

## **WFA response to EU consultation on ongoing fitness check of EU consumer law**

The World Federation of Advertisers (WFA) is the voice of marketers worldwide, representing 90% of global marketing communications spend – roughly €900 billion per year – through a unique, global network of the world’s biggest markets and biggest marketers. WFA champions responsible and effective marketing communications worldwide.

We represent over 146 brand owners and 60 national advertiser associations across the world. This includes national advertiser associations in 19 EU Member States and about 50% of the companies we represent are European.

WFA welcomes the opportunity to respond to the European Commission public consultation on its ongoing fitness check of EU consumer protection law. We remain committed to tackling unfair commercial marketing practices in order to ensure the utmost protection of consumers online.

We believe that existing EU legislation, including the Unfair Commercial Practices Directive, the Audiovisual Media Services Directive, the Digital Services Act, Digital Markets Act, General Data Protection Regulation, among others, already prohibit many forms of misleading, harmful or intrusive advertising practices. These efforts are complemented by national self-regulatory standards across the EU.

We believe focus should therefore be on the effective enforcement of existing rules, on ensuring harmonised application and on increasing cooperation between European and national authorities and self-regulatory bodies.

### **Manipulative commercial practices should be banned. When it comes to advertising, they are already.**

Existing EU legislation, including the Audiovisual Media Services Directive (AVMSD), the Unfair Commercial Practices Directive (UCPD) and the Digital Services Act (DSA), clearly prohibits any form of misleading, surreptitious, hidden, or unidentifiable advertising. The UCPD, which obliges all traders to identify the commercial intent of a commercial practice, applies to all forms of marketing communications – be it on radio, TV, outdoor, on social media or in the metaverse.

A 2018 European Commission study on advertising and marketing practices in online social media<sup>1</sup> concluded that the problematic online practices are “already covered under the UCPD blacklist of commercial practices which are in all circumstances considered unfair, so there is no need for further regulatory action”.

This legislative framework is complemented by national self-regulatory standards, enforced by self-regulatory organisations (SROs) across the EU. Importantly, these SROs handle consumer complaints (92% of all complaint cases are solved in less than 2 months) and run proactive sweeps of the online environment to ensure advertising is legal, decent, honest, and truthful.

**RECOMMENDATION: WFA and its members remain committed to delivering marketing communications that meets the highest standards of transparency and safeguards consumer trust in advertising. The focus should be on enforcement of existing marketing law to ensure harmonised application, and increased cooperation between European and national authorities and self-regulatory bodies.**

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<sup>1</sup> [Behavioural study on advertising and marketing practices in online social media](#), Final Report, 2018.

## **The distinction between average and vulnerable consumers is key for the application of consumer law.**

WFA fully supports the idea that marketing practitioners must pay particular care to vulnerable consumers. This goal is enshrined in existing EU legislation such as the AVMSD, the UCPD and the DSA, and further pursued by self-regulation. The UCPD bans the use of direct exhortation to children to buy advertised products. The ICC's Advertising and Marketing Communications Code for instance highlights the importance of "special care" in marketing communication to children.

Children need special protection particularly when it comes to age-restricted products, like alcohol, or to limit children's exposure to marketing for food and beverage products high in fat, sugar or salt (HFSS). WFA drives initiatives in both sectors. The [EU Pledge](#), addressing food marketing to children, and the [Responsible Marketing Pact](#), working towards eliminating minors' exposure to alcohol ads, have both been tabled under [the EU Code of Conduct for Responsible Business and Marketing Practices](#).

The protection of vulnerable consumers should not, however, interfere with the concept of the 'average consumer' in EU consumer and marketing law. The UCPD characterises a commercial practice as misleading if it causes, or is likely to cause, the average consumer to take a transactional decision that they would not have taken otherwise. In line with the principle of proportionality, and to permit the effective application of consumer protection laws, the UCPD defines the average consumer as "reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors"<sup>2</sup>. Certainly, the average consumer becomes vulnerable when deceived or manipulated unfairly, and these are precisely the practices which the UCPD already prohibits.

**RECOMMENDATION: WFA fully recognises the need for special care when it comes to vulnerable consumers, such as children. However, undermining the concepts of average, versus vulnerable, consumers would put at risk the application of existing consumer protection law.**

## **Personalised advertising should be transparent, fair, and unobtrusive.**

WFA does not support personalised advertising practices which are intrusive, or which exploit vulnerabilities. We believe consumers should always have full transparency, choice, and control over how their data is used for targeted advertising purposes.

The use of personal data for digital advertising is already regulated by existing EU legislation. The recently adopted Digital Services Act (DSA) introduces new measures which will, once implemented, provide consumers with more transparency and control over the personalised ads they see. The DSA will also protect consumers from the discriminatory display of advertising using sensitive personal data and increase protections for minors by restricting the use of their personal data for ad profiling. These measures supplement the fundamental requirements of the General Data Protection Regulation (GDPR) and ePrivacy Directive (ePD) which provide for a high level of protection and choice over how personal data is used for advertising, including the use of misleading practices in the collection of consent. The effective implementation and enforcement of all these rules is crucial to prevent misleading personalised advertising. The DSA's requirements are not even implemented at this stage, so their effect remains unknown.

The European Commission behavioural study on unfair commercial practices in the digital environment found during its research that "most people were used to [personalised advertising] and did not find it problematic' but that they were 'irritated by persistent and aggressive targeted advertising"<sup>3</sup>. WFA and its members are committed to reducing annoyance for consumers and we support initiatives which aim to tackle issues such as bombardment, repetition, and obtrusiveness of ads, such as the Coalition for Better Ads. Personalised advertising is just one form of personalised offer, and different forms of personalised offer may need to be treated differently, other stakeholders are likely better placed than

<sup>2</sup> Case law of the EU Court of Justice

<sup>3</sup> [Behavioural study on unfair commercial practices in the digital environment: dark patterns and manipulative personalisation](#), Final Report, April 2022

WFA to explain the potential effects for digital services of providing users with an explicit option to turn off personalised advertising.

**RECOMMENDATION: WFA and its members remain committed to avoiding personalised advertising practices which are intrusive, annoying or which exploit vulnerabilities. The focus should be on enforcement and harmonised implementation of existing and as yet unimplemented rules, such as the DSA, which are vital to protecting consumers from misleading personalised advertising.**

### **Influencer marketing needs to be more transparent.**

The prohibition of hidden advertising is probably the most fundamental principle of advertising law. Recent updates to the UCPD, under the New Deal for Consumers, introduced specific language around false consumer reviews or endorsements. The UCPD guidance provides a clear definition of ‘influencer’, highlighting the need to ensure transparent advertising in the context of influencer marketing. The latest revision of the AVMSD has extended the definition of commercial audiovisual communications to user-generated content, meaning the influencers, just as broadcasters, must ensure proper disclosure of the commercial nature of the given content.

Self-regulatory ad standards bodies have an important role to play when it comes to raising awareness, and educating, influencers, brands, agencies, and digital platforms about these obligations. For instance, the French Autorité de Régulation Professionnelle de la Publicité (ARPP) developed a ‘Certificate for Responsible Influencer Marketing’, aimed at helping brands identify influencers that conduct marketing communications in an ethical and lawful manner.

**RECOMMENDATION: Influencer communications need to be more transparent. WFA stresses the need for uniform application of the UCPD guidance on influencer marketing. Self-regulatory organisations play a vital role in awareness raising, education and enforcement.**