THE MAIN INNOVATIONS OF THE ITALIAN LEGISLATIVE DECREE NO. 21/2014 TRANSPOSING THE DIRECTIVE 2011/83/EU ON CONSUMER RIGHTS

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1 PRELIMINARY REMARKS

The legislative decree No. 21 of 21 February 20142 (“the Decree”) transposing the Directive 2011/83/UE of 25 October 2011, represents the last step of a legislative process which has seen, over the years, a substantial strengthening of the consumer protection law and an extension of the Authority’s competences.

The purpose of the transposed Directive is to simplify and revise the rules as provided for by the previous Directive 85/577/CEE (on contracts negotiated away from business premises), and the Directive 97/7/CE (on distance contracts), with a view of removing inconsistencies, filling gaps, and amending the excessive fragmentation of national laws. As the cross-border potential of distance selling, and internet sales in particular, has not been fully exploited to date, such EU intervention has improved the functioning of the internal market by increasing consumer protection and leading companies to save administrative costs.

In this framework, the Decree on one hand introduces novelties in the consumer contracts regulation, mostly regarding distance contracts, stipulated online or by telephone, but also in traditional contracts stipulated inside business premises. On the other hand, the Decree states some important provisions in relation to administrative protection conferring an exclusive competence to the Authority to enforce the new rules and definitively establishing the choice of the unitary principle in administrative consumer protection. This paper will highlight the main innovations introduced by the Italian legislator with an overview of the new consumer protection and enforcement system.

1 Italian Competition Authority. I would like to thank M. Pacillo and J. Pelucchi for their helpful collaboration.

2 THE NEW CONSUMER PROTECTION

The Decree transposes the Directive 2011/83/UE through a complete replacement of Chapter I (now titled “Of consumer rights in contracts”), Title III, Part III of the Consumer Code (Articles 45-67), previously devoted to distance contracts and contracts negotiated away from business premises. The new regulation concerns “any contract concluded between a trader and a consumer, including contracts for the supply of water, gas, electricity or district heating, including by public providers, to the extent that these commodities are provided on a contractual basis”. The expression “any contract concluded between a trader and a consumer” can be misleading because it seems to refer to any type of contract between a trader and a consumer, regardless of its purpose.

Actually, the new rules apply to four well-defined types of contracts: i) sales contracts; ii) service contracts (excluding financial services); iii) contracts for the supply of water, gas, electricity or district heating; iv) contracts of digital content not supplied on tangible mediums. However, the new provisions completely exclude several important types of consumer contracts (such as consumer credit, distance contracts relating to financial services, timeshares, contracts stipulated with the intervention of a civil servant - among which notary -, contracts for tourist services, some of the passenger transport contracts) and contracts negotiated away from business premises “for which the payment to be made by the consumer does not exceed EUR 50”.

In this framework, the Decree separately deals with, along the lines of the EU Directive, i) “Consumer information for contracts other than distance or off-premises contracts” (section I); ii) “Consumer information and right of withdrawal for distance and off-premises contracts” (section II); iii) “Other consumer rights” (section III). In redefining each of such profiles, it takes into account the different levels of harmonization introduced by the EU Directive, which is characterized, on one hand, by the maximum harmonization of certain aspects of distance contracts and contracts negotiated away from business premises (such as obligations of pre-contractual information, formal requirements, right of withdrawal), as well as other consumer rights in sales and services contracts; on the other hand, by the provision, under the system of minimum harmonization, of informative obligations in the pre-contractual phase also for contracts other than distance contracts and contracts negotiated away from business premises.

2.1 Obligations of pre-contractual information in contracts other than distance and off-premises contracts

Although the new regulation has been conceived mainly focusing on distance contracts and so-called door-to-door sales contracts, a strengthening of consumer protection is provided, first of all, for contracts other than the above-mentioned ones, that is, contracts negotiated on business premises, excluding those which “involve day-to-day transactions and which are performed immediately at the time of their conclusion”.
Regarding such contracts - whose exact identification will keep commentators busy - Section I, art. 48, of the Consumer Code (“Codice del consumo”), states the minimum content of pre-contractual information bearing on the trader, that is the principal elements of the offer made, such as the main characteristics of the goods or services, identity of the trader, total price of the goods or services, functionality and interoperability in the case of contracts with a digital content, etc.

