

Consultation response

Digital fairness



AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €4 trillion in 2023, directly supports more than 4.6 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

Executive summary

Digital fairness in the EU must be pursued through coherence, clarity and consistent enforcement rather than through new layers of regulation. Europe already has the world's most advanced consumer and digital protection framework, strengthened by recent updates including the Digital Services Act (DSA), Digital Markets Act (DMA), AI Act and General Data Protection Regulation (GDPR). The main challenge to digital fairness lies not in legislative gaps, but in uneven implementation, overlapping obligations and divergent national interpretations.

A new Digital Fairness Act risks adding complexity where simplification is needed most. Without a clear assessment of how new obligations interact with existing law, they could fragment the Single Market, create uncertainty for cross-border services and undermine the EU's competitiveness.

The European Commission must focus on practical measures that make current rules work better: harmonised enforcement, targeted guidance and a risk-based, proportionate approach. Any initiative should align with the forthcoming Digital Omnibus package and the EU's Better Regulation agenda – promoting fairness through consistency.

This response outlines how a balanced, evidence-based approach can achieve genuine digital fairness while supporting innovation, competitiveness and consumer trust across the Single Market. The annexe includes submissions in relation to various sections of the consultation questionnaire. This is because the design of the Commission's consultation process left significant uncertainty about how it will collect and interpret stakeholder input and data. This lack of transparency risks reducing confidence in the consultation's results and may lead to concerns in the future about whether stakeholder perspectives are truly reflected in later policy proposals.

1. Existing legal framework: sufficient but lacks consistent and effective enforcement

In the EU, there is already a comprehensive set of rules in place governing:

- 'Manipulative' interface design (Unfair Commercial Practices Directive [UCPD], DSA, GDPR, AI Act)
- Advertising and recommender systems (DSA, Audiovisual Media Services Directive [AVMSD], DMA, ePrivacy Directive, GDPR, AI Act, Consumer Rights Directive [CRD])
- Digital Subscriptions (UCPD, CRD, UCTD)
- Automated decision-making and personalisation (GDPR, AI Act)
- Influencer marketing (UCPD, DSA, AVMSD)
- Pricing transparency (CRD, Price Indication Directive, UCPD)

The principal issue is not a lack of legal instruments, but rather inconsistent enforcement, overlapping obligations and divergent national interpretations. Before considering new legislation, full use should be made of existing frameworks, supported by improved harmonised guidance and enforcement coordination. Better implementation is the most effective path to improving outcomes without duplicating existing legislation. In this context, greater cooperation and coordination between regulators and enforcement authorities would also enable a more harmonised application of regulations across Member States and more synergies among decisions made by various enforcement authorities.

2. Priority considerations

- **Showcasing ‘Better Regulation’ principles** throughout the legislative process of DFA will improve the impact of the legislation. The Commission should strengthen its impact assessment by including cost-benefit analysis and introducing a competitiveness check. Embedding competitiveness considerations into every stage of law-making will ensure that the EU delivers legislation that is predictable, proportionate and innovation-friendly.
- **Expanding or redefining the concept of the ‘average consumer’** – for example, to include temporary emotional states – would introduce excessive legal ambiguity. The existing ‘average consumer’ standard is an effective benchmark that has been consistently interpreted by the European Court of Justice for over two decades. This framework already includes special standards for specific consumer segments, such as the ‘vulnerable consumer’. Introducing new benchmarks would undermine legal certainty for businesses and could hamper consumer protection by making it impossible to account for every individual's unique characteristics. New consumer laws like the EU New Deal for Consumers have introduced new obligations. However, it is too early to tell if more laws are needed. The current framework, which already accounts for vulnerable groups, remains flexible and effective.
- **Introducing subjective criteria** which could cause legal uncertainty and overburdensome compliance for businesses. The introduction of unclear or subjective criteria, such as ‘emotional distress’ as a vulnerability that cannot be targeted by personalisation, risks making restrictions unworkable, particularly for complex systems that require automation like advertising. Increased uncertainty may lead to over-enforcement, directly impacting the businesses that rely on those advertisements to thrive, in particular small- and medium-sized businesses. A focus on clear, actionable and objective categories of data is essential to foster a competitive digital economy.
- **Reversing the burden of proof** in complex digital environments, including for interface design, personalisation and algorithmic outcomes, would significantly increase legal and compliance risk. The consultation suggests this shift could apply not only to enforcement authorities, but to individual consumers as well – multiplying potential litigation and liability. The risk is further heightened by the growing role of third-party litigation funders in consumer disputes, in a context where such funding remains largely unregulated. Moreover, the current consumer regulatory framework already mandates transparency and effective disclosure of important information to consumers.
- **Mandating specific user interface design elements** (eg one-click cancellation, uniform layouts and ‘fairness by design’) or blanket bans of specific design elements risks stifling innovation and disregards the diversity and evolution of services across sectors. A principle-based,

