

EASA’s answer – Consultation on the fitness check of EU consumer law on digital fairness

To what extent do you agree or disagree with the following statements?

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	Don't know
*Consumers require a strong legal framework to protect their interests in the digital environment.	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
*The existing EU consumer laws provide sufficient protection in the digital environment.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
*There are some legal gaps and/or uncertainties in the existing EU consumer laws.	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
*Traders generally comply well with the existing EU consumer laws in the digital environment.	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
*Consumer protection in the digital environment should be regulated at EU level in a uniform manner.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
*The existing EU consumer laws are coherent with other laws , such as on data protection, new rules applicable to online platforms, artificial intelligence etc.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
*There is some scope for simplification and burden reduction in existing EU consumer laws.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Please explain your replies, including any other statements you wish to highlight.

The [self-regulation of advertising](#) complements the very comprehensive legal framework for consumer protection that already exists in this field (UCPD, AVMSD, and DSA, in particular). Unfortunately, a lack of consideration by the co-legislators to existing consumer law and audiovisual media law in the policymaking process of the DSA have led to a situation where different legal acts cover the same matter without using the same terminology, and without readily interoperable tools. These overlaps are highly likely to trigger legal uncertainty. Therefore, the focus should be on the coherent and comprehensive implementation of these acts, rather than on their revision or on new legislative proposals.

In order to mitigate such legal uncertainty over the protection of consumers, the self-regulation of advertising is a powerful ally for consumer protection in the areas of marketing and commercial communications. The implementation of DSA’s Article 46, which sets a very rigid framework for EU Codes of Conducts on advertising transparency – and is therefore ill-suited to foster self-regulation – should not come at the expense of genuine advertising self-regulatory initiatives, which are encouraged in both the UCPD and the AVMSD. Although EASA does not support any revision of the UCPD in the short or middle term, should such a revision occur nonetheless in the future, EASA would call for a new wording of Article 10, inspired from Article 4a(1) of the AVMSD (see proposition in Annex).

Genuine self-regulation of advertising allows for burden reduction and simplification as stated in the last question of the table above. On average, 92% of all complaint cases handled by SROs are solved in less than 2 months. Furthermore, prior advice contributes to reduce the number of occurrences of law violation, thereby avoiding overloads of administrative or judicial procedures.

To the question of whether consumer protection in the digital environment should be regulated at EU level in a uniform manner, our answer is twofold. Whilst some common EU-wide regulatory basis is indisputably needed – and already existing – a sufficient margin of manoeuvre should be left to the implementation of these rules at local level. The strength of EASA’s network of self-regulatory organisations (SROs) relies precisely on this balance, between a common basis setting out the core principles for the protection of consumer against harmful ads, as laid down in the [Advertising and Marketing Communications Code](#) (ICC Code) and EASA’s Best Practices Recommendations, and the detailed codes and rules owned and applied by the SROs themselves.

In particular, EASA considers that a revision of the UCPD itself would be of limited value, and therefore not necessary, as the Directive does not suffer from any loophole endangering consumers. Furthermore, the latest modification to the UCPD has entered into application in Member States only last summer, and the UCPD Guidance was updated just over a year ago. Therefore, it seems too early for an accurate assessment of the adequacy of the updated UCPD, as complemented by the Commission’s UCPD Guidance.

How positive / negative is the impact of the existing EU consumer law framework on the following aspects in the digital environment?

	Very positive impact	Rather positive impact	Neutral	Rather negative impact	Very negative impact	I don't know
*Amount & relevance of information available to consumers to compare and make informed purchasing choices.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
*A level playing field amongst businesses addressing consumers in the EU.	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
*Enforcement regarding cross-border infringements through EU coordination mechanisms (Consumer Protection Co-operation network)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
*Protection of consumers against unfair commercial practices.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
*Protection of more vulnerable consumers (e.g. minors, elderly, persons with disabilities).	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
*Availability and choice of products.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
*Prices of products.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

	Very positive impact	Rather positive impact	Neutral	Rather negative impact	Very negative impact	I don't know
*Number of customers and revenues for businesses supplying consumers in the EU.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
*Increase of national e-commerce (i.e. within your EU country).	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
*Increase of e-commerce across EU Member States .	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
* Competitiveness of EU businesses vis-à-vis non-EU businesses.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

Please explain your reply.

