

CPC Network
c/o European Commission

and

Marie-Paule Benassi
DG JUST
European Commission
Rue Montoyer 59

B – 1040 Brussels

Ref.: BEUC-X-2021-064/UPA/PGA/rs

27th January 2021

Subject: Nintendo continues to sell products that fail prematurely, which is harming consumers and the environment.

Dear members of the CPC network,
Dear Ms Benassi,

I am writing to you on behalf of BEUC, the European Consumer Organisation, to inform you that today we are launching an **external alert** to the CPC network about a **widespread infringement with Union dimension** of EU consumer law, related to the **premature obsolescence** of the product called **Nintendo Switch** (sold in the EU by Nintendo Europe GmbH, based in Germany).

In this letter, which should be read in context and as a complement to our external alert according to Article 27 of the Consumer Protection Cooperation Regulation we would like to provide you with further explanations, the evidence collected by our members and our legal assessment of the application of the Unfair Commercial Practices Directive¹ to this case (in attachment to this letter).

BEUC and its members are very concerned about Nintendo continuing to sell a product that was continuously reported to Nintendo and in the media by consumers as failing prematurely. The obsolescence of the product means that consumers often have to buy a new set of game controllers after a short time, also because of the unproportionate costs and the practical burdens that consumers would face when trying to exercise repairs. The practices of Nintendo are of such nature that they mislead consumers, stimulate the acquisition of new products, boosting artificially the sales and resulting in unnecessary electronic waste.

We ask the European Commission to **call on the national authorities to investigate** Nintendo's practices in their countries, **launch a coordinated enforcement action and issue a joint position**, which should request the company to change the design of their product, to effectively prevent its early obsolescence, and until then, to repair this product for free and properly inform consumers about the limited lifespan of the Joy-Con controllers. .

Finally, we ask the European Commission to inform us about any relevant procedural steps taken with regards to the potential investigation and co-ordination and to be regularly informed about the process under confidentiality requirements.

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¹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices.

Description of the issue

Nintendo Switch is a video game console developed by Nintendo and released in March 2017. The newer version of this console, the Nintendo Switch Lite, was released in September 2019.

Until June 2020, the Nintendo Switch and Nintendo Switch Lite sold more than **68 million units worldwide**².

The Nintendo Switch comes with two controllers called the Joy-Con.



Shortly after Nintendo Switch entered the market, a recurring technical problem with its controllers came to light – an issue commonly known as the “**Joy-Con Drift**”.

The default manifests itself by the fact that the characters in the game move without the player even touching the controller. This means that the player cannot control the game and thus cannot play. It makes the console useless.

Nintendo response

In July 2020, the CEO of Nintendo: Mr Shuntaro Furukawa, publicly admitted to the existence of the Joy-Con Drift and apologized to its customers³.

Nintendo at first claimed only to be responsible for the free repairs within the 1-year commercial guarantee period. For any repairs outside of this period it would charge consumers €45 to repair one of the controllers. Moreover, it would also charge consumers €15 in case of Nintendo’s negative evaluation of the consumers request for such a repair. While a new pair of controllers would cost only €70 on average.

In France and Belgium, after the pressure from our members, the company announced that it will withdraw from this practice and promised to expand their commercial guarantee to two years and ensure free repairs for their defective controllers.

In the framework of its investigations, we ask national authorities to check whether free repairs are provided in all EU countries.

Technical study

At the beginning of 2020, our French member UFC Que Choisir commissioned a **technical study** (see attached to this letter), which examined the reasons behind the Joy-Con Drift.

Two issues have been singled out by the experts as being at the origin of the failure:

- premature wear of printed circuits;
- a sealing defect that causes dust enter the interiors of the joystick.

Experts noted that Nintendo made changes to the design of its controllers a few months ago but did not fix the issue causing the failures. More particularly, the components affected by the failures were not modified. Instead, the company continue to sell products that are very likely to break prematurely.

Moreover, the same defect was signalled by consumers also in the newer version of the console – Nintendo Switch Lite, which entered into the market only in September 2019 (two years after the problems with the controllers were publicly known).

² https://www.nintendo.co.jp/ir/en/finance/hard_soft/index.html

³ <https://www.01net.com/actualites/nintendo-presente-ses-excuses-aux-joueurs-victimes-du-joy-con-drift-1941308.html> ; <https://www.phonandroid.com/nintendo-switch-le-constructeur-sexcuse-officiellement-pour-le-joy-con-drift.html>

BEUC members activities

In September 2020, our French member UFC Que Choisir launched a **legal action**⁴ against Nintendo on the basis of the French law prohibiting the practices related to **planned obsolescence**. This action is currently pending.

