App-solutely protected? The protection of consumers using mobile apps in the EU

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1. Introduction

In July 2014, the five mobile app platforms, through which applications are available for download, were offering a total of 3,170,000 apps. The two main platforms, namely Google Play and the App Store offer 2,500,000 apps between them,[2] dominating the market for access to apps. According to Apple, app downloads between 2008 and 2013 amounted to 50 billion averaging 800 hundred downloads per second.[3] Just a year later that number grew by 50% reaching 75 billion downloads.[4] The time users spend on apps is also continuously increasing,[5] pointing to an "app boom".[6] Moreover, the huge popularity of apps is leading consumers to living an "app-driven life",[7] entailing the use of apps "to navigate through life – shopping, playing, reading,

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[2] Number of apps available in leading app stores as of July 2014, Statista, 2105, http://www.statista.com/statistics/276623/number-of-apps-available-in-leading-app-stores/ (last visited April 17, 2015).

[3] Cupertino, Apple's App Store Marks Historic 50 Billionth Download, Apple Press Info, May 16, 2013, http://www.apple.com/pr/library/2013/05/16Apples-App-Store-Marks-Historic-50-Billionth-Download.html (last visited April 17, 2015).

[4] Sarah Perez, iTunes App Store Now Has 1.2 Million Apps, Has Seen 75 Billion Downloads to Date, TechCrunch, June 2, 2014, http://techcrunch.com/2014/06/02/itunes-app-store-now-has-1-2-million-apps-has-seen-75-billion-downloads-to-date/ (last visited April 17, 2015).

[5] Smartphones: So Many Apps, So Much Time, Nielsen, January 7, 2014, http://www.nielsen.com/us/en/insights/news/2014/smartphones-so-many-apps-so-much-time.html / (last visited April 17, 2015); Andrew Lipsman, Major Mobile Milestones in May: Apps Now Drive Half of All Time Spent on Digital, June 25, 2014, http://www.comscore.com/Insights/Blog/Major-Mobile-Milestones-in-May-Apps-Now-Drive-Half-of-All-Time-Spent-on-Digital (last visited April 17, 2015); The Decline of the Mobile Web, April 7, 2014, http://cdixon.org/2014/04/07/the-decline-of-the-mobile-web/ (last visited April 17, 2015); Apps and Mobile Web: Understanding the Two Sides of the Mobile Coin, IAB Mobile Marketing Centre of Excellence, December 16, 2014, http://www.iab.net/media/file/IAB_Apps_and_Mobile_Web_Final.pdf (last visited April 17, 2015).

[6] Jessica E. Lessin & Spencer E. Ante, Apps Rocket Toward $25 Billion in Sales, The Wall Street Journal, March 4, 2013, http://www.wsj.com/articles/SB10001424127887323293704578334401534217878 (last visited April 17, 2015).

[7] Chris Gaylord, The App-driven line: How smartphone apps are changing our lives, The Christian Science Monitor, January 27, 2013, http://www.csmonitor.com/Technology/Tech/2013/0127/The-app-driven-life-How-smartphone-apps-are-changing-our-lives (last visited April 17, 2015).

dating, learning, and more…"[8] Indeed, apps are now more than simple pieces of software enabling a variety of tasks on mobile devices.

Game apps are dominating the market place for the time being.[9] But other 'useful' applications are quickly catching up: from maps to weather applications, train booking services or flight boarding passes and everything in between. Business models are also quickly evolving. The main models include paid app, 'paidmium' where further content to use on a paid app is available for purchase and 'freemium', where the app is free but further content requires additional purchase. Other models may include free apps that are financed by the placement of adverts or the use, or even the sale of the personal details of the user.[10]

The success of apps with users engenders a number of legal issues, many of which are beyond the remit of this chapter. This chapter provides an essential starting point to reflecting on the legal challenges in relation to consumer protection. It cannot be exhaustive. Two key issues are explored. They relate to the contractual rights of consumers using applications as well as the liability of application providers and retails platforms for misleading advertising. Those are areas in the EU that are chiefly coming under the remit of Directive 2011/83/EU on Consumer Rights[11] (DCR) and Directive 2005//EC on Unfair Commercial Practices Directive (UCPD).[12] The Directive on Consumer Rights amends and consolidates pre-existing legislation in the field of distance sales and doorstep sales. It offers consumers in the EU a number of rights, protecting them when purchasing from a business. The Directive also introduces legislation controlling the sale of digital content. Those rights are essential components of EU Consumers' right arsenal, but are not necessarily well adapted to the app world as the below explores. The UCPD meanwhile offers protection (mostly by means of public enforcement and private redress in most member states) against a number of commercial practices that are considered unfair, including advertising. This legislation is able to protect consumers, but its application also poses challenges in the app world.

2. **Applying the DCR in the app world**

According to Recital 19 DCR, *'digital content means data which are produced and supplied in*

[8] Ibid.

[9] 21,45% of all apps downloaded in the Apple App store were games in 2015; Most popular Apple App Store categories in March 2015, by share of available apps, Statista, 2015, http://www.statista.com/statistics/270291/popular-categories-in-the-app-store/ (last visited April 17, 2015). Games apps accounted for 40% of all downloads in App Store and Google Play as well as for 70%-80% of all app-accruing revenue; Jeff Grubb, Apple v. Google: A world view on the mobile gaming war, VentureBeat, April 25, 2014, http://venturebeat.com/2014/04/25/apple-vs-google-a-world-view-on-the-mobile-gaming-war/ (last visited April 17, 2015).

[10] For a detailed description of various business models, see Kalle Hahl, The success of Free to Play Games and the Possibilities of Audio Monetization, Bachelor's thesis (May, 2014), available at http://www.theseus.fi/bitstream/handle/10024/79905/Hahl_Kalle.pdf?sequence=2.

[11] Directive 2011/83/EU on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, O.J. L304/64 (2011).

[12] Note that in the EU, Directives have to be implemented in national law. For more on European Consumer Law see Norbert Reich et al., European Consumer Law (2nd ed. 2014).

digital form, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means.' Applications therefore fall within the remit of the Consumer Rights Directive and can be treated as digital content. Digital content, defined in Article 2(11) DCR as "data which are produced and supplied in digital form", follows a sui generis legal regime.[13] Under the DCR, digital content is neither subject to the rules applying to goods or services although it is primarily inspired by the sale of goods. It offers tailored rights and remedies due to the intangible nature of the content taking direct account of the hybrid character of digital content.[14] This gives consumers a right to information but they are normally barred from a right to withdraw from the purchase of digital content. Rights concerning the quality of the digital content received also exist under separate legislation, but are beyond the remit of this chapter.[15]

2.1 Right to information

The rights laid out in the DCR were informed by a large number of problems identified prior to the legislation being adopted. Research conducted in 2010 for Consumer Focus in the UK found that consumer information was of low quality, demonstrated by lengthy contracts, complex wording and widespread use of legal jargon. Only 43 per cent of mystery shoppers understood

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[13] Recital 19 DCR explains: 'contracts for digital content which is not supplied on a tangible medium should be classified (…) neither as sales contracts nor as service contracts.' Also see, Marco Loos et al., Digital content contracts for consumers, Journal of Consumer Policy (Amsterdam Law School Legal Studies Research Paper No. 2012–66, Centre for the Study of European Contract Law Working Paper No. 2012–66, 2012), available at http://ssrn.com/abstract=2081918.

[14] Marco B.M. Loos et al., *Comparative analysis, Law & Economics analysis, assessment and development of recommendations for possible future rules on digital content contracts,* Centre for the Study of European Contract Law (August 30, 2011), available at http://ec.europa.eu/justice/consumer-marketing/files/legal_report_final_30_august_2011.pdf.

