

THE IN-APP PURCHASE CASES BEFORE THE ICA

Gilberto Guardavaccaro, Andrea Venanzetti¹

Keywords: consumer protection, unfair commercial practices, free in-app purchase, common position on online games, Italian Competition Authority

1. APPS AND THEIR DIFFUSION

The growing diffusion of mobile devices for surfing on the web and technological innovations for data transmission on mobile phone networks have led to a significant growth of demand for dedicated software, typically under the form of “applications” (“apps”). Through the apps installed on their devices, users can have access to several services such as information, images and sound, music, multimedia works, transactions, connections to social media, videogames, etc.

Some apps are installed by the device manufacturer, but the majority are chosen by users according to their needs, preferences, etc. Apps are then installed by downloading the software via the mobile network or a Wi-Fi connection, and are then stored on the device. Initially, apps were supplied by the most widely-used operating systems owned by Apple (IOS) and Google (Android). Subsequently, other suppliers entered the market, such as manufacturers of mobile devices, app developers through their websites, and e-commerce traders (supplying digital and multimedia content along with their traditional offer of tangible goods); among the latter ones, Amazon has started offering its customers apps for its own devices (Kindle) as well for the Android operating system.

Apps can be supplied for free or sold for a price. In another business model, called “*freemium*”, the app is offered for free in its simplest version, but some premium content is offered during its usage (so-called *In-App purchases*).

If the *app* is marketed through an online store, a contract regulates the relationship between the developer and the supplying platform. Usually, developers get a share of the revenue also stemming from In-App purchases, and the platforms pay the developers periodically. Final users pay for app purchases and usage through their personal account on the platform which is linked to a means of payment (usually a credit card).

¹ Italian Competition Authority.

2. MAIN CONSUMER ISSUES AND THE COORDINATED ACTION BY EU COMMISSION AND MEMBER STATES

As app usage increased, some consumers' complaints emerged, especially in relation to the "free" claim associated with apps whose full usage involves *In-App Purchases*. This was critical in the case of apps offering videogames in which the user is the main player. In those cases, the "free" claim could be very misleading since in virtual reality, many users may erroneously think that they are being invited to make "virtual" purchases, while in practice they are being charged – sometimes heavily – as payments are automatically collected on the means of payment linked to the account used to download the app. This situation was even more harmful when game apps were used by children. In those cases, the claim of a "free" app targeted inexperienced and vulnerable users, and in breach of national laws stemming from EU provisions protecting children. Consumers also reported big difficulties when they wished to identify and contact the contractual counterpart in order to complain of poor service or for a breach of their rights.

In December 2013, the Danish Consumer Ombudsman and the European Commission promoted a "common action", *i.e.* a coordinated initiative of consumer protection agencies active in the CPC (Consumer Protection Cooperation). This action, the first of its kind, targeted the two most important mobile phone platforms (Apple, Google) for the conduct described above. The first step was the adoption of a "*Common position of national authorities within the CPC*" on commercial practices linked to "*online games*" that can be played through apps²; this outlined the following principles for In-app purchases' compliance with EU consumer legislation.

The use of the "free" apps claim is allowed only for games that can be played entirely for free, or contain appropriate specifications about which parts of the game are free, as well as the ones that can be purchased. If games that contain unavoidable in-app purchases or require a purchase for a substantial game experience are advertised as "free", this qualifies as an infringement of No. 20, Annex I of the Unfair Commercial Practices Directive (UCPD). This does not rule out that conduct could infringe other UCPD provisions for omitting or giving misleading information.

Games targeting children, or which can reasonably attract children, should not contain any invitation for the purchase of game items or induce them to ask an adult for their purchase.

Consumers should be clearly informed of payment arrangements as part of the traders' diligence requirements. That information should be displayed in a clear manner, and not embedded in the Terms & Conditions or in other pages or through links. Standard settings on mobile devices should not allow payments without the explicit consent of the consumer, even for the time window.

² http://ec.europa.eu/consumers/enforcement/documents/common_position_on_online_games_en.pdf; press release issued on 27 February 2014: http://europa.eu/rapid/press-release_IP-14-187_en.htm.

The consumer should easily be able to find the trader's e-mail address.

The common position was the starting point of the common action. On December 2013, letters were sent to Apple, Google and to the Interactive Software Federation (ISFE) requesting the companies to change their conduct in order to comply with EU legislative provisions on consumer protection. Talks with the parties went on for few months.

On 18 July 2014, another common position³ was issued, re-stating the main principles: a) only those apps containing optional in-app purchases can be offered as being “free”, and without misleading consumers; b) no exhortations urging children to purchase, or inducing them to ask adults to purchase, should be included in app games; c) consumers must be free to choose between the default payment settings and settings requiring individual authorization for each purchase; d) the trader's e-mail address should be provided for those consumers wishing to contact the same trader. The common position acknowledged that Google's proposed measures (including the removal of the word “free” for apps containing in-app purchases), once fully implemented, could be compliant with EU legislation, while Apple's proposals were not yet satisfactory. Following Apple's letter to the CPC on 31 October 2014, which contained substantial improvements, the CPC replied⁴ that once fully implemented, Apple's proposals could be compliant with the UCPD and the CRD.

