

The Consumer Voice in Europe

FROM INFLUENCE TO RESPONSIBILITY

Time to regulate influencer marketing



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Why it matters to consumers

Influencers have become an essential part of modern marketing in the European Union and worldwide. So much that it is considered the most effective form of online marketing¹. However, influencer marketing is not without problems for consumers², especially the young ones. From hidden advertising to dropshipping³, from the promotion of dangerous and risky financial products to the promotion of unhealthy food to children, harmful commercial practices posed by influencer marketing are numerous. European consumer law is only partly able to deal with several situations, and it is currently not sufficiently and consistently enforced across EU Member States. In addition, EU law needs to be updated to provide harmonised solutions to unfair commercial practices present in all EU Member States, to clarify the rules and responsibilities of the different actors operating in the influencer marketing 'value chain', and to ensure that consumers benefit from a fair and safe online environment.

Summary

Influencer marketing is now part of our digital environment and our daily life. This sector is growing exponentially and forecasts indicate that companies will invest even more in this advertising mode in the coming years⁴. Influencer marketing comes with problematic practices for consumers which are similar across the EU and require an European response (ex: recurrent hidden advertising). The growth and progressive professionalisation of the sector also leads to the emergence of new actors to consider (e.g. influencer agencies)⁵ and who should also bear clear responsibilities for compliance with applicable law.

This report provides recommendations, both for a reform to further regulate influencer marketing and for better enforcement of existing EU legislation in this sector.

❖ Recommendations to better regulate influencer marketing

- General recommendations :

- Provide for a **definition of an “Influencer Marketing”** in the Unfair Commercial Practices Directive⁶ (UCPD) and clarify that **any publication from a content creator against any kind of consideration**, should be sufficient to qualify as a commercial intent and to be subject to disclosure requirements. The size of the influencer audience, the recurrence with which they run commercial partnerships with brands and the fact that brands have control or not on the content of the publication should be irrelevant.

¹ Statista, 2021, Influencer marketing market size from 2016 to 2021. Available at:

<https://www.statista.com/statistics/1092819/global-influencer-market-size/>, last consulted on 04 July 2023.

² See for instance UFC Que Choisir article- Réseaux sociaux. Attention : trafic d'influence, published on 24/06/2021, available [here](#), last consulted on 04 July 2023.

³ Dropshipping is a sale on the Internet in which the seller is only responsible for the marketing and sale of the product. It is the seller's supplier who sends the goods to the final consumer. The consumer is usually unaware of the existence of the supplier and its role.

⁴ The impact of influencers on advertising and consumer protection in the Single Market. Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies, Frithjof MICHAELSEN, Luena COLLINI et al., PE 703.350 - February 2022, section 3.1. Full study available [here](#).

⁵ Idem.

⁶ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

- **Amend the Unfair Commercial Practices Directive Annex** (Points 11 and 28 of the UCPD) to introduce the concept of “user generated content”. As this notion is broader in scope than the current wording “editorial content”, it would bring legal clarity and ensure that all contents posted by content creators are subject to the transparency rules, irrelevant if users promoting products on a sparse or recurrent basis.
- Tackle hidden advertising and insufficient disclosures of commercial contents:
 - The European Commission should establish **EU wide ‘disclosure standards’** to determine “*how*”, “*how much*” and “*when*” disclosure duties should be done by influencers (unique wording to be used, momentum, in-video insert etc.).
 - To facilitate enforcement against hidden advertising, **consider introducing a rebuttable presumption** that influencers are in a commercial relationship with traders.
- Make all actors in the influencer ‘value chain’ liable:
 - Introduce a **joint and several liability between influencers, their agencies and brands** in case of breach of consumer law requirements to make all the players in the value chain accountable. **Strict requirements and liabilities**, coupled with **dissuasive sanctions**, such as a percentage of their annual turnover in case of non-compliance, would ensure better compliance with the requirements of consumer law. As marketing professionals, **brands and influencer agencies should have an obligation to monitor the compliance** of influencers with EU and national applicable laws.
 - Competent enforcement **authorities should further use their powers’ to “name & shame” non-compliant influencers, agencies and traders**. In case of sanction from a national authority or from a court, influencers should be required to post a citation/reference to the national authority's decision/sanction at the beginning of each publication for a sufficiently long period of time⁸.
- Protect consumers in risky sectors, such as financial services:
 - Amend the UCPD Annex **to prohibit influencer marketing campaigns for certain type of products** which pose particular risks to consumers.
 - **Replicate at EU Level the prohibitions of the recent French law** that regulates commercial influencing and combats the abuses of influencers on social networks (ban on aesthetic surgery, nicotine based products etc.)⁹.
 - **Prohibit the promotion by influencers of:**
 - **Unhealthy food to children**, in particular High in Fat, Salt and Sugar (HFSS food).
 - **Alcohol products**, especially in ads targeting minors,
 - **Gambling**, including sports betting and prognostics, especially in ads targeting minors.

⁷ See Article 9 of the Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 (so-called “CPC-Regulation”).

⁸ See for example, the recent action by the DGCCRF, which ordered four new influencers to post a banner warning of their “misleading commercial practices” at the top of their publications on social networks. See DGCCRF [webpage](#), and [France Info article](#) providing the examples of the “banner implementation”, last consulted on 12 June 2023.

⁹ Loi n°2023-451 du 9 Juin 2023 visant à encadrer l’influencer commercial et à lutter contre les dérives des influenceurs sur les réseaux sociaux. See French [Journal Officiel](#) of the 10 June 2023.

- **Medical products/procedures**, other than their intended use.
 - **Regarding financial services** : Sector-specific regulation should consider the role of influencers in rules on advertising and promotion of financial services via social media, including the prohibition of the promotion of products which expose consumers to a high risk of financial loss.
- Clarify the role of online platforms regarding 'influencer marketing':
- A legislative reform following the Digital Fitness Check of EU Consumer Law¹⁰ and the implementation of the Digital Services Act (DSA)¹¹ should be an opportunity to **define EU-wide and harmonised functionalities across platforms** to allow influencers to declare, in a clear and unambiguous manner, whether their content constitutes or contains a commercial communication.
 - **Platforms should have a proactive role in combatting unfair influencer marketing practices.** They should:
 - Report recurrent complaints against influencers and brands to the competent authorities,
 - Set up simple and effective reporting tools in case of suspected hidden advertising and illegal content. Any report from a user should be followed up by the online platform.
 - Consistently enforce their terms and conditions and promptly remove content which has been confirmed as hidden advertising or illegal by self-monitoring and/or following a signal from another user.¹²
 - Apply proportionate and effective sanctions to influencers who have posted hidden advertising, to deter them from doing it again ("name and shame", temporary ban or dereferencing etc.).
 - **"Compliance by design"**: The UCPD Annex should be amended to ensure that when an online platform provides for the possibility to post commercial content on it, not providing technical tools to be compliant with EU consumer law should be considered an unfair practice in all circumstances. This would ensure "compliance by design" of online platforms and complement the new Digital Services Act (DSA) provisions¹³.

¹⁰https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law_en, last consulted on 04 July 2023.

¹¹ See in particular articles 26, 44 DSA (+ Recital 68 DSA). The DSA that will be fully applicable as of February 2024, requires that digital platforms (including social networks) provide their users (influencers/content creators included) with functionalities to declare whether the content they provide constitutes or contains a commercial communication so that consumers can identify in a "clear and unambiguous manner and in real time, including through prominent markings", whether the content they are viewing is advertising or not.

¹² In this regard see BEUC and nine of its member organisations [external alert](#) submitted on 08 June 2023 to the European network of national consumer authorities ("CPC-Network") about Instagram, YouTube, TikTok and Twitter for letting misleading advertisements for crypto-assets ("crypto") flourish on their platforms, notably by not enforcing their terms and conditions and branded content policies. In our view, these practices constitute a breach of professional diligence under the EU Directive 2005/29/CE on unfair business-to-consumer commercial practices (lack of professional diligence) and expose consumers to serious harm.

¹³ Article 31 Point 1 DSA specifies that "Providers of online platforms allowing consumers to conclude distance contracts with traders shall ensure that its online interface is designed and organised in a way that enables traders to comply with their obligations regarding pre-contractual information, compliance and product safety information under applicable Union law".

❖ Recommendations to better enforce existing (and future) laws:

- **Influencer marketing should be an enforcement priority** of the CPC-Network and of any relevant national authorities in the most problematic sectors (financial enforcers, regulators for audiovisual media services etc.). CPC-Network should carry out **sweeps** to identify widespread unfair practices.
- **Ensure a more consistent enforcement between national authorities** of the Unfair Commercial Practices Directive, the Consumer Rights Directive, Audio Visual Medial Services Directive, the eCommerce Directive, and the new Digital Services Act (DSA)¹⁴ obligations against unfair influencer marketing practices. Substantiated offences should lead to dissuasive sanctions on all actors of the value chain (influencer, influencer agencies, platform, brands) by competent authorities.
- **Develop cross-sector enforcement cooperation to tackle problematic practices in the influencer marketing sector.** Influencer marketing is at the crossroads between several disciplines. Therefore, several authorities may be competent in case of problematic practices depending on the product/service promoted (CPC authorities, audio-visual media services, financial regulators etc.). It is therefore essential to strengthen cooperation between the different competent authorities, both at national and EU level, and to launch coordinated investigations and enforcement actions, if necessary.
- **Develop and disseminate e-enforcement tools** to monitor publications of content creators and to empower enforcers to detect infringements and launch enforcement actions in the influencer marketing sphere.
- **Use the Digital Services Act (DSA) notably its broad definition of illegal content¹⁵,** to enhance consumer protection in the influencer marketing sector.
- **Raise awareness in the influencer marketing value chain** about their obligations towards consumers (influencers, their agencies, brands and online platforms).

¹⁴ DSA will be enforceable as of February 2024.

¹⁵ Under the DSA, 'illegal content' means any information that, in itself or in relation to an activity, including the sale of products or the provision of services, is not in compliance with Union law or the law of any Member State which is in compliance with Union law, irrespective of the precise subject matter or nature of that law;". Failure to comply with these requirements (EU or national) may render any content illegal within the scope of the DSA.

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1. Introduction

1.1. Influencer marketing in a snapshot

1.1.1. What are 'influencers' and what is 'influencer marketing' ?

What is an influencer: There is no legal definition of an “influencer” enshrined in EU law. However, the UCPD guidelines specifies that “an influencer is generally described as a natural person or virtual entity who has a greater than average reach in a relevant platform”¹⁶.

For the purposes of the UCPD, an influencer can qualify as a ‘trader’ or, alternatively, as person ‘acting in the name of or on behalf of a trader’. The UCPD guidelines specifies that influencers would qualify as ‘trader’ if they ‘frequently carry out promotional activities towards consumers on their social media accounts regardless of the size of their following’.

A European Parliament study on the impact of influencers on advertising and consumer protection in the Single Market¹⁷ (hereafter IMCO study) defines an influencer as “a content creator with a commercial intent, who builds trust and authenticity-based relationships with their audience (mainly on social media platforms) and engages online with commercial actors through different business models for monetisation purposes”.

Influencers can be categorized by the size of their ‘followers’:

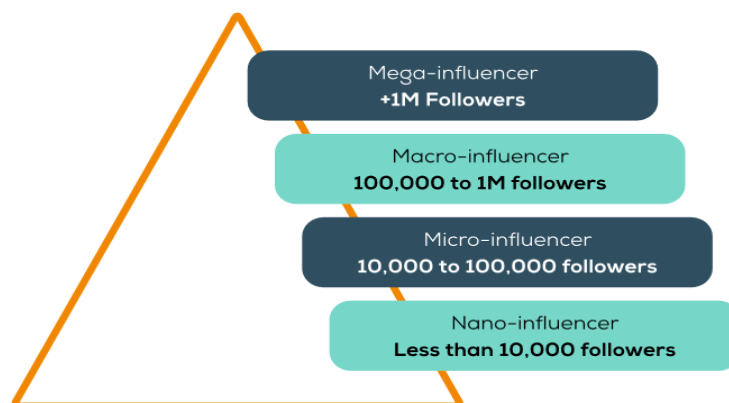


Figure 1 : Influencer Categorisation from the Irish CCPC report on Influencer Marketing (2022) ¹⁸

According to the IMCO study, the key elements defining influencers are¹⁹:

- **Content creation**, namely the service provided by influencers to other users.
- **Commercial intent**, which is driven by direct revenue from brands (monetary and non-monetary), by revenues from audience engagement or by platform compensation.
- **Monetisation**, namely the generation of revenue through different business models (including but not limited to influencer marketing).
- **Trust and authenticity**, namely the source of influence, related to the parasocial²⁰ relationship of trust established with the audience and the perceived authenticity and relatability of the content.

¹⁶ Unfair Commercial practices guidance, section 4.2.6. See here, last consulted on 04 July 2023.

¹⁷ The impact of influencers on advertising and consumer protection in the Single Market. Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies, Frithjof MICHAELSEN, Luena COLLINI et al., PE 703.350 - February 2022. Full study available [here](#). Last consulted on 04 July 2023

¹⁸ Competition and Consumer Protection Commission (CCPC) report on Influencer Marketing. Full report available [here](#). last consulted on 04 July 2023.

¹⁹ [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU\(2022\)703350_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf), last consulted on 20 June 2023.

²⁰ Parasocial relationships are one-sided relationships, where a media user becomes attached to and invested in a social media character. See IMCO study : the impact of influencers on advertising and consumer protection in

It is also worth noting that marketing industry and agencies representing influencers interests are now also using the term “content creators” instead of “influencers”. This wording is also being adopted by some statutory and self-regulation bodies across Europe²¹.

For the purpose of this report we will use the wording ‘influencers’.

What is ‘influencer marketing’: there is no definition of influencer marketing in EU law²². In this paper, we will use the definition provided by the European Commission in its updated UCPD guidelines²³ which states that “Influencer marketing involves the promotion of specific brands or products through influencers using the positive impact that influencers are likely to have on consumer perceptions”.

