

Digital fairness – fitness check on EU consumer law

SUMMARY

FEDMA welcomes the opportunity to provide feedback to the public consultation on 'digital fairness – fitness check on EU consumer law'. We support the evidence-based approach of the European Commission to assess the existing horizontal consumer law instruments and its fitness to the challenges of the digital environment.

Overall, FEDMA believes that the issues identified by the Commission with regards to the Data and Marketing Industry are already addressed by the existing framework, complemented by self-regulatory tools:

- **Unfair consumer decision-making practices** are already regulated under the Unfair Commercial Practices Directive (UCPD) and its guidance which was recently updated. Other forms of misleading communication practices in the data and marketing industry are also covered under the General Data Protection Regulation (GDPR), guidance by Data Protection Authorities (DPAs) and the recently adopted Digital Services Act (DSA).
- Options regarding the **personalization of marketing communications** can already be accessed by consumers under the GDPR and the ePrivacy Directive while the forthcoming DSA will introduce a set of binding measures to foster ad transparency and control.
- The 2021 Guidelines of the UCPD clarifies the concept of influencer and the necessary requirements to ensure compliance. Next to it, a *corpus* of self-regulatory programmes is growing to further address specific issues regarding **influencer marketing**.

Rather than adding another legislative layer with risks of unintended consequences on legal coherence, legal certainty, and additional costs to consumers in the current economic context, FEDMA first recommends making a thorough **assessment of the enforceability of existing EU law** while enhancing the cooperation between data protection, competition and consumer law regulators. However, should the Commission identify gaps in the current legislative framework, we recommend an evidence-based and targeted regulatory intervention by means of coregulatory tools such as codes of conduct.

FEDMA believes that the current framework and extensive case law are still fit for purpose for the challenges of the digital age. Existing EU consumer laws apply across the entire customer journey including extensive rights on precontractual information, withdrawals from contracts, remedies such as the right to return products, clear rules around the fairness and banned unfair commercial practices. This body of EU law has also been designed to be technology and channel-neutral, thus applicable both online and offline.

Furthermore, new legislations, including the Digital Services Act (DSA), Digital Markets Act (DMA), and Artificial Intelligence Act (AIA), are expected to further complement the current framework, addressing specific challenges brought by the digital age, including misleading online interfaces, personalized recommended content and advertisements, interoperability of certain online services, automated decision-making, etc. In parallel, there are other recently adopted rules which have yet to be evaluated, such as the Omnibus Directive and the Consumer Protection Cooperation (CPC) Regulation. It would thus be premature to create additional legislative layers before a thorough assessment of existing laws.

1. UNIFORM HARMONIZATION OF EU CONSUMER PROTECTION RULES

FEDMA agrees on the need for a common EU-wide regulatory basis – already existing – but we also deem necessary to preserve a sufficient margin of manoeuvre on the implementation of these rules at national level. Some marketing activities can be very country-specific activity, linked to different culture and practices across countries which makes it difficult to find a one-size-fits-all solution. This is due, sometimes, to the local nature of this industry, especially the prominent use of the language, and the importance of the economic and geographic profile of the area (remoteness, population density, presence of other economic activities).

2. SIMPLIFICATION AND BURDEN REDUCTION

Companies, especially SMEs, had just come out of the economic crisis due to COVID and they now must face a new difficult economic outlook. Any impact assessment from the Commission should therefore also take into consideration the economic impact on these companies stemming from the compliance with any new legislation. Compliance with new rules will require businesses to undertake internal changes and invest in new resources, increasing internal costs which will eventually be borne by consumers.

