

# Platform Contracts: Legal Framework and User Protection

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*Digital platforms are a very important economic reality, also in consideration of the epidemiological emergency which has increased online daily transactions. When we talk about digital markets, we refer to the transformation of the markets, induced by the exploitation and use of new technologies, in which digital contracts are an increasingly widespread phenomenon. This paper aims to give some hints about such issue and its legal framework. There are different elements to be considered: contract requirements, weaker party protection, sharing economy and some issue about the so-called “zero price economy”. In short, the paper summarises some profiles of legal relevance of such topical and wide subject.*

**Keywords:** *Digital single market; Platform contracts; Sharing economy; Weaker party protection; Zero price economy.*

## Introduction

Digital platforms are a very important economic reality, also in consideration of the epidemiological emergency which has increased online daily transactions.

The use of IT platforms allows companies to raise their profit exponentially. For this reason, it is useful to investigate the issue of corporate bargaining with regard to user protection profiles. If digital platforms represent a constant element in the daily lives of most European consumers and have the great merit of facilitating access to goods and services, as well as the creation of the digital single market, the users/consumers may find themselves disarmed and lacking clear and sufficient tools to protect their position<sup>2</sup>.

It is a relatively recent reality; we talk about platform economy and digital platform and also about collaborative economy<sup>3</sup>.

What are these concepts referring to? Platform economy is a business model that gives life to a virtual market in which supply and demand for goods and services meet thanks to digital platforms<sup>4</sup>. In turn, this last expression indicates all those services whose purpose is to encourage

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<sup>2</sup>El Sabi (2021); Foltran (2019).

<sup>3</sup>Pascuzzi (2020) at 20 et seq.

<sup>4</sup>See inter alia: Quarta & Smorto (2020) at 178 et seq.

interaction between users and to facilitate the exchange of content, goods and services<sup>5</sup>.

A related concept is that of a collaborative economy: it defines a new organisational and business model based on the use of digital platforms to connect people who want to benefit from various utility in a direct, simple way and with minimal intermediation.

In all case it is necessary the creation of an account within the platform in order to be able to access and conclude contracts.

The phenomenon requires the use of the Internet and the presence of a digital infrastructure created in order to make information, data and economic offers available to third parties through the creation of a non-physical digital market.

When we talk about digital markets, we refer to the transformation of the markets induced by the exploitation and use of digital technologies.

In this context, if we consider the professional side, we see how the productive organisation of the company, the communication strategies, the relationship with consumers and the role of information have changed. This latter has big importance in a double sense: both for the company that aims to spread its offers and for consumers' awareness and protection. Furthermore, the role of data and the importance of data accumulation are crucial since they are aimed at creating a position of power in the market and reducing competition.

We may think of firms such as Amazon, eBay, Booking and so on. Such economic realities increase on a daily basis with huge impact in terms of numbers of users and economic income.

When we talk of "online markets" the EU definition is given by Dir. 2019/2161 (so-called "Omnibus directive") approved with the aim of updating an already consolidated regulatory framework which was obsolete in light of the last technological innovations<sup>6</sup>. At recital 25, it provides that "*the definition of 'online marketplace' should be updated and rendered more technologically neutral in order to cover new technologies. It is therefore appropriate to refer, instead of to a 'website', to software, including a website, part of a website or an application, operated by or on behalf of the trader, in accordance with the notion of an 'online interface' as provided by Regulation (EU) 2017/2394 and Regulation (EU) 2018/302 of the European Parliament and of the Council*". Thus, a new definition of online marketplace is given by Art. 4, par. 1, let. e): *«a service using software, including a website, part of a website or an application, operated by or on behalf of a trader which allows consumers to conclude distance contracts with other traders or consumers»* [point (17)]; this definition includes all those services, managed by or on behalf of a professional, which use software to allow consumers to negotiate at a distance with other professionals or consumers and the

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<sup>5</sup>Foltran (2019) at 163.

<sup>6</sup>The Directive, approved on 27 November 2019 and entered into force on 7 January 2020, reforms the European legislative framework for the protection of economic interests of consumers. This regulatory intervention is part of the package of measures presented by the Commission on 11 April 2018, under the name of "New deal for consumers".

professional, who provides an online marketplace, is called “online marketplace provider” [point (18)]<sup>7</sup>.

