



# Study to support the Fitness Check of EU consumer law on digital fairness and the report on the application of the Modernisation Directive (EU) 2019/2161

Final Report - Annexes



Centre for  
**Strategy & Evaluation  
Services**

# **Study to support the Fitness Check of EU consumer law on digital fairness and the report on the application of the Modernisation Directive (EU) 2019/2161**

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### *Notice*

This document has been prepared for the European Commission however it reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

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## Annex 1: Overview of evaluation questions

### Evaluation questions by criterion and research questions (addressed in main report)

#### Problematic practices (Section 3.2)

- RQ1 – What problems do consumers face with dark patterns? How far are dark patterns sufficiently addressed by the UCPD and in other pieces of EU law?
- RQ2(1) – Which commercial practices qualify as “aggressive” in the digital environment?
- RQ2(2) – Are there any new aggressive online commercial practices that challenge the UCPD’s effectiveness? Which types of traders and market sectors are making most use of such practices? Are there any differences between EU Member States or regions or EU and non-EU traders?
- RQ3 – What are the specific modalities for consumers in relation to the length of subscription contracts for digital services and their automatic renewal?
- RQ4 – Are subscriptions adequately addressed by the Unfair Commercial Practices Directive (UCPD), the Consumer Rights Directive (CRD) and other EU laws?
- RQ5 – What technical problems do consumers face when they exercise the right of withdrawal (RoW) from the contracts for digital content or services?
- RQ6 – To what extent are there problems in exercising cancellation rights?
- RQ7 – What transparency and fairness problems do consumers face with business-to-consumer personalisation practices (e.g. personalised advertising, offers, pricing, search results) that are not already sufficiently addressed by existing legislation?
- RQ8 – How far is online market segmentation through personalised pricing/offers is unfair and how if yes, this can be tackled?
- RQ9 – What are the problems with the application of current rules influencer marketing, considering enforcement cases and guidelines at national level?
- RQ10 – What are the drivers of digital addiction and what are the challenges for legislators in addressing this problem area?

#### Effectiveness – section 3.1

- EQ1 – What are the main problematic digital business-to-consumer (“B2C”) practices identified in digital trade from a consumer protection perspective? How prevalent are these practices, and has there been an increase in these practices in the past few years?
- EQ2 - Given the full harmonisation nature of the UCPD, to what extent should Member States can regulate practices such as dark patterns, influencer marketing, personalisation practices or other problematic practices identified? Does the emergence of national legislation undermine the single market?
- EQ3 – How successful have the Directives been in achieving their objectives and in promoting digital fairness?
- EQ3(1) – What progress has been made towards the achievement of general objectives?
- EQ3(2) – What progress has been made towards the achievement of specific objectives?
- EQ3(3) – How far have the EU consumer law Directives been effective in providing regulatory certainty in the digital environment?

- EQ4 – How far are the following rules/concepts still effective and have contributed towards an improved level of consumer protection and trust: (1) the burden of proof and (2) a transactional decision?
- EQ4(1) – The burden of proof in EU consumer protection
- EQ4(2) – How far is the concept of a ‘transactional decision’ in EU consumer law working effectively? Does this concept sufficiently capture commercial practices in the attention economy?
- EQ5 – How effective has the enforcement of the Directives been in relation to digital products, services, and content?
- EQ5 – Given the full harmonisation nature of the UCPD, to what extent can Member States have regulated the problematic practices? Does the emergence of national legislation undermine the single market?

### Efficiency – section 3.2

- EQ6 – What are the regulatory compliance costs (administrative, adjustment costs) of the Directives for the different actors involved (Member States authorities, businesses, consumers) and for consumers overall in the digital area?
- EQ6(1) – What is the cost for businesses to comply with the Directives, including specifically for SMEs considering the weight of the different kinds of SMEs operating in the digital sector(s) (micro, small and medium ones)?
- EQ6(2) – For those SMEs involved in business on a cross-border basis, were there any additional compliance costs?
- EQ6(3) – What are the benefits of the Directives for the different actors involved (Member States authorities, businesses, SMEs, consumers) and for society overall, in the digital area?
- EQ6(4) – To what extent are these costs proportionate to the benefits, assessing first within each stakeholder category and as a second step – the overall effect for the society?
- EQ6(5) – Are there opportunities to simplify the legislation or reduce unnecessary regulatory costs without undermining the intended objectives of the Directives?
- EQ7 – What are the benefits of EU consumer law in terms of ensuring digital fairness and wider benefits?

### Relevance – section 3.3

- EQ8 – To what extent do the Directives remain relevant and correspond to the identified needs of consumers and traders? How far does the legal framework remain fit for purpose in addressing digital asymmetries faced by the average consumer?
- EQ9 – How far has EU consumer law remained relevant in addressing the needs of vulnerable consumers in the digital environment?

Further sub-questions considered were:

- EQ9(1) – To what extent is the existing concept of ‘vulnerability’ defined in the UCPD still relevant?
- EQ9(2) – What role does the concept of an ‘average consumer’ play in the digital

environment and in the evolution in what constitutes a vulnerable consumer?

- EQ10 – Are there any technological and/ or market-related developments that are likely to challenge the ongoing relevance of the Directives in future? Are there any technologies that could help to strengthen consumer protection?
- EQ11 – How far is the digital environment sufficiently addressed in EU consumer law currently through the general principles-based approach and supporting guidance documents for each of the three Directives? To what extent does the technology-neutral design remain relevant, or should digitalisation aspects be more explicitly regulated?
- EQ12 – To what extent does the legal framework remain fit for purpose?
- EQ13(1) – Can specific regulatory gaps be identified in EU consumer law due to developments in digital markets and services and due to the advent of other EU legislation, including new and existing data protection related and digital-related laws?
- EQ13(2) – How far are perceived gaps being addressed by regulators in third countries?
- EQ14 – What are the possible improvements to the existing EU consumer law framework that could be considered to strengthen consumer protection?
  - RQ11 – Is it necessary to reverse the burden of proof in specific circumstances of digital asymmetry between traders and consumers? (UCPD)
  - RQ12 – Is it necessary to introduce additional transparency obligations about personalised practices (considering existing legislation, e.g. Articles 13 and 14, GDPR)?
  - RQ13 – Is it necessary to introduce a new obligation about the parameters upon which personalised commercial practice is based, in particular for sensitive parameters? Is it necessary to introduce an option of non-personalisation?
  - RQ14 – Is it necessary to introduce new prohibitions, or obligations regarding dark patterns?
  - RQ15 – Is the regulatory framework to tackle aggressive commercial practices fit for purpose? Should the current blacklist in Annex I of the UCPD on aggressive practices be further updated to include additional digital practices?
  - RQ16(1) – Is it necessary to consider the introduction of new prohibitions or obligations to combat the problem of digital addiction, for instance in respect of infinite scrolling and loot boxes?
  - RQ16(2) – Should the aim also be to mitigate the potential negative effects on the social and financial situation of consumers due to addiction and prolonged use of certain digital content and services?
  - RQ17 – Is it necessary to introduce specific rules regarding influencer marketing and other advertising practices on social media platforms?
  - RQ18 – Is it necessary to introduce further rules on personalised pricing and price discrimination?
  - RQ19 – Should there be more specific rules on online subscriptions to prevent subscription traps, including possible rules on the termination, length, and renewal of contracts in the digital environment?
  - RQ19(1) – Renewal and transparency in relation to online subscriptions

- RQ19(2) – Cancellation button
- RQ19(3) – Payment details for free trial subscriptions
- RQ19(4) – The withdrawal button under the CRD
- RQ19(1-4) – Possible solutions to address problems in online subscriptions:
- RQ20 – Is it necessary to introduce new prohibitions or obligations regarding scalping practices?
- RQ21 – What changes are necessary to adapt or complement the existing provisions of the UCTD to better address digital challenges?
- RQ22 – Given the UCTD’s minimum harmonisation nature, to what extent should Member States be able to regulate consumer contract terms and/ or develop national blacklists?
- EQ15 – How far has the Modernisation Directive (MD) ensured fitness for purpose in the underlying consumer legislation it supports (e.g. the UCPD, CRD and UCTD) through regulatory amendments?

#### **Coherence – Section 3.5.1 - Internal coherence and Section 3.5.2 - 3.9 external coherence**

- EQ16 – Can any internal discrepancies and/or inconsistencies between the provisions of the Directives related to transactions and practices in the digital environment be identified? Are there any further internal coherence-related issues across the three Directives be identified, for instance from the perspective of EU consumer law combining both minimum and maximum harmonisation directives?
- EQ17 – As far as business-to-consumer (B2C) transactions and practices in the digital environment are concerned, are there any overlaps and / or complementarities between the Directives and any other Union legislation with similar objectives?

#### **EU added value – section 3.10**

- EQ18 – What is the overall EU added value of the EU consumer law within scope in the context of digital fairness?
- EQ19 – What would have happened in the absence of regulatory intervention through EU consumer law at EU level to ensure (digital) fairness?
- EQ20 – How can market practices be expected to evolve and what would be the most likely consequences if there is no further strengthening of the Directives with respect to consumer protection in the digital environment?

#### **Additional questions addressed in case studies grouped by case study theme**

The case studies have allowed for a further series of questions to be addressed:

##### *Aggressive practices, dark patterns*

- Are the provisions on aggressive commercial practices (Articles 8 and 9) sufficiently precise and successful in capturing problematic digital practices? Are consumers subject to the exploitation of personal vulnerabilities or psychographic profiling to exercise emotional or psychological pressure to distort a consumer’s transactional decision?
- Is the current blacklist of aggressive commercial practices (Annex I) successfully capturing problematic digital practices?



- What commercial practices qualify as “aggressive” in the digital environment?
- To what extent does the UCPD specifically apply to aggressive commercial practices in the digital environment?
- To what extent are there examples of aggressive commercial practices in the digital environment (for example, Nagging, Roach motel, sneak into the basket, Hidden subscription / forced continuity/registration)? If examples exist, does the UCPD cover these? If yes, fully, or partially?
- Are there any new aggressive online commercial practices that challenge the effectiveness of the UCPD? Which types of traders and market sectors are making the most use of such practices? In this regard, are there any differences between EU Member States or regions or EU and non-EU traders?
- To what extent do aggressive commercial practices vary depending on the national context or stakeholder group?
- Have there been any recent developments in terms of aggressive commercial practices in the digital environment that are likely to challenge the effectiveness of the UCPD in the future?
- To what extent do aggressive commercial practices continue to influence consumers’ choices in the digital environment?
- Are there emerging aggressive commercial practices that (could) dodge the current provisions and represent a threat to consumers in the future?
- Are there legal gaps or uncertain/grey areas in the UCPD regarding aggressive commercial practices in the digital environment? Which aggressive online commercial practices are likely to be already considered illegal under the existing rules and only require improved enforcement?
- Are there any shortcomings/gaps in the definition and scope of the provisions on aggressive commercial practices, which would result in certain types of emerging digital practices not being covered by the UCPD?
- Is it necessary to introduce provisions to minimise the use of harassment, coercion, and undue influence as a digital practice?
- How effective has the enforcement of the UCPD Articles 8 and 9 been with digital products? What hinders/influences effective enforcement in the digital area? Are there problems specific to SMEs resulting in a widespread lack of compliance?
- To what extent have the Member States managed to enforce the provisions on online commercial aggressive practices?
- What problems do consumers face with dark patterns, i.e., manipulative interface and choice architecture designs, which are not sufficiently addressed by the UCPD’s Articles 8 and 9?

#### *Digital vulnerability*

- How adequate is the concept of vulnerable consumers in the Directives? To what extent are appropriate vulnerable groups named and considered in the Directives?
- To what extent are the wording of Article 5(3) UCPD and recital 34 of the CRD, broad enough to cover all types of relevant vulnerable groups including those with less digital skills, children, consumers with mental or physical infirmity, those prone to addiction, etc?

- To what extent can vulnerable groups apply the vulnerable consumer concept of the UCPD? To what extent are there any challenges that prevent the application of the vulnerable consumer concept? Is the concept easy to apply? (i.e., the burden of proof)
- To what extent is the concept of the vulnerable consumer in the UCPD aligned with EU and international legislations?
- Is the UCPD concept of the vulnerable consumer aligned with EU consumer and cross-sectoral legislation and with EU policies and reports?
- Is the UCPD concept of the vulnerable consumer aligned with the United Nations Guidelines for Consumer Protection (UNGCP)?
- To what extent is the existing concept of 'vulnerability' defined in the UCPD broad enough to consider the new digital environment?
- To what extent does this require any changes considering the digital environment and the evolution in what constitutes a vulnerable consumer? (i.e., Is it necessary to amend the concepts of the 'average consumer' and/or the 'vulnerable consumer'?)
- To what extent is the 'digital asymmetry' concept proposed by BEUC helpful in relation to a possible widening of the definition of what constitutes a vulnerable consumer.
- Are there any regulatory gaps regarding vulnerable consumers that could be addressed by the Commission in future?

#### *Digital subscriptions*

- What are current practices regarding the length of subscription contracts for digital services and their automatic renewal? Are there challenges in cancelling longer-term contracts based on automatic renewals, including regarding the procedures for doing so?
- How far are current practices in digital subscription services (including issues such as passive vs. active consent) acceptable and leading to digital fairness? To what extent do specific consent-related issues pose a problem, such as the automatic renewal of subscriptions and the issue of affirmative vs. passive consent; the automatic conversion of free promotional trials into paid-for subscriptions?
- Are there significant variations between Member States in regulatory requirements for the termination of consumer contracts for digital services and subscription renewal currently at national level in the EU-27?
- How far would EU level action help to establish a level playing field in a single market context (e.g. possible cancellation button on websites / in email reminders about auto renewal of subcontracts)?
- Free trials: Are there challenges in cancelling free trials that automatically convert into automatic subscriptions? Does this raise issues in relation to compliance with pre-contractual information requirements?
- Free trials: Is passive consent sufficient for a free trial to automatically convert into a paid automatically renewed subscription service?

#### *Personalisation*

- Processing personal data for the purposes of engaging in targeted advertising
- Transparency regarding whether advertising is targeted and the mechanisms used to target advertising

- Prohibitions of specific practices that could relate to targeted advertising
- Is the UCPD Guidance sufficient as regards guidance on personalised advertising?
- Which data is used for personalised offers and pricing?
- How might strategies for personalisation evolve?
- Concerns related to personalisation options: data gathering issues; transparency issues (GDPR, CRD, DSA); financial and other exploitation of data; increased search costs and narrowed perspective (limiting consumer choice/knowledge)

#### *Digital addiction*

- What kinds of consumer problems emerge due to the addictive use of digital products? What are the drivers of these problems (e.g., use of dark patterns like forced autoplay to induce continued use; providing incentives/rewards for more time spend using the service; 'gamification' of digital services, use of virtual items)?
- What problems do 'loot boxes' create?
- Do the Directives ensure the prevention of the potential negative effects on the social and financial situation of consumers due to addiction and prolonged use of certain digital content and services? Are there other regulations at national or EU level that sufficiently prevent or mitigate the risk from such negative effects?
- Are there any examples of legislation that limits either the money or time that can be spent using digital content and services and mandatory disclosures about their addictive nature?
- If not, to what extent is it necessary and is there scope for introducing specific rules which mitigate the potential negative effects on consumers due to addiction and prolonged use of certain digital content and services?

#### *Social commerce and influencer marketing*

- What are the emerging trends and technologies (e.g. livestream shopping with role of influencers; metaverse shopping; tokenisation (e.g. NFTs)?
- To what extent does existing EU legislation (e.g., UCPD, CRD, UCTD, MD, AVMSD, DSA and DMA) address market practices related to social commerce effectively?
- To what extent have Member States already, or are looking in future to regulate social commerce?
- How might EU consumers be affected by non-EU traders in terms of the role of social influencers and/ or social media platforms located outside the EU?
- How far – and why - has influencer marketing emerged at Member State level? Does this point to a need to consider such legislation at EU level, or are the prohibitions on hidden advertising already sufficient?

#### *Unfair contract terms*

- Is it necessary to add new terms to the indicative list of unfair terms (Annex to the UCTD)? To adapt the existing provisions of the UCTD to better address the imbalances resulting from the use of data-driven personalisation practices to avoid traders profiting from consumers' personal characteristics?
- Given the minimum harmonisation nature of the UCTD, to what extent could Member States can regulate problematic practices concerning consumer contract terms? What

would be on the impact on the single market?

- Given the minimum harmonisation nature of the UCTD, to what extent do Member States can regulate contract terms? What are the advantages and disadvantages of a minimum harmonisation approach?
- To what extent does the use of standard terms remain relevant for consumers? What changes have there been in terms of trends towards the personalisation of contracts in a digital context and how far has this impacted on the ongoing relevance of the UCTD?
- To what extent are there issues around personalised pricing? How far can these be resolved through the UCTD?
- To what degree is there evidence of different default rules being personalised in consumer contracts in the digital space? How far is this a problem and what have been the consequences? Does this leave in regulatory gaps in the UCTD?

## Annex 2: List of interviews

A list of interviews is provided in the following table:

Stakeholder type	Organisation
Business association	EuroCommerce
Consumer association	BEUC - European Consumer Organisation
Consumer association	BEUC - European Consumer Organisation
Consumer association	European Consumer Centre Denmark
Consumer association	UFC-Que-Choisir
Consumer association	Swedish Consumer Agency
EU policy maker	European Commission, DG JUST
EU policy maker	European Commission, DG JUST
EU policy maker	European Commission, DG JUST
Industry association	Independent Retail Europe
Industry association	The European Gaming and Betting Association (EGBA) is the Brussels-based industry body representing the leading online gaming and betting operators established, licensed and regulated within the EU.
Industry association	Ecommerce Europe
Industry association	Digital Europe
Industry association	Ecommerce Europe + national NL consumer association
Industry association	Independent Retail Europe
Legal researchers & academics	Utrecht University School of Law
Legal researchers & academics	Humboldt/Leiden
Legal researchers & academics	School of Law, University of Nottingham, Nottingham, UK
Legal researchers & academics	Uni of Reading
Legal researchers & academics	Independent researcher
Industry association	Wiggin
National Ministries	Ministry of Justice
National Ministries	Ministry of Justice
National Ministries	Ministry of Justice, FIN

Stakeholder type	Organisation
National Ministries	Bundesministerium für Wirtschaft und Klimaschutz (BMWK)
National Ministries	AT BMSGPK
National Ministries	AT BMSGPK
National Ministries	AT BMSGPK
National Ministries	AT BMSGPK
Online marketplaces	eBay
Online marketplaces	eBay
Online marketplaces	Amazon
Legal researchers & academics	(University Carlos III of Madrid)
Legal researchers & academics	Queen Mary University
Legal researchers & academics	Professor in Consumer Law, Aalborg University
Legal researchers & academics	University of Oldenburg Professor of Civil Law.
Legal researchers & academics	Univ. of Tartu
Legal researchers & academics	IT University of Copenhagen
Industry association	Dansk Industri
Industry association	Dansk Industri
National enforcement authorities	The Netherlands Authority for Consumers and Markets (ACM)
Industry association	Thuiswinkel.org, Dutch e-commerce association
Legal researchers & academics	National University of Ireland Galway; College of Business Public Policy and Law; School of Law
Software / search engines/ app producers/ AI developers	Google
Software / search engines/ app producers/ AI developers	Google
Online platforms	Meta
Online platforms	Meta
Industry association	European Games Developer Federation
Legal researchers & academics	UCC IE
National enforcement authorities	Danish Consumer Ombudsman
National Ministries	Ministry of Consumer Affairs

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Stakeholder type	Organisation
National Ministries	Senior policy employee (senior beleidsmedewerker) at the Dutch Ministry of Economic Affairs and Climate
National Ministries	Ministry of Economics
National Ministries	Ministry of Economy and Industry
National enforcement authorities	Consumer Protection and Technical Regulatory Authority
National Ministries	Ministry of Economic Affairs and Communications
National Ministries	Ministry of Economic Affairs and Communications
National Ministries	Ministry of Justice
National Ministries	Ministry of Economy and Sustainable Development
National Ministries	The National Authority for Consumer Protection (A.N.P.C.), subordinated to the Government
National Ministries	Ministry of Industry and Trade
National Ministries	Ministry of Justice (Department for Private Law and Administration of Justice)
National Ministries	Ministry for Inclusion, Voluntary Organisations and Consumer Rights
National Ministries	Consumer Policy Division (within the Ministry of Finance)
National Ministries	Ministry of Business and Made in Italy (Direzione generale per il mercato, la concorrenza, la tutela del consumatore e la normative)
Industry association	Business Europe
Industry association	Business Europe
Industry association	Business Europe
Consumer association	Consumentenbond
Consumer association	The Swedish Consumers' Association
Legal researchers & academics	CERP, Robert Schuman Centre for Advanced Studies
National Ministries	Office for Consumer Affairs within the Malta Competition and Consumer Affairs Authority
Legal researchers & academics	Open Evidence
National Ministries	Ministry of Economic Affairs and Communications
Trader association	Director of Public Affairs, Video Games Europe

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Stakeholder type	Organisation
Trader association	Director of Policy, Video Games Europe
Legal researchers & academics	Independent academic, assistant professor (specialism in consumer vulnerability and digital asymmetry).
Trader	Lavazza (focus on dual quality)
Trader association	HOTREC (focus on dual quality)
Trader	Apple EU
Trader	Apple EU
Trader	Apple EU
NGO	FiveRights Children's Association
Trader association	DotEurope
Legal researchers & academics	Oxford University
National enforcement authorities	The Irish Competition and Consumer Protection Commission (CCPC)
Legal researchers & academics	European University Institute
Legal researchers & academics	The European Law Institute (ELI)
Legal researchers & academics	The European Law Institute (ELI)
Legal researchers & academics	The European Law Institute (ELI)
Legal researchers & academics	Independent academic
Consumer Association	Cyprus Consumers' Association (CCA)
Consumer Association	Danish Competition and Consumer Authority
Consumer Association	The Consumers' Union of Finland
Consumer Association	Norwegian Consumer Council



## Annex 3: Bibliography

The bibliography has been structured thematically.

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## Annex 4: Sweeps

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## 1 Introduction

In the context of this study, sweeps should be understood as simultaneous checks carried out on a sample of websites or mobile and tablet applications to assess their performance on specific parameters and their compliance with consumer law. In practice, researchers browsed websites or used applications, performing normal tasks, such as looking for products to buy, or attempting to subscribe to a service. They collected data on the information that was presented to them, its content and clarity.

Given the scope of the study, the sweeps provide for a qualitative assessment of the problems, including researchers' opinion of the clarity of information, practical examples of problems identified, supported by screenshots. While covering a number of selected websites, each sweep is different in scope, objective and nature. These sweeps are not comparable to those undertaken by national enforcement authorities in the framework of the CPC network and coordinated by the Commission.

The sweeps linked to the MD aimed at checking how traders were complying with the Directive, as transposed into national law. Other sweeps such as those on manipulative and opaque personalisation practices, digital subscriptions, video games and unfair contract terms contributed more to the Fitness Check.

Given the similarity in the methodology to follow for some of the sweeps, they have been grouped to maximise the synergies between the topics. Different methods have been used for each sweep to ensure it fits best with the issue to be investigated. For each sweep, a short assessment of the problem is provided, followed by a description of the methods used by the researchers, findings and an overarching conclusion.

The sweeps covered the following areas:

- Telephone calls at a basic rate (for passenger transport only)
- Transparency of online marketplaces (triple sweep)
  - Transparency of the ranking of search results / disclosure of advertising and paid ranking
  - Presence of information on a personalised price
  - Online consumer reviews (prohibition of fake reviews)
- Manipulative or opaque personalisation practices
- Price reductions
- Digital subscriptions
- Video games
- Customer service
- Unfair contract terms

## 2 Sweep results

### 2.1 Telephone calls at basic rate

This section provides the methodology and results for the sweep on telephone calls at basic rate in passenger transport services.

Article 21 of the CRD, which obliges traders to operate post-purchase customer telephone hotlines at basic rate (meaning without surcharge for callers), did previously not apply to passenger transport services. This was changed by the Modernisation Directive, which extended the scope of that provision.

The cost of calls made to customer service telephone lines should not exceed the cost of a standard call. As clarified by Court of Justice ruling in Case C-568/15, the concept of “basic rate” must be interpreted as call charges relating to a contract concluded with a trader to a telephone helpline operated by the trader may not exceed the cost of a call to a standard geographic landline or mobile telephone line.

#### 2.1.1 Methodology for the sweep

In each country, the researcher followed a detailed process set out below.

##### Step 1: Select a website

The researcher was asked to sweep the following websites. In the table below, a distinction is made between passenger transport providers and intermediaries.

France	Germany	Hungary	Italy	Poland	Portugal
<b>Intermediaries</b>					
	Skyscanner.de	Skyscanner.hu	Skyscanner.it	koleo.pl	amadeus.net
			Viaggiatreno.it	fly4free.pl	skyscanner.pt
<b>Passenger transport provider</b>					
easyjet.com	Lufthansa.com	Wizzair.com	Wizzair.com	wizzair.com	easyjet.com
ryanair.com	Eurowings.com	Ryanair.com	Easyjet.com	lot.com	ryanair.com
airfrance.fr	Bahn.de	bkk.hu	Trenord.it	ryanair.com	flytap.com
eurotunnel.com	Ryanair.com	bkv.hu			
nouvelair.com					

Romania	Spain	Sweden	Estonia
<b>Intermediaries</b>			
bucharestairports.ro		1409.se	tpilet.ee
skyscanner.ro		skyscanner.se	trip.ee
			skyliner-aviation.de
			flightlogger.net
<b>Passenger transport provider</b>			
cfrcalatori.ro	ryanair.com	sas.se	luxexpress.eu
wizzair.com	vueling.com	norwegian.com	
ryanair.com	iberia.com	ryanair.com	
	tramalicante.es		
	vectalia.es		

## Step 2: Conduct the search

The purpose of this sweep was to check what kind of telephone numbers the customer transport companies want the consumers to use:

- normal landline/mobile, or
- premium or
- short/free numbers (as short and “free” numbers can, in fact, attract additional costs as operators in particular mobile ones would not include calls to such numbers in their inclusive offers).

## Step 3: Answer specific questions

The researchers were asked to provide their answers in a reporting grid.

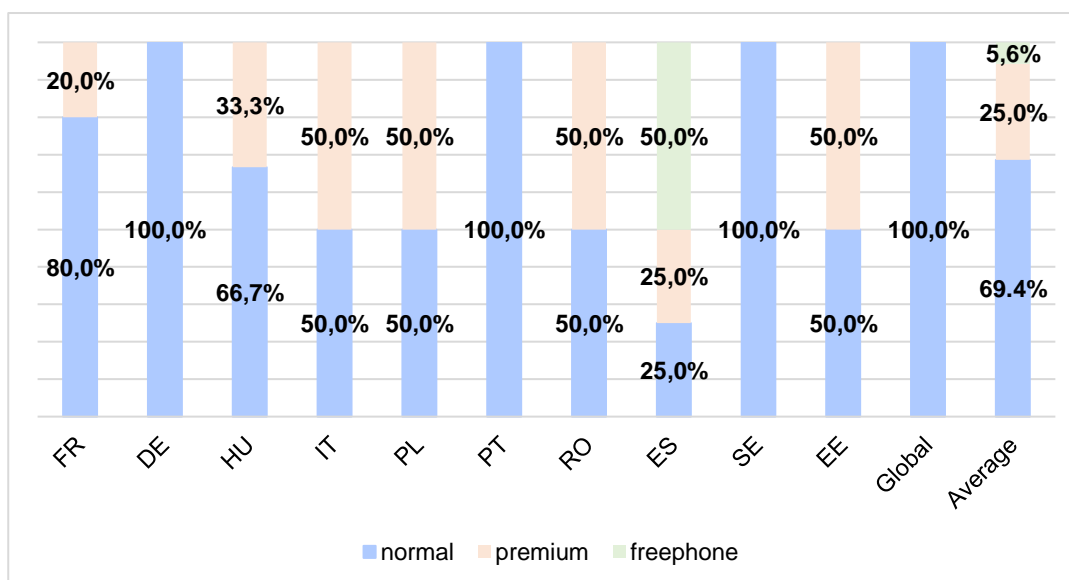
### 2.1.2 Results

The sweep was undertaken in June 2023. Out of the 50 websites swept, 37 were for airline, 4 for bus transport and 6 for railway transport. The remaining three catered for more than one type of transport. Sixty-three percent of the websites are for transport services selling direct to consumers, while the remaining 37% are intermediaries.

The majority of websites (68%) provided the number of a hotline (80% for direct passenger transport providers, and 12.5% for intermediaries). The remaining 32% did not.

Where a phone number was provided, it was **a normal (fixed/mobile) rate number in two-thirds of cases** (69%, including one where the number was in another Member State), a premium rate number in a quarter of cases (25%), and a “free” number in 6% of cases.

**Figure 1: What kind of number is provided on the website?**



In the four cases identified where more than one number was present, consumers were informed on the website that there were different rates based on the type of phone call. The number related to ‘existing bookings’ (as covered by the legal requirements of the Modernisation Directive). The premium numbers related to calls for the sale of tickets or additional services to a flight (booking a specified seat, additional baggage, etc.).

Where premium numbers are available, **the website generally provides the cost of the call** (eight out of the nine cases identified). The costs of calls identified and presented on the websites are listed in the table below and are divided between the cost of connection and the cost per minute. Furthermore, where these numbers were provided, they related to other services than post-contractual consumer service offered by the transport company (such as sales).

**Table 1: Cost of premium numbers**

Country	Cost per minute	Cost of connection
France	EUR 0.06	None
Hungary	HUF 250 (EUR 0.66)	None
Italy	EUR.0.549	None
Italy	EUR 1.22	0.12 per call
Poland	PLN 2.58 (EUR 0.59)	None
Poland	PLN 4.92 (EUR 1.13)	None
Romania	EUR 1.19	None
Estonia	EUR 0.30	None

No additional information on costs was provided in the cases where a “free” phone number was provided. However, in all cases, the number was included in the normal inclusive calls for the country.

Out of those providing a phone number, the ease with which it could be found on the website varied. The researchers were asked to count the number of ‘clicks’ required to find the correct telephone. In approximately one third of cases only one or two click were necessary, 14% of websites required more than 5 clicks for the number to be found.

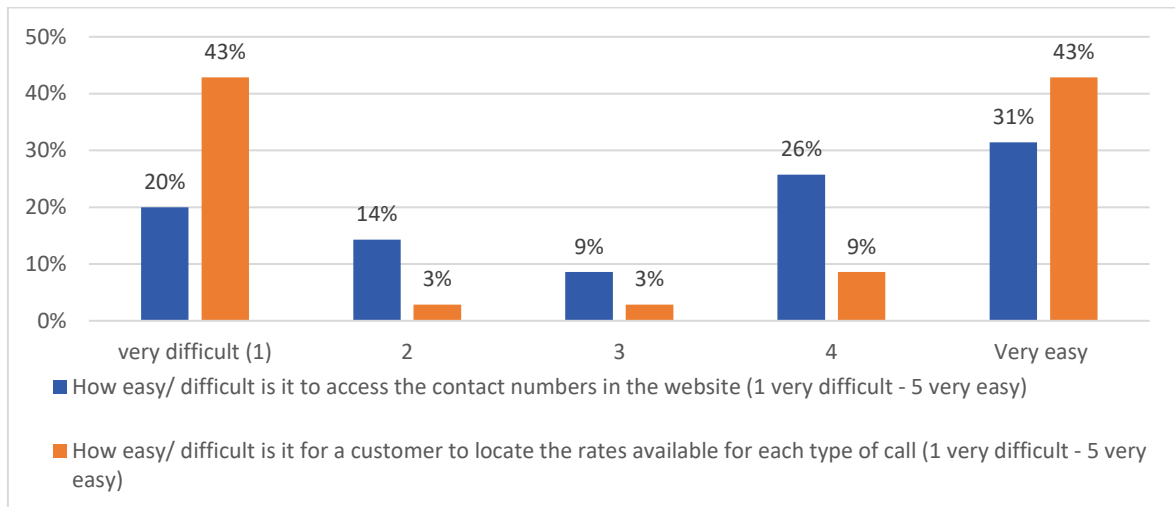
**Table 2: Number of clicks from the homepage are necessary to access the helpline number (n= 36)**

1	2	3	4	5	more than 5
10.0%	20.0%	16.0%	4.0%	2.0%	14.0%

Furthermore, researchers were asked to assess the ease with which the contact number was accessible on the website screened. In 57% of websites, finding the number was seen as easy or very easy, while in 34% of cases the researcher found it difficult or very difficult to access this information.

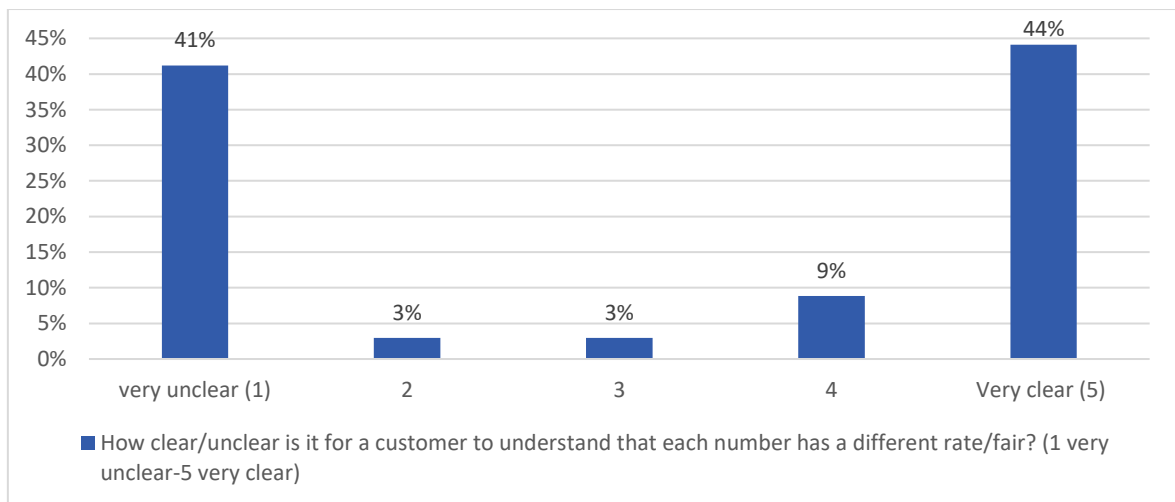
They were also asked to assess the ease with which it was possible to find information on the costs of the calls. With regards to the ease of locating **rates for each type of call on the website**, the results are very split. In the exact same share (43%) of cases, the researchers found this information very easily and with many difficulties. In all cases, the cost of the numbers was found on the website, and in no case was it necessary to check the cost of numbers on telecom providers’ websites.

**Figure 2: How easy / difficult is it access the contact phone number and the rate available for the call (n=36)**



This is in line with the way in which the researchers perceived **the clarity of whether different numbers carry different rates**. They were asked to rank how clear they found it to understand the rate of the number from 1 (very unclear) to 5 (very clear). They found it to be very unclear in 41% of cases and very clear in 44% of cases.

**Figure 3: How clear/unclear is it for a customer to understand that each number has a different rate/fair? (1 very unclear-5 very clear) (n=35)**



### 2.1.3 Conclusions

Overall, it appears that passenger transport companies **comply with the obligation to provide a number at 'basic rate' for post-contractual customer services**. Where premium numbers are available (in 25% of cases), this related to other services offered by the transport company (such as sales). However, it should be kept in mind that the websites swept represent relatively large and well-known providers.

## 2.2 Transparency of rankings of search results, personalised pricing and online consumer reviews

This section provides the methodology and results for the ‘triple sweep’, which covers three separate elements:

- Transparency of the ranking of search results/ disclosure of advertising and paid ranking (2a);
- Presence of information on a personalised price (2b);
- Online consumer reviews (2c).

### 2.2.1.1 Transparency of the ranking of search results/ disclosure of advertising and paid ranking – 2a

E-commerce platforms or marketplaces may show more prominently in online search results those offers for which their provider has paid to obtain higher ranking or insertion (advertising in search results). Article 7(4a) of the UCPD (which applies only to traders that allow consumers to search for products offered by other, third party, traders or by consumers, i.e., online marketplaces and price comparison websites)<sup>1</sup> and Art. 6a of the CRD (applicable only to online marketplaces) introduced by the MD requires traders to disclose the parameters that lead to the search results shown to the (potential) consumer on their websites. In addition, the new point 11a of the UCPD Annex I (blacklist) now expressly prohibits undisclosed paid advertising in search results.

Paid placement in search engine results can affect the behaviour of potential buyers, many of whom would have a natural tendency to select the first results. Information on the default ranking parameters could induce the consumer to try alternative ways of searching for offers, if made available by the search provider, thus arriving at different top-ranked products.

### 2.2.1.2 Presence of information on a personalised price – 2b

Having access to consumers’ personal data (which can include past web searches), enables traders to have extensive knowledge about the preferences and willingness to pay of individual consumers. They may use this knowledge to offer consumers personalised (higher) prices on items they are likely to be especially interested in. In the absence of transparency about the fact that personalised pricing is occurring, consumers would not be able to take an informed transactional decision.

### 2.2.1.3 Online consumer reviews – 2c

Traders are also obliged, by Article 7(6) of the UCPD, to provide information about whether and how they ensure that consumer reviews on their website or app originate from real consumers who have bought and/or used the product. Moreover, the new points 23b and 23c of the UCPD blacklist prohibit traders, including sellers, brand owners or manufacturers, from posting fake reviews that promote their own products. All traders that collect and give access to reviews, in particular online platforms, are also prohibited from presenting the reviews they host as consumer reviews when they do not take adequate steps to ensure that they originate from real consumers.

Online consumer reviews and ratings assess the perceived quality of the goods and services. They reflect the subjective experience of the consumers using goods and services, such as accommodation, providing detailed and valuable information for their peers that would not be available otherwise. Fake reviews influence consumer behaviour.

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<sup>1</sup> It does not apply to traders that provide their consumers with a possibility to search only amongst their own offers of different products, nor does it apply to search engines.

The Commission's latest sweep on online consumer reviews in 2021 showed that 71% of consumers consider reviews as important when choosing holiday accommodation.<sup>2</sup>

## 2.2.2 Methodology for the sweep

### Step 1 – Prepare the appropriate profile

This sweep concentrated on comparing the rankings provided following product searches on selected websites per Member State, as well as the presence of personalised pricing and the presentation of consumer reviews. Researchers were asked to undertake two searches in each instance:

- **Normal sweep** - The first one using their usual browser, while signed into the accounts and websites they use on a regular basis (Google, Facebook, X (formerly Twitter), if relevant the website' researched etc.).
- **Clean sweep** - For the second one, the researchers used a VPN locating them in the same country, making sure they were logged out of all accounts and performed the searches on a browser they never use and cleared of cookies before each search.

The researchers undertook the searches immediately one after the other to ensure maximum comparability.

This method was devised to ensure that the sweep allows to observe differences in the ranking of results, the presence of personalised pricing and the presentation of consumer reviews. Having the researcher use a clean browser and a VPN ensures that cookies and other information linked to the users' past habits and ISP were not taken into account in the second search.

### Step 2 – Website selection

The website/app categories that were covered included e-commerce and travel websites as illustrated below:

France	Germany	Hungary	Italy	Poland	Portugal
idealo.fr	Mydealz.de	argep.hu	idealo.it	skapiec.pl	kuantokusta.pt
ledenicheur.fr	Giezhals.de	olcsobbat.hu	bizrate.com	okazje.info.pl	custojusto.pt
lemeilleuravis.fr	Coolblue.de	guentiger.de	laptop10.it	najlepszy-ranking.pl	portaldaqueixa.com
Amazon.fr	Amazon.de	arukereso.hu	trovaprezzi.it	allegro.pl	olx.pt
leboncoin.fr	Idealo.de	Arukereso.hu	Amazon.it	ceneo.pl	worten.pt
Fnac.com	Ebay.de	Jofogas.hu	Subito.it	olx.pl	nit.pt
Airbnb.fr	Airbnb.de	szallas.hu	Airbnb.it	airbnb.pl	airbnb.pt
Hotels.com	Fewo-direkt.de	airbnb.hu	Trivago.it	profitroom.com	trivago.pt

Romania	Spain	Sweden	Estonia	Global
fruugo.ro	idealo.es	pricerunner.se	hinnavaatlus.ee	Booking
shopmania.ro	tiendas.com	autouncle.se	photopoint.ee	hotels.com
price.ro	electrocosto.com	ubuy.com.se	hansapost.ee	amazon.com
emag.ro	milanuncios.com	blocket.se	kaup24.ee	aliexpress.com
olx.ro	elcorteingles.es	prisjakt.nu	go3.tv	etsy.com
compari.ro	wallapop.com	amazon.se	euronics.ee	0
travelminit.ro	airbnb.es	airbnb.se	novatours.ee	0
directbooking.ro	trivago.es	ving.se	estravel.ee	0

<sup>2</sup> Sweep available at: [https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/sweeps\\_en](https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/sweeps_en)

### Step 3 – Search

For this sweep, the interest lied in whether some results were placed higher on the result page than others and the transparency of these results, the presence of personalised pricing and the presentation of consumer reviews. Furthermore, the sweep sought to see how information is provided about the main parameters of the search ranking, in compliance with the Modernisation Directive.

The search included two types of products:

**1. Commoditised products**, where consumers may not specifically look for a brand, but simply the product itself. Based on our research of popular products on e-Commerce websites which can be considered commoditised, the researchers were asked to search for five products in order to **ensure they collect information for three**:

- Mobile phone case iPhone 13
- FFP2 mask
- BPA-free water bottle
- Travel hair dryer
- Front bicycle light

**2. Specific products.** A second approach, to identify undisclosed paid promotion in search results, was to search for specific products. This was done to help identify instances where a product of the same category as the one searched for but of a different brand or make was placed higher up the list of results. If a top result was the same product category from a different brand and not presented as “advertisement” or similar, there could be reason to conclude that an undisclosed paid advertisement had been used.

In those cases, the five products were:

- Vacuum cleaner (Dyson V8 Absolute Bag & Cordless Vacuum Cleaner incl. 3 electric brushes with direct drive)
- Cycling tool (Topeak TT2583B Mini PT30 Multitool Black 7.4 x 4 x 1.9 cm)
- Baby and toddler product (BABYBJÖRN Baby Carrier Mini, Cotton, Black)
- Luggage (Samsonite S’Cure Spinner 75/28, Black)
- Pet feeder (Balimo Paul Automatic Feeder for Cats and Dogs, 4 L Automatic Feeding Dispenser with Stainless Steel Bowl, Automatic Cat Food, LCD Screen, Automatic Feeder Cat, Programmable Timer)

For both types of searches, the researcher was asked to add different commoditised and specific products at their discretion where the ones on the list were not available.

For **accommodation** websites, the researcher was asked to look for a room for one weekend in:

- The capital city
- Close to a touristic destination in the country.

### Step 4 – Result collection

The researcher then collated information on specific questions.



## 2.2.3 Results

### Transparency of the ranking of search results/ disclosure of advertising and paid ranking – 2a

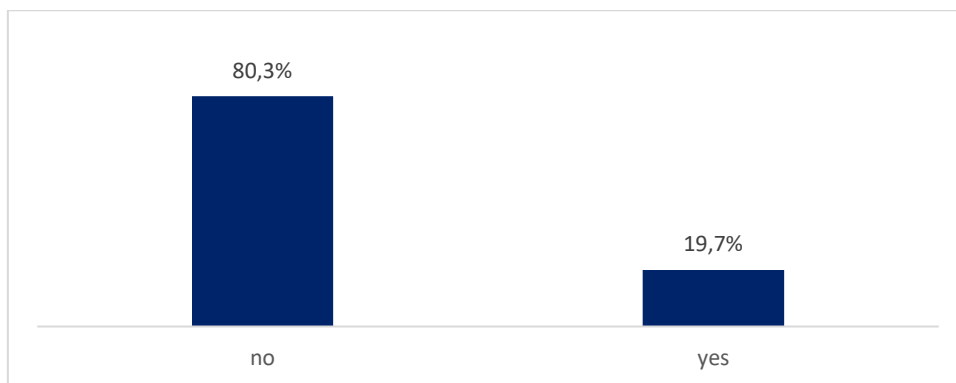
#### ***What is the method used for identification of paid placement (i.e., labels such as “Ad” – how prominent are they for consumer?)***

A total of **414 searches** were undertaken, exactly half using the “normal search setting”, and the “clean” one, using a VPN.

Fourteen percent of the searches returned search results for which the top products displayed were labelled by the marketplace ‘ad’ or ‘sponsored’.

In over half of the searches (56.4%) on 47 websites (out of 85), none of the result presented paid placement. **In one fifth of search cases (19.7%, 15 out of 85 websites), some form of paid placement was identified.** In the remaining 80.3% (70 websites) of cases, the researcher could not find reference to the presence of paid placement.

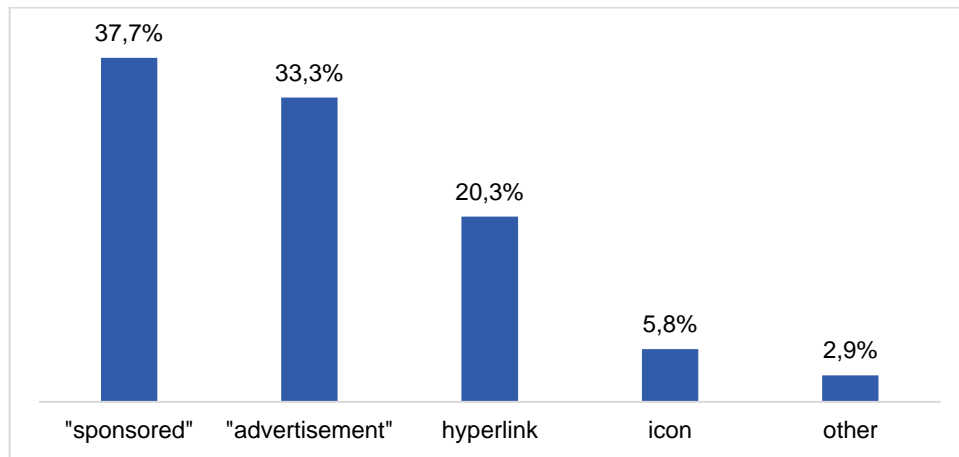
**Figure 4: Paid placement identified by the researcher (n=414)<sup>3</sup>**



In the 19.7% of cases where paid placements are indicated, they were generally marked as ‘**sponsored**’ (37.7% of results), or ‘**advertising**’ (33.3% of cases). Other methods of identification included an icon (see figure 6 below) or a link to click, which either brings the user to a different page providing information, or text stating that the result was sponsored appearing when hovering the mouse on top of the icon (26.1% of cases). Finally, in 2.9% of cases, the method used was different.

