

LAS VENTAS ONLINE DESPUÉS DE LA TRANSPOSICIÓN DE LA DIRECTIVA
SOBRE DERECHOS DE LOS CONSUMIDORES EN ALGUNOS PAÍSES
EUROPEOS

ONLINE SALES AFTER THE TRANSPOSITION OF THE DIRECTIVE ON CONSUMER RIGHTS IN
SOME EUROPEAN COUNTRIES

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RESUMEN: El artículo analiza las ventas online así como la relación existente entre el Código Civil italiano y la legislación especial en materia de comercio electrónico. El autor se centra en el estudio del derecho de desistimiento, los requisitos de información y la llamada “Button solution”, dirigida a evitar las denominadas “Internet cost traps”. De igual modo, el artículo también estudia el impacto que la Directiva ha tenido sobre el resto de disposiciones existentes en materia de protección del consumidor.

PALABRAS CLAVE: ventas online; Derecho de consumo; Derecho civil; Derecho europeo.

ABSTRACT: The essay analyzes online sales and the relationship between the Italian civil code and the special legislation of e-commerce. The author focuses on the right of withdrawal, the information requirements and the so-called “Button solution” to prevent Internet cost traps. It also analyzes the impact that the new law has produced on the general law.

KEY WORDS: online sales; consumer rights; civil law; European law.

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I. ONLINE SALES: THE METHOD OF STUDY.

Online sales (contracts of sale entered into on the web) started to spread also in European countries at the end of 1990s, becoming an innovation within the economic system and bringing an important social change¹. Firms, stimulated by the progress of information and communication technologies, started to use the web as an alternative channel for the promotion and sales of their products.

Online customers have been continuously increasing thanks to both the intrinsic economic convenience and ease of doing transactions in a market without borders, wherever and whenever they want and by paying through more secure electronic mechanisms and instruments. The initial suspicion that especially old people, used to more traditional physical exchanges and due to a lack of IT education, had to these new electronic devices, can be considered over.

In Italy for example, a research done in collaboration with the Polytechnic of Milan (2014), observed that in Italy there were 14 million online customers, an increase of 14% over the previous year.

The 2013 sales volume was 11 billion euro, with an individual expense of 900 euro, which is continuously increasing, although less than the European average of 1.492 euro².

When this new phenomenon has started to become common and popular, scholars began to study this “subject” in a systematic way³.

¹ As it noticed, the different subjects that participate in the exchange determine the distinction among the *B2B (business to business)* contracts, such as contracts among businessmen; the *B2C (business to consumer)* contracts between businessmen and consumer; the *B2PA/B2G (business to public administrations/business to governments)* contracts, such as contracts between businessmen and public administration; the *S2C (supplier to customer)* contracts, such as contracts between suppliers and customers; the *P2P (peer to peer)* contracts, such as contracts among peers, that includes all the hypothetical goods and services exchanges by and among privates, through a specific professional staff (for example: in online auctions, or when users exchange music files, independently from their professional status).

² *Osservatorio e-commerce B2C Netcomm – School of Management*, Polytechnic of Milan.

³ ALBERTINI, L.: “Osservazioni sulla conclusione del contratto tramite computer e sull’“accettazione di un’offerta in Internet”, *Giustizia civile*, II, 1997, 21; BIANCA, C. M.: “I contratti digitali”, *Studium Iuris*, 1998, 1035; BISCONTINI, G. and RUGGERI, L.: *Diritti del cittadino e tecnologie informatiche*, Edizioni

For the subject of interest here, the literature started to appear at the end of the last century and has grown in the first years of this century. This debate has been characterized by various theses with the rise of those who, due to lack of *ad hoc* regulation, have stated that this subject could be governed by the evolutionary interpretation of the 1942 code which, although created for a physical and sensorial system, could be adapted to this new reality, finding solutions that respect the fundamental principles of the legal system and the inalienable human rights, which are constitutionally guaranteed⁴.

A multidisciplinary approach is required, as the jurist has to deal, not only with legislative elements, but also with the social, economic, technical and psychological components. Only in this way it is possible to understand and give adequate answers to this phenomenon that is more influenced by the economy, the social effects of the new IT society and by the continuous technological progress.

In addition, it is essential to carry out this study adopting a transnational perspective. Due to its intrinsic nature, e-commerce involves the crossing of national law borders. The use of State regulation is not sufficient in order to solve problems that cross its borders; the globalization of information and services” market does not allow to distinguish between national and international commerce, anymore businessmen do not detect the borders of their activities.

