

European Strategy for Regulating Online Video Games and New Digital Markets: A Comparison of Emerging Opportunities and the Current Italian Regulatory Framework

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Europe is targeting video games for economic growth, employment and increased sales volumes. This is a booming sector whose strong push toward innovation that contributes to the digital transformation within the European Union. In fact, the use of video games is not only limited to leisure activities but also has strong uses in the area of skill enhancement, especially digital, education as well as aiding advancement in technological areas. With regard to turnovers, one context greatly impacted by this sector is online sales of digital goods sold in online video games. Alongside the attractive sales volumes, however, are serious risks arising from noncompliance with existing regulations within such new sales contexts. This paper therefore aims to analyse these new contexts, assessing concrete risks and examining specific means of protection to create a safer environment for players and buyers of goods within video games.

Keywords: *Video games; Contractual obligation; Children; Compliance*

Introduction - The new European strategy for regulating video games

The European video game sector is the fastest growing cultural and creative sector in Europe, with an important potential for growth and job creation, and contributes to Europe's digital single market¹.

The European video game industry consists mainly of small and medium-sized enterprises (SMEs) and start-ups, which play an important role in the innovation and growth of this sector.

In addition, the video game industry has a comprehensive value chain based on innovation and creativity, including a wide range of skills and know-how.

It is also necessary to consider that technological developments in the online video game industry are becoming increasingly important and are also extending to other sectors and industries such as construction, design, retail, education, virtual/augmented reality, and online marketing and shopping.

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¹European Commission (2022).

Video games are one of the most popular forms of entertainment in Europe, along with other entertainment activities, as a 2019 Eurobarometer study found that 27% of Europeans play online games at least once a month, compared to 48% who listen to streaming music and 47 % who watch movies or TV shows on online platforms.

In recent years, the video game industry has maintained steady and unstoppable growth, even during pandemic period, with interesting percentages in terms of both employment and turnover. According to data collected for 2021, turnover stood at 23.3 billion euros with constant growth rates that did not stop even during the pandemic².

One dynamic that has well accompanied the evolution of these volumes is certainly related to the important changes in the purchasing dynamics of digital goods and services related to the gaming context, which will be discussed in detail in the course of the paper. The phenomenon that we need to examine preliminarily is the incidence of online purchases in the specific context of gaming.

The world of shopping is constantly evolving. The strict division between the physical and digital contexts is no longer enough to represent the real dynamics of the sales of goods and services, not only in Italy but also on a global level. As far as Italy is concerned, sales volumes are constantly growing, demonstrating a general attitude of trust towards online services. According to the latest Istat report³, the Italian National Institute of Statistics, in 2022 one person out of two used the internet to make an online purchase, with a certain homogeneity based on gender and geographical distribution, a predominance of young people, who account for 48.2%, slightly contracted in 2022 due to the end of the pandemic restrictions.

This general positive trend underlies the evolutionary mechanisms of purchasing contexts, such as the Metaverse and virtual worlds 4.0.⁴ and the consolidation of areas that are already fully established. With regard to the latter, the video games industry – the analysis of which will be the subject of this contribution, deserves to be mentioned and treated separately.

²EY (2021). For more data on gaming rates during the pandemic, see the reports at <https://www.statista.com/statistics/1111761/gaming-behavior-during-the-coronavirus-covid-19-lockdown-in-italy>.

³As indicated in REPORT_CITTADINIEICT_2022. In 2022, 48.2% of the population aged 14 and over used the Internet in the 12 months preceding the interview to shop online. About a third (32.3%) of these people ordered or bought goods or services in the three months preceding the interview, 10.6% during the year and 5.3% more than a year ago. Men (52.4%, 44.4% of women), residents of the North (52.8%, 40.3% of the South) and, above all, young people aged between 20 and 29 are more inclined to buy online and 24 years old (75.7%). Between 2020 and 2021 there was an increase of 6.5 percentage points in the use of e-commerce, thanks to the increase in users who made at least one online purchase in the last three months preceding the interview (from 27.3% in 2020 to 34.8% in 2021). In the last year, on the other hand, there has been a significant decrease both as regards the overall indicator (which goes from 50.3% in 2021 to 48.2% in 2022) and for that referring to purchases in the last three months (from 34.8% in 2021 to 32.3% in 2022). This change is justified by the end of the restrictions due to the pandemic.

