

Fitness Check on Digital Fairness

Seldia position paper on public stakeholder consultation

Seldia was founded in 1968 to be the voice of the European Direct Selling sector. We represent 25 national associations, 14 companies, 15 service providers, as well as the voices of the independent entrepreneurs engaged in a direct selling activity. Direct selling means any marketing or selling method which is based on the personal contact between a salesperson and a consumer and which is carried out through personal or individual explanation or demonstration, physically or digitally, of products, away from business premises. Our member companies provide products or services, which are sold by their independent distributors or independent commercial agents (direct sellers) directly to consumers.

Seldia welcomes the opportunity given by the European Commission to contribute to the public consultation on the review of the EU consumer law with regard to digital fairness. Our companies strongly support an online environment that is governed by the principles of fairness and trust between businesses and consumers.

Current legal framework

Currently, there are a number of consumer protection legal instruments applicable to the digital environment. These include the Unfair Commercial Practices Directive (UCPD), the Consumer Rights Directive, the Modernisation and Better Enforcement Directive, the recently updated guidelines on the EU Consumer law but also the Digital Services Act, the General Data Protection Regulation and the e-privacy Directive.

The Commission's review is assessing whether new rules are needed with regard to specifically identified issues such as dark patterns, personalised practices, influencer marketing, contract cancellations and subscription service contracts. However, the Commission's guidelines clearly state that those issues are already regulated by the EU Consumer Acquis. For example, practices that make it difficult for the consumer to unsubscribe from a service infringe Articles 6 and 7 of the UCPD. Dark patterns are regulated by the General Data Protection Regulation, the Digital Services Act and the Unfair Commercial Practices Directive.

Influencer Marketing

Influencer marketing has become a popular and effective form of promotional practice. It is relevant for direct selling as third parties or distributors promote and sell their products on social media.

The Commission's public consultation requests whether new rules are needed to clarify the notion of influencer marketing as well as the obligations of traders towards consumers in this regard.

However, influencer marketing is already adequately regulated by existing EU legislation. The Unfair Commercial Practices Directive (UCPD) sets out rules that cover unfair influencer practices:

- Article 7(2) of the UCPD considers that failing to disclose the commercial intent of a trader is a misleading omission. Therefore, it is qualified as an unfair commercial practice

- An influencer **that is deemed to be a trader, or acting on behalf of a trader**, would be subject to the transparency requirements of Articles 6 and 7 of the UCPD. He/she should also comply with the trader's professional diligence requirements under Article 5(2) of the UCPD
- In accordance with Articles 8 and 9 of the UCPD, influencers have to refrain from using aggressive commercial practices that use harassment or coercion or exploit a position of power
- Annex I Point 11 of the Directive bans the practice of using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial)
- Annex I Point 22 of the Directive prohibits the practice of falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer¹

In addition to that, **the European Commission Guidance on the interpretation and application of the UCPD of 29 December 2021 already provides clarifications on the concept of influencers, their obligations as well as the relationship between trader and influencer.** The document clarifies that influencers could qualify as traders if they engage in such practices on a frequent basis, regardless of the size of their audience. Alternatively, in case the persons do not qualify as traders, they can be considered to act 'on behalf of' the trader whose products are promoted by the practice and therefore fall within the scope of the Directive.

In addition to the existing legislation, national law, soft law (guidelines issued by national authorities) and self-regulation adopted by the Advertising Standards authorities are already in place to complement the law. Seldia has also adopted a specific social media Guidance²: this document aims to help member companies comply with the related applicable regulatory and self-regulatory rules by providing practical examples of good practice tailored to direct selling companies and sellers.

Taking all the above into consideration, we do not think that there is any need for additional rules regarding influencer marketing and the influencers' obligations towards consumers. No regulatory gaps or unaddressed issues have been identified. The case law and decisions from authorities show that the UCPD rules can already be applied to many cases of influencer marketing. We also believe that the 2021 Guidance document provides the necessary clarifications regarding the implementation of EU rules.

Rather than proposing any new rules specifically targeted to influencers, **we urge the European Commission to assess how it can further strengthen the enforcement of the current legislation.** This could be done, for example, by (a) supporting national authorities in developing and using digital tools to monitor influencer marketing activities and the enforcement of consumer rights³ as well as (b) encouraging stronger cooperation between national authorities and social media platforms that are used by influencers to promote products. In this regard and as an example of good practice, we would suggest that social media platforms would adjust the algorithm to display content based on relevancy and

¹ Study of the European Parliament on the impact of influencers on advertising and consumer protection in the Single Market

² Seldia Guide on disclosure and recognisability of the commercial nature of direct selling social media content (ADD URL)

³ See also page 97 of the Study

geography, so that a European online user would in principle see only content that is in compliance with the European Union's legislation.

Vulnerable and average consumers

In its questionnaire, the European Commission is asking stakeholders whether the concept of the 'average consumer' or 'vulnerable consumer' needs to be adapted.

It is well known that the concept of "average consumers" under the UCPD serves as the benchmark for assessing the impact of a commercial practice. According to the current rules, an average consumer is "reasonably well informed and reasonably observant and circumspect".

National courts and authorities have been interpreting this definition by taking into account the general presumed consumers' expectations at a given situation⁴. This rather broad and flexible definition enables them to adjust the definition to the present market reality.

When it comes to vulnerable consumers, the characteristics that define vulnerability in Article 5(3) of UCPD are indicative and non-exhaustive, as indicated by recital 19. The Commission highlights in the updated 2021 guidance on UCPD that the concept of vulnerability in the UCPD is dynamic and situational, meaning, for instance, that a consumer can be vulnerable in one situation but not in others. That being said, updating the definition to add new criteria of vulnerability would not address the "situational" problem as indicated above.

Taking all the above into account and in view of the constantly changing market reality, **we do not support a regulatory change in the definition of "average" and "vulnerable" consumers**. A more flexible approach, whereby courts are able to interpret the definitions and adjust them to the given circumstances seems to be the best way forward.

Conclusion

As indicated already in this paper, a number of EU legislative instruments already regulate a number of issues identified in the public consultation. We therefore invite the European Commission to carefully assess whether problems faced by consumers online have emerged due to the ineffective enforcement of currently applicable rules rather than the lack of rules.

In this regard, the European Commission behavioural study on unfair commercial practices in the digital environment cited the insufficient public and private enforcement of the existing EU legal framework as a factor that may undermine the respective rules. The study suggests the improvement of the resources and powers of enforcement authorities as one possible avenue to address this issue. Moreover, we are of the opinion **that awareness raising campaigns and consumer training** can also play an important role in strengthening the awareness of EU consumer rules. Social media platforms should also provide easy and efficient reporting mechanism to flag non-compliant content, so that users can quickly report misleading and unfair commercial practices online.

⁴ Page 34 Commission Guidance on UCPD