outcome-focused approach is more appropriate to take into account the specificities of each business model.

- **Addressing ‘addictive’ design** needs more research before any regulatory action is taken. It is currently unclear which specific design features or categories of online services are the most pressing. As legislation should focus on regulating identified gaps rather than aspects already covered by existing legislation, more research is required. The Commission should execute its proposed EU-wide inquiry into digital wellbeing and should seek the input of a wide range of stakeholders, including providers of relevant online services, academics, teachers and parents. The Commission must take relevant economic and societal factors into account, exploring the topic from a broad perspective. Existing industry-led best practices should be taken into consideration, as these have often proven effective at tackling such risks.

3. New risks introduced by the DFA consultation

The consultation introduces several concepts and a potentially flawed methodology that merit careful scrutiny. These include:

- **‘Fairness by design’** lacks a clear definition, is inherently subjective as a concept and risks overlapping with obligations already established under the UCPD, DSA, GDPR, CRD and AI Act. These current rules already cover this principle through measures like comprehensive pre- and post-contractual information requirements and the prohibition of manipulative practices. Moreover, regulations such as Article 5(1) of the Unfair Commercial Practices Directive already achieve the same goal by broadly prohibiting unfair commercial conduct. A more effective approach to ensuring fairness is to clarify and specify the current regulations through court rulings or official guidance, instead of mandating an ambiguous ‘fairness by design’ principle with a new law.
- **Age verification mandates** must be carefully evaluated, especially when they involve biometric or identity checks, as these raise significant feasibility and privacy concerns under current data protection laws. The Digital Services Act and the Article 28 Guidelines recommend using effective age assurance methods that are accurate, reliable, robust, non-intrusive, and non-discriminatory.
- **Digital contracts** are already subject to a comprehensive legal framework, including the CRD with its pre- and post- contractual obligations and the UCPD, which combats subscription traps by prohibiting misleading actions and classifying obstacles to contract cancellation as an aggressive practice. The DSA also prohibits misleading user interfaces which make cancellation difficult, while e-Commerce Directive ensures the ability to effectively contact the trader. Recent revisions of the Distance Marketing of Financial Services Directive and the Consumer Credit Directive mandate that consumers maintain the right to human intervention when chatbots or automation are employed in sensitive financial scenarios and put a requirement for a withdrawal function, thereby ensuring this exists without being overly prescriptive. This is crucial to maintain enough flexibility to manage online subscriptions across different subscription services, devices and platforms. Prescriptive cancellation systems involving a ‘single cancellation’ button raise significant cybersecurity risks while not being beneficial for consumers that would require additional steps to identify their subscriptions.

- **Inconsistency with Better Regulation principles.** The design of the consultation appears inconsistent with Better Regulation general principles and minimum standards for stakeholder consultations. According to the principles and minimum standards set out Tool #53 of the Better Regulation Toolbox, consultation questions must be designed in a neutral manner, including the opportunity for respondents to add further comments or explain their answer in a text box. However, a review of the online questionnaire indicates that the structure may reinforce predetermined policy options. For instance, selecting 'better enforcement of existing rules' still prompts a question on preferred new EU actions, while selecting 'no action' offers no space for justification. This calls into question the neutrality and methodological integrity of the consultation.

