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Ensuring digital fairness in EU consumer law: taking stock of existing rules

Executive summary

New technologies and data-driven practices have helped to empower consumers and improve their experiences online. DIGITALEUROPE supports the European Commission's long-term goal to ensure that EU consumer law remains fit for purpose in the context of the digital transition. Creating legal certainty and effective enforcement of the existing framework will help ensure consumers are adequately protected and maintain trust. We encourage the Commission to promote a framework that allows businesses operating in Europe to offer innovative products and services to their customers.

DIGITALEUROPE encourages policymakers to **take stock and make use of existing rules** before proposing new ones. Any **new rules must be based on clear evidence** that current practices harm consumers or society as a whole.

Should genuine concerns be identified, they must be **tackled online and offline** so that consumers are protected regardless of the service they use. An open dialogue with industry will help address specific concerns effectively and timely.

The focus of this fitness check should equally be to identify areas where simplification is needed to reduce unnecessary administrative burden.



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Evidence-based approach

Europeans are the best-protected consumers in the world thanks to a robust EU consumer acquis built up over decades. DIGITALEUROPE supports the ambition to ensure that EU consumer law keeps pace with emerging trends and remains fit for purpose in the context of the digital transition.

Ensuring that European consumers are adequately protected helps maintain trust, and benefits consumers and industry alike. In this context, we welcome the EU ‘fitness check’ on digital fairness and the evidence-based approach designed to identify potential gaps and challenges to the enforcement of existing rules.¹

Whilst consumer trends and technologies are evolving rapidly, we do not believe that, at this time, there are practices that cannot be addressed through existing rules or recommendations on best practices.



Enforcement of existing legislation

DIGITALEUROPE encourages policymakers to make full use of existing rules before proposing new ones. The Omnibus Directive,² which was adopted to modernise and better enforce consumer protection rules, and the Consumer Protection Cooperation (CPC) Regulation,³ which was designed to improve cooperation between consumer protection authorities in Europe, have yet to be evaluated.

The current legal framework already covers the potential unfair commercial practices highlighted by the Commission roadmap. The Unfair Commercial Practices Directive, the Consumer Rights Directive and the Unfair Contract Terms Directive provide ample ground for enforcement against any commercial practice which is deemed misleading, unfair, aggressive or that includes undue influence on customers’ economic decisions, implemented by sellers or third parties acting on behalf of sellers, e.g. influencers, review brokers or others.⁴ This is further strengthened by the Digital Services Act (DSA) and Digital Markets Act (DMA), which both delve further into dark patterns and transparency.⁵



Technology neutrality

Whilst we do not see gaps in the current consumer framework, should genuinely new concerns be identified, they must be tackled online and offline so that

¹ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law_en.

² Directive 2019/2161/EU.

³ Regulation 2017/2394/EU.

⁴ Directives 2005/29/EC, 2011/83/EU and 93/13/EEC, respectively.

⁵ Regulations (EU) 2022/1925 and 2022/2065, respectively.

consumers are protected regardless of the service they use. Many of the challenges highlighted in the consultation are equally relevant to the offline world. To avoid fragmentation, consumer confidence and legal certainty rules should be technology neutral and principle based.

In addition, we caution against proposing prescriptive new rules that would affect design interface or user experience. This is a key differentiator where different services try to get a competitive advantage. New rules in this area would increase costs for businesses, add complexity, and take away the brand experience that businesses want to create.



Specific practices addressed in the consultation

Cancellation/withdrawal buttons

Whilst it should not be unduly complicated for consumers to cancel a subscription or service, imposing a specific technical approach, e.g. a certain number of clicks, will harm innovation and result in unnecessary additional costs, with limited benefits to consumers. We instead suggest a more proportionate and less proscriptive approach such as to ensure consumers are 'provided with adequate, automated means to cancel existing subscriptions, allowing traders to collect the necessary information and introduce fraud prevention measures.'

