1.1. The title given to my speech evokes the issue of the documentation of the contract. This topic shows peculiar features and raises particular problems with regard to the electronic or telematic contract. This expression refers to cases in which one or more moments of the formation process and execution of the contractual agreement occur through the use of computer resources, and thus in an immaterial and virtual environment. The immateriality of the context where the contractual bargaining takes place colors the issue of documentation of particular importance and complexity. We should try to answer at least the following questions: is the documentation, like all other aspects of contractual phenomenon (information and pre-contractual negotiations, signature, execution), to be made through information technology, and therefore in a purely virtual or immaterial form? And with what risks for contractors? With which guarantees of protection of their mutual reliance?

Everybody, I think, has heard about electronic document and electronic signature. Many European jurisdictions, including the Italian one, are already familiar with these concepts: it dates back to a little over 15 years ago, precisely to the late 90s of last century, the first European framework for electronic signature, which was contained in Directive 1999/93/EC and required Member States to adopt internal measures of adjustment and implementation by 19 July 2001. This Directive, however, is about to lose effectiveness: in its place Regulation No. 910/2014/EU (hereinafter: the Regulation) will have to be applied directly in all Member States, with effect from 1 July 2016. The Regulation, which explicitly repeals the above mentioned Directive, lays down a much larger and richer discipline not only of the electronic signature, but also of other tools, aimed at enhancing trust in electronic transactions in the internal market, on the premise that “building trust in the online environment is key to economic and social development”, while “lack of trust, in particular because of a perceived lack of legal certainty, makes consumers, businesses and public authorities hesitate to carry out transactions electronically and to adopt new services” (Regulation, recital 1 and 2).

1.2. The Regulation intends to “establish a legal framework for electronic signatures, electronic seals, electronic time stamps, electronic documents, electronic registered delivery services and certificate services for website authentication”. It is worth analyzing these different tools in detail.

1.2.1. The electronic signature
According to the definition provided by the regulation, e.s. means data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign.

The basic principles on the legal effect of e.s. are set out in art. 25, according to which an electronic signature shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements for qualified electronic (signatures technological neutrality principle). In other words, a simple e.s. has legal effect and can be admitted as evidence in legal proceedings; however, it has not the same effect as a q. e.s., which has the equivalent legal effect of a handwritten signature.
A q.e.s. is defined as an advanced electronic signature that is created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signatures.

An e.s. is called “advanced” when it meet which meets the requirements set out in Article 26, that is:
(a) it is uniquely linked to the signatory;
(b) it is capable of identifying the signatory;
(c) it is created using electronic signature creation data that the signatory can, with a high level of confidence, use under his sole control; and
(d) it is linked to the data signed therewith in such a way that any subsequent change in the data is detectable.

A qualified certificate for electronic signature is a certificate for electronic signatures (i.e., an electronic attestation which links electronic signature validation data to a natural person and confirms at least the name or the pseudonym of that person), that is issued by a qualified trust service provider and meets the other technical requirements laid down in Annex I;

A qualified electronic signature based on a qualified certificate issued in one Member State shall be recognized as a qualified electronic signature in all other Member States.

1.2.2. ‘electronic seal’ means data in electronic form, which is attached to or logically associated with other data in electronic form to ensure the latter’s origin and integrity;
A qualified electronic seal is an advanced electronic seal (an e.s. which meets the requirements set out in article 36), which is created by a qualified electronic seal creation device, and that is based on a qualified certificate for electronic seal. A qualified certificate for electronic seal means a certificate for an electronic seal, that is issued by a qualified trust service provider and meets the other requirements laid down in Annex III.

As far as legal effect is concerned, an electronic seal shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements for qualified electronic seals (technological neutrality principle).

On the other hand, a qualified electronic seal shall enjoy the presumption of integrity of the data and of correctness of the origin of that data to which the qualified electronic seal is linked.

A qualified electronic seal based on a qualified certificate issued in one Member State shall be recognized as a qualified electronic seal in all other Member States.