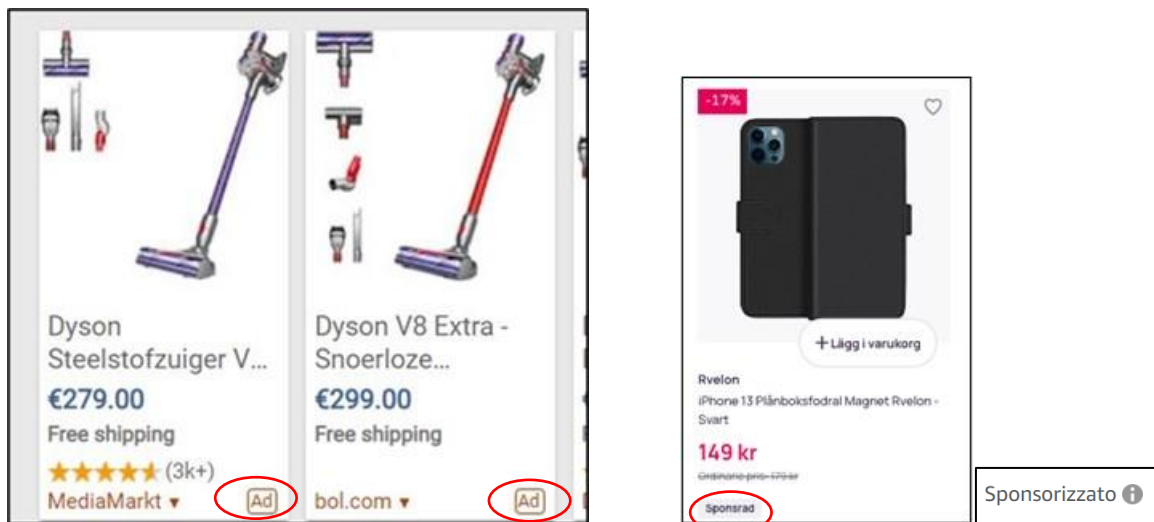
<sup>3</sup> N refers to the number of searches performed

**Figure 5: How is the paid placement identified (what method used) by the researcher (n=69) covering 15 websites**



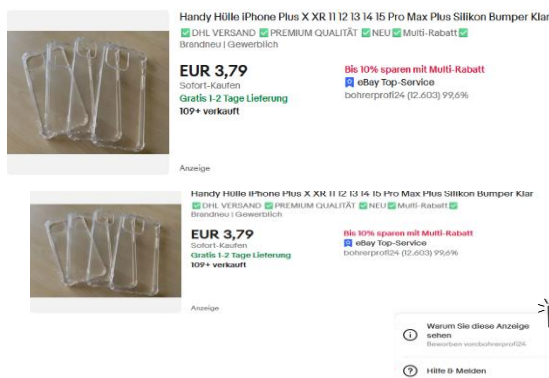
The figures below provide examples of methods used to indicate paid placements.

**Figure 6: Examples of methods used to indicate the paid placement.**

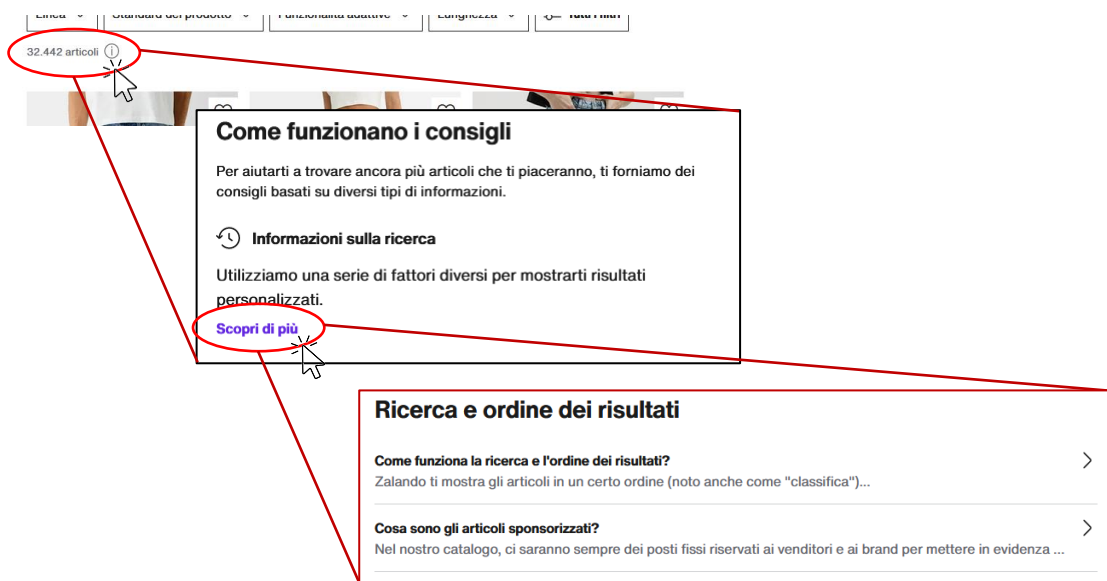


*'ad' indication*

*'sponsored' indication*



*'click'*



*'link to click'*

### ***Did the two types of searches lead to different search results – possibility of undisclosed paid advertising?***

In over a quarter of the searches (28.1%) on 34 websites the results stemming from the two types of searches were different. The way in which those results differ varied. In some cases, the (first four or eight) results are similar, with the remaining ones being different. In other cases, the order in which the results are presented are different throughout the results page. Finally, on 80% of websites (61 of the 85 websites) sites, the clean search comprised no results marked as sponsored whereas as the normal search included such results. The results page was different for the two searches.

### ***Are there any general indications [statements] by website providers that payments generally influence the ranking – how prominent/ accessible are those for consumer? How easy to comprehend is it for consumers?***

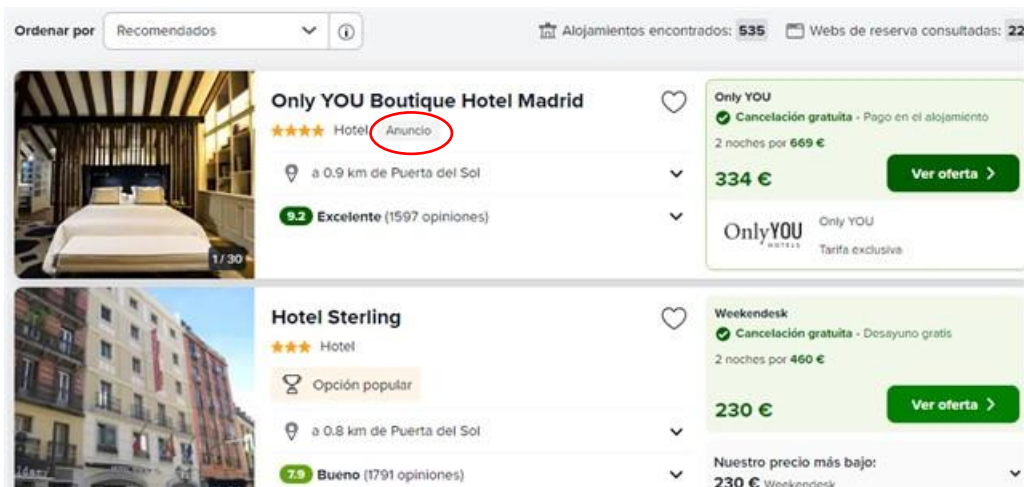
Information on whether payments had been used to influence the ranking of searches was generally provided at the product level (i.e. indicated next to a product or products on the search result page), or in the general terms and conditions section of the websites.

A minority of websites (16.9% of searches, or 21 out of the 85 websites) provided general information that payments influence the order and ranking of the results on **the result page**. In 74.7% of cases, or 53 out of the 85 websites, **the terms and conditions** provided information about the fact that payment had influenced the search results. Comparing this figure with the number of results for which paid placement was identified appears to indicate either that some marketplaces provide information on paid placement in their terms and conditions without actually always using it, or that paid placement is not clearly indicated on the search results page.

The way in which this information is displayed varied:

- In some cases, the information can be found by clicking a small 'i' next to the search results for each individual search concerned;
- In other cases, the user has the option to click on a link to get more information on the products listed on the result page.

Figure 7: Example of button allowing users to get more information on whether payment influence the ratings.



## résultats (1 368)\*

[Plus d'information concernant ces résultats](#)

In general, researchers reported that while information was made available, it was generally not clearly indicated on the search results page. Users looking for specific information are likely to find it (in the terms and conditions), but the influence of payment on ranking is generally not clear on **the results page**. Where results are sponsored, the indication is made in a dull colour (such as grey) and the results are presented in the same way as other results.

Ten out of the 85 websites screened provided information to the user on the use of paid placement in the ranking at the **search result level**. This information took the shape of:

- a hyperlink to click, which leads to the terms and conditions of the ranking, or
- information at the end of the search result page.

***Are consumers provided information about the main parameters that influence the default ranking of search results – how prominent is it? Are there options to change the default ranking criteria (e.g., search by lowest price rather than “most relevant”)?***

In only **27.2% of searches** (or 35% of websites – 30 out of the 85 websites), the consumer was **informed about the main parameters** influencing the default search result rankings. Furthermore, in large number of websites (29) the results are presented by ‘relevance’ as default. On all websites, the researcher was given the opportunity to change the ranking (by price, date added, highest reviews etc).

When information on the ranking of the results was presented; they were generally clear but lacked focus. The general principles were provided (ranking based on the products searches, popular products, or against remuneration from partners), but the exact way in which the ranking was done, i.e. the algorithm or the data used to provide the ranking was never explained or provided.

***Is there any warning about personalised ranking visible when undertaking a search?***

Throughout the sweeps, none of the researchers were warned when undertaking a search that that personalised rankings were applied.

***Are the consumers informed (in relevant sections of the website) that targeted advertisements are used and how? Are the consumers informed that personalised***

***recommendations are used and how? Are the consumers offered the option of obtaining non-personalised advertisements/recommendations. If yes, how?***

In approximately three quarters of the searches (74.7%) on 53 websites, a section of the website provided information on the use of targeted advertising and personalised recommendations. The information was located either in the ‘terms and conditions’, or in the cookies policy (or a section called “how cookies are used”). The information provided generally covered the use of cookies or personal information in general, therefore covering both personalised advertising and recommendations.

The way in which the information is provided appears to present the use of targeted advertising in a positive light. Examples of wording used include:

- This Application uses Cookies to save browsing preferences and to optimize the User's browsing experience (DE4);
- We use targeted, or marketing, cookies to personalise your browsing experience [...] to personalise [our website's] content [...]. Some targeted or marketing cookies are stored by external advertising partners (third party cookies), e.g., to personalise your website, personalise your shopping experience, personalise your website and personalise the use of [our website] (EE1);
- By using cookies, we can provide you with a better experience on the website, for example, cookies help [...] to provide offers and marketing messages more adapted to the user's needs.[...] to provide offers and marketing messages more tailored to the user's needs (EE9);
- Targeting or advertising cookies are used to serve ads that are relevant to the user's interests and to limit the number of times an ad is seen (HU4);
- We use cookies to suggest products and services aligned to the user's preference (IT8);
- Personalised information is used to make the user's visit to the website as productive as possible (PT1);
- Through cookies for personalization, we receive information about how you interact with the Website, such as your purchase history, in order to be able to offer you a more relevant experience of the Website adapted to your preferences (SE24);
- We use cookies to carry out commercial actions (...), management of the services offered through the website, being able to carry out automatic evaluations, profiling and customer segmentation tasks with the aim of personalising treatment in accordance with their characteristics and needs (ES26).

When the explanation of the use of cookies is in the cookie policy section, the user has the option to turn off cookies (as well as when first browsing on the website).

***Are the researchers coming across any personalised ads or other personalised messages that are exploiting their vulnerabilities (e.g., health issues, family concerns, financial difficulties)?***

Throughout the sweeps, none of the researchers were exposed to personalised ads or other personalised messages that are exploiting their vulnerabilities (e.g., health issues, family concerns, financial difficulties).

***Conclusion***

The sweeps of the e-commerce, price comparison and accommodation websites found that paid placement in search results is used and clearly indicated in approximately 20% of searches on 15 websites. However, in **only 27.2% of searches** (or 35% of websites – 30

out of the 85 websites), the consumer is informed about the parameters influencing the search result rankings, whereas a high share (29 out of the 30 websites) of websites use default ranking by 'relevance'.

The number of websites stating that they make use of paid advertising for ranking purposes, and the observed number of instances where paid placement was identified appears to indicate either that some marketplaces provide information on paid placement in their terms and conditions without actually always using it, or that paid placement is not clearly indicated on the search results page.

Personalisation appears to be commonly used by the websites. The results show that websites generally **disclose of the use of these personalised practices**. However, the information is generally not very accessible to the user, except if they are specifically looking for it.

### Presence of information on a personalised price – 2b

#### ***Are there differences between the prices offered via the two alternative searches and what are they?***

As explained in detail above, the researchers were asked to undertake two distinct searches:

- A **normal search** using their usual browser and being logged in their accounts (google, twitter, Facebook etc), as well as accepting cookies and, where possible logging on the website on which they were undertaking the sweep
- A **clean search**, using a browser they do not generally use and for which they would have deleted all cookies after each search. Furthermore, the researchers were asked to use a VPN still locating them the country in which they undertook the search and to reject all cookies when accessing a website.

Researchers found **12 products on 10 sites (out of total 207 products on 85 sites)** where the price offered diverged when accessing one and the same product from a 'clean' browser (via VPN with all cookies and personal identifiers deleted) and a 'normal' browser (where the accessed website could get personal information about the user). This means that price difference - apparent **personalised pricing - was identified for 6% of total products**. Nine of these products were identified on e-commerce websites, two on price comparison sites and one on an accommodation website. In the majority of cases (9), the normal search actually resulted in a cheaper product whilst the 'clean' search led to cheaper offers in two cases, as illustrated in the table below.

**Table 3: Instance where the price offered to the user differs as part of the clean and normal searches.**

Country	Type of website	Cheaper product	price difference
Germany	Price comparison	Normal search	EUR 30.10 – EUR 50.89
Germany	Price comparison	Normal search	EUR 13.99 – EUR 25.98
Hungary	E-commerce	Normal search	HUF 4,199 HUF 7,090
Italy	Accommodation	Normal search	EUR 199 EUR 295
Italy	E-commerce	Clean search	EUR 12.99 EUR 13.49
Romania	E-commerce	Normal search	Lei 35 – Lei 50

Country	Type of website	Cheaper product	price difference
Romania	E-commerce	Normal search	LEI 20 – Lei 50
Romania	E-commerce	Normal search	LEI 1500 – LEI 1540.16
Sweden	E-commerce	Normal search	SEK 1029 – SEK 1160
Sweden	E-commerce	Normal search	SEK 88 – SEK 398
Spain	E-commerce	Normal search	EUR 900 – EUR 950
Spain	E-commerce	Clean search	EUR 55 – EUR 60

In none of the cases where the price differed was there any indication – when accessing the product with the ‘normal’ browser – that personalised pricing was used. The terms and conditions or cookie policy section of the website did not include any indication that personalised prices were used either, beyond the general explanations on the use of cookies described above.

### Conclusions

The sweep results suggest that personal information is sometimes used to offer **different prices** to different users. Interestingly though, in most cases where this was identified by researchers, the search using personal information returned a lower price than the one made in a more anonymous way.

### Online consumer reviews – 2c

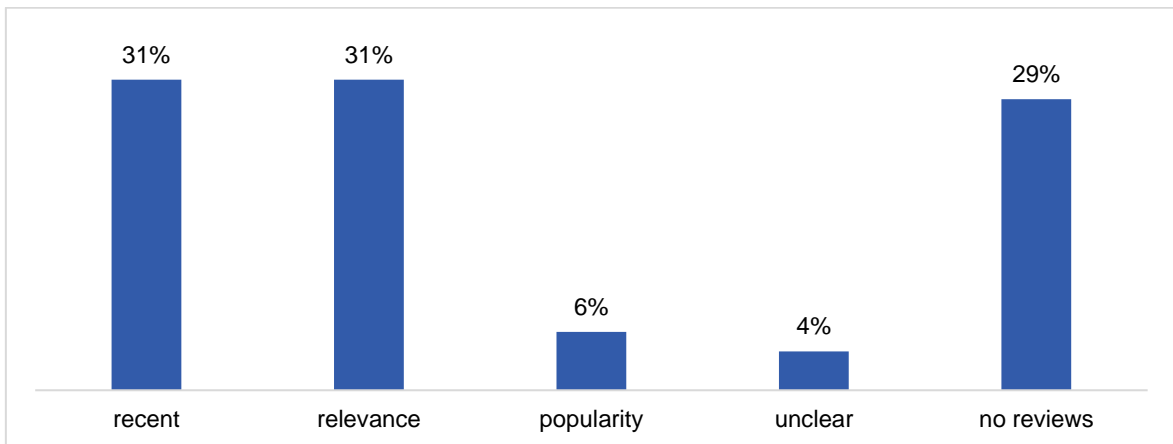
Online consumer **reviews were present on 52 of the 85 websites** screened.

The reviews were located on the product page and presented as user or consumer reviews. In the case of all e-commerce websites, it appears that the reviews were from verified users (i.e., those whose have purchased the product). While this was not always made obvious, there was no possibility to add a review directly on the website. This appears to indicate that only users having purchased the products are invited to leave a product review.

The sweep did not return any findings on the existence of **incentivised reviews**. One caveat is that it is likely that incentivisation would emerge only when the user is asked to provide a review, thus after a purchase and was beyond the scope of this sweep.

The way in which the reviews for a given product were **ranked** varied between websites. the majority of sites displayed the reviews in chronological order, with the most recent first (42.1% of products on 16 sites, or 31% of websites allowing for review to be posted). Reviews were displayed in order of “relevance” in 38.8% of products on 16 websites (or 31% of those allowing for review to be posted) without further explanation of this parameter. In 10.1% of products (on three websites), reviews were displayed by “popularity” (presented as being based on user feedback about the usefulness of the review). Finally, in 9% of cases (2 websites) there was no clear explanation of how the reviews were ranked. The remaining 15 websites did not display any reviews (despite allowing them). It was therefore not possible to assess the way on which they were ranked.

**Figure 8: How are reviews ranked by default (n=52 websites for 277 products)**



The definition of ‘relevance’ was not explained on any of the websites using it as default criterion for presenting the reviews.

**Figure 9: Examples of how reviews are displayed and ranked**

**9,4/10 Exceptionnel**  
127 avis vérifiés  
Avis vérifiés ⓘ

Propreté 9,8/10  
Personnel et service 9,5/10  
Équipements 9,0/10  
Infrastructures et conditions de l'hébergement 9,5/10  
Écoresponsabilité 9,5/10

**Types de voyageurs**

- Couples
- Célibataires
- Voyageurs d'affaires

**6/10 Bien**  
17 mai 2022  
sejour decevant car le deuxième jour la chambre n'a pas ete préparée et donc ni refaite ni nettoyée ce qui est inadmissible!!!! A déconseiller fortement  
🇫🇷 Jacky, séjour de 2 nuits  
Avis voyageur Hotels.com vérifié

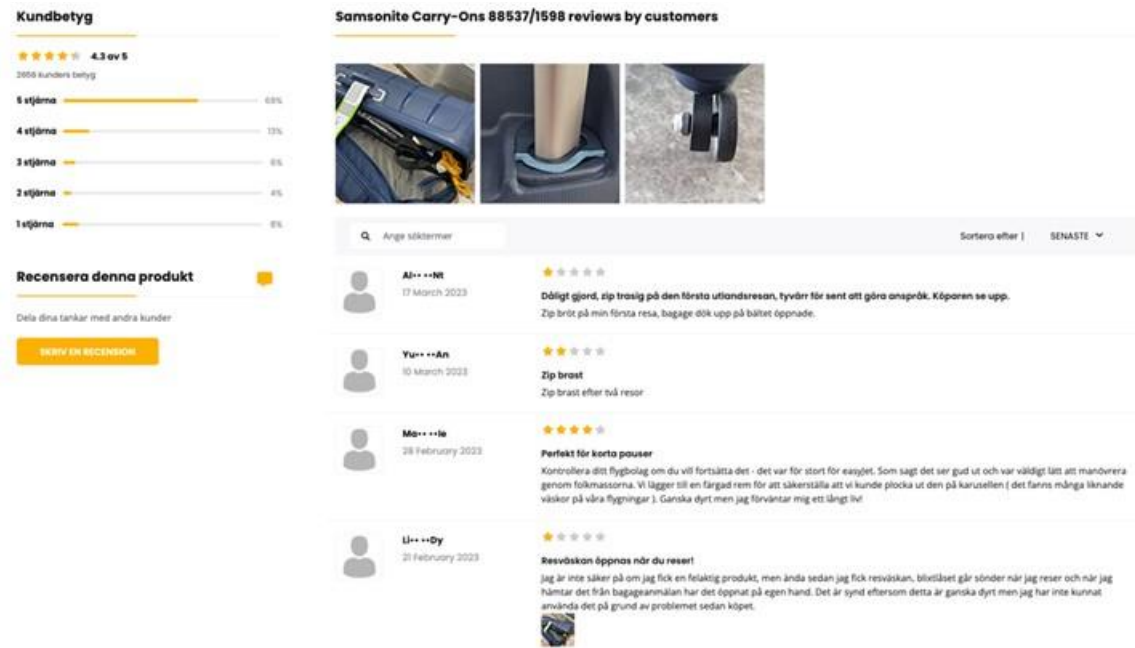
**Réponse de Florence le 18 mai 2022:**  
Chère Jacky, Nous vous remercions de votre commentaire et d'avoir pris le temps de nous faire part de vos remarques. Nous sommes sincèrement désolés que votre expérience lors de votre dernière visite n'ait pas été à la hauteur de vos attentes. Nous ne sommes pas rentrés dans votre chambre le deuxième jour car celle-ci avait été mise en "Do not Disturb". N'hésitez pas à nous remonter cette information quand vous êtes à l'hôtel la prochaine fois afin de vous apporter une solution dans les plus brefs délais. Nous espérons vous accueillir dans un futur proche. Restant à votre disposition, Florence

**10/10 Exceptionnel**  
6 mars 2022  
🇫🇷 Alexander, séjour de 3 nuits  
Avis voyageur Hotels.com vérifié

Trier par  
Les plus pertinents

*Reviews presented by ‘relevance’*



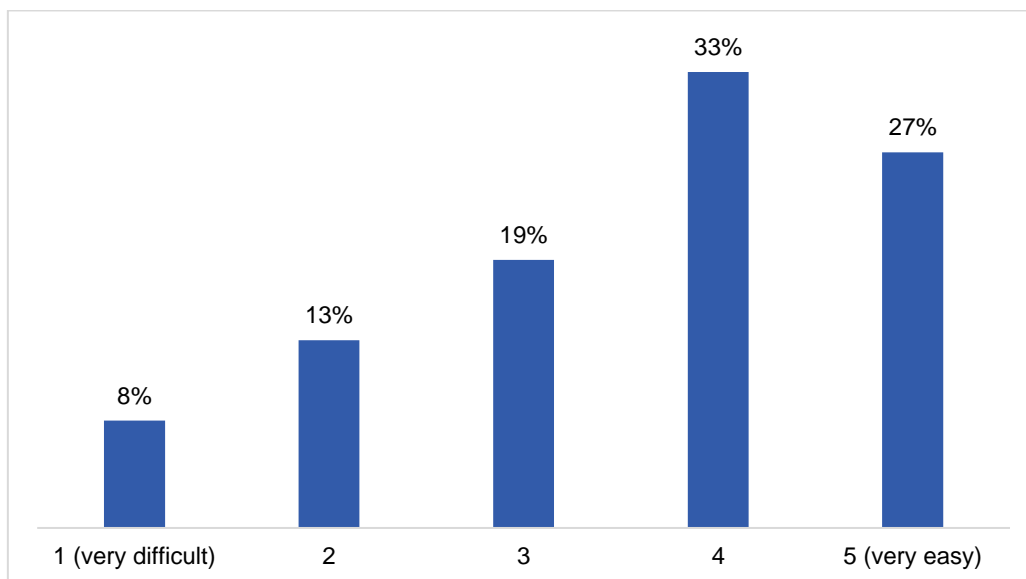


Reviews presented by 'date'

On all websites hosting the reviews, the seller is given the opportunity to respond to the user who left the review.

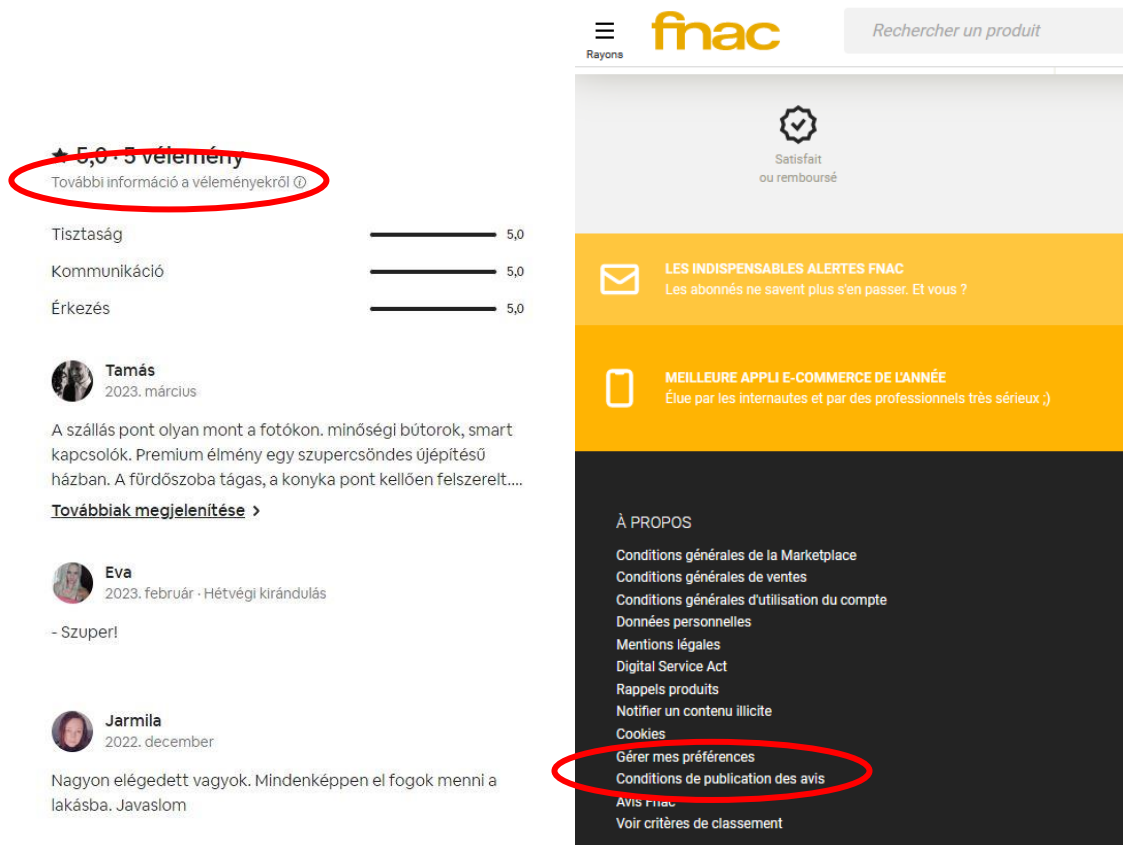
Among the **52 websites** allowing consumer reviews, exactly **half of them (26) provided information on the use and processing of the reviews**. On none of the websites did the research report the possibility to add a review without purchasing the product. It was always presented in the terms and conditions of the website. The link could either be accessed via a link located close to the reviews or through the general 'small print' of the websites (i.e., by scrolling to the end of the page and clicking on the T&Cs section). Researchers found it easy of very easy to access the relevant terms and conditions for 31 websites (representing 60% of those allowing for customer reviews to be posted).

Figure 10: How easy is it to access information on reviews (n= 26)



The link was labelled in different manners, ranging from a link clearly provided with the reviews, inviting the user to click if they were looking for addition information, to no information at all, with only the general T&Cs available on the websites, not linked to the reviews.

**Figure 11: Examples of easy and difficult cases to access information on reviews**



“more information on the reviews”  
On the product page, alongside reviews

“condition on publishing reviews”  
at the end of the website (after scrolling down)

## Conclusion

Online consumer reviews were present on 52 of the 85 websites screened. It appears that in all cases, the reviews are from verified users (i.e. those whose have purchased the product). While this is not always made obvious, there is no possibility to add a review directly on the website. The sweep did not return any findings on the existence of incentivised reviews.

In roughly one third of cases (31% each), reviews are presented by most recent, or by most relevant by default. The latter is a particular issue given that the definition of ‘relevant is unclear. Even in cases where there is further explanation on the ranking of reviews, only general statements are made on the relevance of the reviews, without given specific explanation of how the information is collected.

Additional information on reviews, how they are collected, are generally easy to access, even though, in some cases, the user has to refer to the general T&C links or the website, without any specific information linked to or close to the reviews.

However, it must be stressed that among 52 websites allowing consumer reviews, **only half of them (26)** provided information on the use and processing of the reviews.

## 2.3 Manipulative or opaque personalisation practices

Having access to consumers' personal data (through search history, cookies etc), enables traders to have a lot of knowledge about the preferences of individual consumers. There is a risk that this knowledge may be used to the traders' advantage and put consumers in an unfavourable position. Potentially problematic personalisation practices include personalised advertising, commercial offers and recommendations that exploit specific vulnerabilities of consumers that the trader knows about through their data (e.g., health issues, negative mood, financial situation). The aim of this sweep is to spot examples of consumer vulnerabilities being exploited. For example, when searching for financial services related information or mental health related materials, or when browsing specific apps, such as social media, dating, gambling websites/apps etc.

### 2.3.1 Methodology for the sweep

In each country, the researcher followed a detailed process set out below.

#### Step 1 – Prepare the appropriate profile.

The challenge with this sweep was to ensure the researcher showed vulnerabilities. As such, each sweep session started with the researcher logging on with a VPN and spending 15 minutes opening an Instagram and twitter account before searching the two largest search engines in the country for results which may suggest a vulnerability, including:

- “payday loans”, “quick loan”;
- “depression”, “low morale remedies”;
- “divorce”, “how to deal with grieving”.

This process was undertaken to ensure that information was collected by the websites visited and the accounts used and built a picture of vulnerability of the user in specific areas (financial distress, low morale / depression, and family issues).

#### Step 2 – Website selection

The website/app categories to be covered included **dating and gambling** applications as illustrated below:

France	Germany	Hungary	Italy	Poland	Portugal
Meetic.fr	Joyclub.de	Tinder.com	Bakecaincontriim.com	badoo.com	tinder.com
Badoo.com	Finya.de	Randivonal.hu	Badoo.com	fotka.com	badoo.com
Jecontacte.com	Tinder.com	Badoo.com	Tinder.com	tinder.com	felizes.pt
unibet.fr	tipico.de	tippmix.hu	888casino.it	sts.pl	betano.pt
flashscore.fr	jackpot.de	ivibet.com	giocaonline.it	betclik.pl	betclik.pt

Romania	Spain	Sweden	Estonia	Global
sentimente.ro	tinder.com	happypancake.se	Date.hot.ee	leovegas.com
tinder.com	badoo.com	tinder.com	Delfi Date	unibet.com
badoo.com	meetic.es	badoo.com	Flirtic.ee	bet365.com
888casino.ro	juegosonce.es	unibet.se	AmoreMi.ee	
superbet.ro	bet365.es	atg.se	neanky.ee	

### Step 3 – Search

Once this had been done, the researcher browsed the websites in the table above for 15 minutes, on social media platforms navigating through their social media feed. This was followed by 15 minutes browsing of dating applications and gambling sites.

### Step 4 – collect the results

The researcher then collated information on specific questions.

## 2.3.2 Results

***Do the advertisements presented to the user appear to be linked to the vulnerabilities of the user based on the searches undertaken in step 1 or any other vulnerabilities or sensitive data related to the user (e.g., gender, health issues, sexual preference, political beliefs)?***

The researchers were subjected to advertisement in 52% of cases. None of the gambling websites display ads. They display internal promotions (deal of the day, etc) but no outside ads. Given the researchers were not asked to use money in order to gamble, it could be that ads are only displayed once they start playing the games with money. In the case of dating websites; some appear very clean and professional at the beginning with no ads displayed, but as soon as the researchers created an account and browsed, ads started appearing. It may be that the same applies to gambling websites.

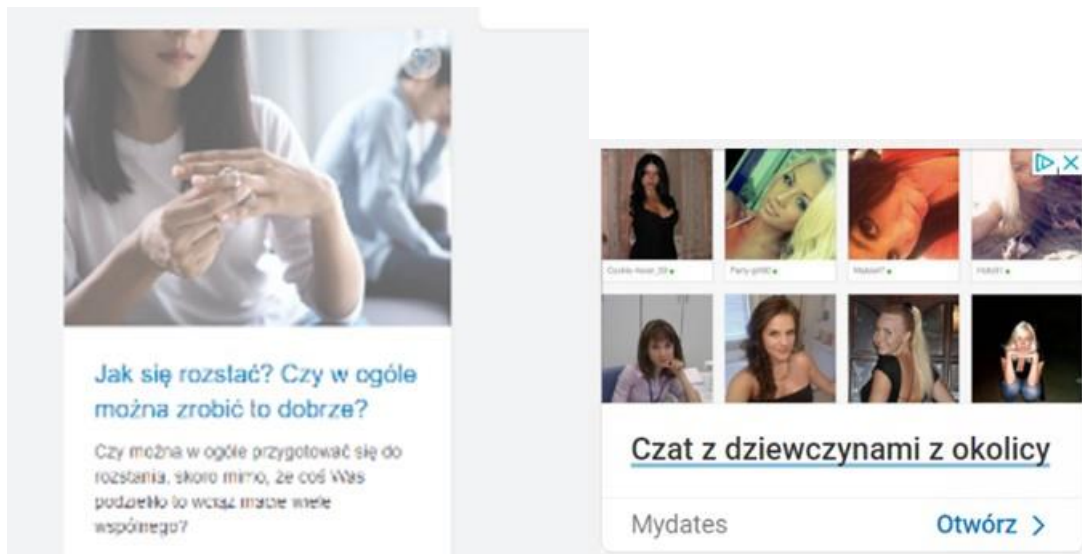
Researchers found that in **42% of cases where adverts are shown, the ad displays were for products or services linked to the vulnerabilities the user searched in the first step.** Whether this is due to the search itself or the nature of the website cannot be determined.

In the majority of cases, there was a mix of generic and targeted adverts. The general ones tended to be professional displays (see Figure 12), while the targeted one appeared to be generated ad hoc and without displaying the graphic design know-how that non-targeted ads do, as shown in Figure 13.

**Figure 12: Example of professional non-targeted ads.**



Figure 13: Example of targeted ads.



*How to break up? Is it possible to do it well at all? Is it possible to prepare for a breakup at all, even though something has been said to you and there is still a lot of conflict?*

*Chat with girls from the area*

This is a promotional advertisement for CIB BANK. It features the CIB BANK logo and the text: "Már hitelkiváltásra is, induló költségek nélkül igényelhető" (Now available for loan replacement, without initial costs). Below this, it lists "Törlesztőrészlet" (Monthly payment) as "61 138 Ft/hó" and "THM" (Annual Percentage Rate) as "14,45%". There is an orange button labeled "Részletek" (Details).

*Advert of loan mad available ‘ canals oba approved for credit approval, without initial costs, (HU)*

This is an advertisement for ABB, an industrial partner. It features the text: "ABB, le partenaire industriel" (ABB, the industrial partner). Below this, it says: "Réduisez jusqu'à 20% sur votre facture grâce à nos compteurs d'énergie" (Reduce up to 20% on your bill thanks to our energy meters).

*Advert on France dating website ‘Reduce your energy bill by up to 20%’*



**Many girls, chats, photos**

Beautiful Women Seeking Older Men. Join now Asiavibe

Open



Advert (in English) on Estonia dating site

ANNONS

There are many gambling sites out there and it can be difficult to find the right casino. Compare [online casino at Casinofeber](#) today!  
Want to know more about casino without a license? Visit [OCS](#) today.  
Find the best games with [casino without a Swedish license](#) now.  
Go in and [compare online casinos at Goplay.se](#) if you are interested in games online.  
All info about each [casino without a Swedish license 2022](#) can be found in the link here.  
There are several [casinos without a Swedish license at Casinoutankonto.net](#) to read about.

Advert on Swedish dating site



**Rencontres des + de 50 ans**

Rencontres amoureuses réservées aux + de 50 ans.

Visiter le site

Advert on French dating app -

Meet over 50s – meet love, reserved for those over 50.

**What vulnerability appeared to be triggered? What types of personal data and in particular sensitive data may be involved?**

Researchers reported that some of the adverts which they were subject to did appear to relate to one of the vulnerabilities they had searched for initially. The adverts appearing most regularly were for ‘meeting’ people of the opposite sex, or loans. These ads appeared after searching respectively relationship and money problems. In some cases, it is

potentially unsurprising that these types of adverts appear on specific websites. For example, ads about meeting people of the opposite sex appeared on dating websites even after the researcher had done a search on money problems. In other instances, the ad appears very targeted to the vulnerability searched. One example is an ad on *How to break up? Is it possible to do it well at all?* shown after searching for solution to relationship problems. This type of ad did not appear after searching for other types of vulnerabilities. These results are anecdotal however, as there is no statistically significant comparison to be made. The table below provides examples of reporting by researchers.

***Are there any warnings or explanations about personalised advertising, recommendations, offers or prices visible on the website/app?***

None of the websites swept provided an explanation of personalised advertising or recommendations used upfront. However, in most cases, users are provided with basic information that the website concerned uses personalisation practices, without any specific information about how this is performed, or the criteria used. In 78% of websites, users are informed that the user has been shown personalised adverts, and the share was the same for the use of personalised offers. In 88% of cases, the websites contain information about the use of personalised recommendations.

The wording used to inform the user on the utilisation of personalised practices is normally very general and focuses on the potential benefits to the users rather than the risks to their privacy in the use of these practices. Examples of wording used include: “cookies are used to make our advertising messages more relevant to you” (HU1, dating website). Other examples are provided in the table below.

**Table 4: Examples of wording used in the terms and conditions**

Website code and type	Wording used
PL1 dating	data can be used for profiling in order to display advertisements that suit the user better.
PL2 dating	may be used to build a profile of your interests and show you relevant adverts on our App and Websites or other Websites you visit, as well as to improve reporting on any advertising campaign and to avoid showing you ads that you have already seen
PL4 gambling	data is collected to perform [...] profiling and personalization based on interests, behaviour, activity, location of the user
IT3 dating	Website uses profiling cookies set by our advertising partners, used by the latter to build a profile of your interests, and show you relevant ads on other sites.
RO5 gambling	Cookies allow us to automatically collect information about you and your online behaviour, as well as your device [...], to improve your browsing of our Services, improve the performance of the Services and customize your experience on our Services. We also use this information to collect statistics about the use of our Services, to perform analytics, to provide content that is tailored to your interests.

In none of the websites was there an option to “turn off” personalisation practices. However,

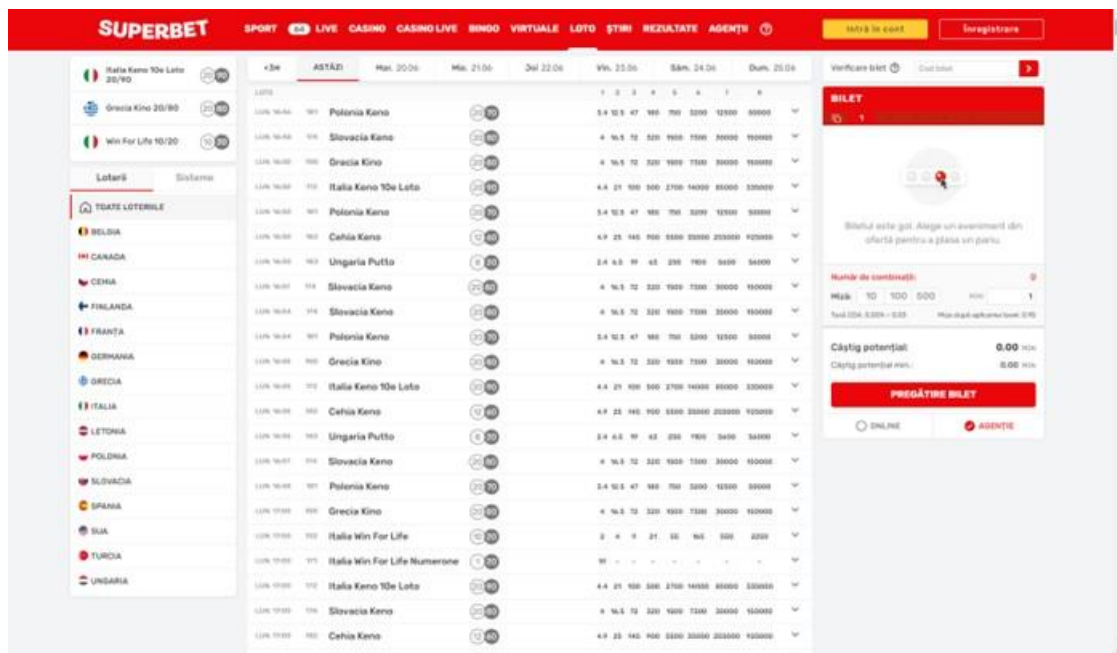
the acceptance of cookies was a question which was asked when first navigating on the website.

**Where was the ad/other commercial message placed on the website/app interface? Describe the look and feel of the practice.**

Websites which were part of the sweep vary from ‘clean interfaces’ to very saturated ones:

- **Clean websites** with only internal or not very visible ads (e.g., ads enticing you to get a paid subscription for the dating website for additional functionalities), or no ads at all. (see figure 14 below)

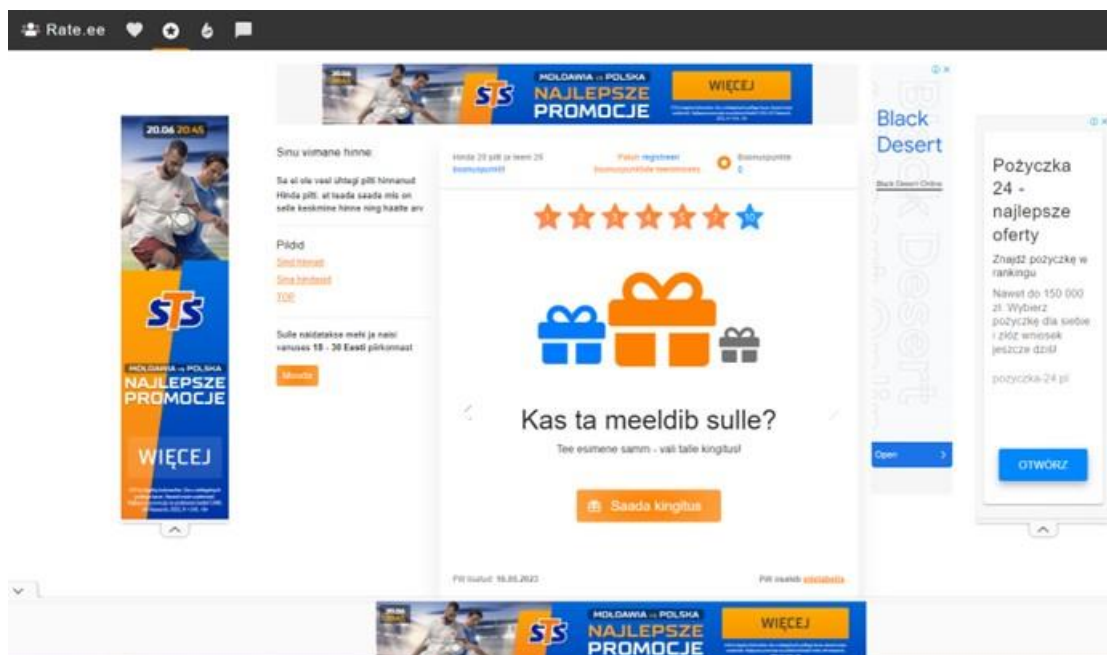
**Figure 14: example of ‘clean’ interface**



- **Saturated websites** (i.e., The webpage is saturated with them, with pop-up ads, banner ads, and sidebar ads (on both sides of the page) sometimes all together), see figure 15 below



Figure 15: example of a saturated website



Beyond the division between dating websites with a presence in numerous countries (which are clean, with no or limited ads) and the national websites (which often display ads) there also seems to be a **divide between the Western dating websites and the Central/Eastern ones (the latter are more saturated with ads)**.

The researchers did not identify or report any instance of 'confirm-shaming' or 'toying with emotion'.

### 2.3.3 Conclusions

In 42% of cases where adverts were shown, the displays broadly related to a vulnerability searched by the researcher in the first part of the sweep. The scope of the sweep does not make it possible to authoritatively conclude on whether the impressions were linked to the vulnerability searched or were generic impressions. The judgement of researchers is that at least in some cases, targeted ads appear to be generated ad hoc and do not display a high level of graphic professionalism. This appears to point to the use of manipulative practices based on users' vulnerabilities at least in some instances.

Most websites' privacy policy states that they use marketing cookies for targeted advertisement; however, many websites had no ads (on some sites, the researcher stayed up to 30 minutes browsing, going through 'likes' and clicking through all the functionalities and still no ads).

None of the gambling websites display ads. They display internal promotions (deal of the day, etc) but no outside ads. This could be because they are restricted and monitored but it could also be that the ads are only displayed once you start playing the games with money. For instance, some of the dating websites appear very clean and professional at the beginning with no ads displayed, but as soon as you create an account and start playing around, ads start popping up. It may be that the same applies to gambling websites.

## 2.4 Digital subscriptions

Consumers increasingly sign up for different digital subscriptions and face several issues, such as automatic renewal of contracts, providing payment information for activating a free trial and difficulties with cancellation. Currently the CRD only sets out pre-contractual information that must be presented to consumers and the UCTD establishes that traders should not use unfair contract terms that create a significant imbalance in the rights and obligations of the trader and consumer. The UCPD's provisions on misleading practices are also relevant in particular for trials that lead to 'subscription traps' and creating obstacles to subscription cancellations can amount to an aggressive practice.

Automatic renewal of subscriptions either after free trials or after the expiration of the initial contract may result in consumers paying for services they do not in reality want to use. Furthermore, if relevant information is not provided to consumers (in an easy and accessible way), they may not be aware of their 14-day right to withdrawal or how to cancel the subscription in the future.

### 2.4.1 Methodology for the sweep

In each country, the researcher followed a detailed process set out below.

#### Step 1 – Website selection

The website/app categories covered included publications, cooking websites, as well as dating and gambling applications. These websites were selected as the most popular (by traffic) in categories where subscriptions were available as listed by SimilarWeb. The full list of websites screened is listed in the table below.

France	Germany	Hungary	Italy	Poland	Portugal
meetic.fr	joyclub.de	astronet.hu	iflirts.com	zapisanisobie.pl	felizes.pt
jecontacte.com	finya.de	randivonal.hu	meetic.it	tvrepublika.pl	waplog.com
marmiton.org	ancestry.de	nosalty.hu	repubblica.it	wp.pl	sapo.pt
myheritage.fr	bild.de	Sorozatbarat.club	ciorriere.it	aniagotuje.pl	record.pt
lemonde.fr	brigitte.de	Videa.hu	giallozafferano.it	ofeminin.pl	pobre.tv

Romania	Spain	Sweden	Estonia	Global
sentimente.ro	meetic.es	happypancake.se	postimees.ee	Facebook.com
bestwap.ro	mobifriends.com	spadam.se	delfi.ee	Twitter.com
libertatea.ro	elmundo.es	dn.se	0	Instagram.com
jamilacuisine.ro	divinacocina.es	koket.se	cineb.net	Youtube.com
filmeserialeonline.org	recetasderechupete.com	arla.se	apollokino.ee	Netflix.com
				tiktok.com
				spotify.com

#### Step 2 – Review the information available to consumers in the pre-purchase stage

The researcher was asked to check what information was presented to consumers, take screenshots of the website, and collate the following results on the collection spreadsheet:

### Step 3 – Check if a free trial is offered

The researcher was asked to check whether a free trial was offered:

- If no, proceed with Step 5
- If yes, proceed, with step 4

### Step 4 – Try subscribing to the free trial

When subscribing to the free trials, the researchers answered a number of questions relating to pre-contractual information and free trial.