In this perspective new definitions are also included by Omnibus directive in Art. 2 of Dir. 2011/83 (Consumer Rights Directive): “goods” [point (3)], “personal data” [point (4a)], “digital content” [point (11)], “digital service” [point (16)], “functionality” [point (20)] and “interoperability” [point (21)]<sup>8</sup>.

In this field we have to bear in mind also the Directive (EU) 2019/770, relating to certain aspects of contracts for the supply of digital content and digital services, which has created a new taxonomy by introducing a distinction (and related discipline) between: 1) “digital content” (e.g. computer programmes, applications, video files, etc.); 2) “digital services” (e.g. cloud computing) and 3) “goods that incorporate digital elements” (we can think of a smartphone with a standard pre-installed application)<sup>9</sup>.

### Contracts and Digital Markets: The Role of Information

There are two different profiles of incidence for contract law: the contract stipulated by the user with the platform and the contract stipulated between the users (seller and buyer) concerning the exchange of goods or services<sup>10</sup>. Distance contracts with the relative peculiarities are here to be taken in consideration. In both cases the problem is establishing whether or not the user is a professional so that the *lex specialis* - given by the Consumer code – can find application.

As for contracts concerning the services of the information society, the Italian normative references are the Legislative Decree 9 April 2003, n. 70 (implementing Directive 2000/31/EC on electronic commerce) and the Italian Consumer code<sup>11</sup>.

Big relevance is given to the obligations of the titular including the obligation to provide information (Articles 7/12 of the Legislative Decree 9 April 2003, n. 70 implementing Directive 2000/31/EC), while the legislation of the Consumer code has been taken into consideration whenever there is a *B2C (business-to-consumer)* relationship. In this case, there are pre-contractual information duties (Article 49 of the Italian Consumer code); contract form requirements (Art. 51) and the withdrawal right (Art. 52)<sup>12</sup>. These provisions are aimed at rebalancing the positions of contracting parties.

When we talk of information, we have also to keep in mind the innovations introduced by Omnibus directive. Consumers must be informed “*in a concise, simple and understandable form*” (recital no. 20, Omnibus Directive). At Article 3, par. 7, it includes a specific provision (Art. 11 *bis*) in

<sup>7</sup>Speziale (2020) at 447.

<sup>8</sup>Speziale (2020) at 447.

<sup>9</sup>El Sabi (2021).

<sup>10</sup>Quarta & Smorto (2020) at 182 et seq.

<sup>11</sup>Legislative Decree 6 September 2005, n. 206.

<sup>12</sup>Quarta & Smorto (2020) at 186-187.

the Annex I of the Directive 2005/29/CE on unfair commercial practices, considering as a commercial practice which is in all circumstances considered unfair: *Providing search results in response to a consumer's online search query without clearly disclosing any paid advertisement or payment specifically for achieving higher ranking of products within the search results.*

The reform introduces a ban on hidden advertising which comes alongside the one provided, for editorial content, by art. 11, Annex I.

Secondly, Art. 23 *bis*, Annex I, forbids the so-called online secondary ticketing. It is about reselling to consumers of event tickets that the professional has previously purchased, using automated tools in order to circumvent the technical limits set by the primary seller.

Furthermore, Arts. 23 *ter* and 23 *quater*, Annex I, deal with reviews on the web. The entrepreneur is required to adopt “*Reasonable and proportionate measures*” to verify that product reviews are submitted by who actually used or purchased it (Art. 23 *ter*). The new Art. 23 *quater* also prohibits the commercial practice consisting in sending false reviews or false likes on social media or however in providing false information to promote products. The provision also admits the possibility that a third party is responsible for committing the offense by the professional, and not the professional himself<sup>13</sup>.

In the context of information duties, among the others, we can consider Amazon case, decided by the European Court of Justice with the judgment of 10 July 2019 (case C-649/17).

Amazon was sued before the German courts by the Federal Union of Consumer Organisations and Associations who maintained that it did not respect its legal obligation to provide consumers, with efficient means, information about how to enter into contract with it; in particular, it did not disclose to consumer, in a clear and comprehensible manner, its telephone and fax numbers. The Federal Union alleged that the Amazon call back service did not satisfy the law information requirements, since consumers had to take a number of steps in order to enter into contact with an interlocutor of that company<sup>14</sup>.

