Academic Journal of Politics and Public Administration

Juniper Publishers key to the Researchers

Review Article
Volume 1 Issue 3 - April 2024
DOI: 10.19080/ACJPP.2024.01.555561

Acad J Politics and Public Admin

On the Contractual Power of Digital Platforms

Guido Alpa*

University of Rome, La Sapienza, Italia

Submission: April 08, 2024; **Published:** April 15, 2024

***Corresponding author:** Guido Alpa, University of Rome, La Sapienza, Italia

Keywords: Conglomerate ecosystems; Prosumers; Oligopolists; Micronations

Digital market and online platforms: in search of a definition

In a few weeks, the European *Parliament* and the European Council have reached two political agreements in principle on digital market regulation (23 March 2022, COM 2020,842 final, *Digital Market Act*) and digital services (23 April 2022, COM 2020,825 final, *Digital Services Act*) respectively. Both agreements refer to the role of digital platforms and outline the features of 'digital capitalism' as configured in the European Union [1]. The explanatory memorandum of the proposal for a Regulation on the *digital market* states that <Large platforms have emerged benefitting from characteristics of the sector such as strong network effects, often embedded in their own platform ecosystems, and these platforms represent key structuring elements of today's digital economy, intermediating the majority of transactions between end users and business users. Many of these undertakings are also comprehensively tracking and profiling end users >. In particular < A few large platforms increasingly act as gateways or gatekeepers between business users and end users and enjoy an entrenched and durable position, often as a result of the creation of conglomerate ecosystems around their core platform services, which reinforces existing entry barriers>. Hence the opportunity to regulate this market in a uniform way for all EU Member States as <As such, these gatekeepers have a major impact on, have substantial control over the access to, and are entrenched in digital markets, leading to significant dependencies of many business users on these gatekeepers, which leads, in certain cases, to unfair behaviour vis-à-vis these business users >.

The proposed framework therefore serves to make platform services contestable

For its part, the proposal for the Services Regulation pursues the objective of fostering the full development of the potential of platforms by addressing at EU level the main repercussions of unfair practices and lack of contestability, so as to allow end users, and also business users, to fully exploit the benefits of the platform economy and the digital economy in general, in a fair and contestable environment. This is in order to avoid fragmentation of the internal market, put an end to it and ensure legal certainty, so as to reduce uncertainty for developers and promote interoperability. The use of technology-neutral requirements should stimulate innovation rather than hinder it.

Therefore, without prejudice to the freedom of the market guaranteed to operators, the European Union, also in order to ensure legal certainty, proposes to set limits and obligations on operators to allow the efficient application of technological innovations and at the same time to protect users' interests. Users, who were accustomed to be simply opposed to businesses, so that every legislator had to balance the *two* sets of interests, now belong to *three categories*: professionals, who use platforms to distribute products and services, consumers, who buy or use products and services and interweave communicative relations between them, and the so-called prosumers [2], who are the same consumers who in turn become producers through search engines, where the visitor's activity is decisive in setting the price of advertisements. The following are also components of the market: electronic commerce, where the reputation of the seller, or of the item on sale, is built on the judgements of previous users; blogs; and sites, pervaded by a *wiki* spirit, i.e. of active collaboration of the communities of their surfers [3]. This circulation of communications, data, images, itself forms a market that is perfectly integrated with the activity of platforms and users.

Hence the sensitivity of legal experts (in particular European legal experts) to the effects that this market may have on the condition of users, and citizens in general. This is because

personal data cannot be considered as 'goods' in the same way as products and services; personal identity cannot be jeopardised by digital identity; and the fundamental rights of the individual cannot be trumpled by the market economy. Problems with the status of workers operating in the traditional marketplace have also emerged and become more acute. Workers have been forced to acquire new skills, converting their activities into others that have not been replaced by the use of artificial intelligence; workers in the digital market are forced to follow the strict rules of this community of producers, consumers, and prosumers, operating throughout the day [4], every day of the year.

