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European Commission's Public Consultation on Digital Fairness – Fitness Check on EU Consumer Law

Response of the European Law Institute





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Drafters: Marie Jull Sørensen, Peter Rott and Karin Sein
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The European Law Institute

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I. Introduction

In its 2020 consumer policy strategy, the 'New Consumer Agenda',¹ the European Commission announced that it would analyse whether additional legislation or other action is needed in the medium-term to ensure equal fairness online and offline. For that reason, the Commission launched, in spring 2022, a Fitness Check of EU consumer law on digital fairness in order to determine whether existing EU consumer law is adequate to ensure a high level of consumer protection in the digital environment. The Fitness Check will evaluate the Unfair Commercial Practices Directive 2005/29/EC (as amended; UCPD), the Consumer Rights Directive 2011/83/EU (as amended; CRD) and the Unfair Contract Terms Directive 93/13/EEC (as amended, UCTD). It examines the adequacy of these Directives in dealing with consumer protection issues such as consumer vulnerabilities, dark patterns, personalisation practices, influencer marketing, contract cancellations, subscription service contracts, marketing of virtual items, the addictive use of digital products, and other matters. It evaluates whether the existing directives would benefit from targeted strengthening or streamlining, while taking into account other relevant legislation in the digital field

and ensuring coherence. It will also examine the scope for any burden reduction, cost savings and simplification.

As a first step, the European Commission published a call for evidence for an evaluation in May 2022,² which received a total of 68 responses from stakeholders and the public. On 28 November, the Commission then opened a public consultation in the form of a questionnaire.

The European Law Institute (ELI) mandated Marie Jull Sørensen, Peter Rott and Karin Sein to draft a response to this consultation. The response focuses on the third part of the questionnaire, in which the European Commission invites comments on potential suggestions on improving EU consumer law for the benefit of consumers. The authors received feedback on their first draft from Advisory Committee members, Sergio Cámara Lapuente and Emilia Mišćenić, and from ELI Scientific Director, Christiane Wendehorst and on their second draft from the ELI Council. The final text was submitted to the ELI Council and approved on 20 February 2023.

¹ Communication from the Commission to the European Parliament and the Council New Consumer Agenda - Strengthening consumer resilience for sustainable recovery, COM(2020) 696 final.

² Commission document Ref. Ares(2022)3718170 of 17 May 2022, available at <https://ec.europa.eu/info/law/better-regulation/>.

II. Need for Stronger Protection Against Unfair Digital Practices (Q1)

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

Answer: Strongly agree

For the purposes of answering this question, we use the notion of 'dark patterns', although the question carefully avoids this term. Considering recital (67) of the new Digital Services Act (DSA), it is apparent that when using the term 'dark patterns' the EU legislature had the type of practice described in Question 1 in mind.

Current EU law on dark patterns is unclear and therefore does not offer sufficient protection. This is due to: (1) uncertainty as to what practices come under the UCPD; and (2) the unclear interplay of the UCPD and the DSA. Legal uncertainty has a massive chilling effect on the enforcement of law, as there is a great risk of having to bear litigation costs, including the costs of the defendant. Moreover, dark patterns also play a role in the effectiveness or otherwise of providing pre-contractual or contractual information in other areas of EU consumer law (3).

ad (1) In its Guidance on the interpretation and application of the UCPD of 2021, the European Commission rightly stated that:

The term 'dark pattern' does not have a legal definition in the Directive. The UCPD applies

to any 'unfair commercial practice' that meets the requirements of the material scope of the Directive, regardless of their classification. If dark patterns are applied in the context of business-to-consumer commercial relationships, then the Directive can be used to challenge the fairness of such practices ...

Thus, dark patterns will be considered unfair practices if they satisfy the general criteria of the UCPD. This may often be the case. One frequently cited example is scarcity patterns where a consumer is put under pressure by, for example, the announcement that only one room is left to book and a dozen people are currently looking at it, when this is actually untrue.³ Another example of a dark pattern commonly used in digital settings is a subscription contract that a consumer can easily enter into but never leaves due to the use of various manipulative design techniques.⁴

However, there are certain issues which seem to have prevented large-scale enforcement actions against dark patterns under the UCPD until now.

First of all, the whole idea of dark patterns sits uneasily with the UCPD benchmark of an average consumer,

³ On scarcity patterns, see M Martini, I Kramme and P Seeliger, "Nur noch für 30 Minuten verfügbar" – Scarcity- und Countdown-Patterns bei Online-Geschäften auf dem Prüfstand des Rechts, Verbraucher und Recht 2022, 123 ff.

⁴ Forbrukerradet, *You Can Log Out, But You Can Never Leave*, 2021, <https://fil.forbrukerradet.no/wp-content/uploads/2021/01/2021-01-14-you-can-log-out-but-you-can-never-leave-final.pdf>.

as it has traditionally been understood. The average consumer is reasonably well-informed and reasonably observant and circumspect (recital (18)). Dark patterns are, however, often discussed in the context of cognitive biases. For example, in its amendments to the (then proposed) DSA,⁵ the European Parliament Committee on the Internal Market and Consumer Protection (IMCO) added a recital (39a), in which we read: 'However, certain practices typically exploit cognitive biases and prompt recipients of the service to purchase goods and services that they do not want or to reveal personal information they would prefer not to disclose.' Ideally, a UCPD average consumer does not have cognitive biases, which is, of course, unrealistic. In fact, behavioural studies show that *all* people, or at least the (average) *majority*, even educated people, can have cognitive biases. Empirical studies demonstrate the greater or lesser effectiveness of some dark patterns within heterogeneous population samples. A behavioural study on dark patterns commissioned by the European Commission and published in 2022⁶ found that '97% of the 75 of the most popular websites and apps used by EU consumers deployed at least one dark pattern and the most prevalent were (1) hidden information/false hierarchy, (2) preselection, (3) nagging, (4) difficult cancellations, and (5) forced registration'. According to one of the conclusions of this study:

awareness levels appear high only for individuals who are already educated on the subject, either from the side of the industry, policymaking, academia or consumer associations. The average consumer's ability to discern the use of these practices in the digital environment is rather limited ... The results revealed that, in general, vulnerable consumers were more likely to make inconsistent choices than average consumers ... These results show that there is a significant portion of average consumers making inconsistent

choices, which may suggest that in the online context both average and vulnerable consumers are susceptible to unfair practices ...; even when consumers are well informed and given enough time to take a transactional decision, their choices are still often inconsistent with their preferences.⁷

Other recent empirical studies confirm that 'the level of awareness did not play a significant role in predicting their ability to resist manipulative designs. This finding implies that raising awareness on the issue is not sufficient to shield users from the influence of dark patterns'.⁸

Therefore, one can very well argue that the 'average consumer' of the UCPD is at risk of being manipulated by dark patterns and that the concept of the 'average consumer' must be interpreted in such a way that it incorporates biases. Indeed, the judgment of the Court of Justice in *Teekanne*⁹ was interpreted in academic writing as an acceptance of related findings from behavioural economics.¹⁰

Nevertheless, we can find greatly diverging assessments of the same practice in academic writing, depending on the extent to which authors rely on the traditional understanding of the attentiveness of the average consumer or on behavioural science. Likewise, there is no guarantee that courts will engage with behavioural studies. Therefore, it should be clarified that the 'average consumer' does have biases that can be exploited by use of dark patterns. The theme is discussed again more generally below in relation to digital vulnerability.¹¹

Secondly, legal uncertainty is furthered by the fact that the UCPD provides for general criteria whose application to the individual case must be pursued via enforcement actions, be they of a public law or a private law nature. Dark patterns come with the design of the website, and each website will be

⁵ EP doc. A9-0356/2022.

⁶ F Lupiáñez-Villanueva, A Boluda, F Bogliacino, G Liva, L Lechardoy and T Rodríguez de las Heras Ballell, *Behavioural study on unfair commercial practices in the digital environment: dark patterns and manipulative personalisation. Final report for the European Commission* (April 2022), 120 ff.

⁷ *ibid.*, 120 f.

⁸ K Bongard-Blanchy, A Rossi, S Rivas, S Doublet, V Koenig and G Lenzini, "I am Definitely Manipulated, Even When I am Aware of it. It's Ridiculous!" - Dark Patterns from the End-User Perspective, DIS '21: Designing Interactive Systems Conference 2021, June 2021, 763 ff., point 8.

⁹ CJEU, 4 June 2015, Case C-195/14 *Teekanne*, ECLI:EU:C:2015:361.

¹⁰ H Schebesta and K Purnhagen, *The Behaviour of the Average Consumer: A Little Less Normativity and a Little More Reality In CJEU's Case Law? Reflections on Teekanne*, *European Law Review* 2016, 595 ff.

¹¹ See the answer to Question 19.

designed individually. Of course, as the number of court rulings increases, the application of the law to individual types of dark patterns will become clearer, but this process is excessively slow. Indeed, very few cases have reached the courts until now, although the problem of dark patterns is recognised as being large.

Thus, concretisation is needed. Within the scope of application of the DSA, the Commission is conferred the power to issue guidelines, but there is a caveat to this, as will be explained below.

A key factor could be standardisation. Notably, one of the areas in which dark patterns are discussed most is consent to cookies. Indeed, traders have come up with a vast variety of designs by which consumers can accept, reject or select cookies.¹² Many of these are clearly meant to prevent consumers from making a free and informed decision, and thus they constitute dark patterns. Others are in the grey zone. Enforcement actions are scarce overall,¹³ and the problem persists and affects consumers and well-meaning traders equally. The jurisprudence of the Court of Justice in cases such as *Content Services*, *Tiketa* and *Meta Platforms Ireland* confirms that EU consumer law is not sufficiently effective to prevent the issues presented.¹⁴

This scenario could have been easily avoided. There is absolutely no reason why each and every trader should develop their own particular design of cookie consent. If the legislature provided for clear rules, or a standardised design, it would be easy for well-meaning traders to comply (rather than engage in trial and error), and it would be equally easy to identify and sanction those who do not comply.

ad (2) Dark patterns have now been regulated in article 25 DSA, although this provision does not mention that notion. According to article 25(1) DSA, providers

of online platforms are not permitted to design, organise or operate their online interfaces in a way that deceives or manipulates the recipients of their service or in a way that otherwise materially distorts or impairs the ability of the recipients of their service to make free and informed decisions. The provision is concretised by recital (67), describing typical dark patterns, which is laudable. At the same time, its scope of application is limited to online platforms, whereas dark patterns are equally detrimental when used by traders on their own websites. The provision should therefore be extended to all traders offering their goods or services on the internet.

Unfortunately, the prohibition of dark patterns is devalued by article 25(2) DSA, according to which article 25(1) DSA does not apply to practices covered by the UCPD or the General Data Protection Regulation (EU) 2016/679 (GDPR). This provision, which was included in the DSA only at the very last minute, is entirely unclear and is unhelpful. First of all, there is no reason why a certain practice should not be able to violate several laws, and it could then be sanctioned under several regimes. The Court of Justice has recognised this, for example in *Pereničová and Perenič*, as regards the use of unfair terms that can at the same time constitute an unfair commercial practice.¹⁵ In article 7(5) UCPD, breach of information obligations under specific pieces of consumer legislation is at the same time qualified as a misleading omission, which brings it under the enforcement system of the UCPD. In relation to dark patterns, by contrast, the UCPD and the DSA are mutually exclusive.

This will affect enforcement massively. The DSA enforcers will have to first consider whether or not a particular practice is 'covered by' the UCPD. But what does it mean to be covered? Does it mean that the practice must not be within the scope of application of the UCPD? Thus, article 25(1) DSA would not apply to business-to-consumer commercial practices but

¹² For graphical illustration and analysis, see C. C. Möller, *Dark Patterns in Consent-Bannern*, *Verbraucher und Recht* 2022, 449 ff.

