PERSONAL DATA IN EXCHANGE FOR DIGITAL CONTENT AND DIGITAL SERVICES: DIRECTIVE 2019/770/EU

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In the context of the digital single market strategy for Europe [1], the recent directives 2019/770/EU (concerning certain aspects of digital content supply contracts and digital services) and 2019/771/EU (relating to certain aspects of contracts for the sale of goods) can be greeted with particular interest.

In particular, **Directive 2019/770/EU** [2] introduces the express qualification of the transfer of personal data as consideration in the contract for the supply of digital content or services and as an obligation similar in all to the payment of the price. In this way, it can be said to be expressly regulated, in the sense of a translation in legal terms of such business models, the now widespread practice of the exchange of content or digital service against personal data [3], a phenomenon which nevertheless continues to be perceived by the user in terms of gratuitousness.

The directive does not forget *"that the protection of personal data is a fundamental right and that therefore personal data cannot be considered as a commodity"* but, in order to avoid that this recognition results in damage to consumers, means *"this Directive should ensure that consumers are, in the context of such business models, entitled to contractual remedies"* (rec. no. 24).

The superior value of the right of the person to privacy, recognized by the European legislator in the directive in question is, however, expressly regulated in the coordination rules with the GDPR (Regulation (EU) n. 2016/679) [4]: in particular, the recitals nos. 37 and 38 and the art. 3 (8) of the EU directive provide that *"In the event of a conflict between this Directive and Union law on the protection of personal data, the latter should prevail"*(rec. no. 37), the directive does not affect the possible legal basis with regard to the processing of personal data (rec. no. 38).

The art. 3 (1) affirms that *"This Directive shall apply to any contract where the trader supplies or undertakes to supply digital content or a digital service to the consumer and the consumer pays or undertakes to pay a price.*

This Directive shall also apply where the trader supplies or undertakes to supply digital content or a digital service to the consumer, and the consumer provides or undertakes to provide personal data

to the trader, except where the personal data provided by the consumer are exclusively processed by the trader for the purpose of supplying the digital content or digital service in accordance with this Directive or for allowing the trader to comply with legal requirements to which the trader is subject, and the trader does not process those data for any other purpose".

Nothing is said in order to **the manner in which consent must be given** so that it is deemed relevant for the purposes of the application of the directive, dispelling the doubts of interpretation that part of the doctrine [5] feared would have been raised if the rule had been adopted as articulated on recital no.14 of the Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content of 9 December 2015 (*"As regards digital content supplied not in exchange for a price but against counter-performance other than money, this Directive should apply only to contracts where the supplier requests and the consumer actively provides data, such as name and e-mail address or photos, directly or indirectly to the supplier for example through individual registration or on the basis of a contract which allows access to consumers' photos […]"),* which appeared excessively limiting.

In any case, where the processing of personal data must be based on the consent to the processing of data, *"in particular pursuant to point a), article 6 (1) of Regulation (EU) 2016/679,* (not also, therefore, when the execution of the contract pursuant to point b) article 6 (1) GDPR and article 3 (1) of the directive), *the specific provisions of that Regulation, including those concerning the conditions for assessing whether consent, is freely given apply* (rec. 38).

A great news of Directive 2019/770/EU is that it gives the consumer the opportunity to see himself recognized the possibility of activating the contractual remedies even where he paid by transferring his personal data, being by now assumed their nature of "contractual consideration".

Thanks to the new European legislation it is expressly recognized that the consumer will be able to carry out the remedies provided in the event of failure to supply or lack of conformity of the service or digital content.

1) As for the **failure to supply**, recital no. 61 and the art. 13 put on the same level the case in which the consideration of the supply contract consists of personal data and that in which the consideration is pecuniary.

In both situations the Directive provides that the consumer, *"Where the trader has failed to supply the digital content or digital service in accordance with Article 5, the consumer shall call upon the trader to supply the digital content or digital service* (except in the cases regulated by the art. 13 (2) in which it is provided the consumer shall be entitled to terminate the contract immediately). *If the trader then fails to supply the digital content or digital service without undue delay, or within an*

additional period of time, as expressly agreed to by the parties, the consumer shall be entitled to terminate the contract" (art. 13 (1)).

2) As regards the **lack of conformity**, where the consideration paid is personal data, there will be two different possibilities, according to a joint reading of recital no. 67 and of the art. 14:

a) *the consumer shall be entitled to have the digital content or digital service brought into conformity* ;

b) the consumer can always terminate the contract, even if the lack of conformity is minor (as a matter of a fact he can not pursue the price reduction) [6], on the contrary for the case where the consideration of the contract is pecuniary it is established that *"Where the digital content or digital service is supplied in exchange for the payment of a price, the consumer shall be entitled to terminate the contract only if the lack of conformity is not minor […]"* [7]in the cases referred to in art. 14 (4) since the remedy for the price reduction can be experienced here.

Lastly, the objectives of the art. 16 (2) of the Directive 2019/770/EU are the **obligations of the trader in the event of termination** and it makes explicit reference to the GDPR stating that *"In respect of personal data of the consumer, the trader shall comply with the obligations applicable under Regulation (EU) 2016/679"*. Therefore, the interpreter has the task of verifying, considering the two regulations in conjunction, what are the actual obligations of the trader regarding the continuation of the processing and the eventual cancellation of personal data in the event of termination and withdrawal.

[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 6 May 2015. A Digital Single Market Strategy for Europe; COM(2015) 192 final, in https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1447773803386&uri=CELEX:52015DC0192

[2] Directive (EU) 2019/770 of the European parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, in https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L0770

[3] *"In the digital economy, information about individuals is often and increasingly seen by market participants as having a value comparable to money. Digital content is often supplied not in exchange for a price but against counter-performance other than money i.e. by giving access to personal data or other data. Those specific business models apply in different forms in a considerable part of the market. Introducing a differentiation depending on the nature of the counter-performance would discriminate between different business models; it would provide an unjustified incentive for*

businesses to move towards offering digital content against data. A level playing field should be ensured. In addition, defects of the performance features of the digital content supplied against counter-performance other than money may have an impact on the economic interests of consumers. Therefore the applicability of the rules of this Directive should not depend on whether a price is paid for the specific digital content in question."; recital no. 13 of the Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content of 9 December 2015; COM (2015) 634 final, in https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015PC0634

[4] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data protection Regulation), in https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679

[5] A. DE FRANCESCHI, *La circolazione dei dati personali nella proposta di Direttiva UE sulla fornitura di contenuti digitali*, in A. MANTELERO, D. POLETTI (a cura di), *Regolare la tecnologia: il Reg. UE 2016/679 e la protezione dei dati personali. Un dialogo fra Italia e Spagna*, Pisa, 2018

[6] See te recital no. 67 of the Directive (EU) 2019/770: *"[…]where the digital content or digital service is not supplied in exchange for a price but personal data are provided by the consumer, the consumer should be entitled to terminate the contract also in cases where the lack of conformity is minor".*

[7] Article 14 (6) of the Directive (EU) 2019/770.