### Step 5 – Collect information from the website’s ‘small print’

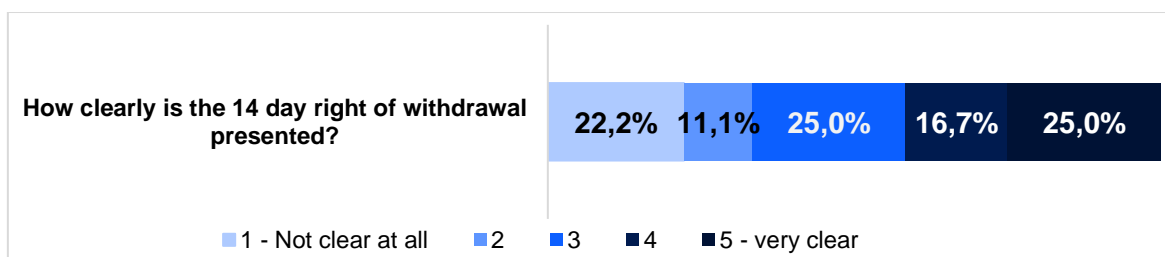
The researchers were then asked to look at the ‘small print’ (terms and conditions etc...) to identify whether any additional information is provided compared to the information available upfront.

## 2.4.2 Results

### Right of withdrawal

In 54% of the sweeps undertaken, the right to withdrawal was presented at the pre-contractual stage. However, the researchers undertaking the sweeps only deemed the information ‘clear’ or ‘very clear’ in slightly over 40% of the cases (41.7%).

**Figure 16: Clarity of the right of withdrawal (n=36)**



Information in the small print of the website is fairly similar, with the right of withdrawal ‘clearly or ‘very clearly’ presented in 44.4% of cases.

Examples of very clear and very unclear information on the right of withdrawal is presented in the figures below.

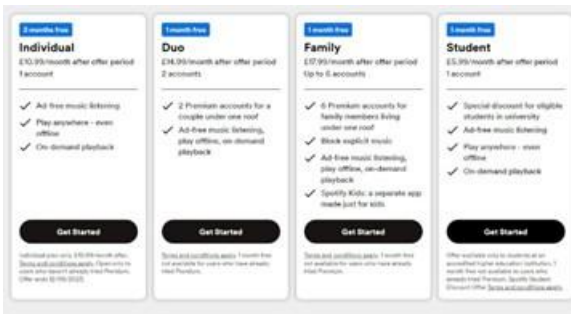
**Figure 17: Clarity of right of withdrawal information**

#### 6. Rétractation

En tant que consommateur/consommatrice, vous bénéficiez du droit de rétractation vous permettant d’annuler votre abonnement, sans indiquer de motif, à tout moment, jusqu’à 14 jours à compter de la date à laquelle vous avez effectué votre achat.

Cependant, et compte-tenu du Service, le démarrage de votre abonnement commence immédiatement avec votre accord, et vous renoncez expressément à exercer votre droit de rétractation dans un délai de 14 jours, conformément à l’article L221-28, 13 du Code de la consommation.

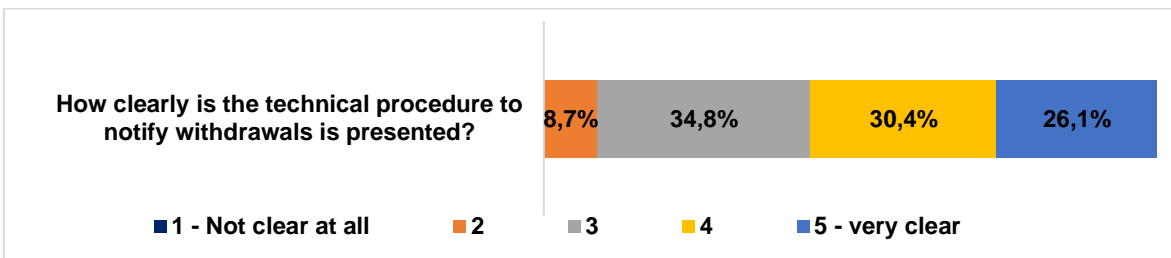
*Example of clear information (in the T&Cs) [translation: As a consumer, you enjoy a right of withdrawal, allowing you to cancel your subscription, without having to prove a reason any time until 14 days from the day you have made the transaction. However, and given the nature of the service, the start of you subscription starts immediately with your agreement, and you expressly decline to use your right of withdrawal after 14 days, in line with article L221-28, 13 of the Consumer Code]*



Example of unclear information (difficult to find – only in the T&Cs)

In exactly 50% of cases, the technical procedure to notify the service provider of the withdrawal is indicated at the pre-contractual stage. The researchers found that the technical procedure to notify withdrawal is generally presented clearly or very clearly (56.5% of cases), while only in 8.7% was the information not clear (in no cases was it 'not clear at all').

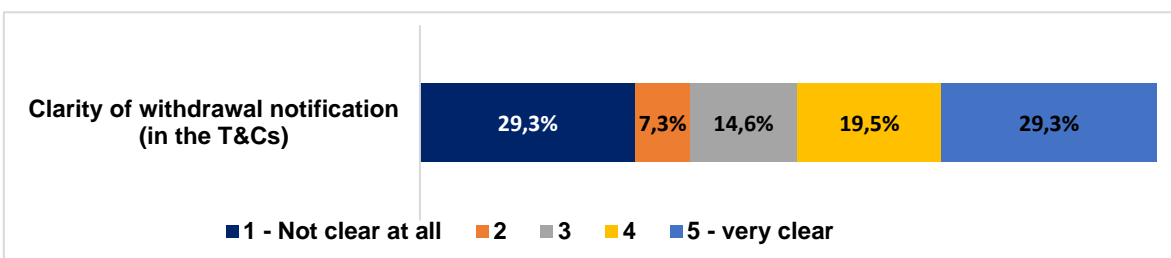
**Figure 18: Clarity of the procedure to exercise the right to withdrawal at the pre-contractual stage (n= 23)**



However, even when the technical procedure is clearly indicated, it often requires action by the user (actively inform the trader before the end of the withdrawal period).

In the terms and conditions sections of the websites, a higher percentage of websites were either unclear or very unclear (36.6%). This mainly relates to those websites which did not provide information at the pre-contractual stage.

**Figure 19: Clarity of the procedure to exercise the right to withdrawal at the pre-contractual stage (n= 41)**



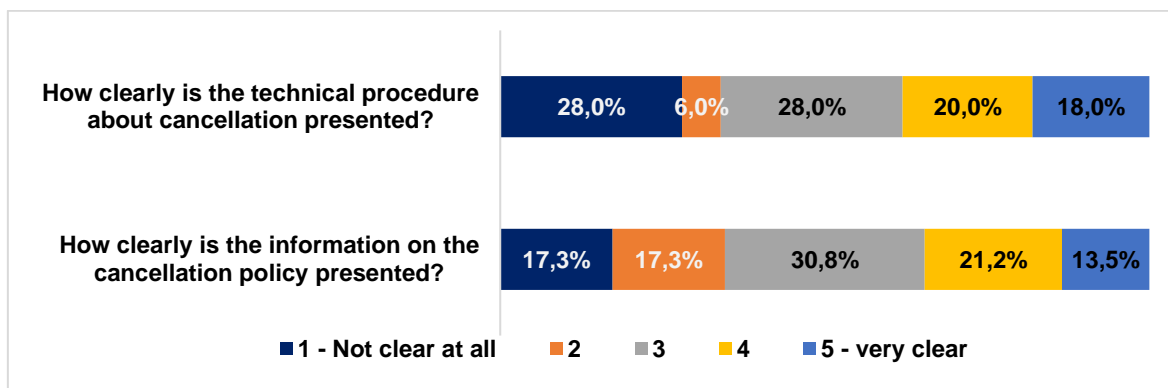
### **Cancellation of the subscription**

Pre-contractual information on the procedure for cancellation of subscriptions was found to be offered in 69% of cases.

The clarity of information on the cancellation policy is mixed. It is clearly or very clearly presented in 34.7% of cases, the same percentage as for 'not clearly' and 'not at all clearly'.

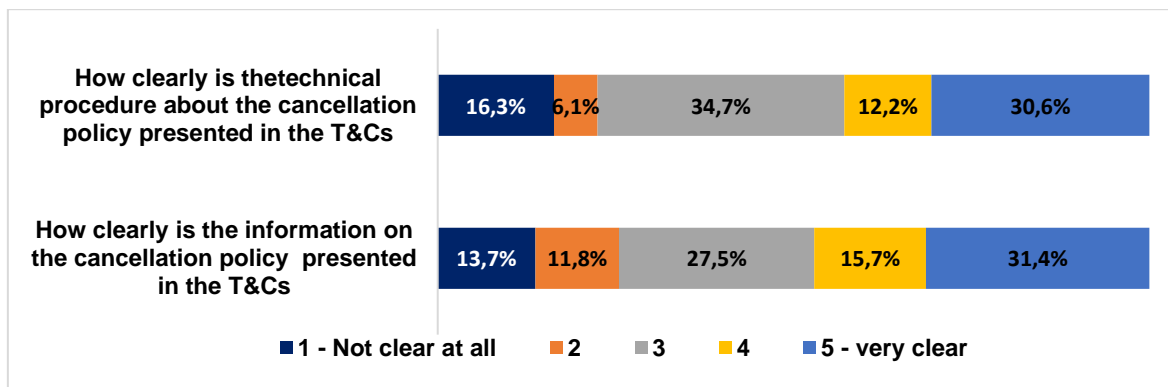
The situation is fairly similar on the clarity of the technical procedure to follow to cancel one's subscription, with it being 'clear' or 'very clear' in 38% of cases, and 'not clear or 'not clear at all' in 34% of cases.

**Figure 20: Clarity of cancellation policies and procedures at pre-contractual stage (n=52)**



Interestingly, the clarity of the information on the cancellation policy provided in the T&Cs is higher, being 'clear' or 'very clear' in 47.1% of cases.

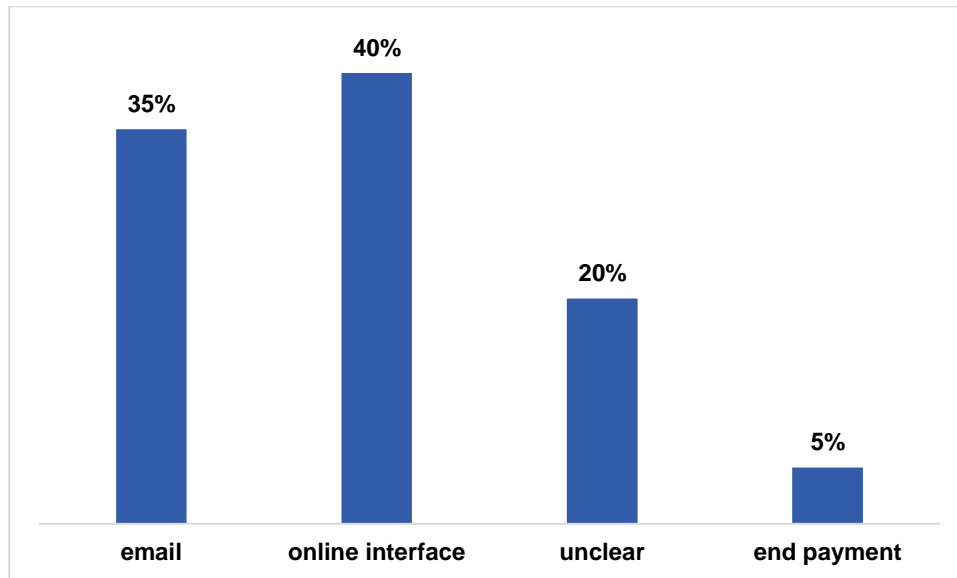
**Figure 21: Clarity of cancellation policies and procedures in T&Cs (n=52)**



The technical procedure to notify cancellation varies, but in the majority of cases (40%) it is on an online interface (such as a button to click on a website), followed by the need to send an e-mail to unsubscribe. In a minority of cases (5%), cancelling the payment would function as a means to cancel the subscription. Interestingly, the procedure was unclear in 20% of cases. These cases include:

- one website, where one has to enter the FAQ, there go into subscription tab, and there find the frequently asked question relating to cancellations. In the correct profile menu "subscription payment" one has to click on the button "cancel the subscription".
- one where there is no procedure or interface to delete the subscription or account and only contact details for the administrator.

**Figure 22: What is the technical procedure to notify cancellation (n=41)**



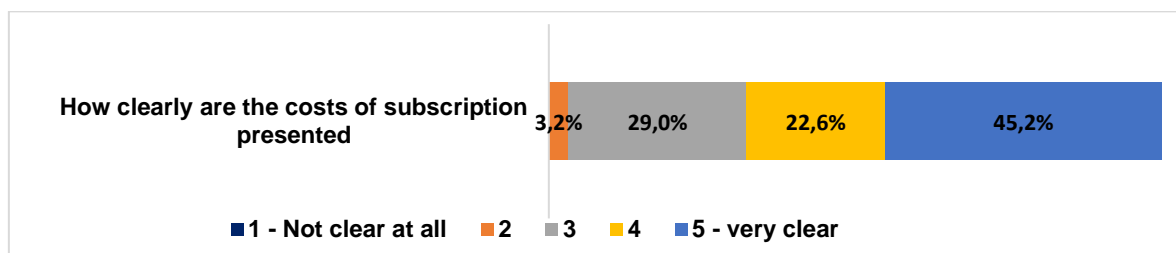
### ***Renewal of subscriptions***

In slightly over half of the cases (54.2%), information about the renewal of subscriptions is presented at the pre-contractual stage. In those cases, the researchers always deemed the information positively, with no instance of ‘unclear’ or ‘very unclear’

Only in a minority of cases (11.5%) is information about inactive subscriptions or accounts provided. When it is, the information is ‘clear’ or ‘very clear’.

### **Cost**

In 61.7% of cases, the cost of subscription is clearly presented. In only 3.2% of cases is the information deemed unclear.



Where free trials are available, payment information has to be provided in 39.1% of cases. In all cases, the subscription would automatically be renewed (and thus turned into a paid subscription) if no action is taken by the user at the end of the free trial.

## **2.4.3 Conclusions**

The results of the sweep show that the information provided at pre-contractual stage is either lacking or not clear. The right of withdrawal is not presented in almost half of cases. Where it is presented, it is deemed unclear or very unclear in one third of cases. Where

there is a free trial, it is automatically turned into a paid subscription in all cases where payment information is required.

The technical information on withdrawal is also often unclear. In terms of cancellation policies, information is more often provided in the Terms and Conditions section of the websites. The procedure is either very simple (through an e-mail, button on the website etc), or very obscure, with no information provided and, in some cases, the researchers found it difficult to find the procedure.

Costs are generally clearly indicated.

## 2.5 Transparency on online marketplaces

Online marketplaces are providers that may also directly sell to consumers, but their defining feature is that they offer a platform for consumers to directly buy products or services from third party sellers/traders or other consumers. In particular, where the marketplace also acts as seller, it can be unclear to the consumer whether they enter into a contract with the platform or with a different trader. This is particularly relevant if the seller is not a trader but a consumer, in which case EU consumer protection rules do not apply. Therefore, the MD has added, in Article 6a of the CRD and Article 7(4)(f) of the UCPD, respective information obligations for online marketplaces. In the absence of adequate information, the buyer (consumer) can be confused about the relationship they have with the seller due to not knowing whether the seller is a professional (trader) or an individual (peer consumer). Second, the consumer may be confused about who – the seller or marketplace is responsible for the performance of the contract.

### 2.5.1 Methodology for the sweep

In each country, the researcher followed a detailed process set out below.

#### Step 1 – Marketplace selection

The five most popular marketplaces as listed on SimilarWeb were chosen for each country. In addition, the four most popular global websites (by traffic) were added, as they are available in most of the countries covered. A total of 50 websites were included.

France	Germany	Hungary	Italy	Poland	Portugal
amazon.fr	amazon.de	emag.hu	amazon.it	allegro.pl	worten.pt
cdiscount.com	shpock.com/de-de	shop.rosmann.hu	homann.it	olx.pl	fnac.pt
fnac.com	yatego.com	alza.hu	etsy.com	sprzedajemy.pl	aliexpress.com
leboncoin.fr	lidl.de	tesco.hu	aliexpress.com	mediaexpert.pl	continente.pt
fr.shopping.rakuten.com	homann.de	mediamarkt.hu	mediaworld.it	euro.com.pl	elcorteingles.pt

Romania	Spain	Sweden	Estonia	Global
emag.ro	amazon.es	clasohlson.com	selver.ee	amazon.com
cal.ro	milanuncios.com	fruugo.se	coop.ee	aliexpress.com
okazii.ro	segundamano.es	apotea.se	maxima.ee	etsy.com
altex.ro	es.wallapop.com	amazon.com	rkiosk.ee	ebay.com
dedeman.ro	pccomponentes.com	elgiganten.se		

### **Step 2 – Search for types of products selected**

Product type to be looked at includes goods that can be sold by the marketplace or other traders, for example:

1. e-book reader
2. laptop case
3. backpack
4. coffee maker

### **Step 3 – Check the presentation of the offer and collect results**

- Is there information on who the seller of the product is?
- Is the information as to who the seller is, visible on the page where the product is offered? ( 1 not visible – 5 very visible)
- Is the seller different from the marketplace itself?
- Is it clearly identified whether the seller is a professional or an individual?
- If the seller is an individual, is there a notice about the non-applicability of consumer legislation?
- Is the information on the status of the seller (professional / individual) easy to identify? ( 1 very easy – 5 very hard)
- Is there information who is responsible for the delivery of the product (marketplace or the seller (when different from the marketplace)?
- Is there information on who deals with consumer' possible claims regarding legal guarantee?
- Is there information on who deals with consumer's application to exercise the right of withdrawal?
- How clear is the information? (1 very unclear – 5 very clear)

### **Step 4 – Collect information from the website's 'small print'**

If the abovementioned information was not presented up front, the researcher was also asked to look at the 'small print' (e.g., Terms & Conditions, Subscriber Agreement, Privacy Policy, Help Page etc.).

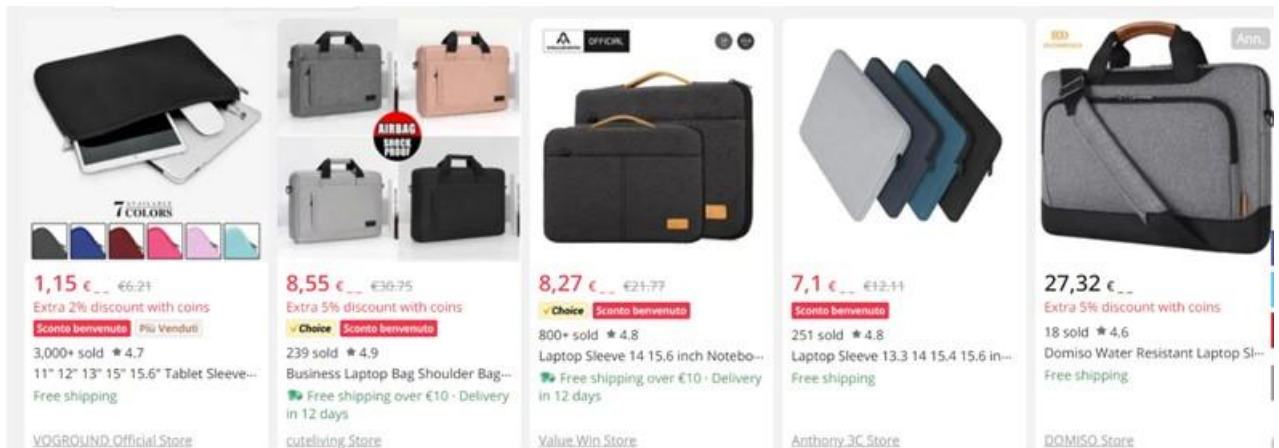


## 2.5.2 Results

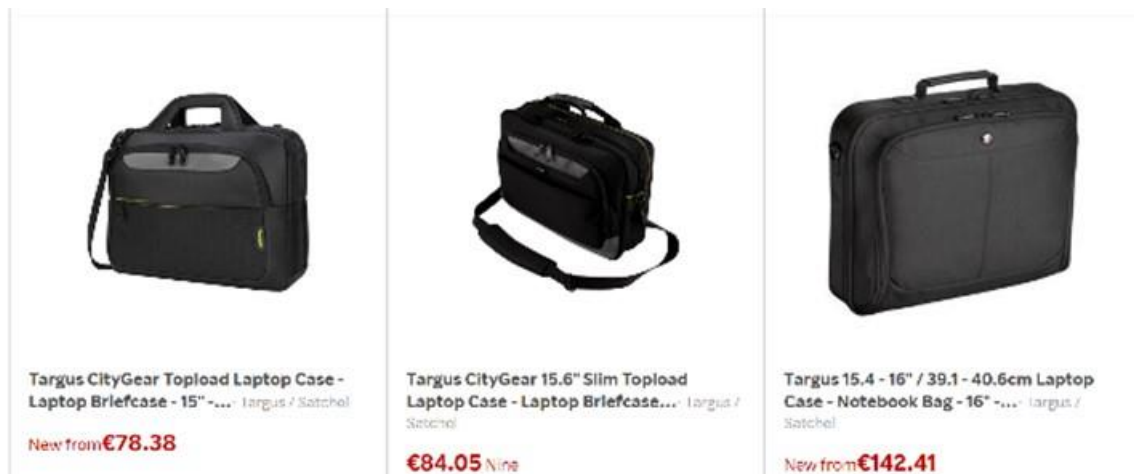
### Result page

For **65.6%** (107) products accessed on 38 websites, the website provided information on whether the product is sold directly by the marketplace or another seller already on the search results overview page.

**Figure 23: Example of information on the trader in the result page**



*Clearly indicated at the bottom*

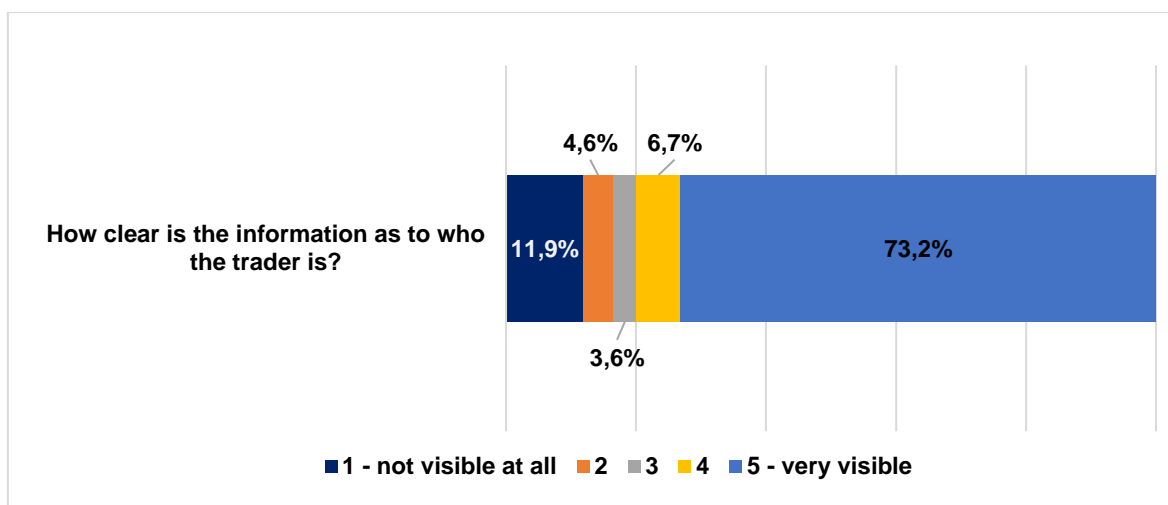


*Not clearly indicated*

### Product page

On the product page, the share of products bearing an indication of who the trader is increases to **85%** of products (168) on 46 websites.

**Figure 24: Clarity of the information on who is the trader? (n=194 products on 50 websites)**

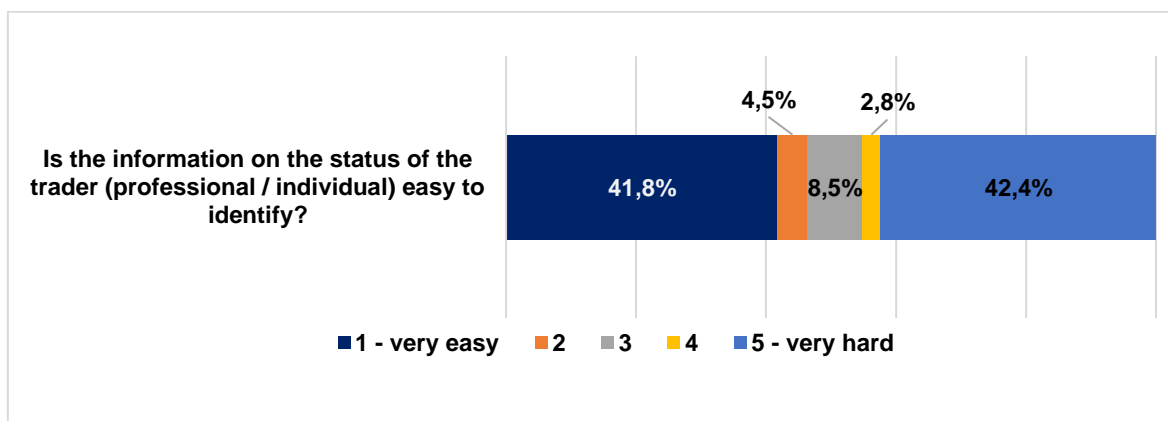


For over two-thirds of the products (**65%**), the researchers were able to identify whether the seller is a **professional or non-professional (individual)**.

Non-professionals were indicated as sellers for 3 out of the 52 products where it was possible to identify the seller. They were all found on the same websites. In these cases, the non-applicability of consumer legislation is not clearly indicated at all.

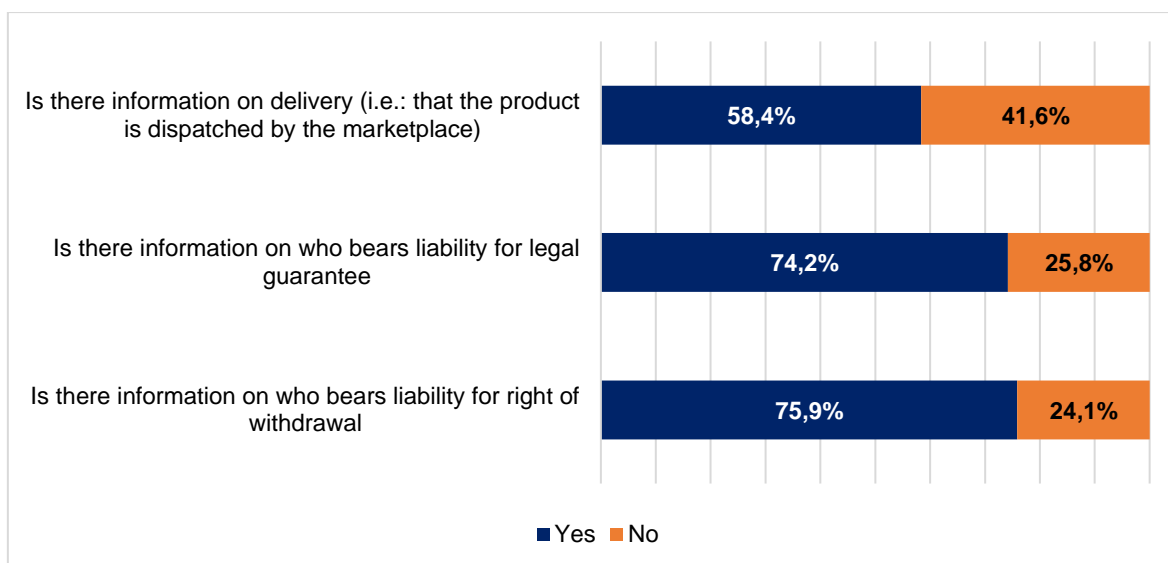
Information about the status of the trader is mixed. With roughly the same share of instances where the information was 'easy' or 'very easy' (46.3%) to identify, and those who were 'hard' or 'very hard' (45.2%) to identify.

**Figure 25: How easy is it to identify the status of the seller? (n=177)**



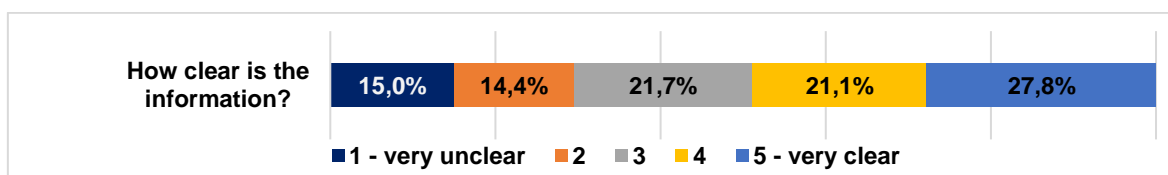
For two thirds of products (**66.5%** or 125 products) **the trader is different from the marketplace**. Even when the trader is different from the marketplace, there are cases where the product is dispatched from the marketplace itself (33.6% or 42 out of the 125 products). For 74.2% of products sold by another trader (84 products), the products page displayed information on who bears liability for the legal guarantee. It is the case for 75.9% of products (88 out of 125) for information on who bears liability for the right of withdrawal.

**Figure 26: When the trader is different from the marketplace... (66.5% or 125 products)**



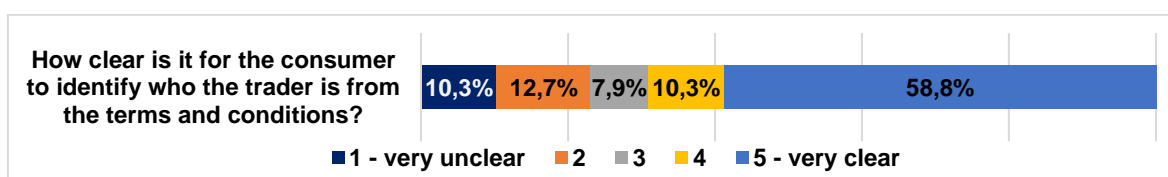
The researchers were asked to rate the clarity of the information on who the trader was, as well as the responsibilities (for dispatch, legal guarantee and right of withdrawal). They ranked information about the trader and the marketplace is unclear or very unclear in 29.4% of cases.

**Figure 27: Clarity of the information on traders that are different from the marketplace.**



### Terms & Conditions

In a number of cases, the offers referred back to the terms and conditions of the website. The terms and conditions are easily accessible in all the sweeps, by clicking once (92.3% of cases) and twice (7.7% of cases). They are generally clear or very clear (in 69.1% of cases) on the aspect of who is responsible for the delivery, liability for legal guarantee and right of withdrawal.



Where the terms and conditions are **unclear or very unclear**, this includes instances where:

- The T&Cs available are general, covering all transactions - **not specific to analysed product offer**. It is available via the website's footer, not the product page. The lack of clarity stems from:

- the fact there is no information about status of the seller
- lack of information about what the status of "individuals" is, and
- the fact that there is no information about division of responsibilities.
- It is difficult to find who is in charge of the dispatch of the product. There is information of the brand of the product but is not extensive. No specific T&C for the product.
- Information on the trader is easy to access and clear, however, there are no specific T&C referring to the trader. General T&C are not very easy to find and it is quite difficult to find information on who bears liability for the legal guarantee.

### 2.5.3 Conclusions

Out of 212 products accessed on the 50 online marketplaces, for 11% (24) products there was no indication of who the trader is on the product page. Out of the 188 products for which it was possible to identify the seller, **125 (66.5%) were offered by third party sellers**, of which all but three were presented as professionals. For the 3 products that were presented as being offered by non-professionals (individual), only one out of three websites provided information on the non-applicability of consumer legislation.

For the 125 products sold by other sellers, the websites provided information about who is responsible for delivery (73 products), right of withdrawal (95 products) and legal guarantee (93 products).

## 2.6 Video games

In recent years, apps and games moved from subscription-based models to so-called mix monetisation models. This means consumers can use free versions of the apps (i.e., games) and pay to enhance their experience (e.g., to access new content, or to use the app without advertisements). The in-app/in-game purchases can be made with real currencies, but in some cases virtual currencies are used instead. Virtual items or goods are merchandise that are purchased or traded for use in games. Some games use this to generate income allowing the game to be played for free. Examples could be weapons, avatar customisation, items, etc. In addition, the marketing of virtual items and intermediate currencies in video games is often connected to the use of so-called 'dark patterns' which try to distort or impair the consumer's decision-making (e.g., repeated 'nagging' requests, fake urgency cues).

Many games use their own currency (like 'gold' and similar). In some games, the specific currency can be acquired both as reward by playing the game and by direct purchases with real money (so called "mixed pot"). Other games use different in-game currencies – one can be acquired by playing and the other by direct purchase. The games then only show the value of in-game purchase in the game's own currency (or in two alternatives in game currencies) thus breaking the association with real money and making easier for users to spend more. There may also be a lack of transparent, accurate and clear up-front information relating, for example, to costs, and other information material to a consumer's decision about whether to play, download or sign up to a game. Article 6 of the CRD includes a list of information that should be presented to consumers at the pre-contractual stage in online contracts. The Commission CRD Guidance specifies:

- **Display of the information:** In the online context, traders must make the mandatory information easily accessible and prominently visible to consumers. Due to its volume, it might not be possible to provide the mandatory consumer information in

a 'clear and comprehensible' manner on a single page. Excessively long pages, where consumers would have to scroll down extensively in order to read all content, should be avoided.

- **Information on “the main characteristics of the goods or services**, to the extent appropriate to the medium and to the goods or services”. For choosing the main characteristics to be communicated to the consumer, the traders should apply the same approach as for the purposes of the UCPD, i.e., inform about those characteristics that consumers need to make an informed purchasing decision. Information about the main characteristics for goods may be available from their packaging or labelling that the consumer can consult. More complex goods may require the communication of additional information to establish their main characteristics. For all contracts where the consumer provides personal data, irrespective of whether payment is involved or not, the trader must inform the consumer about the purposes of processing at the time when the personal data are obtained.
- **Information on the price**: the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;
  - Under Article 6(6) for off-premises and distance contracts, the consumers do not have to bear any additional charges or costs of which they have not been informed by the trader. This reflects the obligation of the trader to inform the consumer of the full price, including all applicable taxes, duties, and additional charges, in particular any import VAT, customs duties, customs clearance etc. applicable to purchases from non-EU traders.
  - Where the digital content or service includes optional additional and built-in purchases, the consumer should be duly informed that such additional purchasing options may be offered, before acquiring the digital product.
  - This requirement could apply, for example, to: — apps that include in-app purchases, such as add-ons or extra levels in a video game; — subscriptions to audio-visual content services that include optional pay-per-view content (movies) offered for additional payment.

### 2.6.1 Methodology for the sweep

For this sweep, researchers were asked to focus on checking in-app and in-games purchases, in particular the information provided to consumer before starting the game and during the gameplay, and the associated commercial practices they see.

#### **Step 1 – Game selection**

Researchers were asked to download, sign-up (if possible) and play the following games for approximately 15 minutes. These games were selected on the basis of their popularity on the play store (for apps), and Steam. Steam was selected as the video game distribution platform with the largest number of title available (over 70,000). The games are a mix of free to play, demos, and paid version of games. Console games were not included in the sweeps due to resource constraints. Furthermore, the inclusion of App and PC games ensured adequate representativeness of the practices.

App games	PC games
World of Tanks	Counter strike: Global offensive
PUBG Mobile	RuneScape
Piano star	Path of exile
Fruit Ninja	Brawhalla
Pokémon Go	War Thunder
Brawl Stars	UNO demo
GT superhero	Euro truck simulator 2
FIFA mobile	Beastieball demo
Parking Jam 3D	Octopath Traveller II
Cubecraft	Contraband Police
Monopoly go	Call of Duty "Welcome to warzone 2.0
Clash of Clans	GTA V
Candy Crush Saga	Hearts of Iron IV
Woodoku	
Save the pets: save dog	

### Step 2 – Download the game and create an account

The researcher will then download the free version of the apps and/or create an account on Steam.

### Step 3 – Assess the information

During the sweep, researchers checked which information is provided to consumers related to in-app or in-game purchases before starting the game and during gameplay. While navigating the app/game they focussed on the information provided on possible virtual items and or intermediate currencies.

The researcher filled in an Excel sheet and provided the following information during the gameplay and the sign-up stage.

During the sign-up to the game:

- Is the price of the game clearly stated upfront? Or is the game clearly labelled/presented as free? Also, if the game access is provided against data, is this clearly indicated?
- If the game access is provided against data, is this clearly indicated
- Is there up-front information on possible in-app purchases?
- Does the up-front information on the in-app purchases address, in particular the types of in-app purchases such as
  - Loot boxes and other virtual items with randomised elements
  - access to additional game's content,
  - skip advertising
  - benefit from premium content
  - continue to play
  - progress with levels

- Is the information on the right of withdrawal and contract cancellation presented?

During the gameplay

- Does the game show in-app purchase prices in the country's official national currency or in their own (in-game) currency?
- For games that use their own in-game currencies:
  - Is the price of the in-game currency per unit constant or does it decrease with higher volume of purchase?
  - Is the in-game currency only available through direct purchase or can players obtain it by progressing in the game (so called "mixed currency pot"), or, on the contrary, the game uses two types of in-game currencies – one only acquired by direct purchase, and the other only acquired by game play
  - Is price/value of the specific in-app purchase expressed in the country's national currency as well? If not, is there an explanation on how the price/value can be calculated in the country's national currency?
- Is there information on the right of withdrawal/ cancellation of the in-app purchase?
- If there is information on RoW, does it include also requesting the player's consent for immediate acquisition of the in-app purchase and information that the RoW is lost as soon as the item is delivered?
- Are there commercial messages intended to encourage the consumer to pay to access to premium content or features?
- Are there any interface designs that can be considered 'dark patterns' that are distorting or impairing the consumer's decision-making, including:
  - repeated 'nagging' requests;
  - fake urgency cues (misleading or fake limited time offers and other pressure-selling techniques);
  - social proof;
  - hidden information/false hierarchy/trick questions;
  - toying with emotion (emotionally manipulative framing);
  - confirm-shaming.
- Can loot boxes, card packs or other virtual items with randomised elements be bought in the game, e.g., in the in-game shop?
- Did any offers to buy loot boxes, card packs or other virtual items with randomised elements appear during the 10 to 15-minute gameplay?
- Does the game contain any other potentially addiction-inducing interface design features, e.g., slot game designs, rewards/incentives for continued playing or penalties for discontinuing the gameplay, paying to remove pressure, that appeared during the 10-to-15-minute gameplay? Which features?
- Is there a possibility to switch-off any features, such as loot boxes?
- Is there a possibility to establish limits on the amount of money or time spent using the game?
- Are there any links to social media platforms, e.g., ability to connect one's social

media account to the game; references to game-related tokens, premium content or donations that is available on social media platforms; references to social media influencers/game streamers?

#### Step 4 – Collect information

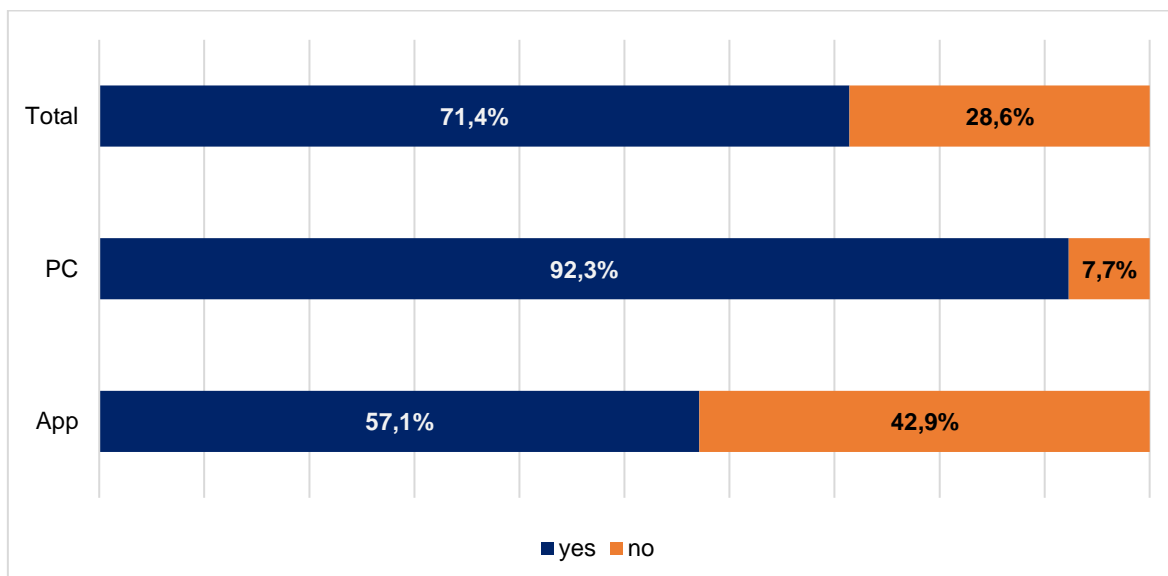
The researchers took screenshots of the displayed information on in-app/online game purchases results and collate the following results on the collection spreadsheet.

### 2.6.2 Results

#### Sign-up phase

The price of the game is clearly indicated in 71.4% of cases. However, this varies dramatically between PC games and apps. In the case of the latter, the price was clearly indicated in the overwhelming majority of cases (92.3%), while this drops to 57.1% for app games.

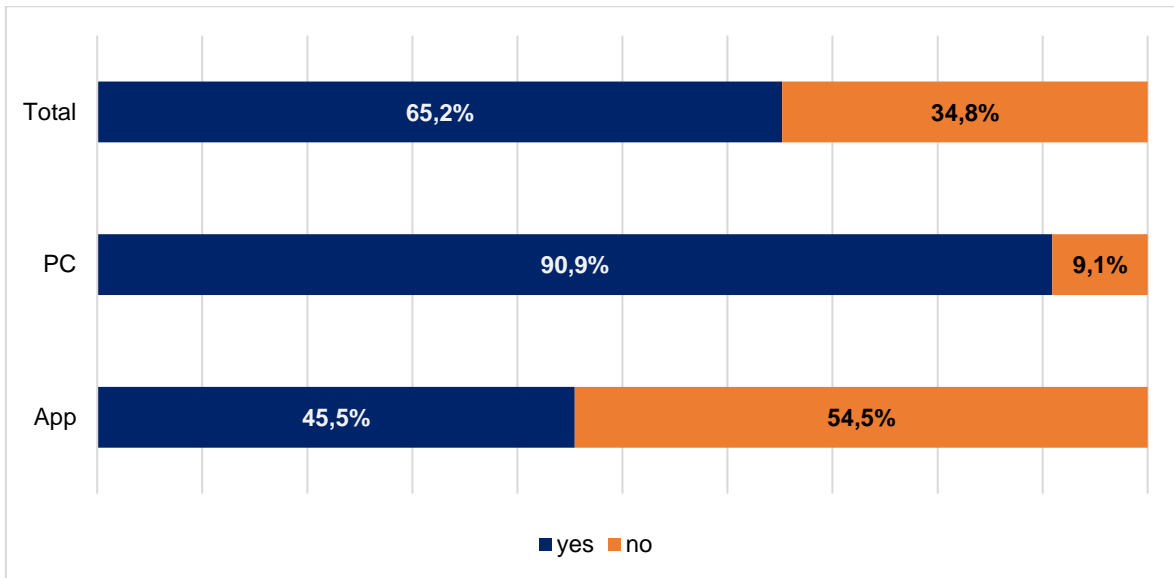
**Figure 28: Is the price of the game clearly stated upfront**



The situation is similar relating to whether a free game is clearly indicated. Overall, it is clearly indicated in 65.2% of cases, although this rises to 90.9% for PC games, and reduces to 45.5% for App-based games.



**Figure 29: Is the game clearly labelled/presented as free?**



The situation is more balanced between App and PC games, in terms of those where access is provided against data. It is not clearly indicated in the majority of cases (88.9% overall, 80% for app games, and 100% of PC games included in the sweeps).

Information about in-app purchase is provided in exactly half of cases, (53.8% of cases of PC games, and 42.9% for App games). However, when playing the game researchers found in-app purchases available in 67.9% of cases (19 games). This shows that for 5 games (representing 17.9% of cases), in-app purchase was available but not indicated upfront.

### Purchases of virtual items

Loot boxes and similar virtual items appeared in 30% of cases (6 games). They appeared more often in app games (4 games) than PC games (2 games). The loot boxes offered different rewards. Given the researchers were not asked to purchase the loot boxes, or the key activation, it was not always possible to identify the content of loot boxes. In two cases, the item offered were in fact ‘passes’ rather than loot boxes (even though they were labelled loot boxes by the researcher). These allow the player to access different levels of the game, but also offer specific items. The type of item on offer are visible before purchasing the pass, but not the exact item it is.

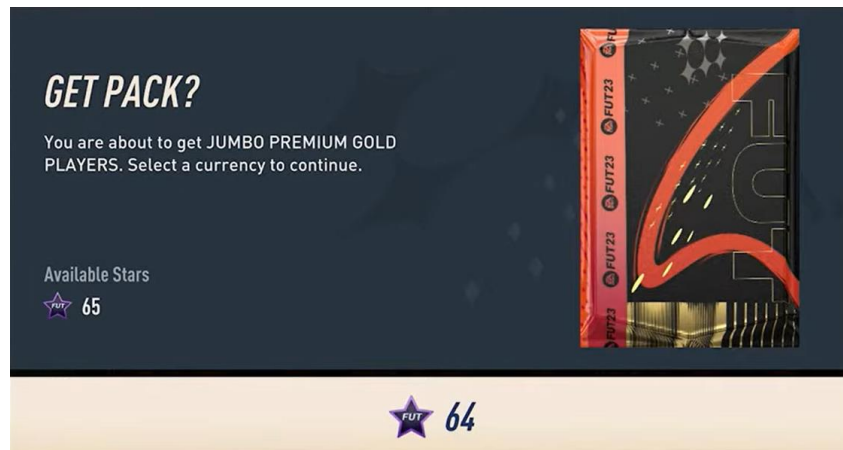
**Figure 30: Example of ‘passes’ availability and content**



In none of cases did a loot box appear within the first 15 minutes of playing the game. They were either to be found in the game shop or appeared after longer time play. This was the case for two games where the researcher either played the game longer or identified a player who had been player the game and provided them with the information.

Where their content is presented, these are impression of the way in which the loot boxes are presented.

**Figure 31: Example of loot boxes**



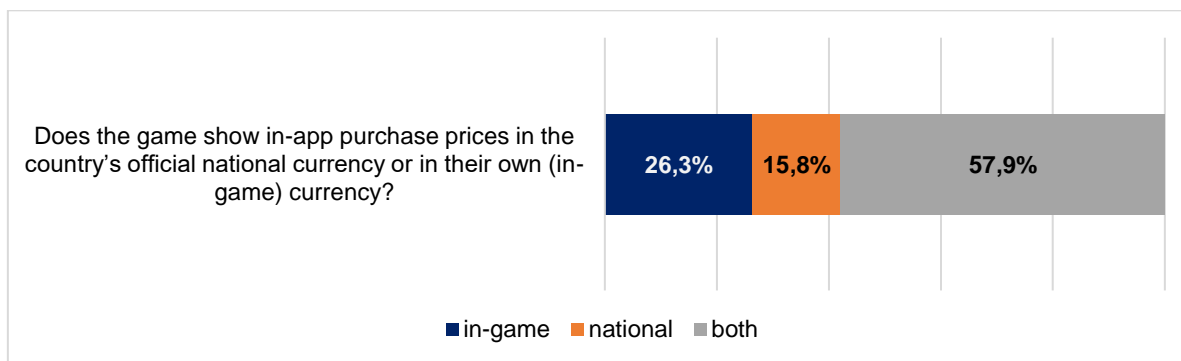
In some cases, the app store provides information on the value of the packages that are available for purchase, without providing any information on what is included. No offer to purchase packages was provided to purchase the packages during the gameplay.

