



Guidelines on publication of user
reviews, 1 May 2015

Guidelines

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On the basis of negotiations with the Danish Consumer Council, the Danish Chamber of Commerce, Danske Medier, the Danish E-commerce Association, the Danish Commercial Industries Federation and Danish Standards as an observer, the Danish Consumer Ombudsman hereby issues the following guidelines with comments pursuant to section 24(1) of the Danish Marketing Practices Act.

Background to the guidelines

There is a general trend towards consumers increasingly consulting online user reviews before they make a decision to purchase a product or a service. This raises the issue of whether such user reviews can be deemed to be so reliable that consumers can trust them. If not, consumers are at risk of making a purchase decision on a false basis.

Consequently, considerations for reliable consumer information, protection of the rights of businesses and reviewers and compliance with legislation impose high demands on traders that make online services available for publication of consumers' purchasing experiences.

The reasons for publishing a user review or a customer rating may not be transparent to consumers. For instance, the initiative for customer ratings posted on a commercial online service may have come about in different ways.

The customer rating may have been submitted on the consumer's own initiative, by request from the intermediary of the online service or from the business which the user review concerns. In addition, traders may use different incentives to get consumers to submit or publish the desired customer ratings. Moreover, publication of false customer ratings contributes to obscuring the objective of reliable consumer information.

Good user reviews also play a major role for businesses in the competition to win the consumers' favour. Publication of false or misleading purchasing experiences about a business or its products may thus harm a business's reputation and obstruct fair competition.

Finally, customer ratings are an important tool in the efforts made by businesses to improve their products and customer service towards the consumers.

Section 1

Purpose

Many different and opposing considerations are involved in the efforts to ensure reliable consumer information in the form of published customer experiences. The current legislation does not always provide unambiguous or precise answers to the conflicts that may arise as a result of such opposing considerations.

Moreover, the market for businesses providing online services the purpose of which is to publish purchasing experiences is characterised by the online services being dissimilar with respect to technical structuring, functionality and manual and automatic monitoring systems or lack of same. These dissimilarities result in different procedures, requirements and options in relation to consumers wanting to publish a purchasing experience and businesses entering into a collaboration with an online service.

The purpose of these guidelines is not to set up requirements on such commercial online services' technical structure, monitoring systems or procedures for publication of user reviews, including whether a verification of the reviews should take place manually or mechanically and before or after publication of a review.

The purpose of these guidelines is to set up requirements pursuant to the Marketing Practices Act¹, ensuring that, regardless of the technical structure of their online service, the responsible businesses comply with the Marketing Practices Act and other key statutory provisions, including basic legal principles.

The contracting parties believe that the guidelines will contribute to greater transparency and reliability of user reviews published on such online services.

Although these guidelines are aimed at online services that publish user reviews and not at how the individual businesses handle them, it has been deemed expedient for the guidelines to also consider certain aspects of the businesses' use of user reviews.

The guidelines should also be considered as a general advance indication, providing directions and recommendations for businesses responsible for commercial online services.

Since these guidelines are issued for a new area which is developing fast in terms of technology, they will be gradually supplemented by best practice as and when experience is gained and the area develops. Decisions made by the Consumer Ombudsman will be made available at forbrugerombudsmanden.dk on an ongoing basis.

The words "shall/must" are used where the directions are stipulated in the Marketing Practices Act or other legislation protecting consumers.

The word "should" denotes a recommendation. The Consumer Ombudsman has not taken a position on whether in all events it would be contrary to legislation not to comply with such a recommendation but will consider this on a case-by-case basis.

Note 1 Consolidated Act no. 1216 of 25 September 2013 on marketing practices, as most recently amended by Act no. 1460 of 17 December 2013.

Section 2

Scope

These guidelines cover online services which are in the nature of commercial activities and which permit the publication of user reviews to a wider group of consumers relating to an experience in connection with testing, using, purchasing or intending to purchase a product or service.

The guidelines cover both purchases made online and purchases made in physical stores.

The guidelines also include issues related to traders actively using the relevant online services in their marketing activities without such use being governed by an agreement between the business and the relevant online services.

Comments

These guidelines apply to all online applications, including websites, blogs and social media accessible from a computer, smart phone, tablet, etc., on which consumers publish purchasing experiences that can be accessed by the general public.