Recent discussions about the introduction of a withdrawal button for all distance contracts concluded online in the context of the revision of the Distance Marketing of Financial Services Directive have highlighted the complexity of the issue.⁶

Suggestions to implement a one-size-fits-all approach are not workable due to existing legal limitations on withdrawing from a contract, e.g. hygiene products, products made to consumers' specifications, services delivered fully or in part before the withdrawal period ends etc. Additionally, there are security concerns if traders cannot ask for log-in and passwords or implement other security layers, e.g. confirmation links or one-time passwords, as bad actors or bots could abuse the interface to make illegitimate withdrawals. Additionally, one contract does not always equal one product or service, but may cover multiple products or services.

Subscription renewal reminder and termination confirmation

Providing consumers with a reminder before the automatic renewal of a subscription is already standard industry practice in the digital sector. However, we urge caution about mandating the form and frequency of such notifications. Depending on the type of service, renewals, for example, could be flagged by the app/service provider but also by the app store/payment provider. Additionally, there is a genuine issue with consent and notification fatigue amongst consumers

⁶ COM(2022) 204 final.

– a renewal reminder for monthly subscriptions could result, for example, in an email sent every month, and thus it might make more sense for one-year and longer subscription timeframes.

Similarly, it is common practice in our sector for services to send a confirmation notification when a consumer terminates a contract. However, it should be noted that consumers already have interfaces to monitor their subscription status. To avoid unnecessary or unwanted notifications, one could consider adding a selectable option during the termination process such as ‘please send me a confirmation via email.’

Subscription inactivity reminder

Similarly, it is common practice in industry to remind customers about their subscriptions after a sustained period of inactivity, as companies want to make sure customers make the most out of their services. However, we should be cautious about mandating specific requirements as depending on the type of service, the periods of relevant inactivity will differ.

For example, some services are used hourly, others monthly or even less frequently. Some subscriptions, such as cloud back-ups or password managers, are not intended to be used on a monthly basis at all, and consumers sign up for these services with the full knowledge they will use them passively. In these situations, it could subject consumers to unnecessary and excessive communication.

Personalisation practices

The consultation seems to assume that the personalisation of commercial offerings is overall harmful to consumers and that consumers are unaware of such practices. This assumption is contradicted by a 2018 study conducted by the European Commission, which highlighted that close to two-thirds (67 per cent) of consumers choose to use services in the knowledge that they are personalised.⁷

The personalisation of offerings for consumers can be beneficial when consumers understand and have agency over the services they use, which is required under the existing data protection framework.⁸ We are strongly opposed to a restructuring of the current legal framework based on such erroneous assumptions. Introducing a ‘neutral choice’ approach is not proportional to an alleged lack of consumer awareness.

⁷ European Commission, *Consumer market study on online market segmentation through personalised pricing/offers in the European Union* (2018), available at https://ec.europa.eu/info/sites/default/files/aid_development_cooperation_fundamental_rights/aid_and_development_by_topic/documents/synthesis_report_online_personalisation_study_final_0.pdf.

⁸ Regulation (EU) 2016/679.

Consumer complaints and interactions

Most companies allow consumers to interact with a human interlocutor upon request. However, introducing a general requirement for human interaction fails to take into account certain realities, including the high and increasing performance of automated tools, but also the scale of such requirements for certain companies in the digital sector such as either being too small or too big to comply.

Terms and conditions

Terms and conditions (T&Cs) must be transparent and easy to understand for consumers. Our members already spend significant resources to minimise text length as much as possible and make T&Cs as simple as possible. However, this remains a challenge because of the extensive information requirements that traders must provide in T&Cs.

To ensure that T&Cs remain comprehensible, we would welcome proposals to reduce the related requirements.

This goal would not be sufficiently reached by requiring traders to provide a mandatory summary of excerpts deemed 'key.' Any regulation to this end must ensure that summaries would not result in additional liability risks for traders as by their nature they cannot reflect the full text. In suggesting such a change to consumer law, it should therefore be clearly clarified what information is to be presented to consumers and in what manner, taking into consideration the parties' contractual freedom.