Therefore, in order to regulate the solution of various concrete problems, it is necessary to refer to EU regulations, international law and also to non-state sources such as self-regulation, with the sensitiveness of not rejecting our traditional legal values and the

Scientifiche Italiane, Napoli, 2004; BORRUSO, R. and CIACCI, G.: “Diritto civile e informatica”, *Trattato di diritto civile of C.N.N.* directed by P. Perlingieri, Edizioni Scientifiche Italiane, 10th ed, Napoli, 2004; COMANDÉ G. and SICA, S.: *Il commercio elettronico. Profili giuridici*, GIAPPICHELLI, Torino, 2001; DELFINI, F.: “Il commercio elettronico”, *Trattato di diritto dell’economia* directed by E. Gabrielli e E. Picozza, Cedam, Padova, 2004; FAVALE, R.: “La conclusione del contratto telematico”, *Giurisprudenza di merito*, XII, 2013, 2553; FOLLIERI, L.: *Il contratto concluso in Internet*, Edizioni Scientifiche Italiane, Napoli, 2005; FRANCESCHELLI, V.: “Computer” (disciplina giuridica del) *Digesto discipline privatistiche sezione civile*, III, 1989, 151; GAMBINO, A. M.: *L’accordo telematico*, GIUFFRÉ, Milano, 1997; GIOVA, S.: *La conclusione del contratto via Internet*, Edizioni Scientifiche Italiane, Napoli, 2000; NAZZARO, A. C.: “Riflessioni sulla conclusione del contratto telematico”, *Informatica e diritto*, 7, 2010; PENNASILICO, M.: “La conclusione dei contratti on-line tra continuità e innovazione”, *Diritto dell’informazione e dell’informatica*, 2004, 810; PERLINGIERI, C.: “Il contratto telematico”, in A. Di Amato ed, *Appunti di diritto dei mezzi di comunicazione*, Edizioni Scientifiche Italiane, Napoli, 2006, 239; PERLINGIERI, P.: “Metodo categorie e sistema nel diritto del commercio elettronico”, in *Il diritto dei contratti fra persona e mercato*, Edizioni Scientifiche Italiane, Napoli, 2003, 652; RICCIUTO, V. and ZORZI, N. (a cura di): “Il contratto telematico”, *Trattato di diritto civile e di diritto pubblico dell’economia* directed by F. Galgano, Cedam, Padova, 2002; RIZZO, V. (a cura di): *Documento informatico firma digitale e commercio elettronico*, Edizioni Scientifiche Italiane, Napoli, 2000; SICA, S. e STANZIONE, P. (a cura di): *Commercio elettronico e categorie civilistiche*, Giuffré, Milano, 2002; TOSI, E. (a cura di): *I problemi giuridici di Internet. Dall’e-commerce all’e-business*, Giuffré, Milano, 2001; also TOSI, E.: *Diritto privato dell’informatica e di Internet. I beni - i contratti - le responsabilità*, Giuffré, Milano, 2006; VALENTINO, D. (a cura di): *Manuale di diritto dell’informatica*, Edizioni Scientifiche Italiane, Napoli, 2004.

⁴ PERLINGIERI, P.: “Metodo, categorie, sistema nel diritto del commercio elettronico”, in Sica, S. and Stanzone, P. (a cura di): *Commercio elettronico e categorie civilistiche* n 3 above, 9; PERLINGIERI, G.: “Le nuove tecnologie e il contratto”, in VALENTINO, D.: (a cura di): *Manuale di diritto dell’informatica* n 3 above, 7; GIOVA, S.: *La conclusione del contratto via Internet*, n. 3 above, 55.

compatibility with the General Principles of the Legal System. In fact, external solutions, often shaped by the mercantilist procedures (as taught by the Master), cannot be considered valid and worthy by our national legal system just because other “civil” countries recognize them⁵.

II. RELEVANT REGULATION.

In e-commerce, all issues related to the qualification of the offer, the various contract’s stipulation modalities, time and place of conclusion are solved by the Italian civil code and by the EU- related special legislation (referring to Decreto Legislativo 9 April 2003 no 70, enforcing the directive 2000/31/CE on e-commerce, stating that “the civil code regulations dealing with all the contract’s stipulation modalities apply also when the IT good or service’s recipient submits his order through an *electronic way*”⁶; this refers also to IT obligations for businessmen and the consumer’s withdrawal right, introduced by European legislator)⁷.

In Spain instead, on 2007 the General Law for consumer’s protection (LGDCU) was approved by Real Decreto Legislativo n° 1/2007.

This law is divided in four books dedicated to general provisions (1st book), contracts and guarantees (2nd book), civil liability for defective goods and services (3rd book) and organized trips (4th book).