The guidelines are limited to activities in the nature of commercial activities. See section 2(1) of the Marketing Practices Act. This means any activity with a commercial purpose.

Reviews of purchasing experiences relating to products and services which are made available free of charge are also comprised by these guidelines if the purpose is deemed to be commercial.

These guidelines cover user reviews relating to agreements made and completed for the purpose of purchasing products and services and any aftersales service related thereto as well as agreements under which delivery was not effected or where the consumer has exercised a right of withdrawal. The guidelines also cover testing and use.

Moreover, the guidelines comprise "purchasing experiences" where the user has had the intention of purchasing, testing or using a product or service but where no purchase was actually made due to the contact or experience with the business.

User reviews which have been published on a trader's own website or which are controlled by the business, e.g. a social media page, are not covered by these guidelines. In such cases, consumers should expect that the trader will only publish favourable purchasing experiences on its website and social media profile. The fact that information about ratings and user reviews posted on a trader's own website or social media page is excepted from these guidelines means that the trader is responsible for ensuring that the published content is in accordance with the Marketing Practices Act and other relevant legislation.

Professional user reviews are also not covered by these guidelines. These include, for example, persons who are required as part of their employment with a magazine publisher to test and publish reviews of restaurants or the like on the magazine's online service.

As part of their marketing activities, traders may invite their customers to publish purchasing experiences on an online service without an agreement being made between the business and the relevant intermediaries about the terms and conditions applicable thereto. As these reviews are just as important for the transparency and reliability of content published on online services as other reviews, the guidelines deal with some issues related to such situations.

Section 3

Definitions

User review: An opinion or customer rating of a purchasing experience by a consumer who has tested, used, purchased or has intended to purchase a product or service, which has been submitted or published for the purpose of informing other consumers about his assessment.

Intermediary: A trader which makes an online service available for publication of user reviews and which is responsible for processing and publishing the reviews.

User: An Internet user or a trader using an online service.

Online service: An online application, image sharing service, website, including a website subsection, web-based software programs, blogs and other social services, the purpose of which is to publish user reviews of products and services.

Product: A product or service.

Terms of use: The intermediary's terms and conditions for submitting user reviews and collecting, processing and publishing such reviews.

Contracting party: Traders who have an agreement with an intermediary about collecting, processing and publishing user reviews on the intermediaries' online services.

Section 4

Regulation of online services that publish user reviews

4.1. Danish Marketing Practices Act

An intermediary's marketing, collection and processing of and permission to publish user reviews must take place in compliance with the following sections of the Marketing Practices Act: section 1 on good marketing practice, section 3 on misleading and improper marketing, section 4 on advertising identification, section 6 on unsolicited communication and section 9(1) on sales promotion activities.

Section 1 of the Marketing Practices Act reads:

"1.-(1) Traders subject to this Act shall exercise good marketing practice with reference to consumers, other traders and public interests.

(2) Marketing in respect of consumers' economic interests may not be designed to significantly distort their economic behaviour."

Section 3(1)-(3) of the Marketing Practices Act reads:

"3.-(1) Traders may not use misleading or improper statements or omit material information if this is likely to materially distort consumers' or other traders' economic behaviour in the market.

(2) Marketing whose content, form or method used is misleading, aggressive or subjects the consumers or traders to improper influence, and which is likely to materially distort their economic behaviour, is not permitted.

(3) Where factual statements are made, these must be capable of being documented. [...]"

Section 4 of the Marketing Practices Act reads:

"4. An advertisement shall be designed in such a way that it will be clearly understood to be an advertisement irrespective of its form and irrespective of the medium in which it is presented."

Section 6(1) and (2) of the Marketing Practices Act reads:

"6.-(1) A trader must not approach anyone by means of electronic mail, an automated calling system or facsimile machine with a view to the sale of products, real property, other property, labour and services unless the party concerned has requested him to do so.

(2) Notwithstanding subsection (1), a trader that has received a customer's electronic contact details in connection with the sale of products or services may market his own similar products or services to that customer by electronic mail, provided that the customer has the option, free of charge and in an easy manner, of declining this both when giving his contact details to the trader and in subsequent communications. [...]"

