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Information asymmetry in online bargaining

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1. *Asymmetries and online bargaining*

The weakness that affects the stakeholder's ability to take advantage of marketplace opportunities is due to the existence of various types of asymmetries that appear to be more evident in the global Internet space, resulting in a lack of online confidence by the recipient of the services of the information society. The information asymmetry implies a lack of information or the inability to process it, and although the legislator provides for the reference to the vices of the will and therefore the termination of the relationship, the consumer is not driven to buy goods or services. For buyers of goods the information asymmetry pertains to product safety, comparability and traceability, while for buyers of Internet services the satisfaction of the customer's interest depends on the behavior of the service provider. A more careful analysis of the issue shows the following: *structural evaluative asymmetry*, which is related to the complexity of the goods and services under the contract, namely to the difficulty of rationally evaluating the offer both from the economic point of view and in terms of psychological satisfaction, such as in the case of purchasing software applications or services based on complex or transactional contracts, which make contractual relationships extremely unbalanced; *temporal evaluative asymmetry*, i.e. the possibility to evaluate the consequences of the offer only a certain time after the conclusion of the

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contract; *bargaining power asymmetry* due to the contract conditions that prevent or hinder the transition to other market offers, although they are left to the autonomy of the parties, such as in the case of inserting unfair terms on which online service providers often base their profit; *organizational asymmetry*, which imposes excessive consulting fees, refers to the costly access to justice, resulting in the need for more appropriate, efficient and faster protection and the implementation of class action and online mediation.

The spread of social interrelations in digital environments poses critical implications about the nature of such implications, and specifically the issue that further affects the completion of contractual relations is online confidence. Confidence is understood as the decision of a user who, in order to achieve a goal, makes it depend on another user's behavior; that said, confidence can be used on the Internet to describe the relations between two or more parts that only interact online. The question arises whether virtual environments are provided with all the necessary conditions to generate confidence.[1]

Online confidence is of great importance in online interactions and commerce. In order for it to constitute the basis for the development of business practices, communication between the parties must necessarily take place in a clear and honest way and procedures must be implemented to ensure the properties required for such communication. However, it is true that the digital environment as such has an informational nature and information is the essential element of all the activities carried out in this environment. *The interactions concerning information disclosure, its honesty and efficiency represent the basis of each activity carried out in digital environments.* Therefore, confidence is a peculiar stimulus to interact and develop social relationships in the virtual environment.

The European Union, since its first interventions on this subject, has paid particular attention to the information regulations in relation to the development, conclusion and execution of the contract. The points of contact between information and contract are manifold: information is important at the pre-contractual stage and in the performance of product promotion activities, since it is likely to influence market choices and therefore contractual choices; it is important since its utilization may constitute an abuse of positions held

[1] M. TADDEO, *Fiducia on-line: rischi e vantaggi*, in *Manuale di informatica giuridica e diritto delle nuove tecnologie*, Turin 2012, 419 and ss.

within the market; it may constitute the instrument whereby the principle of contract transparency can be fulfilled; information can make for the proper execution of the contract. In short, information is the instrument whereby the system intervenes in the contractual regulations to correct, by imposing information obligations, the disparity in the bargaining power of the parties.

2. *The European legislator*

The European legislator has intervened to protect consumers and improve the regulatory body of the Community, by simplifying and completing the existing regulatory framework, to establish a "genuine internal market…, while ensuring respect for the principle of subsidiarity", to get over the fragmentation of the regulation system in force and harmonize national legislations. The differences between the various member states cause significant distortions of competition and impede the proper functioning of the internal market. The reduction of the obstacles in the internal market and the maintenance of a high level of consumer protection are the two essential principles whereby the Commission works to fill the gaps in the applicable directives and coordinate them with each other. The review of the consumer *acquis* summarizes the survey results obtained by the Commission after comparing the enforcement of the directives in member states, including case law and administrative practice, after establishing a permanent work team for the review of the directives, after holding stakeholders' seminars mainly focused on issues related to the contract law relevant to the review of the consumer *acquis*, and after a careful analysis of the attitudes of consumers and companies towards consumer protection provisions and of the effects on cross-border trade. To start an effective and productive review of the *acquis*, two "techniques" can be used (obviously one excludes the other): the so-called v*ertical approach*, i.e. the modification of the directives one by one and then their subsequent coordination; or the so-called *mixed approach*, i.e. the identification of the common points of all the directives and then their unification in a single legislative act. There is also a third solution, the *no legislative action approach,* which would not eliminate the current fragmentation of the regulations but might even increase it following the use in the process of transposition of minimum harmonization by member states. After verifying the degree of harmonization be-

tween the Community legislation in force and that of member states, the Commission pointed out the need to establish the "degree of harmonization" of the Community legislation.

