

**ONLINE CONSUMERS CONTRACTS IN ITALY:
INFORMATION AND FORM REQUIREMENTS UNDER CONSUMER CODE**

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1 – Internet Evolution, Dematerialization of Contract and EU Digital Single Market (DSM)

Internet and virtual spaces nature shifted from initial *ludic phase* to the later and mature *commercialization phase* under which many virtual markets places developed and from which takes the move the recent new building of an EU *Digital Single Market (DSM)*.

The DSM, at a EU level, is considered as a kind of fifth freedom – alongside the four fundamental freedoms of the European Treaties: movement of goods, persons, services and capital – and, consequently, it is considered a priority development.

A DSM requires common European sales law: see in this respect the consolidated text of the regulation project of the European Parliament and the Council regarding a *Common European Sales Law (CESL)* now abandoned in favour of a different preferable approach - addressing all contract issues instead of an optional common law for online sales - outlined in the new EU Directive proposal regulation of online sale of goods COM (2015) 635 “On certain *aspects concerning contracts for the online and other distance sales of goods*”.

In this respect also the dematerialization of object of contracts requires regulation as witnessed by the new EU Directive proposal regulation of online sale of goods by COM (2015) 634 final “On certain aspects concerning contracts for the supply of digital content”.

Commission released on 6th May 2015 the “COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A DIGITAL SINGLE

MARKET STRATEGY FOR EUROPE” (COM(2015) 192 final, explaining the strategies for building the 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 they bring immense opportunities for innovation, growth and jobs. 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 DSM 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 the digital economy. Expanding markets and fostering better services at better prices, offering more choice and creating new sources of employment. A DSM 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 DSM 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 DSM 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 as follow:

- 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 regulation effort of the EU Commission witnesses the ultimate nature evolution of the virtual spaces as a digital market which can boost – if subject to adequate law frame – innovation and economic growth of European economy, entrepreneurs and citizens.

2 – Online contracts with consumers and key information requirements for distance contracts provided by the Consumer Code in Italy

In the meanwhile of the adoption of new horizontal regulation over EU DSM virtual contracts with consumers – belonging to the category and subject to discipline of distance contracts - are subject, in Italy, to the rules provided in this respect by Legislative Decree September 6 2005, n. 206 best known as the *Consumer Code*.

In relation to distance contracts - without interfering with the form of the contract for its validity - Articles 49 and 51 of the Consumer Code define a mandatory requirement for information to provide to consumer.

In this respect, occurs, only a specific information duty of the merchant, the professional part in a wide meaning, and not also the form of the contract and that of a binding minimum content.

The release to the consumer of the contract information document relates, in fact, to the execution phase of a contract, which does not require written form for its validity.

This information obligation - incumbent on the supplier of goods or services at a distance - is divided into two consecutive phases with distinctive forms, functions and content:

- a) before the conclusion of the contract (Article 49 Consumer Code); and
- b) prior to the execution of the service under the the contract or at the latest at the time of delivery of the goods (Article 51, paragraph 7 of the Consumer Code).

The obligation to provide information prior to the conclusion of the contract (Article 49 Consumer Code) relate to the pre-contractual information phase, characterised by freedom of the medium - or rather, free-form - to ensure the proper negotiating consensus.

The new Article 49 of the Consumer Code - as amended by the Legislative Decree of 21 February 2014, n. 21 in implementation of the above EU Directive of 25 October 2011 n. 83 - states that before the consumer is bound by any remote contract - or an off-premises contract or any corresponding offer - the merchant must provide the consumer with the following information, in a clear and comprehensible manner:

- a) the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services;
- b) the identity of the merchant;
- c) the geographical address if the merchant is established and his telephone number, fax number and electronic address, if available, to enable the consumer to contact the merchant quickly and communicate with him efficiently and, if applicable, the geographical address and identity of the merchant on whose behalf it acts;

