

Исследования зарубежных ученых

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ЗАЩИТА ПРАВ ПОТРЕБИТЕЛЕЙ, ЭКОНОМИЧЕСКИЕ ОТНОШЕНИЯ И ЕВРОПЕЙСКАЯ ГАРМОНИЗАЦИЯ В ИТАЛЬЯНСКОЙ ПЕРСПЕКТИВЕ: НОВЫЕ ПОДХОДЫ К КОНТРАКТАМ "DOOR TO DOOR" И ДИСТАНЦИОННЫМ КОНТРАКТАМ

Аннотация: В статье анализируется регулирование контрактов "door to door" и дистанционных контрактов в Италии, которые составляют основу развития европейской законодательной политики, включающей защиту прав потребителей. В исследовании также анализируются возможные решения по совершенствованию европейского законодательства в рассматриваемой сфере.

Ключевые слова: Европейский уровень, защита прав, дистанционные контракты

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CONSUMER PROTECTION, ECONOMIC RELATIONS AND EUROPEAN HARMONIZATION IN THE ITALIAN PERSPECTIVE: THE NEW REGULATION OF DOOR TO DOOR CONTRACTS AND DISTANCE CONTRACTS

ABSTRACT: The paper analyzes the Italian regulation of distance contracts and door to door contracts placing it in the framework of the evolution of the European legislative policy concerning the protection of the consumer. The work also analyzes possible solutions in order to reach a European consumer law.

KEYWORDS: a European level; consumer protection, distance contracts.

SUMMARY: 1. European harmonization and proposal for a directive on consumer rights. - 2. Directive 2011/83 / EU and the downsizing of the policies of "maximum harmonization". - 3. The transposition of the Directive in Italy and the new rules on selling pressure: the new charges informative. - 4. The news concerning the right of withdrawal of the consumer. - 5. Conclusions.

1. Since its origin European Union law, with regard to civil law, has given particular importance to the consumer¹. Over the past three decades there have been many directives concerning the provisions of

¹ About the consumer definition, L. MEZZASOMA, *Il consumatore e il professionista*, in G. RECINTO, L. MEZZASOMA and S. CHERTI (curated by), *Diritti e tutele dei consumatori*, Napoli, 2014, p. 13 ss.

applicable case falling under the subject of consumer law¹. The reason for such interest is found in the importance that the Consumer relationship has on the market²: The consumer is the person who turns out to be the last buyer of goods and services or, in other words, the last "ring" of production process. Just the fact that the entire production chain is activated in order to place the finished product on the market, underlines the central role of the consumer in the plan of a general economic policy.

Because of this central role played by the consumer, the Community legislature has always tried to create a set of rules that would transform the consumer from the mere person who suffers passively the market, into a player on the market. An economic operator that with the awareness of their choices is able to direct the market rewarding the most virtuous professionals and punishing those who fail to produce goods or provide services in a competitive way.

Despite this goal being ever-present in European consumers protect policies, over time the ways to achieve it haven't always been effective³. The directives that have dealt with the right of consumers, in fact, had the common intention of making a "minimum harmonization" of each individual European State. These laws leave ample room for intervention to individual Member States who, when they had to transpose the Directive, had the opportunity to adapt its provisions to the peculiar characteristics of individual interior rights. The directives in question, in fact, imposed a minimum protection of the consumer that the Member States could expand and adapt to suit their needs. All this, while it has led to a convergence of disciplines of individual European countries in the field of consumer law, on the

¹ Without limitation, see as the Directive 85/374 / EEC concerning liability for defective products; Directive 85/577 / EEC on contracts door to door; Directive 90/314 / EC concerning travel contracts "all inclusive" and Directive 93/13 / EC concerning unfair terms

² About the impact of the EU regulations regarding market, L. MEZZASOMA, *SMEs and operationali constraints in the italian market and in Community legislation*, in L. KUPRIYANOVA and P. SALEZNEV (curated by), *Workshop University of Perugia and Financial University under the Government of the Russian Federation*, Riga, 2012; E. LLAMAS POMBO, *La vendita e la tutela del consumatore nell'ordinamento spagnolo*, in E. LLAMAS POMBO, L. MEZZASOMA and V. RIZZO (a cura di), *La compravendita tra realtà e prospettive*, Napoli, in corso di pubblicazione.

³ See E. CATERINI, *La terza fase del «diritto dei consumi»*, in G. CAVAZZONI, L. DI NELLA, L. MEZZASOMA and V. RIZZO (curated by), *Il diritto dei consumi realtà e prospettive*, Napoli, 2008, p. 21 ss.

other hand has not been able to create an equal discipline on a European level¹.

This type of action has definitely had a positive impact in terms of protecting all consumers throughout Europe. Ever since the publication of "the Green Paper" published by the European Commission on the 8th of February 2007 dedicated to the review of the consumer *acquis*, was not as effective as previously hoped². The new goal was to, as the Green Paper had idealized, to reach a maximum harmonization³ of the Consumer provisions. The move from the presence of a variety of consumer national laws alike but not identical, to a system of identical provisions into all the individual Member States, was considered a necessary element in order to allow full development of an organic consumer European law. The goal was to simplify the regular framework by creating a global system of standards valid in the whole of Europe that would allow economic operators to offer their goods and services across Europe whilst being subjected to identical rules⁴. As is argued in the Green Paper itself, in

¹ R. PARDOLESI, *Contratti dei consumatori e armonizzazione: minimax e commiato?*, in *Foro it.*, 2012, V, c. 177 s.