In order to understand the scope of application of the interventions of the European legislator, it is necessary to start from the definition of the technical terms used. The problems of definition are considered to be preliminary, especially in an area in which the legislator (it cannot be said that he is taking his first steps in this field, but certainly) has for the first time felt the need to mark the boundaries with general rules [5]. The proposal for the Services Regulation (Article 2(h) provides a definition of digital platform): this is < a provider of a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information, unless that activity is a minor and purely ancillary feature of another service and, for objective and technical reasons cannot be used without that other service, and the integration of the feature into the other service is not a means to circumvent the applicability of this Regulation.>. The proposal for a regulation on the digital market defines a *gatekeeper* (Article 3(1)), for the qualification of which three conditions must be met: having a significant impact on the internal market; operating a basic platform service that constitutes an important gateway for commercial users to reach end users; and having a consolidated and lasting position in its own business or being able to acquire such a position in the future.

Platforms are relevant, but among them the platforms qualified as *gatekeepers* are decisive.

In the draft EU policy outlined by the Commission in its 2016 Communication No 288, this role is defined, by way of example, with the power to create and shape new markets, to compete with traditional markets and to organise new forms of participation or economic activity based on the collection, processing and modification of large amounts of data. Platforms operate within multilateral markets, but with varying degrees of control over direct interactions between groups of users [6]. The system they use benefits from 'network effects', whereby the value of the service generally increases as the number of users increases; it allows them to reach their users instantly and easily and to play a key role in creating digital value, through the accumulation of data, facilitating new business ventures and creating new strategic dependencies.

Symptomatic examples of digital platforms are Google's AdSense, DoubleClick, eBay and Amazon, Google and Bing Search, Facebook and YouTube, Google Play and App Store, Facebook Messenger, PayPal, Zalando and Uber. Given their multiple functions, it is difficult to give general definitions of a platform, but those found on specialised sites appear more elaborate and all-encompassing than the definitions given by the European legislator. So, a platform is a < hardware or software infrastructure providing services and technological tools, programmes and applications, for the distribution, management and creation of free or paid digital content and services, through the integration of several media (*integrated digital platform*)> [7]. We can therefore distinguish between the platform in a general sense, unders *ood in the language of IT, as the processing structure represented by the hardware and the operating system of a computer, regulated by appropriate standards, and the specific platform, as the set of technologies that govern a digital television system and manage the access modalities. Platforms, for the various activities they enable, include : *digital matchmakers* (transactional platforms and marketplaces), which facilitate the matching of demand and supply of goods and services, creating new business opportunities; the most relevant examples are Amazon and eBay, which derive their profits from sales commissions; *service platforms*, which play the same role, but in the services market; the best-known examples are Uber and Airbnb; *payment platforms*, which enable price and Peer-to-Peer money transfers, such as PayPal; *investment marketplaces*, which finance start-ups through fundraising. Successive interventions in European law have referred to the services provided by platforms, both in regulating the use of electronic payments used in e-commerce, and in regulating the collection, processing and circulation of data, with the GDPR. But they had not provided a complete set of principles, a frame to insert the rules governing digital markets.

This need has been met by the two proposals for Regulations, which should come into force in the next few months. In a nutshell, the dossier prepared on this item by the Italian Chamber of Deputies [8] states that the two planned measures include the obligation to allow commercial users to access the data they generate using the platform; the obligation to provide companies advertising on the platform with the tools and information necessary to allow advertisers and publishers to independently verify the advertising messages hosted on the platform; the obligation to allow commercial users to promote their offer and conclude contracts with customers outside the platform; and the provision of their own interoperable services for third parties in specific situations. The drafts also include several prohibitions for gatekeepers: a prohibition on giving their own services and products favourable treatment in terms of ranking compared to similar services or products offered by third parties on their platform; a prohibition on preventing consumers from contacting businesses outside the platform; a prohibition on preventing users from uninstalling pre-installed software or applications if they so wish; a prohibition on preventing portability [9]. In particular, it is expected that the behaviour of the platforms will be correct (also

How to cite this article: Guido A. On the Contractual Power of Digital Platforms. Acad J Politics and Public Admin. 2024; 1(3): 555561
DOI:10.19080/ACJPP.2024.01.555561

indicating individual technical operations deemed to be unfair), the contractual conditions will be clear and comprehensible, and the components and purposes of the algorithms will be made explicit and therefore transparent [10]. Pending comprehensive supranational legislation, national legislators have provided definitions and regulations [11].

