



Decision

Our reference : ACM/UIT/613927
Case number : ACM/22/179622
Date : **December 18, 2023**

Decision of the Netherlands Authority for Consumers and Markets regarding the imposition of fines and a binding instruction on Epic Games International S.à.r.l. due to violations of the Dutch Unfair Commercial Practices Act.

Summary

- 1 Consumers must be able to navigate online markets with confidence. The Netherlands Authority for Consumers and Markets (hereafter: ACM) commits itself to combating misleading and aggressive commercial practices in the digital economy. In doing so, ACM specifically targets commercial practices that affect vulnerable consumer groups, such as minor children.
- 2 Game developer Epic Games International S.à.r.l. (hereafter: Epic) damaged the trust and interests of children. In the online game Fortnite Battle Royale (hereafter: Fortnite), Epic offered them various products in a misleading and aggressive manner. For example, in its offer it used countdown timers that were not accurate. Various advertisements in the game also directly exhorted children to make purchases. Epic also contravened the requirements of professional diligence by presenting children with an unclear offer under time pressure.
- 3 This is not permitted. Especially when offering products to children, traders must act with care and fairness. For the violation observed, ACM has imposed on Epic a fine totaling 1,125,000 euros and a binding instruction. With these measures, ACM is making it known that unfair treatment of children in the digital world is particularly grave and will be dealt with severely.

1. Course of the procedure

- 4 In May 2019¹, ACM learned about a study by the University of Amsterdam's Institute of Information Law (hereafter: IViR) about the effect of Fortnite on the judgment of children, in particular when making decisions about transactions.² ACM enforcement officials had contact with IViR employees on this subject. ACM saw this as grounds for conducting an investigation into Epic's commercial practices.³
- 5 This investigation led to the preparation of an investigation report⁴ that showed that Epic engaged in several misleading and aggressive commercial practices in Fortnite. Epic has made known its opinion on the investigation report.⁵ It also supplied ACM with financial data⁶ and an expert opinion⁷.
- 6 Afterwards, ACM informed Epic that it intended to change the legal basis of one of the violations identified in the investigation report.⁸ ACM sent Epic a draft elaboration of this amended violation, as well as a draft of a binding instruction that it intended to impose on Epic. In response, Epic made a further opinion known, which ACM included in its assessment.⁹

¹ At the 2019 European Privacy Law Scholars Conference.

² The study resulted in a scientific paper that was published on January 12, 2021. See file document 124 (ACM/UIT/573703).

³ File document 96 (ACM/UIT/569048).

⁴ File document 162 (ACM/UIT/583181).

⁵ Epic did this in writing (ACM/IN/729413) as well as orally during a hearing (ACM/UIT/588171).

⁶ ACM/IN/728899.

⁷ ACM/IN/771131.

⁸ ACM/UIT/599327, ACM/UIT/599327 and ACM/UIT/604611.

⁹ ACM/IN/813125.

2. The online game Fortnite

- 7 Dutch consumers were able to play Fortnite at least during the investigation period from December 2, 2020 through December 3, 2021. After being downloaded, the digital game could be played on a PC, Sony PlayStation, Microsoft Xbox, Nintendo Switch, and Android smartphone.
- 8 Fortnite is a 'last man standing' game in which players control a 'character' in an online location. These characters play against each other with the goal of eliminating each other. You can play the game alone or with others. This makes it possible to coordinate with friends and form a team together. The game is made up of various levels through which players can progress. For example, the game consists of three 'chapters', with each chapter divided into eight to 10 'seasons'. The seasons are linked to a 'Battle Pass', which is a tiered system of 100 levels in a particular theme that players can complete over the course of the season (10 to 12 weeks). A player completes a level by performing tasks during a match, which lasts an average of 20 minutes.
- 9 Every five levels, a player receives a reward, which is often a cosmetic product ('item') to customize the standard outfit and equipment of the player's character, in order for players to personalize themselves in the game. Players can use these items to distinguish their character from other characters. They keep these rewards when the season is over and take them through to the next season.
- 10 The game is free to download and play. However, paid purchases can be made in the game.¹⁰ Most purchases are made by players using 'V-Bucks', Fortnite's online payment method.¹¹ These V-Bucks can be purchased in various bundles, paid for digitally. Players can also acquire a limited number of V-Bucks without payment by earning rewards in the Battle Pass. Once players hold V-Bucks, they can use them to make purchases. This means that children who play Fortnite can then also make purchases independently, without the intervention of parents or other caregivers who are involved in a child's upbringing (both hereafter: parents).
- 11 Purchases can be made in Fortnite's 'Item Shop', the game's digital store in which items are offered for sale. During the investigation period, this offer featured 24-hour countdown timers. The timers started at midnight and first counted down in hours, then, during the last 12 hours, the remaining time was also displayed in minutes and seconds. When the timers expired, the range of items changed (the Item Shop was 'refreshed'). Some items then disappeared from the Item Shop, while others remained and still others became available. In the process, new 24-hour countdown timers appeared to replace those that expired. No explanation was given about these timers or the 'refreshing' of the Item Shop after they had expired.
- 12 In addition to the offer in the Item Shop, players were shown screens or videos offering products at various times within the game. The products offered did not provide any in-game advantages; they mainly involved levels and cosmetic items for characters. In addition, players could purchase a 'Battle Pass Upgrade' (hereafter: upgrade), with which they received a reward after each completed level within a season instead of every five levels. Finally, players could purchase a 'Fortnite Crew Subscription' (hereafter: subscription), with which they received the upgrade for the season and 1,000 V-Bucks plus some cosmetic items each month.
- 13 On the Sony PlayStation, Microsoft Xbox, and Nintendo Switch, parents were able to adjust the settings so that their children could not make purchases (in euros) by themselves. That possibility was built in by the manufacturers of the game consoles and therefore concerned all the games played on those game consoles. Epic had also built parental controls into the Fortnite game. These parental controls concerned the playing time and chat functions, but not the making of purchases.

¹⁰ It is known as a 'freemium game'.

¹¹ With the exception of the so-called 'Limited time offers' and the 'Fortnite Crew Subscription' that players can also purchase with euros.

3. Legal assessment

3.1 Competence of ACM

- 14 ACM is responsible for enforcing compliance with Section 8.8 of the Dutch Act on Enforcement of Consumer Protection (hereafter: Whc).¹² This section forbids traders from engaging in unfair commercial practices as referred to in Section 3A of Title 3 of Book 6 of the Dutch Civil Code (hereafter: BW). In the following subsections, ACM assesses whether the practices identified qualify as such commercial practices. Prior to this, ACM considers the average consumer who plays Fortnite and their specific vulnerability. The ACM considers in its assessment that the practices took place in an online game with a substantial reach¹³, which could therefore damage the collective interests of consumers.¹⁴

3.2 Assessment of commercial practice from the perspective of children

3.2.1 The average consumer

- 15 In assessing Epic's commercial practices, the first question is who the average consumer is who plays Fortnite. ACM sees several clues indicating that Fortnite is aimed at children, or that Epic could reasonably foresee that children are particularly susceptible to this game or that the game may appeal to them. ACM therefore assesses the effect of Epic's commercial practice in the Fortnite game from the perspective of children. By 'children', ACM refers to persons up to the age of 18 years (minors).¹⁵
- 16 The above is evident first of all from the way the game is played and its design: it is a colorful game with a non-realistic style (imaginative, exuberant, playful, often exaggerated and in a cartoon style).¹⁶ When an opponent is put out of action, the game talks about 'eliminating' (instead of 'murdering', for example), no blood is visible, and the eliminated player is picked up by a robot and flown away. Moreover, themes that appeal to children¹⁷ are used within the game and there is the possibility of having players perform dances and 'moves' that are popular among children.¹⁸ The game is thus closely linked to children's experiences. Furthermore, as stated above, Epic has incorporated parental controls into the game that allow various restrictions to be set for children.¹⁹
- 17 In view of the game's characteristics, the PEGI (Pan-European Game Information) age rating system has deemed it suitable for children from the age of 12 years.²⁰ Epic has also issued licenses to IMG Licensing and toy manufacturer Hasbro to market Fortnite merchandise aimed specifically at children, such as school supplies, children's clothing (including costumes) and toys (including toy weapons, board games and other games, and action figures).²¹ These products are offered for sale in the Netherlands.²²
- 18 Based on the above, ACM concludes that Fortnite is aimed at children, or that it is reasonable for Epic to foresee that, due to their age, children are particularly susceptible to the online game Fortnite and that the game may appeal to them.²³ Representative research by Motivaction shows that 27% of Dutch children played the game in 2021.²⁴ The fact that Fortnite is popular among children and played by

¹² Under Section 2.3(2) Whc and point (a) of the Annex to that Act.

¹³ See file document ACM/IN/648934, p.3. In the period from December 2, 2020 to July 20, 2021, there were [CONFIDENTIAL] 'active accounts' in the Netherlands. Although the investigation period continued through December 3, 2021 and, according to Epic, the number of accounts does not correspond exactly to the number of players, this figure gives a sufficient indication that this is a game with a substantial reach.

¹⁴ Which means that there may be a violation as referred to in Section 1.1, preamble and under (1) Whc.

¹⁵ As referred to in Section 1:233 BW.

¹⁶ Cf. in this connection <https://www.fortnite.com/news/build-explore-craft-and-fight-on-july-25>.

¹⁷ For example, Marvel superheroes (such as Spider-Man), characters from Star Wars (such as Baby Yoda), and DC Comics comic book heroes (such as Superman).

¹⁸ File document 154 (ACM/UIT/579566).

¹⁹ Inter alia, file document 23 (ACM/UIT/552727).

²⁰ File document 158, Annex 7 (ACM/UIT/575679).

²¹ File Document 158, Annexes 14 and 16 (ACM/UIT/575679).

²² See, for example, file document 158, Annex 15 (ACM/UIT/575679) and file document 139 (ACM/INT/447365).

²³ Cf. *Parliamentary papers II* 2006-07, 30928, 3, p. 14.

²⁴ File document 148 (ACM/INT/449012).

them is also supported by several public sources.²⁵ These also show that children talk with each other about Fortnite and the items they have obtained, and about dances and 'moves' they have performed in the game.

