Call for Evidence – Digital Fairness Act— Feedback Febelfin

Febelfin, the Belgian Financial Sector Federation, represents a large majority of the Belgian financial sector, including banks, credit providers, asset and fund managers, market infrastructures, stockbroking firms and stockbrokers, leasing companies, etc. Our broad representation basis delivers a comprehensive and balanced position that considers the unique characteristics of various branches within the financial industry.

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Introduction

Febelfin broadly supports initiatives aimed at enhancing consumer protection in the digital space. However, with regard to a potential Digital Fairness Act (DFA), it is important to emphasize that manipulative online practices, such as dark patterns, influencer marketing, addictive design features, and exploitative profiling, are already addressed through an extensive framework of legal instruments at both national and European levels.

Over recent years, numerous legislations have been adopted to better regulate the digital environment, covering areas such as data protection, competition, cybersecurity, and consumer rights. These developments encompass both horizontal regulations and sector-specific rules, such this is also the case within the financial sector.

This proliferation of legislations has resulted in a framework that is increasingly difficult to navigate creating legal uncertainty. It is precisely this complexity that prompted the European Commission to launch the Digital Omnibus initiative, aimed at streamlining certain aspects of digital regulation.

In line with the rationale behind the Digital Omnibus consultation, we advocate for greater coherence across existing legislative instruments. While we acknowledge the Commission's recognition of the need for simplification, aligning this objective with the introduction of yet another horizontal legislative initiative appears challenging. Such a proposal would add to an already complex regulatory environment, which includes horizontal, sectoral, national, and EU-level instruments.

There is a tangible risk that introducing new legislation would further complicate an already intricate framework (such as the General Data Protection Regulation, the Digital Services Act, the Digital Markets Act, the AI Act and the Distance Marketing of Financial Service Directive). Achieving clear harmonisation of existing rules is essential to ensure legal certainty and to reduce the complexity arising from overlapping compliance requirements.

Illustrative examples over overlapping (non-exhaustive):

- **Dark patterns, addictive design, profiling, and targeted advertising** (section 1 & 2 public consultation) are already covered by the Unfair Commercial Practices Directive (UCPD), the General Data Protection Regulation (GDPR), the Digital Services Act (DSA), and the Digital Markets Act (DMA). Sector-specific legislation, such as the Directive 2023/2673 on distance marketing of financial services, also addresses elements like dark patterns. The problem, which already exists, is that future regulation could conflict with existing provisions, by covering the same topics with different definitions, similar obligations and/or thresholds (see Annex I).
- **Digital contract issues** (Section 7 public consultation) risk overlapping with Directive 2023/2673, particularly regarding the right of withdrawal. Similar concerns arise under the AI Act, which includes provisions for requesting human interaction in contractual contexts.
- **Simplification measures** (Section 8 public consultation) should be carefully designed to avoid legislative overlap. Nonetheless, they offer an opportunity to enhance clarity and legal certainty. For instance, reducing information requirements for repetitive or automated transactions could alleviate constraints in digital financial services. Rebalancing the right of withdrawal could also benefit subscription-based banking services, provided it aligns with transparency obligations under sector-specific rules.

Conclusion

We welcome the opportunity to contribute to this consultation and appreciate the Commission's continued efforts over recent years to shape a European digital framework. However, regarding the DFA, we believe that the current priority should be to assess and reflect on a coherent application of existing rules and, as the case might be, adapt existing legislation where necessary.

In our view, the DFA would not fill a gap but rather increase complexity by adding new concepts or definitions, redefining existing practices, creating conflicting obligations. **Giving the current legal framework, we believe, the core problem is not a lack of regulation, but rather the need of clarifications and a coherent and well-articulated interplay between existing texts. While this may require a different kind of effort, it is essential for the Commission to remain consistent with its stated objectives around simplification.** This process should also take into account sector-specific frameworks, including the possibility of exemptions for the financial sector, where tailored regulations already apply. Ultimately, such an approach will better serve consumers by ensuring more effective and consistent protections across the digital landscape.

Annex I

Below you will find some examples of overlapping notions and thresholds.

1. <u>Dark Patterns & Addictive design</u>

To begin with, we observe that while some more traditional concepts in existing regulations may encompass the notion of dark patterns, new regulations have been introduced that define or describe dark patterns in ways that are not always fully aligned.

