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WHAT ARE YOUR DISCLOSURE OBLIGATIONS PRIOR TO CONCLUDING A CONTRACT ON LINE?

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Abstract

This is the third article, in a four-part series. Its aim is to explain the disclosure requirements of the provider prior to the conclusion of an online contract. On this occasion, Teresa Rodríguez de las Heras Ballell, Associate Professor in Commercial Law at the Carlos III University of Madrid, Spain, and the author of the book on legal aspects of E-Marketplaces *El régimen jurídico de los Mercados Electrónicos Cerrados (e-Marketplace)*, focuses her attention on pre-contract information. There are some disclosure obligations, and the text explains the points that have to be clearly, comprehensibly and unambiguously addressed before the contracting procedure begins.

Pre-contract disclosure

Proper formation of contractual intent and, consequently, minimization of the risk of emergence of defects of consent are based on full, exact and precise pre-contract disclosure. In preparing and presenting the pre-contract information, attention has to be paid to two main risks that must be balanced. On the one hand, the lack of attention, or straying nature of Internet users to precontract details must be actively addressed. Attention to such details by users must be actively attracted. On the other hand, over information may result in misinformation. Excessive information does not inform because it is usually disregarded and seldom read. A balance between these two risks must be pursued by the information services provider.

This balance is addressed in two ways. First, by looking at the more formal or appearance-related components, that is the systematization of the information, the type of resources used and the mode of presentation of the content. Second, the purely substantive aspect, that is the necessary content and the recommended content that must be covered by the pre-contract information, taking into account, on the one hand, the nature of the goods or services, and on the other, the on-line contracting environment.

Contracting via electronic means, in particular, on-line on the Web, implies the disappearance of the executory and advisory role that can be played by competent professionals in off-line transactions when they perform information and advisory functions. But an on-line environment brings extraordinary communication capacities that must be exploited efficiently, not just to fill in for the absence of direct personal treatment, but to strengthen many of its informative possibilities. Moreover, the wealth of resources offered by the digital world and absence of time and space restrictions make compliance with the pre-contract disclosure duty a much more demanding task. Embracing this demanding approach as a principle and a bold and creative handling of the available resources will significantly enrich the informative effect of this pre-contract duty on the user.

As part of the fulfillment of the pre-contract disclosure duty, and without prejudice to other information requirements established in the applicable laws and regulations, an information society service provider who engages in on-line contracting has an additional obligation to inform the recipient clearly, comprehensibly and unambiguously before the contracting procedure begins on the following points:

- a) **The different formalities or technical steps that must be followed to execute the contract.** The reason for this requirement is that it is the provider who freely designs the on-line trading procedure through which the process of making the contract is channeled. Adequate disclosure to the user of the steps needed to complete the procedure facilitates its completion and generates certainty as to its perfection. This is extraordinarily simple to implement as it is sufficient to give the information using any graphic resource before the procedure is initiated as to the number and order of steps in the process.
- b) **Whether the provider will file the electronic document** in which the contract is concluded or not, and whether the document will be accessible or not.
- c) **The technical means made available for identifying and correcting input errors.** The fear that the on-line environment will heighten the risk of errors in communicating and transmitting the information explains the need to make available (not just information on those resources), adequate, effective and accessible systems that allow the user to spot and correct data entry errors. The opportunity to review the list of selected items before confirming the order might be a simple way to minimize errors. More sophisticated techniques that automatically identify impossible, apparently wrong (or unusual data (age higher than 110 years, two-figure telephone number, family name including numbers) giving the user the chance to confirm or modify them might be very useful.
- d) **The language** or languages offered for the conclusion of the contract.
- e) **Codes of conduct** to which the provider adheres to and instructions on how to consult them on-line.
- f) Before the contracting procedure begins, the service provider must make available to the recipient the **general conditions** to which the contract will be subject, if applicable, so that they can be stored and reproduced by the recipient.

The obligation to inform on the points indicated in subparagraphs a) to e) will not apply when so agreed by the parties not being consumers or when the contract is concluded exclusively by exchange of electronic mail or other equivalent individual communications. The Member States may impose penalties for the breach of these obligations. These will generally be fines in amounts that depend on certain gradation criteria (intent, length of time of the breach, recidivism, nature and amount of harm, profits obtained, volume of turnover affected by the breach).

In the forthcoming Article 4, disclosure obligations requirements after contract conclusion will be discussed.