

TELESELLING PROCEDURES IN THE ELECTRONIC COMMUNICATIONS AND PAY TV SECTORS AFTER THE ICA

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1. INTRODUCTION

Formal requirement rules for off-premises contracts and for distance contracts are one of the main changes introduced by Law Decree no. 21/2014² implementing the Consumer Rights Directive no. 2011/83/EU (CRD).

Article 51 (6) of the Italian Consumer Code, implementing Article 8 (6) of the CRD, provides formal requirements for distance contracts, that is contracts to be concluded over the phone.

This article, after a quick review of the previous legislation and business practices, focuses on the main issues of the change and the solutions provided by recent decisions of the Italian Competition Authority (hereinafter ICA) in the electronic communications and pay TV sectors.

2. A STEP BACK: THE DISCIPLINE OF DISTANCE SALES AND CORPORATE PRACTICES BEFORE DECREE NO. 21/2014

Selling goods and services over the telephone falls within the scope of distance contracts which are characterized, as before the new legislative provisions, by consumer protection rules mainly focused on two different aspects: the provision of pre-contractual information requirements for traders, and the acknowledgment that consumers are free, in a given period, to exercise the right of withdrawal

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² On this issue, see S. PERUGINI, *Il recepimento della Direttiva 2011/83/UE: prime riflessioni*, in *Giustizia Civile.com*, Giuffrè, 21 maggio 2014, pp. 1-33; and ID., *I "nuovi" strumenti di intervento dell'AGCM*, in *D.lgs. 21 febbraio 2014, n. 21: nuove tutela per i consumatori*, in *Corriere giur.*, 2014, p. 44.

from the contract without any penalty and without having to give explanations. The legislation did not provide for special forms of contract conclusions over the phone, with the consequent possibility to subscribe to an offer with just an oral agreement. The only formal provision regarded the mandatory written notice containing the pre-contractual information provided by the Italian Consumer Code to be sent “*before or at the same time of the execution of the contract.*”³

The minimum harmonisation approach in the former Directive 97/7/EC on consumer protection for distance contracts - currently repealed by Directive 2011/83/EU consumer rights - resulted in the adoption by the sectorial Authorities of various rules and regulations applicable to the relationship between traders and consumers.

With specific reference to the electronic communication sector, the Italian Regulatory Authority for Telecommunications (hereinafter AGCOM) introduced specific rules on how to conclude a distance contract as well as on the remedies, in case of non-requested supply, adopting AGCOM’s Resolution no. 664/06/CONS 23.11.2006 (titled “*Regulation for consumer protection in respect of provision of electronic communications services through distance contracts*”).⁴

Also in the public enforcement of measures for unfair commercial practices (articles 18-27 of the Consumer Code)⁵ the ICA found, in several cases, the existence of unsolicited supplies (inertia selling) following misleading or false information given to consumers during sales over the phone.

In order to comply with these measures, the industry has progressively introduced one or more phone calls (so-called *Welcome Call* or *recall*) whose purpose is to verify the authenticity of consumers’ consent to the sale and to prevent the phenomenon of unsolicited supplies.

3. INFORMATION REQUIREMENTS AFTER DECREE NO 21/2014

Law Decree no. 21/2014 implementing Directive 2011/83/EU introduced in the Italian Consumer Code a new set of rules appointing the ICA with the competence for its enforcement.

One of the main innovations introduced by the decree refers to the provision of strict formal requirements for off-premises contracts (Article 50) and for distance contracts (Article 51).

³ See Article 53 (1) of the Italian Consumer Code before Decree no. 21/2014.

⁴ Concerning teleselling, Article 2(6) of the Regulation requires that, when consumers receive a proposal by phone for the supply of goods and services in the electronic communication sector, disclosure requirements and the informed consumer could be achieved by the consumer through the complete recording of the phone call, if the consumer gives previous consent to the recording itself (so called vocal recording).

⁵ The literature is vast. For an update on the topic see v. a. S. PERUGINI, *Le pratiche commerciali scorrette*, in *Diritto dei Consumi: Atto, attività, enforcement*, di Liliana Rossi Carleo (a cura di), Giappichelli, 2015, Parte III, Capitolo I, pp. 161-202.