Spending and time-use limits

Many digital services already offer the option for users to tailor and restrict their experience as they wish. Furthermore, there are many solutions available from third parties or at device level to monitor a variety of usage parameters, including time and purchases.

Free trials

Free trials are voluntary offers from traders allowing consumers to assess whether products meet their specific expectations. They complement and go beyond withdrawal rights granted to consumers under law.

Offering a free trial is a costly marketing measure and for smaller developers, additional regulation is likely to result in fewer trials being offered, meaning that consumers would have to pay for a service they could not try out first.

In addition, there is no necessity to separate trial periods, which by definition are an element of a paid contract, from the main contract.

When consumers sign up, traders must already ensure that consumers explicitly acknowledge their obligations to pay. Customers also receive clear and

transparent information on trial terms, as required under existing regulations, including expiration dates and from when consumers will be charged to continue using the service. It is also common market practice to remind free trial participants of this expiration date shortly before the end of the free trial.

Requesting payment information only at a later date and/or requiring express consent when switching from a free trial to a paid service may not only deteriorate customer experience. It also misinforms as to the character of a ‘trial’ and creates the misleading impression of a non-paid service. There are multiple reasons that providers require payment details before starting a free trial. For instance, some consumers may repeatedly sign up for free trials under a variety of different names and email addresses to avoid ever paying for the service. In other cases, payment details may also serve as a tool to verify the customer has the required minimum age. Additionally, adding payment details is an effective means of ensuring consumers’ informed consent.

Influencer marketing

The concept of an influencer is already clear and the relationship between traders and influencers on commercial grounds is heavily regulated. Existing legislation bans hidden advertising/marketing – including the claim that a professional is a consumer. This is covered extensively in guidance and any infringement is also heavily guarded by responsible brands. The DSA and the Audiovisual Media Services Directive (AVMSD) also introduce helpful transparency standards on user-generated commercial content.⁹

In addition, we believe that consumers are increasingly savvy to the world of influencer marketing and sales of products. They understand that the promotion of products and services by individuals through digital channels is often a part of a commercial agreement.



Key concepts and definitions

The consultation suggests that key concepts such as the ‘average consumer’ or ‘vulnerable consumer’ could be adapted or complemented by additional benchmarks or factors. Consumers are not more vulnerable online. Consumers have more choice, more information and can easily change suppliers online. It is a matter of enforcement.

⁹ Art. 26(2) DSA requires online platforms to provide consumers with a functionality to declare whether the content they provide is or contains commercial communications. They must also ensure that other recipients of the service can identify in a clear and unambiguous manner and in real time, including through prominent markings, that the content is or contains commercial communications. Art. 28b(2), Directive (EU) 2018/1808 applies to video content and requires online service providers to inform users clearly when programmes or user-generated videos contain commercial communication, and to provide the means for the user who upload user-generated videos to declare the videos contain audiovisual commercial communications.

Burden of proof

There is no necessity to place traders, including small and medium businesses, under a presumption of acting in a non-compliant manner. Establishing additional requirements for businesses to demonstrate compliance with consumer laws requires additional efforts and ultimately results in disproportional costs that will in the end be passed on to consumers.

It must also be taken into account that the vast majority of consumer law requirements relate to mandatory information that has to be disclosed to consumers as well as other aspects that are transparent to consumers.



Areas of concern for the digital sector

Misuse and fraud in relation to ‘right of withdrawal’

The Consumer Rights Directive gives consumers a 14-day withdrawal period to change their minds about purchases made online without giving any reason.¹⁰ Consumers should only use this right to inspect a product. However, our sector experiences misuse of the right of withdrawal, and even fraud, resulting in high costs for European manufacturers and large sustainability implications.

