ONLINE MARKETPLACES AND NEW MEASURES FOR CONSUMER PROTECTION: THE AMAZON CASE

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1. INTRODUCTION

In the last years, developments in marketing and technology have created new challenges for the consumer protection agenda. A specific application of these developments is distance selling over the Internet.

The advantages of this method of distance selling are obvious. From the supplier’s perspective the marketplace is greatly expanded and the costs associated with establishing and maintaining a business can be reduced. From the buyer’s perspective, the advantages include the convenience of being able to ‘shop from home’ for a wider range of goods and services, at a more competitive price.

However, every different stage of an e-commerce transaction presents contractual risks for consumers. During the pre-contractual stage, they might be misled about the products or services offered and their pricing, the contractual terms or even about the identity of the trader. Indeed, since transactions are carried out in a virtual environment where face-to-face contact is nonexistent, consumers conclude contracts without ever seeing the counterparty.

During the contractual stage, consumers may face irregularities relating to contract terms such as missing information or use of pre-checked boxes. Finally, during the post-contractual stage, products or services might not be delivered or delivered damaged and consumers may face challenges to return the goods.

These e-consumer-related issues call for the intervention of consumer law, in order to rebalance the consumer’s position. With this in mind and after years of consultations, was adopted the Consumer Rights Directive 2011/83/EU.

Renouncing its approach of minimum harmonisation in the area of consumer law, i.e. allowing Member States on the basis of Directives to adopt more protective rules, the EU legislator now turned

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to a targeted full harmonisation by means of the Consumer Rights Directive, aiming at increasing the consumer protection across the EU by bringing together in a single instrument the currently distinct laws for distance selling and off-premises contracts as well as other types of consumer contracts.

The Directive is a horizontal piece of legislation which regulates some aspects of distance, off-premises and on-premises contracts between consumers and businesses. It covers contracts for the purchase of goods, services, digital content not supplied on a tangible medium and supply of public utilities. Nevertheless, some contracts are excluded from the scope of the Directive (e.g. contracts concerning social services, healthcare, gambling, immovable property, financial services, package travel, timeshare, supply of foodstuffs or – except for some specific provisions - passenger transport).

The Directive provides that consumers must receive complete and transparent information about key contractual elements, formal requirements for distance and off-premises contracts, a right for consumers to withdraw from distance and off-premises contracts, clear rules on delivery of goods and passing of risk and some specific provisions regarding fees for the use of means of payments, communication by telephone between consumers and traders and rules regarding additional payments.

This paper aims to provide a background of the Italian framework on distance contracts after the implementation of mentioned Directive and to analyse the proceedings PS9353 “Amazon Marketplace”.

2. THE ITALIAN FRAMEWORK ON DISTANCE CONTRACTS

With Lgs.D. 21/2014 implementing directive 2011/83/EU, the Italian legislator regulated pre-contractual information requirements with reference to goods and services purchased through a means of distance communication. Article 49 of the Consumer Code provides for a considerable amount of information that must be given to consumers before entering into a contract. In particular, this provision regulates the obligation to provide information on the right to withdraw (including any possible exclusions), the trader’s identity and the characteristics of the goods and services being sold, as well as the obligation to insert a reminder on the existence of a legal guarantee of conformity for goods, the existence and the conditions of after-sales services and commercial guarantees, where applicable. Moreover, this sizeable list of information required by article 49 of the Consumer Code must be integrated by information requirements provided for by Lgs.D. 70/2003 implementing directive 2000/31/EC with reference to e-commerce. However, distance contract regulations prevail over those of Lgs.D. 2003/70 in case of conflicts as regards contents and modalities for providing information.

More specifically, information requirements concern first of all the structural aspect of the pre-contractual phase, therefore the characteristics and prices of products and the trader’s identity. In fact,
these are crucial elements that can affect the consumer’s choice and help assess whether goods satisfy the consumer’s specific needs.

Further equally important information that must be provided concerns the content regulating the contract, such as for example payment terms and conditions, the possible provision of after-sale assistance and related terms, contract withdrawal terms, the provision and offer of the legal guarantee of conformity. These elements – although not referable to the pre-contractual structure – must be provided in a clear and prominent manner, and directly before the consumer places his order, because capable of not meeting the consumer’s needs even in abstract terms. Therefore, the provision of said information and its full accessibility are crucial aspects for assessing the trader’s conduct.