An influencer may be advertising products or services of a brand in exchange for remuneration (monetary or of any kind such as free products, services, trips, or experiences) or may be promoting their own products instead (“self-promotion”). Influencer marketing is polyforme and could be done via paid publications, affiliated contents (e.g. the influencers share a code or a discount link with their audience in exchange for a commission), retweets or a mention (“tag”) of the professional or the brand etc.

Such advertising method is increasingly popular among brands because it is flexible and effective. *On the one hand*, influencers have a multiplier effect which allows brands to reach out to large and new audiences. *On the other hand*, it also allows for very granular marketing practices by launching targeted campaigns - so called ‘micro-targeting’ - on niche audiences via ‘nano’ or ‘micro’ influencers recognized in their fields (e.g. gaming or automotive sectors etc.). This micro-targeting is all the more effective since the different platforms also proposed tools for brands to finetune the population they want to reach out to²⁴. Coupled with the impact of influencers personalised message to their audience and the strong relationship between them increase the “engagement” rate²⁵ of the followers.

Influencer marketing has revolutionised marketing campaigns. Traditionally, advertising was very controlled and regulated. Consumers could easily identify when they were facing an advertisement. Now, with influencer marketing, anyone can advertise. The line between editorial content and advertised content is more and more blurred for consumers. As influencer marketing is based on a strong relationship of trust between influencers and their followers on online platforms, it is a powerful vector and a huge opportunity for brands to reach the “relevant” consumers. **This strong relationship is likely to influence a decision of consumers and especially the youngest ones such as children or teenagers.**

the Single Market. Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies, Frithjof MICHAELSEN, Luena COLLINI et al., PE 703.350 - February 2022. Full study available [here](#), Last consulted on 04 July 2023.

²¹ See Competition and Consumer Protection Commission (CCPC) report on Influencer Marketing. Full report available [here](#). Last consulted on 04 July 2023

²² At national level, there is now one in France, enshired in the Article 1 of the new Loi n°2023-451 du 9 Juin 2023 visant à encadrer l’influencer commercial et à lutter contre les dérives des influenceurs sur les réseaux sociaux. See French [Journal Officiel](#) of the 10 June 2023.

²³ See UCPD guidelines, Section 4.2.6.

²⁴For example, TikTok explicitly propose to traders to target users between 13 and 17, <https://ads.tiktok.com/help/article/ad-targeting?redirected=1>, last consulted on 23 January 2023.

²⁵ According to the Influencer Marketing Hub, “the engagement rate in digital marketing is a metric that is used to analyze a brand campaign’s effectiveness. Engagement rates are what tell brand partners, account managers, basically anybody in the digital marketing world that consumers are actively engaging with a piece of content. To put it simply, engagement rates are what track how involved your audience is with your content”, see <https://influencermarketinghub.com/glossary/engagement-rate/>, last consulted on 04 July 2023.

1.1.2. A booming sector

It is estimated that since 2019, the market value of influencer marketing practices has more than doubled²⁶. Worldwide, the amount spent on influencer marketing exceeded 14 billion dollars in 2021, a 700% increase since 2016²⁷. This trend was even more exacerbated by the pandemic and the boom of platforms such as TikTok, Instagram etc.

According to the 2021 Social Media Marketing Industry Report, **88% of marketers surveyed stated that social media efforts “pay off”** and generate more traffic for their brands, more sales and interest in their products²⁸.

Several studies and surveys conducted at national level also demonstrate that brands have quickly understood the impact of influencer marketing and are devoting more and more of their marketing expenses to it. For instance, *in Finland*, it is estimated that 80% of the enterprises surveyed have at least one contract with influencers²⁹. *In France*, marketers declared they spent around 45% of their total marketing on influencer marketing per year³⁰. *In Italy*, the value of influencer marketing reached 280 million in 2021. *In Spain*, almost 80% of companies declared that they positively value their campaign via influencers³¹. These couple of figures demonstrate the rocketing growth of the sector.

1.1.3. Influencer marketing's impact on consumers

As of any marketing practice, the goal of influencer marketing is to convince consumers to buy the promoted product or service. Some might question the impact of influencers on their followers' decisions to buy or not a promoted product or service. However, **data is there and is clear.**

In 2019, in France, Germany, the United Kingdom, Australia, and the United States, a survey on the impact of influencer marketing on ‘consumer purchase decision-making’ was conducted. It revealed that among consumers who actively engage on social media platforms, the share of influenced purchases is high. The survey highlighted that 41% of users frequently discover new brands and products through influencers and that 80% of them also purchased the product directly via the influencer's link provided on the social media platform. The same survey revealed that 88% of the surveyed users stated that they were at least inspired by the post.

- See Rakuten Marketing, 2019, [Influencer Marketing – Global Survey – Consumers](#).

²⁶ The impact of influencers on advertising and consumer protection in the Single Market. Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies, Frithjof MICHAELSEN, Luena COLLINI et al., PE 703.350 - February 2022. Full study available [here](#). Last consulted on 04 July 2023.

²⁷ Idem.

²⁸ Social Media Examiner, 2021 Social media marketing industry report, how marketers are using social media to grow their businesses. Available at: <https://www.tractionwise.com/wp-content/uploads/2021/06/Industry-Report-2021-Final.pdf>.

²⁹ Indieplace, 2021, Vaikuttajamarkkinointi vuonna 2022 – miksi sille kannattaa leikata isompi pala kakkua ensi vuoden budjetista? Available at: <https://www.indieplace.fi/vaikuttajamarkkinointi-vuonna-2022/>, Last consulted on 04 July 2023

³⁰ Rakuten Advertising, 2021 Report. Available at: <https://rakutenadvertising.com/fr-fr/resources/rapport-mondial-influence/%20-%20https://blog.rakutenadvertising.com/fr-fr/insights/etude-influence-marketing-marketeurs/> -Last consulted on 04 July 2023.

³¹ BrandManic, 2018, Estudio sobre Marketing de Influencers en España, El mercado español de influencers, según los responsables de marketing. Available at: https://www.esan.edu.pe/conexion/actualidad/2019/05/10/Estudio_Marketing_de_Influencers_en_Espa%C3%B1a_2018.pdf. Last consulted on 04 July 2023.

Thus, because of the specific characteristic of the relationship between the followers and the influencers based of closeness, trust, expertise in specific topic and legitimacy, **the content of influencers is considered of high value by their followers³² and is therefore very likely to influence consumers purchasing decision.** Consumers also further consider input from influencers to be “own opinions” or “personal expressions” that are more trusted than “traditional” advertising coming from brands directly³³.

In a survey, performed by Open Evidence for BEUC³⁴, over half of the respondents report buying products or services recommended by influencers, highlighting the efficiency of this marketing technic.



Figure 2: From BEUC report, *Connected but unprotected: digital fairness in the eyes of consumers*.

At national level, different surveys clearly **demonstrate the significant impact of influencer marketing on consumers purchasing decisions^{35 36 37}.**

If influencer marketing is considered effective on consumers in general, it is even more so on vulnerable consumers such as children and teenagers³⁸. Such impact of influencer marketing is exacerbated for young consumers because of the the tailored presentation of the product or service by influencers and because children and teenagers in general have overall a low advertising literacy skill and are most prone to “influence”³⁹.

³² The impact of influencers on advertising and consumer protection in the Single Market. Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies, Frithjof MICHAELSEN, Luena COLLINI et al., PE 703.350 - February 2022, p. 43. Full study available [here](#). Last consulted on 04 July 2023.

³³ Idem.

³⁴ See BEUC report, *Connected but unprotected: digital fairness in the eyes of consumers*. Forthcoming summer 2023.

³⁵ In Italy, among followers of “mega-influencers”, around 54% of consumers surveyed indicated that they follow them because they provide good advices and pledge their expertise in specific topics. It is estimated that 20 million of Italians between 18 and 54 follow at least one influencer and that 85% of consumers claimed taking into account influencers opinions before buying a product. See Buzzzoole, Mondadori, Infovalue, 2021, *Italiani & Influencer*. Available at: <https://buzzzoole.com/resources/italiani-e-influencer/it>, last consulted on 05 July 2023.

³⁶ In France it is reported that one out of three Internet users follows at least one influencer on social networks. Three out of four followers have already made a purchase under their influence. 62% of followers are between 18 and 24 years old. See [here](#). Last consulted on 04 July 2023.

³⁷ In Ireland, in its 2022 report on social media influencers, the Irish consumer authority (CCPC) revealed that 66% of consumers surveyed had purchased products as a direct result of an influencer mentioning it. 60% of them also explained that they have recommended such products to their relatives and friends. See [here](#). Last consulted on 04 July 2023.

³⁸ For instance, a joint survey conducted in France, Germany, the United Kingdom, Australia, and the United States, highlighted that 80% of young consumers purchased products directly via the link provided via the influencer promotion and 88 % of surveyed consumers stated that they were at least inspired by the post . It is also reported that young consumers, between 15 to 24 are more inclined to buy a sponsored product. In Belgium, it is estimated that 85% of young people follow at least one influencer and a quarter of young people mentioned that they have bought at least one product from an influencer in the last three months. The impact of influencers on advertising and consumer protection in the Single Market. Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies, Frithjof MICHAELSEN, Luena COLLINI et al., PE 703.350 - February 2022, Full study available [here](#). Last consulted on 04 July 2023.

³⁹ De Veirman, M., Hudders, L., & Nelson, M. R., *What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research* (2019), available [here](#). Last consulted on 04 July 2023.

2. Hidden advertising & insufficient disclosure of commercial intents – an EU-wide issue

2.1. What does the law say?

At EU level, there is no specific legislation on 'influencer marketing'. However, the horizontal consumer law framework, so-called 'consumer law acquis' (Unfair Commercial Practices, Consumer Rights and Unfair Contract Terms Directives) - **remain fully applicable to influencer marketing practices.**

In the first place, the **Unfair Commercial Practices Directive** seems to be the most relevant EU tool to tackle problematic practices of influencers, including hidden advertising.

Under the UCPD, as for any kind of marketing, the failure to declare the commercial element in an influencer's content or practice in a clear and appropriate manner could amount to a misleading practice under general provisions of the **Articles 6 and 7 UCPD**.

As stated in the updated UCPD guidelines, the adequation of the disclosure, should consider *"the medium in which the marketing takes place, including the context, placement, timing, duration, language, target audience and other aspects. The disclosure must be sufficiently salient to adequately inform the average or vulnerable consumer that receives the content"*.

Furthermore, the UCPD Annex is of particular relevance for disclosure of commercial partnership. For instance, **point 11 of Annex I** prohibits practices which do not make it clear that a trader has paid for the promotion of a product in editorial content. Finally, a lack of transparency about commercial intent of user-generated content also increases the risk of breaching **point 22 of Annex I**, which prohibits the fact to falsely representing oneself as a consumer.

According to the UCPD guidelines⁴⁰, the commercial intent is considered to be present whenever an influencer receives any form of consideration for the endorsement. The presence of a contract and monetary payment is not necessary to trigger the application of these rules. This is also confirmed by the European Court of Justice in its Peek & Cloppenburg⁴¹ decision.

In parallel, other EU instruments provide for disclosure requirements, in particular the **Audiovisual Media Services Directive 2018/1808**⁴², the **eCommerce Directive 2000/31/EC**⁴³ and the **Digital Services Act**⁴⁴ require all influencers in the EU to disclose their commercial partnership as well as the brands for which this communication is made.

Furthermore, these requirements may also be supplemented by specific EU or national modalities of advertising related to certain products or services such as financial services, gambling, tobacco etc.

⁴⁰ See UCPD guidance 4.2.6.

⁴¹ See judgment of the Court (Sixth Chamber) of 2 September 2021, Peek & Cloppenburg KG, v Peek & Cloppenburg KG, Case C-371/20. Available [here](#). Last consulted on 04 July 2023.

⁴² See in particular Articles 9, 10 and 28b of the Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

⁴³ See Article 6 of the Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

⁴⁴ See Article 26 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act).

2.2. What is the problem?

It is clear from EU law that influencers must inform and display to consumers commercial communications that are integrated into their user generated content in a clear and transparent manner (be it videos, photos, audios, posts etc).

However, despite the current EU framework, the guidelines of national authorities or self regulatory bodies, and awareness raising campaigns, **hidden advertising remains widespread among content creators**. The IMCO study points out that the **lack of transparency, unclear disclosure of commercial intent** of user-generated content and the **lack of separation between editorial and commercial content** are the most common reasons for consumer complaints to the authorities and self regulatory bodies⁴⁵.

For instance, in December 2022, the Irish Competition and Consumer Protection Commission (CCPC) published a report on social media influencers which found that failure to label ads is widespread throughout the Irish influencer industry.⁴⁶

Idem *in the United Kingdom*, where in 2021, the Advertising Standards Authority (ASA), the UK's regulator of advertising published a report⁴⁷ highlighting the widespread lack of transparency of influencers towards consumers about paid promotion on Instagram⁴⁸.

In *France*, a recent investigation⁴⁹ by consumer protection regulator – the *Direction générale de la Concurrence, de la Consommation et de la Répression des fraudes (DGCCRF)* – revealed that 60% of influencers under scrutiny were non-compliant with consumer and advertising law and notably transparency requirements.

This lack of transparency is further exacerbated with new advertising methods that are emerging online. For example, we are witnessing a “gamification”⁵⁰ of ads with brand challenges led by influencers which encourage consumers to replicate funny dances using brand filters⁵¹. In such context, consumers, especially the young ones, just do not realise that they are promoting a product.

2.3. Why is the problem occurring?

As seen above, the Unfair Commercial Practices, the Audiovisual Media Services and eCommerce Directives, provide for information disclosure obligations. **But the 3 instruments leave major open questions:**

- **How**⁵² these disclosure obligations should be made (label, hashtags, wording to be used etc.),

⁴⁵ See IMCO study, p.53.

⁴⁶ <https://www.ccpc.ie/business/ccpc-research-on-social-media-influencers-highlights-the-need-for-improvements-in-labelling-influencer-ads/>, last consulted on 04 July 2023. The Irish Competition and Consumer Protection Commission (CCPC) published its 2022 [Social Media Influencers report](#), which found that failure to label ads is widespread throughout the industry.

