

## **Common position of national authorities of the CPC Network concerning the commercial practices of Nintendo of Europe GmbH**

Under the Consumer Protection Cooperation (CPC) Regulation (EU) 2017/2394<sup>1</sup>, Member State authorities<sup>2</sup> have the duty to launch coordinated investigations in cases of a reasonable suspicion of a widespread infringement of Union consumer law.

CPC authorities, with the Greek Ministry of Development and Investments and the German Federal Office of Justice acting as coordinators, have taken the following common position regarding the protection of consumers using Nintendo Switch and Nintendo Switch Lite consoles on the following topics.

This common position is without prejudice to any other legal issues or terms that national authorities may want to raise or may have raised in national proceedings.

### **Background**

Nintendo Switch is a video game console developed by Nintendo and released in March 2017. The newer more compact model of the console, the Nintendo Switch Lite, was released in September 2019. The Nintendo Switch console contains two wireless Joy-Con controllers (one right and one left), which can either be connected to a screen for portable hand-held play, connected to a grip accessory to function like a traditional home console, or detached altogether to function as individual controllers for one or two players. In Nintendo Switch Lite the two controllers cannot be detached, but extra wireless controllers can be used for games that require motion controls.

Since 2017, consumers who used Nintendo Switch console have reported to CPC authorities and consumer associations that they have been dealing with a recurring technical problem named “Joy-Con drift”. “Joy-Con drift” appears as a loss of control of the game, as controllers deteriorate and start to register unwanted commands without having been touched by the user. The “Joy-Con drift” fault appears to both Nintendo Switch and Nintendo Switch Lite consoles.

### **1. Misleading information and misleading omission of material information**

While marketing its product, Nintendo publicly expressed its intention to support the Switch by further evolving how it can be used, in view of keeping a growth in the sales of the product for even more than 6 years<sup>3</sup> (which was the average for Nintendo consoles)<sup>4</sup>. These

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<sup>1</sup> Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, OJ L 345, 27.12.2017, p. 1–26.

<sup>2</sup> The Consumer Protection Cooperation (CPC) network consists of authorities responsible for enforcing EU consumer protection laws in EU-27 Member States.

<sup>3</sup> <https://asia.nikkei.com/Business/Consumer/Nintendo-sees-chance-for-Switch-to-beat-Wii-sales-record2>

statements could reasonably create the impression to the average consumer that since the Nintendo Switch Console had such a support of the company, it is safe choice with a long lifespan that would exceed the 6 years (as was also reflected in the relevant articles in the press<sup>5</sup>). Nevertheless, according to consumers' testimonials the consoles develop the "Joy-Con drift" defect mostly in the first year (or between the first and the second year) after the purchase of the console.

It is indicative, as to the scale of the problem, the fact that BEUC's member organisations had received nearly 25.000 consumer complaints about the Nintendo Switch console by January 2021<sup>6</sup>.

CPC authorities consider that the nature of the failure and the frequency of its occurrence, taking into account a) the fact that many consumers report experiencing "Joy-Con drift" on multiple Joy-Con controllers, including replacement controllers they purchased separately from their Switches, and b) the gravity of the reported defect that prevents the Nintendo Switch and Nintendo Switch Lite consoles in performing its expected function, demonstrate the limited lifespan of the consoles whose release was, nevertheless, accompanied by statements of continuous evolving and growth. The Unfair Commercial Practices Directive (UCPD) (article 6(1) (a) to (g)) prohibits misleading actions which are capable of deceiving the average consumer on a wide range of elements, including the existence of the product, its main characteristics (e.g. its composition, method of manufacture, geographical or commercial origin, the risks and results to be expected from its use), the price or the manner in which it is calculated or the existence of a specific price advantage, the nature, attributes and rights of the trader. Article 6 of the UCPD clearly covers any commercial practice which "*contains false information and is therefore untruthful*"<sup>7</sup>.

Moreover, according to article 7(1) of the UCPD, "*a commercial practice shall be regarded as misleading 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*" and therefore establishes, in very general terms, a positive obligation on traders to provide all the information which the average consumer needs to make an informed purchasing decision.