In February 2020, our Belgian member Test Achats/Test Ankoop sent a **letter of formal notice** to the producer of the Nintendo Switch (Nintendo Europe GmbH) console calling the company to repair all the defected products free of charge and to publicly communicate about the defect of their product that can have an important impact on their lifetime. The company agreed to follow these recommendations.

In January 2021, our UK member Which? also started to collect consumer testimonies⁵ in order to check how many consumers are affected by this misleading practice in the UK.”

Coordinated action of BEUC members

At the end of last year, ten BEUC members⁶ joined forces in order to verify whether their consumers have also been or are affected by these practices and to collect additional evidence. They have launched **calls for testimonies** on the basis of a **common questionnaire**.

The legal assessment of Nintendo’s practices as attached is based on the Directive (2005/29/EC) on business to consumer unfair commercial practices.

Until today, **nearly 25 000 consumer complaints about the Nintendo Switch console**⁷ have been submitted to our member organisations.

On the basis of the above, BEUC is launching an **external alert to the CPC network** calling it to start a coordinated enforcement action to investigate and stop the unfair commercial practices of Nintendo.

We are ready to support your efforts in our common goal of protecting consumers’ interests.

Please do not hesitate to contact us in case of any further questions.

Yours sincerely,

Ursula Pachl
Deputy Director General

Attachments:

1. BEUC legal assessment of the application of the UCPD to the Nintendo case
2. Technical report of the Nintendo Switch controller, commissioned by UFC Que Choisir (English translation from French; French version available on request)
3. Summary of the consumer testimonies across nine European countries

⁴<https://www.quechoisir.org/nos-combats-switch-nintendo-l-ufc-que-choisir-denonce-l-obsolence-programmee-des-manettes-joy-cons-n72823/>

⁵ <https://conversation.which.co.uk/technology/joy-con-drift-nintendo-switch-questionnaire/>

⁶ UFC-Que Choisir, Test-Achats, Consumentenbond, DECO, Consumatori Italiani per l'Europa, Forbrukerrådet, Zveza Potrošnikov Slovenije – ZPS, Spoločnosti ochrany spotrebiteľov, KEPKA, EKPIZO.

⁷ More details of these complaints are attached to this letter for your information.

ANNEX

BEUC legal assessment of the application of the Directive (2005/29/EC) on business to consumer unfair commercial practices (UCPD) to the Nintendo case

I. Breach of art. 6 & 7 (misleading actions and misleading omissions) of the UCPD

Misleading action. “A commercial practice is misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise”.⁸ The enumerated elements include: the nature (including the composition) of the product,⁹ the price or the manner in which the price is calculated,¹⁰ the need for service, parts, replacement or repair,¹¹ the ‘main characteristics of the product’,¹² which may also include its expected lifespan as was confirmed in the caselaw.

Misleading omission. A practice is a misleading omission “if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise”.¹³

In our view a combination of misleading actions and misleading omissions can be invoked in this case. A similar legal basis was used previously for example in the Apple and Samsung cases,¹⁴ where both companies were fined for a combination of misleading actions and omissions.

Application to the Nintendo case:

The consoles have been marketed as having a lifespan of 7 to 10 years (cf. statements of Tatsumi Kimishima,¹⁵ whereas no information was provided on the limited lifespan of the game controller, the lower quality of its components, the premature need for repair or the high repair costs.

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⁸ Art. 6 (1) UCPD.

⁹ Art. 6 (1) a) UCPD.

¹⁰ Art. 6 (1) d) UCPD.

¹¹ Art. 6(1) e); R. Koolhoven, L. Heerema (2018), “Fighting planned obsolescence or ‘the lightbulb conspiracy’ as an unfair commercial practice” in M. Carvalho (ed.), *Law & Technology: E.Tec Yearbook* , 43.

¹² Art. 6 (1) b) UCPD.

¹³ Art. 7 (1) UCPD.

