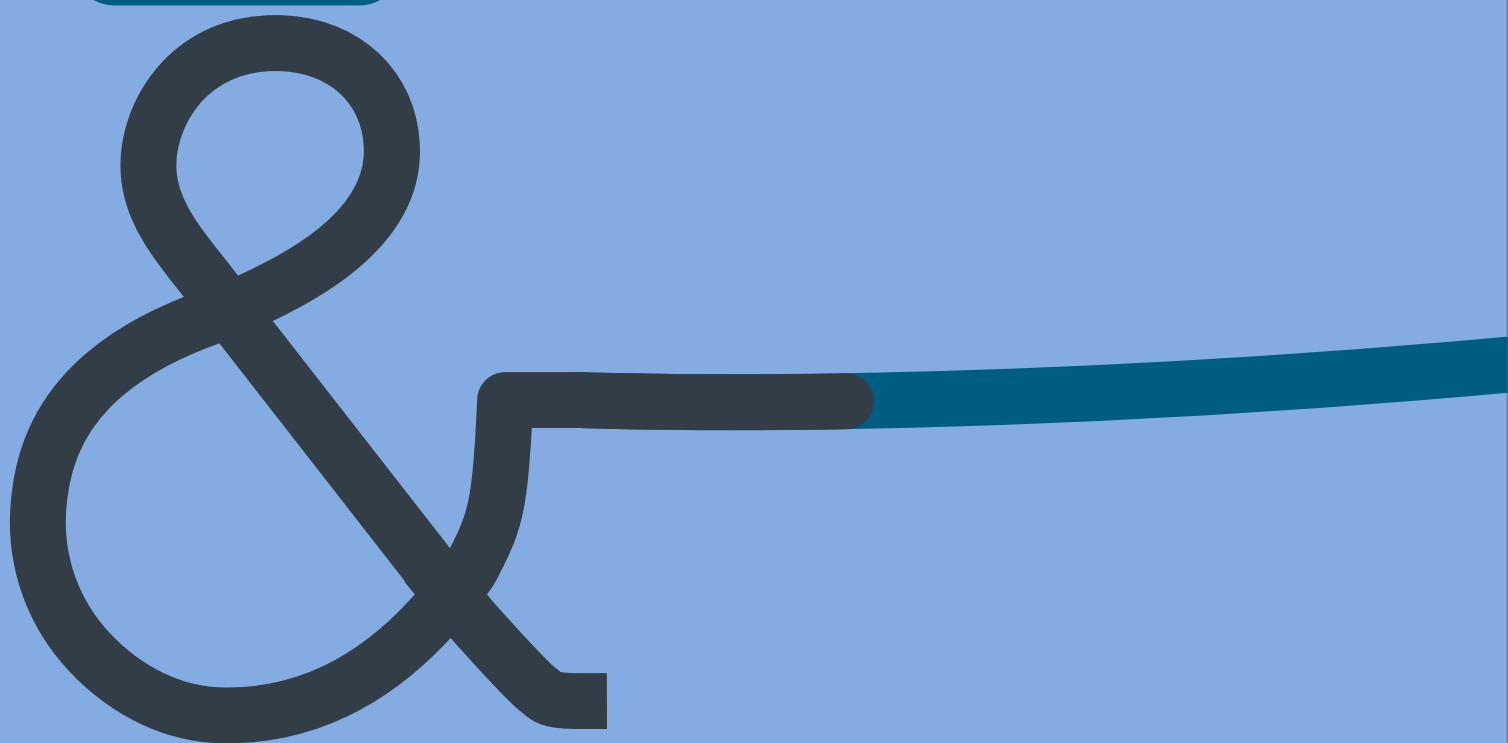


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protection rules  
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# New consumer protection rules arrive in Italy: the decree implementing the Omnibus Directive has been published

On 18 March 2023, Legislative Decree No. 26 (the "Legislative Decree") implementing Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU for better enforcement and modernisation of Union rules on consumer protection (the "Omnibus Directive"), was published in the Official Journal.

