



EUROPEAN COMMISSION
DIRECTORATE-GENERAL
FOR JUSTICE and CONSUMERS

Common position of national authorities within the CPC Network concerning the protection of consumers on social networks

Under the Consumer Protection Cooperation (CPC) Regulation (2006/2004/EC), Member State authorities, with the facilitation of the European Commission, have the duty to work together to enforce EU consumer law in the Single Market. CPC authorities, under the lead of the French authority DGCCRF (Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes), have taken the following common position regarding the protection of consumers using social networks vis-a-vis the following two topics. This common position is without prejudice to other issues or terms that national authorities may want to raise in national proceedings.

A) Duty of social media operators to provide an email address and to cooperate with consumer protection authorities – Notice and action procedure

As information society service providers, social media operators are required by EU legislation, and in particular Article 5(1)(c) of the E-Commerce Directive¹, to make easily and permanently accessible to the recipient of the service and to national competent authorities and/or designated bodies within the meaning of the CPC regulation, adequate contact information, including an email address, so that they can be "*contacted rapidly and communicated with in a direct and effective manner*".

This requirement is in the interests of fair trading in electronic communications, as it provides consumer protection authorities with means to rapidly signal to social media operators any practices on social media which may infringe consumer or other legislation.

It is also in the interest of social media operators to establish effective cooperation mechanisms with enforcement bodies to help keep the social media environment safe and their users free from the risks posed by illegal commercial practices, which may harm consumers, especially vulnerable groups.

Recital 40 of the E-Commerce Directive further clarifies that "*service providers have a duty to act with a view to preventing or stopping illegal activities*". Based on Article 14 of the same Directive, information society service providers, which act as hosting

¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')

services are not liable for the information stored by their users when they have no actual knowledge of illegal activities or content. However Article 14(1)(b) requires that *"the provider upon obtaining knowledge or awareness [of illegal activity or information], acts expeditiously to remove or disable access to the information"*. Article 14(3) further clarifies this Article shall not affect the possibility for an administrative authority *"of requiring the service provider to terminate or prevent an infringement"*.

Furthermore, it should be noted that a social media operator acting as a "trader", as well, must always comply with EU consumer and marketing law as far as its own commercial practices are concerned. In particular, traders are subject to the requirements of Articles 6 and 7 of Directive 2005/29/EC on Unfair Commercial Practices, which require them to refrain from misleading actions and omissions whenever engaging in the promotion, sale or supply of a product to consumers.

In view of these requirements, CPC authorities may require the cooperation of social media operators, whether they are acting as a hosting service provider or as a trader, in providing them a dedicated email address so that they can be contacted in case they have found content or practices which are likely to breach consumer legislation and in particular Directive 2005/29/EC on Unfair Commercial Practices, Directive 2011/83/EU on Consumer Rights, Directive 93/13/EC on Unfair Contract Terms and Directive 1999/44/EC on the Sale of Goods and Associated Guarantees.

Moreover, in the past months, CPC authorities have acquired evidence that a number of practices in breach of these Directives are taking place on social media accounts such as:

- subscription traps where consumers are offered to register for a free trial but are not given clear and sufficient information;
- marketing of counterfeited products;
- misleading pre-contractual information, for example where the identity and the details of the trader, the price, availability or main characteristics of products and services are not provided or accurate; and
- scams involving payments taken from consumers.

To make the exchange of information efficient and mutually beneficial between consumer authorities and social media operators, acting as host providers, CPC authorities propose to establish a standardised communication format which will include the following elements:

From Competent Authorities²:

- Description of the content deemed illegal (with screenshots when available);
- Description of reasons and legal bases (including references to the relevant provisions in the EU consumer Directives and their national transposition measures);
- Description of the action requested by the authority:
 - to obtain from social media operators information about the legal or natural person that owns the content so that this person can be efficiently contacted;
 - and, in case the content is likely to cause harm to consumers (such as scams) the immediate taking down of the content until further notice.
- If needed, further justification of the issue at stake.

