

Italian Transposition of the Omnibus Directive: the Reform in Pills

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Faced with the new challenges of a changing market, developing digital platforms and the consequential rise of new online commerce practice, the European Union (“EU”) has strengthened its current legislation on consumer protection. As part of the EU’s New Deal for Consumers, the EU adopted the Directive (EU) No. 2019/2161 (the “**Omnibus Directive**”) expanding consumers’ rights, enhancing enforcement measures and placing stricter transparency requirements on traders all over the EU.

The Omnibus Directive applies to traders engaged in business-to-consumer (B2C) transactions and traders offering digital services to consumers where payment is in the form of personal data rather than money.

On March 18, 2023, Italy officially published the Legislative Decree No. 26/2023 (the “**Reform**”), which transposed the Omnibus Directive into the Italian Consumer Code.

This alert memorandum provides an overview of the Reform, explains its key procedural and substantial innovations and explores the upcoming implications of this initiative for traders and consumers.

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I. Background

In the last few years, the EU has launched several initiatives to keep up the pace of and update its legislation on consumer protection. After a thorough research exercise (known as “Regulatory Fitness and Performance Program”—“REFIT”) aimed at gauging whether the current EU legislation was fit for purpose, in 2018, the EU adopted the New Deal for Consumers to enhance the protection of EU consumers. One of its building blocks is the Omnibus Directive (also known as the “Enforcement and Modernization Directive”) that came into effect on January 7, 2020. Its purpose was to modify the most important existing directives on consumer protection, namely the Unfair Contract Terms Directive (93/13/EEC), the Price Indications Directive (98/6/EC), the Unfair Commercial Practices Directive (2005/29/EC) and the Consumer Rights Directive (2011/83/EU).

The Omnibus Directive modernises and strengthens consumer rights. In particular, it enhances the enforcement measures, increases the transparency requirements and imposes additional obligations upon traders conducting online business (especially B2C). In case of non-compliance with its provisions, the Omnibus Directive sanctions traders with substantial fines of up to 4% of their annual turnover for the more serious infringements (see Section II below) or with an even higher fine if so provided by the Member States.

EU Member States had to implement the Omnibus Directive by November 28, 2021, and to bring it into force by May 28, 2022. Despite some initial delays, on August 4, 2022, Italy passed the Law No. 127/2022 setting the framework to transpose the Directive. On March 18, 2023, it published the Reform, which applies from April 2, 2023, although some articles apply starting from July 1. The Reform fine-tunes the Italian Consumer Code (Legislative Decree No. 206/2005) to the Omnibus Directive, and it introduces procedural as well as substantial innovations.

II. Procedural provisions

First, the Reform modified Article 27 of the Consumer

Code.

With regard to cases of a purely national dimension, it increased the maximum fine that the Italian Competition Authority (“ICA”) can issue for unfair practices, from EUR 5 million to EUR 10 million, for non-compliance with urgent measures, injunctions or orders to remove the effects or the commitments undertaken (in all cases for purely national cases).

With regard to cases of a EU dimension, the Reform introduced a special regime for the fines issued pursuant to Article 21 of Regulation (EU) No. 2017/2394 for widespread infringements¹ or infringements with a Union dimension.² In these cases, the ICA can sanction up to 4% of the trader’s annual turnover in Italy or in other Member States concerned. If there is no available information on the sanctioned trader’s turnover, the sanction may not exceed EUR 2 million.

The same sanction system also applies to unfair consumer contract terms (Article 37-*bis* of the Consumer Code). It follows that traders using these terms will not only have to modify those clauses—Courts might also declare null and void unfair contract terms—but also pay a fine of up to EUR 10 million or up to the 4% of their annual turnover in case of wide-spread infringements.

Second, the Reform clarified the (indicative) criteria that the ICA must follow when imposing fines for national, cross-border and infra-EU infringements. In particular, the ICA has to consider:

- 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;
- the financial benefits gained or losses avoided by the trader due to the infringement, if the relevant data are available;
- penalties imposed on the trader for the same infringement in other Member States in cross-border cases where information about such penalties is

¹Regulation (EU) No. 2017/2934 defines “widespread infringement” as an act or an omission contrary to EU consumer protection law that harms or is likely to harm the collective interests of consumers in at least two EU countries other than the country in which (i) it originated or took place; (ii) the trader responsible is based; or (iii) where the evidence or assets of the

trader involved are to be found.

