

**THE PROTECTION OF DIGITAL  
CONSUMERS:  
Italian experience.  
Synergies between competition  
and consumer protection.**

**BITS SEMINAR  
Bruxelles, 15/3/2016**

•

**Avv. ANTONIO MANCINI**  
Directorate B Consumer Protection  
Italian Competition Authority (ICA).



## Evolution of CONSUMER PROTECTION and cross border trade

-In 1990 (26 years ago) when the Italian Competition Authority (ICA) was created there was very little consumer legislation at EU and at national level (more related to a pre-contractual stage and especially for misleading and comparative advertising).

-The fragmentation of different national legislation created obstacles for cross border trade and consumer confidence.



# CONSUMER PROTECTION AND EU LEGISLATION

- Since then, in Eu law we noted:
  - a) unfair terms legislation with a specific protection for the contractual stage;
  - b) rules for distance and doorstep selling;
  - c) definition and instruments to block “unfair commercial practices” (maybe the most wide, complex and comprehensive tool);
  - d) finally regulation about consumer rights (CRD) for distance contracts especially in the internet economy.

The full harmonization approach of these last directives was based on the aim: a) to avoid national law fragmentation; b) to define rules for cross border trade; c) to destroy national frameworks of protection for some traders categories.



# Consumer protection in the «internet economy»

-The enforcement of consumer legislation (especially extensive UCPD and CRD rules) is crucial in the internet economy and for the aim of an effective and efficient «SINGLE» DIGITAL MARKET (EU Commission priority).

-New enforcement challenges come from the growth of online and mobile commerce, including new platforms, the app economy, the sharing economy, web advertising, platforms, intermediation, comparison tools (also with related problems of consumer and personal data protection).

-In the wide and «extensive» UCP enforcement activity, ICA anticipated the evaluation of several practices considered illegal under CRD legislation (for ex.: opt-out systems for optional/ancillary services, credit surcharges, obstacles to consumers' rights, unsolicited supplies, etc.).



# AGCM (competition and consumer protection)

## AGCM: The Italian Competition Authority (ICA)

- is an administrative independent Authority (the institutional law was held at the end of 1990).
- ICA is responsible not only for the enforcement of competition legislation and policy but also for consumer protection issues especially under the following EU legislations:
- **UCPD, UCTD, CRD.**



# Italian “enforcement system” (I)

- ICA is entitled to investigate UCPs; UCTs, CRD violations not only upon reception of consumers’ complaints, but also on its own initiative (*Ex Officio investigation powers*).
- We have the same powers if compared with the competence in competition field. For example:
  - INTERIM MEASURES for grave infringements;
  - CEASE AND DESIST powers (without the need to go to the Court and rely on long, complex and sometimes different Court decisions): adoptions of ICA final decisions “all published” that can be appealed (Italian Adm. Tribunal in 2 steps: TAR and finally Consiglio di Stato);



## Italian “enforcement system” (II)

- **BIG SANCTIONS** (up to € 5 mill. euro for each UCPs);
- **INSPECTIONS** (in cooperation with Financial Police);
- Possibility to accept **COMMITMENTS**;
- Possibility to adopt “**MORAL SUASION**” procedures.
- **FOR UNFAIR “CONTRACT TERMS”**: Italy represents an unique example of a “fully administrative competence” (once again no need to go to the Court!).



## UCP enforcement activity in «regulated sectors»

After the UE 2013 infringement procedure against Italy, in a recent Italian law in 2014 (transposition of the consumer rights Directive n. 83/2011) it has been finally clarified the “full and exclusive ICA competence against UCPs” in all regulated sectors.

The only exception is based on the existence of a “conflict” between the UCP general / horizontal Directive and the sectorial Directives with specific consumer protection aims (art. 27, c. 1bis of the Italian Consumer Code).

Two very recent sentences (Febb. 2016) in TLC sector of the Italian Administrative Supreme Court (Consiglio di Stato, Plenary) confirmed this interpretation of the “speciality principle”.



