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Editorial

Planned Obsolescence challenging the Effectiveness of Consumer Law and the Achievement of a Sustainable Economy

The *Apple* and *Samsung* Cases

In the digital economy a well known problem takes a new shape: planned obsolescence increasingly impacts our everyday life, undermining the performances of our smart devices, from mobile phones, to personal computers, connected cars and smart homes.

This shatters the very basis of consumer law, challenges its effectiveness, and raises some crucial issues, requiring innovative solutions. Addressing the legal implications of such phenomenon has thus become a necessity.[1]

Current sanctions and the approach of the EU legislator on this point so far show a lack of effectiveness, leaving open some fundamental questions. Is actual consumer law fit enough to tackle planned obsolescence? Can unfair trading law contribute to improving the effectiveness of consumer contract law in solving the issue of planned obsolescence? Other major issues concern the growing tension with the goal of achieving sustainable development[2] and a circular economy;[3] ensuring longer durability of consumer goods is indeed crucial for achieving more sustainable consumption behaviour, waste reduction and environmental protection.

European unfair commercial practices' rules play a crucial role in tackling the phenomenon of planned obsolescence, as they cover traders' behaviour before, during and after a commercial transaction in relation to a product. On 25 September 2018, the Italian Competition Authority (hereinafter: ICA) fined, under two separate decisions, both *Apple*[4] and *Samsung*[5] for unfair commercial practices concerning software updates which seriously impaired the functioning of certain models of mobile phones. The two big firms were fined 10 m and 5 m Euros respectively. Such decisions immediately gained worldwide resonance. In particular, the ICA ascertained that the two companies had carried out misleading and aggressive commercial practices, thereby breaching the implementing provisions of Arts. 5, 6, 7 and 8 of Directive 2005/29/EC on Unfair Commercial Practices (hereinafter: UCPD)

1 See most recently e. g. Christian Hess, "Geplante Obsoleszenz" (Nomos, 2018), 29 ff.; cf. Tobias Brönnecke and Andrea Wechsler (eds.), "Obsoleszenz Interdisziplinär", (Nomos, 2015).
2 See e. g. Paola Spinozzi and Massimiliano Mazzanti (eds.), "Cultures of Sustainability and Wellbeing" (Routledge, 2018).
3 See http://ec.europa.eu/environment/circular-economy/index_en.htm.
4 See Italian Competition Authority, 25 September 2018, PS11039, *Apple*, <http://www.agcm.it/dotcmsdoc/allegati-news/PS11039_scorr_sanzDich_rett_va.pdf> accessed 15 November 2018.
5 See Italian Competition Authority, 25 September 2018, PS11039, *Samsung,* <http://www.agcm.it/dotcmsdoc/allegati-news/PS11009_scorr_sanz_omi_dichrett.pdf> accessed 15 November 2018.

in relation to the release of firmware updates for their mobile phones. These had caused causing serious malfunctions, significantly reducing their performance and, as a consequence, had accelerated their replacement with more recent products.

In the *Apple* case, the ICA ascertained the unfairness of two commercial practices. The first one concerned situations in which consumers who purchased iPhone 6, 6Plus, 6 s and 6sPlus, were insistently asked to update their operating system to iOS 10 and, subsequently, to iOS 10.2.1 – which modified functional characteristics and significantly reduced the performances of the above mentioned phones. This was done without customers being adequately informed in advance about the inconvenience that the installation of these updates might cause, and giving only limited and belated advice about how to remedy these shortcomings, for example by means of a downgrading or battery substitution. In addition, it was ascertained that *Apple* used undue influence over consumers as, on the one hand, it induced them to install a firmware update by means of insistent request to download and install updates, as well as by not providing adequate assistance to consumers who wished to restore the previous functionality of their devices. This speeded up the replacement of such devices with new iPhone's models. This practice was fined under Art. 5, 6, 7 and 8 UCPD.[6] Furthermore, the Italian Competition Authority fined *Apple* according to the implementing provision of Art. 7 UCPD for misleading omissions concerning the lack of information relating to duration, handling and costs for substitution of the iPhone 6, 6Plus, 6 s and 6sPlus batteries, with specific reference to the case in which, after the above mentioned updates, the performance significantly decreased and, as a consequence, consumers were induced to purchase a new phone instead of being appropriately informed about the opportunity to replace the battery.