Increasing the relevance of information available to consumers to compare and make informed purchasing choices is a good way to improve consumer protection. However, while EASA fully recognises the need for sufficient information to be provided to consumers, increasing the amount of information to consumers is only efficient until a certain extent, in the case of advertising. Indeed, when too much information to the consumer is made available in an ad, the consumer may not have the willingness, the time, or the relevant competence to read it and understand it in full.

The Consumer Protection Co-operation network (CPC) is a very useful network for the enforcement regarding cross-border infringements through EU coordination mechanisms. However, self-regulation remains the most suitable first-resort instrument, considering its high flexibility enabling quick adaptation to new practices and technologies. EASA's collaboration with the CPC Network is promising for the protection of consumers, and could be in particular useful to ensure that new types of commercial communication, such as influencer marketing, fully comply with legal and self-regulatory rules.

The Protection of consumers against unfair commercial practices is one of the utmost priorities of EASA's network.

As for the protection of more vulnerable consumers, EASA's view is that it requires a case-by-case analysis, taking into account the local nuances of consumers sensitivities, which is why self-regulation so well-suited in the field of advertising. More should be done to rely on self-regulation as a first-resort tool.

How strongly do you agree or disagree with each of the following statements about potential suggestions to improve EU consumer law for the benefit of consumers?

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	I don't know
*There is a need for stronger protection against digital practices that unfairly influence consumer decision-making (e.g. manipulative website/app designs such as misleading presentation of 'yes' and 'no' choices; or creating multiple obstacles before reaching a cancellation/unsubscribing link).	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
*Where traders require consumers to agree to terms and conditions (T&C), consumers	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	I don't know
should receive an easily understandable summary of the key T&C in an easily accessible manner.						
*When cancelling contracts, a clear technical means (e.g. a prominent cancellation button) would help consumers to cancel more easily.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
*Receiving a confirmation (e.g. by e-mail) when a consumer terminates a contract would help consumers check that their contract has been successfully terminated.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
*Receiving a reminder before any automatic renewal of digital subscription contracts would help consumers to decide whether they want to renew a contract or not.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
* Reminders about their subscriptions after a period of inactivity could be beneficial for consumers who might otherwise have forgotten that their subscription exists	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
* Signing up for a free trial should not require any payment details from consumers.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
*Requiring express consent when switching from a free trial to a paid service could be beneficial for consumers.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
*Having the explicit option to receive non-personalised commercial offers (e.g. non-personalised advertising, non-personalised prices) instead of personalised ones could be beneficial in allowing consumers greater choice.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
*There is a need for more price transparency when buying virtual items with intermediate virtual currency (e.g. in-game currency in video games).	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
*There is a need for more transparency regarding the probability of obtaining specific items from paid content that has a randomisation element (e.g. prize wheels, loot/mystery boxes in video games, card packs).	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
*Allowing consumers to set limits to the amount of time and money they want to spend using digital services (e.g. in-app	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	I don't know
purchases in video games) could help to better protect consumers.						
*Clarifying the concept of an 'influencer' (e.g. social media personalities) and the obligations of traders towards consumers would be beneficial.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
*Where automation/bots are used to deal with consumer complaints and other inquiries, consumers should have the possibility of contacting a human interlocutor upon request.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
*It should be possible to limit the possibility for resellers to buy sought-after consumer products using automated means (software bots) in order to resell them at a higher price.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
*More specific information obligations should apply when products such as event tickets are sold in the secondary market.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
*The concept of the trader's 'professional diligence' [1] towards consumers should be further clarified in the digital context.	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
*The burden of proof of compliance with legal requirements should be shifted to the trader in certain circumstances (e.g. when only the company knows the complexities of how their digital service works).	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
*The concept of the 'average consumer' or 'vulnerable consumer' could be adapted or complemented by additional benchmarks or factors.[2]	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

[1] [In general, 'professional diligence' means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers – honest market practice and/or the general principle of good faith in the trader's field of activity.]

