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**TOPIC: Pre-contractual information in distance and off-premises contracts: the possibility of actual knowledge of Terms & Conditions (T/C) and the informed order implying an obligation to pay**

Author / Title:  
Alexandros Chatziakovou  
Associate



Andreas Papastathis  
Junior Partner



**Pre-contractual information in distance and off-premises contracts: the possibility of actual knowledge of T/C and the informed order implying an obligation to pay**

The rapid spread and development of the use of digital media last decades has significantly increased the need to protect the consumer as it is apparent from the numerous EU legislative measures that shape the landscape particularly of financial transactions. Directives 2011/83 on consumer right, incl. provisions regarding off-premises contracts and 2005/29 on unfair commercial practices have, to a certain extent, defined the content and the way of providing the pre-contractual information that the average<sup>1</sup> consumer is in need in order to make an 'informed transactional

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<sup>1</sup> As for the consumer model, neither the instructions nor the antagonistic provisions of Law 2251/1994 specify in particular which standard consumer will be taken into account for the adequate provision of

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decision<sup>12</sup> However, the reality is often far from the information requirements introduced by the law, as it is the case in terms of access to the content of the general T/C as well as the indication of the legal binding nature of the order.

**“Suppliers regularly add the words «T/C are applied” when announcing one of their service or product: Is there a need to specify the phrase?**

In distance contracts, the information requirements should be adapted to account for the technical limitations of certain media, such as restrictions on the number of characters on certain mobile phone screens or the time limitation of television sales messages. In such cases, the trader should comply with a minimum set of information requirements and refer the consumer to another source of information by providing a hyperlink to a trader's website where the relevant information is directly available and easily accessible. Such is the case with the addition at the end of audio and television advertisements of the clichéd phrase: "terms and conditions are applied ", by which the advertisers fulfil their legal obligation, but the mere inclusion of this phrase in itself is for the consumer, meaningless since they don't know the kind and in the extend the “Terms and Condition” negate the presentation of the market services and products. An explanation of at least the important features altered by that T/C means is missing. It is important to note that many consumers, depending on the service or product, may not exercise sufficient caution and might base their decision solely on the presentation without thorough examination<sup>3</sup>.

The trader is obliged to provide the consumer, before the contract is concluded, with a summary of its main points, many of which are in any case contained in the General Terms and Conditions, written in plain language, not in small print, so that the consumer has a first 'guide' to his rights, obligations and risks (description of the product, service, price, any instalments, total financial burden, exemptions or exceptions, withdrawal/cancellation procedures, out-of-court complaint or dispute resolution mechanisms). Such obligation is well known and is already imposed by EU

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relevant information. The nature of the Directive requires the standard of "average informed and careful consumer" to be complied with, but the trade should take into account the special needs of consumers who are particularly vulnerable due to mental, physical or psychological disability, age or responsibility, in a way that the trader could reasonably be expected to foresee”, Recital 34 Directive 2011/83.

<sup>3</sup> Article 2(2) of Law 2251/1994

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legislation e.g. on insurance contracts<sup>4</sup>, on PRIIPs<sup>5</sup>, on UCITS units<sup>6</sup> and should apply in general.

## **"Order with obligation to pay": which similar phrases comply with the obligation to give notice?**

Where distance contracts are to be concluded by electronic means, the imposition on the consumer of an obligation to pay, regardless of whether this obligation arises and/or is fulfilled first after the conclusion of the contract or whether prepayment becomes a condition of the order, the supplier must provide the consumer with certain information in a clear and prominent manner "not at any stage but immediately before the consumer places his order". In this way the obligation to provide information is temporarily shifted to the stage before the proposal, thus making this information a necessary part of the supplier's invitation to conclude a contract.

