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UNFAIR COMMERCIAL PRACTICES, SPAM, AND FAKE ONLINE REVIEWS. THE ITALIAN PERSPECTIVE AND COMPARATIVE PROFILES

Abstract

This paper starts its analysis from Legislative Decree number 146/2007 which incorporated Directive 2005/29/EC into the Italian Consumer Code. This Directive is about unfair commercial practices, useful in illustrating the phenomenon undertaken by unscrupulous businessmen against consumers.

Ten years after the enforcement and entry of this legislation into Italian law, the balance is still not positive because consumers do not seem to be totally protected from the implementation of those devious entrepreneurial strategies designed to mislead the consumer from taking an informed decision of a commercial nature. More specifically, in my study I analyze the lack of legislation, above all on unfair trade practices classified as spam and fake reviews (otherwise known as 'opinion spam') against which Italian private law (different from other legal systems) is totally insufficient to protect consumers.

Keywords

unfair commercial practices – spam – fake online reviews – cutomers – astroturfing – crowdturfing

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I. Unfair Commercial Practices in Directive 2005/29/EC

Directive 2005/29/EC, which was incorporated into the Italian legal system for the section related to unfair trade practices through Legislative Decree number 146/2007, has a high level of importance in the general framework aimed at maximum harmonization of the rights conferred to consumers. This is because it is intended to regulate the act of consumption in its dynamic aspect, inducing us to value, not only negotiated transactions, but the activity in its complexity. Therefore, numerous pre-contract obligations (including correctness, duty of care and good faith that the trader must have towards the consumer) trickle down.

The normative law on unfair commercial practices always remains up-to-date, simply because this makes it suitable for preventing *ex ante* and punishing *ex post* the beginning of those new deceitful business strategies which specialise in coercing the free choice of the consumer and causing him, in substance, through numerous commercial practices, to take a transactional decision that he would not have carried out otherwise. The normative law (which is the specific subject matter of this study) does not aim solely at the safeguarding and protection of the interests of consumers since, through this protection, the notions of the correctness, fairness, competitiveness, and transparency of the whole market are protected. Therefore, we can also state that the consumer is not the only recipient of the protection from unfair commercial practices as, through protection and defence of the interests of consumers, free competition among traders is, likewise, guaranteed.

It should be borne in mind that Directive 2005/29/EC on unfair commercial practices regulates the business-to-consumer relationship directly, and above all regulates the business end of the relationship. However, it also ensures that all the other traders respect the rules of the market at the same time. It is necessary to underline that this provision considers these commercial practices unfair, solely because they are acts addressed only to an individual, but at the same time determine a perceptual distortion of the market behaviour of consumers and of the competitive rules fixed by the legislator. Thus, the obvious connection between *micro* and *macro* economic perspectives is inseparable.

According to this viewpoint, it is certain that an unfair commercial practice performed by a trader produces irrationality and, as some market dynamics are inherently and potentially dangerous, the consumer's choice concerning legal transactions comes second. Imposing this ban, in substance, does not mean imposing any coercion upon the market, but only reinstating the right functioning: a really free and fully conscious interface of supply and demand.

The legislator is fully aware that the market power of the trader can give rise to unfair commercial practices. The regulation of unfair practices is, then, a barrier to the unjust exploitation of the trader's economic power and also other people's limited rationality. The Directive has, in fact, been introduced to ensure a high level of protection to the consumer, so as to take conscious decisions, but also, and above all, in order to promote the internal market, in the awareness that a single market is based on both supply and demand.

This emerges with greater clarity when it is stated that the objective of its disposition is "to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by harmonizing the laws, regulations, and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests"[1]. In fact, according to the European legislator, "*the laws of the Member States relating to unfair commercial practices show marked differences which can generate appreciable distortions of competition and obstacles to the smooth functioning of the internal market*"[2].

The legislation in defence of consumers led to the adoption of the Directive on unfair commercial practices in 2005 and is based essentially on a vertical approach to provide specific solutions for particular problems. This approach has determined a fragmented normative framework. For this reason, "*the high level of convergence achieved by the approximation of national provisions through this Directive creates a high common level of consumer protection*"[3]. This Directive aims to create a single legal

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[1] Article 1 of Directive 2005/29/EC available online at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005L0029&from=EN [last accessed: 27 October 2018].

[2] Motive 3 of Directive 2005/29/EC.

[3] Motive 11 of Directive 2005/29/EC.

framework for the regulation of unfair commercial practices in relation to the consumer. That objective is to be achieved by the harmonisation of fair-trading laws in the Community Member States in the interests of eliminating obstacles to the freedom of movement in the internal market. Its legislative objective is therefore the full harmonisation of this area of life at the community level:[4] "*Harmonisation will considerably increase legal certainty for both consumers and businesses. Both consumers and businesses will be able to rely on a single regulatory framework based on clearly defined legal concepts regulating all aspects of unfair commercial practices across the EU. The effect will be to eliminate the barriers stemming from the fragmentation of the rules on unfair commercial practices harming consumer economic interests, and to enable the internal market to be achieved in this area*"[5].

However, it is deducible that the Community legislator, even though it is aiming at an internal market guarantee and the free circulation of goods and services, does not protect other competitors of the traders directly in this Directive (objects explicitly contemplated in Directive 1984/450/EC on misleading comparative advertising), but rather places greater importance on the economic interests of consumers and B2C (business to consumer) relations. Besides this, the Directive does not include unfair commercial practices involving only firms or rather considerable conducts as antitrust. Among these are those agreements between businesses which are contrary to competition, the abuse of a dominant position, mergers, etc.

