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Thoughts on the EU Digital Single Market Strategy and the New Consumer Sales Directive

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Abstract

The paper describes the impact of the EU 'Digital Single Market Strategy' (DSMS) on consumer law. The essay analyses, in particular, the new Consumer Sales Directive [Directive (EU) 2019/771] and its recent transposition into Italian Law. Starting from the assumption that the Information-Digital Age certainly has social-economic impacts, therefore also legal ones, the paper first of all illustrates the Strategy promoted in 2015 by the European Commission. In order to represent how the Commission intends to face the new digital "revolution" and its economic opportunities, this essay — through a brief description of the main pillars of the DSMS — tries to circumscribe the outcomes of the Strategy and its correlation with the new legal regime proposed for the building of the so-called 'Internal Market 2.0'. Moreover, the paper analyses the important role that consumer protection plays in relation to the European Commission's DSMS. With this in mind, the article examines the main aspects of the so-called 'New Deal for Consumers' (NDC), promoted in 2018 by the Commission in order to accompany the implementation of certain parts of the DSMS. In this first part of the article, a sort of "toolbox" is offered to the reader with the purpose of developing a better understanding of the current EU trends in consumer law. Following this line of research, the second part of the article focuses on the Directive (EU) 2019/771 proposed by the European Commission to regulate certain aspects concerning contracts for the sale of goods. In the final section, the paper describes the principal characteristics of the Italian transposition of the New Consumer Sales Directive (NCSD), as implemented in November 2021. In the conclusion, the paper suggests that the most recent EU interventions on consumer law are still based on a traditional understanding of consumer protection and, with regard to certain aspects, do not appear to be very different from the previous legislation (this is the case of the so-called hierarchy of remedies).

Keywords

digital age, EU digital single market strategy, new deal for consumers, consumer protection, consumer law, consumer sales directive, Italian Consumer Code.

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Introduction

In his book *The Fourth Industrial Revolution* the German economist Klaus Schwab wrote: «I believe that today we are at the beginning of a fourth industrial revolution. It began at the turn of this century and builds on the digital revolution. It is characterized by a much more ubiquitous and mobile internet, by smaller and more powerful sensors that become cheaper, and by artificial intelligence and machine learning. […] The fourth industrial revolution, however, is not only about smart and connected machines and systems. Its scope is much wider. […] It is the fusion of these technologies and their interaction across the physical, digital and biological domains that make the fourth industrial revolution fundamentally different from previous revolutions». [Schwab K., 2016: 11–12].

The Fourth Industrial Revolution — also referred to as the New Information-Digital Age [De Franceschi A. et al., 2016]; [Grundmann S., Hacker P., 2017: 255 ff.] — is an economic and social revolution, which certainly has many legal implications.

With specific regard to consumer relationships — which will be the only focus of the present analysis — *t*echnology may create the illusion that problems such as asymmetry of information can be solved with no need of a legal framework. On the contrary, the social concepts of 'network' and 'trust' appear to be weak when technological devices operate within trade relationships [Sartor G., 2020: 9 ff.]; [Pistor K., 2019: 183 ff.]. The legal 'Code' plays an essential role when it creates accountability mechanisms to face abusive behaviour and to guarantee consumer protection. Effective enforcement mechanisms could indeed implement the current Revolution, so as to develop a horizontal system, making it possible to develop a cooperative model and an intra-community trade that could benefit all market actors.

This is in line with the activity of the European Commission with specific — but not exclusive — regard to consumer protection law. The European Commission has indeed considered the impact of the New Information-Digital Age as an opportunity to improve the digital declination of the Single Market, and since 2015 the Commission has engaged in an intense activity to address the legal implications of this "revolution".

After a brief introduction of the 'Digital Single Market Strategy' (DSMS)[1] and its main pillars (Section 1), Sections 2 and 3 analyse its impact on EU consumer law. Section 4 then follows by focusing on the so-called 'New Consumer Sales Directive' (hereinafter NCSD)[2] that was proposed by the European Commission to regulate «certain aspects concerning contracts for the sale of goods». In Section 5, the paper then illustrates the main aspects and characteristics on the Italian transposition of the NCSD. As confirmed by the Italian experience, the paper argues that the most recent EU interventions on the topic (i.e., the NCSD) are still based on a traditional understanding of consumer protection.

1. The Digital Single Market Strategy and the New Deal for Consumers of the European Commission

In May 2015, the European Commission has published its communication on the Digital Single Market Strategy,[3] where the EU digital market is described as a market «in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence».