⁴⁷ <https://www.asa.org.uk/static/dd740667-6fe0-4fa7-80de3e4598417912/Influencer-Monitoring-Report-March2021.pdf>, last consulted on 04 July 2023.

⁴⁸ The authority screened over 24,000 individual 'Stories', posts, IGTV and 'reels' across 122 UK-based influencers revealed a disappointing overall rate of compliance with the rules on making it sufficiently clear when they were being paid to promote a product or service. According to the ASA, only 35% of the Instagram "stories" screened were clearly labelled and obviously identifiable as advertising. Full report available [here](#). Last consulted on 04 July 2023.

⁴⁹ See DGCCRF Press release of 23 January 2023; available here :

https://www.economie.gouv.fr/files/files/directions_services/dgccrf/presse/communiqu%C3%A9/2023/CP-Marketing-d%27influence-des-influenceurs.pdf?v=1674467615, Last consulted on 04 July 2023.

⁵⁰ Gamification is the 'process of making activities more game-like', [Kevin Werbach \(2014\)](#) . Gamification is increasingly used in social marketing using techniques such as scoring, incentivizing, and competition and enable businesses to attract and engage customers in a fun way and to collect data.

⁵¹ See BEUC report TikTok without Filters, a consumer law analysis of TikTok's policies and practices (2021), available here :

https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-012_tiktok_without_filters.pdf

⁵² See R. Ducato, One Hashtag to Rule Them All? Mandated Disclosures and Design Duties in Influencer Marketing Practices, CRIDES Working Paper Series no. 4/2019; to be published in Ranchordás, S. and Goanta, C. (Eds), The Regulation of Social Media Influencers, 2019, Edward Elgar Publishing, Forthcoming.

- **How much**⁵³ disclosure is needed and in which contexts content creators should be transparent,
- **When** such disclosure requirements should take place to ensure timely information to consumers.

To fill these gaps, there has been a multiplication of sometimes contradictory national guidelines from consumer protection authorities and national advertising regulators. There has also been a proliferation of self-regulatory guidances and codes of conduct for the industry⁵⁴.

In addition, the last few years we have seen a multiplication of national courts and authorities decisions, sometimes contradictory, on influencer marketing and disclosure requirements⁵⁵.

De facto, this has led to different obligations and recommendations for influencers from one EU Member State to another, resulting in different level of consumer protection despite similar hidden advertising practices across the EU : different disclosure obligations, different interpretations of the legislation, fragmented enforcement etc.

At international level, regarding disclosure practices, several initiatives tried to gather best practices and establish standards⁵⁶, but as highlighted by the European Commission Behavioural study on Advertising and Marketing practices in online social media, they are not specific enough and their acceptance and respect by the influencers and the marketing industry remains unclear.

2.4. What do we propose?

In the face of these common and repeated disclosure failures, it is a high time **that an EU approach to tackle issues raised by influencer marketing is developed**.

2.4.1. Provide for a definition of "influencer marketing" and clarify when disclosure rules apply

Defining the term "influencer marketing" is not an easy task. Several definitions have been proposed to date⁵⁷. However, in order to frame the practice it is necessary to provide a **broad definition**.

BEUC would recommend the following:

*"[Influencer Marketing] is an action whereby a natural or legal person communicates, by electronic means, a content intended to promote directly, or indirectly, goods, services or any other causes, with a commercial intent, to an audience with whom said person builds relationships (mainly on social media platforms) and engages online, or otherwise, with commercial actors through different business models for monetisation purposes"*⁵⁸.

⁵³ European Commission, 2018, Behavioural study on advertising and marketing practices in online social media, available [here](#). Last consulted on 04 July 2023.

⁵⁴ See IMCO study, Section 4 : The Regulation of Influencers.

⁵⁵ See R. Ducato, One Hashtag to Rule Them All? Mandated Disclosures and Design Duties in Influencer Marketing Practices, CRIDES Working Paper Series no. 4/2019; to be published in Ranchordás, S. and Goanta, C. (Eds), The Regulation of Social Media Influencers, 2019, Edward Elgar Publishing, Forthcoming.

⁵⁶ See for instance [EASA best practices](#) on online behavioural advertising (2018) or ICPEN Guidelines for Digital influencers [guidelines](#) (2016). Last consulted on 04 July 2023.

⁵⁷ The proposed definition is inspired from the one proposed in the IMCO study : the impact of influencers on advertising and consumer protection in the Single Market. Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies, Frithjof MICHAELSEN, Luena COLLINI et al., PE 703.350 - February 2022, Section 2, Full study available [here](#). Last consulted on 04 July 2023.

⁵⁸ Idem, section 2.3.

The size of the audience of the influencer should be irrelevant under this new definition because:

- The proportion of fake followers⁵⁹, or likes etc. is unfortunately still widespread on social media ^{60 61 62}.
- So-called niche influencers and micro influencers active in specific sectors (e.g. gaming, automotive etc.) despite a smaller audience, have a higher "engagement rate" of their community than mega-influencers^{63 64}.

It should also be clarified, by law, that influencers will be considered as "trader" or "acting on the behalf of a trader", and therefore subject to information and transparency obligations, as soon as they receive **any form of consideration from a brand**, including in a form of payment, discounts, partnership contracts, percentage of affiliate links, free products (including unsolicited gifts), trips or invitations to events, etc. It should also be clear that the **presence of a contract and monetary payment is not required to trigger the disclosure requirement** under the rules as ruled by the European Court of Justice in its *Peek and Cloppenburg*⁶⁵ decision.

Similarly, it should be clear that the fact that a brand has provided instructions on how the promotion should be done by the influencer (e.g. providing a script) **should not be relevant**. Indeed, instructions or not, influencers are still promoting a product or service. Moreover, given the specific relationship that the content creators have with their community, giving the influencer *carte blanche* on how to personalize the promotion of a product could even have a bigger impact for brands than providing instructions.

This regulatory approach would ensure a harmonised definition of influencer marketing and clarify, on a European scale, when influencers will be subject to transparency obligations, and more broadly, to consumer law legislations.

2.4.2. Establishment of EU-wide 'disclosure standards'

The consumer law *acquis* and the relevant EU legislation are silent as to "How" and "How much" disclosure to consumers must be done⁶⁶. **An EU-wide regulatory approach** would provide more certainty to all actors and **facilitate enforcement for the competent authorities**.

Such EU standards should clarify where and when to put labels and hastags and how influencers must word it. They should be established for all types of devices available (desktop computer or mobile phone etc.). Such standards should be flexible enough to capture new influencer marketing practices or online platforms that may appear. They should be evaluated with behavioural insights and updated on a regular basis following a consultation of the relevant stakeholders (e.g every 2 years).

⁵⁹ Fake followers are accounts that have been bought to increase the number of followers.

⁶⁰ The Influencer Marketing Hub revealed in its 2022 report, "[State of Influencer Marketing](#)", that despite diminishing in the last years, the proportion of Instagram influencer account frauds remained high. It is reported that "On average , 49,23% of influencers globally are affected by fraud (comments and "likes" from bots, giveaway comments, comments from Pods, etc.). Last consulted on 04 July 2023.

⁶¹ In March 2022, following an action of the ACM, the Dutch consumer protection authority, six Influencers stop using fake likes and fake followers. In addition, ACM in also pointed out to tens of thousands of buyers of fake likes and fake followers that they mislead consumers with such practices.

⁶² In 2021, the Dutch consumer protection authority (ACM) forces online store to stop using fake likes and fake followers, <https://www.acm.nl/en/publications/acm-forces-online-store-stop-using-fake-likes-and-fake-followers>, Last consulted on 04 July 2023..

⁶³ See trusted shops article, *Pourquoi miser sur les micro-influenceurs et comment les trouver*, available online [here](#). Last consulted on 04 July 2023.

⁶⁴ See AdWeek newspaper article, *Micro-Influencers Are More Effective With Marketing Campaigns Than Highly Popular Accounts*, available online [here](#). Last consulted on 04 July 2023.

⁶⁵ See Judgment of the Court (Sixth Chamber) of 2 September 2021 - Peek & Cloppenburg KG, v Peek & Cloppenburg KG.Case (C-371/20) available here : <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62020CJ0371> , Last consulted on 04 July 2023.

⁶⁶ European Commission, 2018, Behavioural study on advertising and marketing practices in online social media, available [here](#). Last consulted on 04 July 2023.

It is worth noticing that this call for clarification and simplification is one of the recommendations of the recent Irish Competition and Consumer Protection Commission (CCPC) report on influencer marketing⁶⁷. The report found that Irish social media users indicated that requiring influencers to use a small number of tags would reduce inconsistencies in labelling methods amongst influencers.

This is also a recommendation of the European Commission behavioural study on advertising and marketing practices in online social media, which suggests that the disclosure duties and legal responsibilities under the UCPD should be clarified⁶⁸.

2.4.3. Make disclosure terms clear to consumers

Currently, several terms are used by influencers, sometimes ambiguous, to indicate a commercial partnership. The terms to be used differ depending on court or authority decisions, existing guidelines, codes of conduct, but also the tools proposed by video sharing platforms or social media, when available. In practice these terms range from "affiliated content", "gifts", "paid partnership", "ad", "sponsored" etc. depending on the type of partnership between the influencer and the brand.

There is a need for a harmonised approach which will make clearer for consumers the commercial intent of a content.

- It is indispensable that a **clear and unique term, namely "advertisement"** is used to increase transparency. From a consumer point of view, the type of contract or remuneration between influencers and brands is irrelevant and should not lead to different term formulation.

Furthermore:

- **Abbreviations should be forbidden** (e.g. "advertisement" should be used instead of "ad")
- A specific wording could be used for promotion by influencers of their own brand like **"self-promotion"** as proposed by the Polish Office of Competition and Consumer Protection (UOKiK) in its recent guidelines⁶⁹.
- Influencers should use **an official language of the Member States** they are operating in.
- Finally, as per the French legislation on influencers, BEUC supports the introduction of two additional disclosure obligations **regarding "edited" or "altered" content** (e.g. when a picture has been photoshopped), and **"virtual picture"** or content for virtually created images (via AI for instance)⁷⁰. According to the French legislation, the mentions should be displayed in a clear, legible and identifiable manner on the image or video, in all formats and throughout the whole viewing experience.

⁶⁷ <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2022/12/2022.12.12-172837-CCPC-Influencer-marketing-report.pdf>, Last consulted on 04 July 2023.

⁶⁸ European Commission, 2018, Behavioural study on advertising and marketing practices in online social media, available [here](#), see point 3.3.1 : Options for regulatory action.

⁶⁹ See Recommendations of the President of UOKiK pertaining to the tagging of advertising content by influencers on social media (2022), available [here](#). Last consulted on 04 July 2023.

⁷⁰ See Article 5-II (1° & 2°) of the Loi n°2023-451 du 9 Juin 2023 visant à encadrer l'influencer commercial et à lutter contre les dérives des influenceurs sur les réseaux sociaux. See French [Journal Officiel](#) of the 10 June 2023.

2.4.4. Clarify when disclosure must happen

National authorities and courts have different approaches about "when" such disclosure requirements should take place. However, content created by influencers can last several hours, such as a video on Youtube etc.

BEUC considers that a simple obligation to indicate at the beginning of a video via a label that a content contains a commercial communication is not sufficient. Consumers may then have difficulty to distinguish when watching the influencer content where the commercial part is. This is particularly the case for young consumers who find it more difficult to identify online advertisements⁷¹.

BEUC considers that the disclosure "momentum" should be defined and harmonised to avoid the different interpretations and to enhance consumer protection.



Figure 3: Snapshot of a Youtube label at the beginning of a 16 minutes "sponsored video"⁷²

For videos, BEUC recommends that the "advertised nature" should be communicated to consumers **just before and during the whole "sponsored fragment"**, and not only at the beginning of a user generated content. The same goes for audio content like podcasts, as also envisaged by the Polish Office of Competition and Consumer Protection (UOKiK)⁷³.

In France, the recently adopted legislation on influencers⁷⁴ take the same line and established that each photo or video containing a product placement must contain the explicit mention "advertisement" or "commercial collaboration" in a clear, legible and identifiable manner, during the entirety of the sponsored part⁷⁵, i.e. embedded.

⁷¹ European Commission, 2018, Behavioural study on advertising and marketing practices in online social media, available [here](#). Last consulted on 04 July 2023.

⁷² Snapshot taken on 01.02.2023.

⁷³ See Recommendations of the President of UOKiK pertaining to the tagging of advertising content by influencers on social media (2022), available [here](#). Last consulted on 04 July 2023.

⁷⁴ Loi n°2023-451 du 9 Juin 2023 visant à encadrer l'influenceur commercial et à lutter contre les dérives des influenceurs sur les réseaux sociaux. See French [Journal Officiel](#) of the 10 June 2023.

⁷⁵ Idem, See Article 5-I. However, BEUC would favor the use of a single and unique wording for disclosure, namely "Advertisement". See Section 2.4.3 of the paper.

For videos, **one possibility could be also to introduce an “advertising insert” that would appear during the whole sponsored part.** For audio’s content, leads-in should be used to help consumers distinguish between editorial and sponsored content. **Coupled with a simplified and unique wording** to be used for transparency requirements, this would allow:

- Consumers (especially the young ones) to be clearly informed of the sponsored nature of the content and when the promotion is taking place.
- Influencers to know how and when to segment their content between advertised and editorial content.
- Enforcers to more easily identify breaches of transparency obligations.

For short videos like Instagram *Reels*⁷⁶ and *Stories*⁷⁷, *Snaps*⁷⁸, TikTok posts etc. that are sponsored, BEUC considers that the **disclosure labels should remain in-video for the duration of the whole post**⁷⁹. Furthermore, partnerships are also happening via series of short videos (e.g. Instagram stories). For BEUC, in this context, the commercial nature of the video needs to be clearly visible in all the videos and not only during the first one⁸⁰
⁸¹,

The commercial character of the contents should also be presented upfront to consumers in the description of the video, podcast, blog, reel, story etc. when a description tool is available.