When concentrating on the real object of this Directive, it is necessary to underline that the heart of the normative structure is constituted by Article 5, paragraph number 1, which states that: "*unfair commercial practices shall be prohibited*". These unfair commercial practices are both the actions (or omissions) before the purchase of a product (information, marketing, advertising, or commercial communication in general), and the purchase itself (the sale procedure), and even the reasons subsequent to the purchase (guarantee, maintenance, repairing and *post* sale services).

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[4] Those are the conclusions of Advocate General in the cases C-261/07 and C-299/07 on 21 October 2007 avaible online at: https://eur-lex.europa.eu/legal-content/IT/ALL/?uri=CELEX:62007CC0261 [last accessed: 27 October 2018].

[5] Motive 12 of Directive 2005/29/EC.

This Directive is made up of two parts. In the first section (from Articles 2 to 13), there are some detailed regulations relating to unfair commercial practices between businesses and consumers. These comprise a variegated multiplicity of cases, including any conduct described as active or passive, undertaken by a trader previously, contextually, or also subsequently to the completion of a contract with a consumer. Therefore, the traders of the Member States are faced with wide and general prohibition of prejudicing the economic interests of consumers through unfair commercial practices, defined in detail in Article 5, paragraph 2. On the basis of this provision, a commercial practice is unfair if it is built on two basic components: if on one hand it is contrary to the laws of professional diligence, and on the other if it is intended to significantly distort the economic behaviour of the consumer. Finally, by Articles 11, 12 and 13, the Member States shall ensure, through adequate and effective means, the prevention and repression of unfair commercial practices (even by trial instruments), so that they can effectively sanction them.

The second part of the Directive (Articles 14 – 15 – 16), introduces changes to common measures concerning: misleading and comparative advertising[6]; the protection of consumers in respect to distance contracts[7]; injunctions for the protection of consumers' interests[8] and consumer protection cooperation[9].

Referring clearly to the manner in which this Directive has been taken into consideration in the Italian legal system, an important matter needs to be stressed. Considered the maximum level of harmonization requested by Directive 2005/29/EC concerning unfair commercial practices in the relations between traders and consumers, the technical provisions (corresponding to the first 10 Articles of the Directive) are adopted in the Italian legal system without any substantial modifications in respect to the Community text.

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[6] Directive 84/450/EC available online at: https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:31984L0450&from=EN [last accessed: 27 October 2018].

[7] Directive 2002/65/EC available online at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0065&from=EN [last accessed: 27 October 2018].

[8] Directive 98/27/EC available online at: https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:31998L0027&from=en [last accessed: 27 October 2018].

[9] Reg. EC 2006/2004 available online at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R2006&from=IT [last accessed: 27 October 2018].

With regard to this point, it is necessary to state precisely that the modifications concern, at the most, the terminology in the text in order to allow a better inclusion of the new normative law into the internal legal system. The Directive, in fact, contemplates 'unfair' commercial practices, but the Italian legislator considers them as 'not correct'. This choice seems to be really opportune so that any lexical and semantic confusion with the Italian law should be avoided by the Civil Code regarding unfair competition (from Article 2598 to 2601) and additionally in order to underline the difference between '*ratio*', protections and the field of applications of the implementing provisions of Directive 2005/29/EC.

The use of the expression '*commercial transactions*' as a synonym for '*agreement*' and the use of the word '*product*' in a general and inclusive meaning of '*every good and service*' broadens the definition of '*commercial practice*' within the meaning and for the purpose of Article 2, paragraph D of the Directive.

Without a doubt, referring to the statements it makes, and also to acts and behaviours, it follows that unfair commercial practices can be sanctioned as any kind of transaction between trader and consumer (actual, potential, collective or individual) realized through statements, material behaviour, actions or omissions, before, during, or after the beginning of contractual relations, even inside the development of any trade of promotion, sale or supply of goods or services.

It is meaningful to note the attitude of commercial practices through actions, omissions, behaviours, statements, or commercial communications (which subsequently amplify the list of punishable acts in order to directly influence the economic/commercial choices not of the individual and vulnerable consumer, but of the average consumer, the final recipient of their effects.

The Directive could also be clearly perceived as referring to the unfairness of forbidden practices, understood as deception or as aggressiveness. This derives from their attitude or ability (that is referred to their abstract, but objective capacity) to falsify or alter (not in any measure, but in a considerable, remarkable or appreciable way) the economic choice, the trade behaviour, the final decision on the purchase, the freedom of choice, or the conscious self-determination of the consumer, thus, inducing him, in substance, to undertake a transactional decision that he would not have taken otherwise.

In conformity to Article 2, paragraph K of Directive 2005/29/EC, "transactional decision means any decision taken by a consumer concerning whether, how, and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting".

The protection and defence of the freedom of choice of the consumer is the *ratio* of the whole normative law and the ultimate objective which should serve to identify the right balance between the necessity to protect consumers and the promotion of free trade in a competitive market[10]. In principle, this should inspire all the rules that govern trade activity, preventing the consumer from suffering the exploitation of his limited rationality[11].

The choice has to be made in full awareness (that is without a false representation of reality), be spontaneous and not induced, and also free (namely without violence or threat, and not falsified by deceptive and aggressive practices). It is enough that the trader truly profits from the fragility of the consumer because the transaction is not efficient and the law has to intervene. This contrasts with the emergence of unvirtuous behaviour in relation to the consumer through a control of loyalty on activities and business acts[12].