In e-commerce it is important to give attention to the contract regulation and to the concrete interests and profits’ rules in order to prove their compliance with law, focusing on the concrete worthiness of the deed and determining if it has generated a proportionate, fair and reasonable layout of interests. In fact, in order to be worthy of protection according to our national legal system based on the solidarity, equity and person protection, the legal act can not be the mere objectification of the free will of being legally bound⁸, but it has also to implement the general framework of constitutional principles⁹ that are harmonized by the reasonable balancing between interests and values

⁵ PERLINGIERI, P.: “Metodo, categorie, sistema nel diritto del commercio elettronico” n 3 above, 10.

⁶ DELFINI, F.: “Il decreto legislativo 9 April 2003 n° 70 di attuazione della direttiva 2000/31/CE sul commercio elettronico”, *Contratti*, 2003, 819; GIOVA, S.: “Il recepimento della direttiva sul commercio elettronico: informazioni, conclusione dei contratti e profili di responsabilità civile (Osservazioni)”, in BISCONTINI, G. and RUGGERI, L. (eds): *Diritti del cittadino e tecnologie informatiche*, n. 3 above, 306.

⁷ CAPOBIANCO, E. and PERLINGIERI, G.: (a cura di): *Codice del consumo annotato con la dottrina e la giurisprudenza*, Edizioni Scientifiche Italiane, Napoli, 2009.

⁸ PERLINGIERI, P.: *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, Edizioni Scientifiche Italiane, Napoli, 2006, 184-185; see also PERLINGIERI, P.: *Forma dei negozi e formalismo degli interpreti*, Edizioni Scientifiche Italiane, Napoli, 1987, 12.

⁹ PERLINGIERI, P.: “Il diritto civile e la complessità del sistema”, in *L’ordinamento vigente e i suoi valori. Problemi di diritto civile*, Edizioni Scientifiche Italiane, Napoli, 2006, 12.

which contribute to give contents to the concrete case¹⁰.

Taken singularly, the economic value of online sales is (very often) moderate (hence justifying the lack of significant juridical rulings). In particular, legal decisions have dealt with the qualification of the offer in the contract concluded through the website access known as “public supply” (art. 1336 Italian civil code), as the proposal is addressed to all web users and all the contract’s elements are stated¹¹; as well as the need to sign the approval of each vexatious provision through the asymmetric double checked digital signature, as it does not determine the stipulation of a sale contract through the unconditional Internet approval of a contract’s general conditions published on the webpage¹². All together online sales represent an important business amount, which deserves attention. The bargaining contents in fact are managed by businessmen who, due to their superior condition, are able to impose to an undetermined mass of potential contracting parties standard bargaining regulations to which the bargaining configurability and the capacity to affect regulations are simply waste.

If ever, the actual concern affects the remedy modalities and all the protection instruments to be used.

The contents’ test is more important in the contracts between business (so called *B2B*), where the formal protection instruments, which characterize the weak consumer-contracting party’s protective legislation, do not applied¹³. Actually the weak contracting party is not anymore identified with the consumer also thanks to the bargaining experience related to e-commerce, where technological progress and the increasing complexity of the economic operations determine relationships that, although carried out among firms, are characterized by disequilibria among parties¹⁴. Art. 1229, 1342, 1370 which are suitable for all the contractual typologies, can apply to these sales, as well as the sub-procurement legislation which, focusing on the so called “technological and economic dependence”, can apply also to the above-mentioned contracts, where the technological unbalance between the contracting parties can cause a vexatious situation

¹⁰ See also GIOVA, S: *La proporzionalità nell’ipoteca e nel pegno*, Edizioni Scientifiche Italiane, Napoli, 2012, 33.

¹¹ These confirm what scholars have already stated: “The website page where the enterprise exposes its goods” catalogue can be considered a store legally representative “IT document” in relation to the public supply (art. 1336 Italian civil code), when the proposal is addressed to all web users and all the essential contractual elements are present, in order to turn the proposal into an actual contract», Tribunale di Bari 11 June 2007, *Diritto e pratica societaria*, XIX, 85 (2007).

¹² Corte di Cassazione 22 March 2006 n° 6314, *Foro italiano*, c. 2035, 7-8 (2006), according to which a business contract stipulation on the web does not imply the unconditional acceptance of all the provisions included in the general contractual conditions published on the web. The vexatious provision must be signed with the asymmetric double checked digital signature.

¹³ MINERVINI, E. and BARTOLOMUCCI, P. F.: “La tutela del consumatore online”, in VALENTINO, D. (a cura di): *Manuale di diritto dell’informatica*, n 3 above, 62.

¹⁴ LAZZARELLI, F.: *L’equilibrio contrattuale nella fornitura di sistemi informatici*, Edizioni Scientifiche Italiane, Napoli, 2010.

against one of the parties¹⁵.

