



Section 5.2 of the revised UCPD guidance – online sector

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**Unit E2 - Consumer and Marketing Law
DG Justice, European Commission**



Liability of online platforms

Platform as a "trader" (I)

- Platform provider is liable under the UCPD for its commercial practices towards consumers whenever it acts as a "**trader**", i.e. in the course of its business (UCPD Art. 2(b)).
- Obligations for traders under EU consumer law apply **irrespective** of the liability regime under the e-Commerce Directive.
- Recital 11 of the e-Commerce Directive states that it is "*without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts*".

Platform as a "trader" (II)

- In particular, as any other trader, the platform provider is subject to **information requirements** to provide consumers with truthful and accurate information. As regards the main characteristics of its services (UCPD Art. 7(1)-(2)), this would typically include information about:
 - Types of products offered on the platform;
 - Types of third party suppliers present on the platform (whether traders or peer-consumers) and about different rights of the buyer depending on the status of the supplier;
 - Payment procedures;
 - Liability for performance of contract concluded on the platform;
 - Any guarantees provided by the platform;
 - Any complaint procedures.

"Hosting provider" v. other types of platforms

- Online platform provider has to act in accordance with the requirements of **professional diligence** (UCPD Art. 5(2)) in relation for unfair commercial practices engaged by other traders on the platform.
- The status of a mere "**hosting service provider**" under the e-Commerce Directive has an impact in applying these requirements
- According to Art. 14 e-Commerce Directive a platform which qualifies as "**hosting service provider**":
 - Is not liable for information stored by third parties;
 - Provided that it does not know about the illegal information stored and acts expeditiously to remove it upon obtaining such knowledge.

Criteria for "hosting service providers"

- Court of Justice Case C-324/09 L'Oreal: *"Where, by contrast, the operator has provided assistance which entails, in particular, **optimising the presentation of the offers for sale in question or promoting those offers**, it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale. It cannot then rely, in the case of those data, on the exemption from liability referred to in Article 14(1) of Directive 2000/31."*
- Case C-238/08 Louis Vuitton: to assess if Google is a "hosting service provider" it is *"necessary to examine whether the role played by that service provider is **neutral**, in the sense that its conduct is **merely technical, automatic and passive** (...)"*. For national court to assess.

Many platforms do more than mere hosting

- Many online platforms are not mere **"hosting service providers"** under Art. 14 e-Commerce Directive: They actively shape the presentation of the information provided by third parties, process payments and product deliveries, charge commissions on transaction.
- The application of the liability regime for hosting service providers is to be assessed on a case-by-case basis.

Professional diligence obligations

- When **not** acting as mere hosting provider, under the professional diligence requirements (UCPD Art. 5(2)) the platform provider could be required:
 - **To remove expeditiously** – similar to hosting service providers – upon notice (in particular by consumer enforcement authorities) misleading third party information that infringes the UCPD/EU consumer law;
 - To put in place a mechanism for **notifying infringements** of UCPD/EU consumer law committed by third party traders on the platform;
 - To design the **presentation of information** by third party traders in a way that enables their compliance with EU consumer law (in particular, pre-contractual information under the Consumer Rights Directive);
 - To require third party sellers to specify **whether they act as traders or consumers**;
 - To exercise reasonable and proportionate care in **proactively identifying and removing infringing information** by third party traders – to be assessed on a case-by-case basis.



Application of the UCPD to specific types of online services

Search engines

- Search engines must inform consumers about the criteria applied for ranking results (UCPD Art. 7(1)-(2)).
- Search engines must ensure that searches are carried out **fairly** and **do not mislead** consumers (UCPD Art 5(2)).
- Specifically search engines must **clearly disclose** (UCPD Art. 7(1)-(2), Annex I No. 11):
 - ❖ If **certain traders have paid** for,
 - Or
 - ❖ If **the search engine itself** has economic motives for a **higher placement or inclusion** in the display of results.
- **For example**: a trader running both a search engine and other services could have an economic interest in giving precedence to his own services in the search results.

Comparison tools (CTs)

- CTs must inform consumers about the criteria applied for ranking results, coverage of the tool and updating frequency (UCPD Art. 7(1)-(2)).
- Comparisons to be carried out **fairly** and **not to mislead** consumers (UCPD Art. 5(2)).
- CTs must **clearly disclose** if certain traders have **paid for higher placement or inclusion** in the display of search result (UCPD Art. 7(1)-(2), Annex I No. 11).
- Final price to be displayed with all charges included or information about the manner in which the final price is to be calculated (UCPD Art. 7(4)(c)).
- Any differences in characteristics of the compared products has to be explained (UCPD Art. 7(4)(a)).
- Any information on price advantages and availability has to be accurate (UCPD Art. 6(1)(d)).