Further underlining the brief of commercial practices destined to impact on economic trade choices, it is necessary, likewise, to dwell upon the subjective parameters represented by the average consumer, as set out in Point 18 of the European Directive[13] and transposed in the second and third paragraphs of Article 20 in the Italian Consumption Code. This Article asserts that the recipient of the Directive is a person who is "reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural, and linguistic factors, as interpreted by the Court of Justice", and not a vulnerable, weak, incompetent, irrational, inattentive, and uncritical economic operator who substantially lacks

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[10] G. B. Abbamonte, *The Unfair Commercial Practices Directive: An Example of the new European Consumer Protection Approach*, "Columbia Journal of European Law" 2006, vol. 12, p. 695 et seq.

[11] Ibid.

[12] Ibid.

[13] *Supra* note 1.

the necessary care, knowledge, and information to be able to make well-considered, wise, prudent, and fully conscious commercial choices[14].

In particular, then, the aforementioned underscored anticipation of protection provided by the normative law on unfair commercial practices (even in the phase of commercial solicitation, *i.e.* before the establishment of a possible contractual relationship between the parties), involves an evolution of the concept underlying the consumer, who is considered no longer the sole and weak contracting operator, but a real and competent transactor, able to make informed choices.

It is undeniable that the purpose of the legislator (also dictating these notes to the typical consumer) is *in primis* to avoid the excesses of a planned or paternalist discipline which induces consumers into a lower threshold of attention or improvident attitudes facing the commercial practices that they are faced by on the market. Considering that this information is really first and the most important means to protect and defend the customer's rights, and thereby provide European consumers with the same circumstances and with the same rights and guarantees under protection. This is the principle of legal certainty.

There is a real risk, however, that these objectives remain exercises in sheer rhetorical deceitfulness since, in like manner, it is easy to object that European consumers are not homogeneous at all. This diversity is due to traditions, laws, habits, social, cultural, and linguistic factors, cognitive capacities, competences, experiences, knowledge, psychological suggestion, emotional states, convictions, expectations, perceptions, standard of living, etc.

It should be noted that all those who act in the market are not equally cautious, informed, and rational. *Ergo* the model agent, evaluated in a legal qualitative objective (and not static and quantitative) state, which can result in his being extremely difficult to identify. Therefore, the model agent must be considered more as an aim than a criterion on which to base itself.

As well as it being clear that referring to the model agent does not satisfy even the principle, it is necessary to dictate detailed, precise,

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[14] P. Bartolomucci, *Le pratiche commerciali scorrette ed il principio di trasparenza nei rapporti tra professionisti e consumatori* [*The unfair commercial practices and the principle of transparency in the relations between professionals and consumers*], "Contratto e impresa" ["Contract and business'] 2007, issue 6, p. 1417 *et seq.*

different, and distinct rules, properly for the specific personal economic and social reasons of weaker and more vulnerable people, who are even so worthy of more protection and care in respect to others.

That is why it is necessary to arrange a correction to the descripton of the average consumer in order to allow an enhanced and more rigorous protection, especially when commercial practices are aimed at particular categories of consumers based on their determinate, qualitative, and constant characteristics which make those groups of consumers particularly vulnerable owing to age (minors and elderly) and conditions (ill, illiterate, naive, poor). Thus, we can better understand the importance of the average member as a value parameter of such vulnerable groups referenced in paragraph 18 of Directive 2005/29/EC[15].

It is better to state precisely that it is necessary to avoid the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. Where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group. It is therefore appropriate to include, in the list of practices which are in all circumstances unfair, a provision (without imposing an outright ban on advertising directed at children) which protects them from direct exhortations to purchase.

In virtue of this, we can mention Article 2, paragraphs 2 and 3 of this Directive[16] which state: "*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*".

II. Spam

Among the examples of definite practical importance (as particularly frequent and surely insidious by reason of the easy exploitation by the

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[15] *Supra* note 1.

[16] *Supra* note 1.

trader's power on one hand and the weakness of the consumer on the other) is the case of number 26 on the black list of commercial practices. This case is presented in Annex 1 of the Directive, which describes this practice as in any case unfair specifically because it consists of "*Making persistent and unwanted solicitations by telephone, fax, e-mail, or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation. This is without prejudice to Article 10 of Directive 97/7/EC*[17] *and Directives 95/46/EC*[18] *and 2002/58/EC*[19]".

Such activity in the trader's intentions aims to direct the will of the counterparty who, often exasperated, acquires the good or the service, or concludes the proposed contract. In essence, therefore, the final result is to operate according to a choice that is neither free nor rational nor conscious, determined by the distortive and aggressive intent of an imprudent trader.

Over the years, the growing economic development of mass markets has led to the spread of trading strategies and techniques often characterized by petulance and aggression, or even threats, thus limiting the freedom of the consumer's trade choice. If, therefore, it is clearly obvious that spam should be classified spam as an aggressive commercial practice, then it consequently means that "*we ourselves become the product*"[20]. Specifically, this statement points out the dangerous link between spam, a particular aggressive practice that also violates the privacy of unsuspecting potential consumers (through continuous and repeated emails sent to the mail boxes of people who have never agreed to receive such forms of advertising), and the mapping of personal data which is used by unscrupulous traders to catalogue consumer tastes and thus turn even more invasively the unaware consumers towards targeted purchases.