Of course, in line with the requirement of the article 5(3) UCPD, all the different “transparency requirements” should be adapted and understandable to vulnerable consumers, in particular to children and teenagers which are massively following influencers⁸²

2.4.5. Amend the UCPD Annex to include ‘user-generated content’

The updated UCPD guidelines⁸³ states that an influencer would qualify as a ‘trader’ or alternatively or ‘acting in the name of or on behalf of a trader’. It clarifies that persons **“frequently carry[ing] out promotional activities toward consumers on their social media accounts are likely to qualify as ‘traders’”**.

Such clarification, **while welcome, does not cover certain practices that affect consumers.** Thus, a content creator who occasionally promotes products, or is only starting to conduct influencer marketing campaigns, despite a clear commercial intent would not be covered by the transparency requirements applicable to ‘traders’ because it does not meet the ‘frequency’ criteria. However, in such case a product is still promoted to consumers, and this should be indicated as such by the content creator.

To address this legal uncertainty of whether a content creator should be subject to the duty of disclosure, one solution would be to amend **Point 11 of the UCPD Annex** as proposed in the European Commission behavioural study on Advertising and Marketing Practices in online social media⁸⁴. Currently, Point 11 states that:

⁷⁶ <https://about.instagram.com/blog/announcements/introducing-instagram-reels-announcement> Last consulted on 04 July 2023.

⁷⁷ <https://about.instagram.com/features/stories> , Last consulted on 04 July 2023.

⁷⁸ <https://influencehunter.com/2021/12/10/how-to-use-snapchat-for-influencer-marketing/> , last consulted on 04 July 2023.

⁷⁹ Similar obligation is now enshrined in the French *Loi n°2023-451 du 9 Juin 2023 visant à encadrer l’influencer commercial et à lutter contre les dérives des influenceurs sur les réseaux sociaux*. See French *Journal Officiel* of the 10 June 2023.

⁸⁰ See Section 4.2.6 of the UCPD Guidelines.

⁸¹ See Recommendations of the President of UOKiK pertaining to the tagging of advertising content by influencers on social media (2022), available [here](#). Last consulted on 04 July 2023.

⁸² This is without prejudice to further recommendations by BEUC to change article 5(3) UCPD that we will propose in an upcoming position paper.

⁸³ Section 4.2.6 of the UCPD Guidelines.

⁸⁴ European Commission, 2018, Behavioural study on advertising and marketing practices in online social media, p.47. Available [here](#). Last consulted on 04 July 2023.

11. 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).

Point 11 of the UCPD Annex should be amended to integrate the concept of "user-generated content". This notion of user-generated content is broader in scope and would apply to all contents uploaded and shared by any content creator on online platforms and social media, irrelevant if they are promoting products on a sparse or recurrent basis.

Furthermore, it should be clarified that **Point 11 applies to "media" in the traditional sense, but also to promotion conducted by content creators via "social media" and "online video sharing platforms".** This would bring more legal certainty and provide for uniform protection of consumers.

*11. Using editorial content in the media **or a third party via user generated content on a social media or video sharing platform**, to promote a product **or a service** where a trader has **directly or indirectly** paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer.*

Point 28 of the UCPD Annex could also be amended to cover direct exhortation to children via content creators:

*28. Including in an advertisement, **or in user-generated content on social media or video sharing platform**, the trader has **directly or indirectly paid for**, a direct exhortation to children to buy advertised **or promoted** products **or services** or persuade their parents or other adults to buy advertised **or promoted** products **or services** for them. This provision is without prejudice to Article 16 of Directive 89/552/EEC on television broadcasting.*

2.4.6. Introduce a rebuttable presumption that influencers are in a commercial relationship with traders

A solution to avoid the difficulties of establishing whether content published by an influencer is advertised or not, could be **to introduce a rebuttable presumption that it is.**

In this context, the burden of proof would be reversed and it would be for the influencer to demonstrate that there is no commercial collaboration with a trader.

The introduction of a rebuttable presumption, coupled with the introduction of a mandatory contract between the influencer and the agency⁸⁵ would facilitate the detection of potential infringements by the relevant authorities.

⁸⁵ See Section 3 below.

BEUC recommendations

- The UCPD should be amended to define what is "influencer marketing". It should be clarified that any publication from a content creator against any kind of consideration, should be sufficient to qualify as commercial intent and for influencers to be subject to transparency requirements.
- EU wide 'disclosure standards' should be established to determine how, how much and when disclosure duties should apply (exact terms to be used, momentum, in-video insert etc.),
- Points 11 and 28 of the UCPD Annex should be amended to cover the concept of "user-generated content".
- To facilitate enforcement against hidden advertising, introduce a rebuttable presumption that influencers are in a commercial relationship with traders.

3. Clear liabilities in the influencer value chain should be established

When it comes to influencer marketing, several key actors should be considered:

- **Influencers** promoting products or services,
- **Brands** that connect with influencers to promote their products or services and to increase their visibility,
- **The online platforms (social media and video sharing platforms)** which allowed the various players to connect on an unprecedented scale.
- **Influencer agencies:** In recent years, the influencer marketing sector has become more professional and has seen the emergence of influencer agencies acting as agents or intermediaries between brands and influencers.

These different actors constitute what we can call the "**influencer value chain**". However, the professionalisation of the sector **should be accompanied by clear rules, obligations and liabilities between the different actors** to ensure the respect of consumers' rights.

3.1. What does the law say?

Influencers, when engaging in commercial partnerships are subject to the transparency obligations of the Unfair Commercial Practices Directive, the E-Commerce Directive 2000/31/EC and the Audiovisual Media Services Directive (EU) 2018/1808. The latter requires all influencers in the EU to disclose their commercial communication as well as the company for which this communication is made. This disclosure and transparency obligation is applicable in every EU Member State. Thus, an influencer must indicate in a clear and understandable way that their post/content is an advertisement.

3.2. What is the problem ?

However, the problem of hidden or insufficient disclosure of advertising is still the most reported one when dealing with influencer marketing⁸⁶ and it is unclear whether the Unfair Commercial Practice Directive, and other transparency requirements defined in EU legislations apply also to the intermediaries of the influencer marketing sector (such as influencer marketing agencies).

3.3. Why is the problem occurring?

The current EU legal framework, as pointed out by the behavioural study on advertising and marketing practices in online social media of the European Commission does not answer precisely '*how and how much disclosure is required, **and who is responsible for it***'.⁸⁷

Currently, the consequences of a failure to clearly display the commercial element in user-generated content **fall primarily on influencers promoting the products or services**.

Even if the updated UCPD guidelines were to clarify that a lack of transparency could be attributed both to the influencer or to the trader/brand that has engaged with the influencer and benefits from the endorsement notably for lack of professional diligence under Article 5 UCPD⁸⁸, this remains on specific occasions and on a case-by-case basis.

Influencer agencies often establish contracts for commercial partnerships but are not regulated at EU level⁸⁹. However, **as middlepersons and advertising sector professionals, influencer agencies are well-placed (and sometimes better placed)⁹⁰ to guide influencers and ensure that they respect the applicable laws**.

Furthermore, influencer agencies can be based in the EU and represent the interests of influencers based outside the EU. They should therefore have an obligation to help influencers comply with EU and national law requirements, notably transparency requirements.

Traders are also better placed than influencers to know the specific legislation applicable to the products or services they are promoting via influencer marketing campaigns. This is even more the case if the product or service they promote is strongly regulated (alcohol, gambling, financial services etc.).

⁸⁶ See IMCO study on the impact of influencers on advertising and consumer protection in the Single Market. Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies, Frithjof MICHAELSEN, Luena COLLINI et al., PE 703.350 - February 2022. Full study available [here](#). See also CCPC report (2022) on influencer marketing, available here : <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2022/12/2022.12.12-172837-CCPC-Influencer-marketing-report.pdf>. Last consulted on 04 July 2023.

⁸⁷ European Commission, 2018, Behavioural study on advertising and marketing practices in online social media, Section 3.3.1. Available [here](#). Last consulted on 04 July 2023.

⁸⁸ See Section 4.2.6 of the UCPD Guidelines

⁸⁹ In France there is now an official definition of influencer agents. According to the Article 7-I of recently adopted French legislation, the activity of an influencer agent consists of representing, on a commercial basis, natural or legal persons who exert commercial influence on legal or natural persons and, where applicable, their representatives, with the aim of promoting, for consideration, goods, services or any cause whatsoever (free translation).

⁹⁰ Industry figures reveal that advertisers start contacting influencers for partnership when a simple 5 000 followers' threshold is reached, which is very low. In practice, this means that many platform users, with low or no knowledge at all of consumer law, can qualify and act unconsciously as "micro-influencers", having partnership with brands, exposing consumers to potentially unfair practices and, exposing themselves to possible fines in case of non-compliance with consumer law rules. See for instance, See *Le Monde* newspaper article, *Comment réguler le Far West des influenceurs*, published on 08.01.2023, available here : https://www.lemonde.fr/economie/article/2023/01/08/comment-reguler-le-far-west-des-influenceurs_6157077_3234.html. Last consulted on 06.02.2023.

“Influencers, unlike celebrities, can be anywhere. They can be anyone”

-Influencer Marketing Hub 2023 [report](#).

In practice, in absence of clear liability rules between the different actors established by law, **there is no incentive for influencer agencies or brands promoting their products to ensure that influencers are respecting disclosure requirements.**

A survey conducted by Reech, a French agency connecting influencers to brands, provides some striking data⁹¹ in this regard. Even though brands, influencer agencies are professionals in the advertising industry, the survey reveals that among the surveyed brands using influencer marketing campaigns to promote their products:

- Only 53% required that the commercial partnership is mentioned in a transparent way by the influencer.
- 44% still do not require the influencer to mention the business relationship between them and,
- 3% even formally require that influencers not mention this relationship.

This should be addressed by the Digital Fitness Check of EU Consumer Law followed by legislative proposals to tackle the related problems for consumers.

3.4. What do we propose?

3.4.1. Introduce joint and several liability between influencers, their agencies and traders

For BEUC, all actors in the influencer value chain – influencers, agencies, brands – should have clear liabilities to ensure compliance with EU and national applicable law.

While it is obvious that the obligations of transparency and compliance with consumer law rest on influencers, since they ultimately promote the product or the service to their followers, **a joint and several liability between the influencers - their agencies (if any) - and the brands, should be introduced by law** for :

- non-compliance with applicable law (displaying obligation, promotion of forbidden products etc.) toward enforcers and regulators, and,
- in case of damage caused to consumers by a promoted product or services, as per the new French legislation on influencer marketing⁹².

⁹¹ See IMCO study on the impact of influencers on advertising and consumer protection in the Single Market. Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies, Frithjof MICHAELSEN, Luena COLLINI et al., PE 703.350 - February 2022, p.54. Full study available [here](#).

⁹² Article 8 – III of the new Loi n°2023-451 du 9 Juin 2023 visant à encadrer l’influencer commercial et à lutter contre les dérives des influenceurs sur les réseaux sociaux. See French [Journal Officiel](#) of the 10 June 2023.

3.4.2. Clarify the obligations between influencers and their agencies

Influencer marketing agencies have multiplied in recent years and play now a key role in the influencer marketing sector⁹³. **As their role in the sector is growing, this should go hand-in-hand with more responsibilities.**

It should be clarified by law that influencers and agencies should **jointly** be obliged to verify, before any influencer marketing campaign, that:

- the brand they partner with exists,
- the activity it is conducting is legal,
- the products/services to be promoted comply with EU standards and are legal under national and European law.
- the brand's terms and conditions and policies comply with consumer law and that consumers will be able to easily exercise their rights (right of withdrawal, legal guarantees etc.).

Furthermore, the EU should introduce an obligation for influencers and their agencies, when entering into a commercial partnership with a brand and irrespective of the type and value of the consideration received⁹⁴, **to establish a contract with mandatory information.** This was recently enshrined in the new French legislation on influencer marketing⁹⁵.

Inter alia, such contract should:

- Recall the obligations of the influencers towards consumers (transparency etc.) and the legal consequences in case of a breach.
- Contain information related to the identity of the trader that will be promoted (e.g. their postal, phone and email contact information, a contact email address in case of consumer complaints) and establish that the contact information of the brands should be given to consumers for each promoted post to allow them to easily raise complaints.

Influencers and their agencies (where applicable), who engage in commercial cooperations with traders should **keep a "record" of the partnership they had with brands**, as well as detailed contacts of the brands they have cooperated with. This to avoid 'hit-and-run' practices where rogue traders use influencers to promote poor quality products and then disappear after a few weeks.

This way, consumers who bought products through an influencer (affiliate links, etc.), will be able to trace the contact details of the merchants for several months or years and be able to enjoy their basic consumer rights (e.g. right of withdrawal or warranty rights). **This will also facilitate enforcement by authorities.**

All influencers from outside the European Union who exert their toward the public of one or more EU Member States should be obliged to have a representative on the territory of

⁹³ It is now estimated that, woldwilde, the number of agencies for influencer has grown from 335 companies in 2016 to around 1.120 in 2019. See IMCO study on the impact of influencers on advertising and consumer protection in the Single Market. Full study available [here](#).

⁹⁴ French legislation (Article 8 - II) states that persons defined as influencers are not subject to the obligation to establish a contract with compulsory mentions when the remuneration for the commercial influencing activity concerned or the total cumulative value of the benefit in kind granted in exchange for it is less than an amount to be defined a Conseil d'Etat Decree. BEUC opposed this provision as it would, in our view, exclude from the scope numerous "nano" and "niche" influencers. All actors, irrelevant there size or the type and amount of the consideration should be subject to this obligation.

⁹⁵ Loi n°2023-451 du 9 Juin 2023 visant à encadrer l'influencer commercial et à lutter contre les dérives des influenceurs sur les réseaux sociaux. See French [Journal Officiel](#) of the 10 June 2023.

the Member States they target consumers, even if incidentally. A similar line was adopted by the French regulator⁹⁶.