Section 9(1) of the Marketing Practices Act reads:

“9.-(1) A sales promotion, including by means of gifts with purchase, trading stamps, discount or loyalty schemes, prize competitions and the like, must be presented in such way that the terms of offer are clear, unambiguous and easily available to the consumer, and in general no material information may be omitted, including information on the value of any additional services likely to materially distort the economic behaviour of consumers.”

In its assessment of whether an intermediary has acted in contravention of the Marketing Practices Act, the Consumer Ombudsman will to the extent relevant include national² or international standards in its decision-making basis and interpretation of the provisions of the Marketing Practices Act.

4.2. Provisions of the Danish E-commerce Act on intermediaries' liability

The E-commerce Act contains rules that define conditions for when an intermediary will not be held liable for stored or transmitted content³. The rules are reproduced in Annex 1. For additional information, see the L'Oréal judgment. The grounds provided in the judgment as to when an intermediary cannot plead exemption from liability under section 16 of the E-commerce Act for the contents of any stored information are reproduced in Annex 2.

4.3. Danish Act on Processing of Personal Data⁴

According to section 3(iv) of the Act on Processing of Personal Data, the data controller is the natural or legal person etc. which alone or jointly with others determines the purposes of and means to be used in the processing of personal data, while the data processor according to section 3(v) of the Act is the natural or legal person etc. which processes data on behalf of the data controller.

If the user of an online service for publication of user reviews has a right of disposal of personal data published on the online service, the user is the data controller in charge of the processing of personal data in connection with the publication.

If an intermediary offering an online service has a right of disposal of personal data for its own purposes or otherwise without the consent of the reviewer, the intermediary will be considered to be the data controller and thus be required to comply with the provisions of the Act on Processing of Personal Data.

This, for example, is the case in connection with the preparation of a rating on the basis of submitted reviews of a business and retention of user reviews in spite of a reviewer's request for deletion. The same applies to information about reviewers collected by the intermediary with a view to managing its online service.

Annex 3 contains an overview of the most important rules of the Act on Processing of Personal Data which intermediaries are required to comply with as data controllers.

Note 2 One example of this is the French standard NF Z 74-501, Avis en ligne de consommateurs – Principes et exigences portant sur les processus de collecte, modération et restitution des avis en ligne de consommateurs, of 19 July 2013 concerning the collection, moderation and publication of consumer opinions.

Note 3 The person responsible for an online service the purpose of which is to permit publication of consumer reviews may, depending on the circumstances, be considered to be an intermediary of information society services and thus be comprised by Act no. 227 of 22 April 2002 on certain legal aspects of information society services, in particular electronic commerce (the E-commerce Act). Sections 14 to 16 of the E-commerce Act among other things comprise rules on the terms on which an intermediary of information society services will be exempt from liability, including contributory liability, for information transmitted from or stored on its online service (general exemption from liability rules). These general exemption from liability rules apply both in relation to criminal and civil liability. If the intermediary does not satisfy the conditions for exemption from liability under sections 14 to 16 of the E-commerce Act, the intermediary may be subject to criminal or civil liability if the conditions for liability under Danish law have otherwise been met.

Note 4 Danish Act no. 429 of 31 May 2000 on Processing of Personal Data as amended.

Section 5

Marketing of online services

If an intermediary has a mark or a logo affiliated with its online service which can be used by businesses which have made an agreement with the intermediary about the publication of user reviews on the online service, the marking scheme may not be misleading or contain incorrect statements. This means that a mark or logo may not express more or anything other than what can be substantiated. Doing otherwise could be contrary to sections 1 and 3 of the Marketing Practices Act.

A mark or logo may not give consumers the impression that businesses using the mark or logo of the online service are safe to do business with or that they comply with statutory requirements if the intermediary does not effectively verify that this is the case.

Furthermore, it may not appear from the marketing communications that the mark is an expression that the intermediary's terms of use and collaboration agreements comply with the requirements of any standard or are subject to the control of an independent body monitoring compliance with the standard if this is not the case.⁵

If an intermediary also permits publication of user reviews concerning businesses which are not contracting parties, such user reviews must be subject to the same criteria for processing, assessment, objection, etc. as those applying to reviews concerning a contracting party.

