

## Lessons From Epic's Dutch Fine For Unfair Marketing To Kids

By Rafi Azim-Khan, Preetha Chakrabarti and Sam Cooper (June 14, 2024, 2:51 PM BST)

On May 14, the Netherlands Authority for Consumers and Markets, or ACM, released its decision imposing fines totaling €1.125 million (\$1.216 million) on Epic Games International SARL for violations of the Dutch Unfair Commercial Practices Act.[1]

This decision, stemming from Epic's commercial practices in the popular online game Fortnite, marks a significant moment in the ongoing scrutiny of digital market practices, especially those targeting vulnerable consumer groups.

This case illustrates the complexities of regulating digital practices across different jurisdictions. Epic Games, a Luxembourg-based company, was scrutinized by Dutch authorities for a globally available game, raising questions about the enforcement of consumer protection laws in a digital, borderless market. The global nature of digital markets poses significant regulatory challenges.

This analysis summarizes the ACM's decision and explores its implications, in particular within the U.K.'s broader regulatory framework. We will also highlight parallel developments in the U.S. and the European Union.[2]

### Legal Analysis of ACM's Decision

The ACM's decision addresses three main violations: the use of deceptive scarcity indicators, direct exhortation of children to make purchases and presenting a complex offer under time pressure.

Each of these practices was found to exploit the vulnerabilities of children.

The ACM fined Epic Games €562,500 for using countdown timers in Fortnite's item shop — where players can buy items to be used in the game — which suggested items were available for a limited time when, in reality, they were available for longer.

This practice was deemed misleading as it created a false sense of urgency, exploiting children's fear of missing out and pressuring them into making impulse purchases.[3]

Another fine of €562,500 was imposed for directly encouraging children to make purchases or to persuade their parents to do so. The ACM identified several instances within Fortnite, such as



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promotional videos and in-game notifications, where children were directly exhorted to buy items.

The ACM found irrelevant the time necessary to hold down the buy button, or the required method of payment. The direct exhortation of children was considered an aggressive market practice, also in violation of the Dutch Unfair Commercial Practices Act.

Epic Games was also issued a binding instruction to amend its practices in the in-game item shop to comply with the requirements of professional diligence. The ACM criticized the complex and unclear presentation of the offer, combined with a countdown timer, for creating artificial scarcity and uncertainty.

This complexity and time pressure was found to distort children's economic behavior, leading to impulse purchases. The item shop was considered not to comply with the requirements of professional diligence, also in violation of the Dutch Unfair Commercial Practices Act.

### **U.K. Legal and Regulatory Framework**

The protection of children from harm in the digital, gaming and social media arenas has also been a key priority for U.K. regulators and lawmakers, particularly during the past decade.

It has led to new laws, such as the Online Safety Act 2023, which tackle not just obviously harmful or age-inappropriate content but also that facilitating controlling or coercive behavior. Recent bolstering of U.K. consumer law enforcement powers has further increased risk for entities in this area.

The U.K. Code of Non-broadcast Advertising and Direct & Promotional Marketing, also known as the CAP Code, provides that gambling and lottery advertisements must not "be likely to be of strong appeal to children or young persons, especially by reflecting or being associated with youth culture."<sup>[4]</sup>

This prohibits content that has, for example, references to video game content and gameplay, as well as stars, popular with people under 18 years old.

The U.K. Advertising Standards Authority has also adopted a similar approach to in-game advertisements for video and mobile games, where it has issued rulings against, for instance, Gamehaus Network Technology Co. Ltd.<sup>[5]</sup> and Oasis Games Ltd.,<sup>[6]</sup> in respect of breaches of the CAP Code's rules regarding responsible advertising.<sup>[7]</sup>

As can be seen from the ASA's guidance and recent decisions, game developers and advertisers should consider their target audience to assess whether content could be considered harmful or offensive.

In addition to the CAP Code, when marketing to children game developers and advertisers need to consider consumer laws and, particularly, the rules brought in by the Consumer Protection from Unfair Trading Regulations, which implemented EU Unfair Commercial Practices Directive 2005/29/EC into U.K. law.

While there is overlap between the CAP Code and the Consumer Protection from Unfair Trading Regulations, breaches of the regulations can attract more serious penalties, with local Trading Standards offices having the power to issue fines, and their investigations potentially leading to imprisonment where a criminal offense has been committed.

In addition, the Competition and Markets Authority will shortly have much stronger powers to take direct action against breaches of consumer law, without having to go to court as before, as a result of the new Digital Markets, Competition and Consumers, or DMCC, Act, which received royal assent on May 24 and was published on June 3.

The new DMCC Act powers allow the CMA to determine when consumer law has been breached, potentially fine businesses up to 10% of global revenue and award consumers compensation. Involved individuals who are an accessory to the breach can face substantial fines also — up to £300,000 (\$381,600).

