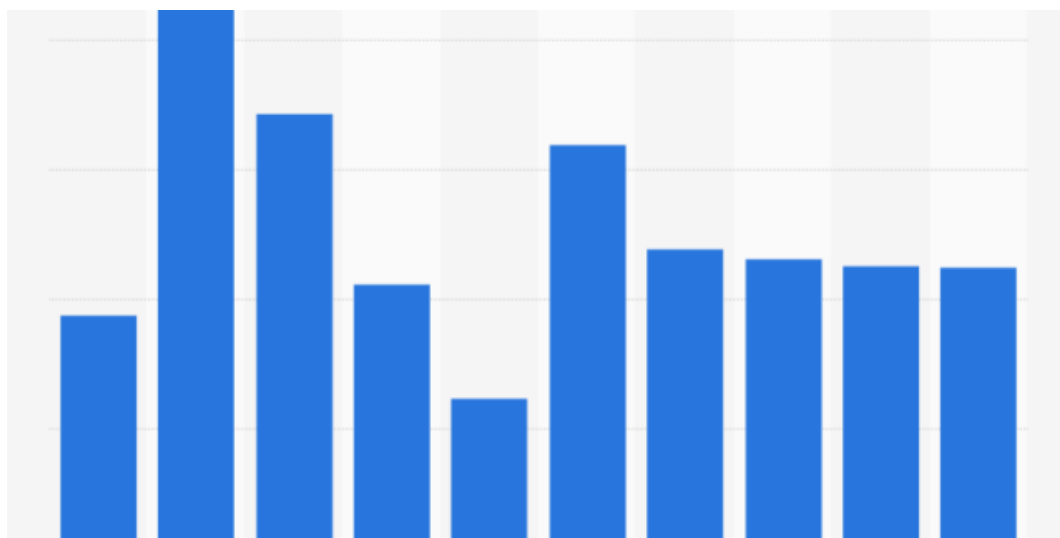


EU Digital Single Market (DSM), Electronic Commerce and Digital enterprise in Italy

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An overview of legal emerging issues

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EU Commission released on 6th May 2015 the “COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMICS AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A DIGITAL SINGLE MARKET STRATEGY FOR EUROPE” (COM(2015) 192 final) explaining the strategies for building the Digital Single Market (DSM).

“The global economy is rapidly becoming digital. Information and Communications Technology (ICT) is no longer a specific sector but the foundation of all modern innovative economic systems. The Internet and digital technologies are transforming the lives we lead, the way we work – as individuals, in a business, and in our communities as they become more integrated across all sectors of our economy and society.

These changes are happening at a scale and speed that bring immense opportunities for innovation, growth and job. They also raise challenging policy issues for public authorities which require coordinated EU action. All Member States are wrestling with similar problems but on a national basis which is too limited to allow them to seize all the opportunities and deal with all the challenges of this transformational change. For many issues the European Level offers the right framework. That is why the European Commission has set the creation of a Digital Single Market as one of its key priorities.

A Digital Single Market is one in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses compete, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence. Achieving a Digital Single Market will ensure that Europe maintains its position as a world leader in the digital economy, helping European companies to grow globally.

Europe has the capabilities to lead in the global digital economy but we are currently not making the most of them. Fragmentation and barriers that do not exist in the physical Single Market are holding the EU back. Bringing down these barriers within Europe could contribute an additional EUR 415 billion to digital economy can expand markets and foster better service at better prices, offer more choice and create new sources of employment. A Digital Single Market can create opportunities for new start-ups and allow existing companies to grow and profit from the scale of a market of over 500 million people.