Thus, in this decision the Court dealt with the content of the disclosure requirements. The results of the Courts interpretation were that an e-commerce platform such as Amazon is not obliged in all cases to make a telephone number available to consumers before the conclusion of a contract.

The Court pointed out that the Directive 2011/83/EU (*Consumer Rights Directive* of 25 October 2011) seeks to ensure a high level of consumer protection by guaranteeing their information and their safety in transactions with traders trying the right balance between a high level of consumer protection and the competitiveness of enterprises as enshrined in the Charter of Fundamental Rights of European Union (Arts. 16, 38).

According to the Court, an unconditional obligation imposed on traders to provide consumers, in all circumstances, with a telephone number or to establish a

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<sup>13</sup> Speziale (2020) at 446.

<sup>14</sup> German law requires traders, before concluding a distance or off-premises contract with consumers, to provide their telephone number in all circumstances in the same way as the provisions of Art. 49 let. c) of the Italian Consumer Code.

telephone or fax line, or to create a new email address to allow consumers to contact them appears to be disproportionate.

The Omnibus directive is in line with such judgment: in fact, at recital 27, it provides “[...] *The information requirements for providers of online marketplaces should be proportionate. Those requirements need to strike a balance between a high level of consumer protection and the competitiveness of providers of online marketplaces [...]*”. The directive does not oblige traders to establish a telephone or fax line or to create a new email address to allow consumers to contact them in all circumstances. It is not necessary that a telephone line or a fax number is activated, there may be alternative means of communication as long as the information relating to these means is accessible to the consumer in a clear and understandable way.

### *Unfair clauses in online agreements*

Another relevant profile in this discussion is that of unfair clauses within the digital contract. In platform contracts the acceptance of the contract terms of use can be done by clicking (i.e. by checking the box inserted on the site) or by using the service itself. In the presence of unfair clauses, such as unilateral withdrawal from the contract, which rules are in force? For b2b (*business-to-business*) or c2c (*consumer-to-consumer*) contracts, Art. 1341 of the Italian Civil code which provides for formal protection, subordinating the validity of the unfair clauses to their written approval.

In fact, in *inter pares* contracts, Italian civil code opts for a “formal” protection in order to ensure that the clause is consciously accepted and in order to overcome the information asymmetry resulting from the unilateral provision of the same clause; it was therefore not intended to limit the autonomy of the parties *a priori* around the choice of the content of the contract, but only to ensure the existence of a conscious consent by the party accepting the contract<sup>15</sup>.

What about digital contracts?

When an electronic contract contains unfair clauses, how can Art. 1341 of the Italian Civil code find room<sup>16</sup>? In this context, on the one hand, the jurisprudence maintains that for the validity of the unfair clause present in a digital contract it is necessary to specifically approve it by means of an electronic signature<sup>17</sup>. In e-commerce agreements, formal approval is considered necessary so that the clause must be specifically signed by the buyer (or the subject adhering to the contract, who is the weaker contractual party).

Therefore, according to this interpretation, for the validity of an unfair clause contained in an online contractual form, the mere click of approval of

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<sup>15</sup>Cerdoneo Chiaromonte (2018) at 404 at 405.

<sup>16</sup>*Ibid.*

<sup>17</sup>See, among the others, Trib. Catanzaro, 30 April 2012, in *Il caso.it*; Giudice di Pace of Trapani, 14 October 2019; Giudice di Pace of Giarre, 21 October 2019, in *DeJure*.

the contractual text is not sufficient, it is instead necessary to specifically sign the same clause through digital signature.

According to another orientation instead, the electronic signature is not necessary because it is too sophisticated and it would risk paralyzing the development of market on an international level; so a specific box is enough to tick because this is equivalent to a specific approval of the unfair clause<sup>18</sup>.

If the contract is b2c we have the application of the Italian Consumer code: the presence of unfair clauses is banned by Art. 33 and following.<sup>19</sup> Thus, for the validity of the clause it is necessary to prove in court that it has been individually negotiated (Art. 34 Consumer code).

The latest European regulatory intervention is the Omnibus Directive: it requires EU countries to introduce effective, proportionate and dissuasive measures against traders who break the rules on unfair contract terms based on a set of parameters.

