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ACM Additional Technical Recommendations on Digital Fairness

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Markets that work for people and businesses

In the Authority for Consumer and Markets (hereinafter "ACM") position paper on digital fairness, the ACM points out aspects which could be further strengthened or clarified in the Digital Fairness Act (hereinafter "DFA"). In addition to the main points, the ACM would like to address further – technical – suggestions for the Commission to consider in the context of the DFA.

1 Suggestion for stricter rules in the DFA

1.1 Prohibit the offering and selling of fake engagement and reviews

Current legislation makes it very difficult for national enforcement agencies to take action against the offering and selling of fake engagement and reviews. This is because the selling of fake engagement/reviews takes place between two traders, which places this situation outside of consumer law. Because of current legislation it is only possible to take action against the seller of fake engagements/reviews when the enforcement agencies can prove the seller plays a part in posting/submitting the fake engagements/reviews, on behalf of the trader, aimed at consumers. Only then the enforcement agencies can prove the that seller of fake engagements/reviews, independently, commits an unfair commercial practice. ACM finds that sellers of fake reviews are easily found online, from which it could appear to traders that this is a legitimate practice. To tackle this more effective, ACM would argue that the offering and selling of fake reviews/engagement should generally not be allowed to be a legitimate practice. This means that not only the posting but also the offering/selling of engagement or a review which is not based on a genuine consumer experience should not be permitted. This would be a potential useful addition to the law.

1.2 Legal liability for third-party facilitators

Under current legislation, there are challenges to hold third-party suppliers/intermediaries liable for the unfair persuasive techniques that they create or help create/facilitate. This is problematic considering the many online traders who use third parties that facilitate or enable the development of persuasive techniques on their digital sales environments. Approximately 60% of a subsample of Dutch online retail entrepreneurs relied on these third party suppliers.[1] In some cases these third-party facilitators offer products and services that lead to unfair outcomes for consumers per se. In other cases, third-party products and services contain no or insufficient measures to prevent the trader from using them to mislead consumers. This increases the risks of consumer harm. A potentially useful addition to the law is to extend the application of consumer law beyond traders to third-party facilitators of unfair persuasive techniques. Introducing a clear legal liability, for third party suppliers as explained above, could be a way to decrease the number of unfair practices in e-commerce.

1.3 Consider setting defaults for data-usage or a one-click action to refuse personalised design of large firms

We believe that consumers should be provided control over the question as to whether they want to be subjected to various forms of personalisation or not. This is in particularly important when it comes to large firms. The ACM would like to propose three options to tackle this problem. First option, is to require that personalisation is switched off by default, instead of the current situation where it is switched on unless consumers actively turn it of. Second option, where personalisation is allowed, require consistent and effective transparency on personalisation by traders, preferable in a way that is standardised across the European Union (hereinafter "EU"). And align EU consumer and privacy law to create an intricate legislative framework governing personalisation practices. Third option, is to give people the right to refuse a design that is personalised, and make this a one-click action, consistent with article 27 and 38 recommender system transparency DSA. Moreover, all traders should provide information in the terms and conditions about when and how design is personalised consistent with article 27 DSA.

[1] ACM, Naleving Leidraad Bescherming Online Consument Onderzoek onder webshops, 2024 (only available in Dutch).

2 Suggestions to strengthen enforcement in de DFA

2.1 Clarify capabilities for mystery shopping in a digital environment

The ACM acknowledges that the DFA introduces several changes to adapt to an ever more developing digital landscape of consumer engagement. In order to effectively enforce the obligations set forth under the proposal, it is necessary to specify the powers of investigation granted to the national enforcement agencies (such as those under the CPC) and adapt them to a digital environment in which these powers may be more effectively utilised.

The ACM welcomes the changes introduced under the CPC, clarifying the conditions for national enforcement agencies to engage in so called “mystery shopping” practices to better identify consumer legislation infringements in an online environment. It does also however note that there are several practical barriers to an effective use of this power, most notably when an actual consumer contract or agreement is not entered into. Many information obligations on current platforms of sellers are locked behind user accounts or registration obligations for the use of their products and services.

