

Opinion of the European Economic and Social Committee on ‘Advertising through influencers and its impact on consumers’

(Exploratory opinion requested by the Spanish Presidency)

(2023/C 349/15)

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Section responsible	Single Market, Production and Consumption
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Outcome of vote (for/against/abstentions)	179/0/3

1. Conclusions and recommendations

1.1. One of the most characteristic aspects of the transformation seen in the audiovisual and electronic communications field is the rise of ‘influencers’ — online content-creating users who disseminate messages systematically and in various formats (videos, comments, photos), achieving a high profile among the target audience to which they are addressed.

1.2. Although there are no specific rules at EU level governing the activity of content creators/influencers, the existing legislation provides an adequate level of protection for the dual activity that content creators/influencers can carry out in the single market: as **advertisers (and traders)** primarily, and as **sellers/producers**.

1.3. On the basis of this legislation, various Member States have been developing their own laws in response to the challenge posed by this phenomenon, allowing national regulators to exercise their powers of supervision, control and, where appropriate, sanction.

1.4. In any case, given the constant developments in this area, the European Economic and Social Committee (EESC) considers it necessary to intervene in order to ensure the homogeneous treatment of the ‘specific’ illegal activities of content creators/influencers in the EU, with equally specific obligations for the **administrators of the platforms and social networks** in which they operate, and for the **content creators/influencers** themselves (EU residents and non-EU residents).

1.5. The EESC calls for the administrators of platforms and social media networks to:

- be jointly and severally liable for illegal content published by content creators/influencers;
- be obliged — in all cases where illegal activity by content creators/influencers is reported — to take the necessary action to neutralise the illegal online communication and report the illegal activity carried out by content creators/influencers to the competent authority;
- platforms and administrators of social networks should require all content creators/influencers operating outside the EU to identify clear legal liability within the EU and to hold professional indemnity insurance in case of harm caused by unlawful conduct.

1.6. The EESC believes that this harmonised treatment of influencers at European level should take into account, as a minimum, criteria such as:

- identifying the advertising nature of their messages with a commercial purpose using indicators and clear warnings, thereby avoiding covert advertising;

- making these messages subject to sector-specific rules, in order to protect the health and safety of consumers and users, especially minors and other vulnerable groups;
- considering the breach of rules to be an infringement committed by the influencer, without prejudice to the joint and several liability of advertisers and platforms and social networks.

1.7. Special attention should also be paid to the use of dark patterns, the improper or disparaging use of trade marks, unauthorised financial products, and identity theft or fake influencers using the images of well-known people without their knowledge, which are increasingly common, particularly in relation to financial investments and cryptocurrencies. This unlawful conduct could become increasingly sophisticated and widespread with the use of artificial intelligence (AI) techniques and must be tackled effectively.

1.8. The EESC proposes that this regulatory harmonisation be clarified and defined specifically, without prejudice to the complementary creation of co-regulatory frameworks. This co-regulation should involve influencers, their agents and their representative associations; the industry and advertisers; advertising self-regulatory associations; consumer and user associations; the social partners and civil society organisations; and regulatory authorities.

1.9. For the EESC, there are a number of issues relating to the activity of content creators/influencers, such as their place in labour law, matters concerning income tax and VAT, and the specific activity carried out by influencers who are children, which we believe should be carefully analysed at EU level.

2. General comments

2.1. One of the most characteristic aspects of the digital transformation seen in the audiovisual and electronic communications field over the last decade is the proliferation of ‘content creators’ — individuals who, apparently operating in a personal capacity, disseminate messages systematically and in various formats (videos, comments, photos) via web platforms, social media and electronic messaging. When these content generators have large numbers of loyal followers, they become influencers, which in the field of advertising can be defined 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’⁽¹⁾.

2.2. The relationship between influencers and followers — characterised by the perception of closeness, authenticity and trust — has a direct and indirect impact on the attitude of followers towards brands as well as on their consumer purchasing decisions. This is particularly the case for children, young people and consumers with low levels of education and/or income and low media and information literacy.

2.3. Where commercial communication in particular is concerned, not only does the use of influencers as champions of products and brands allow companies seeking to advertise to benefit from their impact and reputation, in the context of ‘influence marketing’ — especially in relation to young people, who are harder to reach through more traditional mass media — it also affords such companies greater freedom when developing sales arguments which they would not use in their conventional advertising and which sometimes circumvent the law. On the other hand, advertisers themselves stress that the particular nature of influencers gives them a high degree of autonomy in constructing the commercial message, which the advertiser cannot always control.

2.4. In other words, although there are no specific rules at EU level governing the activity of influencers, the existing European legislation currently provides an adequate level of protection for the dual activity that influencers can carry out in the single market: as **advertisers (and traders)** primarily, and as **seller/producers**.

⁽¹⁾ *The impact of influencers on advertising and consumer protection in the Single Market*, European Parliament, 2022, p. 9.

