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Position Paper - Digital Fairness Act (DFA) - Alliance Digitale

Alliance Digitale: France's Leading Federation for Online Advertising and Digital Marketing

Alliance Digitale is the main professional association for digital marketing players in France and is a member of the IAB Europe and FEDMA networks. The association brings together over 300 companies across the entire value chain, including Equativ, Kantar, Le Bon Coin, Mirakl, Ogury, Teads, Publicis Media, and Dailymotion. Its membership encompasses all major media outlets and their advertising departments, such as Le Monde, Le Parisien, Le Figaro, France TV, TF1, Radio France, Canal+, and Prisma.

General remarks

As the voice of digital marketing and online advertising in France, Alliance Digitale's vision of digital marketing and advertising has always been consumer-oriented. Alliance Digitale is a privileged forum for the sector to enable innovative, consumer-driven digital marketing and online advertising models to answer to the evolving needs of consumers. Alliance Digitale stands ready to actively contribute to the ongoing and upcoming policy discussions surrounding the Digital Fairness Act (DFA) and to engage in structured and forward-looking dialogue with all relevant stakeholders to further explore the challenges raised in this position paper.

We welcome the Commission's ambitious 2030 Consumer Agenda and its commitment to enhancing consumer protection across both online and offline environments. We understand that the Commission intends to evaluate whether certain practices, such as dark patterns, addictive design, and personalization, are adequately addressed in the digital market by the existing regulatory framework. The results of the Fitness Check, published on October 3, 2024, call for the reform of existing consumer law and digital rules to better tackle these practices online. In our view, the existing body of EU consumer and digital law, including the Unfair Commercial Practices Directive (UCPD), is still fit for purpose, but is plagued by inconsistent and often insufficient enforcement and application.

In the context of the DFA's preparatory work and upcoming public consultation, we urge the Commission to prioritize the effective application of existing EU consumer and digital law, and in particular the UCPD, the Digital Services Act (DSA), and the General Data Protection Regulation (GDPR). We believe a robust enforcement strategy for the current acquis should be the initial focus. This approach clearly aligns with the Commission's simplification objectives¹, which emphasize ensuring the effective implementation and enforcement of existing rules. Any new legislative initiative should be a last resort and target specific, proven and clearly identified problematic unfair commercial practices as well as strictly upholds the principled approach enshrined in the UCPD.

We therefore caution against an approach based on broad concepts that is legally fragile and subject to extensive interpretation by all stakeholders. Specifically, we are concerned about a broad categorization of commercial practices in the upcoming DFA encompassing accepted and harmless online advertising practices to the detriment of consumers' choice as well as the introduction of broad

¹ https://commission.europa.eu/document/download/8556fc33-48a3-4a96-94e8-8ecacef1ea18_en?filename=250201_Simplification_Communication_en.pdf

and untested new concepts such as digital vulnerabilities and the so-called “fairness by design”². The obvious difficulties that this approach would cause for the enforcement of the law and its future-proofness would be in contradiction with the European Commission's stated objective of simplifying existing legislation and promoting innovation and competitiveness for European businesses.

To avoid significant overlaps with existing comprehensive digital legislation and unintended consequences for Europe’s dynamic digital marketing sector — a vital channel for many businesses — we encourage the Commission to pursue a targeted, evidence-based approach focused exclusively on clearly harmful practices, and in particular to:

1. Avoid a blanket approach to personalization including advertising and distinguish between truly harmful and unproblematic practices;
2. Ensure a principled and evidence-based approach resting on objective definitions and criteria;
3. As a last resort, prioritize a targeted regulatory strategy aiming at clarification rather than piling-up new rules, to merely close demonstrated loopholes, ensuring it complements and avoids duplication with existing frameworks.

I. Avoid a blanket approach to personalization including advertising and distinguish between truly harmful and unproblematic practices

Despite acknowledging the benefits of personalized advertising and recommendations as “*a positive development, which can help to direct consumers to more relevant purchases and content*”, the results of the Digital Fairness Fitness Check, published on October 3, 2024, makes sweeping negative assumptions about all personalization practices, often conflating them with harmful manipulation. Such a blanket approach — which may influence the forthcoming DFA — overlooks the diversity and consumer benefits of many forms of personalization. We strongly caution against treating all commercial practices as equivalent, without accounting for their specific features, context, and varying impacts.