In the *Samsung* case, the ICA ascertained an unfair commercial practice according to the implementing provisions of Art. 5, 6, 7 and 8 UCPD, as the trader developed and insistently suggested to customers of the *Samsung* Galaxy Note 4 to proceed to firmware updates based on Android's Marshmallow: such updates modified the phone's functionalities, by sensibly reducing performances and preventing consumers from assuming a conscious decision as to whether or not to install new updates to their device. Additionally, it was ascertained that *Samsung* deliberately decided not to provide assistance for the products, which were no longer under warranty, requiring high costs for repair and not providing the downgrade to the precedent firmware version, thereby intentionally accelerating the products' substitution.

Finally, both *Apple* and *Samsung* were also required, according to Art. 27 para 8 of the Consumer code, to publish an amending declaration on the Italian homepage of their websites, with a link to the respective ICA decision.[7]

The ICA's *Apple* and *Samsung* decisions highlight at least two fundamental criticisms concerning the effectiveness of current European consumer and market law. Firstly, the decisions raise serious doubts concerning the aptitude of the existing penalties laid down in way of implementation of the UCPD for effectively tackling the challenge of planned obsolescence. And, secondly, the question of how consumer (contract) law could be improved in order to react to and ideally prevent the above-mentioned phenomenon in the future.

As concerns the first point, it is in particular questionable whether a penalty up to 5 m Euros (that is the maximum amount provided for by Art. 27 para 9 of the Italian Consumer Code, implementing Art. 13 UCPD) is sufficient to effectively dissuade tech giants like *Apple* and *Samsung* from adopting the above outlined and other kinds of unfair practices. In this regard, Art. 13 UCPD provides that Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive, and that "these penalties must be effective, proportionate and dissuasive". First of all, from a systematic point of view, the circumstance that the European legislator did not provide clear harmonised penalties for the case of breach of the prohibition of unfair commercial practices

6 See on those provisions e. g. Mateja Durovic, "European Law on Unfair Commercial Practices and Contract Law" (Hart Publishing, 2016), 10 ff.
7 See e. g. <https://www.samsung.com/it/> accessed 15 November 2018.

opened the door to a fragmentation of the national solutions resulting from the implementation of UCPD: that fragmentation impairs consistency and the realisation of an efficient EU-wide strategy against unfair practices.[8] Secondly, but not less importantly, effectiveness and dissuasiveness can be actually achieved mainly through proportionality of penalties. In order to better substantiate the concept of proportionality, the penalty shall in our opinion be linked to the annual turnover of the trader being sanctioned for an unfair commercial practice.[9] Rather than fixing an amount of money as the highest possible penalty, a link to annual turnover would allow the trader's size, market power and – above all – market impact to be taken into account. This would avoid both "over-" and "undersanctioning".

With particular regard to the practices of the major players in the global market, it seems that private law remedies are not effective enough in influencing traders' behaviour to solve the above-mentioned problem. Therefore, a consistent and effective EU-wide set of public law penalties would be needed. This would also ensure the effectiveness of private consumer law, and encourage fair trading behaviour. It is not by chance that *Apple* significantly modified its practices in a virtuous way after the lodgement of the above mentioned Italian case, in order to comply with the provisional requirements of the ICA.[10] While the average consumer is often dissuaded from bringing a matter before a civil court, the compelling pressure generated by prospective or actual proceedings before a competition authority like the ICA (which has the power to impose public law penalties) is often sufficient to ensure a better enforcement of consumer private law rights.