These criteria include: the nature, gravity, scale and duration of the infringement; any action taken by the trader to mitigate or remedy the damage suffered by consumers; any previous infringements by the trader; penalties imposed on the trader for the same infringement in other EU countries in cross-border cases where information about these penalties is available through the mechanism set up by Regulation (EU) 2017/2394. Under the Omnibus directive, EU countries must be able to impose effective, proportionate and dissuasive penalties where, in connection with coordinated actions under Regulation (EU) 2017/2394, they identify major cross-border infringements affecting consumers in several EU countries. Fines are very high: they can reach 4% of a trader's turnover or € 2 million where information about the trader's turnover is unavailable.

### ***Jus Poenitendi* and Account Deactivation**

From the point of view of the European institutions, alongside the disclosure obligations for professionals, the right of withdrawal assumes a strategic role for the implementation of the digital single market. The consumer's right of withdrawal allows the titular to repent and exit the contract, playing a role of fundamental importance as a tool for consumer protection.

The *jus poenitendi* is based on the asymmetry of bargaining power that characterises the relations between professionals and consumers and is aimed at creating a balance between the asymmetrical contractual positions of parties. Although over time several directives have been adopted in this field in European Law and the new techniques of commercialisation have modified the market itself, the *jus poenitendi* has not changed in its structure and function<sup>20</sup>. It is a consumer fundamental right, unrenounceable<sup>21</sup>, *ad nutum*<sup>22</sup> and free. It results in the

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<sup>18</sup>Trib. Naples, 13 March 2018, n. 2508.

<sup>19</sup>Chiarella (2016) at 68 et seq.

<sup>20</sup>Patti (2012).

<sup>21</sup>This derives from the imperative rules set up to protect the consumer within internal market.

<sup>22</sup>This means that such withdrawal does not require any preconditions.

termination of the contract and determines the obligation for the consumer to return the goods and for the professional to reimburse the price.

With the acknowledgement of withdrawal right, the consumer is not protected from the point of view of the content of the contract, but from that of his free and informed consent. In this perspective, the “*pacta sunt servanda*” principle does not undergo a derogation in consumer contracts: the *jus poenitendi* has the purpose of guaranteeing freedom of choice of the consumer and, ultimately, his contractual autonomy. The principle is still in force, but only after the so-called cooling – off period<sup>23</sup>.

The *jus poenitendi*, the duty to disclosure, the formal requirements, on the one hand, and the control over the content of the contract, on the other hand, represent the fundamental cornerstones of consumer law, offering specific rules also for the platform contracts<sup>24</sup>.

Recently the Omnibus Directive has modified Art. 9 of Dir. 2011/83, on the right of withdrawal, adding a paragraph 1 *bis* which allows EU member States to extend the withdrawal period, normally of fourteen days, to thirty days, in the case of contracts stipulated with aggressive marketing techniques.

With the purpose to modernise some EU provisions on consumer protection, Art. 4 of Omnibus Directive has partly amended the letters a) and m) of Art. 16 of the CRD (*Consumer Rights Directive - 2011/83*), on the exceptions to the right of withdrawal. In this context, the obligation for professionals to obtain prior express consent is also accompanied by the acceptance of the fact that consumer will lose the right of withdrawal once the contract has been executed, if the consumer is obliged to pay a price to the professional.

Furthermore, Art. 16, par. 2, has also been modified: member states may derogate from the exceptions to the right of withdrawal of paragraph 1, lets. a), b), c) and e), for contracts that have been concluded following unsolicited visits or organised excursions. National legal systems may, therefore, exceptionally, extend the right of withdrawal and/or admit it, where normally excluded<sup>25</sup>.

The Omnibus directive clarifies that the necessity of consumer consent before the expiration of the cooling-off period works for all for services, including digital services, provided for a fee<sup>26</sup>.

In the practice, online selling of goods or services is different from platform service itself (e.g. eBay, Amazon, Booking and so on): in the latter case, the withdrawal is generally exercised by the user informally, abandoning the use of the service or deleting the account<sup>27</sup>. No other fulfilment is required.

