

THE ICA'S ENFORCEMENT AGAINST UNFAIR COMMERCIAL PRACTICES ON THE WEB

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The Italian Competition Authority (ICA), in line with its institutional aims and with recommendations from the EU Commission, put under scrutiny unfair – often aggressive - commercial practices (UCPs) on the web which were infringing the Italian Consumer Code and the Legislative Decree n. 145/2007 (B2B misleading advertising).

Investigations against on-line UCPs were launched on the basis of complaints submitted by consumers who did not receive the goods they had purchased on the web and for which they were not able to obtain refunds. The ICA, thus, has carried out formal investigations concerning false information on traders' websites as regards: a) availability of products never delivered; b) product delivering status; c) expected date of delivery; d) refund rights for undelivered products. Many traders stopped their conducts as soon as the Authority stepped in, but in some cases there was evidence that website owners registered new domain names and reiterated the same infringements. In those cases, the ICA was empowered to start non-compliance proceedings capable of even leading to the temporary closing of the trader's activity (in case of reiterated non-compliance), according to what provided for by the Italian Consumer Code.

Within this framework, the ICA dealt with cases concerning websites selling counterfeited and unsafe products, a phenomenon that is widespread among many sectors. Such phenomenon misleads consumers who, in a period of economic crisis, want to take advantage of market globalization, internet and tax differences among countries and end up believing that certain items sold on said websites are original and very cheap, but then discover after the purchase that they are fake.

The ICA's investigations on fake brand products were launched following complaints submitted by traders' associations (AIFA, INDICAM) and consumers' associations, concerning websites that looked like official sites of brand product manufacturers. The investigations focused on the misleading effect on consumers considering the characteristics of the products and on the consumers' consequent impossibility to exercise their rights as provided for by the Consumer Code. Indirectly, the investigations helped to defend business trademark owners that were likely to be damaged by the sale of fake products, also in their brand image. In fact, counterfeiting badly alters market dynamics, lowers incentives in improving products, confuses consumers and eventually prevents competition to create its benefits, i.e. lower prices as well as a broader and better choice of products and services.

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By using the powers entrusted by the law, specifically the electronic commerce Directive, the ICA blocked two websites selling pharmaceuticals and over 50 websites selling fake brand products, also by applying interim measures. In some cases, the items sold by said websites not only were counterfeited but were also a health hazard.

The first block of decisions included 20 websites selling brand fashion items (Gucci, Prada, Hogan, Tod's, Armani, Ray-Ban) at outlet prices. According to complaints, many purchasers were misled by the website's structure and by the images that mimicked the original ones and induced purchasers to believe that those websites belonged to the official resellers; products were sold at discount prices ranging from 50% to 70% less. The websites contained no information concerning product guarantees - which could not be claimed since they were selling fake items - neither concerning the rights for annulment and cooling off period, nor concerning traders' identity and contacts for possible complaints. In the case of a specific website selling sunglasses, the Authority's intervention was particularly needed and urgent, as the items on sale were of low quality and could have caused eye damage.

Another investigation concerned 33 websites selling counterfeited Nike shoes which were a health hazard as well. Upon receiving two complaints, the ICA launched two proceedings against Chinese traders; at the same time, the press reported that the same kind of fake products had been seized by the Italian Finance Police (Guardia di Finanza): laboratory analyses carried out on several samples taken from fake Nike brand shoes, including children's shoes, imported from China and meant for sale all over Europe, showed that they contained an alarming percentage (6 or 7 times above the authorized limit) of hexavalent chromium, a carcinogenic substance. Recently, 1.7 million shoes for a value of 20 million Euros were seized in wholesale stores in four Italian regions. Non-toxic trivalent chromium is normally used in leather shoe manufacturing, but in case of bad quality leather, the substance becomes hexavalent chromium. In other fake brand shoes imported from China and similar items sold on the websites, a high and dangerous concentration of DFM (a mildew remover) was found.

By giving interim orders to suspend the practice, the ICA made use of its enforcement powers as provided for by Legislative Decree n. 70/2003 which transposed into the Italian law with the Directive 2003/31/EC on electronic commerce. The cited law empowers authorities to require operators acting as mere conduit (connection and information transmission), memorization (automatic, intermediate, and temporary), caching for better forwarding information and information hosting on behalf of the service provider, to cease infringements.

