



Rules of thumb

Online platforms

Supplement to the Guidelines on the protection of the online consumer. Boundaries of online persuasion.

Rules of thumb for online platforms

1 Background, objective, and scope

The platform economy is growing. More and more activities (economic or otherwise) of consumers and traders take place over online platforms. That offers consumers opportunities, but it also creates risks. Consumers are able to take advantage of benefits such as new services, a wider selection, and lower prices. At the same time, there are many questions about, for example, the application of the existing legal framework, and the division of responsibilities. Boundaries may become blurred between seller and intermediary, consumer and trader, employee and independent contractor, as well as the other businesses involved in the chain between manufacturer and consumer.

If a consumer makes a purchase over a platform, it is sometimes unclear who exactly the seller is. Does the consumer buy something from the platform provider, from a professional user or from a consumer that offers products and services over the platform? In addition, it is sometimes unclear whom the consumer can turn to if they have any complaints regarding the purchase. The consumer consequently becomes unsure about their rights, and will be able to exercise these rights less effectively. Moreover, questions such as these create uncertainty among the professional users involved regarding their consumer-law obligations. Also, they are sometimes unable to meet their obligations because the design of the platform lacks the capability to do so. The platform provider decides on the design of the platform service. If there is a lack of certainty or if there are limitations because of the design of the online platform, it may result in consumer confidence in the digital economy taking a hit. Think of the confidence of consumers to be able to shop online hassle-free, for example, using an online platform service.

In early-2020, the Netherlands Authority for Consumers and Markets (ACM) published its “Guidelines on the protection of the online consumer. Boundaries of online persuasion” (hereafter: the Guidelines).ⁱ In the Guidelines, ACM applies the standards laid down in consumer law to the techniques that businesses (traders) use in order to influence the online behavior of consumers. In that context, ACM focuses on the rules regarding unfair commercial practices. Businesses can use these Guidelines as an helpful aid when developing a website, game, or app.

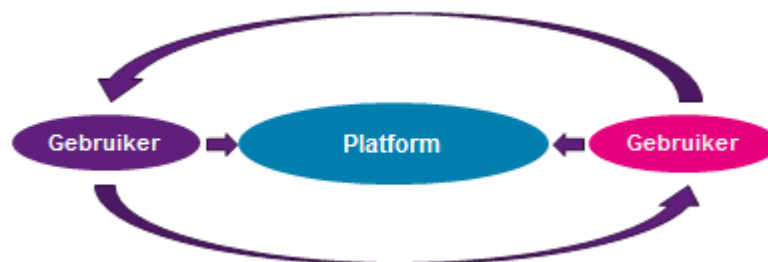
The use of online persuasion techniques can add to the uncertainty about the role and responsibilities of platform providers. This supplement to the Guidelines focuses on that role and those responsibilities. It contains rules of thumb for interactions and transactions between consumers and providers of products and services over platforms. These rules of thumb follow from obligations laid down in consumer law. These obligations are briefly explained in chapter 4. Providers of online platform services play a crucial role in safeguarding consumer rights and in enforcing compliance among businesses with relevant obligations. This supplement contains a framework with which providers of online platform services must comply.

2 In what situations are you considered an online platform service?

Online platform services come in many shapes and sizes. Online platform services that target, among other groups, consumers include marketplaces, app stores, sharing-economy platforms, search and comparison platforms, group-buying platforms, review platforms, and social-media platforms.ⁱⁱ There is no one generally-accepted definition of online platform services, and the law, too, does not (or not yet) have a legal definition of this concept. However, several characteristics can be identified based on real-world experiences.

Online platform services facilitate interactions and/or transactions between users of goods, services, and/or information on the platform.ⁱⁱⁱ In addition, at least three participants are involved in an online platform service:

- The provider of the platform service;
- At least two users of the platform service. These are the participants that, using the platform service, conduct interactions and/or transactions with each other and with the provider. The users can be consumers or professional participants (businesses). Consumer law applies to relations between consumers and professional participants.



In most cases, one or more contractual relations are established between the provider and the users, as well as between the users themselves. In addition, platform services that target, among other groups, consumers can, roughly speaking, be divided into two types:

- Platform services that primarily focus on facilitating transactions between users, and
- Platform services that facilitate interactions between users in a more general sense.

With online platforms that facilitate transactions, the service often focuses on facilitating supply and demand of goods, services (online and offline) and/or digital content. One such example is an online marketplace such as an app store. Examples of online platform services that facilitate interactions are social-media platforms, review platforms, and collaboration and development platforms for software. Many online platform services are a hybrid of these two types. In any event, this supplement targets the providers of services that fall under the above descriptions.

3 Rules of thumb for online platform services

With regard to your online platform, it is essential that consumers are able to exercise their consumer rights. In addition, professional participants that are active on your platform must comply with consumer law. And, you as a platform provider must also comply with those rules. Several rules of thumb can be distilled from all of this. These rules of thumb primarily follow from the general rules on unfair commercial practices. And these rules of thumb are also based on obligations (for example

information obligations) laid down in other consumer protection rules. The next chapter contains a concise overview of the relevant consumer protection rules.

