GETTING THE DEAL THROUGH

e-Commerce 2015

in 24 jurisdictions worldwide

2015

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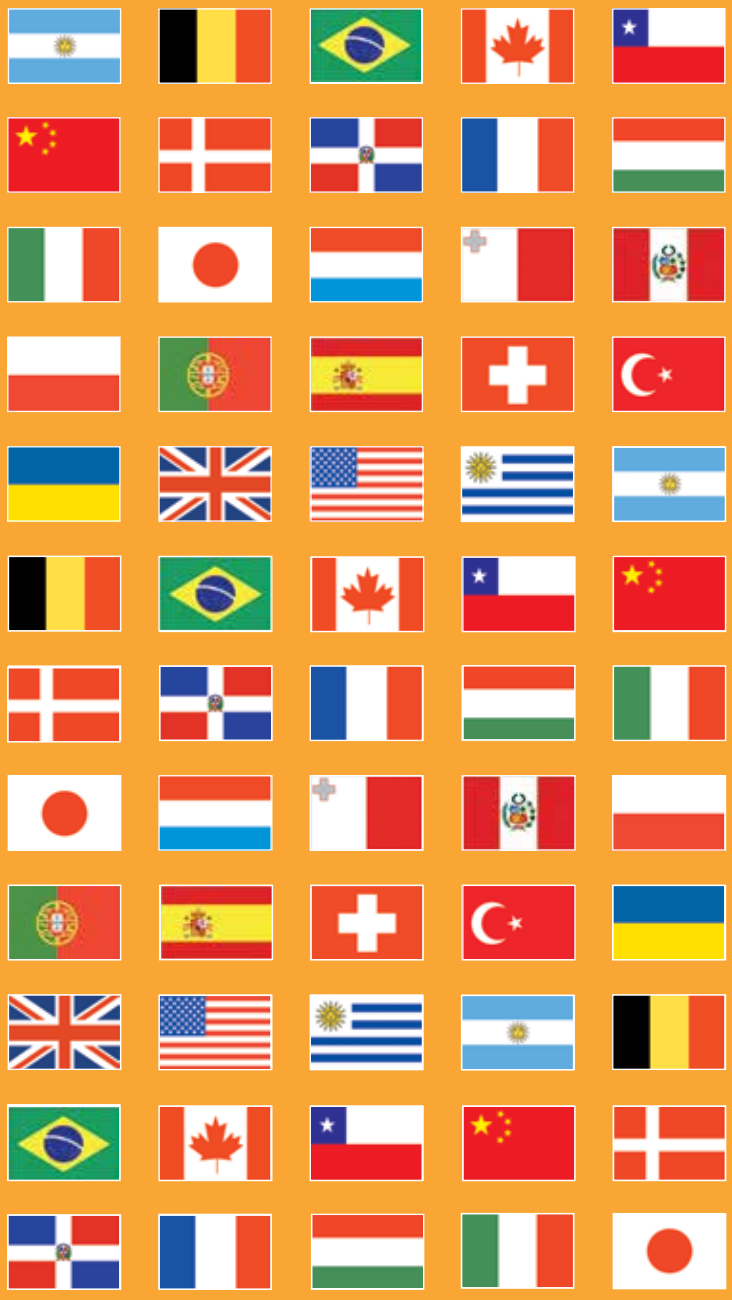

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Getting the Deal Through is delighted to publish the eleventh edition of *e-Commerce,* a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 24 jurisdictions featured. New jurisdictions this year include Belgium, Brazil, Canada, Denmark, Hungary and Portugal. This year the volume features chapters on Monitoring in the Workplace and The Growth of Outsourced Solutions.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. ***Getting the Deal Through*** publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.gettingthedealthrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would also like to extend special thanks to contributing editor Robert Bond of Speechly Bircham LLP for his continued assistance with this volume.

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Italy

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General

1 How can the government's attitude and approach to internet issues best be described?

Silvio Berlusconi's fourth government (2008–2011) did not show any particular inclination in relation to internet and e-commerce regulation in general. Its approach to the implementation in Italy of the EU Audiovisual Media Services Directive (AVMSD) is an example of its unfavourable attitude to e-commerce players in general and intermediaries in particular. In addition, recent regulations relating to e-books show the government's approach in protecting the old industry against new e-commerce entrants. The ex-prime minister's hostile approach towards the web and internet players can also be demonstrated by the fact that, during this government, Mediaset, the group controlled by the Berlusconi family, filed several judicial claims against major internet operators (Google/YouTube, Dailymotion, Yahoo! Italia, Libero and many other Italian and international players).

The next government (Monti, 2011–2013) did not have a special focus on this area. However, in 2012 it established the Italian Digital Agenda and created the Agency for Digital Italy (ADI), which has been put in charge of boosting the use of information technology in public administration.

The following government (Letta, 2013–2014) tried to deal with the delays the ADI has incurred and created a new management board. Moreover, new measures for promotion of the use of the internet have been taken within Decree No. 69 of 21 June 2013 (eg, the creation of free wi-fi hotspots in Italian cities).

Even the current government (Renzi, 2014–present) seems to be interested in developing broadband access for all Italian citizens. However, the realisation of such proposal has been deferred until 2015. As regards the Italian Digital Agenda, the new government will also support Italian innovation through the likely appointment of a young manager as a director of the ADI.

Legislation

2 What legislation governs business on the internet?

The following legislation governs business on the internet:

- Legislative Decree No. 70 of 9 April 2003 implementing the E-Commerce Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce in the internal market;
- Legislative Decree No. 206 of 6 September 2005 (the Consumer Code);
- Law No. 633 of 22 April 1941 governing copyright (the Copyright Law);
- Legislative Decree of No. 30 of 10 February 2005 governing intellectual property rights (the Industrial Property Code);
- Legislative Decree No. 196 of 30 June 2003 on the protection of personal data, recently amended by Legislative Decree No. 69 of 28 May 2012 (the Data Protection Code);
- Legislative Decree No. 82 of 7 March 2005 governing electronic documents and digital signatures;
- Code of Marketing Communication Self-Regulation (the IAP Code);
- Decision dated 4 June 2014 of the Italian Data Protection Authority concerning the new cookies provisions;
- Regulation No. 680/13/CONS of the Italian Communication Authority on the copyright enforcement on electronic communications networks and implementation procedures pursuant to Legislative Decree of 9 April 2003 No. 70; and
- other self-regulatory sources (eg, the Netcomm Code of Self-Regulation concerning the communication and advertising of discounts in the e-commerce industry, January 2013).

