

Position Paper of the German Startup Association

On the Digital Fairness Act

Date: 23rd October 2025



Position Paper on Digital Fairness Act Consultation

I. Introduction

Startups and scaleups across Europe have a strong interest in an effective consumer protection framework in the digital space as they offer innovative solutions that often help making the consumer's life easier and less dependent on few digital gatekeepers. In recent years, various pieces of legislation have been adopted to ensure a high level of protection for online consumers both at EU and Member State level. In moving forward, the Commission has to ensure that the level of regulation of innovative companies in the digital space does not surpass that of non-digital companies as that would stifle innovation and economic growth and put European startups and scaleups at a considerable disadvantage vis-à-vis their global competitors.

European consumers already benefit from the highest level of protection in the world. The shortcomings identified in the fitness check of EU consumer law are not evidence of a lack of rules but point to ineffective enforcement and the need for workable and actionable guidance. Any further overlapping rules are likely to increase confusion for market participants and authorities alike, reducing the efficiency of enforcement.

II. Ensuring effective implementation and avoiding excessive red tape

Various existing laws already ensure a high level of protection of consumers in the digital world, i.e. the Consumer Rights Directive, the Unfair Commercial Practices Directive, the Unfair Contract Terms Directive and numerous enforcement decisions and case law. Interpretation and jurisprudence in this area are evolving dynamically and already cover a wide array of digital practices that unfairly influence consumer decision-making. In going forward, authorities should prioritise the application and implementation of legal frameworks, such as the Digital Services Act which focuses on several of the issues identified by the Commission in its fitness check from 2023, including dark patterns, personalisation, consumer vulnerabilities and subscriptions. Public authorities' resources should hence be focused on the

application of existing norms and on testing their efficacy, rather than developing additional requirements.

Most incidences of so-called dark patterns or other manipulative digital practices that were detected in recent years were in clear breach of existing EU law. Additionally, the Digital Services Act is considered a game changer when it comes to regulating dark patterns. It is the first legal instrument to provide a definition of dark patterns in Recital 67, which states "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" and it aims to safeguard individuals' autonomy by preventing online platforms from using deceptive or manipulative design techniques that will affect the recipient's decision-making process when interfering with their platform. While its scope is limited to online platforms, other digital players are covered by various other EU directives and regulations mentioned above. Detected cases of dark patterns are therefore, if anything, indicative of remaining gaps in the implementation of existing consumer protection rules in the online space as well as a lack of awareness of consumers about their online rights.

We therefore believe that it is crucial to focus on smooth and effective implementation of the existing consumer protection rules, particularly with regards to the Digital Services Act, and ensure consistency with the additional digital legislation recently adopted at EU level, notably the Data Act and AI Act. While there was a clear gap between regulation of the digital and non-digital space not too long ago, we see this trend being reversed in recent years with digital activity being subject to a substantial amount of legislation. This negatively impacts smaller companies more severely as small businesses are more often active in the digital sphere and do not have the same resources at their disposal as their larger competitors. As financial and staff resources for startups are extremely limited, many report that the time spent adhering to compliance processes is the greatest threat to their business. Even more concerning, a substantial number of startups consider starting their business elsewhere due to the scale of the regulatory and compliance burden in Europe. In light of these developments, we call on the Commission to ensure effective implementation of the existing EU consumer protection laws whilst avoiding stifling innovation and growth in

the startup ecosystem by creating additional red tape. Adding another layer of regulation would only increase to the complexity of an already challenging enforcement landscape. Instead, the European Commission should provide clear, cohesive guidelines that make it easier for consumers and business to navigate the complex legal framework. Such guidelines would be essential to ensure legal certainty, reduce regulatory ambiguity, and improve harmonised enforcement across different legal instruments and across EU Member States.

III. Refraining from a disproportionate reversal of burden of proof

The majority of startups and scaleups oppose the use of manipulative techniques to trick consumers into uninformed choices. As startups are entering new markets and are often building up their customer base from scratch, it is in their economic interest to offer attractive and transparent conditions to their customers in order to distinguish themselves from the established competition on the market. While open questions remain when it comes to a legally watertight definition of dark patterns – which should be addressed in the framework of implementing the Digital Services Act – it is clear that most small businesses do not resort to the use of manipulative designs. The unlawful behaviour of few “rogue traders” should not negatively affect the many European startups and scaleups that conduct their business fairly and lawfully. This is why we do not find the possible reversal of the burden of proof with regards to dark patterns to be proportionate for small and medium-sized companies as it will put unjustified administrative burdens on the many “innocent” companies.

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Eintrag im Lobbyregister des Deutschen Bundestages unter der Reg.Nr.: R002111