The French legislator designed the 'Republique numerique' by regulating the use of platforms [12] with Law No 2016-1321 of 7 October 2016.

In Italy, the Chamber of Deputies and the Senate of the Republic have several texts in the pipeline concerning both the regulation of platforms and the protection of work managed through platforms [13]. The Senate bill contains a definition almost similar to the one given in the dictionaries, i.e. that a technological platform is a set of *software*, technical specifications, *standards* and *hardware* organised by an information society service provider so that the user can use particular *software* or services made available electronically or make use of certain digital content via the *Internet*, with the exception of *software* limited to specialised uses and therefore not for general use.

It is important to emphasise that any definition - be it descriptive or technical - of platforms is concerned with highlighting the relationship they have with the intermediaries and the recipients of goods and services. It is also important to point out that the whole phenomenon does not only concern market management but also the effects that this market produces on the circulation of data and communications, information and opinions, and therefore on the phenomena of socialisation and the expression of democratic participation in a community. Hence the need to protect fundamental rights, the identity of individuals and groups, the fight against discrimination and hate speech, as well as the transparency of the mechanisms for organising platforms and their relations with customers, consumers and users. In this regulatory complex, different areas intersect: commercial law specific to digital markets, public law concerning fundamental rights and the pillars of democracy, and civil law concerning the ownership of data, the exchange of data with services and therefore involvement of contractual relations. This is not only the case in the bilateral relationship between the platform and its customers, but also in the trilateral relationship, which is created by the platform bringing customers into contact with providers of goods and services through its mediation.

From what has been said so far, it is clear that platforms can be conceived as "entities". Legally, a platform it is an enterprise, and we consider the best known gatekeepers, we are faced with multinational corporations with enormous power [14]. Platforms use their regulatory power just like any other company vis-à-vis professionals and consumers, but they are even more fearsome both because of their position on the market, which makes these web's financial giants assimilate to oligopolists assimilated to "micronations".

The regulatory power of platforms and the general terms and conditions imposed on 'customers'

Their regulatory power takes the form of imposing contractual clauses relating to the service provided. Therefore, this power cannot escape the rules of the European Union and the rules of domestic law related to consumer protection, competition, copyright, trademarks, personal data. Like any company, platforms must respect fundamental rights and they must draw up a non-financial balance sheet and participate in the programme of ESG (Environmental Social Governance) objectives drawn up by the UN with a final deadline of 2030. The fact that they are classified as 'private transnational legal orders' does not therefore exempt them from observing the rules of private law (European and national). Obviously, their specific weight must also be considered from the point of view of public law, and therefore in the construction of public opinion, in the dialectic of the democratic game, since the circulation of data of all kinds, which they generate, is intertwined with the democratic life of a country, as is the use of computers, the Internet and other communication tools. In order to understand how these platforms operate vis-à-vis the public, it is worth examining the general terms and conditions that they use to carry out their activities offered to the public.

As an example, we could consider three platforms of different nature: a platform offering digital services (Google), a platform offering products and services (Amazon), a platform offering a communication site between members (Facebook, now Meta). These three platforms are gatekeepers of identical nationality, they are American, but have set up subsidiaries in Europe: Google has its headquarters in Dublin (Google Ireland Limited incorporated and operating under the laws of Ireland), and also operates in Switzerland; Amazon in Luxembourg (Amazon Europe Core sarl, Amazon EU sarl, Amazon Service Europe sarl, Amazon Media EU sarl, while Amazon Studios Europe has kept its headquarters in London even after Brexit); Facebook in Dublin. All of them have offices in London and in major cities on the Continent.

The general terms and conditions of contract, which in Italian practice are formulated as contractual clauses with expressions typical of normative texts, in the case of these gatekeepers are expressed in a colloquial, persuasive and expository tone, as if they were "speaking" directly to the user and involving him in the discourse. Moreover, the judicial effects of these terms in the discourse with the client are taken for granted and the conditions are presented as rules of service as if they were "naturally" incorporated into the service. That is to say, a service provided on the basis of the private contractual power imposed on the users by means of the contractual clauses drawn up by them. This reinforces the conviction of the (non-lawyer) client that the rules

How to cite this article: Guido A. On the Contractual Power of Digital Platforms. Acad J Politics and Public Admin. 2024; 1(3): 555561
DOI:10.19080/ACJPP.2024.01.555561

are, so to speak, "inherent" in the service. The client does not feel that the conditions are imposed on him, and does not perceive the bargaining power exercised by the platform, which presents itself not as a counterpart, but as a co-operator in solidarity. It is reasonable and obvious that - with respect to millions of users - these rules are equal for all and non-negotiable.