¹³ Although it should be observed that the French CNIL has already fined Google, Amazon and Facebook heavily because the rejection of cookies was more burdensome than their acceptance. See CNIL; Cookies: the CNIL fines GOOGLE a total of 150 million euros and FACEBOOK 60 million euros for non-compliance with French legislation, <https://www.cnil.fr/en/cookies-cnil-fines-google-total-150-million-euros-and-facebook-60-million-euros-non-compliance>; Cookie Law Info, *Cookie Consent Violations: CNIL fines Google and Amazon*, <https://www.cookie-law-info.com/cookie-consent-violations-cnil-fines-google-and-amazon>.

¹⁴ CJEU, 5 July 2012, C-49/11 *Content Services*, ECLI:EU:C:2012:419; 24 February 2022, C-536/20 *Tiketa*, ECLI:EU:C:2022:112; 22 April 2022, C-319/20 *Meta Platforms Ireland*, ECLI:EU:C:2022:322.

¹⁵ CJEU, 15 March 2012, C-453/10 *Pereničová and Perenič*, ECLI:EU:C:2012:144, para. 47.

only to practices that are not commercial, or not between businesses and consumers. Or would it only not apply to unfair business-to-consumer commercial practices, as this is how article 3(1) describes the scope of application of the UCPD? Would this then mean that there might be some dark patterns that come under the UCPD while there are others that are not unfair in terms of the UCPD but are prohibited by the DSA?

This would trigger the question as to how article 25(1) DSA and article 5 UCPD differ, and one possibility could be that the UCPD (still) clings to the image of the average consumer, whereas the DSA seems to recognise consumers' cognitive biases.

Be that as it may, an enforcer of the DSA who wants to invoke article 25(1) DSA would face the risk that courts come to the conclusion that the practice in question is also an unfair commercial practice in terms of the UCPD and that they therefore lose their case. Thus, the lack of legal certainty regarding the UCPD in relation to dark patterns indirectly impacts on the effectiveness of enforcement under the DSA. As a result, neither UCPD enforcers nor DSA enforcers may take action.

In conclusion, strong protection under the UCPD is needed, and it should be as concrete as possible. Standardised designs should be mandatory where there is no justification for individual designs, as in the context of cookie consent banners. Article 25(2) DSA should be deleted.

ad (3): More generally, dark patterns should be prohibited not only under the DSA and the UCPD but generally in EU consumer law where information is of utmost importance. This applies, for example, to the UCPD, to the Consumer Rights Directive (CRD) and to many sector-specific pieces of EU consumer contract law.

By contrast, an effort should be made to work towards the effectiveness of pre-contractual information or contractual information in EU consumer law where the contract is made via the internet. Notably, this is taken up by the article 16a(4) and recital (22) CRD as proposed in the 2022 proposal for a new Directive concerning financial services contracts concluded at a distance,¹⁶ which concretise the 'clear and comprehensible manner' standard for the provision of information, particularly in suggesting the technique of layering.¹⁷

¹⁶ COM(2022) 204 final.

¹⁷ Recital (22): 'When providing pre-contractual information through electronic means, such information should be presented in a *clear and comprehensible manner*. In this regard, the information could be *highlighted, framed and contextualised* effectively within the display screen. The technique of *layering* has been tested and proved to be useful for certain financial services; its uses, namely the possibility to present detailed parts of the information through pop-ups or through links to accompanying layers, should be encouraged. A possible manner of providing pre-contractual information is through the '*tables of contents*' approach using *expandable headings*. At the top level, consumers could find the main topics, each of which can be expanded by clicking on it, so that the consumers are directed to a more detailed presentation of the relevant information. In this way, the consumer has all the required information in one place, while retaining control over what to review and when. Consumers should have the possibility to download all the pre-contractual information document and to save it as a stand-alone document' (emphasis added).

III. Easily Understandable Summary of the Key T&C (Q2)

Where traders require consumers to agree to terms and conditions (T&C), consumers should receive an easily understandable summary of the key T&C in an easily accessible manner.

Answer: Neutral

The proposal to present a summary of the key T&C to the consumers is another expression/development of the information paradigm. (Pre-contractual) information obligations have been a popular regulatory tool in European consumer law aimed at reducing information asymmetry and empowering consumers to make informed decisions. Yet there is widespread understanding among consumer law scholars as well as in neuroscience, behavioural economics and cognitive psychology that the information paradigm is not an effective way of protecting the interests of consumers.¹⁸ There is growing evidence that extensive pre-contractual information results in information overload. Whereas at first glance mandated disclosure of a short summary of T&Cs would seem an effective way of reducing the information overload problem, it is very likely that consumers will not read the shortened versions of T&Cs either. As put by *Bar-Gill and Ben-Shahar*, 'these disclosures are neither read nor used, and they are beyond most people's interest or understanding'.¹⁹

There are different empirical findings as to whether standardised and shortened information improves the level of consumer protection. A recent empirical study on the standardisation of investment product information sheets has shown that while standardisation has improved the comparability of products, increased comparability does not necessarily lead to an improvement in the investment decisions of private investors.²⁰ Given that background, additional information obligations for companies would likely result in a greater economic burden for traders but little added value for consumers. On the other hand, an empirical study commissioned by the European Commission has shown that 'shortening and simplifying the terms and conditions results in improved readership of the T&Cs';²¹ in particular, 'when the T&Cs were extremely short and simple, 26.5% reported to have read the whole T&Cs compared to only 10.5% in the standard long and complex T&Cs. Consumers also understood the T&Cs better when they were short and simple'.²²

¹⁸ C Busch, *The future of pre-contractual information duties: from behavioural insights to big data*, in C Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Elgar 2016), 221; O Ben-Shahar and CE Schneider, *More Than You Wanted to Know* (Princeton University Press 2014). Luzak correctly notes that 'there is a big risk online of overwhelming consumers with many different disclosures, particularly if every online trader has to repeat the same information'; see J Luzak, *Online Disclosure Rules of the Consumer Rights Directive: Protecting Passive or Active Consumers?*, *Journal of European Consumer and Market Law (EuCML)* 2015, 79, 86.

¹⁹ O Bar-Gill and O Ben-Shahar, *Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law*, *Common Market Law Review* 50 (2013), 109, 110.

²⁰ P Münchhalfen and R Gaschler, *Attention Distribution of Current Key Investor Documents: Standardization as a Long-Term Goal of the PRIIP Regulation*, *Journal of Consumer Policy* 44 (2021), 73 ff.

²¹ M Elshout, M Elsen, J Leenheer, M Loos, and J Luzak, *Study on consumers' attitudes towards Terms and Conditions (T&Cs). Final report, Study commissioned by the European Commission*, 2016, 4, available at <https://op.europa.eu/en/publication-detail/-/publication/45ebfd93-3d90-11ea-ba6e-01aa75ed71a1/language-en>.

²² *ibid.*, 97.

Use of a standardised system of icons for the most relevant terms, allowing for a quick comparison of offers and a quick check of the main legal content of a contract, has also been recommended. From the industry side, BusinessEurope has favoured the icon system with regard to certain aspects (price, delivery, contract duration, contract termination, right of withdrawal).²³ The proposal for a regulation establishing a framework for setting ecodesign requirements for sustainable products²⁴ is also taking that approach. However, whereas icons can be considerably easier to process for consumers than words, it can turn out to be problematic to find suitable and understandable icons for all key contract terms, especially for all sectors.

There are pros and cons to introducing mandatory T&C summaries. Whereas improving the quality and not the quantity of information is surely a step in the right direction and enhances transparency, one must also acknowledge that obliging traders to present consumers with shortened T&Cs under the CRD will create legal fragmentation. For example, in the case of package travel contracts, package travel organisers have no obligation to send summary T&Cs.²⁵ The European Standardised Information Sheet (ESIS) under articles 2(2), 14(5) and Annex II of Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property does not have an additional one-pager or short summary. A slightly different approach will most probably be used in the new Consumer Credit Directive, as both the Council²⁶ as well as the Parliament²⁷ have decided against a separate one-page Standard European Consumer Credit Information (SECCI)

overview. Instead, the Council has suggested that the key information be presented on the first page of the SECCI. On the other hand, there is an example of the template for a contract summary in electronic communication services under article 102(3) of the European Electronic Communications Code.²⁸ Similarly, article 14(5) of the recently adopted DSA obliges the providers of very large online platforms and of very large online search engines – but not other digital intermediaries – to provide recipients of services with a concise, easily-accessible and machine-readable summary of the T&Cs.

It could also turn out to be complicated to decide which terms constitute key contractual terms that have to be included in the short summary. Is it up to the trader to decide, or should a template be annexed to the CRD? Is it even possible to determine the key terms across a wide range of contracts, starting with contracts on electricity and gas and ending with social media contracts? It is possible that a sector-specific solution will be an optimal one as the information obligations landscape of European consumer law is a very scattered one.

Finally, the question will arise as to what happens if one or more term in the summary deviates from the T&Cs? Which one will then prevail and form an integral part of the contract under article 6(5) CRD? A consumer-friendly solution to this problem would be a rule in favour of the version that is more beneficial to the consumer; this would encourage the drafter of both documents to ensure that they are drafted in a transparent and consistent manner.

²³ BusinessEurope, Recommendations for a better presentation of information to consumers, 2019, available at <https://www.besnesseurope.eu/publications/recommendations-better-presentation-information-consumers>.

²⁴ Proposal for a Regulation establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC, COM(2022) 142 final.

²⁵ See arts 5 to 7 of Directive (EU) 2015/2302 on package travel and linked travel arrangements.

²⁶ See art 10(3) of the Council's General Approach on the proposal for a new Consumer Credit Directive, Council document 9433/1/22 of 7 June 2022.

²⁷ See art 10(4) of the Report of the IMCO Committee of the European Parliament on the proposal for a new Consumer Credit Directive, EP document A9-0212/2022 of 25 August 2022.

²⁸ Commission implementing Regulation (EU) 2019/2243 of 17 December 2019 establishing a template for the contract summary to be used by providers of publicly available electronic communications services pursuant to Directive (EU) 2018/1972 of the European Parliament and of the Council, OJ 2019 L 336/74.

IV. Clear Technical Means for Contract Cancellation (Q3)

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

Answer: Strongly agree

By the notion of cancellation, we understand both withdrawal from the contract, where a withdrawal right exists, and termination of the contract.

EU consumer law has already helped the consumer to withdraw from a distance contract by requiring the trader to provide the consumer with a standardised withdrawal form. Still, many consumers appear to face difficulties in exercising their right of withdrawal.

Even more importantly, it seems to be just and fair that cancelling a contract that was concluded online should not be more difficult than entering into the contract. This is what the European Commission has expressed in recital (24) of its proposal for a Directive amending the Consumer Rights Directive concerning financial services contracts concluded at a distance.²⁹ A withdrawal button is provided for in article 16b of that proposal. There is, however, no reason to limit the scope of application of that withdrawal button to the distance selling of financial services, as the underlying issues are the same in other contracts that are concluded online. The rule should therefore be generalised.

Moreover, there should be a button for the termination of long-term contracts. Experience shows that traders use unfair methods to keep consumers in long-term contracts and, in particular, to prevent or make excessively difficult the (timely) cancellation of a contract or of its renewal. Examples of such methods include standard terms according to which the termination of the contract must be in writing; burdensome requirements to provide evidence of

actually being the contractual partner that no longer wishes to obtain the service; the flat denial of having received a termination notice in the first place or the claim that it arrived too late; the claim that a different form was needed for the termination; and many more.