- d) if different from the address provided in accordance 'the letter c), the geographical address of the place of business if the consumer can' address any complaints and, if applicable, that of the merchant on whose behalf he is acting;
- e) the total price of the goods or services inclusive of taxes or, if the nature of the goods or services makes it impossible to reasonably calculate the price in advance, the terms for calculating the price and, if appropriate, all additional freight, delivery or postal charges and any other costs or, if these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable; in the case of a permanent contract or a contract involving a subscription, the total price include the total costs per billing period; when such contracts are charged at a fixed rate, the total price shall also mean the total monthly costs; if the total costs cannot be reasonably calculated in advance, the terms for calculating the price must be included;
- f) the cost of using the means of remote communication for the conclusion of the contract if that cost is calculated on a basis other than the basic rate;
- g) the terms for payment, delivery and performance, the date by which the merchant undertakes to deliver the goods or provide the services and, if appropriate, the handling of complaints by the merchant;
- h) if there is a right of withdrawal, the conditions, terms and procedures for exercising that right in accordance with Article 54, paragraph 1, as well as the model withdrawal form in Annex I, Part B;
- i) if applicable, the information that the consumer must bear the cost of returning the goods in case of withdrawal and, in the case of remote contracts, if the goods by their nature cannot normally be returned by post;
- l) that, if the consumer exercises his right of withdrawal after having made a request under Article 50, paragraph 3, or Article 51, paragraph 8, he is liable to pay the merchant reasonable costs in accordance with Article 57, paragraph 3;
- m) if there is no right of withdrawal pursuant to Article 59, the information that the consumer will not benefit from a right of withdrawal or, if applicable, the circumstances under which the consumer loses his right of withdrawal;
- n) a reminder of the existence of the legal guarantee of conformity for goods;

- o) if applicable, the existence and the conditions of after-sales assistance to the consumer, after-sales services and commercial guarantees;
- p) the existence of relevant codes of conduct, as defined in Article 18, paragraph 1, letter f) of this Code, and how a copy can be obtained, if applicable;
- q) the duration of the contract, if applicable, or, if the contract is indefinite or is a contract to be extended automatically, the conditions for terminating the contract;
- r) if applicable, the minimum duration of the consumer's obligations under the contract;
- s) if applicable, the existence and the conditions of deposits or other financial guarantees that the consumer is required to pay or provide on request of the merchant;
- t) if applicable, the functionality of the digital content, including applicable technical protection measures;
- u) any interoperability relevant to the digital content with hardware and software, of which the merchant is aware or could reasonably be expected to be aware, if applicable;
- v) if applicable, the possibility of using an out of court appeal and redress to it the merchant is subject and the conditions for having access.

The pre-contractual information requirements, referred to in paragraph 1, shall also apply to contracts for the supply of water, gas or electricity, when they are offered for sale in a limited volume or specific amount, district heating or digital content not supplied on a tangible medium.

In the case of a public auction, the information referred to in paragraph 1, letter b), c) and d) may be replaced by the equivalent details of the auctioneer.

The information referred to in paragraph 1 of Article 49 of the Consumer Code are an integral part of the remote contract - or the contract negotiated away from business premises - and cannot be changed except by express agreement of the parties.

In the case of use of techniques that allow individual communications, the information referred to in paragraph 1 shall be provided, if the consumer so requests, in Italian.

The burden of proof for the fulfilment of the information requirements under this section of the Consumer Code is incumbent on the merchant.

The *contractual* information obligation of the contract (Article 51, paragraph 7 of the Consumer Code) relates to the *contractual information phase, or rather, the executive phase of the already concluded contract* (only with reference to the delivery of material goods; in the case of services before the execution began), with the function of protecting freedom to disagree with negotiating choices already made by exercising the right of withdrawal under paragraph 52 of the new Consumer Code.

The information obligation in the execution phase must be performed with respect to the consumer on a durable medium: a medium that can be, no doubt, as much paper as digital.

It was, therefore, appropriate to remove the misunderstanding regarding the confirmation of the information through an informative document made "in writing" in the previous text of Article 53 of the Consumer Code now amended as aforesaid.