The DMCC Act will carry over the numerous — 31 — unfair commercial practices from the regulations, and add another, a ban on fake consumer reviews.

The regulations and DMCC Act contain a number of practices, the use of which would mean that an advertisement will be automatically regarded as unfair and prohibited in all circumstances.

Also, active in this space is the Information Commissioner's Office, the data protection regulator in the U.K., which has published top tips for game designers on how to comply with its Children's Code, a code of practice aimed at protecting children in the digital world, particularly in the context of online gaming.

The guidelines cover various aspects of game design and operation to ensure children's safety and privacy are prioritized.[8]

The role of the Information Commissioner's Office in safeguarding children's privacy in digital spaces further emphasizes the multifaceted approach to regulation, reinforcing the importance of creating a safe online environment for children.

### **U.S. And EU Focus on Online Protection of Children**

Whereas, to our knowledge, Epic Games has never been fined in the U.K. for unfair practices toward children, such is not the case in the U.S.

In December 2022, the Federal Trade Commission and the U.S. Department of Justice announced that Epic Games had to pay two record fines totaling half-a-billion dollars: \$275 million in civil penalties for violating the Children's Online Privacy Protection Act, in the largest fine ever imposed under the act, and \$245 million in refunds to consumers who made unintended purchases, in the largest administrative order in FTC history.

The FTC's announcement signaled a more muscular role in policing the online children's game and social media industry. Indeed, a bill introduced in 2023, the Kids Off Social Media Act, goes a step further in that direction.[9]

The act aims to complement the Privacy Protection Act with additional social media protections for children online, due to the outsized negative effects of social media on people under 18 years old. The bill is only in the early stages of the legislative process, and still needs to be passed in congress.

Unsurprisingly, the online protection of children also continues to be at the top of the EU agenda. On May 16, days after the ACM's Epic Games decision was published, the European Commission announced a formal investigation into Meta Platforms Inc., on the basis that it may have

breached the Digital Services Act over the protection of minors on Facebook and Instagram.[10]

The commission plans to investigate the sites' age-assurance and verification methods. "With the Digital Services Act we established rules that can protect minors when they interact online," said Margrethe Vestager, European commissioner for competition, announcing the investigation.[11]

### **Practical Takeaways**

Lawyers advising clients in the digital market space should anticipate increased regulatory scrutiny, especially regarding practices targeting vulnerable consumers. Legal advice should incorporate a thorough risk assessment of marketing strategies from a consumer protection perspective.

The decision highlights the importance of considering the vulnerability of the target audience in assessing the fairness of commercial practices. Legal practitioners should advise clients to evaluate their marketing strategies' impact on vulnerable groups, such as children.

Lawyers must navigate a complex web of international, regional and local consumer protection laws. Advising clients on compliance requires a nuanced understanding of these legal landscapes, as well as a solid understanding of the priorities and boundaries set by regional and local regulators.

In light of the ACM's decision, companies should proactively review and adapt their commercial practices to ensure compliance with consumer protection laws. Such compliance efforts can help companies avoid the reputational damage and financial penalties associated with unfair commercial practices.

In conclusion, as European and U.S. regulators continue to crack down on marketing methods directed at children, in games and online, that they find unfair and deceptive, consumer products marketed online to children should go through multiple internal reviews to confirm that they conform with frequently updated European and U.S. regulations.

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[1] [https://www.acm.nl/system/files/documents/sanctiebesluit-fortnite\\_en.pdf](https://www.acm.nl/system/files/documents/sanctiebesluit-fortnite_en.pdf).

[2] On 14 May 2024 the ACM did not only release its decision to the public, but also a good summary of the case which can be found here: ACM imposes fine on Epic for unfair commercial practices aimed at children in Fortnite game | ACM.nl; <https://www.acm.nl/en/publications/acm-imposes-fine-epic-unfair-commercial-practices-aimed-children-fortnite-game>.

[3] See in particular para. 35 and 37 of the decision.

[4] UK Code of Non-broadcast Advertising and Direct & Promotional Marketing, Rule 16.3.12.

[5] ASA Complaint Reference: A23-1218813 Gamehaus Network Technology Co Ltd.

[6] ASA Complaint References: A22-1161063 Oasis Games Ltd and A22-1168359 Oasis Games Ltd.

[7] <https://www.asa.org.uk/codes-and-rulings/advertising-codes/non-broadcast-code.html>.

[8] <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/childrens-information/childrens-code-guidance-and-resources/top-tips-for-games-designers-how-to-comply-with-the-children-s-code/>.

[9] <https://www.congress.gov/bill/118th-congress/senate-bill/1291/titles>.

[10] [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_24\\_2664](https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2664).

[11] Press release 16 May 2024: Commission opens formal proceedings against Meta under the Digital Services Act related to the protection of minors on Facebook and Instagram, [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_24\\_2664](https://ec.europa.eu/commission/presscorner/detail/en/IP_24_2664).