In the context of this question, two issues are at stake: First, can traders reject the termination by electronic means of a contract that was concluded by electronic means? And second, should that termination by electronic means be facilitated by a button?

Legislative action at EU level is advisable for two reasons: (1) the protection of the consumer; and (2) the avoidance of legal fragmentation.

ad (1) As mentioned above, in terms of consumer protection, there should be a principle that it must be as easy to cancel the contract as it is to conclude the contract. Thus, if a contract can be concluded online by simply providing the consumer's address and bank details, without further evidence of the consumer's identity, it must be just as easy to cancel the contract. In fact, such a principle could already be derived from the UCTD, and indeed this is what the German *Bundesgerichtshof* (BGH) decided in a landmark decision of 2016 in relation to a provider of online partnership intermediary services.³⁰ This route is, however, much too slow – in the case that was finally decided by the BGH, it took five years from the first instance judgment, and consumer centres had in the meanwhile registered hundreds of similar cases. Traces of such a principle can also be seen in article 9(d) UCPD and in article 25(3) DSA.

²⁹ COM(2022) 204 final.

³⁰ BGH, 14 July 2016 - III ZR 387/15, *Neue Juristische Wochenschrift* 2016, 2800.

However, a clear legal rule to the effect that a contract which can be concluded online can also be terminated online would be clearly preferable, as Spain already introduced in 2006 with article 62(3)§2 of the Consolidated Text of the General Law on Consumer Protection³¹ and as Germany introduced in 2016 (§ 309 no 13 lit b) of the Civil Code).³²

Implementation of that principle by means of an easy solution is necessary to avoid the above-mentioned problems of traders using unfair methods to reject the consumer's termination of the contract, and, indeed, a cancellation button would present such an easy solution, and one that the consumer is already familiar with from the order button of the CRD. In that sense, the solution would also further the consistency of EU consumer law.

Germany already introduced a termination button in 2021, with the new § 312k of the Civil Code that came into effect in July 2022.³³ The provision applies to traders that allow consumers to conclude long-term contracts via a website and imposes on them the duty to provide, on that website, for a termination button that must contain only the words 'terminate the contract here'. Clicking that button must lead the consumer to a confirmation page where they are asked to enter their details, the details of the contract, the reason for termination (if applicable), the time by which the contract is to end and the way in which the confirmation of the termination can be transmitted speedily to them. Then there must be a second button with the words 'terminate now'. It goes without saying

that those buttons and the confirmation page must be constantly available and easily accessible.

ad (2) Under article 6(1) Rome I Regulation,³⁴ all EU traders concluding contracts with consumers that are domiciled in Germany will normally have to comply with the new cancellation button requirements. Assuming that the problem is not unique to the German market, other Member States may introduce similar but not identical legislation, which will cause legal fragmentation and therefore unnecessary transaction costs for traders. In France, a legislative proposal similar to the German solution was tabled in July 2022.

It should be mentioned that such rules need to come with a robust enforcement system. Implementation of the new termination button in Germany has been disappointing until now.³⁵ The first case has already reached the German courts where a telecommunications service provider had introduced the termination button but had required the consumer to use a password with it. The Regional Court of Cologne held this to be in breach of the new rules, as identification of the consumer must also be possible in other ways.³⁶ Here, some national adjustment appears to be necessary, given the different stages of digitalisation of society in different Member States. Whereas in some Member States, using a strong digital signature is common in everyday life, this is certainly not the case in other Member States.

³¹ 'The consumer and user may exercise his right to terminate the contract in the same manner in which he concluded it, without any penalty or onerous or disproportionate charges.' The original wording is: '*El consumidor y usuario podrá ejercer su derecho a poner fin al contrato en la misma forma en que lo celebró, sin ningún tipo de sanción o de cargas onerosas o desproporcionadas, tales como la pérdida de las cantidades abonadas por adelantado, el abono de cantidades por servicios no prestados efectivamente, la ejecución unilateral de las cláusulas penales que se hubieran fijado contractualmente o la fijación de indemnizaciones que no se correspondan con los daños efectivamente causados.*'

³² § 309 BGB: 'Even to the extent that a deviation from the statutory provisions is permissible, the following are ineffective in standard business terms: (13) lit. b) a provision by which notices or declarations that are to be made to the user or a third party are tied to a more stringent form than text form (...)' *Textform* (§ 126b BGB) is the implementation of the EU concept of a durable medium; thus, it includes electronic messages.

³³ For detailed discussion, see S Stiegler, *Der Kündigungsbutton*, *Verbraucher und Recht* 2021, 443 ff.

³⁴ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

³⁵ See Verbraucherzentrale Bayern, Online-Kündigung mit Hürden, <https://www.verbraucherzentrale-bayern.de/pressemeldungen/digitale-welt/onlinekuendung-mit-huerden-78599>; vzbv, Verbraucherprobleme mit dem Kündigungsbutton, https://www.vzbv.de/sites/default/files/2023-01/23-01-02_Kurzpapier_K%C3%BCndigungsbutton%20%28003%29.pdf.

³⁶ LG Köln, 29 July 2022 – 33 O 355/22.

V. Confirmation of Contract Termination (Q4)

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

Answer: Strongly agree

Experience has shown that simply denying receipt is a strategy of rogue traders that individual consumers have little opportunity to counter. In the past, this often happened when consumers sent their withdrawal from a distance selling contract by normal mail. In today's digital era, even where they can provide evidence that they have sent an e-mail, the burden of proof will lie on consumers to establish that this e-mail was received by the contracting partner; which is virtually impossible. Thus, the only safe way to terminate a contract has been the very expensive use of registered mail, the costs of which the consumer has to bear.

This is disproportionate when there is an uncomplicated mechanism that provides for legal certainty and that does not overburden the other party. Automated e-mail replies are common practice in online trade and obviously cheap to set up. Thus, in order to restore the balance, traders must be obliged to have a system in place that guarantees automated confirmation of termination messages.

Germany has even introduced a double safety net. On the one hand, the consumer must be able to save their termination declaration in such a way that the date and time of termination can be seen. On the other hand, the law requires the trader to confirm the termination of the contract immediately by electronic means in a durable medium (§ 312k paras 3 and 4 Civil Code).

To impose the duty on the trader to automatically confirm receipt would also be consistent with the approach of article 11(1) of the E-Commerce Directive 2000/31/EC that requires traders to acknowledge the receipt of the recipient's order without undue delay and by electronic means.

VI. Automatic Subscription Renewals Reminder (Q5)

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

Answer: Strongly agree

A proposal for such a reminder was also put forward by Busch based on inspiration from the UK and US.³⁷

That suggestions to improve consumer protection legislation try to take consumer behaviour into account is welcomed. Inertia is a well-known part of consumer behaviour, and a reminder can be seen as a way to push/nudge³⁸ the consumer to take action in accordance with their needs. In addition, if a consumer has used an app or a service for a while, the app/service has had the opportunity to collect data about them, making it possible for the app/service to personalise the way the app/service interacts with the consumer. The consumer has therefore built up a feeling of trust or dependence on the app/services, making it even harder to stop the renewal of a contract without a reminder. Further, such a reminder would fit with an information paradigm whose focus is having relevant information provided at the relevant time.

The proposal taps into the above-mentioned information paradigm found in consumer protection law (see Question 2). Thus, it is essential that new information duties result in added value for the consumer and/or the market as such. The purpose of such a reminder is to ensure that the consumer is made aware of the renewal in order for the consumer to take action based on their needs. Behavioural science shows that giving information is probably not enough to change the behaviour of consumers,

so the information must be supplemented with technical features that will assist in the execution of their decision if the decision is to do something other than leave the situation at status quo.³⁹ These features must not involve dark patterns, confusing consumers or making it difficult to actually exercise their wish to cancel a subscription. Such a ban on dark patterns could be expressly stated as a regulation on technical design (from law to code) in relation to the rules on a reminder of automated renewal, or, as it is now, be considered aggressive advertising.⁴⁰ Self-evidently, such cancellation must be possible free of charge. Also, there must be a duty to give notice of any modifications to the renewed contract.

One could argue that a duty to remind the consumer before an automatic renewal of the subscription contract should apply to all subscriptions (offline and online). Regulating digital subscriptions is increasingly relevant, but with the development of 'from ownership to usership', subscriptions to use physical goods in the offline world might also increase. Here, the same considerations apply as the consumer can benefit from a reminder of the renewal of their subscription, supplemented with an easy way to prevent the renewal.

In order to make such a reminder work in practice, a failure to provide information should be sanctioned. Many information duties are sanctioned with

³⁷ C Busch, *Updating EU Consumer Law for the Digital Subscription Economy*, EuCML 2022, 41 f.

³⁸ For a wide and favourable approach, see CR Sunstein and LA Reisch, *A Bill of Rights for Nudging*, EuCML 2019, 93 ff. See also RH Thaler and CR Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Yale University Press, 2008).

³⁹ Busch, EuCML 2022, 41 f.

⁴⁰ 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, OJ 2021 C 526/1, section 2.10.

finer, but to ensure that businesses are attentive in sending out reminders, failure to do so should lead to the renewal not being valid upon the consumer making such a claim. This presents, however, another challenge in consumer protection, which is that rights held by the consumer must be claimed by the consumer. Claiming one's rights requires awareness and resources, and combined with the well-known concept of inertia, this often results in a lack of action from the consumer. This is, of course, also a risk here.

If such a renewal rule (together with its sanctions) is found to be too burdensome on businesses or too annoying for consumers, it might be worth considering whether such a rule should not be applied to 'free' subscriptions (where the counter-performance is data other than what is necessary for the functioning of the subscription)⁴¹ or to free trial-periods but instead be reserved for subscriptions paid for in money or other monetary means. To limit the number of reminders sent to the consumer, the consumer could also be given the possibility to opt out of the reminders. Here, of course, one must be aware of how such an opt-out option is presented to avoid misleading/nudging consumers to opt-out if this is not what they want.

One could challenge the whole concept of contracts subject to automatic renewal as compared to ongoing subscriptions featuring a right to terminate the contract with fair notice. Automatically renewed contracts ensure that the parties are bound for a certain period and, thus, that the business can rely on the income from the consumer for that period. This gives the business a better basis to conduct its business. Indirectly, this might also benefit the consumer through better prices and/or better services. Contractually, the consumer would be better off having an ongoing right to terminate the contract with fair notice. However, if the consumer were not reminded once in a while of this right (or about the subscription in general – see answer to Question 6), the consumer would probably not exercise this right and would be better off with an automatically renewed contract including a reminder of renewal.

Based on the critique of the whole concept of automatically renewed consumer contracts, an additional rule could be suggested, one stating that any renewed contract can be terminated at any time subject to a maximum one-month notice period. Such a rule is already found in article 105(3) of the Electronic Communications Code.⁴²

The right to notice of automatic renewal of subscriptions could supplement the general information duties in the CRD.

It is important to underline that such a reminder should not just be given in for example an app but also via additional means of communication as have been provided by the consumer to the platform, such as an e-mail address or mobile phone number.

It is also important to be clear about the concept of 'renewal'. In line with contractual principles, it should not be possible to change the T&Cs of a contract without informing the consumer and giving them the right to terminate the contract. If a reminder of a renewal is actually an offer to enter into a contract automatically on new T&Cs, the 'reminder' has to give notice of the new T&Cs and also inform the consumer of their right not to enter into this new contract if they do not wish to do so. Thus, if the T&Cs are changed, fresh consent from the consumer will be needed to 'renew' the contract. A simple reminder with the option to opt-out of the automated 'renewal' is not enough in this case and will be considered an unfair commercial practice. One could argue that such practices could be specifically regulated/banned in the UCPD and the European Electronic Communications Code, as well as in other applicable and relevant directives, such as the Audiovisual Media Services Directive.⁴³ Thus, automatic renewal as referenced in the question on digital subscription contracts should only be about the renewal of a contract on the same T&Cs. If the T&Cs are changed, a reminder is not sufficient as it takes advantage of consumer inertia by requiring action from the consumer to not be bound by this new contract.