More precisely, the obligation to communicate information in a durable medium in Article 53, paragraph 1, of the Consumer Code.

This is required confirmatory information, as to the content of the information outlined in Article 49 of the Consumer Code - already communicated to the consumer, in other forms, in the pre-contractual phase: they are the mere *repetition* on a durable medium - in implementing the obligation mentioned above - of information already disclosed to the consumer (Article 51, paragraph 7 of the Consumer Code).

The information obligation in question relates to - in particular - the information to consumers of the withdrawal right (increased to 14 days, as against the former period of 10 days and the original period of 7 days, due to the amendment of the Consumer Code of 2014 which is commented on here in brief) and the modes of operation in accordance with Article 52 ff. of the Consumer Code.

With regard to distance or off-premises contracts, the consumer - under Article 52 of the Consumer Code, subject to the exceptions referred to in Article 59 - may exercise the right of withdrawal for a period of fourteen days without giving any reason and without incurring any costs other than those referred to in Article 56, paragraph 2 and Article 57.

Article 53 of the Consumer Code penalises breach of the obligation of information concerning the right of withdrawal of the consumer by ruling that if, in violation of Article 49, paragraph 1, letter h), the Consumer Code, the merchant does not the consumer with the information on the right of withdrawal, the withdrawal period ends twelve months after the end of the initial withdrawal period, as determined in accordance with Article 52, paragraph 2.

As for freedom of expression, it must be pointed out that that freedom is, in any case, bound to the adequacy of the medium chosen and the technology of remote communication used, but also the ability to convey information in plain and intelligible language (Article 51, paragraph 1, of the Consumer Code).

In formal terms - as regards remote contracts - the new Article 51 of the Consumer Code states that the merchant provides - or makes available - to the consumer the information referred to in Article 49, paragraph 1, of the Consumer Code:

- appropriately to the means of remote communication used in simple and understandable language;
- the information presented in a durable medium must be readable by the Consumer.

Finally, the new Article 51, paragraph 4 of the Consumer Code - with reference to contracts concluded by a means of remote communication which allows limited space or time to display information as for example in the case of mobile commerce through smartphones - establishes that the merchant, on that particular medium and prior to the conclusion of the contract, must provide at least the pre-contractual information regarding:

- the main characteristics of the goods or services,
- the identity of the merchant,
- the total price,
- the right of withdrawal,
- the duration of the contract and,
- in the case of contracts of indefinite duration, the conditions for terminating the contract, in accordance with Article 49, paragraph 1, letters a), b), e), h) and q).

The other information referred to in Article 49, paragraph 1, is provided by the merchant in an appropriate way in accordance with paragraph 1 of this Article.

3 – *The virtual contracting button rule*

If a remote contract that is to be concluded by electronic means - as is the case of the virtual contract with consumers - means that the consumer is obliged to pay, the merchant must communicate to the consumer in a clear and obvious the information referred to in Article 49, paragraph 1, letters a), e), q) and r), directly and before the consumer submits the order.

The merchant must ensure that, when placing the order, the consumer explicitly acknowledges that the order involves an obligation to pay.

We should mention in particular the new communicational and legal aspect - introduced by the amendment of the 2014 Consumer Code discussed here - inherent in the “virtual contracting button” – known in US legal frame as “point and click” - which as is shown above is the preferred procedural way of virtual conclusion of the contract with the consumer in Internet.

In the event that placing an order, in practice, involves pressing a button - as in the case of the virtual contracting button - or a similar function, point and click - under the new Article 51, paragraph 2 of the Consumer Code - must be labelled in an easily readable form with the words "order with obligation to pay" or a corresponding unambiguous formulation indicating that placing the order entails the obligation to pay the merchant.

The "penalty" for failure to comply with the above information obligation - by the merchant - is extremely important: the consumer will not, in fact, be legally bound by the contract or order.

