

The Consumer Voice in Europe

TOWARDS EUROPEAN DIGITAL FAIRNESS

BEUC framing response paper for the REFIT consultation



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Why it matters to consumers

Three decades after the deployment of the World Wide Web, digital technologies have become near-omnipresent in consumers' lives. Although the digital world has brought about many benefits, it has also put consumers in a position of increased weakness. Digital companies control what we see and the choices we are given. They influence our experiences and decisions in ways that are far too complex to be understood by the average consumer. This complexity and increased business power requires a new approach to consumer protection, to strengthen consumer rights and redefine what fairness means in the new digital reality.

Summary

This paper aggregates BEUC's input into the public consultation part of the 'digital fairness' fitness check of consumer law. The key recommendations are summarised below (non-exhaustive list).

1. Horizontal recommendations

- A. Digital asymmetry should be recognised in horizontal consumer law as an overarching power imbalance that necessitates, in particular, a reversal of the burden of proof and a duty of care to ensure a high level of consumer protection in the digital environment.
- B. A horizontal principle of 'fairness by design' should be introduced to govern the design of products and services.
- C. Key concepts of consumer law like 'trader', 'consumer', 'average consumer', 'consumer vulnerability', 'consumer harm', 'trader' or 'professional diligence' should be evaluated and adapted in the course of the fitness check;
- D. Precautionary effects on EU consumer protection law caused by interplay with other maximum harmonisation instruments regulating for example the digital single market must be avoided;
- E. Specific prohibitions should be introduced into the Unfair Commercial Practices Directive ('UCPD') and the Unfair Contract Terms Directive ('UCTD') to address some of the most common transgressions;
- F. A horizontal regime for protecting children beyond the framing as vulnerable consumers under the UCPD is needed.

2. Specific recommendations

- A. A horizontal prohibition on dark patterns reinforced by an anti-circumvention clause is needed in the UCPD;
- B. Use of psychographic profiling for price personalisation should be prohibited;
- C. Personalisation practices should be rendered fair and empowering to consumers;
- D. A prohibition of in-game or in-app currencies should be considered.
- E. Offering loot boxes, 'pay-to-win' mechanisms or other randomised content in exchange for real money in games that are likely to be accessed by minors should be banned.
- F. Alongside the withdrawal button, the Consumer Rights Directive should feature a cancellation button for long-term contracts.
- G. To address the challenge of influencers, transparency and disclosure requirements should be further defined, standardised, and harmonised at EU level to clarify the rules and facilitate compliance monitoring and enforcement.
- H. Promotion of illegal products and services by influencers should constitute an unfair commercial practice and be blacklisted in the UCPD.
- I. The Omnibus Directive's measures against fake and sponsored reviews should be assessed to verify if stricter protection is needed.
- J. Prohibitions are needed to protect consumers from the addictive effects of online services, with particular caution to the effects these practices may have on minors.
- K. The Omnibus' measures applicable to ticket resale should be reassessed and complemented to include important material information, namely the main characteristics of the event ticket, such as its face value, indication of the seat/row/section or existing restrictions imposed by third parties to use the ticket.
- L. In addition to the need for fairness by design, it should be considered whether a general obligation to provide consumers with a summary of the General Terms and Conditions, based on a harmonised template, should be introduced.
- M. A set of new rights for consumers should be introduced to address the imbalance that is digital asymmetry:
 - a. A right not to be tracked,
 - b. A right to meaningful personalisation,
 - c. A right to receive non-personalised offers
 - d. A right to know one's 'digital alter-ego'
 - e. A right to a human interlocutor.
- N. BEUC also supports the proposed rights considered by the Commission in the public consultation survey.

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1. Introduction

With all the improvements that technology has brought into the lives of individuals, the reverse side of the coin has been that the power of companies over their lives – both as consumers and citizens – has only grown. Sophisticated use of data and AI places consumers in an ever-weaker position vis-à-vis businesses, which control choice environments and affect consumers' online behaviour. As consumers become dependent on data-driven environments for their daily functioning in society, the unceasing exposure to monetisation-driven algorithms delivering everyone a personalised experience of the market and the world at large has already been seen to have harmful consequences and reduced consumers and citizens' trust in markets and democratic societies.

The European Commission's 'digital fairness' fitness check of consumer law forms a unique opportunity to pave the way for a new generation of consumer protection legislation that will reverse the negative trends which have been rendering consumers powerless in a world dominated by digital technologies. Revised and updated, consumer law should be able to effectively tackle the risks and challenges that consumers face in the digital world and secondly, fulfil its role as a legislative safety net in areas covered by laws such as the General Data Protection Regulation (GDPR), the Digital Services Act ('DSA'), the Digital Markets Act ('DMA'), the Data Governance Act ('DGA') and upcoming laws such as the Data Act ('DA') and the AI Act ('AIA').

Responding to the public consultation within the framework of the 'digital fairness' fitness check of consumer law, this paper brings together BEUC's input to the consultation. It is comprised of two major sections, dedicated to high-level suggestions and specific considerations respectively. **The first** makes horizontal recommendations pertaining to the place consumer law has in the world of today, the risks it faces and the ways in which it must evolve to correspond with reality. It is essential that the European Commission's fitness check starts at the beginning, namely with re-thinking the concepts of EU consumer law.

The second seeks to address specific issues, addressing also the issues listed by the European Commission for the fitness check exercise, yet going beyond.

We will continue to provide input to the larger fitness check process also beyond the consultation timeframe. **New research and new positions taking a more in-depth look at the proposed concepts are being prepared and will be published at a later stage.**

2. Horizontal recommendations

2.1. Digital asymmetry and fairness by design

Although consumer law has always focused on protecting the consumer as the weaker party, modern-day data driven services (however empowering and beneficial they can be often seen) place the consumer in a weaker position than ever. Traders benefit from behavioural insights based on datasets often aggregating data from consumers' entire history of interacting with the Internet, including search histories, email and instant messaging histories, browsing habits or predictions of economic status. At the same time, the consumer is faced with constantly changing choice architectures, continuously being optimised to maximise conversion rates and engagement.

This imbalance of power, dubbed **digital asymmetry**, is near-omnipresent in the digitalised environment. Provided only with (often extremely complex) privacy policies and terms of service, consumers will never be able to analyse and understand how data-driven businesses operate. Apart from that, being a consumers cannot become a full-time job. As demonstrated by the Forbrukerrådet (the Norwegian Consumer Council, 'NCC') in 2020, an in-depth analysis of privacy policies of popular services bring no meaningful knowledge of what is actually going on.¹ In effect, **the utility of disclosure, transparency and consent** as the only tools to effectively protect consumers are shown to be **severely limited**.

This imbalance of power also affects enforcers, particularly in its knowledge dimension. Investigating possible compliance issues of a data-driven service, including analysis of an opaque algorithmic environment is extremely difficult and resource-intensive, while the services' interfaces, terms and conditions and other policies change all the time, rendering any investigation all the more difficult.

What results for the consumer is **digital vulnerability**: a universal state of susceptibility to the exploitation of differences in power in the trader-consumer relationship that results from internal and external factors beyond the control of the consumer. Such internal factors can include insufficient digital literacy, cognitive biases, or information overload. External factors may include the digitally mediated relationship, the choice architectures, the knowledge gap, limited control over data through user interfaces, the design of digital consumer environments and choices, the lack of interoperability between services, the way default settings are configured, etc.² The condition is aggravated by individualised and other behavioural techniques for influencing consumer behaviour. This demonstrates that vulnerability must not be restricted to 'traditionally protected' groups (e.g. young, old and persons with disabilities) but include all consumers. Every person can find themselves in a vulnerable position where AI can detect vulnerabilities like emotional distress, exhaustion, tiredness, grief, sorrow, physical pain or the influence of medication in real time and exploit them to the detriment of the consumer.

Fairness by design and duty of care: To account for the imbalance of knowledge and powers under conditions of digital asymmetry, the design and operation of products and services should embed the principle of **fairness by design**, rendering them fair to consumers without the necessity for the consumer to undertake any specific action to shield themselves from negative consequences (such as the necessity to disable non-essential data collection features, or read and analyse a Privacy Policy or the Terms of Service to identify potential risks). Under conditions of digital asymmetry, this should also entail the trader's **duty of care** to ensure a high level of consumer protection, and in particular that the consumer's decision autonomy is not impacted by its commercial practice, in particular the design and operation of interfaces or parts thereof. This must include, as a minimum, enabling consumers to see, understand, and exercise their capacity for making different choices, which includes the manner of presentation of information and choice architectures. The trader should also be expected to prevent identifiable decision-making biases as well as mitigate any such imbalances with the consumer. Lastly, this should entail a lack of direct and indirect interference with the decision-making process.

¹ NCC (2020) Out of control.

² See Micklitz, Helberger et al., (2021) EU Consumer Protection 2.0: Structural asymmetries in consumer markets, https://www.beuc.eu/publications/beuc-x-2021-018_eu_consumer_protection.0_0.pdf, p. 46.