3. PROCEEDINGS AT THE ICA

On 15 May 2014, the Italian Competition Authority (“ICA”) initiated proceedings for alleged infringements of several UCPD provisions as transposed into Articles 20, 21, 22, 23(g), (p) and (v), 24 and 26(c) and (e) of the Italian Consumer Code, concerning the marketing of the *app* called “*Littlest Pet Shop*”.

Littlest Pet Shop is a videogame which clearly targets children and is sold by several online stores. Proceedings were initiated against the developer (the company “Gameloft”) and against Apple, Google and Amazon, as platforms supplying the app. The alleged infringements were: i) misleading and/or incomplete information on the real costs for playing the game, which was advertised as “free”; ii) the omission of relevant information, such as, specifically, the developer's details, the existence of purchasing offers within the game, and information on how to prevent automatic charges on the

³ http://ec.europa.eu/consumers/enforcement/documents/in-app_cpc_common-position_en.pdf, press release: http://europa.eu/rapid/press-release_IP-14-847_en.htm.

⁴ http://ec.europa.eu/consumers/enforcement/documents/apple-inapp-closing-letter_en.pdf.

means of payments linked to the ID account; iii) exhortations to children to make purchases or to induce others to do so.

The first two alleged infringements concerned all parties, while the third one was notified only to Gameloft, the videogame developer.

On 28 January 2015, the ICA closed the proceedings by accepting the commitments proposed by all parties and ruling that they are mandatory, pursuant to Article 27(7)⁵ of the Italian Consumer Code.

The main points of the commitments are:

- a) substantial changes in the presentation of apps containing *In-App Purchases*. iTunes (Apple) and Google Play have committed themselves to remove the word “free” from the apps’ presentation, while Amazon will clearly specify that only the downloading is free;
- b) platforms running online stores have significantly changed and improved information given to consumers about default payment instructions and about changes to settings that can be introduced to prevent payment authorizations;
- c) Google Play and iTunes have introduced structural changes to payment systems. Prior to the AGCM’s investigation, when users identified themselves through the ID Account and the password, a time window opened by default during which all purchases were charged to the credit card without the need for specific authorization. In compliance with commitments, Google Play and iTunes’ new authorization systems now allow the user to choose how often the password is requested for authorizing purchases;
- d) all online stores have introduced stricter clauses in contracts with developers as regards compliance with EU consumer law and obligations to show developers’ details;
- e) Gameloft have introduced warnings to parents which appear before the app download, have removed all exhortations to children, and have made it clear that purchases are not required to play the game further.

⁵ Under this provision, the Authority can accept commitments proposed by the parties and can make them mandatory. The proceedings are then closed without assessing the alleged infringements. The full text in Italian of the decision and of the commitments can be read on ICA’s online Bulletin, <http://www.agcm.it/stampa/comunicati/7427-ps8754-accolti-gli-impegni-di-itunes-google-amazon-e-gameloft-in-materia-di-diffusione-di-app-apparentemente-gratuite.html>.

4. THE DECISION OF THE ICA AND THE CPC COMMON ACTION

The CPC common action was a new experience in trans-border enforcement at the European level. Common actions are not envisaged by the CPC Regulation 2006/2004. However, the action came as a suitable solution for tackling EU-wide infringements carried out by multi-national traders. According to the former Danish Consumer Ombudsman, Mr Henrik Oe, the common position was crucial for enabling EU national authorities to speak with one voice, enhancing European credibility, and influencing international traders operating in the European market who finally received a clear message that they must comply with EU legislation⁶.

The CPC joint action is just a common negotiation with companies since its strength lies in the enforcement powers that Member State authorities can wield to ensure compliance⁷. ICA's proceedings should, therefore, be assessed within this framework. There is no counterfactual evidence on what would have been the outcome of the joint CPC action without the formal investigation in Italy: however, it is reasonable to state that the probe undertaken by the ICA demonstrated to parties that the action at EU level had to be taken seriously, as any other national agency could have taken the same steps; moreover, one cannot rule out that traders accelerated the proposal of measures which led to a favorable assessment by the CPC, also with a view to meeting the concerns expressed by the ICA and avoiding a fine.

On the content of the measures, the commitments which were ruled to be mandatory by the ICA, and were also accepted at the CPC level, resulted in remarkable improvements to consumer protection standards in the app world. Firstly, platforms recognize their tasks to ensure clear and full information to consumers about the real costs of apps, the platforms' details, the developers' identity and that platforms, as well as developers, must take suitable steps to avoid the presence of any exhortations to children. Secondly, consumers have now been made more aware of existing payment arrangements on their account and are given the choice to modify payment settings so as to avoid any unwanted purchases on online stores. Moreover, it must be stressed that those pro-consumer measures were taken without forcing platforms and developers to disrupt the app business which, so far, was one of the most promising innovations in the online world. From this point of view, the ICA's choice to accept the proposed commitments can be regarded as a suitable solution to the concerns raised at the national and at the EU level, as well as a starting point for ensuring compliance to EU and national consumer legislation in the online world linked to mobile devices.

⁶ See Mr Oe's speech at the international conference at AGCM "EU Cooperation for enforcement of consumer legislation", Rome-7-8 July 2014, <http://www.agcm.it/convegni-e-seminari/7122-eu-cooperation-for-enforcement-of-consumer-legislation.html>.

⁷ The common position of 18 July 2014 stated that the joint enforcement action was "*with no prejudice to any actions at Member State level on outstanding legal issues, including on-going national enforcement actions*".