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[17] Available online at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997L0007&from=en [last accessed: 20 October 2018].

[18] Available online at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=IT [lact accessed: 20 October 2018].

[19] Available online at:https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0058&from=EN [last accessed: 20 October 2018].

[20] B. Blasco, *Spam e pratiche commerciali scorrette* [*Spam and incorrect business practice*], "Contratto e impresa" ["Contract and business"] 2012, issue 4–5, pp. 967–988.

With particular reference to both the analysis of the case in Article 26 in Annex 1 of the Directive[21], and the use of the Internet as a channel of contact with a large and potential number of customers, the scope of this provision is such as to raise the legal significance of the spam phenomenon to the point where it represents unlawful conduct owing to the improper treatment of personal data, and also constitutes an aggressive commercial practice with all the consequences of the case, including those relating to a possible regime of liability.

In substance, according to these terms, spam (which can occur not only through the use of email, but also through newsgroups, chats, or mailing lists, where consumers are advised to buy a certain product or visit a particular kind of site) is also an aggressive commercial practice and as such is sanctionable, besides representing illicit behaviour in terms of the unlawful treatment of personal data.

There is no doubt that the use of email addresses in order to transmit unsolicited commercial communications entails a violation of the recipient's privacy rights, but at the same time, spam damages the interests and economic rights of users and, if repeated and persistent, exhibits the foremost characteristics of an increasingly aggressive commercial practice[22].

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[21] *Supra* note 1.

[22] Regarding the spam problem see: L. Furlanetto, *La pubblicità online e le comunicazioni commerciali* [*Online advertising and commercial communications*], available online at: http://www.altalex.com/documents/news/2007/03/19/la-pubblicita-online-e-le-comunicazioni-commerciali [last accessed: 20 October 2018]; G. Scorza, *I contratti del consumatore nel nuovo codice del consumo* [*Consumer contracts in the new consumer code*], Padova, 2010, p.176 *et seq.*; E. Falletti, *La nuova normativa antispam australiana a confronto con gli obblighi dei providers italiani* [*The new Australian antispam legislation compared to the obligations of Italian providers*], "Diritto dell'Internet", Issue 1, 2006; M. A. Caruso, *Le pratiche commerciali aggressive* [*Aggressive commercial practices*], Padova, 2010, p. 128 *et seq.*; S. Gauthronet, E. Drouard, *Messaggi pubblicitari indesiderati e protezione dei dati personali* [*Unsolicited advertising and protection of personal data*], available online at: http://www.privacy.it/aretespamm2001.html [last accessed: 20 October 2018]; N. Lucchi, *Comunicazioni indesiderate: lo spamming tra razionalizzazione delle norme esistenti e pronunce dell'Autorità di garanzia* [*Unwanted communications: spamming between rationalization of existing rules and rulings by the Guarantee Authority*], "Studium Iuris", Issue 4, 2004, pp. 456–468; E. Florindi, *Spam e tutela della riservatezza* [*Spam and protection of confidentiality*], "Informatica e diritto", 2003, vol. XII; A. Stazi, *La comunicazione commerciale in rete: peculiarità, tipologie*

It should be noted that the commercial practice of sending spam is generally unsatisfactory and objectively inconsistent with a competitive model based on consumer sovereignty. It is therefore possible to assume that the not agreed to serial sending of emails with commercial content, consequently constitutes an unfair commercial practice according to the 2005/29/EC Directive.

Spam involves people who are exposed to costs in terms of (wasting) time and money (for example, the cost of connecting to the Internet to read or delete spam messages from the user's mailbox), precisely because emails containing commercial material without request and authorization are delivered directly to user's mailboxes by unknown senders. As spam generally means the sending of massive and repeated unsolicited advertising messages from a sender who masks or falsifies his/her identity, it is evidently a form of unsolicited advertising communication. However, it differs from others because of its massive, repeated, and unfair character. That is to say, spam is a form of unwanted advertising, but not every form of unwanted advertising is spam.

The advent of telematics, and above all the Internet, has radically altered the communication of advertising with new methods, and has particular peculiarities linked mainly to the ability of the Internet to disseminate information without any geographical limitation and the ability to reach the cyberconsumer in an effective way. In this context, therefore, it is easy to understand what role the new electronic and telematic commercial channels (email, SMS, MMS) play in the realization and management of advertising campaigns and what advantages they

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e disciplina [*Commercial communication on the web: peculiarities, types and discipline*], "Diritto dell'informatica e della comunicazione"["IT and communication law"], Torino, 2009; M. Fusi, *Pratiche commerciali aggressive e pubblicità manipolatoria* [Aggressive commercial practices and manipulative advertising], "Rivista di diritto industrial" ["Magazine of industrial law"], 2009, issue 1,; R. G. Massa, *De spam: tutela giuridica e informatica* [*The spam: legal and IT protection*], available online at: http://www.altalex.com/documents/news/2007/06/21/de-spam-tutela-giuridica-ed-informatica [last accessed: 20 October 2018]; S. Rodotà, *Persona-Consumatore* [*Person-consumer*] [in:] P. Stanzione (ed.), *La tutela del consumatore tra liberalismo e solidarismo* [*Consumer protection between liberalism and solidarity*], Napoli, 1999, p. 20 *et seq.*; S. Rodotà, *Intervista su privacy e libertà* [*Interview on privacy and freedom*], Roma-Bari, 2005; P. Grugnola, *Disciplina dello spamming* [*Discipline of spamming*], "NGCC", Issue II, 2004, pp. 474–479.

have in relation to traditional communication channels in terms of cost savings, speed and immediacy, audience satisfaction, and the guarantee of reaching a very high number of potential consumers[23]. However, it is exactly these 'advantages' which are at the root of the problem of spam, making it one of the most worrying phenomena of daily harm to the rights and interests of users and consumers in the telematic field.