As anticipated in our previous [alert](#), the Legislative Decree - which will definitively enter into force on 2 April 2023 - considerably expands the protection granted to consumers by introducing significant amendments and additions to Legislative Decree No. 206 of 6 September 2005 (the "Consumer Code").

The main changes are summarised below.

## *Price Reduction Announcements*

The Legislative Decree introduces Article 17-bis in the Consumer Code, which will make it **compulsory for traders to indicate in each announcement of a price reduction, the prior price and the current price of their product**, except for perishable agricultural and food products.

The provision applies to all promotional statements by the seller announcing a price reduction presented in various ways such as announcements in terms of percentage (e.g., 20% off); a specific amount (e.g., 10 euro off); or the new lower price together with the higher price previously applied (e.g., now 50 euro, was 100 euro).

Specifically, **the lowest price applied by the trader to the generality of consumers during the thirty days prior to the application of the price reduction** must be indicated. Personalised offers, *i.e.* those reserved for individual consumers or specific categories of consumers, will not count for the purposes of identifying the prior price. Below-cost selling prices will also not be considered.

Article 17-*bis* will also be relevant for the purpose of identifying the normal sale price that must be displayed by law during so-called 'extraordinary sales', *i.e.* clearance sales, end-of-season sales and all promotional sales in which the trader offers favourable conditions for the purchase of its products<sup>1</sup>. The normal sale price will therefore be identified as the lowest price charged by the trader in the thirty days preceding the extraordinary sale. Below cost sales, on the other hand, remain excluded and sector regulations will continue to apply.

If the price is reduced progressively over time during the same sales campaign and without interruption (e.g., from 100 euro to 50 euro, to 40 euro, etc.) the prior price shall, in any case, be the lowest price applied during the thirty days preceding the first price reduction. The prior price remains unchanged for all subsequent price reductions.

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<sup>1</sup> Pursuant to Article 15, paragraph 5, of Legislative Decree 114/1992, in extraordinary sales '*the discount or rebate made must be expressed as a percentage of the normal sale price, which must in any case be displayed*'.

Otherwise, in the case of products that have been placed on the market for less than thirty days, the trader shall specify which period of time the prior price refers. This obligation does not apply, however, to the so-called 'starting prices', *i.e.* those where a lower price is charged when the product is placed on the market and then raised later.

In case of violations, Article 17-*bis*, as Article 17 above, provides for an administrative penalty of between EUR 516.46 and EUR 3098.74. For the purposes of the penalty, consideration will be given to: the nature, seriousness, extent and duration of the breach; any actions taken by the trader to mitigate or remedy the damage; the advantage obtained by the trader as a result of the breach; and any other aggravating or mitigating factors, including any previous breaches.

## *Unfair commercial practices*

The Legislative Decree also innovates the discipline of unfair commercial practices on several points explained below.

### Definitions

In Article 18 of the Consumer Code, the definition of 'product' is expanded to expressly include digital services and digital content. A definition of 'online marketplace' is also introduced as '*a service using software, including websites, parts of websites or an application, operated by or on behalf of the trader, which enables consumers to conclude distance contracts with other traders or consumers*'.

These changes confirm the long-standing interpretation of the applicability of the Consumer Code to the digital world.

### The new business practices

Article 21, paragraph 2, of the Consumer Code adds, under letter b-*bis*, the **new misleading practice of 'Dual Quality'**, *i.e.*, the promotion of a good in one Member State, as identical to another good marketed in other Member States, where the promoted good has significantly different composition and characteristics from the good sold abroad.

The following information is added to the list of information considered relevant to a misleading omission (Article 22 of the Consumer Code)<sup>2</sup>:

- whether a person offering products on online marketplaces is a trader or not;
- the criteria for classifying search results - to be made available in a special section of the website accessible from the page displaying the results - in cases where consumers are offered the possibility of searching for products offered by different traders or consumers on the basis of a search by keyword, phrase or other data; and
- in cases where the trader provides access to relevant consumer reviews, the manner in which the trader ensures that the published reviews come from consumers who have actually purchased or used the product.