The Digital Single Market Strategy has benefited from input and dialogue with Member

States, the European Parliament and stakeholders. It has a multi-annual scope and is focused on key interdependent actions that can only be taken at EU level. They have been chosen to have maximum impact, can be delivered during this Commission's mandate, and will be taken forward in line with Better Regulation principles. Each action will be subject to appropriate consultation and impact assessment. The Digital Single Market Strategy will be built on three pillars:

- Better access for consumers and businesses to online goods and services across Europe – this requires the rapid removal of key differences between the online and offline worlds to break down barriers to cross-border online activity.
- Creating the right conditions for digital networks and services to flourish – this requires high-speed, secure and trustworthy infrastructures and content services, supported by the right regulatory conditions for innovation, investment, fair competition and a level playing field.
- Maximising the growth potential of our European Digital Economy – this requires investment in ICT infrastructures and technologies such as Cloud computing and Big Data, and research and innovation to boost industrial competitiveness as well as better public services, inclusiveness and skills”.

The Digital Single Market Strategy delivered by the EU Commission sets out 16 key actions – under aforesaid three pillars – which shall be ended, if any unforeseen event occurs, within 2016.

The Commission's key highlights of the DSM new rules building can be resumed in three pillars:

- Pillar I: Better access for consumers and businesses to digital goods and services across Europe;
- Pillar II: Creating the right conditions and a level playing field for digital networks and innovative services to flourish;
- Pillar III: Maximising the growth potential of the digital economy.

The new market of the virtual space are characterised by new consumption patterns of intangibles and services: the exclusive right of ownership gives way to forms of negotiating which are non-exclusive, with repeated use of intangible goods and services.

From the consumption of material goods purchased on the Internet (clothing, shoes, computers and smartphones) we have moved in recent years to the ever increasing consumption of intangibles (music, movies, ringtones, audiovisual items and software).

In Italy electronic commerce – disregarding worrying unlawful phenomena of digital piracy and gambling – represents a volume of business, according to the Assinform estimates for 2014, of about 13 billion euros and is growing steadily[1].

The growth of digital markets in Italy – in an overall market, in 2013, of about 65 billion euros[2] – is catalysed by the following steadily expanding market segments:[3]

1. *Electronic commerce*: after the 11.3 million of 2013 (18%), it is expecting 13.2 for 2014 (17%);
2. *Smartphone*: continued growth of mobile devices – a strategic convergence tool in the development of the digital content market – which in 2013 recorded a gain of 15.4% to 1.3 billion in turnover;
3. *Cloud Service*: this is still a nascent market (just over 750 million in 2013), but with strong growth (32.2%). The new method of collection and use of data through cloud services is evolving positively;
4. *Internet of things*: it represented in 2013 a market of 1,430 million (13%) and growing. It is a new market linked to the variety of objects (in the industrial, logistical, vehicular, domestic, energy and environmental sectors) and their ability to detect and exchange data;
5. *Big Data*: the scenario of data management today is characterised by a flow of data growing exponentially not least because, among other things, of the distribution of social networks and the Internet of Things (IoT). About 90% of world data has been created in the last two years and it is expected that in 2020 the amount will be 50 times that of 2010. Business intelligence services have recorded, in 2013, a market of 456 million euro, with a positive trend over the previous year. The potential for the analysis of big data, it must be stressed, is yet to be discovered.

The Digital Enterprise can therefore launch successful business initiatives developing the following catalysts for the growth in the global digital markets, namely: *i*) Cloud; *ii*) Mobile; *iii*) Social Network; *iv*) Big Data.

It has been, acutely, observed that “in the new era markets are giving way to networks,

and the real right of ownership is progressively replaced by the right of access. Businesses and consumers are beginning to abandon what is the core of modern economic life: the exchange in a market of property owned between buyers and sellers. In the new economy, the vendors retain ownership of an asset, rent it or lease it or is willing to give it in temporary use against payment of a fee, a subscription, a registration fee (...). The market survives, but is expected to play an increasingly less relevant part in human activities"[4].

This is the phenomenon of the *access society* and the sharing of digital content made possible by the providers of access to electronic communication networks – the access providers – and by “intermediaries” of the information society.

The development of electronic commerce and the diffusion of new forms of digital consumer requires above all a deepening of the rules responsible for the formation of the contract and electronic forms.

