A DIGITAL MARKET THAT WORKS FOR CONSUMERS

DECO's position paper on the Digital Fairness Act

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The digital market has become central to the daily lives of European citizens and the current European digital ecosystem is more and more characterized by rapid technological innovation, the proliferation of new digital agents, and the growing integration of AI based tools into business models.

This landscape has brought undeniable benefits to both consumers and businesses, but it has also introduced new risks and challenges under the existing legal framework.

The practical application of EU legislation – such as the Digital Services Act (DSA), the Digital Markets Act (DMA), the Data Act, the General Data Protection Regulation (GDPR), and the Artificial Intelligence Act (AI Act) – continues to expose gaps, grey areas, and difficulties in ensuring consistency and interoperability between different legal instruments.

European digital legislation must primarily serve as a driver of mutual trust between consumers and businesses, fostering a regulatory environment that encourages responsible innovation. Legal clarity, proportionality, and the predictability of legal consequences are essential conditions for businesses – particularly the most innovative – to develop new digital products, services, and business models without the fear of legal uncertainty or disproportionate obligations.

Regulation should promote "regulated innovation" – establishing a stable, coherent, and proportionate framework that supports both digital SMEs and large global operators, holding them accountable while also providing legal certainty.

The aim must be to create a digital ecosystem where protection and innovation go hand in hand.

Regulatory fragmentation and the absence of a holistic approach may prevent coordinated and effective responses. The recent Digital Fairness Fitness Check had already reflected on this, but it is urgent to clarify the boundaries and intersections between the main digital legislative acts. It is proposed that cross-cutting interpretative guidance be developed, alongside coordination mechanisms between competent authorities, particularly regarding enforcement, dispute resolution, and the definition of criteria for risk and impact assessment of deployed technologies.

It is also necessary to ensure that digital legislation is applied consistently with sector-specific laws, such as those governing mobility, health, financial services, electronic communications and energy — particularly regarding contractual rights arising from contracts concluded through AI or digital intermediaries, such as recommendation websites or apps and comparison tools.

Likewise, consistent regulation of influencer marketing that has taken over the digital landscape and become professionalised is required, including the establishment of a public registry for influencers. More precise disclosure requirements should be introduced and the prohibition of certain practices in areas that have proven particularly problematic, with special risks in terms of whether due to their impact on physical and mental health or because they carry other associated risks, should be considered.

Consumers need a very ambitious Digital Fairness Act (DFA), that updates EU consumer acquis to better protect consumers online, not a superficial touch-up. This means DFA should focus on addressing identified gaps and areas of legal uncertainty concerning consumer protection online. A shift towards coherence and simplification is needed, but it is important to highlight that simplification **should not mean deregulation or lowering consolidated consumer rights**. On the contrary, simplification shall mean clearer rules, streamlined enforcement and aligning legislation with digital language.

The DFA should address horizontal issues, namely: introducing the principle of fairness by design and by default; reviewing concepts such as 'vulnerable consumer', considering digital vulnerability and digital asymmetry; amending rules regarding unfair contract terms in order to respond to new contracting trends; clarifying key legal concepts – such as "consent", "profiling", and "automated contract"; adapting rules in terms of burden of proof.

It is also urgent to establish instruments enabling more coordinated and functional governance of the digital enforcement system, namely a **Digital Enforcement Strategy**, which, in DECO's view, should include the creation of a **Regulatory Enforcement Forum for the Digital Market**, bringing together all relevant stakeholders - main competent authorities, including data protection authorities, consumer protection bodies, sectoral regulators, DSA coordinators, consumer organisations- to improve cross-regulatory cooperation, and also a new approach to actions aimed at responding to infringements, ensuring more expeditious proceedings and proportionate and dissuasive sanctions.

In addition, problematic practices identified in the Digital Fairness Fitness Check need to be addressed definitively, such as such as dark patterns, addictive design, algorithmic manipulation, unfair practices in video games, unfair personalisation and pricing, influencer marketing.

Below we present a set of suggestions for the DFA aimed at making the digital environment safer and strengthening and clarifying the applicable legal framework, and we comment on some of the simplification measures identified in the public consultation, which we believe fall far short of what is needed.

Closing Regulatory Gaps

Our current legal framework, although robust to a certain extent, is not keeping up with the digital pace.

The implementation of key EU laws — such as the Digital Services Act, the Digital Markets Act, the GDPR, the AI Act and the Data Act — is proving complex. These instruments do not always align neatly. They overlap, diverge, and often lack coordinated enforcement mechanisms. This creates confusion not only for consumers but also for businesses — particularly SMEs and startups — who operate in a climate of legal uncertainty and sometimes disproportionate obligations.