## ICA competence in regulated sectors

The new art. 27, c. 1bis of the Italian Consumer Code has set the obligation for the ICA -at the end of each investigation against a practice with impact in a regulated sector- to ask a “non binding opinion” to the Regulatory Authority;

ICA adopted several agreements of cooperation with the most important Italian Regulatory Authorities in order to exchange information and try to find the best solutions for an effective and high standard of consumer protection (especially in the preliminary stage of investigations and in order to avoid duplication of proceedings).



# Competition and UCPs

- There are important elements of convergence between the enforcement of competition rules and consumer protection, since unfair commercial practices are often used as an important “COMPETITION TOOL”.
- Indeed, commercial practices are a powerful tool for the newcomers and a way to lead consumers to choose the best options for them, in terms of prices and quality, by means of more conscious, rational and informed decisions.
- In my opinion, the consumer protection legislation could be enforced in a more wide and effective way especially in countries where the Competition Authorities are competent also for consumer protection matters (just for this beneficial “synergic” approach).



## COMPETITION AND CONSUMER WELFARE (synergies I)

- More in general, the evolution of antitrust policies seems to be actually more linked to an «effect based approach» with economical analysis and a concrete attention to «consumer welfare» profiles (not like an «indirect and eventual» effect but like a crucial priority);
- instruments to try to measure «ex ante and ex post» effects of antitrust decisions on consumer welfare and market efficiency (especially in terms of economic conditions, quality of products/ services, concrete opportunities to develop correct and efficient business models, spaces for new comers, innovation, quality research, etc.).



## COMPETITION AND CONSUMER PROTECTION (synergies II)

COMPETITION POLICY: effects especially on the «supply side» of the market in terms of an open and efficient system to promote consumer welfare, innovation, economic equilibrium, adequate prices / quality/ quantity, offers, etc.

CONSUMER PROTECTION POLICY: effects especially on the «demand side» of the market in terms of transparency of information for more rationale consumers' choices, fairness of commercial behaviours (to improve economic meritocracy), consumers' confidence, availability to buy, etc.



# PRIVATE ENFORCEMENT DIRECTIVE

- New opportunities to develop synergies between competition and consumer protection will be linked to the next transposition into national legislations of the Directive on «private enforcement».
  - Systematic instruments for consumers and traders to have access to documents and elements of proof collected during antitrust investigations with the final aim to obtain a compensation for damages coming from antitrust violation;
- ICA decisions are used also to support judicial «class actions» of Consumer Associations;
- Complementarity between «public» and «private» enforcement.



# Specific features of the TLC Sector

It is widely recognized that the TLC sector is characterized by complex dynamics, as a result of:

- the various interests involved;
- the wide range of services offered to consumers;
- the rapid evolution of technology;
- the existence of many actors; and
- the appearance of new players willing to acquire bigger market shares.

As a consequence, the TLC sector is characterized by a physiologic information asymmetry between traders and consumers, caused - *inter alia* - by the spreading of increasingly complex offers and innovative services.

Therefore, traders active in the TLC sector are required to adopt a higher standard of diligence.

# Examples of aggressive/misleading practices with “anti-competitive” effects

The ICA considered that some practices were both: misleading (especially for ambiguous/omissive information on market conditions to push consumers to “choose less favorable options”) and AGGRESSIVE.

The most common aggressive practices more relevant for “anti-competitive” effects seem to belong to the following categories: obstacles to consumer rights (especially during “switching procedures”); retention activity; after selling assistance; tele-selling; unsolicited supplies; intermediaries responsibility; platforms; joint offers/tie-in; etc.



# Distance contracts of digital services for mobile phones

The Italian Competition Authority (AGCM in the following) carried out several investigations concerning the unsolicited subscription of services that allow users to download contents for mobile phones (such as ringtones and wallpapers).

Often these services were offered ON INTERNET as a free trial or single buy, but the consumers indeed authorised a subscription to a service with continuous and automatic payments if they didn't express opt-out options.

