

LEGAL BRIEF #3: WHEN IS AN INFLUENCER A ‘TRADER’?

So far, European consumer law does not have a clear legal definition for influencers, although this may soon change. Between 2022 and 2024, the European Commission is looking at options to clarify the laws for specific commercial practices. This is expected to have an impact on the influencer industry. Meanwhile, we can focus on the legal standards of the main consumer law that applies to advertising - that's the [Unfair Commercial Practices Directive](#) (UCPD). The UCPD is concerned with the unfairness of business practices, such as manipulating consumers. Although until 2023, European consumer law hasn't specifically defined influencers, it does define traders. In this brief, we will use the UCPD to explain when European law sees you as a 'trader', and as a consequence, when you need to comply with consumer protection rules. All consumer protection instruments in the European Union define the concept of 'trader', and in the past decade, these definitions have been used in very similar (if not identical) ways across the different rules.

As an influencer, you'll probably be involved in 'commercial activity' at some point. This could include brand deals to advertise products or services, selling courses (online or in real life), selling e-books, selling apps, or even your own merch.

Contracts

To be valid, contracts must not be signed manually – this is a myth. Any kind of so-called 'meeting of the minds', namely an agreement which entails that someone makes a clear offer and someone accepts that offer, will lead to a contract. This includes agreements which are expressed in Direct Messages on social media. What does it mean when you have a contract? It means that if someone promises to pay you in a DM where you agreed on specific terms to do several posts for an amount of money, this may be legally enforceable. However, although the legal nature of these agreements does not need a more traditional paper contract, it is important to consider concluding contracts in a more formal way (e.g. by sending an electronically signed document via email), because that will often help you to prove your agreement. Using most instant messaging services can lead to situations where messages and documents are no longer available, or have been deleted by one party.

Unfortunately, contract law is not harmonised at European level like consumer protection. For this reason, depending on the law that applies to your contracts (e.g. the law of your residence or the place where you conclude a contract), there will be more specific rules which may impose additional requirements. Contract law considerations are not included in this legal training, but make sure to get some legal advice for more considerable deals.

Traders under EU consumer law

'Commercial activities' are all supposed to bring you revenue, so whether you're what lawyers would call a 'natural person', a one-person business (like a freelancer) or a registered company, you are considered a 'Trader' and the UCPD applies. The UCPD defines a 'trader' as 'any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader'. Here's a breakdown of this definition:

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1. First, to qualify as a trader, **you need to make revenue through content monetisation** - basically any activity that you earn money with online as a content creator.
2. You **need to engage in commercial practices towards consumers**. This also includes communication around advertising or selling goods or products aimed at an audience that includes consumers. So talking about services may be a commercial practice: for example if you make a TikTok about a beauty treatment. Reviews may also be commercial practices: if you make a video about a restaurant launch party you were invited to or if you review a new gadget you were sent by a company.
3. **You need to be acting in connection to your trade, business, craft or profession, meaning that you're acting as a professional.**

In turn, consumers are the opposite of traders. They act '*for purposes which are outside [their] trade, business, craft or profession*'. Simply put, the business of an influencer is content production and advertising. If you review a product in exchange for payment - you have used your advertising skills to help your business earn more money. In contrast, if an airplane pilot buys the lipstick you advertise, and it has nothing to do with their job, they are considered a consumer.

The trader definition is no simple definition, because it needs to include businesses from all possible industries and of all possible categories - and as we have seen, even individuals who have not registered a business with a local Chamber of Commerce.

The Court of Justice of the European Union offers additional clarifications on how you can relate to this definition. This is like the Supreme Court of the European Union, and its task is to interpret EU law. In 2018, the Court dealt the [Kamenova](#) case. In this case, a Bulgarian citizen had published a total of eight product ads on olx.bg, and the question the Court had to answer was whether she qualified as a trader or not. To answer this, the Court proposed a number of criteria that may be helpful in determining when someone acts for purposes relating to their business (para. 38 of the judgment):

- *'whether the sale on the online platform was carried out in an organised manner,*
- *whether that sale was intended to generate profit,*
- *whether the seller had technical information and expertise relating to the products which she offered for sale which the consumer did not necessarily have, with the result that she was placed in a more advantageous position than the consumer,*
- *whether the seller had a legal status which enabled her to engage in commercial activities and to what extent the online sale was connected to the seller's commercial or professional activity,*
- *whether the seller was subject to VAT,*
- *whether the seller, acting on behalf of a particular trader or on her own behalf or through another person acting in her name and on her behalf, received remuneration or an incentive,*
- *whether the seller purchased new or second-hand goods in order to resell them, thus making that a regular, frequent and/or simultaneous activity in comparison with her usual commercial or business activity,*
- *whether the goods for sale were all of the same type or of the same value, and, in particular,*
- *whether the offer was concentrated on a small number of goods.'*

This is not a checklist that ends in a yes-or-no answer. But the outcome of this case is still very useful because these criteria can be applied to specific situations. In its ruling, the Court ended up saying that just because this Bulgarian citizen wanted to sell eight products on an online platform, it did not automatically make her a trader. But if you're selling more than eight products and you tick some of the boxes on this list, perhaps you are a trader.

What does this mean for you and why is this definition important? As an influencer, you may be considered as an advertising or retail start-up. That means you are trying to consolidate your business activities - these are likely using your creative skills in advertising or selling goods or services. If you have eight endorsement deals in a year, just like in [Kamenova](#), you may not yet be considered a trader. However, if you get more and more deals and you're serious about making money in this industry, you are likely engaging in commercial activities on a regular basis.

To summarise, if you earn money or other benefits (e.g. invitations, gifts, discounts) by creating content on social media and you do it regularly, the chances are very high that you are a trader. This means that according to the UCPD you need to observe and comply with consumer protection rules, just like any other business that communicates with consumers about their goods and services. Although that leads to a lot of responsibility, if you do engage in regular commercial activities, it is important to get to know these rules and what you need to do to comply with them.