

## Submission the public consultation on EU Digital Fairness

February 2023

### Introductory remarks

News media play a central role in democracy, acting as public watchdogs – the so-called “fourth estate”. It is therefore important to highlight that this sector should be treated differently than ordinary online businesses. The business of news is fundamentally a business of trust with citizens and online audiences.

Retaining and acquiring new subscribers through business-to-consumer contracts is crucial for the development of a more sustainable and diverse information landscape. This is even more true considering the existential threat posed to our industry by online platforms and their dominance of the online advertising market.

Online contracts concluded with news subscribers are also different from other goods and services in that they offer consumers with instant and direct access to content that can easily be stored and shared. It is therefore fundamentally different from goods that require shipping or other services which do not involve digital content.

While news businesses should not be exempt from consumer law, we urge the European Commission to consider the impact that the measures discussed could have on subscription models and by extension our sector. The Commission should not facilitate the circumvention of fair subscription agreements by consumers.

Several Commission initiatives, including the Media Action Plan and Media Freedom Act, already stress the need for the EU do more to support the business model of news.

- ***There is a need for stronger protection against digital practices that **unfairly influence consumer decision-making** (e.g. manipulative website/app designs such as misleading presentation of ‘yes’ and ‘no’ choices; or creating multiple obstacles before reaching a cancellation /unsubscribing link).***

Manipulative interfaces and dark patterns that coerce or otherwise unfairly nudge consumers into taking certain decisions are a serious problem. The EU currently has several tools at its disposal to tackle such problems, including the GDPR and ePrivacy when it comes to personal data, the Digital Services Act when it comes to online platforms, and the Unfair Commercial Practices Directive more broadly.

These rules should be fully enforced and any specific practices that are not tackled by those rules should be identified and documented before additional EU initiatives.

Rules concerning the design of user interfaces which have the purpose of protecting consumers are sometimes necessary but can also restrict the ability of businesses to freely communicate with users in a format that they deem appropriate. This is an important

dimension along which businesses compete and should also be understood as part of their freedom to conduct business.

There can be a thin line between prohibiting practices or user interfaces that deceive consumers and imposing the use of pre-defined digital interfaces onto businesses. Any initiative must take this into consideration alongside the role of existing legislation.

- ***When cancelling contracts, a clear technical means (e.g. a prominent **cancellation button** ) would help consumers to cancel more easily.***

It is important that consumers can create and cancel (or otherwise modify) a contract with ease, for example by subscribing or unsubscribing to a news service. It follows that the possibility to easily manage a contract or subscription should benefit from prominence in the options or settings available to consumers, especially when they are logged into accounts.

However, it is important that consumer rights to cancel or modify contracts are not used to object to contracts concluded with businesses, as well as the conditions associated with the validity of such agreements. Cancelling or modifying agreements may, depending on the substance of such agreements, involve the fulfilment of certain conditions so long as these are not considered unfair.

Therefore, terms of notice and other similar conditions may still apply, and consumers cannot simply be (or expect to be) exempt overnight from agreements by the simple click of a cancellation button. Otherwise, the very nature and purpose of such contracts in facilitating commercial transactions would be severely compromised.

To avoid prescribing how digital interfaces should be designed in a way that restricts the ability of businesses to freely communicate with users, it is best to focus on identifying and documenting specific practices that harm consumers. For example, practices that seek to hide options to cancel or modify a contract.

There must also be recognition that giving more prominence to the possibility of entering contract than to the possibility of cancelling or modifying a contract is not necessarily a bad and can be good, so long as it does not remain unnecessarily difficult to otherwise cancel or modify an existing contract. Therefore, assessments regarding the prominence of cancellation buttons should not compare the relative prominence of different options to manage a contract.

- ***Receiving a **confirmation** (e.g. by e-mail) when a consumer terminates a contract would help consumers check that their contract has been successfully terminated.***

It is unclear whether all consumers would like to receive a confirmation email regarding the termination of a contract. Some consumers may find this useful while others may not like it and find that this resembles spam.

Many contracts for news subscriptions in the EU are concluded by phone. Requiring a written communication by email would make this more complicated for no apparent reason.