In order to enforce said resolutions, the ICA cooperated with a Special Unit of the Italian Finance Police. From this cooperation, it emerged that the operators hosting those websites were situated outside the Italian territory.

Within the European Union, the phenomenon of falsifying medicines has reached an alarming level. Falsified medical products reach the patient not only through networks of illegal distribution but are also introduced in the legal chain of procurement through on line selling, thus constituting a serious threat for public health.

Currently, on-line selling of any and whatsoever drug is forbidden in Italy. The wording of art. 122 of Royal Decree No. 1265/1934 is clear and states “*Public selling of drugs in the dose or form of medicines is allowed only to pharmacists and is to be carried out in the pharmacy under the owner’s responsibility.*”

With specific reference to the so-called ethical drugs, the Italian law states the need for a prescription and, therefore, for a preventive medical control, and forbids advertisement. Moreover, the mentioned national regulations in force not only impose that the imported products must obtain marketing authorization (the so-called AIC), but they also require that the package and relevant patient information leaflet must be written in Italian.

The need to ensure a greater standard of protection for public health represents the *ratio* for adopting more restrictive measures as regards the on-line selling of ethical drugs.²

In order to counter the illegal sale of ethical drugs to Italian consumers through the Internet and to protect consumers from unfair commercial practices, the ICA adopted, in December 2012, a formal decision – after an interim suspension measure - against a Dutch company that set up an articulated marketing strategy to persuade Italian consumers to purchase drugs online through the www.bestgenericdrugs.net website.

For this specific purpose, the company used the Italian language website www.viagra-cialis-livitra.it (which it also owns) to convince Italian consumers that online drug sales are entirely lawful in Italy. Consequently, the attempt was to persuade them to purchase by linking them directly to the website www.bestgenericdrugs.net.

Along the same line, in September 2013, the ICA ordered the British company Hexpress to suspend every activity of on-line selling of ethical drugs on two internet websites, accessible through connection requests coming from the Italian territory. In fact, contrarily to the mentioned regulation, the websites led the Italian consumers to believe that the on-line purchasing of ethical drugs is totally lawful and safe, even without a prescription from a qualified doctor and without a pharmacist.

² Said measures are acknowledged by the Court of Justice – in the well-known ruling *Deutscher Apothekerverband* (PROCEEDINGS C-322/01 dated 11th December 2003) – as compatible with the community regulations. In fact, the Court deemed that the possible risks connected to the use of said drugs, as well as the need to be able to verify effectively and responsibly the authenticity of the prescriptions, and thus to ensure the delivery of the drug both to the actual customer but also to any person appointed by the latter to accept the delivery, is such to justify the forbiddance to sale ethical drugs by mail.

The number of dietary supplements - and the variety of uses for which they are promoted - has increased significantly in the last few years. In fact, the direct purchase of said products through the web is now common.

In this field, the ICA's role is to ensure that consumers obtain accurate information concerning dietary supplements so that they can make informed decisions concerning these products. In this area, the ICA's enforcement action is focused on false and misleading claims in the advertising of weight loss supplements and products (patches and body creams). Many adverts promise immediate success without any need to reduce the intake of calories or to increase physical activity. In particular, many supplements are of unproven value or have been connected to serious health risks. In other words, the use of deceptive, false, or misleading claims in weight loss advertising is widespread and potentially dangerous.

More in particular, and with specific regard to on-line selling, in June 2013, the ICA ordered an international network of six companies to suspend every activity of promotion and on-line selling of over 40 weight-loss supplements through 13 websites. The ICA assessed that the websites contained misleading information as regards: *a)* false claims of specific performances (such as weight loss up to 7 kilos per week) outside the realm of possibility for the products being advertised; *b)* false claims concerning quick loss of substantial amounts of weight without any diet or exercise; *c)* false images of testimonials with photos before and after; *d)* false claims concerning long-term or permanent weight loss; *e)* unqualified safety claims or confusing representations concerning the safety of ingredients known to have potential risks for a significant number of users. The final resolution, issued in November 2013, determined fines for over 1 million Euros³.

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