



Juridical Observatory on Digital Innovation
Osservatorio Giuridico sulla Innovazione Digitale

ROADMAP : DIGITAL SERVICES ACT – DEEPENING THE INTERNAL MARKET AND CLARIFYING RESPONSIBILITIES FOR DIGITAL SERVICES

INTRODUCTION: SCOPE OF THIS DOCUMENT

The Juridical Observatory on Digital Innovation (“JODI”) ⁽¹⁾ welcomes the initiative taken by the European Commission to consult with the various stakeholders prior to putting forward a proposal for a future regulation dealing with, inter alia, the “responsibilities for digital services” in the context of the ‘Digital Services Act package’ announced by the President of the European Commission.

This document addresses certain issues relevant to the EU Commission’s stated objective to establish “a common set of responsibilities for online platforms like social networks or marketplaces to be adopted in order to protect users’ fundamental rights online”.

JODI’s comments as contained in this paper are the following:

- The concern that online platforms may be employed to exploit human behaviour, not limitedly to consumers’ behaviour
- The proposal to identify a specific notion of “fairness” consisting in the duty of care for human behavioural vulnerability, not limitedly to consumers’ vulnerability
- The recommendation to contemplate: *(i)* in terms of Ex-ante compliance: mandatory provisions to ensure “fairness by design”; *(ii)* in terms of Ex-post enforcement: collective remedies and public enforcement provisions for their higher ability to act as deterrents against unfair practices compared to individual ex-post remedies.

⁽¹⁾ Transparency Register number 164451038125-33 - <https://web.uniroma1.it/deap/ogid>. This document has been prepared and authored by Professor Salvatore Orlando, Full Professor of Private Law at the University of Rome “Sapienza” and Head of JODI, to serve as JODI’s feedback to the EU Commission’s Roadmap on the “Digital Services Act” (<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12417-Digital-Services-Act-deepening-the-Internal-Market-and-clarifying-responsibilities-for-digital-services>).

A. JODI'S COMMENTS ABOUT THE CONCERN THAT ONLINE PLATFORMS MAY BE EMPLOYED TO EXPLOIT HUMAN BEHAVIOUR, NOT LIMITEDLY TO CONSUMERS' BEHAVIOUR

It is recognised that online platforms operate in a very dynamic environment. For this reason, the Commission set up an EU Observatory on the Online Platform Economy to monitor the evolution and identify emerging challenges. Among the topics the Observatory is looking at are: issues related to data access and use, non-discrimination, algorithmic decision making or ranking (<https://ec.europa.eu/digital-single-market/en/news/how-do-online-platforms-shape-our-lives-and-businesses-brochure>).

Also, it is recognised that algorithmic transparency is an important safeguard for accountability and fairness in decision-making. For this reason, the Commission is carrying out an in-depth analysis into algorithmic transparency (<https://ec.europa.eu/digital-single-market/en/algorithmic-awareness-building>).

It can be further observed that algorithms not only can make discriminatory decisions, but also may be used for targeting people with the aim of taking advantage of certain average conditions of subjective vulnerability which are presumed to be borne by the targeted persons, and, thus, with the aim – and, in any case, with the result - of creating the conditions for distorting (as opposed to influencing) the typical decision-making processes of the targeted people in connection with certain specific decisions, including but not limitedly to economic or transactional decisions (e.g. a certain purchase decision, a certain complaint decision, a certain electoral decision, a certain healthcare decision etc., decisions relevant to the affiliation or the continued affiliation to communities or organizations, such as online communities, political parties, churches, foundations, associations, unions etc).

The issue at stake is therefore not limited to the realm of consumer law, while it regards the fundamental rights of the users of online platforms at large (which include, but are not limited to, consumers). Users' fundamental rights are typically violated by marketing practices (which include, but are not limited to, business-to-consumer marketing practices) exactly designed for taking advantage of average conditions of human vulnerability.

B. JODI'S PROPOSAL TO IDENTIFY A SPECIFIC NOTION OF "FAIRNESS" CONSISTING IN THE DUTY OF CARE FOR HUMAN BEHAVIOURAL VULNERABILITY, NOT LIMITEDLY TO CONSUMERS' VULNERABILITY : THE CONCEPT OF UNFAIRNESS TOWARD USERS OF UNLINE PLATFORMS

In EU law, the purpose of protecting human decisional vulnerability is traditionally relevant to consumer-protection legislation, as it is made evident by the very important "framework" directive of 2005 intended for combating unfair business-to-consumer commercial practices: Directive 2005/29/EC.

As known, the focus of the discipline of Directive 2005/29/EC has been set in the concept of the consumer's transactional decision and, more specifically, around certain average consumer's

conditions of vulnerability associated with the consumer’s decision-making process. Acting in a manner contrary to the requirements of professional diligence (Article 2(h) of Directive 2005/29/EC) means acting in a way that allows the trader to take advantage of certain average consumer’s conditions of vulnerability associated with the consumer’s decision-making process. In essence, it is forbidden to influence consumers’ transactional decisions in such a way as to take advantage of certain average consumer’s conditions of vulnerability. Whenever the trader puts in place commercial practices that present this feature he is said to act against the professional diligence and to ‘distort’ (as opposite to ‘influence’) the consumers’ economic behaviour, and, in brief, to act unfairly (Article 5, para. 2 (a) and (b) of Directive 2005/29/EC).

Since the realm of online platforms is not limited to business-to-consumer commercial practices, it appears sensible to remark that the issue of fairness/unfairness in connection with online platforms should be aimed at protecting human decisional and behavioural vulnerability and at combating practices exploiting human behaviour and taking advantage of human decisional and behavioural vulnerability in any possible field of application of online platforms, e.g. online targeting for electoral purposes, health care decisions, affiliation to online communities, political parties etc.

C. JODI’S RECOMMENDATION TO CONTEMPLATE MANDATORY PROVISIONS TO ENSURE ‘FAIRNESS BY DESIGN’, COLLECTIVE REMEDIES AND PUBLIC ENFORCEMENT

As regards the measures to combat unfairness toward users of online platforms, in the sense highlighted above, the following recommendations are made:

Ex ante compliance:

It is suggested that the design of algorithms for AI’s marketing systems or other software applications used on online platforms should be made subject to ex-ante requirements aimed, in essence, at prohibiting and avoiding **(a)** the processing of data with the purpose of creating clusters of vulnerable people with respect to stated categories of behavioural and decisional vulnerability, and **(b)** the triggering of functionalities aimed at targeting people on that basis.

Ex post remedies:

Based on the experience of the implementation of Directive 2005/29 EC on B2C unfair commercial practices in the various Member States, it is recommended to give a central role to collective remedies and public enforcement for their higher ability to act as deterrents against unfair marketing practices compared to individual ex-post remedies.

Respectfully submitted

Rome, 30 June 2020



Prof. Salvatore Orlando