Together with the general problem of unsolicited supplies, AGCM discovered on its investigations also other kind of aggressive practices specially for the obstacle created to the “deactivation procedure” (right of withdrawal): for instance the “opt-out



# The premium services case in Italy (1)

- The ICA closed on 13/1/2015 four investigations concerning the biggest mobile phone operators (Telecom Italia, Vodafone, Wind, H3G) and three content service providers (CSP) for **unsolicited activation of premium services on mobile phones (cramming)**.
- **Premiums services:** various content (games, ringtones, etc.), advertised through pop-ups, banners, links. Activated through a single click and debited automatically to the mobile phone user (enrichment = mobile phone operator passes user's data to the CSP).
- Many consumers billed for premium services they never agreed to activate nor had they been made aware of. **Consumers just slightly touched the screen of their mobile phones when the banner appeared.** Majority of prepaid SIM cards: billing occurs on the credit in advance of service use and that users periodically recharge.
- **Revenues** stemming from premium services **shared** between the mobile phone operator and the CSP: mobile phone operators **liable** for the conduct.



# The premium services case in Italy (2)

- Infringements:
  - a) **omitting relevant information** on default authorization given for receiving premium services through banners and links and for being charged for them, and on deactivation procedures;
  - b) adopting an automatic system of user's data transfer ("**enrichment**") **without informing consumers**;
  - c) omitting in the landing pages and other ads of premium services, relevant **information on trader's identity, geographical address methods of payment, right of withdrawal**.
- Conducts infringing **articles 5, 7, 8 and 9 of the UCPD and qualifying as practice nr. 29 in Annex I of the UCPD** (articles 20, 22, 24, 25, 26 of the Italian Consumer Code)
- **Fines:** total amount of **5.5 million €** (1.75 mln € H3G).
- First Appeal Court ruling on H3G case: **ICA's decision upheld**, full support for ICA's analysis of the case.



## RECENT ICA DECISIONS (cross border relevance)

- APPLE** (legal warranty / misleading info and practice about the necessity to buy the «Apple protection plan» to gain the «two years» extension, confusion between legal warranty and commercial warranty; obstacles to consumer's rights for after selling assistance);
- TRIP ADVISOR** (misleading claim about systems and procedure to check and block «fake reviews», platform responsibility, etc.);
- IN-APP purchases** (app games for mobile devices - apparently «free», need to protect «vulnerable consumers» like adolescents): national Italian case closed with commitments in parallel with the EU «joint action»;
- AIRLINES WEB TICKETS** (transparency of the final prices; credit surcharges; optional insurance products pre-selected with unfair opt-out systems; etc.)



## Conclusions: synergies between competition and consumer protection and enforcement activity (I).

- Complete harmonization rules seem to be more effective (and in line with the Single Digital Market EU Strategy and “priority”) in order to avoid national fragmentations and lack of protection;
- A sort of horizontal consumer protection system for all “digital services” (e.commerce first of all and also audio-visuals and telecommunications) could be more concrete and avoid potential confusion;
- In EU member States there are several National Consumer Protection Authorities which take part to the Eu network “CPC” (like in competition field for the ECN network).



## CONCLUSIONS (II)

- In my opinion, the consumer protection legislation could be “enforced” in a more wide and effective way especially in countries where the Competition Authorities are competent also for consumer protection matters.
- For example, this “synergic” competence still exist not only in Italy but in several member States like: Hungary, U.K., Poland, Malta, Czech Rep., etc.;
- Outside EU, first of all, it could be useful the experience of FTC in U.S.



## Conclusions: synergies between competition and consumer protection and enforcement activity (III).

- COMPETITION AND CONSUMER PROTECTION: **two faces of the same medal to promote the fundamental rights of «economic freedom», economic democracy and collective sovereignty (ICA Annual Report, Consiglio di Stato n. 2479/2015).**

-Finally, **investigations against UCPs, especially if aggressive (like the examples described before) could be considered not only as instruments of consumer protection but also as market tools of: EFFICIENCY and FAIR COMPETITION.**



**THANK YOU FOR YOUR KIND ATTENTION!**



**AVV. ANTONIO MANCINI**  
**ITALIAN COMPETITION AUTHORITY (ICA)**