Generally, e-commerce is regulated by (as mentioned above) the general legislation on contract (adequately adapted) combined with the specific one related to the sales, integrated by the particular one on the e-commerce, included both in the decreto legislativo 9 April 2003 no 70 and in the Consumer Code, decreto legislativo 6 September 2006 no 206, whose text, recently modified with the decreto legislativo 21 February 2014 no 21¹⁶, entered totally into force on 13 June 2014 (this last one only for the *B2C*)¹⁷.

This important change, consisting of the recruiting of a whole new Chapter one (from artt. 45 to 67) has transposed the (famous) 2011/83/EU Directive on consumer rights, which was released with the purpose of increasing the legal certainty both for EU traders and consumers¹⁸, improving the consumers' protection and solving the problem of the so called "*Internet cost traps*" (cost traps, over-the-counter costs), has aimed at totally harmonizing some fundamental elements of the *B2C* contract regulation¹⁹.

For online sales this transposition has consisted of the adoption of the correlated EU legislation, particularly adopting the definitions of "sale contract"²⁰, "distance contract"²¹, "durable medium"²², "digital content"²³ and "ancillary contract"²⁴.

¹⁵ For more details see LAZZARELLI, F.: "Dipendenza tecnologica e dipendenza economica: una 'ragionevole' interpretazione della legge sulla subfornitura", *Rassegna di diritto civile*, 2015, I, 102.

¹⁶ Gazzetta Ufficiale 11 March 2014 n.º 58.

¹⁷ CUFFARO, V.: "Nuovi diritti per i consumatori. Note a margine del decreto legislativo 21 February 2014 n.º 21", *Corriere Giuridico*, 2014, VI, 745; PAGLIANTINI, S.: "La riforma del codice del consumo ai sensi del decreto legislativo 21 February 2014 n.º 21: una rivisitazione (con effetto paralizzante per i consumatori e le imprese?)", *Contratti*, VIII, IX, 2014, 796.

¹⁸ Gazzetta Ufficiale dell'Unione Europea 22 November 2011, legge 304/64 entered into force the 12th December 2011; DE CRISTOFARO, G.: "La direttiva 2011/83/UE del 25 ottobre 2011 sui 'diritti dei consumatori': l'ambito di applicazione e la disciplina degli obblighi informativi precontrattuali", in D'ANGELO, A. and ROPPO, V. (eds): *Annuario del contratto 2011*, Giappichelli, Torino, 2012, 30; LEHMANN, M.: "E-Commerce in der EU und die neue Richtlinien über Rechte der Verbraucher", 2012, *CR*, 261; see also LEHMANN, M. and DE FRANCESCHI, A.: "Il commercio elettronico nell'Unione Europea e la nuova direttiva sui diritti dei consumatori", *Rassegna di diritto civile*, 2012, 419.

¹⁹ PERLINGIERI, C.: "La protezione del cyberconsumatore secondo la direttiva 2011/83/UE", *Corti salernitane*, 2012, 526.

²⁰ Art. 45, par. 1, lett. e), Consumer Code: "Any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract as its object both goods and services".

²¹ Art. 45, par. 1, lett. g), Consumer Code: "Any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded".

²² Art. 45, par. 1, lett. l), Consumer Code: "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".

²³ Art. 45, par. 1, lett. m), Consumer Code: "Data which are produced and supplied in digital form".

²⁴ Art. 45, par. 1, lett. q), Consumer Code: "a contract by which the consumer acquires goods or services related to a distance contract or an off-premises contract and where those goods are supplied or those

Among the important innovations, the trader shall provide the consumer with much information, the extension of the time to exercise the right to withdraw, the possibility of excluding the right of withdrawal in the digital contents' procurement and the introduction of the so called “*Button solution*” to prevent “*Internet cost traps*”.

Also in Spain, on 28th of March 2014 entered into force law 3/2014 which modifies the text of General law for consumers protection approved by Real decreto legislativo no 1/2007²⁵.

With the influence of directive 2011/83/UE in fact, this law aims to give more protection to consumers rights²⁶.

In this way, art. 3 of LGDCU²⁷ establishes a new concept of consumer, dedicating the first paragraph to consumer as physical person and the second one to consumer as legal person.

And so, consumer is a physical person who acts beyond his commercial or professional activity, but consumers as legal person are all entities without legal personality which act without profit's aim beyond their commercial activity²⁸.

In addition, Law 3/2014 regulates together distance contracts and contracts stipulated beyond commercial establishment.

In particular, the new 3rd title, expands the concept of distance contract which includes all contracts stipulated between businessman and consumer in a organized system of sale or professional services, using only one or more methods of communication, for example internet, telephone, fax or email²⁹.

