



# Ambush marketing and UEFA Euro 2020. Italian Competition Authority enforces Decree-Law no. 16/2020 for the first time

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📁 INTELLECTUAL PROPERTY

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## **T**he decision

By decision no. 30099 of 29 March 2022<sup>1</sup>, the Italian Competition Authority (AGCM or Authority) inflicted to Zalando SE, a well-known company active in the field of e-commerce (Zalando or Company), an administrative fine of 100,000 Euro pursuant to Decree-Law no. 16/2020 on ambush marketing<sup>2</sup> (Decree-Law). The Company was found to have put in place a parasitic advertising activity on the occasion of the international soccer event UEFA Euro 2020. It is the first time the AGCM enforces the Decree-Law.

More particularly, on June 8, 2020 the financial police reported the presence, in the square of Rome where UEFA had set up the official Football Village of the event, of a large-scale billboard showing the claim “*Who will be the winner?*”, the name of Zalando, images of the 24 flags of the nations participating in the tournament and a white football t-shirt bearing Zalando’s distinctive logo (see image below).

<sup>1</sup> Available in Italian at this [link](#).

<sup>2</sup> Decree-Law 11 March 2020, no. 16, entitled “*Urgent provisions for the organisation and holding of the Winter Olympic and Paralympic Games Milan Cortina 2026 and the ATP Finals Turin 2021 - 2025, as well as on the prohibition of parasitic activities*”, converted with amendments by Law 8 May 2020, no. 31.





The billboard had been displayed for only seven days, from June 1 until June 8, while during the following period from June 8 to 15 it was replaced with another billboard in which the answer “*Love always wins*” had been added, the national logos had disappeared and the t-shirt had been decorated by whimsical colourful rainbow elements (see image below).



The AGCM held that the first billboard, kept by Zalando from 1 to 8 June 2020, amounted to a parasitic advertising activity specifically prohibited by article 10, paragraphs 1 and 2 letter a) of the Decree-Law<sup>3</sup>.

According to the AGCM, the complex of elements included in the billposting was suitable to create a link between Zalando's name and trademark, on the one hand, and the UEFA soccer event, on the other hand, and in that way to mislead the public by suggesting that Zalando was, contrary to the truth, an official sponsor of the event.

## The Company's arguments and the Authority's grounds

It is worthwhile dwelling on how the Authority dismissed the several arguments put forward by Zalando.

First, the Company argued the need to privilege a restrictive interpretation of the Decree-Law. More precisely, Zalando advocated a teleological interpretation whereby, since the Preamble of the Decree-Law expressly mentioned extraordinary and urgent needs posed by the winter olympic and paralympic games of Milan - Cortina 2026 and the tennis tournament ATP finals of Turin 2021-2025, and did not contain any reference to UEFA Euro 2020, the latter event ought to have been excluded from its scope. According to the Company, the two events expressly mentioned were not comparable to UEFA Euro 2020 in terms of public (economic and socio-cultural) advantages. The winter Olympics and Turin ATP would take place on national territory, while the involvement of Italy with respect to UEFA Euro 2020 concerned only four matches (not including either the final or the semi-finals) out of a total of fifty-one, with a consequently much less significant audience.

The Authority found instead that the scope of the Decree-Law is defined by the general provision of its article 10, which prohibits all fraudulent, deceptive or misleading parasitic advertising and marketing activities, that (i) are performed in connection with the organization of sporting or trade fair events of national or international importance; (ii) are not authorized by the organizing entities; and (iii) have the purpose of deriving an economic or competitive advantage. The AGCM further noted that the very Preamble of the Decree-Law makes reference to the

