

UNCTAD Webinar: Protection of vulnerable consumers on digital markets

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**Manipulative practices targeting DIGITAL VULNERABLE
CONSUMERS:**

**Enforcement experiences of the Italian Competition Authority (AGCM) in
the social media and online gaming sectors**

(AGCM CASE DECISIONS)

Presentation

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Manipulative practices targeting DIGITAL VULNERABLE CONSUMERS: enforcement experiences of the Italian Competition Authority (AGCM) in the social media and on line gaming sectors (AGCM CASE DECISIONS)

ON LINE SEMINAR UNCTAD

21/03/2024 (14.00-15.30)

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-Studies have shown that certain groups are more often :
potential TARGETS of on line dark patterns (D.P.)

-in particular children.

-These groups typically experience more severe harm as a result of dark patterns, such as falling **victims to potential threats and scams, loss of privacy, financial harm.**

- See, for example, the **CPC behavioural study project;**

-Also interesting the 2022 OECD GUIDANCE on DARK PATTERNS and definition also in 2022 DSA, DMA legislation.

-Distinction between **more traditional forbidden D.P. like hidden costs, drip pricing, preselection** of ancillary services;

-And **more recent D.P. sometimes in a “grey zone”:**

forced action, interface interference, nagging, obstruction, sneaking, social proof, urgency.

The increasing use of dark patterns has caught the attention of consumer regulators.

- BUT at EU Level the **most comprehensive and powerful general and horizontal legislative tool remain the “UCPD”** defined as a “milestone” for consumer protection especially for the more active and efficient Enforcement Authorities:
- 1. the UCPD general clauses on “**professional diligence**” standard;
- 2. the UCPD specific clauses on **misleading; omissive indications** (price transparency; product characteristics;
- 3. the UCPD provisions about “**aggressive**” practices;
- 4. Some Black list point: for example **Point 7 of the UCPD annex for pressure selling/ scarcity claim** as a concrete dark pattern example.

- The Competent Protection Authorities (CA) should try to set, in concrete cases, a more clearer line between the real illegal dark patterns with relevant “economic” effects and some acceptable persuasive and finally legal marketing techniques;
- **Identifying dark patterns that are not obviously deceptive and may sit in a potential ‘grey’ legal zone**, considering greater need to better understand them and how to be more efficient in addressing them in concrete;
- -behavioral studies seem to be more useful for complex, new types of D.P. while very often not necessary for more traditional D.P.;
- **Enforcement activity should be for an efficient CA the “absolute priority”** developing the most adequate investigation and enforcement tools and without the fear to start formal proceedings against the web multinational traders (the “actual” gate keepers; platforms and similar).

- Dark patterns sometimes appear to be **more effective on mobile devices rather than desktop computers and when combined or layered in a single website or app.**
- Not all dark patterns are equally effective: for example, **hiding information from the consumer could appear substantially more effective in affecting consumer choice than creating for example a more limited sense of urgency.**
- Consumers also appear unable to identify some more tricky dark patterns.

TIK TOK **CASE PS/12543** closed on 5/3/2024 (TikTok/French scar)

- Just a few days ago our Authority closed a big investigation **against Tik Tok** for the **violation of the professional diligence standard of this platform to «prevent and eliminate post and stories about dangerous challenges»** and for misleading info in its GUIDELINES about this kind of functions and the security environment of this social media;
- During the investigation Agcm had the confirmation about the lack from Tik Tok side of this prevention and reaction tools;
- **Art. 21 of the Italian Consumer Code in addition:** special **protection for children as vulnerable consumers** aimed to block practices potentially **dangerous (also indirectly) for the health and security of adolescents**
- A **final fine of 10 million euro (maximum level sanction under the Italian Consumer Code)** was imposed jointly on three companies of the Bytedance Ltd group, namely the Irish TikTok Technology Limited, the British TikTok Information Technologies UK Limited and the Italian TikTok Italy Srl.
- stressing the special «liability regime» of social media platforms under the UCPD horizontal / general legislation (the famous «milestone» for an essential, priority and crucial consumer protection safeguard).