- 19 In view of the above, it is desirable that ACM consider the effect of the commercial practice from the point of view of children, as also follows from the applicable Unfair Commercial Practices Directive (hereafter: UCP Directive).²⁶ Accordingly, ACM assumes in its assessment that the average consumer who plays Fortnite is a child.²⁷

3.2.2 Special vulnerability of the average consumer

- 20 Because of their age, children are more vulnerable to certain commercial practices than the fictional average consumer who²⁸ is reasonably informed, circumspect, and attentive²⁹. In the Fortnite game, they are confronted with many design choices made by Epic that exploit this vulnerability. The offer in the Item Shop includes the use of timers (combined with a rotating offer). Timers indicate a limit to the time available for deciding on an offer. The rotating offer after the timer has expired indicates scarcity, which is possibly artificial. Children will logically believe that items in the Item Shop are no longer available after the timer has expired, and this may affect their purchase decision. An analysis of academic literature by Chan et al.³⁰ shows that creating scarcity increases the likelihood of consumers making an impulse purchase. Research by Hodkinson³¹ shows the same picture.
- 21 Scarcity influences the likelihood of impulse purchases among consumers (especially children) by capitalizing on what is called 'fear of missing out' (hereafter: FOMO) and the motivation of wanting to be unique or exclusive. Research by Zhang et al.³² shows that the more extreme the scarcity, the greater the likelihood of FOMO, which in turn increases the likelihood of making impulse purchases. The more consumers are by nature susceptible to FOMO, the more likely they are to make impulse purchases, according to research by Karapinar et al.³³ This research also shows that the more consumers are prone to making impulse purchases, the more regret they experience about their purchase afterwards. Research by Gierl & Huettl³⁴ shows that creating scarcity causes products to be evaluated more positively when consumers see those products as a way to be unique in relation to others. Creating scarcity therefore also plays into consumers' motivation to be unique or exclusive and to be able to differentiate themselves from others through a product.
- 22 Scientific research by John, Melis et al.³⁵ focuses specifically on children and shows that scarcity can create FOMO, which children are susceptible to. This makes scarce, cosmetic products without any functional characteristic more desirable among children, particularly in a competitive setting such as a 'last man standing' game, of which Fortnite is one. According to John, Melis et al., scarcity results in a preference among children for unique, hedonistic products without any functional characteristic (e.g., cosmetic items or dances and 'moves' for characters), because more scarcity goes hand-in-hand with

²⁵ Inter alia, file document 158, Annexes 18, 20 and 23 through 30 (ACM/UIT/575679).

²⁶ Cf. recitals 18 and 19 of the preamble of Directive 2005/29/EC of the European Parliament and of the Council of May 11, 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Directive 84/450/EEC of the Council, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and of Regulation (EC) No 2006/2004 of the European Parliament and of the Council, L 149/22.

²⁷ As referred to in Section 6:193a(2) BW.

²⁸ CJEU, July 16, 1998, C-210/96, ECLI:EU:C:1998:369 (*Gut Springenheide*).

²⁹ Because of that vulnerability, various treaties (national and international) as well as other rules and regulations grant children extra protections, too.

³⁰ File document 160 (ACM/UIT/582173) Chan et al., "The state of online impulse-buying research: A literature analysis". Chan et al. bases this on Zheng, X., Liu, N., & Zhao, L. (2013), "A study of the effectiveness of online scarce promotion—Based on the comparison of planned buying and unplanned buying".

³¹ File document 160 (ACM/UIT/582173) Hodkinson, "Fear of Missing Out' (FOMO) marketing appeals: A conceptual model".

³² File document 160 (ACM/UIT/582173) Zhang et al., "The Impact of Scarcity on Consumers' Impulse Buying Based on the S-O-R Theory".

³³ File document 160 (ACM/UIT/582173) Karapinar, I., Eru, O., and Cop, R., "The Effects of Consumers' FoMo Tendencies On Impulse Buying and The Effects of Impulse Buying on Post-Purchase Regret: An Investigation on Retail Stores". BRAIN. Broad Research in Artificial Intelligence and Neuroscience, 2019, 10(3).

³⁴ File document 160 (ACM/UIT/582173) Gierl and Huettl, "Are scarce products always more attractive? The interaction of different types of scarcity signals with products' suitability for conspicuous consumption". International Journal of Research in Marketing.

³⁵ File document 160 (ACM/UIT/582173) John, Melis et al., "The preference for scarcity: A developmental and comparative perspective".

greater FOMO and because children use such scarce products to feel unique.

- 23 Research from a thesis by Krassen³⁶ deals specifically with Fortnite: it also shows that exclusivity of items motivates players to purchase cosmetic in-game items in Fortnite. Research by Li et al.³⁷ also shows that the greater the desire of players of Fortnite to be unique and differentiate themselves from others, the more in-game purchases they make. It further follows from the aforementioned thesis by Krassen that while Fortnite players are aware that a scarcity tactic is being applied, they are nevertheless prone to purchase items that are seen as exclusive, for the purpose of differentiating themselves from others. Academic research focusing specifically on Fortnite thus also shows that FOMO and the motivation to be unique/exclusive, which is capitalized on by creating scarcity, influence in-game purchases.
- 24 Research by Hale shows that children need more time to process information, compared to adults and young adults.³⁸ Children (including adolescents) are generally more impulsive by nature than adults because of neurological differences between children and adults. A review paper by Leuker & Van den Bos³⁹ discusses two scientific studies⁴⁰ that show this. As a result, children are relatively susceptible to wanting immediate rewards and, by extension, to making impulse purchases. Scientific research by Cai et al.⁴¹ and the aforementioned research by Li et al. both show that the younger the players of Fortnite are, the more likely they are to make cosmetic or other in-game purchases. It follows that children may be relatively vulnerable to the scarcity tactic used in Fortnite, because children are more impulsive by nature and because younger players make more cosmetic and other in-game purchases in Fortnite. Moreover, research by Schöber and Stadtmann shows that when children pay with V-Bucks, it is not immediately clear to them how many euros they are spending, which may accelerate purchases that otherwise would not have been made.⁴²
- 25 Furthermore, with regard to the special vulnerability of children, ACM considers it relevant that the timer displayed for an offer in the Fortnite Item Shop always starts counting down at night (Dutch time) and children will generally not play the game 24 hours in a row. Children's online playing time is often restricted by their parents; for example, they are allowed to game for a limited amount of time each day. This increases the likelihood that children will experience more pressure than adult players to decide on a purchase within the gaming session due to the countdown timer, which in the Item Shop in Fortnite always stands at less than 24 hours.
- 26 In addition, children are in a 'last man standing' game environment, where they have to make choices quickly to ensure that they are not eliminated. This mindset may contribute to children feeling a sense of urgency to make quick choices in the Item Shop as well – under the pressure of a timer counting down and a rotating offer.
- 27 Taking all the above into account, ACM considers the average consumers who play Fortnite to be particularly vulnerable and susceptible to Fortnite and the offers in the game, especially due to their age and associated pitfalls, and bearing in mind the game's design characteristics.

3.2.3 Assessment of Epic's opinion

- 28 Epic states in this context that it does not focus specifically on children, but rather on players aged [CONFIDENTIAL] to [CONFIDENTIAL] years. This statement is not substantiated and, in view of the facts and circumstances as referred to in §3.2.1, implausible. The circumstance that Epic saw reason

³⁶ File document 160 (ACM/UIT/582173) Krassen, "Games of Social Control; Understanding Social & Technical Pressure in Online Multiplayer Games".

³⁷ File document 160 (ACM/UIT/582173) Li et al., "Power in Skin: The Interplay of Self-Presentation, Tactical Play and Spending in Fortnite".

³⁸ Hale, S. (1990). "A global developmental trend in cognitive processing speed". Child development, 61(3), 653-663.

³⁹ File document 160 (ACM/UIT/582173) Leuker and Van den Bos, "I Want It Now! The Neuroscience of Teenage Impulsivity".

⁴⁰ Crone, E. A., and Dahl, R. E. (2012). "Understanding adolescence as a period of social-affective engagement and goal flexibility." In Nat. Rev. Neurosci. 13(9), 636–50. doi: 10.1038/nrn3313; Steinberg, L., and Chein, J. M. (2015). "Multiple accounts of adolescent impulsivity". In Proc. Natl. Acad. Sci. U.S.A. 112(29):8807–8. doi: 10.1073/pnas.1509732112.

⁴¹ File document 160 (ACM/UIT/582173) Cai et al., "Who Purchases and Why? Explaining Motivations for In-game Purchasing in the Online Survival Game Fortnite".

⁴² File document 160 (ACM/UIT/582173) Schöber & Stadtmann, "Fortnite: The Business Model Pattern Behind the Scene", pp. 7-9. Cf. the European Commission's Guidance on the UCP Directive (2021/C 526/01), p. 103.

to include parental controls in the game indicates that Epic was aware that children – and possibly many children – played the game. The fact that there are no exact figures available for the number of children who play Fortnite in the Netherlands does not make it impossible for Epic to foresee that Fortnite attracts children in particular. Also irrelevant to that foreseeability is the circumstance that Epic does not itself determine the age classification (set by PEGI) or the manner in which merchandise products are offered for sale by third parties. Moreover, since the merchandise is by its nature aimed at children, it is irrelevant that [CONFIDENTIAL].

- 29 Epic states that some of the public sources cited by ACM in footnote 25 fall outside the investigation period and ACM therefore cannot rely on them. This statement is unfounded. When using public sources, ACM is not required to limit itself to sources that were prepared in the investigation period. ACM sees no evidence leading it to conclude that the popularity of Fortnite among minors in the investigation period would be different than in the period to which some of the aforementioned sources refer.
- 30 Epic also cannot derive any benefit from the opinion it submitted on the scientific literature cited in §3.2.2. ACM specifically comments as follows in this regard:
- Epic states that the studies by Karapinar et al., Chan et al., and Zhang et al. are correlational in nature and therefore do not prove causal relationships. ACM acknowledges the correlational nature of the studies, but notes that the relationships investigated and demonstrated in those studies were substantiated on the basis of existing theory (reviewed literature), after which hypotheses were drawn up that were subsequently tested in the studies. This is therefore not exploratory research and the researchers in the papers in question make a plausible case for the hypotheses and findings being in line with the reasoned causal relationships. This makes it clear that there is a sufficient basis for these hypotheses and findings, and that ACM can justifiably rely on them.
 - Epic states that Hodkinson's conclusions are based on qualitative research, the results of which are mainly of an exploratory nature and principally suitable for constructing hypotheses, but not for drawing conclusions. ACM acknowledges that the findings from this research are more exploratory, but considers that the combination of the research and literature analysis by Chan et al. and the research by Hodkinson shows that creating scarcity has an influence on decisions, including purchase decisions. This combination enables ACM to base its evidence on the results of the studies.
 - Epic states that the research by John, Melis, et al. looks at the effect of scarcity in competitive settings, in the sense that products can 'run out' at some point. According to Epic, this is not the case within Fortnite. ACM does not agree with Epic on this point. It notes that Fortnite is a 'last man standing' game in which players are constantly interacting (sometimes socially) with other players. This means that players do indeed have a competitive mindset while playing Fortnite. In addition, the impression is created in the Item Shop that the products offered will no longer be available after the timer has expired (an artificial scarcity is created). Moreover, the type of product studied by John, Melis, et al. is very similar in terms of characteristics to the cosmetic items in Fortnite. These circumstances mean that the conclusions from the aforementioned study are also relevant here.
 - According to Epic, the examples (products) of conspicuous consumption used in the study by Gierl & Huettl are not relevant to Fortnite. Epic also thinks it likely that players of Fortnite know that there is no real scarcity in the TP item sets on offer, so that these cannot be classified as conspicuous consumption. ACM does not agree with Epic regarding these statements. ACM acknowledges that the products used by Gierl & Huettl do not correspond 1-to-1 to the offers in Fortnite, but does not infer from this that these offers cannot be seen as a form of conspicuous consumption. The finding of Gierl & Huettl – that creating scarcity leads to products being evaluated more positively when consumers see those products as a way to be unique in relation to others – is in line with findings by John, Melis et al. and research by Li et al. These studies show that for players of Fortnite specifically, the greater their desire to be unique and to

differentiate themselves from others, the more in-game purchases they make. The impression is created in the Item Shop that the products offered will no longer be available after the timer has expired, with the result that players may well think that there is real scarcity.