The Commission intends to reach the following outcomes with its strategy regarding a single digital market: (i) the «removal of key differences between the online and offline worlds to break down barriers to cross-border online activity»; (ii) the implementation of «secure and trustworthy infrastructures and content services». In other words, we are observing the construction of a sort of 'Internal Market 2.0' [Garben S. et al., 2020].

In particular, the Commission underlined that a fully operative digital single market could bring many benefits to European businesses and

[1] COM(2015) 192 final, 6 May 2015.

[2] Directive (EU) 2019/771.

[3] In May 2017, the Commission published a mid-term review of the implementation of the DSMS.

consumers, promoting innovation and increasing European GDP. In line with these purposes, the Commission presented an ambitious package of reform proposals, based on the idea of the digital market as a place characterized by the absence of any legal barriers regarding both the entry of new operators, on the one hand, and the possibility for consumers to directly relate with entrepreneurs from any Member State, on the other (indeed, with its Strategy, the Commission intends to ensure «better access for consumers and businesses to online goods and services across Europe»).

The DSMS consists of a series of initiatives that are functional to the promotion of e-commerce through the harmonization of national laws. It is built on three main pillars:

'Access': «better access for consumers and businesses to online goods and services across Europe»;

'Environment': «creating the right conditions for digital networks and services to flourish»;

'Economy and Society': «maximising the growth potential of the digital economy».

The DSMS and its three pillars clearly encourage two follow-up legal measures: developing harmonised EU rules for online purchases of digital content; allowing traders to «rely on their national laws based on a focused set of key mandatory EU contractual rights for domestic and cross-border online sales of tangible goods».

The implementation of the Strategy and the consequent growth of e-commerce has created new legal problems that should be addressed considering e-commerce's specificities. In this regard, there are two main arising issues: the trust gap between market actors of the digital economy and the legislative fragmentation. However, both these issues cannot be solved simply by applying the traditional European legal framework that was developed for an "offline" single market.

Subsequently, the Strategy promoted by the Commission was enriched by the so-called *New Deal for Consumers* (hereinafter NDC) [Tommasi S., 2020: 311 ff.]. The NDC was presented in April 2018[4] with the specific aim of ensuring a high level of protection of consumer rights. According to the Commission, the objective of creating a (digital) single market — by removing, also within the digital dimension, the legal obstacles to the free movement of goods and capital — must, in any case, be reconciled with an

[4] COM (2018) 183 final, 11 April 2018.

intensification of the protection of consumer rights (which represents one of the fundamental pillars of European private law). After evaluating the existing law (which was implemented in 1987), the Commission has concluded that «that EU consumer protection rules have helped the operation of the Single market and provided a high level of consumer protection. They are fit for purpose overall but must be better applied and enforced. The evaluation also has identified areas where EU consumer law could be updated and improved». In this spirit, the Commission proposed both to adopt a set of new directives and to update certain areas of existing legislation.

As regards consumer law in the strict sense, two general action lines have been identified and are summarised below.

Firstly, the Commission intends to modernize consumer law by taking into account the latest digital developments: in this respect, online platforms should be required to make it clear to consumers whether consumers are about to conclude a contract with a private individual or with a 'trader' (this is because only in the latter case the rules on B2C relationships will apply); consumer protection mechanisms must be present even when consumers receive free services and, simultaneously, provide the 'provider' with their personal data (which becomes the "payment" for the services received); the use of direct forms of communication for consumers, such as online forms and chats, should be encouraged; online platforms should clearly explain the classification criteria (price, delivery time, etc.) used to create consumers' search results; it should also be clear to consumers whether the price they are offered is based on automated algorithms that have previously monitored their behaviour as digital consumers.

Secondly, the Commission proposes to introduce specific legal instruments to prevent infringements of consumer rights, to sanction conduct contrary to those rights and to strengthen existing mechanisms and systems: (i) it's necessary to guarantee legal remedy both individual (including compensation for damages) and collective (class-action) to consumers who suffer an infringement of their rights; (ii) it is necessary to strengthen ADR systems and especially ODR (Online Dispute Resolution) systems; (iii) furthermore, it is necessary to encourage uniformity of sanctions for the infringement of consumer rights laid down by the different national systems; lastly, it is appropriate to encourage cooperation between the national authorities of the different Member States.

As will be further examined in the following pages, a few of the legislative proposals adopted in order implement the Commission's Strategy (and the subsequent NDC) have only recently been transposed by Member

States. Therefore, it is still early to comment on their effectiveness in terms of adequate protection of consumer rights. That said, some preliminary and general considerations can be made regarding the Commission's approach to consumer law of the New Information-Digital Age [Grochowski M., 2020: 387 ff.].