² See G. PAISANT, *La révision de l'acquis communautaire en matière de protection des consommateurs – A propos du Livre vert du 8 de février 2007*, in *JCP*, 2007, I, p. 152; G. ALPA and C. CONTE, *Riflessioni sul progetto di Common Frame of reference e sulla revisione dell'acquis communautaire*, in *Riv. dir. civ.*, 2008, I, p. 159.

³ About this trend P. FOIS, *Dall'armonizzazione all'unificazione dei diritti interni. Valutazione critica di una tendenza in atto*, in *Studi sull'integrazione europea*, 2012, p. 237 ss.; G. ALPA, *I "principi fondamentali" e l'armonizzazione del diritto contrattuale europeo*, in *Contr. impr.*, 2013, p. 825 ss.

⁴ The goal of creating a European legislation uniform has become even more evident in the Green Paper of July 1, 2010 "on the options for progress towards a European Contract Law for consumers and businesses" [COM (2010) 348] which aims was to lay the foundations for the creation of a European contract law that concern both business to consumer relationships, both business to business. About the Green Paper of 2010, see E. BATTELLI, *Il nuovo diritto europeo nell'ambito della strategia Europa 2020*, in *Contratti*, 2011, p. 1065; C. TWIGG-FLESNER, *Good-gye harmonisation by directives, hello cross-border only regulation? – A way forward for EU consumer contract law*, in *European Review of Contract Law*, 2011, p. 235. The results of these intentions have materialized in developing a proposal for a Regulation of the Common European Sales Law (CESL). G. D'AMICO, *Direttiva sui diritti dei consumatori e Regolamento sul diritto comune europeo della vendita: quale strategia dell'Unione europea in materia di vendita?*, in *Contratti*, 2012, p. 611 ss.; M.B.M. LOOS and H. SCHELHAAS, *Commercial sales: The Common European Sales Law Compared to the Vienna Sales Convention*, in *European Review of Private Law*, 2013, p. 105 ss.; L. BACIUCCO, *Regolamento europeo sulla vendita: la materia delle clausole abusive e il particolare profilo dell'accertamento sul contenuto economico del contratto*, in *Le Corti umbre*, in corso di pubblicazione; G. D'AMICO, *La Proposta di regolamento per un diritto comune europeo della vendita*, in E. LLAMAS POMBO, L. MEZZASOMA and V. RIZZO (a cura di), *La compravendita tra realtà e*

fact, the different levels of protection that we found in each individual Member States placed traders (professionals and consumers) in a position of difficulty which created a climate of distrust towards the conclusion of cross-border contracts¹.

The proposal for a directive on consumer rights by the European Parliament and the European Council on the 8th of October 2008², seems to be the result of such a policy. Its original version, wanted to reform the whole of the Directive 85/577 / EEC on Door to Door Contracts: Directive 93/13 / EC on unfair terms in consumer contracts, Directive 97/7 / EC on distance contracts and Directive 99/44 / EC relating to guarantees in the sale of consumer goods, through an intervention of maximum harmonization that would guarantee to all member states an identical discipline. The same proposal expressly states that "the purpose of the proposal is to Contribute to the proper functioning of the business-to-consumer internal market and Achieve a high common level of consumer protection by fully Harmonising the key aspects of consumer contract law Which are relevant the internal market" placing itself as an expression of a policy of maximum harmonization of the laws of individual Member States³.

2. Despite the ambitious goal of creating a horizontal legislation⁴ - that would cover the entire discipline concerning the consumer - and its theoretical coherence, there have been many complaints about this

prospettive, cit., E. CATERINI, Principi e clausole generali nella proposta di regolamento europeo della vendita transfrontaliera, ivi.

¹ See, F. MAZZASETTE, *Il codice del consumo tra diritto interno e diritto europeo*, Napoli, 2012, p. 46 ss; M.T. KAWAKAMI, *Adjusting EU Consumer Protection Mechanisms to the Needs of Private Actors: Collaborative Consumer Protection and the Ex Ante Avoidance of Conflict*, in *European Review of Private Law*, 2013, p. 1255 ss. Ritene che una disciplina unitaria non produca il risultato di stimolare la fiducia dei consumatori in tema di acquisti transfrontalieri, T. WILHELMSSONT, *The Abuse of the Confident Consumer as a Justification for EC Consumer Law*, in *Journal of Consumer Policy*, 2004, p. 317.

² COM(2008)614 def. See, M. DONA, *La proposta di direttiva sui diritti dei consumatori: luci ed ombre nel futuro della tutela contrattuale*, in *Obbl. contr.*, 2009, p. 582; G. HOWELL and R. SCHULZE, *Overview of the Proposed Consumer Right Directive*, in G. HOWELL and R. SCHULZE (curated by), *Modernising and Harmonising Consumer Contract Law*, München, 2009, p. 3; W. MICKLITZ and N. REICH, *Crónica de una muerte anunciada: the Commission Proposal for a "Directive on Consumer Rights"*, in *Common Market Law Review*, 2009, p. 471.

³ See, U PACHAL, *The future of EC consumer legislation*, in *Consumatori, diritti e mercato*, 2009, 14, p. 19.

⁴ G. BENACCHIO, *Diritto privato della Comunità europea, Fonti, modelli, regole*, 4^a ed., Padova, 2008, p. 288.

approach on "a regulatory level" emerging from within the European bodies¹. Many things are criticized, first, a possible infringement of the principle of proportionality and subsidiarity, embodied in Article 5 TEU, that requires the European Union to pursue its goals imposing the least possible sacrifice from the Member States². It would therefore illegitimate an EU regulatory intervention that adopts excessively strict measures in relation to the goal being pursued since individual States would lose the freedom to regulate their own national law³.