⁴With regard to the content of the European Commission's new Virtual Worlds and Web 4.0 strategy, see the information in the link <https://digital-strategy.ec.europa.eu/en/library/virtual-worlds-and-web-4-0-factsheet>

Video games represent a significantly widespread entertainment worldwide, a factor of cultural expression and aggregation in large communities. However, beyond the purely recreational aspect, it is a scenario that hides behind it a fascinating world full of opportunities.

One of the main distinguishing features is the very high prevalence of the phenomenon. In Europe, video games involve all ages, with half of the players being in the 6 to 64 age group, with the largest proportion/with a higher percentage between the ages of 45 and 64.

Regarding minors, on the other hand, about whom we will discuss in more detail later in this article, the percentages are certainly higher, since 73% of children between 6 and 10 years old belong to this category, 84% of those between 11 to 14 years old and 74 of young people 15 to 24 y.o.⁵.

Currently, there are estimated to be more ninety thousand jobs in Europe and with an ever-increasing number of operators in the supply chain such as cultural creators, game developers, designers, writers, music producers and other artists. This sector therefore represents a crucial link, straddling the digital and cultural sectors and accounting for over 50% of the added value of the overall EU market for audio visual content.

Due to the steady growth and the substantial increase in turnover, a new focus on this sector has arisen, which led to the development of a project focusing on this area, 'Understanding the value of a European gaming company'⁶.

The true distinctiveness of the video game industry lies in its intimate connection with the themes of the innovation topic, as well as in its bivalent nature, located between the high tech and the creative sector. The creation and development of such systems require the use of increasingly sophisticated and high-performing technologies and infrastructures, whose competencies cover increasingly broad areas such as design, retail, education, marketing, virtual/augmented reality and online sales, a fundamental part of the sustainability of online business.

Thus is therefore a field that has the undoubted merit of promoting innovation in Europe, the development of new technologies, such as artificial intelligence and virtual and augmented reality, contributing to the growth of digital infrastructures and skills.

Its implications, therefore, do not remain constrained to a purely playful context, but instead find application in contexts with major implications such as teaching and training, where they help develop creativity, critical thinking and

⁵Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A digital decade for children and young people: the new European strategy for a better internet for children (BIK+). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022DC0212>.

⁶For project details see <https://digital-strategy.ec.europa.eu/en/policies/value-gaming>. The project "Understanding the value of a European gaming society" provides insights into the numerous economic, cultural, financial and social issues that video games have on our society and how this industry affects a number of policy areas. The related activities were developed in 2022 and had two main objectives: 1) to deepen the understanding of the video game sector in order to identify future policy options; 2) to create and cultivate a network of actors and experts in the field of the EU video game industry, in order to facilitate future exchanges and support their growth.

technical knowledge. The positive effects examined, however, are also accompanied by negative aspects.

The flip side of the coin, in fact, is identified in the possible undesirable effects associated with overuse which can lead, for example, to negative consequences on social relationship, dropout rates, physical and mental health and lower academic performance. The conclusion is that becoming a habit for user is necessary for the survival of an app, and therefore/thus the goal of developers is to implement mechanisms that encourage its use.

By taking advantage of systems calibrated and studied on our brain structure, with the application of the most proven principles of neuroscience. In a nutshell, mechanisms are exploited that increase levels of dopamine, a neurotransmitter that generates the sense of pleasure linked to a certain experience. Added to this are mechanisms that associate more or less random reward systems which are accompanied by an increase in dopamine, generated precisely by the dopamine⁷.

For this reason, the *gaming* industry can turn into a psychologically risky environment, also due to a disorder that WHO has labeled as a "gaming disorder", i.e. the pathological addiction characterised by altered control over gaming and on the normal management of one's life. In this hypothesis, more priority is given to continuous and intensified gaming over normal daily activities such as study and work⁸.

The summarised framework examined indicates the presence of two essential factors underlying these dynamics: the attempt to keep the player within the virtual environment, in order to increasingly (retain the user and promote purchases within the game) build user loyalty and promote in-game purchases; and the opacity inherent in the design, which as we shall see, sometimes follows illegal logics to further the game related business model.

The negative implications have repercussions first and foremost on the contractual level, with respect to sales that are made within the online gaming stores, for a whole series of consequences in terms of the rights recognised by the law, which will be examined in this contribution.

Further concerns then arise from the perspective of the processing of personal data collected during interaction with gaming systems, regarding the economic monetisation of players' behaviours and preferences for marketing and profiling purposes. This information is of fundamental interest to developers, but it poses a risk to users' rights and freedoms. On the latter aspect, critical issues also increase in the face of the specific type of user of these systems, such as minors and vulnerable individuals.