When it reaches significant proportions (because it can reach a huge number of users through sending to newsgroups, and chat or mailing lists), the phenomenon in question is called 'spamming'. The users of this behaviour are called 'spammers' and get the addresses that they use to send commercial communication in various ways: by buying address packets, retrieving lists on websites, or locating discussion groups created around a particular interest.

In essence, advertising is certainly a commercial practice[24] (as expressely stated in Article 2, paragraph D of the 2005/29/EC Directive). However, it becomes unfair when the individual retailers or distributors (and not only specialized firms) process timely campaigns of marketing through the mechanism of very targeted advertisements that are created by exploiting real data files (names, surnames, addresses, emails, mobile numbers, tastes, sexual and purchase preferences) from data that we users have increasingly provided voluntarily to social networks and search engines. The data is conversely public property but not, for this reason, public.

The market offers packets of addresses retrieved through those sites that require users to be pre-registered for the use of a service, or through software that can scan the network to search for email addresses published on webpages.

The unfair commercial practice, therefore, identifies the interests of unwary individual users of the Internet by constructing profiles as specific as possible, so that the potential consumer becomes 'a product' in order to resell himself to unscrupulous companies. In turn, these firms set targeted advertising campaigns, systematically abusing lists of email addresses in their possession, and undertake aggressive commercial

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[23] *Supra* note 21.

[24] As expressely stated in Article 2, paragraph D of the 2005/29/EC Directive.

practices effecting repeated and unwanted commercial solicitations, to have their products better known.

More and more often, private subjects or companies focus their whole business on the research, storage, and sale of email addresses, as they have become invaluable tools for trade. These activities are illegal if not previously authorized by a signature from the legitimate owners of mailboxes (called an 'opt-in mechanism') and therefore it leaves no doubt about the unjustified and unbiased embezzlement of email addresses prejudicing our legitimate right not to be flooded by advertising. In other words, advertising is lawful in as much as it respects the basic principles of honesty and fairness, and not when it decisively annuls and compromises the capacity of self-determination of the recipient, imposing on him/her the uncritical acceptance of a pre-established choice.

In particular, it is wise to point out that despite knowing of a personal datum deriving from publication on the web, it does not make it lawful to use this same data for activities different from the reason the data is present online. That is to say, the possible availability of personal data and/or addresses on the Internet must be related to the aims for which they are published on the Internet.

Furthermore, in order to identify the legal regime applicable to commercial advertising by telematic means, it is clear that the first of the legal questions which arises is the question relative to what legislation may apply to the phenomenon.

The transnational character of the system and the possibility of spreading the message without geographical boundaries also reverberate in advertising: the messages produced and spread in a state whose legislation considers them completely lawful, may be illegal under the legislation of another country in which they are received. Therefore, the question is to determine which law is applicable to the messages and, in particular, whether they must conform to the legal system in the country of reception.

The best solution is to follow the mechanisms of international private law in order to settle the conflict between rules peculiar to individual national legislation. This means, essentially, referring to the Rome Convention on the law governing contractual obligations from 1980, based on the fundamental criteria of the law chosen by the parties, provided that such a choice does not affect the protection ensured to the

consumer by the law of the country where he usually resides, in which case the latter law will be applied.

Specifically, Community law regulates the discipline of unwanted electronic communications in a variety of aspects, because it protects the right of the consumer to correct, clear, and transparent information. It thereby safeguards private life and personal data under the great care of the protection of privacy. Last but not least, it aims to sanction those people who undertake unfair commercial practices.

With reference to Community law, it seems appropriate to recall that telecomunications Directive 97/66/EC (now repealed and replaced by the most recent Directives 2002/58/EC and 2009/136/EC, which did not explicitly include the sending of email messages) already foresaw this situation in Article 12: "The use of automated calling systems without human intervention (automatic calling machine) or facsimile machines (fax) for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent".

With regard to other forms of dispatching unwanted advertising material, the Directive allowed the Member States to choose between the prior consent and the right of opposition. Today, the current Directive 2002/58/EC (modified by Directive 2009/136/EC) concerning the processing of personal data and the protection of privacy in the electronic communication sector, points out that sending unsolicited commercial emails may be both inappropriate for consumers and for suppliers of services of the information technology community and may upset the smooth functioning of interactive networks.

That Directive aims at respecting the fundamental rights of the natural person and, in particular, protecting private and family life. The protection of subscribers from any electronic commercial service is envisaged, particularly from interference in their private life, including interference carried out by abusing their emails.

The Directive also ensures that European States take appropriate measures to ensure that unwanted commercial communications are not allowed if there is no consent from subscribers, or if they do not clearly express their desire to receive such types of solicitations. Point number 6 states: "The Internet is overturning traditional market structures by providing a common, global infrastructure for the delivery of a wide range of electronic communication services. Publicly available electronic

communications services over the Internet open new possibilities for users, but also new risks for their personal data and privacy".