- Epic states that the conclusions of Krassen's thesis are anecdotal. According to Epic, it cannot be determined to what extent the statements in the comment threads that were studied are a reflection of actual behavior within Fortnite. ACM acknowledges that the conclusions are based on anecdotal evidence, but it considers that the conclusions drawn from that evidence are nevertheless relevant. This is in view of (i) the large number of comments analyzed (3,471), of which 1,205 comments were specifically about Fortnite, and (ii) the fact that Krassen's conclusions are also supported by the research of Li et al., which also looks specifically at Fortnite.
- Epic states that the conclusions in the paper by Leuker & Van den Bos are correct in principle, but that the paper appears unscientific and aimed at children. ACM notes that the paper's format does indeed deviate from that of a standard scientific paper and therefore possibly appears less scientific. At the same time, this has a demonstrable cause, namely that the target audience of the scientific journal in which the paper was published is children aged 8 to 15. In addition, Leuker & Van den Bos base their conclusions on findings from other scientific studies. Therefore, the objections raised by Epic to the conclusions drawn by ACM on the basis of this paper fail.
- Epic correctly states that the research of Cai et al. shows that there is no connection between age and the number of V-Bucks purchased by players, and that it cannot be determined whether the connection between age and in-game purchases exists in a specific age segment. However, ACM notes that neither aspect detracts from the finding from the study that ACM includes in its decision, namely that Fortnite players are more likely to make in-game purchases when they are younger.
- Epic states that the studies by Cai et al. and Li et al. show similarities and that if both studies used the same data set, this would increase the likelihood of a statistically significant connection being found by chance (chance findings). ACM sees the similarities between the studies referred to by Epic, but notes at the same time that there are also some differences between the studies. ACM cannot rule out chance findings, but it does not consider these to be particularly plausible, given the differences.
- Epic states that the study by Zhang et al. pertained to a different type of product in a different type of consumer context, with the result that the conclusions from the study are not applicable to Fortnite. ACM agrees with Epic that the products in the study by Zhang et al. are not the same as the products offered in Fortnite and that the conclusions from that study therefore cannot be translated one-to-one to Fortnite. At the same time, the study does underpin the conclusions that arise from several scientific studies included in this decision, i.e., that the creation of scarcity leads to FOMO, which subsequently increases the likelihood of making impulse purchases. ACM therefore additionally includes the study and the conclusions it draws in its considerations.
- Epic states that the study by Schöber & Stadtmann is an unpublished and unreviewed working paper from a university, in which it is sometimes unclear what the assertions are based on. ACM acknowledges that certain conclusions from this study appear to be based on anecdotal evidence. At the same time, Schöber & Stadtmann's reasoning that the use of in-game currency may complicate the decision process because it makes it more difficult for consumers to estimate the monetary value of items can be supported by the theoretical basis provided. This reasoning is only used by ACM as supporting evidence in relation to the argument that the scarcity in Fortnite is harmful.

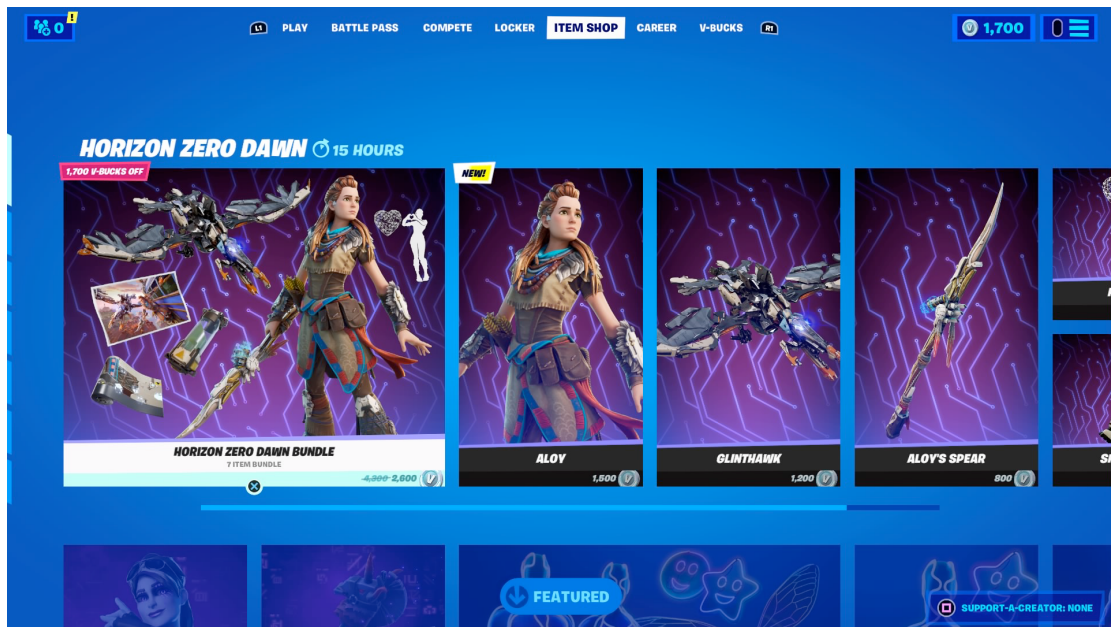
3.2.4 Conclusion

- 31 Because of their age and the design features of the game, children are particularly susceptible to the commercial practices in Fortnite. By exploiting that susceptibility and known pitfalls of this target group, game developer Epic may affect children's economic behavior in ways that it could reasonably foresee. It is therefore necessary to ensure that children are appropriately protected by assessing

commercial practices from the point of view of the average member of that group. ACM does so in the following section.

3.3 Violation 1: Deceptive scarcity indicators

- 32 In the period from February 1, 2021 through December 3, 2021, various products were offered in the Fortnite Item Shop, including what are called 'Third-Party Item Sets' (hereafter: TP item sets). These are sets of cosmetic items that are subject to third-party rights, including intellectual property rights. TP item sets were offered, among other ways, under a unique header relating to the relevant set. Not only the set as a whole was offered under that header, but also a number of individual items from the set. The offer was presented in one or more horizontal rows (containing 1 to 14 products per row).⁴³ See, for example, the TP item set under the header '*Horizon Zero Dawn*' in the image below.⁴⁴



- 33 Next to each header (and, where there were several rows with products on offer, above each new row), there was a timer counting down from 24 hours (see also marginal).⁴⁵ When the timer expired, the offer was 'refreshed'. This sometimes caused TP item sets and accompanying individual items to disappear from the Item Shop. Often, the TP item sets remained unchanged in the Item Shop for several days in a row.⁴⁶ In the process, new 24-hour countdown timers kept reappearing.⁴⁷
- 34 There was no explanation of the meaning of the timers in the Item Shop. On Epic's website, the following explanation was included under the header 'FAQ': "*What's available in the item shop constantly rotates. If an item you wanted is no longer available, check back frequently as there's a good chance you can buy it later. You can see when the items will change by looking at the countdown timers that are above the FEATURED ITEMS and DAILY ITEMS sections. We also sometimes announce when special items will return to the shop through social media or blog posts.*"⁴⁸ This explanation did not give any information about the timers accompanying the offer of TP item sets with their own unique headers. There was no reference next to the timers in the Item Shop to the explanation in the FAQ on Epic's website.

3.3.1 The violation

- 35 ACM considers the use of 24-hour countdown timers accompanying an offer that is available for longer

⁴³ File document 162 (ACM/UIT/583181), §5.1.3.

⁴⁴ File document 21 (ACM/UIT/552621).

⁴⁵ E.g., file document 3 with annexes (ACM/UIT/548437) and the annexes to file document 93 (ACM/UIT/566762).

⁴⁶ File document 141 with annex (ACM/UIT/576476). See also file document 162 (ACM/UIT/583181), §5.4.2.

⁴⁷ Idem.

⁴⁸ File document 26 (ACM/UIT/552799).

than those 24 hours to be deceptive within the meaning of Section 6:193g, preamble and under (g) of the Dutch Civil Code.⁴⁹ ACM considers it plausible that a child who plays Fortnite will expect that a timer displayed near the products on offer indicates the time period within which those products can be purchased – after which they will disappear from the Item Shop. When 24-hour countdown timers accompany TP item sets, children will think that they have at most 24 hours to decide whether to make a purchase from among those TP item sets.

- 36 However, the suggestion that the TP item sets were available for a limited period was not correct in practice. TP item sets were systematically on offer for longer than 24 hours. In the period from February 1, 2021 through December 3, 2021, ACM regulatory officials recorded the range of TP item sets on offer under unique headers in the Item Shop on a number of consecutive days each month.⁵⁰ This showed that half of the 60 TP item sets recorded were offered for longer than 24 hours. For 14 of these TP item sets, officials recorded exactly how many days the sets were on offer. This was always longer than 24 hours and on average 15 days.⁵¹ The contracts with licensees of the IP rights to the TP items also show that TP item sets were to be offered for several days.⁵² This makes the timers accompanying the offer of TP item sets deceptive.
- 37 These deceptive timers encourage immediate decisions about making a purchase. Children are in a game environment in which they tend to make choices quickly. In addition, timers in that game environment indicate a limit to the time within which a decision has to be made about whether or not to make a purchase. This time limitation gives children a sense of urgency, sparks a fear of missing ‘an opportunity’, and limits the quality of the purchase decision. These feelings may be reinforced by the limited playing time many children have, which means they will have to make a purchase decision about the offer within the gaming session before the timer expires (Cf. marginal 25 for this).
- 38 In addition to the time pressure, the timers create a deceptive idea of scarcity of specific TP item sets, in the sense that children may think that the TP item sets currently available will no longer be available once the timer has expired. This is also a motivation to make a decision immediately. Furthermore, the use of an in-game currency may complicate the decision-making process because it makes it more difficult to estimate the monetary value of items. ACM refers to what is written about this in §3.2.2. Looking at the scientific studies referred to in this subsection, ACM considers it plausible that the scarcity created by the deceptive timers triggers FOMO in children. When experiencing FOMO, a person may think less rationally in the moment preceding a decision. As a result, a child may not be able to make a well-informed decision about the offer. The deceptive timers distort children’s economic behavior in the sense that they will more quickly proceed to make a purchase.

3.3.2 Assessment of Epic’s opinion

- 39 The arguments submitted by Epic⁵³ against the scientific literature cited in marginals 20 through 24 do not alter the finding that this is a misleading commercial practice. This literature shows that it is plausible that the risk of FOMO and poor impulse control in children is real in the context of the commercial practices used. ACM sees insufficient evidence in Epic’s opinion and the expert opinions it provided to alter this conclusion and refers in this context to §3.2.3.
- 40 Epic further states in its opinion that its explanation in the FAQ on its website showed that the timers do not refer to the availability of the offer, but to the time remaining until the Item Shop refreshes the offer. ACM considers that this explanation on Epic’s website is placed too far away from the timer accompanying the TP Item Sets category in the game’s Item Shop to be of any significance when children are thinking about making a purchase. At that point, children would have to search of their own accord outside the game – on Epic’s website – for the meaning of the timer in the Item Shop. And they would have to do this without there being any indication to suggest that the timers mean anything

⁴⁹ Cf. the European Commission’s Guidance on the unfair commercial practices directive (2021/C 526/01), p. 99, and see also ACM’s Guidelines on the protection of the online consumer, p. 60.

⁵⁰ File document 141 with annex (ACM/UIT/576476). Monthly records were made of the Item Shop, with the exception of the month of October 2021.

⁵¹ File document 156 with annex (ACM/UIT/579560).

⁵² File document 153 (ACM/IIN/701660). File document 83 (ACM/IIN/656615), p. 2.