Businesses and contracting parties which on their own websites and social media post user reviews and ratings concerning their business which originate from an online service are required to reproduce such reviews and ratings correctly as they would otherwise, depending on the circumstances, be acting in contravention of sections 1 and 3 of the Marketing Practices Act.

Comments

The Consumer Ombudsman believes that the use of expressions like "Approved", "Maximum consumer reliability", "At [name of mark], you can see whether an online store is safe to do business with" or similar expressions are contrary to section 3(1) of the Marketing Practices Act if the intermediary does not in any way check whether the businesses that use the mark according to agreement with the intermediary comply with the statutory requirements.

It would be contrary to section 1 of the Marketing Practices Act for an intermediary to claim that its processing of user reviews submitted voluntarily comply with national or international standards for publication of user reviews without being able to document this. The same applies if it appears from the marketing communications that the procedure for publication of user reviews is certified and this cannot be documented.

It would also be contrary to section 1 of the Marketing Practices Act if an intermediary were to impose more lenient requirements on the processing of user reviews originating from contracting parties than the requirements on other reviews.

Note 5 Executive Order no. 1084 of 14 September 2007, as most recently amended by Executive Order no. 546 of 24 May 2013, on unfair commercial practices comprises an annex listing commercial practices which are in all circumstances considered unfair. According to item 2 of the annex, a commercial practice will be deemed to be misleading if: "The trader displays a trust mark, quality mark or equivalent without having obtained the necessary authorisation".

Section 6

Consumer information

In its terms of use, the intermediary must provide information about the terms and conditions applicable to submission and publication of user reviews, including collection and processing of such, which the reviewers accept⁶ at the time of registration or submission of a review.

Terms of use, including basic principles for the procedure for submitting reviews, any use of weighting of reviews and the methods chosen for summarising product reviews, must generally be easily accessible to the general public and to the users of the online service and be structured in an easily comprehensible manner.

The same applies to information about any requirements on documentation of a purchase, an online service intermediary's time limits for processing reviews, criteria for rejection of reviews or modification of the wording of a review, an intermediary's potential access to removing these after publication as well as information about automatic removal of published reviews after a period of time to be determined in advance.

Moreover, information must be provided about the access to drawing attention to any illegal or inappropriate content and about the conditions applicable to replies.

The general terms and conditions for status as a contracting party must also appear clearly from an intermediary's online service.

Comments

The information which the reviewer is required to actively accept in order to submit a review includes requirements on the contents of the text intended for publication and information about the reviewer, including the reviewer's identity and contact information for use by the intermediary, so as to ensure that the reviewer can be contacted. If reasonable doubt has been raised about the correctness of the contents of a review and if it is not possible to get in contact with the reviewer using the contact information provided, the intermediary may remove the review.

It would not be contrary to the Marketing Practices Act for the terms of use to allow reviewers to remain anonymous in published reviews.

The terms of use should also state how submitted reviews are processed, including whether they are subjected to any advance or subsequent mechanical or manual processing.

Note 6 It is doubtful whether an intermediary in accordance with good marketing practice has an obligation to arrange an acceptance process before publishing user reviews. If an intermediary does not set up conditions for the publication of user reviews and remains passive as to the published content, the intermediary may be at great risk of being held criminally or civilly liable for illegal content, and the reliability of the contents posted on the service must be deemed to be very limited.

Section 7

Submission of user reviews

The procedure for submitting and publishing a user review in the online system made available by the intermediary must ensure that the reviews are processed in an objective manner which can be verified and which, providing full information about the terms of use of the intermediary, allows reviewers to express their opinion without being unfairly influenced in the process.

To the extent possible, the intermediary should develop processes and technical monitoring systems to verify that user reviews are in accordance with the intermediary's terms of use. The procedure for submission or publication of user reviews may not result in misleading or incorrect information. For example, the purchasing experience, and where necessary the product involved, descriptions must be sufficiently precise. In addition, the form or rating may not be structured in such a way as to influence the user review in any specific direction.

It is not permitted to perform any selection of reviews on the basis of the users' positive or negative purchasing experiences or any other form of advance selection of customers invited to submit a review.⁷

An invitation to submit a user review must be accompanied by clear information about the trader which is the subject of the review and about the entity inviting users to submit reviews. In addition, information must be provided about, among other things, the use of the review, the place of publication, if relevant, and which contents and information about the user will be published.