The rules of thumb can be divided into, on the one hand, information obligations and transparency obligations, and, on the other hand, organizational and verification obligations.

Information obligations and transparency obligations

- When offering goods and/or services to consumers, be clear about your role. What is it you offer? In what situations can the consumer contact you? If the consumer cannot contact you, whom can they contact? Also, avoid any information that is ambiguous about your role and the roles of others. This is especially important if you act as direct seller or direct service provider, and also as provider of the platform service.

Example: you sell online products to consumers yourself, and you also offer others the opportunity to do the same over your platform service under the term 'partner'. When consumers see the offerings, it is unclear who exactly is the seller of the products on offer. That is not allowed.

- Make sure that the consumer knows with whom they do business. Make sure you can be reached. And make sure that any professional participant that uses your platform service, too, is able to inform the consumer with whom the consumer does business and how the professional participant can be reached. Contact details must be easy to find.

Example: you are an intermediary for meal deliveries by restaurants. The consumer can only find your address after clicking on three links, and you cannot be reached over the phone, by email or chat without the consumer creating an account first. This is not allowed.

- Inform consumers about the fact that, if they enter into an agreement with a non-professional participant over an online platform, they will not be protected by consumer law, and explain to them what that means.

Example: you run an app store. Both professional and non-professional participants offer their apps, and enter into agreements with the buyers of their apps. The app provider indicates that they are a consumer. It is not explained in the app store that the buyer of the app does not enjoy any protection vis-à-vis the app provider under consumer law. That is now allowed.

- Do you use admission criteria for professional users that have access to your platform service? Inform consumers about those and about how you verify their trustworthiness.

Example: on your website, you indicate that you select professional users on the basis of their liquidity and solvency, and that you verify their registration with the Dutch Chamber of Commerce. In reality, you do not use any admission criteria, and you have no policy or procedure regarding verification of any such criteria. That is now allowed.

Organizational and verification obligations^{iv}

Take measures that ensure that professional users on your platform comply with consumer law. For example, you can do so by:

- Not admitting just any professional user to the platform. For example, you can verify the conditions of these users before admitting them;

- Only admitting professional users that comply with the consumer rules;
- Reprimanding professional users that do not comply with consumer law, and imposing sanctions on them if they do not adjust their behavior.

Example: as provider of an online marketplace, you receive a complaint about a professional user of your marketplace. You do nothing. That is your policy. This is not allowed.

- Mandate users to state clearly whether they act as traders (professional participants) or as consumers (non-professional participants). In that context, you can go on the statement of the user itself. This requirement applies to providers of online marketplaces.

Example: you offer online marketplace services. Both professional and non-professional participants offer their products. On the website, it is not clear whether a participant is professional or not, because you failed to ask for a statement. This is not allowed.

- Design your infrastructure in such a way that professional participants are able to comply with European consumer-protection and marketing rules, such as providing information about their identities, official addresses, and the most important features of the product.

Example: you run an app store. You have structured the user interface in such a way that it is impossible for the app provider to inform the consumer in a clear manner about how the app uses data. That is now allowed.

4 Platform services and consumer law

The rules of thumb primarily follow from the general rules on unfair commercial practices. In addition, they also follow from obligations (including information obligations) laid down in other consumer rules. A brief overview of the relevant rules laid down in consumer law is given below. In that overview, attention is also given to the rules that apply to purchase agreements between consumers and professional participants, and future statutory rules for online platform providers.

4.1 Rules on unfair commercial practices

The rules on unfair commercial practices prohibit misleading and aggressive commercial practices. They also include the standard of professional diligence. That means that a trader cannot act below the level of the professional standard in the sector. And their commercial practices must be fair. These rules on unfair commercial practices can be applied broadly, and also act as a safety net. They supplement the other EU rules and regulations that cover specific aspects of unfair commercial practices.

The rules on unfair commercial practices apply if the provider of the online service is a ‘trader.’ Furthermore, the practice in question vis-à-vis consumers must be a ‘commercial practice’ within the meaning of the rules on unfair commercial practices.^v In annex 4 to the Guidelines, it is explained what a “trader” and a “commercial practice” is, and under what circumstances a commercial practice is unfair. That annex contains an explanation of the rules on unfair commercial practices.

The European Commission drew up Guidance on the implementation of this directive (UCP Guidance) that delves deeper into these rules.^{vi} The UCP Guidance also contains a chapter on online platforms. That chapter explains in detail how the rules on unfair commercial practices apply to different categories of online platform services.

