

Goods With Digital Elements And The Seller's Updating Obligation

by Piia Kalamees*

Abstract: The updating rules of Directive 2019/771 on certain aspects concerning contracts for the sale of goods are new to most if not all Member States. It is a central issue regarding goods with digital elements as these goods often need to be updated in order to remain conforming to the contract. The article focuses on analysing whether the sellers' updating obligation is well balanced with their respective rights. The article briefly explains the notion of goods with digital elements and thereafter, discusses the subjective and objective requirements for

conformity of updates. Questions of which updates the seller is obliged to ensure are provided and how long the updating obligation lasts are being analysed. The article also focuses on the sellers' liability period and rules on burden of proof. Finally, the seller's right of redress is addressed. The article concludes that while the sellers' obligations towards the consumer are provided for in as much detail as the versatile nature of goods with digital elements allows, this is not true regarding the rules on a seller's right of redress.

Keywords: Updates; Sale of Goods Directive; Goods with digital elements; Right of redress

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Recommended citation: Piia Kalamees, Goods with Digital Elements and the Seller's Updating Obligation, 12 (2021) JIPITEC 131 para 1.

A. Introduction

1 The provisions of the Directive 2019/771 on certain aspects concerning contracts for the sale of goods¹ (SGD) regarding updates are something groundbreaking in the European contract law² and also in

many European countries. The updating obligation is a central issue concerning 'goods with digital elements'.³ The aim of the provisions regarding updates is to keep smart goods in conformity for a certain period of time and not just at the moment of

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1 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. OJ L 136, 28–50.

2 Dirk Staudenmayer in Rainer Schulze, Dirk Staudenmayer

(eds), *EU Digital Law. Article-by-Article Commentary* (Nomos 2020) Art 8 para 2, Dirk Staudenmayer, 'Kauf von Waren mit digitalen Elementen – Die Rechtslinie zum Warenkauf' (2019) NJW 2890; Sören Segger-Piening 'Gewährleistung und Haftung im Internet der Dinge – Zugleich eine Analyse der neuen Warenkaufrichtlinie' in Beyer, Erler, Hartmann, Kramme, Müller, Pertot, Tuna, Wilke (Hrsg.), *Privatrecht 2050 – Blick in die digitale Zukunft* (Nomos 2019) 108.

3 Jorge Morais Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771' (2019) EuCML 194, 199.

the delivery of the goods.⁴ From the SGD, it is clear that the seller of goods with digital elements has the obligation to ensure that the consumer is informed of and supplied with updates.

- 2 The goal of this article is to analyse whether the updating obligation of the seller as set forth in the SGD is well balanced with seller's respective rights. After a brief explanation on which goods should be considered goods with digital elements, the relevant provisions on updates of the SGD are analysed. The article deals with questions of subjective and objective requirements for conformity of updates in order to ascertain which updates the seller should provide, or ensure will be provided, to the consumer, and for how long. Also, the seller's liability period for updating obligation and questions of burden of proof are addressed. As the regulation of updates is also closely tied to the seller's right of redress and the matters related to it, the article also touches upon this. Finally, there are some conclusions offered to the question raised.

B. The sale of goods with digital elements

- 3 The SGD and the Digital Content Directive⁵ (DCD) were passed at the same time. While the former lays down rules related to the sale of goods, the latter deals with aspects concerning contracts for the supply of the digital content and digital services. Although both directives have a different scope of application, there is one area where there is interplay between them: goods with digital elements. The delineation between these two directives is defined by Article 3(3) of the SGD and Article 3(4) of the DCD.
- 4 Pursuant to Art 2(5b) of the SGD, goods with digital elements are tangible movable items that incorporate or are inter-connected with digital content or digital service in such a way that the absence of the digital content or the digital service would prevent the goods from performing their functions. The SGD applies to the sale of these goods if the digital content or the digital services are provided with the goods under the sales contract (art 3(3) SGD).⁶ If a digital service is supplied but the

absence of that content or services does not prevent goods from performing their functions⁷ or the digital content is supplied separately from the goods, the DCD is applicable instead of the SGD. If there is doubt about which of the two directives is applicable, then pursuant to Article 3(4) of the DCD and 3(3) of the SGD, the digital content or the digital service shall be presumed to be covered by the sales contract.

- 5 Therefore, the alternative criteria that need to be met in order for goods to be qualified as goods with digital elements are the following: 1) the digital content must be incorporated in the goods, or 2) the goods must be inter-connected with digital content or a digital service. It is quite clear what incorporated digital content means – broadly speaking, it is a software that is integrated into the goods.⁸ The question of what constitutes goods that are inter-connected with a digital content or a digital service is complicated. Some explanation is offered in recital 14 of the SGD. According to that recital, this could be, for instance, the continuous supply of traffic data in a navigation system or the continuous supply of individually adapted training plans in the case of a smart watch.
- 6 Determining whether an interconnected digital service forms a part of the smart goods is important, among other reasons, for determining the seller's liability for defects of such services under the SGD. The seller is liable if a) the digital service is inter-connected with the goods in such a way that the absence of that digital service would prevent the goods from performing their functions (Article 2(5) (b) SGD); and b) the digital service is provided with the goods under the sales contract (Article 3(3) SGD). Hence, the functions of the goods need to meet the criteria that are determined in the contract or meet the objective conformity criteria set forth in Article 7(1) of the SGD. Additionally, the digital content and the tangible goods need to be sold together.⁹ The condition of Article 3(3) of the SGD that the digital content or digital services need to be provided with the goods under the contract is ambiguous. A clear

Services – Scope of Application and Trader's Obligation to Supply – Part 1' (2019) 15 ERCL 271; Jasmin Kühner and Carlo Piltz, 'Der Regelungsmechanismus im Referentenentwurf des BMJV v. 3.11.2020 zur Umsetzung der Richtlinie 2019/770/EU' (2021) CR 16.