Also, automated contracts — increasingly concluded via chatbots or virtual assistants — require specific regulation. Too often, consumers are unaware that a contract has been formed at all. They may not have actively consented. They may have been nudged or misled by default settings. In such contexts, we believe clarification and reinforcement, not deregulation, is the answer.

With the growing adoption of AI systems in contractual processes – from chatbot-assisted contracts/ automated contracts to the execution of smart contracts (using blockchain technology) – consumer rights must be reinforced across several dimensions:

- Explicit consent mechanisms suited to digital environments.
- The right to a comprehensible explanation of any automated decision, including its rationale and possible alternatives, thus complementing the wording of the GDPR.
- The right to ensure that a smart contract is a legal contract, subject to consumer protection legislation.
- The right to a human review and supervision of AI contracts concluded with consumers.
- The right to refuse to enter contracts with entities that rely exclusively on AI for essential decision-making processes.
- The imposition of limits on contractual automation in sensitive areas such as health and well-being, housing, energy, insurance, and electronic communications.

We also need to rethink how consumer protection law interplays with the broader digital legislative package. At DECO, we propose that certain provisions of the DMA and DSA be extended to a wider range of platforms that may not be formally designated as gatekeepers but still exert significant influence. Likewise, the principles of the AI Act — especially explainability and impact assessment — should also apply to so-called “low-risk” AI when used in consumer contexts.
In short, consumer protection must follow the logic of the technology, not the formal categories of the law.

Amendment of EU Consumer Law Aquis to respond to current market needs and future developments

In DECO's view it is important to:

• **Adapt the Consumer Rights Directive**, incorporating specific obligations for digital services, such as clarity regarding the duration, renewal and cancellation of subscriptions, and strengthening pre-contractual obligations in respect of contracts concluded via online platforms, particularly social networks, especially where such platforms rely on algorithmic profiling or recommendation systems.

• **Amend the Unfair Contract Terms Directive** to update rules regarding information requirements and to address automated contracts and introduce additional duties of good faith in interactions mediated by artificial intelligence.

An interplay between the trader's digital terms and conditions, the service conditions and the privacy policy is needed. Information should be simple, clear, intelligible, machine-readable, and always accessible.

A summary of the information of the terms and conditions should always be provided to consumers.
Clear rules regarding the communication of changes to the terms and conditions should also be introduced.

• **Reinforce the Unfair Commercial Practices Directive**, by blacklisting several manipulative digital practices such as **dark patterns, addictive design or algorithmic nudging**.

• Introduce minimum usability and accessibility requirements and tools for all consumer-facing digital contracts and interfaces, ensuring protection by default and by design, particularly with respect to minors, extending the DSA's provisions to other actors and digital services, accompanied by an anticircumvention clause like the one established in the DMA.

Main problematic practices identified in the Digital Fairness Fitness Check which urgently require a response in terms of regulation through the DFA

Dark patterns

Commercial practices that aim to influence consumers are not a new phenomenon, but they have gained new scale and effectiveness, raising increased concerns with the development of digital markets.

Although there is no legal definition, the concept "dark patterns" refers to commercial practices that substantially distort or impair consumers' ability to make autonomous and informed choices, through the structure, design or functionality of digital interfaces or system architecture, in order to influence consumers to make decisions they would not otherwise make, for example by presenting choices in a non-neutral way, creating a false sense of urgency, using emotional manipulation or misleading consent options.

The Commission's 2022 dark patterns study showed that 97% of the most popular websites and apps used by EU consumers deployed at least one dark pattern, with the most common ones involving hiding information, creating false hierarchies in choice architectures, repeatedly making the same request, difficult cancellations and forced registrations.

Dark patterns have become highly prevalent, as evidenced by numerous studies and enforcement investigations from recent years. As referred in the Commission's Staff Working Document with the conclusions of the Digital Fairness Fitness Check, in the public consultation, ***89% of consumers reported being confused by dark patterns*** *in website/app design and 76%* ***felt pressured to buy something due to the language or design that was used****. BEUC's 2023 survey found that 61% of consumers have felt under pressure when buying online and* ***41% ended up buying things they did not intend to*** *due to confusing design.*

This data reveals that introducing clearer rules is strongly advisable. DECO calls for the adoption of the following measures:

❶ **Introduction of a horizontal ban of dark patterns in the UCPD**. *This ban should be more robust than that provided in article 25 of the DSA;*

❷ **The following dark patterns should be added to the blacklist** *in UCPD Annex I:*

- Giving more prominence to certain choices when requesting consumers to make a choice.
- Creating the false impression that the consumer has no other choice than the one prominently presented by the trader.
- Requesting consumers to make or reconsider a choice that has already been made.
- Requiring consumers to click through many steps if they want to make certain choices, for instance to change default settings, to cancel a contract or to opt-out of certain features.
- Pressuring consumers towards certain a choice by using urgency, scarcity or high demand claims.