[15] Information requirements concerning the quality and conformity of the goods apply under Article 6(1) (l) and (m) DCR. These issues however are primarily governed by Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (Consumer Sales Directive) O.J. L171 (1999), although it only applies to tangible goods. For more on this issues in the context of the CSEL which applies to digital content, see Marco B.M. Loos & Chantal Mak, Remedies for buyers in case of contracts for the supply of digital content, Ad hoc briefing Paper for the European Parliament's Committee on Legal Affairs, (Amsterdam Law School Research Paper No. 2012-71, Centre for the Study of European Contract Law Working Paper Series No. 2012-08, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2087626; Marco B.M. Loos, The Regulation of Digital Content B2C Contract in the CSEL, Journal of European Consumer and Market Law 146 (2014), available at http://www.euvr.eu/euvr/Issue_3_2014_files/Marco%20Loos_euvr_2014-146.pdf. For a discussion of the issues linked with providing protection for conformity and quality issues for digital content in the UK, see Robert Bradgate, Consumer Rights in Digital Products - A research report prepared for the UK Department for Business, Innovation and Skills, Institute for Commercial Law Studies (September, 2010), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31837/10-1125-consumer-rights-in-digital-products.pdf.

their responsibilities when buying digital products and 35 per cent understood their rights.[16] Those results were consistent with those uncovered by a survey in 2011 for the European Commission, led by Europe Economics, which showed that consumer detriment was mostly located in information and transparency with regards to digital content. Out of the problems identified, information issues represented 42% of the reported most recent problems. Lack of information (24%) was mostly problematic followed by unclear/complex information (18%).[17] While this study was conducted before clear information and transparency rules were spelt out for consumers buying digital content, it is important to note that, at the time, the Distance Selling Directive[18] was in place and effective in the Member States. Rules on services were also existent in most countries. Yet, information about digital product was not forthcoming. One of the main reasons identified for this lack of information, is that the legal regime was ambiguous and not harmonized across Member States.[19] Indeed, the classification of digital content as goods or services on which much of the existing legal regimes were underpinned varied from one Member State to the next.[20]

The DCR introduced a number of common rules, although their efficacy remains to be tested. The right to information applies to the purchase of applications as well as content purchased in-app. The rules also apply whether the app or its content are provided on a tangible medium or are dematerialized.[21] It is also applicable whether or not the consumer pays for the digital content,[22] although when content is free he/she should have lower expectations in particular with regards to quality and functionality.[23] The burden of proof of the provision of the required information rests on the trader.[24]

Article 5 sets out the rules for information requirements for contracts other than distance or off-premises contracts and in some limited instance will apply to the purchase of applications. However, by and large, applications and in-app purchases will take place at a distance. The obligations set in Article 6 are therefore the most relevant. This Article requires that 'before the

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[16] Marzena Kisielowska-Lipman, Up and down(load)s - Consumer Experiences of buying digital goods and services online, Consumer Focus (December, 2010) available at http://www.consumerfocus.org.uk/files/2010/12/Consumer-Focus-Ups-and-downloads.pdf.

[17] Digital Content Services for Consumers: Assessment of Problems Experienced by Consumers (Lot 1), Final Report, Europe Economics (June 15, 2011), available at http://ec.europa.eu/justice/consumer-marketing/files/empirical_report_final_-_2011-06-15.pdf.

[18] Directive 2011/83/EU on consumer rights, supra n.11.

[19] Marco B.M. Loos et al., supra n.14.

[20] Ibid.

[21] Article 6(2) DCR.

[22] DG Justice Guidance Document concerning Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, European Commission, DG Justice (June, 2014), available at http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf.

[23] Marco B.M. Loos et al., supra n.19. ; Marco B.M. Loos & Chantal Mak, Remedies for buyers in case of contracts for the supply of digital content, Ad hoc briefing Paper for the European Parliament's Committee on Legal Affairs (Amsterdam Law School Research Paper No. 2012-71, Centre for the Study of European Contract Law Working Paper Series No. 2012-08, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2087626.

[24] Article 6(9) DCR.

consumer is bound by a distance or off- premises contract, or any corresponding offer, the trader shall provide the consumer with a set of information in a clear and comprehensible manner. The set is composed of no less than 20 pieces of information.[25] Those obligations are complemented by information requirements under Article 5 of the Electronic Commerce Directive (ECD).[26] In addition, Article 8 DCR imposes some transparency requirements to ensure that consumers are fully aware of the charges and conditions imposed by retailers and in our case also, app developers. This includes the use of plain and intelligible language, legibility and the use of a durable medium.[27] Article 8(9) makes it clear that transparency requirements under the DCR are without prejudice to the provisions on the conclusion of e-contracts and the placing of e-orders set out in Articles 9 and 11 ECD.

2.1.1 Generic information

Some information is generic and not specifically tailored to the purchase of applications or in-app purchases, although it may cause particular problems in this context.

This includes an obligation to inform the consumer on the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services.[28] For mobile applications this therefore may require some adaptation compared to other digital content that may be downloaded via websites on a computer or seen on a tablet.[29] The rules in place, even the most recent ones, were not drafted with App stores in mind.[30] Indeed, apps, mostly designed for use on mobile phone or other handheld devices, are designed for convenience and are not able to carry the same level of details. Further, app users would seldom require long descriptions of the main characteristics of the application itself. Recital 36 explains that in *'the case of distance contracts, the information requirements should be adapted to take into account the technical constraints of certain media, such as the restrictions on the number of characters on certain mobile telephone screens or the time constraint on television sales spots. In such cases the trader should comply with a minimum set of information requirements and refer the consumer to another source of information, for instance by providing a toll free telephone number or a hypertext link to a webpage of the trader where the relevant information is directly available and easily accessible.'* Article 8(4) specifies that the information to be provided includes "the main characteristics of the goods or services, the identity of the trader, the total price, the right of withdrawal, the duration of the contract and, if the contract is of indeterminate duration, the conditions for terminating the contract(…)." For applications purchased via Google play or the Apple App store, information about each app is normally available prior to purchase and includes the technical requirements of each app, the main characteristics of the app, i.e. what the app does, some screenshots of the app, other users' reviews, details about the developer, etc. Some information is available via hyperlinks, which, according to Recital 36, is acceptable.

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[25] Article 6(1) (a) to (t) DCR.

[26] Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') O.J. L178 (2000).

[27] Article 8(7) DCR.

[28] Article 6(1) (a) DCR.

[29] Those indeed have technical particularities that make them friendlier than mobile apps, see below at p.

[30] Arno R. Lodder, Information requirement overload? Assessing disclosure duties under the E-Commerce Directive, Service Directive and Consumer Directive, in Savin Andrej and Trzaskowski Jan (eds.), Research handbook on EU Internet Law (2014).

Another piece of information concerns the identity of the trader[31] and his contact details. Article 6(8) DCR states that the information requirements laid down are in addition to information requirements contained in Directive 2000/31/EC.[32] Under Article 5 ECD, the trader must also provide any registration number to trade register or equivalent as well as VAT information if applicable. The geographical address at which the trader is established and the trader's telephone number, fax number and e-mail address, where available, are also required under the DCR, to enable the consumer to contact the trader quickly and communicate with him efficiently.[33] This means that providers of apps can dispense with a number of means of communication available to consumers, even though given that apps are offered online, app providers would qualify as providers of information society services under the ECD and thus, be under an obligation to provide an email address pursuant to Article 5(1)(c) ECD.

2.1.2 Information about the price

Some of the most controversial issues to date to mar the success of applications have revolved around pricing and lack of transparency.[34] This lack of transparency experienced by consumers is anchored in the fact that the business models adopted by the app industry are still quite foreign to consumers.[35] 'Fremium', the business model that dominates games, is spreading steadily to non-game applications.[36] Fremium applications are free to download and offer some basic features to use but consumers have to pay to purchase additional features. As a result, the total price payable by the consumer may not be easily calculated other than on a transaction-to-transaction basis. Yet according to Article 6(1) DCR, this price must be "*inclusive of taxes, or where the nature of the goods/services or digital content is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges and any other costs (...)".* As a result, it is paramount that when first downloading an app the consumer is made aware of the individual pricing structures and how prices will be calculated for any in app purchases that may follow. While prices for paid apps are normally displayed on Google play or the Apple App store, prices of further purchases tend to be more difficult to identify. However, the description of the app

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[31] Article 6(1) (b) DCR.

[32] Note that Article 6(8), para 2 DCR also states that in case of conflict the DCR shall prevail.

[33] If the trader is being represented, similar requirements exist under Article 6(1)(c) and (d) DCR.

[34] Across platforms the same app may not be retailing at the same price. For example, Angry Birds was free on Google Play but costs £3.99 on Apple App Store. As consumers are more or less captive because of technological requirements, price competition is an issue in the app market, but it is beyond the remit of this chapter.