¹⁴ Italian Competition Authority, 25 September 2018, PS11039, *Apple*, http://www.agcm.it/dotcmsdoc/allegati-news/PS11039_scorr_sanzDich_rett_va.pdf> accessed 15 November 2018; Italian Competition Authority, 25 September 2018, PS11039, confirmed by Regional administrative court for Lazio, 20 May 2020, *Apple v AGCM Samsung*, <http://www.agcm.it/dotcmsdoc/allegati-news/PS11009_scorr_sanz_omi_dichrett.pdf> accessed 15 November 2018.

¹⁵<https://www.phonandroid.com/nintendo-switch-duree-de-vie-7-a-10-ans-console-excellent-investissement.html>;
<https://metro.co.uk/2018/02/02/nintendo-plans-support-switch-7-10-years-7281632/>;
<https://nintendosoup.com/nintendo-wants-extend-switchs-lifespan-6-years/>

With correct information on the limited lifespan of the game controller, consumers would have or are likely to have refrained from buying a Nintendo console or from buying it at the set price, to have refrained from incurring costs for repair or from buying a new game controller. The behaviour and communication of Nintendo has led to a situation that impaired the consumer's ability to make an informed choice. Consumers did not have sufficient information in order to make an informed choice at the time of the initial investment, nor were they able to assess the overall lifetime cost of the product, thus causing them to take a transactional decision they would not have taken otherwise.

II. Breach of the art. 9 (aggressive practices) of the UCPD

"A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise." An aggressive practice implies the use of harassment, coercion or undue influence. '**Undue influence**' involves the exploiting a **position of power** in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision.¹⁶

The UCPD Guidance furthermore stresses that prohibition in essence "prevents traders from adopting selling techniques which limit the consumer's freedom of choice or conduct with regard to the product, thereby distorting their economic behaviour."¹⁷

Article 9 elaborates on the criteria that can be taken into account "in determining whether a commercial practice uses harassment, coercion, including the use of physical force, or undue influence". Especially point d) seems relevant for the Nintendo case as it refers to "(d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader".

Application to the Nintendo case:

Nintendo's commercial techniques involve the use of undue influence in a way that significantly limits the consumer's ability to make an informed choice. Nintendo exploits its position of power that stems from the additional knowledge it has on the (mal)functioning of (part of) its product and from the **lock-in effect** which makes it more difficult for consumers to switch brands or to refrain from buying a new game controller.

That position of power and the lock-in effect follows from the fact that a Nintendo console costs several hundred euro's and that games for such consoles cost on average around 50 EUR. Accessories and games can only be used within the Nintendo ecosystem. This means that the consumer is locked-in. The switching costs involved for consumers add to the position of power of Nintendo and to the economic dependence of consumers.

Consumers are *not* able to make an informed choice based on lifecycle thinking when buying a console as they are not even aware that specific parts of their console will be in need of early replacement let alone of the price of such replacement or repair.

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¹⁶ Article 2(j) UCPD.

¹⁷ Commission Guidance UCPD, at 3.5.

The game console is marketed as having a lifespan of 7 to 10 years (cf. statements of Tatsumi Kimishima¹⁸) but the game controllers have a far more limited expected lifespan.

Nintendo is thus artificially creating an aftermarket in a sector in which this should not be the case, in a sector in which the average consumer should not expect the lifespan for the game controllers to be more limited than that of the console and does in any event not take into account the eventual cost of repair or replacement of game controllers when buying the console.

Marketing consoles with a longer expected lifespan than the game controllers that are needed to use the console due to the use of materials of inferior quality for these controllers, therefore reduces the ability of the consumer to make an informed choice and induces the locked-in consumer to buy a replacement good and can be considered an aggressive practice.

This practice is exacerbated by the repair and guarantee policy of Nintendo, which can be considered as *'onerous or disproportionate non-contractual barriers imposed by the trader'* on consumers wishing to exercise rights under the contract (art. 9, d UCPD), that have as an effect or are at least likely to have as an effect to induce consumers to buy new game controllers. Such barriers consist in:

- the excessive costs charged by Nintendo for repair outside the one year commercial guarantee;
- the administrative costs charged by Nintendo on consumers to recover their faulty Joycon in case consumers refuse the repair;
- the burden of missing the game controller during several weeks even if a free repair is proposed (within the one year legal guarantee period).

Finally, the fact that a majority of consumers were obliged to buy a new controller within two years of purchase is clearly a transactional decision they would not have taken without this unfair commercial practice.