BEUC recommendations:

- Alongside the existing construct of consumer vulnerability based on personality traits and personal characteristics, the UCPD should recognise digital vulnerability as the universal state of susceptibility to distortion of decision-making under conditions of digital asymmetry.
- A horizontal principle of fairness by design should be introduced to govern the design of products and services.
- The UCPD should also integrate the concept of digital asymmetry.
- The UCPD should also mandate the reversal of the burden of proof and a duty of care on the part of the trader to ensure a high level of consumer protection (fairness by design).

2.2. Burden of proof and enforcement

Despite boasting one of the highest standards of consumer protection worldwide, EU consumer law has been difficult to enforce.³ Now, with the transnational layout of digital services and the digital asymmetries of knowledge and power working against enforcers,⁴ strengthening enforcement is one of the major tasks brought about by the digital age.

BEUC's research on digital asymmetry⁵ shows the need to address the following:

- 1) Strengthening the institutional pillars of cross-border consumer law enforcement (**the institutional perspective**) focusing on the review and improvements to the regime governed by the CPC Regulation. These considerations have been published in the BEUC paper on strengthening the CPC framework.⁶
- 2) **Public enforcement and private enforcement must go hand in hand.**⁷ In particular, it is important that representative actions be available in all sectors where the collective interests of consumers may be affected, including in all digital sectors.
- 3) Reallocating the **burden of proof**⁸ to where the power and the knowledge lie (**the evidence perspective**). In this respect, horizontal consumer law must respond to the fact that digital asymmetry also affects enforcers. This is notable in the dimension of **knowledge**⁹ (e.g. in the case of the necessity to penetrate through opaque algorithmic environments), **architectures** (where the traders' choice architecture evolves quickly and may be a far cry from the original version at the time of the investigation) and **resources**, as building up evidence for effective policing of complex digitalised environments requires disproportionately large expenditures on the part of enforcers,

³ See the discussion in https://www.beuc.eu/sites/default/files/publications/BEUC-X-2022-135_Strengthening_the_coordinated_enforcement_of_consumer_protection_rules.pdf, p. 4.

⁴ For an overview of the challenges faced by enforcers, see www.beuc.eu/sites/default/files/publications/BEUC-X-2022-135_Strengthening_the_coordinated_enforcement_of_consumer_protection_rules.pdf (p.8).

⁵ Micklitz, Helberger et al., (2021) EU Consumer Protection 2.0: Structural asymmetries in consumer markets, https://www.beuc.eu/publications/beuc-x-2021-018_eu_consumer_protection.0_0.pdf

⁶ BEUC (2023) Strengthening the coordinated enforcement of consumer protection rules. The revision of the Consumer Protection Coordination (CPC) https://www.beuc.eu/sites/default/files/publications/BEUC-X-2022-135_Strengthening_the_coordinated_enforcement_of_consumer_protection_rules.pdf.

⁷ For example, BEUC member Altroconsumo has provided evidence of the efficiency of independent evidence collection via the [CICLE](#) project to tackle unfair behaviours: [Shopping online: TigerShop e BigPrice multate, anche grazie alle vostre segnalazioni | Altroconsumo](#).

⁸ BEUC (2022) EU Consumer Protection 2.0 - Protecting fairness and consumer choice in a digital economy <https://www.beuc.eu/position-papers/eu-consumer-protection-20-protecting-fairness-and-consumer-choice-digital-economy>

⁹ For a fully-fledged description of the concept of digital asymmetry, see https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-018_eu_consumer_protection_2.0.pdf.

while obscuring unfair practices and building a defence is relatively easy for high-tech traders.¹⁰

BEUC recommendations:

- On an institutional level, the CPC model should be revised as proposed in the BEUC position paper on strengthening the coordinated enforcement of consumer protection rules.¹¹
- Under conditions of digital asymmetry, the **burden of proof** must be put on traders to demonstrate their commercial practices are in compliance with EU law.
- For the above rule to be effective, it should be connected with a duty of disclosure for providers of b2b data-based services (including platform-to-business services) involved in the value chain to ensure that the investigating authority or regulator may obtain a meaningful response.¹²

The penalties should be dissuasive, including measures like a shutdown of websites or standardised compensation for affected consumers.

2.3. Key concepts and definitions of consumer law

In order to respond to the challenges brought about by the age of data, a revision of consumer law should not shy away from examining the most basic of its concepts, such as '**consumer**', '**average consumer**'¹³ (based on the assumption of being reasonably well informed but also rational in decision-making) and '**consumer vulnerability**'.

This is needed to protect consumers from harms which arise within the consumer-trader relationship, reaching beyond the lens of protection of **economic interests** which currently permeates European consumer law.¹⁴ In recent years, digital commercial practices have been instrumental to the decline of the decision-making autonomy of consumers and their trust in markets and institutions. Side effects have also included echo chambers, opinion polarisation and consumers turning their back on traditional providers of information built on constant human quality monitoring and supervision (such as newspapers, TV networks, news websites) in favour of largely unsupervised systems like TikTok, programmed to feed on raw engagement and to maximise it.¹⁵ These side effects show that **new types of consumer harm** have been emerging that escape the existing conceptual framework of consumer law.

¹⁰ A recent example may be seen in the reversal of the EUR10M penalty in the Apple 'planned obsolescence' case by the Consiglio di Stato on grounds of insufficient proof of a causal link between the software update and the subsequent battery issues (Sentenza Consiglio di Stato N. 00448/2023REG.PROV.COLL., 13.01.2023, available at <https://www.giustizia-amministrativa.it>)

¹¹ BEUC (2023) Strengthening the coordinated enforcement of consumer protection rules. The revision of the Consumer Protection Coordination (CPC) [https://www.beuc.eu/sites/default/files/publications/BEUC-X-2022-135 Strengthening the coordinated enforcement of consumer protection rules.pdf](https://www.beuc.eu/sites/default/files/publications/BEUC-X-2022-135%20Strengthening%20the%20coordinated%20enforcement%20of%20consumer%20protection%20rules.pdf).

¹² BEUC is currently undertaking an effort to operationalise these recommendations through new research.

¹³ For example, the January 2023 preliminary reference question of the Italian Consiglio di Stato asks whether the UCPD concept of 'average consumer', understood as a consumer who is reasonably well informed and reasonably observant and circumspect, refer not only to the classic concept of homo economicus, but also to the findings of the latest theories on bounded rationality, showing people often limiting the information they need through decisions which appear 'irrational' suggesting the need for greater consumer protection where there is a risk of cognitive influence. See comments on <https://recent-ecl.blogspot.com/2023/01/we-read-that-preliminary-ruling-request.html>.

¹⁴ For example, see Article 1; Recitals 4, 6, 8, 10 of the UCPD; preamble to the UCTD; New Consumer Agenda of 13 November 2020 (here listed alongside health and safety).

¹⁵ [2021 Eurostat data](#) shows a general decline of traditional sources of news in favour of social media. However, in the [2022 study by Pew](#) of social media as news providers for U.S. inhabitants, TikTok was the only service that showed a sharp increase over the preceding three years among all social media providers.

These are linked to the omnipresent surveillance and data processing technologies.¹⁶ Simultaneously, the mentioned societal externalities of data-driven services suggest strongly that also the **consumer-citizen** dimension must be brought seriously into the discussion of what goals consumer protection should aim to achieve in the world of today.

A related issue is the protection of '**transactional decision-making**' by the consumer under the Unfair Commercial Practices Directive protects. The revised Guidance document to the UCPD notes that the definition of 'transactional decision' of Article 2 (k) UCPD must be interpreted broadly, such as continuing to use the service (e.g., scrolling through a feed), to view advertising content or to click on a link.¹⁷ This interpretation captures services which monetise the attention and engagement of consumers, where the consumer pays the trader by spending their time and interacting with the service and should be written into law.¹⁸

Another issue is the understanding of **professional diligence** in the context of identifying unfair commercial practices which the Unfair Commercial Practices Directive (UCPD) defines as dependent upon the commercial context.¹⁹ Literature on the subject points out that the potential of data-driven commercial practices (and digital choice architectures) to (i) exploit vulnerabilities of consumers; (ii) to create digital dependencies and asymmetrical power relationships and in effect; to (iii) create influence over autonomous choices, should also be considered as creating new professional duties and obligations of professional diligence. Their relevance for the discussion about the definition of professional diligence is an important consideration for the fitness check.²⁰ To add to the complexity, in the connected reality dominated by a handful of strong actors, it may be particularly difficult to abstract a 'diligent operator' benchmark independently of how these actors have been affecting our understanding of 'diligence' and our expectations as consumers. This demonstrates further the need to examine how professional diligence should be understood in these types of environments.

Lastly, in order to ensure accountability in today's reality, the definition of **trader** should also be examined closely from the perspective of the oft-complex value chains and networks of intermediaries and contractors engaged in the provision of digital services, with varying degrees of dependence on big platforms and often serving as tools for outsourcing activities of dubious compliance away from the big players.²¹

¹⁶ The report *Out of control: How consumers are exploited by the online advertising industry* by BEUC member the Forbrukerrådet also lists the following harms: the feeling of powerlessness, the lack of transparency affecting disclosure-based rights (such as the right to object, the right to an explanation, and the right of erasure); manipulation, discrimination, purpose creep, threats to security and risk of fraud, as well as chilling effects on freedom of expression. See <https://fil.forbrukerradet.no/wp-content/uploads/2020/01/2020-01-14-out-of-control-final-version.pdf> p. 43 et seq.

