

## DECISION OF THE PRESIDENT OF THE OFFICE FOR COMPETITION AND CONSUMER PROTECTION REGARDING VINTED'S PRACTICES - GUIDELINES FOR E-COMMERCE MARKET PLAYERS

On 9 May, the President of the Office for Competition and Consumer Protection ("OCCP"), after a one-year proceeding against Vinted UAB ("Vinted"), issued a decision finding that the company had applied unfair commercial practices consisting of misleading omissions (omitting material information). For these violations, OCCP imposed on Vinted a fine exceeding PLN 5 million.

The decision is unprecedented due to the following aspects:

- **the clear position expressed for the first time by the OCCP on several important areas of the functioning of services dedicated to consumers (in particular, how to communicate with consumers in the digital environment),**
- **very high penalty imposed on an entity operating in the e-commerce sector,**
- **speed of the proceedings (it took one year from the commencement of the investigation to the issuance of the decision).**

Vinted is a C2C platform that enables the sale of pre-owned clothes and accessories. The OCCP found that the practices infringing collective consumer interests applied by Vinted consisted of:

- 1) **failure to inform sellers** on the Vinted platform in a **clear, unambiguous, and timely manner about the possibility of additional identity verification in the know your customer (KYC)** procedure carried out by the platform's counterparty - the e-wallet service provider (Adyen). Funds from transactions made via the Vinted platform were transferred to the e-wallet. The funds were blocked on the e-wallet until the KYC procedure was resolved,
- 2) **failing to inform consumers buying on the Vinted platform in a clear, unambiguous, and timely manner about the possibility of purchasing an item listed on the Vinted.pl website without paying a Buyer Protection fee.** The OCCP concluded that the platform provided two sales models:
  - (i) directly through Vinted.pl with a mandatory fee or
  - (ii) outside Vinted.pl (through direct arrangements between buyer and seller).

Below we present a selection of the most important conclusions from the decision of the OCCP stemming from the Vinted case, which may prove useful for companies concluding online contracts with consumers.

### THE PURCHASE FLOW IS OF GREAT SIGNIFICANCE ...

The second of the practices determined by the OCCP **refers to the lack of coherence between the solutions presented on the website and the provisions of Vinted's T&C.** Analysis of the decision indicates that the **OCCP analyzed the design of the architecture of the Vinted.pl website in a detail. The examination concerned such details as specific graphic solutions, used hyperlinks and buttons that the consumer sees on the site.** On that basis, the OCCP found that the entire website was designed in such a way that the consumers were under the impression that it was possible to purchase items only directly on Vinted.pl (with an obligatory additional fee), and not through direct contact with the seller (as provided in the T&C).

Although there may be doubts as to whether direct arrangements between the seller and the buyer (outside the website) might be considered a method of concluding an agreement on the platform, the justification of the decision provides a clear sign that the user interface will increasingly come under the scrutiny of the authority. The clarity and timeliness of information

provided to **consumers directly in the purchase flow will be assessed, as well as its consistency with the rules laid down in the T&C.** Particular attention should also be paid while designing **default options and settings.** Thus, it may be a good idea to involve the legal department in the process of designing the user interface. These conclusions are in line with the transparency by design approach advocated in consumer law, *i.e.* transparent design of the environment dedicated to consumers<sup>1</sup>.

### ... AS OPPOSED TO MATERIALS PUBLISHED IN ADDITIONAL TABS

The OCCP questioned publishing information material for consumers. Which related to the terms of services rendered, solely in additional tabs (help center) and documents (privacy policy). In the opinion of the authority, the information provided there should be treated as "additional and supplementary".

At the same time, it seems that the OCCP allowed for the possibility to fulfill information obligations towards consumers by placing required information in such additional materials, provided that the consumer is **redirected to them directly in the purchase process** (he or she does not have to search for the materials on the platform on their own). Thus, details of the website's design - such as the inclusion of an appropriate hyperlink - will be important in this regard (cf. section 1).

Given the above, providers of services dedicated to consumers should make sure that **relevant information concerning the services provided (including consumers' rights and obligations) is communicated in the purchase flow and the terms and conditions, and not only in additional sections of the website** (e.g. FAQs, help centers, etc.).

### SUPPLEMENTARY CONTRACTS WITH THIRD PARTIES

Often service providers entrust third parties to provide complementary or additional services to the main services offered on the site (e.g. payment services, delivery). **If the use of the service requires an agreement with a third party to provide such additional service, the consumer should expressly agree to this. In other words, it is not permissible to conclude agreements with third parties automatically or implicitly by the mere fact of using the main service.** It follows from the decision that, in such a case, the consumer should accept the terms and conditions of the ancillary service (regulations), presented to him/her **in Polish.**

### THE TIME AND MANNER IN WHICH ADDITIONAL CHARGES ARE PRESENTED ON THE WEBSITES

It is common for platforms and services to charge buyers with additional, obligatory fees (service, buyer protection, etc.) in connection with intermediation in the transaction. The justification of the decision, as a side remark to the second practice, indicates the position of the OCCP on the disclosure of additional fees and prices in the service.