4.2 Consumer purchase

When selling products to consumers, the sellers must comply with certain statutory obligations. In addition, the consumer can exercise certain rights vis-à-vis the seller, for example, if the product does not meet the agreement's conditions (non-conformity, statutory warranty).^{vii} In the case of online platform services that facilitate transactions with regard to products, it is not always clear to consumers who exactly is the seller, so whom they can call to account. This is the case, for example, with purchases on online marketplaces. Do you as provider of the platform service give the impression that you are acting as the seller? Or are you insufficiently clear about your role? If so, you as provider may be designated as 'seller', which means you are also subject to the relevant obligations.^{viii}

4.3 Other rules regarding information obligations

Besides the rules on unfair commercial practices and on the consumer purchase, the Dutch Civil Code also contains other rules that help consumers know with whom they are doing business online. For example, there are rules that mandate businesses to display clearly their business names, contact details, registration with the Dutch Chamber of Commerce, and VAT-number.^{ix} Such information obligations apply to the provision of online services ('information society service'), online advertisements, and the entering into agreements online. These information obligations apply to each phase of your customer journey. Make sure that the right information is easily available for consumers in all your online activities.

4.4 New consumer rules

From 28 May 2022, some of the rules of thumb will become more specified information obligations that apply to providers of online marketplaces.^x These are online platform services that enable consumers to enter into a distance contract with other traders or consumers.^{xi} Are you such a provider? If so, you will have to offer consumers the following information, according to these new rules:

- The most important parameters that determine the ranking of the offers that are presented to the consumer as a result of the search query, as well as the relative weight of those parameters in relation to the other parameters.
- The kind of user that offers products using your service. Make clear whether or not they are traders. You can do so based on the statement of the user in question. Are they not a trader? If not, indicate that EU consumer law does not apply to the agreement between the consumer and that user.^{xii}
- The way in which the consumer-law obligations are divided between you and the professional user. That should make it clear to the consumer whom they can contact in case of problems.

You must provide this information before consumers are bound to any agreement. In addition, you must do so in a clear and easy-to-understand fashion that suits distance communication.^{xiii}

ⁱ [ACM Guidelines on the protection of the online consumer. Boundaries of online persuasion](#), acm.nl, 11 February 2020. These rules also apply to providers of online platform services.

ⁱⁱ European Commission, '[Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices](#)', SWD(2016) 163 final, 25 May 2016. Section 5.2 of this guidance examines in detail how the Directive on unfair commercial practices ([Directive 2005/29/EC](#)) applies to online platform services, including the mentioned variants.

ⁱⁱⁱ See for a similar definition: Statistics Netherlands (CBS), 'Monitor Platformen', version 4.0, September 2020.

^{iv} Verification obligations that are imposed on online platform providers are limited by the prohibition of a general oversight obligation laid down in Article 15 of the Directive on electronic commerce ([Directive 2000/31/EC](#)).

^v Section 6:193a, paragraph 1, preamble and under b and d of the Dutch Civil Code (Hereafter: 'BW') (definition of trader and commercial practice).

^{vi} , '[Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices](#)', SWD(2016) 163 final, 25 May 2016. Section 5.2 of this guidance examines in detail how the Directive on unfair commercial practices ([Directive 2005/29/EC](#)) applies to online platform services

^{vii} The conformity scheme for consumer purchases is laid down in Section 7:17 BW, and the remedies that the consumer can exercise are laid down in Section 7:22 BW. These rules are amended in certain parts by the new rules that are introduced by the Directive on the sale of goods ([Directive \(EU\) 2019/771](#)) and the Directive on the supply of digital content ([Directive \(EU\) 2019/770](#)). This will also be accompanied by new rules about, among other things, the conformity regarding the supply of digital content and digital services.

^{viii} ECJ EU 9 November 2016, case C-149/15, [ECLI:EU:C:2016:840](#) (Wathelet).

^{ix} See, among other provisions, Section 6:230m BW (information obligations for distance contracts), Section 3:15d BW and Section 3:15e BW (information obligations for information society services and their commercial communication).

^x The Directive on unfair commercial practices and the Directive on consumer rights ([Directive 2011/83/EU](#)) were partially amended recently by the so-called Omnibus directive ([Directive \(EU\) 2019/2161](#)). The amendments must now be transposed into national law, and enter into force on 28 May 2022.

^{xi} For the definition of an 'online marketplace', see Article 2 under a (new) Directive on unfair commercial practices (suggestion: Section 6:193a paragraph 1 under m BW) and Article 2 under 17 (new) Directive on consumer rights (suggestion: Section 6:230g paragraph 1 under u BW). For the obligations that will apply to them, see Article 7 paragraph 4 under f (new) of the Directive on unfair commercial practices (suggestion: Section 6:193e paragraph 1 under f BW) and Section 6bis paragraph 3 (new) of the Directive on consumer rights (suggestion Section 6:230m paragraph 3 BW). All these provisions have been introduced by the Omnibus directive. All previous references to the Dutch Civil Code (BW) are subject to change. The legislative process is still ongoing.

^{xii} Article 7 paragraph 4 under f (new) of the Directive on unfair commercial practices stipulates that the information about whether or not the user that offers the product on the online marketplace is a trader is deemed essential information. If you omit this information or if you conceal this information when making an offer including a price, it may be considered misleading.

^{xiii} This has been laid down in Article 6bis paragraph 3 (new) of the Directive on consumer rights.

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