4 See same opinion on the DCD regulation Staudenmayer in Schulze/Staudenmayer (n 2) Art 8 para 112.

5 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. OJEU L 136/1.

6 Karin Sein and Gerald Spindler, 'The new Directive on Contracts for the Supply of Digital Content and Digital

7 It is noteworthy that the the SGD does not require that the "main functions" are affected. More on that see Karin Sein "Goods with digital elements" and the Interplay with Directive 2019/771 on the Sale of Goods' <<https://ssrn.com/abstract=3600137>> accessed 23 February 2021.

8 Sein (n 7) 3.

9 Sein (n 7) 5.

occasion is when the parties to the contract have agreed to provide the digital content or services, but this is not the only case where the SGD is applicable. It is also possible that the digital content or services objectively form part of the contract (Article 7 of the SGD). Whether the supplier of the digital content or services is the seller or a third party, makes no difference – the seller is liable for the sold goods (including its digital part).¹⁰ Recital 14 of the SGD additionally explains that there is no difference if the digital content that fulfils a contractually agreed function is pre-installed or added to the goods later. E.g. if a consumer has bought a fitness tracker and after he has concluded the sales contract needs to install an application to his smart phone for using all the functionalities of the tracker (and agree also to the end user licensing agreement of the producer of the tracker), the application is also considered being a part of the sold smart goods. On the other hand, the SGD does not apply, for example, when a consumer is buying a laptop and software separately,¹¹ installing separately bought application on their iPad well after they have bought the device, or when the consumer has bought a car with built-in hardware for a navigation system but buys the system (e.g. maps) later from a third person.¹²

C. Updating obligation as part of subjective conformity requirements

7 Pursuant to Article 6 d) of the SGD, in order to conform with the sales contract, the goods shall, in particular, where applicable, be supplied with updates as stipulated by the sales contract. According to recital 28 of the SGD, the sellers may agree with consumers to provide updates for goods with digital elements. Such updates can improve and enhance the digital content or digital service elements of the goods, extend their functionalities, adapt them to technical developments, protect them against new security threats, or serve other purposes. Consequently, sellers may promise to deliver updates that should be considered upgrades, as their purpose is not just keeping the goods functioning according to the contract, but to extend considerably

their initial functionalities.¹³ Adding just slightly new features should not be considered an upgrade,¹⁴ but it is an update, just not a necessary one, e.g. change of the graphics of an application linked to the fitness tracker. The failure to supply these updates, if agreed upon in the contract, constitutes a non-conformity of the goods. The parties to a sales contract are free to agree on a wide variety of updates, and if the seller does not deliver the updates agreed upon, the goods are non-conforming to the contract, and the seller is in breach of his contractual duties.

8 On some occasions the seller might not want to agree on such updating obligations, because they are not in charge of additional updates/upgrades or even able to provide them. The updates for goods with digital elements are often provided by third parties who are developing (or have commissioned someone to develop) the digital part of the goods (apps, embedded digital content, security updates etc). However, agreements regarding updating obligations can also result from the circumstances of entering into the contract, the information on the sales object or its features presented by the seller to the buyer in the course of preparing the sales contract, and the seller's unilateral statements concerning the features of the goods.¹⁵ For example, if the seller is selling a fitness tracker and on its packaging there is a promise that the software of the tracker will be updated for three years in respect of latest sleep tracking possibilities, the seller is obliged to deliver the promised updates (upgrades).

9 One would expect that the larger sellers of goods with digital elements have regulated this matter in their general terms as the question of updating obligation is very topical in their line of business. By looking at some of such sellers it appears that these agreements are not common. For instance, one of the largest sellers, Amazon, does not regulate this matter in their Conditions of Sale,¹⁶ and neither does Germany's leading electronics seller MediaMarkt.¹⁷

10 Sein (n 7) 2.

11 Ivo Bach 'Neue Richtlinien zum Verbrauchsgüterkauf und zu Verbraucherverträgen über digitale Inhalte' (2019) NJW 1706.

12 See for Estonia Piia Kalamees and Karin Sein, 'Connected consumer goods: who is liable for defects in the ancillary digital service?' (2019) EuCML 14.

13 See also Christina Möllnitz 'Änderungsbefugnis des Unternehmers bei digitalen Produkten. Auslegung und Folgen des § 327f BGB-RefE' (2021) MMR 117.

14 Karin Sein and Gerald Spindler. 'The new Directive on Contracts for Supply of Digital Content and Digital Services – Conformity Criteria, Remedies and Modifications – Part 2' (2019) 15 ERCL 370.

15 Carvalho (n 3) 198.

16 Amazon.de Conditions of Sale <https://www.amazon.de/-/en/gp/help/customer/display.html/ref=hp_left_v4_sib?ie=UTF8&nodeId=201909000#> accessed 23 February 2021.

17 <<https://www.mediamarkt.de/de/shop/AGB.html>>

One would suppose that at least the car dealers selling different models of Volkswagen and Audi would regulate this matter in detail. However, a quick search among such German and Estonian car dealers showed that it is not the case.¹⁸ The examples brought here are chosen because these two industries should have the most interest in regulating the matter in their terms and conditions. These are just few examples to illustrate the situation and a more thorough research of this matter might show that there are sellers who have regulated this matter in the contracts. Yet, the result of this quick search is still surprising. It seems that the updating obligation and its regulation in contracts with consumers is still something rather new for the sellers. This situation will undoubtedly change after the provisions of the SGD have been transposed to the national laws of the Member States.