The formation of the contract between platforms and their customers

The procedure for the formation of a contract is not the same in all legal systems of the Member States of the Union and of the countries outside the Union. The matter of the conclusion of a contract has not been regulated by the European legislator, and with the abandonment of the project for the compilation of a European Civil Code (DCFR), which, in Articles II.4:201, provided for the regulation of the procedure, this matter changes from system to system. Thus, in each system it has to be ascertained how the exchange of offer and acceptance can lead to the conclusion of the contract, and where the contract was formed.

The differences are remarkable.

In France, for example, the discipline of the ordinary contract always implies the exchange of offer and acceptance (according to art.1113 ff. , the ordonnance of 10 February 2016 reforming the Civil Code), but silence, considered uneffective in most countries, can count as an acceptance if it results so by law, custom, business relations, particular circumstances (art.1120 Civil Code); to contracts concluded electronically are deserved very detailed provisions in arts. 1125 ff., as amended by the law called <pour une République numérique> of 7 October 2016. Although innovative compared to the past, a number of issues concerning crucial aspects of the regulation of the contract have remained unresolved. The question is whether these provisions are extended to the *invitation to offer*, which the French Civil Code does not explicitly regulate, and at what point in time the contract is deemed to be concluded. On the first point, the prevailing view is that the rules governing the offer also extend to the invitation to offer. On the second point, a distinction must be made between the ordinary contract and the on-line contract. In the first case, the conclusion takes place at the moment when the offeror becomes aware of the acceptance. In the case of a digital contract, the question arises as to whether a "double click" is sufficient or whether it is necessary to ascertain the moment at which the customer has received the documents or the message attesting to the conclusion of the contract [15].

The rules established by the Italian Civil Code, in Arts. 1326 et seq., identify different procedures for the formation of the contract, in addition to the exchange of offer and acceptance, such as direct execution, acceptance by concluding facts, and so on. For contracts concluded electronically, in the absence of specific rules, several solutions have emerged: the prevailing view is that the conclusion takes place when the offeror – in our case, the platform - receives the offeree's acceptance by e-mail, and this fact becomes decisive both for establishing the time of the conclusion of the contract and the place of its conclusion. This is because electronic correspondence is equated with paper correspondence, and because the electronic address is equated with the ordinary address (as provided for by Presidential Decree No. 445 of 2000, Article 14 c.1). Whereas Google and Facebook do not lay down any particular rules concerning the way in which a contract is concluded, Amazon lays down very detailed rules.

First of all, Amazon's conditions specify, under the paragraph entitled "our contract" that the presentation of products and services on the site or via Amazon applications for mobile devices constitutes an *invitation to offer.* It therefore qualifies the display of its products, which, as we know, now range from books, which constituted the initial market, to everything necessary for the home, furniture, clothing, etc.: the display – as it happens in supermarkets - does not imply the voluntary act typical of an offer, but an invitation which, only if accepted, implies the proposition of an offer by the customer. Furthermore, Amazon reserves the right to accept or refuse, but does not specify the reasons why it might refuse the offer. However, it does specify how to submit the offer. At the top of the same page, we will find the "Buy Now" button, which you must click in order to place your order. What happens once the order has been received? The regulations also state:

< Your order will then be considered as your contractual proposal to Amazon for the products listed, each one individually. Upon receipt of your order, we will automatically send you an order acknowledgement message ("Order Receipt"). If you use certain Amazon Services (such as Amazon mobile applications) the Order Receipt may be published in the Communication Centre accessible from the site>.