In this regard, another interesting issue is that of private accounts deactivation by the titular of the platform. It is very relevant for its effects on the market: Italian courts have judged the deactivation of the account as a tool for governing the market, able to compromise the positioning and the image of the companies<sup>28</sup>.

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<sup>23</sup>Patti (2012) at 1009.

<sup>24</sup>El Sabi (2021).

<sup>25</sup>Speziale (2020) at 446.

<sup>26</sup>See Recitals 37-38 of Directive 2019/2161.

<sup>27</sup>Quarta & Smorto (2020) at 193 et seq.

<sup>28</sup>See in argument Trib. Messina, 7 July 2010, in *Altalex.com* and Trib. Catanzaro, 30 April 2012, in *Ilcaso.it*. Furthermore see: Quarta & Smorto (2020) at 195.

For this reason, a debate raised in order to individuate the case in which the deactivation of private accounts is licit<sup>29</sup>. According to a first approach, the titular of the platform can cancel private accounts only in case of serious and important breach of contract and only if this faculty is allowed by a specific clause. Furthermore, since this clause contains the power of a unilateral withdrawal and, as such, is an “unfair clause”, it needs distinct approval by the user<sup>30</sup>. According to a second interpretation, since the deactivation of private accounts is expression of the right of withdrawal of the platform titular, it needs not only a specific approval by the user (according to Art. 1342, co. 2, c.c.), but also a judicial decision<sup>31</sup>. The issue will be examined again in next paragraph.

### **Regulation (UE) 1150/2019**

Now we have to consider the subject of online intermediation services. The merchant (“commercial user”) needs the intermediary (platform) to promote (in the “telematic windows”) his products and to reach interested parties and customers<sup>32</sup>.

The EU Regulation 1150/2019 of 20 June 2019 (which promotes fairness and transparency for business users of online brokerage services) is relevant in this field because it regulates *business-to-business* relationship, i.e. between the platforms and those who offer their services<sup>33</sup>. The Regulation aims to offer a system of safeguards for professionals who use online intermediation services and to avoid the risk of unfair agreements and abuse of bargaining power. As it is pointed out by Art. 1, in fact, the purpose of the Regulation is «*to contribute to the proper functioning of the internal market by laying down rules to ensure that business users of online intermediation services and corporate website users in relation to online search engines are granted appropriate transparency, fairness and effective redress possibilities*».

The need for protection arises in all those cases in which the terms of use of the service have not been individually negotiated with specific reference to the use, termination and suspension of online intermediation services<sup>34</sup>.

The Regulation applies only to the relationships between online platforms (including search engines) and commercial users, i.e. those subjects who act in the context of their entrepreneurial activity excluding consumers (who instead operate for personal purposes) and sharing economy platforms<sup>35</sup>.

Business users must have their place of establishment or residence in the Union and, through online intermediation services or online search engines, offer goods or services to consumers located in the Union, irrespective of the place of

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<sup>29</sup>Quarta & Smorto (2020) at 194-195.

<sup>30</sup>Trib. Messina, 7 July 2010, in *Altalex.com*.

<sup>31</sup>Trib. Catanzaro, 30 April 2012, in *Il caso.it*.

<sup>32</sup>Quarta & Smorto (2020) at 195 et seq.

<sup>33</sup>Foltran (2019) at 174 et seq.

<sup>34</sup>Quarta & Smorto (2020) at 196.

<sup>35</sup>Foltran (2019) at 168.



establishment or residence of the providers of those services and irrespective of the law otherwise applicable (Art. 1, par. 2)<sup>36</sup>.

By online intermediation services the Regulation means online platforms that allow commercial users to offer goods and services with the aim of facilitating the initiation of the direct transaction with users. It is important to underline that while the application of the Regulation to online payment services or to online advertising tools or online advertising exchange is excluded (Art. 1, par. 3), for the purpose of submitting an intermediary service to the Regulation it is not necessary that the entire transaction is carried out inside the platform, but it is sufficient that the platform is the virtual place through which the transaction is initiated, although some steps of the transaction may take place outside of it (Art. 2, point 2, let. b).

Art. 3 of the Regulation contains *Terms and conditions*: these are unilaterally arranged by the providers of the online intermediation services and have: to be drafted in plain and intelligible language (par. 1, let. a); to be easily available online (let. b); to set out the grounds for decisions to suspend or terminate or impose any other kind of restriction upon, in whole or in part, the provision of their online intermediation services to business users (let. c).

