic exploitation of consumer data could bring the contract within the twin directives’ scope. Where no economic counter-performance (monetary or data) is provided by consumers, a contract governed entirely by national law can be envisaged.

If updates are not classified as digital content under the twin directives, or if there is no counter-performance from consumers, national contract law would apply in full.

In all other cases, due to Article 135-*novies* c. cons., consumers would not have access to the DCSD’s remedies against “third-party” suppliers. Instead, updates would represent third-party fulfilment, and consumers could still claim compensation for any damages resulting from failure to update under non-contractual liability.

## 5. B2B IMPACTS OF THE OBLIGATION TO SUPPLY UPDATES

Following the implementation of the SGD in Italy, B2C sellers of goods with digital elements are now obligated to supply updates to consumers for a certain period after delivery. The structure of this obligation, as clarified in Section 3.2., focuses on the monitoring activities related to embedded digital contents by the sellers.

Although this obligation is confined to consumer law, generally regarded as a sector-specific set of rules, it is possible to extend its relevance into the general law of obligations and contracts through the principle of integrative good faith.

### 5.1. Integrative good faith in Italian contract law

According to Italian scholars and case law, the duty of good faith – understood as loyalty and fairness between parties – can expand the scope of a contract and serve as a source of “supplementary” or “integrative” contractual obligations.<sup>47</sup> Good faith may play an integrative role, as it falls within the legal

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<sup>47</sup> According to Article 1375 c. c., “contracts shall be performed in good faith”. Article 1175 c. c. states that “debtors and creditors must behave following the rules of fairness”.

“integrative” rules of contracts provided for by Article 1374 c. c., specifically within the reference to “law”.<sup>48</sup>

On the assumption that parties are bound to pursue their own interests while safeguarding the utility of the other parties, Italian scholars interpret good faith to mean that parties may be required to fulfil ancillary obligations not explicitly outlined in the contract itself.<sup>49</sup> In compliance with the duty of good faith, parties could be required to undertake supplementary and instrumental obligations of warning, information, solidarity, and protection towards the interests of the other party, within the limits of an appreciable sacrifice of their own interests.<sup>50</sup>

The “contents” of “integrative” good faith cannot be easily established *a priori*, as they depend on circumstances and are usually specified by courts.<sup>51</sup> However, good faith aims to integrate contractual obligations to safeguard parties’ expectations of proper and efficient performance of contracts, including in B2B relationships.<sup>52</sup> Supplementary obligations could therefore be presumed in advance, observing which supplementary conducts belong to normal practices in the type of contract involved, provided that the logic of the contract is not distorted.<sup>53</sup>

## 5.2. Objective vocation of the obligation to supply update

Generally, consumer law rules are restricted to B2C contracts because they are designed to rebalance the position of the parties in favour of the weaker party. Imbalances of power between the parties justify such legislative interventions.<sup>54</sup>

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<sup>48</sup> Article 1374 c. c.: “contracts bind the parties not only to what is expressed therein, but also to all consequences arising therefrom according to law”.

<sup>49</sup> Franzoni, M., *Degli effetti del contratto: Volume II: Artt. 1374-1381*, 3rd edn., Giuffrè, Milano, 2013, p. 214.

<sup>50</sup> See Bianca, C. M., *La nozione di buona fede quale regola di comportamento contrattuale*, *Rivista di diritto civile*, vol. 29, no. 1, 1983., pp. 205–216.

<sup>51</sup> See Febbrajo, T., *Good Faith and Pre-Contractual Liability in Italy: Recent Developments in the Interpretation of Article 1337 of the Italian Civil Code*, *The Italian Law Journal*, vol. 2, no. 2, 2016, pp. 291–312.

<sup>52</sup> According to Italian case law, integrative good faith also largely applies to B2B transactions. See Scrima, A., *Buona fede come fonte di integrazione dello statuto negoziale: Il ruolo del giudice nel governo del contratto*, Corte Suprema di Cassazione, Ufficio del Massimario, Relazione tematica, no. 116, Roma, 10 September 2010, [https://www.cortedicassazione.it/it/rlc\\_dettaglio.page?contentId=RLC1474](https://www.cortedicassazione.it/it/rlc_dettaglio.page?contentId=RLC1474) (25 January 2023).

<sup>53</sup> See D’Adda, A., *Integrazione del contratto*, in: D’Amico, G. (ed.), *Enciclopedia del diritto – I tematici: Contratto*, Giuffrè 2021), pp. 609–635.

<sup>54</sup> See Schulze; Zoll, *op. cit.* (fn. 3), pp. 101–108.

The question arises, therefore, as to whether consumer law rules, whose rationale is not the subjective imbalance between the parties but the objective features of the contract, can apply beyond the subjective boundaries of consumer law. This could be the case with the obligation to supply updates.

In this regard, the rationale of the obligation to supply updates is based on the features of the object of the contract – i.e., goods with digital elements, as pointed out in Section 2.1. – and not on the subjective characteristics of the contract.<sup>55</sup> The duty to supply updates exists due to an imbalance concerning the object of the contract, not the quality of the parties. Buyers of goods with digital elements, even professionals are typically unable to monitor and update them themselves. Thus, the risks mentioned in Section 2.1. can also arise in B2B contracts.

From this perspective, the obligation to supply updates has an “objective” vocation, as its purpose is to rebalance an objective asymmetry that may exist in any contract concerning goods with digital elements, due to the features of these goods.<sup>56</sup>

The objective nature of updates under the SGD suggests that its provisions could influence the interpretation of all contracts involving the supply of goods with digital elements, not just consumer contracts.