**Figure 32: Information on the price of package in the app store.**



Nineteen of the games included in the sweeps (67.9%) included the possibility of in-game purchase. In about one quarter of cases (26.3%), the prices are only presented in the in-game currency.

**Figure 33: Are in-game purchases presented in the in-game currency or in the national currency?**



In the majority of cases where there is an in-game currency (61.5%), the price of the currency decreases with the amount bought. Similarly, in most cases, the in-game currency can be obtained through direct purchase or earned while playing the game. In one case, two currencies were available, one obtained through purchasing, the other obtained while playing.

**Figure 34: Display of in-game currency purchase**



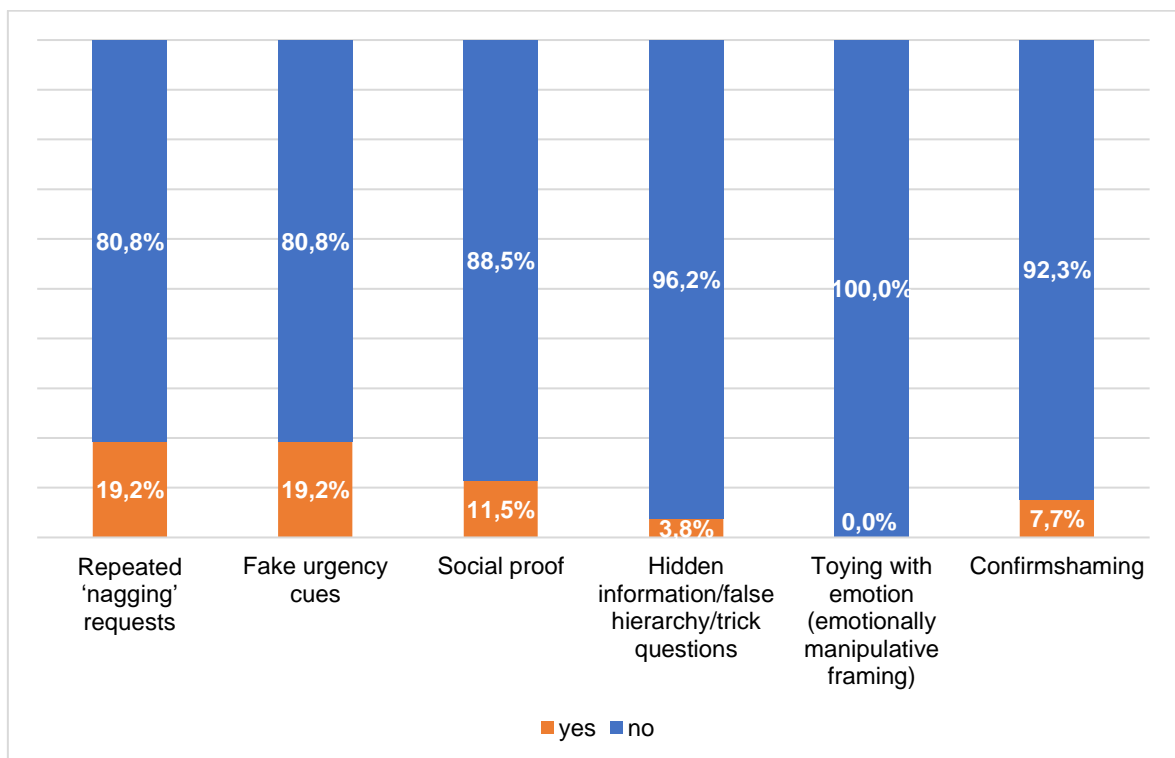
In one third of cases, the withdrawal policy relating to the purchase is presented. In these cases, the right of withdrawal requesting the player's consent for immediate acquisition of the in-app purchase and information that the RoW is lost as soon as the item is delivered.

In at least two cases, the currency mechanism is more complex. There are three different currencies, two of which can be mined, the third, premium currency can be bought or earned based on achievements. For the two mined currencies, the stock of currency available to a player increases as time goes by. The speed at which the stock increases as well as the maximum value the player can hold can increase based on investments made using these currencies. Mined currencies can also be bought using the premium currency. The in-game availability of the premium currency is extremely limited, encouraging the player to make real life purchases of the premium currency to advance in the game. None of the dynamics of the in-game currencies are explained clearly and upfront, the player gradually discovers the internal mechanism while playing the game.

Only two of the games played allowed for a maximum amount to be spent. In both cases, this is done through the setting or controls of the game. Setting a maximum amount to be spent appears to be geared at parents or person responsible for games which are aimed at gamers from different ages. In one case, the controls allow to disable features such a multi-player mode or set a cap on the amount of time played per week. In the case of one game, this is done specifically by the parent linking their account to their child's one, which allows them to enable and disable features directly.

A number of dark patterns were experienced by the researchers during game play. However, this was in a minority of cases, and in all cases, this related to App games, rather than those played on a PC.

**Figure 35: Experience of dark patterns**



Examples of patterns are presented below.

**Figure 36: Example of dark patterns**



Nagging request



Incitation to watch video

Beyond those types of practices, others experienced by the researchers include incentives for continued playing or penalties for discontinuing the gameplay (prompts such as “if you quit now, you’ll lose your active powerups”). In some games with a multi-player element, the player is incentivised to log into the game (and thus play) at least once a day, otherwise they are at greater risk of suffering penalties (being attacked by other players etc.). There is an option to prevent this by buying ‘shields’. In the case of the game shown below, the currency shows in the in-game premium currency which generally must be bought (or earned at slow pace when playing the game).

**Figure 37: Example of ‘shields’, protecting the user from attacks whilst not playing the game.**



On mobile app games, the game automatically asked at the start of each session whether push notification could be allowed. In cases here the researcher accepted them, push notification appeared on their phone on daily basis reminding the player of the progress they could make, or the benefits they could lose by not logging into to the game.

In 38% of cases, the game encourages the player to connect through a social media platform.

In other cases, the element of social media is linked to the platform. As an example, games bought or played on platforms such as Steam allow the players to advertise their achievements to other users, through gaining ‘achievements’ or ‘badges’ that are then displayed on the user’s profile.

### 2.6.3 Conclusions

The upfront price of games (or the fact that they are free) is generally clear for PC and App games. Information about the existence of in-app purchases is less clear, with only half of cases stating they clearly exist. In roughly one quarter of cases, the in-app purchases are only available in the in-game currency. In the majority of cases where there is an in-game currency (61.5%), the price of the currency decreases with the amount bought.

In the games where loot boxes appear, they offer a number of different rewards. Loot boxes, when they are to be purchased generally do not provide a clear understanding of what they contain.

Where in-app purchases are possible, the right of withdrawal is only presented in one third of cases, and only two games played allowed for a maximum amount to be spent.

## 2.7 Price reductions and other types of price promotions

This section provides the methodology and results for the sweep relating to price reduction and other types of price promotions.

In the 2018 CPC sweep coordinated by the European Commission on price transparency and discounts, consumer authorities suspected that the special offers were not authentic on more than 31% of the websites offering discounts or they found that the way the

discounted price was calculated was unclear.<sup>4</sup> Following this sweep, the MD amended the Price Indication Directive (PID): its new Article 6a now requires sellers of goods, when offering a price reduction, to indicate the ‘prior’ price (understood as the lowest price the good was sold in the prior 30 days). The provision aims to prevent the practice that traders increase the price before the price reduction to make it appear more attractive. This new provision does not apply to various other price promotions that traders commonly use, such as price comparisons, conditional offers etc. that remain subject to the UCPD.

During the 2022 Black Friday period, the European Commission and 13 national consumer protection authorities conducted another sweep of 16,000 products from 176 websites, monitoring them over a month period to establish whether the indicated prior price complied with the new legal requirements. The sweep showed that more than half of the products monitored presented a price reduction. Out of this number, 23% price reduction announcements were breaching the new legal requirements under the PID. These breaches were found on at least 43% of the screened websites.

**The purpose of this sweep was different.** It did not monitor the validity of the “prior” price. Instead, it aimed at **establishing the methods** that sellers use for announcing price reductions and other forms of price promotion, i.e.:

- **Price comparisons** (such as comparisons with manufacturer’s recommended prices or competitor’s prices);
- Conditional **combined/tied offers** (such as ‘30% off when buying 2 items);
- Comparisons between prices for members of “**loyalty programme**” and “public” prices;
- **Reductions** when spending more than a **certain amount** (e.g., -30% when buying for more than EUR 50);
- Reductions presented as **personalised** (including those sent by e-mail to registered users).

### 2.7.1 Methodology for the sweep

In each country, the researcher followed a detailed process set out below.

#### Step 1 – Website selection

The sweep included **95 websites**, which are listed below. The websites were selected based on their popularity ranking on SimilarWeb in the eCommerce and Shopping category.

France	Germany	Hungary	Italy	Poland	Portugal
Amazon.fr	Amazon.de	arukereso.hu	Amazon.it	allegro.pl	olx.pt
Darty.com	Idealo.de	Alza.hu	Ebay.it	ceneo.pl	worten.pt
Fnac.com	Ebay.de	Jofogas.hu	ibs.it	olx.pl	nit.pt
Decathlon.fr	Ebay-kleinanzeigen.de	Emag.hu	libraccio.it	otomoto.pl	amazon.es
cdiscout.com	Otto.de	Ingatlan.com	Mediaworld.it	pepper.pl	habitissimo.pt
Leroymerlin.fr	kaufland.com	Vatera.hu	Euronics.it	vinted.pl	lidl.pt
carrefour.fr	obi.de	aboutyou.hu	Mediamarkt.it	zalando.pl	leredoute.pt
lidl.fr	fahrrad.de	douglas.hu	Aliexpress.com	bauhaus.pl	continente.pt
mr-bricolage.fr	hornbach.de	Idealo.de	zalando.it	rossmann.pl	elcorteingles.pt

<sup>4</sup> [https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/sweeps\\_en](https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/sweeps_en)

Romania	Spain	Sweden	Estonia	Global
emag.ro	amazon.es	blocket.se	telia.ee	amazon.com
olx.ro	aliexpress.com	prisjakt.nu	kaup24.ee	aliexpress.com
compari.ro	milanuncios.com	amazon.se	go3.tv	etsy.com
hornbach.ro	elcorteingles.es	tradera.com	euronics.ee	ikea.com
libris.ro	wallapop.com	clasohlson.com	eestiloto.ee	shein.com
bookzone.ro	carrefour.es	furniturebox.se	sportland.ee	rakuten.com
elefant.ro	lidl.es	zalando.se	apollo.ee	
libraiaonline.ro	bricomart.es	sephora.se	kingitus.ee	
epantofi.ro	verdecora.es	mediamarkt.se		

## Step 2 – Initial ‘general’ search

During sales period (Summer 2023), the researchers went on the websites and identified any ‘general’ information on price reductions and other promotional techniques regarding the price. These may include the presence of banners or information on percentage savings over the whole website or coupons code for a percentage discount linked to a minimum purchase.

## Step 3 – Product search

The researchers were also asked to search for five products for each website; they were provided with a list of types of products and examples of specific products for each type of products. The products were selected on the basis of products that had been on sale in the past and were therefore likely to be discounted.

- a. **Vacuum cleaner** (Dyson V8 Absolute Bag & Cordless Vacuum Cleaner incl. 3 electric brushes with direct drive)
- b. **Cycling tool** (Topeak TT2583B Mini PT30 Multitool Black 7.4 x 4 x 1.9 cm)
- c. **Baby and toddler product** (BABYBJÖRN Baby Carrier Mini, Cotton, Black)
- d. **Luggage** (Samsonite S’Cure Spinner 75/28, Black)
- e. **Pet feeder** (Balimo Paul Automatic Feeder for Cats and Dogs, 4 L Automatic Feeding Dispenser with Stainless Steel Bowl, Automatic Cat Food, LCD Screen, Automatic Feder Cat, Programmable Timer)

If the website was specialised in certain types of products, the researcher was asked to search products at their discretion. As an example, if one of the websites selected was a clothes retailer, all the products to be selected were chosen by the researcher based on the products available.



The researchers answered the following questions:

Regarding price reductions:

- How is **the price reduction presented** (as a percentage reduction ('30% off') or absolute value reduction ('10 EUR off'), the reduced price presented alongside the prior price struck through ('20 EUR 15 EUR'), other presentation)?
- Is the 'prior' price clearly indicated? Are there specific indications explaining the 'prior' price, i.e., that it is seller's lowest price over the past 30 days? Is the prior price higher or actually lower than the current (reduced) price? Especially, in the latter case, does the seller provide other reference prices to demonstrate the advantage of the current "reduced" price? – are they explained (e.g., 'selling price before price reduction')?
- How are price comparisons presented – can they be confused with price reduction (e.g., the comparison price is indicated in struck-through form and information about it being a comparison is only available via a link, such as "i" pop-up button? To what extent is it clear to the customer what is the reference price used in the comparison (manufacturer's recommended price, competitor's price, other)?
- Are combined offers presented on the product page? What type of offer is this (combined with same product, product of the same type, product of the same brand)? Are there alleged conditional offers that are rather depended on a minimum amount spent (e.g., 20% off when buying for at least EUR 50)?

Regarding other price promotion techniques:

- **Clarity of the presentation** of price comparisons – is it readily clear for average user that it is price comparison? – is there clear label explaining that it is comparison (possibly with further information via clickable link), or rather the reference is merely presented as e.g., strikethrough price with information available via link only or otherwise? - is there room for confusion with price reductions?
- **What reference price is used** – e.g., manufacturer's recommended price, competitor's price, other?

Regarding combined/tied offers – the researcher established the typology, in particular whether the offer applies only to combination of two or more items:

- of the same product?
- of the same type of product?
- of a product of the same brand?
- of any product on seller's offer?
- are there alleged conditional offers that are rather dependent on a minimum amount spent (e.g., 20% off when buying for at least EUR 50)?

## 2.7.2 Results

Out of the 475 products screened, reductions appeared on 360 products (75 out of 95 websites).

### General price reductions/promotions

The sweeps revealed that banners or information on percentage savings over the whole website or coupons code for a percentage discount linked to a minimum purchase over the

whole website are relatively common, appearing in 49.5% (47) of the total 95 websites screened.

On these websites, the reductions are applicable subject to a minimum amount spent in 11.8% (9) of websites, this amount ranging from EUR 10 to EUR 245. In the latter case, increasing discounts were offered as the total spend increased (EUR 10 off for EUR 99 spent, or EUR 25 discount or EUR 249 spent – see figure 38 below). The website-wide reduction linked to a minimum spent generally take the form of a coupon code which has to be added at checkout. The example below shows a website where different discounts are provided for different amounts spent (although the percentage discount is the same for both prices).

**Figure 38: Example of discount linked to a minimum purchase over the whole website.**



*Promotion valid on the whole website (-EUR 10 with EUR 99 spent, -EUR 25 with EUR 249 spent).*

On one website, the benefit advertised is an amount credited to a gift card (which the users can use themselves for future purchases), rather than a direct discount at checkout.

On another website, the reduction was presented as time-limited via a pop-up window that appeared when the researcher accessed the website.

**Figure 39: Specific types of general price reductions/promotions.**



Reduction credited on gift card

“time-limited” reduction via pop-up.

## Product-specific price reductions/promotions

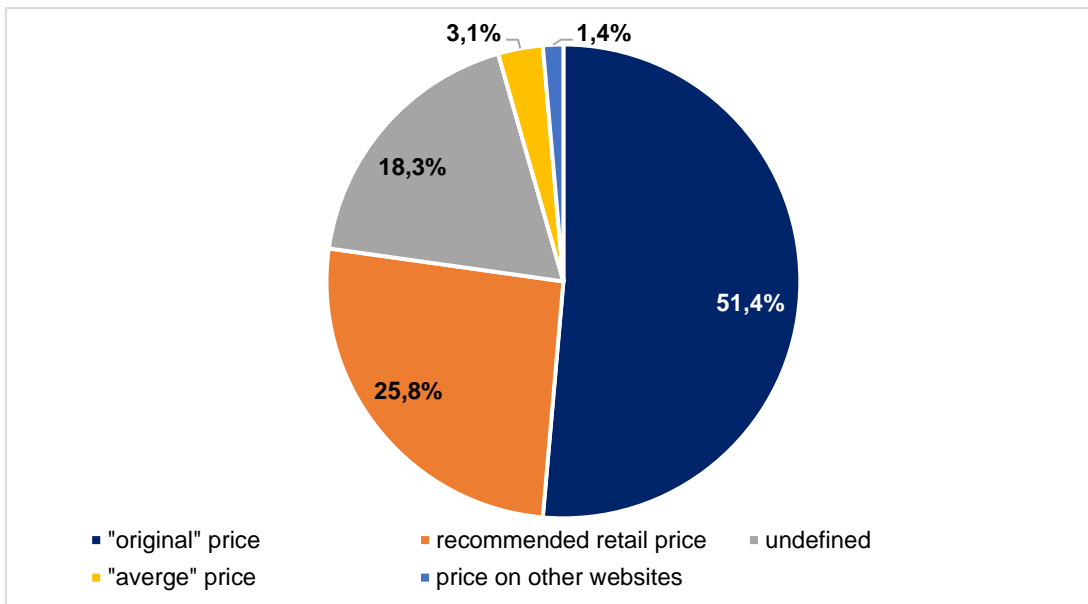
### Presentation of the price reduction / promotion

On the product pages, price reductions/promotions were observed for 360 specific products (available on 75 websites). These product specific promotions were observed both on sites that did not use the general announcements, and on those sites which offered general, site-wide ones.

Regardless of their nature, the “reference” price used for the promotion was generally struck out. The nature of this ‘reference price’ depends on the website. For slightly over half of products concerned by a promotion (69.7%, 251 out of 360 products concerned by a reduction or promotion), the reference price was presented as “original” price, or the price before reduction, or no indication was provided about the reference price. This category is treated in the analysis as “price reductions”.

For a quarter of products concerned (25.8%, 93 products), the “reference price” refers to a recommended retail price. The remaining cases are where the price relates to the ‘average price’ (3.1%, 11 products) and the price on other websites (1.4%, 5 products). These categories were treated as “price comparisons”.

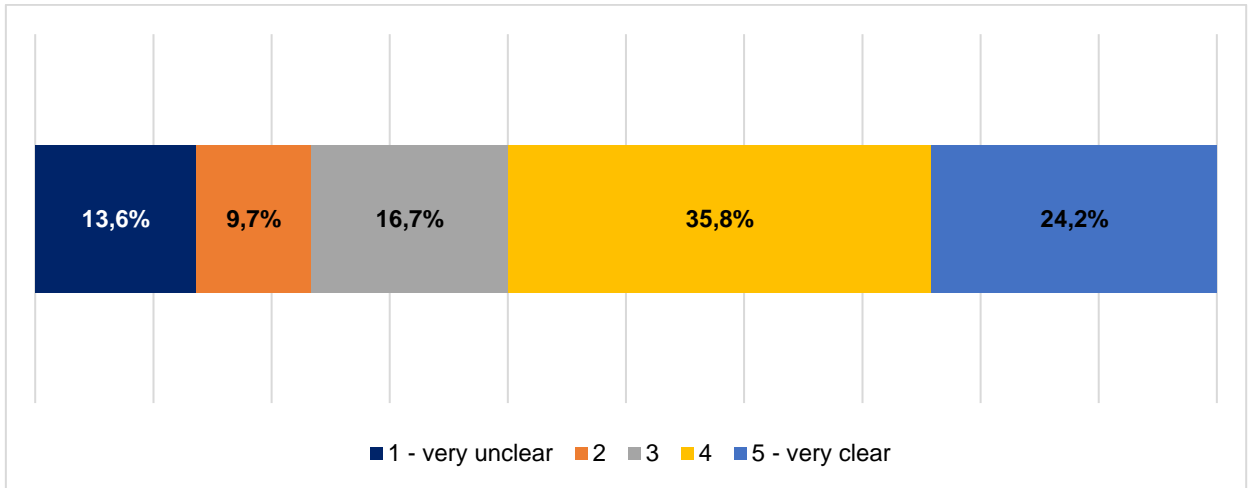
**Figure 40: What the ‘reference’ price refers to? (Number of products subject to a price reduction or promotion (n) = 360)**



### Clarity of the price reduction / promotion presentation

While in the majority of cases (60%, 216 products), the researcher found it easy or very easy to see what the ‘reference’ price referred to, it was deemed unclear or very unclear in almost a quarter of cases (23.3%, 84 products).

**Figure 41: To what extent is it easy to see to what the reference price refers to? (Number of products subject to a price reduction or promotion (n) = 360)**



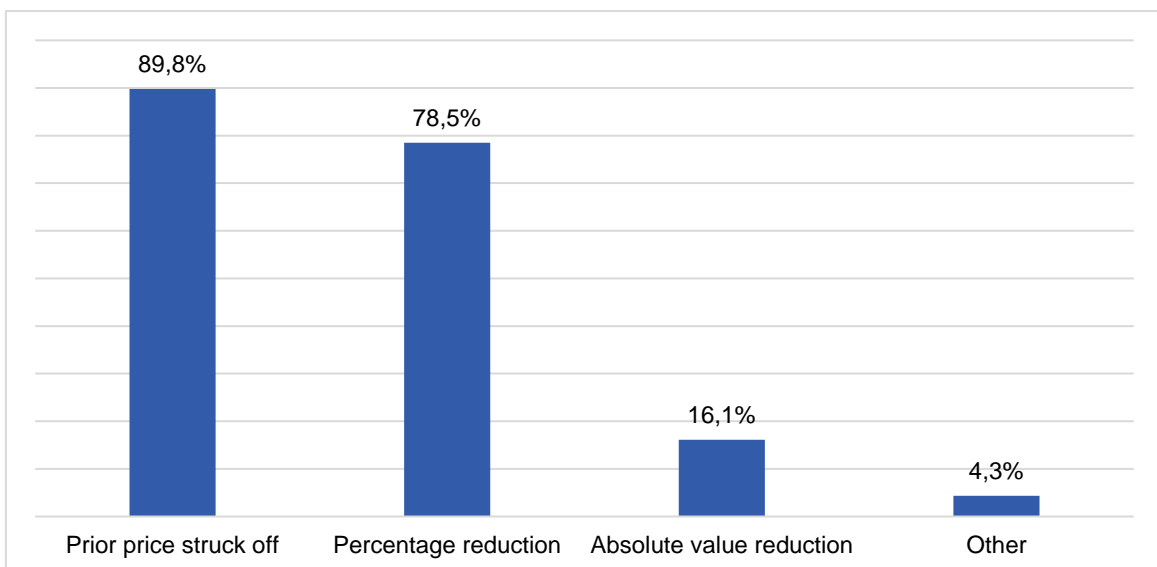
### Price reductions

In total 251 products on 42 websites were classified as being object to product-specific price reduction announcements (to which Article 6a of the PID is applicable).

These price reductions were presented in different ways. In the majority of cases, the reference price is struck off (89.8% or 225 products subject to price reduction), a percentage reduction is indicated for 75.6% or 197 of products subject to price reduction. The absolute value reduction (amount) was presented for 16.1% or 40 products subject to price reduction.

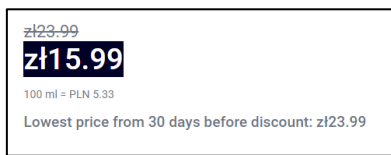
Often, the reduction is presented in more than one way, i.e., by showing the reference price struck off, as well as another method (percentage or absolute value reduction).

**Figure 42: How is the price reduction presented (n=251 products subject to price reduction)**

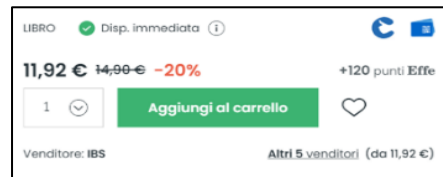


Examples of the main ways of presenting price reductions are presented below.

**Figure 43: Example of how price reductions are presented.**



Price struck off



Price struck off and percentage reduction.



Price struck off and value reduction offer.



Pop-up “time-limited” “personalised” reduction offer.

**Price reductions – “simple” scenario where only one reference price was used.**

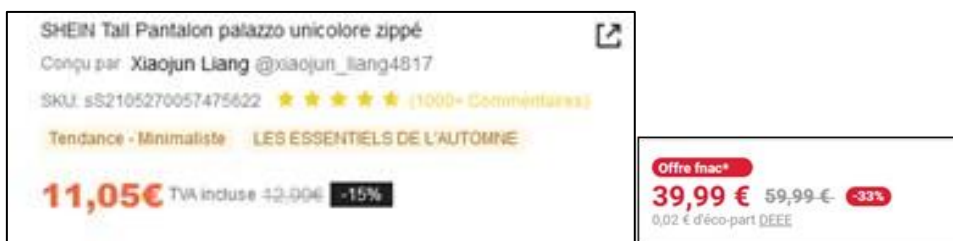
Researchers reported that in all cases only one reference price was presented.

As explained above, the reference price was presented as the “original” price, or the price before reduction, or no indication was provided about the reference price.

Out of the products subject to price reduction, the majority of announcements did not provide any explanation of what the ‘original price’ or ‘price before reduction’ referred to (66.1%, or 123 products). In 28% (52 products), the price referred to the lowest price in the 30 days prior to the reduction, and therefore appear to comply with the requirements of article 6a PID. One product referred to the average price of the 30 days prior to reductions. For a further 10 products (5.4%), the prior price is different (recommended retail price, price of the product ‘at the beginning of the season’ etc.).

In all cases, the prior price was higher than the new (reduced) price.

**Figure 44: Examples of ‘simple’ price reductions (without additional reference prices)**



In the approximately 5% of cases where there is information about the reference price, a page provided more detailed information about what it related to. Some websites have a specific section detailing the nomenclature they use, such as “Was price”, the median selling price on the website, “previous price”, the average price of the product over the past 30 days, or the lowest price in the 30 days prior to the reduction. This information is provided but often not easy to identify without searching of it specifically.

**Price reductions – “complex” scenario where more than one reference price was used.**

The researchers did not find any case where more than one reference price was indicated.

**Other types of price promotions – price comparisons**

Apart from price reductions, other types of practices promoting price advantages can be used, such as price comparisons with other prices, e.g. prices of other traders or the manufacturer’s recommended retail price.

Sellers of 175 products on 42 websites used price promotions, including price comparisons. In most of these cases, it was difficult to distinguish between price comparisons and price reduction announcements as the same presentation techniques were used and the explanations offered were not clear.

These price promotions were presented in various ways. In the majority of cases, the reference price is presented as a percentage reduction (71.8%, or 125 products subject to price comparison). The second most observed method of presenting the price change is to present the current price alongside a struck off price (69.5%, 121 products subject to price comparison). Finally, in 17.9% of cases (31 products subject to price comparison), the price comparison is presented as an absolute price difference.

The reference price referred to the recommended retail price in 53.1% of cases (93 products subject to price comparison), the average price over different websites in 7.4% of cases (13 products subject to price comparison), and the price on other websites or the list price (provided by the manufacturer) in 2.9% of cases each (five products subject to price comparison for each). Finally, in one third of cases (33.7% of cases, or 59 products subject to price comparison), the reference price is unclear. The latter cases have been included in the price comparison section of the chapter rather than the price reduction because, while the reference price was unclear, the researcher’s opinion was that it referred to a comparison and not a reduction.

In cases where there is information about the reference price, a page provided more detailed information about what it related to. Some websites have a specific section detailing the nomenclature they use, such as RRP ((recommended retail price, list price etc). This information is provided but often not easy to identify without searching of it specifically. In unclear cases, where no information is given on what the reference price relates to, the way in which the price promotion is presented is very similar to the cases listed above, but no information is available either next to the price promotion, or by hovering one’s cursor on the reduction presented.

**Combined offers**

Sellers of 88 products on 27 websites used combined offers.

Combined offers are presented in 25.8% of cases. In half of the instances (51.1% of cases, 45 products), the combined offers referred to products of the same type. While this isn’t always described, suggestions are provided as to what type of products is relevant to the reduction. Combined offers for products of the same brand accounted for 40.9% of cases (36 products). The remaining combined offers related either to the same product (i.e. additional reduction if the same product was purchased more than once), in 8% of cases (7 products).

### 2.7.3 Conclusions

**Price reductions and other types of price promotions are common.** The websites screened found two different types of price reduction or promotion.

The first type, referred to as price reductions should comply with the requirements of article 6a PID. This appeared to be the case in only 28% of cases. In the majority of cases (66.1%), no explanation of what the reference price referred to.

Price reductions and promotions are generally clearly presented, with the price struck of in 80% of cases, a percentage reduction (75.6%) or other means. In all cases, a “reference price” is clearly indicated, however, what this refers to depends on the website.

Combined offers existed in 25.8% of cases. In the majority of cases, they refer to products of the same type, followed by products of the same brand (40.9%).

## 2.8 Customer service

While undertaking **price reduction and other price promotions sweep**, the researchers were asked to report whether they had experienced customer service chatbots and what process was offered to contact customer service. While not a sweep in itself, the results are presented here.

### Methodology

As part of the sweep on price reduction and other types of price promotion, the researchers were asked to indicate whether they were exposed to an automated chatbot for customer service.

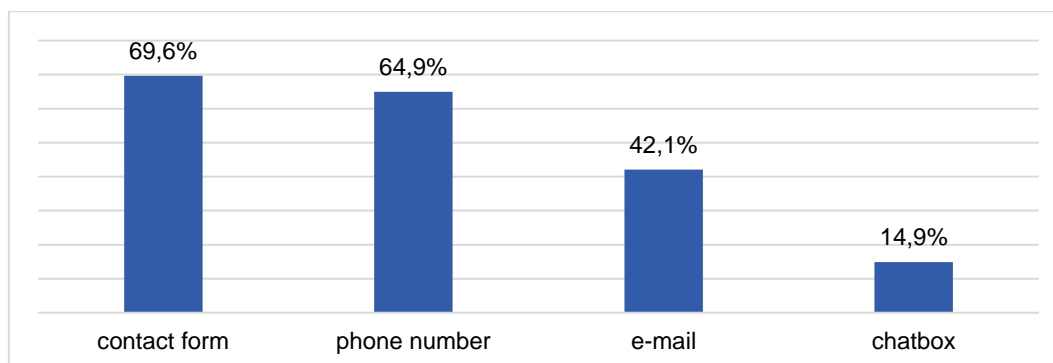
They were then asked to check the website they were visiting, whether it was possible to have access to a human interlocutor via e-mail, telephone or through a contact form.

### Results

Researchers experienced chatbots in 14.7% or 14 of 95 websites screened. The most common methods to contact customer service are through a contact form (69.9%) or phone number (64.9%). In only two cases, no way of contacting customer service was obvious.

In cases where the website swept is that of a large company with a physical presence in the country, the websites also suggest referring the customer to a physical shop in case of questions or returns.

**Figure 45: How can the customer service be accessed?**



## 3 Research on selected online unfair contract terms

### 3.1 Scope and objectives of the research

The research aimed to complement the existing Unfair Contract Terms Directive (UCTD)<sup>5</sup> case study, with a comprehensive examination of the terms and conditions (T&Cs) of 35 selected websites and platforms.<sup>6</sup>

EU unfair terms consumer law, embodied in the UCTD, seeks to address power imbalances between consumers and businesses. The UCTD identifies and prohibits unfair contract terms that may disadvantage consumers, emphasising the need for clarity, fairness, and transparency in contractual relationships. Some literature and some stakeholders consulted during the fitness check have suggested that the UCTD may need to be updated to address the challenges posed by digital-specific unfair terms.<sup>7</sup> Notwithstanding, the legislation was designed to be technology-neutral, and to apply to standard contract terms in both the offline and online environment (which most stakeholders perceived has worked well for many years). Therefore, careful consideration is needed to analyse the extent to which the UCTD's application in the digital environment has resulted in specific challenges and new types of unfair contract terms emerging, and whether this is specific to particular business practices and/ or types of traders.

The contemporary digital environment has distinctive characteristics that were absent in traditional face-to-face transactions. Notably, consumers engage with a diverse array of digital service providers and online platforms, and these interactions are regulated through terms and conditions (T&Cs)<sup>8</sup> that have particular characteristics.

These T&Cs delineate the contractual obligations and rights of both consumers and service providers. Although the primary purpose of T&Cs is to safeguard the interests of all involved parties, it is frequently observed that these agreements incorporate unfair terms that put consumers at a disadvantage. These unfair terms, embedded in the terms and conditions, may manifest as overly complex language, hidden fees, or clauses that limit consumer rights for instance in relation to data collection and processing and consent, given many

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<sup>5</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29-34 at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31993L0013>. For an introduction, C. Gardiner, *Unfair Contract Terms in the Digital Age. The Challenge of Protecting European Consumers in the Online Marketplace* (Cheltenham, UK; Northampton, MA, USA: Edward Elgar 2022).

<sup>6</sup> M. Loos and J. Luzak, *Update the Unfair Contract Terms directive for digital services*, EU Parliament Study, Brussels: European Parliament 2021) at [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/676006/IPOL\\_STU\(2021\)676006\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/676006/IPOL_STU(2021)676006_EN.pdf) (last accessed on 15 January 2024). Some unfair terms that Loos and Luzak have also expressed concerns about regard the right of consumers to withdraw from distance contracts for digital services. These terms may obstruct consumers' use of their right to withdrawal and require them to pay compensation or damages for withdrawal. Unfair terms obstructing consumers' use of the right of withdrawal or requiring consumers to pay compensation or damages for withdrawal should be addressed in order to protect consumers' rights. See also M. Loos and J. Luzak, *Wanted: a Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers'* (2016) 39 *Journal of Consumer Policy*, 63-90.

<sup>7</sup> K. Drazewski, *EU Consumer Protection 2.0 - Protecting fairness and consumer choice in a digital economy*, Brussels, BEUC, 2022. The BEUC notes that "in digital marketplaces, 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". The report also argues that "Regulatory attention should shift from defining vulnerability or sorting out particular users under the concept of vulnerability towards tackling the sources of vulnerability, which comprise digital asymmetry".

<sup>8</sup> Online T&Cs are typically presented as digital documents that users shall agree to before accessing a website, app, or service. They are often displayed as a checkbox or link that users must click or acknowledge.

In contrast, offline T&Cs may be provided in physical form, such as printed documents or signage, and may not always be as prominently displayed or readily accessible.

In addition:

- online environments are dynamic and can be updated or revised more easily compared to offline settings.
- online T&Cs can leverage interactive features and multimedia elements to enhance user experience and comprehension. For example, digital platforms may use pop-up windows, tooltips, or interactive tutorials to explain complex terms or highlight important clauses.



digital services and platforms provide such services without monetary payment in exchange for data. Consequently, consumers may find themselves in a vulnerable position, facing challenges in understanding and exercising their rights within the digital transaction landscape. This imbalance underscores the need for a critical examination of existing T&Cs and the development of regulatory mechanisms that ensure fairness and transparency in digital interactions.

In addressing this issue, our research aimed to shed light on the prevalence of unfair terms in digital contracts, their nature and main patterns. Thus, the key objectives of the research were: (1) to scrutinise the compliance of contract T&Cs with the UCTD and (2) to identify potentially unfair terms within these agreements and (3) to detect new unfair terms proper of digital environments.

## 3.2 Methodology applied

In the context of digital environments and the prevalence of unfair terms in T&Cs, it becomes imperative to develop innovative methods for investigation. Traditional approaches may fall short in dealing with the complexity and scale of digital transactions. The importance of embracing new investigative methods lies in the unique challenges posed by the digital landscape, where consumers interact with numerous service providers and online platforms, and contractual relationships are defined by intricate T&Cs.

By incorporating advanced technological tools, such as machine learning and data analytics, into the investigative process, we can efficiently scan through vast volumes of digital contracts. This enables us to identify and analyse potential unfair clauses, ensuring a more comprehensive and timely assessment compared to traditional manual methods.

Accordingly, our research methodology unfolds with the utilisation of the software Claudette<sup>9</sup> for the automated examination of T&Cs, which were systematically downloaded from a representative sample of 35 websites<sup>10</sup>. Among these websites, 15 were from e-commerce (covering sectors like telecoms, energy, and travel), 15 were platforms, and 5 micro-contract operators.<sup>11</sup> The selection process was multifaceted and considered diverse parameters like user engagement, geographical representation, perceived fairness, and a strategic mix of sectors.<sup>12</sup>

The analytical approach was hybrid, incorporating both automated assessments via Claudette and manual evaluations carried out by the research team. Given that Claudette was noted to be helpful but not always accurate, for instance the tool over-flagged some terms and missed others, the findings were assessed with caution. Therefore, the supervision and review of Claudette's findings by the research team was crucial to interpret and determine the true nature of the identified unfair clauses.

The exploration of unfair terms is anchored in the regulatory framework provided by the UCTD, governing non-individually negotiated contract clauses at the EU level. The research sought to unveil newly problematic unfair terms and assesses the compliance levels across various types of traders within the digital landscape. The research shows the intricate challenges posed by digital transactions, the emergence of novel business practices, and

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<sup>9</sup> See the interface of Claudette at <http://claudette.eu.eu/demo>.

<sup>10</sup> The 35 selected websites are listed in the table below.

<sup>11</sup> Precisely, the following websites: amazon.it, arukereso.hu, bahn.de, Bakecaincontri.com, bkk.hu, booking.com, buymeacoffee.com, cardmarket.com, chess.com, emag.ro, facebook.com, finya.de, fsolver.es, google.com, idealo.de, idealo.es, indiegogo.com, Instagram.com, kickstarter.com, lichess.org, Mediaset.it, Netflix.com, patreon.com, podia.com, pricerunner.se, roblox.com, szallas.hu, thetrainline.com, Tiktok.com, tinder.com, trovaprezzi.it, tvn24.pl, Twitch.tv, Twitter.com, youtube.com

<sup>12</sup> Lagioia et al., AI in Search of Unfairness in Consumer Contracts: The Terms of Service Landscape (2022) 45 Journal of Consumer Policy, 481-536 at <https://link.springer.com/article/10.1007/s10603-022-09520-9> (last accessed on 15 January 2024). Ruggeri et al., 'Detecting and explaining unfairness in consumer contracts through memory networks' (2022) 30:1 Artificial Intelligence and Law, 59-92, at <https://link.springer.com/article/10.1007/s10506-021-09288-2> (last accessed on 15 January 2025).

underscores the importance of further research to identify and assess the prevalence and implications of unfair terms in digital contracts.

### 3.2.1 Review of unfair clauses identified through Claudette IT tool

Claudette is an IT tool to check whether there are unfair standard contract terms using automation. This was an innovative project developed by the European University Institute (EUI) which automates the analysis of T&Cs, with a specific focus on data protection and GDPR compliance (given the crucial importance of the interaction between the GDPR and the UCTD for many digital services).

This section provides an overview and a comment on the results of Claudette's reports on unfair terms identified in the 35 selected websites.

The results **were automatically generated by the software and then reviewed and analysed by our team to identify types of unfair contract terms and to assess how typical / atypical these are in the digital environment.**

An example of Claudette's report about potentially unfair clauses is provided in the box below, and concerns Claudette's report on Amazon.it.

#### Box 1: Example of Claudette's report on potentially unfair clauses identified on Amazon.it.

- Potentially unfair clause 1: *By using our services, you accept these General Conditions of Use.*
- Potentially unfair clause 2: *We reserve the right to prevent access to our services or to terminate an Amazon account if you violate applicable law, applicable contractual provisions, our guidelines or our policies.*
- Potentially unfair clause 3: *We have the right to remove or edit such content.*
- Potentially unfair clause 4: *The District Courts of Luxembourg City will have non-exclusive jurisdiction.*
- Potentially unfair clause 5: *You are bound by the terms and policies of our services in effect at the time you use such services.*
- Potentially unfair clause 6: *We may change these conditions in certain circumstances and make changes to our services at any time.*
- Potentially unfair clause 7: *We reserve the right to prevent you from accessing the Amazon Services or to terminate your account if your behavior constitutes reasonable grounds for doing so.*

A comprehensive breakdown of Claudette's findings, focusing on the frequency and prevalence of specific clauses across various websites is provided. The analysis shows the following clauses which are common in the T&Cs under examination:

- **Unilateral Termination:** Claudette's analysis revealed a significant occurrence of clauses related to unilateral termination across 23 websites. Noteworthy examples include Amazon.it, Netflix.com, and Patreon.com. These clauses grant platforms the right to terminate user accounts or access unilaterally, raising concerns about user rights and the balance of power.
- **Unilateral Change:** The clauses about unilateral change have been found across the websites and for a total of 30 occurrences. Claudette's software detected the clauses about unilateral change in various platforms such as Amazon.it, Netflix.com, Twitch.tv and Kickstarter.com, illustrating the dynamic nature of digital agreements and potential challenges for users.

- **Content Removal:** Claudette identified 13 examples of clauses related to content removal, pointing to platforms' authority to edit or remove user-generated content. Notable examples include Facebook.com, Instagram.com, and Twitch.tv, each with 1 occurrence. These findings prompt considerations about user autonomy and the platforms' responsibilities in overseeing user-generated content.
- **Jurisdiction:** Clauses regarding jurisdiction emerged in 13 instances, where platforms specify the legal jurisdiction governing disputes. Examples include: Booking.com, Netflix.com, and Tiktok.com. This emphasizes the importance of understanding legal implications and potential challenges users may face in case of disputes. For example, Tiktok.com's clause about jurisdiction specifies: "The user may also appeal to the following courts: the courts of the Republic of Ireland, which will have non-exclusive jurisdiction in relation to disputes with TikTok Technology Limited; and the courts of England and Wales, which will have non-exclusive jurisdiction in relation to disputes with Tik Tok Information Technologies UK Limited". In this regard, we note that the EU does not completely forbid standard jurisdiction clauses in consumer contracts, as long as they do not violate the fairness principle. In *Ryanair DAC v. DelayFix*, the CJEU held that if the forum selection clause in a contract has resulted in a serious imbalance between the rights and obligations of the two parties and harmed the interests of consumers' benefit, it shall be invalid.<sup>13</sup>
- **Limitation of Liability:** 8 examples of clauses limiting platforms' liability were found for instance on Amazon.it, Netflix.com, and Tinder.com. Such clauses raise questions about user protection and the extent to which platforms assume responsibility for user experiences and outcomes.
- **Choice of Law:** Claudette identified 7 clauses where platforms dictate the choice of law governing contractual agreements. Platforms like Netflix.com, Roblox.com, and Tinder.com exemplify this trend. For example, Netflix.com's clause states that "These Terms of Service shall be governed by and construed in accordance with the laws of the state of Delaware, U.S.A. without regard to conflict of law's provisions, and not by the 1980 U.N. Convention on contracts for the international sale of goods". In any case, we underline that Art. 6 (2) UCTD invalidates any choice of law of a non-EU Member State that would result in the consumer losing the protection afforded by the UTD, provided there is a 'close connection with the territory of the Member States.
- **Arbitration:** Contracts that include clauses forcing consumers into binding arbitration or depriving them of the right to seek legal recourse in the case of disputes can be deemed unfair. A total of 10 clauses relate to arbitration clauses, specifying the method of dispute resolution. Examples from Amazon.it, Twitch.tv, and Indiegogo.com highlight the prevalence of company-established alternative dispute resolution (ADR) mechanisms in digital platforms' T&Cs. For example, Tinder.com's clause clarifies that: "*Except for members residing within the EU or the European Economic Area and where prohibited by applicable law: the exclusive means to resolve any dispute or claim arising out of or in connection with this Agreement ( including alleged breaches of this Agreement ) or in connection with the Service , will be binding administration administered by JAMS under its Streamlined Arbitration Rules and Procedures by JAMS , except as modified by our Arbitration Procedures*". In fact, EU consumer law has been very protective in this respect. Particularly, the ECJ has determined that the UCTD ought to be interpreted as meaning that a national court deciding on an action to set aside an arbitral award must determine whether the arbitration agreement was unfair and thus void, even in cases where the consumer had not pleaded its invalidity in the course of the

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<sup>13</sup> Case C-519/19 *Ryanair DAC v. DelayFix* [2020] ECR, paras. 58-9.

arbitration proceedings but had only done so before the judge deciding over the annulment action.<sup>14</sup>

The Table below provides an overview of Claudette’s results for each of the 35 websites swept by the software.

**Table 5: Categories of potentially unfair clauses according to Claudette.**

Website name	Categories of potentially unfair clauses according to Claudette							
	Contract by Using	Unilateral Termination	Content Removal	Jurisdiction	Unilateral Change	Limitation of Liability	Choice of Law	Arbitration
amazon.it	yes	yes	yes	yes	yes	yes	yes	
arukereso.hu						yes	yes	
bahn.de	yes	yes	yes		yes	yes		
Bakecaincontri.com		yes			yes	yes		
bkk.hu	yes	yes			yes	yes		
booking.com		yes		yes	yes	yes	yes	
buymeacoffee.com	yes	yes	yes			yes	yes	
cardmarket.com		yes	yes		yes		yes	
chess.com	yes	yes	yes	yes	yes	yes	yes	
emag.ro					yes			
facebook.com		yes	yes	yes			yes	
finya.de					yes	yes		
fsolver.es		yes			yes	yes		
google.com		yes			yes	yes		
idealo.de		yes	yes		yes	yes		
idealo.es		yes			yes	yes		
indiegogo.com	yes	yes	yes	yes	yes	yes	yes	yes
Instagram.com	yes	yes	yes	yes	yes		yes	
kickstarter.com	yes	yes			yes	yes		
lichess.org	yes	yes	yes		yes	yes		
Mediaset.it		yes			yes			
Netflix.com	yes	yes			yes	yes	yes	yes
patreon.com	yes	yes	yes	yes	yes	yes	yes	
podia.com	yes	yes	yes	yes	yes	yes	yes	yes
pricerunner.se	yes	yes	yes		yes	yes		
roblox.com	yes	yes	yes	yes	yes	yes	yes	yes
szallas.hu	yes	yes	yes		yes	yes		
thetrainline.com						yes		

<sup>14</sup> Court of Justice Case 168/05, Elisa Maria Mostaza Claro v Centro Movil Milenium SL [2006] ECR I-10421. See also Court of Justice Case 40/08, Asturcom Telecomunicaciones SL v Cristina Rodriguez Nogueira [2009] ECR I-00000.

Categories of potentially unfair clauses according to Claudette								
Website name	Contract by Using	Unilateral Termination	Content Removal	Jurisdiction	Unilateral Change	Limitation of Liability	Choice of Law	Arbitration
Tiktok.com		yes	yes	yes	yes	yes	yes	
tinder.com	yes	yes	yes	yes	yes	yes	yes	yes
trovaprezzi.it	yes	yes			yes	yes		
tvn24.pl		yes						
Twitch.tv	yes	yes	yes	yes	yes	yes	yes	yes
Twitter.com	yes	yes	yes	yes	yes	yes	yes	yes
youtube.com	yes	yes	yes		yes	yes		

### 3.2.2 Analysis of reports generated by the Claudette IT tool

Claudette reviewed the T&Cs of the selected websites, with a primary focus on identifying and understanding the presence of unfair terms. By considering these digital contracts, we aimed to point out some of the implications for consumers navigating the complex and dynamic digital environment. This section contains our analysis of Claudette’s reports.

Interestingly, the examination of terms and conditions (T&Cs) using the Claudette tool has unearthed **noteworthy pattern about unilateral change clauses, limitation liability clauses, choice of law and jurisdictions clauses**. These clauses appeared to be the most common and frequent in the selected websites.

Firstly, Claudette’s analysis exposes a striking trend—the prevalence of clauses allowing **platforms to unilaterally change their terms and conditions**. With a total of 30 occurrences identified across a diverse array of platforms, including leading players, such as Amazon.it and Netflix.com, these clauses grant platforms the authority to modify contractual agreements without users’ explicit consent. Indeed, the ubiquity of unilateral change clauses raises crucial questions about user expectations and the notion of informed consent. Users, often faced with lengthy and complex T&Cs, might not fully grasp the potential implications of granting platforms unilateral power to modify agreements. Thus, one key aspect in the discourse surrounding unilateral changes is the need for enhanced transparency and communication from digital platforms.

