

Digital Fairness-Fitness Check on EU Consumer Law

Seldia submission to Commission's Call for Evidence

Digitalisation has created numerous opportunities for businesses and consumers. Consumers have now access to a wide range of products and services, while businesses have the possibility to explore new opportunities by reaching a wider audience. The digital transformation of direct selling companies has been particularly accelerated due to the new reality imposed by the COVID pandemic. In order to further encourage the digital transition of businesses and enhance consumer trust online, core principles of legal certainty and fairness are paramount.

Review of the 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 Omnibus 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 call for Evidence indicates that the Fitness Check will look into 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. Hidden advertising in the context of influencer marketing is prohibited under Article 7(2) (misleading practices) and point n°22 of Annex I of UCPD (banned practices). Dark patterns are regulated by the General Data Protection Regulation, the Digital Services Act and the Unfair Commercial Practices Directive.

Enforcement of existing rules and self-regulation

In this regard, the Commission should carefully assess if problems faced by consumers online have emerged due to the ineffective enforcement of currently applicable rules. 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 rules¹. The study suggests the improvement of the resources and powers of enforcement authorities as one possible avenue to address this issue. Another good example of how the EU could further support national authorities to efficiently monitor and enforce the related EU legislation is by providing access to EU innovative digital tools and resources that have been developed in this regard². Last but not least, awareness raising campaigns and consumer training can also play a critical role in strengthening enforcement of EU consumer rules so that consumers can quickly identify unfair commercial practices³ online. This could be helpful in particular for vulnerable consumers.

Another important parameter to consider in the upcoming review process is the existence of self and co-regulatory frameworks and their effectiveness in improving compliance of businesses with EU

¹ Page 123 of the *Behavioural Study on unfair commercial practices in the digital environment: dark patterns and manipulative personalisation*

² For example, the EU eLab is a common platform for online investigations and enforcement

³ See also page 95 of the *European Parliament's study on the impact of influencers on advertising and consumer protection in the Single Market*

consumer law. For instance, the EASA and national self-regulatory rules adopted in the area of influencer marketing⁴. On this point, we would like to mention that Seldia has also adopted a Guidance regarding marketing on social media, which aims to help members 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.

In line with the recommendations made by the European Parliament's study mentioned above, we ask the Commission to consider the existing self-regulatory measures as well as their overall effectiveness in its review.

Key principles ahead of developing new rules

Should the Fitness Check exercise show the need for the Commission to come forward with new EU consumer rules, we believe that these rules should be clear, fair, targeted and should not duplicate the existing EU legal framework. Otherwise, we may risk ending up with overlapping or even potentially inconsistent rules that will confuse businesses, consumers and national authorities and which will significantly disrupt the digital environment.

That being said, we would recommend that the Commission focuses on and maps out unfair commercial practices related to the topics falling under the Fitness Check exercise that are not already covered by the existing EU rules. For instance, hidden advertising in the context of influencer marketing is already prohibited under Annex I n°22 of UCPD.

As a second step, we would suggest that when carrying out this evaluation, the Commission clearly distinguishes between unfair online manipulative practices such as dark commercial patterns and legitimate marketing techniques. In both cases, the element of persuasion of the consumer behaviour is present. However, the Commission should identify the criteria that differentiate these two practices. More specifically, according to the UCPD rules, in order for a commercial practice to be unfair, it needs to "appreciably impair the consumer's ability to make an informed decision". This could, for example, be the case where online information flow is manipulated in such a way that the consumer cannot make an independent and informed choice⁵.

To conclude, we insist that when carrying out its Fitness Check on the EU consumer law, the European Commission must carefully assess the different existing legislative and non-legislative frameworks available. We welcome the Commission's plans to extensively consult various stakeholders throughout this process and we remain committed to providing further feedback during the next consultation phases.

⁴ page 73 of the European Parliament's study on the impact of influencers on advertising and consumer protection in the Single Market

⁵ Page 5 of OECD Report on "Roundtable on Dark Commercial Patterns Online"