¹⁷ See Commission Notice - Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, 29.12.2021. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021XC1229%2805%29> Sections 2.4 and 4.2.7.

¹⁸ See BEUC (2022) EU CONSUMER PROTECTION 2.0 Protecting fairness and consumer choice in a digital economy https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-015_protecting_fairness_and_consumer_choice_in_a_digital_economy.pdf p. 10.

¹⁹ Article 2 (h) of the Unfair Commercial Practices Directive defines it as 'the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity' and uses it as one of two key criteria for determining unfairness under Article 5 (2) (a).

²⁰ Helberger, Micklitz, Sax, Strycharz (2021) Surveillance, consent and the vulnerable consumer, p. 25-26 in: Helberger, Lynskey, Micklitz et al. (2021) Structural asymmetries in digital consumer markets. BEUC 2021 https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-018_eu_consumer_protection_2.0.pdf; see also Maltieri, Gianclaudio, and Jędrzej Niklas. 2020. 'Vulnerable Data Subjects.' Computer Law & Security Review 37: 105415-. <https://doi.org/10.1016/j.clsr.2020.105415>.

²¹ See the investigation of the Belgian Data Protection Authority against IAB Europe and its Transparency and Consent Framework (TCF): <https://www.dataprotectionauthority.be/iab-europe-held-responsible-for-a-mechanism-that-infringes-the-gdpr>.

Notably, the Commission's Guidance document on the UCPD points out that the definition of trader also includes entities 'directly connected with a consumer's transaction with another trader in whose name or on behalf of whom such trader is acting'.²² The fitness check should aim at codifying these considerations into law and evaluating to establish whether further regulation is needed.

BEUC recommendations:

Given the developments in modern-day digital markets, the key concepts of consumer law need to be re-examined for their continued validity. For example:

- The concepts of 'consumer' and 'vulnerable consumer' should undergo a review from the perspective of who they should apply to and the interests they aim to protect.
- Consumers in the digitalised market should no longer only be protected in regard to their economic interests as this fails to address harms such as loss of objective information, reduced decision-making autonomy or the feeling of disempowerment.
- The concept of 'professional diligence' should be reviewed to account for new professional duties and obligations that should arise under conditions of digital asymmetry such as fairness by design.
- The definition of 'transactional decision' in the UCPD should be updated to follow the revised UCPD Guidance document, in particular to include transactions where the behaviour of the consumer is connected to the revenue-earning model of the trader.
- The definition of 'trader' should be clarified in line with the UCPD Guidance document and reassessed to ensure accountability in today's networked arrangements involving a platform and a myriad of smaller entities which may or may not be functionally independent of the main service provider and may be acting on the platform's behalf or their own.

2.4. Preclusionary effects

The recent years have seen a wave of legislative efforts at EU level to regulate the digital environment. The Digital Services Act, the Digital Markets Act, the Data Governance Act and the draft AI and Data Acts are examples of such legislation, all with the status of a Union Regulation and all built on the premise of maximum harmonisation.

These Acts can be seen as complementing and, in some cases, overlapping with consumer rights legislation. Recent research conducted on a selection of Commission proposals has demonstrated that this overlap can be dangerous to consumers as it may lead to 'regulating by not regulating', i.e., creating a situation where certain matters may already be claimed to have been regulated for consumers, even if no specific protections have been put in place (the precautionary effect).²³

²² See Commission Notice - Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, 29.12.2021.

²³ Helberger, N., H.-W. Micklitz & P. Rott (2021) The Regulatory Gap: Consumer protection in the digital economy. BEUC, December 2021. https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law/F3296031_en

BEUC recommendation:

- Any revisions of consumer legislation that may ensue in the wake of the fitness check process should clearly establish that the consumer protection measures contemplated therein cannot be overridden by lex specialist that would provide a lower level of consumer protection and that they apply always in case of any legal gaps. Only this way can the consumer law acquis fulfil its role of a horizontal safety net across all fields of law.

2.5. Prohibitions of consumer-disempowering commercial practices and contract terms

Specific prohibitions of particularly harmful practices can carry the value of straightforwardly shutting down the most undesired market behaviours and indicating the desired direction of interpretation of the law. BEUC recommends **blacklisting practices using the asymmetry of power to the benefit of the trader and to the disempowerment of the consumer.**

Practices based on data exploitation can render consumers entirely powerless in situations where insights from their data allow the trader to exploit their vulnerabilities and pressure points against them. To this end, applying such practices to create psychological pressure, (e.g., exploiting someone's life situation that may create a pressure to purchase) should be prohibited.

At the level of contractual clauses, consumers purchasing goods and services can be put in a situation of particular disadvantage where the 'fine print' in the contract terms requires them to enter into yet another contract to use their newly purchased device (e.g. connected devices proving to be useless without a contract with a service provider), or when they are prohibited from using the device in ways which are allowed by law (e.g. recording a show to watch it later, or sharing an e-book with a family member).

BEUC proposes to prohibit a number of contract terms which entail risks typical to digital service contracts.²⁴ This includes, for example, misleading the consumer as to the nature of what they are buying (e.g. believing that they are buying content instead of paying for a service, which affects the right of withdrawal), using 'tacit consent' as a method of contract formation (e.g. where the consumer accepts simply by using the website) or creating the impression that digital services are provided for free, where consumers are in fact allowing the trader to monetise their personal data, time or attention.

BEUC recommendations:

BEUC proposes to at least prohibit (non-exhaustive list):

1. In the Unfair Commercial Practices Directive:

- Commercial practices using psychographic profiling or similar techniques to apply psychological pressure such by exploiting personal (even temporary) vulnerabilities like emotional distress, exhaustion, tiredness, grief, sorrow, physical pain or the influence of medications.
- Commercial practices using personal data which the trader knows or should reasonably know was obtained unlawfully.

²⁴ Luzak J, Loos M (2021) Update the Unfair Contract Terms directive for digital services [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2021\)676006](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2021)676006)

2. In the Unfair Contract Terms Directive:

- Contract terms which oblige the consumer to conclude an additional digital content contract or another contract pertaining to hardware with a third party;
- Contract terms preventing consumers from exercising rights under copyright law, e.g. format shifting, sharing content within family, or private copies.
- Contract terms misrepresenting a service as acquisition of content, using tacit consent and 'browsewrap' contracts or misrepresenting the service as free where the trader monetises their personal data, time or attention.
- Contract terms forcing the consumer to waive ownership of content they share on the service (videos they produce, photos uploaded on social media, etc.).
- Contract terms giving the trader the right to unilaterally delete a consumer's user account (this can have a huge impact on consumers, for many their online accounts are an important part not only of their social but also their professional activity).
- A list of prohibitions to protect consumers from abusive clauses in contracts pertaining to their connected products.²⁵

2.6. Protection of minors

Despite the arguably increasingly understood risks for harm to minors caused by digital services,²⁶ no uniform and decisive approach currently exists in EU law²⁷ to protect minors from it. For example, in opposition to traditional media such as TV where advertisements are mostly passively received by children, online marketing promotes a much more active (and often longer) engagement between children and advertised content²⁸ while children are significantly less able to identify content as advertising.²⁹ EU legislation such as the General Data Protection Regulation, the Digital Services Act, as well as the Audiovisual Media Services Directive³⁰ contain specific provisions related to child protection but most of them are

²⁵ For specific suggestions, please refer to BEUC (2022) Giving consumers control over their data [https://www.beuc.eu/sites/default/files/publications/BEUC-X-2022-103%20BEUC Position paper on the Data Act proposal.pdf](https://www.beuc.eu/sites/default/files/publications/BEUC-X-2022-103%20BEUC%20Position%20paper%20on%20the%20Data%20Act%20proposal.pdf) p. 12.

²⁶ OECD (2019) impacts of technology use on children: exploring Literature on the brain, cognition and well-being, OECD Education Working Paper No. 195- <https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=EDU/WKP%282019%293&docLang=ua&page=En>

²⁷ The announced [European strategy for a better internet for kids](#) (BIK+) includes plans for a code of conduct on age-appropriate design and foresees an EU-wide age verification system which aims to improve the situation over the coming years. Please also see BEUC's privacy concerns in this respect in BEUC (2022) making European digital identity as safe as it is needed, https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-016_eidas_position_paper.pdf.

²⁸ BEUC (2021) Food marketing to children needs rules with teeth. https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-084_food_marketing_to_children_needs_rules_with_teeth.pdf

²⁹ Nairn, A. and Hang, H. (2012), 'Advergaming: It's not child's play. A review of research. London: Family and Parenting Institute https://www.agnesnairn.co.uk/policy_reports/advertgames-its-not-childs-play.pdf . See also Danish Competition and Consumer Authority, 'Consumers benefit from Visually Salient Standardized Commercial Disclosures on Social Media', Competitive Markets and Consumer Welfare, #48, June 2021 <https://www.kfst.dk/media/z3lmycqw/20210617-consumers-benefit-from-visually-salient-standardized-commercial-disclosures-on-social-media.pdf>.