Article 51 (6) of the Italian Consumer Code titled “*Formal requirements for distance contracts,*” implementing Article 8(6) of Directive 2011/83/EU, says: “*Where a distance contract is to be concluded by telephone, the trader has to confirm the offer to the consumer who is bound only once he has signed the offer or has sent his written consent; in such case the electronic document may be signed digitally pursuant to Section 21 of Legislative Decree No. 82 of 7 March 2005 as subsequently amended. Upon agreement with the consumer, such confirmations may be given on a durable medium.*”⁶

Article 51 (6) contains a special rule for contracts concluded over the phone requiring that the oral agreement must be confirmed by the parties.

If the trader does not confirm the proposal and does not obtain the consumer’s express confirmation, the consumer is not bound by the contract. Unlike what used to happen in the past, oral statements made during telephone calls have no legal value. Distance contracts are concluded only once the trader is compliant with the formal requirements provided for in Article 51 (6) of the Italian Consumer Code: a) the exchange of written confirmation, or b) confirmations are made on a durable medium, with the consumers’ express consent.

The main problematic issues of Article 51 (6) concern the following aspects:

- i) its scope and, in particular, if it should be applied only when a distance contract is to be concluded over the phone or also at a later time;
- ii) as regards the exchange of written confirmations, the timing of the conclusion of the distance contract;
- iii) as regards confirmations made on a durable medium:
 - a) the sense of the expression “*Upon agreement with the consumer*” as regards the duration and methods for taking the consumers’ consent to give confirmation on a durable medium, instead of a written confirmation;
 - b) what media fall within the notion of durable medium (Article 45 lett. l) cod. cons. and recital n. 23 of Directive), in particular, the exchange of confirmation is made through a recorded phone conversation;
 - c) the relationship between Article 51, (6), third period and the confirmation in Article 51 (7).

⁶ Article 8 (6) of Directive says: “*Where a distance contract is to be concluded by telephone, Member States may provide that the trader has to confirm the offer to the consumer who is bound only once he has signed the offer or has sent his written consent. Member States may also provide that such confirmations have to be made on a durable medium.*” It is an exception from the principle of full harmonisation and leaves Member States free to choose among three options: 1) no formal requirements for the conclusion of the contract; 2) the contract is to be concluded only in writing; 3) the contract is to be concluded through the exchange of contractual statements on a durable medium. The Italian lawmaker chose options sub 2) and 3) introducing them in the Italian Consumer Code Article 51 (6).

4. PROCEEDINGS BEFORE THE ICA

4.1 The scope of Article 51(6)

The ICA, in line with its institutional aims and with the EU Commission's recommendations, investigated teleselling contracts concluded over the phone in two sectors: electronic communications and pay TV.

The cases focused on procedures used by four traders active in the electronic communication sector (mobile and fixed telephone services) and one pay TV trader.⁷ The procedures required the acquisition of consumers' consent to the offer during a recorded phone call, after taking consumers' previous consent to the recording. The five proceedings - which were opened on 10 March 2015 and closed between September and December 2015 - solved many of the interpretative issues of Article 51 (6) highlighted above.⁸

As to the first question (under (a) above), two operators (Telecom and Sky) in their defense stated that their procedures (concerning the sale of telephone services -both fixed and rechargeable mobile- and television services) did not fall within the scope of Article 51 (6), because the contracts were not concluded over the phone (but only in a second moment) and because contract terms were structured so as to make consumers the formal proponents of the offer previously described by the traders.

In both cases, the results of the investigation showed that, contrary to the parties' arguments, during the recorded phone call operators did not just pick up consumers' mere expression of interest without legal and factual consequences, but they got confirmation from consumers of their acceptance of the offer by phone, a consent that translates into the subscription of a new contract.

In this regard, the ICA found that the formal requirements of Article 51 (6) must be applied in all cases in which the phone is employed by the company - as means of distance communication - to acquire consumers' acceptance of the offer proposed by the trader.