[2] [According to the case law of the EU Court of Justice, the average consumer is defined as reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors. Under current EU law, vulnerable consumers are those that are particularly vulnerable to unfair commercial practices, for example because of their mental or physical infirmity, age or credulity.]

Please explain your reply.

Dark Patterns

The first question in the table seems to refer to what is commonly known as dark commercial patterns.

First of all, we would like to highlight that the majority of the dark patterns inadequately covered by current rules are of a non-advertising nature – as shown by all the examples that you provided in the question: “manipulative

website/app designs such as misleading presentation of ‘yes’ and ‘no’ choices; or creating multiple obstacles before reaching a cancellation/unsubscribing link”.

As regards any dark patterns which would be of an advertising nature, EASA’s view is that the Unfair Commercial Practices Directive (UCPD), as it stands, is well-equipped to tackle all kinds of misleading advertising, including dark patterns. Furthermore, the UCPD Guidance published by the European Commission is an valuable document supporting the UCPD’s implementation, which was adjusted one year ago to address the new forms of misleading practices and could be further adjusted in the future. Furthermore, self-regulatory rules already apply to all misleading advertising practices, including dark patterns within advertisements.

EASA would like here to refer to the Commission’s [Behavioural Study](#) accompanying the fitness check. In its conclusions, the Study noted that “several dark patterns and manipulative practices are already prohibited in all Member States through the blacklist Annex I of the UCPD”. In addition, the principle-based Articles 5 to 9 of the UCPD “provide a basis for assessing the fairness of most business-to-consumer practices on a case-by-case basis”.

Randomised paid-for items

Randomised paid-for items (lootboxes) may represent a risk for misinformed and vulnerable consumers. As a first step, clarification of the nature of lootboxes might be of more use and relevance. Then, consideration could indeed be given to transparency obligation.

Influencers

Clarifications about influencers in the legal framework are not needed, considering the applicability of the Unfair Commercial Practices Directive to influencers, well clarified and explained by the Commission’s Guidance, and complemented by self-regulatory rules which apply to influencers. Influencer marketing has always been covered by advertising self-regulatory codes, since their remit extends to any commercial communication appearing in any media format. To ensure that the new industry players are explicitly included within the scope of activities of SROs and their rules, EASA established in 2008 a Best Practice Recommendation (BPR) on Digital Marketing Communications, later updated in 2015 and then followed in 2018 by a BPR on Influencer Marketing, meant for the self-regulatory organisations to help them draw and enforce already existing SR rules on the matter more effectively. These EASA guidelines recognise how the fine line between influencer marketing and genuine unbiased user-generated content may mislead consumers, and acknowledge that the role of advertising self-regulatory organisations is to guide industry stakeholders towards a more responsible use of this marketing technique.

In line with EASA’s Influencer Marketing BPR, 15 advertising standards bodies have either drafted codes on influencer marketing or adopted specific provisions in their local codes, plus an additional 6 bodies that are at the final stages of an adoption process. Consequently, SROs have been effectively handling consumer complaints related to influencer marketing, as well as organising training programmes for the industry, but also for influencers. EASA has just revised this winter its guidance documents on influencers and online advertising to ensure that they closely match the evolving unfair marketing practices, including influencers’ misleading practices.

Furthermore, several of EASA’s SROs are developing data-driven tools aimed at harnessing the potential of artificial intelligence (AI) for the benefit of consumer protection. Such tools can be used for the monitoring of influencers.

Bots handling complaints

We agree that bots alone should not be considered as a sufficient response to a complaint. EASA’s advertising self-regulatory organisation members all have a human review of the complaints they handle.