In addition to the information duties provided for by article 49, paragraph 1 of the Consumer Code, the legislator also specified precise procedure requirements for distance contracts, regulated by article 51, paragraph 2 of the Consumer Code. In fact, the mentioned article introduces additional pre-contractual information requirements (the indication of payment obligations); it also introduces rules, for the pre-contract procedure to be valid, concerning modalities to be followed when giving specific information as provided for by article 49, letters a), e), q) and r) (the mentioned information concerns the trader’s identity, the main characteristics of the products, the total price; the duration of the contract, the conditions for withdrawing and, if applicable, the minimum duration of the contract).

Article 51, paragraph 2 of the Consumer Code is based on recital 39 of Directive 2011/83/EU which recalls the importance to ensure for distance contracts concluded through websites that the consumer is able to fully read and understand the main elements of the contract before placing his order. To that end, provision should be made in this Directive for those elements to be displayed in the close vicinity of the confirmation requested for placing the order. It is also important to ensure that, in such situations, the consumer is able to determine the moment at which he assumes the obligation to pay the trader. Therefore, the consumer’s attention should specifically be drawn, through an unambiguous formulation, to the fact that placing the order entails the obligation to pay the trader.

3. THE PROCEEDINGS PS9353

With decision n. PS9353 the Authority implemented the above mentioned regulations against Amazon. In fact, in the case at hand, the ICA’s preliminary investigations found that the informative regime applied by Amazon – as regards both direct sale and the marketplace platform - did not provide consumers with precise and complete information.

As regards to direct sale, preliminary investigations proved that the purchase procedure did not provide information immediately perceivable concerning the right to withdraw, the provision of after-
sale assistance and related terms, after-sale services and commercial guarantees, and the note on the existence of the legal guarantee of conformity of the goods.

During preliminary investigations, Amazon stated that said information was available in the sections “Terms and Conditions” and “Returns,” accessible through links at the bottom of the page. To this regard, it is important to highlight that the links to which Amazon referred were at the bottom of the page and therefore not necessarily visible during the purchase procedure. Whereas, as emphasized in the guidelines for the implementation of Directive 2011/83/EU, article 51, paragraph 2 of the Consumer Code, traders are obliged to provide said information “right before” the conclusion of the contract, moreover “in a clear and evident way” and “in proximity” so that “...consumers can see it and read it before submitting the order without being obliged to leave the page in use to submit the order, at least as regards the elements of information.”

Therefore, from the proof collected, it does not result that the Amazon did everything possible to make adequately evident – before the entering into contract and in an easy and accessible way – specific pre-contract information concerning the right to withdraw and related terms and exclusions, as well as the legal guarantee.

A regards the marketplace platform, the ICA found also this set of pre-contractual information duties incomplete.

To this regard, it is important to highlight that as clarified by the mentioned guidelines, also marketplace platforms are obliged – jointly – to comply with regulations provided by directive 2011/83/EU. As explained by recital 20, “The notion of an organised distance sales or service-provision scheme should include those schemes offered by a third party other than the trader but used by the trader, such as an online platform. It should not, however, cover cases where websites merely offer information on the trader, his goods and/or services and his contact details”.

An even better clarification of the obligation to which marketplace platform managers are subject is given by the example provided in the guidelines on the implementation of CRD (see point 4.3.4): “In off-premises / distance contracts the Directive requires the trader, who acts on behalf of another trader, to indicate also the identity and geographical address of the principal. In particular, where the trader provides an on-line trading platform for other traders to market their products, for example, an app store for selling digital content offered by different developers, the platform provider should make sure, through appropriate arrangements with the developers, that information about them as content providers is duly displayed”.

In the case at hand, the Authority’s proceedings proved that the set of information provided by Amazon in the marketplace was incomplete.

In fact, first of all, Amazon did not provide specific information in the marketplace concerning its role in the transaction (that is of mere “intermediary”).

This lack generate even greater confusion since Amazon, in some cases, manages the shipping of the products and the return service directly. In such cases, in fact, consumers carry out the payment of the
transaction through Amazon’s tools, and the products purchased are delivered to consumers through Amazon’s services. Lastly, in such cases, also withdrawal is managed by the mentioned trader.

Lacking clear and precise indications on Amazon’s role in the transaction and on its actual obligations towards consumers, the latter did not result adequately informed neither on the contracting party’s real identity, nor on the actual role carried out by ASE in the transaction, in conflict with article 49, paragraph 1, letter a), and article 51, paragraph 2, of the Consumer Code.

Always with reference to information requirements with specific regard to the marketplace platform, the ICA found that Amazon omitted to give consumers the mandatory pre-contractual information on contracts and on the before/after-sale assistance guaranteed by third parties. To this regard, it emerged that Amazon required third party sellers to provide a set of both mandatory and optional information. The mandatory information is limited to: a) company name; b) VAT number; c) physical address; d) telephone number. However, this information is not visible automatically during the purchase procedure, but can be consulted only if consumers use the hypertext link placed next to the product image.