Secondly, Claudette’s scrutiny reveals instances of **limitation liability clauses** in platforms such as Amazon.it, Netflix.com, and Tinder.com, prompting a closer examination of the balance between user protection and platforms’ legal disclaimers. While "Limitation of Liability" clauses offer legal clarity and risk mitigation for platforms, they require a corresponding commitment to transparency, effective communication, and a robust framework for addressing user complaints.

For example, on 20 August 2020, the Italian CPA initiated separate proceedings against the companies Google Drive, Dropbox, and iCloud Apple.<sup>15</sup> In essence, by means of the clauses deemed unlawful by the CPA, the DSPs excluded any liability for the malfunctioning or failure of a service, as well as for damage caused to the device and the uploaded data, placing the entire risk on the consumer and excluding any protection or right of the latter. In fact, these clauses, so-called ‘as-is’ or ‘closed-box’ clauses, exempt the supplier from

<sup>15</sup> Autorità Garante della Concorrenza e del Mercato, *Bollettino Settimanale* no. 38/2021 at [www.agcm.it/dotcmsdoc/bollettini/2021/38-21.pdf](http://www.agcm.it/dotcmsdoc/bollettini/2021/38-21.pdf) (last accessed on 20 January 2024). See also CJEU, of 4 June 2020, C495/19 at <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:62019CA0495&from=FR>; CJEU, of 11 March 2020, C-511/17 at <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:62017CA0511&from=EN> (last accessed on 15 August 2023).

liability for any error or malfunctioning that may occur; with the consequence that the consumer cannot claim any compensation in the event that he/she suffers any damage during use of the service (e.g. loss of data, interruption of activities, etc.), unless there is wilful misconduct or gross negligence on the part of the DSP in breach of the terms of service. Doubtless, this kind of provision gives rise to a contractual imbalance between the parties, since the user, in the event of formal compliance with the terms of service by the DSP, would be prevented from asserting all his/her rights against the same.

Thirdly, the analysis of **jurisdiction and choice of law clauses** across digital platforms, as revealed by Claudette's examination, sheds light on the multifaceted implications for users, the platforms themselves, and the broader legal landscape. The research shows different approaches to the clauses concerning the choice of law and jurisdiction, with platforms like Booking.com opting for a segmented strategy based on the type of service. On one hand, tailored jurisdictions may streamline dispute resolution, but on the other, users may face complexities in understanding and navigating different legal frameworks. Additionally, Global platforms such as Netflix.com and Tiktok.com adopt jurisdiction and choice of law clauses that reflect a global user base. The adoption of broad-ranging legal frameworks may simplify legal processes for the platforms but raises questions about the protection of European users' rights. Users engaging with platforms across different legal jurisdictions may encounter difficulties in accessing justice, understanding their legal rights, and navigating the intricacies of diverse legal systems.

The review and analysis of Claudette's reports combined with desk research showed some new unfair clauses that are specific to digital environments, such as: content removal, data-paid digital services, consumer data. This confirms that the distinct characteristics of digital markets have the potential to give rise to new and original unfair terms. Additionally, T&Cs of platforms often involve dynamic and rapidly changing terms that can be updated regularly without direct communication with consumers.

Nevertheless, identifying digital-specific unfair terms used by DSPs in consumer contracts poses unique and new challenges to EU institutions, CPAs, and researchers for various reasons associated with the dynamic and complex nature of the digital environment. Some further issues are also considered beyond the review of the Claudette reports pertaining to additional issues in the digital environment.

### 3.2.3 Clauses about content removal

Claudette identified clauses from thirteen different platforms, each flagged by the software for their potential problems in the realm of **content removal**. It has detected a potentially unfair clause on Amazon.it, indicating the platform's reserved right to remove or edit user-generated content. This pose concerns about the transparency and fairness of content moderation policies, necessitating a closer examination of user rights and expectations. Similarly, Bakecaincontrii.com exhibits a clause allowing the removal or editing of user-generated content, raising questions about user autonomy and the platform's responsibility in overseeing content. Facebook.com also appears on Claudette's report due to a clause granting the right to remove or edit user-generated content. This highlights the challenges in balancing user freedom with the platform's content moderation policies. Similar clauses were also identified in the following websites: Finya.de, fsolver.es, Instagram.com, Indiegogo.com, Netflix.com, Patreon.com, Podia.com, Roblox.com, Twitch.tv and Twitter.com Thus, Claudette's analysis highlights the prevalence of clauses related to content removal across diverse digital platforms. These findings necessitate to carefully consider platform responsibilities in shaping the digital content landscape, especially in the light of the enforcement of the DSA.<sup>16</sup>

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<sup>16</sup> Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277, 27.10.2022, p. 1–102 at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R2065>

### 3.2.4 Unfair clauses dealing with data-paid digital services

Article 3 para. 1 of the Directive on certain aspects concerning contracts for the supply of digital content recognises that consumers may use their personal data as counter-performance in exchange for contents or services.<sup>17</sup> In practice, DSPs have mastered the art of creating an illusion for consumers, leading them to believe that they are not incurring any exchange when accessing services. However, the reality is very different. Users often “pay” by sharing their personal data, or by dedicating their time and attention to advertisements. This non-monetary payment system has a tangible value and should be considered as an obligation on the consumer side.

In fact, our analysis of the T&Cs confirmed that, in numerous instances, DSPs deploy the “freemium model”, where basic services are offered for free, while more comprehensive services or additional content come at a cost. The core of the UCTD’s unfairness test lies in understanding if any term creates a significant imbalance in the obligations and rights of involved parties, at the consumer’s expense also with respect to the “freemium model” of business.

Case-law shall also be considered in this respect. For instance, the Tribunal de Grande Instance of Paris (TGI) had, in its judgment against the Google+ service in 2018 and 2019, declared certain terms as unfair.<sup>18</sup> They primarily highlighted the opacity regarding the commercial utilization and value of users’ data.<sup>19</sup> More specifically, the French Tribunal de Grande Instance of Paris, commonly referred to as the TGI, made a significant ruling regarding the fairness of certain terms within the Google+ service. This decision, rendered in response to legal actions initiated by the French consumer association UFC Que Choisir against major tech players like Twitter, Google, and Facebook in 2018 and 2019, unveiled a noteworthy revelation about the lack of transparency surrounding users’ data and its commercial utilization. In its judgment, the TGI de Paris found that a substantial number of online contract clauses employed by these platforms were deemed unfair.

Firstly, the TGI asserted that the collection of personal data lacked adequate transparency. Users were not sufficiently informed that their personal data held a commercial value and would be utilized for business purposes. This prompted the conclusion that users’ explicit consent should be incorporated into the contract itself, rather than relegating it to the terms and conditions for using the service. Furthermore, the TGI emphasised the necessity for users to provide a new agreement in the event of substantial amendments to privacy policies and terms of use. This underscored the importance of keeping users informed and obtaining their explicit consent for any significant changes to the contractual framework.

Another crucial point addressed by the TGI was the prohibition on the trader’s ability to suspend or delete an account without justification or recourse, safeguarding users against arbitrary actions. Moreover, the TGI ruled against the exclusion of any liability on the part of the online service provider, reinforcing the principle that these tech companies should be accountable for the services they offer. The legal reasoning behind these decisions was firmly grounded in the provisions of the French Civil Code and the French Consumer Code, establishing a robust legal foundation for the verdicts. This legal precedent in France echoes a similar sentiment in Italy, where the Lazio Regional Administrative Court in 2019 acknowledged the commercial value of data. Notably, Facebook faced condemnation for

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<sup>17</sup> Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ L 136, 22.5.2019, p. 1–27 at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019L0770>

<sup>18</sup> C. Leone, French tribunal invalidates many terms in Google+ T&Cs, University of Amsterdam Papers, 2019, at [https://pure.uva.nl/ws/files/50394464/Recent\\_developments\\_in\\_European\\_Consumer\\_Law\\_French\\_tribunal\\_invalidates\\_m\\_a.pdf](https://pure.uva.nl/ws/files/50394464/Recent_developments_in_European_Consumer_Law_French_tribunal_invalidates_m_a.pdf)

<sup>19</sup> Cour d’Appel de Paris, 14 avril 2023 n. 19/09244 at <https://www.courdecassation.fr/en/decision/643a42acd83dbd04f5fb2a86>

misleadingly claiming to provide its services entirely for free, shedding light on the economic significance of user data in the digital realm.<sup>20</sup>

There have been further legal cases concerning whether if a consumer does not give their consent for data processing, online platforms can prevent them from using a particular service within their T&Cs.

### 3.2.5 Unfair clauses concerning consumer data

The interplay between data protection law and EU unfair terms consumer law becomes evident in scenarios where the collection and use of personal data impact contractual relationships. The GDPR's principles<sup>21</sup> align with the objectives of consumer law by requiring transparency in data processing practices and obtaining informed consent. Ensuring that consumers are fully informed about how their data will be utilized aligns with both legal frameworks, fostering fairness and transparency in contractual relationships.

Our analysis reveals that DSPs, in the provision of their services, occasionally incorporate clauses that authorise the collection of excessive data beyond what is essential. This practice not only contravenes the data minimization principle stipulated by GDPR but may also be deemed potentially unfair under the UCTD. This is especially problematic as consumers are often insufficiently informed when sharing data that goes beyond the necessary requirements for service delivery. In addition, DSPs have a duty under the GDPR to maintain accurate and updated consumer data. Yet, it seems that some DSPs have introduced terms absolving them from the responsibility of data accuracy.

There have been some legal cases by data protection authorities that related to data processing by traders of consumers' data. In a recent enforcement action involving the Irish Data Protection Authorities and a major global social media platform, for instance, the social media firm had sought to change the basis for consent to process personal data in a way that was incompatible with the GDPR's transparency obligations. It was observed in a research paper that

“There was an attempt to shift from relying on user consent as the basis on which it relies under the GDPR to process personal data (Article 6(1)(a)), to relying on the ground of contractual necessity (Article 6(1)(b)). The DPC's final decisions on the complaints were announced on 31 December 2022, and upheld the binding decision of the European Data Protection Board (EDPB). It was held that Meta breached its transparency obligations under the GDPR, falling foul of Articles 12, 13(1)(c), and 5(1)(a) of the regulations. The information pertaining to the legal basis on which data processing was conducted was not outlined with sufficient clarity, meaning users were not equipped with sufficient understanding as to how, and on what grounds, their data would be used”.<sup>22</sup> Pg. 424.

### 3.2.6 Unfair clauses relating to the duration of contracts

Some literature has pointed to wider challenges relating to the UCTD's application in the digital environment, such as the need for potential modernisation due to the inherently

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<sup>20</sup> Regional Administrative Court of Lazio, first section, judgment no. 261 of January 10, 2020, at [https://www.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza?nodeRef=&schema=tar\\_rm&nrg=201815275&nomeFile=202000260\\_01.html&subDir=Provvedimenti](https://www.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza?nodeRef=&schema=tar_rm&nrg=201815275&nomeFile=202000260_01.html&subDir=Provvedimenti) (last accessed on 20 January 2024).

<sup>21</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1-88 at <https://eur-lex.europa.eu/eli/reg/2016/679/oj>

<sup>22</sup> Durovic, M., Poon, J. Consumer Vulnerability, Digital Fairness, and the European Rules on Unfair Contract Terms: What Can Be Learnt from the Case Law Against TikTok and Meta?. J Consumer Policy 46, 419–443 (2023). <https://doi.org/10.1007/s10603-023-09546-7>.



different nature of traditional offline contracts compared with online contracts for digital services. For instance, in a research paper on the UCTD<sup>23</sup>, it is noted that:

“A particular concern arises from the fact that the UCTD, having been drafted for sales contracts and service contracts that were fully performed shortly after their conclusion (Recital 6), may be unable to extend its protection to contracts concluded online. Specifically, online contracts are often of a long-term nature and are subject to much more extensive changes than the UCTD may have originally taken into account.”

This may pose some risks to consumers in some circumstances. For example, the standard term contracts of social media platforms can often be changed at any time in future, leading to concerns whether this affords adequate consumer protection.

### 3.3 Conclusions

The analysis of Claudette’s reports on potentially unfair clauses yielded insights into prevalent issues across the 35 selected websites. The findings were categorised into thematic patterns, highlighting specific concerns related to unilateral changes, content removal, jurisdiction, limitation of liability, choice of law, and arbitration clauses.

A noteworthy trend emerged with the prevalence of clauses allowing platforms to unilaterally change terms and conditions. With 30 clauses identified across diverse platforms, including major players like Amazon.it and Netflix.com, these clauses grant platforms the authority to modify contractual agreements without explicit user consent. This raises critical questions about user expectations, the notion of informed consent, and the necessity for enhanced transparency in digital platforms.

Instances of limitation liability clauses were also identified in platforms such as Amazon.it, Netflix.com, and Tinder.com. This finding prompted a closer examination of the delicate balance between user protection and platforms’ legal disclaimers. While “Limitation of Liability” clauses provide legal clarity and risk mitigation for platforms, they necessitate a corresponding commitment to transparency, effective communication, and a robust framework for addressing user grievances.

The analysis of jurisdiction and choice of law clauses across digital platforms revealed diverse approaches. Platforms like Booking.com adopted a segmented strategy based on the type of service, posing both advantages and challenges. While tailored jurisdictions may streamline dispute resolution, users may face complexities in understanding and navigating different legal frameworks. Global platforms like Netflix.com and Tiktok.com adopted broad-ranging legal frameworks, raising questions about the protection of European users’ rights and the complexities faced by users engaging with platforms across different legal jurisdictions.

Claudette’s reports and additional desk research highlighted emerging unfair clauses specific to digital services, particularly in content removal policies and clauses related to free digital services. The analysis showed DSPs incorporating clauses authorizing the collection of excessive data, thereby contravening GDPR’s data minimization principle, and potentially violating the UCTD. Notably, some DSPs introduced terms sidestepping responsibilities for data accuracy, raising concerns about misleading consumers and

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<sup>23</sup> Durovic, M., Poon, J. Consumer Vulnerability, Digital Fairness, and the European Rules on Unfair Contract Terms: What Can Be Learnt from the Case Law Against TikTok and Meta?. *J Consumer Policy* 46, 419–443 (2023). <https://doi.org/10.1007/s10603-023-09546-7>

potential UCTD violations. Additionally, challenges in ensuring data security, especially in connected devices, were identified based on contractual terms that restrict DSPs' liability or lack transparency about third-party data sharing.

Our analysis confirms that a significant challenge arises due to the rapid evolution of the digital landscape. The digital services sector undergoes continuous innovation and technological progress, leading to the introduction of novel services and business models. T&Cs often bring along new contractual terms and practices that have not been previously encountered or addressed by existing consumer protection laws.

Additionally, certain unfair terms may involve intricate technological aspects, such as data collection, processing, and sharing practices. Assessing the fairness of these technical clauses requires specialized knowledge and expertise, posing a challenge for enforcement agencies and consumer organizations to thoroughly investigate and address potential concerns.

Moreover, contracts from DSPs are notorious for being lengthy, intricate, and filled with technical jargon. These terms and conditions can be convoluted, making it challenging for consumers to fully comprehend the implications of various clauses. Unfair terms may be concealed within these contracts, making it hard for consumers to identify and voice concerns about them. The lack of transparency and the absence of user-friendly language in these contracts obstruct consumers' understanding of their rights and potential unfair treatment.

We also note that some unfair clauses are widespread, regardless of the type of platform under consideration. This means that certain unfair terms appear consistently across different platforms, irrespective of their specific nature or industry. The ubiquity of these unfair clauses highlights a commonality in challenges faced by users or consumers, regardless of the DSP they engage with.

Each service provider may have its own specific terms and conditions tailored to its particular services and operational practices. This diversity in contract terms complicates the establishment of uniform criteria for assessing fairness across the digital services sector.

Furthermore, the crucial role of consumer awareness comes into play in identifying unfair terms.<sup>24</sup> Many consumers may not be fully aware of their rights, or the potential pitfalls present in DSP contracts. Consequently, they may unintentionally agree to unfair terms without realizing the consequences. Lack of awareness hampers consumers' ability to identify and raise concerns about unfair terms, further complicating the process of recognizing and addressing these issues.

Finally, the cross-border operations of DSPs introduce an additional layer of complexity. Many DSPs operate in multiple jurisdictions, serving consumers from different countries. These cross-border operations make it challenging to consistently enforce consumer protection laws since laws and regulations may significantly differ between countries. DSPs may exploit this legal variation to their advantage, making it difficult to effectively address unfair terms.

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<sup>24</sup> B. Hajek, Online Platform Service Providers on Platform 9¾: A Call for an Update of the Unfair Contract Terms Directive, ERPL, 2020, 28(5), 1143-1174 at <https://kluwerlawonline.com/journalarticle/European+Review+of+Private+Law/28.5/ERPL2020066> (last accessed on 15 January 2024).



## **Annex 5: Case studies**

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# 1 Case study – Aggressive practices

Case study headings	Description and analysis
<p><b>Introduction and Case Study Objectives</b></p>	<p>This case study examines the concept of aggressive practices covered by the Unfair Commercial Practices Directive (UCPD) in the context of the digital environment.</p> <p>As per Articles 8 and 9, the UCPD regards a commercial practice as aggressive if, by harassment, coercion, or undue influence, it significantly impairs the consumer’s freedom of choice or conduct and causes them or is likely to cause them to take a transactional decision that they would not have taken otherwise. In addition, one must consider all the features and circumstances of such practice in its factual context. For example, the Italian Competition Authority (ICA) condemned Facebook for its unfair commercial practices, ascertaining the undue influence exerted to obtain the transmission of registered consumers’ data to third-party websites/apps for commercial purposes without express and prior consent. We provide further details on this case and others below.</p> <p>This case study focuses on Articles 8 and 9 of the UCPD and the conditions for considering commercial practices as aggressive in the digital environment. This includes how to interpret the concepts of harassment, coercion, and undue influence and the extent to which they apply to the digital environment. The objective is to assess the concept of aggressive commercial practices as defined in the UCPD and whether the legal provisions in place are sufficient to account for all types of aggressive commercial practices and the digital environment.</p> <p>In addition, we assess the extent to which Annex I to the UCPD sufficiently defines commercial practices that are prohibited in all circumstances. We assess in the following the extent to which these practices apply to the digital environment as well as the need to add specific ones to the “blacklist”.</p> <p>For a commercial practice to be considered aggressive, two conditions must be fulfilled: first, the practice must amount to harassment, coercion, or undue influence; second, the practice must be capable of significantly impairing the average consumer’s freedom of choice regarding the product.</p> <p>The focus of this provision, and therefore of this case study, is on altering the very process to shape consumers’ will using techniques that compromise their freedom of decision<sup>25</sup>, not, as in the case of misleading practices, on transmitting information that could lead to an error about the characteristics of the corresponding products or services.</p>
<p><b>Case study method</b></p>	<p>The evidence draws on:</p> <ol style="list-style-type: none"> <li>(1) Desk research (see bibliography at the end of the case study)</li> <li>(2) Public consultation responses and position papers</li> <li>(3) Interviews (see the list with the types of stakeholders consulted at the end of the case study)</li> </ol> <p>We will update this case study to include relevant findings from the targeted surveys and the remaining interviews.</p> <p>The case study is structured as follows:</p> <ul style="list-style-type: none"> <li>• The research questions guiding the analysis,</li> <li>• An overview of the context within which the concept of aggressive commercial practices has evolved and how it figures in broader EU legislation,</li> <li>• An outline of the problematic practices, their scope and magnitude, and how these have increased with the digitalisation of the consumer space, – However, this case study does not assess the new and emerging practices themselves. Separate case studies cover some of them in specific instances.</li> <li>• An in-depth assessment of the concept of aggressive commercial practices in the UCPD and the extent to which the Directive covers the issue in the digital environment or if there is a need for specific definitions and examples, including about the exploitation of digital vulnerabilities, for instance, which can be a prime example of an aggressive scenario online that may need prohibition as BEUC recommended.<sup>26</sup></li> </ul>

<sup>25</sup> Pablo Fernández Carballo-Calero, Aggressive Commercial Practices in the Case Law of EU Member States, Journal of European Consumer and Market Law, Volume 5, Issue 6 (2016) pp.255-261.

<sup>26</sup> BEUC, EU Consumer Protection 2.0 – Protecting fairness and consumer choice in a digital economy, 10.02.2022.

Case study headings	Description and analysis
<p><b>Research questions</b></p>	<p>The following research questions have guided the case study:</p> <ul style="list-style-type: none"> <li>• EQ: Are the provisions on aggressive commercial practices (Articles 8 and 9) sufficiently precise and successful in capturing problematic digital practices? Are consumers subject to the exploitation of personal vulnerabilities or psychographic profiling to exercise emotional or psychological pressure to distort a consumer’s transactional decision? Is the current blacklist of aggressive commercial practices (Annex I) successfully capturing problematic digital practices? <ul style="list-style-type: none"> <li>▪ RQ: What commercial practices qualify as “aggressive” in the digital environment?</li> <li>▪ RQ: To what extent does the UCPD specifically apply to aggressive commercial practices in the digital environment?</li> <li>▪ RQ: To what extent are there examples of aggressive commercial practices in the digital environment (for example, Nagging, Roach motel, sneak into the basket, Hidden subscription / forced continuity/registration)? If examples exist, does the UCPD cover these? If yes, fully or partially?</li> </ul> </li> <li>• EQ: Are there any new aggressive online commercial practices that challenge the effectiveness of the UCPD? Which types of traders and market sectors are making the most use of such practices? In this regard, are there any differences between EU Member States or regions or EU and non-EU traders? <ul style="list-style-type: none"> <li>▪ RQ: To what extent do aggressive commercial practices vary depending on the national context or stakeholder group?</li> </ul> </li> <li>• EQ: Have there been any recent developments in terms of aggressive commercial practices in the digital environment that are likely to challenge the effectiveness of the UCPD in the future<sup>27</sup>? <ul style="list-style-type: none"> <li>▪ RQ: To what extent do aggressive commercial practices continue to influence consumers’ choices in the digital environment?</li> <li>▪ RQ: Are there emerging aggressive commercial practices that (could) dodge the current provisions and represent a threat to consumers in the future?</li> </ul> </li> <li>• EQ: Are there legal gaps or uncertain/grey areas in the UCPD regarding aggressive commercial practices in the digital environment? Which aggressive online commercial practices are likely to be already considered illegal under the existing rules and only require improved enforcement? <ul style="list-style-type: none"> <li>▪ RQ: Are there any shortcomings/gaps in the definition and scope of the provisions on aggressive commercial practices, which would result in certain types of emerging digital practices not being covered by the UCPD?</li> <li>▪ RQ: Is it necessary to introduce provisions to minimise the use of harassment, coercion, and undue influence as a digital practice?</li> </ul> </li> <li>• EQ: How effective has the enforcement of the UCPD Articles 8 and 9 been with digital products? What hinders/influences effective enforcement in the digital area? Are there problems specific to SMEs resulting in a widespread lack of compliance? <ul style="list-style-type: none"> <li>▪ RQ: To what extent have the Member States managed to enforce the provisions on online commercial aggressive practices?</li> </ul> </li> <li>• EQ: What problems do consumers face with dark patterns, i.e., manipulative interface and choice architecture designs, which are not sufficiently addressed by the UCPD’s Articles 8 and 9?</li> </ul>
<p><b>Context</b></p>	<p>Aggressive commercial practices in the digital environment have been a growing concern for the European Commission, with the year-on-year increase in Internet use. In its 2013 communication on the application of the UCPD<sup>28</sup>, the Commission indicated that thanks to the Directive, national consumer protection watchdogs had been able to curb and sanction aggressive practices. For example, in 2009 and 2010, the Italian Antitrust Authority issued EUR 4.45 million in fines for unfair practices of <a href="http://www.easy-download.info">www.easy-download.info</a> in which the</p>

<sup>27</sup> Such as the use of smart contracts, increase in personalisation, the impact of AI, the use of IoT, and connecting data from different sources, including social media.

<sup>28</sup> European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of the Unfair Commercial Practices Directives – Achieving a high level of consumer protection – Building trust in the Internal Market, Brussels, 14.03.2013.

Case study headings	Description and analysis
	<p>website registration mechanism was used to induce consumers unknowingly to subscribe to various service contracts.<sup>29</sup></p> <p>However, the Commission highlighted that a few Member States signalled aggressive practices targeting children in online games, already in 2013. More recently, consumer organisations have also criticised the games industry for its aggressiveness, especially since children are a significant and vulnerable audience.<sup>30</sup> This evolution and the market highlights below make this sector a prominent one in the use of aggressive commercial practices:</p> <ul style="list-style-type: none"> <li>• 52% of the population (aged 6-64) play video games, and the number of players has increased from 118.3 million in 2020 to 124.8 million in 2021 on all platforms (mobile devices, consoles, and PCs).</li> <li>• On average, people in Europe spend 9 hours/week playing video games.</li> </ul> <p>The Commission’s 2020 New Consumer Agenda<sup>31</sup> also highlights that children and minors are particularly exposed to aggressive commercial practices online and that addressing specific consumer needs is one of the key priorities. Nevertheless, all sectors use aggressive commercial practices. While they are not specific to the digital environment, it is essential to recognise that the scale of the problem has increased with the development of the online market economy. With the Internet, traders have more extensive access to personal data than offline, giving them more opportunities to develop or use aggressive commercial practices. This means that there is a power asymmetry between traders and consumers. BEUC uses the term “digital asymmetry” to describe this power imbalance between data-empowered traders and consumers. Online traders control the choice architecture and the information presented to the consumer. As a result, nearly all services consumers encounter in the digital environment are based on insights from their previous online searches. Even if consumers are aware of the personalisation of their online experience, they may not realise the extent of it or the distortion it introduces into their view of the market and the choices they make. This resulting state of vulnerability applies to all online consumers<sup>32</sup> (see case study on consumer vulnerability). Traders may use some information in a way that might affect the consumer psychologically and which can, therefore, amount to coercion or undue influence<sup>33</sup>.</p>
<p><b>How far does the existing EU (and any national legislation where relevant) address the problem?</b></p>	<p>The objective of the UCPD (2005) is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by prohibiting unfair commercial practices, which include aggressive practices<sup>34</sup>. The Directive’s adoption and its amendments brought about by the Modernisation Directive, constituted a significant development in the EU consumer law framework and enhanced consumer protection.</p> <p>An exhaustive list of commercial practices that are, in all circumstances, unfair appears in Annex I to the Directive, which makes explicit those practices deemed unfair without a case-by-case assessment against the provisions of Articles 5 to 9. This list includes eight aggressive commercial practices, including the following six that apply to the digital environment:</p> <p>26. Making persistent and unwanted solicitations by telephone, fax, e-mail, or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation. This is without prejudice to Article 10 of Directive 97/7/EC and Directives 95/46/EC (1) and 2002/58/EC.</p> <p>27. Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights.</p>

<sup>29</sup> AGCM, Internet: investigation launched into unfair commercial practices by Easy-download.info website. 12.07.2010, available at: <https://en.agcm.it/en/media/detail?id=f099e240-7655-4766-9214-5406d2783ba8>.

<sup>30</sup> UFC-Que Choisir, Jeux vidéo – L’industrie doit cesser de se jouer de vous, 01.06.2022.

<sup>31</sup> European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the New Consumer Agenda – Strengthening consumer resilience for sustainable recovery, Brussels, 13.11.2020.

<sup>32</sup> BEUC, EU Consumer Protection 2.0, ‘Protecting fairness and consumer choice in a digital economy’, 10.02.2022.

<sup>33</sup> European Commission, Directorate-General for Justice and Consumers, Mascarenhas de Ataíde, R., Barroso Rodrigues, A., De Araujo Meirelles Magalhães, F., et al., Consumer protection in the European Union: challenges and opportunities, Publications Office of the European Union, 2023, <https://data.europa.eu/doi/10.2838/457132>.

<sup>34</sup> UCPD.

Case study headings	Description and analysis
	<p>28. Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them. This provision is without prejudice to Article 16 of Directive 89/552/EEC on television broadcasting.</p> <p>29. Demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer except where the product is a substitute supplied in conformity with Article 7(3) of Directive 97/7/EC (inertia selling).</p> <p>30. Explicitly informing a consumer that if he does not buy the product or service, the trader's job or livelihood will be in jeopardy.</p> <p>31. Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either:</p> <ul style="list-style-type: none"> <li>— there is no prize or other equivalent benefit,</li> <li>or</li> <li>— taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.</li> </ul> <p>In addition, while the 2016 version of the UCPD Guidance<sup>35</sup> gave little space to aggressive practices, the December 2021 Commission Notice on the interpretation and application of the Unfair Commercial Practices Directive ('UCPD Guidance')<sup>36</sup> makes it more evident how the UCPD applies to the digital sector. While the UCPD has a technology-neutral approach, the UCPD Guidance has a section on the digital sector, providing examples of aggressive commercial practices specific to the sector. The new Guidance addresses the rapid development of the digital space and adaptation to changes in commercial practices and legal interpretations by EU authorities since the adoption of the previous 2016 UCPD Guidance. The updated UCPD Guidance gives higher importance to rapid technological developments and consumers becoming increasingly vulnerable, because of these developments<sup>37</sup>. It notably provides additional legal interpretation on critical questions and topics such as data-driven personalisation and dark patterns.</p> <p>In addition, the Digital Services Act (DSA)<sup>38</sup>, together with the Digital Markets Act (DMA)<sup>39</sup>, provide for additional reforms aiming at restricting the misuse of personal data for commercial purposes and online platforms' use of dark patterns – which are deceptive designs and tricks used on websites to encourage, deceive, or steer consumers to take a specific action.</p> <p>Several EU-wide studies have focused on specific examples of aggressive commercial practices in the digital environment, such as loot boxes<sup>40</sup> or dark patterns<sup>41</sup>. The nature of the problematic practices varies significantly as the digital environment allows traders to develop many such techniques. Protecting modern-day consumers' own choices in a data-driven digital environment, therefore, represents a significant challenge<sup>42</sup>. Some issues are broader than aggressive practices and can fall under EU consumer protection law outside the UCPD. As mentioned, several pieces of legislation can apply to dark patterns, for instance, including the Digital Services Act (DSA)<sup>43</sup>, Consumer Rights Directive (CRD), Unfair Contract Terms Directive (UCTD)<sup>44</sup>, ePrivacy Directive and General Data Protection</p>

<sup>35</sup> European Commission, Commission Staff Working Document – Guidance on the implementation of Directive 2005/29/EC on Unfair Commercial Practices, SWD (2016) 163 final, Brussels, 25.05.2016.

<sup>36</sup> Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, OJ C 526, 29.12.2021.

<sup>37</sup> Zsafia Bitai, Unfair Commercial Practices in the digital space, CEE Legal Matters Magazine, Issue 9.3, 04.2022.

<sup>38</sup> Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277, 27.10.2022, pp.1-102.

<sup>39</sup> Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265, 12.10.2022, p.1-66.

<sup>40</sup> Cerulli-Harms, A. et al., Loot boxes in online games and their effect on consumers, in particular young consumers, Publication for the committee on the Internal Market and Consumer Protection (IMCO), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020.

<sup>41</sup> Open Evidence, LSE, BS and BDI Research for the EU Commission, Behavioural study on unfair commercial practices in the digital environment: dark patterns and manipulative personalisation, 04.2022.

<sup>42</sup> BEUC, EU Consumer Protection 2.0 – Protecting fairness and consumer choice in a digital economy, 10.02.2022.

<sup>43</sup> See Recital 67, Article 25, and Article 31, Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC, OJ L 277, 27.10.2022, pp.1-102.

<sup>44</sup> See BEUC, "Dark patterns" and the EU consumer law acquis – Recommendations for better enforcement and reform,



Case study headings	Description and analysis
	<p>Regulation (GDPR).<sup>45</sup> Yet, the UCPD Articles 8 and 9 are key as dark patterns can be a form of aggression.<sup>46</sup></p> <p>While legal experts and consumer organisations recognise the improvement of the new Guidance and its focus on the application of the UCPD in specific fields, notably the digital sector, they agree that there is a need to revise it regularly to keep up with the development of the online environment. The following section examines the issues that limit the extent to which the UCPD addresses aggressive commercial practices based on the desk research and the stakeholders' feedback.</p>
<p><b>Topics covered</b> <b>Problematic practice – nature and magnitude</b></p>	<p>Articles 8 and 9 refer to three different forms of aggressive commercial practices – harassment, coercion, and undue influence. Yet, while Article 2 provides a definition of the latter, there is no definition of harassment and coercion. However, as considered below, applying these two notions may not be clear enough in the digital environment specifically.</p> <p>Since the UCPD defines only one of the three types of aggressive practices, it is necessary to discuss these first.</p> <ul style="list-style-type: none"> <li>• The Cambridge Dictionary<sup>47</sup> defines 'harassment' as behaviour that annoys or upsets someone.</li> <li>• The Cambridge Dictionary<sup>48</sup> defines 'coercion' as the use of force to persuade someone to do something they are unwilling to do. UCPD Articles 8 and 9 also state that coercion includes the use of force, which is irrelevant to the digital environment (or not relevant at all, one could argue<sup>49</sup>). The American Psychology Association specifies that coercion is the process of attempting to influence another person using threats, punishment, force, direct pressure, and other negative forms of power<sup>50</sup>.</li> <li>• The UCPD indicates that 'undue influence' means exploiting a position of power on the consumer to apply pressure, even without using or threatening to use physical force, in a way that significantly limits the consumer's ability to make an informed decision<sup>51</sup>. It is, therefore, clearer how the latter can apply to the digital environment based on the relational power asymmetry between traders and consumers mentioned above.</li> </ul> <p>Based on this definition, for example, the behaviour of social media influencers can, in some cases, amount to an aggressive commercial practice based on the use of 'undue influence', due to their relationship with their audience, often based on trust and a personal connection, which puts them in a position of power that they can exploit.</p> <p>One can argue that influencers' practices can also amount to 'harassment'. For example, there may be circumstances in which, during live-streaming shopping events, influencers aggressively promote products, using practices that pressure consumers into making purchases, if they pester consumers with follow-up communications or ask them to buy at a specific time (see separate case study on social commerce and social media influencers for a detailed assessment of such practices).</p> <p>In addition, if one looks further than the definition of coercion mentioned above, psychological coercion, according to USLegal, includes theories of mind/thought control, or a brainwashing claim that an outside source can control a person's mind. It then becomes clearer how influencers can also apply psychological coercion, given their position of power.</p> <p>This shows how there might be overlaps between the three different types of aggressive practices.</p> <p>Psychological coercion is particularly relevant in instances when the main target audience of an influencer includes vulnerable consumers, such as children and young people. The latter is also one of the main target audiences of the gaming industry, in which certain</p>

<sup>45</sup> See European Data Protection Board, Guidelines 3/2022 on Dark patterns in social media platform interfaces: How to recognise and avoid them, 14.03.2022.

<sup>46</sup> See BEUC, "Dark patterns" and the EU consumer law acquis – Recommendations for better enforcement and reform,

<sup>47</sup> Cambridge University Press & Assessment, Cambridge Dictionary, 2023, available at: <https://dictionary.cambridge.org/>.

<sup>48</sup> Cambridge University Press & Assessment, Cambridge Dictionary, 2023, available at: <https://dictionary.cambridge.org/>.

<sup>49</sup> See Cartwright P. and Hyde R., Virtual coercion and the vulnerable consumer: 'loot boxes' as aggressive commercial practices, Legal Studies 42, pp. 555-575, University of Nottingham, Nottingham, UK, 15.01.2022, available at: <https://doi.org/10.1017/lst.2022.7>.

<sup>50</sup> American Psychology Association, APA Dictionary of Psychology, 2023, available at: <https://dictionary.apa.org/coercion>.

<sup>51</sup> Article 2, UCPD.

Case study headings	Description and analysis
	<p>commercial practices can indeed be aggressive. This includes selling practices related to loot boxes, in the case of which a significant impairment of choice or conduct might arise through undue influence or coercion. In their article on virtual coercion and the vulnerable consumer, P. Cartwright and R. Hyde suggest that the offering of loot boxes might fall under either of these concepts. They conclude that the absence of a definition of coercion introduces unnecessary uncertainties<sup>52</sup>. Other potentially aggressive practices include personalised advertising, notably as traders consider specific information about gamers' vulnerabilities, including using algorithms to target addiction-prone players. Where the trader collects data about a consumer and makes offers based on conclusions its algorithm draws about the individual, there is a strong argument that the trader is in a position of power, forming the basis for undue influence, which concretise if the trader exploits this position in a way that 'significantly limits the consumer's ability to make an informed decision'.<sup>53</sup></p> <p>More generally, online behavioural advertising combined with market power can lower the visibility of 'non-personalised' outside options, namely adverts that do not exploit consumers' irrationalities based on their inferred cognitive makeup<sup>54</sup>. If a trader misuses knowledge of a consumer's vulnerable circumstances, by offering products on instalment credit to financially vulnerable and/or indebted consumers, for example, that may constitute an aggressive commercial practice based on 'undue influence' (see separate case study on behavioural/personalised advertising).</p> <p>Aggressive commercial practices in the digital environment also include cases of dynamic pricing that take place during the transaction (whereby a trader raises the price for a product during the booking process after the consumer has put it into their digital shopping cart or proceeds to payment, without giving the consumer reasonable time to complete the transaction), which one can consider harassment.</p> <p>The Netherlands Authority for Consumers and Markets (ACM) has Guidelines specifically on boundaries of online persuasion to protect the online consumer<sup>55</sup>. They state that if the techniques that traders that sell games use to boost sales of products with microtransactions put such pressure on consumers that they can no longer make an informed choice, ACM deems this to be 'undue pressure' and to constitute an aggressive commercial practice. An example they mention is the use of algorithms that determine the price, the offer, or the time of the offer based on data concerning the specific psychological vulnerabilities of certain groups of players.</p> <p>Therefore, many online commercial practices fall under the three 'aggressive' category types. Some of these practices are the focus of dedicated case studies (Influencer marketing and social media e-commerce; behavioural/personalised advertising; personalised offers and pricing). Furthermore, if the aggressive practice relates to online interface design, they are often labelled 'dark patterns'.</p> <p>The problem is widespread in the EU and has notably prompted consumer protection authorities to act against some large market players. While the extent of enforcement activities focusing on aggressive commercial practices varies across the EU-27, a few Member States have fined big players for aggressive commercial practices in the digital environment.</p> <p>Examples of problematic practice in law</p> <p>A recent concrete example of aggressive commercial practices is the WhatsApp case. In July 2021, BEUC filed a complaint with the European Commission and the European network of consumer authorities against WhatsApp, including for breaches of UCPD Articles 8 and 9:</p> <ul style="list-style-type: none"> <li>• Harassment – For several months, WhatsApp unduly pressured its users to accept its new terms of use and privacy policy. The wording of the notifications and the message that they conveyed inferred that these users may lose access to the</li> </ul>

<sup>52</sup> Cartwright P. and Hyde R., Virtual coercion and the vulnerable consumer: 'loot boxes' as aggressive commercial practices, *Legal Studies* 42, pp. 555-575, University of Nottingham, Nottingham, UK, 15.01.2022, available at: <https://doi.org/10.1017/lst.2022.7>.

<sup>53</sup> Cartwright P. and Hyde R., Virtual coercion and the vulnerable consumer: 'loot boxes' as aggressive commercial practices, *Legal Studies* 42, pp. 555-575, University of Nottingham, Nottingham, UK, 15.01.2022, available at: <https://doi.org/10.1017/lst.2022.7>.

<sup>54</sup> Johann Laux, Sandra Wachter, and Brent Mittelstadt, Neutralizing Online Behavioural Advertising: Algorithmic Targeting with Market Power as an Unfair Commercial Practice, *Common Market Law Review*, 58(3), 09.04.2021, Available at: <https://ssrn.com/abstract=3822962>.

<sup>55</sup> ACM, Guidelines – Protection of the online consumer – Boundaries of online persuasion.

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	<p>platform (or to some functionalities of the service) if they did not agree with the policy<sup>56</sup>. The systematic pushing of the terms of use until the consumer agrees with them could amount to harassment<sup>57</sup>.</p> <ul style="list-style-type: none"> <li>• Coercion – This case also brought an additional perspective to examine coercion and the relational power asymmetry between traders and consumers. META acted from a position of power, and users could not use the services if they did not adhere to the terms of use. A structural asymmetry appears based on the power that this specific trader has in the market<sup>58</sup>. This brings a new understanding of what may constitute an aggressive practice based on structural power imbalances. It also seems to shift the focus from the information that is provided to consumers to the power between the different players and how it may make itself apparent. This new interpretation brings the need for another layer of protection, where the importance is not only on how the information provided may have some psychological effects on consumers but on the factual possibility of the consumer rejecting dealings with a trader because of the traders' power in a specific market. In this case, the need to remain connected with relatives and co-workers allows the trader to force specific choices on consumers.<sup>59</sup></li> </ul> <p>Following BEUC's alert, the Consumer Protection Cooperation (CPC) Network first sent a letter to WhatsApp in January 2022, and a second one in June 2022. Following a dialogue with the consumer protection cooperation (CPC) network, WhatsApp notably committed to making it easier for users to reject updates when they disagree with them and to clearly explaining when such rejection leads the user to no longer be able to use WhatsApp's services<sup>60</sup>.</p> <p>In the past, the Italian Competition Authority (ICA) has notably investigated and fined big players in the digital environment for their aggressive commercial practices.</p> <p>Undue influence:</p> <ul style="list-style-type: none"> <li>• In November 2018, ICA imposed a sanction of EUR 10 million on Facebook for its unfair commercial practices in collecting subscribers' data, ascertaining the aggressive nature of Facebook's conduct under the Italian Consumer Code. The ICA found that Facebook's commercial practices are aggressive in the sense that the online social medium exerted undue influence on registered consumers to obtain the transmission of their data to third-party websites/apps for commercial purposes, and vice versa, without express and prior consent from them and therefore unconsciously and automatically. The undue influence stems not only from the default option that Facebook imposed to the broadest consent to data sharing but also from the circumstance that, when users decide to limit their consent, they are faced with significant restrictions on the use of the social network and third-party websites/apps, which induce users to maintain the default choice<sup>61</sup>.</li> <li>• Similarly, ICA sanctioned Apple and Google for EUR 10 million, notably for aggressive practices regarding the acquisition and use of consumer data, in November 2021. In the account creation phase, Google pre-imposes the user's acceptance of the transfer and/or use of his data for commercial purposes. This pre-activation allows Google's transfer and use of data without the need for other phases in which the user can confirm or modify the choice pre-set by the company from time to time. In the case of Apple, the promotional activity is based on a</li> </ul>

<sup>56</sup> BEUC, Press Releases > Consumer groups file complaint against WhatsApp for unfairly pressuring users to accept its new policies, 09.07.2021, available at: <https://www.beuc.eu/press-releases/consumer-groups-file-complaint-against-whatsapp-unfairly-pressuring-users-accept-its>.

<sup>57</sup> See BEUC's full report: BEUC, What's up with WhatsApp? An assessment of WhatsApp's practices in the light of EU consumer protection rules, 07.2021.

<sup>58</sup> WhatsApp is the most popular messaging app in over 100 countries. See Similarweb LTD, Most Popular Messaging Apps Worldwide 2023, 2023, available at: <https://www.similarweb.com/blog/research/market-research/worldwide-messaging-apps/>.

<sup>59</sup> European Commission, Directorate-General for Justice and Consumers, Mascarenhas de Ataíde, R., Barroso Rodrigues, A., De Araujo Meirelles Magalhães, F., et al., Consumer protection in the European Union: challenges and opportunities, Publications Office of the European Union, 2023, <https://data.europa.eu/doi/10.2838/457132>.

<sup>60</sup> European Commission, Home > Press corner > Consumer protection: WhatsApp agrees to comply fully with EU rules, informing users better and respecting their choices on contract updates, 06.03.2022, available at: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_1302](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1302).

<sup>61</sup> AGCM, Facebook fined 10 million Euros by the ICA for unfair commercial practices for using its subscribers' data for commercial purposes, available at: <https://en.agcm.it/en/media/press-releases/2018/12/Facebook-fined-10-million-Euros-by-the-ICA-for-unfair-commercial-practices-for-using-its-subscribers%E2%80%99-data-for-commercial-purposes>.

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	<p>method of acquiring consent to the use of user data for commercial purposes without providing the consumer with the possibility of prior and express choice on sharing of data. Apple's acquisition architecture does not allow exercising one's will regarding the using their data for commercial purposes. Therefore, the consumer is conditioned in the choice of consumption and is subjected to transferring personal information, which Apple may have for its promotional purposes carried out in different ways<sup>62</sup>.</p> <p>There were already cases of pre-ticked boxes constituting an aggressive practice in 2012. The 2016 Guidance on implementing the UCPD included the example of the Latvian Consumer Protection Authority considering an airline's use of pre-ticked boxes as aggressive in 2012<sup>63</sup>. Yet, in the meantime, the Consumer Rights Directive (CRD)<sup>64</sup> regulated the practice of pre-ticked boxes for additional services by requiring express consent for additional payments. The use of default options for obtaining that consent is not allowed<sup>65</sup>.</p> <p>Coercion:</p> <ul style="list-style-type: none"> <li>• Before that, in 2009 and 2010, the Italian Antitrust Authority issued EUR 4.45 million in fines for unfair practices of <a href="http://www.easy-download.info">www.easy-download.info</a><sup>66</sup> - 'Easy Download-Attivazione non richiesta' case. The ICA notably took the circumstances mentioned in Article 9 into account. The Authority concluded an aggressive commercial practice consisting of the various emails the defendant sent to consumers following the two weeks within which they could have exercised the right of withdrawal. A charge of EUR 5 for a few weeks of delay in the payment represented a further element of psychological pressure.<sup>67</sup></li> <li>• In a 2012 case, the Latvian court held that terms of a ticket booking system, which require consumers to act actively (i.e. click on a refusal button) to decline additional services a trader offers, constituted an aggressive commercial practice.<sup>68</sup> The court considered that consumers might inadvertently forget to click on the button to decline the additional services and, thus, purchase unwanted services. By requesting consumers to decline the automatic offer of additional services, the plaintiff (Air Baltic Corporation) is coercing consumers to make a decision they otherwise may not have made.</li> </ul> <p>In recent years, the Hungarian Competition Authority (Gazdasági Versenyhivatal – GVH) has also actively tackled interesting and novel issues in the digital world.<sup>69</sup></p> <ul style="list-style-type: none"> <li>• For example, GVH imposed a fine of HUF 2.5 billion (EUR 6 million) on Booking.com for, among others, putting aggressive psychological pressure on consumers to book quickly and banned the Dutch company from continuing these aggressive sales practices. According to the decision of the competition authority, Booking.com B.V. engaged in unfair commercial practices against consumers by, among other things, exerting undue psychological pressure on consumers to</li> </ul>

<sup>62</sup> AGCM, PS11147-PS11150 – ICA: \$20 million sanctions against Google and Apple for commercial use of user data, Rome, 26.11.2021, available at: <https://en.agcm.it/en/media/press-releases/2021/11/PS11147-PS11150>.

<sup>63</sup> European Commission, Commission Staff Working Document – Guidance on the implementation of Directive 2005/29/EC on Unfair Commercial Practices, SWD (2016) 163 final, Brussels, 25.05.2016.

<sup>64</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011, pp.64-88.

<sup>65</sup> As of 13 June 2014, Article 22 does not allow traders to use default options the consumer has to reject (such as pre-ticked boxes) to avoid additional payments, rather than requesting the consumer's express consent for extra payments

<sup>66</sup> AGCM, Internet: investigation launched into unfair commercial practices by Easy-download.info website. 12.07.2010, available at: <https://en.agcm.it/en/media/detail?id=f099e240-7655-4766-9214-5406d2783ba8>.