From social media operators

² In addition to Competent Authorities, relevant entities include Single Liaison Offices and designated bodies within the meaning of the CPC Regulation.

- Acknowledgement of receipt of the request;
- Provision of the information requested and of any other relevant information;
- In case of request for taking down the content, information of the action taken and, if no action is taken, the legal and factual reasons for this.

Timeline

The procedure should contain deadlines for the various exchange of information so as to address the issues raised by illegal content rapidly. The possible suggested deadlines could be the following: [1] days for acknowledgement of receipt, [3] days from request to provide information and/or take down content and report on this, or provide reasons for not taking down content.

National Procedures

This proposed CPC procedure is intended to facilitate efficient cooperation between social media operators and national enforcers. It does not pre-empt national authorities from using other procedures and enforcement measures (e.g. official requests for information or action) as it is appropriate in order to ensure compliance with national law.

B) Fairness or lack of clarity of some "Standard Terms" of social media services

The present document reflects the assessment by CPC authorities of a number of contract terms or of aspects relating to the contract terms used by main social media operators active in the European Union and, by extension, in the European Economic Area (including thus Norway, Iceland and Liechtenstein).

Social media operators supplying services to users residing in the European Union (and in other EEA countries) shall use terms of services in their contracts that are in conformity with Directive 93/13/EC on Unfair Contract Terms. This Directive applies to all contracts between consumers and businesses, regardless of whether they involve monetary consideration, including contracts where consumer generated content and profiling represent the counter-performance alternative to money.

Directive 93/13/EC intends to ensure sufficient protection of consumers in the Internal Market of the European Union regarding unfair contract terms so that cross border trade and competition are not hindered. It provides that standard terms which create a significant imbalance in parties' rights and obligations, to the detriment of the consumer (Article 3) are unfair -and therefore invalid. In addition, as provided for in Article 3 (3) of the Directive, its Annex I contains an indicative and non-exhaustive list of terms that may be regarded as unfair. The Directive furthermore requires that terms are drafted in plain and intelligible language (Article 5) so that consumers are informed in a clear and understandable manner about their rights. Pursuant to the Directive, contractual terms that mislead consumers on their rights are likely to be unfair.

Professionals, including social media operators cannot, through the use of contract terms, limit consumer rights stemming from other bodies of EU law, such as those granted by Directive 2011/83/EU on Consumer Rights, as it is stipulated in its Article 25. They are also prevented from using contract terms to implement unfair commercial practices in their relations with consumers, given that such conduct is prohibited by Directive 2005/29/EC.

To check their compliance with European legislation, the contractual documents that were assessed within this CPC joint action are the English versions of the contract terms identified as below. It should be noted that some language versions may vary from one country to another. Therefore, depending on the various language versions, some contractual terms may be assessed differently. It is however important that all language versions remain consistent and updated. CPC Authorities could address, as appropriate, issues which are specific to the language version applicable in that Member State.

CPC authorities, by examining the various available "Service Terms" of social media operators that apply to consumers residing in the EU and in the EEA, have identified the following terms as unclear or likely to create a significant imbalance between the social media operators and consumers. CPC authorities encourage the social media operators to change or clarify those terms.

1. Jurisdiction, applicable law clause and waiver of mandatory consumer rights

***Jurisdiction and applicable law**

Term: Social media operators cannot deprive consumers in the EU of the right to bring proceedings in the Member State of the consumer's habitual residence and the consumer may not be deprived of the protections of EU consumer law.