If the terms of use of the online service permit that reviews are submitted against payment or other benefit, including participation in a competition, it must be clearly stated in the terms of use that the reviewer is obligated to provide such information. Moreover, the information about this obligation must be provided on the page on which the review is provided so that it appears clearly from the published user review whether such payment or benefit has been offered.

If the intermediary is aware that one or more reviews have been submitted against payment or other benefit, this must be stated clearly and unambiguously in the presentation given to the users e.g. at the beginning of the relevant business's online service reviewer page as well as on the page on which the business's overall rating is posted or otherwise be clearly indicated to the users.

Note 7 It is doubtful whether the principle that no selection may take place among the invitations to submit customer reviews also applies to businesses which do not have the status of contracting parties if the businesses only invite satisfied or "expectedly" satisfied customers to review a purchasing experience on an intermediary's online service. However, the procedure may, depending on the circumstances, be deemed to be an unfair commercial practice contrary to good practice (see section 1 of the Marketing Practices Act) if the invitation is clearly in contravention of the specific intermediary's terms of use, and the business realised or ought to have realised this, and if the reviews are specifically designed to impair the reliability of the content on the relevant online service and thus the intermediary's business.

If the reviewer is offered payment or other benefit in return for submitting a review, irrespective of whether the review was submitted without invitation or submitted on the basis of an invitation, the payment or benefit may not depend on the contents of the review submitted. Moreover, the terms and conditions for obtaining the payment or benefit must be stated clearly in the invitation.

Comments

Only natural persons may submit a review, and it must be possible to link the review to the author. The intermediary must have sufficient information to be able to contact the author for the purpose of verifying the authenticity of the review and, where relevant, to check that the reviewer is able to duly document the purchase or render probable the sequence of events to which the review relates.

In the opinion of the Consumer Ombudsman, it is not contrary to sections 1 and 6 of the Marketing Practices Act when an intermediary or a business invites a consumer to review a purchasing experience with the business, provided the invitation does not in any way market the business or the intermediary but appears completely unbiased.

However, in the opinion of the Consumer Ombudsman, it is in contravention of section 1 of the Marketing Practices Act if an intermediary or a business sends an invitation to review a purchasing experience, regardless of the consumer expressly having requested not to receive further communications from the business in question.

Moreover, it follows from section 9(1) of the Marketing Practices Act that the conditions for obtaining payment or any other special benefit offered in return for submitting a user review must be clear, unambiguous and easily available to the consumer, and no material information may be omitted, including information on the value of such special benefit.

Traders should in all circumstances exercise restraint with offering consideration as a reward for submitting user reviews as it will increase the risk of the review being different from or more positive than a review submitted without such benefit being offered.

If the intermediary is aware that reviewers from a business have received payment or other benefit in return for submitting their review, this must appear clearly and unambiguously to the users of the online service. For example, the intermediaries may satisfy this duty to provide information by providing the following information at the beginning of the relevant business's review page and on the page on which the business's overall rating is posted:
"All reviewers have been offered to participate in a competition in return for submitting their review."

Section 8

Processing of user reviews

An intermediary's processing of reviews must ensure that the reviews are in accordance with the general terms of use of the intermediary.⁸ Accordingly, a review must be rejected or published within the time limit stated in the intermediary's terms of use. The time limit applies irrespective of whether the assessments are positive or negative.

The intermediary may apply a fully or partly automated processing method or manual processing to monitor whether content is illegal or not in accordance with the terms of use. In the event of repeated illegal reviews or breach of the terms of use concerning a specific product in connection with a purchasing experience or a number of products from a specific business, good marketing practice prescribes that the intermediary must take special measures to prevent similar incidents from occurring.⁹

A reviewer must be informed about any rejection of a user review submitted by that reviewer and about the reasons for such rejection. In particular, a review may be rejected if the intermediary assesses that publication of the review may give rise to civil or criminal liability of the intermediary, for example because the wording involves harassment or libel, is unrelated to the object reviewed or shows that the reviewer has no actual consumer experience with the product.