³⁰ The [Audiovisual Media Services Directive \(AVMSD\) revision](#) contains vague rules to protect minors from inappropriate on-demand media audiovisual services. These include 'encouraging' Member States to ensure that self-and co-regulatory codes of conduct are used to effectively limit the exposure of children and minors to audiovisual commercial communications for alcoholic beverages (Recital 11) or it being necessary to set out 'proportionate rules' on protecting minors from harmful content (Recital 26), or to take 'appropriate measures to protect minors from content that may impair their physical, mental or moral development' (Recital 28). The new Article 12 states that programmes 'which may impair the physical, mental or moral development of minors are only made available in such a way as to ensure that minors will not normally hear or see them' yet without giving any specifics. Similar provisions apply under the new Article 28a to video-sharing platforms.

principle-based and not concrete enough to be effective in practice without lengthy and costly litigation. Evidence shows that some major companies which are present in many children's lives are not sufficiently protecting them from online harms.³¹

Recital 38 of the General Data Protection Regulation speaks of children meriting specific protection with regard to their personal data as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data, in particular in regard to the use data for marketing or creating profiles. This principle is not taken up in the Articles of the Regulation itself, save for Article 8 which sets specific conditions applicable to children's consent.³² It is therefore not clear what the GDPR actually mandates in terms of protection of minors.

The new Digital Services Act contains provisions on protection of minors which are a step in the right direction. However, these only apply to online platforms and in some cases to very large players. In addition, they fall short of prohibiting tracking and profiling minors. Article 28 requires 'appropriate and proportionate measures to ensure a high level of privacy, safety, and security' and a prohibition of displaying ads based on profiling using data from minors. However, it remains to be seen how platforms will effectively do this in practice in view of the absence of concrete legal provisions on how to operationalise these requirements. We await the European Commission's guidance for platforms on what measures these could be³³.

The DSA also contains provisions on the Commission promoting (voluntary) standards for targeted measures to protect minors online (Article 44 (1) j)), explaining the conditions and restrictions regarding the use of the service in a way that minors can understand – where the intermediary service is primarily directed at minors or is predominantly used by them (Article 14(3)), as well as very large platforms' and very large search engines' obligations to conduct risk assessments and risk mitigation measures.³⁴

In the context of the broader concerns about the protection of children in the digital environment and the need for broader protections beyond online platforms, there is a clear need to bring the spotlight on the aspects related to the commercial exploitation and the effects of commercial practices on children and young consumers. With the U.S. discussions on revamping the Children and Teens' Online Privacy Protection Act to ban targeted advertising to children, introduce mandatory age verification, options to disable addictive product features and algorithmic recommendations now gaining momentum,³⁵ Europe should not stay behind.

BEUC recommendation:

- The fitness check should aim at introducing a horizontal regime for protecting children beyond the framing of minors as vulnerable consumers under the UCPD, taking into account the heightened risks to commercial exploitation and negative impact on development and mental health that can occur as a result of the business models of predominant digital services such as those based on continuous data processing, attention and engagement.

³¹ See the BEUC action against TikTok, <https://www.beuc.eu/tiktok> and letter to ERGA - https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-014_beuc_submitted_an_alert_to_consumer_protection_authorities_about_tiktok_with_relevance_for_erga.pdf.

³² This is built upon in the announced [European strategy for a better internet for kids](#) (BIK+) which seeks to introduce a broad age verification tied to the EIDAS 2.0 framework. BEUC's privacy concerns in this respect were raised in BEUC (2022) making European digital identity as safe as it is needed, https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-016_eidas_position_paper.pdf.

³³ In line with Article 28(4) DSA.

³⁴ Articles 34 (1) (d) and 35 (1) (j) DSA.

³⁵ Swartz J (2023) [Biden's hard-line stance on banning online ads that target kids has plenty of support from both parties](#). MarketWatch Feb. 13, 2023; Ng A (2023) [Biden calls for ban of online ads targeting children](#) Politico 7th Feb 2023.

3. Specific recommendations

3.1. Dark patterns

In 2022, a behavioural study published by the European Commission showed that 97% of the most popular websites and apps used by EU consumers deployed one or more misleading or deceptive interface functionalities, commonly referred to as 'deceptive design' or 'dark patterns'. The most common types included hidden information/false hierarchies, preselection, nagging, difficult cancellations and forced registration.³⁶ A more recent sweep by the European Commission and national authorities of the CPC Network of online retail stores for use of specific types of manipulative design features (fake countdown timers, web interfaces designed to lead consumers to purchases, subscriptions or other choices and hidden information), finding evidence of at least one of such 'dark patterns' in 148 out of the 399 examined shops.³⁷

The Digital Services Act contains a prohibition on dark patterns in its Article 25 (1). However, this provision is severely weakened by the exclusion of practices 'covered by' (sic) Directive 2005/29/EC (UCPD) or Regulation (EU) 2016/679 (General Data Protection Regulation) under Article 25 (2). The wording used in Article 25(2) is unclear and likely to cause interpretative doubts, e.g. whether formal decisions must be issued first under the GDPR and the UCPD before the provision may apply. This may render the provision unusable in practice for situations affecting consumers.

Although most dark patterns should in theory be covered by the UCPD, it is in practice rarely the case that a trader is held responsible for deploying such practices. This points to insufficient enforcement but also to difficulties in applying the law arising from such asymmetries of power and knowledge as identified in the BEUC research on structural asymmetries in digital markets³⁸

This points to the need to revise the Directive, with particular attention to the examination of its core concepts in light of the challenges posed by digital asymmetry, but also to include a horizontal prohibition of using dark patterns in traders' interactions with consumers.

BEUC recommendations³⁹

On top of our horizontal recommendations offered in the first sections of the paper, the following suggestions are offered for consideration:

- I. The revised Unfair Commercial Practices Directive (UCPD) should include:**
 - 1 A horizontal ban on dark patterns;
 - 2 An anti-circumvention clause to prevent traders from deploying contractual, technical, behavioural or any other measures to bypass their obligations under the Directive.
 - 3 A list of prohibitions of the most commonly used dark patterns in Annex I to the Directive.

³⁶ European Commission 2022: Behavioural study on unfair commercial practices in the digital environment: dark patterns and manipulative personalisation. <https://op.europa.eu/s/xrpf>

³⁷ https://ec.europa.eu/commission/presscorner/detail/en/ip_23_418

³⁸ Micklitz, Helberger et al., (2021) EU Consumer Protection 2.0: Structural asymmetries in consumer markets, https://www.beuc.eu/publications/beuc-x-2021-018_eu_consumer_protection.0_0.pdf

³⁹ For more detailed recommendations, see BEUC (2022) "Dark patterns" and the EU consumer law acquis - Recommendations for better enforcement and reform - https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-013_dark_patterns_paper.pdf

II. The Consumer Rights Directive (CRD) should include an anti-circumvention clause to prohibit traders from deploying contractual, technical, behavioural or any other measures to bypass their obligations, as well as an obligation for a cancellation button (discussed in more detail further in this paper).

III. Other recommendations (listed in full in the BEUC paper on dark patterns)⁴⁰ include:

- 1 Under the coordination of the European Commission, creating a database of unfair design practices;
- 2 Providing guidance to companies on the legal boundaries of persuasion to avoid designing choice architecture in a way that can be unfair and misleading.

3.2. Price personalisation and other personalisation practices

From search results to social media, content recommenders and prices for online cloud storage: nowadays consumers encounter personalised digital services on every corner as data processing and algorithms determine what products or content they are most likely to click on, and how much they might be willing to pay for a product. The omnipresence of personalisation puts into question freedom of choice: if everything we see online is personalised, from the information we are given to the choices we are offered, does freedom of choice still exist?

In the position paper on the Digital Services Act Proposal,⁴¹ BEUC asked for non-profiling to be the default for both advertising purposes and for recommending content. Article 38 of the Digital Services Act requires that providers of very large online platforms and of very large online search engines that use recommender systems shall provide at least one option for their recommender systems which is not based on profiling.

Notably, a degree of personalisation is necessary for many services to work. Search engines create user profiles to deliver more relevant search results; in the case of social media, personalisation may be relevant for the current content recommenders to operate.

On the level of revenue generation, it is beneficial to traders that consumers have little control over how personalisation works; this allows them to seek to maximise engagement by offering content and product recommendations which may be quite different from those that the consumer sought on the website (for example, by showing clickbait content that the user is likely to respond to).

Regulation of personalised recommendations for content or products should thus be considered to give consumers more control over the outputs of such systems. This way, the consumer would be empowered by receiving recommendations that are more relevant to them, while being able to filter out the ones which are just distractions aimed at sparking an instant-purchase instinct or increasing content monetisation.

The personalisation of prices based on an algorithmic assessment of one's lifestyle, attitudes, values, habits, beliefs, interests (psychographic profiling) to determine an individual's willingness to pay is also of great concern. This practice is extremely invasive and carries a considerable risk of discrimination and exploitation of difficult life situations. It should thus be prohibited.⁴²

⁴⁰ Id.

⁴¹ BEUC (2021) The Digital Services Act Proposal, https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-032_the_digital_services_act_proposal.pdf, p. 26.