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services are provided by the trader or by a third party on the basis of an arrangement between that third party and the trader”.

²⁵ MARÍN LÓPEZ, M. J.: “Comentarios al proyecto de ley de reforma de la LGDCU el “nuevo” concepto de consumidor y empresario en la inminente reforma del TRLGDCU”, *Revista CESCO de Derecho de Consumo*, 10/12/2013.

²⁶ For more details see, MEZZASOMA, L., RIZZO, V., RICCIUTO, V. and LLAMAS POMBO, E.: *Il consumatore di servizi tra Italia, Spagna e Latino America*, Edizioni Scientifiche Italiane, Napoli, 2016.

²⁷ General Law for consumers protection.

²⁸ See also MEZZASOMA, L.: “Il consumatore e il professionista”, in *Diritti e tutele dei consumatori* Edizioni Scientifiche Italiane, Napoli, 2014.

²⁹ For more informations, see MENDOZA LOSANA, A. I.: “Los contratos a distancia y celebrados fuera de establecimiento mercantile tras la directiva 2011/83/UE”, *Revista CESCO de Derecho de Consumo*, n° 1/2012; see also: MEZZASOMA, L., RIZZO, V., LLAMAS POMBO, E.: *La compravendita: realtà e prospettive*, Edizioni Scientifiche Italiane, Napoli, 2015.

The legislation obliges traders to inform consumers about the main elements of the contractual regulation, information shall form an integral part of the contract and shall not be altered unless the contracting parties expressly agree otherwise. They are in addition (for our interest) to the information requirements, established by the Decreto Legislativo 9 April 2003 no 70 about e-commerce.

In particular, in order to prevent cost traps, the legislator obliges traders to specify the total price of goods or services, inclusive of all additional freight, delivery or postal charges and any other costs, including the cost of returning the goods in case of withdrawal as well as the manner in which the price of goods is to be calculated when the total costs can not be reasonably calculated in advance³⁰.

If the trader has not complied with the information requirements, the consumer shall not bear those charges or costs, with the burden of proof in charge of trader³¹.

In particular, for the distance contracts concluded by electronic means which place the consumer under an obligation to pay, the information provided for by art. 49, par. 1, lett. a), e) q) and r) of the Consumer Code, related to the main characteristics of the goods or services, the total cost inclusive of taxes, the duration of the contract and conditions, time limit and procedures to exercise the right of withdrawal, has to be communicated to consumers «in a clear and prominent manner» before the consumer places his order. If the trader has not complied with these requirements, the consumer «shall not be bound by the contract or order» (art. 51, par.2, Consumer Code).

The Italian legislation, by the transposition of the European Directive, has unified the two paragraphs of par. 2 of art. 8 Directive, enhancing consumer's protection with the introduction of the “non-binding character of contract or order”, when the informations about costs, the duration of the contract, the minimum duration of the consumer's obligation under the contract, the consumer's explicitly acknowledgment that the order implies an obligation to pay, are not being shown before the order is placed³².

In addition, the trader shall ensure that the consumer when placing his order explicitly acknowledges that the order implies an obligation to pay. If placing an order entails activating a button or a similar function, the button or similar function shall be labelled in an easily legible manner only with the words «order with obligation to pay» or a corresponding unambiguous formulation.

This is the so called “*Button solution*”, a specific modality that aims to prevent the so called “*Internet cost traps*”, which is a deception that, although other mechanisms of protection

³⁰ Art. 49, par. 1, lett. a), Consumer Code.

³¹ Art. 49, par. 6, Consumer Code.

³² PERLINGIERI, C.: “La protezione del cyberconsumatore”, n. 19 above, 256: «In fact beforehand, the lack of binding was limited only to single provisions: the “illegal” ones and those that “limit or exclude, directly or indirectly, consumers” rights included respectively in the art. 6 par. 1 of the Directive 93/13/CEE on unfair terms in consumer contracts and in the art. 7, par. 1 of the Directive 99/44/CE on certain aspects of the sale of consumer good”.

already present in national law, represents one of the main reason to distrust this type of contract.

The legislator has transposed art. 8, par. 2 of the European Directive (the same provision is included in the art. 25 of the proposal for a regulation of the European Parliament and of the Council on a common European sales law),³³ stating that information requirements are considered the essential prerequisite for the existence of the contractual duty. In this way penalties “effective, proportionate and dissuasive” are provided, as required by art. 24 Directive which aims at reducing cost traps and increasing consumers’ trust on online sales.

With regard to the “*Button solution*”, in Germany the European Directive has been transposed in 2012. The current §312j, par. 4, BGB states that “contract is binding only if”³⁴ information requirements³⁵ are fulfilled as provided by the antecedent par. 3³⁶.