*Restriction, suspension and termination* are analytically governed by Art. 4, which in any case requires the service provider to communicate on a durable medium, prior to or at the time of the restriction, the decision to suspend or terminate the service.

In the event that the deactivation is definitive, the decision and its motivation must be made known with at least thirty days' notice from its effective application (Art. 4, par. 2).

Following the service provider's communication, the right for the commercial user to lodge a complaint is ruled by par. 3, clarifying the reasons and facts in support of his eventual contestation of the decision adopted by the platform.

The obligation to provide a period of notice does not apply if there is a regulatory obligation to cease the service (Art. 4, par. 4, let. a), the withdrawal is justified by imperative reasons under national law (Art. 4, par. 4, let. b) or there is the possibility for the platform operator to demonstrate that the user has repeatedly violated the terms and conditions of service (Art. 4, par. 4, let. c).

According to Art. 4, last paragraph, moreover, the service provider is not even required to provide a justification of the reasons for withdrawal or termination of the contract "*where it is subject to a legal or regulatory obligation not to provide the specific facts or circumstances or the reference to the applicable ground or grounds, or where a provider of online intermediation services can demonstrate that the business user concerned has repeatedly infringed the applicable terms and conditions, resulting in*

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<sup>36</sup>The Regulation does not apply «to online payment services or to online advertising tools or online advertising exchanges, which are not provided with the aim of the facilitating the initiation of direct transactions and which do not involve a contractual relationship with consumers» (Art. 1, par. 3).

*termination of the provision of the whole of the online intermediation services in question”.*

The choices in the “positioning” of the products, the way to sort the results of a search contribute to increase or decrease the turnover or revenue. For this reason, the Regulation provides rules valid for both online platforms and search engines. In both cases, the choice of positioning the professional’s offer or his website is capable of affecting the knowledge of the professional’s activities and also on the consumer’s choices<sup>37</sup>. Art. 5 of the Regulation establishes that the parameters that determine the positioning and the reasons must be set out in the terms of use of the platform that offers the brokerage service (par. 1); similarly, search engine providers must offer these elements in an easily and publicly accessible and updated description, written in simple and understandable language (par. 2). Furthermore, information - of the possibility of influencing the positioning against payment of a consideration - must be given (par. 3).

The Regulation provides for specific contractual clauses that the terms of use of the platforms must contain in order to ensure that the relationship with the professional is conducted in good faith and fairness (Art. 8). These include the clause by which the platform undertakes not to impose retroactive changes to the terms of use (let. a); the one that indicates to the professional the conditions for terminating the contract (let. b) and, finally, the clause relating to technical and contractual access to the information that the professional provides to the platform and which is kept by the latter even upon expiry of the contract (let. c).

Article 9 governs access to data: it provides that within the contracts there is a description about the possibility or not to access personal data or other data that are provided or generated both by consumers and by the commercial user and, in the event that access is possible, the categories of data concerned and the conditions of access. This information must be provided both regarding any access to such data by the intermediary service provider and if access is allowed to the commercial user of the platform (par. 1). In addition, the Regulation indicates that specific information must also be provided on the possibility of access by the commercial user to the data in aggregate form (par. 2, let. c) as well as whether or not the sharing of data with third parties is envisaged and, if such sharing is not necessary for the functioning of the platform, the purpose it intends to satisfy and the possibility or not by the commercial user to oppose it (par. 2, let. d).

Lastly, importance is given to the need for the online platform to establish internal complaint-handling system (Art. 11). The system must be easily accessible, free of charge and must ensure a decision within a reasonable time. The characteristics of this system are specified in terms of treatable issues (concerning alleged non-performance by commercial users, technological problems of the platforms or behaviour and measures adopted by the supplier) and the ways in which they must be resolved (rapidity, effectiveness, transparency and fairness).

Art. 12 provides for the possibility of mediation in the event that the dispute has not been resolved by the internal complaint-handling system.

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<sup>37</sup>Quarta & Smorto (2020) at 197.