Online user reviews and social media

- Traders operating user review and social platforms must ensure that **advertising is clearly identifiable** (UCPD Art. 7(2), Annex I No. 11).
- They must accept the posting of both **positive and negative reviews**.
- Persons posting reviews on behalf of traders should clearly identify **sponsored reviews** (UCPD Art. 7(2), Annex I No. 11).
- Information posted by traders, which is presented as consumer experience, must be genuine – i.e. reflect the opinion of real consumers (UCPD Art. 6(1)(c)).
- Traders operating user review and social platforms should, under their professional diligence obligations (UCPD Art. 5(2)), exercise reasonable and proportionate technical verification of the genuine nature of reviews – to be assessed on a case-by-case basis

Online marketplaces (sale of goods)

- Marketplaces must comply with all the **information obligations** about their services (UCPD Art. 7(1)-(2)) and general **professional diligence obligations** (UCPD Art. 5(2)) towards consumers regarding the information supplied by third parties.
- *Specific issue*: where identification of the third party seller is omitted (contrary to UCPD Art. 7(4)(b)), and the consumer is rather given the impression that he/she is buying directly from the intermediary (i.e. the platform) (UCPD Art. 6(1)(f))- the platform may also, subject to a case-by-case assessment, be deemed to be liable for the execution of the transaction, i.e., in the case of non-delivery or non-conformity under the Sales and Guarantees Directive 1999/44/EC, in conjunction with the UCPD. (*for information: a recently submitted request by a Belgian court for preliminary ruling (case C-149/15) concerns the application of the term "seller" under Directive 1999/44/EC to traders who act as intermediaries*)

App stores (digital content)

- App-store must comply with all the **information obligations** about their services (UCPD Art. 7(1)-(2)) and general professional diligence obligations (UCPD Art. 5(2)) towards consumers regarding **information supplied by third party traders**.
- Experience of the CPC Joint Action on in-app games – specific issues:
 - Games not requiring up-front payment but including in-app purchases can be presented as “free” only if in-app purchases are optional and the game can still be played also without such purchases (UCPD Art. 6(1)(d), 7(4)(c), Annex I No. 20);
 - Games must not contain direct exhortation to children (UCPD Art. 5(3), Annex I No. 28);
 - Payments for in-app purchases to operate only with clear user consent (UCPD Art. 7(2) and 7(4)(d)).

Sharing economy

- Sharing economy platforms that qualify as traders must comply with all the **information obligations** about their services (UCPD Art. 7(1)-(2)) and general professional diligence obligations (UCPD Art. 5(2)) towards consumers regarding information supplied by third party traders.
- Specific requirements:
 - Information to users about the criteria used for the inclusion of offers by suppliers (UCPD Art. 7(1)-(2));
 - Information about any controls and checks applied on suppliers (UCPD Art. 7(1)-(2));
 - Reasonable and proportionate mechanisms to check reliability of suppliers (UCPD Art. 5(2)).

Group buying

- Collaborative e-commerce: Allows consumers to purchase products together to obtain a more favourable price.
- **Information to be clear and accurate** regarding **content and price** of the offer + the **provider** of the product/service (UCPD Art. 6(1)(b),(d); Art. 7(4)(a),(b),(c)).
- **Quality** of product not to be lower than normal (UCPD Art. 6(1)(b), 7(4)(a)).

Horizontal issues in the online sector: Dynamic pricing, price discrimination, geoblocking, personalised marketing

Dynamic pricing

- Dynamic pricing (real-time pricing) means changing the price for a product in a flexible and quick manner in response to market demands.
- Dynamic pricing is not an unfair commercial practice *per se* – traders are free to determine the prices they charge for their products as long as they adequately inform consumers about the prices and how they are calculated (UCPD Art. 6(1)(d) and 7(4)(c)).
- However, certain dynamic pricing practices could be considered as unfair. ***For example***: where a trader raises the price for a product after a consumer puts it in his digital shopping cart (UCPD Art. 6(1)(d)).

Price discrimination

- Applying different price conditions to different groups of consumers can be considered contrary to professional diligence (UCPD Art. 5) when it is based on **illicit criteria, e.g. race and religion.**
- Otherwise: Not an unfair commercial practice *per se*. Traders are free to determine prices if they adequately inform consumers about the price/how it is calculated (UCPD Art. 6(1)(d) and 7(4)(c)).
- However, it may infringe different pieces of EU law:
 - General prohibition on price discrimination based on nationality/place of residence: Services Directive (2006/123/EC): "General conditions of access to a service" may not "*contain discriminatory provisions relating to the nationality or place of residence of the recipient.*" Exceptions for differences can be justified by "objective criteria".
 - Also illegal according to Regulations on air transport No 1008/2008, maritime transport No 1177/2010 and bus transport No 181/2011 which ban discrimination (including price discrimination) based on nationality/place of residence.

Personalised pricing/marketing

- Traders can "**track**" and "**profile**" consumer behaviour to **personalise** and **target** offers at **specific consumers/groups**.
- Not an unfair commercial practice *per se* as long as traders adequately inform consumers about the product and the price (UCPD Art. 6(1) and 7(4)). (But it could be problematic in view of Data Protection rules).
- Personalised pricing/marketing could be combined with unfair commercial practices, for example:
 - the information gathered through profiling is **used to exert undue influence**: trader establishes that the consumer is running out of time to buy a flight ticket and falsely claims that only a few tickets are left available (UCPD Art. 6(1)(a), Annex I No. 7).

Geoblocking

- The practice of using location data (e.g. IP address, residence address, country of issue of credit cards etc.) to **deny the sale** or to **re-route to a local store**.
- Traders **must inform about delivery restrictions** at the latest at the beginning of the ordering process (CRD Art. 8(3)).
- If traders do not: a **misleading omission**, because this is **material information** (UCPD Art. 7(5)).
- If this information requirement is fulfilled: Geoblocking **not an unfair commercial practice *per se*** under the UCPD.
- But, geoblocking **could lead to** unfair commercial practices, for example:
 - trader re-routes a consumer from one website to another (local) one with **higher prices** – after catching the consumer's interest on the first website offering better conditions (UCPD Art. 5(2), 6(1)(d), 7(4)(c)).



Thank you!

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