If one focuses on the mechanisms to *prevent* violations of consumer law, the Commission's approach appears, in particular, to be based on disclosure duties and on transparency (both of which are imposed on traders before concluding the contract). The effectiveness of such contractual mechanisms has already been called into question in recent years, precisely in the field of consumer protection [Bar-Gill O.-Ben-Shahar O., 2013: 109 ff.]; [Somma A., 2018: 524 ff.]. Indeed, these mechanisms are based on the assumption that the average consumer is a rational individual who — in the presence of all possible available information (both subjective and objective) concerning the contract he or she intends to conclude — will be perfectly capable of understanding whether that particular contract corresponds to his or her needs and economic interests. This approach, which is based on the idea that the consumer is the weaker party in the relationship — thus suffers an information asymmetry — is, in the abstract, undoubtedly functional to protect consumer rights. In practice, however, it risks exposing the consumer to an information overload thus preventing him or her from being able to make a truly informed and genuine decision. The risk of an information overload could be further increased by all the information which, according to the Commission, traders should communicate to the consumer in addition to what must currently already be communicated.

In this respect, the fact that online transactions are substantially carried out in a very short period of time is an indirect sign of how low (if not inexistent) consumer attention is towards information available to them for each single contract. One can consider, for example, the low level of attention consumers have towards the general terms and conditions of a contract. They, in any case, are often not comprehensible to the average consumer.

Moreover, if all mandatory disclosures were actually analysed by the consumer, the time needed to assess every single aspect contained in the traders' disclosures would likely cause an increase in time and transaction costs (in this ideal scenario, the time needed by a consumer to conclude an online contract would have to be much broader than the one-click buying system which is currently the most widespread); on the contrary, from the outset, the aim of EU consumer law has been to reconcile adequate consumer protection with the need for a fast and efficient market.

Lastly, it should be noted that the Commission's approach may not be consistent with the general view of the European Court of Justice on the definition of 'consumer': the Court has in fact ruled that the notion of consumer is independent from the knowledge/skills or from the information that a given person indeed possesses with regard to the specific sector of the services offered by their professional counterparty[5].

2. The DSMS and the Role of Consumer Law

In addition, and without any prejudice to what has been observed above on the Strategy and the NDC promoted by the European Commission between 2015 and 2018, it should be stressed that recent EU legislative initiatives related to the digital economy have undoubtedly contributed to strengthen the fourth industrial revolution and to drive the market out of the strict hierarchical infrastructure that is typical of the offline world and of its economic regime

In this context, EU consumer law can play a crucial role as well [De Franceschi A., 2015: 144 ff.]. However, in this sector, EU law seems to still be «grounded upon the simplistic and ontological dichotomy between a consumer and a professional/trader […]; [the] juxtaposition between the two is definite and evidently entails a rigid […] regime» [Inglese M., 2019: 68]. In fact, despite the evolving interpretation of the European Court of Justice,[6] this dichotomy represents a limit for the entire B2C framework: e.g., peer-to-peer relationships, where all users are acting in a non-professional capacity. Furthermore, it is useful to consider those "hybrid" platforms that involve both private individuals and real traders, where there is a high risk of the consumer being misled with regard to the real identity of his or her counterparty and with regard to the effective applicable regime of legal remedies (the B2C regime applies only when the counterparty is a trader accordingly to the EU consumer law definition) [Lombardi E., 2021: 52 ff.]. Even if some of the most recently adopted EU laws have been intended to cover both offline and online sales, they do not often provide specific rules for online platforms [Iamiceli P., 2019: 399].

This seems to be the case for the 'New Consumer Sales Directive' as well.

[5] See for example ECJ, Case C-498/16 – M. Schrems, judgment of 25 January 2018.

[6] See for example ECJ, Case C-329/19 - Condominio di Milano, judgment of 2 April 2020.

3. The New Trends of EU Consumer Law

The debate concerning the 'Internal Market 2.0' legal regime has shifted from a theoretical level to a legislative one and has led to the drafting of a multitude of acts strictly grounded on the Commission's Strategy [Savin A., 2021: 213 ff.].

More specifically, by implementing its Strategy with regard to contract and consumer law, the European Commission enacted two different legislative proposals:

'Proposal for a Directive on certain aspects concerning contracts for the supply of digital content' [December 2015 — COM (2015) 634 final];

'Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods' [December 2015 — COM (2015) 635 final].