## The Distinction Business – Consumer

Anyone can participate in the production system which works thanks to the platform, so it is not easy to understand whether the person providing the service is a professional or not<sup>38</sup>. Anyone (not only professional merchant) can sell goods or services online through digital platform, just as anyone can rent a room (even he is not a hotel keeper) since everyone can participate in the production and distribution chain<sup>39</sup>.

Nowadays we discuss about the crisis of the distinction *Business – Consumer*. For this reason, the expression “*prosumer*” has been coined to explain the hybrid nature of modern market actors<sup>40</sup>. It expresses a crisis of the traditional categories of *professional* and *consumer* existing even within contemporary digital system. The professional nature of the operator affects the applicability of the Consumer code and is crucial also to establish who is required to fulfil the administrative burdens set by law to carry out certain activities<sup>41</sup>.

In this regard, we may reflect on the fact that the role of platforms is not always related to an instrumental or ancillary role with respect to the main object of the transaction: in fact, it is frequent the case in which the same platform directly offers goods and services in competition with those offered by professional users, assuming the position of a negotiating party<sup>42</sup>.

In this regard, we have the Communication of the European Commission of 2 June 2016 *A European agenda for the collaborative economy* which has the objective to distinguish commercial activities from occasional ones. For this purpose, it introduces some professionalism indicators: attendance, turnover, profit, salaries, etc.

Some questions for determining whether the platform should be held responsible for the underlying service are: is the final price set by the platform? Are there terms of use unilaterally set to regulate the offline relationship between those who provide the service and those who receive it? Are the assets owned by the platform? Various other elements depending on the case, from time to time, are under consideration<sup>43</sup>.

Furthermore, according to the recital 27 of the Omnibus Directive “*Providers of online marketplaces should inform consumers whether the third party offering goods, services or digital content is a trader or non-trader, based on the declaration made to them by the third party. When the third party offering the goods, services or digital content declares its status to be that of a non-trader, providers of online marketplaces should provide a short*

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<sup>38</sup>Azzarri (2021).

<sup>39</sup>Quarta & Smorto (2020) at 202.

<sup>40</sup>Foltran (2019) at 164.

<sup>41</sup>Quarta & Smorto (2020) at 203; Foltran (2019) at 170. See in argument among the others: ECJ, 4 October 2018, C-105/17 in *Diritto e Giustizia*, 4 October 2018.

<sup>42</sup>Foltran (2019) at 164. An example of this genre of activity is given by Uber taxi.

<sup>43</sup>As exemplary cases, in this field, we can consider two decisions of the European Court of Justice: Uber taxi case (ECJ, 20 December 2017, Case C-434/15) and Airbnb Case (ECJ, 19 December 2019, Case C-390/18).

statement to the effect that the consumer rights stemming from Union consumer protection law do not apply to the contract concluded. Furthermore, consumers should be informed of how obligations related to the contract are shared between third parties offering the goods, services or digital content and providers of online marketplaces. The information should be provided in a clear and comprehensible manner and not merely in the standard terms and conditions or similar contractual documents [...]”. This is a very important provision from the point of view of consumer protection.

The goal of making consumer rights more effective is balanced by the provision which consider also the interests of businesses. In this perspective, “*the information to be provided about the responsibility for ensuring consumer rights depends [as recital n. 27 continues] on the contractual arrangements between the providers of online marketplaces and the relevant third-party traders. The provider of the online marketplace could indicate that a third-party trader is solely responsible for ensuring consumer rights, or describe its own specific responsibilities where that provider assumes responsibility for certain aspects of the contract, for example, delivery or the exercise of the right of withdrawal*”<sup>44</sup>.

### **The “Payment” through Personal Data**

Another relevant issue is given by law relationships in the so-called “zero price economy”. Nowadays in digital platform and online agreements, there is a tendency to recognise an economic value to personal information, preferences and other content generated by users-consumers, which can be transferred to third parties. We talk about “propertisation” of personal data, which are no longer seen only as a representation of the person, but also as a “good” endowed with a value and therefore exchangeable with other merchandise or services<sup>45</sup>.

In this perspective the Omnibus directive introduces the express qualification of the transfer of personal data as price in the contract for the supply of digital content or services (Art. 3, par. 1). In this way, the common practice of exchanging digital content or service against personal data is introduced into law, although such phenomenon is generally perceived by the user in terms of gratuitousness.