Notification to the customer of the receipt of his order is not, however, an expression of acceptance. The regulation specifies that:

<. Receipt of an order does not constitute acceptance of your purchase proposal. By sending us the Order Receipt, we are only confirming that we have received your order and that we have subjected it to data verification and availability of the products you have requested. The contract of sale with Amazon EU Sarl will only be concluded when we send you a separate email or publish a message in the Communication Centre on the site accepting your proposed purchase, which will also contain information about the shipment of the product and the expected date of delivery ("Shipping Confirmation")>.

Since the confirmation of the order is made only after the user has paid for the service by the established means (by credit or debit card, or PayPal) it is reasonable to assume that the exchange of the role of the parties (bidder/obligee) is not only due to the need to ascertain whether the requested product is still available,

How to cite this article: Guido A. On the Contractual Power of Digital Platforms. Acad J Politics and Public Admin. 2024; 1(3): 555561
DOI:10.19080/ACJPP.2024.01.555561

but is also related to the customer's financial availability. The prepayment, i.e. the regularity of the transmission of the price, becomes an unspoken but necessary condition for the conclusion of the contract. The contract is not concluded with the receipt of the order - as it normally happens in the case of an invitation to offer - but at a separate point in time, decided by Amazon, which coincides with the start of the dispatch procedures. Amazon justifies this complex procedure by the fact that it is not known, at the time the order is processed, whether the product is available in the warehouse If this is the case, unavailable products should not be displayed, or the order could be downgraded to a 'reservation', as is the case for books announced for publication but not yet published. These rules modify, at least in part, those established by the Italian civil code, which in any case can be waived because they are not mandatory. However, it is debatable whether the exchange of the role of the parties does not imply the exercise of an abusive power by the provider of goods and services. The legal problems posed by the general terms and conditions of the three gatekeepers under consideration do not end there.

In the Italian civil code we face with the problem of the knowability of the conditions. As I pointed out at the beginning of my speech, they are published on the website of all platforms, but not in the place where products or services are offered, but in a different place, concerning the characteristics of the platform, and under the expression 'terms' or conditions of use. The question has therefore arisen as to whether this separate placement may be considered in compliance with the provisions of Article 1341(1) of the Civil Code, which makes their effectiveness conditional on the adherent's knowledge of them. The question has therefore arisen as to whether this separate placement can be considered to comply with Art. 1341(1) of the Civil Code, which makes their effectiveness conditional on the adherent being *aware of them.* Knowability means the exercise of ordinary diligence by the customer: it is generally held that the standard of diligence must be measured by taking into account the usual conduct of the multitude of adherents and the circumstances of the case. Since it is sufficient for the general terms and conditions to be displayed on the company's premises, it would seem easy to solve the problem by observing that the clauses are in any event displayed on the platforms' website and are therefore knowable by the adherent-customer.

The fact that they are known is not, however, a requirement sufficient to decide for their effectiveness, since the clauses - vis-à-vis whoever is their addressee, a consumer or a professional – enlisted in Art.1341 (2) of the Italian Civil Code and therefore unfair - are not effective unless they have been signed one by one. This aspect is completely ignored by the "terms" imposed by the three platforms; indeed, the texts adopted by them suggests that they do not even question the matter, since the general conditions are written *as if* they were still effective even if not individually subscribed. This is a formal obligation concerning *all* customers, whatever category they belong to: in default, unfair terms - in particular those concerning liability - are not effective. The signature, according to the majority of interpreters, takes place with the affixing of a *digital signature*, which it is reasonable to assume never happens in reality. A number of important clauses in the platforms must therefore be considered ineffective.

Limitation of liability clauses

With regard to Google, the general liability clause is (in my opinion) ineffective because it is generic, as well as unsigned, since it states:

< These terms limit our liability only to the extent permitted by applicable law. These terms do not limit liability for fraudulent activity, fraudulent misrepresentation or death or personal injury caused by negligence or wilful misconduct.