The OCCP, referring to Article 12(1)(5) of the Consumer Rights Act ("**CRA**"), indicates that if Vinted allowed for purchasing only on its marketplace, the additional obligatory fee (for Buyer Protection) should be presented together with the product/service price. Therefore in this case, **in the opinion of the OCCP, total prices (including the additional fee) should be displayed on the platform.** The OCCP explains that this way of presenting fees should apply "**both at the stage of searching and presentation** (of products - own note) in the catalog, as well as displaying the details of a given offer"<sup>2</sup>.

<sup>1</sup> See report of the European Commission Behavioral Study on the Transparency of Online Platforms, p. 57. Report available at: [https://ec.europa.eu/info/sites/default/files/transparency\\_of\\_platforms-study-final-report\\_en.pdf](https://ec.europa.eu/info/sites/default/files/transparency_of_platforms-study-final-report_en.pdf)

<sup>2</sup> Article 6 (1) of EP and Council Directive 2011/83/EU of 25 October 2011, Official Journal of the European Union L 304 of 22.11.2011, p. 64-88.

**In our opinion, the conclusions presented in the justification of the decision, including the cited legal basis for the considerations, raise far-reaching doubts.** According to the Art. 12 (1) of the CRA cited by the OCCP, pre-contractual information (including the total price) should be provided to the consumer "at the latest at the moment the consumer expresses his will to be bound by the distance contract". The provision of the Directive implemented by the CRA indicates that such information should be given "before the consumer is bound by the distance contract (...) or any corresponding offer". Moreover, Article 17(1) of the CRA, as a specific provision applicable to online contracts, explicitly indicates that information about the total price should be provided "directly before the order is placed". Therefore, it may be argued that there is no obligation to disclose the total price (including additional fees) on the search results page or listing of offers.

Notwithstanding the above, it is of course possible to mislead consumers by gradually surprising them with additional charges in the order placement process (so-called "drip pricing" referred to in the European Commission's Guidelines on Unfair Commercial Practices<sup>3</sup>). However, then the allegation would be effective upon proving the premises outlined in the Act on Combating Unfair Commercial Practices, and not the CRA.

Importantly, in the course of the investigation, Vinted changed the way prices were presented on the website so that the list of offers displayed a tooltip (an icon with a message) explaining to users that additional fees will be added to the product price. The OCCP found this change to be insufficient, without further explanation.

In light of the OCCP's strict approach, **platform providers should take particular attention when displaying additional fees.** Moreover, it is unclear what position the OCCP would take if the company charges fees in the amount that could not be specified already in the first step. It is the case when a fee depends on, for example, the total amount of the order or selection of a particular product feature (which is determined at a later stage, e.g. checkout). It may be expected that these questions may be answered (at least to some extent) in connection with the ongoing OCCP's investigation of additional fees applied by UberEats<sup>4</sup>.

### SIGNIFICANT PROCEDURAL MATTERS

The speed of the proceedings conducted by the OCCP is also noteworthy. It took just one year from the commencement of the investigation to the issuance of the decision, while investigating two separate practices and assessing commitments submitted by the undertaking. **This speed of investigation shows the authority's strong determination to enforce consumer law in the digital environment,** including eliminating irregularities identified on platforms.

The commitments offered by Vinted were not accepted by the OCCP (unfortunately, in the part concerning this issue the decision is mostly redacted due to business secrets). As regards the first practice, in justifying the non-acceptance of the commitments, UOKiK stressed that the key factor was Vinted's failure to take action to remove the effects of the practice (mere termination of the practice was not sufficient).

It should be appreciated that during the proceedings the OCCP communicated and justified the refusal to accept the commitments to Vinted. It had happened in the past that the OCCP

<sup>3</sup> See par. 4.2.8 of the Guidelines on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, OJ C 526 of 29.12.2021, p. 1-129.

<sup>4</sup> See press release published on the OCCP website on October 27, which stated that "consumers in complaints about Uber Eats indicated that they were unaware of the additional charge at the food selection stage - it only appeared when they paid for their order." Press release available at: [https://uokik.gov.pl/aktualnosci.php?news\\_id=17931&print=1](https://uokik.gov.pl/aktualnosci.php?news_id=17931&print=1)

communicated this only in the decision ending the proceedings, which made it impossible for the undertaking to submit any further, modified commitments.

It is also important for companies operating websites available in many markets that the OCCP considered the turnover generated by the Polish version of the website and its relation to the global turnover of Vinted UAB with its registered office in Vilnius (operating in many European countries). Such adjustment of the amount of the penalty should be assessed positively, as it allows to impose of a penalty adequate to the scale and effects of the alleged practice.

## CONTACT

**If you have questions or concerns about the issues raised, our experts are available to assist you.**



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