Explanation: Consumers residing in the EU may bring proceedings against the other party to a (business-to-consumer) contract before the Courts of the Member State where they are domiciled, provided the contract lies in the scope of the other party's commercial or professional activities in the Member State of the consumer's domicile. Accordingly, the contract concluded by a consumer with a social network operator shall be governed by the law of the country where the consumer has his habitual residence. Any different choice of law should not deprive the consumer of the protection afforded to him by EU Consumer Law. Choice of law clauses must be sufficiently transparent, in that they should specify unambiguously that consumers still have the possibility to invoke mandatory provisions of the laws of their own country (under Article 6 (2) Rome I). Choice of law clauses which convey the incorrect impression that the contract is governed only by a distant and non-accessible jurisdiction and a foreign and unclear applicable law is unfair pursuant to Directive 93/13/EC and it is not valid under EU law. The contract cannot exclude or hinder the consumer's right to take legal action or exercise any other legal remedy (e.g. participate in a class action).

Legal Basis

- Unfair Contract Terms Directive 93/13/EEC
 - Article 3
 - Article 6 (2)
 - Annex 1.q
- Regulation No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
 - Articles 17 (1) (c), 18, 19 and 25 (4)
- Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I)
 - Article 6 (1) and (2)

***Waiver of mandatory consumer rights**

Term: Social media operators cannot require consumers to waive mandatory rights granted to them by EU consumer law.

Explanation: The consumer should not be deprived of rights that arise from the non-performance or the inadequate performance by the operator of its contractual or statutory obligations under EU law, such as the consumer's right to cancel the contract. Any term that requires the waiver of the aforementioned category of rights can be found in breach of EU consumer legislation.

Legal Basis:

- Unfair Contract Terms Directive 93/13/EEC
 - Article 3
 - Annex 1.b
- Consumer Rights Directive 2011/83/EU
 - Article 25
- Directive 2013/11/EU
 - Article 10

2. Failure to identify commercial communications

Term: The commercial nature of communications and sponsored content cannot be hidden from consumers but should be identifiable as such.

Explanation: Contractual terms must be drafted in a clear manner and not give rise to doubts about their meaning, especially in relation to the right of consumers to be presented with identifiable commercial content. Consumers must understand the eventual commercial nature of the content they may be exposed to when using social media services as with any other online content. Service providers have to ensure that there is sufficient clarity about the commercial nature or intent of a communication or a practice, especially when social media operators are informed of the practice, for example because they have contributed to the presentation of the practice and/or they derive revenues from it (e.g. advertising revenues, sponsored likes, etc.). Social media service providers also have an obligation to provide information on the main characteristics of the goods or services to the consumer. Any term that excludes the operator's liability as to this mandatory rule is likely to be in breach of EU Consumer Law.

In addition, the implementation of terms enabling social media operators to avoid the identification of commercial communications as such may also be apprehended as a practice falling into the scope of the Unfair Commercial Practices Directive.

Legal Basis:

- Unfair Contract Terms Directive 93/13/EEC
 - Article 5
- Unfair Commercial Practices Directive 2005/29/EC
 - Article 5
 - Article 6
 - Article 7
 - Annex 1 n. 11
 - Annex 1 n. 22
- E-Commerce Directive 2000/31/EC
 - Article 6 (a)

3. Consumer's obligation to indemnify the provider and waiver by the provider of all liability

Term: Suppliers cannot limit or totally exclude their liability in connection to the performance of any of their contractual obligations, while they impose a general and absolute liability on the consumer in connection to the latter's actions. Consumers' liability for damages that does not depend on the consumer's negligence cannot be validly established in standard terms.

Explanation: Any term that creates a significant imbalance of rights between the operators and consumers can be considered as a breach of EU consumer law. Consumers should be able to exercise their rights that relate to the non or partial performance of the social media operator's contractual and other legal obligations. This implies that standard terms and conditions should be drafted in a way to acknowledge that the liability of social media operators may also be triggered when their action or omission has contributed to the conduct or the damage/loss on which a claim is based.

Legal basis:

- Unfair Contract Terms Directive 93/13/EEC
 - Article 3
 - Article 5
 - Annex 1.b
 - Annex 1.o
- E-commerce Directive 2000/31/EC
 - Article 14

4. Removal of user generated content

Term: The criteria on the basis of which social media operators can refuse to display or remove content generated by the consumer cannot remain general or unspecified. Standard terms and conditions should contain a sufficiently detailed indication of the main grounds on which content can be removed and possibly of how consumers are informed and can appeal to the removal of content.