In order to ensure effective enforcement in such situations, it is necessary for national enforcement agencies to engage in activities which are related to, but not bound by, a consumer contract or purchase online. The ACM would therefore welcome a clarification of the current ‘mystery shopping’ powers, focussing on expanding the applicable scope to include digital platforms or environments where a range of consumer interactions can take place without the necessity of a consumer sales agreement having been concluded. It would be strongly beneficial to the enforcement of European consumer law to gain access to these platforms, utilizing fictitious identities to create accounts or register otherwise as a consumer. This gives national enforcement agencies the necessary space to adapt to the developments of online sellers, for example related to personalised practices which require registration of an account or are otherwise locked behind the submission of personal data as means of access to its services and websites.

2.2 Challenges in regulation non-EU traders

The current consumer law enforcement regime faces challenges when addressing traders established outside the EU. This is partly due to the lack of enforcement capacity at the European level, as discussed in ACM position paper on digital fairness. Additionally, the legislation could be clearer in stating that EU consumer law applies to all traders active in the EU market, regardless of their domicile. Moreover, the absence of these traders from EU jurisdiction weakens the deterrent effect of any imposed interventions. For instance, fines may not be effectively enforced, reducing their impact.

The solution the ACM would like to propose is the obligatory appointment for (large) multinational traders of a legal representative within the EU, similar to the requirement under DSA. This could also serve as a solution for improving enforcement and compliance under the CPC regulation, ensuring better consumer protection and more effective cross-border coordination.

3 Suggestions to clarify in the DFA

3.1 Possibility to access human interaction, besides AI chatbots

A growing number of traders offer customer service through AI systems, like chatbots, virtual assistants or voice interfaces. Which is an understandable development. When chatbots are well designed, they contribute to efficiency and continuous availability. But the ACM also observes that the answers chatbots give, are not always right and sometimes even incorrect. This is at odds with current consumer law which obliges traders to effective and direct communication with consumers. An important aspect of effective communication is that consumers receive the right information.[2]

[2] HvJ EG 16 oktober 2008, C-298/07, ECLI:EU:C:2008:572 (Deutsche Internet *Versicherung* AG)

For the ACM, this standard of effective and direct communication, also means that there should always be the possibility to access human interaction. The ACM notices that, not all traders yet understand the possibility to access human interaction – aside from AI chatbots – is the standard. The DSA is clearer on this subject. The DSA, which is applicable to intermediary services such as online platforms, explicitly states that "*providers of intermediary services should allow recipients of services to choose means of direct and efficient communication which do not solely rely on automated tools*."[3] The ACM would like to ask the Commission to align consumer law with this requirement in de DSA. This will give consumers the opportunity to access human interaction, when they need it. This is especially true for consumers in vulnerable position or consumers who are less digitality skilled.

The ACM would like to ask the Commission to make sure that traders, who offer customer support through AI systems also offer the possibility to contact an employee in case the AI system does not provide the help customers were searching for.

3.2 Clear and standardized labels for sponsored influencing

Followers do not always understand that content provided by influencers are paid endorsements, and hence advertisements. If followers believe the recommendations are genuine, this can lead to misguided purchases. Studies suggest that standardized labels can support consumers to make better decisions.[4]

3.3 Mandatory acceptance of returns within the EU for dropshipping

Dropshipping has become an increasingly popular e-commerce model, allowing traders to market and sell goods directly to EU consumers without holding any stock within the EU. While this model offers low operational costs and wide product availability, it presents serious risks and practical challenges for consumers. Dropshippers are often based in the EU but arrange direct delivery from a supplier, who is often located outside the EU, for example in China or North America.

The problem is that consumers often don't realize they are ordering from a dropshipper that ships from outside the EU. They are given the wrong impression as many dropshipping platforms present themselves with EU-sounding names, websites, and customer service. When consumers want to return a product, they are faced with unexpected high costs for returning the item to, for example, China. The cost of returning a shipment to China is many times higher than returning to an address within the EU. What makes this even more problematic is that consumers frequently want to return products precisely because the quality is often lower than they expected. At the same time, the products often have a low value, causing the return costs to sometimes exceed the purchase price, rendering EU consumer protection rights practically void. In short, consumers face high shipping costs, long delays, and customs complications and unexpected high costs when attempting to return goods, when simply trying to exercise their legal right to withdraw from a purchase or return faulty items.