The scope of application of Article 23 of the Consumer Code concerning commercial practices that are considered misleading in any event (*i.e.*, those practices that are prohibited regardless of the assessment of their misleading nature) is considerably broadened with the addition of the following new provisions:

- in the case of the provision of search results in response to an online search, the **failure to clearly indicate paid advertisements or payments** aimed at obtaining a better ranking of products among such results (letter m-*bis*);
- **the resale to consumers of tickets for events purchased by the trader by automated means aimed at circumventing any limits** on the number of tickets that may be purchased per person or other rules relating to the purchase of tickets (letter bb-*bis*);

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<sup>2</sup> The absence of such information may therefore render a practice misleading.

- the sending by the trader (or entrusting another person with the sending) of **false reviews or endorsements** or the provision of false information about such reviews and endorsements to promote its own products (letter bb-ter); and
- the use of reviews of a product by consumers who have actually used or purchased the product without taking reasonable and proportionate measures to verify that the reviews originate from such consumers (letter bb-c).

### The new penalties

One of the aspects that will be most affected by the Legislative Decree is related to penalties. With the main objective of avoiding the risk that sanctions applicable to the most serious violations will have a limited deterrent effect on traders with particularly high turnover, the legislator has **considerably tightened the penalties for traders who violate the regulations on unfair commercial practices**.

In particular:

- **the Italian Competition and Market Authority** (Autorità Garante della Concorrenza e del Mercato - AGCM) **will be able to impose a penalty ranging from EUR 5,000 to EUR 10 million** (thus doubling the upper limit of the penalty from EUR 5 million to EUR 10 million);
- the sanction will be determined by the AGCM, not only on the basis of the seriousness and duration of the violation, but also in light of the economic and governance conditions of the trader. Other factors include: any actions taken by the trader to mitigate or remedy the damage, the benefits obtained by the trader, and other aggravating or mitigating factors, including any previous violations;
- in the event of non-compliance with injunctions or removal of the effects and commitments undertaken, the AGCM may apply a penalty ranging from EUR 10,000 to EUR 10 million (again, the maximum penalty is doubled); and
- the penalty imposed on cross-border operators will be up to 4% of the turnover achieved by those operators in Italy (in the absence of this figure, the maximum penalty will instead be EUR 2 million).

## *Contracts between a trader and a consumer*

### Unfair terms

The new sanctions for unfair commercial practices **will also apply to unfair terms in contracts between a trader and a consumer** under Article 33 of the Consumer Code.

In fact, the Legislative Decree provides that, in addition to the declaration of nullity of the individual term, the AGCM will now be able to impose particularly high penalties if it discovers the use of unfair terms in B2C contracts.

### Definitions and scope

Important new definitions are added to Article 45 of the Consumer Code, including that of a digital service, which is defined as '(1) a service that allows the consumer to create, process, store or access data in digital form; or (2) a service that allows the sharing of data in digital form uploaded or created by the consumer and other users of that service or any other interaction with such data'.

The Legislative Decree also specifies that the provisions on consumer contracts (see Articles 48-67 of the Consumer Code) will apply:

- to contracts between a trader and a consumer *'in which the latter pays or undertakes to pay the price'* (contracts where the consumer does not have to pay a price, except those relating to digital services and content, are thus excluded);
- contracts where the trader provides digital content by means of a non-material medium or a digital service to the consumer and the consumer provides, as consideration, his personal data to the trader, except where such data are processed by the trader exclusively for the purpose of the performance of the contract and the compliance with legal obligations.

This means that contracts in which the trader provides access to an online digital content or service and, in exchange, the consumer consents to the processing of personal data, will also be fully covered by the Consumer Code.

### Information requirements in distance and off-premises contracts

Article 49 of the Consumer Code introduces several changes concerning the pre-contractual information that traders are required to provide in distance and off-premises contracts. In particular:

- it will no longer be necessary to indicate the fax number of the trader (the same also applies to the withdrawal form in Annex I);
- information concerning any other means by which the consumer may engage in written correspondence with the trader must be indicated, bearing the date and time of the messages and in a durable medium;
- the means of communication provided by the trader must *'enable the consumer to contact him quickly and communicate effectively with him'*;
- where applicable, the address and identity of the trader on whose behalf the professional is acting shall be indicated;
- it shall be indicated whether the price has been customised for the consumer on the basis of an automated process; and
- the legal guarantee, the functionality of the goods, and any compatibility and interoperability in relation to digital content and services shall be indicated.