It can be inferred from a careful analysis that so-called *minimum harmonization*, namely the right of each member state to ensure a more extensive consumer protection level than provided for by the directives, thus creating somewhat differentiated consumer protection among member states, brought about a situation of great uncertainty that generates, on the one hand, a strong limit to cross-border entrepreneurial activities and on the other hand, consumers' uncertainty to receive the same protection level in cross-border bargaining as ensured in their own country. What are then the possible solutions? One hypothesis involves the complete review of the consumer *acquis*, thus obtaining full harmonization[2]. In this way, member states would not have the possibility to enforce protection rules more pregnant than those provided for by the Community legislation. Should maximum harmonization be impossible for certain reasons, a clause of *mutual recognition* could be recalled generating the possibility to integrate the national legislation with provisions aimed to achieve a higher consumer protection level, without burdening companies established in other member states with stricter requirements that would produce unjustified restrictions on freedom of movement or freedom to provide services. Another hypothesis consists in the review of the legislation according to a criterion of minimum harmonization, to be couple with a clause of *mutual recognition*. States might ensure higher consumer protection, provided that companies having their registered offices in other member states respect only the regulations in force in the country where they are established. The Union opted for full harmonization, but it did not review the entire body of European legislation on consumer protection, as had been pointed out several times, although the study promoted by the commission and consisting in the *Consumer Law Compendium* witnessed a systematic fragmentation (*the reason for such variations is that the corresponding provision of the respective Directive contains a gap which the member states have tried to fill with national laws*), numerous converging but different regimes for each of the profiles covered by the directives, ambiguity, inconsisten-

[2] A. SOMMA, *Introduzione critica al diritto europeo dei contratti*, Milan 2007, 32 and ss.

cies and not least obsolescence of the directives themselves due to the emergence of new business models created by the enormous development of technologies.

In fact, the proposal for a directive on consumer rights of 2008[3] was only made for the review of four fundamental consumer directives: Directive 85/577/EEC on contracts negotiated away from business premises, Directive 93/13/EEC on unfair terms in consumer contracts, Directive 97/7/EC on the protection of consumers in respect of distance contracts and Directive 99/44/EEC on certain aspects of the sale of consumer goods and associated guarantees. However, that proposal failed to provide for a systematic regulation of the rights of contractors/consumers in general, which would disregard sectorial regulations, even if the commission had chosen maximum harmonization as an instrument.

According to many, the choice was unfortunate because not necessarily do the different national legal solutions, to the extent permitted by the directives, produce such serious barriers to competition as to justify the measures proposed, but above all they would violate the principles of proportionality and subsidiarity that underlie Community regulatory interventions. The Court of Justice of the European Union has also repeatedly stated that the harmonization measures under art. 95 of the EC Treaty are implemented only if they are necessary to achieve the purpose; moreover, the principle of subsidiarity provided for by art. 5 of the EC Treaty provides that outside the areas of competence, the Community can intervene only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by member states and therefore can be better attained at Community level. In this case, the instrument used would be a horizontal directive based on maximum harmonization and therefore it would act as a regulation, implying the inapplicability of national provisions if conflicting and states would be deprived of discretion, albeit minimum. The European Economic and Social Committee even criticizes the choice of the legal base of the proposed directive, stating that reference should not be made to article 95 as a legal prerequisite since it relates more to the construction of the internal market, but to article 153, which provides that the Community promotes consumers' interests and ensures a high level of consumer protection consistently with the competence of member states. In fact, European consumers cannot only be seen in the perspective of the internal market as ac-

[3] COM (2008) 614 def.