The Omnibus directive allows the users - of contracts for corresponding services supply of digital content or services - to “pay” with their personal data. It adds a paragraph 1a to Art. 3 of Dir. 2011/83/EU (*Consumer Rights Directive*) and so it extends the scope of application to those contracts for the supply of digital content and digital services that do not require the payment of the price by the consumer, but rather the payment through personal data [the only exception is given by the fact that “*«the personal data provided by the consumer are exclusively processed by the trader for the purpose of supplying the digital content (...) or for allowing the trader to comply with legal requirements to which the trader is subject, and the trader does not process those data for any other purpose*”].

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<sup>44</sup>In argument, see Speziale (2020) at 447.

<sup>45</sup>Ricciuto (2018) at 689 et seq.; Ricciuto (2020); Alvisi (2019) at 675 et seq.

The last decisions - relevant in this field - come from Italy; they concern both consumer rights and data protection. In 2021 Italian judges have confirmed the condemnation of Facebook by Italian Competition Authority (AGCM) for not informing properly users about its collection and use of data.

We have a first judgment given by Lazio Regional Administrative Tribunal (10 January of this year)<sup>46</sup> confirmed by the decision of the Italian Council of State (29 March 2021) for violations of the Consumer code in the context of processing and sharing of users' data with third parties for commercial purposes<sup>47</sup>.

In particular, the Council of State upheld the decision of the Administrative Tribunal and rejected Facebook's appeals. According to the judgment of Italian Council of State, Facebook had misled users to register to the Facebook platform, since it did not inform them that their data would be used for commercial purposes.

According to the judges, the exploitation of the personal data (that the users has made available in order to be able to use the services, offered as 'free of charge') by the titular of a social network (in this case, Facebook) is an "unfair commercial practice", because of the data transmission to third parties for commercial purposes.

The core of the sentence is given by the presence of a forced consent to the processing of data and by the lack of complete information suitable for making it clear that, in the face of the advantages connected to the service, the automatic profiling of the customer is carried out, together with the acquisition of the personal data, by an indefinite number of operators for indefinite commercial purposes<sup>48</sup>.

As first, in this case the provision of consent was required in order to access the service, so there is a compression of personal freedom, although such limitation is compensated by the ability to access the service.

Furthermore, Facebook did not inform properly the user with clarity and immediacy about the collection and use, for remunerative purposes, of the user's data and, consequently, of its commercial intent, aimed at monetizing the same. The information provided to users has been considered generic and incomplete without adequately distinguishing between, on the one hand, the use of data functional to the personalisation of the service with the aim of facilitating socialisation with other users, and on the other, the use of data to carry out targeted advertising campaigns.

In the motivation, the Court explains that the communication to third parties of the personal data implements the phenomenon of "propertisation": since it invests situations governed not only by the GDPR, it must not be

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<sup>46</sup>See T.A.R. Lazio, Rome 10 January 2021, n. 260, in *DeJure* [see the comment of Solinas (2021) at 320 et seq.].

<sup>47</sup>Cons. Stato, 29 March 2021, n. 2631, in *DeJure*. In argument, see Ricciuto & Solinas (2021), at 1 et seq.; Carnovale (2021) at 1 seq.

<sup>48</sup>This was already pointed out by the European Data Protection Supervisor in the decision n. 4 of 2017: "presenting services as 'free' is 'deceptive' and blinds consumers to the actual costs which they will experience 'downstream' and distorts decision making, thereby harming both consumers and competition".

related exclusively to *privacy* rules, in order not to reduce the “multilevel protection” guaranteed to individuals.

Thus, the case - concerning the exploitation of personal data in the context of an online service - fell under the realm of *consumer* law, in addition to personal data protection law and to the General Data Protection Regulation [Regulation (EU) 2016/679].

These judicial statements open the way to the possibility of considering the choice of the subjects to allow the processing of their personal data also as an exercise of economic freedom and not only in the perspective of the protection of personality rights. The issue is placed in the context of exchange contracts: personal data can be considered as contractual price with the applicability of rules, such as that on unfair commercial practices, which find their rationale in the protection of the consumer’s consent for optimal market competition.

In conclusion, this peculiar genre of economic freedom must be considered alongside the protection of the individual’s own personality in the context of online platform contracts.

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