4. Opportunities for clarification and harmonisation

Where genuine gaps or inconsistencies exist, targeted clarification can support both consumer protection and legal certainty. Potential actions include:

- **Issuing harmonised guidance on 'dark patterns'**, ensuring consistency of interpretation of the different legal bases across Member States and strengthening enforcement.
- **Enhancing transparency standards for influencer marketing** through joint guidance and voluntary compliance schemes. Education initiatives for both consumers, businesses and enforcement authorities at EU and national level could also support compliance. Regarding addressing the liability of influencer marketing, it should be noted that all actors in the influencers marketing ecosystem have a role to play, but the level of responsibility should be proportionate to their role in the value chain and the degree of control and visibility they have over the content. Influencers should be held solely liable for ensuring the transparency of their commercial communications. In addition, brands should not be held liable for organic content posted by influencers with whom brands have no contractual relationship.

5. Digital Omnibus linkages and systemic simplification

Any new rules introduced under the DFA should be evaluated in the context of the EU's broader digital rules and the objectives of the forthcoming Digital Omnibus package. The Commission must apply the same simplification mindset to any planned initiatives, including the DFA. The simplest way to simplify is to show regulatory restraint and ensure any new legislation meets better regulation guidelines. Key considerations include:

- **Enforcement:** prioritise full and consistent implementation of current legislation before considering expansion. New rules must complement – not conflict with – the Commission's digital simplification agenda.
- **Data and privacy:** avoid duplicating GDPR or ePrivacy obligations related to personalisation, consent or transparency.
- **AI regulation:** clarify the interaction between any DFA rules on personalisation, 'addictive design', 'dark patterns' and the AI Act.

6. Simplification proposals

In line with the Commission's commitment to better regulation and its simplification agenda, any future initiative on digital fairness should prioritise regulatory clarity, proportionality and coherence across existing digital rules. Simplification is a strategic necessity to support competitiveness, innovation and trust in the Single Market. As discussions on the DFA proceed, pursuing consistency with the broader Digital Omnibus package is essential. In particular, there should be recognition of the overlapping cybersecurity reporting requirements under the Network and Information Security Directive 2 (NIS2), the Digital Operational Resilience Act (DORA) and the Cyber Resilience Act (CRA). Any further obligations or a reversal of the burden of proof would add to companies' compliance requirements and introduce uncertainty. A fragmented or overly prescriptive DFA could risk undermining the integrated regulatory simplification and harmonisation agenda that the forthcoming Omnibus initiative is designed to deliver.

The following targeted measures could materially enhance the effectiveness of digital fairness objectives while reducing unnecessary complexity:¹

- **Streamline information obligations** in low-risk or repetitive transactions, such as in-app purchases or ongoing digital subscriptions, particularly where the consumer has a pre-existing commercial relationship with the service provider.
- **Rebalance the right of withdrawal** in subscription-based digital offerings, where usage begins immediately. Any adjustments to the current regime should maintain core consumer protection while reflecting operational realities and avoid enabling abuses, which would negatively impact the high upfront investments in content production and acquisition.
- **Preserve digital-by-default delivery of consumer information**, with paper options available on request. This would reduce friction for digital-native consumers and avoid unnecessary administrative duplication for businesses.
- **Avoid duplicative conformity assessments or reporting channels**, particularly where interface or personalisation practices may already be subject to compliance under other frameworks such as the CRA, DSA or GDPR.

¹ See also [“Digital Omnibus: Priorities for simplifying the EU’s digital rules” \(AmCham EU, July 2025\)](#)

- **Ensure definitional alignment and interpretive clarity** across legislative instruments. Terms such as ‘vulnerability’, ‘unfair personalisation’ or ‘manipulative design’ should not diverge from established frameworks unless clearly justified.
- **Reinforce a risk-based and proportionate enforcement approach**, especially in areas such as AI-driven personalisation, algorithmic content delivery or automated decision-making, where user outcomes may be variable and subjective.
- **Avoid introducing new notification or transparency requirements** unless these can be harmonised with existing mechanisms. Standalone obligations risk creating parallel reporting systems that fragment compliance and divert resources.
- **Publish consolidated guidance on cross-legislation consistency**, ensuring that the DFA is interpreted in a manner consistent with the GDPR, DSA, DMA, AI Act and other relevant legislation. A one-stop interpretative reference would enhance legal certainty and operational coherence.