Personalized advertising is essential for many digital industries. The digital advertising ecosystem, particularly when it comes to personalized advertising, is a highly complex and interconnected environment involving a multitude of diverse players across the value chain. This intricate web includes publishers, advertisers, data providers, technology platforms, and numerous intermediaries, each playing a crucial role in the delivery of relevant and engaging content to consumers. A recent study from one of the working groups of *Les Etats généraux de l'Information* evidenced that advertising accounted for 38% of global media revenues (26% for newspapers and 43% for TV Channels³).

Furthermore, personalized advertising is also vital for Small and Medium Enterprises (SMEs) in Europe for at least two main reasons.

² Commission staff working document Fitness Check of EU consumer law on digital fairness, 03/10/2024, p. 53

³ Étude menée sur 370 marques médias grand public “Combien la France consacre-t-elle à l’information ?”, Octobre 2024 <https://etats-generaux-information.fr/actualites/presentation-de-l-etude-du-groupe-3-des-egi>

- First, the ecosystem is predominantly composed of SMEs. A study we conducted in 2023 shows that nearly 9,000 companies are part of the digital marketing and online advertising ecosystem in France, with over 96% being SMEs throughout the territory⁴;
- Second, personalized advertising serves as the main channel for these businesses to effectively reach their audiences at attractive prices democratizing access to communication for many companies that cannot afford traditional TV, radio, or print advertising, with 4,287 SMEs across the EU using personalized digital advertisements for their business⁵. Indeed, according to another study conducted in 2022, the number of advertisers increased by over 29% between 2014 and 2020, this market expansion being mainly due to the ability of SMEs to communicate through personalized advertising⁶.

Besides, consumer demand for personalization is well-documented, with many studies revealing that a majority expect tailored advertising and a personalized online experience.⁷

These findings highlight that personalization is not a risk but a key consumer expectation. Personalized advertising has always been an essential and valid component of B2C relationships, in particular for traders and retailers. A lack of personalization could drive customers away and may lead to an increase in advertising volume to compensate for significant revenue losses (between 35% and 70% depending on studies⁸) for digital advertising players and publishers.

Moreover, the advertising industry has been a frontrunner in implementing robust and diverse best practices. Whether in developing tools to ensure compliance with the GDPR⁹ and the DSA¹⁰, measuring and reducing the carbon footprint of digital campaigns¹¹, or enhancing influencer marketing standards¹², the industry has consistently demonstrated its ability to widely and proactively

⁴ “Le marketing digital, une filière au cœur de l’économie française”, Décembre 2023, EY Alliance Digitale <https://www.alliancedigitale.org/le-marketing-digital-pilier-de-leconomie-francaise/>

⁵ The Impact of Digital Advertising on Europe’s Competitiveness: a study of the role of digital advertising in Europe https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_public_first_impact_of_digital_ads_european_competitiveness_mar25.pdf

⁶ “La publicité, une innovation créatrice valeur”, Avril 2022, Asterès IAB France, <https://www.alliancedigitale.org/publication/etude-la-publicite-digitale-une-innovation-creatrice-de-valeur/>

⁷ Lab Fevad Mars 2023 <https://us14.campaign-archive.com/?e=5BUNIQID%5D&u=fe9a80b3fc4a592466b8f5f4d&id=73bbf7ec9c>

⁸ Several sources:

- the UK CMA report final report of its market study into online platforms and digital advertising, https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf
- The post post-IDFA dashboard insights from Remerge17, based on an analysis of ad requests from iOS devices monitors that ad placements without the presence of an Identifier for Advertisers (IDFA) in the iOS environment, <https://post-idfa-dashboard.remerge.io/>
- “The Economic Value of User Tracking for Publishers” by Laub, Rene and Miller, Klaus and Skiera, Bernd (April 14, 2024). Available at SSRN based on the analysis of 218 million ad impressions from 10,526 publishers, <https://ssrn.com/abstract=4251233>

⁹ Transparency and Consent Framework – IAB Europe <https://iab europe.eu/transparency-consent-framework/>