²Regulation (EU) No. 2017/2934 defines “widespread infringement with a Union dimension” as a widespread infringement that has done, does or is likely to do harm to the collective interests of consumers in at least two-thirds of the Member States, accounting, together, for at least two-thirds of the population of the EU.

available through the mechanism established by Regulation (EU) No. 2017/2394; and

- any other aggravating or mitigating factors applicable to the circumstances of the case.

Lastly, the Reform expressly allows consumers harmed by unfair practices to bring an action before the national courts to obtain civil remedies, such as damages compensation, price reduction or termination of the contract.

III. Substantial provisions

1. Price reduction announcements

The Reform introduced Article 17-*bis* of the Consumer Code which applies from July 1, 2023. Pursuant to this provision, any announcement of a price reduction shall indicate the prior price applied by the trader for a determined period of time prior to the application of the reduction. By “prior price”, the Consumer Code refers to the lowest price applied by the trader to all consumers during the thirty days preceding the reduction. Article 17-*bis* does not apply to perishable food products.

Three years before the Reform, the ICA already investigated on announcements of ambiguous and suspiciously incremented price reductions, considering them either as misleading or aggressive practices.³

2. Definitions amendments

The Reform also amended some of the definitions set forth in Article 18 (such as those pertaining to commercial practices, advertisement and other commercial communications) and introduced new definitions in such list. For instance, following the Reform:

- Product: “*means any good or service including immovable property, digital service and digital content, as well as rights and obligations*”;
- Ranking: “*means the relative prominence given to products, as presented, organized or communicated by the trader, irrespective of the technological means used for such presentation, organization or communication*”; and
- Online marketplace: “*means 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”.

3. Consumer rights and personal data

Pursuant to the new version of Article 46, the Consumer Code—and, in particular, its safeguards—also applies to all contracts where the trader provides digital content or services and the consumer provides or undertakes to provide his/her personal data in return.

With the increased use of social media, it is not the first time that personal data is considered a form of compensation and the provision of personal data is qualified as an “economic decision”. The ICA had already taken decisions on several cases finding that traders like WhatsApp⁴ or Facebook⁵ had failed to inform their users of the data gathering, and it considered the data as a form of payment for using the digital services.

4. Contracts concluded on online marketplaces

The Reform introduced new information requirements for contracts concluded on online marketplaces in Article 49-*bis* of the Consumer Code. In particular, before a consumer is bound by a distance contract, or any corresponding offer, on an online marketplace, the provider of the online marketplace shall provide the consumer with the following information in a clear and comprehensible manner and in a way appropriate to the means of distance communication:

- general information, made available in a specific section of the online interface that is directly and easily accessible from the page where the offers are presented, on the main parameters determining ranking of offers presented to the consumer as a result of the search query and the relative importance of those parameters as opposed to other parameters;
- whether the third party offering the goods, services or digital content is a trader or not, on the basis of the declaration of that third party to the provider of the online marketplace;
- where the third party offering the goods, services or

³ Decision No. 28218 of April 8, 2020, in the “Wish” case (PS11734 proceedings, accessible [here](#)).

⁴ Decision No. 26597 of May 11, 2017, in the “WhatsApp” case (PS10601 proceedings, accessible [here](#)).

⁵ Decision No. 27432 of November 29, 2018, in the “Facebook” case (PS11112 proceedings, accessible [here](#)), confirmed on appeal (Council of State Decision No. 2631 of March 29, 2021, accessible [here](#)).

digital content is not a trader, that the consumer rights stemming from EU consumer protection law do not apply to the contract; and

- where applicable, how the obligations related to the contract are shared between the third party offering the goods, services or digital content and the provider of the online marketplace, such information being without prejudice to any responsibility that the provider of the online marketplace or the third-party trader has in relation to the contract under other EU or national law.