German scholarship has hoped that the Italian legislator, as in Germany, would not simply reproduce the text of the European Directive which, in the par. 2 part two, states: «The consumer shall not be bound by the contract or order», as it happened.

It is my opinion that due to the formulation chosen by the legislator, if the trader violates information requirements, the contract shall be deemed non-existent; the legislator analyzes the interests’ regulation and states that the information requirements are the fundamental prerequisite for the contract’s existence (and not for its validity). So, in case of their violation and if the trader delivers goods to the consumer, it can be considered, as German literature has already stated, a «not requested supply»³⁷ (art. 57, par. 1, Consumer

³³ COM (2011) 635. [Definition](#).

For more details about the proposal for a regulation of the European Parliament and of the Council on a common European sales law, see D’AMICO, G.: “Il diritto comune della vendita”, *Contratti*, 2012, 611; MELI, M.: “Proposta di regolamento. Diritto comune europeo della vendita”, *Nuove leggi civili commentate*, 2012, 183; STANZIONE, P.: “Il regolamento di diritto comune europeo della vendita”, *Contratti*, 2012, 624; SIRENA, P.: “Diritto comune europeo della vendita vs. Regolamento di Roma I: quale futuro per il diritto europeo dei contratti?”, *Contratti*, 2012, 634.

³⁴ The so called “*Button Solution*” has originally (May 2012) been acknowledged by the German legislator in the par. 3 and 4, BGB. Through the German acknowledgement law of the whole European provision (September 2013), all the contents are included in the present BGB.

³⁵ §312j, par. 4, BGB: «Ein Vertrag nach Absatz 2 kommt nur zustande, wenn der Unternehmer seine Pflicht aus Absatz 3 erfüllt».

³⁶ §312j, par. 3, BGB: «Der Unternehmer hat die Bestellsituation bei einem Vertrag nach Absatz 2 so zu gestalten, dass der Verbraucher mit seiner Bestellung ausdrücklich bestätigt, dass er sich zu einer Zahlung verpflichtet. Erfolgt die Bestellung über eine Schaltfläche, ist die Pflicht des Unternehmers aus Satz 1 nur erfüllt, wenn diese Schaltfläche gut lesbar mit nichts anderem als den Wörtern “zahlungspflichtig bestellen” oder mit einer entsprechenden eindeutigen Formulierung beschriftet ist».

³⁷ LEHMANN, M. and DE FRANCESCHI, A.: “Il commercio elettronico nell’Unione Europea e la nuova direttiva sui diritti dei consumatori”, n. 18 above, 447, state that “it can hardly affirm that the performance can not be considered as “request” from the consumer only because he, due to the free claim of the offered service, has been attracted and consequently fallen into trader trap, accepting (or simply not refusing) of receiving the offered service, thinking wrongly that it would be free. For example, we think of the advertised free offered goods through some indications inserted in the *banners* which appear on the consumers email *account*; or also when the consumer, as he needs a PC program, writes on *Google Adobe*

Code), which does not prevent the consumer from exercising his right to damages, due not to “*not stipulated contract*”, but to the so called “*illegitimate bargaining*”³⁸.

Information requirements involve the area of values and interests’ regulation affecting not the validity, due to the lack of agreement (art. 1325 Consumer Code), but the “*existence*” of the contract³⁹, in opposition to the scholarship, which advocates a distinction between validity and behaviour rules.

Validity rules, which can be summarized into a “must be”, such as obligations and behaviour duties, may be included in behaviour rules.

As regards Spanish judicial system, art. 60 of TRLGDCU⁴⁰ reinforces all information that businessman has to give to consumer in a distance contract.

In this way, businessman has to give to consumer all informations about goods, services but also his identity, his commercial name, costs of products including taxes and all payment conditions⁴¹.

And so, art. 97 TRLGDCU, in execution of all general rules established by art. 60 obliges businessman to give all informations about distance contract clearly and comprehensible⁴².

reader gratis and consequently the website addresses him to a trader website. So apparently the program can be downloaded freely but, after that he realizes that a costly subscription contract has been stipulated. In all these hypothesis, the consumer (even in a non technical definition) does not request the service, but the professional invites him to accept the service (attracting him in his trap), without specifying that this consumer’s behaviour will determine the demand (that is unfounded) for a counter service. So, due to the *Internet cost trap*, the art. 8, par. 2, Directive firstly provides the elimination of the trap created by traders, considering the contract or the order not binding for consumers; for this reason the consumer’s service is considered ‘not requested’ as he owns it because he has been attracted in the professional trap, although he could prove- an evil *probatio* that the consumer looked for the service and not that he simply found it. In this case, there would not be the risk of consumers’ violation and neither disequilibrium in favor of him. The not binding contract for consumers due to the violation of the art. 8 par. 2 and the consequential above mentioned not requested procurement discipline applicability will be put into force only when the service is presented as free to the consumer and if he violating the art. 8 par. 2 par. 2, Directive has not be informed about the service cost and he has not recognized that his order would imply an obligation to pay». For a deeper knowledge of the 2011/83/EU Directive and the protection instruments strictly linked to the online contract stipulation and execution modalities, see PERLINGIERI, C.: “La protezione del cyberconsumatore” n 19 above, 526.