1.2.3. ‘electronic time stamp’ means data in electronic form which binds other data in electronic form to a particular time establishing evidence that the latter data existed at that time;
qualified electronic time stamp’ means an electronic time stamp which meets the requirements laid down in Article 42, that is:
(a) it binds the date and time to data in such a manner as to reasonably preclude the possibility of the data being changed undetectably;
(b) it is based on an accurate time source linked to Coordinated Universal Time; and
(c) it is signed using an advanced electronic signature or sealed with an advanced electronic seal of the qualified trust service provider, or by some equivalent method.

An electronic time stamp shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not
meet the requirements of the qualified electronic time stamp (technological neutrality principle).
A qualified electronic time stamp shall enjoy the presumption of the accuracy of the date and the time it indicates and the integrity of the data to which the date and time are bound.
A qualified electronic time stamp issued in one Member State shall be recognized as a qualified electronic time stamp in all Member States.

1.2.4. electronic registered delivery service’ means a service that makes it possible to transmit data between third parties by electronic means and provides evidence relating to the handling of the transmitted data, including proof of sending and receiving the data, and that protects transmitted data against the risk of loss, theft, damage or any unauthorised alterations;
‘qualified electronic registered delivery service’ means an electronic registered delivery service which meets the requirements laid down in Article 44, that is:
(a) they are provided by one or more qualified trust service provider(s);
(b) they ensure with a high level of confidence the identification of the sender;
(c) they ensure the identification of the addressee before the delivery of the data;
(d) the sending and receiving of data is secured by an advanced electronic signature or an advanced electronic seal of a qualified trust service provider in such a manner as to preclude the possibility of the data being changed undetectably;
(e) any change of the data needed for the purpose of sending or receiving the data is clearly indicated to the sender and addressee of the data;
(f) the date and time of sending, receiving and any change of data are indicated by a qualified electronic time stamp.
In the event of the data being transferred between two or more qualified trust service providers, the requirements in points (a) to (f) shall apply to all the qualified trust service providers.
Data sent and received using an electronic registered delivery service shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements of the qualified electronic registered delivery service (technological neutrality principle).
Data sent and received using a qualified electronic registered delivery service shall enjoy the presumption of the integrity of the data, the sending of that data by the identified sender, its receipt by the identified addressee and the accuracy of the date and time of sending and receipt indicated by the qualified electronic registered delivery service.EN L 257/106 Official Journal of the European Union 28.8.2014

1.2.5.‘certificate for website authentication’ means an attestation that makes it possible to authenticate a website and links the website to the natural or legal person to whom the certificate is issued;
‘qualified certificate for website authentication’ means a certificate for website authentication, which is issued by a qualified trust service provider and meets the requirements laid down in Annex IV.
The requirements for qualified certificates for website authentication are laid down in Annex IV.
1.3.The Regulation provides a definition of ‘electronic document’ as any content stored in electronic form, in particular text or sound, visual or audiovisual recording
As far as the legal effects of electronic documents are concerned, it sets out the basic principle that an electronic document shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in electronic form (so called technological neutrality principle).
We should remember that, according to art. 9 of Directive 2000/31/EC, Member States have to ensure that “their legal system allows contracts to be concluded by electronic means and that “the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means”. The principle of equivalence between electronic contracts and contracts made by non electronic means (that is another way to say the principle of technological neutrality) may be not applied to contracts falling into specific categories, e.g. contracts that create or transfer rights in real estate, contracts requiring the involvement of courts or public authorities, contracts governed by family law or by the law of succession.

1.3.1. An interesting question. Can the electronic document be used for contracts which requires a notarial deed?

2. It can be affirmed that European law now offers individual contractors all the tools they need to pack, in a context of relative safety, even forgoing the traditional paper support, documents capable of punctually reflect the agreement concluded between them. However, we should observe that:

- The principle of t.n. is to be understood in the sense that the admissibility of electronic signatures, electronics seals and electronic time stamps, which can be parts of an electronic document can be considered equivalent to traditional (handwritten) signatures and time indications on traditional paper documents as evidence in legal proceedings only when they meet the requirements laid down in order to “qualify” them.

- One of these requirements, perhaps the most significant, is the intervention of a third party, that is a “qualified trust service provider” which is necessary to build something like a bridge between the reality of paper documents, handwritten signatures etc. and the immaterial or virtual reality of the web.

Who is the qualified trust service provider?

