



Ministry of Justice

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The Danish Government's response to the Commission's fitness check on EU Consumer Law on Digital Fairness

The Danish Government welcomes the Commission's decision to initiate a fitness check of EU Consumer Law on digital fairness and appreciates the opportunity to elaborate on how EU consumer law can handle new challenges arising especially from the increasing digitalization of our society.

While data driven business models can lead to more optimized user experiences, we also see a risk that traders continuously update their interfaces to ensure further engagement by consumers through retention mechanisms, online choice architecture and other types of personalized persuasion practices. This also happens offline, but in a data-driven environment it can become more and more challenging for consumers to make informed choices. This only heightens the need for effective enforcement, however, the ever-evolving development within new data-driven business models can make it difficult for authorities to ensure and secure effective enforcement of the consumer legislation.

Given this, the Danish Government recommends the Commission to look into interactions between traders controlling data and consumers in order to assess the process of obtaining a legal ground of data processing. Furthermore, the Commission is recommended to look into how pre-contractual arrangements are influenced by technological design techniques. A solution is most likely found in the correlation between the GDPR, the ePrivacy rules and the consumer protection rules. However, a consolidated approach is needed to tackle the way in which traders operate when building their interface and constructing the manner in which users will engage with their platform. This means recognizing data-driven business models as the new normal, when referring to the economic behavior of a trader and it also means recognizing the use of algorithms as an integral and main driving force for the way platforms interact with consumers today. Given this fact member states and the Commission alike need to rethink the way we approach and address particularly the tech giants given their mounting influence in our society today.

Moreover, the Danish Government is particularly concerned with the protection of minors and harmful commercial practices in the digital environment that do not take into account the vulnerabilities of young consumers. With regards to gaming and social media, the emergence of virtual currencies, in-app micro-transactions and loot boxes offers new challenges to ensure consumer protection online. Persuasion techniques and personalization are also prevalent in videogames. The legal framework should therefore also be clarified with this sector in mind.

The Danish Government supports the Commission's ambition to further outline how online commercial practices are adequately addressed with the EU consumer rules. In relation to this, the Commission should in particular consider which regulatory tools are best suited to address these practices and especially how the rules simply and effectively can support the efforts of enforcement authorities. This also means ensuring that the scope of the legal acts are clear and that the legislation is

easily manageable for enforcement agencies and the judiciary, when handling concrete cases. This could be achieved by incorporating the Commission's guidance on the scope into the legal acts. This includes looking into whether the current disclosure requirements are serving their purpose and whether evidence of actual effect on consumers should play a bigger role, when the Commission consider introducing new disclosure requirements. Equally the Danish Government encourages the Commission to look into the possibility of reversing the burden of proof in areas, where there is a significant digital asymmetry to the detriment of the consumer. This could help alleviate enforcement agencies. Furthermore, the fitness check should investigate the interplay between the consumer law and the many new legislative initiatives in the digital area, including the AI Act, the AI liability directive, the Digital Services Act, the Cyber Resilience Act and the Data Act. These acts all have as their aim to ensure effective competition, consumer safety and security and protection of fundamental rights. It is vital that overlaps as well as gaps are avoided, and that the enforcement of the acts are undertaken in a coherent manner. The fitness check should hence take a holistic approach to the legislation impacting consumer welfare in a digital environment.

The Danish Government further encourages the Commission to look into new digital trends as digital commercial environments will continue to develop at an ever-growing pace and technological progress can bring new challenges. In the near future, Artificial Realities such as Metaverse will most likely become more prevalent. Artificial intelligence, virtual, augmented and extended reality, cryptocurrency and other technological changes will create new challenges such as interaction with deepfakes, avatars and robots with lack of transparency as one consequence. Within these new realities, enforcement agencies will most likely have to adapt their tools of investigation and identification of violations through a machine-based approach, such as web crawling. This will most likely also be necessary to keep up with a growing number of cases in the online world. From a legislative perspective, the Commission should examine whether well-established rights for the consumer are covered in these new domains within the current and upcoming legislation. When the consumer legislation is only revised occasionally, there is a risk that the legislation is only adjusted to existing harmful commercial practices without paying attention to coming trends. The Commission should therefore conduct fitness checks in this area on a regular basis to capture new harmful commercial practices in the digital environment.

Likewise, digitalization has contributed to the development and propagation of for instance subscription-based products and services. The Commission is encouraged to address issues of consumer inactivity in such contracts.

Further, the Commission is encouraged to evaluate whether to introduce a "black list" and new requirements regarding unilateral changes of contract terms in the Unfair Contract Terms Directive. In addition, the Commission may evaluate whether relevant case law from the European Court of Justice regarding the Unfair Contract Terms Directive should be codified with the aim of strengthening the legal clarity of the directive.

Finally, the Danish Government encourages the Commission to continue its focus on behavioral insights, when analyzing problems and designing solutions to the consumer legislation.

Enclosed you will find the Danish Governments recommendations for the digital fitness check. The Danish Government will be at your disposal for any questions or comments to the recommendations.