⁴¹ Such counter performance is defined in art 3(1) of Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, OJ 2019 L 136/1.

⁴² Directive (EU) 2018/1972 establishing the European Electronic Communications Code, OJ 2018 L 321/36.

⁴³ Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ 2010 L 95/1.

VII. Reminder After a Period of Inactivity (Q6)

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

Answer: Agree

It is welcomed that new suggestions for consumer protection legislation try to take consumer behaviour into account. The consumer could have forgotten about their subscription, but whether the lack of action from the consumer is a result of forgetfulness or inertia, a reminder can be seen as a way to push the consumer to take action in accordance with their needs.

See in general the comments submitted for Question 5, including application of the proposals for offline as well as digital subscriptions and the requirement that the reminder be given by means of communication other than for example an app.

The reminder will probably have a positive effect on some consumers, who will then reconsider their subscription and take action if they want to cancel it – especially if it is technically easy to do so. Yet the extent of this effect is unknown. The technical set-up allowing easy cancellation has to be developed and maintained, but it would not be too burdensome for the business to send out the reminder. For the business, it might seem counter-productive to spend resources on reminding people that they might wish to cancel their subscriptions, but that cannot be the determinative factor.

The question is whether consumer protection should be micro-managed in this way. From a policy point of view: Are we going too far? Nursing too much? From an economic point of view, we must remember that each time a burden is put upon a business, the consumer will most likely be the one ultimately

paying for it. And lastly, such a reminder is yet another piece of information relating to the considerations inherent in the current information paradigm, eg will the consumer read and understand the information?

In order to limit the stream of information and the burden on businesses, a duty to remind a consumer of inactivity regarding their subscription could be limited to subscriptions where the counter-performance is money or other monetary means (and not 'just' data). Even though the suggested reminder seems good for the consumer, as it allows them to make their choice based on information and not just forgetfulness, the risk of such added information is that the consumer will only experience such reminder as a piece of information in the pile of information overload. The consequence is that they will not read it and will become even more inclined to ignore information in general. Some consumers might not desire this flow of reminder information, so as in Question 5 it would be good for the consumer to be able to opt-out of such a reminder mechanism.

VIII. Free Trial (Q7)

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

Answer: Agree

Free trial subscriptions allow consumers to receive goods or services for free (or at a reduced rate) throughout the trial period but then convert automatically to a paid subscription that will continue until cancellation by consumers. For example, some video games have introductory or time-limited free offers known as lure-to-pay games.⁴⁴ Automatic conversion and contract enforcement are possible as consumers are required to give their payment details (credit card information) at the time of the contract's conclusion. If traders were precluded from requiring these details when concluding the contract, automatic enforcement could not take place.

First, it is necessary to stress that free-trial-related consumer protection issues should ideally be tackled based on the technology neutrality principle, ie the same approach should be adopted both for online as well as for offline contracts. Whereas subscription traps surely create more problems in the online world given the prevalence of subscription-based business models, they can also occur in analogue situations.⁴⁵ Allowing traders to require payment details in contracts concluded offline but prohibiting this practice for contracts concluded online needs careful substantiation. Therefore, if one prohibits asking for payment details for online contracts, one should also prohibit it in the case of offline contracts.

Prohibiting the requirement of providing payment details from consumers for free trial contracts would surely raise the consumer protection standard and would help to fight many abusive practices. When

introducing this rule, one should also keep in mind certain limits or drawbacks. First, consumers might have an interest in having convenient contract enforcement, and at least some of them might not be interested in dealing with payment details only after the free trial is over. One could imagine allowing this via the consumer's express and separate consent as done under article 7(5) of the Sale of Goods Directive (EU) 2019/771 (SGD). Second, and more importantly, the industry might respond to such a prohibition by simply changing the business model: instead of a free trial, they could start using a reduced-rate trial (eg charging 1 cent). This may allow a circumvention of the prohibition.

One should also consider the penalties for breaching the prohibition: should breach lead to the contract being void? If yes, then article 3(5) CRD, which leaves the validity and formation of a contract within the competence of the Member States, should be amended. Or should breach be considered an unfair commercial practice? Should breach additionally lead to a fine by the enforcement authority? Perhaps a right to withdraw at any time (or for a certain period of time) or treating these digital services as unsolicited goods (and hence entitling the consumer to claim back the already executed payment) could be considered as well. Finally, enforcing this rule will be impossible in the case of existing long-term contracts where the trader already has the payment details of the consumer and subsequently offers a new additional service (under new contract terms) with a free trial period in the beginning.

⁴⁴ A Cerulli-Harms, M Münsch, C Thorun, F Michaelsen and P Hausemer, *Loot boxes in online games and their effect on consumers, in particular young consumers*, 2020, 24, available at <https://op.europa.eu/en/publication-detail/-/publication/56bb7432-cc8a-11ea-adf7-01aa75ed71a1/language-en/format-PDF>.

⁴⁵ Eg automatically renewing gym subscriptions that have been concluded offline. As Busch correctly notes, book-of-the-month clubs have been around for decades; see Busch, *EuCML* 2022, 41, 42.

IX. Express Consent for Paid Service (Q8)

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

Answer: Strongly Agree

Subscription traps are a well-known problem in the subscription industry. Consumers lured into a seemingly free (or reduced-rate) service (for example, Amazon Prime or a reduced-rate e-journal) often forget to cancel it before the end of the free period and the resulting paid service will self-execute based on the already available credit card (or other payment) information. It is true that article 8(2) CRD (the so-called 'button solution') already obliges online traders to inform consumers when they are about to enter into a legally binding agreement that includes a consumer's payment obligation. This obligation does not, however, protect consumers against being overconfident that they will remember to cancel the subscription later.

Research has shown that notifying consumers about the monthly fee to be charged after the end of a free trial period can help to improve consumers' awareness, but some consumers still fail to notice that aspect of the advisement.⁴⁶ The obligation to obtain express consent would therefore be better suited from the consumer protection perspective. Such an obligation already exists in the United States, where the Restore Online Shoppers' Confidence Act (ROSCA) obliges traders to obtain express informed consent from consumers before the end of any introductory period before charging the consumer.⁴⁷

A similar reform aimed at tackling subscription traps is being considered in the United Kingdom.⁴⁸

The obligation to request express consent from consumers when switching from a free trial to a paid service would surely help to raise the consumer protection standard in the EU as well. Moreover, requiring a consumer's express consent is not novel in EU consumer contract law. For example, article 8(5) of the Digital Content and Digital Services Directive (EU) 2019/770 (DCD) establishes an 'express and separate' consent requirement when deviating from the objective conformity criteria of digital content or digital service. The same principle is found in article 7(5) of the SGD. Similar 'express and separate' consent could be required before conversion from a free trial to a paid service. In order to avoid circumvention, the rule should also apply to reduced-rate trials (for example, a trial period charging 1 or 5 cents). In addition to being 'express' and 'separate', such consent must also be transparent and not distract the consumer.

In addition to the express consent requirement, the EU legislature should oblige traders to send consumers reminders⁴⁹ before a contract auto-renews. Such reminders should be transparent and specify that the subscription will continue for a new term unless

⁴⁷ FTC, Enforcement Policy Statement Regarding Negative Option Marketing, 13, available at https://www.ftc.gov/system/files/documents/public_statements/1598063/negative_option_policy_statement-10-22-2021-tobureau.pdf.

⁴⁸ See UK Department for Business, Energy and Industrial Strategy, Reforming competition and consumer policy: government response, available at <https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response>.

⁴⁹ If this kind of free service is about to become a paid service, the consumers must receive an offer to conclude a contract, wherein the offer should include all essential elements, such as the price and content, and seek their explicit consent.

cancelled and make reference to the cancellation option (cancellation button or the like). These obligations should apply in the case of all consumer contracts, irrespective of whether the consumers could be considered vulnerable or not. In practice, several traders are already sending such reminders voluntarily. Sending digital reminders to consumers is, moreover, not leading to huge compliance costs for traders.

One must, finally, not forget that in many cases free trials involve deceptive commercial practices. The European Commission's Guidance document explains how the UCPD can be used in responding to misleading free trials and other deceptive commercial practices relating to subscriptions.⁵⁰ Under the case law of the Court of Justice, unfair commercial practices may in some cases lead to unfair terms: an unfair commercial practice is one element among others when assessing whether a contractual term is unfair or not.⁵¹ Consequently, depending upon the circumstances and the misleading practices, contract terms relating to subscriptions (eg automatic renewal) may be qualified as unfair and thus already void under the current legal situation.

Finally, one must also distinguish cases where a small-fee trial converts into a full-paid service from cases where the fee for an initially paid service is later raised unilaterally by the trader: the latter situation should be assessed under existing rules on unfair terms.

⁵⁰ 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, OJ 2021 C 526/1, 58 f. For example, if a trader does not make it clear to consumers that they are entering into subscriptions by signing up for a free trial, traders may infringe arts 7(1), 7(2) and 7(4)(a) UCPD by omitting material information.

⁵¹ CJEU, 15 March 2012, C-453/10 *Pereničová and Perenič*, ECLI:EU:C:2012:144, para. 47.

X. Non-personalised Commercial Offers (Q9)

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

Answer: Agree

For an option to opt-out of personalised commercial offers to be a real option, such an option has to be very explicit and not simply a pre-ticked box that can be unticked in the T&C. One could also consider making non-personalised offers the default if it is found that both options (personalised and non-personalised offers) should be provided.

Assuming that the option of non-personalised offers is provided, it will give consumers greater choice. Giving consumers greater choice, however, is only ideally beneficial if the consumer is capable of selecting the choice that will suit the consumer's preferences. Research shows that consumers do not make rational decisions and that they are influenced by all sorts of biases.⁵² In addition, such choice is also potentially influenced/manipulated by nudges or even misleading practices engaged in by businesses. Thus, an explicit option to receive non-personalised commercial offers might increase the range of choices but not necessarily the quality of choice. Securing informed choice and thus informed consent is an extremely complex topic relevant for each regulatory initiative aiming at enhancing consumer choice. How to secure informed choice will not be further elaborated on here.⁵³

There might already be a possibility to opt-out of personalised advertising through the GDPR,⁵⁴ but

this concerns harvesting one's data. Thus, having the option to opt out of personalised advertising on each app/webpage may be advisable in addition to the general protection of the GDPR.

An answer to Question 9 requires that 'offers' be split into sub-categories of information: commercial advertising and prices.

With regard to advertising, one could argue that the consumer might find it better to receive 'relevant' offers if they have to receive offers. Thus, a young teenager will probably prefer advertisements from a store that sells clothes for teenagers rather than from a store that sells nappies. The challenge is, of course, that the algorithm can also target commercial offers at the teenager based on more subjective parameters, such as a willingness to spend money on clothes. If the teenager has previously shown interest in an expensive shirt, the algorithm might show advertisements from a similar price range, which will result in a 'shirt-echo-chamber' that gives the teenager the impression that this is what is available, thereby depriving them of the choice of cheaper alternatives because of the personalised advertisement. But more important than an echo-chamber of shirts, personalised advertising can also prove more effective (read persuasive) because the words and presentation of the advertisement can

⁵² J Trzaskowski, *Lawful Distortion of Consumers' Economic Behaviour: Collateral Damage under the Unfair Commercial Practices Directive*, European Business Law Review 27 (2016), 25 ff.