In addition to the liability described above, Google is only liable if you violate these terms or any additional terms specific to the applicable services, subject to applicable law. >

The clauses of contracts concluded with professionals (which Google defines as companies, professionals and organisations) contain further limitations:

< Loss of profits, revenue, business opportunity, reputation or anticipated savings, indirect or consequential loss, punitive damages. Google's total liability arising out of or relating to these terms is limited to the greater of (1) €500 or (2) 125% of the fees that you paid to use the relevant services in the 12 months before the breach>

It is hardly worth noting that the contractual damage that can be compensated is only direct and immediate damage (pursuant to article 1223 of the civil code); the deductible is admitted, but I doubt that punitive damages can be excluded, if admitted, because they express a sanctioning power of the judge. If anything, it is punitive damages per se that are not always considered admissible, according to the leading case of the Supreme Court (decision no. 16601 of 2017) which has recognised the compatibility of punitive damages with our system only when provided by the law. With regard to Amazon, the limitations of liability are less relevant, because in most cases they relate to circumstances in which the platform would not in any event be liable to pay damages, which are excluded if due to the intervention of third parties or to unforeseeable circumstances and force majeure:

Our Responsibility

We will do our best to ensure that access to the Amazon Services is provided without interruption and that transmissions are error-free. However, due to the nature of the Internet, uninterrupted access and error-free transmission cannot be guaranteed. In addition, your access to the Amazon Services may also be occasionally suspended or restricted to allow for repair work, maintenance, or the introduction of new activities or

How to cite this article: Guido A. On the Contractual Power of Digital Platforms. Acad J Politics and Public Admin. 2024; 1(3): 555561
DOI:10.19080/ACJPP.2024.01.555561

services. We will attempt to limit the frequency and duration of these suspensions and limitations. Amazon will not be liable for (i) any losses that are not a consequence of our breach of these terms and conditions or (ii) any loss of business opportunity (including lost profits, revenues, contracts, deemed savings, data, goodwill or unnecessarily incurred expenses) or (iii) any other indirect or consequential loss that was not reasonably foreseeable, either by you or by us, at the time you started using the Amazon Services.

We shall not be liable for any delay or non-performance of our obligations under these terms and conditions if the delay or non-performance is due to unforeseeable circumstances or force majeure. This provision does not affect your statutory rights and in particular your right to receive the purchased goods within a reasonable period of time or to be refunded in the event of non-delivery due to circumstances arising from a fortuitous event or force majeure. The laws of some countries may prohibit the above limitations of liability. In the event that such provisions are applicable, the above limitations of liability shall not apply and you may be entitled to additional rights. Nothing contained herein shall limit or exclude our liability for death or personal injury caused by our negligence or caused by our wilful misconduct or gross negligence.

Amazon's terms and conditions are rather detailed on guarantees, product returns, and the right of withdrawal, all of which are not covered in these notes. Facebook's terms and conditions are a little different, because on the one hand they insist on the user's commitments, and on the other they provide for the user's authorisation to use the data and content provided by the user. In addition, they stipulate that the contract continues to have effect if one or more of the conditions prove to be ineffective. The same is said in Directive no.13 of 1993 on unfair terms, and in art.36 of the Consumer Code, but the case must be adapted to the Italian Civil Code, which entrusts the judge with the task of assessing whether the partially null contract can still produce some effect (art.1419 c.2).

Limitations of liability are in any event reasonable, although a general exclusion of liability for the negligent conduct of third parties is not permissible.

Limitations of liability

Nothing in these Terms is intended to exclude or limit our liability for death, personal injury or fraudulent misrepresentation caused by our negligence or prejudice to your legal rights. We will act with professional diligence in providing you with our Products and services and in ensuring a safe, secure and error-free environment. Provided that Meta has acted in accordance with professional diligence, Meta accepts no liability in respect of losses that are not caused by its breach of these Terms or otherwise attributable to its actions, losses that were not reasonably foreseeable by you and Meta at the time of your acceptance of these Terms and in respect of events beyond Meta's reasonable control>.

If the other party is a consumer, the three platforms entertain the idea that the rules to be applied are those designed to protect him. And that could only be the case. Therefore, all clauses, and not only those relating to liability, must be assessed in the light of the parameter of *good faith and significant imbalance* in the parties' rights and obligations arising under the contract, to the detriment of the consumer (art.3 (1)). The limitations of liability must therefore be assessed on the basis of Articles 1229, concerning exclusion clauses in general, and 1341(2) of the Civil Code and Articles 33 et seq. of the Consumer Code (Legislative Decree No. 206 of 2005, applying the European directive).

