

HOSTING CODE OF CONDUCT (HCC)

Notice and take down

PREAMBLE

simsa (the Swiss Internet Industry Association) has adopted the present Hosting Code of Conduct ("HCC") in order to lay 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 people affected by illegal content to instigate legal proceedings against those responsible.

The notice and take down procedure laid down by simsa in the HCC 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 HCC, simsa also took note of regulatory requirements, particularly in the USA and the European Union and its member states, applicable to so-called notice and take down procedures and related limitations of liability for hosting providers; it also took into account the fact that the regulatory framework in the European Union is different from that in Switzerland.

By adopting this HCC, simsa 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 in order to meet national regulatory objectives on the Internet and thereby acknowledge and promote ISPs' ability to organise and regulate themselves. In this connection, it also consulted the Human Rights Guidelines for Internet Service Providers drawn up by the Council of Europe in cooperation with 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. In order to support the economic, social and cultural potential of their services, they agree to uphold the following principles of conduct.

1. OBJECT AND LEGAL NATURE

The HCC 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 AREA OF VALIDITY

The HCC is aimed at companies and individuals that operate hosting services and are subject to Swiss law. Hosting services are services that enable operators of websites and applications to store and process content and make it publicly available to third parties.

Any services offered by hosting providers that are not purely hosting services are excluded from the scope of the HCC. In particular, Internet access services and

services for storing and processing content and making it available to third parties in an area that is not publicly accessible (e.g. cloud services) are not included.

3. SIMSA "SWISS QUALITY HOSTING" STAMP OF QUALITY

The HCC is designed to help all hosting providers, whether they are simsa members or not, to conduct themselves in accordance with the law. Providers who carry the simsa "Swiss Quality Hosting" stamp of quality must respect the HCC in accordance with the stamp of quality regulations. For other hosting providers, the HCC is a tool that can be used voluntarily.

4. DEFINITIONS

- 4.1 Illegal content: content that infringes the rights of third parties, particularly intellectual property rights in the broad sense (e.g. copyright or trademark rights), or personality rights, or that constitutes a criminal offence (particularly in the areas of pornography, the portrayal of violence, racism and libel).
- 4.2 Customer: customer of the hosting provider, who has signed a contract concerning hosting services.
- 4.3 Notice: communication from a person affected by allegedly illegal content made publicly available by the customer. 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 must be the injured party (or their representative), while for intellectual property right infringements it must be the holder of ownership or licensing rights for the content concerned (or their representative). For offences for which proceedings are brought directly by the public prosecutor's office, the sender does not need to be particularly affected.

A notice must at least meet the following formal and content-related requirements: (a) name and address of the sender; (b) explanation of why the sender is particularly affected (except offences for which proceedings are brought directly by the public prosecutor's office); (c) URL of the offending web page or sub-page; (d) precise description of the allegedly illegal content; (e) reason why the content is illegal.

5. NO MONITORING OBLIGATION

Hosting providers, as intermediaries on the Internet, provide an infrastructure that enables operators of websites and applications to store and process content and make it publicly available to third parties. Hosting providers have no knowledge of the content stored, processed and made available by their customers. Neither are they obliged to actively monitor that content. The customer alone is 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 HCC are designed to make it easier for people affected by illegal content to instigate legal proceedings against those responsible.