Regulatory bodies

3 Which regulatory bodies are responsible for the regulation of e-commerce and internet access tariffs and charges?

There are no regulatory bodies specifically responsible for the regulation of e-commerce and internet access tariffs and charges. However, there are regulatory bodies whose responsibilities include regulation of these fields. The Communications Regulatory Authority, the independent body in charge of the regulation of the Italian communications sector, promotes and safeguards competition in the telecommunications market among stakeholders and, at the same time, it ensures the protection of the rights of users of telecommunications services. The Italian Competition Authority promotes the protection of consumers from unfair commercial practices as well as from misleading advertising and unlawful cases of comparative advertising, which are becoming increasingly common as e-commerce grows in the Italian market. New procedural rules on this specific matter have recently been set out by the Italian Competition Authority.

Jurisdiction

4 What tests or rules are applied by the courts to determine the jurisdiction for internet-related transactions (or disputes) in cases where the defendant is resident or provides goods or services from outside the jurisdiction?

Council Regulation No. 44/2001, which is directly enforceable in Italy, provides a set of rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The general principle set out in Regulation No. 44/2001 is that jurisdiction is to be exercised by the EU country in which the defendant is domiciled, regardless of his or her nationality. Domicile is determined in accordance with the domestic law of the EU country where the matter is brought before a court. In a recent case regarding the unlawful and unauthorised use of a Swiss tour operator's trademarks by a German competitor as keywords on the Google

AdWords service, the Italian Court, despite the nationality of the parties involved in the proceeding, stated that, pursuant to section 5 point 3 of Regulation No. 44/2001, any lawsuit concerning copyright infringement may be brought before the court of the place where the harmful event occurred. Given that the unlawful activity was addressed to the Italian market and carried out through the internet, the harmful event occurred everywhere (in Italy). Thus, the Italian Court declared its own jurisdiction on the matter (Tribunal of Rome, 27 February 2014, *Bravofly S.A. v Unister GmbH*).

Regulation No. 44/2011 also contains a specific section concerning contracts where one of the parties to the contract is a consumer (ie, a person who enters into a contract with a professional for purposes outside of her or his own trade or profession). Consumers may bring proceedings either in the courts of the EU country in which the defendant is domiciled or in the courts of the place where the consumer (the plaintiff) is domiciled. On the other hand, proceedings may be brought against consumers by the other party to the contract only in the courts of the EU country in which the consumer is domiciled.

As for non-contractual obligations arising out of a tort or delict, Regulation 864/2007 (Rome II) states that as a general rule the law applicable is the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage and the indirect consequences of that event occur. However, if both the person claiming to be liable and the person sustaining damage have their habitual residence in the same country at the time in which the damage occurs, the law of such country shall apply. Finally, please note that, the above-mentioned criteria may be replaced by the law of the country manifestly more closely connected with the tort. Pursuant to section 4 paragraph 3 of Regulation 864/2007, a manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort in question.

Specific rules are provided for particular hypotheses (eg, for product liability cases the applicable law is the law of the country where the damaged person had his or her habitual residence when the damage occurred or the law of the country in which the product was acquired).

On the specific issue of the infringement of personality rights through content placed online, the European Court of Justice has recently stated that the person who considers that his or her rights have been infringed has the option of bringing an action for liability either before the courts of the member state in which the publisher of that content is established or before the courts of the member state in which the centre of his interests is based (ECJ 25 October 2011, Joined Cases C 509/09 and C 161/10).

Contracting on the internet

5 Is it possible to form and conclude contracts electronically? If so, how are contracts formed on the internet? Explain whether 'click wrap' contracts are enforceable, and if so, what requirements need to be met?

Under Italian law it is possible to conclude contracts electronically. Since no specific rule or law is provided on this issue, the conclusion of contracts by electronic means is governed by the general rules set out in the Civil Code in relation to ordinary contracts. In Italy, however ,'click wrap' and similar contracts present problems of enforceability.

Section 1341 paragraph 1 of the Civil Code states that the provisions of standardised or adhesion contracts imposed on a customer without negotiation are ineffective against such a customer if at the time of execution of the contract the customer did not know these provisions or had no possibility of knowing them in the ordinary course of business. Therefore, according to this provision, the terms of a click wrap contract must be provided to the other party to the contract before the latter accepts it by clicking the acceptance button or icon.

Moreover, it should be stressed that even when the customer is provided with the terms and conditions of the contract before acceptance, certain provisions of the click wrap contract may not be enforceable against the customer if he or she has not accepted them in writing. A list of such provisions is provided in section 1342 paragraph 2 of the Civil Code: this list includes clauses attributing limitation of liability on the party imposing the contract, the right to terminate the contract or to suspend the performance of the contract, clauses limiting the right of a party who did not negotiate the contract to raise defences, restriction on contractual freedom in relation to third parties, tacit extension or renewal of the contract, arbitration clauses or derogation to jurisdiction. For the enforceability of such provisions, section 1342, paragraph 2 of the Civil Code requires that the customer expressly accepts them in writing. Usually this is done by requiring the customer to return a signed copy of the licence including, in addition, a separate signature specifically by each clause at issue.

6 Are there any particular laws that govern contracting on the internet? Do these distinguish between business-to-consumer and business-to-business contracts?

There are no specific rules concerning contracting on the internet as far as business-to-business (B2B) contracts are concerned. General principles governing the formation and conclusion of ordinary contracts are also applicable to contracts entered into on the internet.