The provision represents one of the main innovations introduced for consumer protection, since so far the imposition of precise information requirements in the pre-contractual phase existed only for certain types of contracts due to their object (such as timeshares, holiday packages, etc.) or the negotiation techniques used (distance contracts and contracts negotiated away from business premises). Through the provision of wider pre-contractual information in any type of consumer contracts, the legislator has enabled, on one hand, consumers to make an informed choice at the moment of purchasing, on the other hand, traders to act in a more transparent manner.

2.2 Obligations of pre-contractual information and right to withdraw for distance and off-premises contracts

The core of the new regulation concerns, as explained above, distance contracts (i.e. contracts concluded without the simultaneous physical presence of the parties) and contracts negotiated away from business premises, for which specific protection of consumer rights are provided, depending on the context of the relationship between the parties. For these contracts, Section II, arts. 49 et seq., redefines the main features of the regulation through: i) an extension of the content of the information that the trader shall provide to the consumer in the pre-contractual phase; ii) the provision of formal requirements; iii) the provision of a strengthened right to withdraw.

Briefly, as regards the obligations of pre-contractual information, this includes a compulsory list of information that the trader must provide to the consumer “before” the consumer “is bound”, respectively, for a distance contract or for an off-premises contract. Such information must be delivered to the consumer in a clear and comprehensible manner. Furthermore, more specific obligations, compared to the past, are provided – in particular regarding the price, that shall be all-inclusive – than the ones required in “other” contracts. Information concerning the right to withdraw is also included.

With respect to the binding regime of the aforementioned obligations, differently from those related to “other” contracts, it is clearly stated that the given information is “an integral part of the contract and cannot be modified without the parties’ express agreement.” The regulation introduces a substantial constraint on contractual freedom and, as for the burden of proof regarding compliance with the information requirements, it establishes that this “must be borne by the trader.” The main scope being to make the consumer fully aware, the legislation requires that, for both contracts negotiated away from business premises and distance contracts, a number of specific formal requirements concerning pre-contractual
information has to be provided. For instance, in the case of distance contracts which use electronic means to be concluded, it is stated that if the order is made by activating a button or a link, the consumer must be informed that by so doing he is obliged to pay; if the trader does not comply with this, the consumer is not bound by the contract or the order, and therefore cannot be obliged to pay.

Other obligations apply to contracts concluded by telephone. In this case, the trader must confirm the proposal and the acceptance from the consumer in writing.

Finally, one of the main features of the regulation is the new regime regarding the right to withdraw (the so-called *ius poenitendi*), which is characterized by an extension in favor of the consumer concerning the withdrawal period during which one can exercise this right (14 working days instead of 10 working days). Moreover, if the trader does not provide the consumer with information on the right to withdraw, the consumer can exercise this right for one year and 14 days from the delivery of the goods or the conclusion of the service contract. As regards the procedure in exercising this right, the written form is no longer required, rather, the consumer must inform the trader presenting any type of unequivocal statement or by using a harmonized withdrawal form (included in attachment I, part B). This measure aims to simplify the procedure, especially in order to reduce costs for the trader in cross-border sales.

### 2.3 Other consumer rights in contracts for the sale of goods and service contracts

After setting the rules for contracts “other than” those regarding distance contracts and contracts negotiated away from the business premises, Section III regulates, in art. 60 *et seq.*, “other rights of consumers” for the sale of consumer goods and service contracts, even if not concluded at a distance or away from the business premises. It deals with three distinct practices, setting rules that are not homogeneous in content and that are, on one hand, inspired by the discipline of unfair business practices, and on the other hand, introduce two significant prohibitions from a private law perspective.