⁵³ For a recent study, see G Sartor, F Lagioia and F Galli, *Regulating targeted and behavioural advertising in digital services: How to ensure user's informed consent* (July 2021), [http://www.europarl.europa.eu/RegData/etudes/STUD/2021/694680/IPOL_STU\(2021\)694680_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2021/694680/IPOL_STU(2021)694680_EN.pdf).

⁵⁴ See the recent case from the Irish Data Protection Commission fining Meta for illegal data processing operations, <https://www.dataprotection.ie/en/news-media/data-protection-commission-announces-conclusion-two-inquiries-meta-ireland>.

be personalised to speak to the specific values and emotions of the particular consumer, and then there is a great risk of manipulation.

If all advertisements were non-personalised, *some* consumers would probably end up not reading the advertisements as the advertisements would be both irrelevant and non-catchy for them personally. Advertisers would then, of course, pursue other aggressive means to get the attention of the consumer. As with other consumer protection measures, it must be taken into consideration that if businesses cannot target delivery of their advertisements, their advertising budgets might increase, leaving the consumer to pay that bill in the end.

To get the best of both worlds, one could argue that instead of giving the consumer an option to receive non-personalised advertisements, there could be limits placed on the parameters that can be employed in the algorithm used to target the advertisements. Putting law into code this way will mean that lawmakers could decide, for instance, that data on values, mental state, political preferences, etc cannot be a part of the data used in the personalisation algorithm for advertisements.

If an option to choose non-personalised advertisement is provided for the consumer and this option is utilised, the rule should be supplemented with a prohibition against increasing the price to use the digital service as a consequence of the consumer having opted out.

Personalised pricing is a very complex and problematic issue which cannot be fixed merely by giving the consumer an opt-out option.⁵⁵ That being said, an option to opt-out is better than not having one at all.

The purpose of personalised prices is to find the highest price that a particular consumer (or groups of consumers) will pay for a specific product. It is a mix between a hardcore evaluation of what a product is worth to the specific consumer and what the consumer can afford. An offline example would be a store in a wealthy neighbourhood having much more expensive prices than the same brand of store in a poor neighbourhood. In some ways, such a personalised pricing scheme might benefit poor consumers when the store is not only adding to its earnings by increasing its profit in the wealthy neighbourhoods but is also using this additional profit to lower its prices in the poor neighbourhood. The market as well as society might have an interest in personalised prices in that respect. However, the possibility of exploiting personalised pricing in the digital world is very high as so many more parameters can be taken into account, making it non-transparent and very personal and thus potentially exploiting the consumer's needs. This speaks against personalised pricing in general.

When regulating personalised pricing, it might also be relevant to limit the parameters taken into account by the algorithm to those that are not so easily exploited, assuming such parameters can be identified.

⁵⁵ For a recent analysis, see P Rott and J Strycharz, *Personalised Pricing* (November 2022), [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).

XI. Price Transparency (Q10)

There is a need for more price transparency when buying virtual items with intermediate virtual currency (eg in-game currency in video games).

Answer: Neutral

A typical feature of video games is the possibility to buy virtual items with in-game currencies such as gold coins, gems, points, credits, chips or berries. These currencies are typically purchased with real money (typically by credit card). In-game purchases paid for with in-game currency are less transparent for consumers than purchases with real money, as players have to do an additional calculation to determine the real cost of, for example, 50 gold coins spent for a virtual sword. Transparency is further worsened by bundle offers, specific bonuses or better conversion rates for 'wholesale' purchases. This substantial complexity of in-game currencies is similar to the complexity and transparency problems created by payment in foreign currency, and it has been shown that paying in foreign currency can lead to over- or underspending, depending on the situation.⁵⁶

Under current EU consumer law, transparency in consumer transactions is endorsed, most importantly, by the UCTD, CRD, DCSD and UCPD.⁵⁷ For example, the Commission's Guidance on the interpretation and application of the UCPD explains that:

The prices of virtual items must be clearly and prominently displayed (also) in real currency. If the price cannot reasonably be calculated in advance, the trader should indicate the manner in which the price is to be calculated. The prices of virtual items must be clearly and prominently displayed in real currency when the commercial transaction takes place. ... Under Articles 7(2) and 7(4)(d)

UCPD and Article 6(1)(g) CRD, consumers must be clearly informed about the arrangements for payment before each purchase.⁵⁸

There is little research on whether these existing instruments are already tackling all the transparency problems relating to in-game currencies in video games or whether any transparency gaps remain. In the context of video games, experts have doubted the effectiveness of some transparency and information measures in general.⁵⁹ Therefore, before commencing new legislative steps at EU level, more research is needed to establish whether the current horizontal instruments have significant gaps such that sector-specific legislation is needed. Currently, it seems that the existing regulatory framework already allows for a high level of transparency in the case of video games and in-game currencies, and better enforcement would be preferable to additional legislative action.

It should be stressed that the issue of price transparency as regards in-game purchases is not the biggest problem with video games. Rather, one should tackle the issue of advertising games as being free when they are, in fact, not free as the players are ultimately unable to play the game without paying for certain in-game items. For example, in the United States, Epic Games, the producer of Fortnite, has been fined for violating minors' privacy rights and using dark patterns to trick players into making unintentional purchases.⁶⁰

⁵⁶ For an empirical study on people's spending behaviour when using foreign currencies, see P Raghubir and J Srivastava, *Effect of Face Value on Product Valuation in Foreign Currencies*, *Journal of Consumer Research* 2002, 335 ff.

⁵⁷ See for example, the agreement on better transparency standards in video games achieved by the Italian Consumer Protection Authority under the UCPD, available at <https://www.gamingtechlaw.com/2021/01/transparency-loot-boxes-italian-antitrust.html>.

⁵⁸ Guidance on the interpretation and application of Directive 2005/29/EC, 104.

⁵⁹ Cerulli-Harms et al (n 44 above), at 43.

⁶⁰ See FTC, *Fortnite Video Game Maker Epic Games to Pay More Than Half a Billion Dollars over FTC Allegations of Privacy Violations and Unwanted Charges*, <https://www.ftc.gov/news-events/news/press-releases/2022/12/fortnite-video-game-maker-epic-games-pay-more-half-billion-dollars-over-ftc-allegations#top>.

XII. Virtual Reward Transparency (Q11)

There is a need for more transparency regarding the probability of obtaining specific items from paid content that has a randomisation element (eg prize wheels, loot/mystery boxes in video games, card packs).

Answer: Neutral

Loot boxes are a type of virtual reward that can be found in many video games. They are typically obtained through in-game purchases or by completing certain tasks and can contain a variety of virtual items, such as new weapons or armour. The main difference between loot boxes/prize wheels and other in-game purchase systems is the element of chance: in the case of paid content that has a randomisation element, players do not know what items they are purchasing before making the transaction. Whereas loot boxes generally do not qualify as gambling in the EU,⁶¹ some research has found that problem gambling and purchasing loot boxes are related: however, there is no consensus on whether a causal link between loot boxes and harmful behaviour exists.⁶²

A recent study commissioned by the European Parliament states that the video game industry has already taken steps to tackle concerns about loot boxes. For example, video games that include in-game purchases are increasingly labelled accordingly. Platforms such as Google Play and Apple's App Store

have increased transparency, requiring that games containing loot boxes display the probabilities of winning different items, and many game developers beyond mobile games have started providing these probabilities. Moreover, several highly popular video games have already stopped using loot boxes: Overwatch, for example, replaced loot boxes with battle passes (either directly purchased or earned in the game). Similarly, Fortnite and Rocket League replaced the loot box mechanisms with systems where consumers know which items they are buying before making a transaction. Instead of random-based rewards, many game publishers are increasingly using other forms of in-game purchases and other business models – such as subscriptions – to monetise their games.⁶³

When looking at possible blueprints for legislative actions, it has been noted that China introduced legislation in 2016 requiring publishers of online video games to provide players with information on the probabilities of winning virtual items or services.⁶⁴ The literature suggests a holistic approach that combines

⁶¹ Exceptions are Belgium and the Netherlands, where loot boxes have been banned and consequently removed from games, see Cerulli-Harms et al (n 44 above), at 8, 31. However, in March 2022 the Dutch Council of State overturned a decision of the lower court and ruled that loot boxes are not to be considered gambling, see D Leahy, *Rocking the Boat: Loot Boxes in Online Digital Games, the Regulatory Challenge, and the EU's Unfair Commercial Practices Directive*, *Journal of Consumer Policy* 45 (2022), 561, 567. In Spain, loot boxes are not yet prohibited, but with Law 23/2022 of 2 November, an Additional Provision 10^a has been introduced in Law 13/2011 of 27 May on the regulation of gambling; this provision orders the government to establish guidelines on loot boxes and, in particular, on their advertising, required disclosures regarding risks of use and abuse and on storage security. The draft regulation of the Ministry of Consumer Affairs contemplates banning loot boxes for minors and establishes the obligation of service providers to implement documentary verification systems regarding identity and age (official identity card, passport) which can be complemented with biometrics, but this regulation has not yet been approved. See <https://www.consumo.gob.es/sites/consumo.gob.es/files/BORRADOR%20APL%20Y%20MAIN%20MECANISMOS%20ALEATORIOS%20RECOMPENSA%20010722.pdf>.

⁶² Cerulli-Harms et al (n 44 above), at 8.

⁶³ *ibid*, at 8, 20, 41.

⁶⁴ *ibid*, at 39.

consumer protection and gambling law.⁶⁵ However, taking into account the trends in the market where market participants are voluntarily switching to other business models in order to monetise their games, it would probably be short-sighted to provide a specific regulation at EU level concerning video game in-game purchases with randomisation elements. It is therefore suggested that legislative action should focus on problematic game designs more broadly, rather than narrowly on loot boxes.⁶⁶ At the same time, there is a risk of over-regulation without clear empirical evidence about the harms of this kind of game design and without research on whether these practices can be tackled by existing unfair commercial practices law. Leahy, for example, argues that ‘the UCPD, as evidenced by the updated Guidance, offers an existing and flexible legislative solution which can tackle exploitative game design, use of psychological manipulation techniques to drive spending, use of aggressive game mechanics and industry targeting of vulnerable players.’⁶⁷ Moreover, the core of the problem – at least concerning minors – is the limited availability and use of (parental) controls. If parents used more parental control options, there would be less need to protect minors against in-game loot boxes and the like.

Finally, one should not forget that the randomisation element also exists in analog lotteries and other games of chance. Following the technology neutrality principle, additional transparency rules would also need to apply in an offline context.

⁶⁵ Leahy, JCP 45 (2022), 561, 566 ff.

⁶⁶ Cerulli-Harms et al (n 44 above), at 9.

⁶⁷ Leahy, JCP 45 (2022), 561, 586.

XIII. Limiting Time and Money Spent on Digital Services (Q12)

Allowing consumers to set limits to the amount of time and money they want to spend using digital services (eg in-app purchases in video games) could help to better protect consumers.

Answer: Strongly agree

Allowing consumers to set limits on the amount of time and money they want to spend using digital services would surely raise the consumer protection level in the world of digital services. The positive impact would be especially important in the context of video games due to their addictive character, but it could also be beneficial in other contexts, eg in the case of digital subscriptions for food deliveries, taxi/car sharing rides or ordering goods from a specific web platform. In all these situations, consumers might easily lose oversight of their monthly/yearly expenditure, as payment usually occurs via a credit card, and allowing them to set monthly or yearly limits on these services would enable consumers to take control of their spending. In addition to setting limits, it is also recommendable to enable consumers to set warnings to alert themselves that they are approaching their financial limit.