- Summary of the **UCPs of Tik Tok both “misleading and aggressive” under UCPD** (10 million euro fine; cease and desist order; compliance report imposed):
- a) **inadequacy of the control and supervision measures** adopted by TikTok on the content published by users, with particular reference to the protection of vulnerable subjects (**professional diligence standard**);
- b) violation of the obligations of diligent application of **its Guidelines communicated to users in a misleading/omissive way (misleading UCP)**;
- c) dissemination of **content capable of threatening the psycho-physical safety of children and adolescents**;
-



- Maybe the last most important practice (**aggressive UCP**) included in the Agcm decision was:
- d) **undue conditioning** of users through the repetition of content -based on consumer profiling algorithms- that **exploits the vulnerability of certain groups of consumers (aggressive UCP):** general “**recommendation system**” based on “**algorithmic user profiling**”, which constantly selects which **videos to target in the 'For You' and 'Followed' sections** with the aim of increasing user interactions and the time spent on the platform so far to develop **advertising revenue** under its own business model (see the famous **past Agcm decision against FB** about consumer personal data as the “**new money**” of **commercial transactions under UCPD: “zero-price” ucps**).



AGCM CASE PS/12543: TIK TOK/ FRENCH SCAR (Mar. 2024)

- Also very important as a possible example of best investigation practice the consultation (**hearing**) **during the procedure of an expert specialized in neuro-science analysis for children** to confirm the negative effects of this kind of social media practices against children / adolescents as a typical category of vulnerable consumers (with additional protection need);
- Evaluation of the **relationship between the horizontal UCPD and the sectorial DSA** (to answer to the traders' defence observations and stress the wide extension of the mentioned **CP milestone** to provide a concrete / general / effective legal basis).



- The Authority closed a few weeks ago (last Febb. 2024) another investigation (**case PS/12661**) against the company distributing a product potentially dangerous especially for **young consumers** who are more likely to accept challenges launched on social media:
- a single items potato-based snack with ingredients to make it particularly spicy, **“artificially created”**; sold at the abnormal price of 10 euro and more (for ex. on Amazon); and **advertised not as a normal spicy snack for ordinary eating** aim but as special “item” created to push young people to “try” to eat it without drinking and resisting its extreme pungency effects;
- The accepted commitments from the trader (DAVE's s.r.l.) distributor of **the product “Hot Chip Challenge”** eliminated the future effects of the practice:
- -obligation of no longer market or advertise this dangerous “item” and **remove it from its sales lists!**

Changes in business models:

- from game sales to in-game purchases.

The video game business model is gradually shifting from selling copies of a certain game to purchase content and features **within the game itself**.

In this digital environment, the consumer pays for access to a game through an **online store** (such as *Microsoft Store*, *PlayStation Store*, *App Store*), which is then downloaded onto a device where it can be played.

This shift has led to **decreased shipping and transaction costs for companies** and has laid the ground for new business models and revenue.

One of the currently dominant business models is “**in-game purchases**” that unlock content in the video game environment.

Loot boxes are a particular set of in-game purchases. They allow the user to obtain a random set of game elements, not previously known:

1. The main difference between loot boxes and other in-game purchase systems is the **element of chance**. With loot boxes players do not know the precise items they are purchasing before making the transaction;
- 2 According to many experts, loot boxes are **designed in a similar way to traditional *gambling games***. Video game developers design loot-boxes with sounds, music and bright colors. This may increase excitement and expectation, especially in children. So loot boxes **pose a particular challenge for children and adolescent protection as “vulnerable consumers”**.



In-game purchase: AGCM CASES closed in 2020

AGCM proceedings against two of the major world operators active in the development, marketing and distribution of videogames and interactive software: -US groups **Electronic Arts and Activision Blizzard** (very popular game as for example **Fifa or Hearthstone**):

Agcm case n. **PS/11594** → **Electronic Arts**

Agcm case n. **PS/11595** → **Activision Blizzard**

In-game purchase and vulnerable consumer protection (Italian cases)

Both proceedings concerned the behavior put in place by traders in relation to the promotion and sale on the **Italian market**. The companies were accused of having carried out the **following conducts**, in possible violation of art. 5, 5 c. 3, 6, 7, 9 and annex1, n.5 of the UCPD:

- i) **misleading and omissive information regarding the characteristics and costs of video games;**
- ii) **lack of transparent and exhaustive information about in-game purchases and the presentation of some of these games as *free-to-play*;**
- iii) **having activated, respectively, in video games «FIFA» and «Hearthstone» a game mechanism (LOOT BOXES) that may induce minors to make purchases;**
- iv) **Electronic Arts was also accused of having omitted or inadequately provided, in the process of purchasing, pre-contractual information required by law, regarding the right of withdrawal and its possible exclusion.**