⁵³ ACM does not discuss Epic’s opinion against the scientific papers that ACM has not included in its decision.

other than what the children would have expected at first glance (i.e., that the offer will no longer be available after the timer expires). Moreover, if children do find this explanation, it focuses on the timers above the offers in the 'Daily' and 'Featured' categories in the Item Shop. Children would have to work out for themselves that this explanation also applies to the countdown timer that is specifically displayed with the offer of TP item sets, each with its own unique header, in the Item Shop. Therefore, Epic does not derive any benefit in this context from the explanation it refers to.

- 41 Epic further states in its opinion that for the application of Section 6:193g, preamble and under (g) of the Dutch Civil Code (BW), a connection must be sought with the interpretation of 'threat' or 'deception' as referred to in Section 3:44 BW. This is incorrect. Section 3:44 BW and the Dutch Unfair Commercial Practices Act from Book 6 BW are regulations that exist side by side, each with its own conditions. There is some overlap in parts between the two regulations, as a result of which it is possible that children who have made a purchase as a result of an unfair commercial practice may, under certain circumstances, also invoke vitiated consent.⁵⁴ However, this does not mean that the conditions set out in Section 3:44 BW have to be tested in order to establish a violation of Section 6:193g, preamble and under (g), BW.
- 42 Epic also states that it has since changed the timers to a single clock at the bottom of the screen (applicable to the entire Item Shop) and that it indicates by means of a pop-up message accompanying the timer that the Item Shop will be refreshed when the timer expires, allowing items to disappear and new items to be added. This does not detract from the identified violation either. After all, the changes were not made until after the violation period.⁵⁵ The use of timers during the violation period, as described in marginal 33, is not disputed by Epic.
- 43 Epic states finally that ACM has extended the violation period, because it is longer than the period referred to in ACM's first request for information⁵⁶ from Epic. Epic also derives no benefit from this statement. On the basis of ACM's investigation, it was established that Epic committed multiple violations over an extended period of time. The first request for information is not a determinant; the investigation is thus not limited in advance. Moreover, new requests for information were later sent to Epic, reflecting a more extensive investigation period.⁵⁷ Epic had sufficient opportunity to respond to the established violations before ACM took a decision on them.⁵⁸ Epic did make use of this opportunity,⁵⁹ so there can be no question of damaged defensive interests.

3.3.3 Conclusion

- 44 In view of the foregoing, ACM finds that during the period from February 1, 2021 through December 3, 2021, Epic deceptively claimed that TP item sets under unique headers would only be available for 24 hours. This required the average consumer (the child) to make a decision about a purchase under false time pressure, without sufficient time to think it through properly. ACM considers this commercial practice to be misleading under all circumstances. ACM establishes a violation of Section 8.8 of the Dutch Act on Enforcement of Consumer Protection (Whc) in conjunction with Section 6:193g, preamble and under (g) of the Dutch Civil Code (BW).

3.4 Violation 2: Direct exhortation of children to make purchases

- 45 In Fortnite, children are unavoidably confronted by the following messages:⁶⁰
- (i) The promotional video for the Battle Pass upgrade. Children were shown this message at least during the period from December 2, 2020 through December 3, 2021 when they started Fortnite

⁵⁴ *Parliamentary papers II*, 2006–07, 30928, 3, p. 9.

⁵⁵ File document 137 (ACM/IN/691273), p. 11.

⁵⁶ File document 45 (ACM/UIT/557584).

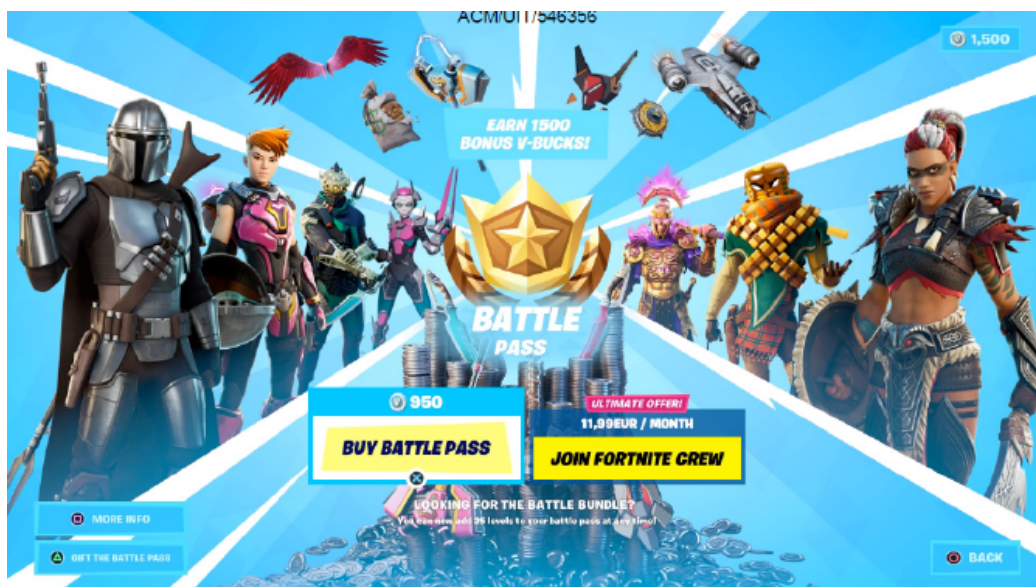
⁵⁷ File document 150 (ACM/UIT/578498).

⁵⁸ File document 127 (ACM/UIT/571607), ACM/UIT/584767, ACM/UIT/599327, and ACM/UIT/604611.

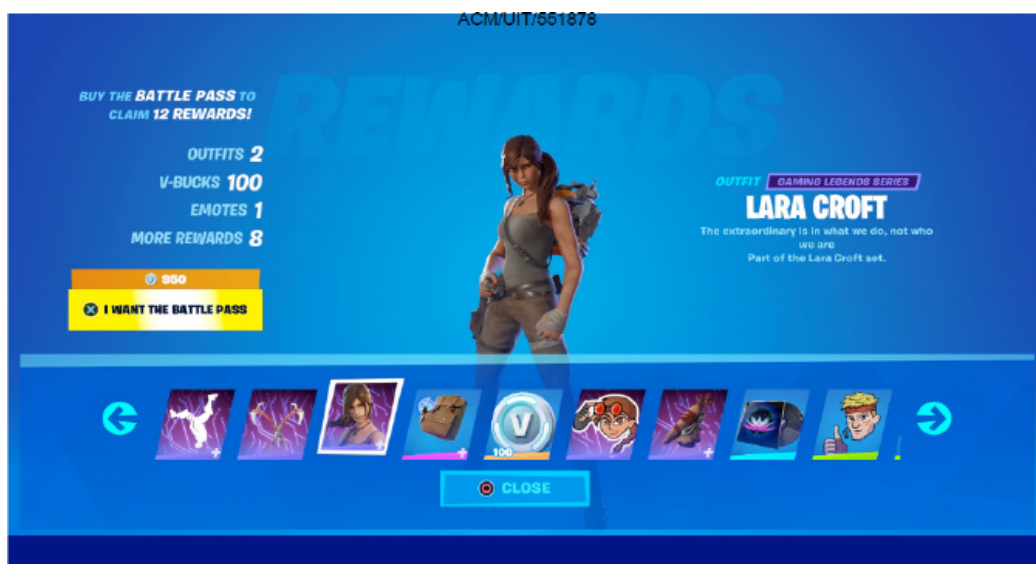
⁵⁹ File document 137 (ACM/IN/691272) and footnotes 5, 7, and 9.

⁶⁰ Children were able to click the message away, but they could not prevent the message from appearing on the screen and were therefore confronted by it.

for the first time in a new season. See the image below for an example of this message.⁶¹



- (ii) The Claim Rewards screen. Children were shown this screen at least during the period from December 2, 2020 through June 7, 2021 when they wanted to leave a match in which they had reached a higher level. Children were first shown a screen with the reward that belonged to that level and that they had unlocked. If children had not upgraded the Battle Pass, they were then shown a second screen. That screen displayed the rewards that children had unlocked during the current season, but that they could not claim without upgrading the Battle Pass. Children could not return to a previous season to acquire the unclaimed rewards. See the image below for an example of this message.⁶²

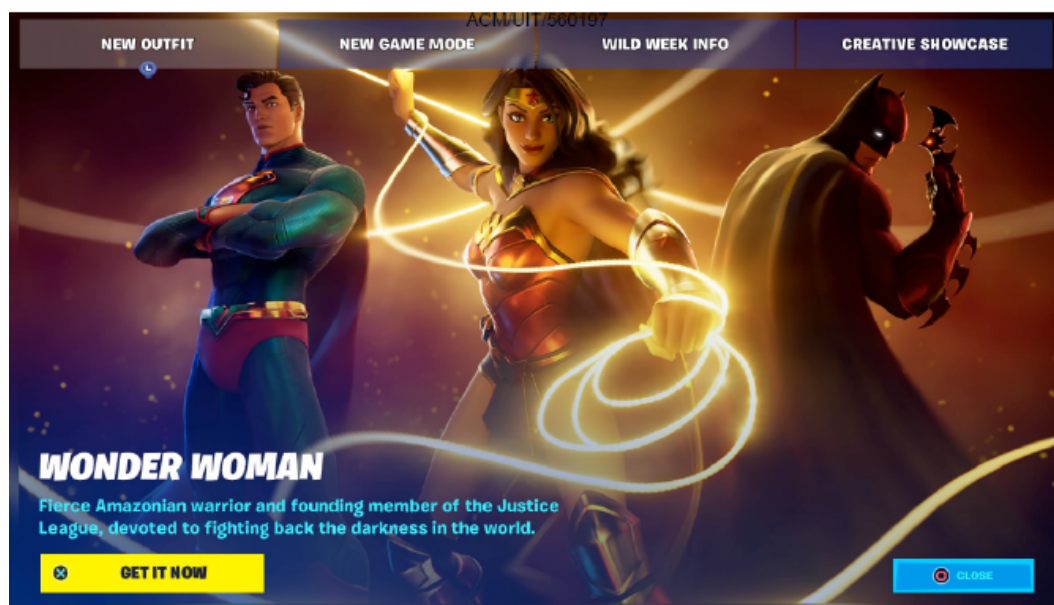


- (iii) The Message of the Day (hereafter: 'MOTD'). At least during the period from December 2, 2020 through December 3, 2021, when children started Fortnite, a 'News' notification often appeared first, followed by a screen-filling pop-up, the MOTD. There were four MOTDs available on average; the first MOTD was shown first, while children had to click through to see the others. The MOTD could be about new additions to the game or new or existing features in the game. However, the MOTD often concerned particular items in the game, such as the subscription, the

⁶¹ File document 2 (ACM/UIT/546356, Annex 20201217_546356_Battle Pass C2S5).

⁶² File document 13 (ACM/UIT/551878, Annex 20210402_551878_Claim rewards_C2S6).