[35] In-app advertising is also developing with over 40 % of publishers surveyed using advertising on their paid app to generate further revenues. See Mobile App Advertising and Monetization Trends 2012-2017: The Economics of Free, IDC, App Annie (March, 2014), available at https://s3.amazonaws.com/files.appannie.com/reports/App_Annie_and_IDC_Mobile_App_Advertising_and_Monetization_Trends_2012-2017/App_Annie_and_IDC_Mobile_App_Advertising_and_Monetization_Trends_2012-2017.pdf. There, some obligations befall the providers under Article 6 ECD, which requires that commercial communications be clearly identified as such. Under Article 2(f) ECD, a commercial communication is defined as 'any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession'. There is no doubt that apps carrying adverts as a revenue making exercise will fall within the scope of this provision. Also see Recital 29 ECD.

[36] See Mobile App Advertising and Monetization Trends 2012-2017: The Economics of Free, IDC, supra n.35.

now normally mentions that the app offers in-app purchases and provides a price range for in-app purchases. This is for example the case for Angry Birds on Google Play, indicating that in-app products are available for €0.72 - €35.69 per item.[37] Yet, this has only been after authorities have objected to the lack of price transparency.[38] Worse, in the US litigation against Apple for example, it was clear that the way account users could accrue further charges following the download of a 'seemingly free' app was not transparent to users.[39] In this case, parents had downloaded game applications or allowed their children to do so by signing into their Apple account. A signature enabled purchases without the need to re-enter a password for a period of fifteen minutes. Unbeknown to parents and children, the app marketed as 'free' or only costing a nominal fee was subsequently enticing the purchase of game currency when playing on the app. Because of the lapse in identification, children were able to make purchases without the need for their parents to re-enter a password and thereby authorize a subsequent purchase. Similarly, 'Paidmium' models under which an application is purchased and further updates or content are paid for at a later stage will also require clear disclosures not only at the point of first purchase but also for any subsequent ones. Indeed, Article 8 (2) DCR states that if a *'distance contract to be concluded by electronic means places the consumer under an obligation to pay, the trader shall make the consumer aware in a clear and prominent manner, and directly before the consumer places his order, of the information provided for in points (a), (e), (o) and (p) of Article 6(1)'*.

Price transparency is important because under Article 6(6) DCR , if the trader has not complied with the information requirements on additional charges or other costs, the consumer shall not bear those charges or costs. Further, unless the consumer *"explicitly acknowledges that the order implies an obligation to pay (...) [he] shall not be bound by the contract or order"*.[40] Perhaps unsurprisingly therefore Apple and Google had both agreed to refund unintended charges incurred by children unbeknown to their parents.[41] Further, Article 22 DCR on additional payments states that *'before the consumer is bound by the contract or offer, the trader shall seek the express consent of the consumer to any extra payment in addition to the remuneration agreed upon for the trader's main contractual obligation. If the trader has not obtained the consumer's express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment.'* Though there may be some doubt as to what would be considered to be the trader's 'main contractual obligation' and what would therefore count as an *additional* charge in the app context,[42] the particular provision certainly joins forces with other provisions, in particular Articles 6(1) and 8(2) requiring app platforms and app sellers to ensure that any in-app purchases, and their costs, are clearly flagged up and to obtain express consent from the

[37] Screenshots on file with the authors. Consulted 23 April 2015.
[38] See below at p.
[39] Re Apple In-app purchase litigation, Northern District of California, San Jose Division, Case No. 5:11-CV-1758 EJD.
[40] Article 8(2) DCR. In addition, note that according to Article 8(7), the trader also must provide confirmation of the conclusion of the contract on a durable medium. This may include for apps purchases on a mobile phone, an email or a free text message.
[41] See below at p.
[42] Each in app-purchase for example probably constitutes a separate contract with delivery of the in-app product constituting the trader's main contractual obligation.

consumer for extra charges or risk losing any payment collected.[43]

Express consent is not defined by the Directive, and causes some concern. Article 27 DCR on inertia selling, explains that the consumer shall be exempted from the obligation to provide any consideration in cases of unsolicited supply of goods, water, gas, electricity, district heating or digital content or unsolicited provision of services, prohibited by Article 5(5) and point 29 of Annex I to Directive 2005/29/EC. In such cases, the absence of a response from the consumer following such an unsolicited supply or provision shall not constitute consent.' As a result, absence of response is not consent. Express consent therefore seems necessarily to involve a positive action, something that also arises from Article 22. The latter expressly declares that implied consent that is inferred from pre-checked boxes for example, that the consumer needs to reject to avoid the charge, does not constitute valid consent for the purposes of the provision. It would follow that signing in with a password to authorize each purchase on Apple App store can be equated to express (and valid) consent. A signature that is only required every 15 minutes does not seem to fulfill this requirement and it may also constitute an unfair commercial practice violating the UCPD.[44]

2.1.3 Information specific to digital content

A survey of businesses revealed that the industry already pays attention to the more advanced and technological aspects of consumer information for digital products, i.e. functionality, interoperability and option for in-app purchases. Those information items are specific to digital products.[45] Our own anecdotal research on this aspect found that interoperability and functionality were by and large present on the description of the apps consulted on both Apple App Store and Google Play. Article 6(1)(r) DCR states that where applicable, the functionality, including applicable technical protection measures, of digital content needs to be disclosed to consumers. This may be useful information if for example the use of an app is limited to a number of devices. But Recital 19 clarifies that "The notion of functionality should refer to the ways in which digital content can be used, for instance *for the tracking of consumer behavior (…)*".[46] The way apps collect personal data, often without user's consent, is a heated topic troubling commentators[47] and enforcers alike. By virtue of Article 6(1)(r), the consumer should

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[43] DG Justice Guidance Document concerning Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, European Commission, DG Justice (June, 2014), available at http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf.

[44] See below at p.

[45] Consumer information in the digital online market - a behavioral approach, European Parliament (2011), available at http://www.europarl.europa.eu/document/activities/cont/201108/20110825ATT25258/20110825ATT25258EN.pdf. The survey concerned businesses dealing in computer software, mobile and tablet applications, in-app purchasing inside another software or application and online products useable on a website without installation of software.

[46] Emphasis added.

[47] Jennifer Betts et al., Same Issues, New Devices: Is Smartphone App Privacy Groundhog Day for Regulators? (June 4, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2351189; Cheung ASY, Location Privacy: The challenges of mobile service devices, Computer Law & Security Review Vol. 30 No.1 (2014), available at http://hub.hku.hk/bitstream/10722/194700/1/Content.pdf?accept=1; Timothy J. Van Hal, Taming the Golden

clearly be made aware of any privacy-sensitive feature beforehand or risk falling short of the requirements of the DCR but also fail to comply with the UCDP as we will explore shortly.

In addition, Article 6(1)(s) also requires information on any relevant interoperability of digital content with hardware and software that the trader is aware of, or can reasonably be expected to have been aware of. The reason for this requirement is that it is important for the consumer to be aware of technical incompatibilities. By and large, the way the app market has organized itself reduces any interoperability issues, although it may create competition issues. Google Play is mostly servicing Android platforms and the Apple App Store is the primary source for iphones, ipads and other handheld and wrist-held devices of the same brand. However, problems may subsist because the language adopted to describe interoperability may be of little use for certain categories of consumers who are not particularly tech savvy.

2.2 Right of withdrawal and information in the context of app purchases

The aim of a right to withdraw is to 'put the consumer in a position which makes it more likely that his consent will be free, well considered and informed'[48] in situations where the consumer is faced with information asymmetry. In the context of app purchases, there are a few points at which withdrawal may need to be available: the point at which an app is purchased and the points at which in-app content or a subscription to the app is purchased. Under Article 6(1) a number of pieces of information regarding the right to withdraw need to be communicated to the consumers prior to the initial purchase.[49]

Regarding digital content not supplied on a tangible medium, Article 16 (m) normally bars withdrawal, providing that the performance has begun with the consumer's prior express consent and his acknowledgment that he thereby loses his right of withdrawal. Article 6(1)(k) requires that the consumer receive the information that he/she will *'not benefit from a right of withdrawal or, where applicable, the circumstances under which the consumer loses his right of withdrawal.'* The art is therefore in informing the consumer in such a way that express consent and acknowledgement that the right of withdrawal is lost, is collected by the supplier. Express consent, we have seen is not defined. Another requirement here is to seek acknowledgment from the consumer that he/ she losses the right to withdraw. Presumably this can be done at the point of purchase for paid apps and for freemium apps at the point where the consumer contracts for the purchase of additional features.