Finally, **influencers should also be obliged to subscribe to a civil insurance that could be activated if something goes wrong for consumers.**

Coupled with a joint and several liability, this would ensure a better compliance with consumer rights and would also facilitate enforcement by competent authorities.

3.4.3. Brands should have a legal duty to monitor their influencer marketing campaigns

Brands sponsoring and remunerating influencers in any kind, should also have **an obligation** – in EU legislation – **to monitor the compliance by their sponsored influencers** with EU and marketing law applicable in the specific country they are operating.

Traders are better placed than influencers to know the specific legislation applicable to the products for which they are conducting marketing campaigns.

At national level, several authorities and court rulings already consider influencers and traders to be jointly liable for insufficient ad disclosure.

- *In Norway*, a trader re-posted social media posts by influencers that promoted their products in return for consideration but failed to adequately label their posts as commercial communications. A national court held the trader liable for not taking necessary measures to ensure compliance with consumer law, such as ensuring transparency, and having control mechanisms to bring infringements to an end⁹⁷.
- *In Belgium*, the recommendation on online influencers^{98 99} states that whoever places the post, the online influencer is responsible for breach of this recommendation. It also clarifies that traders requesting the placement of advertising posts, networks, agencies, platforms and other parties involved in social media marketing may also be held liable for violations of this recommendation. **The advertiser can therefore be held liable for content posted by influencers and has a duty to monitor them.**
- *In the Netherlands*, in 2022, the Advertising Code Committee (ACC) ruled that **advertisers have their own independent duty to check whether the influencer is actually complying with the rules**, notably the Advertising Code for social media (RSM)¹⁰⁰. The advertiser must take active action and check for himself whether the influencer is being clear¹⁰¹.
- *In the United Kingdom*, **brands which use influencers to advertise their products also have a responsibility to be transparent with consumers and make sure that advertising on social media platforms is properly labelled.** The Competition and Markets Authority (CMA) also published guidance¹⁰² for

⁹⁶ <https://www.legifrance.gouv.fr/download/pdf?id=LsFRbD6JvPkRailnsjmCz81EHFQ2DqWXsjxXY-a5RFQ=>, last consulted on 15/06/2023.

⁹⁷ Norwegian Market Council, MR-2021-349: Sports Nutrition AS.

⁹⁸ See RECOMMANDATIONS DU CENTRE DE LA COMMUNICATION EN MATIERE D'INFLUENCEURS, available here : https://www.jep.be/wp-content/uploads/2022/04/influencers_FR.pdf

⁹⁹ <https://www.lydian.be/sites/default/files/files/2021-10/Chambers%20Advertising%20%26%20Marketing%202021%20Global%20Practice%20Guide.pdf>, last consulted on 04 July 2023.

¹⁰⁰ See Dutch Advertising Code for Social Media & Influencer Marketing (RSM), available [here](#). Last consulted on 04 July 2023.

¹⁰¹ <https://www.lexology.com/library/detail.aspx?q=f6fec918-4105-41e4-92dc-220a252d8737>, last consulted on 04 July 2023.

¹⁰² <https://www.gov.uk/government/publications/businesses-and-social-media-endorsements>, published on 03.11.2022. Last consulted on 04 July 2023.

businesses to clarify how they can reduce the risk of hidden advertising. It recommends, inter alia, to:

- Ensure that content creators understand their legal obligations before posting as a result of being sent a gift, or entering into an agreement to publish content-based advertising,
- Check that published content is properly identified as advertising, and if not, taking steps to rectify the content to accurately reflect the commercial relationship.

BEUC recommendations

1) Spell out in EU law that all actors in the influencer value chain – influencers, agencies, brands – have a joint and several liability. This to ensure their compliance with EU and national law applicable toward enforcers, and liability for any damage caused to consumers.

2) Oblige in EU law brands remunerating influencers in any kind to monitor the compliance by their sponsored influencers with EU and marketing law applicable in the specific country they are operating.

3) Clarify the obligations between influencers and their agencies (e.g. legality of the product with national law etc.).

4) Introduce a number of obligations at EU level:

- Influencers and their agencies, when entering a commercial partnership with a brand, must establish a contract with mandatory information as recently enshrined in French legislation¹.
- Influencers based in a non-EU country must have a representative on the territory of the Member States where they target consumers, even if incidentally.
- Influencers must cover the risk of their activities by subscribing to a civil insurance that could be activated if something goes wrong for consumers.

4. Influencer Marketing and online platforms

4.1. What does the law say?

- *The Unfair Commercial Practices Directive (UCPD)*

Online platforms such as social media platforms enable their users to create accounts and interact with each other. **They provide the technical infrastructure** for influencers to share information and content, and to traders to reach out to influencers to promote their products or services. Platforms gain revenues from the activities of influencers, as consumers are spending more and more time on their services¹⁰³.

¹⁰³ See IMCO Study on the impact of influencers on advertising and consumer protection in the Single Market. Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies, Frithjof MICHAELSEN, Luena COLLINI et al., PE 703.350 - February 2022. Full study available [here](#). Last consulted on 04 July 2023.

However, as recognised by the updated UCPD guidelines, “*social media platforms increasingly feature commercial practices that may be problematic under the UCPD and EU consumer law more broadly, such as: [...] misleading influencer marketing[...].*”

As facilitators and key players in the influencer marketing sector, online platforms are in a unique position to make sure that their users can be in compliance with EU consumer law (“compliance by design”)¹⁰⁴.

The UCPD applies to platforms, including social media, as recalled by the UCPD guidelines. Consequently, all types of commercial communications on social media platforms shall be disclosed. In particular “*the prohibitions against hidden advertising in Article 7(2) and point No 22 of Annex I UCPD could be invoked both against social media platforms and third-party traders using a social media platform*”¹⁰⁵.

In addition, as many users of social media and video sharing platforms are children and teenagers, article 5(3) UCPD remains fully applicable and the disclosures of commercial communications must be understandable for the likely targeted audience, considering the specific circumstances of each case and the environment of the specific social media platform. Finally, **point 28 of the UCPD Annex** which prohibits direct exhortations to children in commercial communications is also applicable.

Furthermore, **online platforms used for the promotional activities are also subject to their professional diligence obligation** under article 5(2) UCPD. This includes: the obligation to take appropriate measures to enable third party traders to comply with their obligations under EU law, e.g. to provide specific and appropriate disclosure tools in the platform’s interface¹⁰⁶.

- **The Audiovisual Media Services Directive (AVMSD)**

Specific requirements for video sharing platforms are also defined in the AVMSD. In particular, Article 28b(3)(c) AVMSD specifies that: *Member States shall ensure that all video-sharing platform providers under their jurisdiction apply such measures. [...] Those measures shall consist of: [...]*

*(c), having **a functionality for users** who upload user-generated videos **to declare whether such videos contain audiovisual commercial communications** [...].*

- **The Digital Services Act (DSA)**

The DSA, that will be fully applicable as of February 2024, requires¹⁰⁷ that **digital platforms (including social networks) provide their users (influencers included) with functionalities to declare whether the content they provide constitutes or contains a commercial communication** so that consumers can identify in a “*clear and unambiguous manner and in real time, including through prominent markings*”, whether the content they are viewing is advertising or not.

Despite this welcomed step, the DSA is also silent on *how* such functionalities should be designed and *when* they should be used.

Article 44 DSA specifies that “*The Commission shall consult the Committee and shall support and encourage the development and implementation of voluntary standards drawn up by the relevant European and international standardization bodies, at least for the following aspects [...]*”

¹⁰⁴ This term was notably used by the CPC-authorities in their common position against Shopify. Available [here](#), last consulted on 04 July 2023. .

¹⁰⁵ Section 4.2.5 on social media of the UCPD guidelines.

¹⁰⁶ Idem.

¹⁰⁷ See Article 26 DSA.

h) technical measures to meet **the advertising requirements of this Regulation**, including **requirements for prominent markings to be used for advertisements and commercial communications as referred to in Article 26** [...];

2. The Commission shall support the updating of the standards in the light of technological developments and the behaviour of the recipients of the services in question [...] (emphasis added).

Recital 68 DSA specifies that platform users [...] *should ensure that the information is salient, including through standardised visual or audio marks, clearly identifiable and unambiguous for the average recipient of the service, and should be adapted to the nature of the individual service's online interface*".

The DSA also provides for new obligations that could be relevant for influencer marketing.

Platforms have now an obligation of treacability¹⁰⁸ of traders using their services such as collecting information on traders and to make every effort to assess whether the information is reliable and complete. In case of inaccurate, incomplete or outdated information, the platform shall request the trader to return to compliance as soon as possible. Otherwise, the platform shall promptly suspend the provision of its service to the trader, until the request is fully satisfied.

Information about the identity of the trader (such as name, electronic address), their registration number in national professional registers and the self-certification of the professional by which they undertake to provide only products or services that comply with the applicable rules of the Union law must be put at the disposal of the users of the platform. This must be done in a clear, easily accessible and understandable way on the online interface of the platform where the information on the product or service is presented.

Furthermore, when a platform has knowledge that a trader offers an illegal product or service to EU consumers through its services, and the platform has consumers' contact details, it must inform them that the product sold is illegal, the identity of the trader and the means of redress. Where it does not have the contact details of all the consumers concerned, it shall make available this information to them, in an easily accessible manner, on its online interface¹⁰⁹.

4.2. What is problem?

Platforms including video-sharing platforms and online social networks are key actors in the influencer marketing value chain by enabling collaborations between traders and influencers and allowing them to reach an unprecedented number of consumers.

In addition, platforms gain a lot of their revenues from influencers' presence. As explained by literature "*influencers are undoubtedly a culturally important part of these platforms' business models*" as they allow influencers to "*produce and post high-quality content that impels their audiences to scroll. Influencers attract and keep audiences.*"¹¹⁰. Several platforms also provide tools to traders to target the specific audience they would like to reach out and finetune their communication strategy (by age ¹¹¹ etc.).

¹⁰⁸ See Article 30 DSA.

¹⁰⁹ See Article 32 DSA.

¹¹⁰ See Sophie Bishop article, *Name of the Game "Creator" and "influencer" aren't different jobs. Who does it serve to pretend they are?*, available here : <https://reallifemag.com/name-of-the-game/>, last consulted on 06.02.2023.

¹¹¹ <https://ads.tiktok.com/help/article/ad-targeting?redirected=1#> , last consulted on 10.01.2023.

However, **platform transparency features are not always available to content creators when publishing content**¹¹². When available, they are different from one platform to another. Some of them are still insufficient^{113 114}, even if used, to meet the disclosure requirements set out in the UCPD, the AVMSD and the eCommerce Directive, and to allow consumers to understand they are facing an ad.

4.3. Why is this problem occurring?

Despite creating disclosure obligations and diligence obligations, the Unfair Commercial Practices Directive, the Audiovisual Media Services Directive, the eCommerce Directive and Digital Services Act are silent on "how" such "disclosure functionalities" should be designed. As a result, platforms have developed their own tools, thus creating different functionalities and different levels of protection and transparency depending on the platform.

While the UCPD guidelines¹¹⁵ recognize a "design duty"¹¹⁶ of platform to ensure that their users (e.g. influencers) are compliant with EU Consumer Law as matter of professional diligence, guidelines remain non-binding.

In a recent survey¹¹⁷ conducted by Open Evidence for BEUC, a grand majority (74%) consumers believe that platforms should be more responsible for the influencers they host.

Online platforms should be responsible for the influencers they host (e.g., in case of harmful content or unsafe products).

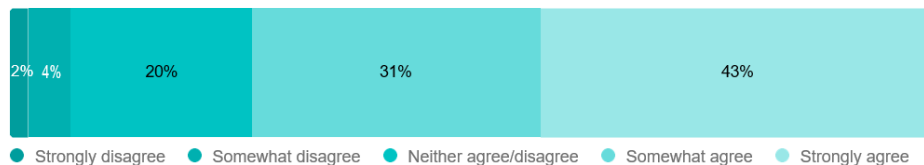


Figure 4: From BEUC report, *Connected but unprotected: digital fairness in the eyes of consumers*.

4.4. What do we propose

4.4.1. Harmonisation of the 'technical functionalities' across online platforms

The pending Digital Fairness Fitness Check and the implementation of the Digital Services Act (DSA)¹¹⁸ provisions should be an opportunity **to define EU-wide and harmonised functionalities across platforms** to allow influencers to declare, in a clear and unambiguous manner, whether the content they upload on the platforms constitutes or contains a commercial communication.

¹¹² See for instance CCPC report on influencer marketing.

¹¹³ For instance, the in its 2019 [guidelines on influencer marketing in social media](#), the Finnish Competition and Consumer Authority expressed the view that the use by influencers of "Youtube's own labelling tool ("Includes Paid Promotion") alone is not sufficient as the name of the brand promoted should also be displayed to consumers. See p.9.

¹¹⁴ In 2021, the Danish Competition and Consumer Protection Authority stated in its publication "Consumers benefit from visually salient standardized commercial disclosures on Social Media" that "It is unclear whether standardized disclosure labels implemented by various video-sharing platforms in order to comply with the AVMSD follow these guidelines, which could mean that influencers cannot solely rely on declaring commercial intent via a platform-integrated functionality". Article available [here](#). Last consulted on 04 July 2023.

¹¹⁵ UCPD guidelines Section 4.2.6 on Influencer Marketing.

¹¹⁶ Christoph Busch, 'Self-Regulation and Regulatory Intermediation in the Platform Economy' (2019) Forthcoming in: Marta Cantero Gamito & Hans-Wolfgang Micklitz (eds) *The Role of the EU in Transnational Legal Ordering: Standards, Contracts and Codes*, Edward Elgar.

¹¹⁷ See BEUC report, *Connected but unprotected: digital fairness in the eyes of consumers*. When drafting these lines the report is not published yet. Forthcoming summer 2023.

¹¹⁸ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act).