Indeed, the lawmaker intended to keep consumers safe from being bound by a contractual obligation only by giving oral consent over the phone – regardless of the role given to consumers by contract terms, i.e. being the proponents of the offer previously described by the trader in the marketing activity or just being the recipients of the trader's unilateral contractual proposal.

⁷ See *PS/9981- Sky procedure di teleselling*, no. 25634, September 30th of 2015, in Boll. 35/2015; *PS/9983 – H3g procedure di teleselling*, no. 25635, September 30th of 2015, in Boll. 35/2015; *PS/9880 – Fastweb procedure di teleselling*, no. 25755, December 2nd of 2015, in Boll. 47/2015; *PS/9881 – Vodafone procedure di teleselling*, no. 25756, December 2nd of 2015, in Boll. 47/2015; *PS/9982 – Telecom procedure di teleselling*, no. 25757, December 2nd of 2015, in Boll. 47/2015.

⁸ The five proceedings were closed with fines of only 100,000€ for each trader. The Authority took into account that the decisions were the first enforcement cases in Italy concerning this consumer protection legislation.

The Authority inferred the lawmaker's intent due to the fact that the rule applies to distance contracts that are concluded in writing – i.e. through exchange of written confirmations – and not by phone, even if before the confirmation the offer is described by a phone call in which consumers' acceptance is taken: this is the procedure described by Article 51 (6) first sentence.⁹

4.2 The exchange of written confirmations

The requirement of a written form for distance contracts, set by Article 51 (6), first sentence, is fulfilled when the trader submits the written proposal (called “*confirm of proposal*”) to consumers and obtains their express confirmation in writing. In this case, one of the issues concerns the time when the contract may be considered concluded.

Influential doctrine shows that Article 51, paragraph 6, does not seem to dictate a special rule for the conclusion of the contract, if compared to the general principle contained in Article 1326 (1) and Article 1335 of the Italian Civil Code regulating contracts among individuals. Consequently, the contract may be considered concluded not when the consumer signs the proposal, but in a later moment, more precisely when the acceptance document (containing the consumer's explicit confirmation), signed by the consumer, is received by the trader.¹⁰

Such an interpretation was endorsed by the Authority in one of the above mentioned proceedings, insofar as it ruled out the infringement of Article 51, paragraph 6, where the procedure adopted by the trader provided for consumers to be bound by the contract, only after receiving the form containing the signed confirmation of the offer described by the agent over the phone; only then, the service was activated.

4.3 Confirmations made on a durable medium

More difficult is the interpretation of the provision set by the 3rd sentence of Article 51, paragraph 6, of the Italian Consumer Code (point iii) above). The provision was introduced in the Italian Consumer Code after a long parliamentary debate and intense discussions with companies and customer associations. It states: “*Upon agreement with the consumer, such confirmations may be given, on a durable medium.*”

⁹ The ICA also considered the European Commission's Guidance on the implementation of the CRD and in particular on distance contracts, where we can read: “*Although simply taking of an appointment with the trader is not considered a distance contract, a binding reservation made, for example, by telephone of goods to be collected or services to be received at a certain time is likely to constitute a distance contract for the purposes of the Directive.*”

¹⁰ In case of the so-called “role-inversion,” the scheme adopted by vendors provides for consumers to be the formal proponents of the deal and the trader to be the recipient. In such case, the contract is deemed concluded when customers receive at their address the document through which the trader – having received customers' written and signed confirmation of the offer – formally accepts the proposal.

In this case, to be sure that oral statements acquire binding force, those statements need to be made on a durable medium according to the definition given in Article 45, letter l) of the Italian Consumer Code (Article 2, number 10, of the CRD) and upon agreement with consumers. As clarified by the ICA, it represents a «*simplified and alternative [procedure] if compared to the exchange of written confirmations*».

i. Consumers' consent to give confirmation on a durable medium

The first issue relates to the meaning of the expression “*upon agreement with the consumer.*” While considering insufficient the traders’ practice to ask customers to agree to the mere recording, the Authority highlighted the duty for the trader to give customers preliminary information, in understandable language, concerning alternative legal ways for concluding the contract and related consequences, i.e. *renouncing to the written confirmation.* All this should be done before getting customers’ consent to give confirmation on a durable medium.