The issue however is not as straight-forward as one may think. Some apps (often free) enable the purchase of in-game tokens or currency or any other gimmicks. Others sell membership packages. It is unclear if such in-app purchases and/or memberships are service contracts or would qualify as digital content. For service contracts, a right to withdraw exists and is only lost

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Goose: Private Companies, Consumer Geolocation Data, and the Need for a Class Action Regime for Privacy Protection, 15 Vanderbilt Journal of Entertainment & Technology 713 (2013), available at http://www.jetlaw.org/wp-content/uploads/2013/03/VanHal.pdf.

[48] Peter Rott & Evelyne Terryn, Right of withdrawal and standard terms, in Hans-W Micklitz et al. (eds), Cases, Materials and Text on Consumer Law (2010).

[49] Article 6(1) (h) to (k) DCR.

after service provision has been completed.[50] The distinction is therefore important.

Under Article 9(2)(a) DCR, the 14-day period runs from the day of the conclusion of the contract for service contracts. Article 9(3) explains that the parties will be able to perform their contractual obligations during this period and payment can also be collected for the service.[51] However, to proceed in those contracts, the consumer will need to give his prior express consent, together with the acknowledgement that he will lose his right of withdrawal once the contract has been fully performed.[52] Article 2(6) defines service contracts as 'any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof'.[53] Recital 50 states that a consumer should always benefit from the right to withdraw, even in cases where he has asked for the provision of services before the end of the withdrawal period. Under Article 16(a) DCR the consumer loses his right to withdraw if the service has been fully performed, but only if the performance had begun with the 'consumer's prior express consent and with the acknowledgment that he will lose the right of withdrawal once the contract has been fully performed by the trader'. When the consumer exercises his right of withdrawal, the DCR enables the trader to recover a proportionate amount calculated on the basis of the price agreed between the parties.[54] For monthly membership this may be that a full month's notice is due after which the right to withdraw kicks in. By contrast, if the membership is considered digital content, once the app is downloaded, the consumer loses any right to withdraw and may well be locked in that membership, unless the information was not adequately provided or the consumer did not gives its express consent and acknowledged the loss of the right to withdraw.

Further, in particular cases, the consumer shall bear no cost for performance of a service or supply of digital content under Article 14 DCR. The way in which the consumer avoids costs, however, does vary depending on the classification of the contract. Article 14(4)(a) DCR indicates that the consumer shall bear no cost for the performance of services in full or in part, during the withdrawal period where (i) the trader failed to provide information in accordance with points (h) or (j) of Article 6(1) [namely concerning the conditions, time limits and procedure for exercising the right to withdraw as well as the fact that the consumer will be required to pay reasonable costs to withdraw if he made an express request for the performance of the service to begin during the withdrawal period]; or (ii) the consumer has not expressly requested performance to begin during the withdrawal period. This is unless the consumer can demonstrate that the total price is in itself disproportionate, in which case, the amount to be paid is calculated on the basis of market value according to Recital 50 DCR. The conditions are different when it comes to avoiding paying costs for digital purchases. Under Article 14(4)(b) DCR: 'The consumer shall bear no cost for: … (b) the supply, in full or in part, of digital content which is not supplied on a tangible medium where:(i) the consumer has not given his prior express consent to the beginning of the performance before the end of the 14-day period (…); (ii) the consumer has not acknowledged that he loses his right of withdrawal when giving his

[50] Article 16(a), DCR.
[51] This rule is an extension of Article 6(3) DSD which barred withdrawal for services if performance had begun, with the consumer's agreement, before the end of the seven-day period.
[52] Article 16(a) DCR on exemptions from the right of withdrawal.
[53] Article 2(6) DCR.
[54] Article 14(3) DCR.

consent; or (iii) the trader has failed to provide confirmation in accordance with (…) Article 8(7) [namely confirmation on a durable medium of the required information as well as confirmation of the consumer's prior express consent and acknowledgement].

What seems more appropriate, to better protect consumers is to consider in-app purchases as well as memberships as a service contract. The advantage is that the consumer will be free to withdraw at any stage, even if some in-game currency or in-app purchase had been partly used. However, this is an interpretation that has not yet been tested in court and regarding which much uncertainty exist.[55]

3. Applying the UCPD in the app world

Directive 2005/29/EC on Unfair Commercial Practices Directive (UCPD)[56] prohibits any unfair commercial practices. Commercial practices are defined as "(…) any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers".[57] The Directive includes a black list of thirty-one commercial practices (contained in the Annex) that are unfair and prohibited under all circumstances. It also defines three categories of practices that are subject to a 'fairness' test. Those include unfair commercial practices that mislead consumers either by action[58] or omission.[59] The Directive also prohibits aggressive practices.[60] Those practices are unfair if they are restricting user freedom of choice through coercion, harassment or undue influence and result or are likely to result in a consumer making a transactional decision he would not have otherwise taken.[61] Finally, a general fairness clause ensures that commercial practices that are neither misleading nor aggressive and are not included in the black list either,

[55] The Commission Guidance does not clear the uncertainty. Though it treats subscriptions to online services such as online newspapers as service contracts, it seems to regard app-related subscriptions and purchases included as a built-in feature of other digital content such as apps as contracts for digital content, see European Commission, supra n.43 at pp.6-7, 64-65. However, at least in relation to purchases of in-game currency, that would not seem to be a correct approach. See also Christiana Markou, Online penny auctions and the protection of the consumer under EU law, Computer Law & Security Review Vol. 30 No. 5 (October, 2014), available at http://www.sciencedirect.com/science/article/pii/S0267364914001290.

[56] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') O.J. L 149/22 (2005).

[57] Article 2(d), UCPD.

[58] Article 6, UCPD. (false or inaccurate information)

[59] Article 7, UCPD. (non-provision of information that the consumer needs to make a decision

[60] Articles 5(1) and 5(4)(b), UCPD.

[61] Article 8, UCPD.

can still be deemed unfair if they are contrary to professional diligence and are likely to result in a consumer decision that would not otherwise have taken.[62]

To fall within the scope of the UCPD, a 'transactional decision' is therefore required. A transactional decision is, amongst others, a decision to purchase or make payment.[63] The European Commission and the UK OFT favours a broad interpretation and therefore "(…) A commercial practice may be considered unfair not only if it is likely to cause the average consumer to purchase or not to purchase a product but also if it is likely to cause the consumer to enter a shop (…)."[64] Therefore, the commercial practices discussed (chiefly advertising) performed within an app and aimed at convincing consumers to purchase an in-app product can lead to a transactional decision, thereby satisfying the relevant requirement. By the same token, the same is true even where the commercial practice aims at 'pushing' consumers to use a free app, which does not (initially) involve any purchase or payment as it seems akin to consumers entering a shop.

There are three main situations where fairness is questionable in the app world. They are linked to the type of advertising the app developer or app-providing platform engages with. We will review issues of fairness linked with (i) the use of apps as third party advertising media, (ii) apps as products themselves and thus, as the subject matter of advertising, and (iii) apps as advertising media for their own in-app products.

3.1 Apps as a third party advertising media

On websites, network advertising agencies often provide adverts paid by interested advertisers. Apps can serve as such 'advertising-homes' too. Much of this advertising is behavioural advertising. It raises many objections and legal issues mainly relating to privacy, thus engaging data protection and privacy legislation.[65] To a lesser extent, it also raises consumer protection issues, falling under both the ECD[66] and the UCPD.[67] Those are not new issues, and they have been aptly explored elsewhere[68] However, while this chapter will not revisit behavioural advertising as a topic, it points to certain characteristics of the app environment that increase the risks faced by consumers subject to such advertising. App-based behavioural advertising essentially emulates network advertising on the web. This activity is led by organizations such as

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[62] Article 5(2), UCPD.
[63] See supra at p.
[64] European Commission, The meaning of transactional decision, https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.guidance.showArticle&elemID=14 (last visited April 17, 2015).
[65] In particular, the 95/46/EC Data protection Directive and the 2002/58/EC e-Privacy Directive.
[66] Article 6 ECD.
[67] The argument implicating the UCPD revolves around whether a failure to disclose the behavioural nature of the advert can cause a consumer transactional decision that would not otherwise have taken, thus constituting a misleading omission under Article 7(1) UCPD, see below at p.
[68] See for example, Christine Riefa & Christiana Markou, Online Marketing: Advertisers Know You are a Dog on the Internet, in Savin Andrej & Trzaskowski Jan (eds.), Research handbook on EU Internet Law (2014) pp.398-401.