To these critics we have to add the remarks made by the Committee on Legal Affairs of the European Parliament, which highlights that a "maximum harmonization" on consumer affairs would change in an extremely strong way the laws of each Member State, highlighting a series of contrasts between European legislation and each individual Member State's internal legislation which might create a greater uncertainty compared to the existing one⁴.

In addition to these technical issues, there are also strong doubts that the "maximum harmonization" would be the correct solution to solve the uncertainty of the law which involved difficulties in terms of cross-border trading. According to some legal commentators, in fact, harmonization is not an essential step in order to stimulate the circulation of goods and services⁵, because of other major limitations, such as, linguistic, cultural and tax differences that exist between the Member States. These, for obvious reasons, would continue even after

¹ The European Parliament itself with resolution of 6 September 2007 on the Green Paper on the Review of the Consumer Acquis, expressly states in paragraph 11 that the European Parliament "Suggests that sectoral tools that are being reviewed should be based on the principle of minimum harmonisation, combined with the principle of mutual recognition where the coordinated area is concerned; notes, however, that this does not exclude full targeted harmonisation where this proves necessary in the interests of consumers and professionals".

² Article. 5, paragraph 3 of the Treaty provides: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".

³ See, L. DELOGU, *La proposta di direttiva sui diritti dei consumatori: la situazione a un anno dalla sua presentazione*, in *Contr. impr. Eur.*, 2009, p. 965 ss.

⁴ See, in this sense, the Opinion of the Committee on Legal Affairs of the European Parliament on 15 April 2009.

⁵ M. FAURE, *Towards a maximum harmonization of consumer contract law?!?*, in *Maastricht Journal of European and Comparative Law*, 2008, p. 433; R. SEFTON-GREEN, *Choice, Certainty and diversity: Why More is Less*, in *European Review of Contract Law*, 2011, p. 135 ss.

the complete harmonization of regulations had been carried out¹. In this respect, it was also noted that introducing common rules does not necessarily guarantee a uniform safeguards. The rules, even if identical, would then be applied into each individual State according to the rules of interpretation in force within them. This would lead, however, to a different application of rules although formally identical and, consequently, the creation of different territorial applications of the same laws².

It was also reported that stiffen consumerist discipline through European standards of "maximum harmonization" could have the negative effects, such as, reducing consumer protection in some Member States. The "Minimum harmonization" imposed by the previous directives, in fact, identified a "minimum" protection that individual legal systems have the possibility to integrate and enrich without providing additional instruments of protection. In this context, to impose strict rules valid for all EU countries, would determine the cancellation of all the additional safeguards which, according to the regulations of "Minimum Harmonisation", had been taken by each individual Member State³.

Finally, if the objective of the Community legislature would be to create a European consumer law that was entirely separate from that of the individual Member States, it would have required a more robust and conscious project with the result of a transparent and more reasoned legislative policy especially under the perspective of future development⁴.

The original ambitions started with the Green Paper of 2007 and resized by the Proposed European Directive on consumer rights in 2008, according to the above criticism, has suffered a further compression in the final version of Directive 2011/83 / EU⁵. In fact,

¹ R. PARDOLESI, *Contratti dei consumatori e armonizzazione: minimax e commiato?*, cit., c. 179.

² See, A. DE VRIES, *The Aim for Complete Uniformity in EU Private Law: An Obstacle to Further Harmonization*, in *European Review of Private Law*, 2012, p. 913.

³ J. SMITS, *Full Armonization of Consumer Law? A Critique of the Draft Directive on Consumer Rights*, in *European Review of private Law*, 2010, p. 5 ss.

⁴ See, M. HESSELINK, *The consumer rights directive and the CFR: Two worlds apart?*, in *European Review of Contract Law*, 2009, p. 290 ss.

⁵ G. DE CRISTOFARO, *La direttiva 2011/83/UE sui "diritti dei consumatori": ambito di di applicazione e disciplina degli obblighi informativi precontrattuali*, in V. ROPPO and A. D'ANGELO (curated by), *Annuario del contratti*, Torino, 2012, p. 30 ss.; S. PAGLIANTINI,

the Green Paper of 2007 proposed the revision of eight directives¹, that went down to four in the Proposal of 2008² and, in its final version, further limited to the modification of Directives 85/577 / EEC and 97/7 / EC concerning the door to door contracts and distance contracts³.

Although art. 4 of Directive 2011/83 / EU states expressly that “Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive” maintaining under a formal point the will of a broad reform of consumer law, the text of the Directive expresses its sectorality and its biasness⁴. As has been highlighted by the doctrine, the excessive width of the title of the directive - which is dedicated to the "consumer rights" - suggests a global intervention on the matter that, in reality, does not exist⁵. There is no doubt, therefore, that the assumptions based on which the reform process began have not been proved right⁶. The same objectives⁷, although being stated in Directive 2011/83 / EU, are evidently resized remaining a "hybrid" level of harmonization. This is shown by the fact that, despite this latest regulatory intervention is definitely more incisive than the regulations

Il neo formalismo contrattuale dopo i d.lgs. n. 141/10, n. 79/11 e la Dir. 2011/83/UE: una nozione (già) vielle renouvelée, in Nuove leggo civ. comm., 2012, II, p. 325 ss.

¹ Were the Directive 85/577 / EEC; Directive 90/314 / EEC; Directive 93/13/EEC; Directive 94/47 / EC; Directive 97/7 / EC; Directive 98/6 / EC; Directive 98/27 / EC; Directive 1999/44 / EC.