¹⁰ Digital Services Act Transparency <https://iabtechlab.com/standards/dsa/>

¹¹ One frame - Methods for calculating the carbon footprint of its communication campaigns <https://uniondesmarques.fr/impact/oneframe>

¹² Certificat de l’Influence Responsable - Autorité de régulation professionnelle de la publicité (ARPP) <https://www.arpp.org/influence-responsable/>

EASA Best Practice Recommendation on Influencer Marketing Guidance 2023 https://www.easa-alliance.org/publications/best-practice-recommendation-on-influencer-marketing-guidance_v2023/

disseminate effective practices. To this end, it maintains a regular and constructive dialogue with all relevant stakeholders, allowing for continuous improvement of the tools available to market players.

Finally, the Fitness Check recommends a broadly defined ban on **psychographic profiling** and suggests including it in the annex of the UCPD as an unfair commercial practice. Psychographic profiling underpins many forms of personalized advertising and content recommendations to make tailored marketing messages. As suggested in the Fitness Check, the proposed definition would cover a wide range of accepted practices that assist consumers in making informed choices ranging from targeted advertising to personalized recommendations. In this respect, we believe that profiling is already sufficiently regulated under the DSA, the GDPR, the ePrivacy Directive, and the UCPD, which collectively address problematic and manipulative practices. Annex I of the UCPD, for instance, targets sector-specific issues, such as games of chance or misleading claims that a product can cure illnesses.

We believe that a legislative initiative such as the DFA should be a last resort and, in any event, adopt a cautious, evidence-based approach in order to target problematic practices online without undermining the benefits of personalized services for consumers. It is essential that the Commission avoid a blanket approach to personalization, but instead focuses on clearly defined, harmful practices that undoubtedly exploit consumer vulnerabilities.

II. Ensure a principled and evidence-based approach resting on objective definitions and criteria

We also caution against the adoption of broad and subjective concepts to address horizontally consumer law problems in the upcoming DFA, such as **digital vulnerability** and **“fairness by design”** which are heavily mentioned in the Fitness Check.

These terms lack objective definition and risk creating significant regulatory uncertainty. They threaten to overlap with established, well-defined obligations and definitions, such as the robust framework for handling vulnerabilities already enshrined within the GDPR. Article 9(1) of the GDPR already explicitly prohibits the processing of sensitive personal data, including information revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, union membership, genetic data, biometric data, health data, and data concerning sexual life or orientation. This comprehensive framework effectively safeguards consumers against the exploitation of highly sensitive personal information.

We would also like to raise concerns about the risks associated with the approach to dark patterns as outlined in the Fitness Check. As currently framed, it appears to depart from the principle-based nature of the UCPD by introducing a new category of unfair practices, amounting to a de facto overhaul of EU consumer law. Such a shift would risk creating further overlaps and confusion with existing regulatory frameworks—most notably the GDPR and the DSA—while failing to ensure future-proof protections, as it may quickly become obsolete in light of the continuous evolution of digital practices and user behaviors.

Furthermore, the Fitness Check proposes to incorporate broad consumer vulnerabilities, like emotions, financial difficulties, or personal struggles, into the DFA. It would create legal and practical obstacles that are disproportionate and fundamentally impossible to overcome for all stakeholders

involved. These vulnerabilities are inherently subjective, diverse, often fleeting, and exceptionally difficult to discern without forcing companies to collect more personal data, including sensitive personal data - which would fully contradict the data minimization principle of the GDPR and all efforts of the industry to collect less data and pseudonymized data. This approach would not only be disproportionate but contradict a long-standing principle in the UCPD -the reasonable consumer- which is the standard to determine whether a commercial practice is unfair or deceptive. Attempting to identify and address such subjective and variable states would impose an unreasonable burden on online businesses compared to physical ones, potentially leading to over-compliance and stifling legitimate online marketing activities.

Concurrently, we contend that the current regulatory framework — including both EU and national consumer laws, as well as the GDPR and the DSA — already offers consumers strong safeguards to manage their data and mitigate potential abuses. These instruments ensure meaningful user control over the digital environment. Introducing vague and loosely defined concepts such as 'digital vulnerability' or 'fairness by design' would therefore not only be unnecessary but could also prove counterproductive by creating legal uncertainty and undermining existing safeguards.