tors in a competitive system, the protection of whom would consist in providing them with *better and ampler information*, but the EU consumer protection policy is effective only if it represents an *essential and assertive element of the citizens*. The Committee further states that any proposal whose goal is maximum harmonization in the field of consumer protection must cover specific aspects and be accompanied by special precautions to meet the high level of consumer protection guaranteed by the Treaty, in compliance with the principle of subsidiarity. Otherwise, there would be a great number of consequences, including in particular delaying or impeding the development of consumer rights in each member state. Despite the failure to complete the project for the unification of the consumer law, which would have superseded acquired national rights, and in the wake of allegations that while protecting traders the prominent object of the review of the *acquis*, namely consumer protection, would be undermined, the Commission did provide for maximum harmonization, which was however targeted and related to the national regulation of member states. The final version of the directive, approved by the Union, provides for maximum harmonization only for contracts concluded away from business premises and for distance contracts.

3. *Continued*

In convergence trade consumers enter the digital market by using various instruments such as computers, tablets, smartphones, TV sets connected to a fixed, Wi-Fi or mobile network (we talk about m-commerce, i.e. mobile commerce), from their houses, their offices, in urban areas and through social networks (f-commerce, i.e. Facebook-commerce or social commerce). Therefore, network access conditions, phone rates and phone number portability become subject to consumer protection.

Dematerialization is the main feature of the new virtual markets, so network non-territoriality and denationalization redefine the ways of using goods, especially non-material goods[4], and the exclusive property right gives way to non-exclusive contract forms for non-

[4] J. RIFKIN, *L'era dell'accesso. La rivoluzione della new economy*, Milan 2000: .. In the new era, markets are making way for networks, and ownership is steadily being replaced by access. Companies and consumers are beginning to abandon the central reality of modern economic life – the market exchange of property between buyers and sellers. Instead, suppliers hold on to property in the new economy and lease, rent or charge an admission fee, subscription of membership dues for its use…

material goods and services.[5] In this sense, there is a clear difference between online consumer and digital consumer: as far as the former is concerned, the legislator focuses on the form and the creation process of agreements in online bargaining; as to the latter, the legislator takes into account the dematerialization of the object, the use of digital contents and therefore new consumption methods, guarantees and protection.

The relentless technological development of the media and the ever-growing digital connotation of contracts constitute an exponential increase in the market and the Union, in the context of the Europe 2020 strategy, could not fail to review the regulations relating to online contracts, so it attached importance to digital contents for the first time by regulating the "digital content contract" to stimulate the circulation of such contents and improve consumer protection. In fact, by the Digital Agenda for Europe, the Union intends to develop the internal market with particular regard to digital contents. In this regard, legislative reforms are required in all sectors that make for the best use of the network by all citizens, intended for the field of broadband, aimed at improving digital services for cross-border interoperability and IT safety, and not least at implementing cloud computing in all sectors of the economy for the reduction of information technology costs.

The cloud can stand as a platform of digital contents and web services that can be assessed through broadband by all users at lower costs and in a shorter time; moreover, it can provide for the desired *area without internal borders for information society services*.

The European legislative initiatives relating to the regulation of digital content trade tend to stimulate online bargaining and consequently to remove the barriers that prevent companies from carrying out their cross-border activities and those that prevent users' access to the Internet.

The Directive 2011/83 of 25 October 2011[6] is the final act in the process of adaptation of certain directives relating to e-commerce and of consumer rights to the new technological context and the new opportunities it offers. The Directive was transposed into our

[5] V. FRANCESCHELLI, *Consumatori e nuove tecnologie. Cittadini e consumatori nell'era digitale*, in E. Tosi (edited by) *La tutela dei consumatori in Internet e nel commercio elettronico*, Milan 2012, 10 and ss.

[6] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council, which repeals Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, GUUE L 304/64 of 22.11.2011.

system by the legislative decree no. 21 of 21 February 2014[7], which amended the code on consumption replacing articles 45 to 67. The legislation applies to all contracts negotiated online or away from business premises by a trader and a consumer, and is related, subject to certain exceptions governed by other directives, to both goods sale contracts and service provision contracts, as well as to contracts for the supply of water, gas, electricity and remote heating by public providers.