<sup>67</sup> Fernández Carballo-Calero, P., Aggressive Commercial Practices in the Case Law of EU Member States, Journal of European Consumer and Market Law, Volume 5, Issue 6 (2016) pp.255-261.

<sup>68</sup> Plaintiff is an airline company that maintains a website where consumers can book tickets online. Several steps must be taken during the booking. Between the third and the fourth step, a window offering consumers to purchase additional services such as flight date/time change, seat reservation, etc., appears automatically. To decline these additional services, a consumer must click on the button "Do not want to purchase these services". Consumer Rights Protection Centre (Riga), Consumer Rights Protection Centre Decision No. E03-PTU-K115-39, 23.10.2012.

<sup>69</sup> Gabor Fejes and Zoltan Marosi, The Hungarian Competition Authority case against Facebook and beyond, CEE Legal Matters Magazine, Issue 9.3, 04.2022.

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	<p>make early bookings.<sup>70</sup> Through this process, Booking.com tried to influence consumers by using direct pressure and the threat of missing out. As a result, in December 2019, Booking.com undertook to modify its commercial behaviour in several ways to comply with EU rules.<sup>71</sup></p> <ul style="list-style-type: none"> <li>• Additionally, the GVH imposed a fine of HUF 40 million (EUR 100 000) on the operator of Alza, for aggressively urging consumers to buy quickly with messages with mostly untrue content<sup>72</sup>.</li> </ul> <p>Nevertheless, it took over a decade after introducing the UCPD for the Court of Justice of the European Union (CJEU) to decide on the first case on aggressive practices and almost 15 years for such a case focusing on digital practices<sup>73</sup>. The issue was that the advertising messages (so-called 'inbox advertising') that the company Interactive Media placed in the inboxes of users of the free email service T-Online for Eprio, an electricity company, were presented in a way that made them indistinguishable from the rest of the emails apart from the date being replaced by the word 'Anzeige' (advertisement), no sender, and the text appearing against a grey background. Regarding aggressive practices, the Court decided that advertising messages breached the UCPD's Annex I<sup>74</sup> featuring a professional making persistent and unwanted solicitations by email to enforce a contractual obligation<sup>75</sup>.</p> <p>Another case law based on the UCPD's Annex I (28) involves Stardoll AB, a company running a gaming community online in Sweden. The community is aimed at girls aged 7-17 years. The website contained the information "buy", "Buy more", "buy here", "upgrade" and "upgrade now" with direct links to buy products. The defendant also sent direct marketing e-mails to the minors' mailboxes without consent from their parents. In these emails, the addressees were, among others, exhorted to "Buy before it's too late". The Swedish Market Court first found that the statements on the website constituted a direct exhortation to children to buy the advertised products and hence a blacklisted commercial practice. The Court further found that the information "it will not stay long" and "buy before it's too late" in an e-mail to a minor constitutes an aggressive marketing practice<sup>76</sup>.</p> <p>Nevertheless, indirect exhortations to buy products aimed at children do not automatically constitute aggressive commercial practices. Another example is the case of a German website advertising the video game "D*****-Universe" for schoolchildren (up to 14 years). The advertisement contained general wording such as "now available" and "available now in retail". Also, it included information on the options for how to order the product (e.g. a reference to the website link where the products could be purchased). The advertisement also contained general descriptions of the game as desirable. Both the first instance judge and the court of appeal had ruled that this practice was aggressive, particularly because information was given on how to purchase the product (links on the website). According to both instances, these expressions were direct exhortations aimed at children. Yet, the Austrian Supreme Court overruled the decisions of the first instance judge and the court of appeal. The Supreme Court made a difference between "direct exhortation", i.e. advertisements formulated as a request to purchase a product (e.g. "get a sticker album"), and mere "indirect exhortations". According to the Supreme Court, there is an indirect exhortation if the consumer has to make an intermediate step between the advertisement and the decision to purchase and if the advertisement only generally describes the product as desirable and presents the options to move ahead with the purchase. In the case at hand, the Supreme Court considered that the expressions used by the defendant were</p>

<sup>70</sup> In connection with the accommodation offers available on Booking.com through their mobile application, the company adopted pressure selling tactics at each stage of the search and booking process. This took the form of the use of attention-grabbing (striking in colour, font size or other characteristic) information (such as "32 more people are also watching"; "One person is considering booking this accommodation right now"; "Highly sought after! Booked 17 times in the last 24 hours"), which gave consumers the impression that the accommodation they were viewing was subject to high demand and limited availability. This practice is likely to exert psychological pressure and disrupts the consumer's decision-making process, as it subconsciously evokes emotions and fears in consumers that if they do not book the accommodation as soon as possible, they may lose out on it (a phenomenon described as the FOMO – Fear of Missing Out – effect). All this distorts the consumer's transactional decision.

<sup>71</sup> Gazdasági Versenyhivatal, Gigantic fine imposed on Booking.com by the GVH, 28.04.2020, available at:

[https://gvh.hu/en/press\\_room/press\\_releases/press-releases-2020/gigantic-fine-imposed-on-booking.com-by-the-gvh#\\_ftn1](https://gvh.hu/en/press_room/press_releases/press-releases-2020/gigantic-fine-imposed-on-booking.com-by-the-gvh#_ftn1).

<sup>72</sup> Zsófia Bitai, Unfair Commercial Practices in the digital space, CEE Legal Matters Magazine, Issue 9.3, 04.2022.

<sup>73</sup> Judgment of 25.11.2021 – Case C-102/20 StWl Städtische Werke Lauf a.d. Pegnitz.

<sup>74</sup> Point 26, UCPD.

<sup>75</sup> See the case and Kaprou E., Aggressive commercial practices 2.0: Is the UCPD fit for the digital age? EuCML · Issue 2/2023, 2023.

<sup>76</sup> Swedish Market Court, MD 2012:14, 06.12.2012, available at: <https://lagen.nu/dom/md/2012:14>.

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	<p>indirect exhortations. The Court repeated that advertisements directed to children do not automatically constitute unfair commercial practices.<sup>77</sup></p> <p>Finally, another example of a case from 2013 by the Supreme Court of Finland illustrates that simple annoyance may not amount to an aggressive practice. A direct marketing company had affixed advertising tags to consumers' apartments' front doors and mailboxes without permission. While the Supreme Court of Finland considered the practice contrary to good practice and therefore prohibited its use, they did not consider the marketing aggressive<sup>78</sup>.</p>
<p><b>Assessment of key research questions, drawing on desk research and stakeholder feedback</b></p>	<p><b>Effectiveness</b></p> <p>A researcher consulted mentioned that it is difficult to assess the impact of the UCPD in the digital environment in general and on aggressive commercial practices in the digital environment specifically because online markets were less developed before the adoption of the UCPD. At the EU level, the “aggressive commercial practices” as such were first sanctioned in the UCPD. The Modernisation Directive, the 2021 UCPD Guidance, and the national guidelines are indicative of progress. However, the enforcement of Articles 8 and 9 remains limited. For example, BEUC expressed their “disappointment” in the results of the CPC action against WhatsApp, which are limited to improving transparency for consumers and only for the future. BEUC referred to a “weak reaction”, considering that authorities did not address the aggressive nature of the practices that WhatsApp used. No remedy was offered to consumers who accepted the new terms under the pressure exerted by WhatsApp. According to the BEUC Deputy Director General, this illustrates the “lack of deterrence from the current way to enforce consumer law” and the need for “urgent reform to ensure more effective enforcement”, especially in cases of EU-wide infringements.<sup>79</sup></p> <p>In addition, stakeholders’ feedback indicates that the UCPD has raised awareness of misleading commercial practices<sup>80</sup> more than of aggressive practices. A researcher interviewed confirmed that the lack of awareness of aggressive commercial practices, also among consumers, and the difficulties that enforcement authorities face in interpreting coercion, harassment and undue influence in the digital environment and keeping up with the ever more sophisticated targeting practices limit the level of consumer protection from aggressive commercial practices in the digital environment. Enforcement has been more effective in Member States such as Hungary, where consumer protection from aggressive commercial practices dates from before the UCPD.</p> <p>So, the main obstacles to progress towards the objectives of the UCPD regarding aggressive practices in the digital environment are the level of consumers’ awareness and the level of enforcement actions undertaken by authorities. These are related to the fact that the UCPD does not spell out cases of aggressive practices in the digital environment. The uncertain legal definition of coercion and harassment can, therefore, explain the lack of use of Articles 8 and 9 to a large extent. While aggressive commercial practices do not vary significantly depending on the national context or stakeholder group, enforcement and understanding between national authorities do. For example, the national authorities involved in the CPC process had a different understanding of the problem in the Booking.com case. It showed a different interpretation of the same rules. According to a national authority interviewed, not all the authorities involved considered Booking.com’s practices as aggressive.</p> <p>The provisions on aggressive commercial practices are sufficiently broad to capture problematic digital practices. The Directive’s technology-neutral, with more specific examples in the Guidance documents to show how they apply to the digital environment, is the right way to go about it from an enforcement point of view, according to a researcher consulted. The technology-neutral phrasing remains relevant – it is future-proof since technology moves faster than legislators can keep up with.</p>

<sup>77</sup> Supreme Court, RS0128246, 09.07.2013, available at: [https://www.ris.bka.gv.at/JustizEntscheidung.wxe?Abfrage=Justiz&Dokumentnummer=JJT\\_20130709\\_OGH0002\\_0040OB00095\\_13V0000\\_000&IncludeSelf=True](https://www.ris.bka.gv.at/JustizEntscheidung.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20130709_OGH0002_0040OB00095_13V0000_000&IncludeSelf=True).

<sup>78</sup> Finlex, KKO:2013:5, 30.01.2013, available at: <https://finlex.fi/fi/oikeus/kko/kko/2013/20130005?search%5Btype%5D=pika&search%5Bpika%5D=KKO%3A2013%3A5>.

<sup>79</sup> BEUC, A ‘yellow card’ for WhatsApp and a disappointment for consumers, 06.03.2023, available at: <https://www.beuc.eu/press-releases/yellow-card-whatsapp-and-disappointment-consumers#:~:text=The%20European%20Commission%20and%20the,do%20better%20in%20the%20future.>

<sup>80</sup> Articles 6 and 7.

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	<p>While the UCPD broadly covers aggressive commercial practices in the digital environment (since it covers all such practices), the lack of definition of coercion and harassment means it is not sufficiently precise to capture problematic digital practices. Consumers are subject to the exploitation of personal vulnerabilities or just psychographic profiling<sup>81</sup> to exercise emotional or psychological pressure to distort their transactional decisions. A definition of coercion and harassment would clarify how this relates to aggressive practices. In addition, introducing the concept of resilience to pressure could help address the issue related to the notion of “average consumer” and the inequality of power in the digital environment.<sup>82</sup> Aggressive commercial practices in the digital environment are indeed linked to the notions of average and vulnerable consumers. The UCPD can also mitigate the harmful impacts of OBA on consumer choice by referring to the concentration of market power within the industry and how it affects the transactional decision-making of behaviourally targeted consumers, as per the example of the WhatsApp case mentioned above. Including market power considerations by deploying a stricter ‘average consumer test’ under the UCPD could neutralise OBA as a potentially aggressive commercial practice (depending on the circumstances).<sup>83</sup></p> <p>The Commission’s 2022 behavioural study on dark patterns presents a legal assessment of specific examples of unfair commercial practices in the digital environment, including many that could fall under the ‘aggressive’ category.<sup>84</sup> For example, nagging – repeated requests to do something the company prefers – can amount to harassment, as discussed above in the WhatsApp case. Yet, realistically, given the lack of definition of coercion and harassment, the UCPD does not provide enough legal certainty to ensure consumer protection from these practices, which it only partially covers. In addition, the UCPD blacklist could include some established aggressive practices in the digital environment to reflect better the latter’s reality, such as personalised advertising/pricing (undue influence).</p> <p>Practices that qualify as aggressive have expanded with the digital market and have become more sophisticated, including based on psychological pressure and shaming, with the consumer being exposed to what they will miss. According to a researcher consulted, these practices are on the rise, and traders use them on a large scale.</p> <p>According to the Commission’s 2022 behavioural study<sup>85</sup>, traders of all sizes use dark patterns: 97% of the most popular websites and apps in the EU deployed at least one dark pattern. Yet, a researcher consulted highlighted that powerful market players’ practices are more likely to have a bigger impact on society (snowball effect), as they shape how people shop and entertain themselves.<sup>86</sup> They benefit from the large amount of data they accumulate over time, leading to situations where they can influence the nature of interactions.<sup>87</sup> Smaller traders may also engage in aggressive commercial practices, but they have a lower potential to harm consumers on a large scale.</p> <p>The prevalence of dark patterns nonetheless varies between different types of websites and apps<sup>88</sup> but is similar for mobile apps and websites, as well as across Member States and EU/non-EU traders.</p>

<sup>81</sup> Psychographics is the study of consumers based on their activities, interests, and opinions to target them based on how they think. See CB Information Services, What Is Psychographics? Understanding The Tech That Threatens Elections, 06.05.2020, available at: <https://www.cbinsights.com/research/what-is-psychographics/>.

<sup>82</sup> Eleni Kaprou, The legal definition of ‘vulnerable’ consumers in the UCPD – Benefits and limitations of a focus on personal attributes, in *Vulnerable Consumers and the Law*, 2020.

<sup>83</sup> Johann Laux, Sandra Wachter, and Brent Mittelstadt, Neutralizing Online Behavioural Advertising: Algorithmic Targeting with Market Power as an Unfair Commercial Practice, *Common Market Law Review*, 58(3), 09.04.2021, Available at: <https://ssrn.com/abstract=3822962>.

<sup>84</sup> Nagging, Roach motel, intermediate currency, Sneak into the basket, hidden subscription, forced continuity/registration, preselection, toying with emotion, disguised ad, confirm-shaming, infinite scroll, Autoplay, immortal account, loot boxes, personalised pricing/advertising/communications. See European Commission, Behavioural study on unfair commercial practices in the digital environment: dark patterns and manipulative personalisation – Final report, 2022, p.61.

<sup>85</sup> European Commission, Behavioural study on unfair commercial practices in the digital environment: dark patterns and manipulative personalisation – Final report, 2022.

<sup>86</sup> European Parliamentary Research Service, Scientific Foresight Unit (STOA), Online platforms: Economic and societal effects, PE 656.336, 03.2021.

<sup>87</sup> European Commission, How do online platforms shape our lives and businesses? - Brochure, 31.01.2023, available at: <https://digital-strategy.ec.europa.eu/en/library/how-do-online-platforms-shape-our-lives-and-businesses-brochure>.

<sup>88</sup> For example, countdown timers or limited-time messages are prevalent on e-commerce platforms, while the use of nagging is more customary in health and fitness websites/apps.

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	<p>More generally, loot boxes commonly used in video games are accused of being predatory, especially in cases of vulnerable consumers such as young people<sup>89</sup>, and can therefore qualify as an aggressive commercial practice, based on undue influence or coercion in the way they trigger the fear of missing out and spur more impulse buying.<sup>90</sup> They often also involve using aggressive marketing practices to push sales at every opportunity.<sup>91</sup></p> <p>Regarding the non-EU traders, according to the desk research and stakeholder consultation, there are no clear differences with the EU. A researcher highlighted that companies operating globally might have a uniform policy that they need to adjust to the EU framework, but this is not always done.</p> <p>In terms of aggressive commercial practices in the digital environment, most developments concern the use of AI and the increase in personalisation<sup>92</sup>. By targeting personal characteristics, AI-enabled personalisation makes individuals more susceptible to persuasion, leaning towards manipulation and threatening individual autonomy. Personalisation can thus potentially create new vulnerabilities in consumers and the 'average consumer' benchmark can challenge the effectiveness of the UCPD in protecting consumers against the exploitation of vulnerabilities through personalisation<sup>93</sup>. A good example of this, though not in the digital environment, is the judgement that the Higher Regional Court of Frankfurt am Main handed down on 29 January 2009<sup>94</sup>. They considered that a letter advertising gravestones to the relatives of a deceased person, shortly after the death had taken place, as a case of aggressive practice by harassment<sup>95</sup>. Such targeting of situationally vulnerable consumers can even more easily happen in the online environment.</p> <p>While there are no major recent further developments in terms of practices, some specifically growing markets, like the video games and online event ticketing industries, and large online platforms, have been more and more subject to criticism, including due to practices like those that Booking.com was fined for in Hungary and had a CPCP action about. The online event ticketing industry indeed has recourse to forms of coercion to weaken consumers' freedom of conduct thereby causing them to take a transactional decision that they would not have taken otherwise.</p> <p>The Hungarian Competition Authority also noted Viagogo's use of psychological pressure tactics through messages reading "only x minutes x seconds left to finish the purchase. After that, prices may increase, or these tickets might no longer be available"<sup>96</sup>.</p> <ul style="list-style-type: none"> <li>• Are there legal gaps or uncertain/grey areas in the UCPD regarding aggressive commercial practices in the digital environment? Which aggressive online commercial practices are likely to be considered illegal under the existing rules and only require improved enforcement?             <ul style="list-style-type: none"> <li>▪ RQ: Are there any shortcomings/gaps in the definition and scope of the provisions on aggressive commercial practices, which would result in certain types of emerging digital practices not being covered by the UCPD?</li> <li>▪ RQ: Is it necessary to introduce provisions to minimise the use of harassment, coercion, and undue influence as a digital practice?</li> </ul> </li> </ul> <p>As described above, the lack of a definition of 'coercion' and 'undue influence' constitutes a first shortcoming. Further detail on the three notions characterising aggressive practices would provide more certainty regarding what they cover.</p> <p>In addition, the UCPD could also refer to and define key concepts of the digital environment that make consumers potentially more subject to aggressive practices. BEUC recommended accounting for the realities of digital asymmetry and for aggression rooted</p>

<sup>89</sup> European Commission, Behavioural study on unfair commercial practices in the digital environment: dark patterns and manipulative personalisation – Final report, 2022.

<sup>90</sup> Forbrukerrådet, Insert coin – How the gaming industry exploits consumers using loot boxes, 31.05.2022.

<sup>91</sup> Forbrukerrådet, Insert coin – How the gaming industry exploits consumers using loot boxes, 31.05.2022.

<sup>92</sup> For example, AI creative-content generation vastly improves the precision of the endeavour, scientifically selecting the best words for every message. See Boston Consulting Group, AI Has Launched a \$200 Billion Revolution in Content Personalization, 05.10.2021, available at: <https://www.bcg.com/publications/2021/ai-content-generation-is-a-2-billion-dollar-revolution-in-content-personalization>.

<sup>93</sup> Strycharz, J. & Duijvenvoorde, B., The exploitation of vulnerability through personalised marketing communication: are consumers protected?, Internet Policy Review, 10(4), 08.11.2021, Available at: <https://doi.org/10.14763/2021.4.1585>.

<sup>94</sup> Higher Regional Court (Frankfurt on the Main), 29 January 2009, Case n°. 6 U 90/08.

<sup>95</sup> Fernández Carballo-Calero, P., Aggressive Commercial Practices in the Case Law of EU Member States, Journal of European Consumer and Market Law, Volume 5, Issue 6 (2016) pp.255-261.

<sup>96</sup> Public consultation, position paper from a business organisation.



Case study headings	Description and analysis
	<p>in the elements that form the foundation of the trader's advantage, such as the choice architecture, the technical infrastructure, or the knowledge asymmetry. The UCPD's concept of 'transactional decision' should make clear that aggression may not be limited to a single transactional moment, which may not always be possible to define but may be external or structural, permeating the consumer's relationship with the data-driven service. External factors may include the digital choice environments, the knowledge gap, the design of digital consumer environments, the lack of interoperability, the default settings, etc. The definition of an aggressive practice should consider structural features and circumstances such as the digital choice environments, the technical infrastructure, and the degree of informational asymmetries. BEUC argue that in addition to updating the definition of harassment, coercion, and undue influence, the UCPD should also include 'structural influence', with Article 9 including the following<sup>97</sup>:</p> <ul style="list-style-type: none"> <li>• The extent to which the digital consumer environment is personalised,</li> <li>• The transparency or covertness of the practice,</li> <li>• Whether insights resulting from analysis of consumer behaviour or individual characteristics inform the practice,</li> <li>• The extent to which the given service is interoperable with other services,</li> <li>• The level of competition and ease with which consumers can switch to other digital choice platforms.</li> </ul> <p>In addition, BEUC suggests that the UCPD should include an updated concept of digital vulnerability (or of digital asymmetries) to be anchored in articles 5, 8 and 9.<sup>98</sup></p> <p>In terms of actual practices, while this is not specific to aggressive commercial practices, a legal gap concerns loot boxes and aggressive selling techniques, as mentioned above. 20 European consumer associations have called on the authorities to put in place strict and effective regulations for the video games sector to deal with the persistence of practices such as loot boxes. They believe there should be specific and protective regulations for this booming market, most consumers of which are young people, particularly vulnerable to cognitive bias. They demand stricter regulation, including a ban on deceptive designs, additional protections for minors and transparency of transactions.<sup>99</sup></p> <p>The Commission's 2022 behavioural study<sup>100</sup> also concluded that some legislative adjustments may be necessary to better respond to dark patterns and manipulative personalisation, namely the prohibition of the most harmful practices that are not yet in the blacklist of the UCPD and the imposition of a fair/neutral design obligation on traders. There is a need to update the UCPD blacklist to tackle certain aggressive practices more specifically and ensure misleading user interfaces and data personalisation techniques do not harm consumers<sup>101</sup>. The blacklist should include personalisation practices that are in all circumstances considered aggressive and cover dark patterns such as confirm-shaming, which implies using language and emotion (e.g., shaming) to steer or guilt consumers into or away from making a specific choice or action.<sup>102</sup></p> <ul style="list-style-type: none"> <li>• How effective has enforcing the UCPD Articles 8 and 9 been online? What hinders/influences effective enforcement in the digital area? Are there important problems specific to SMEs resulting in a widespread lack of compliance?             <ul style="list-style-type: none"> <li>▪ RQ: To what extent have the Member States managed to enforce the provisions on online aggressive commercial practices?</li> </ul> </li> </ul> <p>Although most of the existing aggressive online commercial practices could already be considered illegal under the existing text of the UCPD, they require stricter interpretation and effective enforcement. Otherwise, despite existing prohibitions of aggressive commercial practices, traders can seemingly continue using them with impunity.</p> <p>Two main issues have prevented large-scale enforcement actions against aggressive commercial practices under the UCPD until now.</p>

<sup>97</sup> BEUC, EU Consumer Protection 2.0 – Protecting fairness and consumer choice in a digital economy, 10.02.2022.

<sup>98</sup> BEUC, EU Consumer Protection 2.0 – Protecting fairness and consumer choice in a digital economy, 10.02.2022.

<sup>99</sup> UFC-Que Choisir, Jeux vidéo – L'industrie doit cesser de se jouer de vous, 01.06.2022.

<sup>100</sup> European Commission, Behavioural study on unfair commercial practices in the digital environment: dark patterns and manipulative personalisation – Final report, 2022.

<sup>101</sup> BEUC, "Dark patterns" and the EU consumer law acquis – Recommendations for better enforcement and reform, BEUC-X-2022-013, 07.02.2022.

<sup>102</sup> BEUC, "Dark patterns" and the EU consumer law acquis – Recommendations for better enforcement and reform, BEUC-X-2022-013, 07.02.2022.

Case study headings	Description and analysis
	<p>First, aggressive practices do not work well with the UCPD definition of an average as opposed to a vulnerable consumer since the characteristics get blurred online with the potential exploitation of personal information – see also the dedicated case study on vulnerable consumers.</p> <p>Second, because the UCPD only defines ‘undue influence’, and its annexe I only provides technology-neutral examples of commercial practices that are in all circumstances considered aggressive, it creates legal uncertainty and a risk of bearing litigation costs. Unless the blacklist directly refers to the concrete practice, the evaluation of the aggressiveness, whether online or not, is subject to a case-by-case assessment by a court/authority. It requires demonstrating that the consumer’s transactional decision is (likely to be) affected. Considering the three elements that make up aggressive practices, enforcement investigations and activities would require behavioural insights to assess how a given practice is likely to affect consumers’ actual behaviour and companies to disclose complete information about the use of behavioural experiments for the design or optimisation of a given interface for instance<sup>103</sup>. As the European Law Institute puts it, legal uncertainty has a “massive chilling effect”<sup>104</sup> on law enforcement. Yet, applying Articles 8 and 9 to individual cases through enforcement actions is necessary to create supporting jurisprudence. This vicious circle furthers legal uncertainty. Indeed, only a few cases of aggressive commercial practices online have reached the courts until now, although the problem is recognised as large. The Consumer Law Database, for example, lists 122 cases related to Articles 8 and 9 and Annex I<sup>105</sup>, only three of which deal with online practices<sup>106</sup>:</p> <ul style="list-style-type: none"> <li>• The above-mentioned ‘Stardoll AB’ case considered information on a gaming community on the internet aimed at children and containing statements such as “Buy”, “Buy more”, “Buy here”, “upgrade”, or “Upgrade now” is a direct exhortation to children to buy the advertised products and therefore constitutes a blacklisted commercial practice as per Annex I, 28. Information by e-mail to minors in a gaming community containing a statement saying “buy before it’s too late” is also considered an aggressive marketing practice.</li> <li>• The ‘Easy download-Attivazione non-richiesta’ case<sup>107</sup> mentioned above concluded that sending various emails to consumers urging them to pay the trader within a period during which they can withdraw from a transaction constitutes an aggressive commercial practice.</li> <li>• The ‘Air Baltic Corporation’ case<sup>108</sup> mentioned above concluded that terms of a ticket booking system, which require consumers to actively decline additional services a trader offers (i.e. click on a refusal button), constitute an aggressive commercial practice.</li> </ul> <p>Enforcement actions are scarce overall, and aggressive online commercial practices persist and affect consumers and well-meaning traders equally. As the number of court rulings increases, applying the UCPD Articles 8 and 9 to individual aggressive practices, including dark patterns falling in this category, will become clearer, but this process is particularly slow. Despite the “New Deal for Consumers”<sup>109</sup>, there have been limited enforcement efforts.</p> <ul style="list-style-type: none"> <li>• What problems do consumers face with dark patterns, i.e., manipulative interface and choice architecture designs, which are not addressed sufficiently by the UCPD?             <ul style="list-style-type: none"> <li>▪ RQ: What are the most prevalent dark patterns used on websites and platforms?</li> </ul> </li> </ul>

<sup>103</sup> BEUC, “Dark patterns” and the EU consumer law acquis – Recommendations for better enforcement and reform, BEUC-X-2022-013, 07.02.2022.

<sup>104</sup> European Law Institute, European Commission’s Public Consultation on Digital Fairness – Fitness Check on EU Consumer Law, Response of the European Law Institute, p.7.

<sup>105</sup> The same case can deal with legal issues related to several articles and may appear several times in different places.

<sup>106</sup> European Union, Consumer Law Database > Unfair Commercial Practices Directive (2005/29) > Text of the Directive, 2021, available at: [https://e-justice.europa.eu/596/EN/text\\_of\\_the\\_directive](https://e-justice.europa.eu/596/EN/text_of_the_directive).

<sup>107</sup> Italian Competition Authority, “Easy Download-Attivazione non richiesta”, PS6013, 03.11.2010.

<sup>108</sup> Consumer Rights Protection Centre (Riga), Consumer Rights Protection Centre Decision No. E03-PTU-K115-39, 23.10.2012.

<sup>109</sup> The “New Deal for Consumers” initiative aimed at strengthening enforcement of EU consumer law considering a growing risk of EU-wide infringements and at modernising EU consumer protection rules given market developments. European Commission, Review of EU consumer law, available at: [https://commission.europa.eu/law/law-topic/consumer-protection-law/review-eu-consumer-law\\_en#new-deal-for-consumers](https://commission.europa.eu/law/law-topic/consumer-protection-law/review-eu-consumer-law_en#new-deal-for-consumers).

Case study headings	Description and analysis
	<p>As mentioned above, the UCPD only partially covers certain forms of dark patterns relating to online interface designs, which can fall under coercion, harassment or undue influence.</p> <p>Yet, dark patterns, especially personalised ones, are particularly difficult to tackle, according to a researcher consulted. Traders can profile individual consumers and tailor the advertising messages according to the data they have collected about the consumers, based on not only what they have previously bought but also their mood, emotions, and the phase of their life they are in – for example if breaking up with someone, unemployed, etc. There is a need to tackle this ever more sophisticated individualised targeting of consumers at such a micro level. It is not just about the fact that they see a specific ad. It is also about the timing, the application’s structure, or the digital environment.</p> <p>It is important that enforcement authorities consider whether aggressive practices could be materialised by user interface and certain dark patterns when considering breaches of Articles 8 and 9.<sup>110</sup></p> <p>Nevertheless, as mentioned above, several pieces of consumer law apply to dark patterns, and the UCPD and the DSA are mutually exclusive. This will largely affect enforcement as the DSA enforcers must first consider whether or not a particular practice is ‘covered by’ the UCPD. Yet, the coverage of the UCPD is unclear, given the abovementioned issues<sup>111</sup>.</p> <p>The main report provides more detail on the issue of dark patterns more broadly.</p>
<p><b>Preliminary conclusions (incl. assessment of potential regulatory gaps)</b></p>	<ul style="list-style-type: none"> <li>• In theory, the UCPD is flexible enough to address aggressive commercial practices broadly, including in the digital environment.</li> <li>• However, the lack of a definition of ‘coercion’ and ‘harassment’ creates legal uncertainty about applying UCPD Articles 8 and 9. Furthermore, only a few aggressive practices are expressly prohibited in the Annex blacklist, and even fewer apply to the digital environment.</li> <li>• Therefore, interpretation can significantly differ between Member States..</li> <li>• So, although UCPD Articles 8 and 9 could partially address aggressive commercial practices in the digital environment, evidence shows limited enforcement, which does not support clearer interpretation through jurisprudence.</li> <li>• This limits the actual level of consumer protection from aggressive commercial practices in the digital environment, as in several sectors, traders continue using these with impunity and can develop new ones faster than regulators can keep up with.</li> </ul>
<p><b>Supporting information</b></p>	<p>Bibliography:</p> <p>ACM, Guidelines – Protection of the online consumer – Boundaries of online persuasion</p> <p>BEUC, “Dark patterns” and the EU consumer law acquis – Recommendations for better enforcement and reform, BEUC-X-2022-013, 07.02.2022</p> <p>BEUC, EU Consumer Protection 2.0 – Protecting fairness and consumer choice in a digital economy, 10.02.2022</p> <p>Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, OJ C 526, 29.12.2021, pp.1-129</p> <p>Consumer Rights Protection Centre (Riga), Consumer Rights Protection Centre Decision No. E03-PTU-K115-39, 23.10.2012</p> <p>Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC, and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and the Council (Unfair Commercial Practices Directive)</p> <p>Eleni Kaprou, The legal definition of ‘vulnerable’ consumers in the UCPD – Benefits and limitations of a focus on personal attributes, in Vulnerable Consumers and the Law, 2020</p>

<sup>110</sup> BEUC, “Dark patterns” and the EU consumer law acquis – Recommendations for better enforcement and reform, BEUC-X-2022-013, 07.02.2022.

<sup>111</sup> European Law Institute, European Commission’s Public Consultation on Digital Fairness – Fitness Check on EU Consumer Law, Response of the European Law Institute.

Case study headings	Description and analysis
	<p>European Commission, Behavioural study on unfair commercial practices in the digital environment: dark patterns and manipulative personalisation – Final report, 2022</p> <p>European Law Institute, European Commission’s Public Consultation on Digital Fairness – Fitness Check on EU Consumer Law, Response of the European Law Institute</p> <p>European Union, Consumer Law Database &gt; Unfair Commercial Practices Directive (2005/29) &gt; Text of the Directive, 2021, available at: <a href="https://e-justice.europa.eu/596/EN/text_of_the_directive">https://e-justice.europa.eu/596/EN/text_of_the_directive</a></p> <p>European Union, Digital economy and society statistics – households and individuals, 16.12.2022, available at: <a href="https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Digital_economy_and_society_statistics_-_households_and_individuals#Internet_access">https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Digital_economy_and_society_statistics_-_households_and_individuals#Internet_access</a></p> <p>Federico Galli, EU Law on Unfair Commercial Practices. In: Algorithmic Marketing and EU Law on Unfair Commercial Practices. Law, Governance and Technology Series, vol 50. Springer, Cham, 2022</p> <p>Forbrukerrådet, Insert coin – How the gaming industry exploits consumers using loot boxes, 31.05.2022</p> <p>Gabor Fejes and Zoltan Marosi, The Hungarian Competition Authority case against Facebook and beyond, CEE Legal Matters Magazine, Issue 9.3, 04.2022</p> <p>Gazdasági Versenyhivatal, Gigantic fine imposed on Booking.com by the GVH, 28.04.2020, available at: <a href="https://gvh.hu/en/press_room/press_releases/press-releases-2020/gigantic-fine-imposed-on-booking.com-by-the-gvh#_ftn1">https://gvh.hu/en/press_room/press_releases/press-releases-2020/gigantic-fine-imposed-on-booking.com-by-the-gvh#_ftn1</a></p> <p>Interactive Software Federation of Europe (ISFE), Key facts from 2021 about the European Video games sector – a force for good, 2022, available at: <a href="https://www.isfe.eu/wp-content/uploads/2022/08/FINAL-ISFE-EGDFKey-Facts-from-2021-about-Europe-video-games-sector-web.pdf">https://www.isfe.eu/wp-content/uploads/2022/08/FINAL-ISFE-EGDFKey-Facts-from-2021-about-Europe-video-games-sector-web.pdf</a></p> <p>Italian Competition Authority, "Easy Download-Attivazione non richiesta", PS6013, 03.11.2010</p> <p>Johann Laux, Sandra Wachter, and Brent Mittelstadt, Neutralizing Online Behavioural Advertising: Algorithmic Targeting with Market Power as an Unfair Commercial Practice, Common Market Law Review, 58(3), 09.04.2021, Available at: <a href="https://ssrn.com/abstract=3822962">https://ssrn.com/abstract=3822962</a></p> <p>Pablo Fernández Carballo-Calero, Aggressive Commercial Practices in the Case Law of EU Member States, Journal of European Consumer and Market Law, Volume 5, Issue 6 (2016) pp.255-261</p> <p>Regulation (EU) 2022/2065 of the European Parliament and the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277, 27.10.2022, pp.1-102</p> <p>Statista, Event Tickets – Europe, 2023, available at: <a href="https://www.statista.com/outlook/dmo/eservices/event-tickets/europe#market-shares">https://www.statista.com/outlook/dmo/eservices/event-tickets/europe#market-shares</a></p> <p>The “New Deal for Consumers” initiative aimed at strengthening enforcement of EU consumer law considering a growing risk of EU-wide infringements and at modernising EU consumer protection rules given market developments. European Commission, Review of EU consumer law, available at: <a href="https://commission.europa.eu/law/law-topic/consumer-protection-law/review-eu-consumer-law_en#new-deal-for-consumers">https://commission.europa.eu/law/law-topic/consumer-protection-law/review-eu-consumer-law_en#new-deal-for-consumers</a></p> <p>UFC-Que Choisir, Jeux vidéo – L’industrie doit cesser de se jouer de vous, 01.06.2022</p> <p>Your Europe, Citizens &gt; Consumers &gt; Unfair treatment &gt; Unfair commercial practices, 10.11.2022, available at: <a href="https://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-commercial-practices/index_en.htm">https://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-commercial-practices/index_en.htm</a></p> <p>Zsafia Bitai, Unfair Commercial Practices in the digital space, CEE Legal Matters Magazine, Issue 9.3, 04.2022</p> <p>Stakeholders interviewed:</p> <ul style="list-style-type: none"> <li>• One researcher</li> <li>• One trader representative</li> <li>• Three members of a national authority</li> </ul>

## 2 Case Study – Consumer vulnerability

Case study headings	Description and analysis
<p><b>Introduction and case study objectives</b></p>	<p>The case study looks at the concept of vulnerable consumers covered by the three Directives under review, namely:</p> <ul style="list-style-type: none"> <li>• The <b>Unfair Commercial Practices Directive (UCPD)</b><sup>112</sup> enshrines the concept of the vulnerable consumer Article 5(3) as someone requiring additional assistance compared to the “average consumer” due to a set of characteristics which make them particularly vulnerable. These characteristics are <u>mental or physical infirmity, age, or credulity</u>.</li> <li>• The <b>Consumer Rights Directive (CRD)</b><sup>113</sup> mentions in its recital that consumers can be particularly vulnerable because of their <u>mental, physical, or psychological infirmity, age or credulity</u> (the CRD thus applies the same understanding as the UCPD).</li> <li>• The <b>Unfair Contract Terms Directive (UCTD)</b><sup>114</sup>, does not explicitly mention vulnerable consumers, but requires in its recitals that in making an assessment of good faith, particular regard should be paid to the relative strength of the bargaining positions of the parties. The European Commission guidance also suggests that <u>vulnerable consumers</u> should be taken into account when assessing the effectiveness of remedies for unfair contract terms provided by national laws.<sup>115</sup></li> </ul> <p>The concept of a vulnerable consumer in EU consumer law is differentiated from the notion of an average consumer defined in EU case law as someone who is “reasonably well-informed and reasonably observant and circumspect”<sup>116</sup>. However, as considered below, the distinction between the two notions may become blurred in certain circumstances since an average consumer may also have certain vulnerabilities in certain contexts, i.e. the concept of situational vulnerabilities.</p> <p>The case study focuses on the UCPD as it is the only one of the three Directive which explicitly refers to vulnerable consumers within an Article (as opposed to the Recital). As such, the UCPD remains the point of reference for how to interpret the concept of vulnerable consumers in consumer legislation.</p> <p>The objective of the case study is to assess the concept of the vulnerable consumer as defined in the UCPD and to assess whether the legal provisions in place are sufficient to account for all types of vulnerable consumers and for the new digital landscape. The findings are based on desk research drawing from academic and grey literature as well as court cases (see bibliography at the end of the document). The desk research was complemented through interviews (see list of organisations and type of stakeholders consulted at the end of the document) as well as public consultation responses and position papers. This case study will be further updated with the findings from the sweeps (as relevant), targeted surveys, and Member States’ national authorities’ interviews (as relevant).</p> <p>The case study is structured as follows:</p> <ul style="list-style-type: none"> <li>• The methodology and research questions guiding the study.</li> <li>• An overview of the context within which the concept of the vulnerable consumer evolved and how it figures in broader EU legislation.</li> <li>• An outline of the problematic practices and their scope and magnitude regarding the issue of consumer vulnerability (and how these have increased due to the digitalisation of the consumer space). However, this case study will not provide an</li> </ul>

<sup>112</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market

<sup>113</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance

<sup>114</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

<sup>115</sup> Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts, section 5.4.2. See also Case C-76/10 Pohotovost’ and Case C-168/15 Milena Tomášová.

<sup>116</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market

Case study headings	Description and analysis
	<p>in-depth assessment of the new and emerging practices related to trends in digital commerce and the role of social media platforms. Separate case studies are conducted on these topics and will touch upon the related issues of consumer vulnerability in these specific instances.</p> <ul style="list-style-type: none"> <li>• An examination of the concept of the vulnerable consumer in the UCPD.</li> <li>• An in-depth assessment of the concept of vulnerable consumer in the UCPD the extent to which the Directive sufficiently define the concept or if, in line with the desire expressed by the European Parliament<sup>117</sup>, there is a need for a wider definition of vulnerable consumers such as to take into account the notion of digital asymmetry advocated by BEUC.</li> </ul>
<p><b>Research Questions</b></p>	<p>The study will be guided by the following research question broken down into different sections:</p> <p><b>Problematic practice – nature and magnitude</b></p> <ul style="list-style-type: none"> <li>• What online practices are harmful to vulnerable groups?</li> <li>• To what extent are vulnerable populations affected by these targeting methods?</li> </ul> <p><b>Assessment of the concept of vulnerable consumers in the Directives (Stakeholders' feedback)</b></p> <ul style="list-style-type: none"> <li>• To what extent are vulnerable groups named and considered in the Directives? <ul style="list-style-type: none"> <li>▪ To what extent are the wording of Article 5(3) UCPD and recital 34 of the CRD, broad enough to cover all types of relevant vulnerable groups including those with less digital skills, children, consumers with mental or physical infirmity, those prone to addiction, etc?</li> </ul> </li> <li>• To what extent can vulnerable groups apply the vulnerable consumer concept of the UCPD? <ul style="list-style-type: none"> <li>▪ To what extent are there any challenges that prevent the application of the vulnerable consumer concept?</li> <li>▪ Is the concept easy to apply? (i.e., the burden of proof)</li> </ul> </li> <li>• To what extent is the concept of the vulnerable consumer in the UCPD aligned with EU and international legislations? <ul style="list-style-type: none"> <li>▪ Is the UCPD concept of the vulnerable consumer aligned with EU consumer and cross-sectoral legislations?</li> <li>▪ Is the UCPD concept of the vulnerable consumer aligned with EU policies and reports?</li> <li>▪ Is the UCPD concept of the vulnerable consumer aligned with the United Nations Guidelines for Consumer Protection (UNGCP)?</li> </ul> </li> <li>• To what extent is the existing concept of 'vulnerability' defined in the UCPD broad enough to take into account the new digital environment? <ul style="list-style-type: none"> <li>▪ To what extent does this require any changes in light of the digital environment and the evolution in what constitutes a vulnerable consumer? (i.e., Is it necessary to amend the concepts of the 'average consumer' and/or the 'vulnerable consumer'?)</li> <li>▪ To what extent is the 'digital asymmetry' concept proposed by BEUC helpful in relation to a possible widening of the definition of what constitutes a vulnerable consumer.</li> </ul> </li> </ul> <p><b>Conclusion</b></p> <ul style="list-style-type: none"> <li>• Are there any regulatory gaps regarding vulnerable consumers that could be addressed by the Commission in future?</li> </ul>
<p><b>Context</b></p>	<p>Consumer vulnerability has been a recurrent concern for the European Commission. It was already identified as a growing challenge in 2012 in the Commission Staff Working Document<sup>118</sup> on knowledge-enhancing aspects of consumer empowerment, as well as by</p>

<sup>117</sup> European Parliament, 2021, Vulnerable consumers, Available at: [EPRS\\_BRI\(2021\)690619\\_EN.pdf](#)

<sup>118</sup> European Commission, 2012, Commission Staff Working Document on Knowledge-Enhancing Aspects of Consumer Empowerment 2012-2014, Available at: [http://ec.europa.eu/consumers/archive/strategy/docs/swd\\_document\\_2012\\_en.pdf](http://ec.europa.eu/consumers/archive/strategy/docs/swd_document_2012_en.pdf)

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	<p>the European Economic and Social Committee<sup>119</sup>, and by the European Parliament<sup>120</sup> in its 2012 resolution which called on the Commission to consider reinforcing the rights of vulnerable consumers. Today, consumer vulnerability remains one of the main priorities of the Commission's New Consumer Agenda (2020 to 2025<sup>121</sup>), which builds on the 2012 Consumer Agenda (which expired in 2020) and the 2018 New Deal for Consumers (both of which also addressed vulnerable consumers). Through this agenda, the Commission seeks "to protect all consumers in their dealings with professional traders", taking into account that certain groups of consumers in certain situations can be particularly vulnerable and need specific safeguards..<sup>122</sup></p> <p>The result of this continued focus on the vulnerable consumer is a wide array of consumer and cross-sectoral legislation (in food, energy, and finance legislation in particular) with provisions protecting vulnerable consumers. However, as demonstrated by the non-exhaustive list below, these provisions are either enshrined in recitals rather than Articles<sup>123</sup> and/or are limited to the same group of vulnerable consumers as defined in the UCPD (i.e., mental or physical infirmity, age, or credulity). Thus, and as reported by legal and consumer experts consulted, while provisions protecting vulnerable consumers can be found in many EU legislation, the UCPD remains the reference point for the protection of vulnerable consumers.</p> <ul style="list-style-type: none"> <li>• Article 2(b) of the <b>General Product Safety Directive</b><sup>124</sup> (<b>GPSD</b>) suggests that categories of consumers, in particular <u>children and the elderly</u> can be particularly vulnerable to the risks posed by certain products.</li> <li>• Recital 94 of the <b>Digital Services Act</b><sup>125</sup> (<b>DSA</b>) recognises that specific groups or person may be disadvantaged in their use of online services because of profiling based on their <u>gender, race or ethnic origin, religion or belief, disability, age or sexual orientation</u>. Therefore, consumers should not solely be offered products or promoted services or content based on such profiling. This goes further than the UCPD, but only in the Recital.</li> <li>• The proposal for the <b>Artificial Intelligence Act (AIA)</b> prohibits some AI practices that have a "significant potential to manipulate persons through subliminal techniques beyond their consciousness or exploit vulnerabilities of specific vulnerable groups <u>such as children or persons with disabilities</u>."<sup>126</sup> While the term "such as" suggest that it may be more inclusive than the UCPD, it remains to be seen whether the proposal will be legislated with this wording in an article.</li> <li>• Article 5 of the <b>Regulation on Online Dispute Resolution</b><sup>127</sup> (<b>ODR</b>) requires that the ODR platform is accessible and usable for all, including vulnerable users, but <u>does not define what constitutes a vulnerable consumer</u>.</li> <li>• Recital 75 of the <b>General Data Protection Regulation</b><sup>128</sup> refers to the protection of "vulnerable natural persons" data, identifying <u>children</u> in particular.</li> </ul>

<sup>119</sup> Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — A European Consumer Agenda — Boosting confidence and growth, Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:011:0054:0058:EN:PDF>

<sup>120</sup> European Parliament resolution of 22 May 2012 on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI)), Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0209&language=EN&ring=A7-2012-0155>

<sup>121</sup> European Commission, 2020, New Consumer Agenda

<sup>122</sup> The new strategy covers measures to protect financially vulnerable consumers at risk of over-indebtedness, low-income consumers, older people and people with disabilities (especially those who have no access to the internet), children and minors, and consumers at risk of discrimination by biased artificial intelligence algorithms.

<sup>123</sup> Recitals in EU laws are not legally binding in the same way that the articles are. However, when implementing the legislation, the recitals are important in interpreting and expanding any provisions of the EU legislation which are not clear.

<sup>124</sup> Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety

<sup>125</sup> Proposal for a Regulation on a Single Market for Digital Services (Digital Services Act and amending Directive 2000/31/EC COM (2020) 825 final, Explanatory memorandum, 2

<sup>126</sup> AI Act Proposal explanatory memorandum, 12-13.

<sup>127</sup> Article 5 of the Regulation on Online Dispute Resolution (ODR) requires that the ODR platform is 'accessible and usable for all, including vulnerable users ("design for all"), as far as possible'

<sup>128</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

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	<ul style="list-style-type: none"> <li>• Cross-sectoral legislation (energy): The <b>Electricity Markets Directive</b><sup>129</sup> and the <b>Gas Directive</b><sup>130</sup> require Member States to ensure there are adequate safeguards to protect vulnerable customers. However, the Directive leaves it to the Member States to define who the vulnerable consumers are based on the ruling of the CJEU which takes the <u>UCPD as its reference point</u>.</li> <li>• Cross-sectoral legislation (finance): The <b>Directive on Consumer Credits</b><sup>131</sup> mentions vulnerable consumers twice in the explanatory referendum without defining them, and similarly, the <b>Basic Payment Account Directive</b><sup>132</sup> highlights that vulnerable consumers should be sufficiently informed but <u>does not define who the vulnerable consumers are</u>.</li> <li>• Cross-sectoral legislation (food): The <b>Regulation on flavourings</b><sup>133</sup> notes in the recitals that 'where possible, attention should be focused on whether or not the use of certain flavourings could have any negative consequences on vulnerable groups' without defining them and the <b>Regulation on nutrition and health claims made on foods</b><sup>134</sup> <u>refers to the UCPD definition of vulnerable consumer</u> in its recitals.</li> </ul>
<p><b>Problematic practice – nature and magnitude.</b></p>	<p>As highlighted in several EU-wide studies including the Commission's 2016 study on "Understanding consumer vulnerability in the EU's key markets"<sup>135</sup>, a 2018 consumer survey on self-perception of vulnerability<sup>136</sup>, and the latest (2019) consumer condition scoreboard, large segments of the EU population consider themselves to be vulnerable<sup>137</sup>. For instance, in 2019, 43 % of the EU citizens surveyed believed themselves to be vulnerable consumers for one or more reasons (mainly linked to their socio-demographic status, and the complexity of offers, terms and conditions, etc. – see figure 46 below). The percentage of self-reported vulnerable consumers was 35% in 2016 indicating a growth in perceived vulnerability among consumers.<sup>138</sup> This is in line with the findings from academic literature, consumer reports and the feedback from all stakeholders consulted which highlighted the growth in consumer vulnerability as a result of the evolving digital landscape.</p>

<sup>129</sup> Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU.