III. Breach of art. 5 (general clause) of the UCPD

According to the general clause of the UCPD, a commercial practice shall be unfair if:

- a) it is contrary to the requirements of professional diligence, and
- b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer.

The notion of professional diligence is a vague concept that leaves a lot of discretion to the courts.¹⁹ The practice must be demonstrated to be contrary to *'the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practices and/or the general principle of good faith in the trader's field of activity'*.²⁰

¹⁸<https://www.phonandroid.com/nintendo-switch-duree-de-vie-7-a-10-ans-console-excellent-investissement.html>; <https://metro.co.uk/2018/02/02/nintendo-plans-support-switch-7-10-years-7281632/> ; <https://nintendosoup.com/nintendo-wants-extend-switch-lifespan-6-years/>

¹⁹ G. Straetmans, "Unfair commercial practices in B2C relations", in J. Stuyck, G. Straetmans, *Commercial practices*, Larcier, 2014, 52.

²⁰ Art. 2 (h) UCPD.

According to the **Commission Guidance**, the notion of '*professional diligence*' encompasses principles which were already well-established in the laws of the Member States before the adoption of the UCPD, such as 'honest market practice', 'good faith' and 'good market practice'. These principles emphasize normative values that apply in the specific field of business activity.²¹

Application to the Nintendo case:

The standard of skill and care in the field of activity of Nintendo is a high standard. It is already higher in general for a professional than for an average person,²² and the fact that Nintendo is a market leading company in a high-tech sector must also be taken into account.²³ In addition, the fact that other game controllers produced by Nintendo present no such problems, illustrates that it has the technological capacities to avoid the identified flaws. It is furthermore important that the specificities of the market for game consoles are taken into account: it is a market that involves a relatively high entry cost for consumers (acquisition of console and games) and the fact that the games and accessories can only be used within the Nintendo ecosystem creates an economic dependence for the consumer, who cannot easily switch to a different system in case of a flaw in an essential element of that system: the game controller. Similar to a position of dominance in competition law - such a situation of economic dependence implies a high standard of skill and care for the trader and creates expectations with consumers that their legitimate interests will be taken into account.

In these circumstances, the practice of Nintendo consisting in offering a game console with a flawed game controller can be considered contrary to **professional diligence**, as interpreted by the CJEU in *Sony*²⁴, in that consumers were not correctly informed that the game controllers they acquired were of lesser quality and likely to be in need of replacement before the end of the lifespan of the console; the offer of Nintendo did *not* allow consumers to accept all the elements of the offer; the offer of a console with a flawed game controller did not meet the expectations of a significant proportion of consumer and Nintendo cannot be regarded as having demonstrated care towards consumers.

Nintendo therefore did not meet the required standard of duty and care. Nintendo should be considered to have acted negligently, and at the very least to have inadvertently failed to take the interests of consumers into account, thereby committing an unfair commercial practice:

- By *bringing* its game consoles on the market with game controllers that are likely to be fail before the end of the expected lifespan of the game console, and thus without exercising adequate quality control;
- *A fortiori*, by *keeping* its game consoles on the market without remedying the defect in the game controllers, after these flaws were known to Nintendo;
- *A fortiori*, by bringing a revised version of its game console on the market without remedying the defect in the game controllers, after the flaws were known to Nintendo;
- *A fortiori*, Nintendo should be held to have acted contrary to professional diligence, by combining the aforementioned practices with a repair and replacement strategy that induced consumers to buying a replacement good prematurely.

Last but not least, the above-mentioned practices **materially distorted the economic behaviour** of the consumers. Many consumers were obliged to buy a new set of controllers within two years of purchase, which is clearly not a transactional decision that they would have taken without the unfair commercial practice.

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²¹ Commission Guidance, at 3.2.

²² G. Howells, C. Twigg Flesner, T. Wilhelmsson, "Regulation of unfair commercial practices", in *Rethinking consumer law*, 2018, Routledge, Oxon, 58-59.

²³ See Samsung, at para. 131 and para. 137, https://www.aqcm.it/dotcmsdoc/allegati-news/PS11009_scorr_sanz_omi_dichrett.pdf

²⁴ CJEU 7 September 2016, C-310/15, *Deroo-Blanquart v Sony*.

IV. Legal basis for a CPC external alert

Legal basis	Listed in the CPC Annex?	Eligible legal basis for a CPC external alert
UCPD (Art. 6 and 7)		
UCPD (Art. 9)		
UCPD (art. 5)		

END