Battle Pass upgrade and items in the Item Shop. See the image below for an example of this message.⁶³



3.4.1 The violation

- 46 Under Section 6:193i, preamble and under (e) of the Dutch Civil Code, it is under all circumstances an aggressive commercial practice to directly exhort children in an advertisement to purchase advertised products or to persuade their parents or other adults to purchase the products for them. ACM considers the aforementioned commercial practice to be a violation of this section and its considerations are as follows.
- 47 In the promotional video for the Battle Pass upgrade, the Claim Rewards screen and the MOTD, there was advertising for cosmetic items and for the upgrade, which a child could buy to use subsequently in Fortnite. These three screens therefore contain advertising.
- 48 As ACM explained in §3.2.1, it considers that Fortnite – and therefore the three advertisements relevant here – is aimed at children. Game developer Epic can, as stated above, reasonably be expected to foresee that the offer and the design of the game appeal to children in particular.⁶⁴ In this context, too, ACM understands 'child' to mean anyone up to the age of 18 years. ACM bases this first of all on the high level of consumer protection, which is one of the objectives of European consumer policy and is pursued by European consumer legislation.⁶⁵ A broad interpretation of the term 'child' is appropriate here. Moreover, the International Convention on the Rights of the Child and the Dutch Civil Code define 'child' as a person up to the age of 18 years.⁶⁶
- 49 The language used by the trader is critical to whether advertising directly exhorts children to buy products or to persuade their parents or other adults to buy those products for them. The Battle Pass promotional video includes the 'Buy Battle Pass' button.⁶⁷ The Claim Rewards screen includes 'Buy the BATTLE PASS to claim [X] REWARDS!' in conjunction with the 'I want the battle pass' button.⁶⁸ The MOTD contains a button with texts such as 'Check it out', 'Get it now', 'Get [name of item]' or

⁶³ File document 59 (ACM/UIT/560197, Annex 20210820_560197_Pop-up-New Outfit_C2S7).

⁶⁴ See the Guidance on the implementation/application of Directive 2005/29/EC concerning unfair commercial practices of the European Commission of May 25, 2016, SWD(2016) 163 final, section 4.6 and the Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (2021/C 526/01), section 3.7. See also the ACM guidelines for the online consumer: <https://www.acm.nl/sites/default/files/documents/2020-02/acm-leidraad-bescherming-online-consument.pdf> (in Dutch).

⁶⁵ Article 169 of the TFEU; Directive 2005/29/EC, considerations 1, 11, 23 and 24.

⁶⁶ See Article 1 of the International Convention on the Rights of the Child and see Section 1:233 BW.

⁶⁷ File document 162 (ACM/UIT/583181), marginal 225 with Figure 22 (file ACM/UIT/546356, Annex 20201217_546356_Battle Pass C2S5) and Figure 23 (file ACM/UIT/550945, Annex 20210318_550945_Battle Pass C2S6).

⁶⁸ File document 162 (ACM/UIT/583181), marginal 235 through 237 and Figure 25 (ACM/UIT/551878, Annex 20210402_551878_Claim rewards_C2S6).

'Grab it'.⁶⁹ ACM sees in such messages with forms of address in the imperative a direct pressure to buy.⁷⁰

- 50 The layout of the three types of advertising also contributes to the conclusion that there is a direct exhortation to make a purchase. In all three advertisements, the button encouraging a purchase (and containing the aforementioned texts in the imperative form) is designed in such a way that it stands out from the rest of the screen. This button is yellow and prominently displayed, and is also the pre-selected option for the child. In contrast, the 'Back' and 'Close' buttons – on which the child must click to make the purchase not final – are blue in color and placed inconspicuously at the bottom of the screen.
- 51 In its advertising message, Fortnite offers products that children can obtain against payment. It is not relevant how they subsequently pay for this purchase – with euros or unlocked V-Bucks. Section 6:193i, preamble and under (e) of the Dutch Civil Code (BW), concerns advertising messages and does not require purchases to have subsequently actually been made (in euros).
- 52 In this context, ACM notes that Epic has chosen to introduce its own currency in Fortnite: V-Bucks. That choice should not cause all purchases with V-Bucks to fall outside the scope of the prohibition in Section 6:193i, preamble and under (e) BW, which would mean that children would not be protected from that unfair commercial practice. Purchases in Fortnite can be made with V-Bucks and those V-Bucks can be bought with euros; in short, the child may buy the advertised products. In this way, V-Bucks represent a monetary value.
- 53 It is no different if children make purchases using unlocked V-Bucks. These V-Bucks also represent a particular value; they are scarce and can only be spent once. If a child purchases an item with these V-Bucks, the balance of V-Bucks decreases and the child gives up alternative spending options. Incidentally, ACM concludes from the prices of the items in Fortnite that there is little chance of items being purchased only with unlocked V-Bucks. A child can unlock a maximum of 300 V-Bucks per season without paying (3 times 100 V-Bucks). However, the upgrade, which must be purchased anew each season, already costs 950 V-Bucks.⁷¹ The cheapest single item available in the Item Shop costs 200 V-Bucks.⁷² TP item sets cannot be purchased for 300 V-Bucks. This means that children will almost always purchase additional V-Bucks with euros, in order to be able to buy advertised items in Fortnite. This is supported by the revenue of [CONFIDENTIAL] that Epic earned with Fortnite in the Netherlands in 2021.⁷³

3.4.2 Assessment of Epic's opinion

- 54 Epic refers to [CONFIDENTIAL] of the messages that are relevant here and to the fact that the messages are not integrated into the game. Epic cannot derive any benefit from these circumstances. Whether or not the advertising is [CONFIDENTIAL] is irrelevant to the prohibition in Section 6:193i, preamble and under (e) of the Dutch Civil Code. The same is true of the circumstance that the advertising is not integrated into the game. The advertising was shown to children when they started the game (Battle Pass promotional video and MOTD) or after the end of a match (Claim Rewards screen). This is not altered by the fact that children have the option to click away the advertising after it has appeared on the screen.
- 55 According to Epic, the term 'child' can only mean all persons up to the age of 14 years. This statement is incorrect. The age limit referred to by Epic does not stem from the Dutch Civil Code or the UCP

⁶⁹ File document 162 (ACM/UIT/583181), marginal 245 through 247 and Figures 27, 28, 29, 30 and 31. See also file document 21 (ACM/UIT/552621), 59 (ACM/UIT/560197), 50 (ACM/UIT/559039), 64 (ACM/UIT/561326) and 29 (ACM/UIT/553088).

⁷⁰ Various decisions by national courts in other EU Member States have ruled in the same way on such texts in similar cases. Cf. Bundesgerichtshof July 17, 2013, I ZR 34/12 (*Runes of Magic*), ground 26; Oberster Gerichtshof July 9, 2013, 4 Ob 95/13v, ground 4.1 and Marknadsdomstol December 6, 2012, 165/MD 2012:14 (*Stardoll*), ground 143-145. Cf. also Markedsrådet December 3, 2013, MR-2012-1245, ground 4.

⁷¹ Cf. also file document 160 (ACM/UIT/582173) Schöber & Stadtmann, "*Fortnite: The Business Model Pattern Behind the Scene*". Since the upgrade for a season already costs more than the V-Bucks that can be unlocked in a season, the discussion about the payment method is not a factor for the advertising messages mentioned in marginal 45 under (i) and (ii).

⁷² File document 160 (ACM/UIT/582173) Schober & Stadtmann 2020, "*Fortnite: The Business Model Pattern Behind the Scene*", p.10.

⁷³ File document 162 (ACM/UIT/583181), marginal 77.

Directive. The ruling by the German court that Epic refers to in this context⁷⁴ is based on German civil law⁷⁵ and does not fit within the protective idea of the UCP Directive. That ruling also considered that the term 'child' might possibly need to be interpreted more broadly when applying the UCP Directive.

- 56 Epic then points out that a child has to hold down the 'Buy' button for some time in order to conclude a purchase. ACM finds this circumstance irrelevant, as Epic only introduced the aforementioned functionality after the violation period.⁷⁶ Moreover, in ACM's opinion, this does not change the direct character of the invitation to purchase. After all, the purchase (even when a button is held down longer) is still immediately executed by clicking on the 'Buy' button, which means there is a direct link between the invitation to purchase and the execution of the purchase.
- 57 According to Epic, the intermediate screens that a child is shown when they do not have enough V-Bucks to make a purchase (in which it is explained that the child is about to make a purchase) mean that there is no direct invitation to purchase.⁷⁷ ACM does not accept that argument. In ACM's opinion, the intermediate screens do not detract from the fact that the advertisement contains a direct invitation to purchase. The fact that the execution of the purchase is only possible after passing through the intermediate screens is irrelevant to the assessment of the invitation to purchase itself. The advertisements contain the prices and features of the advertised product – there is no need for the child to take additional steps to find those. It cannot be the case that traders can easily circumvent the prohibition in Section 6:193i, preamble and under (e) of the Dutch Civil Code by introducing intermediate screens or a link into the advertising.⁷⁸
- 58 Epic also cannot derive any benefit from the parental controls that it refers to. These measures cannot be activated before commercial messages are displayed in Fortnite. Therefore, parents cannot prevent their children from being shown advertising that directly exhorts them to buy.
- 59 Finally, Epic refers to the fact that purchases must be made by credit card. According to ACM, the required method of payment does not affect the qualification of messages as advertising. It is not illogical that online purchases are settled using a credit card or other payment method, such as iDeal. The payment of a purchase in Fortnite does not differ in this from any other online purchase and does not contain any additional measures to discourage purchases by children. Moreover, the method of payment – just as the parental controls built into the Microsoft Xbox, Nintendo Switch and Sony PlayStation that pertain to making purchases with euros – is related to the processing of the purchase. These aspects relating to the execution of the purchase are not relevant to assessing the nature of the invitation to purchase, which is the subject of the prohibition in Section 6:193i, preamble and under (e) of the Dutch Civil Code. The UCP Directive also clarifies that unfair commercial practices can occur even before a commercial transaction has been concluded between trader and consumer.⁷⁹

3.4.3 Conclusion

- 60 In view of the foregoing, ACM finds that children who played Fortnite in the periods referred to in marginal 45 were directly exhorted in the promotional video for the Battle Pass Upgrade, the Claim Rewards screen and the MOTD to make purchases or to persuade their parents or other adults to make those purchases on their behalf. In this way, they were treated in an aggressive manner. On this point, ACM establishes a violation of Section 8.8 of the Dutch Act on Enforcement of Consumer Protection in conjunction with Section 6:193i, preamble and under (e) of the Dutch Civil Code.

⁷⁴ Landesgericht Berlin April 21, 2015, 16 O 648/13 (see also production 2 accompanying Epic's opinion).

⁷⁵ Section 1(1) of the Jugendschutzgesetz (German Youth Protection Act).

⁷⁶ Specifically on July 9, 2022; see: <https://www.fortnite.com/news/updates-to-fortnite-purchase-cancellation-and-social-settings>.