² These are Directive 85/577 / EEC on door to door contracts; Directive 93/13 / EC on unfair terms in consumer contracts, Directive 97/7 / EC on distance contracts and Directive 99/44 / EC relating to guarantees in the sale of consumer goods

³ With regard to the Directive 93/13 / EC on unfair terms in consumer contracts and Directive 99/44 / EC relating to guarantees in the sale of consumer goods, the Community legislature is limited to insert marginal additions through Articles 32 and 33 of Directive 2011/83 / EU.

⁴ See, S. WEATHERILL, *The Consumer Rights Directive: How and Why a Quest for “Coherence” Has (Largely) Failed*, in *Common Market Law Review*, 2012, p. 1279 ss.

⁵ I. RIVA, *La direttiva di armonizzazione massima sui diritti dei consumatori, o almeno ciò che ne resta*, in *Contr. impr./Eur.*, 2011, p. 755.

⁶ See, A. PALMIERI, *Quel che avanza dei diritti dei consumatori: una disciplina parziale e frammentaria (con qualche spunto interessante sul piano definitorio)*, in *Foro it.*, 2012, V, c. 181 ss.; R. ALESSI, *Gli obblighi di informazione tra regole di protezione del consumatore e diritto contrattuale europeo uniforme e opzionale*, in *Eur. dir. priv.*, 2013, p. 311 ss.

⁷ V. MAK, *Standards of Protection: In Search of the “Average Consumer” of EU Law in The Proposal for a Consumer Rights Directive*, in *European Review of Private Law*, 2011, p. 26.

characterized by "minimum harmonization", it takes on a sectoral character and, as such, keeps alive the peculiar legislative policies of individual Member States¹.

This confused European legislative policy, while it shows the persistence of a strong attention of EU bodies towards the weaker parties², on the other hand shows the persistence of severe difficulties in the creation of a unified consumer law, pursuing the road of maximum harmonization³.

3. Despite not reaching its original goal⁴, Directive 2011/83/EU did not fail in having a strong influence in Italian law in relation to the substantial change of the previous law on door to door contracts and distance contracts.

First of all, it underlined the importance of protecting the consumer needs that emerge within these types of trades, arising from their particular aggressiveness. The main subject of this discipline, in fact, is not an individual type of contract but specific trading methods. The reason is that while in door to door contracts the contract is signed away from the shops, in distance contracts there is not the simultaneous presence of the trader and the consumer at the time of the agreement. In both cases, the particular factual circumstances in

¹ V. MAK, *The degree of armonization in the proposed consumer rights directive: a review in light of liability for products*, in G. HOWELLS and R. SCHULZE, *Modernising and armonising consumer law*, cit., p. 305. It should be noted that even the professional can sometimes assume the position of the weaker party, see L. MEZZASOMA, *Attività imprenditoriale e limiti legali all'autonomia negoziale nel contratto di compravendita nell'ordinamento italiano*, in L. KUPRIANOVA, *Organizational-Economic, financial, managerial and legal development of competitiveness of the Russian economy*, Riga, 2013.

² L. WADDINGTON, *Vulnerable and Confused: The Protection of "Vulnerable" Consumers under EU Law*, in *European Law Review*, 2013, p. 757 ss.

³ See, G. HOWELLS, *European Consumer Law – The Minimal and Maximal Harmonization Debate and Pro Independent Consumer Law Competence*, in S. GRUNDMANN and J. STUYCK (curated by), *An Academic Green Paper on European Contract Law*, The Hague, 2002, p. 755; P. ROTT, *Maximum Harmonisation and Mutual Recognition versus Consumer Protection. The Example of Linked Credit Agreements in EC Consumer Credit Law*, in *European Legal Forum*, 2006, I, p. 61; T. WILHEMSSONT, *Full Harmonisation of Consumer Contract Law?*, in *Zeitschrift für Europäisches Privatrecht*, 2008, p. 225; P. ROTT and E. TERRY, *The Proposal for a Directive on Consumer Rights: no Single set of Rules*, *ivi*, 2009, p. 456; M. LEHMANN and A. DE FRANCESCHI, *Il commercio elettronico nell'Unione europea e la nuova direttiva sui diritti dei consumatori*, in *Rass. dir. civ.*, 2012, p. 422.

⁴ See, M. CASORIA, *Frammenti di un regime protettivo a vocazione generale*, in *Foro it.*, 2012, V, c. 190 ss., noting that only part that deals in general with consumer protection is the one included in Chapter IV of Directive titled "Other consumer rights".

which the contract is concluded expose consumers to the risk of concluding contracts not fully desired¹.

This happens both for the fact that the consumer is taken by surprise by the professional and because the circumstances in which negotiation took place make it much more difficult for the consumer to find the information needed in order to understand in a specific and timely way the content and obligations arising from the contract.

This happens both for the fact that the consumer is taken by surprise by the professional and because the circumstances in which negotiation takes place make it much more difficult for the consumer to find the information needed in order to understand in a specific and timely way content and obligations arising the contract.

This creates the need for a specific system of protection which takes into consideration the particular position of weakness of the consumer and provides for specific protection tools that eliminate the risks described above.

Precisely for these needs, these types of negotiations had already been covered previously by Directive 85/577 / EEC (on door to door contracts) and Directive 97/7 / EC (on distance contracts). These two provisions are replaced by Directive 2011/83 / EU leading the need for Member States to readapt the internal discipline to the new legislation².

The work of transposition took place in Italy through the Legislative Decree on February 21st 2014, n. 21³ that, in transposing the text of Directive 2011/83 / EC, has completely rewritten Articles. 45-67 of the Italian Consumer Code (Legislative Decree 6 September 2005, n. 206). This new discipline has completely replaced the previous and will apply only to distance and off-premises contracts that are entered after June 13th 2014⁴.