D. Updating obligation as a part of objective conformity requirements

I. Which updates is the seller obliged to provide?

- 10 Pursuant to Article 7(3) of the SGD, in the case of goods with digital elements, the seller shall ensure that the consumer is informed of and supplied with the updates, including security updates, that are necessary to keep those goods in conformity, for the period of time (a) that the consumer may reasonably expect given the type and purpose of the goods and digital elements, and taking into account the circumstances and nature of the contract, where the sales contract provides for a single act of supply of the digital content or digital service; or (b) indicated in Article 10(2) or (5), as applicable, where the sales contract provides for the continuous supply of a digital content or a digital service over a period of time.
- 11 It has to be noted, however, that according to the wording of Article 7(3) of the SGD, the sellers are not necessarily obliged to provide the updates themselves, but they have to ensure that the consumer

is informed of them and that the updates are being supplied. This can also be done by a third party,¹⁹ which is often the case in practice. This creates uncertainty for the sellers as they normally are not developing the updates themselves and might not have much bargaining power to guarantee that the consumer will receive the necessary updates from the third party. One could imagine, for instance, a local electronics shop selling a wide variety of smart goods (from electrical toothbrushes to smart refrigerators and TVs). The seller in this example might not even have a direct contact with the producer of the goods that they sell and is therefore just forced to rely on the developer of the updates to fulfil their obligations to the consumer. They will be liable *viz-a-viz* the consumer, pursuant to Article 7(3) of the SGD, despite their lack of control over providing the updates. It does make the situation uncontrollable for the seller in some cases; however, this solution should not be something entirely new to the sellers. For example, small local electronics shops have probably sold ordinary vacuum cleaners for years. The shops normally do not repair the vacuum cleaners themselves and have some agreements with third parties or producers of vacuum cleaners to solve consumer complaints about the lack of conformity. The sellers will undoubtedly have similar agreements with relevant third parties with respect to the updating obligation. What is new to the sellers is the nature of an updating obligation as this needs to be fulfilled continuously maybe through the years. This is more burdensome to the sellers than the repairing obligation known to them until now, as the traditional goods (without digital content) might have never needed repairing, but smart goods definitely need constant (security) updates. However, the goal of the SGD is to provide consumers with a high level of protection (Article 1 of the SGD) and with regard to goods with digital elements the updating obligation is of crucial importance. In order to balance the additional extent of the sellers' obligation the SGD foresees right of redress pursuant to Article 18.

- 12 Article 7(3) of the SGD mainly raises two questions: which updates should be provided and for how long? It is apparent from Article 7(3) of the SGD that the seller is obliged to provide only updates that are necessary to keep the goods in conformity.²⁰

accessed 23 February 2021.

18 For Germany see eg <https://www.held-stroehle.de/images/pdf/AGB_Neuwagenverkaufsbedingungen_2016.pdf, <https://www.spindler-gruppe.de/agb/>, https://www.autohaus-warncke.de/wp-content/uploads/2019/03/VW_e-Fahrzeuge-Neuwagen-Verkaufsbedingen_Stand_12-2016.pdf> accessed 23 February 2021. Estonian car dealers do not tend to show their general terms and conditions on their websites at all.

19 Christian Twigg-Flesner 'Conformity of Goods and Digital Content/Digital Services' in Esther Arroyo Amayuelas, Sergio Camara Lapuente, *El Derecho Privado En El Nuevo Paradigma Digital* (Colegio Notarial de Cataluna' Marcial Pons 2020) 69. For similar obligation in the DCD see Staudenmayer in Schulze/Staudenmayer (n 2) Art 8 para 126.

20 Also, recital 30 of the SGD supports this view. Cristiane Wendehorst 'Aktualisierungen und. Andere digitale Dauerleistungen' in Johannes Stabentheiner, Cristiane

The seller does not have the obligation to provide consumer with updates that improve the goods with digital elements²¹ or that are not necessary for keeping the goods in conformity.²² The seller is obliged to ensure the supply of such updates or upgrades only if the parties have agreed so in the contract. The seller is obliged by the SGD to make sure that the goods will keep functioning according to the contract even if the digital environment around them changes, but not to improve them.²³ This view is also supported by recital 30 of the SGD which states that the seller's obligations should be limited to the updates which are necessary for such goods to maintain their conformity with the objective and subjective requirements for conformity laid down under the SGD. The European legislator has especially stressed the importance of security updates (Article 7(3) of the SGD). Therefore, the seller of a fitness tracker is obliged to inform and supply the consumer with updates that keep the application functioning according to the contract and the objective requirements of the SGD for conformity. The seller does not have the obligation to improve the digital elements tied to the goods in any way, e.g. adding functionalities to the application.²⁴ The key issue is the extent of modifications made to the digital part of the goods. If changes are fundamental (functions extended considerably), then they cannot be considered to be updates but should be considered upgrades.²⁵ The seller does not have the obligation to provide such upgrades to the consumer unless agreed otherwise. To determine whether there is an update or an upgrade, the contents of the update have to be evaluated. If the update is necessary for keeping the goods functioning according to the contract, it is an update. This is the case for example where an update to a fitness tracker is provided in order to eliminate some security threats. However, if there is an update that adds some sleep analysis methodology to the fitness tracker's app this should

be considered an upgrade if such functionality was not agreed upon in the sales contract.