⁴² See also Rott P, Strycharz J (2022) Personalised Pricing. Study requested by the IMCO committee [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/734008/IPOL_STU\(2022\)734008_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/734008/IPOL_STU(2022)734008_EN.pdf)

Lastly, as algorithmic personalisation finds its way into consumer contracts,⁴³ the applicability of the protections afforded by the Unfair Contract Terms Directive should be ensured. While the wording of Article 3 (1) UCTD clearly stipulates it applies to contractual terms which have not been 'individually negotiated', which would likely capture all personalised contracts, any doubts should be avoided pertaining to personalisation no longer leading to a 'standard contract' offered in the same form to all consumers. This should be clarified in a guidance document.

BEUC recommendations:

- The Commission's fitness check should examine personalisation practices used by businesses, in particular the harms they can bring to consumers. It should also explore the policy options to render them fair and empowering to consumers.
- Personalisation of prices based on psychographic profiling is harmful and should be prohibited.
- The applicability of the Unfair Contract Terms Directive to algorithmically personalised contracts should be reaffirmed in a guidance document.

3.3. Virtual items and virtual currencies

Even though a gift emoji on a social media platform⁴⁴ or a mystery box of magical benefits in a video game exist only virtually, they often cost consumers real money. The actual buying process is often split into two stages: first, one needs to buy some imaginary currency offered by the service provider, to then exchange it for virtual items. Not infrequently, in the gaming world, what is offered for purchase is not a specific item but a chance of winning one instead.

In May 2022, 20 national consumer associations from the BEUC network, relayed the report of entitled "[Insert Coin: How the gaming industry exploits consumers using loot boxes](#)" simultaneously to their national governments and authorities. The report pointed out the numerous issues pertaining to an increasing trend to offer consumers who play video games purchases of virtual items containing randomised in-game benefits (loot boxes).

The NCC's analysis showed that game environments render it easy for video game companies to use a large variety of dark patterns weaponising cognitive or behavioural biases and vulnerabilities to incentivise the consumer to spend more. As the report notes, this may include compelling or confusing visuals, entire aspects of game design, as well as in-game currencies that have multiple exchange rates and are used to obscure the real costs of in-game purchases from the gamer.⁴⁵

Loot boxes were also found in the report to carry other detriments to the consumer such as aggressive marketing, meaningless or misleading transparency disclosures about the likelihood to win, opaque algorithms and skewed probabilities, layers of virtual currencies to mask or distort real-world monetary costs, high costs of freemium features, the omnipresent risk of losing content at any time and targeting loot boxes and manipulative practices also at children.⁴⁶ Other implications of using virtual currencies include a *sui generis* lock-in effect which occurs when a virtual currency is sold in batches (e.g. the user cannot buy less than e.g. 50 virtual coins) which forces the user to buy more virtual currency than needed – than they will then need to find ways to spend it, otherwise it would go to waste. This is especially

⁴³ See generally Golobardes M A (2022) [Algorithmic personalisation of consumer transactions and the limits of contract law](#). Journal of Law, Market & Innovation vol. 1 - 1/2022.

⁴⁴ BEUC (2021) TikTok without filters, https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-012_tiktok_without_filters.pdf

⁴⁵ <https://storage.forbrukerradet.no/media/2022/05/2022-05-31-insert-coin-publish.pdf>, p. 13.

⁴⁶ Id, p. 3.

true for video games where a new edition is released every year (e.g., FIFA), where bought in-game currencies are not transferable from one edition to another.

In the resolution on the 30th anniversary of the single market, the European Parliament has recognised that the need for updating consumer protection, in a way that also takes digital asymmetries into account, should also cover the digital services sector, such as gaming, virtual reality, augmented reality and virtual worlds.⁴⁷

BEUC recommendations:

- A ban should be introduced on manipulative design in games which may likely lead to distortion of transactional behaviour;
- The fitness check should evaluate whether there are any consumer benefits at all to in-game and in-app currencies and whether they should be prohibited. Alternatively, an obligation should be introduced to always state the price in 'real' money next to the amounts denominated in virtual currencies^{48 49 50};
- A ban should be introduced on offering loot boxes, 'pay-to-win' mechanisms or other randomised content in exchange for real money in games that are likely to be accessed by minors.
- An obligation should be introduced to disable in-game payments and loot boxes mechanisms by default⁵¹.
- Solutions are needed for more transparency: researchers and regulators should have access to the algorithms and datasets that are involved in the loot boxes to conduct independent research in the public interest.
- Consumers should have the option to use the game without algorithmically driven decision-making that aims to influence consumer behaviour.
- If other remedies do not alleviate the problems, a full ban of 'paid' loot boxes should be considered^{52 53}.
- Given the scale of the unfair practices, consumer protection authorities (CPC-authorities) should ensure that the existing consumer law acquis is fully applied in the gaming industry.

⁴⁷ European Parliament resolution of 18 January 2023 on the 30th anniversary of the single market: celebrating achievements and looking towards future developments (2022/3015(RSP)) https://www.europarl.europa.eu/doceo/document/TA-9-2023-0007_EN.pdf

⁴⁸ In this regard, see [TikTok commitment](#) after the CPC-Network coordinated action. This coordinated action of the CPC authorities was triggered by BEUC complaint against TikTok on February 2021 for multiple EU consumer law breaches. See <https://www.beuc.eu/press-releases/beuc-files-complaint-against-tiktok-multiple-eu-consumer-law-breaches>.

⁴⁹ See European Parliament INI Report on consumer protection in online video games: a European single market approach, (2022/2014(INI)) – https://www.europarl.europa.eu/doceo/document/A-9-2022-0300_EN.html#_section2.

⁵⁰ See https://www.acm.nl/system/files/documents/acm-reactie-op-eu-fitness-check-on-digital-fairness_0.pdf, The Dutch CPC-authority (ACM) go even further and propose in their contribution to the Digital Fitness Check (2022) to analyse whether in-game and in-app currencies really serve consumers in any way and should therefore be banned.

⁵¹ See European Parliament INI Report on consumer protection in online video games: a European single market approach, (2022/2014(INI)) – https://www.europarl.europa.eu/doceo/document/A-9-2022-0300_EN.html#_section2.

⁵² See European Parliament INI Report on consumer protection in online video games: a European single market approach, (2022/2014(INI)), https://www.europarl.europa.eu/doceo/document/A-9-2022-0300_EN.html#_section2, calling for a possible ban of paid loot boxes to protect minors, avoid the fragmentation of the single market and ensure that consumers benefit from the same level of protection, no matter their place of residence; Point 27.

⁵³ See ACM contribution to the Digital Fitness Check (2022) calling to consider a prohibition of loot boxes. https://www.acm.nl/system/files/documents/acm-reactie-op-eu-fitness-check-on-digital-fairness_0.pdf

3.4. Contract cancellations and withdrawals

One of the major obstacles for consumers wishing to exercise their right to withdraw from a contract, or to cancel a contract where they have the right to do so, is the difficult procedure put in place by the trader. For example, it can be difficult for consumers to find the right address to send the termination notice. High-profile cases like the CPC action against Amazon Prime following complaints by the Forbrukerrådet, the Trans-Atlantic Consumer Dialogue and BEUC,⁵⁴ or the CPC action against WhatsApp (where BEUC filed the external alert) have been proven to be just the tip of the iceberg: according to a 2022 study by Consumentenbond, one in each four companies was found to make it too difficult to consumers to cancel their contracts online.⁵⁵

To enable consumers to exercise their right to **withdraw from a contract within the prescribed withdrawal period** (usually 14 days), a set of requirements has been proposed for a withdrawal button, which is already being discussed currently in the context of the proposed revision of the Distance Marketing of Financial Services Directive,⁵⁶ to be integrated into the Consumer Rights Directive. The withdrawal button, applicable to all distance contracts concluded through an online interface, is to be placed in a prominent manner and permanently available during the entire withdrawal period, on the same interface as the one used to conclude the distance contract. Activation of the withdrawal button should result in an instant confirmation notice to the consumer that the right of withdrawal has been exercised, indicating the date and time of the exercise of the right. Confirmation of the exercise of the right of withdrawal shall be provided by the trader to the consumer on a durable medium.

In the meantime, some Member States have already taken steps to introduce a requirement to give consumers **a similarly easy way to terminate long-term contracts**. In cases where the consumer has the right to terminate a contract, effective 1st July 2022, the German Government has introduced a cancellation button which allows consumers to terminate a contract in the same way as subscribing to a contract. This applies to all consumer contracts, except financial services due to the scope exemption of financial services from the Consumer Rights Directive.⁵⁷ The integration of financial services into the Consumer Rights Directive is now the opportunity to extend the application of the cancellation button to financial services.⁵⁸ A similar solution has been introduced in France in 2022.⁵⁹

To ensure swift implementation of both solutions, they should be backed by an effective sanctioning mechanism in case consumers cannot easily access the button. A good way forward would be to apply the rules prolonging the right of withdrawal in case of incomplete information.⁶⁰

⁵⁴ See <https://www.acm.nl/en/publications/users-must-be-able-cancel-their-amazon-prime-subscriptions-two-clicks>.

⁵⁵ <https://www.consumentenbond.nl/nieuws/2022/online-abonnement-opzeggen-nog-te-vaak-te-moeilijk>

⁵⁶ Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/83/EU concerning financial services contracts concluded at a distance and repealing Directive 2002/65/EC <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0204> 2022/0147 (COD).