RevMob[69] and of course, Google which has developed app-specific advertising solutions such as AdMob to respond to and monetize this new advertising medium.[70] Because of app-based behavioural advertising, apps seemingly know that you are a user from a particular country, know what your personal preferences may be, and much more. Google admits to be serving 'interest based ads' on apps belonging to the Google Display Network selected on the basis of information such as user browsing habits and app usage activity.[71]

3.1.1The impact of apps' technological characteristics on the effectiveness (and dangers) of behavioural advertising

The size of the screens of smart phones and tablets is a first aggravating factors concerning the impact of behavioural advertising in apps. Unlike the web, which is still very often accessed through personal computers with a screen of 11 to 17 inches (or larger), apps have to be accessed through mobile devices having a (much) smaller screen. As a result, the impact of adverts is much greater than during web browsing. Behavioural adverts can be missed while browsing a web page because they intermingle with other web content that claims the user's attention. By contrast, in an app, they are given a central place because they are bound to occupy a significantly larger part of the devices' display. Especially when a smart phone is used, the behavioural advert takes the full width of the screen and the user can only view other content if she scrolls up or down to the advert. In this respect, app-related behavioural advertising can be much more effective than its web-based counterpart. Consequently, the individual autonomy of the consumer is more at risk than it was in a web setting.[72]

In addition to monopolizing attention, app-based behavioural adverts can also be served to users even when they are offline, unlike *web*-based ads, which are only shown and seen when the user is connected to the Internet. The fact that the ad can be seen without an internet connection being available creates problems, because the user seeing the ad will be unable to use the 'i' icon[73] if it is available, and receive information about the commercial nature of this advert. Article 6 ECD requires that online advertising is clearly identifiable as such and Article 7(2) requires disclosure of the commercial intent of the commercial practice.[74] Compliance with these requirements is particularly important in the app context, where adverts may not always be readily distinguishable from app content. Further, if the non-disclosure of the behavioural nature of the advert is likely to affect consumer decision-making, the non-functional 'i' icon may also engage

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[69] See REVMOB, https://www.revmobmobileadnetwork.com/ (last visited April 17, 2015).
[70] Mobile Ads, Think with Google, https://www.thinkwithgoogle.com/products/mobile-ads.html (last visited April, 2015); Monetize your apps intelligently, AdMob, https://www.google.com/admob/index.html (last visited April 2015).
[71] This can be seen by clicking on the 'i' icon that is attached on each advert. For more on this icon, see below at p.
[72] Riefa and Markou, supra n.68.
[73] This is because the 'i' icon typically leads users to a web page containing the relevant information which requires an Internet connection to work.
[74] On this provision, see also below at p.

Article 7(1) UCPD on misleading omissions.[75] The fact that the advert is seen more prominently on a mobile device may increase the likelihood of a practice affecting the way the consumer makes a decision, as the consumer cannot avoid or ignore it. The use of the 'i' icon to inform consumers was the result of a self-regulatory initiative taken in response to concerns expressed in relation to behavioural advertising. It can be an efficient method of compliance with the law, but only if it is fully functional.[76] Thus, unless app-developers make sure that offline cached adverts are accompanied by relevant information, which is similarly accessible offline, such behavioural adverts can potentially fall foul of the EU legislation currently in place.

The dangers of the 'gamification' of apps for children and other target groups

Another issue concerns the fact that the line between content addressed to adults and content that is addressed (or may be appealing) to children is much less bright in the app environment than it is on the web. Apps are accessed through mobile devices that invariably incorporate touch screen technology. Touch screens and the way they respond to mere touches are likely to appeal to children more than keyboards and mouse clicks. Indeed, research suggests that "children's initial reaction to touch screen devices is characterized by fascination and immediate engagement (…)".[77] "Touch screen technology and accompanying digital Apps offer an accessible and meaningful media platform for children as young as two years of age".[78] Websites now go mobile, thereby becoming accessible via touch screens too. Yet experts confirm that when it comes to interactivity with users, apps score much higher than the mobile web.[79] This high level of interactivity is bound to appeal to children who naturally tend to be discouraged by the need to put effort on tasks and are more likely to get excited with the effortless and lively reactions of apps. Moreover, unlike mobile websites, which can only be accessed after the relevant URL is typed in the address bar of the browser, apps stored on a mobile device are readily accessible through a touch on the colourful and child-friendly app icons. In addition, there is a danger that game apps in particular are likely to appeal to children even when they are not addressed to them. The ease of access, high interactivity, bright and colourful graphics, the 'smart' sounds and more generally, the playful appearance that even games addressed to grown-ups often have are likely to be attractive to children. As Chester puts it, there are apps that "look child-friendly but are

[75] Online Targeting of Advertising and Prices, Office of Fair Trading 62 (May, 2011) available at http://webarchive.nationalarchives.gov.uk/20140402142426/http:/www.oft.gov.uk/shared_oft/business_leaflets/659703/OFT1231.pdf.
[76] For more on the issue, see Christine Riefa & Christiana Markou, supra n.68 at p.409.
[77] Michael Cohen Group LLC, Young Children, Apps & iPad (2012) available at http://mcgrc.com/wp-content/uploads/2012/06/ipad-study-cover-page-report-mcg-info_new-online.pdf.
[78] Ibid.
[79] Jason Summerfield, Mobile Website vs. Mobile Apps (Application): Which is Best for Your Organization?, http://www.hswsolutions.com/services/mobile-web-development/mobile-website-vs-apps/ (last visited April 17, 2015).

actually anything but"[80] or "are far more adult-like than they appear".[81] Even non-game apps can have a playful appearance or features. Indeed, 'gamification' is an acknowledged technique for improving user interaction and loyalty and successfully pursuing commercial goals for all type of apps even business ones.[82] A list of examples of gamification includes websites that would never be thought to be child-friendly and include the US army app.[83]

As a result, serving the appropriate targeted advert in apps is a challenging task that may not always be performed successfully. The Guardian uncovered that some adverts promoting cash loans were appearing on Talking Friends apps.[84] Those are primarily addressed to children. The featured advertiser did not know this had been the case and immediately agreed that its adverts should not appear within apps addressed to persons below the age of 18 when alerted. Behavioural advertising is not equivalent to contextual advertising because the content of the advert is not decided merely by reference to the context within which the adverts appear but on the interests, prior activity and other apps on the mobile device of the user. Thus, an app-network advertising system will serve adverts relevant to the variety of interests of the main user (and most probably) owner of the mobile device even, when it is his child who uses the device. In effect, not just loans but also dating, gambling and even adult content can be advertised to that child, something which is not merely morally wrong but may also entail serious legal issues as the advertising of gambling to children for example, is often a criminal offence.[85] What is more, the standard by which the fairness and hence, legal acceptability of any advert (even one of non-controversial subject-matter) is assessed under the UCPD is stricter when the advert is addressed or can be received by children.[86]

Admittedly, the same issues apply also in the context of web-based behavioural advertising: the advertising system does not know if it is a child that browses the internet at a given time. Yet, given the special characteristics of apps just explained, it seems much more difficult to ensure a law-abiding advertising system in the app-based environment. The exclusion of controversial adverts or total exclusion of adverts on game apps appear too drastic in a domain which is primarily financed through advertising and in any event, the relevant solutions could not furnish advertisers and/or network advertising agencies with a fully effective shield against the possibility of inappropriately dealing with children and facing legal sanctions. Indeed, recall that

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[80] Parents warned: Smash Dude app one of many unsuitable apps available to children, News.co.au, May 19, 2103, http://www.news.com.au/technology/home-entertainment/parents-warned-smash-dude-app-one-of-many-unsuitable-apps-available-to-children/story-fn81y8rt-1226645800352 (last visited April 17, 2015).
[81] Ibid.
[82] William J. Francis, Gamify your apps to increase user interaction and build loyalty, TechRepublic, April 9, 2014, http://www.techrepublic.com/article/gamification-is-a-great-way-to-build-sticky-apps/ (last visited April 17, 2015).
[83] Robert Stanley, Top 25 Best Examples of Gamification in Business, Clickipedia, March 24, 2014, http://blogs.clicksoftware.com/clickipedia/top-25-best-examples-of-gamification-in-business/ (last visited April 2015).
[84] The official talking friends shop, http://talkingfriends.com/ (last visited April 17, 2015).
[85] See for example, Section 46 of UK Gambling Act 2005.
[86] For more on this issue, see below at p.

apps not intended for children may, due to "gamification", appeal to them. The app provider, who knows his app best, ought to filter the adverts to be shown within its app, using relevant filtering tools, some of which are often provided by app-based advertising providers.[87] Of course, to be able to perform such filtering effectively, app providers would need some guidance regarding the practical ramifications of the UCPD's fairness test. In this respect the Principles developed by the UK OFT[88] and other similar initiatives that we will explore shortly can prove very useful.