Unlike Italy, a lot of European States provide for aggressive commercial practices under stricter sanctions. In particular, French law number 2008-3, which specifically deals with the French transposition of Directive 2005/29/EC (which has modified the Title II – *Practiques Commerciales* (of Book I) *Information des consommateurs et formation des contrats*, *Code de la consommation*), for the development of competition in the service of consumers. If on one hand, the law provides nothing on the validity and or invalidity of the contracts agreed upon with the consumer (and whose conclusion has been favoured and/or preceded by unfair deceptive commercial practices), on the other hand, in relation to aggressive commercial practices, the French law considers the application of serious sanctions under Articles 131 to 139 of the Criminal Code, and it even considers the contract that is derived from this action devoid of any legal effect.

In the United Kingdom, however, the *Trade Descriptions Act* and *Consumer Credit Act* do not consider using penalties derived directly from the law if the liability does not result from a clear violation of criminal law. Nor do the *Consumer Protection from Unfair Trading Regulations* contemplate the dissolution of the contract solely for the reason that it has violated the rules on commercial practices.

The Polish *Law on the Prevention of Unfair Market Practices* (transposing Directive 2005/29/EC) is attributive of the consumer's power to request the cancellation and/or the dissolution of ae contract agreed upon in consequence of unfair commercial practices. Additionally, consumers can request the return of all that was executed in the realization of the contract and the costs incurred for the same contract. The law, likewise, demands the suspension of the unfair practice and the removal of effects, compensation for damages, and penalties such as the limitation of personal freedom for up to a maximum of eight years.

Compared to the European approach, the U.S.A specifically aims at regulating the phenomenon of spamming through a single Federal law, namely the *Controlling the Assault of Non-Solicited Pornography and Marketing Act* (or *Can-Spam Act*) of 2003. This legislation specifically dedicated to the regulation of the phenomenon of spamdoes not, however, forbid the sending of unwanted commercial emails (provided that the sender is identified clearly), but requires that the commercial operator,

at the consumer's request, removes the consumer's name from the lists in the commercial operator's possession (a mechanism called out '*opt–out*'). This legislation, therefore, is unsufficient to give total, complete, and adequate protection to the consumer. This is especially noteworthy considering that the U.S. is one the main producers of spam worldwide.

In contrast, in Italian law there is a noticeable absence of a specific discipline relating to telematic advertising, particularly on the basis of a preferable interpretation, and an over-extensive application of the general rules on advertising and unfair commercial practices. As well as this, there are the provisions on e-commerce referred to in Legislative Decree number 70/2003, and those relating to privacy, as in Legislative Decree number 196/2003. All of this is entrusted to the relative and relevant competences of the Antitrust Authority and the Data Protection Authority.

Under the same conditions of the Community system, the Italian legislator already provides (according to Law 287/1990 on the protection of competition and the market) a kind of binary protection, namely in administrative procedures by the Antitrust Authority, and in jurisdictional procedure by means of the Judicial Authority (for the protection of subjective legal situations in which the plaintiff will have to provide evidence of the existence of the damage suffered as a result of the unfair conduct of repeated dispatch of undesired communications).

More specifically, on the basis of expectations contemplated in Legislative Decrees number 145 and 146 of 2007 (transposing Directive 2005/29/EC), the Antitrust Authority may initiate proceedings in both the case of unfair commercial practices and the case of misleading and comparative advertising, and is provided with relevant instructing sanctioning powers. Therefore, it can be stated under Article 27 of the Consumer Code that the Antitrust Authority is the authority responsible for investigating and intervening in the field of unfair commercial practices, having the ability to act, not only upon signalling, but also *ex officio*.

It is also necessary to point out the existence of two more laws which protect Internet users from spam in different ways: namely, Legislative Decree number 171/1998 (which states that the advertising cost must be entirely paid for by the advertiser and not by the user who receives the email and additionally has to pay for the Internet connection and electricity); and Legislative Decree number 185/1999 (which denies the

use of automated call systems without the intervention of the operator in the field of distance sales, unless previously authorized by the consumer).

Nevertheless, the true problem related to the protection of consumers from unfair and specifically aggressive commercial practices is the difficulty of defending them from unsolicited messages coming from abroad, by subjects operating beyond the borders of the European Union. If the global subject abuses these means of communication, what happens to the user?

Today, in fact, the extreme difficulty in tracking down the person(s) responsible for spam is the biggest obstacle to the protection of user's rights. Unfortunately, this difficulty is occuring more more and more frequently because of the sophisticated technical precautions adopted by senders. The only solution to foreign spam is for service providers to install *ad hoc* filters by cutting all communications from those servers that send thousands, or even millions, of junk emails.

It is highly recommended that we pay close attention when we subscribe to any service on the internet, as this could authorize a company to (mis)use our personal data. If this same company provide data to a third party, this could authorize the dispatch of unwanted advertising material. It is therefore necessary to contact the provider of the service immediately in order to deny the uses of data that go beyond the simple supply of services.

III. Fake online reviews

False reviews can be included in the general category of deceptive commercial practices whose constituent element is perceived as irrelevant, or which fails to communicate to the consumer all relevant and useful information to be able to guarantee him that a commercially aware and informed decision is taken. This, thus, exploits the customer's emotional and cultural weaknesses (*i.e.* the substantial position of weakness the consumer experiences in the consumer relationship) in order to persuade him to take decisions of a commercial nature which he would not otherwise have taken.