II. How long must the seller provide updates?

- 13 To determine for how long the seller should ensure that the consumer is provided with updates, it is important to differentiate between one-off contracts and contracts for the continuous supply of digital content or a digital service. The rules on updating obligation's durations are different for these two categories.²⁶ Regrettably, distinguishing between these two categories can be difficult.²⁷ Buying a photo frame for displaying photos from an SD-card is undoubtedly a one-off contract. Buying an e-book reader with the condition that 10 books per month are available to the consumer for three years free of charge should be considered a continuous supply of the digital content. Having in mind the great variety of goods with digital content, there might also exist numerous cases where the qualification is not as easy as in the previous examples.
- 14 If the continuous supply of digital content or a digital service is provided for in the contract, Article 7(3)(b) of the SGD refers to the time limits set forth in Article 10(2) and (5). Hence, if the sales contract provides for a continuous supply of digital content or digital services, the seller has to ensure that the updates are delivered to the consumer within two years from the time when the goods with digital elements were delivered. Where the parties of the contract have agreed on a period longer than two years for supplying the digital content or digital services, the seller has an obligation to deliver updates according to the contract.
- 15 The law is less clear in respect to the duration of the seller's updating obligation when a contract for one-off supply of digital content or digital service (Article 7(3)(a) of the SGD) is at hand.²⁸ Pursuant to this article, the seller has an updating obligation for a period of time that the consumer may reasonably

Wendehorst, Brigitta Zöchling-Jud (Hrgs), *Das neue europäische Gewährleistungsrecht: zu den Richtlinien (EU) 2019/771 über den Warenkauf sowie (EU) 2019/770 über digitale Inhalte und digitale Dienstleistungen* (Manz 2019) 122.

21 For similar regulation on the digital content and the DCD see Sein/Spindler (n 14) 370 and Staudenmayer in Schulze/Staudenmayer (n 2) Art 8 para 114; Wendehorst (n 20) 122.

22 Wendehorst (n 20) 122.

23 Staudenmayer (n 2) 2890.

24 Staudenmayer (n 2) 2890; Klaus Tonner, 'Die EU-Warenkauf-Richtlinie: auf dem Wege zur Regelung langlebiger Waren mit digitalen Elementen' (2019) VuR 368.

25 See on the same topic about DCD Sein/Spindler (n 14) 370.

26 Article 7(3) of the SGD.

27 Simon Geiregat and Reinhard Steennot 'DCD Proposal: Scope of Application and Liability for a Lack of Conformity' in Ignace Claeys and Evelyne Terryn (eds) *Digital Content and Distance Sales. New Developments at EU Level* (Intersentia 2017) 161; Thomas Riehm and Metawi Adrian Abold 'Mängelgewährleistungspflichten des Anbieters digitaler Inhalte' (2018) ZUM 83.

28 For the same problem regarding the regulation of the DCD see Sein/Spindler (n 14) 386.

expect. To determine this period of time, the type and purpose of the goods and the digital elements need to be taken into account, as well as the circumstances and the nature of the contract.

- 16 There has been some criticism about the rule that makes the seller's liability not dependent on a precise timeframe²⁹ as it does not give certainty to the parties of the contract. The consumer's reasonable expectations determine whether the seller must provide updates in certain situations. A concrete time limit would likely reduce arguments among sellers and consumers regarding the duration of the seller's updating obligations. At the same time, it is understandably difficult to determine a time limit that would suit all sales contracts of smart goods. This difficulty is the reason behind the current rule of the SGD.³⁰
- 17 An example of goods that require a single act of supply of digital content would be a simple digital photo frame that can be used by just plugging in a USB-stick or using an SD card. The photo frame has embedded digital content, which is necessary for it to function, but it does not need any outside support for proper functioning. In order to determine whether the seller is obliged to provide updates for such goods, it must be considered that it is a photo frame (type of the goods), that this is meant to display photos from a USB-stick or an SD card, and the circumstances and nature of the contract. The latter two criteria might be that the consumer bought the photo frame from an online shop on standard terms, paying 15 euros for the photo frame. From this case, it could be concluded that as the frame should not really need updates for functioning and the consumer should probably not expect to receive any updates. On the other hand, when the consumer buys some expensive device that they are looking forward to using for a long period of time, such as a navigation device, their legitimate expectation would be that the navigation software will be up to date for more than just a few weeks.³¹ In this case, it might even be expected that the device be updated during two years. With respect to some other goods, like cars, the period could even be longer. These examples illustrate how the SGD is regulating a very wide variety of smart goods, and that it is truly difficult to delimit the duration for the seller's updating obligation.
- 18 One has to keep in mind that these examples are drastic – some are really expensive goods that are meant to be used for a long period of time and, the others are goods that could be considered cheap and do not really need to be updated. There is a wide variety of goods between these two extremes. What if the consumer buys a fitness tracker for 200 euros? How long should the seller's updating obligation last?
- 19 Pursuant to recital 31 of the SGD, the consumer would normally expect to receive updates for at least as long as the seller is liable for the lack of conformity. It has been stated that reading Article 7(3) together with Article 10(1) of the SGD suggests that the consumer's reasonable expectations could not exceed two years in case of one-off contracts.³² However, if only Article 7(3) of the SGD is looked at, it is obvious that the consumer's reasonable expectations for updating might last much longer than two years, e.g. in the case of heating devices the reasonable expectation could be for ten years.³³ This could also be the same or even longer for smart cars, e.g. 12 years, as this seems to be an average lifespan of a car nowadays.³⁴ This could be the case especially regarding security updates. It is true that the consumer might have a reasonable expectation to receive at least security updates also, even after the liability period of the seller.³⁵
- 20 At the time of writing this article, it is quite impossible to anticipate the exact time frame for updating some smart goods. As noted before, the solution of the SGD is probably not the best one, but is justified, as contracts for the sale of goods that provide for a single act of supply of digital content or a digital service can be concluded for the sale of a wide variety of goods. An alternative approach that would raise the level of legal certainty would be to foresee a concrete time frame for the updating obligation for one-off contracts. The disadvantage of this solution is, however, that the consumer does often have a reasonable expectation to receive at least security updates for a longer period. If there would be a concrete time-limit set (e.g. 2 years for the updating obligation), then it would prevent consumers from claiming (security) updates for

29 Staudenmayer (n 2) 2891, regarding the DCD see Staudenmayer in Schulze/Staudenmayer (n 2) Art 8 para 139.

30 Staudenmayer (n 2) 2891.

31 Christiane Wendehorst 'Sale of goods and supply of digital content – two worlds apart?' <https://www.europarl.europa.eu/cmsdata/98774/pe%20556%20928%20EN_final.pdf> accessed 23 February 2021 14; Carvalho (n 3) 199.