The ICA already addressed similar issues in its decision that Amazon had not provided consumers with pre-contractual information, including with respect to legal warranty.⁶

5. New unfair commercial practices

The Reform amended Articles 22 and 23 of the Consumer Code, expressly foreseeing new misleading practices, which now enumerate:

- a. *“Dual quality” scenarios*: as set forth in the new version of Article 21 of the Consumer Code, this practice consists of marketing a good in a EU Member State as identical to a good marketed in other Member States, while that good has a significantly different composition or characteristics (except where it is justified by legitimate and objective factors).
- b. *Misleading omissions: relevant information*: pursuant to Article 22 of the Consumer Code, misleading by omission is a commercial practice the trader uses when it omits relevant information that the average consumer may need to make an informed decision, thus causing (or being likely to cause) him/her to make a decision that he/she might not have taken otherwise. Misleading by omission also includes the practice of hiding the relevant information or providing it in an unclear, unintelligible, ambiguous or untimely manner.

Article 22 as amended by the Reform enumerates among the (not-to-be-omitted) “relevant information” all general information on the main parameters

determining rankings of offers presented to the consumer as a result of search queries on a platform, as well as on the relative importance of those parameters.

- c. *Placement*: Article 23 of the Consumer Code now includes the practice of a trader providing search results in response to a consumer’s online search without clearly indicating any paid advertisement or specific payment to achieve a better ranking of products within those results.

In the last decade, the ICA handled two similar cases, concerning the placement of products on Facile.it⁷ and Booking.com,⁸ and stressed how consumers could be misled when there is no clear indication of the parameters used in ranking the products.

- d. *Fake reviews*: it is considered as “relevant” every piece of information indicating whether and how the trader guarantees that the reviews published on its online interface are written by consumers who purchased and used its products. If the trader does not undertake reasonable and proportionate measures to verify the sources of the reviews, the trader may have committed a misleading practice.

In this regard, it is a misleading practice also sending—even by instructing another legal or natural person to do so—fake consumer reviews or fake praises or providing fake information on consumer reviews or praises on social media with the goal of promoting one’s own products.

In 2014, the ICA focused on a similar case concerning online fake reviews and sanctioned Tripadvisor for spreading misleading information on the reliability and soundness of the reviews published on its platform.⁹

- e. *Secondary ticketing*: with the increase of abuses on online marketplaces, including ticket resale sites, the EU addressed the phenomenon of illegal secondary ticketing. It is now a misleading practice to resell event tickets to consumers where the trader has purchased them using automated means to avoid any quantitative limit on the number of tickets a person

⁶ Decision No. 25911 of March 9, 2016, in the “Amazon Marketplace” case (PS9353 proceedings, accessible [here](#)).

⁷ Decision No. 25420 of April 8, 2015, in the “Facile.it” case (PS9212 proceedings, accessible [here](#)) after which the ICA accepted the company’s commitments.

⁸ Decision No. 28176 of March 17, 2020, in the “Booking.com” case

(PS10769 proceedings, accessible [here](#)) after which the ICA accepted the company’s commitments.

⁹ Decision No. 25237 of December 19, 2014, in the “Tripadvisor” case (PS9345 proceedings, accessible [here](#)), annulled on appeal (Council of State Decision No. 4976 of July 15, 2019, accessible [here](#)).

may purchase or any other rule applicable to the purchase of tickets.

The ICA already addressed similar issues concerning Ticketone¹⁰ and Ticketbis,¹¹ and their failure to adopt diligent measures to avoid the massive purchase of tickets on their websites through automated means.

IV. Conclusions

By now, almost all of the Member States have already transposed the procedural and substantial innovations and safeguards introduced by the Omnibus Directive. While in some countries its provisions were already in force as of May 28, 2022, the last date for implementation set by the Directive,¹² in others, consumers did not enjoy the same guarantees from that date, as the transposition by the local governments took longer than expected.¹³

The effects of the Omnibus Directive, and consequently of the Reform in Italy, will have a sweeping impact on the market for both tangible and intangible products and services. Considering the wide-spread application of its provisions and the high-sanctioning risks associated with non-compliance, it is all the more important that traders align with the Directive's new requirements.

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¹⁰ Decision No. 26534 of April 5, 2017, in the "Ticketone" case (PS8035 proceedings, accessible [here](#)).

¹¹ Decision No. 26536 of April 5, 2017, in the "Ticketbis" case (PS10611 proceedings, accessible [here](#)), annulled on appeal (Council of State Decision No. 1217 of February 12, 2020,

accessible [here](#)).

¹² See, e.g. France's Ordonnance No. 2021/1734 which entered into force on May 28, 2022 (accessible [here](#)).

¹³ See, e.g. Slovakia, where the law implementing the Directive was expected to enter into force on August 1, 2023.