This lack of information was even more significant in cases in which consumers, despite having purchased a product on the website www.amazon.it, found out who their actual contract counterpart was only in case of defect of conformity, that is in case of disservices in using the good.

In said cases, in fact, Amazon simply stated its non-involvement in the contract between the third party seller and the consumer, without entering the merit of the complaint in any way whatsoever. As emerged during preliminary investigations, this concerned especially situations in which consumers complained about the non-provision of the legal guarantee.

During the proceedings, Amazon defended itself referring to e-commerce regulations and, in particular, to the possible derogation applicable to Amazon in marketplace pursuant to article 14 of Directive n. 2001/31/EC (articles 16 and 17 of Legislative Decree 70/2003). As known, the regulation exempts the hosting provider from any liability concerning information given by a service provider, unless the hosting provider: a) is aware of the fact that the activity or information is illegal; b) is aware of facts or circumstances, with reference to compensation actions, that make the activity or information clearly illegal; c) does not intervene immediately to remove the information or disable the access upon communication from cognizant authorities, and therefore as soon as being aware of the facts (article 16).

On this subject, with ruling C-324/09 - L’Oréal e a., the Court of Justice substantially clarified when a service provided by the manager of an online market (such as Amazon) falls within the scope of article 14, n. 1, of directive 2000/31 (hosting) and in what circumstances the manager of an online market can be deemed «aware» pursuant to article 14, n. 1, of directive 2000/31.

The position taken by the court follows in the footsteps of the Google decision (Joined cases C-236/08 and C-238/08) and is unequivocally for a restrictive interpretation of article 14 of the
Electronic Commerce Directive. The Court clarified that Article 14(1) of Directive 2000/31/EC must be interpreted as applying to the operator of an online marketplace where that operator has not played an active role allowing it to have knowledge or control of the data stored.

The operator plays such a role when it provides assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting them.

Where the operator of the online marketplace has not played an active role within the meaning of the preceding paragraph and the service provided falls, as a consequence, within the scope of Article 14(1) of Directive 2000/31, the operator none the less cannot, in a case which may result in an order to pay damages, rely on the exemption from liability provided for in that provision if it was aware of facts or circumstances on the basis of which a diligent economic operator should have realised that the offers for sale in question were unlawful and, in the event of it being so aware, failed to act expeditiously in accordance with Article 14(1)(b) of Directive 2000/31. Therefore the Court focussed on the “active role” (as opposed to neutral role) the intermediary plays and placed a low threshold of involvement to trigger liability. Indeed the court mentions assistance in optimising the presentation of adverts and promotion as an active role.

In the case at hand, against Amazon the element of neutrality appeared to be totally absent. In fact, it is self-evident that Amazon, with reference to the marketplace platform, not only stores - that is, memorizes on its server - data provided by its customers, but is also involved as follows: it is remunerated, as it receives a percentage on the operations carried out on the basis of the sale offers; it processes the data provided by its sale customers; it organizes sale modalities; it intervenes in the relationship sometimes taking care of shipping the goods and even managing withdrawal; it intervenes in the relationship through its payment platform; it monitors sellers’ performances; it filters contacts between sellers/consumers. Lastly, if requested, Amazon also provides assistance aimed at optimizing or promoting certain offers on sale.

In conclusion, the Authority deemed that Amazon’s conducts, carried out after 13 June 2014, integrated a violation of articles 49 and 51, paragraph 2 of the Consumer Code, and imposed a fine amounting to 300,000 Euros.

4. FINAL REMARKS

In the e-commerce environment, the “depersonalization” of the purchase relationship typical of distance contracts considerably weakens the purchaser’s position; at the same time, it increases the trader’s information asymmetry. Hence, the information provided to consumers prior to their purchase choice must be clear, comprehensible, precise and exhaustive with reference to the essential characteristics of the products sold and the modalities for carrying out the contract. This allows
consumers to verify the expediency of their transaction and the conformity of the goods/services provided with the traders’ statements. Moreover, considering the characteristics and organization of the Internet, the fact of providing consumers from the very outset with detailed, complete, exhaustive, clear and comprehensible information on the commercial transaction does not entail a further burden for the trader.

In conclusion, the ICA’s interventions in the e-commerce sector are aimed at increasing consumers’ trust without however imposing pressing rules on the operators of the sector, so as to enhance the development of the European digital single market.