32 Twigg-Flesner (n 19) 70, regarding the DCD the two-year time frame has, on the contrary, been called a minimum time for updating obligation Kühner/Piltz (n 6) 34. For more on seller's liability see p 6 of this article.

33 Wendehorst (n 20) 130.

34 How Today's Cars Are Built to Last. <<https://www.aarp.org/auto/trends-lifestyle/info-2018/how-long-do-cars-last.html>> accessed 23 February 2021.

35 Staudenmayer (n 2) 2891.

goods with digital elements that have a longer life span and for which it is reasonable to expect the updates to be provided for a longer period of time. A longer time span would be unfair towards the sellers of such goods. The photo frame, for example, does not need updating and as such, obliging the seller to update goods like this for two years would not be advisable. Therefore, the solution of the SGD currently used must be considered as good as possible. It does leave some uncertainty to both parties to the contract but at the same time it is flexible enough to fit the wide variety of smart goods sold on the market.

E. The consumer's obligation to install the updates?

- 21 Clearly, the seller has an obligation to provide updates to smart goods to remain according to the subjective and objective requirements. Pursuant to recital 30 of the SGD, there is no obligation for the consumer to install such updates.³⁶ However, article 7(4) of the SGD states that there are consequences for failing to install updates– the seller will not be liable for any lack of conformity resulting solely from the lack of the relevant update. For the seller to be freed from the liability, two additional conditions need to be met. First, the seller must have informed the consumer about the availability of the update and the consequences of the failure to install it. Secondly, the failure of the consumer to install (including incorrect installation) was not due to the shortcomings in the installation instructions. Therefore, the consumer does not have a direct obligation to install the updates,³⁷ but if he fails to install the update, and this failure to install is not caused by the update itself or its installation instructions, the seller is no longer liable for the non-conformity of the goods.
- 22 For the seller not to be liable for the non-conformity of smart goods, the non-conformity has to result solely from the lack of a particular update. If there are any other reasons for the non-conformity of the goods, the seller might still be liable. This might be the case, for example, where the consumer has not installed the required update, but the goods have partially become non-conforming because of some bug in their hardware.
- 23 Article 7(4) of the SGD is quite understandable from the consumer's point of view. As the digital environment is often changing rapidly, it might be that a certain update makes the consumer lose

some required functionalities on his device. It may be something as simple as being able to play their favourite game on their computer or to use some apps' functionalities on their smartphone. The current provisions leave the consumer an opportunity not to accept and install such updates that would bring about detrimental consequences to him.

- 24 The quite clear regulation on the consumer's choice regarding the installation of the updates might become complicated in situations where the update is necessary for keeping the goods in conformity with the contract but needs actions from the consumer which the latter is not willing to take. This would be the case if there is an operation system update, while in order to install it, the consumer needs to delete some of the applications on their phone, as otherwise there would not be enough disk space. If in this situation the consumer chooses not to install the update and later there is a security violation, it is questionable whether the consumer could revert to remedies against the seller. The answer should still be that if the seller has informed the consumer of the availability of the update and the possible consequences of not installing it, and the security breach is caused by the fact that the update was not installed by the consumer, the seller should not be held liable for the lack of conformity of the goods. Otherwise, it would be left solely to the discretion of consumers whether the seller is liable or not.
- 25 The SGD does not provide sellers with a right to modify the digital content of smart goods. By contrast, Article 19 of the DCD includes such a right, stating that in case of continuous supply of digital content or services, the trader may modify the digital content or digital service beyond what is necessary to maintain the digital content or digital service in conformity with the contract. Article 19(2) of the DCD also grants the consumer a right to terminate the contract under certain conditions if the modifications have negative impact on consumers interests. Suggestions have been made that the SGD should include a similar article in order to grant the seller a right to modifications.³⁸ It is quite difficult to see why this would be necessary. Foremost, it would bring about the necessity to differentiate between the physical and the digital part of the goods. It would not be advisable to allow sellers to modify the physical part, e.g. to paint a car brought to maintenance in a different colour. Terminating the contract in case of smart goods would just bring about too many difficulties, e.g. taking back the physical goods, reselling them if possible etc, for the seller and would often not grant the consumer a higher level of protection.

³⁶ Tonner (n 24) 368.

³⁷ Tonner (n 24) 368. For similar regulation on the DCD see Sein/Spindler (n 14) 370.

³⁸ Staudenmayer (n 2) 2891; Axel Metzger 'Verträge über digitale Inhalte und digitale Dienstleistungen' (2019) JZ 578.

F. Liability rules regarding updates

- 26 According to Article 10(2) of the SGD, in the case of contracts for continuous supply of the digital content or digital service over a period, the seller is liable for any lack of conformity that becomes apparent within two years of when the goods with digital elements were delivered. If a contract provides for continuous supply of the digital content or digital service for more than two years, the seller is liable for the time he is under an obligation to supply the digital content or digital services. The seller is therefore liable for the time they must supply the digital content or digital services.³⁹
- 27 While the rules on liability for updates for contracts of continuous supply of the digital content (Article 10(2) of the SGD) are well explained and take into account the nature of such contracts,⁴⁰ the situation for one-off contracts is not as clear-cut as it might appear at first sight. The sale of the navigation system discussed in chapter D.II. is a one-off contract, but the device needs to be updated in order for it to fulfil its functions. According to Article 10(1), the seller of such a device should be liable to the consumer during two years. The second sentence of that article adds that this time-limit is also applicable to goods with digital elements, but without prejudice to Article 7(3) of the SGD. Recital 31 of the SGD states that the seller is liable for the lack of conformity that exists at the time of delivery, and that they are liable for the defects for two years. Further down the recital, it is stated, however, that a consumer would normally expect to receive updates for at least as long as the period during which the seller is liable for a lack of conformity. In some cases, especially with regard to security updates, the consumer's reasonable expectations could extend beyond that period.
- 28 This leaves open the question of whether the general two-year period should be considered from the time of the delivery of the smart goods or from the time of providing a certain update. If an update is provided right before the end of the two-year liability period and causes the smart goods to be non-conforming to the contract in month 26, should the liability period start all over for this last update? This should be the case, pursuant to the second sentence of Article 10(1) that refers to Article 7(3) of the SGD, which in turn states that, "without prejudice to this article, the two-year liability period is applicable also to goods with digital elements." It is true that the updating obligation is not a separate obligation of the seller and its purpose is to ensure that the smart goods remain in conformity for the time reasonably expected by