On the other hand, business-to-consumer (B2C) online contracts are specifically regulated by the Consumer Code – as recently amended by Italian Legislative Decree 21 February 2014 No. 21 – and Legislative Decree No. 70/2003. Such regulations require that a professional provides a consumer with clear and detailed information in relation to the identity of the professional, the good or service at issue (main features, price inclusive of tax and delivery costs), the existence of a right of withdrawal, the procedure for returning the goods and minimum term of the contract.

Moreover, as far as distant contracts are concerned, the above-mentioned Legislative Decree 21/2014 introduces relevant changes to the Italian Consumer Code. The most important amendments regard the information that trader must provide to customers before the execution of the contract, the payment's terms, the conditions of refund, the delivery of goods and the consumer's right of withdrawal. With reference to the latter, the term for withdrawing from the contract has been extended to 14 days. Furthermore, if no information on the right of withdrawal is provided by the trader, the withdrawal period will expire 12 months after the end of the initial withdrawal period. The withdrawal may be communicated by the consumer by using a standard form provided by the law or by an unequivocal statement, with no penalties and with no need to specify the reason for the withdrawal. The consumer has to send back the goods (even if partially decayed) not later than 14 days from the communication of the withdrawal. It should be stressed that the new provisions exclude the right of withdrawal for the supply of digital content through a non-tangible medium, if the performance has begun with the consumer's prior express consent and his or her acknowledgment that he or she thereby loses right of withdrawal. In case of sale of digital goods, the trader cannot charge consumers, in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of such means.

Finally, the European Court of Justice has found that providing the consumer with information only via a website or via hyperlinks is not compliant with the Distance Selling Directive, section 5, which states that the consumer must 'have been given' or 'receive', prior to or at the time the agreement is closed, 'written confirmation' or 'confirmation in another durable medium' of all relevant information

(ECJ 5 July 2012, Case C 49/11). There are no specific decisions by Italian courts on this issue yet.

7 How does the law recognise or define digital or e-signatures?

Digital and e-signatures are governed by Legislative Decree No. 82/2005, also known as the Code of Digital Administration. According to this, a digital signature is a particular kind of electronic advanced signature, based on asymmetric cryptography. An electronic document undersigned with an electronic advanced signature, digital or qualified, that enables the identification of the author of such signature and warrants the integrity of the document and the fact that the document cannot be modified, fully proves that the content of the document comes from the person who undersigned it, as provided by section 2707 of the Civil Code.

8 Are there any data retention or software legacy requirements in relation to the formation of electronic contracts?

There are no specific laws concerning data retention or software legacy requirements in relation to the formation of electronic contracts. However, as a general rule sections 2214 and 2220 of the Italian Civil Code provide that accounting records must be stored for 10 years from their last record. Please note that this term is equivalent to the limitation of actions period according to section 2946 of the Italian Civil Code. Moreover, there are laws that impose some technical requirements, which should be emphasised. For example, the Consumer Code provides that, as far as distance contracts are concerned, before the execution of the contract, the consumer must be provided with specific information relating to the contract itself. Such information includes an adequate description of the product's features, the identity of the trader and contact details, the total price of the goods or services or the manners of its calculation, the costs of using the means of distance communication for the conclusion of the contract other than the basic rate, the arrangements for payment, delivery, performance, the information on the right of withdrawal, a reminder of the existence of a legal guarantee of conformity, of after sale customer assistance (if any) and of codes of conduct, the duration of the contract or the conditions for termination (Section 49 of the Italian Consumer Code). The above information must be provided in writing or in a durable medium, in an intelligible language and in a way appropriate to the means of distance communication used. A durable medium is defined as any instrument that allows the consumer to store information that is addressed to him or her so that such information can be easily retrieved in a period of time adequate for the purposes such information is aimed at, and that enables the reproduction of the stored information. With specific reference to distance contracts for the provision of financial services, there have been discussions in Italy with respect to the possibility of considering PDF documents compliant with the definition of durable medium. In this respect, it has been argued that to the extent that the PDF file containing the information that must be provided to the consumer is protected and cannot be amended and that such information can be saved by the consumer on his or her computer and printed, PDF documents could comply with the definition of durable medium.

Security

9 What measures must be taken by companies or ISPs to guarantee the security of internet transactions?

Section 33 of the Data Protection Code provides that minimum security measures aimed at ensuring a minimum level of personal data protection must be taken when processing personal data. In particular, if data processing is carried out by electronic means, according to section 34 of the Data Protection Code, then the minimum security measures consist of computerised authentication, implementation of authentication credentials management procedures, use of an authorisation system, protection of electronic means and data against unlawful data processing operations and implementation of procedures for safekeeping backup copies and restoring data and system availability. Failure to adopt the minimum security measures set out in section 33 of the Data Protection Code is punishable by imprisonment for up to two years and is in any case punishable by fines of up to €120,000.

10 As regards encrypted communications, can any authorities require private keys to be made available? Are certification authorities permitted? Are they regulated and are there any laws as to their liability?

There are no specific laws enabling a third party to require private keys to be made available. Certification authorities are regulated under section 26–32-bis of Legislative Decree No. 82/2005. Qualified certification authorities, which are entities that must satisfy specific requirements set out in Legislative Decree No. 82/2005, are registered in the public register held by DigitPA, the former National Centre for Information Technology in the Public Sector. The identity of a party signing a digital document can be verified by qualified certification authorities. Certification authorities are liable for any damage caused to third parties who rely upon the digital signature appended to the digital documents and, in particular, upon the accuracy of the information required to verify the signatures contained in the certificate and upon the fact that at the time the certificate was issued the signing party had the signature-creation data corresponding to the signature verification data given or identified in the certificate.

11 What procedures are in place to regulate the licensing of domain names? Is it possible to register a country-specific domain name without being a resident in the country?

The service for registering ccTLD.it domain names is managed by Registro.it, the Italian country-specific domain name registry office. The registration of ccTLD.it domain names is governed by a set of rules contained in a regulation issued by the Italian domain name registry office, which is updated on regular basis. Domain names are licensed on a first-come, first-served basis. In order to register a domain name under the '.it' top-level domain, it is not necessary to be resident in Italian territory: any person residing in one of the member states of the European Economic Area, in the Vatican City, the Republic of San Marino or Switzerland can register a domain name under the '.it' top-level domain.