<sup>130</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC

<sup>131</sup> Proposal for a Directive of the European Parliament and the Council on consumer credits, COM/2021/347 final

<sup>132</sup> Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features Text with EEA relevance

<sup>133</sup> Regulation (EC) No 1334/2008 of the European Parliament and of the Council of 16 December 2008 on flavourings and certain food ingredients with flavouring properties for use in and on foods and amending Council Regulation (EEC) No 1601/91, Regulations (EC) No 2232/96 and (EC) No 110/2008 and Directive 2000/13/EC

<sup>134</sup> Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods

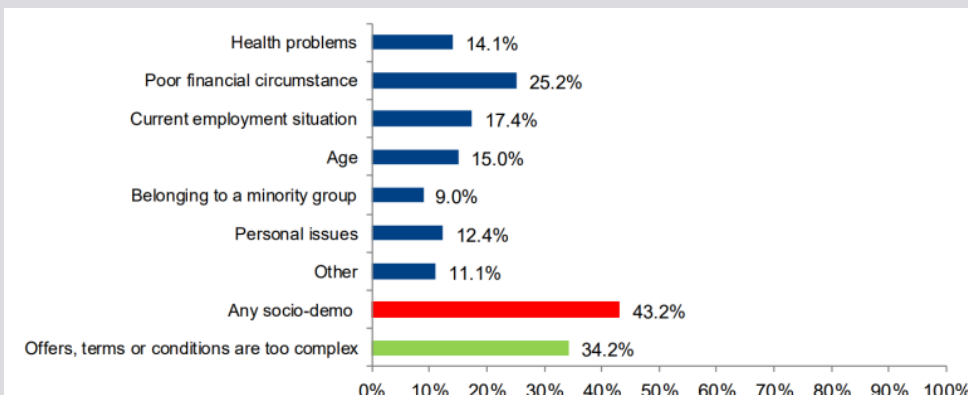
<sup>135</sup> European Commission, 2016, Understanding consumer vulnerability in the EU's key markets, Available at: [Understanding consumer vulnerability in the EU's key markets \(europa.eu\)](https://ec.europa.eu/info/sites/info/files/understanding_consumer_vulnerability_in_the_eu_s_key_markets_europa.eu)

<sup>136</sup> European Commission, 2018, Consumer Survey, 2018, Available at : [https://ec.europa.eu/info/sites/info/files/consumer-survey-2018-main-report\\_en.pdf](https://ec.europa.eu/info/sites/info/files/consumer-survey-2018-main-report_en.pdf)

<sup>137</sup> European Commission, 2019, Consumer conditions scoreboard: consumers at home in the single market - 2019 edition, Available at: [Consumer conditions scoreboard: consumers at home in the single market - 2019 edition \(europa.eu\)](https://ec.europa.eu/info/sites/info/files/consumer_conditions_scoreboard_consumers_at_home_in_the_single_market_2019_edition_europa.eu)

<sup>138</sup> European Commission, 2018, Consumer Survey



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	<p data-bbox="422 309 1085 340"><i>Figure 46: Self-reported vulnerability in the EU: 2019 average</i></p>  <table border="1" data-bbox="422 358 1394 750"> <thead> <tr> <th>Category</th> <th>Percentage</th> </tr> </thead> <tbody> <tr> <td>Health problems</td> <td>14.1%</td> </tr> <tr> <td>Poor financial circumstance</td> <td>25.2%</td> </tr> <tr> <td>Current employment situation</td> <td>17.4%</td> </tr> <tr> <td>Age</td> <td>15.0%</td> </tr> <tr> <td>Belonging to a minority group</td> <td>9.0%</td> </tr> <tr> <td>Personal issues</td> <td>12.4%</td> </tr> <tr> <td>Other</td> <td>11.1%</td> </tr> <tr> <td>Any socio-demo</td> <td>43.2%</td> </tr> <tr> <td>Offers, terms or conditions are too complex</td> <td>34.2%</td> </tr> </tbody> </table> <p data-bbox="422 761 965 792"><i>Source: European Commission, consumer survey, 2018.</i></p> <p data-bbox="422 801 1394 1467">As evidenced in the desk research and stakeholder consultation, the increase in vulnerable consumers is in large part due to the development of digitalization including e-commerce and AI-based technologies. For instance, the 2017 external study for the fitness check of EU consumer and marketing law warned that certain groups of consumers, especially vulnerable groups, could be particularly at risk from being targeted by unfair practices that “exploit consumers’ cognitive biases, enabled by advances in technological innovation and behavioural insights” (such as online behavioural advertising)<sup>139</sup>. However, at the time, the Commission concluded that there was no need to amend the ‘average consumer’ benchmark as the concept was considered to allow, in practice, a significant degree of flexibility in its application. In the absence of evidence of major problems in the application of the current rules, and in light of the clarifications already provided via the revised UCPD guidance, the Commission concluded that there was no need to change the specific rule on vulnerable consumers under Article 5(3). However, the fast pace of the digitalisation of the consumer landscape noted by BEUC in its 2021 “EU Consumer Protection”<sup>140</sup> study suggests that due to large parts of consumer activities moving into online space and onto digital platforms, the average consumer has now become a vulnerable consumer. This is also in line with the findings of the New Consumer Agenda which warns that the digital transformation – together with the underlying data collection, processing and analysis of consumers’ behaviour and their cognitive biases – can make it harder for all consumers to make informed choices, and may limit the effectiveness of the current rules, including on unfair consumer practices<sup>141</sup>. For instance, it warned that practices such as the use of user interfaces aimed at manipulating consumers (‘dark’ patterns), abusing consumer behavioural biases, profiling, hidden advertising, false or misleading information and manipulated consumer reviews, increase consumer vulnerability.</p> <p data-bbox="422 1478 1394 1870">It is beyond the scope and aim of this case study to address the many issues vulnerable consumers face due to new and emerging practices related to trends in digital commerce and the role of social media platforms. Separate case studies are conducted on these topics and will touch upon the related issues of consumer vulnerability in these specific instances. However, this overview serves to highlight both the scope and magnitude of the issue as well as the important question of whether the concept of vulnerable consumer (defined in EU legislation as the exception rather than the rule) is still sufficient (as per the Commission’s findings on the 2017 external study for the fitness check of EU consumer and marketing law)<sup>142</sup> or if a broader understanding of vulnerability should be applied in light of the increasing vulnerability of all consumers to new forms of unfair commercial practices (emerging as a result of digitalization and resulting in new power imbalances between consumers and traders). The following section will delve deeper into this issue beginning with an overview of the UCPD as it currently stands, followed by an assessment of the concept of the vulnerable consumer concept in the UCPD.</p>	Category	Percentage	Health problems	14.1%	Poor financial circumstance	25.2%	Current employment situation	17.4%	Age	15.0%	Belonging to a minority group	9.0%	Personal issues	12.4%	Other	11.1%	Any socio-demo	43.2%	Offers, terms or conditions are too complex	34.2%
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<p data-bbox="239 1883 399 2076"><b>How far does existing EU (and any national legislation where relevant)</b></p>	<p data-bbox="422 1883 1394 1971">Despite the wide array of existing consumer legislation and cross-sectoral legislation which touch upon (to various degrees) the notion and protection of vulnerable consumers, the UCPD is the main EU legislation which defines the concept of consumer vulnerability as:</p> <p data-bbox="518 1971 1394 2060"><i>“Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity.</i></p>																				

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address the problem?	<p><u>age, or credulity in a way which the trader could reasonably be expected to foresee.</u><sup>143</sup></p> <p>A more exhaustive (indicated by the use of “such as”) provision appears in Recital (19) of the Preamble to the Directive which makes an explicit link between the concepts of a vulnerable consumer and an average consumer. It reads:</p> <p><i>“Where certain characteristics such as age, physical or mental infirmity or credulity make consumers particularly susceptible to a commercial practice or to the underlying product and the economic behaviour only of such consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee, it is appropriate to ensure that they are adequately protected by assessing the practice from the perspective of the average member of that group”</i></p> <p>Since its entry into force, the concept of the vulnerable consumer in the Directive has not been amended (despite the recommendations of the 2017 fitness check of EU consumer and marketing law), either directly in the underlying legislation or through the Modernisation Directive amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU as regards the better enforcement and modernisation of Union consumer protection rules.<sup>144</sup> However three Commission guidance documents were drafted to provide further context to the evolving interpretation of the Directive’s provisions.</p> <ul style="list-style-type: none"> <li>• The first guidance document, released in 2009, referred to the concept of a “weak and vulnerable” consumer and elaborated on the criteria used in Article 5 to define vulnerability.<sup>145</sup></li> <li>• The second guidance document, released in 2016, introduced a new, multi-dimensional interpretation of consumer vulnerability based on the Commission’s 2016 study on vulnerability across key markets.<sup>146</sup> The multidimensional nature of consumer vulnerability highlighted the impact of personal characteristics on the likelihood of being vulnerable as a consumer. For example, characteristics like age and gender can increase vulnerability in some dimensions (i.e., susceptibility, ability to obtain and assimilate information, immaturity/credulity, etc), but not in others. Importantly, in the revised UCPD Guidance document, the Commission clarified that the list of specific vulnerabilities in Article 5(3) is not exhaustive</li> <li>• The third and latest guidance document, released in 2021 on the UCPD, further stressed the multi-dimensional forms of vulnerability and introduced the concept of vulnerability in the digital environment highlighting that those vulnerabilities are particularly acute in the digital environment, which is increasingly characterised by data collection on socio-demographic characteristics but also personal or psychological characteristics, such as interests, preferences, psychological profile and mood. The updated UCPD Guidance, therefore, gives higher importance to rapid technological developments, the growing digital space, new digital solutions,</li> </ul>

<sup>139</sup> European Commission, 2017, Study for the Fitness Check of EU consumer and marketing law, Available at: [JUST - Results of the Fitness Check of consumer and marketing law and of the evaluation of the Consumer Rights Directive \(europa.eu\)](https://ec.europa.eu/justice/euro-justice/just-2017-01-17-study-for-the-fitness-check-of-eu-consumer-and-marketing-law-and-of-the-evaluation-of-the-consumer-rights-directive)

<sup>140</sup> BEUC, 2022, EU Consumer Protection 2.0, ‘Protecting fairness and consumer choice in a digital economy’.

<sup>141</sup> European Commission, 2020, New Consumer Agenda

<sup>142</sup> European Commission, 2017, Study for the Fitness Check of EU consumer and marketing law, Available at: [JUST - Results of the Fitness Check of consumer and marketing law and of the evaluation of the Consumer Rights Directive \(europa.eu\)](https://ec.europa.eu/justice/euro-justice/just-2017-01-17-study-for-the-fitness-check-of-eu-consumer-and-marketing-law-and-of-the-evaluation-of-the-consumer-rights-directive)

<sup>143</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market

<sup>144</sup> Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules

<sup>145</sup> (i.e., mental or physical infirmity may include sensory impairment, limited mobility and other disabilities; age may be considered both from the perspective of older (elderly people) and younger consumers (children and teenagers); while credulity is a neutral term that covers any consumer who may more readily believe specific claims.) See Guidance on the implementation / application of Directive 2005/29/EC on unfair commercial practices, 3 December 2009

<sup>146</sup> European Commission, Study on consumer vulnerability in key markets across the European Union (EACH/2013/CP/08), [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/vulnerability/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/vulnerability/index_en.htm). The study defined the ‘vulnerable consumer’ as a consumer, who, as a result of socio-demographic characteristics, behavioural characteristics, personal situation or market environment is at higher risk of experiencing negative outcomes in the market, has limited ability to maximise his/her well-being, has difficulty in obtaining or assimilating information, is less able to buy, choose or access suitable products, or is more susceptible to certain marketing practices.

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	<p>and consumers becoming more and more vulnerable, because of these developments.<sup>147</sup></p> <p>While the guidance documents have sought to broaden understanding of what can be included under the concept of “vulnerable consumer”, a recurring criticism raised by academic, consumer organisations and experts in the field is the fact that the definition of the vulnerable consumer remains too rigid and narrow. Based on the analysis of the desk research conducted and the assessment of the stakeholders’ feedback (Open Public Consultation and interviews with consumer organisations and legal experts), the following section will examine the issues which limit the extent to which the UCPD addresses the problems of vulnerable consumers.</p>
<p><b>Assessment of stakeholder feedback</b></p> <p><i>[Review primary data and information]</i></p> <p><i>Interviews OPC findings Targeted consultation findings</i></p>	<p><b>To what extent are vulnerable groups named and considered in the UCPD and CRD Directives?</b></p> <p>Both the CRD and the UCPD only list three groups of vulnerable consumers:</p> <ul style="list-style-type: none"> <li>• Infirmary: (mental or physical) includes sensory impairment, limited mobility and other disabilities. For instance, an Italian consumer authority considered advertising that misleadingly presented products as able to cure serious illness as could cause vulnerable consumers, such as people affected by a serious illness, to take a transactional decision that they would not have taken otherwise.<sup>148</sup></li> <li>• Age: Including the elderly, children, and teenagers</li> <li>• Credulity: covers groups of consumers who may more readily believe specific claims. The vagueness of the concept is further discussed below.</li> </ul> <p>In limiting the groups of potential vulnerable consumers, the Directives omit several other important factors such as low socio-economic status, low education level, not being able to speak a particular language, minority status, gambling addiction, etc. Those are all characteristics which also increase the (theoretical) risk of becoming vulnerable and which should therefore be taken into account. For instance, as reported in the “Addictive use” case study, policymakers, the media and consumers are increasingly raising concerns over loot boxes inducing consumers (particularly those susceptible to gambling) to overspend on video games.</p> <p>As highlighted in figure 46, these are also vulnerabilities that were self-reported by a large share of the population surveyed as part of the 2018 consumer survey. For example, as documented in the literature, consumers from disadvantaged backgrounds are consistently charged more for goods and services and pay a poverty penalty. In the EU, low-income consumers are regularly put on more expensive energy tariffs due to limited payment methods.<sup>149</sup></p> <p>Beyond the limited set of vulnerable groups listed in the Directive, experts have also criticized the approach of identifying specific groups of consumers. This is what Cole calls the “victim approach” to vulnerability, as the concept is used to draw attention to the inherent weakness of particular groups, or their inability to fend for their own interests<sup>150</sup>. Similarly, Martha Fineman argued in her vulnerability theory that consumer vulnerability is not a fixed characteristic but a consequence of human embodiment, carrying with it “the ever-present possibility of harm, injury, and misfortune” and therefore “no individual can avoid vulnerability”<sup>151</sup>. This is particularly relevant when it comes to the digital environment where all consumers can become vulnerable. The notion of “vulnerability by default” (and the related “digital asymmetry” also advocated by BEUC) are further discussed in this case study when assessing whether the concept of ‘vulnerability’ as defined in the UCPD is broad enough to take into account the new digital environment.</p> <p>While the UCPD Recital 19 and the Commission’s guidance documents on the implementation and application of the UCPD suggest that the closed list of vulnerable</p>

<sup>147</sup> European Commission, 2021, 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, Available at: [Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market \(europa.eu\)](#)

<sup>148</sup> PS6980 - Autorità Garante della Concorrenza e del Mercato.

<sup>149</sup> Christine Riefa, 2022, Protecting Vulnerable Consumers in the Digital Single Market

<sup>150</sup> Cole, Alyson. 2016. ‘All of Us Are Vulnerable, But Some Are More Vulnerable than Others: The Political Ambiguity of Vulnerability Studies, an Ambivalent Critique.’ *Critical Horizons* 17 (2): 260–77

<sup>151</sup> (Albertson Fineman 2008)

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	<p>groups in Article 5(3) may not be exhaustive (by adding “such as” before the list), to date, few courts have extended the scope of this notion past the list contained in the article.<sup>152</sup> Indeed, as previously demonstrated, recitals have no binding legal force.<sup>153</sup> As such, using recital 19 to interpret Art.5.3 UCPD might result in conferring rights to consumers who might otherwise not enjoy them as per the law. Given that the UCPD is a maximum harmonisation directive (i.e., it sets both the floor and ceiling of protection) Member States cannot deviate from the UCPD standard to protect vulnerable consumers such as by having stricter or more comprehensive standards of protection for certain groups. This may explain why Member States have taken the safer approach of limiting the interpretation of the Directive to the group of vulnerable consumers listed in the Article of the Directive.</p> <p><b>The limited set of vulnerable groups listed in the UCPD and CRD Directives restrict the extent to which vulnerable groups are named and considered and thus protected. All stakeholders consulted as part of this case study (consumer groups and experts) suggested broadening the definition and expanding the characteristics, thus aligning the Directives with the guidance documents.</b></p> <p><b>To what extent can vulnerable groups apply the vulnerable consumer concept of the UCPD?</b></p> <p>For the concept of the vulnerable consumer to be applied, three restrictive elements need to be met. These elements have been criticised in the desk literature and by consumer experts interviewed as restricting the extent to which the vulnerable consumer concept can be applied (and therefore the extent to which the concept can be used to protect vulnerable consumers.)</p> <p>1) <u>The consumer needs to be part of a clearly identifiable group of vulnerable consumers:</u> The difficulties in regard to the first requirement have already been previously discussed, <b>namely the narrow focus of the UCPD on a small set of personal characteristics limits the application of the concept beyond age, physical or mental infirmity or credulity and is therefore not sufficient to take into account the wide array of potential vulnerabilities.</b></p> <p>Beyond this issue, experts have also raised concerns regarding the application of the credulity criteria. The only definition of that group is provided in the guidance document as “<i>groups of consumers who may more readily believe specific claims</i>”<sup>154</sup>. This broad definition is however difficult to apply as for the vulnerable consumer concept to apply there has to be a clearly identifiable group of credulous consumers. For instance, Twigg-Flesner et al. suggest that asylum seekers can be considered as potentially credulous due to their lack of language skills<sup>155</sup>. However, this implies that all asylum seekers are somehow naïve and credulous which becomes a sensitive political line to take. This does not suggest that asylum seekers are not or should not be considered a vulnerable group (for example, Peroni and Timmers demonstrated in the case law of the European Court of Human Rights, that the acknowledgement of vulnerability status for particular groups, including asylum seekers, has had positive effects<sup>156</sup>), but rather than the credulity criteria is misleading and patronising and can lead to stigmatizing and stereotyping of a particular group as being credulous.</p> <p>One consumer expert interviewed also questioned the extent to which the credulity criteria could cover consumers who are more inclined to accept certain claims due to their beliefs. Some clear-cut cases may include members of a sect or televangelists charging tickets for their sermons or to perform ‘healing rituals’ on stage. However, (and beyond the fact that this infringes on the freedom of religion) it brings into question the divide between cult and organised religions (i.e., could followers of organized religions i.e., Christians, Muslims, Jews, etc. fall within the category of credulous consumers?). These examples showcase</p>

<sup>152</sup> See Decision Vj-5/2011/73 by the Hungarian Competition Authority, 10 November 2011 as cited in Second Guidance Document note 114 as the only example of a Member State authority expanding the criteria for vulnerability.

<sup>153</sup> Case C-162/97, Nilsson, [1998] ECR I-7477, para. 54

<sup>154</sup> European Commission, 2021, 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

<sup>155</sup> Twigg-Flesner C et al., ‘An Analysis of the Application and Scope of the Unfair Commercial Practices Directive’ (Department of Trade and Industry, 2005), para 2.61

<sup>156</sup> Audrey R Chapman, and Benjamin Carbonetti. 2011. ‘Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights.’ Human Rights Quarterly 33 (3): 682–732. <https://doi.org/10.1353/hrq.2011.0033>.

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	<p>the difficulty in meeting the ‘clearly identifiable group’ requirement of the Directive for consumers falling under the “credulous group” and thus the challenges of applying the Directive.</p> <p>2) <u>The practice should only target individuals within that group (and only that group):</u> The Directive refers to “<i>Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable...</i>”<sup>157</sup>. The inclusion of the word “only” suggests that the vulnerable consumer category can only be used in (rare) situations where a commercial practice targets <i>only</i> the member of that group (however it can be specific sub-groups within that group, such as a specific infirmity, age bracket, etc.). For instance, two national authorities ruling against a misleading commercial practice of printing information in a very small font found that people with impaired eyesight fell under the category of the average consumers (and not the “infirm” vulnerable consumer category) as the malpractice was not targeted at them specifically<sup>158</sup>. This is in line with the UCPD guidance which clarifies that a group of consumers should be “sufficiently identifiable, of limited scope and homogeneous” and if “a particular group cannot be identified, then the assessment should focus on the general average consumer benchmark”. <b>This requirement limits the extent to which (and opportunities) where the vulnerable consumer concept can be applied as instances where practices target only specific groups of vulnerable consumers (but no one else) are relatively rare and difficult to prove.</b></p> <p>3) <u>The trader could not have reasonably foreseen that harm would be caused to that particular group by the practice:</u> Art.5(3) UCPD requires that the clearly identifiable group of consumers is vulnerable in a way “which the trader could reasonably be expected to foresee”<sup>159</sup>. It is meant to ensure that the average vulnerable standard is interpreted in a way that is proportionate. However, the foreseeability requirement has been criticised as being overly restrictive. <b>Experts consulted suggested that the foreseeability requirement could be used as a loophole by traders</b> (i.e., traders arguing that they didn’t know) and highlighted that the lack of foreseeability should not become an excuse for traders to neglect their duties towards vulnerable consumers.</p> <p>Beyond the difficulty in meeting all three requirements, an additional difficulty in applying the concept of the vulnerable consumer is that the burden of proof rests on consumers. That is, it is currently the responsibility of the targeted consumer to (1) demonstrate ownership to a group (which can be challenging for the credulous group in particular as demonstrated); (2) that the practice is not just targeting him/her as an individual but the group in question <i>and</i> only members of that group; and (3) to demonstrate that the trader could have reasonably foreseen that harm would be caused to that particular group by the practice. This requires a clear understanding of the law and its implementation which consumers are unlikely to have. Moreover, as argued by BEUC, the obscurity of algorithmic processes and the resulting difficulty to establish compliance with data-driven services throughout the supply chain means that the trader holds the advantage over the consumer making it difficult for consumers to pinpoint unlawful behaviour and malpractices. BEUC recommends that the burden of proof and argumentation should be placed on the traders, requiring them to come forward with conclusive evidence on the details of the employed practice<sup>160</sup>.</p> <p>In addition, as argued by Professor Riefa, the most vulnerable consumers are also likely to be those from low socio-economic backgrounds characterised by lower education and financial means. For instance, in a case involving the omission of information by a credit institution, the Hungarian Competition Authority considered that that consumers that had been banned by credit institutions due to poor ability to pay were particularly susceptible to a specific offer, which made them more vulnerable<sup>161</sup>. Those types of vulnerable consumers will have less ability (i.e., knowledge, resources, time, etc) to make a case against a trader</p>

<sup>157</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market

<sup>158</sup> European Commission, 2021, 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

<sup>159</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market

<sup>160</sup> BEUC, 2022, EU Consumer Protection 2.0, ‘Protecting fairness and consumer choice in a digital economy.

<sup>161</sup> Decision Vj-5/2011/73 by the Hungarian Competition Authority, 10 November 2011.

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	<p>and a malpractice<sup>162</sup>. Even if access to courts or ADR is guaranteed, in an online set-up, consumers are faced with having to gather the required evidence of wrongdoing. One legal expert interviewed suggested that access to justice (or lack thereof) was thus a systemic vulnerability in itself.</p> <p>For all these reasons, vulnerable groups (or regulators) find it difficult to apply the vulnerable consumer concept of the UCPD, preferring instead to use the targeted average consumer concept which offers the same level of protection but is broader and thus more flexible.</p> <p><b>To what extent is the concept of the vulnerable consumer in the UCPD aligned with EU and international legislation?</b></p> <p>As previously highlighted (see context section), a wide spectrum of consumer and cross-sectoral legislation includes specific provisions (either in Articles or Recitals) to protect vulnerable consumers. These provisions are aligned with the UCPD definition of vulnerable consumers, either applying the same group of vulnerable consumers or leaving it up to the Member States to decide with the understanding that the Member States would refer back to CJEU court case precedents which define the vulnerable consumer and the average consumer as per the UCPD. <b>The definition in the UCPD is thus aligned with that of other EU legislation (including the CRD, GPSD, DSA, AIA, ODR, etc.)</b></p> <p>However, a stricter interpretation of the relevant UCPD Article (and therefore the other above-mentioned EU legislations) might lead to the impression that there is a mis-alignment with EU reports on the concept of vulnerable consumers. For instance, the 2017 European Commission study on consumer vulnerability in key markets across Europe defined the ‘vulnerable consumer’ as a consumer, who:</p> <p><i>“as a result of socio-demographic characteristics, behavioural characteristics, personal situation or market environment is at higher risk of experiencing negative outcomes in the market, has limited ability to maximise his/her well-being, has difficulty in obtaining or assimilating information, is less able to buy, choose or access suitable products, or is more susceptible to certain marketing practices.”<sup>163</sup></i></p> <p>The newest UCPD Guidance refers back to this definition (although in a footnote) and stresses that the concept of vulnerability is not limited to the characteristics listed in Article 5(3), but should also cover more context-dependent vulnerabilities which are particularly acute in the digital environment. There is therefore a clear disparity between the vision of vulnerability in EU policy reports and guidelines which offers a more sophisticated version of vulnerability, and the more rigid definition of the UCPD.</p> <p>At the international level, the United Nations Guidelines for Consumer Protection (UNGCP) ensures the protection of “vulnerable and disadvantaged consumers”. Although not legally binding, their strength comes from their adoption by the United Nations General Assembly, and the consensus of countries and experts from around the world. By referring to ‘disadvantaged’ together with vulnerable consumers, the UNGCP recognizes that socio-economic factors are linked to vulnerability, but it does not combine the notions. Vulnerability thus could be said to remain attached to personal attributes and therefore the UNGCP concept of vulnerable consumer is similar to, and aligned with the approach taken by the UCPD.</p> <p><b>To what extent is the existing concept of ‘vulnerability’ defined in the UCPD still relevant in light of the digital environment and the evolution of what constitutes a vulnerable consumer?</b></p> <p>As indicated in Recital 18 and further specified in Articles 5 to 9, the UCPD’s benchmark for assessing the impact of a commercial practice is the notion of the ‘average consumer’, first developed by the CJEU in 1998 as someone who is “reasonably well-informed and reasonably observant and circumspect”<sup>164</sup>. This definition first appeared in Case C-210/96 ‘Gut Springenheide’<sup>165</sup> but the logic that led to its creation in the CJEU can be traced to</p>

<sup>162</sup> Riefa, C. (2022) Protecting vulnerable consumers in the digital single market. *European Business Law Review*, 33 (4). pp. 607-634

<sup>163</sup> European Commission, 2016, Understanding consumer vulnerability in the EU’s key markets, Available at: [Understanding consumer vulnerability in the EU’s key markets \(europa.eu\)](https://ec.europa.eu/consumers/odr/files/understanding_consumer_vulnerability_in_the_eus_key_markets_en.pdf)

<sup>164</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market

<sup>165</sup> whereby the national court wanted to know how to define the average consumer in order to assess if the description of packs of eggs was misleading. The CJEU directed national courts to “take into account the presumed expectations which it evokes in an average consumer who is reasonably well informed and reasonable observant and circumspect”.

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	<p>earlier judgments, such as those in Case C-210/96 290/90 “Cassis-de-Dijion” and in case C-470/93 “Mars”.<sup>166</sup></p> <p>As highlighted by Professor Riefa, this established definition of the average consumer resembles that of a ‘homo economicus’ posited under the neo-classical rational choice theory (i.e., someone who is consistently rational and narrowly self-interested, and who pursues its subjectively defined ends optimally)<sup>167</sup>. This definition thus sets a very high standard against which vulnerable consumers are benchmarked. As a result, while the concept of the vulnerable consumer is perceived as too narrow, the standard of the average consumer is criticised as setting a standard which is too high and does not correspond to actual consumer behaviour (which is not always rational), and not sufficient to afford appropriate protection to consumers who are ‘below’ the average consumer standard, but do not fall into the vulnerable consumer category. This argument was also developed by the European Parliament in a 2021 briefing on vulnerable consumers<sup>168</sup>. By treating the average vulnerable standard as an exception to the rational average consumer, the UCPD does not consider the fact that vulnerability may concern large parts of the consumer population or the notion that anyone may experience vulnerability, in particular in this digital age.</p> <p>As reported by Professor Kaprou, the results of various psychological studies over the last 50 years have shown that consumers rarely act entirely rationally when making their decisions. They are not always sufficiently focused and attentive, tend to overestimate their abilities and underestimate potential risks, often do not seek or underestimate important sources of information (for example, comparative tests of products or recommendations of independent consumer organisations or government authorities), and trust unreliable sources such as fake news or influencers on social media<sup>169</sup>. Beyond these findings which already indicate that the average consumer is not “reasonably well-informed and reasonably observant and circumspect”<sup>170</sup>, an increasing challenge faced by consumers in today’s technological world is the vast amount of information available and the time required for a rationale and knowledgeable consumer to go through and assess this information to make the best decision. That is, the expectation that the average consumer should read carefully all the information about any product they are interested in, and compare the product across the wide array of similar products available is not realistic. This is especially true for low-value products, as well as those that are shopped on a daily basis<sup>171</sup>. Moreover, several stakeholders interviewed pointed to information overload and stressed that consumers do not read terms and conditions, or in detail about a product’s characteristics.</p> <p>As advanced by all stakeholders interviewed, a more accurate representation of the average consumer is the “disengaged consumer” identified in the European Commission report on consumer vulnerability in key markets as a category of consumers who fail to read terms and conditions, fail to be aware of their contract conditions or do not read communications from their providers<sup>172</sup>. On this latter point, consumer experts such as Siciliani, Riefa and Gamper have highlighted how ‘disengaged’ consumers find themselves in vulnerable purchasing situations, not because of “cognitive failings or sociodemographic characteristics”, but because of the “structure of the consumer markets on which they evolve leads to apathy through obfuscation.”<sup>173</sup></p> <p>This case is further developed by BEUC in their 2021 report on the structural asymmetries in the digital consumer markets.<sup>174</sup> According to BEUC, the digitization of consumer markets and electronic transactions has introduced new forms of personalized persuasion strategies that discover, and build on, individual biases, weaknesses, preferences and needs and that can be directed, very purposefully, at making all consumers vulnerable, as they are not able</p>

<sup>166</sup> Interview with consumer legal expert

<sup>167</sup> Riefa, C. (2022) Protecting vulnerable consumers in the digital single market. *European Business Law Review*, 33 (4). pp. 607-634

<sup>168</sup> European Parliament, 2021, Vulnerable consumers, Available at: [EPRS\\_BRI\(2021\)690619\\_EN.pdf](#)

<sup>169</sup> Eleni Kaprou, 2022, ‘The current legal definition of vulnerable consumers in the UCPD: benefits and limitations of a focus on personal attributes’

<sup>170</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market

<sup>171</sup> Eleni Kaprou, ‘The current legal definition of vulnerable consumers in the UCPD: benefits and limitations of a focus on personal attributes’

<sup>172</sup> European Commission, 2016, Understanding consumer vulnerability in the EU’s key markets, Available at: [Understanding consumer vulnerability in the EU’s key markets \(europa.eu\)](#)

<sup>173</sup> Riefa, C. ORCID: <https://orcid.org/0000-0001-8561-1537> (2022) Protecting vulnerable consumers in the digital single market. *European Business Law Review*, 33 (4). pp. 607-634.

<sup>174</sup> BEUC, 2021, Structural asymmetries in digital consumer markets

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	<p>to rationally deal with a particular marketing practice. In other words, <b>the vulnerable consumer is no longer the exception</b>. BEUC coined the term “digital asymmetry” to describe this growing power imbalance in the markets between data-empowered traders and consumers. That is, online traders control both the information that is presented to the consumer, and the entire choice architecture. Nearly all services that consumers encounter in the digital environment benefit from insights formed by detailed knowledge of their online searches. Even if consumers recognise that their online experience is personalised, they may not realise the extent of this personalisation, or the distortion it introduces into their view of the market, and the choices they make as a result. For instance, as demonstrated in the digital addiction case study, certain commercial practices in gaming, including embedded advertisements, can be aggressive, notably as traders consider specific information about the gamers’ vulnerabilities to personalise their ads, including using algorithms to target addiction-prone players. More generally, online behavioural advertising combined with market power can lower the visibility of ‘non-personalised’ outside options, namely adverts that do not exploit consumers’ irrationalities based on their inferred cognitive makeup. Moreover, even if they do realise, the consumer has no or limited bargaining power – they may either accept or leave, with limited alternatives. This resulting universal state of vulnerability, referred by BEUC as “digital vulnerability”, applies to virtually all consumers who are online.<sup>175</sup></p> <p>However, other stakeholders, such as some legal academics argued in interviews that technology can play a role in overcoming information asymmetries as the development of new devices and tools in the digital environment can assist consumers in making more informed choices to help overcome potential vulnerabilities due to such asymmetries. For instance, price comparison websites and personal assistants (the latter using AI technologies) are able to provide comparative information about products and pricing in a way that enables consumers to avoid being taken advantage of. However, it could be argued that those with lower socio-economic status and social vulnerabilities may be less likely to be aware of such support tools.</p> <p>While the 2021 UCPD Guidance document introduced the concept of vulnerability in the digital environment highlighting that consumers are particularly vulnerable in the digital environment<sup>176</sup>, no changes were introduced to the UCPD which still benchmarks the vulnerable consumer against the outdated (defined in 1996) rational average consumer. Those findings, supported by all stakeholders consulted as part of this case study, suggest that the concept of the average consumer defined as “reasonably well-informed and reasonably observant and circumspect”<sup>177</sup>, and the concept of the vulnerable consumer defined in narrow terms (i.e., age, infirmity, credulity) are no longer <b>relevant in light of the digital environment</b> whereby all consumers can become vulnerable regardless of their personal characteristics.</p>
<p><b>Conclusions (incl. assessment of potential regulatory gaps).</b></p>	<p>The UCPD is based on the idea that, while it is appropriate to protect all types of consumers from unfair commercial practices, consumers who qualify as members of one of the groups listed in Article 5(3) should be ensured a higher level of protection than ‘the average consumer’ referred to in Article 5(2). The UCPD approach emphasises three characteristics which make these consumers vulnerable (i.e., age, infirmity and being credulous). The main advantage of this approach is that it offers legal certainty as to who should be considered vulnerable and is therefore easier for traders to comply with. However, the disadvantage is that the definition is rigid and narrow and does not account for the wide array of potential vulnerabilities that consumers may face (i.e., such as low socio-economic status, low education level, not being able to speak a particular language, a minority status, digital addiction etc.). According to this view, consumers can move in and out of vulnerability, depending on their individual state. For instance, consumers tend to be more vulnerable in markets that offer complex products that make it difficult for them to compare different offers and understand complicated contracts. The issue of vulnerability has been exacerbated by the growth of the digital sector which has furthered the divide and power imbalance between traders and consumers thus decreasing the knowledge and power of the rationale ‘average consumer’ and increasing the vulnerability of all consumers regardless of the small set of</p>

<sup>175</sup> BEUC, 2022, EU Consumer Protection 2.0, ‘Protecting fairness and consumer choice in a digital economy.’

<sup>176</sup> European Commission, 2021, 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, Available at: [Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market \(europa.eu\)](#)

<sup>177</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market



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	<p>personal characteristics which make them vulnerable according to the UCPD article. This indicates that both concepts may no longer be relevant in light of the digital environment and the evolution of what constitutes a vulnerable consumer.</p> <p>As noted by stakeholders consulted, amending the terminology of the article to include a more flexible conceptualisation of vulnerable consumers would allow for a greater range of vulnerabilities to be included. The disadvantage of this approach is that by being less precise and potentially broad, if multiple types of vulnerabilities were included and/ or situational vulnerabilities, this may create more legal uncertainty. However, while acknowledging this trade-off, there was consensus among the stakeholders consulted that a broader definition within the article was desirable to align the text of the article with the intent of the Commission (as per the guidelines and the various policy reports). As highlighted by one national authority interviewed: “It is only after the term is defined that an effective regime of protection can be set up, which is not the situation at present.”<sup>178</sup></p> <p>Beyond the debate regarding which additional vulnerabilities should be included in the UCPD definition of vulnerable consumer, findings also suggest that the concept of the “vulnerable consumer” is difficult to prove and use in practice. While the Commission Communication on a New Consumer Agenda notes that consumers are the weaker party in a transaction,<sup>179</sup> instead of alleviating this power imbalance between the trader and consumer, the requirements placed by the UCPD further enshrined it through restrictive requirements and by placing the burden of proof on the consumer. Professor Riefa argues that this is the case because the concept of the average consumer is not rooted in consumer protection but in trade protection – more specifically, in the free movement of goods. Much of the case law is aimed at discouraging Member States from adopting measures that would be too protective of their local producers. As a result, it was considered more advantageous for the CJEU to paint the average consumer as a smart rationale consumer that is not easily misled, so as to be able to suppress national rules that were overly-protective of consumers and impeded trade. The way the concepts of average and vulnerable interact thus showcases an inherent tension in consumer law between protecting users as the weaker party in commercial dealings and enabling consumers to play their role as active and autonomous market participants. This may be why the vulnerable consumer concept is rarely used by national enforcement authorities and the courts, and why the ‘targeted average consumer’ is often used for the protection of vulnerable consumers (instead of the dedicated vulnerable consumer concept). It seems that because the targeted average consumer standard is more flexible, in that it can refer to any group, it has allowed for better protection of vulnerable categories than the vulnerable consumer concept. While stakeholders consulted did not consider that an issue as the average targeted consumer standard effectively protects vulnerable consumers, it brings to question the relevance of a specific vulnerable consumer concept. One consumer law expert consulted highlighted that even if not used, having a dedicated ‘vulnerable consumer’ concept provide visibility for vulnerable consumer within the Directive.</p> <p>As was shown in the reference to the role of personal assistants and price comparison tools, the traditional relationship between consumers and traders is changing, and the average consumer cannot be assumed to face major information asymmetries in the era of the internet. However, vulnerable consumers may not be able to use such tools to overcome asymmetries as average consumers. There is also a policy debate to be had about whether new market and technological developments leading to the development of intermediary support tools (such as personal assistants) and services (price comparison websites) will lead to a reshaping of the traditional distinction between a consumer facing considerable information asymmetries and a trader having all the informational advantages. Nonetheless, despite the potential improvements in consumer protection afforded by the internet and support tools in overcoming informational asymmetries, some types of consumers remain vulnerable, and the notion of vulnerabilities (including their multi-dimensional character) is more complex and nuanced than the UCPD’s text focusing on specific vulnerabilities relating to a limited number of personal characteristics would currently suggest.</p>
<p><b>Supporting information</b></p>	<p><b>Bibliography/ list of sources consulted</b></p> <p>Audrey R Chapman, and Benjamin Carbonetti. 2011. ‘Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on</p>

<sup>178</sup> National authorities

<sup>179</sup> New Consumer Agenda (n 14), 16.

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	<p>Economic, Social and Cultural Rights.’ Human Rights Quarterly 33 (3): 682–732. <a href="https://doi.org/10.1353/hrq.2011.0033">https://doi.org/10.1353/hrq.2011.0033</a>.</p> <p>BEUC, 2021, Structural asymmetries in digital consumer markets</p> <p>BEUC, 2022, EU Consumer Protection 2.0, ‘Protecting fairness and consumer choice in a digital economy.</p> <p>Case C-162/97, Nilsson, [1998] ECR I-7477, para. 54</p> <p>Case C-465/98 Adolf Darbo [2000] ECR I-02297</p> <p>Christine Riefa, 2022, Protecting Vulnerable Consumers in the Digital Single Market</p> <p>Cole, Alyson. 2016. ‘All of Us Are Vulnerable, But Some Are More Vulnerable than Others: The Political Ambiguity of Vulnerability Studies, an Ambivalent Critique.’ Critical Horizons 17 (2): 260–77</p> <p>Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts</p> <p>Decision Vj-5/2011/73 by the Hungarian Competition Authority, 10 November 2011 as cited in Second Guidance Document note 114 as the only example of a Member State authority expanding the criteria for vulnerability.</p> <p>Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules</p> <p>Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety</p> <p>Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market</p> <p>Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC</p> <p>Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance</p> <p>Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features Text with EEA relevance</p> <p>Directive’ (Department of Trade and Industry, 2005), para 2.61</p> <p>Eleni Kaprou, 2022, ‘The current legal definition of vulnerable consumers in the UCPD</p> <p>European Commission, 2012, Commission Staff Working Document on Knowledge-Enhancing Aspects of Consumer Empowerment 2012-2014, Available at: <a href="http://ec.europa.eu/consumers/archive/strategy/docs/swd_document_2012_en.pdf">http://ec.europa.eu/consumers/archive/strategy/docs/swd_document_2012_en.pdf</a></p> <p>European Commission, 2016, Understanding consumer vulnerability in the EU's key markets, Available at: Understanding consumer vulnerability in the EU's key markets (europa.eu)</p> <p>European Commission, 2018, Consumer Survey, 2018, Available at : <a href="https://ec.europa.eu/info/sites/info/files/consumer-survey-2018-main-report_en.pdf">https://ec.europa.eu/info/sites/info/files/consumer-survey-2018-main-report_en.pdf</a></p> <p>European Commission, 2019, Consumer conditions scoreboard: consumers at home in the single market - 2019 edition, Available at: Consumer conditions scoreboard: consumers at home in the single market - 2019 edition (europa.eu)</p> <p>European Commission, 2020, New Consumer Agenda</p> <p>European Commission, 2021, AI Act Proposal explanatory memorandum, 12-13.</p>

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### 3 Case study – Online subscriptions

Case study headings	Description and analysis
<p><b>Introduction and case study objectives</b></p>	<p>The case study aims are to:</p> <ul style="list-style-type: none"> <li>• Review market trends in online subscriptions in the context of the platform economy;</li> <li>• Examine problematic issues surrounding online subscriptions, such as: <ul style="list-style-type: none"> <li>▪ Subscriptions traps, including the conversion of free trials into automatic subscriptions without full consent / the consumer being insufficiently informed through pre-contractual information upfront;</li> <li>▪ Absence of mandatory requirement to send reminders regarding renewals – the issue of passive vs. active consent.</li> </ul> </li> <li>• Explore the current situation in terms of the extent to which individual Member States have regulated the automatic renewal of online subscriptions (e.g. legislation in Germany on the cancellation button and prohibiting traps like automatic renewals without active consent);</li> <li>• Consider the position internationally, namely the nature and extent of the problem and the extent to which – and how - it is being addressed by regulators; and</li> <li>• Consider potential regulatory solutions such as the possible introduction of a cancellation button and / or a withdrawal button to exercise existing consumer rights, and strengthening awareness about forthcoming renewals through reminders for consumers.</li> </ul>
<p><b>Case study method</b></p>	<p>Our evidence base draws on:</p> <ol style="list-style-type: none"> <li>(1) Desk research (see bibliography)</li> <li>(2) Interviews (list of organisations / types of stakeholders consulted in annex)</li> <li>(3) Review of Public Consultation responses and position papers</li> <li>(4) Findings from sweep on online subscriptions</li> <li>(5) Targeted consultations</li> </ol>
<p><b>Context and developments in digital markets</b></p>	<p>Key market highlights:</p> <ul style="list-style-type: none"> <li>• <b>The global digital subscription economy has grown exponentially in the past five years</b>, powered by digital product and service subscriptions. The market is dominated by the US but also with a significant EU share, a trend likely to accelerate to 2025 and beyond.</li> <li>• The <b>automatic renewal of online subscriptions is a common business practice for longer-term contracts</b>.</li> <li>• <b>Free trials that automatically convert at the end of the trial period into a paid subscription</b> are also a growing trend. Under current laws, conversion of free trials is a legitimate business practice, but only provided that the consumer is made fully aware upon starting a free trial through relevant pre-contractual information.</li> <li>• <b>New types of subscriptions are emerging due to the maturation of social media platforms and the evolution in business models</b> of content creators (e.g. freemiums, micro contracts signing up for additional paid-for / members only content).</li> </ul> <p>Market estimates in 2020 valued the worldwide digital subscription economy at 650 billion USD, with an expectation that the market’s rapid growth will continue, exceeding twice this value by 2025.<sup>180</sup> According to a Deloitte study, the global digital subscription market is dominated by the US,<sup>181</sup> accounting for over half of the global market, followed by Europe (21%) and China (14%), respectively.<sup>182</sup> US economic influence is not surprising given the dominance of large US big tech players. According to <i>transparency market research</i> “the major vendors that offer digital subscription are Salesforce, Amazon, Flipkart, TechCrunch, Netflix, Microsoft Corporation, Algolia, Oracle Corporation, SAP</p>

<sup>180</sup> [Subscription economy: global market size 2025 | Statista](#); [The subscription prescription \(deloitte.co.uk\)](#)

<sup>181</sup> [The subscription prescription \(deloitte.co.uk\)](#)

<sup>182</sup> [Subscription economy: global market share 2020 | Statista](#)

Case study headings	Description and analysis
	<p>SE, and Vigorate Digital Solutions. These leading companies are focusing on inventing new technologies and expansion for growth in digital subscription market.<sup>183</sup></p> <p>Research by ING suggests that the average European household spends 130 EUR per month on all subscriptions, for an estimated market worth of 350 billion EUR, 5% of total European household consumption. Within this, service subscriptions (such as internet, mobile phone services or cable TV) account for 240 billion EUR. Meanwhile, purely digital product and service subscriptions (such as software, music, video-on-demand and games) are valued collectively at 30 billion EUR. Importantly, the latter category is outstripping tangible goods subscriptions and expected to grow further, with young Europeans continuing to subscribe at a higher rate.<sup>184</sup></p> <p>In recent years, the online subscription economy has also seen new developments to their business models, which include:</p> <ul style="list-style-type: none"> <li>• <b>The changing nature of monetisation business models used by content creators on online platforms.</b> Consumers may choose to support their favourite content creator by signing up for additional paid-for services / members-only content by making a one-off or regular monthly micro payment contribution through membership sites such as Patreon<sup>185</sup> and Buy Me a Coffee<sup>186</sup> promoted through online platform content.</li> <li>• <b>The trend towards freemium business models for online services.</b> Basic services are provided free of charge, whilst consumers pay for advanced features and services. Whereas many platforms have previously relied solely on advertising-based business models, with consumers benefiting from personal data paid 'free' services, there is a trend towards subscription services for a certain percentage of customers willing to pay for premium services. In 2022-23, for instance, both Twitter (Twitter Blue) and Meta (META Verified) have launched or are testing subscription services.<sup>187</sup></li> </ul> <p>These examples highlight how increasingly complex relationships and modes of business may require further consideration by regulators in open discussion with all stakeholders. However, this does not preclude that other developments may also occur more rapidly and sporadically with potential implications relating to consumer safety. As an example, Twitter is considering disabling two-step authentication for non-subscription, verified users which could undermine cybersecurity and expose consumers to online harms.</p>
<p><b>Problematic practice(s) – nature and magnitude.</b></p>	<p>This case study focuses on the issue of online subscriptions, an increasingly common business model in the subscription economy. Specifically, there are several problematic practices identified relating to the automatic renewal of online subscriptions:</p> <ul style="list-style-type: none"> <li>• <b>Online subscription traps;</b> <ul style="list-style-type: none"> <li>▪ <b>Free trials</b> leading to automatic subscriptions without the consumer being clearly informed through pre-contractual information this would convert into a long-term contract;</li> <li>▪ The requirement in many free trials to <b>provide credit card details upfront</b> and whether this risks subscription traps at higher prices than the initial promotional price without warning / consent; and</li> <li>▪ <b>Hidden and / or inflated payments</b> in recurring online subscriptions e.g. instances where the consumer was aware they were entering into a paid subscription, but the conversion occurred at a much higher price than the initial promotional price (without them being made aware in advance);</li> </ul> </li> <li>• <b>General challenges in the cancellation of contracts in the digital environment</b> (i.e. obstacles put in place by traders to make it more difficult to</li> </ul>

<sup>183</sup> Subscription (Digital) Services Market Scope, Size, Share, Trends, Forecast, Analysis by 2026 ([transparencymarketresearch.com](https://www.transparencymarketresearch.com))

<sup>184</sup> ING Economics Department, 2018. Now that we subscribe to music, are tools and toiletries next? Opportunities and challenges for tangible goods subscriptions, Sustainable transitions: circular economy. <[https://www.ing.nl/media/ING\\_EBZ\\_opportunities-and-challenges-for-tangible-goods-subscriptions\\_tcm162-143372.pdf](https://www.ing.nl/media/ING_EBZ_opportunities-and-challenges-for-tangible-goods-subscriptions_tcm162-143372.pdf)>

<sup>185</sup> <https://www.patreon.com/> - a website site that enables creators to build memberships by providing exclusive access to their work.