3.2 Apps as a product and subject-matter of advertising

Primarily apps are consumer products. An important challenge for app developers and/or providers is to ensure that their app finds its way onto consumers' devices. Understandably, no matter how an app intends to generate revenue, be it from behavioural advertising, a download fee or in-app purchases, it will not succeed if users are not convinced to download it in the first place. Advertising and promoting the app seems therefore a prerequisite to its success. In this context, the advertising medium for the app is primarily the app-providing platform, such as the App Store or Google Play. On those platforms, consumers can search for apps, read about the ones they are interested in and decide whether to hit download.

3.2.1 Curbing the excesses of 'freemium' models

Much controversy surrounds free apps that are in fact simply a platform for in-app purchases, the cost of which is not always transparent to users.[89] More worryingly, apps may also collect personal data and construct individual profiles that will be monetized by serving behavioural adverts or by being sold to third parties. Studies conducted by data protection authorities and privacy watchdogs in Europe (and beyond) have shown that most apps collect a striking amount of user personal data while only a small fraction of them offers users clear and comprehensive information about the relevant data collection and usage prior to such data being communicated by the user.[90] The French Data Protection Authority speaks of "massive amounts of points of

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[87] About ad filters, AdMob Help, https://support.google.com/admob/answer/3150235 (last visited April 17, 2015); About the ad review centre, AdMob Help, https://support.google.com/admob/answer/3480906 (last visited April 17, 2015).

[88] These are discussed in detail below at pp.

[89] This is an issue we have discussed in the context of the DCR, see supra at p.

[90] Lucian Constantin, Data Protection Authorities find Privacy Lapses in Majority of Mobile Apps, InfoWorld, Sep. 12, 2014, http://www.infoworld.com/article/2682555/internet-privacy/data-protection-authorities-find-privacy-lapses-in-majority-of-mobile-apps.html (last visited April 17, 2015), Results of the 2014 Global Privacy Enforcement Network Sweep, Office of the Privac Commissioner of Canada, Sep. 10, 2014, https://www.priv.gc.ca/media/nr-c/2014/bg_140910_e.asp (last visited April 17, 2015), Results of the 2014 GPEN Privacy Sweep, Global Trends and Examples, available at https://www.dataprotection.ie/docimages/GPEN_Summary_Global_Results_2014.pdf.

access to personal data that are invisible to users"[91] and of the "app in exchange of personal data" deal not being "made out in the open".[92]

Alternatively, the supposedly free app may be only partially free. For example, the consumer may have to pay to 'unlock' most of the stages of a game or must perform certain in-app purchases, thereby acquiring certain tools or content, which are vital to the consumer being able to enjoy or successfully play/complete the game or simply use the app. This freemium model is unsurprisingly very popular in the app world, most probably because it greatly assists app developers in overcoming the very first hurdle of getting onto the device of the consumer. Yet this model has its detractors because "the goal is instead to create a game that's compelling initially but frustratingly slow and obstacle-strewn later on, so that player is encouraged to spend real-world cash to skip ahead. Balance, a finely graded difficulty curve, a pleasurable and satisfying user experience – none of this is considered at all".[93]

As much as one can understand the need for app developers to devise ways in which their app can produce revenue, the freemium model is liable to disappointing consumers. Those who have downloaded an app may eventually see their expectation of a free game frustrated. Under such circumstances, the initial consumer decision to download would have been different had the consumer known of the need to pay in order to enjoy the game. Indeed, Torres explains that the freemium system is creating "a bad reputation around games offering in-app purchases, with non-paying users leaving the game as soon as they noticed it's not really free".[94] Of course, there may be ways in which freemium apps can offer enough free features to keep non-paying users content, while making available to paying users "certain advantages assisting them in winning."[95] In any case, the user must be sufficiently informed in advance so that he knows the basic characteristics of the app he/she is about to download and the real (and full) cost of the app. This is because, under Article 7(5) UCPD, not disclosing the information required under the DCR[96] amounts to an unfair omission for it is a failure to disclose material information that a consumer needs. It may also constitute an unfair commercial practice pursuant to other provisions of the UCPD as we will now explain.

3.2.2 Free means free

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[91] Mobilitics, Season 2: Smartphones and Their Apps under the Microscope, CNIL, January 27, 2015, http://www.cnil.fr/english/news-and-events/news/article/mobilitics-season-2-smartphones-and-their-apps-under-the-microscope/ (last visited April 17, 2015).

[92] Ibid.

[93] David Price, Freemium is the worst thing in the history of gaming: a rant, Macworld, October 17, 2013, http://www.macworld.co.uk/news/apple/freemium-worst-thing-history-gaming-rant-3474199/ (last visited April 17, 2015).

[94] Magda Alexandra Torres, App Monetization Stats: Paid vs Freemium vs Paymium, Buildblog, December 18, 2014, http://thinkapps.com/blog/post-launch/paid-vs-freemium-app-monetization-statistics/ (last visited April 17, 2015).

[95] Vineet Kumar, Making "Freemium" Work, Harvard Business Review, May, 2014, https://hbr.org/2014/05/making-freemium-work (last visited April 17, 2015).

[96] See supra at p.

In December 2013, national consumer protection authorities[97] adopted a common legal position[98] identifying, as a first issue associated with app promotion, the misleading use of the word free.[99] The common position explained, "the use of the word "free" (or similar unequivocal terms) as such, and without any appropriate qualifications, should only be allowed for games which are indeed free in their entirety, or in other words which contain no possibility of making in-app purchases, not even on an optional basis".[100] The common position points to paragraph 20 of the black list of the UCPD. Under this paragraph, "describing a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item" is unfair under all circumstances and thus a prohibited commercial practice. This practice could also be considered unfair under Article 6(1)(b), which refers to false or inaccurate information on the main characteristics of the product and Article 6(1)(d) and Article 7(4)(c) UCPD, which refer to price or the manner in which it is calculated.

The OFT developed a set of Principles for online and app-based games clarifying "the OFT's view of the online and app-based games industry's obligations under consumer protection law".[101] The very first Principle refers to pricing. According to the OFT, the costs of the app should specify not only the initial cost of downloading the game, if any but also "any subsequent costs that are unavoidable if the consumer wishes to continue playing the game" as well as "optional extra costs, including in-game purchases".[102] Interestingly, the common legal position was communicated to Apple and Google. They have both proposed to change their relevant practices to align them with the law. It seems that the relevant national authorities have expressed some reservations with the proposal of Apple to add the text 'in-app' purchases next to the word 'free' repeating that the particular term is only permissible where in-app purchases are purely optional.[103] They appeared much more content with Google's practice that removed the word 'free' in relation to apps that contain in-app purchases and its willingness to display the

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[97] These are the authorities established under Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation)Text with EEA relevance OJ L 364, 9.12.2004, p. 1–11

[98] Common Position of national authorities within the CPC, available at http://ec.europa.eu/consumers/enforcement/docs/common_position_on_online_games_en.pdf.

[99] Ibid at p.1.

[100] Ibid.

[101] The OFT's Principles for online and app-based games, Office of Fair Trading 1519, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288360/oft1519.pdf.

[102] Ibid at p.3.