12 Do domain names confer any additional rights (for instance, in relation to trademarks or passing off) beyond the rights that naturally vest in the domain name?

According to section 22 of the Industrial Property Code, domain names are recognised as distinctive signs. Domain names have a proper distinctive nature that identifies the origin of the product or service; indeed, domain names may attract consumers and persuade them to buy a specific product or service, just as trademarks do. As a consequence, the legal provisions in relation to distinctive signs also apply to domain names.

13 Will ownership of a trademark assist in challenging a 'pirate' registration of a similar domain name?

According to both experts and the courts, the owner of a trademark is entitled to take action against the registrant of a domain name that is similar to the trademark and thus confusing. This principle is also regulated by section 22 of the Industrial Property Code, which states that it is forbidden to register a domain name used for commercial purposes that is identical or similar to a trademark owned by a third party if, owing to the fact that the activities carried out by the registrant and the owner of the trademark at issue are similar, there might

be a high risk of confusion or association between them. Moreover, it is also forbidden to register a domain name used for commercial purposes similar to a strong registered trademark distinguishing products or services that are not similar to those offered by the registrant of the domain name, if the use of such mark takes unfair advantage of the distinctiveness and reputation of the trademark.

Advertising

14 What rules govern advertising on the internet?

The internet is one of the most widely used advertising channels as it allows the worldwide spread of information, it reaches a different kind of target audience and it can effectively measure the results of an advertising campaign. In particular, internet advertising has four important features:

- it links the advertising to e-commerce;
- it is 'infomercial' because it invests more in interactivity than in the message's content;
- it allows the tracking of advertisements and the users' interests; and
- it uses several kinds of formats (ie, banner, interstitial, advertorial, AdWords, etc).

Internet advertising is regulated by different rules depending on the product category and the target audience, with particular attention paid to advertising aimed at minors.

As a general rule, title III of the Consumer Code on 'commercial practice, advertising and other commercial communications' sets out the rules governing unfair and deceptive business practices. In addition to the Consumer Code, the Advertising Self-Regulatory Institute (IAP) has adopted the Code of Marketing Communication Self-Regulation (the IAP Code), which binds advertisers, agencies, advertising and marketing consultants, media of any kind and anyone who has accepted the IAP Code directly or through membership in an association or by underwriting a contract pertaining to the execution of a marketing communication. In particular, signatories undertake to observe the IAP Code and its regulations and to ensure compliance by their members. The IAP Code not only regulates advertisers' behaviour (ie, fairness in marketing communication, misleading marketing communication, imitation, confusion and exploitation of competitors' name or trademarks and advertising directed at children and young people), but also provides rules on specific categories of product, such as alcoholic beverages, cosmetics and personal hygiene products, medicinal and curative treatments, etc.

The advertising of discounted products and the comparison of prices during promotions could raise particular concerns. The Italian Antitrust Authority has recently stated that both offline and online sellers must clearly describe the prices applied during promotional campaigns and correctly specify their methods of calculation (Decision No. 23192 of 11 January 2012, *Saldiprivati* case and Decision No. 24095 of 5 December 2012, *Groupalia* case). The above-mentioned Netcomm Code of self regulation provides specific rules on this matter for the e-commerce industry and it is enforceable towards Netcomm's members.

Finally, most of the provisions of Legislative Decree of 31 July 2005 No. 177, although aimed at regulating audio-visual and radio media services, could also be extended to advertising on the internet.

15 Are there any products or services that may not be advertised or types of content that are not permitted on the internet?

Section 36-bis, paragraph l(d) and section 39, paragraph 2 of Legislative Decree No. 177/2005 do not permit the direct or indirect advertising of tobacco products. According to this strict provision, case law states that displaying tobacco products' trademarks should also be banned on categories of products for which advertising is allowed (eg, advertisements of cars or clothing that show tobacco brands are not permitted).

Furthermore, specific provisions prevent and limit certain forms of advertising, among others alcoholic drinks, gambling and gaming, medicinal, cosmetics, toys, physical and aesthetic treatments, financial and real estate transactions.

Financial services

16 Is the advertising or selling of financial services products to consumers or to businesses via the internet regulated, and, if so, by whom and how?

The advertising and selling of financial services products to consumers via the internet shall be lawful and preventively authorised by the relevant Italian authority (CONSOB). As a general rule, this advertising is governed by sections 20 to 26 of the Consumer Code, which prevent unfair commercial practices. Additionally, it shall comply with the decalogue set forth by CONSOB whose infringement may alternatively entail:

(a) the temporary suspension, for a period not exceeding 10 working days, of any further diffusion of the advertisement relating to an offer concerning Community financial instruments, in case of reasonable suspicion of violation of the applicable provisions;
(b) the temporary suspension, for a period not exceeding 90 days, of the further diffusion of an advertisement concerning an offer relating to goods other than those referred to in paragraph (a) above, in case of reasonable suspicion of infringement of the applicable provisions;
(c) prevention of further diffusion of the advertisement in the event of ascertained infringement of the applicable provisions or regulations; or
(d) a ban on carrying out the offer in the case of non-compliance with the measures set forth at (a), (b) or (c) above.

Furthermore, pursuant to section 27 of the IAP Code, advertising aimed at soliciting or promoting financial transactions and in particular transactions for savings and investments in securities or real estate property should:

- supply clear and comprehensive information to avoid misleading consumers regarding the promoter, the nature of the proposal, the quantity and characteristics of the goods or services being offered, the terms of the transaction, and the relevant risks, to ensure that the recipients of the message, even if inexperienced in this field, can make informed choices about the use of their resources;
- avoid, when referring to yearly interest rates, using terms such as 'income' and 'return', to indicate the sum total of unearned income plus increases in property values;
- refrain from suggesting that consumers make commitments and pay deposits without appropriate guarantees; and
- not project future performance on the basis of past performance, or communicate returns based on calculations over periods that are not sufficiently representative with reference to the particular nature of the investment and to the fluctuations in results.