In this regard, it is worth noting that in 2021, **the Danish Competition and Consumer Protection Authority conducted an experiment** revealing that a prominent, salient and standardised disclosure tool strongly improves consumers' ability – especially the young ones – to correctly identify commercial content of a content creator¹¹⁹.

In practical terms – regarding hidden advertising issues – platforms should:

- **Provide easy-to-use functionalities to allow a clear distinction between influencer 'editorial contents' and 'advertised' ones** (such as: chapter/sequencing videos and audio tools). Coupled with an appropriate, transparent, and timely information via standardised labelling and wording¹²⁰, this would allow consumers to better understand when facing a advertised content.
- **A standardised advertising insert (for videos, audio and pictures) should be developed and harmonised across all platforms**¹²¹. To ensure its efficiency it should be developed by an independent body and confirmed by behavioural science. Same goes for other disclosure tools such as labels and hashtag wording etc.
- These standards **could be established by law or introduced in a binding code of conduct** to be enforced by consumer protection authorities.
- **Platforms should remind content creators before each post that any content with a commercial interest should be labelled as such**¹²². This should also be the case for self-promotion of products or services proposed by influencers¹²³.
- **Platforms should devote best efforts to reduce the number of unlabelled advertising content**. When an infringement is detected, platforms should automatically prompt influencers to use the platform tools to label the relevant part of the content as advertising and follow the requirements imposed under the Digital Services Act. Such exercise would be facilitated if the labelling and the wording to be used for disclosure requirements is simplified and standardised, bringing more clarity to Article 44(1)(h) of the DSA.
- **Recurring notifications of hidden advertising against an influencer or concerning the same brand should be automatically reported by platforms to the competent authorities**. Alternatively, recurring reporting should be recorded in the annual report now to be published by the providers of intermediary services under the DSA¹²⁴ about content moderation in which they engage, including the measures taken as a result of the application and enforcement of their terms and conditions.

4.4.2. Amendment to the UCPD Annex

Article 31 DSA states that providers of online platforms allowing consumers to conclude distance contracts with traders shall ensure that their online interface is designed and organised in a way that enables traders to comply with their obligations regarding pre-contractual information, compliance and product safety information under applicable Union law. Such new provisions are applicable to specific types of online platforms **but may not cover all relevant platforms where influencer marketing is conducted**.

¹¹⁹ See Danish Competition and Consumer protection authority testing available [here](#). Last consulted on 04 July 2023.

¹²⁰ See Section 2.

¹²¹ idem.

¹²² <https://www.gov.uk/government/publications/compliance-principles-for-social-media-platforms/hidden-ads-principles-for-social-media-platforms>, in its recent guidelines, CMA recommends that platform should "flag and remind people of the main requirements about labelling incentivised endorsements at key moments when users start using your service and when they are posting content", last consulted on 04 July 2023.

¹²³ The recent CCPC report highlights a massive failure of content creators to correctly label their communication when promoting their own brand products, full report available [here](#). Last consulted on 04 July 2023.

¹²⁴ See recital 49 & Article 15 DSA.

All online platforms must provide the necessary tools and functionalities to their users to be compliant with EU consumer and marketing law. BEUC supports the recommendation from the European Commission in its **Behavioural Study On Advertising And Marketing Practices In Online Social Media to 'blacklist'** the commercial practice to:

"Design its architecture in a way that allow its users to post commercial content in it, but does not provide its users and third-party traders the tools to its users to comply with EU marketing and consumer law".

Such explicit ban would force all online platforms to develop clear and easy to use functionalities to be compliant with the EU law, especially disclosure requirements.

BEUC recommendations

- The Digital Fairness Fitness Check of EU consumer law and the implementation of the Digital Services Act provisions should be used to define EU-wide and standardised functionalities across platforms to allow influencers to declare, in a clear and unambiguous manner, whether the content they upload on the platforms constitutes or contains a commercial communication.
- The UCPD Annex should be amended to ensure that when an online platform provides for the feature to post commercial content on it, not providing tools to be compliant with EU consumer law is unfair in all circumstances. This would ensure 'compliance by design' of online platforms.

5. Prohibition of influencer marketing campaigns for specific products

BEUC considers that the direct or indirect promotion of certain products or services by influencers should be prohibited. That is because of the significant consumer harms, the risks inherent in certain advertised products and services, but also the public health and public order interests at stake.

5.1. The new French law as an inspiration for the European Commission

The French legislator, in the recently adopted law to regulate the practices of influencers established that it will now be forbidden¹²⁵ for them to promote:

- Aesthetic surgery and even cosmetic procedures (e.g. lip injections with hyaluronic acid, the promotion of surgery or clinics performing this type of operation).
- Any procedure, technique or method presented as comparable, preferable, or substitutable to therapeutic procedures, protocols, or prescriptions.
- Products considered as nicotine products that can be consumed and composed even partially of nicotine (such as electronic cigarettes).
- Advertising involving wild animals (except in collaboration with zoos).
- Subscriptions to sports betting advice and betting sites.
- Certain financial products and services (ex: complex financial products and/or products with unknown risk or risk greater than the initial capital, crypto and Non fungible Tokens (NFT) unless approved etc).

¹²⁵ See Article 4 of the new Loi n°2023-451 du 9 Juin 2023 visant à encadrer l'influenceur commercial et à lutter contre les dérives des influenceurs sur les réseaux sociaux. See French [Journal Officiel](#) of the 10 June 2023.

Other promotions are now strongly regulated¹²⁶, such as the promotion of approved sports betting sites which is now only possible on platforms that target people over 18 with a statement indicating that the site is prohibited for under 18 years old etc.

Finally, given the numerous consumer complaints linked to *dropshipping*¹²⁷, BEUC welcomes the new French requirements that influencers, when promoting drop shipped products will be fully liable toward consumers if something goes wrong (non-delivery, for instance).

In our view, **the new French legislation is a good start that should inspire the European Commission in the context of the Digital Fairness Fitness Check. The Unfair Commercial Practices should be amended to establish EU-wide prohibitions and avoid fragmentation of the internal market.**

5.2. A better protection in specific sectors remain necessary

In our view, the prohibitions recently enshrined in France should serve as a basis for European Commission to establish an EU-wide bans of promotion of these products and services by influencers.

However, BEUC considers that the French legislation **omits important areas** (ex: the promotion of unhealthy food to children).

BEUC calls on the European Commission, to consider amending the Unfair Commercial Practices Directive Annex to ban, the direct or indirect promotion by influencers of:

- Unhealthy food products to children (High in Fat, Salt, and Sugar Foods - HFSS).
- Alcohol products, especially in ads targeting minors,
- Gambling, including sports betting and prognostics, especially in ads targeting minors.
- Medical products/procedures, other than their intended use.

In this report, you will also find **three case studies** aiming to focus on specific types of products and services that would necessitate further regulation and/or and further attention from enforcement authorities. Namely, the promotion of:

- **Financial services** – *Case study 1*
- **Unhealthy food products** (foods high in fat, salt and sugar - HFSS) – *Case study 2.*
- **Medical products/procedures** requiring a prescription and medical products/procedures other than those intended for their intended use – *Case study 3.*

6. A more consistent enforcement of the existing EU legislation

The current EU legal framework already provides for tools to tackle several unfair practices conducted in the influencer marketing sector (hidden advertising etc.). But their interpretations vary across the different Member States leading to different approaches from enforcement authorities and different levels of protection for consumers.^{128 129} **Despite**

¹²⁶ Idem, Articles 3 and 4.

¹²⁷ According to the [French DGCCRF website](#), *Dropshipping* is an online selling technique in which the seller is only responsible for marketing and selling the product. It is the seller's supplier who dispatches the goods to the end consumer. In practice, the consumer is generally unaware of the supplier's existence or role. Last consulted on 04 July 2023.

¹²⁸ R. Ducato, One Hashtag to Rule Them All? Mandated Disclosures and Design Duties in Influencer Marketing Practices, CRIDES Working Paper Series no. 4/2019; to be published in Ranchordás, S. and Goanta, C. (Eds), *The Regulation of Social Media Influencers*, 2019, Edward Elgar Publishing.

¹²⁹ See IMCO study on the impact of influencers on advertising and consumer protection in the Single Market which summaries the “state of play” within the EU showing a fragmented landscape of consumer protection and the different approaches form enforcers.

influencers mostly being active 'nationally', the problems are identical in the whole EU. A coherent enforcement approach is therefore needed.

BEUC's recommendations to ensure a more consistent enforcement against unfair influencer marketing practices are:

- **Define influencer marketing as an enforcement priority:** National competent authorities (CPC authorities and beyond) should define influencer marketing sector as a priority, given the exponential growth of the sector, the extent of problematic practices in the EU and the rapid evolution of marketing techniques. This is also a recommendation of the recent CCPC report on "influencer marketing"¹³⁰. See notably the case study 2 for a specific focus on why more enforcement of medicines rules on advertising of medicines by influencers is important.
- **Conduct SWEEPS**¹³¹: CPC-Network should carry out sweeps to identify common widespread unfair practices.
- **A more consistent enforcement:** Enforcers should more consistently apply the UCPD, CRD, AVMSD, eCommerce Directive, and the new DSA¹³² obligations against unfair influencer marketing practices (in particular, hidden advertising). Substantiated offences should lead to dissuasive sanctions on all actors of the value chain (influencer, influencer agencies, platform, brands).
- **Develop and disseminate e-enforcement tools:** The European Commission should continue to support the development and dissemination of e-enforcement tools with the relevant authorities. Indeed, influencers are not only effective in communicating to their followers but are also very prolific¹³³. As a result, it is simply impossible to monitor such number of communications with only human resources. This highlights the necessity to develop digital and artificial intelligence monitoring tools to empower the competent authorities to detect infringements and launch enforcement action in the influencer marketing sphere.
- **Allocate more resources to enforcement:** To ensure enforcement of consumer rights in the influencer marketing sector, it is crucial that national competent enforcement authorities have sufficient resources (staff¹³⁴, financial and technical capacities) and develop the necessary digital skills. The European Commission should facilitate capacity building activities in this area.¹³⁵ The review of the CPC-Regulation planned for 2023, should also ensure that all Member States grant their national CPC authorities with direct power to impose penalties for breaches of consumer protection law (including unfair practices like hidden advertising).
- **Cross-sector enforcement is crucial:** Influencer marketing is at the crossroads between several disciplines given the products or services promoted by an influencer. Therefore, several authorities may be competent in case of problematic practices (CPC authorities, audio-visual media services, financial or food authorities, etc.). It is therefore essential to strengthen cooperation between the different competent authorities, both at national and EU level, and to launch coordinated

¹³⁰ <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2022/12/2022.12.12-172837-CCPC-Influencer-marketing-report.pdf>, last consulted on 04 July 2023.

¹³¹ A "sweep" is a set of checks carried out simultaneously by national enforcement authorities to identify breaches of EU consumer law in a given sector. See Article 29 of the [Regulation \(EU\) 2017/2394](#) of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

¹³² DSA will be enforceable as of February 2024.

¹³³ See for instance, the spot check conducted by the UK's Advertising standards authority in September 2020 which revealed that on Instagram alone in three weeks, 122 Instagram influencers generated 24,000 posts.

¹³⁴ See for instance the French Loi n°2023-451 du 9 Juin 2023 visant à encadrer l'influenceur commercial et à lutter contre les dérives des influenceurs sur les réseaux sociaux which introduced a commercial influence unit within the DGCCRF (French CPC-authority), with 15 full-time staff. . See French [Journal Officiel](#) of the 10 June 2023.

¹³⁵ The EU eLab announced under the [New Consumer Agenda](#) (Action 13) provides for a good opportunity to tackle influencer marketing practices. Last consulted on 04 July 2023.

investigations and enforcement actions, if necessary. Examples of written cooperation agreements, *ad hoc* task forces and joint projects between enforcement authorities exist¹³⁶ at national level and should be encouraged and replicated to tackle unfair practices in the influencer marketing sector.

▪ **Use the potential of the Digital Services Act (DSA) in the Influencer Marketing sector:**

- To enhance consumer protection in relation to hidden advertising practices by influencers, enforcement actions can be considered based on the DSA (when being enforceable¹³⁷). Regarding influencer marketing, one of the most important provision in the DSA is the **broad definition of illegal content** it establishes.

Under the DSA, *'illegal content'* means any information that, in itself or in relation to an activity, including the sale of products or the provision of services, is not in compliance with Union law or the law of any Member State which is in compliance with Union law, irrespective of the precise subject matter or nature of that law;¹³⁸. Failure to comply with these requirements (EU or national) may render any content illegal within the scope of the DSA. This broad definition therefore covers both EU and national consumer protection rules. The DSA therefore provides for interesting provisions to be exploited in the "influencer marketing" field by enforcers.

- Authorities should ensure that Article 16 DSA, requiring **platforms to set up simple and effective reporting tools** is fully implemented and ensure that every signalement leads to a follow-up to consumers.
- **In line with Article 9 DSA, authorities should ensure that platforms enforce their terms and conditions and different policies more consistently as provided for under Article 14 DSA by:**
 - Systematically explaining in their branded content policies the obligations of influencers – agencies and brands – to comply with EU Consumer Law and how to comply with it,
 - Promptly removing content which has been confirmed as hidden advertising that they become aware of and swiftly following a signalment from another user in line with Articles 16 *et seq* DSA.

¹³⁶ For more details, see BEUC position paper STRENGTHENING THE COORDINATED ENFORCEMENT OF CONSUMER PROTECTION RULES - The revision of the Consumer Protection Coordination (CPC) Regulation, available [here](#).

¹³⁷ The DSA that will be full applicable as of February 2024.

¹³⁸ Article 3(h) DSA.

- Applying proportionate and effective sanctions to content creators who have posted hidden advertising, to deter them from doing it again, in line with Article 23 DSA (e.g. “Name and shame” policies¹³⁹, preventing them from posting for a defined period, dereference or suspending their account until the disclosure is made in compliance with EU consumer law, and, if there are still infringements, closing their account completely. Sanctions should be escalated for repeated offenders.¹⁴⁰
- **Raising awareness of the influencer marketing value chain about their obligations towards consumers:** All relevant national authorities (CPC authorities and beyond) should join forces and conduct raising awareness campaigns to ensure that content creators, agencies, brands and platforms are better informed about the various requirements of consumer law and beyond¹⁴¹. At national level, several examples of cooperation between authorities exist and should be encouraged¹⁴².