And so, for the other clauses concerning withdrawal and guarantees.

Clauses concerning the applicable law do not appear to pose any problems as regards their validity. On the other hand, clauses imposing the forum convenient for the stronger party are considered unfair by the Italian civil code, as well as by consumer code (art. 33 c.2 lett.t). Thus, for non-consumers written approval will suffice to overcome the problem, whereas for consumers it will be more difficult to exclude nullity, unless it is demonstrated that the clause is balanced by other clauses that are more advantageous to the consumer. However, it must be borne in mind that, in the case of consumers, they will be entitled to bring actions before the courts of their place of residence.

With regard to the applicable law, the consumer cannot be deprived of the additional protection offered by his own law with respect to the law chosen by the platform: this is the case of the necessary subscription of unfair clauses laid down by Italian law, with respect to the laws to which the platforms refer. Google chooses the law of the country in which the user is resident; Amazon chooses the law of Luxembourg, subject to the additional protections of the law of the consumer, and excludes the application of the Vienna Convention; Facebook refers to the law of the user's place of residence for the resolution of disputes arising from complaints, and for everything else, including the regulation of the general terms and conditions of contract, to Irish law. So, Italian consumers are better protected by Italian law which is more generous toward them than the European directive. Among the general conditions laid down by the three platforms, the clause allowing them to amend the contract unilaterally must also be considered unfair. The directive, and therefore the consumer code (Article 33(2)(m)), allows unilateral changes only if they are set out in the contract and are due to a *justified reason*. If the clause is not balanced by others favourable to the customer, it is highly likely that, if there were no other obstacles, the clause could fall under the triple scrutiny of lack of mention in the contract, lack of a justified reason, lack of balancing. Price changes are also monitored, if the price is increased excessively (Art.33 of the Consumer Code, c.2 lett.o).

How to cite this article: Guido A. On the Contractual Power of Digital Platforms. Acad J Politics and Public Admin. 2024; 1(3): 555561
DOI:10.19080/ACJPP.2024.01.555561

The three platforms promote out-of-court dispute resolution. Some clarification is also needed here. As is well known, the European Union promotes the resolution of disputes through conciliation and mediation, and has provided a directive specifically regulating this technique. It has even made an online dispute resolution system available to consumers (EU ODR platform Regulation (EU) 524/2013) [16]. If it is not a service provided by the Union, the clauses concerning this issue must comply with the law: art. 1341 c.2 of the Italian civil code considers ineffective any unsigned clause that entails adherence to arbitration (of whatever nature) or derogations from the jurisdiction of the judicial authority; art.33 c.3 lett.v bis) and v ter) of the Consumer Code considers presumably unfair (and voidable) clauses that make access to conciliation and mediation bodies difficult or impose a single type of body or a single body. Further considerations could be made for the clauses limiting the guarantee, and for the clauses concerning relations with third parties. But we can postpone this analysis to a later stage of the research.

Unfair terms in P2B contracts

It is significant that the regulatory power in contractual matters granted to the platforms has been the subject, together with other obligations, of a specific Regulation of 2019 No. 1150. This Regulation - which came into force directly in our legal system - has been strengthened by certain provisions contained in the Italian Budget Law of 2020 no. 178. It has the task of promoting fairer and more transparent conditions in the market of digital platforms and, on the other hand, to attribute to the public bodies (in Italy the Authority for Communications Guarantees **(**"**Agcom**")) the task of ensuring an adequate and effective application of the P2B Regulation (art.1 c. 515 ss. of the Italian Budget Law). With regard to the general terms and conditions of the contract, the Regulation provides that the terms and conditions laid down must be easily accessible (and thus eases the burden of proof of Art. 1341 of the Civil Code) and must be rendered in clear and comprehensible language (Art. 3). A similar provision had been imposed on the clauses of consumer contracts (art. 35 consumer code). It is significant to note that the Regulation treats professionals adhering to the conditions in the same way as consumers: both categories have weak bargaining power vis-à-vis the platforms.