Advertising relating to real estate transactions should be set out in such a way as to avoid deception by passing financial investments off for real estate investments or by focusing on the financials of a real estate property without making it clear that the investment actually involves securities.

The infringement of the provisions above entails the interruption of the advertising and the publication of the decision of the jury.

In relation to the sale of these products, the Consumer Code states that a consumer, before entering into a contract, must be given clear and comprehensive information about the provider of such services, the financial service product itself, the terms of the contract (eg, the existence or non-existence of the right to withdraw, the

minimum term of the contract, any other rights granted to parties, applicable law and jurisdiction) and remedies.

The offer of financial services through distance communication from foreign states is subject to the rules of the Italian Banking Act (Legislative Decree 1 September 1993, No. 385 and additional modifications) and may be made only by authorised intermediaries.

Defamation

17 Are ISPs liable for content displayed on their sites?

Pursuant to Legislative Decree No. 70/2003, an ISP that carries out caching or hosting activities is not liable for the information stored unless it has actual knowledge of the illegal nature of the activity or information displayed. In any case, the ISP does not have a general obligation to monitor the information that it transmits or stores or to actively seek facts or circumstances indicating unlawful activity. However, upon obtaining such knowledge or awareness and upon notice from the relevant authorities, the ISP must act expeditiously to take down or to disable access to this information.

The ISP exemption-from-liability regime is primarily aimed at preventing the introduction of a new principle of strict liability that is not expressly regulated by law.

Despite the existence of a clear exemption-from-liability regime in favour of the ISP, the Italian courts often emphasise how the current hosting and caching services do not completely overlap the services set out in the relevant EU and Italian provisions on the matter.

The ECJ has recently pointed out (*L'Oréal v eBay*, 12 July 2011, and *Sabam v Netlog*, 16 February 2012) that the exemption-from-liability regime applies to the online market operator who has not played an active role and, therefore, has no control or actual knowledge on the data stored. The ISP plays an active role when it optimises, organises and manages the content posted by the users.

The scope of the ISP exemption from liability must be assessed in concrete terms, considering the active or neutral role played and the actual possibility of the provider to have knowledge or control on the data stored. Therefore, the exemption from liability applies to the ISP if it has not played an active role in providing the knowledge or control of the data it has stored, except when, having obtained knowledge of the unlawful nature of such data, it has omitted to take action in the removal of the data or in stopping access to the data.

Notwithstanding the foregoing, only case law distinguishes between 'active' and 'passive' ISPs; Legislative Decree No. 70/2003 does not provide any indication of this.

The Court of Rome (16 December 2009) has stated that YouTube acts as an 'active' ISP, as it does not merely makes available its platform to internet users and it controls the information posted on its website. The same principle has also been recently applied by the Court of Varese (22 February 2013), which found a blogger responsible for defamatory contents posted on her blog.

As for 'passive' ISPs, the Court of Rome (20 June 2013) recently found Wikimedia Foundation not responsible for (allegedly) offensive information posted on the Italian Wikipedia website, stating that Wikipedia – as a mere hosting provider – has no duty to search for or control any illicit content posted on the website and since it plays no role in creating the content posted by the members of its community.

18 Can an ISP shut down a web page containing defamatory material without court authorisation?

The exemption from liability established by Legislative Decree No. 70/2003 does not prevent the ISP from being the recipient of court orders aimed at restraining infringing activities carried out by third parties. According to section 17 of Legislative Decree No. 70/2003, ISPs are under an obligation to inform judicial and administrative authorities of the unlawfulness of information on the web when they have knowledge of it and to comply with any order for removal and deactivation issued by those authorities.

The courts have often observed that there is a presumption of absence of liability of ISPs owing to the fact that it is not possible to request them to control information on the web, because of the high costs associated with such control and because of the legislative choice to allocate the costs arising from the unlawful activity not on the ISPs themselves but on the victims of such activity.

In a recent decision relating to a request to take down allegedly defamatory comments published on an online blog, the Tribunal of Padua confirmed that, according to the applicable law, the ISP was not in a position to remove offensive messages on the basis of a simple notice, as it is necessary to have a prior order of the court or of the administrative control authority, as provided by section 16 of Legislative Decree No. 70 of 2003.

According to European and Italian case law, a rights holder who asks an ISP – or the judge to order an ISP – to remove certain content or make it inaccessible must promptly identify the URL of the allegedly infringing contents, given that a generic reference to certain types of content is not enough to deal with the rights holder's request as well as it is unfit to undermine the neutrality on the ISP and, thus, to entail its liability (Tribunal of Turin, 5 May 2014, *Delta TV Programs v Google and YouTube*).

In the end, there is a need to balance the interests of freedom of information and free speech with the interests protected by the laws that punish illicit activities.

Intellectual property

19 Can a website owner link to third-party websites without permission?

Italian law does not provide any specific regulation on web linking. The use of hyperlinks could expose the linking website owner to liability under unfair competition and copyright or trademark infringement.

Given that the setter of a hyperlink is generally aware of the website content to which the user will be redirected through this link, some EU member states provide an explicit liability exemption for web linking, modelled on those provided for ISPs. On the one hand the setter of the hyperlink consciously places the hyperlink and he or she is aware of its content but, on the other hand, he or she could not be held liable for changes made on the linked website after the setting of the link itself, unless notified of the above modification.

There is a little case law regarding the matter, in particular on the role of search engines, which, differently from other websites, merely conduct automatic searching and indexing of natural results, consisting of web pages, images, information and other types of files. The Tribunal of Rome (*PFA v Yahoo!*, 16 June 2011) stressed that Yahoo! Italia, pursuant to section 15 of Law Decree No. 70/2003, does not have any liability for the natural results of searches performed through its search engine and that it has no prior or subsequent obligation to monitor such results. The decision, which seems in contrast with the arguments of the other decisions of the same court (*RTI v Google and YouTube*), confirms the exemption-from-liability regime of the providers of search engine services and states that the copyright owners have the burden to prove, with special diligence and care, not only the source of their rights but also the unlawfulness of the third party's activity.