2.4.1. Legislation at EU level governing influencers mainly as **advertisers (and traders)** includes the following:

- the **Unfair Commercial Practices Directive (UCPD)** ⁽²⁾, which lays down a legal framework for dealing with misleading advertising and commercial practices implemented by influencers. The **European guidance on the interpretation and application of the UCPD** ⁽³⁾, which clarifies how the Directive is to be applied when an influencer acts as a trader or alternatively as a person acting in the name or on behalf of a trader. In this context, the Commission is currently conducting the Fitness Check on Digital Fairness, which should also cover the topic of *influencers* ⁽⁴⁾;
- the **e-Commerce Directive** ⁽⁵⁾, which provides additional protection to consumers when influencers post commercial communications on the internet via their social media accounts and blogs;
- the **Audiovisual Media Services Directive (AVSMD)** ⁽⁶⁾, which introduces specific new rules for ‘video-sharing platform services’ and affects influencers where it relates to user-generated videos which are disseminated through those platforms and which may contain commercial communications.

2.4.2. Legislation at EU level governing influencers as **sellers or producers** includes the following:

- the **Consumer Rights Directive (CRD)** ⁽⁷⁾;
- the **Digital Content and Services Directive** ⁽⁸⁾;
- the **Sales of Goods Directive** ⁽⁹⁾.

2.4.3. These two specific areas where EU law intervenes are supplemented by the Digital Services Package, consisting of:

- the **Digital Services Act (DSA)** ⁽¹⁰⁾, which gives greater transparency and accountability for the content of digital services and consumer protection;
- the **Digital Markets Act (DMA)** ⁽¹¹⁾, which regulates ‘gatekeepers’, i.e. platforms with at least 45 million active monthly users.

⁽²⁾ 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 and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’) (OJ L 149, 11.6.2005, p. 22).

⁽³⁾ Commission Notice — Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (OJ C 526, 29.12.2021, p. 1), point 4.2.6.

⁽⁴⁾ See Review of EU consumer law (europa.eu).

⁽⁵⁾ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) (OJ L 178, 17.7.2000, p. 1).

⁽⁶⁾ 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 (OJ L 303, 28.11.2018, p. 69).

⁽⁷⁾ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22.11.2011, p. 64).

⁽⁸⁾ Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (OJ L 136, 22.5.2019, p. 1).

⁽⁹⁾ Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (OJ L 136, 22.5.2019, p. 28).

⁽¹⁰⁾ 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) (OJ L 277, 27.10.2022, p. 1).

⁽¹¹⁾ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (OJ L 265, 12.10.2022, p. 1).

2.4.3.1. In the DSA, the EU defines illegal content as ‘any information, [...] including the sale of products or the provision of services, [which] is not in compliance with Union law or the law of any Member State [...], irrespective of the precise subject matter or nature of that law’. This new definition means that failure to comply with these rules can make the content illegal in the EU.

2.5. Despite the presence of some European rules, in the framework of which the unlawful conduct of influencers (as advertisers or as sellers/producers) can be regulated by the different Member States, various forms of action are called for:

- adopt specific legislation on influencers;
- implement existing consumer protection legislation;
- publish guides and codes of conduct to establish good practices;
- use digital control and enforcement tools;
- provide training and certification for influencers;
- raise awareness and support consumers;
- facilitate compliance on platforms through standardised dissemination tools.

2.6. Given the particular, constantly-evolving context in which content creators/influencers operate, the EESC believes that, despite the existing European legislation, action must be taken to ensure homogeneous application of ad hoc rules aimed at combating the specific illegal activities of influencers in the EU. The EESC's position is borne out by the fact that the Commission is assessing whether to proceed with ad hoc legislation.

2.7. This possibility has been examined for a number of years by governments, EU and national regulatory authorities, consumer and user associations, and civil society bodies ⁽¹²⁾. This has led to various legal initiatives in the Member States ⁽¹³⁾, such as France, Belgium (Flanders) and Spain, as well as in terms of self-regulation and co-regulation at European ⁽¹⁴⁾ and Member State level. It also explains the interest shown by the Spanish Government, in the context of its presidency of the European Union, in asking the EESC for this exploratory opinion on advertising through influencers and its impact on consumers.

2.8. In its request for an opinion, the Spanish Ministry of Consumer Affairs refers to the perception of closeness, authenticity and trust that characterises the relationship between influencers and consumers, which does not usually occur to the same degree with other social communication models, and focuses its concerns on two main aspects:

- firstly, the continued and prolonged use of social networks among minors, who are characterised by their vulnerability as consumers as they are exposed to commercial communications which may contain elements detrimental to their physical, psychological, social and emotional development;
- secondly, the lack of transparency and identifiability of such commercial communications, which characterises the activity of influencers by fraudulently concealing its advertising nature from consumers.