the consumer.⁴¹ At the same time, a rule that would limit sellers' liability in case of one-off contracts only to two years starting from the delivery of the physical part of the goods, would make the contents of Article 7(3) meaningless, as there are smart goods such as smart cars which consumers may reasonably expect to receive updates for a much longer period of time.

- 29 As an example, one can imagine that the consumer has bought some smart goods that they can reasonably expect to be updated during 5 years. The seller stops providing updates 2.5 years after the delivery of the smart goods or a faulty update is provided to the consumer 2.6 years after the delivery. If the seller's liability was limited to two years, this would mean that the consumer could only invoke remedies against the seller during this time. The consumer would have reasonable expectations to receive updates, but no options to enforce their respective rights.⁴² Therefore, the second phrase of Article 10(1) should be understood as laying down that the seller is liable for two years starting from the time when the update was provided to the consumer. In the case of goods with a longer lifespan, this would imply that the seller could be liable for ten or more years.⁴³
- 30 This is also supported by recital 37, which states that the relevant time for establishing conformity of a digital content or a digital service element should not be a specific moment in time but rather a period of time, starting from the time of the delivery. That period of time should be equal to the period during which the seller is liable for the lack of conformity. Despite the somewhat ambiguous wording of Article 10(1) of the SGD, the seller's liability, as a rule, lasts if the consumer can reasonably expect to receive necessary updates plus two years.
- 31 At the same time, Article 10(3) of the SGD leaves open an opportunity for Member States to maintain or introduce time limits longer than those referred to in paragraphs B. and C. of this article. For this reason, Member States may, for instance, determine some longer time frame in their national laws for the updating obligation liability of one-off contracts. This could be three or four years or whatever time limit a member state finds appropriate. Although it might raise the level of protection for the consumers, it will not create a situation where the consumer's interests would be protected in all situations. The consumer

39 Wendehorst (n 20) 131.

40 Wendehorst (n 20) 131.

41 See comments on the DCD for a similar matter Staudenmayer in Schulze/Staudenmayer (n 2) Art 8 para 113.

42 Twigg-Flesner (n 19) 70. For the similar situation regarding the DCD see Sein/Spindler (n 14) 386.

43 Wendehorst (n 20) 130.

could have a legitimate interest to receive security updates or some other updates for a period that is even longer than that which had been provided for in national law. However, a longer liability period for the seller undoubtedly raises the level of consumer protection as the consumer has an opportunity to exercise his rights for a longer time.

G. The burden of proof

32 The burden of proof is regulated in Article 11 of the SGD. The general rule is that any lack of conformity that becomes apparent within one year from the delivery of the goods is presumed to have existed at the time of delivery. There are some exceptions to this rule (e.g. Article 11(1) of the SGD). Hence, the consumer has the obligation to prove that there is a lack of conformity in the one-year time frame following the supply. If they are able to do that, the seller is obliged to prove that this lack of conformity has emerged after the delivery of the goods. This rule is already well-known from the Consumer Sales Directive⁴⁴ and should generally be suitable in cases where the smart goods with a digital content are sold under the one-off contract. It has to be noted, however, that the SGD does not regulate the meaning of “delivery” as this definition is left to national laws.⁴⁵ Nonetheless, Recital 39 of the SGD explains that goods with digital elements should be deemed to have been delivered when both the physical and the digital component for one-off contracts has been delivered. Regarding the contracts that provide for the continuous supply of a digital component, they are deemed to be delivered when the supply of the digital content or the digital service over a period of time has begun.

33 This rule on the burden of proof creates rather confusing situations regarding updates. Who should prove what if a consumer has bought a fitness tracker and is reasonably expecting to receive updates for at least two years, when half a year after receiving the tracker, the provided updates are faulty? In this case, the consumer must prove that there exists a lack of conformity of the goods.⁴⁶ Next, it is incumbent upon the seller to prove that the lack of conformity

did not exist at the time of delivery of the goods to be freed from their liability. This situation could be considered somewhat absurd, as generally the updates for goods are developed and provided well after the sale. So, if the lack of conformity becomes apparent within one year after the delivery of the goods, the presumption of its existence applies. However, if the lack of conformity becomes apparent one year after the delivery of the goods but less than a year from the update, the question remains whether the presumption of lack of conformity at the time of delivery applies. On either occasion, the seller might be able to prove that the lack of conformity did not exist at the time of the delivery of the goods, as the update was designed and installed much later. Regarding a similar provision of the DCD (Article 12(2)), a suggestion has been made that it should be presumed that the lack of conformity is a result of at least one update.⁴⁷ In light of the text of Article 12(2) of the DCD, this suggestion is reasonable as pursuant to this article the burden of proof is on the trader for a lack of conformity that became apparent within one year from the time when the digital content or digital service was supplied. As updates are digital content in the meaning of Article 2(1) of the DCD, the text of the DCD allows such a conclusion. The situation is different regarding Article 11(1) of the SGD though, as pursuant to this article, the burden of proof is incumbent upon the seller for one year from delivery of the goods. “Goods” are defined in Article 2(5) of the SGD as tangible movable items and tangible movable items that incorporate or are inter-connected with digital content or digital service. Therefore, an analogous conclusion with the DCD cannot be made regarding the burden of proof in Article 11(1) of the SGD. This means that if a year from delivery of the smart goods has passed, the burden of proof is on the consumer.⁴⁸

34 Member States also have the opportunity to extend this period up to two years (Article 11(2) of the SGD). This rule makes a uniform approach to the burden of proof between the Member States impossible.⁴⁹

35 Article 11(3) of the SGD includes an important specification relating to the sale of smart goods. According to this article, in case the smart goods are sold pursuant to a contract that provides

44 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. OJ L 171, 12–16. Fryderyk Zoll in Schulze/Staudenmayer. *EU Digital Law. Article-by-Article Commentary* (Nomos 2020) Art 12 para 6.