20 Can a website owner use third-party content on its website without permission from the third-party content provider?

According to the Copyright Law, the author of a work has the exclusive right to use and commercially exploit it, in any form, original or derived.

Therefore, the use of third-party content on a website must be authorised by the rights holder or by any person owning the rights to the content or trademark.

21 Can a website owner exploit the software used for a website by licensing the software to third parties?

As with artistic works, software is also protected by the Copyright Law. Pursuant to section 64-bis of the Copyright Law, the author of software has the exclusive rights to:

- reproduce it, permanently or temporarily, totally or partially, by any means or in any form;
- translate, adapt, transform and modify the program and reproduce the derived work; and
- distribute to the public and also lease the original software or copies of it.

Therefore, only the website owner could authorise third parties' use of the software.

22 Are any liabilities incurred by links to third-party websites?

As a general rule, linking may entail tortious liability for the owner of the linking website pursuant to section 2043 of the Italian Civil Code.

Furthermore, the use of hyperlinks could expose the linking website owner to liability under unfair competition and copyright or trademark infringement. On 24 July 2000 the Tribunal of Crema stated that the hyperlink practice is used by the linking website in order to redirect it to the content displayed on the linked website, with the exclusive purpose of misappropriation of others' attributes and misleading customers, in breach of section 2598 of the Italian Civil Code on unfair competition.

The same applies in case of redirection of a website – registered, without the authorisation of the rights holder, with a domain name corresponding to the name of another company – to a competitor's website.

Data protection and privacy

23 How does the law in your jurisdiction define 'personal data'?

According to the Data Protection Code, personal data is any information that relates to an identified or identifiable person by means of other information (such as a number or an identifying code). Personal data includes name, surname, address, fiscal code, photographs, fingerprints and voice.

Personal data may be distinguished as:

- 'sensitive data', which is personal data allowing the disclosure of racial or ethnic origin, religious, philosophical or other beliefs, political opinions, membership of political parties, trade unions, associations or organisations of a religious, philosophical, political or trade-unionist character, as well as personal data disclosing health and sex life; and
- 'judicial data', which is personal data disclosing the existence of judicial orders recorded in criminal and administrative records.

24 Does a website owner have to register with any controlling body to process personal data? May a website provider sell personal data about website users to third parties?

The processing of personal data by a private entity such as a website owner is allowed, without the requirement to register with any controlling body, provided that the data subject gave his or her express consent to such processing activity. Such consent is effective if:

- it is freely given and documented in writing;
- it relates to a specific clearly identified processing activity; and
- the data subject is provided with the information set out in section 13 of the Data Protection Code.

However, according to section 37 of the Italian Privacy Code, prior notification to the Italian Data Protection Authority by any data controller is mandatory when the processing of personal data concerns:

- genetic data, biometric data, or other data disclosing geographic location of individuals or objects by means of an electronic communications network;
- data disclosing health and sex life where processed for the purposes described under the Data Protection Code;
- data disclosing sex life and the psychological sphere where processed by organisation described under Data Protection Code;
- data processed with the help of electronic means aimed at profiling the data subject and/or his or her personality, analysing consumption patterns and/or choices, or monitoring use of electronic communications services except when such processing operations are technically necessary to deliver said services to users;
- sensitive data stored in databanks for personnel selection purposes, as well as sensitive data used for opinion polls, market surveys and other sample-based surveys; and
- data stored in databanks managed by electronic means in connection with creditworthiness, assets and liabilities, appropriate performance of obligations, and unlawful and/or fraudulent conduct.

In addition, the Italian Data Protection Authority has stated that the geographical position of an individual through an electronic device must also be notified to the same Authority (Order of 23 April 2004, No. 993385).

The selling of personal data to a third party is allowed provided that such activity has been previously and properly communicated by the data controller to the data subject through the information set out in section 13 of the Data Protection Code before the processing activity takes place.

25 If a website owner is intending to profile its customer base to target advertising on its website, is this regulated in your jurisdiction? In particular, is there an opt-out or opt-in approach to the use of cookies or similar technologies?

If a website owner intends to profile its customer base to target advertising on its website, prior notification is mandatory to the Italian Data Protection Authority by the website, pursuant to section 37 paragraph 1(d) of the Italian Data Protection Code. The way consent must be given in relation to the use of cookies or similar technologies is governed by Legislative Decree No. 69/2012, implementing in Italy EC Directive 2009/136 setting rules, among others, on the processing of personal data and the protection of privacy in the electronic communications sector. This Decree, modifying the Data Protection Code, sets out an opt-in approach in relation to use of technologies such as cookies: in fact, according to this regulation, the storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or user is allowed provided that such subscriber or user has given his or her consent after having been provided with the relevant information.

In December 2012, the Italian Data Protection Authority launched a public consultation concerning a standard privacy notice on cookies. The outcomes of the consultation was published on 8 May 2014. The Italian Data Protection Authority distinguished cookies as belonging to two major groups: technical and profiling cookies. Technical cookies are usually installed directly by the data controller or the website manager and they are used exclusively for carrying out the transmission of a communication on an electronic communications network or providing the service requested by the contracting party or user. In such case the user's prior consent is not necessary to install these cookies, while information under section 13 of the Italian Data Protection Code has to be provided in

the manner considered to be most appropriate by the website manager. Conversely, profiling cookies are aimed at creating user profiles for sending target advertising messages. Giving the invasive nature of these cookies, Italian provisions require the website manager to clearly and appropriate inform users on their use in order to obtain their prior valid consents.

Moreover, in order to protect the user's privacy the Italian Data Protection Authority stated that, on accessing the home page or any other landing page of a website, a suitably sized banner with a short information notice should be immediately displayed to the user. More specifically, the banner must include the following information:

- the website use of profiling cookies for sending advertising messages in line with the user's online navigation preferences;
- the presence of third-party cookies (if this is actually the case);
- a clickable link to the extended information notice, where information on technical and analytics cookies must be provided along with tools to select the cookies to be enabled;
- the user's possibility to revoke the consent already provided; and
- a specification that the ongoing browsing of any other section or item of the website (eg, by clicking a picture or a link), entails the user's consent to the use of cookies.