The Community legislator tries to restyle consumer protection regulations, although the repeal of Directives 85/577 (contracts negotiated away from business premises) and 97/7 (distance contracts) provided for by article 31 is due to changes affecting various sectors, while the amendments to Directives 93/13 (unfair terms) and 99/44 (sale of consumer goods) are marginal. However, the directive is intended to systematically rearrange common regulations of contracts negotiated away from business premises and distance contracts in a single regulatory body aimed at promoting a *climate of confidence among European consumers in the level of safety in business transactions that can be performed through the use of online instruments and financed through online payment services*[8]. The prediction of maximum harmonization determines the mandatory nature of the rules and the imperativeness and impossibility to dispose of the rights it confers to the consumer.[9]

The changes introduced by the directive are manifold. Indeed, it provides not only for pre-contractual information obligations for traders who propose consumers to enter into distance contracts or contracts away from business premises (articles 6-8), but also for pre-contractual information obligations for traders who propose consumers to conclude contracts that can be qualified neither as distance contracts nor as contracts entered into away from business premises (art. 5). The directive also introduces significant changes in relation to the right of withdrawal for the consumer who enters into distance contracts or contracts away from business premises (articles 9-16). Finally, another important change is

[7] Legislative Decree no. 21 of 21 February 2014, Implementation of Directive 2011/83/EU on consumer rights, amending Directives 93/13/EEC and 1999/44/EC, which repeals Directives 85/577/EEC and 97/7/EC, GUI no. 58 of 11/3/2014.

[8] V. CUFFARO, *Profili di tutela dei consumatori nei contratti on-line*, in (edited by) G. FINOCCHIARO, F. DELFINI , *Diritto dell'informatica*, Turin 2014, 377 and ss.

[9] Absolute prohibition of derogation by member states, both *in peius* and *in meius*; however, the *favor* is guaranteed to consumers in single bargaining under art. 3 no. 6, so traders may propose consumers contractual agreements that go beyond the protection guaranteed by the directive, art. 3 no. 6.

the treatment of distance contracts whose contents are digital[10]: article 2 defines digital contents as data produced and provided in a digital format, thus including computer programs, games, text and music files, and advertising material offered and marketed in a digital format through the Internet.

Directive 2011/83 provides information models of the right of withdrawal and forms to be used for exercising this right. Moreover, contracts whose subject is digital contents are included in the definition of distance contracts, establishing wide-ranging information obligations and special formal requirements (art. 8) for traders, as well as a *jus poenitendi* for consumers (art.9) except in case the provision of digital contents is through a digital medium (art.16, letter m).

4. *Information requirements*

The European Union has paid special attention to the regulation of information in relation to the development, conclusion and execution of the contract. Information is important in various aspects: at the pre-contractual stage and in the performance of product promotion activities, since it surely influences contractual choices; it may determine an abuse of positions held within a market or represent an instrument for contract transparency; it may ensure the proper execution of the contract and, above all, represent the instrument whereby the disparity in the bargaining power of the parties can be corrected and the afore-mentioned asymmetries can be eliminated. The information necessary to make the best contractual choice is such since it can eliminate the implicit asymmetries. It entails a retrieval and evaluation burden for the party concerned, according to the principle of self-responsibility, and information obligations for the better informed contracting party.

One of the important changes introduced by the directive is the obligation for the seller and the provider of services to deliver certain information at the pre-contractual stage regardless of the contracts being concluded at a distance or away from business premises. In this regard, article 5 specifies some information that the seller, prior to the implementa-

[10] It is the first time that the EU legislator has expressly taken into account digital contents, which are governed by a directive and a proposal for regulation, in order to stimulate the market of digital contents and protect the consumer. In this regard, the legislator has established further information provision requirements for traders concerning the online provision of digital contents and the exclusion of the right of withdrawal by consumers in case they have been informed before the conclusion of the contract and have agreed thereto.

tion of the contract, is required to deliver to the consumer in a clear and comprehensible way, unless it is already incontrovertibly evident. The information concerns: the main characteristics of the product; the trader's identification data; the total price, including taxes and additional transportation, delivery or mail costs, as well as the mechanism for calculating the price in case its exact amount cannot be determined before the conclusion of the contract; agreements, if any, on price payment, goods delivery and service performance, as well as on delivery terms and claim methods; the reminder about the existence of the legal conformity warranty and, if any, post-sales services and the standard warranty; the contract expiry date and, in the case of a permanent contract, the automatic renewal or cancellation conditions; the function of the digital contents, including the applicable technical protection measures; the compatibility of the digital contents with the hardware or software applications in case the seller is or might be reasonably deemed aware.