The problem of overspending is surely an immense one when it relates to video games and minors. Although parental control tools are available on most platforms and operating systems, offering and using them remains voluntary thus far. Moreover, it is reported that adult consumers are not keen on

using them to control their own gaming behaviour.⁶⁸ Allowing consumers to set limits on the amount of time and money they want to spend on video games – although a tool more characteristic of gambling law than consumer law – would surely lead to better protection for players. In any case, making control tools obligatory for game developers could help users control their spending and the time used for playing.⁶⁹

It has been argued that parental control measures cannot be expected to be effective if they are not activated by default.⁷⁰ Indeed, many parents simply lack the digital skills to identify and activate the control mechanisms. Moreover, displaying the option of parental control measures during installation is not always helpful as older children often install the games themselves. Nevertheless, when opting for by-default-parental-control, legislators will be confronted with discussions on, for example, the optimal screen time for minors that should be used as a default setting across the EU. This surely depends upon the age and personal circumstances of the minor.

⁶⁸ Cerulli-Harms et al (n 44 above), at 40.

⁶⁹ This is supported also by Cerulli-Harms et al, *ibid*, at 25; Leahy, JCP 45 (2022), 561, 586.

⁷⁰ Cerulli-Harms et al, *ibid*, at 43.

XIV. Clarifying the Concept of 'Influencer' (Q13)

Clarifying the concept of an 'influencer' (eg social media personalities) and the obligations of traders towards consumers would be beneficial.

Answer: Strongly agree

There are countless studies that confirm that so-called 'influencers' influence the economic behaviour of their followers, and this applies, in particular, to young followers. The main reason for the success of influencer marketing lies in the trust that followers have in influencers, which is caused by the fact that influencers (appear to) share their private life with their followers. At the same time, many influencers advertise, more or less transparently, products or services of third parties, or even their own products and services. More than 50% of traders already use the services of influencers.

The relevant EU legislation is the E-Commerce Directive 2000/31/EC and the UCPD, as amended by the Omnibus Directive. The E-Commerce Directive imposes certain duties on providers of information society services, to which influencers belong. In particular, under article 6(1) E-Commerce Directive, commercial communication must be clearly identifiable as such. The UCPD applies to business-to-consumer commercial communication as well. Disguising the commercial character of a communication would be unfair under the UCPD.

In addition to that, the Audiovisual Media Services Directive 2010/13/EU,⁷¹ particularly after the latest amendments introduced by Directive (EU) 2018/1808,⁷² may apply to influencers. Article 1(1)(a) of the Directive refers to the audiovisual media service being either a television broadcast or on-demand audiovisual media, and, strictly speaking, in both cases influencer programmes on social platforms would be excluded; but there are academic interpretations that support the possibility of including them in accordance with the current social reality.⁷³ In fact, some Member States have taken advantage of the transposition of Directive 2018/1808 to include in their laws an ad hoc definition and regime for influencers. This is the case of Spain, where article 94 of Law 13/2022 of 7 July on General Audiovisual Communication extends audiovisual communication obligations to influencers, who are labelled as 'users of particular relevance using video-sharing platform services'.⁷⁴

To start with, it would seem clear that influencers are usually traders under the terms of the UCPD if they themselves sell products or services (such as sports

⁷¹ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ 2010 L 95/1.

⁷² Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, OJ 2018 L 303/69.

⁷³ See M De Cock Buning, *Life after the European Audiovisual Media Services Directive: social media influencers through the looking-glass*, in C Goanta and S Ranchordás (eds), *The regulation of social media influencers* (Edward Elgar, 2020), 47 ff.

⁷⁴ Article 94(2) of the Spanish Law on General Audiovisual Communication: 'For the purposes of this law, users who use video exchange services through a platform and simultaneously meet the following requirements shall be considered to be users of special relevance:

(a) The service provided entails an economic activity whereby its holder obtains significant income derived from his activity in the video exchange services through the platform;
(b) The particularly relevant user is editorially responsible for the audiovisual content made available to the public on his service.
(c) The service provided is targeted at and may have a clear impact on a significant proportion of the general public.
(d) The function of the service is to inform, entertain or educate and the main purpose of the service is the distribution of audiovisual content.
(e) The service is offered over electronic communications networks and is established in Spain in accordance with Article 3(2).'

courses) on a commercial scale but also if they simply market their image and generate income through advertisements.⁷⁵ Moreover, according to article 2(b) UCPD, influencers are traders when they act on behalf of other traders.⁷⁶

Beyond this, two questions are critical: when is communication by influencers commercial communication, and what do influencers have to do to make commercial communication clearly identifiable?

That the distinction between commercial and other communication by influencers is not easy (without further guidance) can be demonstrated by the fact that a number of German courts, including several Higher Regional Courts,⁷⁷ came to different conclusions before the Federal Supreme Court developed a consistent demarcation between commercial and other communication – which does not of course mean that courts from other Member States would draw the same lines.

Quite obviously, advertising something for third parties, such as producers or traders of clothing, accessories and the like, is commercial communication. The critical element is showing clothing or other items of a particular brand without direct payment from the third party. Here, a line must be drawn between the purely private sharing of preferences with followers and commercial communication, so as to create legal certainty, including certainty for influencers themselves. Otherwise, influencers may simply label every link as advertising, which is then also non-transparent.

According to the German Federal Supreme Court, commercial communication is present where the influencer has obtained the product in question free of charge, for the purpose of testing. For the notion of commercial communication, one would, however, have to look at the (business) relationship broadly. It would also be present if the influencer generally gets

services from the trader for free, without them being linked to the advertisement of a specific product.

As a reaction to the unclear situation, the German legislature has tried to bring about more legal certainty with a law of June 2021 that came into effect in May 2022. According to new § 5a para 4 of the Unfair Competition Act,⁷⁸ conduct in favour of a third party does not have a commercial purpose if the acting person does not obtain payment or a similar remuneration from that third party. Payment or a similar remuneration is presumed unless the person acting makes its absence credible.

This is not meant to advocate the German solution, but it does have one important element: the burden of proof for not having obtained payment of any manner must be on the influencer.

The second question is how to make advertisements clearly identifiable. The easiest way is to clearly display the word 'advertisement' when marketing a product, but influencers have used all sorts of other notions or abbreviations, some of which were held to be insufficient by courts.⁷⁹ This recalls the situation of cookie consent banners. There seems to be no point in waiting for dozens of court decisions on all sorts of notions: rather it would seem preferable to have a legislative decision on one or two viable notions.

The amendments to the UCPD introduced by the Omnibus Directive may help in clarifying the role of influencers on the digital market by demanding that a third party operating on the market and offering the products identifies whether or not he or she is a trader. The introduction of provisions on paid sponsorships is also expected to increase the transparency relating to influencers, who are now obliged to identify whether the promotion was paid for.

Overall, however, it is clear that the current situation is one of high legal uncertainty, and legislative action to clarify the questions discussed in this answer seems highly advisable.

⁷⁵ For a good analysis, see BGH, 9 September 2021 – I ZR 90/20, *Neue Juristische Wochenschrift* 2021, 3450.

⁷⁶ See also the Commission's Guidance on the interpretation and application of Directive 2005/29/EC, paras 2.2 and 4.2.6.

⁷⁷ See, for example, OLG Hamburg, 2 July 2020 – 15 U 142/19, *MultiMedia Recht* 2020, 767; OLG Karlsruhe, 9 September 2020 – 6 U 38/19, *MultiMedia Recht* 2021, 159 (Pamela Reif); OLG Munich, 25 June 2020 – 29 U 2333/19, *Gewerblicher Rechtsschutz und Urheberrecht* 2020, 1096 (Cathy Hummels).

⁷⁸ In German, § 5a para 4 UWG reads: 'Ein kommerzieller Zweck liegt bei einer Handlung zugunsten eines fremden Unternehmens nicht vor, wenn der Handelnde kein Entgelt oder keine ähnliche Gegenleistung für die Handlung von dem fremden Unternehmen erhält oder sich versprechen lässt. Der Erhalt oder das Versprechen einer Gegenleistung wird vermutet, es sei denn der Handelnde macht glaubhaft, dass er eine solche nicht erhalten hat.'

⁷⁹ For example, OLG Celle, 8 June 2017 – 13 U 53/17, *MultiMedia Recht* 2017, 769, rejected the hashtag #ad, placed at the end after other hashtags, as not being sufficiently clear.

XV. Customer Complaints (Q14)

Where automation/bots are used to deal with consumer complaints and other inquiries, consumers should have the possibility of contacting a human interlocutor upon request.

Answer: Strongly agree

The right to contact a human interlocutor is similar to but not the same as the right to contest automated decisions. Concerning automated decisions, the European Law Institute has already argued in an Innovation Paper that '[t]he positive effects of automated and increasingly autonomous systems in decision-making should not lead to uncontrollable, unsupervised ADM.⁸⁰ Certain significant decisions made by ADM, due to their relevance and the importance of their impact on the affected person, may be subject to human review upon request and before any other available legal means to challenge the decision are taken.⁸¹

The human-centred approach entitling one to human intervention and to contest the automated decision is also evident in several EU legislative acts and drafts. For example, article 22 GDPR requires a controller to implement suitable measures to safeguard the affected persons' rights, freedoms and legitimate interests, mechanisms that enable the affected person to contest the decision where the decision is based solely on automated processing (subject to the conditions and exceptions of article 22(2) GDPR). Article 12(1) of the newly adopted DSA obliges providers of intermediary services to designate a single point of contact to enable recipients of the

service to communicate directly and rapidly with them, whereby the means of communication must not rely solely on automated tools. Equally, pursuant to article 20 DSA, online platforms must implement an internal complaint-handling system for users to lodge complaints against certain decisions taken by the provider of the online platform. Although this complaint-handling system can be partially automated, article 20(6) DSA stresses that the decisions in respect of the information to which the complaint relates must not be taken solely on the basis of automated means.

There are also several proposed EU legislative acts affording affected persons the right to contest automated decisions and ask for human review. This is the rationale behind article 8(2) of the proposed Directive on Platform Work⁸² that entitles the affected platform worker to human review of significant decisions, and it also underlies article 18(6)(a) of the proposed (and now already close to being adopted) Consumer Credit Directive.⁸³ On a more general level, article 14 of the proposed AI Act⁸⁴ requires human oversight for high-risk AI systems, although it does not establish a right to contest automated decisions. The recent Declaration on European Digital Rights and Principles⁸⁵ also welcomes this human-centred

⁸⁰ ELI Innovation Paper, Guiding Principles for Automated Decision-Making in the EU, at 22, available at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Innovation_Paper_on_Guiding_Principles_for_ADM_in_the_EU.pdf

⁸¹ *ibid*, at 23.

⁸² COM(2021) 762 final.

⁸³ COM(/2021)347 final.

⁸⁴ COM(2021)206 final.

⁸⁵ Jointly signed by the European Commission, the European Parliament and the European Council on 15 December 2022, <https://digital-strategy.ec.europa.eu/en/library/european-declaration-digital-rights-and-principles>.

approach, entitling one to human intervention as regards working conditions (6(e))⁸⁶ and human supervision as regards algorithms and AI (9(c)).⁸⁷

The right to contact a human interlocutor is, however, broader than the right to contest automated decisions in that it does not presuppose the existence of a decision. Yet it also does not mean that the consumer has a right to talk to a human (via a phone or video call), but rather that a human being is exercising human oversight over the consumer's case. This can also be done, for example, via instant messaging, e-mails and the like. It is, however, of utmost importance that access to such electronic means is easy and user-friendly.