- Pressuring consumers towards a certain choice by using emotional language or shaming.
- Confusing consumers by using ambiguous language when asking for a choice.
- Confusing consumers by using counterintuitive design elements when asking for a choice (e.g. green for 'no' and red for 'yes').
- Not indicating obligatory costs upfront but only during the purchase process.
- Splitting the price into several parts without indicating the total price.
- Adding products or services to the shopping basket without consent.
- Steering consumers into making purchases on credit or into using payment options that come with additional costs.
- Indicating prices only in a virtual currency but not in the national currencies.
- Offering virtual currencies only in bundles.
- Making the procedure for terminating a service more difficult than subscribing to it.
- Making the procedure for aborting a commercial transaction more difficult than launching it.
- Hidden opt-outs.

Addictive design and gaming

The results of a recent survey in Portugal on young people's addictive online behaviour revealed that 60% of people aged between 15 and 24 use the Internet for an average of four hours or more per day.

In a survey conducted in the context of the Digital Fairness Fitness Check, 33% of consumers reported spending too much time or money on certain websites and apps, with 31% saying that this digital addiction was due to specific features such as the autoplay of videos, receiving rewards for continuous use or being penalised for inactivity.

In this scenario it is fair to say that we can talk about a new Silent Epidemic: The Digital Dependency among Young People.

And the fact is that the online environment is not addictive by mere chance. Many of the platforms, from social media, to app stores, to video games are intentionally designed to provoke this effect. The colours, sounds, algorithms, notifications, autoplay, infinite scrolling, recommendations and filters are not just there to entertain. They are there primarily to retain.

Also, video games are increasingly a commercial environment for children, raising different concerns. From virtual currencies, that have become a widespread feature online, also on social media, to the use of loot boxes and pay-to-win mechanisms, there is growing concern about the monetisation strategy of video games. These practices, in addition to having the potential to distort the real value of money, can encourage people to spend more time on these games, which can become more addictive without any real perception of spending.

DECO calls for the adoption of the following measures:

❶ Introduction of practices and features that, as recognised, generate addictive behaviour to the blacklist in UCPD Annex I.

Addictive features should be banned or at least switched off by default, curbing features like autoplay, infinite scroll, and reward loops designed to increase user engagement and spending, particularly for minors.

❷ Regarding video games, it should be clarified in a legally binding manner that EU consumer law applies to in-app purchases.

In case of video games that are likely to be played by minors, loot boxes, and pay-to-win mechanism should not be available at all and in-app purchases should be deactivated by default. The use of premium virtual currencies that have to be purchased with real currency should be prohibited.

Personalisation

Personalisation, if it is a transparent choice for consumers, can be interesting and also convenient, for instance if products and services that match consumers preferences are recommended or advertised to them. But the point is that personalisation can be and is increasingly unfair, for instance if it exploits the knowledge that businesses have about consumers and their vulnerabilities. Personalised offers can be misused to steer consumers towards more expensive offers within the range of offers that they are likely willing to pay for.

The consumer survey conducted for the Digital Fairness Fitness Check showed that 37% of consumers had the impression that a company had knowledge about their vulnerabilities and used it for commercial purposes.

Personalised pricing is particularly unfair as it not only makes it impossible for consumers to compare offers, but also if consumers depend on certain products or services because of their personal circumstances, and may even brig special concerns in certain essential sectors, where it can potentially exclude consumers.

DECO calls for the adoption of the following measures:

❶ Personalised advertising based on sensitive data (Article 9 GDPR) should be prohibited – even if consent has been given according to the GDPR – if the sensitive data is used to exploit vulnerabilities of consumers. In the case of minors, personalised advertising based on tracking should be prohibited in general.

❷ Personalised pricing whenever it may lead to discrimination should be prohibited, except for price reductions.

❸ Non-personalisation of apps and websites, except for personalisation based on technical storage which is strictly necessary for the conveyance of a communication without prejudice to the principle of confidentiality, should be the default option. If consumers opt-in to personalisation, traders should disclose the parameters/criteria used and allow consumers to modify these parameters.