The "Joy-Con Drift" constitutes an important, serious and hidden defect that prevents the product in performing a function for which it was bought and causes inconvenience to consumers. More specifically, the defect interferes significantly with the gameplay and since the entire purpose of the Nintendo Switch and Nintendo Switch Lite consoles is to play video games and the purpose of the Joy-Con controller specifically is to control the gameplay in

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<sup>4</sup> <https://nintendosoup.com/nintendo-wants-extend-switchs-lifespan-6-years/>,  
<https://metro.co.uk/2020/05/08/nintendo-switch-halfway-life-cycle-12673002/>

<sup>5</sup> <https://nintendosoup.com/nintendo-wants-extend-switchs-lifespan-6-years/>,  
<https://metro.co.uk/2020/05/08/nintendo-switch-halfway-life-cycle-12673002/>

<sup>6</sup> [https://www.beuc.eu/publications/beuc-x-2021-002\\_nintendo\\_-\\_premature\\_obsolescence\\_complaint\\_to\\_the\\_ec.pdf](https://www.beuc.eu/publications/beuc-x-2021-002_nintendo_-_premature_obsolescence_complaint_to_the_ec.pdf)

<sup>7</sup> Commission Staff Working Document Guidance on the implementation/application of directive 2005/29/EC on Unfair Commercial Practices (UCPD Guidance), p. 53, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0163&from=EN>

those video games, the defect goes to the device's central functionality and results in the device failing of its essential purpose. Moreover, as regards the Nintendo Switch Lite, since the controller cannot be detached and replaced, when the "Joy-Con Drift" appears the consumer has to replace the whole console. As result, the problem leads to the early obsolescence of the controller and -in some cases- of the console itself.

CPC authorities consider that the consumers wouldn't have bought the Nintendo Switch or Nintendo Switch Lite gaming systems and the Joy-Con controllers or wouldn't have paid such high price, had they known the potential reduced product lifespan because of the "Joy-Con Drift" defect.

In addition, CPC authorities consider that, even though, Nintendo could easily warn consumers on the potential appearance of the defect in any number of ways, including on the product's packaging, this information is not revealed at the time of the purchase, while the average consumer is not able to detect the defect through an ordinary examination of the product.

Taking into account that the Nintendo Switch consoles have been marketed as products that would continue to grow in sales with the support of the company for more than 6 years, and therefore presented as a safe and long-lasting choice, even though the manufacturer has the knowledge of the potential appearance of the defect of the Joy-Con controllers, CPC authorities share the opinion that this commercial practice falls under the article 6(1) (b) of the UCPD and could be considered as a misleading commercial practice likely to deceive consumers on the main characteristics of the product and cause them to take a transactional decision that they would not have taken otherwise.

Furthermore, CPC authorities consider that the potential appearance of the Joy-Con drift fault and the potentially limited lifespan and early obsolescence of the controllers and/or the consoles<sup>8</sup> should be considered as a material information for the purposes of the UCPD. The absence of such information is likely to mislead consumers, as set out in article 7(1) and (2) of the UCPD, and to materially distort the economic behaviour of the average consumer with respect to the purchase of the Nintendo Switch and Nintendo Switch Lite consoles.

### **Legal framework:**

- Directive 2005/29/EC on unfair commercial practices
  - Article 6(1) (b)
  - Article 7(1), (2)

## **2. Nintendo's failure to act in line with the requirements of professional diligence**

Pursuant to article 5(2) UCPD, Nintendo should act in line with the requirements of professional diligence in its commercial practices towards consumers. Based on the available information and the presentation of Nintendo's business model on its website<sup>9</sup> the CPC network considers that Nintendo is a trader within the meaning of article 2(b) of the UCPD

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<sup>8</sup> Commission Staff Working Document Guidance on the implementation/application of directive 2005/29/EC on Unfair Commercial Practices (UCPD Guidance), p. 75, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0163&from=EN>

<sup>9</sup> <https://www.nintendo-europe.com>

and that it is engaged in a business-to-consumer commercial practice within the meaning of article 2(d) of the UCPD.

According to UCPD Guidance, article 5(2) of the UCPD prohibits commercial practices that are contrary to the requirements of professional diligence if they are likely to materially distort the economic behavior of the average consumer<sup>10</sup>. This is a self-standing criterion — it is not an additional cumulative test that needs to be met for a practice to be found in breach of any of the specific categories of unfair practices in Articles 6 to 9 or Annex I to the UCPD<sup>11</sup>.

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. It follows from Article 5(2)(b) that in order to be found contrary to the requirements of professional diligence, a commercial practice must also be considered likely to “materially distort the economic behavior” of consumers<sup>12</sup>.