In the first scenario, we must underline the prohibition for the trader to impose additional fees on the consumer compared to how much the traders themselves pay by using certain means of payment. Then, with regards to telephone communications, the prohibition to impose on the consumer a cost that is higher than the base rate of the phone line used by the trader with the purpose of being contacted by the consumer for information on the concluded contract (*i.e.*, telephone hotlines). Finally, with regards to additional payments, the trader is obliged - otherwise refund is compulsory - to ask for the consumer’s express consent before the consumer can be bound by a contract for those additional services which require extra payment. The regulation, in substance, imposes a clear opt-in for the consumer and seems to prohibit opt-out mechanisms frequently used by operators in the sale of goods or ancillary services; it is up to the consumer to expressly refuse the service which is otherwise inferred as requested or accepted (*e.g.* pre-ticked boxes).

The provisions regarding the delivery of goods and the passing of risk are significant as they fill two gaps in terms of guarantees in contracts of the sale of movable goods. Regarding the time for delivery,
the Decree introduces an obligation for the trader, unless differently agreed upon, to deliver the goods to the consumer without unjustified delay and at the latest within 30 days from the conclusion date of the contract. The provision arises from one of the main sources of litigation with traders regarding frequent difficulties encountered by consumers over the delivery of goods, including loss or damage during the transport and partial or late delivery. With regards to the passing of risk, in cases of loss or damage of the goods delivered, it is placed on the consumer at the moment that the consumer actually receives the goods, that is when the consumer physically takes possession of the goods. Up to that moment, risk is borne by the seller.

3 THE ENFORCEMENT OF THE NEW REGULATION

One of the most interesting aspects of the Decree is that it does not only modify the consumer contract regulation, but it entrusts the Italian Competition Authority to enforce the new regulation. In fact, Article 66 after setting out the recourse to court and out-of-court instruments of private enforcement (among which the right to call for an injunction, the so-called class action, and the settlements of disputes), it provides that the “the Competition Authority ex officio or upon request of any subject or organization having a legitimate interest, shall ascertain the infringements of the rules laid out in Sections I to IV of this Chapter, prohibit their continuation and eliminate their effects”. It also sets forth that the Authority is called to act with the power to ascertain, forbid and impose penalties similar to those provided for unfair business practices. The regulation innovates the internal regulation substantially, since in the former system the competence for imposing administrative penalties regarding distance or door-to-door contracts was entrusted to the individual chambers of commerce.

The choice of the Italian Competition Authority as enforcer institution in this field appears rationale given the close connection with the unfair business practices discipline. In fact, this “horizontal competence” aims at strengthening the enforcement of a regulation addressed to consumer protection, thus making the Authority the leading authority in this field.

The Italian solution raises many interpretative doubts and difficulties, the main one being the relationship between the new law (and the new competence) and the one regulating unfair business practices. Are we dealing with two distinct infringements or only one? When the aforementioned regulation mentions “infringements of the rules laid out in Sections I to IV of this Chapter,” do these infringements mean an unlawful administrative act per se (and as such always liable) or did the legislator intend not to impose specific penalties and refer to norms regulating unfair business practices? It makes a big difference. In the first case, we remain on traditional ground: an unfair business practice is one thing, different from the infringement of single provisions; the only differences, compared to the past, would be the competent body and the entity of the penalty. This interpretation is the closest to the textual formulation of the rule. On the other hand, one could
interpret the new provision to mean that, for the single infringement to be ascertained by the Authority, it is necessary to integrate an unfair business practice, whose all conditions must be met. Therefore, the new legislation raises issues of significant importance, and envisages solutions which will determine the extent of the Authority’s action. Only the enforcement of new rules will disclose the approach privileged by the Authority.

Finally, the new legislative provisions remedy the situation of legal uncertainty stemming from the well-known decisions of the Supreme Administrative Court, whereby the competence of ICA to apply the consumer code provisions on unfair commercial practices was de facto excluded in regulated sectors. In particular, the Decree clarifies that the ICA is the sole body designated to enforce unfair commercial practices regulations. The intervention of sectorial regulator is therefore confined to those instances falling outside the scope of application of the rules on unfair commercial practices.3