³⁸ PERLINGIERI G.: *L’inesistenza della distinzione tra regole di comportamento e di validità nel diritto italo europeo*, Edizioni Scientifiche Italiane, Napoli, 2013; see also PERLINGIERI, P.: *Regole e comportamenti nella formazione del contratto. Una rilettura dell’articolo 1337 codice civile*, Edizioni Scientifiche Italiane, Napoli, 2003, 33.

³⁹ PERLINGIERI, G.: *L’inesistenza della distinzione tra regole di comportamento e di validità*, n. 33 above, 53.

⁴⁰ Texto Refundido de la Ley General par. la defensa de los consumidores y usuarios.

⁴¹ New art. 60, differently from the past, includes the obligation for businessman to inform about contract’s duration or if the contract has an indeterminate duration, all conditions about its dissolution.

⁴² REYES LÓPEZ, M^a. J.: “La reforma introducida en el TRLGDCU por Ley 3/2014 sobre el derecho de desistimiento e información”, *Actualidad Jurídica Iberoamericana*, n° 2 february 2015, 253-292.

IV. RIGHT OF WITHDRAWAL.

The Italian Code has extended from ten to fourteen days the deadline for exercising the withdrawal right that in the case of “sales contract” starts “(...) the day on which the consumer (...) acquires physical possession of goods”⁴³, while in case of contracts for the supply of “digital content” which is not supplied on a tangible medium, it starts on the day of the conclusion of the contract.

If the trader has not provided the consumer with the information on the right of withdrawal (as required by art. 49, par. 1, lett. *b*)) the withdrawal period shall expire twelve months (art. 53, par. 1, Consumer Code) from the end of the initial withdrawal period of fourteen days; while, when information is provided late, the withdrawal period shall expire fourteen days after the day upon which the consumer receives that information (art. 53, par. 2, Consumer Code).

Any agreement on the contrary is void (art. 143, par. 1, Consumer Code).

The legislator has made innovations to the previous legal frame-work, where the expiry of the withdrawal right in case of omitted information was sixty or ninety days (art. 65, par. 3, old formulation).

In order to exercise the withdrawal right, the consumer may use the model withdrawal form as set out in Annex I or make any other unequivocal statement setting out his decision to withdraw from the contract. The trader may give the option to electronically fill in and submit either the model withdrawal form set out in Annex I or other unequivocal statement on the trader’s website. In those cases the trader shall communicate to the consumer an acknowledgement of receipt of such a withdrawal on a durable medium without delay (art. 54 pars. 1, 2, 3 Consumer Code), while the burden of proof of exercising the right of withdrawal in accordance with law provisions shall be on the consumer.

The exercise of the right of withdrawal does not oblige parties to perform the distance contract and, in case of consumer’s offer, to conclude the distance contract also.

The trader shall reimburse, without any delay (and anyway not later than fourteen days from the moment when he was aware about the exercise of withdrawal), all payments made by the consumer through the same means of payment that the consumer has used (unless the consumer has expressly agreed otherwise and does not incur any fees as result of such reimbursement). So he has to reimburse within no more than thirty days, as the

⁴³ Art. 52 par. 2 lett. *b*): “1) in the case of multiple goods ordered by the consumer in one order and delivered separately, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the last good; 2) in the case of delivery of a good consisting of multiple lots or pieces, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the last lot or piece; 3) in the case of contracts for regular delivery of goods during defined period of time, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the first good”.

old version of the Consumer Code stated, but «without delay» or not later than fourteen days.

All the agreements that limit the reimbursement are void. Unless the trader has offered to collect the goods himself, he may withhold the reimbursement until he has received the goods back (that consumer has to give back within fourteen days from the withdrawal).

While on one hand the legislator has notably reduced the terms of the reimbursement, on the other he has ensured to the trader retention of amounts as guarantee of consumer goods' delivery.

The trader does not have to reimburse the supplementary costs, if the consumer has chosen a different modality of delivery other than the least less expensive one offered by the trader. In the most frequent example the consumer opts for receiving the digital content on a *DVD* rather than downloading it from the trader's database. In this situation, if consumer chooses the withdrawal, the trader does not have to reimburse supplementary costs, determined by the different type of delivery, chosen by the consumer.