Such information burden is justified, according to the Authority, «*because of the trader’s advantage compared to the counterpart, in addition to the consumer’s informational and contractual asymmetry, if one takes into account that the content of the recorded phone conversation is unilaterally determined by the trader (the so called vocal order) and it is characterized by questions to which the potential customers can only answer “yes” or “no.”*»

Should consumers refuse to conclude the contract over the phone, the trader must contemplate an alternative procedure which allows consumers to conclude the contract through the exchange of statements via paper. In this regard, it should be noted that, in one case, the commitments submitted by a telecom operator (Fastweb) were considered a mitigating factor in the reduction of the fine.

Those measures, among other things, put consumers in the condition to enter the contract also by exchanging written confirmations, in case they decided not to consent to give confirmation of the offer and expressed acceptance only over the phone (the Fastweb case).¹¹

ii. The durable medium

As to the second question - what kind of media fall within the definition of a “durable medium” - the ICA considered the conduct of large traders that made the phone call recording available upon consumers’ request in contrast with Article 51 (6).

In this regard, the ICA considered, on the one hand, the wording of Article 45 letter l) of the Italian Consumer Code, which considers a durable medium any instrument which enables consumers or traders to store information addressed personally in a way accessible for future reference for a period

¹¹ See PS/9880 – *Fastweb procedure di teleselling*, no 25755, December 2nd of 2015, in Boll. 47/2015

of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored; on the other hand, the wording of recital 23 of directive 2011/83/EU.¹²

Therefore, according to the Authority, the trader has the statutory duty to make the recording of the phone call fully available to consumers, so that they can store and access it in the future for a period of time adequate for the purposes of the information; the medium should ensure the unchanged reproduction of the information stored.

However, a voice recording of the call stored by the trader and made available to consumers only upon request - as in the case of the sanctioned telecom and pay TV traders - does not comply with the law, as it does not fulfill the statutory requirement of the full availability of the instrument.

iii. *Confirmation of the contract concluded (Article 51 (7)).*

Finally, the Authority's decisions clarify the relationship between Article 51 (6), third period, and the following paragraph 7, implementing Article 8 (7) of the CRD: *“The trader shall provide the consumer with the confirmation of the contract concluded, on a durable medium within a reasonable time after the conclusion of the distance contract, and at the latest at the time of the delivery of the goods or before the performance of the service begins.”*

In this regard, the Italian Competition Authority found that the requirement of Article 51, paragraph 7, also applies to cases in which the contract is concluded on a durable medium and consists of a confirmatory communication for concluding the contract. In all proceedings, the Authority found that Article (7) had been violated, because traders did not comply with the provision of Article 51(6).

5. CONCLUSION

On the basis of the above described decisions, the Authority established the following principles:

sub (i): the implementation of the new measure to the cases in which a company uses the phone as a means of distance communication in order to acquire customers' acceptance of the offer regardless of the formal role it has been assigned (*fiction iuris*);

sub (ii): in case of an exchange of written confirmations, the contract is deemed to be concluded when the trader receives written acceptance from customers, as required by Articles 1326 (1) and 1335 of the Italian Civil Code regulating contracts among individuals;

¹² The recital in addition to containing several examples of the instrument, specifies that *“Durable media should enable the consumer to store the information for as long as it is necessary for the same to protect his interests stemming from the relationship with the trader. Such media should include in particular paper, USB sticks, CD-ROMs, DVDs, memory cards or hard disks of computers as well as e-mails.”*

sub (iii): the exchange of «*confirmations on durable medium*» and, specifically, during a recorded phone call, represents a legitimate simplified and alternative procedure, under the condition that the trader must:

- a. acquire customers' express and informed consent by means of an expressed renunciation of the exchange of written confirmations, and of a preliminary clear and understandable information on alternative ways of concluding the contract (thus providing for alternative procedures which allow consumers to conclude the contract through the exchange of written statements);
- b. make the recording of the phone call available to customers for a reasonable period so that they can save it for future use;
- c. give customers the confirmation of the concluded contract on a durable medium before starting the execution of the contract under Article 51, paragraph 7, of the Italian Consumer Code.