⁵⁷ However, implementation has been slow: a study by BEUC member vzbv has shown that out of 3000 surveyed websites, 72 percent were not compliant. See <https://www.vzbv.de/pressemitteilungen/online-kuendigungen-bereiten-weiter-probleme>.

⁵⁸ Based on the German example, the French government made a legislative proposal in July 2022 to introduce a cancellation button for all consumer contracts including financial services; other countries might follow.

⁵⁹ https://www.assemblee-nationale.fr/dyn/16/dossiers/alt/mesures_urgence_pouvoir_achat

⁶⁰ See BEUC (2022) Distance marketing of financial services. BEUC position paper https://www.beuc.eu/sites/default/files/publications/BEUC-X-2022-097_Distance_marketing_of_financial_services.pdf

BEUC recommendations⁶¹

- BEUC calls for introducing a cancellation button in the Consumer Rights Directive and proposes that the initiative should not be postponed until the results of the fitness check evaluation are available but rather benefit from the opportunity provided by the ongoing discussion on the Distance Marketing of Financial Services Directive revision which would enable a quicker regulatory response.
- To ensure a high level of consumer protection in all Member States and facilitate the implementation for traders across borders, the Consumer Rights Directive should include a cancellation button for all contracts, including financial services. The design of the cancellation button follows the same rationale as the withdrawal button, including the instant confirmation notice.
- Sanction mechanisms must be introduced in regard to both buttons to ensure swift implementation.
- To ensure compliance with these new rules, the burden of proof should be on the trader when the existence of either button is questioned.

3.5. Influencer marketing

Influencer marketing is increasing rapidly on social media and comes with big concerns due to the false perception it creates regarding the non-commercial nature of the communications.⁶²

In the context of lack of disclosure of influencer marketing as an advertising practice, the BEUC Position Paper on the Digital Services Act proposal⁶³ proposed that the definition of 'advertisement' include both direct and indirect ways to promote, market or rank information, products or services including indirect and direct forms of remuneration. As long as an influencer receives any consideration from a brand, they should also be subject to applicable transparency requirements under EU law. Unfortunately, the adopted definition under Article 3(r) is much narrower, speaking of information designed to promote the message of a legal or natural person, for commercial or non-commercial purposes, presented by an online platform against remuneration which is linked specifically to promoting that information.

Specific information requirements for providers on online marketplaces were introduced by the Omnibus Directive, requiring them to inform consumers 'whether the third party offering the goods, services or digital content is a trader or not'.⁶⁴ However, the sole basis for this is the declaration of the third party and when the influencer does not consider themselves a trader, the added value of this regulation is largely lost in this case.

⁶¹ For a full discussion, see BEUC (2022) Distance marketing of financial services. https://www.beuc.eu/sites/default/files/publications/BEUC-X-2022-097_Distance_marketing_of_financial_services.pdf. See also BEUC (2021) Public consultation on the Directive on Distance Marketing of Consumer Financial Services – https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-085_response_to_ec_public_consultation_on_dmfsd.pdf.

⁶² See Altroconsumo's report on influencers in the context of their complaint to the market regulator: <https://www.altroconsumo.it/alimentazione/sicurezza-alimentare/news/integratori-e-influencer>. See also the AGCM release on letters calling for compliance sent to entities engaging in influencer marketing: <https://en.agcm.it/en/media/detail?id=33c8815f-b7d5-40f0-a9e0-af950d384277>.

⁶³ BEUC (2021) The Digital Services Act Proposal: BEUC position paper, 9th April 2021. https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-032_the_digital_services_act_proposal.pdf

⁶⁴ Article 4 (5) of the Omnibus Directive, inserting a new Article 6a into the Consumer Rights Directive.

The difficulties do not end there. Despite the revised UCPD Guidance document offering interpretative clues,⁶⁵ the qualification of an influencer as a 'trader' or 'acting on behalf of the trader' under the UCPD varies from one Member State to another, highlighting the need for a legal definition of what makes an influencer.

Hidden advertising (for brands or self-promotion) is still commonplace in the influencer marketing market, despite court and authority decisions, guidance from authorities and self-regulation. Transparency and disclosure requirements are present in the UCPD and other EU (eCommerce Directive, Audiovisual Media Services Directive, as well as sectorial legislations such as financial services). However, EU legislation remains silent on 'how' and 'when' such disclosure should be done, leading to divergent practices in different Member States. Disclosure requirements (e.g. the wording of labelling and hashtags, momentum for such disclosure, its visibility) should thus be further defined, standardised, and harmonised at EU level to clarify the rules and facilitate compliance monitoring and enforcement from authorities. The need for stricter regulation can be seen from some Member States already moving in to regulate influencers on a national level.⁶⁶

Influencer marketing is often a 'value chain' between influencers, influencer agencies, platforms and brands. To tackle hidden advertising practices, the liabilities of each actor should be clarified during the Commission's fitness check process, with particular attention to rules on joint liability of influencers, agencies and brands in case of breach of transparency requirements.

Platforms should provide standardised tools to ensure compliance (through easy labelling and segmentation of content, in-content inserts to allow transparency etc.). An important role could be played in this regard by the Digital Services Act with its voluntary standards of technical compliance measures in regard to advertising and commercial communications (Article 44 (1) (h)), but the interplay of any such rules with the UCPD should be clarified and rendered independent of self-declaration as a trader on non-trader.

Lastly, influencers often promote products, services or content which may carry considerable risks to consumers, e.g. dangerous and risky financial products (e.g. crypto-assets), health and cosmetic surgery devices, or unhealthy food to children (food and beverage products which are high in saturated fat, salt and sugar). The promotion of such products should be prohibited under the UCPD (Annex 1).

BEUC recommendations:

- Future regulation should codify the considerations of Section 4.2.6. of the European Commission's Guidance UCPD into law.
- 'Advertisement' must be defined to include both direct and indirect ways to promote, market or rank information, products or services including indirect and direct forms of remuneration.
- A legal definition is needed of what constitutes influencer marketing as a commercial practice.

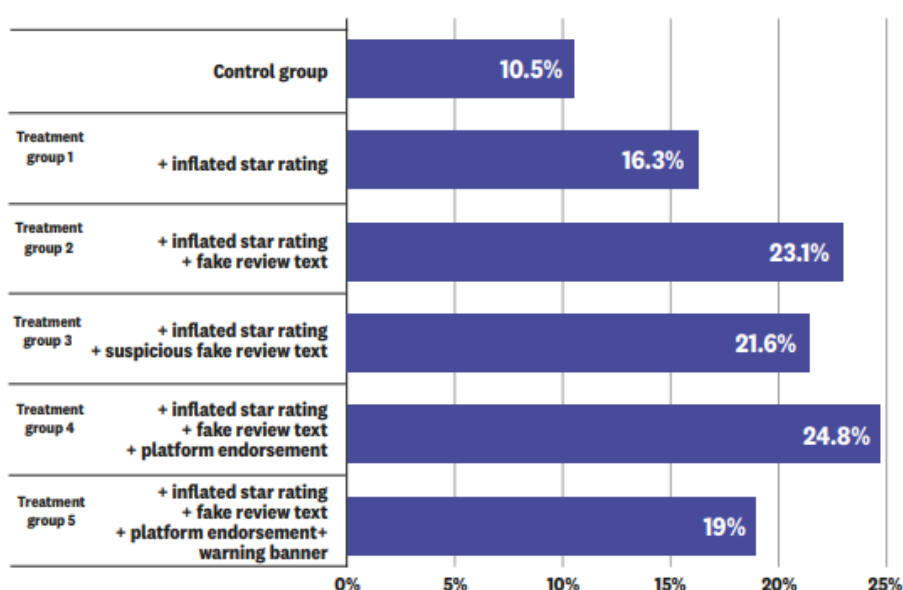
⁶⁵ See Commission Notice - Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, 29.12.2021. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021XC1229%2805%29> Section 4.2.6.

⁶⁶ Croquet P, Jeremie Lamothe (2023) [Les députés français prêts à s'entendre pour légiférer sur les pratiques des influenceurs](#). Le Monde, 9 Feb 2023.

- Transparency and disclosure requirements should be further defined, standardized, and harmonised at EU level to clarify the rules and facilitate compliance monitoring and enforcement.
- The promotion of illegal products and services by influencers should constitute an unfair commercial practice and be blacklisted in the UCPD.

3.6. Fake and sponsored reviews

Consumers read online reviews and can be easily deceived by them.⁶⁷ A 2020 behavioural study by BEUC member Which? on a group of 9,988 consumers demonstrated that fake reviews and fake ratings can be highly effective in steering more consumers towards a bad product.⁶⁸



Source: Which? (2020)

In a 2021 annual sweep into misleading practices, authorities of 26 Member States, Iceland and Norway checked 223 major websites for misleading consumer reviews. In 144 cases doubts arose about the reliability of the reviews. 104 websites did not inform consumers how reviews had been collected and processed, while only 84 websites made such information accessible to consumers on the review page itself, with the rest making the information less accessible. Lastly, 176 of the websites did not mention that incentivised reviews (e.g., resulting from a monetary reward) were prohibited by their internal policies or if not how they ensure they were flagged as incentivised.⁶⁹ Also in 2021, further evidence on online fake reviews was published by BEUC member OCU⁷⁰. In 2022, BEUC member Altroconsumo filed complaints to the AGCM against companies engaging in 'boosting' practices as an unfair commercial practice.⁷¹

⁶⁷ See Stiftung Warentest (2020) [Wie Verkäufer mit gekauftem Lob Kunden manipulieren](#), 23 June 2020.