Explanation: A contract clause cannot confer unlimited and discretionary power to social media operators to determine the suitability of user-generated content, which is part of the remuneration provided by the consumer for the service. As the storage and display of such content is the main element of the social media service, consumers must have a clear understanding of which content is allowed. The absence of any criteria for the determination thereof, creates a significant imbalance vis-à-vis consumers. This however, should not prevent social media operators from providing in their standard terms very clearly that user generated content can be removed without notice, when this is needed to stop rapidly illegal conducts.

Legal Basis:

- Unfair Contract Terms Directive 93/13/EEC
 - Article 3
 - Annex 1.m
- E-Commerce Directive 2000/31/EEC
 - Article 14 (1) (b)

5. Power to unilaterally change terms and conditions

Term: Social media operators cannot unilaterally change the terms and conditions, without clearly informing the consumer of the justification and without giving, under reasonable notice to the consumer, the possibility to cancel the contract.

Explanation: Any change in the terms of a contract that has not been, given with a reasonable notice, and that binds the consumer, may be considered unfair.

Legal Basis:

- Unfair Contract Terms Directive 93/13/EEC
 - Article 3
 - Annex 1.j
 - Annex 1.k
 - Annex 1.m - Annex 2.b (in case of payment or other services of financial nature)

6. Power to unilaterally determine the scope and application of the terms and conditions

Term: Before the conclusion of the contract, social media operators cannot leave it undetermined which of the terms and conditions may cease to apply or may be entirely replaced in the future.

Explanation: It must be clear what the terms applicable to a contract are, as well as the content of the contract itself, before the consumer is bound by it and suppliers must not have unlimited power to decide the scope of application of a contract during its execution. For example, consumers must be properly informed about changes in the scope and application of the terms and conditions of a contract, and they should be given, under reasonable notice, the possibility to cancel or withdraw from the contract.

Legal Basis:

- Unfair Contract Terms Directive 93/13/EEC
 - Article 5
 - Article 3
 - Annex 1.i

7. Power to unilaterally terminate the contract, for any reason

Term: The grounds for unilateral termination of the contract by social media operators must be indicated in a precise manner and reasonable notice should be given to consumers.

Explanation: The consumer, before signing the contract, must be informed of the conditions that can lead to its termination. Those conditions should be explained in clear and intelligible manner and they must not allow for termination of the contract subject to a condition whose realisation depends on the operators alone. Reasonable notice must be given to consumers. This cannot prevent social media operators from providing in their standard terms that a contract can be terminated without notice, when this is needed to stop illegal conduct.

Legal Basis:

- Unfair Contract Terms Directive 93/13/EEC
 - Article 3
 - Annex 1.f
 - Annex 1.g
 - Annex 1.m - Annex 2.a (in case of payment or other services of financial nature)

Nota Bene regarding the fairness of standard terms of the social media services

The assessment made above is without prejudice to any future assessment of compliance of the contract terms with other applicable consumer laws. The list of contract terms hereby identified shall therefore be regarded as non-exhaustive.

It shall also be regarded as relevant on a case by case basis. This assessment is without prejudice to any subsequent differing assessment which may be made in judicial proceedings at a national level.

In this context, it is noted that it is for the national judges and competent national authorities or notified bodies to assess in concreto the unfairness of contract terms taking into account the nature of the service and all circumstances surrounding the conclusion of the contract. The European Court of Justice is the sole body competent to ultimately provide a binding interpretation of Union law.

It is also noted that the consumer protection rules laid down in the Directive 93/13/EC on unfair terms are minimum harmonisation rules and that national laws may therefore provide for stricter rules in compliance with the Treaty on the functioning of the European Union.

The European Commission is solely acting as a facilitator in this process.