We face a different question when asking whether consumers should always have a right to interact with a human being or only as a 'second layer' when interaction with chatbots and the like has failed to solve consumers' problem. When discussing the right to a human interlocutor in EU consumer law, one must keep in mind that the Court of Justice has already dealt with a similar (but not identical) issue of the consumer's communication with a trader. In 2019, the Court of Justice ruled that a distance-selling platform is not always obliged to make a telephone number available to consumers before the conclusion of a contract; it suffices if the platform provides a means of communication, allowing consumers to contact it quickly and to communicate with it efficiently.⁸⁸ The Court stressed that it is necessary to strike the right

balance between a high level of consumer protection and respecting traders' fundamental freedom to conduct business.⁸⁹ The Court noted that the CRD does not preclude traders from providing other means of communication, such as electronic contact forms, instant messaging or telephone callback, provided that those means of communication allow for direct and efficient communication between consumers and traders.⁹⁰ Concededly, the Court did not address the issue of automated communication but rather the different digital means of human communication. Yet the reasoning of the Court possibly means that giving consumers an unconditional right to human communication in all cases (and hence the right to refuse any kind of automated complaint handling) could lead to a violation of the trader's fundamental freedom to conduct business. Therefore, it is important that the right to a human interlocutor should be available upon the request of the affected person and only as a 'second layer': it would probably go too far to require it in all cases as otherwise the very idea of automation will be undermined.

⁸⁶ Ensuring in particular that human oversight is guaranteed in important decisions affecting workers, and that workers are generally informed that they are interacting with artificial intelligence systems'.

⁸⁷ 'Ensuring that algorithmic systems are based on adequate datasets to avoid discrimination and enable human supervision of all outcomes affecting people's safety and fundamental rights'.

⁸⁸ CJEU, 10 July 2019, Case C-649/17 *Amazon*, ECLI:EU:C:2019:576, para 53.

⁸⁹ *ibid*, para 44.

⁹⁰ *ibid*, para 52.

XVI. Limitations on Reselling Sought-after Products (Q15)

It should be possible to limit the possibility for resellers to buy sought-after consumer products using automated means (software bots) in order to resell them at a higher price.

Answer: Strongly agree

On the one hand, this can be seen as simply a business model benefitting from the possibility of successfully buying up sought-after consumer products on a scale that 'monopolises' resale. If consumers are willing to pay a higher price for the product, basic supply and demand mechanisms apply. However, the question is whether consumers should be protected against such boosted prices. In no way does the boosted price benefit the consumer, and the business model does not seem to benefit the market or society either, other than employing a few individuals. So there seems to be no good reason not to limit these business models.

Setting such limits raises, however, some questions regarding the scope of application of such a limit: when are businesses making legal purchases and when are they crossing over into an illegal exploitation of the market? Also, it has to be considered which sanctions are relevant and how the limit should interact with competition law.

XVII. Precise Information Requirements (Q16)

More specific information obligations should apply when products such as event tickets are sold in the secondary market.

Answer: Agree

We have seen a significant amount of abuse in the secondary market for event tickets and in particular the levying of astronomic prices.⁹¹ One legal reaction to this was the insertion of a new no 23a into the annex of the UCPD, according to which it is prohibited to resell events tickets to consumers if the trader acquired them by using automated means to circumvent any limit imposed on the number of tickets that a person can buy or any other rules applicable to the purchase of tickets – a rule which of course addresses only this one particular problem.

There is, however, a bundle of problems encompassed in this issue, and not all of them can be solved through information obligations. Nevertheless, more specific information obligations might improve the situation slightly.

Information on the original ticket price may help to show whether the offer is more or less expensive than the original price, which is useful if tickets are still available on the market.

Information obligations may also help to clarify the service fee of the online ticket platform. In a market survey of 2019, the Consumer Centre of Bavaria found that the online ticket platform Viagogo had a highly intransparent selling process, where service fees and

VAT were added to the ticket price only towards the end of the process and in such a way that they could easily be overlooked.

Finally, information obligations should clarify the legal relations between the consumer-buyer, the event organiser, the platform and the original ticket buyer. Who is the actual seller of the ticket, the platform or the original ticket buyer? Obviously, where the reseller is the original ticket buyer and thus a consumer, there will be no consumer rights against that reseller.⁹²

All this does not, however, solve the issue of prices for events that are subject to high demand even after tickets sell out. Here, only a price cap or a prohibition of professional reselling could help. Italy has this kind of legislation, preventing tickets from being sold for commercial purposes or for a figure above face value, and the Autorità Garante fined Viagogo € 23.5 million in June 2022 for breaking the law in numerous cases.⁹³

Some event organisers, or even national laws,⁹⁴ tie tickets to the name of the first buyer. Thus, purchasers of resold tickets have sometimes not been admitted to events despite their having a seemingly valid ticket. It is, of course, unlawful to resell a ticket that is of no use to the purchaser or to falsely claim that the promoter authorises resale.⁹⁵ Here, responsibility

⁹¹ See Marktwächter Digitale Welt, Faktenblatt Preisspanne Viagogo, <https://www.vzbv.de/sites/default/files/downloads/2020/03/04/faktenblatt-preisspanne-viagogo.pdf>, on Viagogo.

⁹² The withdrawal right of article 9 CRD is excluded in any event, according to article 16(l) CRD; see also CJEU, 31.3.2022, Case C-96/21 *DM v CTS Eventim AG & Co. KGaA*, ECLI:EU:C:2022:238.

⁹³ See <http://www.feat-alliance.org/2022/06/27/viagogo-fined-e23-5m-by-italian-regulator-for-breaking-secondary-ticketing-rules>.

⁹⁴ Such as article 313-6-2 of the French Criminal Code.

⁹⁵ For a French case, see <http://www.feat-alliance.org/2022/02/08/french-consumer-protection-agency-dgccrf-hands-down-e150000-in-fines-for-misleading-ticket-resale-practices>.

is at issue. One could consider a rule according to which the online platform is liable to the purchaser unless it provides full information on the (previously anonymous) seller. This would be in line with the proposal for a new Product Liability Directive (PLD).⁹⁶ Or, one could prohibit anonymous selling in the first place.

Finally, and independent of the reselling problem, consumers often face the problem of who to direct a refund to when the event is cancelled: the event organiser or the platform? Here, it could be desirable to adopt a solution as chosen in the Package Travel Directive (EU) 2015/2302, whereby the platform would be the consumer's addressee and obliged to sort things out with the event organiser.

Overall, legislative action seems to be needed in relation to the secondary market for event tickets. Information obligations could be of some use, but they cannot solve the real problems involved. If the EU legislature resorted solely to information obligations, Member States should be explicitly allowed to maintain or introduce more stringent legislation in this area (minimum harmonisation).

⁹⁶ Proposal for a Directive on liability for defective products, COM(2022) 495 final.

XVIII. Further Clarification of 'Professional Diligence' (Q17)

The concept of the trader's 'professional diligence' towards consumers should be further clarified in the digital context.

Answer: Neutral

The term is found in article 5(2) of the UCPD, whereby no trader should act contrary to the requirements of professional diligence in its commercial practices towards consumers. The term is defined in article 2(h) as a standard of special skill and care that can be reasonably expected from a trader and that is commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity. No further criteria are laid down, but misleading or aggressive practices would be contrary to the requirements of professional diligence and thus also the specific practices identified on the black list, which also mentions specific activities in a digital context. In the DSA, the CRD and the DCD, among others, we find several duties to inform, how to inform, requirements of specific features and how to set up technical steps in the digital context. For platforms specifically, the Guiding Principles on the UCPD state that platforms must enable their users to comply with EU consumer law and marketing law requirements, which would probably entail a specific design of their interfaces.⁹⁷ As shown, there is a great number of specific requirements for businesses when working in the digital context. In the DSA, on the other hand, it is made clear that to comply with professional diligence you do not have to monitor stored information or actively engage in fact-finding.

According to the judgment of the Court of Justice in *UPC Magyarország*,⁹⁸ whether or not a business is compliant with professional diligence (or in this case engages in a misleading practice) is not dependent on intent or negligence. This is an essential part of the clarification of the concept and should be made clear in the UCPD.

In the case of *Mediaprint*,⁹⁹ a question regarding the scope of the concept was raised, namely whether safeguarding a pluralistic press and protecting the weakest competitors could also constitute a part of the assessment of professional diligence.¹⁰⁰ The question was referred back to the national court. Thus, even though the definition speaks about honest market practice and good faith, it is not evident, whether professional diligence should be seen in a broader sense, ie as also encompassing more societal considerations.

As most commercial practices must be assumed to fall under the two concepts of misleading and aggressive commercial practices, and as many specific practices are regulated in different rules across the consumer acquis, the requirement of professional diligence as a stand-alone rule might not have the greatest

⁹⁷ 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 (2021/C 526/01), section 4.2.1.

⁹⁸ ECJ, 16 April 2015, Case C-388/13 *UPC Magyarország*, ECLI:EU:C:2015:225.

⁹⁹ ECJ, 9 November 2010, Case C-540/08 *Mediaprint*, ECLI:EU:C:2010:660.

¹⁰⁰ See also Trzaskowski, *European Business Law Review* 27 (2016), 25 ff.

relevance. Its purpose is to work as a safety net encompassing a practice that does not mislead or is not aggressive but we still will not accept. As there are several rules governing the specific behaviour of a business as regards both commercial practices and the contractual relationship between a business and a consumer, it seems acceptable to have a more open standard for the few cases that fall outside of this regulation, where the Member States have more free rein to evaluate the specific practice.

That being said, it might be beneficial to underline that in the UCPD, compliance is not dependent on intent or negligence (not all Member States have acknowledged this).

See also answer to Question 19, where the relevance of the concept of the vulnerable consumer in respect of the digital consumer is challenged. If we are all vulnerable consumers in the digital economy, the concept of professional diligence might also have to be re-thought. Thus, professional diligence would have to encompass new professional duties and obligations when creating digital dependencies and asymmetrical (power) relationships.¹⁰¹

¹⁰¹ N Helberger, O Lynskey, H-W Micklitz, P Rott, M Sax and J Strycharz, in BEUC (ed), *EU Consumer Protection 2.0, Structural asymmetries in digital consumer markets* (2021), at 26.

XIX. Shifting the Burden of Proof to the Trader (Q18)

The burden of proof of compliance with legal requirements should be shifted to the trader in certain circumstances (eg when only the company knows the complexities of how their digital service works).

Answer: Strongly agree

Generally speaking, such a principle has already been developed in certain areas of EU law (eg as early as the case of *Danfoss* in relation to equal payment between men and women¹⁰²) and the opacity of digitalisation is an obvious candidate for such a shifting of the burden of proof. Thus, in article 12(2) and (3) DCSD, the burden of proof for the conformity of digital content and digital services with the contract falls largely on the trader.

The theme of burden of proof is also subject to the current proposals of the European Commission for a new PLD and for an AI Liability Directive.¹⁰³ The PLD proposal aims to ease the burden of proof in complex cases and ease restrictions on making claims, while ensuring a fair balance between the legitimate interests of manufacturers, injured persons and consumers in general. Thus, the burden of proof is not simply shifted to the producer but the proposal entails a fairly complex system that we do not need to explain to the Commission. The burden of proof rules of the proposed AI Liability Directive mirror that system. The reason for the reluctance to shift the burden of proof entirely lies in the producer's liability risk.

This latter reason seems to be less salient when it comes to digital fairness. Of course, it would still be necessary to show some sort of anomaly that indicates the potential presence of a breach of law. In the case of *Danfoss*, it was the difference between the average salaries of men and women that triggered the shifting of the burden of the proof.

Only upon establishing a potential breach of law would the burden of proving compliance with the law be shifted to the trader – or to the online platform provider – who would then have to explain, for example, the functioning of the algorithm it uses.

¹⁰² ECJ, 17 October 1989, Case C-109/88 *Danfoss*, ECLI:EU:C:1989:383.

¹⁰³ Proposal for a Directive on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive), COM(2022) 496.