26 If an internet company's server is located outside the jurisdiction, are any legal problems created when transferring and processing personal data?

According to the Italian data Protection Code, no legal problems arise when personal data is transferred and processed from Italy to any EU member state. On the other hand, the transfer and processing of personal data from Italy to a non-EU member state is prevented if the laws of the country of destination or transmission of the data do not ensure an adequate level of protection of data subjects.

However, this general principle does not apply if specific circumstances expressly provided by the Data Protection Code occur. In fact, the transferring and processing of personal data from Italy to a country outside the EU is allowed provided that, among other things, the data subject has given his or her express consent, the transfer of data is necessary in order to perform the obligations pursuant to a contract entered into by the data subject or when it is necessary in order to safeguard the public interest or the safety of a third party (see section 43 of the Data Protection Code). Moreover, the transfer of data to a non-EU state is allowed when it has been authorised by the Data Protection Authority on the basis of suitable safeguards for the data subject (see section 44 of the Data Protection Code).

27 Does your jurisdiction have data breach notification laws?

Any provider of a publicly available electronic communications service is obliged to adopt suitable technical and organisational measures in order to safeguard the security of its services. In particular, pursuant to section 32-bis, recently added to the Italian Data Protection Code by Legislative Decree No. 69/2012, in the case of infringement of personal data, a service provider must notify, without undue delay, the Data Protection Authority of such infringement. Moreover, if the breach of personal data is likely to damage personal data, users' or any other third party's privacy, the service provider must immediately notify the latter unless it demonstrated to have implemented technological protection measures that render the data unintelligible to any entity that is not authorised to access it and that the said measures were applied to the data concerned by the breach.

Notification to users (or third parties) shall at least include a description of the nature of the personal data breach and the contact points where additional information can be obtained, and it shall list the measures recommended to mitigate the possible detrimental effects of the personal data breach. The notification to the Data Protection Authority shall describe, in addition, the consequences of the personal data breach and the measures proposed or taken by the provider to remedy the breach.

Finally, if the provider of a publicly available electronic communications service commits the delivery of the said service to other entities, such entities shall be required to notify the provider, without undue delay, of any and all events and information necessary to enable the provider to take the above-mentioned necessary steps referred to in section 32-bis.

Taxation

28 Is the sale of online products subject to taxation?

European Directive 38/2002, implemented in Italy by Legislative Decree No. 273/2003, states that the sale of online products must be treated as an ordinary supply of goods and therefore subject to VAT, which at present is 22 per cent (please note that some goods, such as e-books, are subject to a lower VAT rate).

The distinction between B2B and B2C contracts is relevant in order to establish the status of taxable person. In the former the VAT applicable is that of the territory in which the seller is established; in B2C contracts the VAT of the territory where the purchaser resides will apply.

29 What tax liabilities ensue from placing servers outside operators' home jurisdictions? Does the placing of servers within a jurisdiction by a company incorporated outside the jurisdiction expose that company to local taxes?

As stated in question 28, the distinction between B2B and B2C contracts is relevant in order to establish the status of taxable person: with a B2B contract the VAT applicable is that of the territory in which the seller is established; in B2C contracts the VAT in the territory where the purchaser resides will apply.

The placing of servers within a jurisdiction by a company incorporated outside it does not automatically imply the application of local taxes: the latter apply depending on the company's fixed establishment. Pursuant to article 2(c) of Legislative Decree No. 70/2003, 'established provider' means a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute the establishment of a provider.

30 When and where should companies register for VAT or other sales taxes? How are domestic internet sales taxed?

Any natural or physical person carrying out commercial activities such as the sale of goods and services (also via the internet) within Italian territory is required to apply for a VAT registration number at the tax office of its fiscal domicile.

Domestic internet sales are subjected to VAT at a standard rate of 22 per cent, with the exception of lower rates applicable to particular kinds of goods.

31 If an offshore company is used to supply goods over the internet, how will returns be treated for tax purposes? What transfer-pricing problems might arise from customers returning goods to an onshore retail outlet of an offshore company set up to supply the goods?

Please refer to a specialist taxation expert.

Gambling

32 Is it permissible to operate an online betting or gaming business from the jurisdiction?

The online gambling market is one of the business areas that, in recent years, has grown and continues to grow quickly. The term 'online gambling' covers a large number of services other than gambling, which include the provision of online sports betting services, casino games, spread betting, multimedia games, promotional games, gambling services managed by non-profit organisations and lotteries.

As a general rule, article 718 of the Criminal Code regulates the conduct of those who technically organise, direct, facilitate or manage a gambling house. For the purposes of this article, 'gambling' is defined as activity carried out for profit, in which the win or loss does not depend on the player's skill but on chance. In order to legally operate, online or not, a betting and gaming business, the activities must be authorised by the Italian Agency of Customs and State Monopolies (formerly AAMS). Therefore, all operators that carry out their business activity in Italy by offering online gambling services in Italian territory must hold an AAMS licence. In order to restrict the provision of online betting and gaming activity by unauthorised operators, the AAMS provides a blacklist, updated on a regular basis, of forbidden websites for which access and licensing are prevented.

In the Green Paper on online gambling, published on 24 March 2011, the European Commission underlined the challenges posed by the coexistence of differing regulatory models provided by several preliminary rulings in this area as well as by the development of the 'grey' and illegal online markets across EU member states.

Online gambling services have specific characteristics that enable EU member states to adopt measures restricting or otherwise regulating the provision of such services, particularly in order to combat gambling addiction and protect consumers against the risks of fraud and crime. Therefore, an operator who offers the same type of online gambling service in different member states should apply for a licence in each of these member states. Please note that certain member states recognise licences issued in other member states that are notified to them ('white-listing') without issuing an additional licence to the same operator; others, however, may take into account such authorisation but impose a double licensing regime consisting in additionally authorising the operator within their territory before it can carry out gambling services.

33 Are residents permitted to use online casinos and betting websites? Is any regulatory consent or age, credit or other verification required?