III. **As a last resort, prioritize a targeted regulatory strategy aiming at clarification rather than piling-up new rules, close demonstrated loopholes, ensuring it complements and avoids duplication with existing frameworks**

In line with the European Commission's ambition for simplification, reducing overlap and enhancing legal clarity, the DFA should be designed firstly to streamline the existing framework, clarify interplays and suppress overlaps.

Any new provision should therefore only address **specific targeted issues that, according to an evidence-based assessment, are not adequately covered by the current legislation and are not merely a matter of enforcement means and tools**. A **focused and evidence-based approach** will help prevent regulatory fragmentation and unnecessary duplication, ensuring that new measures complement existing frameworks rather than create additional burdens.

Fourth main reasons can be highlighted to support a focused and evidence-based approach:

- First, many existing legislations, such as the DSA, UCPD, GDPR, AI Act (e.g., article 5 on prohibited manipulative or deceptive practices such as social scoring and related guidelines) and DMA, already address various aspects of commercial practices, Annex I of the UCPD notably already lists commercial practices considered as unfair. Specifically, digital advertising is regulated under multiple frameworks. **Article 26 of the DSA** requires online platforms to ensure ad transparency by clearly identifying ads, disclosing their sponsors and targeting criteria, and providing information on targeting parameters and forbid them to use sensitive data for advertising personalization purposes. **Article 28.2 of the DSA** prohibits online platforms from showing targeted ads to minors based on their behavior or personal data if they can reasonably determine the user is underage. **Article 9 of the GDPR** restricts the processing of sensitive personal data, allowing it only with explicit consent. Additionally, sector-specific advertising regulations exist with targeted measures in accordance with the

risk posed to the consumer, such as the **Consumer Credit Directive**¹³ that includes rules on advertising for credit products, such as requirements for clear and transparent information about interest rates and other costs in Article 7. **Title VIII of the Directive regarding medicinal products for human use**¹⁴ also includes strict rules on the content of pharmaceutical advertisements and requirements for prior authorization for certain types of advertising;

- Second, effective enforcement of existing legislation is vital to avoid any overlap in regulations. We note that the Fitness Check has opened up numerous avenues that overlap with other existing legislative frameworks, without clearly articulating how these approaches should be combined or coordinated. Introducing broad new concepts or addressing issues already covered by other laws would only exacerbate the current situation, increasing legal uncertainty and regulatory complexity;
- Third, better coordination between regulatory bodies is also essential. The current lack of structured cooperation often results in overlapping mandates, conflicting interpretations, and fragmented enforcement, creating uncertainty for both businesses and consumers;
- Fourth, the DFA could present an opportunity to establish a harmonized and thorough framework where needed. It may be relevant as an example for influencer marketing, building on existing national laws such as those in France¹⁵. The latter has led to important progress, such as the creation of a harmonized definition of influence marketing, the obligation to mention the advertising nature of the content, and the ban on sensitive sectors such as cosmetic surgery and tobacco products.

Therefore, the DFA should only exist if there is an evidence-based approach that identifies loopholes or harmful practices that are not already covered by existing regulations. We ask for discussion at political level to identify the policy orientations and we are open after to engage in a more technical discussion with DG Just to find a common language around consumer protection and collaboratively determine the best course of actions should any proven loophole or unfair/aggressive commercial practices emerge.

In this spirit, the DFA should globally be rooted in strong coordination with stakeholders in line with the recent Communication on simplification where the Commission pledged to address interactions between different pieces of legislation, conduct fitness checks and evaluations, organize implementation dialogues with stakeholders throughout the process and conduct thorough impact assessment to make sure that the text only “fills the gap”¹⁶.

¹³ Directive (EU) 2023/2225 on credit agreements for consumers and repealing Directive 2008/48/EC
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202302225

¹⁴ Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0083>

¹⁵ Loi n° 2023-451 du 9 juin 2023 visant à encadrer l'influence commerciale et à lutter contre les dérives des influenceurs sur les réseaux sociaux
<https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000047663185>

¹⁶ See Commissioner McGrath declaration in his official hearing in front of the European Parliament dated November 5th, 2024.