Specific reference should also be made to the manner in which information is provided to ensure maximum transparency on payment obligations undertaken by the consumer. In particular, the supplier must present the visual appearance and the content of the pre-printed declaration of intention to place an order in a way that, by making the relevant declaration of intention, the consumer consciously and expressly agrees that the latter entails an obligation to pay<sup>7</sup>. If, in fact, placing an order entails an activation button or a similar function, the activation button or similar function shall be labelled in an easily legible manner only with the words "order with payment obligation" or a corresponding unambiguous formulation indicating that the placing of the order entails an obligation to pay the trader<sup>8</sup>.

The above obligations protect the consumer mainly in cases where he orders without having paid in advance, so he may not realize that the order already leads to the inevitable imposition of a financial obligation. Essentially, consumer law provisions impose on the supplier the obligation to make it clear to the consumer that by placing an order he is making a binding offer to conclude a contract. This offer, upon its acceptance by the supplier (which in this type of transaction need not necessarily pass

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<sup>4</sup> Article 20(7) of Directive 2016/97, Article 30(4) of Law 4583/2018

<sup>5</sup> Regulation on PRIIPs 1286/2014 Article 5 ff

<sup>6</sup> Article 7 par. 1 (b) & 80 Law 4099/2012

<sup>7</sup> Article 3d par.2 p. c) Law n.2251/1994

<sup>8</sup> Article 3d par.2 p. d) Law n.2251/1994

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to the consumer under Article 193 of Greek Civil Code, and the subsequent agreement and conclusion of the contract in distance) establishes consumer's corresponding contractual obligation to pay the supplier.

Interpreting the relevant provision of Article 8(2) (b) of the Directive 2011/83, the CJEU recently<sup>9</sup> held that the wording "order with an obligation to pay" refers to the provision that it "is indicative in nature and that Member States are permitted to allow the trader to use any other similar wording, provided that such wording is clear as to the origin of the specific obligation (to pay)" and that, in the absence of an authentic dictation of examples of similar wording in national law, 'traders are free to use any kind of markings as they see fit, provided that such markings clearly indicate that the consumer is under an obligation to pay as soon as he presses the button or similar function'<sup>10</sup>.

The Court was called upon to interpret the provision of Directive 2011/83 (Article 8(2)) if it is to be interpreted as meaning that, in order to determine whether the phrase 'completion of the reservation' used on an online accommodation booking website constitutes 'corresponding unambiguous formulation' to 'obligation to pay', only the marking of the specific button or the specific corresponding formulation must be taken into account, without taking into account the circumstances of the order process which may make it clear to the person concerned that there is no obligation to pay<sup>11</sup>. In view of the foregoing, it is for the national court to ascertain whether the term 'reservation' in German, both in the vernacular and in the mind of the average consumer, is necessarily and systematically associated with the obligation to pay, in which case, if the answer is in the negative, it must be held that the expression 'completion of the reservation' is unclear and cannot be regarded as a formulation analogous to the expression 'order with obligation to pay'.

Finally, non-compliance of the supplier with the above obligation has as legal consequence; the non-binding of the consumer from the contract or order. This means that if the contract has been concluded, it is ineffective or invalid for the consumer, and if the contract has not been concluded, because the order has not been accepted

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<sup>9</sup> CJEU C-249/21, ECLI:EU:C:2022:269, Fuhrmann -2

<sup>10</sup> CJEU C -249/21, recital 25-27

<sup>11</sup> C-249/21 recital 28-32,34

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by the supplier, it is not valid as a proposal to conclude a contract, with the result that its acceptance by the supplier is not valid as an agreement which leads to the conclusion of a contract. Therefore, in the absence of a valid contract, the obligation to pay to does not exist and any payment made is without legal basis and therefore the payment is invalid/futile and revocable.

In conclusion, in order for a payment obligation of the consumer to be valid, it should be stated clearly, regardless of the verbal content used, that the consumer's order proposal binds him to the supplier-trader. The most important element is the prior information of the consumer and this information to be provided in a clear, simple and understandable way.

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