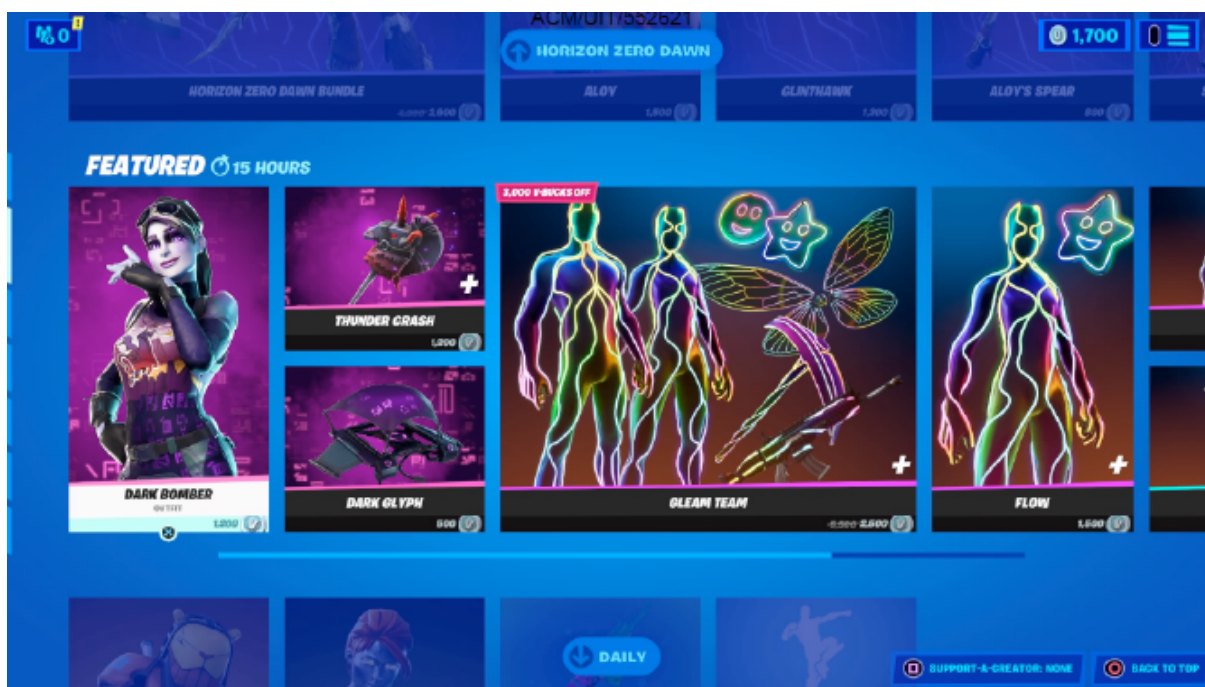
⁷⁷ In this context, Epic refers to VKI Verein für Konsumenteninformation, Austria Supreme Court OGH July 9, 2013 4 Ob 95/13v.

⁷⁸ This was also the ruling of the Bundesgerichtshof July 17, 2013, I ZR 34/12 (*Runes of Magic*), ground 36.

⁷⁹ Article 3(1) of the UCP Directive.

3.5 Violation 3: Complex offer under time pressure

- 61 In the period from December 2, 2020 through December 3, 2021, products were also offered in the Item Shop in the 'Daily' and 'Featured' categories.⁸⁰ Children who had V-Bucks were able to make purchases there directly, without parental involvement. Just as with the offer of the TP item sets, each under a unique header, cosmetic items for the player's character were offered in these categories in one or more horizontal rows.
- 62 Next to the header of the category was a 24-hour countdown timer (see also marginal 11). When the timer expired, the category was refreshed in the Item Shop. The range offered in the category then changed, with some items disappearing and others remaining. In total, there are thousands of items that could potentially appear in the Item Shop. However, only 30-90 items were offered in a 24-hour period.⁸¹
- 63 No explanation was given regarding the composition of the offer or which items actually disappeared after the timer had expired. Neither was there any explanation in the Item Shop regarding how long an item was offered; how often or when an item had been offered in the past; how often or when it would again be offered in the future; or what method was used to determine these events.
- 64 All items offered in the 'Daily' and 'Featured' categories of the Item Shop were divided into four levels with the help of a colored frame and a label: green ('uncommon'), blue ('rare'), purple ('epic') and gold ('legendary').⁸² No explanation was given about the colored frame and the label around the item on offer. These elements ostensibly represented the rarity of an item, but the level was linked in particular to the price.⁸³
- 65 Below is an example of the offer in the 'Featured' category:⁸⁴



3.5.1 The violation

- 66 ACM believes the aforementioned offer contravenes the requirements of professional diligence (Section 6:193b(2) of the Dutch Civil Code) and its considerations are as follows.

⁸⁰ See records of the game, such as file document 3 (ACM/UIT/546372), 4 (ACM/UIT/548120), 5 (ACM/UIT/548222), 6 (ACM/UIT/548324).

⁸¹ File document 162 (ACM/UIT/583181), marginal 130 and 173 and file document 121 (ACM/UIT/573135), p. 22.

⁸² File document 162 (ACM/UIT/583181), p. 49 and file document 121 (ACM/UIT/573135), pp. 24 and 25.

⁸³ File document 121 (ACM/UIT/573135), pp. 24 and 25.

⁸⁴ File document 21 (ACM/UIT/552621).

- 67 Professional diligence is the ‘standard of special skill and care which a trader may reasonably be expected to exercise towards end users, in accordance with his conscientiousness, arising from the general principle of good faith in the trader’s field of activity and honest market practices’.⁸⁵ This is an open standard encompassing commercial practices that are not necessarily aggressive or misleading but that may nevertheless have the effect that ‘the ability of the average end user to take an informed decision is or may be noticeably limited, because of which the average end user takes or may take a transactional decision which he otherwise would not have taken’.
- 68 ACM believes that professional normative behavior prevents providers from abusing pitfalls of consumer behavior. Such normative behavior may be based specifically on codes of conduct applicable to a particular industry, but may also be implemented in other ways. In the Guidance on the UCP Directive, professional diligence is based on ‘honest market practices’ and/or ‘the general principle of good faith in the trader’s field of activity’.⁸⁶ The Guidance mentions in this context that, as a general principle based on professional diligence, traders ‘[should] take appropriate measures to ensure that the design of their interface does not distort the transactional decisions of consumers’.⁸⁷ In doing so, economic and behavioral economic insights can be used to identify potentially unfair commercial practices – something that the European Commission endorses.⁸⁸
- 69 The ACM notes in this case that the way in which the range of items is presented in the ‘Daily’ and ‘Featured’ categories of the Item Shop is problematic for children and may have harmful effects. This involves a combination of design features leading to a complex and uncertain product offer under the pressure to make a purchase decision about it within 24 hours.
- 70 In this context, ACM considers that the Item Shop’s offer in the aforementioned categories changes every 24 hours. At that point, items disappear from the Item Shop with great regularity, without them actually being ‘sold out’. This creates artificial scarcity. ACM refers to marginals 20-24 of this decision, which explain how creating scarcity results in FOMO and how this distorts children’s economic behavior by exhorting them to make impulse purchases.
- 71 In addition, some items disappear when the Item Shop is refreshed, while other items remain available. It is not clear to children which part of the offer will disappear after the timer has expired and which part of the offer will still be available. This uncertainty contributes to a tendency in children to make purchase decisions more quickly, because they might otherwise miss items that they would like to have. This is despite the fact that those items are still available the following day. Because no information is given in the Item Shop on the question of whether items will really no longer be available after the timers have expired, children lack the necessary information about the range of products in the Item Shop that is essential for their purchase decision.
- 72 That uncertainty as to the availability of the offer is particularly problematic because the length of time that an item on offer is available partly determines the rarity and exclusivity of that item. If items are available less often or for a shorter time, they may be seen as relatively rare or exclusive. The rarity and exclusivity of items on offer are key product characteristics for children.⁸⁹ They help determine how valuable items are to children (Cf. also §3.2.2).
- 73 However, Epic’s actions mean that children gain no understanding of the degree of rarity and exclusivity of those items before making decisions about the offer. The arrangement of the ‘Daily’ and

⁸⁵ Section 6:193a(1) under (f) BW.

⁸⁶ Article 2(h) of Directive 2005/29.

⁸⁷ Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, §4.2.7.

⁸⁸ See: European Commission (April 2022), Final Report “*Behavioural study on unfair commercial practices in the digital environment: dark patterns and manipulative personalisation*” and European Commission (2016) Guidelines for the implementation/application of Directive 2005/29/EC on unfair commercial practices accompanying Commission Communication to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, p. 65. Cf. also Trazkowski, J. (2011) “*Behavioural economics, neuroscience and the Unfair Commercial Practices directive.*”

Journal of Consumer Policy, 34, pp. 377-392; Dijkstra, P.T. and Tuinstra-Karel, A.A.M. (2017), “*Toepassing van gedragsinzichten in het consumentenrecht door de Autoriteit Consument en Markt.*” (Application of behavioral insights into consumer law by the Netherlands Authority for Consumers and Markets) Tijdschrift voor Consumentenrecht en handelspraktijken, 6, pp. 279-284.

⁸⁹ File document 121 (ACM/UIT/573135), pp. 24 and 25.

'Featured' categories in the Item Shop make it impossible for children to estimate properly the degree of rarity and exclusivity within a limited timeframe. There are a multitude of potentially available items, of which only a small proportion are offered for sale in each 24-hour period. The history of the Item Shop goes back years and some items have not been on sale for many years. Properly estimating the rarity of the products in the Item Shop is therefore very complex, time-consuming and actually impossible.

- 74 The colored frame and label accompanying the items ostensibly represent the rarity of those items, but they do not do so in a way that supports an informed purchase decision. Without further information, the colors that indicate the level of rarity are in fact arbitrary labels that are not helpful, but instead potentially only increase the complexity of the purchase decision. The wording used for the levels indicates a certain degree of scarcity, which increases a player's feeling that they have a unique opportunity to buy the item now. However, the frames and labels say nothing about the actual, objective degree of scarcity: how often has the item been offered in the past; how long will the item now be offered; and how often does an item reappear in the offer of the Item Shop? Neither do the frames and labels enable players to estimate how much scarcer an item is with a specific label (e.g., 'rare'), in relation to an item with another label (e.g., 'uncommon').
- 75 As the Item Shop provides no transparency regarding the rotation of items and their rarity, players are dependent on content from external websites, where they themselves look for information on the rarity of items and exchange it with other players. There are various websites that provide information about the daily rotation of items in the 'Daily' and 'Featured' categories in the Item Shop that refer particularly to the rarity of items.⁹⁰ Even with this information, which players have to collect and weigh up on their own initiative, it is still a matter of speculation how rare items offered for sale really are. In any case, the websites indicate that there is considerable demand from Fortnite players for information, among other things about the last time an item was offered; how often it was offered in the past; and information or predictions about when and how often the item will return to the Item Shop. In short, there is a need for information about the rarity and exclusivity of items in the 'Daily' and 'Featured' categories in the Item Shop.
- 76 The Item Shop, with artificial scarcity, complex and unclear presentation of the offer, also includes a countdown timer. The timer limits the length of time that an offer is available, which triggers a feeling of urgency and scarcity in children in relation to the offer. This may cause them to feel pressure to make an overhasty decision about making a purchase. Because consumers want to avoid missing desired items, they are exhorted by this design choice to buy items.⁹¹
- 77 The timers are set to 24 hours, which gives children only limited time for decision-making about the items on offer. In effect, children can probably only use a small part of those 24 hours, as many do not have unlimited playing time. As a result, they will mostly have to decide during one gaming session whether or not to make a purchase. If, for example, children play Fortnite once a day after school, they will only see the selection of available items in the 'Daily' and 'Featured' categories in the Item Shop in the afternoon, when this offer is only available for a few more hours (the timer then expires the same evening at 23:59). To be sure of being able to purchase a specific item, children have in that case no longer than the period between the end of the school day and bedtime to decide about that purchase.
- 78 ACM considers this available time too short for children to make an informed decision about a complex product offer. After all, they need more time to process information than adults do. The short decision period imposed by the timers can result in harmful effects, such as excessive haste in making a purchase in order to be sure not to miss an important opportunity. In consequence, children may make more or different purchases in Fortnite than they would have made if they had had more time. On this subject, see also §3.2.2.
- 79 Children can certainly not be expected to weigh up properly large amounts of information about potentially a great many items in a short time and on that basis to be able to make an informed

⁹⁰ See, for example: ACM/UIT/575679, 40_fortniteintel.com_OG Skins; ACM/UIT/575679, 41_gameriv.com_Recon Expert; ACM/UIT/575679, 42_gettotext.com_Rarity; ACM/UIT/575679, 43_filterfreeparents.com_Parents; ACM/UIT/575679,

⁹¹ Cf. in this connection ACM's considerations on timers in §3.2.2 of this decision.

purchase decision. This all has to be done before the timer expires and the offer of items changes again in a way that is uncertain and unpredictable for the child. Taking everything into account, the combination of the aforementioned design choices may lead children to make impulse purchases of items that they would not otherwise have made.