⁶⁸ Which? (2020) The real impact of fake reviews a behavioural experiment on how fake reviews influence consumer choices. <https://www.which.co.uk/policy/consumers/5860/realfakereviews>

⁶⁹ https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/sweeps_en

⁷⁰ La Organización de Consumidores y Usuarios (2021) Fake reviews en Amazon, Tripadvisor y Booking, La Organización de Consumidores y Usuarios, <https://www.ocu.org/consumo-familia/compras-online/noticias/fake-reviews>.

⁷¹ See <https://www.altroconsumo.it/organizzazione/media-e-press/comunicati/2022/azioni-penali-e-segnalazione-recensioni-abusive>.

Applicable since May 2022, the Omnibus Directive has put in place amendments to EU consumer law to remedy the situation. To address the **insufficient transparency** problem, the failure to inform consumers whether and how the trader ensures that the published reviews originate from consumers who have actually used or purchased the product is now considered a misleading omission under Article 7 UCPD. Moreover, stating that reviews of a product are submitted by consumers who have actually used or purchased the product without taking reasonable and proportionate steps to check, as well as sourcing false consumer reviews or endorsements, or misrepresenting consumer reviews or social endorsements in order to promote products are now blacklisted as always unfair under the Annex to the Directive. However, the effectiveness of these new measures is not certain. Fake reviews continue to be one of the major traps that await consumers, both within the EU and beyond.⁷²

BEUC recommendation:

- The fitness check exercise should assess the effectiveness of the new measures against fake and sponsored reviews introduced by the Omnibus Directive and consider whether more restrictive measures (such as e.g., prohibition on publishing reviews which are not connected to an actual purchase on the platform) should be introduced.

3.7. Addictive use of digital products

The '**infinite scroll**' (or 'doomscroll') feature used by many social media websites was famously referred to by its inventor as 'behavioural cocaine sprinkled all over the interface' that did not even allow users' brains to catch up with what they were seeing, leading people to stay on the service for much longer than they wanted.⁷³ However, the doomscroll is just **one of many ways** in which many digital practices succeed at grabbing and maintaining the consumer's attention (like social media content recommender systems) disregarding impact on their mental well-being.⁷⁴ Studies link excessive use of social media to **mental illness**, not unlike problematic consumption of news content.⁷⁵ Many digital services use addictive design features which have considerable potential for harming the mental health and cause addiction in consumers, particularly minors.⁷⁶

The '[Insert coin](#)' report by the Forbrukerrådet cites research showing links between the purchasing of loot boxes and developing gambling addiction, which may cause significant harm, particularly to minors.⁷⁷ The report notes that the use of certain casino-like mechanisms may lead to consumers, including children, becoming accustomed to habits that closely resemble gambling addictions. Notably, while casinos – where they are allowed by law – have strict age restrictions, many video games that include loot boxes are played by young children.⁷⁸

⁷² See e.g. <https://www.webretailer.com/amazon/amazon-fake-reviews/>; <https://ecommercenews.eu/amazon-files-lawsuits-in-italy-and-spain-against-fake-reviews/>

⁷³ <https://www.bbc.com/news/technology-44640959>

⁷⁴ Gerrard Y, Gillespie T (2021) When algorithms think you want to die, Wired.com 21st Feb 2021 <https://www.wired.com/story/when-algorithms-think-you-want-to-die/>

⁷⁵ McLaughlin B, Gotlieb MR, Mills DJ (2022) Caught in a Dangerous World: Problematic News Consumption and Its Relationship to Mental and Physical Ill-Being, Health Communication, DOI: 10.1080/10410236.2022.2106086

⁷⁶ Zakon A (2019) Optimized for Addiction: Extending Product Liability Concepts to Defectively Designed Social Media Algorithms and Overcoming the Communications Decency Act (April 2019). Available at SSRN: <https://ssrn.com/abstract=3682048> or <http://dx.doi.org/10.2139/ssrn.3682048>

⁷⁷ <https://fil.forbrukerradet.no/wp-content/uploads/2022/05/2022-05-31-insert-coin-publish.pdf> p. 16.

⁷⁸ Id. The sources cited are "Behind the addictive psychology and seductive art of loot boxes", Alex Wiltshire <https://www.pcgamer.com/behind-the-addictive-psychology-and-seductive-art-of-loot-boxes/> and "Lifting the Lid on Loot-Boxes Chance-Based Purchases in Video Games and the Convergence of Gaming and Gambling",

BEUC recommendation:

- Stricter protections should be put in place against addictive features of online services, including prohibitions to protect consumers from the addictive effects of gameplay features that resemble or reproduce certain aspects of a real-life gambling experience, with particular caution to the effects these practices may have on minors.

3.8. Resale of tickets

The Omnibus Directive explicitly prohibits (through inclusion in the black list of the Unfair Commercial Practices Directive) the practice of reselling to consumers tickets to events which were purchased with automated means for circumvention of per-capita sale limits, or any other rules applicable to the purchase of tickets.⁷⁹ That prohibition is without prejudice to any other national measures to protect the legitimate interests of consumers and the safeguarding of cultural policy and access to events, such as regulating the resale price of the tickets.⁸⁰

However, in addition to prohibiting the most harmful practices, consideration should be given to the fact that ticket reselling websites are not always diligent enough to provide full, accurate or even true information about the tickets being offered to consumers. This could be addressed by introducing specific information obligations for such ticket sales, potentially complemented by a specification of when their breach should lead to the practice being qualified as unfair under the UCPD.⁸¹

BEUC recommendations:

- BEUC supports the measures introduced by the Omnibus Directive. However, the fitness check should also examine whether they are sufficient for achieving their regulatory objectives and whether the adoption of stricter regulatory measures may be justified.
- A specific information requirement should be introduced on ticket resale to include important material information, namely the main characteristics of the event ticket, such as its face value, indication of the seat/row/section or existing restrictions imposed by third parties to use the ticket. It could also specify that providing false information or failing to include these characteristics could be considered an unfair practice under the UCPD.

3.9. Terms of Service summaries⁸²

As the digital age is also one of cognitive overload, consumers are faced with complex Terms of Service and privacy policies that they most often accept without reading. This does not need to be the case.

European law has already covered considerable ground on establishing pre-contractual information requirements for consumer contracts, ranging from horizontal rules provided in the Consumer Rights Directive, separately for on-premises contracts (art. 5(1)) and for off-

James Close & Joanne Lloyd https://www.begambleaware.org/sites/default/files/2021-03/Gaming_and_Gambling_Report_Final.pdf

⁷⁹ Article 3(7) Omnibus Directive.

⁸⁰ Recital 50 Omnibus Directive.

⁸¹ https://www.beuc.eu/sites/default/files/publications/beuc-x-2018-081_omnibus_directive.pdf, p. 16.

⁸² This section draws from an overview created for BEUC's Recommendations for Consumer Friendly Contract Summary Templates for the EECC, https://www.beuc.eu/sites/default/files/publications/beuc-x-2019-030_beucs_recommendations_for_consumer-friendly_contract_summary_templates.pdf.

premises and distance contracts (art. 6(1)), to Information requirements under Art. 7(4) of the Unfair Commercial Practices Directive (Directive 2005/29/EC), to the Unfair Contract Terms Directive (Directive 1993/13/ EEC) provides standards for the transparency and fairness of consumer contract clauses which, as the Guidance document explains, reach as far as the font size and the logical structuring of the contract.⁸³

This approach may be necessary particularly for complex connected products, AI products or products that come with privacy policies and data-sharing policies. This additional information obligation should not, however, replace the overarching need to ensure fairness by design and consumer protection by design and by default.

Over the years, several templates have been established by EU law in the area of financial services, including:

- The Consumer Credit Directive (Directive 2008/48/EC) - Pre-contractual Consumer Credit Information;
- The Mortgage Credit Directive (Directive 2014/17/EU) - The European Standardised Information Sheet (ESIS) for mortgage credit Potential new rights for consumers in the digital sphere;
- The Payment Accounts Directive (Directive 2014/92/EU) - Fee Information Document and Statement of Fees;
- The Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation (EU) No 1286/2014 - Key Information Documents on Investment Products;
- The Insurance Distribution Directive (Directive (EU) 2016/97) - Insurance product information document.

Other fields include:

- Energy (Article 10 of the Electricity Directive) with its summary of the key contractual conditions in a prominent manner and in concise and simple language;
- The European Electronic Communications Code in Article 102 (3) mandates providing consumers with a concise and easily readable contract summary and lists its main elements.⁸⁴
- National regulation of telecoms (e.g. Germany's *TK-Transparenzverordnung*; Belgium's Article 111(1) of the Act on Electronic Communications and the Royal Decree of 15 December 2013).

BEUC recommendation:

In the course of the fitness check, it should be considered whether an obligation to provide consumers with a summary of the General Terms and Conditions, based on a harmonised template should be introduced. Building on the existing European experience for information obligations and supported by a system of incentives, this would help to partly counteract the asymmetry of knowledge created by the sheer volume of information that consumers are required to process.

