

## **Common position of national authorities within the CPC**

The Member States, cooperating together within the network set up by the CPC Regulation, take the following legal position on practices related to online games.

### **a) Misleading advertising of games as "free"**

No form of advertisement should promote games as "free" where this has the potential to mislead consumers as to the actual costs involved in playing the games and/or as to the true costs. Advertisements are more likely to be misleading where information regarding costs associated with the game and/or information about the nature and extent of the free gameplay experience is not clearly and precisely indicated up-front, before the consumer decides to play, download or make a purchase (including in-app purchases). The information should include that any purchase concerns real money when this is the case and indicate the currency.

The use of the word "free" (or similar unequivocal terms) as such, and without any appropriate qualifications, should only be allowed for games which are indeed free in their entirety, or in other words which contain no possibility of making in-app purchases, not even on an optional basis.

The use of the word "free" (or similar) may be tolerated for games which are not entirely free, if it is complemented by appropriate qualifications characterising upfront in a clear manner what elements are for free and which ones can be purchased. In such cases, the consumer should be able to access discrete parts of the game that stand alone without the need to make purchases. "Free" may not be used where the consumer cannot, without making in-app purchases, access content integral to gameplay or play the game in a way that he/she would reasonably expect.

On this basis, the following categories of cases are likely to be found in breach of the Directive:

- games that are advertised as being "free" (or similar), without appropriate qualifications, when in reality they either require in-app purchases (i.e. purchases are unavoidable) and/or offer the possibility of making in-app purchases (i.e. offer optional elements). This group also comprises games where a substantial gameplay experience requires an in-app purchase (e.g. open world games in which users can only access significant gameplay features or areas by making payments and games where payments are necessary in order to progress through the game at a reasonable or practicable rate).
- games in which the use of word "free" (or similar) is complemented by qualifications suggesting that the game may be subject to in-app purchases but when such qualifications are misleading or incorrect, or the information relating to the in-app purchase is not provided in an adequate or timely manner.

The situations identified above involve breaches of Directive 2005/29/EC (UCPD), Annex I, Nr 20 alone or in combination with Art 5(4), Art 6 and Art 7; they would also be in breach of the forthcoming information provision requirements of Directive 2011/83/EC on Consumer Rights.

It is understood that an application which is found in compliance with Annex I, Nr. 20 as concerns the use of the word "free" can still be assessed under other provisions of the Directive, such as Articles 6 to 9 to make sure that other elements, like the way price information is displayed, are not misleading or aggressive.

## **b) Exhortation to children**

Games targeted at children or which traders can reasonably foresee may be likely to appeal to children must not contain direct exhortations to children to buy items in a game. This includes putting pressure on a child to buy it directly or to persuade an adult to buy items for them (Directive 2005/29/EC (UCPD), Art 5 (3) and (5) and Annex I, Nr 28). It should be noted that we consider this provision applies to games that are likely to appeal to children, not only those solely or specifically targeted at children. Note, for example, Candy Crush, which is one of the most popular games among children, although it is not solely or specifically targeted at children, i.e. does not use cartoons or other features children are typically attracted by.

When assessing marketing directed at children, due account should be taken of the way messages are presented and of the context of those messages. In other words, a case by case assessment of the facts and circumstances of the case is, to a large extent, necessary.

However, national enforcement experience confirms that expressions like "buy now !" or "upgrade now !" are deemed to be in breach.

As to whether an application or a game can be considered to be directed at children within the meaning of Annex I Nr 28, the UCPD gives no clear indication. Other provisions in the UCPD contain useful criteria which can be used *mutatis mutandis* to address this matter. For example, Article 5 (2) (b) refers to the distortion by a practice of the economic behaviour of the consumer whom it "reaches". Similarly, under Article 5 (3), where a clearly identifiable group of consumers is particularly vulnerable to a practice in a way which the trader could reasonably be expected to foresee, the practice shall be assessed from the average member of that group.

A game or application, and the exhortation contained within it, may be considered as directed at children, within the meaning of Annex I, Nr 28, when the trader could reasonably be expected to foresee that it is likely to appeal to children.

## **c) Information about and consent to purchase**

Consumers should be clearly informed about the payment arrangements for in-app purchases as a matter of professional diligence (Directive 2005/29/EC (UCPD), Art 7(2) and 7(4) (d)). This information should be prominently displayed (i.e. not in the general terms and conditions or on separate information pages or links). Traders must also be aware of the information provision requirements of Directive 2011/83/EC on Consumer Rights which will be implemented into national laws by December 2013 and will apply at the latest as from 13 June 2014.

The default setting for payments should not allow purchases to be made without the consumer's explicit consent (e.g. via a password or other appropriate means). When the system provides for time slots for the validity of consent (e.g. a 15 minutes slot), traders

should not automatically apply default settings, but rather request the consumer's explicit consent also in relation to the applicable duration.

#### **d) Provision of the trader's e-mail address**

It should be clear to the consumer whom he/she ought to contact in case of queries or complaints. Consumers should be clearly provided with the trader's e-mail address (Directive 2000/31/EC (e-commerce), Art 5 (1) (c)). This information should be easy to find, clear, comprehensive and provided in a timely fashion, before the consumer decides to play, download, or make a purchase (including in-app purchases of digital content) (i.e. not in the general terms and conditions or on separate information pages/ links).

This is without prejudice to the other applicable information requirements under EU law such as, for instance, those under Article 7 (4)(b) of Directive 2005/29/EC (UCPD) which requires traders to provide their geographical address and identity.

Further examples of situations likely to constitute good and bad practices may be found in the principles prepared by the UK Office of Fair Trading:

<http://www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-current/childrens-online-games>