¹ G. DE CRISTOFARO, *Particolari modalità di conclusione del contratto*, in G. DE CRISTOFARO and A. ZACCARIA (curated by), *Commentario breve al diritto dei consumi*, 2^a ed., Padova, 2013, p. 441

² See, G. DE CRISTOFARO, *I contratti conclusi «a distanza» e «fuori dei locali commerciali»: area di applicazione della disciplina*, in *Tratt. contr.* diretto da V. Roppo and A.M. Benedetti, V, Milano, 2014, p. 63 ss.

³ About this legislative decree, S. PAGLIANTINI, *La riforma del codice del consumo ai sensi del d.lgs. 21/2014: una rivisitazione (con effetto paralizzante per i consumatori e le imprese?)*, in *Contratti*, 2014, p. 796 ss.

⁴ For a first comment to the discipline, F. DE LEO, *La nuova disciplina dei contratti a distanza e negoziati fuori dai locali commerciali tra uniformità, innovazione e perdurante silenzio del legislatore*, in *Resp. civ. prev.*, 2014, p. 1397 ss.

First it should be specified that according to Articles. 45 and 46 of the Consumer code, the new rules will apply to any contract of sale of goods and provision of services concluded between a supplier and a consumer according to the procedures described above¹.

The innovations introduced by the transposition of Directive 2011/83/EU impacted profoundly on the pre-contractual information that the professional has to perform standardizing and extending them significantly².

In the original version of the law, in fact, the pre-contractual informational obligations were governed by two separate rules: Article. 47 of the Consumer code³ took care of the pre-contractual information regarding door to door contracts while art. 52 of the Consumer code, identified the information that the professional had to provide before the conclusion of distance contracts⁴.

In the formulation of the Consumer code, the list of pre-contractual information is made, just to door to door contracts and to distance contract, in art. 49 of the Code. This made the information that the professional must provide to the consumer identical for both distance contracts and the termination door to door contracts⁵.

The one described above is an innovation that simplifies the regulatory framework standardizing information and contextually significantly expands the object of information especially with regard to door to door contracts⁶.

¹ See, F. DE LEO, *o.c.*, p. 1398; V. CUFFARO, *Nuovi diritti per il consumatore: note a margine del d.lgs 21 febbraio 2014, n. 21*, in *Corr. giur.*, 2014, p. 777 ss.; E. BATTELLI, *L'attuazione della direttiva sui diritti dei consumatori tra modernizzazione di vecchie categorie e «nuovi» diritti*, in *Eur. dir. priv.*, 2014, p. 941 ss.

² G. DE CRISTOFARO, *o.c.*, p. 442. P. OCCHIUZZI, *Gli obblighi informativi*, in *Corr. giur.*, 2014, p. 10 ss. For a reading of the relevance of the precontractual information, see R. ALESSI, *Gli obblighi di informazione tra regole di protezione del consumatore e diritto contrattuale europeo uniforme e opzionale*, in *Eur. dir. priv.*, 2013, p. 311 ss.

³ About previous regulation, E. BATTELLI, *Art. 47*, in G. ALPA and L. ROSSI CARLEO (a cura di), *Codice del consumo. Commentario*, Napoli, 2005, p. 348 ss.; R. CALVO, *Art. 47*, in E. CAPOBIANCO and G. PERLINGIERI (a cura di), *Codice del consumo annotato con la dottrina e la giurisprudenza*, Napoli, 2009, p. 289 ss.

⁴ M.P. SUPPA, *Art. 52*, in V. CUFFARO (a cura di), *Codice del consumo*, 3^a ed., Milano, 2012, p. 338 ss.; M. CINQUE, *Art. 52*, in G. DE CRISTOFARO and A. ZACCARIA (a cura di), *Commentario breve al diritto dei consumi*, cit., p. 476 ss.

⁵ See, F. SCAVONE, *Le modifiche apportate al Codice del consumo a seguito del recepimento della direttiva 2011/83/UE*, in *Contr. impr./Eur.*, 2014, p. 468 ss.

⁶ F. DE LEO, *La nuova disciplina dei contratti a distanza e negoziati fuori dai locali commerciali tra uniformità, innovazione e perdurante silenzio del legislatore*, cit., p. 1399 s.; E. BATTELLI, *L'attuazione della direttiva sui diritti dei consumatori tra modernizzazione di vecchie categorie e «nuovi» diritti*, cit., p. 952 ss.

In fact, while in the original formulation of the regulations art. 52 of the Consumer code identified a wide range of pre-contractual information applicable to distance contracts, art. 47 of the Consumer code limited pre-contractual information that have to be given to the consumer in door to door contracts exclusively to the existence and terms of activation of the right of withdrawal¹.

This informative disparity between the two types of trading, previously noted by some commentators², has now been eliminated by the current version of art. 49 of the Consumer code that, in fact, extends the information before prescribed only for distance contracts also to door to door contracts.

Despite this extension appears definitely positive - as it is able to protect the consumer's position -, it has been highlighted by the doctrine that it would be appropriate to intervene on matters concerning applicable fines in case of failure to provide the information required by law. This deficiency, already present in Directive 2011/83/EU³, has not been filled by the internal legislature, opening the way to many interpretation problems⁴.

This deficiency means that the problem must be resolved through the application of the remedies provided by the Italian civil code which, however, are not absolutely clear on the subject. In particular, according to some authors, the fact that it is a violation of mandatory rules, it would allow the application of art. 1418, paragraph 1, of the Italian civil code which establishes the nullity of any contract that violates mandatory rules⁵.