45 See recital 38 of the SGD.

46 See further for the same question regarding the DCD Staudenmayer in Schulze/Staudenmayer (n 2) Art 8 para 113.

47 Zoll in Schulze/Staudenmayer (n 44) Art 12 para 31.

48 Brigitta Zöchling-Jud 'Beweislast und Verjährung im neuen europäischen Gewährleistungsrecht' in Johannes Stabentheiner, Christiane Wendehorst, Brigitta Zöchling-Jud (Hrsgs) *Das neue europäische Gewährleistungsrecht: zu den Richtlinien (EU) 2019/771 über den Warenkauf sowie (EU) 2019/770 über digitale Inhalte und digitale Dienstleistungen* (Manz 2019) 205, Wendehorst (n 20) 129.

49 See also Bach (n 11) 1708.

for the continuous supply of digital content or a digital service over the period of time referred to in Article 10(2), the burden of proof is incumbent upon the seller for that referred period. This should be understood so that the seller has the obligation to prove that the non-conformity of the goods that becomes apparent in two years was not caused by their actions which includes any provided updates. It must be noted though that if the update was not necessary to keep the goods in conformity and were not agreed upon by the parties, these burden of proof rules do not apply. Whereas the second phase of Article 10(1) only refers to Article 7(3), which solely regulates matters related to necessary updates (i.e. updates that are part of objective requirements for conformity). Therefore, in the case of updates that are not necessary for the smart goods to comply with the objective criteria listed in Article 7(3) of the SGD, the consumer does not have any opportunity to use remedies provided by the SGD.

- 36 If the seller has agreed to continuously supply digital content or a digital service for more than two years, the seller bears the burden of proof (including for updates) over that time. Returning to the example of a photo frame described above but, this time it is one that stores photos in a cloud and displays them from there. The seller has promised that the cloud service is available to the consumer for three years. Thus, the frame needs an almost constant connection to the Internet and the continuous service for storing the pictures. If such a frame receives an update 2.5 years after the conclusion of the sales contract that disables some of its functions, the seller has to prove that the lack of conformity did not appear within the three years agreed upon. As long as the seller is obliged to update the goods under the contract (in case of continuous supply) he also bears the burden of proof for fulfilling this obligation.⁵⁰ This situation is quite understandable and should protect the consumer's interests rather sufficiently.

H. The seller's right to redress

- 37 As the seller is obliged to ensure that the consumer receives necessary updates, but the seller is often not the developer of such updates and not in control of providing them to the consumer, Article 18 of the SGD provides for rules on the right of redress that should balance seller's obligations and rights. This article grants sellers the right to use remedies against parties in previous links of the chain of transaction. At the same time, the article remains silent on how (e.g. against whom, what actions, and what conditions) this right should be regulated in the Member state's laws.

⁵⁰ Wendehorst (n 20) 129.

- 38 Keeping in mind the purpose of Article 18 of the SGD, the right of redress should provide sellers with good opportunities of making claims against persons liable for defects in updates. Considering the contents of Article 18 of the SGD, this is a goal that could remain unachieved. The right of redress is regulated very generally and the Member States have a lot of discretion on how to implement this principle.
- 39 What is certain from the text of Article 18 of the SGD, is that the liability of the seller to the consumer must result from an act of omission, including the failure to provide updates, by a person in the previous links of the chain of transactions. Regarding updates, this means that there must be causation between the actions of a third person (not providing updates or providing faulty updates) and the seller's liability to the consumer. If the lack of conformity is caused by the acts or omissions of the seller himself, they obviously should not have the right of redress against the third party.
- 40 The parties against whom the seller could have a redress claim are the producer of the goods and intermediaries in the chain of transaction. The claim can be made against the party who is liable for the lack of conformity.⁵¹ The wording of Article 18 of the SGD leaves it open whether the seller can pursue remedies directly against the person liable in the chain of contracts or as a redress claim along the chain of contracts. The choice in this regard has been left to the Member States.⁵² When making this choice, Member States have to consider that in case of redress claims along the line of contracts there are many factors that may interrupt the remission of liability in this chain, e.g. insolvency of some person, liability clauses, etc.⁵³ If any of them occurs, the seller is left to bear consequences of some other person's actions. Article 18 of the SGD leaves it also open what should be considered the extent of the claims and what claims the seller could make. Therefore, the Member States have been left with a wide choice for introducing the right of redress into their national laws. It might even be that some Member States do not need to make any alterations to their national

⁵¹ Andreas Geroldinger 'Die Rolle anderer Glieder der Vertriebskette und Regress' in Johannes Stabentheiner, Christiane Wendehorst, Brigitta Zöchling-Jud (Hrsgs) *Das neue europäische Gewährleistungsrecht: zu den Richtlinien (EU) 2019/771 über den Warenkauf sowie (EU) 2019/770 über digitale Inhalte und digitale Dienstleistungen* (Manz 2019) 226.

⁵² See also for the DCD Damjan Možina in Schulze/Staudenmayer (n 59) Art 20 para 25.