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Case study 1 : Influencer Marketing and financial services

Influencers specialised in financial services (so-called “finfluencers”) are more and more present on social media, promising consumers high returns and quick gains¹⁴³.

For instance, in a survey performed by Open Evidence for BEUC¹⁴⁴, nearly half of consumers who came across influencers saw them promote crypto products, highlighting the scale of the phenomenon.

Have you been directly exposed to influencers promoting crypto products such as bitcoins?



Figure 5: From BEUC report, *Connected but unprotected: digital fairness in the eyes of consumers*.

¹³⁹ This is one of the recommendations presented in the 2022 CCPC [report](#) on influencer marketing indicating that ‘ASAI will engage with social media platforms to explore ways to utilise the platform as a deterrent mechanism whereby non-compliant influencers are ‘named and shamed’. P. 54. Last consulted on 04 July 2023.

¹⁴⁰ See Consumer Market Authority’s (CMA) Guidance on Hidden ads: Principles for social media platforms, (2022), available [here](#). Last consulted on 04 July 2023.

¹⁴¹ See UOKiK webpage, *AR filter “OznaczamReklamy” will help highlight content*, available [here](#), last consulted on 04 July 2023.

¹⁴² In France for instance, in 2022, the French financial authority (AMF) and the entity in charge of supervising advertising (ARPP) have strengthened their collaboration in favor of clear and responsible advertising in the field of financial products. They signed an amendment to their partnership agreement on the communication of the financial services sector, extending to the new field of crypto assets. The authorities will also work together on influencer practices in finance. Among others, they plan to create a module to the financial sector of the certificate of responsible influence launched in 2021 by the ARPP, with the aim of presenting in an educational way the good practices and rules applying in this field. See statement [here](#). Last consulted on 04 July 2023.

¹⁴³ https://www.amf-france.org/sites/default/files/private/2021-12/rapport-arnaques-a-linvestissement-bva-pour-amf-decembre-2021_0.pdf, last consulted on 04 July 2023.

¹⁴⁴ See BEUC report, *Connected but unprotected: digital fairness in the eyes of consumers*. When drafting these lines the report is not published yet. Forthcoming summer 2023.

However, promotion of financial services via **influencers raises many concerns and comes with important risks for consumers**. These relate to the transparency, quality of advice, the risk of abuse and of misleading information, important financial losses, over indebtedness etc. This is even more the case as influencers are increasingly considered an important source of information for people looking for investment ideas, especially youth¹⁴⁵.

Unfortunately, it is very easy to find examples of consumers suffering important financial losses after following influencers' advice¹⁴⁶.

For example, in 2021, the Dutch Financial Supervisory Authority (AFM), indicates that, it received dozens of complaints from consumers who have lost a lot of money as a result of "Finfluencer" tips¹⁴⁷.

In France, it is estimated that the overall damage suffered by victims of financial scams, amounts to about €500 million euros per year. Forex trading scams have caused nearly €38,000 in average damage to savers according to the country's financial supervisor (*Autorité des Marchés Financiers – AMF*). In 2021, the cryptocurrency market has been a favourite bait for scammers with losses estimated at €20,000 euros per consumer¹⁴⁸. In January 2023, a consumer collective¹⁴⁹ filed a complaint against about 100 influencers, having promoted investments in risky markets with promises of gains. However, to date, the consumers have not received any money back¹⁵⁰.

In Ireland, a recent report from the Consumer Protection Authorities (CCPC)¹⁵¹ highlights that consumers are concerned around influencers promoting cryptocurrencies and other financial products. This is particularly the case when influencers have no experience in the area.

Regarding crypto investments, in March 2022, EU financial regulators warn consumers on their risks and spotted the role and problematic raised by influencers in this area¹⁵².

This is exacerbated by social media platforms which too often let misleading advertisements for financial products and services (notably "crypto") spreading on their platforms as we demonstrated in our external alert to the European network of national consumer authorities ("CPC-Network") and the European Commission against Instagram, YouTube, TikTok and Twitter¹⁵³. In our view, this constitutes a lack of professional diligence under the Unfair Commercial Practices Directive and expose consumers to serious harm.

More transparency requirements only will not solve all the issues raised by influencers and would still expose consumers to risky financial products and services and financial harm.

¹⁴⁵ In 2021, the French Authority of financial market (AMF) noted the arrival on the financial markets of 800 000 new individual investors, with a younger profile. Available [here](#). Last consulted on 04 July 2023.

¹⁴⁶ https://www.journaldunet.com/economie/finance/1511913-investisseurs-ignorants-et-influenceurs-inconsequents-le-crypto-cocktail-qui-a-ruine-des-francais/?qbmilus=f8e9e301cf5e3455754808ac47d34b55b8ebfd186f4559a5651d7fd85a05bab8&utm_campaign=Quotidienne_2022-05-25&utm_medium=email&seen=2&utm_source=MagNews&seen=b8f1141ff45caf2ef66e7adafc0aa155, last consulted on 04 July 2023.

¹⁴⁷ <https://www.afm.nl/en/nieuws/2021/december/verkenning-finfluencers>, last consulted on 04 July 2023.

¹⁴⁸ <https://www.capital.fr/votre-argent/les-plus-grosses-arnaques-aux-placements-financiers-et-comment-les-eviter-1422906>, last consulted on 04 July 2023.

¹⁴⁹ See Press release of the French - Collectif d'Aide aux Victimes d'Influenceurs : Collectif AVI. Available [here](#). last consulted on 04 July 2023.

¹⁵⁰ <https://www.capital.fr/economie-politique/un-collectif-porte-plainte-contre-des-influenceurs-qui-ont-recommande-des-placements-tres-risques-1458173>, last consulted on 04 July 2023.

¹⁵¹ <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2022/12/2022.12.12-172837-CCPC-Influencer-marketing-report.pdf>, last consulted on 04 July 2023.

¹⁵² https://www.esma.europa.eu/sites/default/files/library/esa_2022_15_joint_esas_warning_on_crypto-assets.pdf, last consulted on 04 July 2023.

¹⁵³ See BEUC and 9 members (Altroconsumo in Italy, DECO in Portugal, Forbrugerrådet Tænk in Denmark, KEPKA in Greece, UFC-Que Choisir in France, ASUFIN and OCU in Spain, SOS Poprad in Slovakia and Vartotojų aljansas in Lithuania) [external alert](#) launched on 8 June 2023 against TikTok, Youtube, Instagram and Twitter. See also [BEUC report](#) : *Hype or harm? The great social media crypto con*, published on the same day, explaining our complaint.

BEUC recommendation

- Regarding financial services : Sector-specific regulation should consider the role of influencers in rules on advertising and promotion of financial services via social media, including the prohibition of the promotion of products which expose consumers to a high risk of financial loss.
- Given the significant damage caused to consumers by the unfair practices of 'influencers', the CPC-Network and the authorities in charge of enforcing financial legislation should make this sector an enforcement priority. Where appropriate, both enforcement networks should cooperate in coordinated enforcement actions to ensure compliance with the consumer law acquis and sector-specific financial legislation relating to the promotion of financial services.
- CPC-authorities should ensure that social medial platforms strictly enforce their branded content policies and quickly remove content that is deemed not compliant with the rules applicable to the promotion of financial products or services, or which are contrary to their policies as a matter of professional diligence under article 5 of the Unfair Commercial Practices Directive.

Case Study 2 : Influencer marketing of unhealthy food to children, why a ban is necessary ?

• What does the law say?

Regarding the promotion of unhealthy food to children, the revised Audiovisual Media Services Directive is relevant. However, it states¹⁵⁴ that Member States shall encourage the use of co-regulation and the fostering of self-regulation. This is done through codes of conduct regarding inappropriate audiovisual commercial communications, accompanying or included in children's programmes, for foods and beverages containing nutrients and substances with a nutritional or physiological effect – in particular fat, trans-fatty acids, salt or sodium and sugars, of which excessive intakes in the overall diet are not recommended. At EU level, the voluntary industry initiative to restrict unhealthy food to children is the "EU Pledge" and is supposed to cover influencer marketing¹⁵⁵.

As a horizontal legislation, the Unfair Commercial Practices Directive remains fully applicable to the marketing of food and beverage *products*, in particular the ones which are high in saturated fat, salt and sugar (hereafter HFSS products).

• What is happening?

Children and teenagers are particularly vulnerable to the sophisticated, subtle, and persuasive techniques used by marketers to promote HFSS products. Influencer marketing has proven to be a very effective marketing tool given the very strong relationship built between influencers and their followers.

Food brands have been quick to understand the commercial potential of influencer marketing and have implemented new marketing techniques to promote unhealthy foods

¹⁵⁴ Article 9(4) AudioVisual Media Services Directive.

¹⁵⁵ <https://eu-pledge.eu/>, last consulted on 04 July 2023.

and beverages to young people online. For instance, they developed advertising campaigns with influencers, which encouraged their young followers to participate and reproduce brand “challenges” or are featured in Coca Cola’s Kick Dance shuffle promotional campaigns.

Examples, shown below, were found by both our French and Danish Members, as well as BEUC’s report following our external alert to the CPC-Network against TikTok.

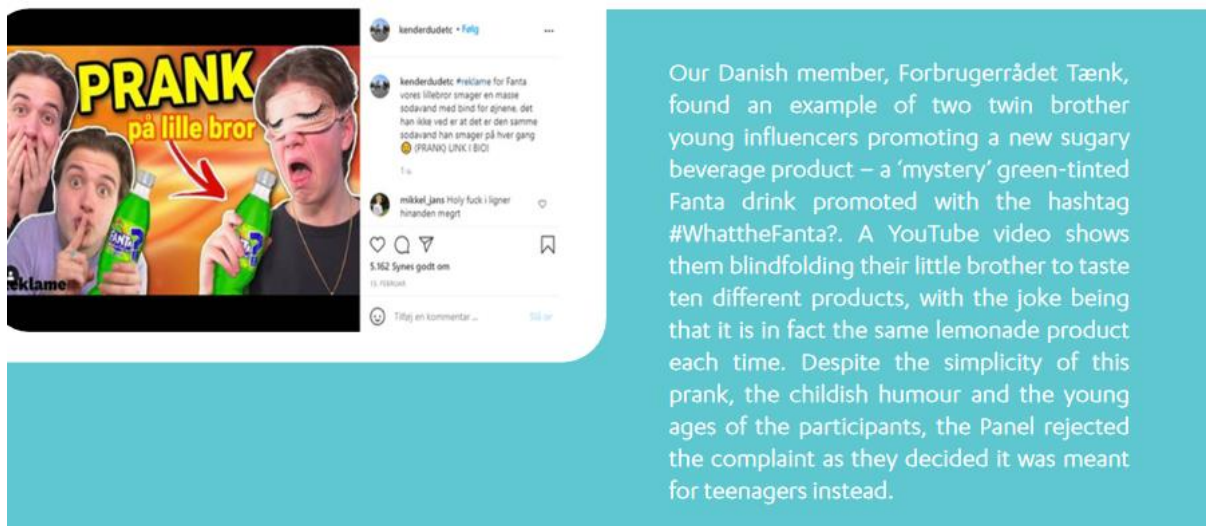


Figure 6: Screenshot taken from BEUC Report ‘Food Marketing to Children Needs rules with Teeth’ (2021)



Figure 7: Screenshots of the Haribo “MAOAM challenge” taken from BEUC Report ‘TikTok without filters’ (2021)



Figure 8: Screenshot taken from our Swiss member investigation 'Les influenceurs font-ils grossir nos enfants?' (2022)¹⁵⁶

Despite the EU Pledge, recent years have seen an increasing rise of influencers entering into paid partnerships with brands promoting HFSS products.

In Norway, our member organisation Forbrukerrådet discovered, in 2019, that 11 of the top 16 Youtubers in the country promoted food and drinks industry products, with broad majority being HFSS products. The channels of these influencers were without exception all aimed at young viewers¹⁵⁷.

On TikTok, hidden marketing practices have mushroomed on the platform as we signalled to the Consumer Protection Cooperation (CPC) Network in our external alert against the platform¹⁵⁸. This is highlighted by the 2020 Catalan Audiovisual Council (*Consell de l'Audiovisual de Catalunya*) study analysing the videos uploaded by eight Spanish influencers with more than a million followers¹⁵⁹. They found that 93% of the content contained hidden adverts notably for fast food and sugary drinks. In our complaint against TikTok, we also raised concerns that the proliferation of "Hashtag challenges" and other branded filters challenges contribute to turning advertising into a game. Such 'gamification' of advertising is particularly appealing for young users, being problematic even more when dealing with HFSS products.

On Youtube, even if the platform launched a 'junior' version of its portal called YouTube Kids¹⁶⁰, BEUC Swiss member Fédération Romande des consommateurs (FRC) highlighted¹⁶¹ influencer brand challenges related to unhealthy food to children are still present on the youth version of the platform. For example, we see Youtubers, massively followed by children¹⁶², eating sweets received by brands, or eating all the products of McDonald's. In another video, a child Youtuber even opens his own fast food restaurant called McSwan¹⁶³.

¹⁵⁶ Fédération Romande des Consommateurs, Enquête : *Les influenceurs font-ils grossir nos enfants?* (2022).

¹⁵⁷ See BEUC Report, Food Marketing to Children Needs Rules with Teeth, A Snapshot report about how self-regulation fails to prevent unhealthy foods to be marketed to children, (2021). Available [here](#). Last consulted on 04 July 2023.

¹⁵⁸ See BEUC report TikTok without Filters, a consumer law analysis of TikTok's policies and practices (2021), available [here](#).

¹⁵⁹ Consell de l'Audiovisual de Catalunya, [Report 122/2020](#), Advertising in video content created by TikTokers, 28 August 2020, last consulted on 06.02.2023.