¹See, M. D'AURIA, *Art. 47*, in V. CUFFARO (a cura di), *Codice del consumo*, cit., p. 317 ss.; G. BENINI, *Art. 47*, in G. DE CRISTOFARO and A. ZACCARIA (a cura di), *Commentario breve al diritto dei consumi*, cit., p. 457 ss.

²M. CARTELLA, *La disciplina dei contratti negoziati fuori dai locali commerciali*, in *Giur. comm.*, 1992, p. 742; A. GENOVESE, *Diritto di recesso e regole d'informazione del consumatore*, in *Contratti*, 2004, p. 380.

³E. HALLS, G. HOWELLS and J. WATSON, *The Consumer Rights Directive – An Assessment of its Contribution to the Development of European Consumer Contract Law*, in *European Review of Contract Law*, 2012, p. 151.

⁴F. DE LEO, *La nuova disciplina dei contratti a distanza e negoziati fuori dai locali commerciali tra uniformità, innovazione e perdurante silenzio del legislatore*, cit., p. 1401.

⁵See, D. MAFFEIS, *Conflitto di interessi nella prestazione di servizi di investimento: la prima sentenza sulla vendita a risparmiatori di obbligazioni argentine*, in *Banca borsa tit. cred.*, 2004, II, p. 458; G. ALPA, *Commercializzazione a distanza di servizi finanziari ai consumatori*, in *Contratti*, 2005, p. 1174; T. FEBBRAJO, *Violazione dei doveri precontrattuali di informazione e tutela del consumatore*, in G. CAVAZZONI, L. DI NELLA, L. MEZZASOMA and V. RIZZO (a cura di), *Diritto dei consumi realtà e prospettive*, Napoli,

According to another approach, however, the art. 1418, paragraph 1, of the Italian civil code only refers to the mandatory rules which govern the structure of the contract and not to the mandatory rules regulating the conduct of the parties. According to this last position, therefore, the violation of mandatory rules that require information in the pre-contractual phase should be sanctioned with compensation for any injury suffered by the subject that has not received the information. The remedy of nullity of the contract, on the contrary, would always be excluded¹.

Despite the first orientation was successful in Italian doctrine², case law has however strongly supported the second position by stating that the violation of mandatory rules of conduct can never be sanctioned with the nullity of the contract³.

Applying this principle to the pre-contractual information described by the current art. 49 of the Consumer code, it must be assumed that its violation by the professional will legitimize the consumer to claim compensation for the damage suffered and not the contract nullity with the related restitution legal actions.

2008, p. 299 ss.; A. GENTILI, *Disinformazione e invalidità: i contratti di intermediazione dopo le Sezioni Unite*, in *Contratti*, 2008, p. 397 ss.

¹ R. SCOGNAMIGLIO, *Regole di validità e di comportamento: i principi e i rimedi*, in *Eur. dir. priv.*, 2008, p. 622 ss.; U. SALANITRO, *Gli obblighi contrattuali di informazione: le regole e i rimedi nel progetto aquis*, *ivi*, 2009, p. 59 ss.; G. D'AMICO, *Nullità virtuali – Nullità di protezione (variazioni sulla nullità)*, in *Contratti*, 2009, p. 732; GUADAGNO, *Violazione degli obblighi di condotta da parte dell'intermediario finanziario: lo strato dell'arte dopo le Sezioni Unite*, in *Nuova giur. civ. comm.*, 2010, II p. 293 ss.

² See, G. PERLINGIERI, *L'inesistenza della distinzione tra regole di comportamento e di validità nel diritto italo-europeo*, Napoli, 2013, p. 31 ss.

³ Trib. Foggia, 30 giugno 2006, in *Contratti*, 2007, p. 423; Trib. Bologna, 18 dicembre 2006, in *Obbl. contr.*, 2007, p. 812; App. Milano, 19 dicembre 2006, in *Danno resp.*, 2007, p. 562; Trib. Asti, 29 marzo 2007, in *Corr. merito*, 2007, p. 1023 e, on all, Cass., Sez. un., 19 dicembre 2007, n. 26725, in *Resp. civ. prev.*, 2008, p. 547, with comment of F. GRECO, *Intermediazione finanziaria: violazione di regole comportamentali e tutela secondo le Sezioni unite*. For further informations about the judgment, see, T. FEBBRAJO, *Violazione delle regole di comportamento nell'intermediazione finanziaria e nullità del contratto: la decisione delle sezioni unite*, in *Giust. civ.*, 2008, I, p. 2785 ss.; A. BOVE, *La violazione delle regole di condotta degli intermediari finanziari al vaglio delle Sezioni unite*, in *Banca borsa tit. cred.*, 2008, II, p. 143 ss.; G. GOBBO, *Le sanzioni applicabili alla violazione delle regole di condotta in tema di investimenti mobiliari: la prima pronuncia nomofilattica su nullità e responsabilità contrattuale*, in *Giur. comm.*, 2008, II, p. 356 ss.; V. SANGIOVANNI, *Inosservanza delle norme di comportamento: la Cassazione esclude la nullità*, in *Contratti*, 2008, p. 221 ss.; A. RUSSO, *Intermediazione finanziaria tra regole di validità e regole di comportamento*, in *Dir. giur.*, 2008, p. 407 ss.; G. COTTINO, *La responsabilità degli intermediari finanziari e il verdetto delle Sezioni unite: cause, considerazioni, e un elogio dei giudici*, in *Giur. it.*, 2008, p. 347 ss.

4. Finally, there are many changes introduced by the transposition in Italy of Directive 2011/83 / EU concerning the right of withdrawal granted to the consumer¹. As anticipated, the need to protect the consumer in distance contracts and door to door contracts emerges for the fact that the consumer may actually conclude contracts not actually desired due to the "aggressive" way which tempted him to purchase. Just to combat this situation, the Community legislature has guaranteed the right to the consumer to withdraw unilaterally from a concluded contract within a period of time specified by law².