The ban on misleading commercial practices expresses the legislator's intent to introduce a series of indications of a general character which can

be applied with reference to the whole Consumer Act in its dynamic aspect. This protects the consumer from the first stage of a commercial contact (which may happen, for example, through advertising), subsequently protecting him in the commercial communication phase (understood as that whole set of behaviours, solicitations, and contacts, not strictly included in the intent of advertising, but which are part of a marketing strategy directed at the consumer). Finally, with the passage from the extra-contractual phase to the negotiated phase properly understood, the consumer is safeguarded in the possible pre-contract negotiation stage, extending afterwards to the protection of the contract execution stage, and possibly to the imposition of sanctions in the case of unsuccessful execution.

The increased risk of fake online reviews is due to the increasing commercialization of the Internet – that is from the constant use of virtual space for the purpose of exchanging goods and services. A number of important legal issues thus arise, among which there are certainly the highest requirements for the safeguarding and protection of the public in the virtual markets offered by the Internet as a channel of contact with key potential audiences[25]. These requirements must be met in order to avoid the danger of conditioning, controlling, manipulating and/or altering the process of the consumer's free will in taking a conscious decision of a commercial nature.

The platform of appreciation in which it is possible to express users' opinions on goods and services is not the market which the potential customer is shown; it is only a partial reflection. Even if it appears to be an open site built with the content of users, it is, instead, a closed and vertical system, governed by algorithms forged by the owner. Instead, a platform that wants to truly serve the users should display two categories of results: vertical results and horizontal results. That is to say, it is necessary to allow a direct comparison between the reviewer

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[25] B. Blasco, *Falsità della recensione in Internet, astroturfing e scorrettezza delle pratiche commerciali* [*False Internet review, astroturfing and impropriety of business practices*], "I Contratti", Issue 2, 2017, pp. 231–242. Regarding the fake review problem see: S. Pugnale, *Pubblicità online: luci e ombre* [*Online advertising: lights and shadows*], available online at: http://www. trevisancuonzo.com; A. Stazi, *La comunicazione commerciale in rete: peculiarità, tipologie e disciplina* [*Commercial communication on the web: peculiarities, types and discipline*], "Diritto dell'informatica e della comunicazione" ["IT and communication law"], Torino, 2009.

and the reviewed website, since it is only from the horizontal dimension of the comparison that it is possible to understand the whole context and objectivity of the judgment.

Serious harm to the market and users derives from the absence of this kind of platform, because it fails to support the 'sentiment' of the average consumer of the Internet who mistakenly supposes himself to be aware of the risks and is able to choose freely. Nothing is more illusory than the apparently never-placated controversy on an open platform because, more than in any social system before, technology and social-media particularly lend themselves to these kinds of distorted and misleading uses.

So false reviews affect the consumer's economic behaviour, damaging both the proper functioning of the market and the single user, under the *macro* and *micro* economic perspective. False reviews can involve such activities as: *boosting*: inserting false positive reviews on a site; *vandalism*: inserting false negative reviews on a competitor's website in an attempt to harm online reputation; *optimization*: systematic publication of fraudolent reviews, generally by third-party companies who are willingly paid; *incentives/discounts/free treatments*: release of false positive reviews related to offers, by sites, discounts, reductions, purchases, vouchers and other kinds of incentives in favour of users.

The deceptiveness of falsely reviewing sites, goods or services entails misleading a large audience of consumers in terms of the nature and characteristics of the product, thereby altering their economic actions. More specifically, in false online reviews the consumers often focus their own economic determinations on comparative sites based on apparently veritable, genuine, and authentic judgments relative to websites, goods or services previously reviewed. These sites are actually handled by traders through a control apparatus that is very often completely ineffective in satisfying the consumer's expectations.

The incorrect action of the trader is therefore sanctioned as unfair practice because it is deficient in all the relevant information which the consumer needs. The information is hidden or otherwise presented in an obscure, incomprehensible, or ambiguous way, offering every protection using opaque conduct, determined by the distortion of the improper trader. This thus leads the consumer to operate according to a choice that is not free, nor rational, nor conscious.

These obligations imposed on the trader by the normative law in the field of unfair commercial practices are surely even more necessary in the case of services available online, which are destined to reach a very large number of consumers. The trader, conscious of the functioning of his control system of reviews and the intrinsic limits of the system (and, in the light of the business model he has adopted), has defaulted in his duty to provide the consumer with a clear, exhaustive, and truthful picture in relation to the promotion of goods or services.

To underline the danger of the subtle and dangerous behaviour that has become part of the moulding of the consumer's will, it is also useful to analyse the parallels between false reviews and the phenomenon of *astroturfing*. This term was born in the marketing sector in the mid-eighties, and refers to the practice of masking the sponsors of a message or organisation to make it appear as though it originates from, and is supported by, 'grassroots' participants. This method has been used for a whole set of goods, services, products, and even political candidates.

Artificial feedback, created thanks to the help of people generally paid to make positive comments about the thing being advertised (and subsequently to trigger off a mechanism able to influence others), creates a fictitious effect developed in order to influence the consensus on online products, thus being efficacious in affecting our purchases.

According to a study by the Harvard Business School[26], the phenomenon of fictitious feedback has an invaluable commercial value and is able to influence purchases and online booking "in a really important way" while, on the contrary, a bad Internet or brand reputation may have a considerable impact on a company. Therefore, if through the use of the Internet we get the utmost freedom to promote or downgrade the reputation of a product, service, or hotel, this effect may be deceitfully amplified if it is entrusted to subjects with a certain digital popularity, or those commissioned under the promise of payment to become compliant users. Take, for example, the practice of *crowdturfing*, in which large numbers of false reviews are created by low-paid staff in order to credit or discredit a product or a reputation.