The reviewer and the intermediary cannot change an already published user review as any such change could raise questions about whether the wording has been manipulated. However, the intermediary may remove illegal content or content which conflicts with the terms of use if this is clearly indicated in the text or in serious cases remove the review entirely.

Any wish on the part of a reviewer to have a review removed should be granted, unless the intermediary assesses that the review is correct and should be maintained. In the latter case, the reviewer's name should be depersonalised if so requested by the reviewer.

However, a reviewer can always submit a new review (possibly in the form of a reply or a retort) or update the previous review by submitting a separate, dated supplement. In both cases, this should be done separately from the previously published review and should appear in connection with that review.

Note 8 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) contains a prohibition against imposing a general obligation on intermediaries to monitor content. Article 15(1) of the Directive reads as follows: "Member States shall not impose a general obligation on intermediaries, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity."

According to whereas-clause 40 of the Directive, the prohibition does not preclude the intermediary from implementing technical or manual monitoring systems. The whereas-clause reads as follows: "[...] the provisions of this Directive relating to liability should not preclude the development and effective operation, by the different interested parties, of technical systems of protection and identification and of technical surveillance instruments made possible by digital technology within the limits laid down by Directives 95/46/EC and 97/66/EC."

Note 9 Whereas-clause 48 of the Directive on electronic commerce equally reads as follows: "This Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities."

Comments

Although a general obligation to monitor cannot be imposed on the intermediary, the intermediary should to the extent possible take measures to prevent repeated reviews containing harassment or false or illegal reviews, for example by implementing technical or manual monitoring systems.

If the intermediary discovers matters that give material reasons to suspect that the information is false, misleading or incorrect, for example due to an unusually high number of reviews submitted within a relatively short period of time, unusually many reviews originating from the same email address or IP address, use of overly positive language, advertising language or use of similar wording in many reviews concerning the same product, the intermediary should investigate the authenticity of the user reviews.

In this connection, the intermediary may mark and monitor the reviewer's profile as being suspicious or terminate the registration of the reviewer in question and remove all user reviews associated with that account. See section 10 for information about rules on intermediaries' liability. The intermediary's processing of a user review must generally result in the user review being either published or rejected.

Consequently, it would be contrary to good marketing practice to change the contents of a review in full or in part, including correcting misspellings in an opinion, change the pseudonym of a reviewer, concealing part of the text, retouch an image or change a video.

However, an intermediary may, as an alternative to completely removing a review, choose to remove specific illegal content or sensitive personal data in a text, provided this is clearly indicated in the text.

Examples of reasons for rejecting a user review or a comment on a user review in full or in part, which should appear from the terms of use of the intermediary, include situations in which the wording

- is completely incomprehensible;*
 - contains overtly inappropriate comments or rudeness, harassment or libel regarding a review or reviewer;*
 - comprises personal information, such as names, personal telephone numbers, physical address or email address of a person who has not consented thereto;*
 - contains a credit card number, civil registration number, bank account number or any other information which may potentially be used for identity theft; or*
 - contains a false review or statements which are otherwise contrary to legislation.*
-

Section 9

Publication of user reviews

All reviews, positive or negative, must be presented in chronological order or in another objective and neutral manner. Every review must as far as possible be published in its entirety, showing date of submission and date of purchase or consumer experience.

User reviews must be published as quickly as possible. The time limit for publication of a review must be stated in the terms of use of the intermediary. The same time limit shall apply to publication of positive and negative reviews.

If an intermediary consolidates all user reviews for a business in one overall rating, the intermediary must provide general and clear information about how the rating has been determined and the total number of reviews on which the rating is based.

The intermediary must as soon as possible take steps to delete a review containing illegal content which the intermediary has become aware of through the use of manual or technical surveillance systems.¹⁰

Moreover, users and a representative of the reviewed product must be given an opportunity to object to the intermediary against a published review.¹¹ Objections must be processed as soon as possible in accordance with the intermediary's terms of use. During the period of processing, the intermediary may opt to mark or suspend the objections and the reviews involved.

In addition, the representative of the reviewed product must be given access to submit a reply to a review free of charge. The reply must be posted on the same place on the online service as the review it concerns.

The intermediary may determine a time limit for removal of published reviews. This time limit may vary depending on the product category. However, the intermediary should not on its own initiative remove a user review within 12 months, unless the review is removed at the request of the reviewer.