The rule *pacta sunt servanda* is in these circumstances temporarily waived in order to allow the consumer a reasonable amount of time to rethink, necessary to verify whether the contract is actually functional to the needs of the contractor³.

The right of withdrawal is an institution already present in the Italian civil code in art. 1373⁴ which, however, has characteristics quite distinct from those provided for in the consumer rules. First, in fact, the withdrawal of the Italian civil code is subject to an express agreement between the parties; Second, it can not be exercised after the start of the execution of the contract and, thirdly, the effects of the right of withdrawal will occur only when it the price for the right to exercise it has been paid.

Conversely, the right of withdrawal provided by the Community directives on consumer protection and, today, by art. 52 of the Consumer code, is imposed by law, this exercise does not require any

¹ See, N. ZORZI GALGANO, *Il contratto di consumo e la libertà del consumatore*, in *Tratt. dir. comm. e pubbl. econ.*, diretto da F. Galgano, Padova, 2012, p. 427 ss.; A.M. BENEDETTI, *La difesa del consumatore dal contratto: la natura «ambigua» dei recessi di pentimento*, in V. ROPPO and A. D'ANGELO (a cura di), *Annuario del contratti*, cit., p. 27 ss.; F. BRAVO, *I contratti a distanza nel codice del consumo e nella direttiva 2011/83/UE. Verso un codice europeo del consumo*, Milano, 2013, p. 237 ss.; S. PATTI, *Il recesso del consumatore: l'evoluzione della normativa*, in *Contr. impr./Eur.*, 2013, p. 45 ss.; M. GRANDI, *Lo jus poenitendi nella direttiva 2011/83/UE sui diritti dei consumatori*, in *Contr. impr./Eur.*, 2013, p. 59 ss.

² C. FERRARI, *Ipotesi di qualificazione per il diritto di recesso del consumatore*, in *Riv. dir. civ.*, 2010, p. 5 ss.; M. FARNETI, *Il nuovo recesso del consumatore dai contratti negoziati fuori dai locali commerciali e a distanza*, in *Nuove leggi civ. comm.*, 2014, p. 962.

³ R. TOMASSINI, *Codice del consumo e jus poenitendi*, in P. PERLINGIERI and E. CATERINI (a cura di), *Il diritto dei consumi*, III, Napoli, 2007, p. 284; A.M. BENEDETTI, *Recesso del consumatore*, in *Enc. dir., Annali*, IV, Milano, 2011, p. 957.

⁴ G. GABRIELLI and F. PADOVINI, *Recesso (dir. priv.)*, in *Enc. dir.*, XXXIX, Milano, 1998, p. 27; M. FRANZONI, *Degli effetti del contratto. Efficacia del contratto e recesso unilaterale*, in *Comm. cod. civ.* Schlesinger, Milano, 1998, p. 308 ss.

explanation from the consumer¹ and, above all, is free of any cost for the consumer².

These special characteristics make evident the protective nature of this new withdrawal that allows the consumer to break free from a contract validly concluded³.

The implementation of Directive 2011/83/EU through the legislative decree n. 21 of 2014 has preserved the characteristics of consumer withdrawal but introduced substantial changes in its discipline with regard to distance contracts and door to door contracts⁴.

What is changed is, first, the period within which the consumer is entitled to exercise the right of withdrawal. In the previous legislation, in fact, the deadline was 10 days which today has been elevated to 14⁵.

At the same time, the rules about the identification of the day from which the deadline started to run for exercising the right of withdrawal have been simplified. In the previous regulation, in fact, art. 65 of the Consumer code differentiated the terms depending on the mode of conclusion of the contract (distance or door to door). Within this distinction, then, we proceeded to diversify the starting point according to the object of the contract⁶.

The actual art. 52 of the Consumer code, conversely, unifies the discipline of door to door contracts and distance contracts providing that, in both cases, the 14-day period begins after the signing of the

¹ See, G. D'AMICO, *Recesso ad nutum, buona fede e abuso del diritto*, in *Contratti*, 2010, p. 11 ss.

² P. SIRENA, *I recessi unilaterali*, in *Tratt. contr.* diretto da V. Roppo, III, Milano, 2006, p. 19 ss. M. FARNETI, *Il nuovo recesso del consumatore dai contratti negoziati fuori dai locali commerciali e a distanza*, cit., p. 965 ss.

³ O. TROIANO, *Disciplina dei mercati e jus poenitendi nella contrattazione a distanza e in quella sorprendente*, in P. PARDOLESI (a cura di), *Saggi di diritto privato europeo*, Napoli, 1995, p. 252; F. GRECO, *Profili del contratto del consumatore*, Napoli, 2005, p. 161 ss.

⁴ R. DE HIPPOLYTIS, *La disciplina unitaria del recesso*, in *Foro it.*, 2012, V, c. 186 ss.

⁵ See, C. CONFORTINI, *Il recesso di pentimento*, in *Corr. giur.*, 2014, p. 24 ss.; F. SCAVONE, *Le modifiche apportate al Codice del consumo a seguito del recepimento della direttiva 2011/83/UE*, cit., p. 472.

⁶ R. GIAMPETRAGLIA, *Art. 65*, in G. ALPA and L. ROSSI CARLEO (a cura di), *Codice del consumo. Commentario*, cit., p. 469 ss.; M. MUSOLINO, *Art. 65*, in E. CAPOBIANCO and G. PERLINGIERI (a cura di), *Codice del consumo annotato con la dottrina e la giurisprudenza*, cit., p. 360 ss.

contract in case of services contracts, or on the date of delivery of the goods in the case of contracts related the sale of products¹.