In this regard, the provisions and means of protection derive from the current legislation on the processing of personal data⁹, which contains, among other

⁷Koepp, Gunn & Lawrence (1998); Weinstein (2010).

⁸According to the World Health Organisation, the "gaming disorder" consists of a series of persistent or recurring behaviours that take precedence over other life interests and has included it in the International Classification of Diseases (ICD) or the official list of pathologies mental. <https://www.who.int/news-room/questions-and-answers/item/addictive-behaviours-gaming-disorder>

⁹Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 concerning the protection of natural persons with regard to the processing of personal data, as well as the free movement of such data and which repeals directive 95/46/EC (Regulation general data

things, specific provisions for the protection of data subjects, including all those related to transparency, lawfulness and fairness, with specific provisions for the protection of minors and vulnerable individuals. However, this provision is not exhaustive of concrete protection needs and in some ways presents serious and complex problems like the other contractual perspective we will examine¹⁰.

New Purchasing Dynamics in the Context of Video Games: The Value and Aspects of Particular Relevance

The video game industry never stops reinventing itself, evolving and progressing. To do so, especially in recent times, it has sped its growth path through new and evolved business solutions that are closer to the needs and expectations of its users.

In particular, in recent decades, there has been a shift from following a product logic, at the time arcade and boxed, to a service logic with so-called pay-to-win or freemium *functionality*. This strategy has also allowed it to absorb, through the sale of game extensions, the significant increase in development costs, thus enabling it to offer increasingly advanced and high – performance products at practically stationary prices.

The value of video game purchases is growing steadily worldwide. According to a US survey, total sales will reach \$225.30 billion with an annual growth rate of 8.35% and a projected market volume of \$352.10 billion dollars by 2027.

Specifically with regard to the revenues from in-app purchases, however, these are expected to reach \$145.30 billion and a value of \$1.25 billion compared to the revenue generated by paid apps¹¹.

The market is constantly growing and the video game industry continues to implement new and profitable features such as multiplayer modes, augmented and virtual reality, subscriptions and loot boxes. Particularly thriving is the sphere of purchases of gaming concessions such as: "skins" or aesthetic elements; in game advantage tools and to avoid advertising; elimination of cool-down timers or waiting times; elimination of "grinding"¹². These features are then purchased by players through microtransactions, either in app or on the platform.

However, with respect to the latter area, the highest risk factors for consumers are recorded, as the dynamic inherent in such purchases are often riddled with

protection) (OJ 04/05/2016 n. L119). <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32016R0679>

and Legislative Decree 196/2003 as amended

¹⁰In USA, the Federal Trade Commission has recently sanctioned Epic Games, creator of the video game Fortnite, for behaviours that harm both the perspectives just examined, therefore both privacy and contractual aspects. <https://www.ftc.gov/legal-library/browse/cases-proceedings/2223087-epic-games-inc-us-v>

¹¹Data collected and processed through reports and analyses of <https://www.statista.com/>

¹²see definition in [https://it.wikipedia.org/wiki/Grind_\(videogames\)](https://it.wikipedia.org/wiki/Grind_(videogames)): term used in the field of video games, in particular in MMORPGs and J-RPGs, to indicate the repetitive execution, by the player, of primary or secondary quests with the sole purpose of making the character grow, increase its level or unlock new content faster, so as not to be led to spend real money, often even at the expense of entertainment.

problems. These defects concern both the pre-contractual phase and the management of contract itself, contrary to the provisions dictated by the Italian Legislative Decree 206/2005 as amended¹³. The consumer code, in fact, dictates stringent rules to protect the balance of contractual relationships, requiring, among other things, adequate information and proper advertising, through a more specific application of the principles of good faith, fairness and loyalty as well as of transparency and equity. This discipline is fully applicable to the area in question due to the explicit extension made by Directive (EU) 2019/2161, the so-called Omnibus Directive,¹⁴ which amended the provisions of the sector directives¹⁵, expanding the margins of protection within the scope of services and digital content.