[103] Common position of national authorities within the CPC Network Assessment of proposals made by Apple, Google and relevant trade associations regarding in-app purchases in online games, available at http://ec.europa.eu/consumers/enforcement/cross-border_enforcement_cooperation/docs/20140718_in-app_cpc_common-position_en.pdf.

price range (from minimum to maximum) of all the in-app purchases offered by a game app.[104] According to them, these said practices would comply with the UCPD and also the DCR.[105]

3.2.3 Controlling the monetization of personal data collected by apps

The financing of a free-to-download app through the collection of user personal data, though primarily being considered a 'privacy' issue,[106] may also give rise to the use of the UCPD. More specifically, according to Article 7(2) UCPD, it may be a misleading omission and therefore, an unfair commercial practice if there is a failure "to identify the commercial intent of the commercial practice if not already apparent from the context (…)." Referring to the corresponding provision in the Consumer Protection from Unfair Trading Regulations,[107] namely Regulation 6(1)(d), the OFT expressed the opinion that "that provision may be relevant where a consumer's personal data are obtained by a business, for example, for marketing or research purposes, but this commercial intent is not clearly disclosed to the consumer".[108] When a game can be downloaded and played without the user having to incur any cost, the commercial intent hidden in the clandestine personal data collection cannot be considered 'apparent from the context' and should, thus, clearly be stated to users.

More generally, according to Article 7(1) UCPD, it is a misleading omission to omit material information that the consumer may need to form a decision. According to the OFT, 'material information' is likely to include whether the game includes advertising either of the trader's own or of those of third parties.[109] Information of this kind is often provided within the privacy policy of the app or the terms and conditions. However, those are often long and technical and it is therefore questionable whether the relevant practice would pass the hurdle of Article 7(2) UCPD, according to which it is a misleading omission if material information is hidden or provided "in an unclear, unintelligible, ambiguous or untimely manner".

3.3 Apps as advertising mediums for their own in-app products

Some of the practices employed by 'Freemium' app developers and/or providers are objectionable. In the US, Google and Apple had to refund millions of dollars spent by children

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[104] Ibid at p.4.
[105] Ibid. On the relevant issue by reference to the DCR, see above at p.
[106] See for example, Daithi Mac Sithigh, App Law Within: Rights and Regulation in the Smartphone Age (Edinburgh School of Law Research Paper No. 2012/22, International Journal of Law and Information Technology, 21(2), 2013) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2158143; IEEE xplore Digital Library, http://ieeexplore.ieee.org/xpl/articleDetails.jsp?arnumber=6893479 (last visited April 17, 2015).
[107] The Consumer Protection from Unfair Trading Regulations (SI 2008/1277).
[108] Children's Online Games report and consultation, Office of Fair Trading 1056, available at https://assets.digital.cabinet-office.gov.uk/media/53330c4de5274a5660000005/oft1506.pdf.
[109] Supra n.101 at p.6.

on in-app purchases, due to the fact that completing transactions was "too easy".[110] Consent to in-app payments is essentially a contractual issue that attracts the application of the DCR, but failure to provide adequate information and using techniques 'vitiating' the consumer's consent also fall under the remit of the UCPD. Further, in-app advertising to children is also of great concern under the prism of the UCPD and it seems that the same is true of US consumer laws.[111]

In-app payments need to be expressly authorized by the consumer

Apple and Google[112] were storing passwords for 15 and 30 minutes respectively following the making of an in-app purchase. That meant that during this time in-app purchases could be made very easily without any need for a password.[113] The 2013 common position, adopted by national consumer protection authorities[114] states that this practice may constitute an unfair commercial practice, specifically a misleading omission pursuant to Article 7(4)(d) of the UCPD. This provision requires that a commercial practice must state "the arrangements for payment (…) if they depart from the requirements of professional diligence". Pursuant to Article 7(2)[115] it must do so, clearly and in a timely manner.[116] That would require that users have the choice to instruct the system to request a password for each and every purchase. Equally, the consumer ought to choose to have its password activated without the need for re-entry. This should never be a default setting as it used to be.[117] The practice by which a password entered once opens a 'window" during which the consumer can make in-app purchases without having to revalidate is also against Principle 8 of the OFT and runs counter to the CDR as well. Indeed, Article 6(1)(g) DCR also requires that information on the arrangements for payment be provided to consumers before contract conclusion.[118] The national consumer protection authorities participating in the

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[110] Google to Refund Consumers at Least $19 Million to Settle FTC Complaint It Unlawfully Billed Parents for Children's Unauthorized In-App Charges, Federal Trade Commission, September 4, 2014, https://www.ftc.gov/news-events/press-releases/2014/09/google-refund-consumers-least-19-million-settle-ftc-complaint-it (last visited April 17, 2015); Sam Frizell, Apple will Refund Parents whose Kids Splurged on Apps, TimeBusiness, January 15, 2014, http://business.time.com/2014/01/15/apple-will-refund-parents-whose-kids-splurged-on-apps/ (last visited April 17, 2015); How to: Get a Refund From Google Play for In-App Purchases Your Kids Made Without Your Permission, Richontech, December 17, 2014, http://www.richdemuro.com/home/2014/12/17/how-to-get-a-refund-from-google-play-for-in-app-purchases-your-kids-made-without-your-permission (last visited April 17, 2015). There has also been a US class action filed against Google in July 2014, see Ilana Imber-Gluck, On Behalf of Herself and all Others Similarly Situated v. Google, Inc., a Delaware Corporation, Case5:14-cv-01070-PSG, https://www.documentcloud.org/documents/1070126-class-action-against-google-over-in-app-purchases.html (last visited April 17, 2015).

[111] Federal Register Vol. 79 No. 15 (January 23, 2014), available at https://www.ftc.gov/sites/default/files/documents/federal_register_notices/2014/01/140123appleanalysisfrn.pdf.

[112] See common position, supra n.98.

[113] See also above at p.

[114] Supra n.112 at pp.2-3.

[115] See supra at p.

[116] Supra n.112 at pp.2-3.

[117] Supra n.112 pp.2-3 and supra n.103 at pp.2-3, 5.

[118] See supra at p. See also Annexe to the OFT' s Principles for online and app-based games: relevant legislative provisions, Office of Fair Trading 1519a, available at

common position expressed regret that unlike Google, Apple had not committed to make any significant changes to its relevant settings,[119] though in March 2014, the new apple software was displaying a relevant warning also offering users the possibility to remove the 'purchase window'.[120]

In-app purchases made by children

The main issue with freemium models and games in particular is that they "(…) are highly addictive, designed deliberately so, and tend to compel children playing them to purchase large quantities of Game Currency, amounting to as much as $100 per purchase or more".[121] Aside from potential issues concerning the ability of children to enter into valid contracts, 'addictive features' raise the question of the fairness of the commercial practice. The UCPD addresses those issues quite powerfully. The relevant provisions have inspired the OFT's Principles 4-7 which refer to examples of practices that:

(i) mislead consumers for example, by 'blending' paid in-app promotion together with gameplay or obscuring the option of acquiring the same benefit (eg. a life) by waiting, instead of paying and,

(ii) are aggressive to children, for example by giving them the impression that the well-being of a game character relies on them[122] or by expressly calling them to make a purchase, in particular through the use of words such as Buy More Now.[123]

The OFT clarified, that misleading practices engage a number of provisions, namely, "Art 6 (prohibition on unfair misleading actions), Art 5(4)(a) and 7 (prohibition on unfair misleading omissions) and in particular Art 7(2) (failure to identify commercial intent of commercial practice)".[124] According to Article 6(1) UCPD, a practice can be misleading if "(…) in any way, *including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct*".[125] As a result, intermingling paid-app content promotion and game may be misleading even if no false information is provided. The information may be there and correct, but because it is not clear, it may result in misleading the consumer. A fortiori, a practice, which hides material information, is prohibited. This is for example the case in game

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288361/oft1519a.pdf. (where the OFT has compiled a table with all legal provisions engaged in relation to the provision of apps to consumers though it refers to the relevant UK transposition measures rather than the European Directives as such).

[119] Supra n.103 at pp.2-3, 5

[120] Lance Whitney, i0S 7.1 warns you about in-app purchase window, CNET, March 12, 2014, http://www.cnet.com/news/ios-7-1-warns-you-about-in-app-purchase-window/ (last visited April 17, 2015).

[121] See supra 41 at paragraph 43.

[122] The OFT uses the example of in-app promotion text that states the following: "You seagull is hungry! Feed him ice cream or he will be unhappy", see supra n.33 at p.13.

[123] Supra n.33 at pp.10-16.

[124] OFT, supra n.49 at p.2.

[125] Emphasis added.

apps where the option to wait for a while instead of paying to continue play can amount to a misleading omission controlled by the operation of Article 7(2) UCPD.