In addition, it remains unclear whether a distinction exists between dark patterns and addictive design. Below, we refer to the definitions of dark patterns as provided in various regulations, which appear to encompass aspects of design. Nevertheless, the consultation seems to suggest a differentiation between the two concepts:

- The **UCPD** does not refer to dark patterns as such but the link can be made with the misleading and aggressive commercial practices (Articles 6 & 8).
- The **DMA** refers to the prohibition for gatekeeper to "degrade the conditions or quality of any of the core platform services provided to business users or end users who avail themselves of the rights or choices laid down in Articles 5, 6 and 7, or make the exercise of those rights or choices unduly difficult, including by offering choices to the end-user in a non-neutral manner, or by subverting end users' or business users' autonomy, decision-making, or free choice via the structure, ***design***, function or manner of operation of a user interface or a part thereof" (Article 13.6).
- The **DSA** refers to practices on online interfaces of online platforms "that materially distort or impair, either on purpose or in effect, the ability of recipients of the service to make autonomous and informed choices or decisions'. Providers of online platforms are therefore prohibited from deceiving or nudging recipients of the service and from distorting or impairing the autonomy, decision-making, or choice of the recipients of the service via the structure, ***design*** or functionalities of an online interface or a part thereof (recital 67 and Article 25).
- The **AI Act** refers to systems that deploy subliminal techniques beyond a person's consciousness or purposefully manipulative or deceptive techniques with the objective, or the effect of materially distorting the behaviour of a person or a group of persons by appreciably impairing their ability to make an informed decision, thereby causing them to take a decision that they would not have otherwise taken in a manner that causes or is reasonably likely to cause that person, another person or group of persons significant harm (Article 5(1)(a)).
- The **Data Act** refers to "techniques that push or deceive consumers into decisions that have negative consequences for them. Those manipulative techniques can be used to persuade users, in particular vulnerable consumers, to engage in unwanted behaviour, to deceive users by nudging them into decisions on data disclosure transactions or to unreasonably bias the decision-making of the users of the service in such a way as to subvert or impair their autonomy, decision-making and choice" (recital 38).

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- **The Fitness Check on Digital Fairness (2024)** refers to 'unfair commercial practices deployed through the structure, ***design*** or functionalities of digital interfaces or system architecture that can influence consumers to make decisions they would not have taken otherwise' (p. 146).
- **The Directive 2023/2676 on financial services contracts concluded at distance** refers to the definition of the DSA and obliges Member States to prevent traders offering financial services at a distance from using such patterns when concluding contracts for such services. This can include, but is not limited to, ***exploitative design*** choices to direct the consumer to choices or actions that benefit the trader, but which may not be in the consumer's interests, by presenting choices in a non-neutral manner, such as giving more prominence to certain choices through visual, auditory, or other components, when asking the consumer for a decision. According to the Directive, because of their complexity and inherent serious risks, financial services might necessitate further detailed requirements regarding dark patterns. Therefor, Member States, by way of derogation from the full level of harmonisation, are allowed to maintain or introduce more stringent provisions, law (recital 41 and Article 16e).

2. **<u>Thresholds</u>**

- **Article 33 of the DSA** imposes reinforced obligations on very large online platforms and very large online search engines which have a number of average monthly active recipients of the service in the EU equal to or higher than 45 million (threshold). Only platforms exceeding this threshold are subject to specific obligations on dark patterns, algorithmic transparency, and systemic risk management.
- **Article 3 of the DMA** designates as gatekeepers companies that hold a dominant position in the market and introduces a presumption if they meet certain thresholds (notably, an annual EU turnover equal to or greater than €7.5 billion for three consecutive years, a market capitalization equal to or greater than €75 billion, or if they provide a core platform service that, during the last financial year, had at least 45 million monthly active end users established or located in the EU and at least 10,000 yearly active business users established in the EU). As a result, only companies exceeding these thresholds are subject to specific prohibitions (e.g., self-preferencing, combining data without consent).
- The **Directive 2023/2673** as regards financial services contracts concluded at a distance is a sector-specific directive and applies without any size threshold to all companies offering financial services at a distance, regardless of their size or number of users, which creates an asymmetry with the DSA/DMA.
- **The GDPR** (Articles 4,6,7 and 22) governs consent, profiling, and automated decision-making without imposing any specific threshold**.**

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