- 80 According to ACM, the use of the aforementioned combination of design features can be characterized as a 'dark pattern'. The creation of artificial scarcity in a complex product offering, uncertainty about that offering and the time pressure imposed lead to the exploitation of FOMO. This increases the likelihood of impulse purchases. Children may be particularly vulnerable to the scarcity tactic used in Fortnite, because they are more impulsive by nature than adults and because younger players make more cosmetic and other in-game purchases in Fortnite.⁹²
- 81 In this way, the design of Fortnite distorts children's decisions about transactions in Fortnite's Item Shop. The ability of the average consumer (the child) to make a decision about a purchase in the 'Daily' and 'Featured' categories in the Item Shop is or may be noticeably limited due to that design, because of which the child makes or may make a transactional decision which they otherwise would not have made. As a result, Epic acts in conflict with the regular level of special expertise and due care towards consumers that can reasonably be expected of it.

3.5.2 Assessment of Epic's opinion

- 82 Epic states that there can be no violation of Section 6:193b of the Dutch Civil Code because this was not established in the report. Epic also states that the changing of the legal basis by ACM's Legal Affairs Department results in a violation of the separation of functions within ACM.⁹³ In this context, ACM refers to established case law⁹⁴ from which it follows that changing the legal basis of a violation is also possible after the investigation phase (in the primary decision phase or even in the subsequent objection phase) if the party concerned is given the opportunity to make known its point of view on the intended change prior to the decision being made. That is what happened here.⁹⁵ For the sake of completeness, ACM notes that the separation of functions referred to by Epic does not apply here, because a binding instruction is being imposed on Epic for acting in violation of the requirements of professional diligence, and not an administrative fine (see §5.2 of this decision).
- 83 Epic then states that it should have been confident that its conduct was permissible, as it is not included in ACM's 'Guidelines on the protection of the online consumer' (hereafter: the Guidelines) as an example of a prohibited working method. ACM notes that the Guidelines give a number of non-exhaustive examples of how ACM applies consumer rules in several – sometimes common – online influencing techniques. The Guidelines explicitly state that these are not exhaustive and that companies have to check for themselves whether they comply with all the legislation and regulations that apply to them.⁹⁶ Particularly in light of the rapid technological developments and the changes in commercial practices that build on those developments, it is neither possible nor desirable for ACM to prescribe exhaustively which commercial practices are not permitted. With regard to timers, the Guidelines only address the question of whether they can be classified as misleading because they are untrue. However, the examples given do not preclude timers from being in violation of consumer law in other ways. Therefore, the fact that a specific timer such as the kind that Epic uses is not mentioned in the Guidelines does not mean that Epic could assume that the timer was permitted.
- 84 Epic furthermore takes the position that the use of timers is permissible, as long as the intended change actually takes place after the timer in question has expired. According to Epic, this position is confirmed by a recent enforcement action by ACM against various webshops⁹⁷, and also by a decision

⁹² Cf. also marginal 21 et seq of this decision for the arguments relating to FOMO and its effects on children.

⁹³ As referred to in Section 12q of the Establishment Act of the Netherlands Authority for Consumers and Markets (ACM Establishment Act).

⁹⁴ See *inter alia* Dutch Trade and Industry Appeals Tribunal (CBb) November 30, 2021, ECLI:NL:CBB:2021:1031; CBb October 12, 2017, ECLI:NL:CBB:2017:327; and Administrative Jurisdiction Division of the Council of State (ABRvS) January 28, 2015, ECLI:NL:RVS:2015:177.

⁹⁵ See marginal 6 of this decision.

⁹⁶ Guidelines on the protection of the online consumer, p. 69.

⁹⁷ See <https://www.acm.nl/nl/publicaties/acm-sprekt-webshops-aan-die-misleidende-countdowntimers-gebruiken> (in Dutch).

of the Advertising Code Committee⁹⁸ (hereafter: RCC) and in a ruling of the Court of Justice of the European Union⁹⁹ (hereafter: the Court of Justice). Since the offer in the 'Daily' and 'Featured' categories of the Item Shop actually rotates after 24 hours, there can be no violation, according to Epic.

- 85 ACM confirms that it sees 'untrue' timers as misleading, which is evident from the Guidelines, from its previous enforcement action, as well as from §3.3 of this decision. The RCC decision cited by Epic confirms that the RCC endorses this position. However, this assessment of 'untrue' timers does not alter the fact that the use of timers and other ways of creating scarcity should also comply with other principles of consumer law. As a consequence of this, ACM can also assess these timers according to the standards of professional diligence.
- 86 The aforementioned ruling by the Court of Justice focused on whether the trader had acted with sufficient care in the context of professional diligence towards the consumer. In the ruling, the Court of Justice referred to a number of case-specific elements that were relevant to that assessment in relation to the commercial practice at issue: selling two different products in one combined offer (a computer with pre-installed software). Here too, ACM assessed whether Epic had acted with sufficient care. It concluded that the design features Epic included in the game did not demonstrate the care that can be expected of a trader toward a vulnerable target group. The specific elements of the Court of Justice's ruling are not relevant here because they apply to a different type of commercial practice that is not at issue here.
- 87 Epic states that it has provided all the essential information that the consumer needs to make an informed decision about the offer in the Item Shop. According to Epic, information relating to the question of whether and when an item will once again be made available in the Item Shop does not come under essential information, so there can be no question of a violation of Section 6:193b of the Dutch Civil Code. ACM comments that Epic is not being accused of failing to provide the consumer with all the essential information (within the meaning of Section 6:193d of the Dutch Civil Code). ACM sees here a different kind of violation that involves making a complex offer to a vulnerable target group under pressure from a timer with a short duration, with the result that behavioral pitfalls faced by the average consumer are exploited and the purchase decision is improperly distorted. The essential information that is or is not provided forms no part of this and Epic's opinion on this point is therefore not relevant.
- 88 Epic says that ACM has neither substantiated nor demonstrated that there is a causal link between the artificial scarcity and making a purchase. As a consequence, according to Epic, there is no significant distortion of the economic behavior of the average consumer. ACM has already explained above that due to the combination of design choices in Fortnite, children may make different purchase decisions. The previously mentioned study by Motivaction¹⁰⁰ shows that children spend money in Fortnite. This study, combined with the arguments as evidenced by academic literature (see marginals 20 through 27 of this decision) make it plausible that children have made purchases that they would not otherwise have made and that children's ability to make an informed decision about purchases in the Item Shop has been or may be noticeably impaired.
- 89 Epic considers that ACM wrongly failed to investigate whether players took account in their purchase decision of the color frames and labels displayed with the offer. As set out in §3.5.1, a combination of various design choices in Fortnite results in children's decisions on transactions in the Item Shop being distorted. One of those design choices concerns the color that indicates the level of rarity. This color frame contributes (together with the other elements referred to) to the complexity of the purchase decision, because this indicates a certain degree of scarcity but says nothing about the actual scarcity of the item. It should be noted that Epic did not explain as to why it believes that it did act with care with its design choices.

⁹⁸ RCC July 4, 2014, 2014/00190 (*Booking.com*), consideration 4.

⁹⁹ CJEU September 7, 2016, ECLI:EU:C:2016:633; C-310/15 (*Sony*).

¹⁰⁰ File document 148 (ACM/INT/449012).

90 Epic states finally that it has now placed one timer at the bottom of the screen, with the explanation that when the timer has expired, the offer in the Item Shop as a whole rotates. This does not alter ACM's assessment. This change was only carried out after the investigation period and it does not alter the complex of facts that led to identifying the violation of Section 6:193b of the Dutch Civil Code. Moreover, as a result of the changed timer – in combination with the other above-mentioned design choices – children may still proceed to make impulse purchases that they would not otherwise have made.

3.5.3 Conclusion

91 In view of the foregoing, ACM determines that in the period from December 2, 2020 through December 3, 2021, trading was carried out in the 'Daily' and 'Featured' categories in Fortnite's Item Shop in violation of the requirements of professional diligence. ACM establishes a violation of Section 8.8 of the Dutch Act on Enforcement of Consumer Protection (Whc) in conjunction with Section 6:193b(2) of the Dutch Civil Code (BW).

4. Violator

92 Section 8.8 of the Act on Enforcement of Consumer Protection stipulates that a trader¹⁰¹ is prohibited from engaging in the aforementioned unfair commercial practices. The trader that violates Section 8.8 Whc can be regarded as a violator within the meaning of Section 5:1(2) of the Dutch General Administrative Law Act (hereafter: Awb). Epic offered the online game Fortnite to consumers in the Netherlands in the violation period in the course of carrying out its business operations.¹⁰² In view of this, ACM regards Epic as a trader and therefore as an offender within the meaning of Section 5:1 Awb in relation to the violations established in marginals 44, 60 and 91.

5. Administrative measures

5.1 Fines

93 ACM can impose administrative fines on the offender for the violations identified in marginals 44 and 60.¹⁰³ ACM considers this to be appropriate and proportionate in this case. ACM thinks it is important for minors and other consumers to be able to engage in online games with confidence, without having to be on the lookout for opaque sales methods. If this confidence is undermined, ACM considers it necessary to take action. Because in this case there are two violations that are entirely separate, ACM considers it appropriate to impose two separate fines.

94 The fines to be imposed on Epic are capped at 900,000 euros per violation or 10%¹⁰⁴ of Epic's turnover, whichever is greater. ACM determines the fines with due regard for Sections 3:4 and 5:46 of the Dutch General Administrative Law Act (Awb), Sections 2.9 and 2.15 of the Dutch Act on Enforcement of Consumer Protection (Whc) and with the application of the ACM 2014¹⁰⁵ Fining Policy Rule (hereafter: Fining Policy Rule).

95 Both observed violations can be fully blamed on Epic. Epic has a responsibility of its own to know and comply with legislation and regulations. It states that it attaches great importance to consumer protection, but at the same time has not made it plausible that it did everything possible to prevent the violations identified in this decision. Epic was able to foresee that children were playing Fortnite. If it was explicitly not Epic's intention to expose children to its commercial practices, then it could have

¹⁰¹ As referred to in Section 6:193a(1)(f) BW.

¹⁰² File document 97 (ACM/UIT/569031), p. 2.

¹⁰³ Under Section 2.9(b) Whc.

¹⁰⁴ See Section 2.15(1) Whc.