¹⁶⁰ https://www.youtube.com/intl/fr_lu/kids/, Last consulted on 04 July 2023.

¹⁶¹ <https://www.frc.ch/les-influenceurs-font-ils-grossir-nos-enfants/>, Last consulted on 04 July 2023.

¹⁶² When drafting these lines, the Swan & Néo's Youtube Channel had over 6 million subscribers.

¹⁶³ https://www.youtube.com/watch?v=bfvz8_af5aU, Last consulted on 04 July 2023.

Of course, the packaging of the fast-food chain McDonald's is present in all the videos, but no mention of a partnership is present (See Figure 4 above).

Another striking example comes from a report from the *Influencer Marketing Hub* which reports on the trends in the sector. The report highlights that among five brands most cited on TikTok in 2021, two are companies proposing HFSS products: McDonald's and Starbucks¹⁶⁴.

This reflects **the extent of the phenomenon of promotion of HFSS products, the strong limits of industry self-regulation** and the ineffectiveness of their weak commitments **to prevent the marketing of unhealthy food to children.**

- **Why is the problem happening?**

Rules are too lax, not suited to new digital marketing practices, especially influencer marketing, and still permit foods which are high in fats, salt and sugar to be marketed to children. Furthermore, enforcement of the EU Pledge has proven to be inconsistent as demonstrated by BEUC and its members¹⁶⁵.

Indeed, between February and March 2021, BEUC and 10 of our member organisations collected examples of unhealthy food marketing. Cases were brought to the EU Pledge 'Accountability Mechanism' created, in theory, to allow the public to report any breaches. Out of 81 complaints collected by BEUC members and submitted, only seven were upheld by the EU Pledge, seven marketing posts have been withdrawn by companies. Complaints which were dismissed were often done so for very trivial reasons. For example, even a complaint about a chocolate egg product for children which was marketed on Instagram with Disney Princesses was dismissed by the Pledge because of language referencing families. Even in cases which were upheld, the consequences for the companies in question were minimal.

In 2021, our French member UFC-Que Choisir also launched a complaint to the Paris Court¹⁶⁶ for misleading commercial practices from McDonald's. Our member highlighted the firm's use of 'KidFluencer' on social media to promote its products, without any indication of partnership and in total contradiction of even the weak EU pledge rules, which at least commit food company member organisations not to place food or drink advertisements in programmes and/or media targeted at young children.

Self-regulation of the food industry as encouraged by the Audiovisual Media Services Directive (AVMSD) has consistently failed to "effectively reduce the exposure of children" to HFSS food marketing.

Given the high level of evidence demonstrating the effects of such marketing on children and teenagers, there is an urgent need for strong regulation at EU level to protect this vulnerable group of consumers.

- **What do we propose?**

The need to put in place **strict restrictions for advertising of unhealthy food to children by influencers is clear.** Regulations however have failed to keep up with the constant pace of technological advances which have dramatically changed the way children consume media content.

¹⁶⁴ https://influencermarketinghub.com/ebooks/Influencer_Marketing_Benchmark_Report_2022.pdf, p.23.

¹⁶⁵ See BEUC Report, Food Marketing to Children Needs Rules with Teeth, A Snapshot report about how self-regulation fails to prevent unhealthy foods to be marketed to children, (2021). Available [here](#). Last consulted on 04 July 2023.

¹⁶⁶ See full [press release](#) : UFC-Que Choisir files a complaint against McDonald's France for lip service regarding advertising by kid influencers and for inflated hiring numbers. Last consulted on 04 July 2023.

The World Health Organisation has stated that there is unequivocal evidence that childhood obesity is influenced by marketing of foods and non-alcoholic beverages high in saturated fat, salt and/or free sugars ¹⁶⁷. The rise in such foods being marketed online has been described as a 'paradigm shift' for the way children are targeted by these adverts.

One of the key recommendations from the Commission's 'Study on the impact of marketing through social media, online games and mobile applications on children's behaviour' ¹⁶⁸ was that more should be done to protect children against online marketing. It also recommends that **it should be considered whether particularly harmful practices should be further regulated and/or banned through legislation.**

BEUC has called for the introduction of an EU-wide regulation which comprehensively covers the various marketing channels and techniques used to reach children and teenagers, including **a complete restriction of HFSS marketing online**. Given the techniques ("gamification of the marketing via challenges" etc.) used by food advertisers to target children online and young people's diminished ability to identify commercial content on the internet and social media platforms, and in anticipation of a potential future comprehensive EU regulation of unhealthy food marketing, **BEUC is calling for online advertising (including by influencers) to children of unhealthy foods¹⁶⁹ to be added to the list of practices in Annex of the Unfair Commercial Practices Directive which are deemed to be unfair in all circumstances in the context of the Digital Fairness Fitness Check¹⁷⁰.**

This ban is needed because:

- As opposed to traditional media such as TV where adverts are passively received by children, influencer marketing promotes a much more active engagement between children and advertised content, often without the full awareness of the child about the commercial nature of their interactions.
- Whilst a TV ad usually lasts around 30 seconds, due to its much more immersive nature children can spend a lot longer engaging with influencers.
- Food companies often use social media profiles as a means to encourage peer-to-peer advertising via 'likes', 'shares' and 'comments' which promotes the brand through the minor's networks lending credibility to the advertising content. Even where a child has not liked or interacted with a brand themselves, once an online friend has done so this will be replicated on their own pages.
- In recent years, an increase of paid partnerships with influencers with a younger audience has been witnessed. The influencers are seen as more authentic and more trustworthy than the brand themselves but the fact that they are paid by the brand is rarely or insufficiently disclosed¹⁷¹ as demonstrated earlier in this paper. Furthermore, children find it much harder to distinguish commercial content online.
- Online advertising targets children subliminally. The effect of embedded advertising has impacts at the subconscious level. Even where children do not recall seeing a brand or a product in an advertisement the brain has nonetheless noticed it and has created an automatic association between the brand and the fun and excitement of the online advertising. Example: branded challenges where consumers are encouraged to dance¹⁷² etc.

¹⁶⁷ Tackling food marketing to children in a digital world: trans-disciplinary perspectives, World Health Organisation, 2016.

¹⁶⁸ [Study on the impact of marketing through social media, online games and mobile applications on children's behaviour](#), Last consulted on 04 July 2023.

¹⁶⁹ As defined by the widely-recognised WHO nutrient profile.

¹⁷⁰ http://www.euro.who.int/_data/assets/pdf_file/0005/270716/Europe-nutrient-profile-model-2015-en.pdf?ua=1, Last consulted on 04 July 2023.

¹⁷¹ <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2022/12/2022.12.12-172837-CCPC-Influencer-marketing-report.pdf>, Last consulted on 04 July 2023.

¹⁷² <https://www.youtube.com/watch?v=yjiqcH22Dkw>, LES MEILLEURS TIKTOK FRANÇAIS 2020 - HARIBO #1, Last consulted on 04 July 2023.

BEUC recommendation

Online marketing of unhealthy food products (HFSS foods), including influencer marketing, should be banned and be added to the UCPD Annex, as an unfair commercial practices in all situations.

Case study 3 : Enforcement of rules on advertising of medicines by influencers should be a priority

- **What does the law say?**

The promotion of medicines available only with a **medical prescription to the general public is prohibited** in the European Union according to the Directive 2001/83/EC on medicinal products for human use.¹⁷³ **Member States are responsible to implement the Directive** and monitor the advertising of medicinal products.¹⁷⁴ This leads to diverse practices across the EU, varying from transparency registers and prior controls exercised by national competent authorities to self-regulating practices¹⁷⁵ such as codes of conduct developed by the pharmaceutical industry itself.¹⁷⁶

While this might be the case in the EU, direct to consumer advertising of prescription-only medicines is legal in the United States and New Zealand,¹⁷⁷ insofar as the information provided is truthful, explains what the drug has been approved to treat, mentions risks and encourages communication with healthcare professionals. These practices are being monitored by the Food and Drug Administration (FDA).

- **What is happening?**

Influencers with no medical training, use their accounts, and offer advice on prescription medicines or engage in undisclosed influencer marketing activities of prescription medicines targeting their followers.

¹⁷³ Article 88 (1)(a).

¹⁷⁴ *Idem* Article 97 (1).

¹⁷⁵ *Idem* Article 97 (5).

¹⁷⁶ <https://haiweb.org/wp-content/uploads/2016/10/Fact-or-Fiction-1.pdf> page 39. Last consulted on 04 July 2023.

¹⁷⁷ Abel GA, Penson RT, Joffe S, et al. *Direct-to-consumer advertising in oncology*. *Oncologist*. 2006;11(2):217–226.



Figure 9: Recommendation by Elon Musk of the use Ozempic as a weight loss tip

With those posts, 'patient influencers' risk:

- 1) **Spreading highly misleading information on medication**¹⁷⁸ that for safety reasons should be prescribed by a healthcare professional with relevant training. Except for just uploading relevant content, patient-influencers can also engage with their followers through direct messages, a practice that is hard to monitor and control.
- 2) **Creating drug shortages and health concerns to their audience.** For example, in March 2023,¹⁷⁹ a TikTok weight loss trend led to the extensive recommendation of the medical drug Ozempic.¹⁸⁰ The latter is a prescription drug originally developed to treat diabetes, which became popular as a weight loss treatment, causing a global diabetes drug shortage¹⁸¹ and raising multiple health concerns for the audience following influencers. Given the scale of the phenomenon of misuse of the drug following influencers' posts, the French medicines authority *l'Agence française de sécurité du médicament*, has warned¹⁸² of the risks of biliary or pancreatic disorders and thyroid cancer if the product is used long-term in people who do not need it.

However, concerns go much further than that, as patient influencers do not necessarily disclose whether they have received any form of reimbursement or payment from medical companies. Under US law, payments made to healthcare professionals must be disclosed.¹⁸³

¹⁷⁸ <https://www.theguardian.com/food/2022/nov/09/i-miss-eating-weight-loss-drug-ozempic-food-repulsive> . Last consulted on 04 July 2023.

¹⁷⁹ <https://www.euronews.com/next/2023/03/02/ozempic-how-a-tiktok-weight-loss-trend-caused-a-global-diabetes-drug-shortage-and-health-c> , Last consulted on 04 July 2023.

¹⁸⁰ <https://www.ema.europa.eu/en/medicines/human/EPAR/ozempic> . Last consulted on 04 July 2023.

¹⁸¹ <https://www.thenationalnews.com/lifestyle/wellbeing/2023/01/27/what-is-ozempic-and-why-is-there-a-global-shortage-of-the-drug/> , last consulted on 20/06/2023.

¹⁸² https://www.francetvinfo.fr/sante/medicament/l-agence-de-securite-du-medicament-alerte-sur-l-utilisation-detournee-par-des-influenceuses-de-l-antidiabetique-ozempic-comme-coupe-faim_5685182.html , last consulted on 19/06/2023.

¹⁸³ <https://www.theguardian.com/us-news/2023/mar/17/patient-influencers-tiktok-instagram-medical-prescription-drugs> . Last consulted on 04 July 2023.

- **Why is the problem happening?**

Lax US legislation, allowing direct to consumer advertising for a broad range of medicines, has led to this widely documented phenomenon of patient influencers.

While in the US, it would be difficult to assess whether patient influencers have violated advertising legislation due to lack of transparency, in the EU as mentioned above, such practices are prohibited by law for prescription-only medicines, causing a grey area since influencers also reach a European audience. Moreover, medicines sold over-the-counter can be advertised in the EU under strict rules,¹⁸⁴ prohibiting promotional activities and recommendations coming from celebrities.

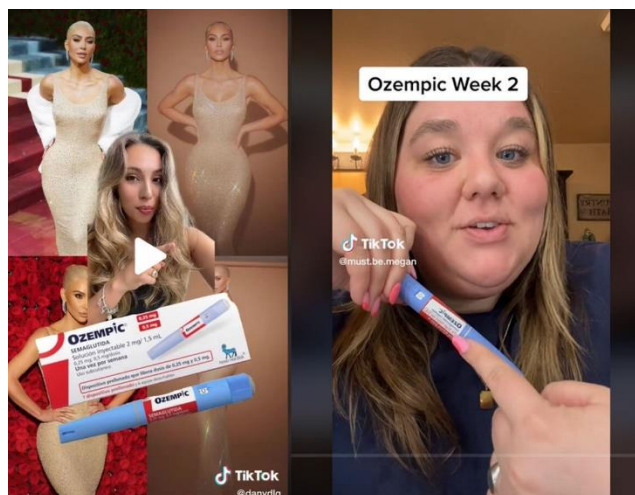


Figure 10: Screenshot taken from BEUC French member UFC-Que Choisir [webpage](#).

- **What do we propose?**

The enforcement of the prohibition of the promotion of prescription only medicines to the general public in the European Union according to the Directive 2001/83/EC **should be a priority of the Heads of Medicines Agencies (HMA) and of the National Competent Authorities (NCA).**

To prevent this prohibited practice in the EU, the European Commission and the networks of national health authorities responsible for enforcing Directive 2001/83/EC **should develop and strengthen their cooperation on the monitoring of advertising practices by pharmaceutical companies, compliance and corrective action.**

Competent authorities should ensure that social media platform terms and conditions and/or branded content policies are clear and recall that the promotion of medicines available only with a medical prescription to the general public is forbidden in the EU. The authorities should also ensure adequate enforcement of rules regarding the promotion of over-the-counter medicines. According to EU legislation, the advertising of these products cannot contain any material which refers to a recommendation by scientists, health professionals or persons who, because of their celebrity, could encourage the consumption of the medicine. **Authorities should ensure that platforms strictly enforce their terms and conditions.**

¹⁸⁴ Directive 2001/83/EC article 90 (f).

Finally, **social media platforms should establish reports to the European Commission and the relevant authorities** about the effectiveness of the measures put in place to prevent consumers from being exposed to the promotion of medicine only available with medical products and illegal promotion of medical devices and medicines for human use.

END



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