<sup>3</sup> Article 10, paragraphs 1 and 2 letter a) of the Decree-Law, entitled “*Prohibition of parasitic activities*”: “... 1. *Parasitic, fraudulent, deceptive or misleading advertising and marketing activities performed in connection with the organisation of sporting or trade fair events of national or international importance that have not been authorized by the organizers and are intended to obtain an economic or competitive advantage are prohibited.* 2. *The following constitute prohibited parasitic advertising and marketing activities within the meaning of paragraph 1: a) the creation of a link, even indirect, between a trademark or other distinctive sign and one of the events referred to in paragraph 1, capable of misleading the public as to the identity of the official sponsors; ...*”.

need to strengthen the regulatory framework on parasitic advertising and the protection of well-known signs in the field of sport *“also in relation to other national and international sporting events that will take place in Italy as early as the year 2020”*. As a result, it concluded that UEFA Euro 2020 fell within the scope of the Decree-Law.

Secondly, Zalando pointed out the terminological vagueness and excessive breadth of the provision of the Decree-Law on which the Authority had relied. Besides, in the Company’s view, a restrictive reading of the Decree-Law would be also warranted by considerations of systemic construction, based on a comparison with other provisions protecting consumers, competition and trademarks.

Conversely, the Authority highlighted that article 10 of the Decree-Law accurately defines the characteristic elements of *“parasitic advertising”* by identifying four typified conducts, amongst which, under letter a) (which is relevant to the case), the creation of a link, even indirect, between a trademark or other distinctive sign and the event such as to mislead the public as to the identity of the sponsors.

Third, Zalando invoked the fundamental rights granted by the Italian Constitution, the EU Charter of Fundamental Rights and other instruments, to advocate a balancing between the interests of organizing entities and official sponsors in not seeing their investments nullified, on the one hand, and the freedoms of competition and expression, on the other. The latter should lead one to limit the enforcement of the prohibition, because of its exceptional character, to major events only. In other words, according to Zalando, the freedom of expression would be emptied of content if sporting events were treated as *“private ceremonies”* on public land.

Furthermore, again according to the Company, the alleged link with the UEFA Euro 2020 event rested on a partial and incomplete reading of its advertising project. Zalando emphasized the absence in the contested billboard of

words like *“Euro 2020”*, of images protected as figurative trademarks and of the reproduction of characters covered by copyright. Rather, it was explained that the Company had long been conducting advertising campaigns aimed at raising awareness of socially important issues, and recalled that June 2021, not only in Italy but worldwide, was also the *“pride month”*, universally characterized and perceived by the use of rainbow colours. In this particular regard, it noted how the interaction with the football event had in itself aroused genuine interest and curiosity (for example, there was much media coverage of the decision of the captain of the German national team, best goalkeeper in the world in 2020, to then wear his captain’s armband in rainbow colours).

All of these arguments were dismissed by the AGCM, according to which the circumstance that the advertising campaign was aimed at highlighting issues of social relevance, such as the inclusion of minorities of sexual orientation, was incapable of breaking the link between the Zalando trademark and the sporting event. This, all the more so, since the Company’s declared objective became clear only from the poster that replaced the contested billboard, once the answer *“Love always wins”* was affixed under the claim *“Who will be the winner?”*, and, after the national flags were removed, the rainbow motifs featured in the t-shirt outline instead.

### **The sanction**

Finally, as regards the sanction, the AGCM recalled article 12 of the Decree-Law (and certain provisions referred to therein), whereby the decision prohibiting the parasitic conduct may apply an administrative pecuniary sanction ranging from Euro 100,000 to Euro 2,500,000, taking into account the seriousness and the duration of the violation, the actions taken by the company to eliminate or mitigate the violation, the personality of the infringer and its economic conditions.

As for the seriousness of the violation, the Authority took into account the economic dimension of Zalando (as shown by its revenues realized in 2020), the limited geographical diffusion of the message (the billboard was only affixed in a single square of Rome), as well as the context of first enforcement of the Decree-Law. As for the duration of the conduct, the AGCM considered that the parasitic activity had been carried out only for seven days.

In light of all those elements, the fine was applied in the minimum amount provided by law.



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