3. Directive 2000/31 / EC seems to offer protection to the interest the customer or beneficiary of information society services (with reference to the case that we are considering here, the person or entity which acquires a good or services online) to use their own language, if not otherwise agreed between parties who are not consumers. If other languages (besides the customer’s native language) are offered, that must be indicated by the contract drafter (see, in Italy, art. 12, 1, e, of legislative decree n. 70/2003).

4. The archiving and preservation of electronic document (Regulation, recital 61). Directive 2000/31 / EC provides, among the obligations to provide information imposed on the provider of information society services, the one concerning the provisions for storing the contract concluded and the access mode, apparently via electronic credentials, archive indicated. The norm (in Italy, Art. 12, 1, b, of the d. Lgs. N. 70/2003) refers to the storage of the contract, but more precisely we should speak of the contractual document storage and possibility of subsequent access the same by contractors (or contractor other than that offered and organized the storage service). The solutions adopted in Italy in the Digital Administration Code (CAD).

5. It is necessary to ensure the readability and usability over time of the electronic document, through a continuous updating of the software that allows the opening and reading of the document itself. Therefore, the activity of archiving and preservation of electronic contracts should involve the obligation to take care of the updating of the software with which the document was packaged in order to prevent the risk that this becomes illegible or no longer accessible due to technological innovation and the
subsequent obsolescence of the originally used software. The solution adopted in this respect in the CAD.

6. The observations made so far are befitting in particular to contract on an individual basis. We must now consider whether and how the use of electronic media influences the mass contracting and the position in it of the party other than the predisposing contractor. The Electronic Commerce Directive n. 2000/31 / EC, implemented in my country with the Legislative Decree n. 70/2003, stipulates (Article 5, 10) a number of information obligations of the provider of information society services, namely the subject engaged in economic activities by offering goods or services online. This must, unless it is otherwise agreed with the other contracting party a consumer, informing the other party, in a clear, understandable and unambiguous, on the following points:

- The technical steps which are necessary for the conclusion of the contract;
- If the contract will be sent to the contractor, and if it will still be accessible;
- The technical tools for identifying and correcting any input errors before sending the order;
- the adhesion to codes of conduct and the way in which these codes may be consulted electronically;
- The general conditions and contractual clauses, which must be made available in a way that allows the customer to store and to reproduce them.

In addition the provider of information society services must, as soon as it has received an order from a customer, acknowledge the receipt, without undue delay and by the same means through which the order was placed, i.e. electronically.

7. The Italian implementing provision (Articles 12 and 13 of the d. Lgs. n. 70/2003) is even more compelling in that it seems to require that a provider of information society services, after receiving the order for a given good or service, makes available a document to the customer electronically without undue delay; this document is not only an acknowledgment of the receipt of the customer’s order, but also contains a summary of the general and particular conditions applicable to the contract, the essential characteristics of the good or service, the details of the price, the terms of payment, delivery costs and applicable taxes, and an indication of the conditions and procedures for exercising the right of withdrawal, if it is provided by contract or by law.

A similar provision can be found in the European legislation on consumers’ protection and recently in the directive no. 2011/83/UE on consumers’ right.

A similar provision can be found in the European legislation on consumer protection, in particular in Directive 2011/83 / EU, which lays down, among others, provisions intended to strengthen the consumers’ rights in the case of distance contracts and off premises contracts, particularly emphasizing the reporting requirements imposed on the entrepreneur or trader.

With regard to contracts B2C concluded “under an organised distance sales or service provision scheme, with the exclusive use of one or more means of distance communication” (among which internet is specifically mentioned)\(^1\), art. 8 of this directive sets out the obligation of the “trader”:

\(\text{(i)}\) to make available to the consumer, prior to the conclusion of the contract, key information regarding the contract itself, namely those concerning the main characteristics of the goods or services, the identity of the trader and its headquarters, the total price before taxes or the procedures and criteria for calculating the price, shipping costs, methods of payment and means of

\(^1\) See recital no. 20
payment accepted, the possible cost of using the means of distance communication, the possible right of withdrawal indicating the mode and operating cases of this right<. 