In particular information safeguards and obligations provided for by law for the strengthened protection of the consumer in B2C contracts.

New forms of consumption involve terms of fruition which are dematerialized and online distribution of digital content and the problem of the adaptation of means of protection and the responsibilities of the various figures of parties operating in the Internet[5].

In this particular context, a central role is played by the subjective concept of “intermediaries” – or more precisely – the providers of information society services – governed by the EC Directive Article 1, paragraph 2, of the Directive 98/34/EC as amended by Directive 98/48/EC – in heterogeneous operational categories:

- service providers who only provide a passive diffusion of content and are merely “intermediaries” of technical services of mere conduit, caching and hosting (EC Directive 31/2000 and Legislative Decree 70/2003): that is, the passive Internet Service Providers;
- service providers that do not simply provide a passive diffusion of content but interfere actively in the development and/or final presentation of it: i.e. the active Internet Service Providers;
- digital content providers: namely the Internet Content Providers.

Specifically, the volume “**High Tech Legal: the Digital Legal Frame in Italy**” (Giuffrè, Milano, 2015, n. 19 della Collana di Studi “Diritto delle Nuove Tecnologie” diretta da V. Franceschelli – E. Tosi) will attempt to account, albeit only in overview of emerging key issues under Italian perspective:

- Origins and recent developments of Italian High Tech Law and key legal sources;
- Technological Innovation and Contract Law:
- Virtual Contract and Consumers protection;
- The Forms of the Virtual Contract: Electronic Signatures and Point and Click;
- Intellectual Property Protection of Digital Content under new Italian notice and take down AGCOM administrative procedure
- Internet Service Provider Liabilities and Digital Content Protection.

The analysis of the strategic role in the protection of digital content of passive Internet Service Providers (hereinafter, for brevity, “ISP”) and the peculiar system of civil liability applicable to them. is also conducted in the light of the recent AGCOM 680/13 regulation on the protection of digital content and the recent emergence in the case law of active ISPs formed in relation to the civil liability related to the peculiar role – in practice – played by new, fundamental, virtual market players, such as:

- search engines
- *social networks*
- third-party content aggregators.

[1] The total value of e-commerce market is about 18 billion euros: these economic data come from the study *Ecommerce in Italy in 2012* made by Casaleggio Associati, in partnership with Adobe Systems, on a sample of 3 thousand companies active in 10 sectors. The best performance (35%) was achieved by the leisure segment driven almost entirely by the gambling segment, which now represents more than half of the market (56,9%), while the one that showed lowest growth was tourism (12%), but it still has second place with 24,8% of the market, and is approaching saturation.

The other segments has grown between 15 and 22% (insurance and furniture 15%; publishing 16%; food, consumer electronics and health and beauty 18%; fashion by 22% and 25% for shopping malls).

[2] Even the most recent data of the Assintel Report: *Market for Software and IT services in Italy* of 15 October 2014 confirms the growth of the Digital Economy in contrast to the slowdown in the ICT sector due to the continuing economic crisis:

-Cloud + 22%,

- Digital Marketing + 29,1%,

- Internet of Things + 13,6%,

- Business Intelligence, Analytics and Big Data + 6,2%.

The crisis is affecting the end consumer (-1%) but is not affecting the growth of “Digital Mobility”: Tablet + 5,5%, Smartphone + 9,3%, with a booming trend towards E-Commerce (+17,8%).

[3] From reading the 45th Assinform *Report on IT, Telecommunications and Multimedia* content presented on 29 September 2014 the following significant data emerge in a total market in 2013, about 65 billion euros.

[4] Rifkin, *The Age of Access. The revolution of the new economy*, Milan, 2000, 6-7.

[5] On the theme of new intangible consumption and consumer protection see also Tosi (ed), *Consumer protection in the Internet and electronic commerce. Contracts, liability, remedies*, Milan, 2012; in particular, Tosi, *Digital content and new consumption: legal repercussions of technological innovation on contract law and civil liability*, *ibid*, 1ff.