Returned products require an inspection and potential testing to determine if the product can be resold as new or refurbished. However, in many cases manufacturers cannot prove that a product has not been used, resulting in the need to sell them as refurbished or discard products even though they might not even be used. Beyond the cost to the trader, there is a cost to the environment that must be considered.

Examples of misuse and fraud:

- ▶▶ Products returned not in original packaging;
- ▶▶ Products (heavily) used with technical or cosmetic damage;
- ▶▶ Non-original product returned, e.g. older product, completely different product, or even alternatives to substitute product weight; and
- ▶▶ Non-complete product returned, e.g. missing accessories.

The European Commission should use this fitness check to address the misuse and fraud associated with the right of withdrawal.

FOR MORE INFORMATION, PLEASE CONTACT:

¹⁰ Directive 2011/83/EU.



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About DIGITALEUROPE

DIGITALEUROPE is the leading trade association representing digitally transforming industries in Europe. We stand for a regulatory environment that enables European businesses and citizens to prosper from digital technologies. We wish Europe to grow, attract, and sustain the world's best digital talents and technology companies. Together with our members, we shape the industry policy positions on all relevant legislative matters and contribute to the development and implementation of relevant EU policies, as well as international policies that have an impact on Europe's digital economy. Our membership represents over 45,000 businesses who operate and invest in Europe. It includes 100 corporations which are global leaders in their field of activity, as well as 41 national trade associations from across Europe.

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Membership

Corporate Members

Accenture, Airbus, AMAT, Amazon, AMD, Apple, Arçelik, Arm, Assent, Autodesk, Avery Dennison, Banco Santander, Bayer, Bosch, Bose, Bristol-Myers Squibb, Brother, Canon, Cisco, CyberArk, Danfoss, Dassault Systèmes, DATEV, Dell, Eaton, Epson, Ericsson, ESET, EY, Fujitsu, GlaxoSmithKline, Google, Graphcore, Hewlett Packard Enterprise, Hitachi, Honeywell, HP Inc., Huawei, ING, Intel, Johnson & Johnson, Johnson Controls International, Konica Minolta, Kry, Kyocera, Lenovo, Lexmark, LG Electronics, Mastercard, Meta, Microsoft, Mitsubishi Electric Europe, Motorola Solutions, MSD Europe Inc., NEC, Nemetschek, NetApp, Nintendo, Nokia, Nvidia Ltd., Oki, OPPO, Oracle, Palo Alto Networks, Panasonic Europe, Philips, Pioneer, Qualcomm, Red Hat, RELX, ResMed, Ricoh, Roche, Rockwell Automation, Samsung, SAP, SAS, Schneider Electric, Sharp Electronics, Siemens, Siemens Healthineers, Skillsoft, Sky CP, Sony, Sopra Steria, Swatch Group, Technicolor, Texas Instruments, TikTok, Toshiba, TP Vision, UnitedHealth Group, Visa, Vivo, VMware, Waymo, Workday, Xerox, Xiaomi, Zoom.

National Trade Associations

Austria: IOÖ

Belgium: AGORIA

Croatia: Croatian Chamber of Economy

Cyprus: CITEA

Czech Republic: AAVIT

Denmark: DI Digital, IT BRANCHEN, Dansk Erhverv

Estonia: ITL

Finland: TIF

France: AFNUM, SECIMAVI, numeum

Germany: bitkom, ZVEI

Greece: SEPE

Hungary: IVSZ

Ireland: Technology Ireland

Italy: Anitec-Assinform

Lithuania: Infobalt

Luxembourg: APSI

Moldova: ATIC

Netherlands: NLdigital, FIAR

Norway: Abelia

Poland: KIGEIT, PIIT, ZIPSEE

Portugal: AGEFE

Romania: ANIS

Slovakia: ITAS

Slovenia: ICT Association of Slovenia at CCIS

Spain: Adigital, AMETIC

Sweden: TechSverige, Teknikföretagen

Switzerland: SWICO

Turkey: Digital Turkey Platform, ECID

Ukraine: IT Ukraine

United Kingdom: techUK