A good example of this is represented by the results of the enforcement of Art. 6 para 2 lett. g UCPD, which qualifies as misleading a commercial practice deceiving or likely to deceive the average consumer in relation to their rights to replacement or reimbursement under the Consumer Sales Directive, or the risks they may face. Such rule is proving – at least in Italy – to be key in compelling businesses to acknowledge consumer rights. If the perspective of being brought before a civil court is frequently not enough to dissuade the trader from misleading the consumer about their contractual rights, the parallel "risk" to undergo an investigation by the competition authority (with the risk of a pecuniary penalty up to 5 m Euros, and especially – as this has an impact on the traders' image – of the publication of the decision or a corresponding corrective statement, according to Art. 27 para 7 Consumer code, so that the practices cease their negative effects) creates a relevant deterrence against unfair commercial practices. This sinergy should in my opinion be improved by the EU legislator.

Here we come to the second main point of criticism mentioned above. According to Art. 3 of Directive 1999/44/EC on consumer sales, the seller shall be liable to the consumer for any lack of conformity existing at the time the goods were delivered. For example, based on such provision, a car motor, which had stopped working after less than two years and ca 65,000 kilometres was already considered to be in breach of the contract . Indeed, in that situation, the Austrian Supreme Court identified a lack of the normally required qualities according to § 922 Para 1 *ABGB* (implementing provision of Art. 2 para 1, dir. 1999/44/EC on consumer sales): such good has been considered by the Austrian Court as not showing the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect.[11] This interpretative result has not gone undisputed.[12] Such criticisms may turn into a relevant chance for improving consumer law.

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8 Cf. the reports on the implementation of the UCPD published in EuCML-Issues 5, 6/2015 and 2/2016.

9 Cf. the example of Article L213-4-1 *Code de la Consommation*: "L'obsolescence programmée se définit par l'ensemble des techniques par lesquelles un metteur sur le marché vise à réduire délibérément la durée de vie d'un produit pour en augmenter le taux de remplacement. L'obsolescence programmée est punie d'une peine de deux ans d'emprisonnement et de 300 000 € d'amende. Le montant de l'amende peut être porté, de manière proportionnée aux avantages tirés du manquement, à 5 % du chiffre d'affaires moyen annuel, calculé sur les trois derniers chiffres d'affaires annuels connus à la date des faits" (see https://www.legifrance.gouv.fr). Such article has been later modified: see below fn. 15.

10 Indeed, in December 2017 *Apple* provided for the possibility to replace batteries at a discounted price : see Italian Competition Authority, 25 September 2018, PS11039, *Apple* http://www.agcm.it/dotcmsdoc/allegati-news/PS11039_scorr_sanzDich_rett_va.pdf (accessed 15 November 2018).

11 Oberster Gerichtshof, 23 April 2015, 1Ob71/15 w, <https://www.ris.bka.gv.at> accessed 15 November 2018.

12 See on this Helmut Koziol, "Obsoleszenzen im österreichischen Recht" (Jan Sramek Verlag, 2016), 3 ff.

Various attempts to tackle the phenomenon of planned obsolescence have been started at both national and EU level. In some European Member States, discussions are under way concerning possible solutions.[13] For instance, in 2015 the French legislator introduced in the *Code de la Consommation* a specific prohibition of planned obsolescence – providing for its breach, *inter alia*, a criminal law sanction[14] – which was modified in 2016.[15] English law also has some scope for tackling early obsolescence as the *Consumer Rights Act* already mentions durability as a criterion for the satisfactory quality test.[16]

In its amended Proposal for a Directive on certain aspects concerning contracts for the sales of goods of 31 October 2017, the European Commission clearly underlined the intention to combat planned obsolescence through a sharpening of the rules concerning guarantees in consumer sales, e.g. by imposing specific durability information in any pre-contractual statement which forms part of the sales contract, on which the consumer should be able to rely as a part of the criteria for conformity.[17] As highlighted by the EU Commission, the European legislator should take the opportunity of the current works on the forthcoming Directive on the sale of goods for introducing durability requirements in relation to specific types or groups of products: such criterion should refer to the ability of the goods to maintain their functions and performance for a certain amount of time while they are used normally.[18]