⁵³ Bert Keirsilck 'Right of Redress' in Ignace Claeys, Evelyne Terryn (eds) *Digital Content & Distance Sales. New Developments at EU Level* (Intersentia 2017) 273.

laws to implement Article 18 of the SGD, as they might already fulfil the conditions set forth in this article.⁵⁴

41 Recital 63 of the SGD further explains that the SGD should not affect the principle of the freedom of contract between the seller and other parties in the chain of transactions. Consequently, the right of redress can also be contractually excluded in contracts between different parties in the chain of transactions.⁵⁵ If the right of redress is contractually excluded in some or all links in the transaction chain, it would strongly influence the balance of sellers' obligations and rights. The seller would be left to bear the economical consequences of a faulty update that they did not have any connection to. This could often be the case if the seller does not have the same bargaining power as the previous party in the chain of transactions or the producer. Therefore, Member States, when transposing this principle into their national laws, should thoroughly consider how to limit freedom of contract as otherwise it might have undesired effects on sales of smart goods to the consumers. For example, this kind of agreements could be considered invalid if included in standard terms and conditions or limited by rules on validity of such general terms.⁵⁶

42 It is true that the SGD requires full harmonisation (Article 4). However, as the principle of redress regulates matters in B2B relations, it is at least questionable whether this principle also covers such legal relationships.⁵⁷ The answer should be negative.⁵⁸ Also, the vague contents of Article 18 of the SGD make full harmonisation impossible.⁵⁹ All of the aforementioned factors do not allow the seller's rights and obligations tied to updating to be regulated in a similar manner in all Member States. In some, the seller's right of redress might, after implementation of the SGD, be regulated in manner that gives the seller a strong position to make redress claims. This is true for example in Germany, where the seller's

right of redress is regulated mostly as mandatory in B2B relationships.⁶⁰ In other states, the right might be regulated so that the seller faces many difficulties in making the claim or not being able to make it at all (e.g. when there is such agreement between parties in the general terms and conditions of the relevant contract). For the seller's rights and obligations regarding updating to be balanced, Member States should design their national rules on right of redress as extensively mandatory (e.g. limit the freedom of contract by not allowing to exclude the right of redress in standard terms).

I. Summary

43 The SGD creates many new rules for the Member States regarding the seller's updating obligation. Some of these rules are ambiguous and some intentionally leave much room for Member States to decide how to implement the provisions of the SGD. While the seller's obligations towards the consumer are provided for in as much detail as the versatile nature of goods with digital elements allows, this is not true regarding the rules on seller's right of redress. This creates a situation where the new obligations put on the seller regarding updating might become disproportionate to their rights, depending on how the Member States choose to introduce the right of redress rules into their national laws. The seller's obligations regarding updating are undoubtedly in favour of the consumer and allow a high level of protection of consumer's rights.

44 Pursuant to the SGD, the seller has to ensure the supply of the updates that have been agreed upon in the sales contract and the updates that are necessary to keep goods in conformity. In either case, the seller might be unable to fulfill his obligations on his own. The sellers are often not in charge of developing the updates. At first sight, the situation does not differ much from the current one, where the sellers are liable for defects in goods that are not produced by them. However in hindsight, there are principle differences. While the seller of traditional goods is under an obligation to repair or replace the goods, he may never need to fulfill such obligations as the goods might stay conforming to the contract for the whole duration of seller's liability. Regarding updates for smart goods this is hardly the case – the seller's obligation to ensure that the updates are provided

54 Geroldinger (n 51) 228.

55 Geroldinger (n 51) 231.

56 This is so for example in Austria, see Geroldinger (n 51) 231.

57 See for the DCD Damjan Možina in Schulze/Staudenmayer, *EU Digital Law. Article-by-Article Commentary* (Nomos 2020), Art 20, para 15.

58 Marco B. M. Loos 'Full harmonisation as a regulatory concept and its consequences for the national legal orders. The example of the Consumer rights directive.' Center for the Study of European Contract law <<http://ssrn.com/abstract=1639436>> accessed 18 February 2021.

59 See for the DCD Možina (n 57) 15.

60 Entwurf eines Gesetzes zur Regelung des Verkaufs von Sachen mit digitalen Elementen und anderer Aspekte des Kaufvertrags <https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Warenkaufrichtlinie.pdf;jsessionid=DA87EC07FDCEDF0FAE1F5117F7A5D556.1_cid334?__blob=publicationFile&v=2> accessed 18 February 2021.

for (at least security updates) exists continuously through the liability period of the seller and might extend even for a longer period of time. Additionally, the rules on duration of the updating obligation leave much room for interpretation, especially in the case of one-off contracts where the time-limit of a seller's obligation is tied to consumer's reasonable expectations. The fact that the burden of proof in the case of updates favours the seller, which is different in respect to other non-conformities of the goods, does not have much effect on balancing seller's rights and obligations. Therefore there have been new and longlasting obligations put on the sellers that they, in most cases, are not in control of fulfilling.

- 45 To balance the seller's expanded obligations, the SGD provides sellers with a right of redress in Article 18. The intentions of the EU legislator are good and a strong redress right would balance the rights and duties of a seller in a reasonable manner. Although, Article 18 of the SGD leaves discretionary room for the Member States. This could lead to the situation where in some Member States the seller's rights and obligations will be well balanced, while in others this might not be the case. This is not a desired result of implementing the rules of the SGD, as it does not allow the seller's rights to be regulated uniformly in all of the EU. The situation is created by the fact that the right of redress in Article 18 of the SGD is regulating B2B and not B2C relationships and therefore does not fall under the full harmonising nature of the SGD and as such, the rules of Article 18 are stipulated vaguely. This leaves it to the Member States' consideration to truly balance seller's rights and obligations related to his updating obligation. While doing so, Member States should design their national rules on right of redress as extensively mandatory (e.g. limit the freedom of contract by not allowing to exclude the right of redress in standard terms).