As stated earlier, the information obligations also apply in the process of implementation and execution of the contractual agreement since they are necessary for the conscious formation of the consumer's consent. They are intended to overcome the information asymmetry of the weaker contracting party. It should be noted that the European and national legislators have not established any penalties of a general nature for the violation of the information obligations, but they have provided for the right of withdrawal, which frequently does not ensure proper protection for the consumer because it might imply the loss of an advantage arising from the contractual relationship, and certainly, in this case compensation for damages would be a more proportionate remedy to the non-satisfaction of the interest upon the proper execution of the contract.

A careful analysis of the EU provisions shows that the legislator adopts two remedy strategies: a preventive, *ex ante* strategy to avoid situations that are not favorable to the consumer and a subsequent, *ex post* strategy designed to rebalance the contractual relationship. In general, in the phase prior to the development of the contractual agreement, protection must be ensured through information obligations and the prohibition of unfair business practices, advertising and information, always taking account of the trader's good faith obligations. Then, after the conclusion of the contract stipulated erroneously due to incorrect, inaccurate or omitted information, suitable remedies can satisfy consumer interests, which

may be alternative or concurrent, individual or collective, in order to ensure maximum market efficiency.[11] In some cases, the EU legal system does not prescribe penalties or does not provide directions about the consequences of the violation, for example, of information-related or pre-contractual behavioral obligations. Thus, the consumer who intends to conclude the contract in spite of the trader's unlawful conduct can make use of other instruments, in addition to the remedies applicable under the law and the exercise of the *jus poenitendi*.

Although the objective pursued is total harmonization, Directive 2011/83, in order to better guarantee the full implementation of the cross-border market, does not *make any choice* in terms of remedies, except for the right of withdrawal, *for the protection of the consumer who concludes the contract, without prejudice to* the rules of national law that govern the validity of the contract. In this regard, recital 14 states that "the directive should be without prejudice to national law regulating for instance the conclusion or the validity of a contract, to the extent that contract law aspects are not regulated by this Directive".

Article 6 of the Directive provides the obligation for the trader who provides online services or goods to deliver information before the conclusion of the contract; this implies a higher level of market transparency, greater competition between business players and lower transaction costs. Before the conclusion of the contract for digital contents, the trader must communicate, *in a clear and comprehensible way*, the characteristics of the goods or services, including the functions of the digital contents and the technical protection measures applied, and then provide information about the interoperability of the digital contents with the hardware and software applications which the trader is or might be reasonably deemed to have become aware of. In this regard, recital 19 specifies that the concept of relevant interoperability is meant to describe the information about the environment, the type of hardware and software applications compatible with the digital contents, such as the operating system, the necessary version and certain hardware features. Traders must also specify their identity, their business operating address, methods of payment, delivery and execution, including the date for the delivery of goods or the provision of services, the existence of the warranty, the possibility to resort to an extrajudicial claim mechanism and, in

[11] M. ASTONE, *Europa e diritto privato*, I/14, 18.

case the right of withdrawal is provided for, the conditions, terms and procedures for exercising the *jus poenitendi*. Information must be provided by the trader compatibly with the means of remote communication used, which in this case is the Internet. Article 8 provides for other obligations; in particular, in case the relationship imposes a payment obligation, before the consumer places an order the trader must give the information under article 6, paragraph 1, letters a), e), o) and p), i.e. the essential elements and the directions for online deliveries. Article 6, paragraph 8, also provides for the obligations of the directive on internal market services (Directive 2006/13/EC), the directive on e-commerce (Directive 2000/31/EC) and, in the case of conflict, the provisions of Directive 2011/83 shall prevail. The directive also grants the possibility for member states to impose additional information requirements to service providers established in their territories. This might cause differences in treatment: if the same service was provided to consumers of a member state by two traders established in other member states, one of them would probably be burdened with the obligation to deliver more stringent information about the provision of services than the other one; this would represent a clear contrast with full harmonization, which is pursued by the directive.