Possible Contractual Risks related to the Digital Purchasing Environment: Manipulative Designs and the Opacity of Terms and Conditions

Safeguards in the context of online shopping are stringent since they must enable consumers to make informed and conscious choices. Indeed, the risk is that of purchasing goods whose contents have not been integral and understandable. In the hypotheses of subscriptions, on the other hand, the risks concern renewal mechanisms that are unclear or for which the consumer is unable to predetermine the effects and consequences, or the related method of cancellation is unclear or particularly difficult. It is clear that these risks are even more dangerous when one considers that, based on what has been observed, the users of these systems are often minors or vulnerable individuals, thus immature and inexperienced in interacting with certain mechanisms whose dangers are now going to be examined. To this scenario one must then add that the contractual dynamics that characterise the online purchasing environment, both of the video game itself and of individual

¹³Legislative Decree 6 September 2005, n. 206, the so-called Consumer Code, in accordance with article 7 of the law of 29 July 2003, n. 229. (GU n.235 of 8-10-2005 - Ordinary Supplement n. 162)

¹⁴Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Directive 93/13/EEC of the Council and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the Parliament and of the Council for better enforcement and modernisation of EU consumer protection rules <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32019L2161&from=EL>, defined as the Omnibus Directive, implemented in Italy with Legislative Decree no. 26 of 7 March 2023, which makes changes to the Consumer Code, integrating multiple provisions regarding unfair terms, unfair commercial practices, unfair competition, untruthful commercial communications, transparency towards consumers in addition to the applicable sanctions.

¹⁵See amendment to art. 2 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 relating to unfair commercial practices between businesses and consumers in the internal market and amending Council directive 84/450/EEC and directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) no. 2006/2004 of the European Parliament and of the Council («directive on unfair commercial practices»), implemented in Italy by Legislative Decrees n. 145 and 146 of 2 August 2007, integrated into the Consumer Code and art. 2.11 of DIRECTIVE 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending directive 93/13/EEC of the Council and of the directive 1999/44/EC of the European Parliament and of the Council and repealing Directive 85/577/EEC of Council and Directive 97/7/EC of the European Parliament and of the Council;

purchases, often eludes the visibility and understanding of adults and supervisors, because of the objectively closed and inaccessible environment to the non-gamer.

Pursuant to current provisions, consumers must be provided all the information concerning the electronic product and any purchasable goods within the game with regard to their content. This information must be easily accessible and viewable in a clear and understandable way before purchasing the game and on the occasion of individual purchases, as well as transmitted to the consumer on a durable medium¹⁶.

Unfortunately, the current purchasing context within video games is characterised by several business practices that present particular challenges to current regulatory requirements. The pre-contractual approach and the dynamics that characterise video games purchases are often characterised by a certain opacity, as they are not exhaustive or inaccessible for consultation. The most frequently encountered problems involve very little information on aspects related to, among other things, subscriptions and renewal or opt-out methods, withdrawal methods, and when and how to refund¹⁷.

In addition, with respect to the requirements of transparency and fairness, an analysis carried out by the European Parliament¹⁸ shows very frequently the use of *dark patterns*, manipulative and distorting designs¹⁹ right from the planning stage, capable of compromising the consumer's freedom of choice making him/her make purchasing decisions that he/she would not otherwise have made. These conducts integrate real aggressive commercial practices, contrary to the provisions of the aforementioned Omnibus Directive and with the Digital Service Act²⁰, in relation to the invoked right to protection against minors and vulnerable individuals.

A further consequence of this opacity is the existence of extremely ambiguous practices which are in fact extremely widespread. Among these, the most significant and risky case is the one connected to the loot box, literally "booty", which corresponds to the purchase of game features, which can be paid with real currency, game currency or with player behaviour such as waiting or displaying advertisements. Loot *boxes* are found in various and common types of games such as card games, esports, role-playing games, also distributed by large channels such as video games for consoles, the app marketplaces for smartphones and tablets.

The peculiarity is that the player does not know the contents of the *loot box* until it is opened, thus at a time after the payment or the behaviour required to obtain it, with uncertainty about the reward or benefit derived from it. These characteristics integrate the violation of several provisions of the law, including the transparency of the purchased content and/or the predetermination criteria,

¹⁶In this sense, lastly, the recent introduction of art. 49- *bis* of the consumer code which integrates the specific additional information obligations for contracts concluded on online markets, especially relevant for the purchase of digital goods on platforms.

¹⁷Casabona (2016).

¹⁸See the report approved by the European Parliament in which, following a detailed survey of the problem, the invitation is formulated to adopt specific rules to protect users of online video games protecting-gamers-and-encouraging-growth-in-the-video-games-sector. <https://www.europarl.europa.eu/news/it/press-room/20230113IPR6664>

¹⁹Perks (2020).

²⁰Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC

including algorithmic criteria, underlying it, as well as the additional provisions of the aforementioned regulation of prices and transactions.

The often obscure mechanism of functioning of these loot boxes in the literature has often led critics to associate their content and purpose with gambling, with particularly risky effects especially towards minors and early childhood, which, as mentioned above, correspond to a large segment of active users. This category is particularly fragile and is therefore the recipient of greater attention and need for protection, as has always been recommended on an institutional as well as a regulatory level.