The ICA's assessment of commitments presented by the traders

ICA made mandatory the presented commitments trying to solve some crucial TRANSPARENCY requirements:

- 1) informing consumers about the real characteristics of these video game and that the use of the game may involve payments in the form of in-game purchases or loot-boxes;
- 2) EA inserted a **specific page «before» the download with all information about the presence of *in-game* purchase;**
- 3) Activision **eliminated the term free** in addition to providing the relative information about the presence of in-game purchase;
- 4) ***Introduction of a specific «parental control» tool.***

In-game purchase and the parental control function

Parented were informed about the Parental Control features available within the platforms and the procedure to follow to set up accounts for children.

Through Parental Control tools, parents can control: access to certain games, play time, the ability to interact with other users and finally, the possibility or not to make purchases and set up a monthly spending limit. The commitments made it more **easy for the parent to create an account for the child** via a hyperlink and through it access the Parental Control features.

Electronic Arts also proposed commitments that solved information gaps with reference to mandatory «pre-contractual information».

Other Agcm investigations on: «multiplayer online function»

The Authority also closed two big investigations against **Microsoft Corporation** and the **Sony group**:

1. the first ([PS/11114](#) - **Microsoft Xbox - *Abbonamento a pagamento***) with the acceptance of the **commitments** presented by the trader;
2. the second ([PS/11068](#) - **Sony Playstation Plus - *Abbonamento a pagamento***) with the ascertainment of the infringement and the **irrogation of a sanction of 2 million euro**;

- The proceedings against Microsoft and Sony concerned:
 1. the behavior of the traders in the **promotion and sale of game consoles «Xbox One» (Microsoft) and «PlayStation 4» (Sony): also the same products box;**
 2. video games through the online stores «Microsoft Store» and «PlayStation Store»;
 3. regarding the **lack of information provided to consumers concernig **the need of a «paid subscription»**** («Xbox Live Gold» and «PlayStation Plus») **to play «multiplayer online»** with other players, i.e. remotely with other players.

Agcm cases against: Sony (Playstation 4) and Microsoft (Xbox One)

- This important information about the need of a duration «subscription contract» to buy this «multi-player on line» function was not clearly displayed:
- A) during the video game buying process (for example in the framework of the sony «playstation store»: //store.playstation.com/it-it) and in the framework of the specific playstation APP for smartphones;
- B) not properly highlighted in the «packaging» of consoles (for example in the packaging of the Playstation 4: only a very small indication on the back of the boxes without any clear evidence and together with many other specifications).

- At the end of this investigations:
 - a) was imposed to the trader (Sony) **a fine of 2 million euro;**
 - b) was set the **obligation to change in 90 days the package of the console Playstation 4** giving evidence to the need of a «paid subscription contract» to enjoy the «on line multiplayer» function.

The «full text» of all the mentioned Agcm decisions (like many others) are published and available on the institutional web site: [«www.agcm.it»](http://www.agcm.it) in Italian (some press releases also in English).



- The main «horizontal» consumer law tool remain the UCPD (as the CP «milestone»).
- For example, this legislation still represent the legal basis of the majority of Agcm investigations and concrete final decision in consumer protection area (especially with an **extended and detailed ENFORCEMENT**);
- In addition to this crucial legislation also CRD; UCTD -always under the Agcm horizontal competence- remain of great relevance (see the structure of the **Italian Consumer Code** as possible best legislative practice);



- Sectorial legislation (Dig.Ser.A, Dig.Mark.A, Art.Int.A, DataA., Dig. Cont. Dir.) should **clarify the application «in parallel»** avoiding confusion, overlapping, and potential conflict of competence between «horizontal-independent Authority (like Agcm in Italy)» and eventual sectorial/regulatory C.A.
- The Italian legislative solution in our Consumer Code is based on the obligation of AGCM, as **competent horizontal Authority**, to ask a «non binding opinion» to the National Sectorial C.A. (for example for Energy, TLC, Financial services, Transportation, etc.) before closing our investigations and so stressing our competence to adopt final, concrete and quick «fully administrative decisions» without any need to rely and wait for long and fragmented «judicial» intervention, authorisation, or similar.

**THANK YOU FOR YOUR KIND
ATTENTION!**

QUESTIONS / ANSWERS



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