XX. Adapting the Concept of the 'Average Consumer' or 'Vulnerable Consumer' (Q19)

The concept of the 'average consumer' or 'vulnerable consumer' could be adapted or complemented by additional benchmarks or factors.

Answer: Agree

The benefits of standards like 'average consumer' and 'vulnerable consumer' are the flexibility of encompassing all types of situations at all times. The standards can change with the development of society. The obvious downside is that they do not provide legal certainty. This is a problem for businesses aiming their information at the 'average consumer' or the 'vulnerable consumer' without knowing exactly what they are supposed to expect regarding the standard/level of understanding of such a consumer. It is also a problem for the consumer, who does not know when they have a right to claim that the information provided was not understandable for the average/vulnerable consumer. Self-evidently, this also constitutes a problem for anyone ruling on such cases.

Legal traditions differ in the Member States, and in Member States (such as Denmark) where the approach to a large part of private law has traditionally been based on principles and broad standards reflecting a pragmatic approach to resolving disputes, standards like 'average/vulnerable consumer' might not seem so problematic if the standards are actually applied in accordance with developments in society. The

uncertainty, however, is still there, and the lack of national case law in the consumer law area means that potential cases in the area are not tried and, thus, that the standards are not fleshed out.

The concepts of 'average consumer' and 'vulnerable consumer' have rightly been criticised for being unrealistic and not in line with consumer behaviour.

'Average consumer'

The concept is referred to in article 5(2) and recital (18) of the UCPD and in CJEU case law which defines it as a consumer who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors. The concept also seems to be the benchmark for consumer protection beyond the UCPD.

From a consumer behaviour point of view, the concept has been criticised for being a prototypical personification of an average consumer.¹⁰⁴ However, as the concept is a flexible standard, it should also be able to change as more behavioural insights are gained, which some authors have already seen reflected in case law.¹⁰⁵ It has also been criticised that the concept

¹⁰⁴ R Incardona and C Poncibò, *The average consumer, the unfair commercial practices directive, and the cognitive revolution*, Journal of Consumer Policy 30 (2007), 21.

¹⁰⁵ K Purnhagen, *More Reality in the CJEU's Interpretation of the Average Consumer Benchmark – Also More Behavioural Science in Unfair Commercial Practices?*, European Journal of Risk Regulation 8 (2017), 437, 439.

is based on the assumption that consumers are alike.¹⁰⁶ One could reply that the concept of 'average' is an indicator of the perception that not all are alike, but the problem then might be that the difference is measured only through an evaluation of three pre-defined, similar and somewhat unrealistic elements (well-informed, observant, circumspect).

Even though the concept has been rightly criticised, the challenge is that we probably need some kind of benchmark for businesses to aim at when they develop advertising, consent forms and other types of information or structures. Also, a benchmark supports collective actions and removes the focus placed upon the individual consumer and their consent/understanding and so on.

With the increasing awareness of the interplay between law and behavioural science – and thus law and consumer behaviour – one could argue that the concept will develop and respond to the criticism at least to some extent, but to boost such development it might be fruitful to abandon the unrealistic notion of the well-informed, observant and circumspect consumer. Instead, it could be considered more appropriate to make reference to factors more in line with actual consumer behaviour.

One could thus argue that the 'average consumer' could benefit from a bit more detailed description encompassing the general biases of consumers (as described in behavioural studies), maybe at least where the consumer interacts in a digital environment – the 'average digital consumer'.

'Vulnerable consumer'

The answer to this part of the question is mainly inspired by the European Consumer Organisation's (BEUC) EU Consumer Protection 2.0 Structural Asymmetries in Digital Consumer Markets report,

along with the included literature study, which is a report specifically on the concept of the vulnerable consumer.¹⁰⁷ From this report, it is evident that the concept of vulnerability is very complex. The following is thus only a brief elaboration on the concept.

In the EU, the concept of the vulnerable consumer forms a subgroup of the average consumer, which is most developed under the UCPD, and it is mainly used to evaluate whether a commercial practice or information is misleading or aggressive. Thus, if a clearly identifiable group is particularly vulnerable to the practice, the benchmark for assessing whether a commercial practice has been misleading is this group. Vulnerability is thus seen as a weakness that makes the group potential victims of activities on the market, whereas the average consumer would presumably be able to cope. The concept has been criticised for not grasping vulnerability even though some changes have been made in the understanding.¹⁰⁸

There are different aspects of vulnerability, such as physical, intellectual and economic vulnerability (as reflected in other relevant consumer legislation).¹⁰⁹ The concept can be found in recital (34) of the CRD, which prescribes that in providing 'clear and comprehensible information before the consumer is bound by a distance or off-premises contract', '... the trader should take into account the specific needs of consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee.' When it comes to digital surroundings, under article 5 of the Online Dispute Resolution (ODR) Regulation (EU) 524/2013,¹¹⁰ it will be ensured inter alia that '... the ODR platform is accessible and usable by all, including vulnerable users ("design for all"), as far as possible.' The concept of vulnerability is particularly recognised in the context of financial services,¹¹¹ such as consumer and mortgage credit agreements and other financial

¹⁰⁶ BB Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer 2015), at 159.

¹⁰⁷ Helberger et al (n 101 above).

¹⁰⁸ European Commission, *Understanding consumer vulnerability in the EU's key markets*, 2016 https://commission.europa.eu/publications/understanding-consumer-vulnerability-eus-key-markets_en.

¹⁰⁹ N Reich, *Vulnerable Consumers in EU Law*, in D Leczykiewicz and S Weatherill, *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016), 139, 141.

¹¹⁰ Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes (Regulation on consumer ODR), OJ 2013 L 165/1.

¹¹¹ I Domurath, *The Case for Vulnerability as the Normative Standard in European Consumer Credit and Mortgage Law – An Inquiry into the Paradigms of Consumer Law*, EuCML 2013, 124 ff.

services relating to combating the financial exclusion of financially vulnerable consumers from the market. As emphasised in the Payment Account Directive 2014/92/EU in its preamble and articles, EU legislation 'must effectively take into account the needs of more vulnerable consumers'.¹¹² The reference to vulnerability in the more sector-specific legislation, however, does not provide more insight into what constitutes vulnerability – does financial vulnerability mean poor people, gullible people or something else?

Vulnerability as a group-issue

Vulnerable consumers are often perceived as specific groups that are particularly vulnerable to a practice or underlying product because of their mental or physical infirmity, age or credulity, which the trader could reasonably be expected to foresee (article 5(3) UCPD). This can, for example, be elderly people and children. A business has to adjust its commercial practices to an average member of this group if the business either directly targets such a group or the group can be identified out of a larger targeted group and this group would be particularly vulnerable to its commercial practices. Categorising vulnerability into the above groups has been criticised because vulnerability is highly context-specific¹¹³ and because vulnerability can be seen from different perspectives.¹¹⁴ One could argue that vulnerability is an aspect of being human and that vulnerability should therefore be the rule – and not the exception.¹¹⁵ It is acknowledged that some groups can in very specific ways be regarded as more susceptible to certain influences, but such vulnerability is only a small part of consumer vulnerability.

We are all vulnerable in the digital economy

In the BEUC report,¹¹⁶ it is stated that in the digital

economy most if not all consumers are potentially vulnerable. 'Instead of singling out certain groups of consumers, digital vulnerability describes a universal state of defencelessness and susceptibility to (the exploitation of) power imbalances that are the result of increasing automation of commerce, datafied consumer-seller relations and the very architecture of digital marketplaces.'¹¹⁷ As consumers, we are constantly manipulated. We all know how physical stores are designed to make us walk past almost all the aisles and how goods are strategically placed based on consumer shopping behaviour. In a digital environment, such manipulative designs (digital choice architectures) can be developed on a much larger scale – amidst constant experimentation – with less or no chance for the consumer to detect them, leaving all consumers vulnerable per definition. In the BEUC report, this is referred to as digital asymmetry. This asymmetry entails that the businesses have a powerful position that cannot be balanced out simply by providing the consumer with information and evaluating whether the average consumer/vulnerable consumer understands it. 'Digital vulnerability' might entail another understanding of consumer vulnerability – maybe even making the vulnerable consumer the rule given that '[e]very consumer has a persuasion profile'.¹¹⁸

'New Consumer Agenda'

In its 2020 New Consumer Agenda, the European Commission focused on developing the notion of the vulnerable consumer. According to the document, 'the vulnerability of consumers can be driven by social circumstances or because of particular characteristics of individual consumers or groups of consumers, such as their age, gender, health, digital literacy, numeracy or financial situation'; and regarding vulnerability in the digital environment, the Communication highlights the findings and results of an empirical

¹¹² See recital (3) of Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic feature, OJ 2014 L 257/214.

¹¹³ Duivenvoorde (n 106 above), at 180.

¹¹⁴ *ibid*, at 179.

¹¹⁵ Helberger et al (n 101 above), at 10 with further references.

¹¹⁶ *ibid*.

¹¹⁷ *ibid*, at 5.

¹¹⁸ *ibid*, at 11 with further references.

study of 2019,¹¹⁹ such as proposals on the use of data to identify vulnerable consumers¹²⁰ and other measures such as self-exclusion.

Some Member States, such as Spain, built on these New Consumer Agenda statements to expressly introduce a general notion of vulnerable consumers in their consumer protection laws or consumer codes. Thus, Law 4/2022 of 25 February on the protection of consumers and users in situations of social and economic vulnerability saw Spain introduce a subtype of the 'vulnerable consumer' into the legal concept of 'consumer' – the same concept found in instruments such as the CRD, UTD, DCD and SGD – in its General Consumer Protection Law, which means the concept therefore applies to all European rules transposed into this general law (such as those mentioned above). According to article 3.2 of the General Consumer Protection Law:

for the purposes of this law and without prejudice to the sectorial regulations applicable in each case, vulnerable consumers with regard to specific consumer relations are those *natural persons who, individually or collectively, due to their characteristics, needs or personal, economic, educational or social circumstances, are in a special situation of subordination, defencelessness or lack of protection* that prevents them from exercising their rights as consumers under equal conditions, even if this is territorial, sectoral or temporary.

Efforts to elaborate and reflect on the concept of vulnerability, as done in the New Consumer Agenda and in the Spanish consumer protection law, can only be supported, but if the concept of vulnerable consumers is extended to the individual

level, the concept loses its status as a standard (a sub-benchmark to the average consumer), and it becomes hard to use the benchmark for businesses' commercial practices if this is indeed still the overall purpose of having such a standard.

Protection through detailed regulation

One could argue that individually vulnerable consumers are to a large extent protected through the consumer acquis in general and specifically through the UCPD and its blacklist. Here the approach seems to be to identify what factors exploit consumer behaviour (situational vulnerabilities) and to regulate them. In the blacklist, some of the worst commercial 'tricks' are prohibited. Thus, an alternative or supplement to the current protection of 'vulnerable consumers', defined as a more static group with inherent vulnerability (eg children), could be prohibitions aimed at practices that potentially exploit vulnerability. In this way, different dispositional 'vulnerabilities' can be targeted across groups.

Under Question 9, it was mentioned that one way to limit exploiting consumers could be to ban the use of certain factors when personalising advertisements, but the same goes, for example, to developing choice architecture. Consumers would be protected against some types of manipulation in the digital environment if certain information about them could not be a part of the data used to develop the environment. The challenge of course is then to select which information should be taken out, and such selection of sensitive data has also been criticised for trying to define vulnerability based on pre-determined information.¹²¹

¹¹⁹ E Costa and D Halpern, *The behavioural science of online harm and manipulation, and what to do about it* (2019), available at <https://www.bi.team/publications/the-behavioural-science-of-online-harm-and-manipulation-and-what-to-do-about-it/>.

¹²⁰ *ibid*, at 52.

¹²¹ Helberger et al (n 101), at 24.

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