6. NOTICE AND NOTICE

- 6.1 The hosting provider checks that any notices received meet the formal and content-related requirements laid down in paragraph 4.3. When assessing these requirements, the hosting provider applies the benchmark of a legal layman.
- 6.2 If a received notice does not meet, or only partly meets, the formal and/or content-related requirements of paragraph 4.3, the hosting provider asks the sender of the notice to provide the missing information within two working days of receiving such request. If the sender fails to respond before the deadline or if the additional information supplied also does not meet, or only partly meets, the formal and/or content-related requirements of paragraph 4.3, the hosting provider pays no further attention to the notice.
- 6.3 If a received notice fully meets the formal and content-related requirements of paragraph 4.3, the hosting provider writes 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 informs the customer that the notice has been received and forwards a copy of the said notice. The provider reminds the customer that the latter bears sole responsibility for content that it stores, processes or makes accessible to third parties using the hosting services. It asks 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 also informs the customer that it is liable to compensate the hosting provider for expenditure relating to the defence of third-party claims and for any other damage suffered. The hosting provider can demand a surety from the customer as a precautionary payment to cover such damage. In clear cases, the hosting provider can also take direct action in accordance with paragraph 7.
 - b) In the letter to the sender of the notice, the hosting provider confirms receipt of the notice and informs him that it has written to the customer. It informs the sender of the notice that the customer bears sole responsibility for content that it stores, processes or makes accessible to third parties using the hosting services. The hosting provider also tells the sender that the hosting provider is not allowed to disclose customer data. Instead, it informs the sender of possible ways in which it can find the identity of the owner of an Internet domain (e.g. via Whois databases available on the Internet) and which state authorities it can contact in order to assert its claims. In clear cases, the hosting provider can also take direct action in accordance with paragraph 7.

7. NOTICE AND TAKE DOWN

- 7.1 If a received notice fully meets the formal and content-related requirements of paragraph 4.3 and if it appears very likely that it concerns illegal content, or if the hosting provider itself could be criminally responsible or liable under civil law, the hosting provider can partially or completely block access to the website at its own discretion until the matter has been resolved between the parties concerned or by a court or other authority.
- 7.2 Immediately before or after blocking a website, the hosting provider informs the customer that a notice has been received, forwards the notice to it and informs it of the reason for the block. At the same time, the hosting provider informs the sender of the notice about the block and the letter to the customer. The hosting provider decides, at its own discretion, whether to report any criminal offence to the KOBİK (national body coordinating the fight against cybercrime) or to the criminal prosecution authorities.
- 7.3 When assessing whether the notice is complete, whether a website should be blocked and whether legal proceedings should be instigated, the hosting provider applies the benchmark of a legal layman.

8. CONTRACTUAL SAFEGUARDS VIS-À-VIS THE CUSTOMER

- 8.1 The hosting provider ensures that its agreements with the customer contain at least the following regulations and information:
- a) The customer may only use the hosting services legally. The customer bears sole responsibility for content that it stores, processes or makes accessible to third parties using the hosting services.
 - b) The hosting provider is not obliged to monitor the hosted content. However, it will 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 other 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 partially or completely block access to the customer's website and withdraw hosting services i) if the relevant requirements of the notice and take down procedure described in its general terms and conditions or in the HCC, 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 other authority or could in some other way be legally responsible or held liable itself, or iii) if a spot test uncovers content that is very probably illegal in the sense of paragraph 4.1.
 - d) The hosting provider describes the notice and take down procedure in its general terms and conditions or refers to the HCC in its general terms and conditions and provides easy access to the HCC on its website. The customer is

responsible for finding out about the notice and take down procedure. It notes and acknowledges that the hosting provider can cancel the contract with the customer with immediate effect if the customer fails to follow its instructions according to the notice and take down procedure described in the general terms and conditions and/or the HCC.

- e) If ordered to do so by a court or other authority, the hosting provider is entitled and obliged to reveal the customer's identity to them 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 can demand a surety from the customer as a precautionary payment to cover such damage. If this surety is not paid, the hosting provider can withdraw the service.

9. INTERNAL ORGANISATIONAL MEASURES

The hosting provider takes internal organisational measures in order to respond to notices quickly. It appoints someone as its head of illegal content and makes clear on its website how and to whom notices should be sent as part of the notice and take down procedure, such as via an online form.

10. SAMPLE LETTERS

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

11. NO LIABILITY FOR SIMSA

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

12. ENTRY INTO FORCE

This Hosting Code of Conduct enters into force on 1 February 2013.