

CODE OF CONDUCT (CCH)

Notice and notice or notice and take down

PREAMBLE

Swico has adopted this Hosting Code of Conduct (hereinafter referred to as the 'CCH') to set down technologically relevant principles of conduct for Swiss hosting providers in relation to illegal content, to establish these principles as an industry standard, to strengthen legal security and to make it easier for data subjects affected by illegal content to institute proceedings against those responsible for such content.

The notice and notice or notice and take down procedure set down in the CCH by Swico contains principles of conduct that are already incorporated in self-regulatory instruments adopted by European and international associations of internet service providers (ISPs) and hosting providers. When drawing up the CCH, Swico also took note of regulatory requirements, particularly in the USA and the European Union and its member states, applicable to notice and take down procedures and related limitations of liability for hosting providers; Swico also took into account the fact that the regulatory framework in the European Union is different to that in Switzerland.

By adopting this CCH, Swico also recognises the efforts of the Council of Europe and its Committee of Experts on New Media to encourage the inclusion of ISPs in regulatory planning to meet national regulatory objectives on the internet and thereby acknowledge and promote ISPs' ability to organise and regulate themselves. In this regard, it also consulted the Council of Europe in cooperation with the human rights guidelines for internet service providers developed by the European Internet Service Providers Association (EuroISPA) and welcomes their recognition of the importance of internet self-regulation. Hosting providers play an important role as intermediaries on the internet. Without them, internet communication would be impossible. To support the economic, social and cultural potential of their services, they agree to uphold the following principles of conduct.

1. SUBJECT MATTER AND LEGAL NATURE

The CCH is a set of guidelines on how to deal with reports of possible illegal content. It is a document of voluntary self-regulation.

2. ADDRESSEES AND SCOPE OF VALIDITY

The CCH is aimed at companies and individuals that operate hosting services and are subject to Swiss law. Any services offered by hosting providers that are not purely hosting services are excluded from the scope of the CCH. In particular, internet access services and services for storing and processing content and making the same accessible to third parties in an area that is not publicly accessible (e.g. cloud services) are not included.

3. DEFINITIONS

- 3.1 *Illegal content*: content that infringes third parties' rights, particularly intellectual property rights in the broad sense (e.g. copyrights or trademark rights), or personality rights, or that constitutes a criminal offence (particularly in the areas of pornography, the depiction of violence, racism and libel).
- 3.2 *Hosting service*: a service that allows operators of websites and applications to store and process content and make the same accessible to third parties.

- 3.3 *Customer*: a customer of the hosting provider who has signed a contract regulating hosting services.
- 3.4 *Notice*: communication from a data subject affected by allegedly illegal content that the customer has made publicly accessible. The sender must be affected by the alleged infringement to a greater extent than a third party or the general public. For personality right infringements and offences that must be reported, this includes the injured party (or their representative), while for intellectual property right infringements, this includes the holder of ownership or licensing rights for the content concerned (or their representative). The sender does not need to be particularly affected for offences for which proceedings are brought directly by the public prosecutor's office.

A notice must at least meet the formal and content-related requirements by including the following information:

- (a) the sender's name and address;
- (b) an explanation of why the sender is particularly affected (except for offences for which proceedings are brought directly by the public prosecutor's office);
- (c) the URL of the website or web page that is the subject of the complaint;
- (d) a precise description of the allegedly illegal content; and
- (e) a reason as to why the content is illegal.

4. NO MONITORING OBLIGATIONS

As intermediaries on the internet, hosting providers provide an infrastructure that enables operators of websites and applications to store and process content and make the same publicly available to third parties. Hosting providers have no knowledge of what content their customers store, process and make accessible. Neither are they obligated to actively monitor such content. The customer alone is solely responsible for content that it stores, processes or makes accessible to third parties using the hosting services. The hosting provider's obligations defined in the CCH are designed to make it easier for data subjects affected by illegal content to institute legal proceedings against those responsible.

5. NOTICE AND NOTICE

- 5.1 The hosting provider checks that any notices received meet the formal and content-related requirements set down in (3.4). When assessing these requirements, the hosting provider applies the benchmark of a legal layman.
- 5.2 If a received notice does not meet the formal and/or content-related requirements set down in (3.4), or only meets them to a certain extent, the hosting provider shall ask the sender of the notice to provide the missing information within two working days of being prompted to do so. If the sender fails to respond before the deadline, or if the additional information supplied also does not meet the formal and/or content-related requirements set down in (3.4), or only meets them to a certain extent, the hosting provider shall not process the notice further.
- 5.3 If a received notice meets the formal and content-related requirements set down in (3.4) in full, the hosting provider shall write to the customer and to the sender of the notice, generally within two working days of receiving the notice.