(ii) The law states the obligation of the trader to provide the consumer, after the conclusion of the contract and within a reasonable time (at the latest upon delivery of the goods or before the start of the execution of the requested service), the "confirmation" of the concluded contract, reproduced on a durable medium or support, namely on a tool capable of holding and storing all information which the trader is obliged to provide to the consumer, related to the specific contract, so that the consumer can easily access it for an appropriate period of time in relation to the purpose for which the information was provided and also capable of allowing the unchanged reproduction of the stored information (according to the definition of “durable medium” contained in Art. 2, paragraph 10, of the Directive).

7.1. The notion of durable medium elicited different interpretations. In the 23rd recital of Directive 2011/83 / EU are included in this concept paper, USB flash drives, CD-ROMs, DVDs, the memory cards, hard disks of computers as well as emails. The diversity of the covered instruments can be somehow surprising; evidently they are all considered capable of the function which they must carry out, which is to store information as long as necessary to protect the interests arising from the contract and to allow the unchanged reproduction of the information. 

The decision of the Court of Justice in 2012.

8. The framework of the contract concluded via the Internet, contained in the more general discipline of distance set out by the Directive 2011/83 / EU, neither supplants nor replace the one contained in the Directive 2000/31 / EC: on the contrary, it is presented as complementary to it, insofar as it strengthens the disclosure requirements already provided for by the latter. The scope of the two Directives does not, however, match precisely because the latest imperatively applies only to contracts between a trader and a consumer (B2C) relating to the supply of a good or a service for remuneration.

9. Looking at total and synoptically to the European regulation of contracts concluded via the internet, it is appropriate to pose some questions about the scope of those rules, namely:

(i) whether it is restricted to B2C transactions or not: we notice in fact that Directive 2011/83 / EU applies mandatorily only to contracts (at distance or in presence) between traders and consumers, while Directive 2000/31 / EC on electronic commerce applies even the (in favor of) "recipients of information society services" who are not consumers (among the definitions in Article. 1 we find either that of the consumer, or that of "recipient of the service", to be understood as the natural or legal person who, for professional ends or otherwise, and in particular to search for information or to make them accessible, uses an information society service);

(ii) whether it is limited to the category of contracts involving the payment of a sum: Recital 18 of the Directive 2000/31 / EC makes it clear that the category of information society services includes a wide range of economic activities, sharing the common feature of taking place on-line and consisting, in particular, but not exclusively, in the sale of goods; the services of the information society are not only those that give rise to on-line contracts, but are also, to the extent that constitute exercise of economic activities, those that are not remunerated by
those who receive them, i.e. that are offered without requiring a quid pro quo for cash.

10. So far my discourse was about statute law. It should now be noted that the empirical analysis provides more than some hints to believe that the above mentioned legal obligation to provide the customer with a documentary representation of the content of the contract has a high rate of ineffectiveness, in the sense that there are many cases where it remains unfulfilled. This is true not so much for the individual contracts concluded on an individual basis, the content of which is negotiated between individuals and therefore the contractor has the ability to control the various stages of the process leading up to the agreement negotiating including the phase of its documentation, but rather the contracts concluded in series through the access of an indistinct mass of customers to a web site, in order to purchase goods or services on the basis of general conditions of the contract unilaterally arranged/predisposed by an entrepreneur.

An example from everyday life may be the online purchase of a flight or train ticket

10.1. The rate of ineffectiveness of the provision on the obligation of provide the other party, on a durable medium, a document summarizing the contract's content seems particularly high in contracts "clickwrap" and "browsewrap". In the first scenario, the website to which the user is directed to purchase a good or service, asking the user to "click" on the button or icon that expresses the consent to the general terms and conditions prepared by the owner of the site; in the absence of this agreement the purchase transaction can not go forward. In the second case, instead, a disclaimer warns the user of the site that simply continuing the navigation implies acceptance of the general conditions and clauses drawn up by the vendor.

The legal issues raised by such a bargaining technique are numerous: in particular, the question arises of whether, to what extent and on the basis of what requirements the simple fact that the user is going on in the navigation can be evaluated as an implicit assent to clauses and conditions packaged by the entrepreneur, the more so when these clauses are included or referred to in such a way that the ordinary user, the normal experience and usually hurried, can hardly read them, examine them carefully and store them, for example because they are referred to other documents, or the 'access to them is possible only through a link to another website.