The provisions on gambling business set out in question 32 apply to both resident and non-resident players.

The Decree of the Ministry of Economy and Finance of 8 February 2011 and the AAMS Administrative Rules for licensing a gaming business identify the entity and requirements necessary in order to obtain AAMS authorisation. Furthermore, with specific reference to online gambling website, the Italian Decree Law dated 13 September 2012 No. 158 (the Balduzzi Decree) requires that the gambling website must display, in a clear and visible way: a warning language concerning the risk of gambling addiction; the relative odds of winning (with an indication of the possibility to consult the notices regarding gambling odds published on the AAMS websites, as well as on the individual operators' websites); and the material set forth by the local health authorities concerning the risks related to gaming addiction and the existence of both public and private assistance services.

With regard to the use of online casinos or betting websites, no credit or other verification is required.

The only limitation consists in prohibiting the use of online betting and gaming websites to minors. On this topic the AAMS, in cooperation with law enforcement agencies, has developed an educational project, 'Game online: risks and dangers', which emphasises the prohibition on minors from participating in all games with cash prizes and, in particular, aims to make aware them of the risks arising from the irresponsible or improper access to online gaming.

Outsourcing

34 What are the key legal and tax issues relevant in considering the provision of services on an outsourced basis?

Services provided on an outsourced basis are not specifically regulated under Italian law. The general principles set out in the Civil Code in relation to services and supplies agreements (sections 1559 to 1570 of the Civil Code) and contract works (sections 1655 to 1676 of the Civil Code) may be relevant in order to regulate outsourcing relationships.

Moreover, as far as IT outsourcing is concerned, usually the provisions set out in the following laws may apply:

- Law No. 633/1941 on the protection of intellectual property rights, which provides rules governing transfer and licensing of intellectual property software rights;
- Legislative Decree No. 30/2005, which sets out rules governing the transfer and licence of patents, trademarks, drawings, models, industrial and trade secrets and know-how;
- the Data Protection Code; and
- Legislative Decree No. 259/2003 concerning telecommunications services.

35 What are the rights of employees who previously carried out services that have been outsourced? Is there any right to consultation or compensation, do the rules apply to all employees within the jurisdiction?

Italian case law on section 2112 of the Civil Code – governing the transfer of an undertaking or transfer of business – states that there is a transfer of business (or branch of businesses) only when there are transferred 'functions' or 'services' where, prior to the transfer, they were functionally autonomous within the transferor. In such cases, the employment relationship continues on the same terms and conditions applied by the outsourcer. In particular, the outsourcer and the new provider are jointly liable for the employee's outstanding credits at the moment of the transfer of business. Moreover, the new employer has to apply to employees the terms and conditions set out in the individual employment agreement and by national collective bargaining agreements until such agreements terminate. Last but not least, if in the three months following the transfer of business the employment conditions change considerably, employees are entitled to resign pursuant to section 2119 of the Civil Code (meaning that in the case of a fixed-term contract, an employee can resign before the expiration of the term, and in the case of an open-ended contract, an employee can resign without notice).

As far as the right to consultation is concerned, the obligation to inform trade unions about the transfer of employees applies only to companies employing more than 15 employees. The outsourcer and the new provider must inform, in writing, the trade unions at least 25 days before the transfer agreement is executed. The notification should contain: the expected date of transfer; the related reasons; the economic, judicial and social consequences for the employees, particularly if the transfer may affect employees' rights; and any measures that are going to be implemented in order to avoid negative effects. In any case, trade unions cannot prevent the transfer.

Online publishing

36 When would a website provider be liable for mistakes in information that it provides online? Can it avoid liability?

The website provider could be held liable at different levels. In particular, with reference to:

- information provided in its privacy policy;
- editorial content; or
- information relating to the features of the product sold.

With regard to point (a), according to the Data Protection Code, the provision of information to data subjects entails:

- liability pursuant to section 2050 of the Italian Civil Code concerning dangerous activities;
- tort liability, and consequent compensation, if the processing of personal data will cause damage to third parties; and
- criminal liability for illicit data processing.

Any changes in the privacy policy must be clearly displayed on the web page in order to promptly inform the user.

If the website hosts third-party editorial content and it is not registered as an online newspaper, according to section 16 of Legislative Decree No. 70/2003 the ISP could not be held liable for mistakes or defamation carried out through the publication of editorial content online, unless it has an active role in writing, organising, indexing and selecting them for advertising purposes. The Italian courts interpret the latter as a form of editorial control or content management.

Finally, with regard to false information about the features of products being sold, which could cause damage to third parties, title III of the Italian Consumer Code on 'commercial practice, advertising and other commercial communications' gives the Italian Competition Authority the power to fine or prohibit the carrying on of those unfair trade practices.

In any case, a website provider could limit its contractual liability – for example, towards users that have accepted its terms and conditions of use – except in the case of wilful misconduct or gross negligence, under section 1229 of the Italian Civil Code.

37 If a website provider includes databases on its site, can it stop other people from using or reproducing data from those databases?

Databases are protected by the Italian Copyright Law, both as creative works and as non-creative products as a result of the significant financial investment, time or work involved in making them.

In the first case, the creative database's creator is the exclusive owner of all right recognised by law. Creativity must characterise the criteria of choice and arrangement of the material included in the database. Therefore, the creativity feature must relate to its organisational form rather than its content, which could even be owned by third parties. Sections 64-quinquies and 64-sexies of the Copyright Law list the exclusive rights accorded to the rights holder of a creative database, which include, among others, the right to temporary or permanent reproduction and the distribution of the database or copies of it.

In the second case, however, the Copyright Law accords the non-creative database's creator a sui generis right aimed at protecting the work and investment made in order to collect, verify or present it. Therefore, a database creator resident in the EU can prevent acts of extraction or reuse of all or a substantial part of its content.

38 Are there marketing and advertising regulations affecting website providers?

As already described in question 14, in Italy there are no specific rules on internet marketing and advertising. Therefore, the general provisions for advertising should be applied by taking into account the particularly nature of the internet and the product category and public to which the commercial communication is directed.

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