¹⁰⁵ Policy Rule of the Minister of Economic Affairs and Climate Policy dated July 4, 2014, no. WJZ/14112617, relating to the imposition of administrative fines by the Netherlands Authority for Consumers and Markets (ACM 2014 Fining Policy Rule), Government Gazette. 2014 no. 19776, last amended by Policy Rule of the Minister of Economic Affairs and Climate Policy dated June 28, 2016, no. WJZ/16056097, amending ACM 2014 Fining Policy Rule, Government Gazette. 2016, no. 34630.

taken measures to this end (beyond the relatively limited parental controls available on some devices), which it did not do.

- 96 The Dutch Act on Enforcement of Consumer Protection and regulations on unfair commercial practices aim to achieve a high level of consumer protection. Failure to comply with these regulations by persuading children to make a purchase in multiple improper ways in an online game may harm individual consumers but also consumer confidence in general. Children and their parents may lose confidence in online games and in their integrity and trustworthiness. Parents may be reluctant to let their children play online games in the future, or even forbid them to do so. This has a detrimental effect on other online games that do comply with legislation and regulations.
- 97 In particular, in this case, a large number of consumers played Fortnite during the violation period and were therefore unavoidably confronted with Epic's unfair commercial practices.¹⁰⁶ A representative sample taken by Motivaction¹⁰⁷ among parents of children in the Netherlands shows that 27% of Dutch children played Fortnite in 2021. In that year, 37% of those children made in-game purchases. Out of this group, 34% spent an amount of 10 to 25 euros on purchases, 21% spent an amount of 25 to 50 euros, and 12% spent more than 50 euros on purchases. Fortnite's significant revenues¹⁰⁸ in the Netherlands in 2021 confirm the picture that in-game purchases were made with great regularity in the game.
- 98 Although not all purchases made in Fortnite's Item Shop¹⁰⁹ can be attributed to Epic's commercial practice, ACM considers it plausible that this practice has distorted children's purchase behavior in the sense that children will make more or more frequent purchases. This results from the previously mentioned FOMO experienced due to scarcity in the offer.¹¹⁰ The nature of the violation, which concerns the direct exhortation of children to make purchases, means that ACM considers it plausible that purchase behavior has been distorted.¹¹¹
- 99 Partly in view of the above, ACM considers the identified violations to be serious. The deceptive use of indications of scarcity and the direct pressure on children to make purchases concern 'blacklist' provisions. These are commercial practices that are misleading and aggressive under any circumstances. ACM considers it especially grave that vulnerable consumers¹¹² have suffered from this systematically and unavoidably over a long period. Taking everything into account, ACM determines a separate basic fine of 562,500 euros for each violation.¹¹³
- 100 In the investigation report and the opinion and financial documents submitted by Epic, ACM sees no circumstances that give grounds to raise or lower the aforementioned basic fines. The lack of complaints about Fortnite stated by Epic neither negates the violations nor makes them any less grave. Moreover, the number of complaints in this context says little, as children or their parents will mostly be unaware that they have been inappropriately influenced or exhorted to make purchases and, in the light of that fact, will not be quick to complain about it. Changes that Epic made to the game in relation to the timers¹¹⁴ after the violation period do not mitigate the fine. With the changes, Epic would, at best, put an end to the identified violations. ACM did not observe any more far-reaching cooperation than that which Epic is obliged to provide under Section 5:20 of the Dutch Administrative Law Act.

¹⁰⁶ File document ACM/IN/648934, p.3. In the period from December 2, 2020 to July 20, 2021, there were [CONFIDENTIAL] 'active accounts' in the Netherlands. Although the investigation period continued through December 3, 2021 and, according to Epic, the number of accounts does not correspond exactly to the number of players (multiple players can play on one account and one player can create multiple accounts), the number of accounts does give an indication of the number of consumers that have been confronted with Epic's commercial practices.

¹⁰⁷ File document 148 (ACM/INT/449012).

¹⁰⁸ See ACM/IN/728899.

¹⁰⁹ File document 76 (ACM/IN/648934). The purchases referred to by Epic only concern part of the violation period, from December 2, 2020 through July 20, 2021. The total number of purchases is higher.

¹¹⁰ Melis et al, "The preference for scarcity: A developmental and comparative perspective", pp. 609-613.

¹¹¹ Cf. also in this context European Commission, Directorate-General for Justice and Consumers, Lupiáñez-Villanueva, F., Boluda, A., Bogliacino, F., et al., *Behavioural study on unfair commercial practices in the digital environment: dark patterns and manipulative personalisation: final report*, 2022, <https://data.europa.eu/doi/10.2838/859030>, pp. 19 and 20.

¹¹² ACM identified violation 1 during 10 months and violation 2 during 12 months.

¹¹³ These basic fines are at three-quarters of the applicable range, which, under Article 2.5(1) of the Fining Policy Rule, is from 300,000 euros to 650,000 euros.

¹¹⁴ Specifically on February 1, 2022, see file document 76 (ACM/IN/648934) and 137 (ACM/IN/691272).

101 Considering all the facts and circumstances, ACM sets the fines to be imposed on Epic at a total amount of 1,125,000 euros, consisting of two separate fines of 562,500 euros. The fines reflect Epic's culpability and the seriousness of the violations, as well as the circumstances under which they were committed.

5.2 Binding instruction

5.2.1 The instruction

102 Epic's unfair commercial practice as established in §3.5 consists of a combination of design features in Fortnite's Item Shop. The 'Guidelines on the protection of the online consumer'¹¹⁵ give a number of non-exhaustive examples of countdown timers that ACM considers misleading. The Guidelines do not list the commercial practice at hand in which separate elements as a combination constitute a violation. That is one of the reasons why, in this case, ACM, in the interest of promoting compliance, imposes a binding instruction on Epic within the meaning of Section 12j of the ACM Establishment Act.

103 ACM orders Epic to bring its digital offer in the Item Shop in Fortnite into line with Section 6:193b(2) of the Dutch Civil Code. It is the combination of various design features that may cause children to experience FOMO, which, in turn, may influence their economic behavior. Epic can significantly reduce this FOMO by implementing changes to the Item Shop with which it, in any case, offers clarity regarding the availability period of items in the Item Shop and offers children more time to take a well-informed decision regarding the supply in the Item Shop.

Clarity regarding the availability period of items in the Item Shop

104 In order to be able to take a well-informed purchase decision regarding an item in the Item Shop, it is relevant to know how long that item will be available for. This is one of the factors determining how valuable players consider that item. The availability period influences the scarcity of that product. A timer counting down that indicates at what point the Item Shop (or a category therein) will refresh itself does not offer any insight into the availability period of individual items. It is not clear what items will disappear as a result of the 'refresh' of the Item Shop, and what items will not. In order to offer that clarity, Epic must indicate for each individual item and in a manner that is clear to children when that item will leave the Item Shop. This will take away the uncertainty surrounding the availability of the supply, as a result of which children will be better able to take a well-informed decision regarding the purchase of an item.

Sufficient time for making a purchase decision

105 Supplementary to the above, Epic must offer children sufficient time to consider a purchase of the items on offer. ACM believes that, in a game environment where the supply rotates constantly, children should not be forced to make a decision within 24 hours regarding the multitude of items that are offered in the Item Shop. With a longer availability period for items, children can still perceive pressure to make purchases, but it will be likelier that children will not have to make a decision regarding the supply in a single game moment (and as such, almost immediately). An extended timeframe offers children the opportunity to think about and discuss with their parents any purchase decisions regarding items. An extended deadline will help reduce FOMO, and thus reduce the risk of unwanted purchases. In order to make this expanded time period effective, it must be presented in a manner that is as clear as possible for children, and in a way that exerts as little pressure as possible.

106 Epic must have changed its commercial practice no later than June 10, 2024 in such a way that it is in line with Section 6:193b(2) of the Dutch Civil Code. Epic must inform ACM about the changes it has made no later than three days after that date. The aforementioned binding instruction imposed on Epic is valid for a period of two years.

¹¹⁵ ACM's Guidelines on the protection of the online consumer, pp. 66-67. Can be found on <https://www.acm.nl/en/publications/information-for-companies/acm-guideline/guidelines-protection-online-consumer>.

5.2.2 Assessment of Epic's opinion

- 107 Epic states that it has already implemented several changes to the Item Shop of Fortnite, and, on top of that, can implement several additional changes no later than June 10, 2024, with which it says it would comply with the binding instruction.¹¹⁶ Epic refers to the following changes as a whole:
- The color frames and labels displayed with the offer will be removed from the Item Shop worldwide;
 - The countdown timers will be removed from the Item Shop worldwide;
 - In the Item Shop, the local time will be displayed indicating when the Item Shop will be refreshed;
 - On the product page of each available item, the date will be displayed indicating when the item will leave the Item Shop;
 - For players up to the age of 18 years in the Netherlands, only items that will be offered for 48 hours or longer will be visible and available in the Item Shop;
 - 'Cabined accounts' will be introduced worldwide, with which players up to the age of 16 years in the Netherlands will need permission from the parents/caretakers to see certain content and to use certain features (including making real money purchases);
 - An 'undo purchase' button will be introduced with which purchases can be undone within 24 hours after the purchase or until the player uses it for the first time (whichever comes first);
 - Three return tickets per player will be introduced, with which a player can return an item to the Item Shop in the first 30 days after the purchase, regardless of whether the items have been used or not. Each year, every player will receive an additional return ticket, as long as the player has fewer than three return tickets (a player can hold a maximum of three return tickets at any given time).
- 108 ACM is of the opinion that Epic will comply with the binding instruction if it implements the above changes. These measures will reduce the uncertainty regarding the availability periods of items and the pressure on children to make a purchase decision within 24 hours. Additionally, the complexity of the offer is reduced, and children are better protected against making unwanted purchases. The changes will offer children more opportunity to make well-informed decisions. The measures thus mitigate the distorted economic behavior of this target audience that was created by the established violation.
- 109 ACM agrees with the time limit that Epic says it needs to implement said measures, and adopts that time limit. Considering the above, ACM will leave undiscussed the other opinions than Epic had submitted.

¹¹⁶ E-mails from Epic dated March 4, 7 and 11, 2024 with reference ACM/IN/849949, ACM/IN/851079 and ACM/IN/851964.

6. Decision

The Netherlands Authority for Consumers and Markets:

imposes on Epic Games International S.à.r.l., with its registered office in Bertrange (Luxembourg), fines totaling 1,125,000 euros, consisting of a fine of

- 562,500 euros for violation of Section 8.8 of the Dutch Act on Enforcement of Consumer Protection (Whc) in conjunction with Section 6:193g, preamble and under (g) of the Dutch Civil Code (BW); and
- 562,500 euros for violation of Section 8.8 Whc in conjunction with Section 6:193i, preamble and under (e) BW;

orders Epic Games International S.à.r.l., with its registered office in Bertrange (Luxembourg)

- to bring its digital offer in the Item Shop in Fortnite into line with Section 6:193b(2) BW no later than June 10, 2024. It can do this by implementing in the Item Shop the changes as described in recital 107 of this decision; and
- to inform ACM about the changes it has made to the Item Shop within three days after the end of the aforementioned period.

The Hague, **December 18, 2023**

Netherlands Authority for Consumers and Markets,
on its behalf:

signed

C.M.L. Hijmans van den Bergh MBA
board member

If you are an interested party, you may lodge an objection in writing to this Decision. Send your substantiated notice of objection to the Netherlands Authority for Consumers and Markets, Legal Affairs Department, PO Box 16326, 2500 BH The Hague. You must do this within six weeks of the day on which this Decision is announced. In your notice of objection, you may request the Netherlands Authority for Consumers and Markets to agree to a direct appeal to the administrative court.