5. *Continued*

The consumer is entitled to receive information, in writing or on a durable medium, before or on the execution of the contract. Thus, the question arises whether the information available by a click on the seller's website should be regarded as information on a durable medium as defined by article 2 no. 10 of Directive 2011/83[12]. While there is no doubt that the term durable medium refers to any instrument that enables the consumer to store and reproduce its contents without any alteration, it is equally true that a website cannot be considered as a durable medium since web pages are, by their nature, modifiable and this implies that the consumer is not in control of the information. Website and durable medium are mutually exclusive, so it should be noted that an informational web page is on-

[12] Article 2 no. 10 of Directive 2011/83: «durable medium»: any instrument which enables the consumer or the trader to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.

ly controlled by those who publish it and not by those who consult it. The information contained therein is in progress and not static, since it can be corrected, and although the page is an electronic document and can be compared to mechanical reproductions pursuant to article 2712 of the Civil Code, it does not offer legal certainty.[13]

The change in the information by the trader upon preparing the contract model would impact on the reasonable confidence of the consumer and violate article 6, which establishes that the information provided is an integral part of the contract and cannot be changed unless expressly agreed upon by the parties; this would lead, as some say, to a contractual agreement that is not invalid but inexistent.[14]

6. *Protection*

The directive on consumer rights has completely rewritten the EU regulation on the right of withdrawal from the term established in fourteen days and commencing according to the type of contract entered into.

In the case of contracts for the supply of digital contents not provided on a material medium, namely when the digital contents are delivered online, the consumer has, pursuant to article 9, paragraph 2, letter C, fourteen days to exercise the right of withdrawal starting from the day the contract is concluded. However, if the trader fails to provide the consumer with the required information on the right of withdrawal, a further period of 12 months shall commence for the exercise of this right at the expiry of the fourteen days (article 10). If the consumer receives the required information on the right of withdrawal within 12 months, the withdrawal period shall expire 14 days after the day upon which the consumer receives that information.

The same article 9, paragraph 1, considers the cases of exclusion of the right of withdrawal provided in article 16 and, with reference to digital contents that are transferred by means of a material medium, establishes that in case consumers provide for an express waiver of the right of withdrawal upon executing the contract they will be no longer able to

[13] S. PAGLIARINI, *Neoformalismo e trasparenza secondo il canone della Corte di Giustizia: note sparse sui content services e ebookers. Com. alla luce della direttiva 2011/83/UE*, in Persona e mercato, 2013, 225 and ss.
[14] M.LEHMANN, A. DE FRANCESCHI, *Il commercio elettronico nell'Unione europea e la nuova direttiva sui diritti dei consumatori*, in *Rass.dir.civ*, 2012, 435 and ss.

exercise the *jus poenitendi*. This prevents consumers from having contents delivered on trial and, after saving them, withdrawing from the contract. Therefore, the possibility to exclude the right of withdrawal of digital contents and their immediate online transfer considerably reduces illegal downloading. So when traders wish to exclude the right of withdrawal, they must arrange for a specific field in their website to inform consumers of the exclusion of the right of withdrawal. Such a field must obviously be clicked by consumers before placing a product order, besides the fact the order implies the obligation to pay: it is what happens in the Button solution. If the provisions on the exclusion of the right of withdrawal are not complied with, consumers still have the right to withdraw within fourteen days after the conclusion of the contract, without any obligation to state the reasons and without having to bear the cost of the termination of the contract. They shall only be liable for the cost of returning the goods, which is free of charge in online bargaining. In the case of material goods, the loss of value must be compensated in the event of handling other than used. Another case is the situation of accessory services, such as the installation of software, where the trader is entitled to compensation in proportion to the accessory services provided. Moreover, the consumer (article 14, paragraph 4, letter b)) shall bear no cost for the supply of the whole or part of the digital contents that are not provided on a material medium in case the trader has failed to fulfil certain information requirements, such as the confirmation (article 8, paragraph 7). This applies also when the consumer has not agreed to the commencement of the performance before the expiry of the fourteen-day term, which starts after the conclusion of the contract. Article 13 also provides that, in case the consumer has expressly requested delivery of the digital contents in a type other and more expensive than the standard one, i.e. delivery on DVD instead of direct download from the trader's website, the trader shall not be liable for any supplementary costs related to that other type of delivery chosen by the consumer. In this case the trader may subject reimbursement to the proper return or reshipment of the goods by the consumer.