These obligations do not replace but are in addition to those already provided for by Legislative Decree 70/2003 on e-commerce.

### Additional information requirements in contracts on online marketplaces

Article 49-*bis* is also added to the Consumer Code, which will provide for **specific and additional information obligations in relation to contracts concluded through online marketplaces**. Traders will be required to provide information on:

- the ranking of offers presented to the consumer as a result of the search query, which shall be available in a specific section of the website that the consumer can directly and easily access from the page where the offers are presented;
- whether a party offering products, services or digital content on online marketplaces is a trader or not and, if not a trader, that EU consumer protection rules do not apply to the contract; and
- where applicable, how the obligations related to the contract are shared between the third party seller and the provider of the online marketplace.

### Withdrawal

To compensate for the contractual imbalance that characterises them, the Legislative Decree modifies the rules on the right of withdrawal in relation to *'contracts concluded in the context of unsolicited visits by a trader to a consumer's home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers'* by extending the withdrawal period to **thirty days** (from fourteen for an ordinary off-premises contract). However, this extension does not apply to contracts concluded in the context of home visits by a trader that are requested by a consumer, and to contracts that are not organised by the trader collectively.

In relation to the trader's obligations in the event of withdrawal by the consumer (Article 56 of the Consumer Code), the following obligations are also added, with particular regard to contracts connected with the provision of digital services or content:

- except in certain specific cases (e.g., when the content is of no use outside the context of the contract or when it has been aggregated by the trader with other data and cannot be disaggregated except through exceptional efforts) **the obligation to refrain from using any content - other than personal data - that has been provided or created by the consumer during the use of a digital content or service of the trader;**

- at the consumer's request, **the obligation to make available to him free of charge and within a reasonable period of time the aforementioned contents**, in a commonly used and easily readable format; and
- the obligation to comply with the provisions of Regulation (EU) 2016/679 (GDPR).

In the event of withdrawal, the trader may in any event *'prevent any further use of the digital content or digital service by the consumer, in particular by making such digital content or service inaccessible to him or by deactivating his user account'* (without prejudice to the aforementioned content provided or created by the consumer).

Parallel obligations are also added for the consumer in the event of withdrawal (Article 57 of the Consumer Code), who must likewise refrain from using the digital content or digital service provided by the trader and from making it available to third parties.

Article 59 of the Consumer Code on exceptions to the right of withdrawal in distance and off-premises contracts is also amended. With the entry into force of the Legislative Decree, **consumers will no longer be able to withdraw**:

- **from service contracts that place the consumer under an obligation to pay after the service has been fully performed** provided that performance of the contract has begun with
  - the express consent of the consumer; and
  - acknowledgement that he will lose his right of withdrawal upon complete performance of the contract;
- **from contracts for the supply of digital content which is not supplied on a tangible medium and that place the consumer under an obligation to pay**, provided that the performance of the contract has begun and:
  - the consumer has agreed to begin the performance during the right of withdrawal period;
  - the consumer has also provided acknowledgement that he loses his right of withdrawal after consent; and
  - at the same time, the trader has provided confirmation of the conclusion of the contract.

If the above requirements are not met in relation to each contract, the consumer's right of withdrawal will remain unaffected.

These exceptions will also not apply to contracts concluded in the context of unsolicited visits by a trader to a consumer's home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers. Conversely, in cases where the consumer requests a visit by the trader to carry out repair work, the consumer will not be able to withdraw from service contracts that place the consumer under an obligation to pay after the service has been fully performed, provided that performance has begun with the consumer's consent.

# Contacts



*Rita Tardiolo*

Counsel

+390230356000  
[rita.tardiolo@twobirds.com](mailto:rita.tardiolo@twobirds.com)



*Francesca Signorini*

Associate

+390230356000  
[francesca.signorini@twobirds.com](mailto:francesca.signorini@twobirds.com)

twobirds.com

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