Another dynamic that occurs in this context is that of the phenomenon called *gold farming*, which consists of playing a massively multiplayer online game to acquire game currency, later reselling it for real money or exchanging it within the same platform. This practice configures a distorted use of the gaming environment which leads to illegal practices.

Possible hypotheses correspond to money laundering, carried out through the purchase and resale in the app.

A second and more serious situation corresponds to the labour exploitation of those, even minors, who perform this activity as a job but are underpaid for exhausting shifts of play²¹. *Gold farming* also confirms the ambiguity and inaccessibility of these contexts, highlighting the urgency of careful supervision by the competent authorities.

In the specific context of video games, another problematic aspect relates to the necessary adjustment of the information regarding prices also in any game currency, the characteristics of the virtual products, payment methods and withdrawal conditions. With specific reference to the price, if this cannot be calculated in advance, the calculation criterion must be clearly indicated and must still be presented visibly and in real currency (in any case be presented in a visible manner and in real currency) at the time of the transaction.

Another issue is related to the instances of purchases by minors in connection with purchases made outside the control of parents or guardians. Given the inability of minors to enter into contracts²², there are frequent cases where they are found to purchase video games or related features through automatic payment mechanisms outside any control or verification²³. Given the general framework of the responsibility of parents and guardians over the control of the activities of those under their respective supervision²⁴, it should be noted that, although control tools are available, to date there is a lack of integrated and truly effective solutions capable of implementing stringent monitoring.

Finally, a further problematic aspect related to the context of purchases in this area is that of the manipulative design techniques often adopted, so-called dark patterns or manipulative design, which in several cases incorporate assumptions of aggressive and therefore prohibited commercial practices. In some cases, for example, it may be the case that the designers leverage manipulative elements, as

²¹Parker (2022). .

²²Gazzoni (2021).

²³With regard to the issue of the annulment of online purchases, see Giarda, Liotta & Rindi (2022).

²⁴Andreola, (2018) at 953.

in the case of microtransaction offers to overcome critical game stages, as well as in the pervasive proposition in the proposition of commercial offers, including through the use of visual or acoustic effects aimed at pressuring the player.

The pervasiveness of these contexts is often configured through video game designs aimed at detecting and exploiting any situations of vulnerability of the player, by implementing unfair commercial practices. In addition to the concerns for minors and adolescents, young adults may also be more susceptible to commercial communications and manipulation practices implemented in video games, especially in the commonly known long and immersive game sessions, frequent in those age groups.

Final Conclusion and Possible Courses of Action

The world of video games represents a fascinating, productive, and opportunity rich world, both from the standpoint of revenues generated and that of growth potential with reference to employment, the breaking down of barriers to disabled individuals, and gender equality.

From the reconstruction outlined above, a picture of enormous opportunity emerges, both in terms of business and turnover, which passes through the high potential in terms of technological evolution and skills. The very high level of risks that revolve around this category remains indisputable, above all due to the evident misalignments with respect to the regulations in force on consumer protection. In this sense, the concerns expressed by the European Parliament regarding the consequences of an incompletely supervised system appear to be fully shared.²⁵

In fact, measures are urgently needed to support the requirements of transparency and fairness, capable of penetrating into the contractual practices that arise and develop within video games. Among these, a factor on which great attention must be paid is that of the automatic renewals of subscriptions and contracts for digital services, which can also be quite convenient for consumers, but must be framed under the lens of correctness due to mechanisms of pre-set or unauthorised opt-ins or made particularly difficult due to lack of information or complex procedures.

In conclusion, the lack of specific regulation for the video game industry does not mean that users in this sector are not protected with regard to the purchase aspect. The protection offered by current legislation on remote purchases is also fully applicable to digital goods and therefore to the context of gaming, but more in-depth actions are needed to probe the most hidden and risky dynamics. In this sense goes the encouragement by the Community institutions towards the creation of more integrated tools²⁶, not limited by sector to the systems of origin. Finally, the most important load is connected to the role of the family and guardians, small domestic legislators, invested with the fundamental role of guiding the most

²⁵See <https://www.europarl.europa.eu/news/it/press-room/20230113IPR6664>

²⁶For this purpose, the PEGI index <https://pegi.info/en/controlparentale> is recommended as a good practice and starting point for the development of new tools.

exposed and sensitive categories up to now, thus contributing to reprogramming the contents of future society.

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