These simplification measures are consistent with the goals outlined in the Commission’s planned Digital Omnibus package and would contribute to a more predictable, interoperable and innovation-friendly regulatory environment.

Conclusion

The policy objective of digital fairness is best achieved by closing enforcement gaps, streamlining existing obligations and resisting legislative fragmentation between EU law. Additional horizontal regulation should not be the default response to evolving digital practices - particularly where well-developed, recently updated frameworks are still being implemented and it takes time to see the full effect.

The success of the EU’s digital and consumer policy agenda depends on ensuring that new initiatives such as a Digital Fairness Act are proportionate, complementary and coherent with broader simplification efforts, including the forthcoming Digital Omnibus package. Alignment, simplification and legal clarity remain the most effective tools for delivering fairness while enabling innovation and competitiveness across the Single Market.

ANNEXE

This annexe sets out AmCham EU's submission in relation to various sections of the consultation. The design of the consultation response did not always allow for proportionate explanations, and it was uncertain whether nuanced responses would be analysed or recorded appropriately.

Section 1 – 'Dark patterns'

Misleading design practices, such as limited user choices and 'dark patterns' across various digital products, hinder consumers' ability to make informed decisions. It is crucial for consumers to have the ability to select and retain their preferred default services, which encourages interoperability and facilitates switching between platforms. This freedom of choice should be consistently applied across all devices where competing services exist. The prevalence of these practices in the online environment is not due to a lack of regulations but rather a deficiency in enforcement. Therefore, instead of creating new rules, the focus should be on enhancing enforcement measures, refining guidance and promoting best practices through dialogue with stakeholders and consumer education.

Several regulations address these issues. For instance, Article 25 of the Digital Services Act (DSA) explicitly prohibits the use of 'dark patterns' that deceive or manipulate service recipients, thereby impairing users' ability to make free and informed choices. Similarly, Recital 37 of the Digital Markets Act (DMA) forbids gatekeepers from designing their online interfaces in a misleading manner that affects users' capacity to provide genuine consent, aligning with obligations outlined in Article 25 regarding data protection. Additionally, the Unfair Commercial Practices Directive (UCPD), particularly Article 6(1), prohibits misleading and unfair practices that could lead consumers to make transactional decisions they otherwise would not have made, even if the information presented is factually correct.

There is also a need to scrutinise the classification of certain practices as "dark patterns". A key challenge is that there is no clear consensus on what constitutes a 'dark pattern', making new legislation potentially problematic. The term is often applied too broadly, sometimes encompassing legitimate business practices. It's crucial to distinguish between genuinely harmful practices (already illegal under current laws) and beneficial choice architecture that improves user experience. For example, the Commission suggests that urgency and scarcity claims should be considered 'dark patterns', even when offers are genuinely limited. This perspective may not hold if there is actual urgency that can be substantiated, such as highlighting the last available rooms for booking. Similarly, regarding customer interactions during a cancellation process, traders should be allowed to engage customers constructively – such as suggesting alternative subscription plans – provided that these interactions are not intrusive and do not impede the cancellation process.

Section 2 – 'Addictive' design

The Commission's [proposed EU-wide inquiry into digital wellbeing](#) should involve a diverse range of stakeholders, including online service providers, academics, educators and parents, and should consider the broader economic and societal factors at play. Policymakers should take into account

existing industry-led best practices that have effectively addressed risks in this area, as the current policy proposals regarding ‘addictive design’ seem to adopt a one-size-fits-all approach that fails to create age-appropriate experiences and neglects the complexities of age verification. This approach appears disproportionate, disregarding industry efforts to implement tools at both the device and app levels that promote healthy digital usage habits and allow users to manage their screen time effectively. Instead of prohibiting design features, which restrict businesses' creative freedom and ultimately diminish consumer choice, a more balanced approach is needed.