⁸³ [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC0927\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC0927(01)) section 3.3.1.

⁸⁴ See also BEUC (2019) BEUC's recommendations for consumer-friendly contract summary templates in In the European Electronic Communications Code https://www.beuc.eu/sites/default/files/publications/beuc-x-2019-030_beucs_recommendations_for_consumer-friendly_contract_summary_templates.pdf and BEUC (2021) draft implementing regulation on a contract summary template for electronic communications services - BEUC's feedback - https://www.beuc.eu/sites/default/files/publications/beuc-x-2019-047_draft_implementing_act_electronic_communications_contract_summary_templates_beuc_feedback.pdf.

4. New rights for consumers in the digital sphere

The regulatory landscape in the digital sphere is now being complemented by rules in new legislation like the AI Act, Digital Services Act, Digital Markets Act or Cyber Resilience Act, focusing on traders operating in the new digital economy.

In view of the doctrinal discussions on how the position of the consumer has been weakened in the digital environment, including the research on digital asymmetry,⁸⁵ it is only reasonable to consider what new rights the consumer should receive to counterbalance these developments.

4.1. A right not to be tracked

A legal definition of tracking (as a category broader than just profiling) does not exist under EU law. Article 4(4) GDPR defines profiling as any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements. The right not to be subjected to automated decision-making in Article 22 states that the citizens have a right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning them or similarly significantly affects them. However, when applied to the myriad of minor or automated decisions based on profiling which we are subjected to as consumers on a daily basis, from search results to a personalised price on Google cloud storage, it is easy to see that this measure of protection is not sufficient.

The Digital Services Act prohibits 'display of advertisements' based on profiling of minors and on profiling using special categories of personal data under the GDPR.⁸⁶ However, these provisions are not enough to address the problem and negative impacts of surveillance advertising and the need for stricter protections for minors as (i) they only apply to online platforms (e.g. a newspaper website or the website of a normal retail store is not covered) and (ii) they do not address all forms of surveillance advertising and the issue at the core, the negative effects of data exploitation and opaque algorithmic systems.

As a result, a straightforward profiling prohibition, therefore, has not yet been formulated. Although its exercise might render certain recommender systems inoperable (see the right to meaningful personalisation below), the creation of such a right (and ideally in an even broader framing, as a right not to be tracked at all) should still be considered under the fitness check.

BEUC recommendations:

- A right not to be tracked should be formulated, to capture both profiling in the understanding of the GDPR and more broadly data collection and processing, with exceptions interpreted narrowly where needed for the provision of a specific service.
- In consequence, participation in the surveillance ecosystem from the moment of data collection should be voluntary and based on an opt-in.

⁸⁵ Micklitz, Helberger et al., (2021) EU Consumer Protection 2.0: Structural asymmetries in consumer markets, https://www.beuc.eu/publications/beuc-x-2021-018_eu_consumer_protection.0_0.pdf

⁸⁶ Article 26 (3), 28 (2) DSA.

4.2. A right to meaningful personalisation

The omnipresence of personalisation-based services has been mentioned as one of the key issues affecting consumer autonomy and choice in the digital world, particularly given how difficult it is to fully evade the tailored view of the market or world at large provided by one's 'irremovable goggles' of personalisation.⁸⁷

With the dependence of modern-day non-semantic recommender systems on personalisation to function, it may be extremely difficult to obtain a meaningful alternative to a system based on profiling (as mandated by Article 38 of the Digital Services Act). Under these circumstances, the regulation of personalisation should progress in the direction of **increasing effective control of the individual** over the personalisation process, rather than leaving it entirely to algorithms focused on maximisation of monetisation.

BEUC recommendation:

- Consumers should be granted the right to meaningful personalisation that would afford them effective control over the recommendations they are shown by content recommender systems.

4.3. A right to receive non-personalised offers, including prices

The consumer should have the right to receive only such offers of products or content which are not based on personalisation techniques. This right could have considerable value to consumers who might prefer to receive an accurate view of the market, or reject the possibility of being given personalised prices.

BEUC recommendation:

Tied with the right not to be tracked, the consumer should have the right to receive only such product / service offers and content recommendations which are not based on algorithmic personalisation techniques.

4.4. A right to know one's 'digital alter ego'

A major factor contributing to the imbalance of power between consumers and traders in the digital sphere is the obscurity of the insights drawn from the collected data (and, in case of profiling occurring directly on the user's device, sometimes without any data collection). As experiments have shown, one can request and download considerable amounts of data about oneself;⁸⁸ however, without the tools, it is still impossible to decipher which of these data and in which manner are being used by a trader when interacting with a consumer. Moreover, it is doubtful whether exercising the data access rights under Article 15 GDPR covers derived or inferred data (insights generated on the basis of data collected from individuals, or even directly on their devices, without any data collection).

⁸⁷ BEUC (2022) EU Consumer Protection 2.0 - Protecting fairness and consumer choice in a digital economy <https://www.beuc.eu/position-papers/eu-consumer-protection-20-protecting-fairness-and-consumer-choice-digital-economy> ; Micklitz, Helberger et al., (2021) EU Consumer Protection 2.0: Structural asymmetries in consumer markets, https://www.beuc.eu/publications/beuc-x-2021-018_eu_consumer_protection.0_0.pdf

⁸⁸ Frederike Kaltheuner (2018) I asked an online tracking company for all of my data and here's what I found, Privacy International, <https://privacyinternational.org/long-read/2433/i-asked-online-tracking-company-all-my-data-and-heres-what-i-found>

Granted the right to know their 'digital alter ego' the consumer would be able to establish what insights, links or predictions a trader is drawing about them from all the data it has (or had) access to.

BEUC recommendation:

- Consumers should be granted the right to know their 'digital alter ego' to learn about the insights and inferences made about them by any trader they are dealing with.

4.5. A right to fairness by design

As discussed in more detail in section 2.2. above, one of the major takeaways from the discussion on digital asymmetry is that consumer protection can no longer rely on disclosure and consent to effectively safeguard consumers in the digital age. What is needed is a policy shift towards consumer protection by design and by default. Alongside the reversal of the burden of proof under conditions of digital asymmetry, this policy objective should be reflected in a horizontal right of fairness by design.

BEUC recommendation:

- Consumers should have the right to expect that the online environment they enter is fair and safe to them, irrespective of whether they have the time to read disclosures or terms of service and one that prevents known decision-making biases rather than exploiting them.

4.6. A right to a human interlocutor

As we are increasingly surrounded by automated decision-making systems meant for handling consumer complaints and other inquiries, contact with a human interlocutor is not a given. While the GDPR establishes that individuals subjected to automated decision-making have the right to obtain human intervention on the part of the controller so that they may express their point of view and to contest the decision (Article 22 (3)); this only applies to decisions which produce legal effects concerning the individual or similarly significantly affecting them.⁸⁹ Needless to say, this is not often the case when dealing with chat bots or other inquiry-handling mechanisms.

BEUC suggested the inclusion of such a right in the context of artificial intelligence, whenever a decision based on algorithmic decision-making can have a significant impact on the consumer. Such a right should exist regardless of whether the processing of consumer's personal data was involved in the algorithmic decision making.⁹⁰ The right should be extended to all commercial contexts irrespective of the technology predominantly used to communicate with the consumer.

BEUC recommendation:

- In all commercial contexts, consumers should have the right to contact a living person when inquiring in relation to a product or a service.

⁸⁹ See BEUC (2018) Automated Decision Making and artificial intelligence - a consumer perspective https://www.beuc.eu/sites/default/files/publications/beuc-x-2018-058_automated_decision_making_and_artificial_intelligence.pdf p. 13.

⁹⁰ https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-088_regulating_ai_to_protect_the_consumer.pdf p. 20.

4.7. New rights suggested in the consultation

A handful of potential new rights have been suggested in the course of the Commission's public consultation that BEUC strongly supports due to their potential for empowering consumers and, at least partially, reducing the negative effects of the imbalances of power between them and digital traders.

These include the following:

A right to a reminder for inactive subscriptions and before automatic subscription renewal which is an excellent example of what **fairness by design** should entail, by preventing known decision-making biases (in this case, aiding consumers who may likely forget they have a subscription).

A right to a truly free trial (without payment details). Consumers are regularly offered free trials of subscription services but more often than not such a trial is conditional upon the consumer entering their (valid) payment details and registering a credit card or other means of payment. This means the trial is only truly free when the consumer takes positive action twice: i) by remembering (or setting a reminder) to cancel in the first place; and then (ii) by going through the cancellation procedure. By remedying this, the right to a truly free trial would form another building block of what should be considered **fairness by design**.

A right to give confirmation when switching from free trial to a paid version of a service: as another means of protection for consumers who might get charged without expecting it (e.g., by not reading the fine print), such a right would help overcome the information overload that modern consumers are suffering from and protect them from unknowingly ending up with a paid subscription.

A right to predefine the time and money spent using digital services would be particularly helpful to consumers who spend time on engagement-based services like social media or videogames. As such services often include mechanisms that end up attracting consumers to stay connected longer than originally intended (which increases the monetisation), the consumer would be able to predefine how much of their resources like time or money they are fine spending on their interaction with a service, thus increasing their control over the interaction.

END