The procedures for exercising the right of withdrawal are provided for by article 11: the consumer shall inform the trader of his decision to withdraw from the contract by using the model withdrawal form as set out in Annex I (B), or by making an unequivocal statement of his decision, and member states shall not provide for any formal requirements

applicable to the withdrawal other than those provided for by the form. Withdrawal shall be validly exercised if the consumer has sent the relevant communication within the fixed period; the trader may, in addition to the above-stated possibilities, allow the consumer to electronically send the withdrawal form as set out in Annex I (B) or the unequivocal withdrawal statement on the trader's website. In these cases the trader shall communicate to the consumer an acknowledgement of receipt of such a withdrawal.

7. *The penalty regime*

In the case of a violation of the national rules adopted in compliance with the directive, while on the one hand the EU legislator lets member states dictate penalties provided they are *effective, proportionate and dissuasive*, calling into question the effective willingness of the Community to implement maximum harmonization, on the other hand it imposes specific penalties to the trader who does not clearly provide the information under articles 6, 14 and 1.

As regards distance contracts, article 8, paragraph 2, provides for a specific penalty that invalidates the agreement concluded without the respect of certain requirements. In fact, it may happen that a trader offers products online free of charge, but in the same web page he indicates, with smaller fonts, that the product is either against payment or free of charge but the related service is against payment. In these case the national law already provides for consumer protection forms: if there is no effective agreement on the price, the contractual agreement has evidently not been implemented or in any case the cancellation of the contract due to fraud can still be requested if the decision to enter into the contract is the result of deceptive practices carried out by the trader[15]. These situations led the legislator to indicate a series of conducts that the trader must follow to make sure that the Internet does not become the house of deceptive behavior. Thus, the abovementioned article provides that when placing the order consumers are aware of the obligation to pay arising therefrom. If clicking a button or the like is provided for the order, the sentence "order with obligation to pay" or something similar must be specified. If the trader has not com-

[15] Moreover, contract terms inserted in order to mislead the consumer may be contested at the competent court, while the trader's unfair practices may be dealt with by applying to AGCM.

plied with this obligation, the consumer shall not be bound by the contract or order. Therefore, in accordance with article 6, paragraph 1, letters a), e), o) and p), the said information must be provided in a clear manner, directly before the consumer places the order, before the conclusion of the contract. Furthermore, the consumer must be provided with a summary of the essential elements of the offer, which, from the point of view of space location, must be placed on the web page, next to the button or other device that allows the forwarding of the order, without the consumer having to scroll through the web page. That said, the question arises about the meaning of: "if the trader has not complied with this obligation, the consumer shall not be bound by the contract or order"? A careful reading of article 8, paragraphs 6 and 7, shows that the contract is effective at a later time and the article considers that partciular case as a contractual agreement with progressive formation. The case provided for by article 8, paragraph 2, excludes this possibility: the trader cannot integrate the essential requirements of existence and effectiveness of the contract a posteriori, because the failure to comply with the formal requirement results in the non-binding nature of the order issued by the consumer, as no statement of the consumer's will aimed at the conclusion of the contract can be recognized.[16]

Abstract

In the reform of EU's founding treaties, from Maastricht to the European Constitutional Treaty, Community legislation regarding consumer protection has made huge strides; in fact, while the initial provisions were based on the single market growth need by removing obstacles which had hindered the economic development of the Community, subsequent regulations have considered the consumer as a person, and as such, the subject of rights and protections, yet always considering the need to create a "real consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises".

Camerino, ottobre 2014.

[16] M. LEHMANN, A.DE FRANCESCHI, *Il commercio elettronico nell'Unione Europea e la nuova direttiva sui diritti dei consumatori*, op. cit., 439 and ss. ….in the existing law, the question of Internet cost traps does not arise because of the lack of protection mechanisms, but rather because of consumers' lack of awareness about the rights they are entitled to, and therefore because of their propensity to yield, often entrepreneurs' against aggressive behavior, to traders' requests for payment.