The intermediary must distinguish between the profile information (accessible to the general public) and all information submitted by the reviewer on registration at the website in order that the standard setup of the website protects the consumer's privacy.

Note 10 Section 16(1)(ii) of the E-commerce Act stipulates that an intermediary will not be liable if the intermediary acts expeditiously to remove or disable access to the information upon becoming aware of the illegal or tortious activity or matters or circumstances from which the tortious activity or information appears.

Note 11 Neither the E-commerce Act nor the Directive on electronic commerce contains provisions concerning the procedure for notification and removal of illegal content (notice and takedown procedure). However, whereas-clause 40 of the Directive recommends self-regulation in this respect through the development of rapid and reliable procedures for removing and disabling access to illegal information.

Comments

The intermediary may not be selective but must publish all user reviews, irrespective of whether they are positive or negative, as long as they are in accordance with the terms of use of the intermediary.

If an online service only posts an extract of a review, the extract must contain a link to the full version of the review.

Reviews should be distributed as quickly as possible as any delay in publication could affect the overall rating of the product.

At the same time, it is important that the intermediary is allowed the time required to assess an indication of whether a review is illegal, false or correct. In making this assessment, it may be necessary for the intermediary to obtain documentation from the reviewer and, depending on the circumstances, also legal assistance to ensure that the intermediary does not make a wrong decision about removing or maintaining the review to the detriment of the user-generated review or to the detriment of the injured party. Moreover, an incorrect assessment may, depending on the circumstances, result in liability on the part of the intermediary. The intermediary may therefore in its terms of use take measures to ensure the necessary access to suspending a review, i.e. removing a review temporarily, until a decision has been made as to whether it should be published or marked with a view to further investigation of whether the review can be maintained.

Upon request by a reviewer, the intermediary may, as described in section 9, choose to remove a review, correct the review or depersonalise the reviewer while maintaining the possibility of tracking with a view to subsequent verification of the review in connection with an evaluation by a reliable third party or a public authority.

The intermediary must keep a history of user reviews removed from the website and the reasons for such removal for a period of at least 12 months from the date of removal of the review. However, this does not apply to reviews which have been removed automatically due to time limits set out in the intermediary's terms of use.

Section 10

Other provisions

Evaluation clause

These guidelines will be reviewed as and when deemed necessary, however, not later than three years after their entry into force. Each of the contracting parties may request that the Consumer Ombudsman consider a revision.

Commencement

These guidelines will enter into force on 1 May 2015.



Annexes

Annex 1

Extract of Act no. 227 of 22 April 2002 on information society services, including certain aspects of electronic commerce

“14.-(1) A service provider who transmits information on a communication network supplied by a recipient of the service is not liable for the information transmitted, on condition that the provider

- 1) does not initiate the transmission;
- 2) does not select the receiver of the transmission; and
- 3) does not select or modify the information contained in the transmission.

(2) The acts of transmission referred to in subsection 1 also cover automatic, intermediate and transient storage of the information transmitted, in so far as this takes place for the sole purpose of carrying out the transmission, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

(3) The provisions of subsections 1 and 2 also apply to a service provider who provides access to a communication network.”

“15. A service provider who transmits information provided by a recipient of the service on a communication network is not liable for the automatic, intermediate and temporary storage of such information or for the content of such information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that the service provider

- 1) does not modify the information;
- 2) complies with conditions on access to the information;
- 3) complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
- 4) does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and acts expeditiously to remove or to disable access to the information he has stored upon obtaining actual knowledge of the fact that the information has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.”

“16.-(1) A service provider is not liable for storage of information or for the content of the information stored, where such storage takes place at the request of a recipient of the service who has supplied the information, on condition that the service provider

- 1) does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
- 2) the provider, upon obtaining such knowledge or awareness (cf. point 1), acts expeditiously to remove or to disable access to the information.

(2) Subsection 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.”

Annex 2

Judgment of the European Court of Justice of 12 July 2011 in the case C-324/09 L'Oréal v eBay, paragraphs 116, 119 and 123.

The judgment specifically concerns the question of when an operator (intermediary according to these guidelines) has played an active role of such a kind as to give it knowledge of, or control over, the data stored that it cannot rely on the exemption from liability referred to in Article 14 of the Directive on electronic commerce. The paragraphs of the judgment read as follows:

Paragraph 116

“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.”