When children are the target of the commercial practice, the 'fairness' test of the UCPD is stricter in that whether a practice is likely to cause a consumer to take a transactional decision[126] should be judged by reference to the average child and not consumer in general. Article 5(3) expressly states that "*Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group*". Recital 18 expressly refers to children as one such clearly identifiable group of consumers. As a result, (in-app) advertising may be considered misleading (and thus unfair) if it can mislead a child whom it is likely to reach, even if it could not mislead an adult. That is so, if the app developer could have foreseen its use by children. The same holds true of aggressive practices discussed below. The real problem for app developers is that, as already explained[127] it is not always easy to distinguish between content that may be appealing to children and content that is highly unlikely to be used by them.

A number of practices can be also considered aggressive and are prohibited. One such practice is described at Paragraph 28 of Annex I. This paragraph states that "including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them (…)" is, under all circumstances, unfair and thus, prohibited.[128] Direct exhortations are thus prohibited out right.

More generally, according to Article 8 UCPD, "A commercial practice shall be regarded as aggressive if (…) by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise". 'Undue influence' refers to "(…) exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision".[129] Representing a game character as suffering or being unhappy as in the example offered by the OFT[130] would therefore seem to qualify as undue influence especially given that (young) children are inexperienced and/or naïve and are thus more vulnerable to pressure.

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[126] This notion is defined in Article 2(e) UCPD, see also supra at p.
[127] Supra at p.
[128] On in-app direct exhortations to children, see also supra n.98 at p.2 and supra n.103 at pp.2, 4.
[129] Article 2(j), UCPD.
[130] See supra n.123.

Another situation giving rise to unfair commercial practices includes "the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product" (Article 9(c) UCPD). Some experts believe that app gaming may class as an addiction.[131] Game addiction could qualify as one such 'specific circumstance' especially given that addictions are scientifically recognized as impairing decision-making.[132] However this is not an issue that has yet been decided by courts in the EU and much controversy still exists surrounding the notion of addiction and its impact.[133] Nevertheless, if not addiction, at least some levels of "engineered compulsion"[134] to make in-app purchases can be recognized, which does not make relevant game apps any less objectionable. As Miguel Sicart, the author of *The Ethics of Computer Games* explains, "when a game is designed to create a shallow but rewarding compulsion loop, and makes the player pay to stay in the zone where that compulsion is satisfying, then I think some problems arise, regardless of this activity being addiction or not".[135] This, amongst others, refers to practices such as those used by games apps. When playing Candy Crush for example, users have to wait to get an additional life to continue the game if they are not willing to pay to acquire one.

As it stands the UCPD offers a number of avenues to control practices that deceive or are likely to deceive children as well as other groups of consumers. It also lays down a general (unfairness) clause,[136] which acts as a "safety net"[137] catching those commercial practices that do not (clearly) fall within the scope of the provisions on misleading and aggressive practices or the black list of the Annex. Specifically, Article 5(2) deems unfair a commercial practice that is not in accord

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[131] This is what Candy Crush Saga does to your brain, The Guardian, April 1, 2014, http://www.theguardian.com/science/blog/2014/apr/01/candy-crush-saga-app-brain (last visited April 17, 2015); Hyeokkoo Eric Kwon et al., Nature or Nurture? An Analysis of Rational Addiction to Mobile Platform Apps (2014), available at http://scecr.org/scecr2014/wp-content/uploads/sites/7/2014/01/scecr2014_submission_39.pdf.

[132] See for example, Addiction as a disorder of decision-making, Canadian Association for Neuroscience, ScienceDaily, May 22, 2013, http://www.sciencedaily.com/releases/2013/05/130522095809.htm (last visited April 17, 2014); Rick Nauert, Gambling Addiction Impacts Decision-Making Area of Brain, University of Granada, PsychCentral, 2013, http://psychcentral.com/news/2013/11/06/gambling-addiction-impacts-decision-making-area-of-brain/61662.html (last visited April 17, 2015).

[133] There seems to be a relevant lack of consensus, see Antonius J. van Rooij, Online Video Game Addiction: Exploring a New Phenomenon, Erasmus University Rotterdam (May 11, 2011), available at http://repub.eur.nl/pub/23381/.

[134] Douglas Heaven, Engineered compulsion: why Candy Crush is the future of more than games, New Scientist Vol. 222 No. 2971, May 31, 2014, http://www.sciencedirect.com/science/article/pii/S0262407914610691 (last visited April 17, 2015).

[135] Rebecca Greenfield, The Ethics of the Candy Crush Pusher, The Wire, July 26, 2013, http://www.thewire.com/technology/2013/07/ethics-candy-crush-pusher/67572/ (last visited April 17, 2015).

[136] See supra at p.

[137] https://books.google.com.cy/books?id=oLOlBAAAQBAJ&pg=PA146&lpg=PA146&dq=unfair+commercial+practices+general+clause+safety+net&source=bl&ots=SEJhExTCB0&sig=ZenMMRi4HigVY4sSsBPKEfCi2kA&hl=en&sa=X&ei=H7xEVcTYM9TnatfugdgI&ved=0CCwQ6AEwAg#v=onepage&q=unfair%20commercial%20practices%20general%20clause%20safety%20net&f=false at p.146.

with professional diligence and is likely to materially distort consumer economic behaviour. Professional diligence involves good faith and honest practice.[138] It may be that 'engineered compulsion' for example, would fall foul of Article 5(2) even if it was to fail under other UCPD provisions. Of course, it remains to be seen how the general clause and the rest of the provisions of the UCPD are to be interpreted by the courts in the context of apps. However the intervention by public enforcement authorities in both sides of the Atlantic seems to indicate that the UCPD and other equivalent legislation are sufficiently clear to force compliance.

Conclusion

The world of apps creates a number of challenges for the legislator. In the context of contractual relationships formed with apps and in-apps, the DCR offers some protection. Primarily, it offers a right to be informed about a number of essential points, such as the contact details of the app provider, the main characteristics (including technical ones) of the product (the app or the in-app purchase) and most importantly the price. However, we have seen that because the DCR was not designed with apps in mind, but simply geared towards controlling the sale of digital content online, some elements of protection cause problems. The classification of apps as services contracts or digital content is particularly difficult and yet crucial to giving consumers a right to withdraw from their purchases or barring them from it.

By contrast, the application of the UCPD, seems more straightforward and national enforcers have already noted its relevance in the app context. However, here again interpreting the legislation in light of the app world has posed a few challenges. Behavioural advertising is problematic in all settings, but the technical limitations of the devices on which apps are used tend to render unfairness more acute. Indeed, the smaller display of mobile devices increases the effectiveness (and hence, dangers) of app-based behavioural adverts. Similarly, the possibility of displaying adverts while offline, may result in consumers being served with the advert but not with the necessary information regarding its commercial and behavioural nature, thus presenting problems when it comes to compliance with the UCPD and the DCR. A similar challenge is presented by, the difficulty in distinguishing between app-content intended for adults from that that intended for minors. Further challenges are posed by the 'freemium' business model which may lead to misleadingly representing the app as free or failing to disclose that the app, although free, is collecting user personal data which is commercially exploited. These practices are prohibited by Articles 6-7 UCPD under which misleading actions and omissions are unfair commercial practices. It is those provisions that underpin some of the Principles devised by the OFT. Those principles, although not mandatory, provide a good indication of the way the OFT interprets the legislation at its disposal. Platforms and/or app developers would therefore be well inspired to comply with the said Principles or be prepared to face enforcement action. Finally,

[138] See Article 2(h), UCPD.

issues of fairness of advertising are raised by *in-app* products or features. Those problems are linked to unauthorized in-app purchases, in particular those made by children, direct exhortations to children and other aggressive commercial practices. These are again tackled by the UCPD.[139] Importantly, the in-app environment may generally be engineered in such a way as to create and exploit addictive and/or compulsive tendencies of users towards in-app purchases. In this regard, the general (fairness) clause under Article 5(2) UCPD may be engaged, thereby 'cleaning' apps from those marketing tricks and techniques that may be found to go beyond the typical exploitation of consumer psychological traits inherent in acceptable advertising.

It transpires that consumers using apps in the EU have, at their disposal, laws that are likely to protect them, although much remains to be done in order to clarify how the law does apply in practice. As the world of apps develops more legal challenges will come to fore. While consumers may momentarily be app-solutely protected, it will not be for long. No doubt, new apps models and marketing techniques will shortly come to challenge the legislations in place in the EU and further afield.

[139] Specifically Articles 6-9 and also paragraph 28 of the Annex.