Furthermore, platforms are required to disclose any kind of additional distribution channels or affiliate programmes that could be used to sell goods and services, and what the effects of the conditions are on users' intellectual property rights. The Regulation also regulates the behaviour of suppliers of goods and services connected with the platform (Articles 4 and 5). There is therefore ample scope for controlling the bargaining power of platforms, but, of course, this is entrusted to individual customers - consumers, professionals, prosumers - and to consumer associations, or, in legal systems where this is provided for, also to market regulators. In Italy, the Antitrust Authority has severely sanctioned platforms infringing competition law and employing unfair commercial practices and has started to monitor the general terms and conditions of contracts that can be cancelled on the basis of unfairness.

References

1. (2016) On digital capitalism, see in particular Schiller, Digital Capitalis. Networking the Global Market System, Cambridge (Mass.), 2000, which highlights the dangers of the new market, consisting in the exasperation of social differences, the promotion of an unstoppable consumerism, and the commodification of educational tools; and Srnicek, Digital Capitalism. Google Facebook Amazon and the New Economy of the Web, Rome, 2017, which speaks of "the production of data by means of data". On the platform economy, see. Lobel, The Law of the Platform, 101 Minn L Rev p. 87. Cohen, Law for the Platform Economy, in 51 U.Cal.Davis, 2017,p.133 ff; Bush, Regulation of Digital Platforms and Infrastructures for Services of General Interest, in Wiso Diskurs, 09/2021, p. 3 ff.
2. Toffler, The Third Wave, New York, 1980. La terza ondata. Il tramonto dell'era industriale e la nascita di una nuova civiltà, Milan, 1980.
3. According to the definition of Menduni, ad vocem, Enc.Scienza e della Tecnica,Treccani, Roma,2008; Maugeri, Smart Contracts e disciplina dei contratti.Smart Contracts and Contract Law, Bologna,2021
4. AA, VV (2020) The Future of Work: Labour Law and Labour Market Regulation in the Digital Era, edited by A. Perulli and T. Treu, Milan.
5. (2018) On this point see Bassan, Digital Platforms and Global Law, Cheltenham, 2021, p. 1 ff. AA.VV., I "poteri privati" delle piattaforme e le nuove frontiere della privacy, edited by P. Stanzione, Turin, 2022; and Resta (G.), Digital Platforms and the Law: Contested Issues, Media Laws 1: 232 ss.
6. COM (2015) 192 final.
7. The definitions are taken from the Treccani online dictionary.
8. Dossier no. 52 of the Chamber of Deputies, 18 May 2021 (18th Legislature)
9. Dossier no. 52 of the Chamber of Deputies, 18 May 2021 (18th Legislature).
10. (2021) More extensively, Alpa, Il mercato unico digitale, in Contratto e impresa/Europa 1: 1.
11. Loi n° 2016-1321 du 7 octobre 2016 Pour une République numérique **:** titre ier : la circulation des données et du savoir (articles 1 à 39) Titre II : la protection des droits dans la société numérique (articles 40 à 68) titre iii : l'accès au numérique (articles 69 à 109) titre iv : provisions relating to the outre-mer (Articles 110 À 113);
12. Beuscart and Flichy, Plateformes numériquers, Réseaux 2018/6 (n° 212), pages 9 à 22.
13. House Bill 1592, draft law presented by the Piedmont Regional Council, on work managed through digital platforms; Senate Bill 2484, on Provisions on the provision of *internet* network services for the protection of competition and freedom of access by users.
14. Bassan speaks of platforms as "private transnational legal orders", op.cit p. 84.
15. (2018) For the first references see. Deshayes,Génicon,Laithier, Réforme du droit des contrats,du régime général et de la preuve des obligations, Paris pp. 394.

How to cite this article: Guido A. On the Contractual Power of Digital Platforms. Acad J Politics and Public Admin. 2024; 1(3): 555561
DOI:10.19080/ACJPP.2024.01.555561

16. It provides the framework for online dispute resolution, the creation of the EU ODR platform and the date (9/1/2016) in which each e-shop in the European Union must provide a link of the platform to its website that would give to the European consumers the access to electronically submit their complaints to an ADR entity.

DOI:10.19080/ACJPP.2024.01.555561

How to cite this article: Guido A. On the Contractual Power of Digital Platforms. Acad J Politics and Public Admin. 2024; 1(3): 555561 DOI:10.19080/ACJPP.2024.01.555561