According to a technical study held by the French Consumer Organization “*Que Choisir*” the Joy-Con Drift defect is mentioned as a problem with the joystick on the left hand side of the controller and, in particular, with moving the joystick up while playing<sup>13</sup>.

It would appear that this defect is the result of several malfunctions:

**Mechanical malfunction:** The signs of wear and tear on the flexible printed circuit board in the joystick can cause contact problems and thus poor movement detection and the dust in the joystick indicates that it is not dustproof. This could also cause detection faults on the contact points of the printed circuit board.

**Electronic or coding malfunction:** The fact that the fault is only in one direction and that it occurs quickly could indicate a problem with the electronic card.

CPC authorities believe that Nintendo is a market leading company in a high-tech sector and, therefore, the standard of skill and care in the specific field of activity is already a high standard. As such, it was in a position to know the true state of facts about the defect, before releasing and marketing the product, at the pre-release testing phase of the console. Moreover, even when alerted (as the problem of “Joy-Con” drift, appeared since the release of the product in 2017<sup>14</sup>), Nintendo did not intervene to change the design of its controllers and put an end to this fragility. On the contrary, in September 2019, Nintendo released the newer compact version of this console, the Nintendo Switch Lite, which develops the same “Joy-Con drift” technical problem that leads to the direct obsolescence of the console. It was only in July 2020 (and following a class-action lawsuit filed against Nintendo in the USA for not

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<sup>10</sup> [Commission Staff Working Document Guidance on the implementation/application of directive 2005/29/EC on Unfair Commercial Practices \(UCPD Guidance\)](#), p.35

<sup>11</sup> [Commission Staff Working Document Guidance on the implementation/application of directive 2005/29/EC on Unfair Commercial Practices \(UCPD Guidance\)](#), p.50

<sup>12</sup> [Commission Staff Working Document Guidance on the implementation/application of directive 2005/29/EC on Unfair Commercial Practices \(UCPD Guidance\)](#), p.50

<sup>13</sup> <https://www.quechoisir.org/nos-combats-switch-nintendo-l-ufc-que-choisir-denonce-l-obsolence-programmee-des-manettes-joy-cons-n72823/>

<sup>14</sup> <https://www.forbes.com/sites/insertcoin/2017/03/11/the-nintendo-switchs-left-joy-con-issue-has-forced-me-to-abandon-my-grip-controller-entirely/?sh=5b7064af3cda>

disclosing the defect of Joy-Con controls<sup>15</sup>) that the CEO of Nintendo Shuntaro Furukawa, publicly acknowledged the existence of the Joy-Con Drift and apologized to its customers but again without suggesting any concrete solutions<sup>16</sup>.

In addition, the fact that other video game controllers produced by Nintendo present no such problems, demonstrates that it has the technological capacity and expertise to avoid the identified flaws.

Furthermore, CPC authorities consider that it is crucial that the specificities of the game consoles market should be taken into account.

In particular, the game console market 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 defect in an essential element of that system: the game controller.

Within this context, the Nintendo practices of offering a game console with a potential flawed game controller can be considered contrary to professional diligence, since 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.

Within this context, CPC authorities reiterate that Nintendo is likely to have acted contrary to professional diligence a) by bringing on the market game consoles with game controllers that are likely to fail before the end of the expected or even average lifespan of the game console, and thus without exercising adequate quality control, b) by keeping the game consoles on the market without remedying the defect in the game controllers, after these flaws were known to Nintendo, c) by bringing a new compact version of the game console on the market (Nintendo Switch Lite) without remedying the defect in the game controllers, after the flaws were known to Nintendo and d) by not adjusting the product description or the main characteristics of the product to include information about a known issue related to the product.

CPC authorities consider that the above-mentioned practices are likely to materially distort the economic behaviour of the consumers since many consumers were obliged to buy a new set of controllers within two years of purchase in the case of Nintendo Switch or even a new console in the case of Nintendo Switch Lite, which is clearly not a transactional decision that they would have taken, had they known the potential reduced product lifespan.

### **Legal framework:**

- Directive 2005/29/EC on unfair commercial practices
- Article 5 (2)

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<sup>15</sup> <https://chimicles.com/wp-content/uploads/2019/07/Class-Action-Complaint-Nintendo-Joy-Con.pdf>

<sup>16</sup> <https://kotaku.com/nintendo-president-apologizes-for-joy-con-trouble-1844216184>