The legal issues raised by such a bargaining technique are numerous: in particular, the question arises of whether, to what extent and on the basis of what requirements the simple fact that the user is continuing the navigation can be evaluated as an implicit assent to the clauses and conditions packaged by the entrepreneur, all the more so when these clauses are included or referred to in such a way that the ordinary user with normal experience and normally hurried, can hardly read them, much less examine them carefully and store them, for example because they are recalled by reference to other documents, or the access to them is possible only through a link to another website.

10.2. Equally important, however, is the issue of documentation of the contractual relationship in case of wrap contracts concluded online. When the operation is finished by the act of purchase, the customer is often in the situation of those who, having clicked on the "I agree" button and maybe read in a necessarily hasty way the contract conditions that scroll down from a special curtain, neither can remember the exact content of the clauses and conditions which he or she had subscribed with that single click, nor is not able to retrieve them from the site, because they are no longer available or can't be found in the "original" version, having been modified or "updated" by the entrepreneur, who most
of the time reserves himself the right to unilaterally change them. In this situation the expression "liquid contract" is really befitting.

10.3. Things are particularly complex and "liquid" in case of "browsewrap" contracts. Here the user, driven by the desire to conclude the transaction as soon as possible in order to purchase the goods or services he or she needs, often does not want to take the time to read (let alone read carefully) the terms and conditions, often numerous and voluminous, which govern the transaction itself; nor is he or she able to reconstruct the content ex post, because it is not possible to "go back" or otherwise recover them through the site; and maybe sometimes he does not even notice the disclaimer in small type and in modest evidence located in the site, which should indicate that the continuation of browsing "implies" acceptance of all the predisposed contractual terms and conditions.

11. In my opinion it should be strongly affirmed that the legal system has to protect the interest of the contractor not only to know the rules or terms governing the contract that he or she is about to conclude, before it is concluded, but also to obtain the documentation of the obligations and commitments he or she has often unwittingly signed; in other word, the legal enforceability of that interest should be guaranteed.

12. More and more frequently in the area of economic activities online, internet users enter into contracts which do not involve, at least in appearance, any payment; therefore they are induced to approach them hasty and in a superficial way, then complaining for having assumed obligations or commitments that they would not have taken if they had previously known the real content of them. This case deserves a special attention from the point of view of the protection of the interest of the customer to obtain previous information and subsequent documentation of the commitments that he has been proposed to take.

From this point of view, as already mentioned, the European law of e-commerce seems to have already made a choice in the sense of applying the regulations on previous information requirements and subsequent documentation of the conditions applied also to the case of online contract services without obligation of payment; according to my opinion, this choice deserves a positive appreciation. It should be however strengthened: the trader or provider of information society service should be obliged to make the conditions and terms of the contract available to the other part, which he has often entered into the contract quite unconsciously, on a durable medium. At present, this obligation may not apply, being provided by the Regulation on consumer rights in distance selling contracts. It has already been noticed that recital no. 12 of Directive 2011/83 / EU seems to allow Member States the option to extend the disclosure requirements and obligations of the Directive; but a solution which is different from State to State seems not to be desirable, especially in the field of online contracts; on the contrary the aim of protecting the customer's interests in cross- border transactions, thus enhancing and fostering transnational electronic commerce, could be reached only on the basis of a harmonized framework at least at the level of the European Union.

13. Likewise, if we agree on the point that laying down an obligation of making the content of the agreement available to the client, by giving him or her a confirmatory documentation of the contract on a durable medium, provides a minimum level of protection to beneficiary of information society services, this kind of provision should apply not only to B2C relationships. From this point of view an intervention of the European legislator, aiming at extending the above mentioned obligation beyond the scope of B2C transactions, is needed. Recital no. 13 of Directive 2011/83/EU opens to Member States the possibility to
opt for the extension of the discipline to start-ups and small and medium-sized enterprises; but even in this case the adoption of different solutions from State to State to state is not suitable: we should create instead a common regulatory framework in order to fully exploit the cross border potential of electronic commerce and electronic contracts. It would therefore be appropriate, in my opinion, stimulate the European legislator to work in the directions indicated.

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Thank you very much for your attention.