The interpretation of all contracts supplying smart goods, whatever their type or the identity of the parties, may be shaped by the provisions implementing the SGD.

### 5.3. Impact on B2B contracts for the supply of smart goods

As discussed in Section 3.2., the obligation to supply updates primarily aims to prevent non-conformity, with much of the activity occurring before the actual supply of the update. The obligation to supply updates can be viewed as an “obligation to prevent the non-conformity” in embedded digital elements by monitoring their proper functioning. Thus, updates can be seen as a duty to protect the interests of the other party.

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<sup>55</sup> This is generally true for the DCSD, as correctly noted by Barceló Compte, R.; Rubio Gimeno, G., *Supply of Goods with Digital Elements: a New Challenge for European Contract Law*, *EuCML – Journal of European Consumer and Market Law*, vol. 11, no. 3, 2022, pp. 81–90.

<sup>56</sup> The general vocation of update provisions can also be deduced from the fact that the SGD abandons any reference to “consumer goods”, favouring a neutral reference to the category of “goods”, within which the new category of “goods with digital elements” is included.

B2B contracts for the supply of smart goods are not specifically regulated in Italian law, and there is no express obligation to supply updates outside the realm of consumer contracts. Since the obligation to supply updates naturally aims to protect the buyer's interests – and because the rationale for the rules concerning the supply of goods with digital elements is objective – this obligation can be linked to the integrative role of good faith.

The obligation to update consists of a duty to protect the buyer's interests by monitoring the proper functioning of the embedded software. If the sale of goods with digital elements in consumer law entails a duty to update the embedded digital element to protect the buyer's interests by anticipating non-conformity, similar requirements should arise in non-B2C relationships with the same content.

In the absence of a specific B2B obligation, integrative good faith (which entails a general duty to protect the other party's interests) should require suppliers of goods with integrated digital elements to monitor the performance of the digital elements they supply and to avoid harming the buyer's interests, even after delivery.

This is certainly the case where sellers of goods with digital elements supply embedded digital elements over a continuous period (e.g., the supply of 3D printers to a company for five years), as the lack of an update would clearly constitute a breach of contract.

The solution is less obvious, but still arguable, when the supplier's commitment is not explicitly projected over time, as in the case of a single act of supplying embedded digital elements (e.g., the sale of computers with business accounting software to a professional accountant).

Nevertheless, in non-B2C transactions, integrative good faith may allow contracts to be supplemented with the duty of suppliers of smart goods to monitor the proper functioning of the digital elements integrated into the goods they sell, and to warn buyers of any risks related to the safety malfunctioning of these goods.

## **6. CONCLUDING REMARKS**

The rules on goods with digital elements and the obligation to supply updates represent a significant turning point for both European and Italian contract law. As seen, these provisions can also have far-reaching relevance for general contract law, particularly in the interpretation of non-consumer contracts.

While these rules aim to address the asymmetries in the B2C market for goods with digital elements, they have not been entirely successful. Although

they offer enhanced protection for consumers, the boundaries of that protection remain uncertain. Moreover, they fall short of fully emancipating consumer law from the traditional bilateral logic of sales law.

Under the previous CSD, it was possible to protect consumers against defects in embedded digital elements only through interpretative methods. However, the new provisions, which grant remedies for non-conformity of embedded digital elements solely against the seller, risk failing to ensure an effective restoration of conformity. This is because the burden of providing updates falls on sellers who, in many cases, lack the technical and economic capacity to develop and supply updates for software produced by third parties.

The centralisation of responsibility for supplying updates on sellers is unrealistic and does not reflect market reality. The twin directives even discourage actions against third-party suppliers of embedded digital elements when these elements are included in the sales contract. By contrast, a more effective consumer protection regime would allow consumers to take action directly against all parties in the commercial chain, similar to the approach found in Portuguese law.<sup>57</sup> In light of this, the rules concerning the seller's obligation to supply updates cannot be considered fully satisfactory.

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<sup>57</sup> See Morais Carvalho, J., *The Implementation of the EU Directives 2019/770 and 2019/771 in Portugal*, *EuCML – Journal of European Consumer and Market Law*, vol. 11, no. 1, 2022, pp. 31–34.

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Sažetak

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**KUPOPRODAJA ROBE S DIGITALNIM ELEMENTIMA:  
OBVEZA PRUŽANJA AŽURIRANJA U TALIJANSKOM PRAVU**

*Ovaj se rad bavi transponiranjem Direktive (EU) 2019/771 (Direktiva o kupoprodaji robe, SGD) u talijansko pravo, s posebnim fokusom na pravila koja se odnose na robu s digitalnim elementima i ažuriranja softvera. Rad istražuje ratio ovih inovativnih odredbi, razlikujući pritom pravne pojmove “ažuriranja” i “nadogradnje”. Nadalje, detaljnije se obrađuje talijanska implementacija odredaba SGD-a o ažuriranjima te pojašnjava pravna priroda obveze pružanja ažuriranja u talijanskom pravu, kao i njezine glavne značajke. Utjecaj tih odredbi na talijansko pravo ispituje se iz B2C perspektive i iz B2B perspektive. U B2C perspektivi, razmatra se potencijalno proširenje pravnog odnosa između prodavatelja i potrošača na dobavljače ažuriranja kao treće strane. U B2B perspektivi, primjenom integrativne funkcije načela savjesnosti i poštenja, ispituje se mogućnost proširenja obveze pružanja ažuriranja na ugovore koji nisu potrošački, a uključuju robu s digitalnim elementima.*

*Ključne riječi: roba s digitalnim elementima, obveza pružanja ažuriranja, zaštita digitalnih potrošača.*

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