- ***Receiving a reminder before any automatic renewal of digital subscription contracts would help consumers to decide whether they want to renew a contract or not.***

It is completely reasonable to expect that consumers should exercise their responsibilities and in doing so meet their rights and obligations.

It is also unclear whether all consumers would like to receive a confirmation email regarding the termination of a contract. Some consumers may find this useful while others may not like it and find that this resembles spam.

- ***Reminders about their subscriptions after a period of inactivity could be beneficial for consumers who might otherwise have forgotten that their subscription exists.***

It is unclear whether all consumers would like to receive a confirmation email regarding the termination of a contract. Some consumers may find this useful while others may not like it and find that this resembles spam.

In addition, there is a question about it is possible to monitor user activity. This is not possible for certain analogue goods such as newspapers, and in the case of digital goods may require the processing of (personal) user data for additional purposes.

- ***Signing up for a free trial should not require any payment details from consumers.***

The purpose of free trials is to allow consumers to learn about and experience new services at zero-monetary cost, regardless of whether payment details from consumers are requested or not.

The purpose of asking consumers for their payment details is to prevent fraud cases or also service abuse, whereby some users create new trial accounts to avoid paying a subscription fee, as each account can be associated with a payment detail. This also allows other abusive practices to be avoided, such as bots that illegally scrape and redistribute protected content without authorisation.

Service providers can avoid abuses with other details than payment details, such as phone contact details. However, if the aim is to convert trial consumers into subscribers, it makes sense to require payment details.

In addition, requiring payment details also allows companies to their consumers for feedback if they choose to not proceed with a normal subscription. Such feedback is important for companies to develop and improve their services.

- ***Requiring express consent when switching from a free trial to a paid service could be beneficial for consumers.***

Any contract concluded with consumers, including those that involve payments in exchange for a subscription, must require the express consent of consumers. This includes commercial practices that involve the “automatic” switching of a free trial to a paid service.

The underlying question is how this can be achieved in a fair and transparent way. The “automatic” switch of trial service into a paid service should not be equated with consumer deception in any way unless there are specific facts that point to that conclusion.

As a principle, contract switches from free to paid must take place under transparency condition with the full understanding and consent of consumers. This means that the terms and conditions of the free trial must be clear, transparent and accessible to consumers before they choose to participate in a free trial.

Therefore, an assessment of whether a switch from free to paid service is fair or unfair towards consumers requires a case-by-case assessment by competent authorities. Specific practices that do not observe consumer rights should be identified and documented before additional EU initiatives.

- ***Having the explicit option to receive non-personalised commercial offers (e.g. non-personalised advertising, non-personalised prices) instead of personalised ones could be beneficial in allowing consumers greater choice.***

There is an ongoing and broad debate about the functioning of online advertising and its impact on different stakeholders such as consumers, publishers, advertisers, technology companies and democracy. This debate cannot be comprehensively covered in the scope of the present consultation.

As a starting point from the perspective of businesses operating in the digital economy, it is important to recognise online advertising comes with obligations and responsibilities. In a legal context, there are rules that must be observed regarding the privacy and protection of personal data of individuals (ie. ePrivacy Directive and GDPR).

It is in our view perfectly legitimate for businesses to conduct personalised (ie. targeted) advertising within the letter and spirit of the law. As far as the media sector is concerned, online advertising revenues, including those revenues that are generated through targeted advertising, constitute a uniquely important source of funding for the sector.

News and journalistic content in particular face difficult conditions in the digital environment. Many publishers would much prefer to have subscribers to their service if that could be easily achieved. However, there are important limits to the subscription model of news. In most markets, successful subscription models are often limited to large national media outlets with sufficient scale or niche media with affluent audiences.

# NEWS MEDIA EUROPE

We remain available to provide further commentary on this point which often causes important discussions in EU decision-making. While there may rightly be room to improve certain sectorial practices considering evolving social values and growing consumer demand for privacy-oriented solutions (and there will likely always be), it is our view that imposing an effective ban on targeted advertising does not provide the kind of constructive and inclusive solution that our sector seeks to current challenges.