Another significant change regards the sanction provided in the event of lack of information about the existence and the modalities of exercising the right of withdrawal. This problem had in the previous regulations not had a very effective reaction. In fact, if the trader fails to supply the information on withdrawal, art. 65 of the Consumer code provided for an extension of the deadline for exercising the right of withdrawal that was 60 days for door to door contracts and 90 days for distance contracts². In both cases these terms started on the conclusion of the contract in case of services contracts or on the date of delivery of the goods in the case of sales contracts.

The actual art. 53 of the Consumer code, in addition to unifying in this case the discipline of the two types of trading, significantly expanding the deadline for exercising the right of withdrawal, which is raised to 12 months starting from the end of the normal period of 14 days established by the current art. 52 of the Consumer code³.

Even this intervention, in addition to simplifying the previous legislation, led to an increase of the level of consumer protection by having expanded considerably the deadline for exercising the right of withdrawal in case of absence of pre-contractual information by the trader⁴. This stiffening of the legislation is definitely more suitable to stimulate the contractor to fulfill in a punctual and precise way the pre-contractual information. Otherwise, in fact, he would remain exposed for a greater period of time in the event that the consumer

¹ E. BATTELLI, *L'attuazione della direttiva sui diritti dei consumatori tra modernizzazione di vecchie categorie e «nuovi» diritti*, cit., p. 971.; M. FARNETI, *Il nuovo recesso del consumatore dai contratti negoziati fuori dai locali commerciali e a distanza*, cit., p. 973 ss.

² See, E. GUERINONI, *Art. 65*, in V. CUFFARO (a cura di), *Codice del consumo*, cit., p. 408 ss.

³ M. FARNETI, *Il nuovo recesso del consumatore dai contratti negoziati fuori dai locali commerciali e a distanza*, cit., p. 977 ss.

⁴ It should however be noted that part of the doctrine has raised serious doubts about the ability of this sanction be effectively appropriate to the purpose of protecting consumers. In this sense, O. TROIANO, *Disciplina dei mercati e jus poenitendi nella contrattazione a distanza e in quella sorprendente*, in P. PARDOLESI (a cura di), *Saggi di diritto privato europeo*, cit., p. 269; D. VALENTINO, *Recesso e vendite aggressive*, Napoli, 1996, p. 385. Da ult., sul punto, M. FARNETI, *Art. 65*, in G. DE CRISTOFARO and A. ZACCARIA (a cura di), *Commentario breve al diritto dei consumi*, cit., p. 542 ss.

was deprived of legal effectiveness while the contract was concluded¹.

5. The above considerations clearly show that the contribution made by Directive 2011/83/EU is certainly positive under the specific profile of the protection of the weaker party. Through this new legislation are in fact greatly increased the protective tools that should protect the consumer both in the pre-contractual phase, and in the executive one. On the first point, it should be definitely appreciated the increased range of the pre-contractual information that are able to make informed consumers about the extent of the obligations negotiating². On the second point, the extension of the deadline for exercising the right of withdrawal allow a larger margin to the weaker party to backtrack freeing himself from a contract concluded regularly³.

While the analysis of each specific provision of Directive 2011/83 / EU - and its implementation in Italy – expresses a positive opinion, it raises more doubts the legislative measure in question in relation to the overall EU legislative policy.

The Evolution that has characterized the discipline, in fact, shows a total failure of those legislative options aimed at creating a complete European consumer law made of precise and punctual rules regulating in detail and in an identical manner between the individual Member States the legally relevant cases. This attitude would have forced Member States to transpose passively EU Community laws, bending the peculiar characteristics of its internal normative systems in the name of uniformity that, however, cannot be normative if it is not the first cultural⁴.

The criticisms made to the policies of "maximum harmonization" seem to hit the target because the reality show a Europe made up of a multiplicity of normative systems far from homogeneous and certainly not levellable authoritatively through rigid impositions⁵.

The path leading to the creation of a common European consumer law, then, should perhaps follow a different trajectory that points not to the imposition of an immediate result but points to stimulate the

¹ F. SCAVONE, *Le modifiche apportate al Codice del consumo a seguito del recepimento della direttiva 2011/83/UE*, cit., p. 475.

² See, § 3.

³ See, § 4.

⁴ P. PERLINGIERI, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, 3^a ed., Napoli, 2006, p. 256.

⁵ P. PERLINGIERI, *o.c.*, p. 258.

gradual and shared growth on European legal culture as a basis for the subsequent inclusion of specific common disciplines.

It would have been more appropriate to follow the path laid out in the consultation by the SiSDIC¹ that, in responding to questions raised by the Green Paper 2007 on the revision of the EU acquis concerning consumer law, had highlighted the need to create a horizontal legislation of a regulatory nature that "Should contain, specifically, a «strong nucleus» of principles, rules and general tools (general framework of rights, interests and safeguards) which bring together, in a unified way, the contents of the individual sectorial directives, avoiding repetitions, redundancies and inconsistencies. In conclusion, this Regulation should host the supranational sector concepts that make as the cultural and axiological glue of European consumer protections. So as to create, in this way, a «basis and homogeneous culture», like which parameterise the application of the sectorial rules"².

There is no doubt about the fact that only by putting together and sharing a solid base made of the general principles we can reach the formulation of a common European law made by identical rules, and uniformly applied in all individual Member States.

¹ It is the Italian Society of Scholars of Civil Law, which was founded by Prof. Peter Perlingieri, gathers the greatest exponents of Italian civil law culture.

² The answer to the questions is available on the website www.sisdic.it.