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[26] S. Green Carmichael, *Everything You Need to Know About Giving Negative Feedback*, available online at: https://hbr.org/2014/06/everything-you-need-to-know-about-negative-feedback [lact accessed: 20 October 2018].

As always happens in a market, if there are web agencies and companies that deal with services such as the selling of false review packages, there are traders who have no scruples about using them. Thus, a flourishing business of digital reputation is born, where the exchanged goods are the reviews and the counterpart always consists in the economic gains. By simulating approval on a product or a service through the use of forums, communities, blogs, and social networks, you can get the appreciable effect of distorting free decision, the choice of conscious purchase, and the economic behaviour of the users and consumers. Therefore, through the sustained use of professional reviewers, or 'influencers', paid directly by advertising agencies or companies that have commissioned the service, the commercial reputation of a product, service or certain brand can be increased or even built from scratch. This then undermines the transparency which is essential for the growth and development of the digital economy.

The normative law on unfair commercial practices sanctions the implementation of those deceptive actions coming from traders. However, it is difficult to undertake such legislative action and sanction messages which are often subliminal and untruthful, coming from bloggers or reviewers that sometimes falsely claim the non-sponsorship of their post and assert the authentic value of their opinions as a result of their intellectual honesty and subjective experience of use.

It is essential that the consumer is made aware that these reviews are often commercial communications and not an expression of personal opinions, but the Italian legal system is still very weak and not yet ready to regulate the phenomenon of the false publicity spread on the Internet.

The legislative instrument offered by the Italian legislator through Legislative Decree number 146/2007 (transposing the Directive so far examined in this article) contemplates only the relationship between the trader and consumer and not cases where a tort is committed by a third party paid by the trader. A comparative analysis should look to the U.S. where the Federal Trade Commission (the government agency put at the head of controlling commercial practices) has issued a series of recommendations aimed at bloggers and agencies, as well as ordering firms to promote honesty and transparency in the blogosphere. This measure has also specified very high pecuniary sanctions (up to $11 thousand) for *astroturfing* or *buzz marketing*. *Buzz marketing* is a form of

communication in which sites, forums, and bloggers are asked, under payment, to give information about a brand or a certain product or service. The *buzz* itself is nothing negative *per se*, as if it is done properly, it is a great way to convey information on a product. It can become negative, however, when the person who is asked to talk about it is also paid. This action is undertaken in the hope that the person does not buzz about a product in an adverse manner. Therefore this behaviour makes misleading what what should be an objective judgment. *Buzz marketing* aims at creating a word of mouth phenomenon that tends to grow gradually and attract attention.

Further analysis should look to France, the only European nation that regulates the trust phenomenon in the digital economy by law. In French law, it is established that all publicity accessible as public online communication must clearly identify the natural or legal person on behalf of whom the advertising is created. In the case of transgression, a fine is levied that can reach up to 37,500 Euros, besides the possibility of sentencing guilty parties to two years of imprisonment.

In the digital market, in essence, as well as in the real market, more than ever there needs to be a balance between the various interests involved. This balance must seek to find the difficult equilibrium point between the freedom of business, free competition, and the protection of the consumer, and must oppose advertising and publicity that undermine good market rules which aim to protect and safeguard all market subjects, and above all consumers.

IV. Conclusion

From what has been analysed, it emerges that, as in consumerism, the protection of the individual consumer (the victim of misconduct through unfair commercial practices as aggressive as spam, or as deceptive as the false reviews examined in this article) is guaranteed only through adequate and exhaustive information that allows him/her to attain greater awareness. Thereby, the consumer is no longer a simple recipient of rules, but an economic operator, active in the market: not just a recipient of products or services, or a defenceless pawn in the hands of the entrepreneur, but a fierce and responsible subject of rights,

so remedying the asymmetric and unbalanced situation that still exists between the consumer and the trader.

Even with reference to the specific object of this study, it must be emphasized that, besides legal protection (even before the legal protection of rights), the protection of the consumer is mainly made up of information and education in commercial relations, making the consumer as aware and responsible as possible.

The study of Directive 2005/29/EC is a good opportunity to ask how community consumer law should evolve in the future. The law in question undeniably institutionalizes the ban on unfair commercial practices, but it is also certain that the protection of the consumer from such practices should be included within the more general protection of the market and its proper functioning, and that, with regard to the specific sanctioning and remedial profiles which are civil, the law is really lacking, leaving the sector of contractual relations unregulated.

It can therefore be said that this legislation has a clear nature which acts against trust, being able to regulate businesses, rather than regulating inter-individual relations between firms and consumers. This is because, by sanctioning the prohibition in question, it certainly provides direct protection of the market and fair competition: these concepts are inextricably linked. However, the consumer contracted and then damaged by unfair commercial practice can only use the usual tools provided by the law.

The community legislator has appeared owing to the process of unravelling such a thorny question and, according to the unguaranteed discretionary power of national legislators, has not chosen the private sanctions and individual remedies in the case of the violation of freedom of choice, rather deciding to concentrate better on collective remedies and protection of an administrative and publicistic nature. It would be desirable to make people aware of the fact that the objective of a European contractual right may represent more of an opportunity than a risk. This would thus eliminate the distinction that exists at the community level between the recognition of the liberties of carrying out economic activities on one hand, and the regulation of legal contractual relations by which such liberties are exercised, on the other hand.