3. Proposals

3.1. Given the existing problems, the EESC considers that the conditions exist to improve and implement European legislation for specific illegal activities involving influencers and to harmonise it at European level, with specific obligations for the administrators of the platforms on which they operate, and for content creators and/or influencers themselves (EU and non-EU residents).

⁽¹²⁾ See footnote 1.

⁽¹³⁾ *Mapping report on the rules applicable to video-sharing platforms*, European Audiovisual Observatory, 2022.

⁽¹⁴⁾ *EASA Best Practice Recommendation on Influencer Marketing 2023*, European Advertising Standards Alliance, 2023.

3.2. *Video-sharing platforms and social networks*

3.2.1. While European legislation (the AVMSD and the Digital Services Package) requires the administrators of video-sharing platforms and social networks, on which content creators and influencers operate, to comply with the provisions on commercial communications and the protection of minors, the EESC notes that:

- platform administrators have no editorial responsibility for ‘illegal’ content created by users;
- similarly, there is no need for content creators/influencers and platform administrators to collaborate in order to ensure actual compliance with European legislation.

3.2.2. The EESC therefore calls for social network and platform administrators to:

- be jointly and severally liable for illegal content published by content creators/influencers;
- be obliged — in all cases where illegal activity by content creators/influencers is reported — to take the necessary action to neutralise the illegal online communication and report the illegal activity carried out by content creators/influencers to the competent authority;
- platforms and administrators of social networks should require all content creators/influencers operating outside the EU to identify clear legal liability within the EU and to hold professional indemnity insurance in case of harm caused by unlawful conduct.

3.3. *Content creators/influencers*

3.3.1. In drawing up proposals for the effective regulation of the provision by users of content through video-sharing platforms and social networks and, more specifically, of the advertising activity of influencers, it may be of interest to take into account the reports published in 2021 and 2022 by the European Regulators Group for Audiovisual Media Services (ERGA) ⁽¹⁵⁾, which made recommendations for the regulation of ‘vloggers’.

3.3.2. Essentially, the ERGA points out that the activity of influencers can be regarded as an audiovisual media service within the meaning of the AVMSD, provided that a number of requirements are met simultaneously:

- it must be an economic service, as defined in Articles 56 and 57 TFEU;
- the provider must have editorial responsibility for the content offered;
- it must be a service targeted at the general public, who select and request individually how the content is displayed, and aim to have a clear impact on a significant proportion of the public;
- the function of the content (videos/programmes) must be primarily to inform, entertain or educate;
- the content must be audiovisual and provided over electronic communications networks.

3.3.3. In this regard, harmonisation at European level should be proposed that explicitly covers the regulation of content creators/influencers and their responsibility when they generate and/or disseminate commercial communications, ensuring greater transparency and accountability in the conduct of their activities.

3.3.3.1. A whole chain of actors is involved in the activity of content creators/influencers: brands, multimedia companies and freelancers, management/talent agencies and agents, social media analysis platforms, multichannel networks, and public relations/advertising companies, whose contracts should provide for the specific responsibilities of all stakeholders, including joint responsibility for illegal conduct by the content creator/influencer.

⁽¹⁵⁾ *Analysis and recommendations concerning the regulation of vloggers*, ERGA, 2021, and *ERGA Vloggers Report 2*, ERGA, 2022.

3.4. The EESC urges both platform and social network administrators and content creators/influencers to ensure:

- the technical possibility of preventing underage users of the platform and/or social network from viewing sensitive content (alcohol and energy drinks, gambling and betting activities, pornography, tobacco and tobacco products, including e-cigarettes, aesthetic surgery, etc.), which in any case must be marked ‘prohibited for children under 18’, require age verification and allow the use of parental control;
- the inclusion of the words ‘advertising’, ‘commercial communication’ or ‘sponsored by’ in such messages;
- for retouched or modified images, the words ‘retouched image’;
- ‘virtual image’ for output created using artificial intelligence, as well as the identification of the use of virtual influencers.

3.5. Special attention should also be paid to the use of dark patterns, the improper or disparaging use of trade marks, the promotion of unauthorised financial products, and identity theft or fake influencers using the images of well-known people without their knowledge, which are increasingly common, particularly in relation to financial investments and cryptocurrencies. This unlawful conduct is becoming increasingly sophisticated and widespread with the use of AI and must be tackled effectively.

3.6. The regulatory harmonisation proposed by the EESC can be complemented by co-regulatory frameworks involving influencers, their agents and their representative associations; the industry and advertisers; advertising self-regulatory associations; consumer and user associations; the social partners and other civil society organisations; and regulatory authorities.

3.7. For the EESC, a number of questions remain relating to the activity of content creators/influencers, such as their place in labour law, matters concerning income tax and VAT, and the specific activity carried out by influencers who are children, which we believe should be carefully analysed at EU level.

Brussels, 13 July 2023.

The President
of the European Economic and Social Committee
Oliver RÖPKE