Unfair pricing

Personalised pricing is much more problematic and, although it is not as widely implemented, there are fears that, without adequate safeguards in legislation, it will become increasingly common.

Pricing practices such as dynamic pricing, drip pricing and comparison pricing have been raising more and more problems, making it difficult for consumers to compare prices and understand the real value of promotions and in some cases even making it impossible to access certain services.

The Modernisation Directive introduced in the Consumer Rights Directive a mandatory obligation for traders to disclose the presence of personalised pricing. This is clearly insufficient, more robust measures are needed.

DECO calls for the adoption of the following bans:

❶ Using any price indication other than the prior price applied by the trader, in order to eliminate misleading price comparisons and cross-out prices that are falsely perceived by consumers as price reductions.
❷ Adding unavoidable fees and charges after the start of the purchasing process (drip pricing).
❸ Using dynamic pricing techniques to increase the price of the product after the start of the transaction process.
❹ Using personalisation and personalised pricing in essential services.
Also, dynamic pricing has also been particularly problematic in sectors such as live entertainment, where we advocate setting maximum limits or, alternatively, banning it.

Finally, since one of the simplification measures identified in the public consultation relates to **ending the current fragmentation of national rules on price reductions for perishable goods** under the Price Indication Directive by fully exempting all food products, which in practice has not been a problem, we must emphasise that DECO is against to eliminating these rules, which are important for consumers to understand the real value of promotions. If fragmentation is presented as a problem, it can be addressed through the harmonisation of the reference period. Nevertheless, **a mandatory reference period, potentially shorter than 30 days, must be maintained**.

Influencer marketing

Influencer marketing has definitively changed the advertising paradigm and is currently considered the most effective form of online advertising. However, its potential, combined with the way it is being implemented, without clear rules and limits, raises new concerns, and the line separating simple content from advertising content is becoming increasingly blurred.

From hidden advertising to the promotion of cosmetic procedures, food supplements, weight loss plans and similar products, which have the potential to negatively influence more vulnerable audiences, common commercial practices in influencer marketing require greater attention and clear limits.

More precise disclosure requirements are definitely needed, and this is precisely what the data from the public consultation on the Fitness Check revealed, showing that 74% of consumers reported a lack of transparency about the paid promotions of products.

Previously, an analysis conducted by the European Commission in conjunction with the CPC Network on social media posts by influencers, published in 2024, revealed that in the analysis of posts by 576 influencers on social media platforms, 97% of influencers published commercial content, but only one in five (20%) systematically indicated that the content was of an advertising nature. The same analysis revealed that 38% of influencers did not use the platform's labels for disclosing commercial content, such as the ‘paid partnership’ button on Instagram. Instead, these influencers opted for different wording, such as ‘collaboration’ (16%), ‘partnership’ (15%) or generic thanks to the partner brand (11%).

In our position paper, we identify a set of problematic practices that deserve attention and call for a tightening of rules and the establishment of prohibitions in certain more problematic sectors.

Our analysis and all data available reveal that introducing clearer rules is strongly advisable.

DECO calls for the adoption of the following measures:

❶ A definition of influencer and a mandatory register for influencers to allow for greater transparency should be introduced.

❷ More precise disclosure requirements should be introduced.

❸ A rebuttable presumption of the existence of a commercial relationship should be introduced, with it being up to the influencer to prove otherwise, where appropriate.

❹ Rules regarding ‘edited content’ should be introduced, making sure it must be clearly identified as such. Editing tools should be explicitly prohibited in relation to certain products, in cases where their use could create unrealistic expectations regarding the actual performance of the goods or services. DECO also advocates for a specific ban on the use of such tools when minors are involved.

❺ A ban on direct or indirect advertising of certain products or services that are potentially more problematic—whether due to their impact on physical and mental health or because they carry other associated risks – should be introduced. The ban should include in addition to the prohibitions already applicable: Aesthetic procedures and establishments and/or professionals dedicated to such procedures; food supplements, weight loss or nutrition products, plans, and similar offerings; products that expose consumers to a high risk of financial loss.

Digital subscriptions

The exponential growth of the digital subscription economy, often with free trial periods but requiring payment details to be provided in order to take advantage of the free period, although meaning a greater range of easily accessible content for consumers, has brought difficulties, particularly with online contract cancellation. It is very simple to sign up, but cancelling can be a nightmare. Furthermore, how many subscriptions do we have that we don't cancel simply because we don't remember they are still on?