- a) In the letter to the customer, the provider shall inform them (the customer) that the notice has been received and shall forward a copy of the same. The provider shall remind the customer that they (the customer) are solely responsible for content that they store, process or make accessible to third parties using the hosting services. It shall prompt the customer to remove the offending content or to explain why the content is lawful in a letter to the sender of the notice. The hosting provider shall also inform the customer that they are liable to compensate it for expenditure relating to the defence of third-party claims and for any other damage suffered. The hosting provider may demand a surety from the customer as a precautionary payment to cover such damage. In clear cases, the hosting provider may also take direct action in accordance with (6).
- b) In the letter to the sender of the notice, the hosting provider shall confirm receipt of the notice and inform the sender that it has written to the customer. It shall inform the sender of the notice that the customer is solely responsible for content that it stores, processes or makes accessible to third parties using the hosting services. The hosting provider shall also notify the sender that it is not allowed to disclose customer data. Instead, it shall inform the sender of possible ways in which they may uncover the identity of the owner of an internet domain (e.g. using Whois databases available online) and of which state authorities they may contact to assert their claims. In clear cases, the hosting provider may also take direct action in accordance with (6).

6. NOTICE AND TAKE DOWN

- 6.1 If a received notice meets the formal and content-related requirements set down in (3.4) in full, and if it appears highly likely that content is illegal, or if the hosting provider itself could be criminally responsible or liable under civil law, the hosting provider may partially or completely block access to the website affected at its own discretion until the matter has been resolved between the parties concerned or by a court or another authority.
- 6.2 Immediately before or after blocking a website, the hosting provider shall inform the customer that a notice has been received, shall forward the notice to them and shall notify them of the reason why the site has been blocked. At the same time, the hosting provider shall inform the sender of the notice of the website being blocked and the letter being sent to the customer. The hosting provider shall decide, at its own discretion, whether to report any criminal offences to KOBIC (the Swiss Coordination Unit for Cybercrime) or to the criminal prosecution authorities. 6.3 When assessing whether the notice is complete, whether a website should be blocked and whether legal proceedings should be instituted, the hosting provider shall apply the benchmark of a legal layman.

7. CONTRACTUAL SAFEGUARDS VIS-À-VIS THE CUSTOMER

- 7.1 The hosting provider shall ensure that its agreements with the customer contain the following regulations and information at the very least:
 - a) The customer may only use the hosting services lawfully. The customer is solely responsible for content that it stores, processes or makes accessible to third parties using the hosting services.

- b) The hosting provider is not obligated to monitor the hosted content. However, it shall examine content after receiving a notice, as required by the notice and take down procedure, or if ordered to do so by a court or another authority. The hosting provider reserves the right to carry out spot checks, even if a notice has not been received.
- c) The hosting provider is entitled to block access to the customer's website either in whole or in part and to withdraw hosting services i) if the relevant requirements set down in the notice and take down procedure described in its General Terms and Conditions or in the CCH, if referred to in its General Terms and Conditions, are met; or ii) if the hosting provider is ordered to do so by a court or another authority or could in some other way be legally responsible or held liable itself; or iii) if a spot check uncovers content that is highly likely to be illegal under (3.1).
- d) The hosting provider shall describe the notice and take down procedure or the CCH in its General Terms and Conditions and shall provide easy access to the CCH on its website. The customer is responsible for finding out about the notice and take down procedure. They note and acknowledge that the hosting provider may terminate the contract with them with immediate effect if they fail to follow its instructions according to the notice and take down procedure described in the General Terms and Conditions and/or the CCH.
- e) If ordered to do so by a court or another authority in writing, the hosting provider shall be entitled and obligated to reveal the customer's identity to the former or to other third parties.
- f) The hosting provider is entitled to bill the customer for any expenditure incurred in relation to a notice. The customer must compensate the hosting provider for any other damage suffered as a result of asserted claims. The hosting provider may demand a surety from the customer as a precautionary payment to cover such damage. If this surety is not paid, the hosting provider may withdraw the service.

8. INTERNAL ORGANISATIONAL MEASURES

The hosting provider shall take internal organisational measures to respond to notices quickly. It shall appoint someone as its Head of Illegal Content and make clear on its website how and to whom notices ought to be sent as part of the notice and take down procedure (using an online form, for example).

9. SAMPLE LETTERS

Swico provides its members with samples of the letters mentioned in the CCH that they must send to customers and to senders of notices.

10. NO LIABILITY ON SWICO'S PART

The CCH is a document of voluntary self-regulation. In view of the current legal uncertainty surrounding provider liability, Swico cannot guarantee that hosting providers will be exempt from criminal prosecution or civil liability if they comply with the CCH.

11. ENTRY INTO FORCE

This Hosting Code of Conduct enters into force on 15 April 2020.

© Swico, April 2020