Professional Diligence

Importantly, EASA’s answer on professional diligence should not be misunderstood as requesting more details in the definition of professional diligence or in the UCPD’s Article 5. Professional diligence is a principle-based requirement working as a safety net, and should remain broadly defined.

However, EASA estimates that the concept of professional diligence could be further clarified by referring to self-regulatory practices operated and enforced by independent organisations, such as self-regulatory organisations members of EASA, in the field of advertising. This would be in line with the existing UCPD's Recital 20, and with the Guidance to the UCPD, which makes it clear that the notion of professional diligence encompasses principles in national law of the Member States, but also "may include principles derived from national and international standards and codes of conduct."

Average and vulnerable consumers

The protection of vulnerable groups is a fundamental pillar of advertising self-regulation. As such, it infuses the codes and self-regulatory codes of EASA's self-regulatory organisation members, with codes taking specifically into accounts some types of vulnerable consumers, such as children.

However, we believe that the concepts of average and vulnerable consumers should not be specified any further than they are in the current version of the UCPD. First of all, such concepts evolve fast over time, and any attempt to specify them would be at risk of being outdated within a few years – if not months. Secondly, the concept of vulnerable consumer may depend on cultural traits that are best taken into account at national or local level. Finally, sufficient margin of manoeuvre should be left to enforcers, whether these may be self-regulatory organisations, national authorities, or judicial bodies.

Finally, we would like to underline that the concept of average consumer should remain central to the rationale underlying the UCPD, and should remain distinct from the concept of vulnerable consumers. The concept of vulnerable consumers is also needed, insofar as it protects specific categories of consumers, such as children.

ANNEX to EASA's answer to the consultation on the Fitness Check of EU Consumer law

EASA reiterates here that it does not support a revision of the UCPD, for all reasons states above.

However, should the fitness check lead to a revision of the UCPD in spite of our recommendation above, EASA would call for the alignment of Article 10 UCPD with Article 4a(1) AVMSD. Both provisions share the same purpose (calling for Member States to encourage the development of codes of conducts), the difference being that the AVMSD Article 4a(1) is more recent, more explicit and more fit for purpose than the UCPD's Article 10. As such, Art. 4a(1) AVMSD efficiently contributes to fuel the development of advertising self-regulation, to the eventual benefit of consumers. Such new wording in Article 10 UCPD would help support to the development of self-regulation, a highly suitable tool in a digital environment where emerging threats to consumer protection appear and evolve faster than they used to, and where such threats require an agile response that self-regulation is able to provide.

EASA would therefore recommend the following wording for Article 10 UCPD, mostly inspired from Art. 4a(1) AVMSD and related relevant recitals, providing further coherence between the UCPD and the AVMSD.

Article 10

~~Codes of conduct~~ Use and fostering of co- and self-regulation

1. ~~This Directive does not exclude the control, which~~ Member States ~~may~~ shall encourage the use of co-regulation and the fostering of self-regulation through codes of conduct adopted at national level in the fields coordinated by this Directive to the extent permitted by their legal systems., ~~of unfair commercial practices by code owners and recourse to such bodies by the persons or organisations referred to in Article 11 if proceedings before such bodies are in addition to the court or administrative proceedings referred to in that Article.~~

Member States should, in accordance with their different legal traditions, recognise the role which effective self-regulation and co-regulation can play as a complement to the legislative, judicial and administrative mechanisms in place and its useful contribution to the achievement of the objectives of this Directive.

Member States may enable judicial and administrative authorities to require prior recourse to other established means of dealing with complaints, including co-regulatory or self-regulatory systems referred to in the first subparagraph.

2. Self-regulatory systems referred to in paragraph 1 shall be set up with independent monitoring bodies to ensure effective compliance with the commitments undertaken by the member companies. Their codes of conduct may include, inter alia, individual or collective measures for prior self-control of advertising content, and shall establish effective systems for the out-of-court settlement of complaints.

3. Recourse to ~~such control bodies~~ co-regulatory or self-regulatory systems shall never be deemed the equivalent of foregoing a means of judicial or administrative recourse as provided for in Article 11.