Specifically regarding minors, the Digital Services Act (DSA) already addresses many online safety concerns, particularly when combined with the DSA guidelines aimed at ensuring the privacy, safety and security of minors. It is essential for stakeholders to have sufficient time to adapt their practices based on these guidelines before assessing the current situation for minors online. The DSA Article 28 guidelines detail various design considerations, such as preventing exposure to persuasive design features that could lead to excessive platform use or compulsive behaviours, and explicitly prohibit manipulative design techniques that promote impulsive spending or addictive behaviours.

There is currently a lack of clarity regarding which specific design features or categories of online services pose the greatest risks. Legislative efforts should prioritise identifying and regulating these gaps rather than overlapping with existing laws.

Section 4 - Unfair personalisation practices

Personalised commercial practices have proven to be immensely beneficial for both businesses and consumers, generating an additional €100 billion in sales for EU companies in 2023 alone. This growth supported approximately 570,000 jobs and contributed around €25 billion to the EU's GDP. However, personalised advertising operates under a stringent regulatory environment, governed by various EU frameworks, including the GDPR, DSA, DMA and the e-Privacy Directive. The EU's comprehensive legal structure ensures that personalised advertising remains a legitimate business model without significant regulatory gaps. Nonetheless, the potential for overlapping regulations could stifle innovation and hinder competitiveness. The focus should shift towards enforcing existing regulations and establishing best practices rather than creating new regulations that could complicate the landscape further.

Personalised advertising is particularly advantageous for small and medium-sized enterprises (SMEs) in Europe, allowing them to maximise their limited advertising budgets effectively. A 2025 IAB study indicates that 80% of EU consumers find online ads useful, with many willing to engage with personalised content. Limiting personalisation could potentially reduce the EU's GDP by up to €106 billion annually. Moreover, personalised ads significantly enhance user experience and resource allocation, leading to higher engagement rates and lower advertising costs. Without personalisation, advertisers may need to spend significantly more for equivalent results. Therefore, maintaining an efficient and effective advertising ecosystem is crucial for supporting the free and open internet, preserving media diversity, and ensuring that SMEs can effectively reach their target audiences. It is essential that enforcement aligns with existing legislation, such as the GDPR, and that the focus remains on proper implementation rather than introducing new overlapping regulations.

Section 7 - Issues with digital contracts

The current EU consumer protection framework offers extensive safeguards through three main directives: the Unfair Contract Terms Directive (UCTD), the Unfair Commercial Practices Directive

(UCPD) and the Consumer Rights Directive (CRD). Each directive has a specific yet interrelated function: the UCTD guarantees fair and clear subscription terms, the UCPD prohibits deceptive practices in marketing and contract execution and the CRD establishes mandatory pre-contractual information requirements and withdrawal rights for distance contracts, including digital subscriptions.

This solid foundation has been further enhanced by recent legislation such as the (Consumer) Omnibus Directive and the Digital Services Act, as well as supporting national laws. However, many of these new provisions have not yet been fully implemented or tested through enforcement actions. Recent revisions to the Distance Marketing of Financial Services Directive and the Consumer Credit Directive mandate that consumers maintain the right to human intervention when chatbots or automation are employed in sensitive financial scenarios. Consumers are therefore already effectively protected in this area. Reopening these areas risks legal uncertainty and undermines recent harmonisation efforts. It should therefore be focused on enforcing this existing legal framework. The regulatory landscape is still evolving as businesses adapt to recent changes and market demands. In this context, any new targeted obligations should only be considered when there is clear evidence of specific problems that necessitate legislative action, particularly those related to new technologies. It is important to avoid pre-emptive regulations for potential future issues, allowing the existing technology-agnostic, principles-based framework to prove its effectiveness in tackling emerging digital challenges.