3. UNFAIR CONSUMER DECISION-MAKING PRACTICES

There is not a need to further address practices that unfairly influence consumer decision making. The Unfair Commercial Practices Directive (UCPD) and the 2021 guidance already tackle any practice meant to manipulate and harm consumers. The principle-based approach in Articles 5 to 9 of the UCPD provide the necessary flexibility to assess the fairness of most business-to-consumer practices on a case-by-case basis, ensuring that the UCPD remains future-proof. Article 4(11) GDPR

and extensive case law (see C-673/17 - Planet49) provide that a user's consent must be freely given, specific, informed and unambiguous by a clear affirmative action. Article 7 GDPR additionally requires that the request for consent shall be presented in a clear and easily accessible manner and must be as easy to withdraw as it is to give. This is also reinforced in Article 5(3) of the ePrivacy Directive which requires GDPR consent for the placement of cookies.

Article 25 of the Digital Services Act also contains provisions on misleading online interface design and organization applicable to providers of online platforms. FEDMA thus believes that the focus should be on enforcement rather than on regulatory gaps. We also call on regulators to refrain from (i) adopting the term 'dark patterns' which ambiguously refers to practices that are already deemed unfair under existing legislation, and (ii) confounding manipulative consumer decision-making practices, which cause harm, and legitimate promotional marketing techniques. Banning any form of marketing persuasion would undermine freedom of contract and entrepreneurial freedom without necessarily benefitting the consumers.

4. PERSONALISATION OF COMMERCIAL OFFERS

As every offer of personalized services implies the processing of personal data, they are subject to the GDPR's principles set out in Art.5 which are binding on all processing of personal data, whichever the lawful ground relied upon under Art.6. These principles are meant to provide the data subjects with information, agency and control over the processing of their personal data, enabling consumers to choose whether they want to receive personalized commercial offers.

Additionally, as several data protection authorities and the European Data Protection Board have explicitly deemed illegal conditioning the access to a website to consenting to the storage of cookies for personalized advertising, consumers who do not give their consent can already have a non-personalised online experience. The recently adopted DSA and Digital Markets Act also introduce new provisions reinforcing the data protection rules, empowering individuals to identify personalized content, change their preferences or be displayed with personalized advertisements.

5. INFLUENCER MARKETING

FEDMA disagrees with the need to address the topic of "influencer marketing" via additional regulatory means. The 2021 guidance document on the interpretation and application of the UCPD clarifies the concept of influencer and the requirements that apply to it. Complementing the existing rules, the European Advertising Standards Alliance (EASA) issued a Best Practice Recommendation on Influencer Marketing in 2018 to support the work of national self-regulatory organisations (SROs) in enforcing current self-regulatory tools on influencer marketing. For instance, the French SRO (ARPP) launched in 2021 a [certificate for influencers](#) based on existing principles and rules.

6. AVERAGE & VULNERABLE CONSUMER

FEDMA considers that the concepts of average and vulnerable consumers do not require to be further specified in the context of the digital environment as the UCPD's definitions are already well suited and clear. However, should the current assessment identify a need for such an update, it will be fundamental to ensure a clear distinction between these two concepts which, especially in the case of a vulnerable consumer, can be culturally biased, and thus they are best taken into account at national or local level.

7. SUMMARY OF KEY T&C

We would like to raise some concerns about some of the suggested contractual solutions. In particular, we believe that while increasing the relevance of information available to consumers through a summary of key T&C may provide some of the advantages of a similar layered approach for privacy policies, the contractual nature of this information is not fit for this form of simplification.

CONCLUSION

Rather than adding another legislative layer with risks of unintended consequences on legal coherence, legal certainty, and additional costs to consumers in the current economic context, we first recommend making a thorough assessment of the enforceability of existing EU law. The Commission's behavioural study on unfair commercial practices in the digital environment already underlined the insufficient enforcement of current rules, recommending improving the resources and powers of enforcement authorities. Given the fast pace of digitalization which is nuancing the separating line between different policy areas, it also becomes fundamental to enhance the cooperation between data protection, competition and consumer law regulators.

However, should the Commission identify gaps in the current legislative framework, we recommend an evidence-based and targeted regulatory intervention by means of coregulatory tools such as codes of conduct. While the Code of Conduct on disinformation has already shown positive results, enabling policymakers to go beyond legal requirements hand in hand with the industry, the further development GDPR Codes of Conduct could also be an effective tool to further specify certain rules.