After several years of debate, in 2019 the two proposals became, respectively, the directive on the supply of content and services [Directive (EU) 2019/770] and the directive on the sale of goods [Directive (EU) 2019/771]; see also [Manko R., 2017]. As mentioned above, the rest of the present analysis will focus only on the latter one.

4. The European Commission's 'NCS' Directive

On 20 May 2019, the EU legislator has enacted the Directive (EU) 2019/771 «on certain aspects concerning contracts for the sale of goods», which repeals the Directive 1999/44/EC.

The Commission stresses the fact that e-commerce is a key element for growth within the European Union market even if its growth potential is far from being fully exploited (Recitals no. 4). Thus, there is a need for harmonizing certain aspects of contract law — with specific regard to contracts for the sale of goods — in order to ensure a high level of consumer protection, and to achieve a «genuine digital single market» (Recitals no. 3).

With these purposes in mind, the Directive introduces rules on goods' conformity as well as remedies in the event of a lack of conformity (Recitals no. 11 and no. 12).

In particular, the NCSD applies to contracts for the sale of goods, «including goods with digital elements where the absence of the incorporated or inter-connected digital content or digital service would prevent

the goods from performing their functions and where that digital content or service is provided with the goods under the sales contract concerning those goods» (Recitals no. 15). More specifically, the Directive provisions can be applied to B2C sales contracts only. While the expression 'B2C' contracts pacifically refers to contracts concluded between businesses and consumers, the notion of 'sales contracts' within the context of the Directive is less clear. For the purpose of this legislative act, 'sales contract' is defined as «any contract under which the seller transfers or undertakes to transfer ownership of goods to a consumer, and the consumer pays or undertakes to pay the price thereof»; where 'goods' are « (a) any tangible movable items […]; (b) any tangible movable items that incorporate or are inter-connected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions ('goods with digital elements')» (Article 2).

In terms of its enforcement, the NCSD is what is often considered a maximum harmonization directive, since it explicitly prohibits Member States to maintain or introduce, in their national law, provisions diverging from those laid down in the Directive (Article 4).

Furthermore, contractual freedom is specifically addressed by the Directive, which states that «any contractual agreement which, to the detriment of the consumer, excludes the application of national measures transposing this Directive, derogates from them, or varies their effect, before the lack of conformity of the goods is brought to the seller's attention by the consumer, shall not be binding on the consumer» (Article 21).

In particular, in the event of a lack of conformity — which occurs whenever the good is "defective" — the Directive follows the so-called 'two-step remedy system' [Howells G. et al., 2018: 186 ff.]: the consumer should first claim 'repair' or 'replacement', and only afterwards, and under certain circumstances, he/she is allowed to demand for price reduction or termination of contract (Articles 13-16). The rationale behind this system is to maintain the contract stable for as long as possible so to also reduce transaction costs; «[t] his is the choice to balance the far-going rights the directive provides the consumer with the interest of the seller, who must not be confronted with a claim for termination or price reduction before he had a second chance to properly perform the contract» [Smits J., 2016: 11].

With specific reference to the two-step remedy system, it is appropriate to make a brief general remark. This system has been present in EU consumer law for a long time (the system was already present in Directive 1999/44/EC); from this point of view, the NCSD does not introduce, therefore, a real legislative novelty.

It is also true that laying down remedies practically represents, on closer inspection, a necessary regulatory practice when it comes to establishing rules that shall be transposed into national systems of private law, very different from one another. From a comparative law perspective, this technique is perhaps the only one that makes it possible to achieve — within the framework of a maximum harmonisation directive — the objective of protecting consumer rights in every domestic system that will then transpose the EU legislation (regardless of the specific categories of each national system). If the possibility to identify the legal device deemed most appropriate (also in terms of compliance with each Member State's own "traditional" model of private law) is left up to the different Member States, legal fragmentation, thus non-uniformity of protection within the (digital) single market, become serious risks. In these terms it is possible to explain the continuity, in relation to the remedy system, between the NCSD and the previous legislation.

In addition, it should be noted that the NCSD, to a certain extent, indicates that repairing goods is preferable to replacing them. This preference is expressly based on the concept of 'sustainable consumption': «enabling consumers to require repair should encourage sustainable consumption and could contribute to greater durability of products [...]. For instance, it might be disproportionate to request the replacement of goods because of a minor scratch, where such replacement would create significant costs and the scratch could easily be repaired» (Recital no. 48; see also Article 13 and [Terryn E., 2019: 851 ff.].