The e-commerce sites must also indicate - in a clear and readable manner - again as a result of the changes introduced by the amendment in question - at the latest at the beginning of the ordering process whether any delivery restrictions apply and what means of payment are accepted.

4 – *Lack of the information requirements: legal effects*

The violation of the information requirements - which by an express ruling of Article 49 paragraph 5 of the Consumer Code form an integral part of the contract and cannot be changed unilaterally - by the merchant entails - with particular reference to remote contracts - under the Consumer Code as amended in 2014 is under sanction of:

- *Article 49, paragraph 6*: in the event of failure to meet the information requirements on additional charges or other costs referred to in paragraph 1, letter e), or the cost of returning the goods referred to in paragraph 1, letter i), the consumer does not must bear such expenses or costs;

- *Article 51, paragraph 2*: in case of failure to provide information regarding the express manifestation of the obligation to pay and the use of the button "order with obligation to pay", the

consumer is not bound by the contract or order;

- *Article 53*: in case of failure to provide the information about the right of withdrawal, the withdrawal period ending twelve months after the end of the initial withdrawal period, as determined in accordance with Article 52, paragraph 2; in the case of the late provision of information about the right of withdrawal - in any case within twelve months from the date referred to in Article 52, paragraph 2 - the withdrawal period ends fourteen days after the day on which the consumer receives the information.

The burden of proof as to the fulfilment of the information requirements under this section is incumbent on the merchant (Article 49, paragraph 10 of the Consumer Code).

5 – Efficacy of the digital forms in complying with the informative form obligation and the obligation of mere informative documentation

The new Article 51 also states expressly that the seller must provide the consumer with the confirmation of the contract on a durable medium, within a reasonable time after the conclusion of the remote contract and at the latest at the time of delivery of the goods or before the execution of the service begins.

The above information confirmation must include:

- a) all the information referred to in Article 49, paragraph 1, unless the merchant has already provided the information to the consumer on a durable medium before the conclusion of the remote contract; and
- b) if applicable, confirmation of the prior express consent of the consumer in accordance with Article 59, letter o).

With regard to the *informative form* – form-content obligation for the protection of the weak contracting party in an asymmetrical contractual negotiation – the formal requirement might be fulfilled by utilizing the digital signature, and the qualified and advanced electronic signatures under the rules set forth by DAC.

In this context, we would like to formulate a few final remarks around the obligation of documenting the pre-contractual informative note.

It has been stated that article 51 of the Consumer Code enjoins on the supplier the obligation to confirm to the consumer, on another durable support, at his disposal and readable, some information envisaged by article 49 of the Code under examination herein.

There are according no legal obstacles to the usability of the telematic instrument for the sake of sending a digital informative document, for instance by sending it to the consumer's *e-mail* address.

The admissibility of using the digital document in order to fulfil the consumer's informative needs does not in fact appear to be in conflict with the rationale underpinning the prescriptions set out in various special laws — examined here *above* — to provide adequate written documentation durably perceivable, and at once, by the consumer.

It is therefore undoubted that the digital document transmitted through or attached to an e-mail message might represent the documentation of the informative obligation, given that, once received, it might be recorded on a magnetic support at the consumer's disposal.

Doubts might arise, instead, in respect of the use of Internet pages founded on *worldwide web* technology, when it comes to meeting the requirements of durability and accessibility of the technical support. The mere link to information data may be unfit if not integrated by print button or save record button.

Only once the consumer has attended to the task of printing or electronically recording, on his own digital support – provided always that the “professional” has arranged a material structure that allows printing and recording the digital document - the pre-contractual information (articles 49 and 51 of the Consumer Code), that one might correctly assert due compliance with the documentation obligation laid down by the Code in question.

Similar considerations apply to the pre-contractual informative obligations referred to in articles 7 and 12 of Legislative Decree No. 70/2003, to be respectively documented by making such information “easily accessible, in a direct and permanent way” (article 7.1 of Legislative Decree No. 70/03) and by enabling for the consumer “their memorization and reproduction” (article 12.1 of Legislative Decree No. 70/03).