Paragraph 119

“In situations in which that provider has confined itself to a merely technical and automatic processing of data and in which, as a consequence, the rule stated in Article 14(1) of Directive 2000/31 applies to it, it may none the less only be exempt, under paragraph 1, from any liability for unlawful data that it has stored on condition that it has not had ‘actual knowledge of illegal activity or information’ and, as regards claims for damages, has not been ‘aware of facts or circumstances from which the illegal activity or information is apparent’ or that, having obtained such knowledge or awareness, it has acted expeditiously to remove, or disable access to, the information.”

Paragraph 123

“In view of the foregoing, the answer to the ninth question is that Article 14(1) of Directive 2000/31 must be interpreted as applying to the operator of an online marketplace where that operator has not played an active role allowing it to have knowledge or control of the data stored. The operator plays such a role when it provides assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting them.”



Annex 3

Certain provisions of Act no. 429 of 31 May 2000 on Processing of Personal Data as amended

The document has been drafted by the Danish Data Protection Agency.

Pursuant to section 1(1) of the Act on Processing of Personal Data, the Act applies to the processing of personal data, meaning any information about an identified or identifiable natural person. See section 3(1) of the Act.

Information about sole proprietorships and partnerships are also comprised by the Act if the partners are natural persons.

To the extent the intermediary of an online service the purpose of which is to publish user reviews acts as data controller and is thus required to comply with the provisions of the Act on Processing of Personal Data, the Data Protection Agency specifically draws attention to the following provisions:

Sections 5-8 and section 11 on authority to process data

Processing, including collection, registration, publication and disclosure, of personal data in connection with user reviews must be in accordance with the processing rules of part 4 of the Act on Processing of Personal Data, including the basic principles set out in section 5 of the Act on Processing of Personal Data. This applies to processing of personal data collected directly from a data subject as well as data collected from a third party.

Section 28 on duty of disclosure in connection with data obtained from a data subject

In connection with collection of data from a data subject, the data controller or its representative (see section 28(1) of the Act on Processing of Personal Data) must provide the data subject with information about the identity of the data controller and its representative, the purposes of the processing for which the data are intended and any further information which is necessary, having regard to the specific circumstances in which the personal data are collected, to enable the data subject to safeguard his interests, for example categories of recipients and the rules on the right of access to and the right to rectify the data relating to the data subject.

Section 28(1) shall not apply where the data subject already has the information mentioned. See section 28(2).

Section 29 on duty of disclosure in connection with data not obtained from a data subject

Where data have not been obtained from a data subject, it follows from section 29(1) that the controller or his representative shall at the time of undertaking the registration of the data, or where disclosure to a third party is envisaged, no later than the time when the data are disclosed, provide the data subject with information about the identity of the data controller or its representative and the purposes of the processing. The data controller must also provide any further information which is necessary, having regard to the specific circumstances in which the data are obtained, to enable the data subject to safeguard his interests, including the categories of collected data concerned and the categories of recipients of the data.

Section 29(1) shall not apply where the data subject already has the information mentioned. See section 29(2).

Moreover, the provision of section 29(1) shall not apply where the provision of such information to the data subject proves impossible or would involve a disproportionate effort. See section 29(3).

Section 35 on objection

It follows from section 35(1) of the Act on Processing of Personal Data that a data subject may at any time object vis-à-vis the controller to the processing of data relating to him. Where the objection under subsection (1) is justified, the processing may no longer involve those data. See section 35(2).

Section 37(1) on rectification, erasing or blocking of data

In addition, it follows from section 37(1) of the Act on Processing of Personal Data that the controller shall at the request of the data subject rectify, erase or block data which turn out to be inaccurate or misleading or in any other way processed in violation of law or regulations.

Section 41(3) on security

According to section 41(3) of the Act on Processing of Personal Data, the controller shall implement appropriate technical and organisational security measures to protect data against accidental or unlawful destruction, loss or impairment and against unauthorised disclosure, abuse or other processing in violation of the statutory provisions.

According to section 41(3), the duty to implement necessary security measures applies to data controllers as well as to data processors.