However, in the above-mentioned directive proposal, such statements are contained just in recitals and do not find any concretisations in black letter rules. This approach needs to be changed in order to provide adequate instruments for tackling planned obsolescence. From this perspective, the forthcoming EU directive on sales contracts should provide that, in order for goods to be in conformity with the contract, they shall possess the durability which is normal for goods of the same type, and which the consumer can reasonably expect (considering the nature of the specific goods and public statements made by or on behalf of the final seller or of any person in the transactions chain, thereby taking into account also statements contained in labelling or in advertising). Such assessment should also take into account all other relevant circumstances, such as the price of the goods and the intensity or frequency of the use that the consumer makes of the goods. In particular – in so far as specific durability information is indicated in any pre-contractual statement which forms part of the sales contract – the consumer should be able to rely on them as a part of the subjective criteria for conformity. Such rules should be particularly complementary to those of Directive 2005/29/EC on unfair commercial practices and to those of Directive 2011/83/EU on consumer rights.

Therefore, from a systematic point of view, the problem of planned obsolescence can be best tackled by means of a synergy between private and public law: (i) the improvement of the guarantees regime through the reshaping of the sales directive, introducing the criterion of "durability" of the goods as one of the parameters which are relevant for the assessment of the conformity of the goods; (ii) a better, more coherent definition by the European legislator of the consequences for the breach of the prohibition of unfair commercial practices, thereby enhancing the proportionality penalties, by linking them to the annual turnover of the trader which has been sanctioned for an unfair commercial practice. Rather than fixing an amount of money as the highest possible penalty, the link to the trader's annual turnover will take into account the trader's

13 See for an overview Stefan Wrbka, "Warranty Law in Cases of Planned Obsolescence", EuCML 2017, 67 ff. See the developements in Belgium: <www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=5&NR=1251&VOLGNR=1&LANG=fr> accessed 15 November 2018.
14 See above fn. 9.
15 Art. L-441-2 *Code de la Consommation*: "Est interdite la pratique de l'obsolescence programmée qui se définit par le recours à des techniques par lesquelles le responsable de la mise sur le marché d'un produit vise à en réduire délibérément la durée de vie pour en augmenter le taux de remplacement" (see: https://www.legifrance.gouv.fr).
16 Art. 9 *Consumer Rights Act 2015*: "The quality of goods includes their state and condition; and the following aspects (among others) are in appropriate cases aspects of the quality of goods: […] (e) durability".
17 See Recital 23 of the Amended Proposal for a Directive of the European Parliament and of the Council, on certain aspects concerning contracts for the online and other distance sales of goods, amending Regulation (EC) No 2006/2004 of the European Parliament and of the Council and Directive 2009/22/EC of the European Parliament and of the Council and repealing Directive 1999/44/EC of the European Parliament and of the Council, COM(2017) 637 final.
18 See recital 23, COM(2017) 637 final.

effective size, market power and – above all – market impact. This will avoid both "over-" and "undersanctioning".

More detailed consumer contract law rules can indeed have a straight-jacket effect, especially if done on a fully harmonised basis. Also, from a consumer's perspective, additional rights may be of little use if enforcement is going to be difficult and/or slow. So an amendment to the UCPD might be an effective solution.

Following this path, the disruption brought about by planned obsolescence offers a great chance to re-configure consumer law: this would enhance its role of protecting consumers and stimulating fair market behaviour, and at the same time become an instrument for achieving the goal of a more sustainable development. Consumer law has a crucial role to play in the years to come: broadening its goals from those of an instrument for just protecting consumers and regulating the market, to those of a system which also orientates and stimulates more responsible environmental behaviour by all market players.

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