ACM finds that consumers must not be obligated to return goods to third countries, as this often results in excessive costs and practical barriers. We already implemented this under the Dutch law, namely Article 6:230s, paragraph 1 of the Civil Code provides the consumer with a choice: to return the item either to the trader themselves or to a third party authorized by the trader. This choice implies that the consumer must always be able to return the product directly to the trader. Returning to the trader is more advantageous than returning to a third party outside the EU. Therefore we propose to have a legal amendment that explicitly includes this right in the law.

[3] 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), art. 12 en consideration 43.
[4] Heil, L.., Feher, B., Giesen, R. van, Boerman, S. & Reijmersdal, E. van, Sponsorvermeldingen door influencers. Onderzoek voor het Samenwerkingsverband Digitale Toezichthouders, 2024, Centerdata (only available in Dutch); Danish Competition and Consumer Authority, Consumers benefit from visually salient standardized commercial disclosueres on social media, 2021.

3.4 Develop effective standardized disclosure for dropshipping[5]

EU consumers are prior to purchase not aware they buy from dropshippers, that the goods will be shipped by a third party, and if still applicable, that the dispatch will occur from outside the EU. They do not know related to the exercise of withdrawal rights such as return shipping, customs duties, and import VAT. The law currently only requires the trader to inform the consumer that they must pay the return costs, but from this information consumers will not extract, if still applicable, high return costs. In the case of dropshipping this information is not presented or is presented in a hidden away in the general terms and conditions or obscure sections of a website and therefore consumers are often unaware of the third-party supplier's identity and may face unexpected costs when returning goods.

As ACM, we take the position that dropshippers must disclose upfront that delivery is made by a third party and specify the country from which the goods are shipped. This is an interpretation of "the method of delivery" (Article 6:230m, paragraph 1, section g of the Civil Code). However, this rule does not apply uniformly across the EU, and we believe it would be beneficial to establish a consistent uniform standardized disclosure approach for all EU Member States. We ask the European Commission to develop and test standardized disclosure that informs consumers upfront about the fact they buy from a dropshipper, and what are the consequences.

3.5 Review right to withdrawal to ensure effective application

The right of withdrawal is included in consumer law to protect consumers in situations where they may not be able to make a fully informed decision at the time of purchase. The Fitness Check on EU Consumer Law suggests that certain digital traders experience difficulties with understanding and applying the right of withdrawal and ask for simplification. This aligns with the findings of our own analysis. Therefore, the ACM would support a critical assessment of the existing provisions in the CRD, their practical applicability in the case of digital products and the underlying causes for the experienced difficulties and whether measures could be taken to simplify or update the framework. Furthermore, legal uncertainty may be reduced by additional guidance on the existing framework.

The ACM considers that in general, the existing rules about the right of withdrawal for digital services that start within the withdrawal period should not be adjusted. The ACM finds the current compensation where the consumer shall pay the trader an amount which is in proportion to what has been provided until the time the consumer has informed the trader of the exercise of the right of withdrawal, in comparison with the full coverage of the contract, adequate. Based on our current analysis, no alternatives have been identified that would offer improvements over the existing framework for both traders and consumers. Furthermore, when simplification is the aim, the ACM is not in favour of creating specific rules for specific traders or sectors in this area.

Legal uncertainty may be reduced by additional guidance on the existing framework of the right of withdrawal. In practice, there seems to be uncertainty at least in relation to the following areas: article 14 (the right to return goods to the trader and not the supplier), article 16 (e) (seal) and (i) (period of performance).

Furthermore, the ACM noted the following inconsistency within article 6 (k) CRD. This provision would be more effective if a legal effect is added if the trader does not provide this information. Especially when it comes to the provisional exceptions in article 16 CRD. If the consumer is not informed that he loses the right of withdrawal under certain conditions, he should still be able to use this right.

[5] These above proposals are directly aligned with the findings and recommendations of the ECC-Net's report of 22 July 2024.