Digital media subscription services provide content that is immediately accessible, with increasing levels of personalisation and technological integration. However, this reality should not justify an erosion of the right of withdrawal. The balance between consumer rights and the legitimate interests of businesses is already ensured by the principle of proportionality in compensation. Legislation permits that, where the consumer exercises the right of withdrawal, the trader is entitled to compensation proportionate to the service provided up to the point of withdrawal.

In this context, **any attempt to restrict or discourage the exercise of this right based on fears of “abusive use” must be rejected**. The legislation itself provides effective mechanisms to mitigate such risks. For example, businesses may limit or modulate access to content during the reflection period by providing samples, partial versions, or reduced functionalities. This practice respects the spirit of the legislation whilst simultaneously promoting protection of business investment and the consumer’s freedom of informed choice.

DECO is firmly against any change to the right of withdrawal, which is sufficiently balanced. Furthermore,

DECO calls for the adoption of the following measures:

❶ When offering free trial periods, traders should be prohibited from requesting payment details.

❷ Traders shall ask consumers for their explicit consent before turning free trials into paid subscriptions. The same shall apply before turning a low-cost-trial into subscriptions at a higher price.

❸ A cancellation button should be introduced to facilitate the cancellation of subscriptions.

❹Traders should be required to send consumers a reminder before the renewal of unused subscriptions.

❺In case of subscriptions with automatic renewals, consumers should have the right to cancel their subscription anytime with a notice period of one month.

Unfair contract terms

The Fitness Check's supporting study confirmed that users of digital services or purchasers of products online rarely read the Terms & Conditions, despite their relevance in B2C transactions. Various studies, including those mentioned in the conclusions of the Fitness Check, have revealed that similar problematic clauses are commonly found in the terms and conditions presented to consumers, raising concerns about consumer rights and the balance of power between traders and consumers in the digital environment. It is also pointed out that the T&Cs of platforms often involve dynamic and rapidly changing terms, which can be updated regularly without direct communication with consumers.

Furthermore, the Unfair Contract Terms Directive was introduced in a very different context that was not geared towards the digital environment, and in which the conclusion of contracts through AI assistants was not even a mirage.

In this new context, and as mentioned above,

DECO considers that an amendment to the Directive is justified, which should include:

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❶ An update on the rules regarding information requirements.

❷ The UCTD should require an interplay between the trader's digital terms and conditions, the service conditions and the privacy policy.

❸ The UCTD should require businesses to provide consumers with a summary of their terms and conditions and should list the elements that must be included in these summaries.

❹ The UCTD should ensure that information is simple, clear, intelligible, machine-readable, and always accessible.

❺ Clear rules regarding the communication of changes to the terms and conditions should be introduced.

❻ The amendment should address automated contracts and introduce additional duties of good faith in interactions mediated by artificial intelligence.

Automated contracts

As for the Automated Contracts, we are facing a contract modality that may become prevalent in digital contracts. These contracts are usually concluded without traditional human-to-human interaction and are often implemented through digital tools such as chatbots, virtual assistants, or algorithmic decision-making systems. They may arise in relationships with traditional service providers — for example, where a consumer interacts with a company's chatbot — or in fully automated environments, where contracts are concluded directly via virtual assistants or intelligent devices.

Despite their growing use, in our view, the legal framework governing automated contracts remains insufficiently clear and fails to offer adequate protection to consumers. In our view, **the suggestion referred in the public consultation to pursue a simplification of the applicable legal framework appears at the least questionable**. Simplification presupposes a coherent and well-understood legal regime — which, in the case of automated contracting, is far from being the case.

Automated contracts represent one of the most disruptive developments in modern consumer markets and will become increasingly common, it would therefore be incomprehensible in this scenario of uncertainty for the DFA not to seek to provide legal certainty and due protection to consumers.

DECO calls for the adoption of the following measures:

❶ Introducing clear legal definitions of automated contracts, virtual agents, and the respective liabilities of traders who deploy such systems.

❷ Introducing mandatory transparency requirements, including clear pre-contractual information about the nature of the interaction, the legal consequences of user actions, and whether a binding contract is being proposed.

❸ Ensuring explicit consumer consent mechanisms, adapted to automated environments, so that no contract can be concluded without active and informed participation by the consumer.

❹ Providing accountability rules for traders regarding the behaviour and decisions of automated systems acting on their behalf.

❺ Ensuring effective remedies and access to dispute resolution mechanisms in cases where consumers are bound to contracts without genuine knowledge or consent, are available.

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