The consumer shall only bear the direct cost of returning goods to the trader (unless the trader has offered to bear them or he has not informed consumer that in case of withdrawal he would have to bear them) and shall only be liable for any diminished value of the goods resulting from the handling of the goods other than what it is necessary to establish the nature, characteristics and functioning of the goods.

This is important only for indirect e-commerce (when the delivery is carried out through traditional distribution channels), because in direct e-commerce everything happens through the web and so there are not any delivery costs.

In Spain the right of withdrawal is disciplined in Chapter II of TRLGDCU from art. 68 to art. 79.

In particular, differently from the previous art. 71, consumer has fourteen days to exercise the right of withdrawal, in according to the transposition of the directive on consumer rights (2011/83/UE).

In addition, Chapter III, from art. 101 to art. 108 of TRLGDCU unifies the regulation about the right of withdrawal for distance contracts and all contracts stipulated beyond commercial establishment.

V. EXCEPTIONS TO THE RIGHT OF WITHDRAWAL.

Art. 59, par. 1, lett. *o*) of the Consumer Code sets forth the exclusion of the withdrawal right in the supply of digital content which is not supplied on a tangible medium if the

performance has begun with the consumer's prior express consent and his acknowledgment that he thereby loses his right of withdrawal⁴⁴.

The provision reproduces exactly art. 16, lett *m*) of the European Directive.

Some scholars have believed that this exclusion prevents violations by the consumer who, after downloading/saving on his computer the digital contents, informs the trader about the withdrawal.⁴⁵ In addition, I agree with those scholars who have affirmed that the exclusion of the right of withdrawal is innate in digital contents not supplied on a tangible medium "(...) as a '*ius poenitendi*' can not be put into force where the technology still does not allow a reverse operation to the downloading"⁴⁶, *id est* the lack of a technological procedure which allows the return to the sender.

In line with the European Directive is the proposal for a regulation of the European Parliament and of the Council on a common European sales law which will exclude the consumer's withdrawal right «where the supply of digital content which is not supplied on a tangible medium has begun with the consumer's *prior* express consent and with the acknowledgement by the consumer of losing the right of withdrawal (art. 40, par. 3, lett. *d*).

VI. ANCILLARY SERVICES.

The consumer should pay only the ancillary service price when he has requested a paid service linked to that one that he thought it was free (for example: the periodic software update whose first version was wrongly considered free).

VII. THE EXECUTION OF THE CONTRACT.

The Consumer Code has introduced new provisions about the online sales execution also.

Art. 61 states that, unless the parties have agreed otherwise on the time of delivery, the trader shall deliver the goods by transferring the physical possession or control of the

⁴⁴ Art. 57, par. 4, lett. *b*), Consumer Code: "the consumer shall bear no cost for the supply, in full or in part, of digital content which is not supplied on a tangible medium where: 1) the consumer has not given his prior express consent to the beginning of the performance before the end of the 14-day period; 2) the consumer has not acknowledged that he loses his right of withdrawal when giving his consent, or 3) the trader has failed to provide confirmation in accordance with Article 51, par. 7: 'the trader provides consumer the contract validation through a long-lasting device, within a reasonable deadline after the contract stipulation in the distance or later during goods' delivery or before that the service's execution starts (...)"

⁴⁵ LEHMANN, M. and DE FRANCESCHI, A.: "Il commercio elettronico nell'Unione Europea e la nuova direttiva sui diritti dei consumatori", n. 18 above, 430.

⁴⁶ PERLINGIERI, C.: "La protezione del cyberconsumatore", n. 19 above, 526.

goods to the consumer «without delay», but not later than thirty days from the conclusion of the contract.

If the trader has failed to fulfill his obligation to deliver the goods at the time agreed upon with the consumer or within the time limit set out, the consumer shall call upon him to make the delivery within an additional period of time appropriate to the circumstances. If the trader fails to deliver the goods, the consumer shall be entitled to terminate the contract, reserving the reimbursement right.

If the trader expressly refuses to deliver the goods or if the delivery term is essential (taking into consideration all the circumstances attending the conclusion of the contract or where the consumer has informed the trader) the consumer shall be entitled to terminate the contract immediately without establishing a delivery term reserving the reimbursement right.

The Code reserves the consumer the right to exercise remedies according to the Italian civil code provisions.

VIII. CONCLUSIONS.

Ultimately, I can assert that the special legislation related to e-commerce is highly interesting for contract general theory and obligations' scholars also, because the above-mentioned provisions necessarily impact the general discipline of contract.

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