Moreover, the Commission had already underlined the importance of environmental issues in the NDC, indicating them as one of the key elements of the new EU consumer protection policy: on the one hand, through the commitment of encouraging consumers to choose more sustainable products and services; on the other hand, through the aim of protecting consumers from misleading information on the environmental features of products and services (thus, for example, protecting consumers from so-called greenwashing practices).

5. The Recent Transposition into Italian Law

On 25 November 2021, Legislative Decree 4 of November 2021 (no. 170) has directly implemented the NCSD in the Italian Consumer Code (hereinafter CC; Articles 128–135 septies), that entered into force on the 1st of January 2022.

While the requirements for the conformity of the goods are substantially aligned with those provided for by the existing framework, the new Article 129 of CC classifies these requirements into two categories: 'subjective' and 'objective'. A good is in conformity with the sales contract, when both the requirements are met.

To satisfy the subjective requirements, the good: must correspond to the description, type, quantity, quality indicated in the sales contract — and it should also possess the functionality, compatibility, interoperability indicated by the sales contract; has to fit into the specific use requested by the consumer and communicated by the consumer to the seller at the latest at the time of the conclusion of the sales contract accepted by the seller; must be supplied with the accessories and the instructions — including installation instructions — as set out by the sales contract; and must be provided with any updates described in the sales contract.

With respect to the objective requirements, the good must: be fit for the purposes for which goods of the same type are normally used, taking into account EU and national law, technical standards or, in the absence of such standards, the applicable sector-specific industry codes of conduct; possess the qualities and correspond to the description of a sample or model that the seller has made available to the consumer before the conclusion of the contract (where applicable); be delivered together with any accessories, including packaging, installation instructions or other instructions, that a consumer can reasonably expect to receive (where applicable); be of the quantity, and possess the qualities, presented in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements made by or on behalf of the seller or other persons in previous links in the chain of transactions.

If the good does not meet the requirements described above, the seller that wants to be exonerated from liability will have to prove that the consumer was specifically informed of the fact that a particular characteristic of the good deviated from the objective requirements of conformity and that the consumer expressly and separately accepted this deviation at the time of the conclusion of the contract (new Article 130 CC).

In addition to the above requirements, for a good to be considered as a good 'with digital elements', the seller must ensure that the consumer is provided with any necessary update — including security updates — to keep such good compliant with the contract (new Article 130 of CC).

In accordance with the Directive, in the event of a lack of conformity, the consumer has the right to have the good repaired or replaced. Only

subsequently, and under certain conditions, he/she can ask for the price reduction or the termination of the contract. The regulation of these remedies (new Articles 135-bis, 135-ter and 135-quarter of CC) remains substantially unchanged with regard to the Directive 1999/44/EC and the former version of the Italian Consumer Code, in accordance with the "traditional" so-called 'hierarchy of remedies' [Jansen S., 2018: 13 ff.]; [Cafaggi F., Iamiceli P., 2017: 575 ff.].

Pursuant to the new Article 135-*bis* of CC, the consumer may also refuse to pay the whole price, or part of it, until the seller has solved the lack of conformity.

The terms of duration of the legal guarantee and limitation of the consumer's action have remained unchanged. However, the consumer's obligation to report defects within two months of discovery has been cancelled. In this regard, even if the Directive left Member States free to maintain or introduce a deadline of at least two months from the discovery of the lack of conformity, the Italian legislator has chosen to ensure a higher level of protection to consumers and has not introduced a similar provision.

Whenever a lack of conformity is discovered within a year from the delivery, the lack of conformity is presumed to exist since the time of delivery; the new version of Article 135 of CC has extended this term from six months to one year.

It will be interesting to observe how the CC — as modified by the implementation of the NCSD — will be applied in case law.

Conclusion

Until the courts implement the new legislation, it may be interesting to observe that, in a certain sense, Italian case law had already "anticipated" the favourable regime laid down by the NCSD (and the CC) for consumers. According to a recent ruling of the Italian Supreme Court of Cassation,[7] the buyer generally always has the specific burden of proving the defects of the purchased good. Conversely, in the case of a sales contract subject to the rules of the CC — as mentioned above — any lack of conformity which becomes apparent within a year of time from when the goods were delivered, shall be *presumed* to have existed at the time when the goods were delivered (Article 135; see also Article 11 of NCSD).

[7] See: Italian Supreme Court of Cassation, no. 11748/2019, judgment of 3 May 2019.

Thus, the protection needs of the buyer-consumer ensure the buyer-consumer a much more favourable regime than the one applied to the ordinary-common buyer.

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