<sup>186</sup> <https://www.buymeacoffee.com/>

<sup>187</sup> See *inter alia*: <https://www.euronews.com/next/2023/02/20/meta-verified-meta-emulates-twitter-with-paid-subscription-service-for-facebook-and-instagram> and <https://techwireasia.com/2023/02/meta-unveils-twitter-blue-like-subscription-are-paid-subscriptions-the-next-step-for-social-media/>

Case study headings	Description and analysis																														
	<p>cancel contracts e.g. consumers can sign up online but can only cancel via a phone line, which requires talking to a customer service person trained in sales).</p> <ul style="list-style-type: none"> <li>• The minimum duration of automatic renewals of online subscriptions and issue as to whether beyond the initial duration of a contract (say 12 months), a shorter cancellation period is appropriate (e.g. monthly).</li> <li>• Issues relating to active vs. passive consent to renew online subscriptions Whether renewal reminders that subscriptions are about to automatically renew should be mandatory, and if yes, the minimum frequency.</li> </ul> <p>The evidence pertaining to these problematic practices stems from literature review and the results of the OPC survey. The literature includes previous studies for the Commission e.g. on subscription traps, other research papers and various articles and blogs that focus on problems stemming from the growth in the subscription economy, with many digital services and products only available through online subscriptions. The evidence base also draws on interview feedback with a variety of stakeholders (e.g. consumer and trade associations, Ministries and CPAs).</p> <p><b>Q4 OPC Survey 'In the past 12 months, have you experienced any of the following?' (n=222) (Relating to online subscriptions).</b></p> <table border="1"> <caption>Q4 OPC Survey Results (n=222)</caption> <thead> <tr> <th>Issue</th> <th>3 times or more</th> <th>Once or twice</th> <th>Never experienced this issue</th> <th>I don't know</th> </tr> </thead> <tbody> <tr> <td>It was technically difficult to exercise my right to cancel a long-term contract (subscription).</td> <td>29,3%</td> <td>40,1%</td> <td>25,2%</td> <td>5,4%</td> </tr> <tr> <td>A digital subscription which I stopped using and forgot to cancel was automatically charged on my account and no reminder was sent ahead of this renewal.</td> <td>21,2%</td> <td>40,5%</td> <td>36,9%</td> <td>1,4%</td> </tr> <tr> <td>Exercising my right to cancel a contract was difficult due to deliberate avoidance of contract cancellation by the trader (e.g. not answering phone calls or email</td> <td>17,1%</td> <td>37,8%</td> <td>39,2%</td> <td>5,9%</td> </tr> <tr> <td>Other problems</td> <td>15,73%</td> <td>7,30%</td> <td>39,89%</td> <td>37,08%</td> </tr> <tr> <td>The cancellation of my subscription was only possible after a longer period of time (e.g. one year), even though I was being charged monthly.</td> <td>11,7%</td> <td>22,5%</td> <td>59,5%</td> <td>6,3%</td> </tr> </tbody> </table>	Issue	3 times or more	Once or twice	Never experienced this issue	I don't know	It was technically difficult to exercise my right to cancel a long-term contract (subscription).	29,3%	40,1%	25,2%	5,4%	A digital subscription which I stopped using and forgot to cancel was automatically charged on my account and no reminder was sent ahead of this renewal.	21,2%	40,5%	36,9%	1,4%	Exercising my right to cancel a contract was difficult due to deliberate avoidance of contract cancellation by the trader (e.g. not answering phone calls or email	17,1%	37,8%	39,2%	5,9%	Other problems	15,73%	7,30%	39,89%	37,08%	The cancellation of my subscription was only possible after a longer period of time (e.g. one year), even though I was being charged monthly.	11,7%	22,5%	59,5%	6,3%
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	<p data-bbox="496 315 1425 367"><b>Q6 OPC Survey ‘We would now like to ask more detailed questions about one specific problem faced in the last 12 months?’ (Specific to Online Subscriptions)</b></p> <div data-bbox="502 383 1418 1350"> <table border="1"> <thead> <tr> <th>Problem Description</th> <th>Percentage</th> </tr> </thead> <tbody> <tr> <td>It was technically difficult to exercise my right to cancel a long-term contract (subscription).</td> <td>33,3%</td> </tr> <tr> <td>A digital subscription which I stopped using and forgot to cancel was automatically charged on my account and no reminder was sent ahead of this renewal.</td> <td>24,1%</td> </tr> <tr> <td>Other problems</td> <td>16,7%</td> </tr> <tr> <td>Exercising my right to cancel a contract was difficult due to deliberate avoidance of contract cancellation by the trader (e.g. not answering phone calls or emails, or...</td> <td>16,7%</td> </tr> <tr> <td>The cancellation of my subscription was only possible after a longer period of time (e.g. one year), even though I was being charged monthly.</td> <td>9,3%</td> </tr> </tbody> </table> </div> <p data-bbox="488 1370 1433 1648">It is necessary in the analysis to distinguish between the automatic renewal of subscriptions as a legitimate business model and the dubious practices that some traders use to deceive consumers into paying more than they expected (e.g. subscription traps) or to make it difficult to cancel automatic subscriptions. Likewise, whilst many free trials are legitimate, there can be misleading practices if it is not made clear that an automatic renewal payment followed by recurring payments subsequently will take place at the end of the trial. Whilst recurring subscriptions of different durations (e.g. monthly, quarterly, annually) is not a new business model or unique to the digital space as it pre-dates e-commerce, the scale and frequency of the problem of consumers being exploited has increased markedly due to the rapid development of the online subscription economy.<sup>188</sup></p> <p data-bbox="488 1664 1433 1720">Examples whereby a customer will have a legitimate complaint regarding online subscriptions includes:</p> <ul data-bbox="539 1727 1433 1968" style="list-style-type: none"> <li>• The contract does not specify the length of the contract.</li> <li>• The pre-contract information does not say that the contract will automatically renew unless cancelled.</li> <li>• There is no explanation about how a consumer can cancel the subscription. This can be referred to as the ‘subscription trap’ where customers have to go through loopholes to find out how to cancel a subscription that will otherwise automatically roll over by default. The subscription cancellation steps may be particularly hard for a vulnerable customer. For example, one who is elderly or disabled.</li> </ul>	Problem Description	Percentage	It was technically difficult to exercise my right to cancel a long-term contract (subscription).	33,3%	A digital subscription which I stopped using and forgot to cancel was automatically charged on my account and no reminder was sent ahead of this renewal.	24,1%	Other problems	16,7%	Exercising my right to cancel a contract was difficult due to deliberate avoidance of contract cancellation by the trader (e.g. not answering phone calls or emails, or...	16,7%	The cancellation of my subscription was only possible after a longer period of time (e.g. one year), even though I was being charged monthly.	9,3%
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<sup>188</sup> [Consumer frequent traps and scams - European Commission \(europa.eu\)](https://ec.europa.eu/consumers/odr/)

Case study headings	Description and analysis
	<ul style="list-style-type: none"> <li>• No reminder is sent to advise that the contract is due to automatically renew unless cancelled by the consumer or the reminder does not explain the steps to be taken to cancel the subscription.</li> <li>• The charging of an unreasonable cancellation fee to end the contract.</li> <li>• The customer is not told about a price hike at the end of the contractual period with the contract automatically renewing on revised terms that are at a significant disadvantage to the customer in comparison to a new customer. This can be referred to as the 'loyalty trap'.</li> </ul> <p>Any unclear term that ties a customer into a subscription contract could be deemed unfair if the business has not made the subscription nature of the contract and the precise terms clear to the consumer. This has to be done by providing the consumer with the terms before they are asked to commit to the contract.</p> <p><b><u>Difficulties in cancelling automatic renewals</u></b></p> <p>Building upon the OECD <i>Report on Dark Commercial Patterns</i>' typologies of dark practices,<sup>189</sup> there are three prominent categorisations of problematic actions relating to online subscriptions undertaken by traders:</p> <ol style="list-style-type: none"> <li>1. Sneaking: the trader hides, disguises, or delays the divulging of information.</li> <li>2. Obstruction: the trader makes a task flow or interaction more difficult than it may inherently need to be with the intent to dissuade an action. Example – being unable to cancel online, only by phone by speaking to a sales agent, or a cancellation button leading to a human chat box sales person trained to keep the person subscribed.</li> <li>3. Interface interference: the trader visually obscures important information or provides misleading reference pricing on supposedly discounted products or services.</li> </ol> <p>Regarding obstruction, the desk research points to difficulties for consumers in cancelling contracts. For instance, in research by the Norwegian Consumer Council, difficulties in cancelling contracts for a well-known major digital services and media platform are outlined.<sup>190</sup> The study found evidence that supported the assertion that in their view dark patterns are a problem in online subscriptions “consumers who want to leave the service are faced with a large number of hurdles, including complicated navigation menus, skewed wording, confusing choices, and repeated nudging. The sum of these practices is a process that seems designed to be obscure and manipulative, in order to keep consumers bound to the paid service”. The ELI position paper in the OPC also pointed to an <b>ongoing problem of subscription contracts being easy to enter into, but difficult to leave</b>. “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”.<sup>191</sup></p> <p>Another obfuscation tactic to prevent consumers from cancelling long-term contracts is using phone lines only and not allowing any web or email-based cancellation possibility. This is designed to delay and obfuscate consumers' attempts to cancel long-term contracts, as on the phone, sales techniques are often used by traders to make consumers change their mind. This makes the cancellation process time-consuming in comparison with an automatic cancellation button, which would be neutral and avoid manipulative practices in dissuading consumer from cancelling automatic subscriptions.</p> <p><b><u>Online subscription traps, including free trials leading to automatic subscriptions and dark patterns</u></b></p> <p>In the <b>EU-27</b>, the problem of subscription traps has been well-recognised, for instance in a 2016 study on <i>'Misleading Free Trials And Subscription Traps For Consumers in the EU'</i> for DG JUST focused on subscription traps, such as free trials in four sectors<sup>192</sup>:</p>

<sup>189</sup> OECD, *Dark Commercial Patterns*, OECD Digital Economy Papers, NO.336. October 2022

<sup>190</sup> YOU CAN LOG OUT, BUT YOU CAN NEVER LEAVE, How Amazon manipulates consumers to keep them subscribed to Amazon Prime, 14.01.2021, [Microsoft Word - 2021-01-14 You can log out, but you can never leave FINAL \(forbrukerradet.no\)](https://www.forbrukerradet.no)

<sup>191</sup> Marie Jull Sørensen, Peter Rott and Karin Sein, *European Commission's Public Consultation on Digital Fairness – Fitness Check on EU Consumer Law: Response of the European Law Institute*, 20 April 2023. ISBN: 978-3-9505318-3-1

<sup>192</sup> 2016 EU study on Misleading « Free » Trials And Subscription Traps For Consumers in the EU (DG JUST). [https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/coordinated-actions/consumer-frequent-traps-and-scams\\_en](https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/coordinated-actions/consumer-frequent-traps-and-scams_en)



Case study headings	Description and analysis
	<p>cosmetics and healthcare products, food and health supplements, dating services, and digital services (i.e. cloud-based backup and video/music streaming services). Evidence was gathered through desk research, mystery shopping and a consumer survey. Problematic practices were identified “before, during and after the time of taking up a free trial or subscription”. The study highlights that the legal framework relevant to such subscriptions is broad and includes not only the UCPD<sup>193</sup>, but also the UCTD and the CRD. Under the CRD, there is the requirement to ensure that the obligation to pay for a service is made clear (say a free trial leading to a paid-for subscription) ‘order with obligation to pay’ (Art. 8.2). There are also pre-contractual information requirements under the CRD, including essential information of which the consumer must be prominently made aware, i.e. the characteristics of the goods or service (subscription instead of a mere ‘trial’), the price and contract duration, and conditions for terminating the contract and cancellation procedures. However, the study found that traders often did not clearly provide the necessary pre-contractual information for the consumers to be able to make informed decisions.</p> <p>Moreover, there are links between subscription traps, the CRD and the Payment Services Directive (PSDII). As the 2016 study makes clear “<i>a contentious mechanism by which traders effectively “trap” consumers into subscriptions relies on the problematic practice of charging higher amounts or subscription payments after the trial on the consumer’s credit card or bank account, without the consent from the consumer.</i> However, there is in theory already legal protection in this regard. As indicated above, if certain requirements regarding pre-contractual information are not fulfilled by the trader, the consumer is not bound by the contract and the consumer is therefore not obliged to pay for subscription charges (Art. 6.5, 6.6, 8.2). The Payment Services Directive (Art. 58, 60) also stipulates that if the trader fails to secure the consumer’s consent, the payment is unauthorised and must be refunded” (pg. 19, 2016 JUST study).</p> <p>There is moreover a problem of dark patterns that trick consumers into automatic subscriptions. Whilst several dark patterns can already be covered under the UCPD, the problem of traders tricking consumers into subscriptions (and/or inflated prices for subscriptions) has not explicitly been regulated. The lack of a more detailed legal framework at EU level on subscriptions has prompted regulators in France and Germany to take action to make it easier for consumers to cancel subscriptions (see section detailing the evolving regulatory environment).</p> <p>Regarding the scale of the problem, it is difficult to estimate the total number of contracts that lead to an automatic renewal involving dark patterns, as consumers may not know about or report their experiences. However, the 2020 DG JUST Survey on scams and fraud experienced by adult consumers reported that 8% of respondents from across the EU had fallen victim to a subscription trap. It was estimated from this data that the financial cost to EU citizens of dark patterns relating to online subscriptions was <b>approximately 1.92 billion EUR across a two-year period</b>. The survey also found that, in comparison to other types of fraudulent actions, “buying scams” such as subscription traps were significantly more likely to incur a financial loss to the victim.</p> <p>Evidence from third countries confirms that there is a high economic cost for consumers due to a combination of factors, such as inertia among consumers (leading them to leave subscriptions running without cancelling them) and also difficulties in exiting from subscriptions they do not see as being good value. For instance, work undertaken as part of a BEIS consumer protection study in 2022<sup>194</sup> showed that between April 2020 and April 2021, 69% of consumers in the UK experienced consumer detriment, with consumers more likely to experience detriment with services and subscriptions (55% of consumers who purchased a service or a subscription faced detriment) compared to items (48%). The Government’s impact assessment accompanying its 2021 consultation paper indicated that consumers are spending as much as £1.8 billion (€2.7 billion) per year on subscriptions they do not perceive to be good value for money.</p>

<sup>193</sup> Annex I, No 20 of the UCPD, describing a product as “free” or similar if the consumer has to pay anything other than the unavoidable costs of responding to the commercial practice and collection or paying for delivery is in all circumstances considered an unfair commercial practice and prohibited.

<sup>194</sup> Consumer Protection Study, 2022: Understanding the impacts and resolution of consumer problems, BEIS [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1068864/consumer-protection-study-2022.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1068864/consumer-protection-study-2022.pdf)

Case study headings	Description and analysis
	<p><b><u>Hidden costs</u></b></p> <p>A finding from the additional research conducted through this case study is that subscription traps without adequate pre-contractual, or sometimes also contractual or post-contractual communication are not confined to free trials. There is sometimes a <b>lack of transparency that an initial subscription price is promotional / discounted</b> and that subsequently the price charged for an automatic renewal could be 200-400% higher than the promotional price. Examples were identified in this regard for software subscriptions.</p> <p>A further issue identified in our research is that <b>pricing strategies by traders lack transparency</b> with a risk that some consumers pay significantly more for an identical product than others. Taking anti-virus software as an example, subscription charges for automatic renewals were significantly higher than the promotional price for subsequent annual renewals, whereas having adjusted the setting to a subscription that can be manually renewed but is not automatic, could result in a discount of around 50%. This lack of transparency disadvantages consumers, creates pricing information asymmetries and creates the wrong incentives. Automatic renewals should, from a consumer protection perspective, provide a convenient solution for consumers that also benefits traders by automating revenue collection for long-term contracts. However, this will not be the case if the consumer cannot trust in the pricing of renewals, with differentiated pricing for subscriptions depending on whether automatic renewal has been selected or a manual renewal. This could create a lack of trust which in turn undermines the European digital economy.</p> <p>The Commission and the CPC Network have found that problems remain in respect of the hidden costs of subscriptions (e.g. when consumers are billed less upfront and then the recurring payment is much higher).<sup>195</sup> However, some progress has nonetheless been made in strengthening the transparency of recurring payments for subscriptions, for instance through a 2021 CPC Network action concerning credit card companies that aimed to strengthen compliance with the Payment Services Directive and Unfair Commercial Practices Directive. In 2022 and 2023, American Express, Mastercard and Visa have tightened their rules for merchants to avoid consumers falling into subscription traps. For instance:</p> <div style="border: 1px solid black; padding: 5px;"> <p><b>Mastercard:</b> Merchants must now disclose the subscription terms simultaneously with a request for card credentials. The disclosure must include:</p> <ol style="list-style-type: none"> <li>1) The price that will be billed;</li> <li>2) The frequency of the billing;</li> <li>3) If relevant, terms of the trial, including any initial charges, the length of the trial period, and the price and frequency of the subsequent subscription.</li> </ol> <p><b>VISA:</b> From 2023 on, merchants will need to ensure that the length of any trial period, introductory offer, or promotional period, as well as the transaction(s) amount(s) is clearly displayed on both the webpage where the card credentials is requested and entered, and on the checkout screen. The transaction(s) amount(s) to be clearly displayed include specifically the amount due at the time of purchase (even if zero), and the amount and fixed date or interval due for each recurring transaction.</p> <p><b>American Express:</b> Merchants must now clearly disclose all material terms of the offer including, if applicable, the fact that Recurring Billing Charges will continue until the option is cancelled by the Card member. If this includes an introductory offer, they should send the Card member a reminder notification in writing before submitting the first Recurring Billing Charge, that allows the Card member a reasonable amount of time to cancel.</p> </div> <p><i>Source: CPC network action led by Danish Consumer Ombudsman, also see <a href="https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/coordinated-actions/consumer-frequent-traps-and-scams_en">https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/coordinated-actions/consumer-frequent-traps-and-scams_en</a></i></p> <p>The problem of unscrupulous practices in online subscriptions has <b>not only been recognised in the EU-27 but also internationally</b>. For instance, in a 2021 policy statement, the US Federal Trade Commission set out its concerns regarding dark</p>

<sup>195</sup> Hidden costs of subscriptions and research by CPC Network on subscription traps and scams (2020) [https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/coordinated-actions/consumer-frequent-traps-and-scams\\_en](https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/coordinated-actions/consumer-frequent-traps-and-scams_en)

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	<p>patterns relating to online subscriptions including tricking consumers into enrolling into an automatic renewal subscription plan, through the hiding of terms behind links, difficult cancellation processes and unannounced changes in the terms of the subscription. Automatic renewal subscriptions remained a priority for the FTC in 2022.</p>
<p>How far does existing EU (and any national legislation where relevant) address the problem?</p>	<p>The EU legal framework in respect of online subscriptions is now summarised in brief:</p> <p><b>Consumer Rights Directive (CRD), 2011</b> – subscriptions – along with other types of distance contracts – are regulated in the CRD, although with no explicit rules specifically governing online subscriptions. For instance;</p> <ul style="list-style-type: none"> <li>• CRD Art. 8(2) - The trader shall ensure that the consumer, when placing his order, explicitly acknowledges that the order implies an obligation to pay. For subscriptions, this means, for instance, in relation to free trials that in the contract there should be a clear explanation that there is a subsequent obligation to pay once the free trial period has ended.</li> <li>• CRD Article 9(2) - Right of withdrawal [RoW] - the withdrawal period expires 14 days after signature of the contract. In the case of subscriptions, this applies when subscription contracts are first entered into.</li> <li>• The Commission’s CRD Guidance (2014) explains that information on a provider’s website, which is required to be provided to consumers prior to conclusion of a contract pursuant to Article 6(1) (Required Information), should be binding on the parties and, “<i>if the provider wishes to alter any of its elements, he should obtain the consumer’s express consent</i>”.</li> <li>• Article 6(1) - Information requirements for distance and off-premises contracts. Pre-contractual information requirements are highly relevant before a consumer enters into a distance subscription contract. If the key requirements are missing, this can render the contract null and void.</li> <li>• Guidance was provided relating to the need for the clear provision of price information, payment structure and re-use of payment information relating to ensuring greater transparency for the consumer. In the context of Article 22 CRD, the guidance explained that the consumer must take a “positive action” to provide its express consent and acknowledgement. The guidance suggests using a tick-box on the provider’s website but clarifies that a pre-ticked box is likely not to be sufficient, nor would reference to the general terms and conditions.</li> <li>• There are no specific requirements on free trials, no information obligation to send out reminders regarding the automatic renewal of subscriptions or requirements regarding the frequency of such reminders. According to an ELI position paper, “the right to notice of automatic renewal of subscriptions could supplement the general information duties in the CRD.</li> <li>• There is currently no cancellation button required in the CRD (only in DE legislation – explained later).</li> </ul> <p><b>The proposed withdrawal button under the CRD</b></p> <p>A 2022 proposal was made for a new Directive concerning financial services contracts concluded at a distance (COM(2022) 204 final). This proposed that for financial services only, a withdrawal button should be introduced to make it easier for the 14-day Right of Withdrawal (RoW) to be exercised under the 2011/83/EU (CRD) concerning financial services contracts concluded at a distance: “A withdrawal button is to be provided by the trader when the consumer concludes, by electronic means, a financial services contract at a distance”.<sup>196</sup></p> <p>The proposed regulatory amendment was subsequently extended in legislative negotiations to include an extension of the obligation to display a “withdrawal button” for all transactions concluded at a distance by means of an online interface.</p> <p>Consumer associations support this proposal on the basis that it would make it easier for consumers to exercise withdrawal rights for similar reasons that they supported the possibility of introducing a cancellation button. The potential benefits of a withdrawal button would be similar to those of a cancellation button, that it would not be made unnecessarily difficult for consumers to exercise either their RoW or to cancel a contract.</p>

<sup>196</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0204>

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	<p>However, industry stakeholders interviewed and those that have produced position papers on this subject<sup>197</sup> were concerned about an incremental approach covering financial services only, and expressed concerns about the practical feasibility of implementing a withdrawal button, namely that they wanted to avoid prescriptive website design requirements both in respect of a withdrawal and/or a cancellation button. For instance, Ecommerce Europe has expressed concerns that this requirement will affect SMEs disproportionately as they will have to redesign web interfaces. “Such a horizontal provision is expected to raise a myriad of technical problems since it will not be able to take into consideration the diversity of distance contracts”.<sup>198</sup> Balanced against these arguments, however, it should be observed that a body of literature attests to the practical problems that consumers face in exercising their right to withdrawal and the difficulties in cancelling contracts.</p> <p><b>Unfair Commercial Practices Directive (UCPD), 2005.</b> Deceptive practices such as subscription traps are tackled by several provisions in the Directive relating to misleading practices.</p> <ul style="list-style-type: none"> <li>• <b>Article 6 Misleading actions</b> – a misleading action occurs when a practice misleads through the information it contains or the deceptive presentation thereof, and causes or is likely to cause the average consumer to take a different transactional decision than he or she would have taken otherwise. If a consumer enters into a subscription based on misleading information, and this leads to a subscription trap, this is covered in Art. 6.</li> <li>• <b>UCPD, Art. 8 Aggressive commercial practices</b> - A consumer may be coerced into a subscription through aggressive selling practices.</li> <li>• <b>UCPD, Art. 9 Use of harassment, coercion and undue influence</b> - Inertia selling falls within the category of aggressive commercial practices which are in all circumstances considered unfair. Subscriptions traps are arguably covered under Art. 9 as a consumer may have been tricked into signing up for subscription services they didn't want or realise they were entering into e.g. a free or cheap mobile phone leading to a monthly subscription they were unaware about.</li> <li>• <b>UCPD Art. 9(d)</b> states that “any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another product or another trader”. In the UCPD Guidance, the Commission established the principle that it should be as easy to unsubscribe as it was to subscribe (linked to Article 9(d) UCPD). This is highly relevant to online subscriptions, and may be a principle cited in future legal cases, but the guidance is non-binding.</li> <li>• <b>Annex I, point 20</b> - a blacklisted practice of the prohibition of falsely presenting a service as ‘free’. “Describing a product as ‘gratis’, ‘free’, ‘without charge’ or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.” This is relevant to free trial subscriptions if not made clear that the service must be paid for upon expiry of the trial. “This provision has been used in relation to a frequently reported practice, targeting mainly vulnerable consumers (teenagers), on websites offering mobile phone ringtones for ‘free’ but where in reality consumers enter into a paying subscription”.<sup>199</sup></li> <li>• <b>Annex I, point 29</b> - 'Inertia selling' is covered within the meaning of the Directive and could be applicable to subscriptions.</li> </ul> <p><b>Unfair Contract Terms Directive (UCTD), 1993.</b> Whilst the UCTD doesn't deal specifically with online subscriptions, it prohibits unfair contract terms generally, therefore if a contract auto-renewal occurs at multiple times the original price, this repricing may constitute an unfair contract term. Indeed, there is case law in this regard where national courts have found in favour of consumer defendants (see example below).</p> <p>Recent new relevant EU legislation, namely the DSA should also be referenced:</p>

<sup>197</sup> <https://ecommerce-europe.eu/publication/joint-industry-letter-concerns-on-extension-of-withdrawal-button-to-all-distance-sales-without-proper-impact-assessment/>

<sup>198</sup> <https://ecommerce-europe.eu/news-item/new-withdrawal-button-obligation-adopted-by-the-council/>

<sup>199</sup> First Report on the application of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, COM/2013/0139 final \*/

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	<ul style="list-style-type: none"> <li>• <b>The new Digital Services Act (DSA) - Article 25(3)(c) – Online interface design and organisation.</b> The provision establishes that providers of online platforms shall not 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, including by (c) <b>making the procedure for terminating a service more difficult than subscribing to it.</b></li> </ul> <p>Overall, whilst there are general legal protections for consumers under EU consumer law, there is no tailored legal regime specifically to deal with subscription traps.</p> <p>Looking ahead, it is worth noting that other countries are looking at a similar set of regulatory issues. In the UK, a new Digital Markets, Competition and Consumer Bill<sup>200</sup> was adopted in May 2023 to combat the risk posed by subscription traps. There is a proposed standalone regulatory regime on subscription contracts.<sup>201</sup> This prescribes for most sectors the following requirements.<sup>202</sup></p> <ul style="list-style-type: none"> <li>• the information which is to be provided to a consumer pre-contract;</li> <li>• requirements for reminder notices to be sent at prescribed intervals during the term;</li> <li>• user-friendly means for consumers to end or cancel a subscription contract;</li> <li>• a cooling-off period during which the consumer can cancel, both following the initial term and in each subsequent renewal period.</li> </ul>
<p><b>Examples of national case law</b></p>	<p><b>Examples of problematic practices relating to subscription traps in national case law:</b></p> <p><b>In a Munich Local Court case judgement of October 24<sup>th</sup>, 2019, whereby a subscription service attempted to claim for the annual cost of a service (1,298 euros) that had seemingly been offered to the defendant for a trial period with a one-off payment of 9.99 euros.<sup>203</sup></b> In this case, the court sided with the defendant and found no grounds for payment, agreeing with the defendant that the price increase following automatic renewal, within the General Terms and Conditions, was “surprising” at thirty times the initial payment price, for four quarters (meeting the threshold outlined in § 305 c para. 1 BGB) and was therefore not a part of the subscription contract. Furthermore, this case found that the plaintiff put customers under time pressure and baited them with the test subscription offer with the intention of trapping them into exorbitant price increases. Whilst this is an extreme example, there are many similar such examples. For instance, anti-virus annual subscriptions sometimes charge a significantly different autorenewal rate from the rate originally charged.</p>
<p><b>Assessment of key research questions (drawing on stakeholder feedback and desk research)</b></p>	<p><b>RQ1: What are current practices regarding the length of subscription contracts for digital services and their automatic renewal? Are there challenges in cancelling longer-term contracts based on automatic renewals, including regarding the procedures for doing so?</b></p> <p>The <b>length of subscription contracts</b> varies depending on the type, and whether a free trial was involved before the subscription contract started. Typically, many subscriptions are either annual or monthly, depending on the sub-sector of the digital market. For instance, security software is often charged annually but sometimes monthly whereas a subscription to media content is often monthly. Business models differ regarding whether cancellation requires a significant period or not. Some industry sub-sectors are more flexible. For instance, media content providers such as Netflix offer flexible cancellation procedures already e.g. monthly contract can be cancelled at any time as billing is monthly. Conversely, the length of other types of subscription contracts is annual (even if billed monthly) and it can be more difficult to cancel subscriptions.</p> <p>Regarding the extent to which there are <b>challenges in cancelling longer-term contracts</b> (of a minimum 1-year duration), examples were identified of contracts</p>

<sup>200</sup> Digital Markets, Competition and Consumers Bill, April 2023 <https://bills.parliament.uk/bills/3453>

<sup>201</sup> The Digital Markets, Competition and Consumer Bill: Taking a closer look at the impact on subscription contracts, Bryan Cave Leighton Paisner LLP <https://www.lexology.com/library/detail.aspx?g=0331a846-297e-4b08-948e-575a473123a0>

<sup>202</sup> Certain categories of contract will remain outside the scope of these new rules (typically those subject to specific-sector regulation, such as contracts in the utilities, financial services, health care, package holidays and timeshare sectors).

<sup>203</sup> Härtel, M., 2022. Automatic renewal of online subscription to 30 times price invalid | ITMediaLaw - Rechtsanwalt Marian Härtel. <https://itmedialaw.com/en/automatic-renewal-of-online-subscription-to-30-times-price-invalid/> (accessed 10.01.24).

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	<p>concluded in the digital environment across different sectors. Whilst the focus of the research was on subscriptions entered into digitally, it should be stressed that there is a wide range of subscriptions, including those relating to digital services and content, and though comparatively less common, also to purchasing products. It should also be noted that many subscriptions entered into by consumers online do not only relate to digital services, but also to physical service provision (e.g. utilities such as electricity, gas and water, internet access).</p> <p>The research found there to be <b>challenges in cancelling a variety of services in different sectors</b> such as <b>software, travel insurance, digital media, such as online newspapers and the provision of maintenance services</b>, such as for gas boilers.</p> <p>Overall, <b>whereas entering into a contract is exceptionally easy for consumers, cancelling a contract is often complex and made difficult by traders to reduce the rate at which clients cancel contracts</b>. Examples were identified of service providers where signing up involves a few clicks online whereas it is not immediately apparent on the website interface how to cancel a contract subject to an automatic renewal. Often cancellations of automatic renewals cannot be done digitally at all (without explanation), or if they can be cancelled online, the process is made unnecessarily complex.</p> <p>An example in this regard was the case of a software company, which whilst offering a 30-day cancellation period, and providing a (voluntary) cancellation button, clicking on the button, and going ahead with the cancellation involved having to go through a customer agent whose main job was sales focused <b>to retain the subscription, for instance, by offering discounts</b>. This raises consumer protection concerns as vulnerable consumers may find the experience especially difficult in cancelling the contract, given persuasive sales techniques.</p> <p>In Germany, the second part of reforms under the “Fair Consumer Contracts Act” entered into force on 1 July 2022 requiring businesses to implement a “cancellation button” on their websites that allows consumers to easily terminate their subscriptions. The new cancellation button is in some ways the opposite of the well-known “order confirmation button” required by the CRD. An interview with the German Federal Ministry of Economic Affairs (BMWK), Unit dealing with consumer affairs revealed how, despite initial expressions of discontent towards a cancellation button, Spotify as one of the major online service providers subsequently conceded that the implementation of such requirements was “no issue”. However, initial observation and academic analysis of the cancellation button in practice suggests that, as yet, despite “clear-cut regulation”, the implementation has proved to be a significant barrier. Interviewed for this case study, the European Law Institute estimated a 60-70% rate of failure to comply among traders. It has been suggested that a combination of hidden buttons (e.g., where the trader inserts interim pages with additional data requirements) and lack of consumer awareness has been central to this.</p> <p>As noted above, cancelling a contract is often not possible by digital means (via website or email) and is only possible by making a phone call (or increasingly talking to an automated chatbot and subsequently a human interlocutor). This raises various issues, such as:</p> <ul style="list-style-type: none"> <li>• Making it <b>time consuming and more difficult</b> for consumers to cancel contracts;</li> <li>• Skewering the balance between consumers and traders in terms of the scope to benefit from efficiencies linked to digitalisation. There are digital fairness issues in terms of the relationship between traders and consumers, as traders can <b>automate contractual renewals</b> and allow customers to sign up online, which is efficient for both parties. However, consumers often face <b>difficulties in cancelling, especially online</b>, which is time consuming and inconvenient; and</li> <li>• Problems for <b>vulnerable consumers</b> (e.g. the elderly, those lacking personal confidence) who may be intimidated, unable or unwilling to make a phone call to cancel a contract they initially entered into digitally. Even if they do try and cancel, they face problems justifying their request for a cancellation to a customer services representative (who often has sales training) and seeks to dissuade them of their decision.</li> </ul> <p>In the public consultation, digital subscriptions were viewed as being difficult to cancel by 53% of consumers.</p>

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	<p>Regarding the prevalence of the problem of deceptive design relating to online subscriptions, the 2016 study for JUST mentioned earlier conducted mystery shopping to review websites. This focused on identifying different types of problematic practices that were most common. “40% of websites contained unclear information on charges and there is often missing or poor information on the duration of the trial (41%), the subscription (45%), and on how and when the consumer can withdraw or unsubscribe (43%)”. As detailed earlier, in some national legislation (e.g. DE, ARG), the cancellation button has been touted as a regulatory solution (or could also be a voluntary, industry-led) to addressing the problem of the challenges of cancelling contracts.</p> <p>The RoW is a one-off when the contract is initially entered into. However, in the case of the automatic renewals of contracts, under the rules on unfair contract terms, consumers instead need to have the possibility to cancel the contract in the case of renewal. However, in the interview feedback, some stakeholders (e.g. legal academics) pointed out that it was quite common for traders to make small changes to contractual terms and conditions, raising a grey area in terms of legal uncertainty as to whether this means that the 14-day RoW should recommence.</p> <p><b>RQ2: How far are current practices in digital subscription services (including issues such as passive vs. active consent) acceptable and leading to digital fairness? To what extent do specific consent-related issues pose a problem, such as</b></p> <ul style="list-style-type: none"> <li>• <b>The automatic renewal of subscriptions and the issue of affirmative vs. passive consent?</b></li> <li>• <b>The automatic conversion of free promotional trials into paid-for subscriptions?</b></li> </ul> <p>The automatic renewal of subscriptions requires some form of consent. Common practice among businesses in many sectors appears to be that they either send an email, SMS or a letter (or more than one of these communication means) to inform the consumer that an automatic renewal is due to take place. However, literature points to a couple of issues:</p> <ul style="list-style-type: none"> <li>• The <b>frequency of renewal reminders</b>. Whereas many traders do send renewal reminders, there is an issue around whether these should be sent only annually, quarterly or monthly depending on the types of digital service (or other service entered into digitally but provided offline) being provided and the frequency of payments.</li> <li>• The important distinction between <b>passive and active consent</b>. Often, subscription providers only seek passive consent before charging customers for renewals and legal debate has focused on whether this is acceptable or active consent is required.</li> </ul> <p>Regarding the <b>frequency of renewal reminders</b>, in the public consultation, consumers were asked about how far they had experienced problems each year. Being automatically charged for a subscription without receiving (or least recalling) any reminder about the renewal was mentioned by 62% of respondents, combining the responses “three or more” and or “one or two” times per year. Moreover, in terms of potential solutions, 94.2% either strongly agreed or agreed that 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.</p> <p>In recent years, specific approaches to ensuring consent in the automatic renewal contracts have developed independently across a number of Member States, namely <b>Austria, Belgium, Bulgaria, Denmark, France, Germany, Italy, Netherlands, Romania and Sweden</b>. Whilst all of these countries stipulate rules on the timing and form of renewal information provided to consumers, a few (<b>Czech Republic, Finland, France, Portugal</b>) see the need for the rules to be applied only to specific types of contracts such as energy provision, insurance or communications service agreements. In France and Italy, any tacit renewal clause must be signed, or clicked, twice (double-validation) otherwise the consumer can cancel the contract at any time.</p> <p>In <b>Belgium</b>, specific guidelines clarify the form and content of fixed-term service contracts that contain a tacit renewal clause. Belgium has uniquely specified that the renewal clause must be prominently displayed in a separate box on the first page of the contract, and must clearly state the consequences of the tacit renewal, the final date for opposing it, and the methods for notification of opposition. Additionally, after the first tacit renewal, the consumer has the right to terminate the contract without compensation, provided they</p>

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	<p>give a notice period of two months or less. The guidelines established for fixed-term service contracts with a tacit renewal clause also apply to sales contracts for both goods and services, such as fitted kitchens and tiling. However, fixed-term contracts for the delivery of goods, like magazine subscriptions and book clubs, are not included in this provision. However, there is an option to expand this rule to certain types of goods via a royal decree.</p> <p>In <b>Germany</b>, state legislation has taken this further in specific relation to online subscriptions, by introducing a mandatory clear tick-box option for the cancellation of subscriptions using a cancellation button on websites. On 1 March 2022, the first part of the “Fair Consumer Contracts Act” in Germany came into force. Among the important changes that the legislation brings concerns the auto-renewal of subscription contracts. The automatic renewal of subscriptions will only be possible if the contract is extended for an indefinite period, i.e. without a further minimum term. Consumers must also be given the right to terminate the contract at any time with one month’s notice. In addition, clauses stipulating notice periods of more than one month before the end of the initial contract term will be invalid. Before the reform, auto-renewal clauses could extend the contract for a new term of one year and the notice period before the end of the initial period could be three months.</p> <p>Nonetheless, a strategic question raised by the adoption of legislation in Germany is whether similar legislation is needed at European level through reform of consumer law dealing with online subscriptions (e.g. the CRD) to prevent the internal market from being undermined if divergent rules in different countries were to emerge on the automatic renewal of online subscriptions and on the ease of cancellation. Reported divergences and poor implementation, particularly in the legislation around energy and telecoms contracts in some EU countries (Estonia and Germany) are leaving consumers with limited choice from traders and an increased burden of price risk. Furthermore, it was suggested in an interview with a DG JUST Enforcement Unit official that effective but slow enforcement processes in Germany, reliant upon private litigation, may be too slow for European regulators in fast-evolving digital markets. Without harmonisation at the supranational level, delays and cross-border issues will likely increase. In the US too, similar arguments are being made to advocate the introduction of federal level legislation, given the risk of considerable divergence emerging between states in their legislative approaches. Perhaps similar action to that in Germany, but also considerations of the US state level subscription laws can provide inspiration as to how best to legislate in case of any future cases of regulatory divergence across the Member States. Drawing on experience in wider third countries, a further issue that has been considered by the UK’s CMA is that of no automatic renewal of subscription contracts when it is not in the interests of the consumer. This would be relevant in cases where businesses can easily see whether services have been accessed over a period, rather than to continue autorenewal regardless of usage. In digital and tech services, such data would be available to the firm, for example regarding digital content such as film, book, or game downloads.</p> <p>The emergence of different national legislative frameworks on online subscriptions raises the issue as to whether the single market is already being undermined (and risks being further eroded in future should further national legislation arise that differs regarding which sectors are affected). An interviewee from a major online marketplace and interviewees from ecommerce industry associations stressed however that whilst not objecting to the introduction of a cancellation button in general, they cautioned the need to focus this only on subscription services and digital content and not to products, given the high costs of returns and the existing legal protection for consumers through the Right of Withdrawal.</p> <p>A new <b>French law</b> has also been adopted that contains a cancellation button. There is introduced an obligation to enable the termination of a contract by electronic means an improved cancellation process. This comes into application from 1 June 2023. The new law imposes an obligation on traders to enable the termination of a contract by electronic means where the contract has been concluded by electronic means or if it has been concluded by another means if, on the day of termination, the traders offer consumers the possibility of concluding such contracts by electronic means. The new provisions are intended to apply broadly and are not be limited to contracts concluded at a distance. Traders will have to make available to consumers free functionality allowing the consumer by electronic means, the notification, and steps necessary for the termination of the contract. This could be in the form of a “cancellation button” accessible on the trader’s website, similar to the system developed in Germany.</p>



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	<p>The issue of active or passive consent was addressed in a question in this fitness check's OPC, which asked whether stakeholders agreed that explicit consent for online subscriptions is needed (67% supported requiring express consent when converting a free trial into a paid service). Some of the OPC position papers addressed this issue. For instance, in the ELI paper response to the OPC, they advocate for a common sense approach: "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". Whilst many traders already provide reminders, and increasingly credit card companies also send reminders or provide other information such as to ensure consent, not all traders do so. The authors of the ELI paper point to the need to ensure that any future information duty regarding automatic renewals should also be applicable both in the digital and non-digital environment, as although online subscriptions are increasingly prevalent, there are also problems regarding offline subscriptions.</p> <p>The ELI paper argues that there should be an information duty to inform about automatic renewals to overcome information asymmetries. In their view, reminders alone are not enough, as there would have to be clear rules on these for them to be effective:</p> <p><i>"This 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. 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. Also, there must be a duty to give notice of any modifications to the renewed contract".</i></p> <p>The FTC issued a policy statement specifically regarding negative option markets (failure to take affirmative action to reject a good or service or to cancel the agreement as acceptance or continuing acceptance of the offer). According to the FTC: "Negative option programs are widespread in the marketplace and can provide substantial benefits for sellers and consumers. At the same time, consumers suffer costs when marketers fail to make adequate disclosures, bill consumers without their consent, or make cancellation difficult or impossible. Over the years, unfair or deceptive negative option practices have remained a persistent source of consumer harm, often saddling shoppers with recurring payments for products and services they did not intend to purchase or did not want to continue to purchase. [...] the Commission receives thousands of complaints each year related to negative option marketing. The number of ongoing cases and high volume of complaints demonstrate there is prevalent, unabated consumer harm in the marketplace."</p> <p>The main federal statute in the <b>US</b> to tackle problems relating to online subscriptions was the <i>2011 Restore Online Shoppers Confidence Act (ROSCA)</i>. This prohibits charging a consumer's credit card on a recurring and automatic basis without the consumer's affirmative consent. "Case law interpreting ROSCA has interpreted the statute to prohibit prechecked consent boxes and hidden disclosures. Automatic renewal subscriptions also may require compliance with the Telemarketing Sales Rule, Electronic Fund Transfer Act, and the Postal Reorganization Act. The FTC has turned to all of these statutes in different automatic renewal contexts, as well as Section 5a of the FTC Act, broadly prohibiting unfair or deceptive acts in commerce". This partially addressed problem associated with online subscriptions but also dealt with many other issues.</p> <p>However, the legal framework (and supporting guidance and principles) has had to evolve over time to address the changing nature of the challenges linked to online subscriptions. US FTC principles and guidance provided in 2021 outlined commonly addressed areas in negative option cases, confirming what was similarly suggested in the EU legislation, namely, that a "pre-checked box" does not constitute affirmative consent. The issue of consent often arises, with regulators seeking to remove ambiguity on the part of the consumer. Efforts to achieve this goal by regulators recognise the presence of both intentional bad practices by traders, as well as a lack of awareness both among consumers and service providers about the importance of consent. Again, focus in the US context has been towards the "clear and conspicuous" provision of information relating to the terms of contracts and accessible steps towards cancellation "as easy as the method the consumer used to initiate the negative option feature".</p> <p>At the US state level, a "patchwork quilt" of laws have sought to address subscription marketing, making changes to existing legislation and / or through the introduction of new</p>

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	<p>state level legislation in California, New York, North Dakota, Vermont, and Washington, D.C. In 2022 specifically, new statutes have been introduced to elaborate on the requirements around explaining subscription terms and providing reminder notices to consumers before renewals in Colorado and Delaware, with further amendments to existing laws having taken place in California and Illinois).</p> <p><b>RQ3 Are there significant variations between Member States in regulatory requirements for the termination of consumer contracts for digital services and subscription renewal currently at national level in the EU-27?</b></p> <p><b>RQ4 How far would EU level action help to establish a level playing field in a single market context (e.g. possible cancellation button on websites / in email reminders about auto renewal of subcontracts)?</b></p> <p>From the standpoint of the European Consumer Centre Network (ECC-NET), the main issues relating to online subscriptions include difficulties in ensuring consumers are adequately informed regarding automatic renewals and their costs and free trial periods leading to an automatic conversion into a paid-for subscription without any pre-contractual information being provided. The overarching issues of obscured or complex right of withdrawal procedures from contracts pertaining to the first 14 days, and cancellation procedures for longer-duration contracts were also considered to be problematic.</p> <p>The ECC-NET propose a range of actions taken to support consumers, most prominently they support the implementation of the unambiguous German “termination/cancellation button” on websites EU wide. Furthermore, ECC-NET has asserted the need for both a product page as well as an order confirmation page where the price is indicated and validated by the consumer. In these pages, the main characteristics of the subscription should be covered (starting date, duration, end date, renewal and renewal period, initial price, renewed price, deadline, and form to cancel). ECC-NET calls for an outright ban on the need to provide payment information to access free trials, and observes that subscriptions entered via social media pose a particular problem for consumers, as they often fail to provide information or links to relevant webpages regarding the terms and conditions of the contract. Underlining the position on online subscriptions, whether short fixed-term or indefinite rolling, they insist that enforcement is key to the effective implementation of these recommendations.</p> <p>Trader feedback was also analysed on issues relating to online subscriptions. For instance, in Sweden, HelloFresh SE approach the issue from the perspective of the trader, believing that, like many other traders in the Commission’s Call for Evidence, the current rules in the EU provide a high level of protection across both the offline and digital environments. Citing their business model of “rolling flexible subscription contracts [...] where customers [...] have the ability to amend, cancel or pause at any time”, they call for nuance in any potential alterations to the current legislation, with a differentiation between such short-term contracts and “other subscription contracts, primarily for digital assets” where they suggest deceptive practices such as subscription traps are more prominent.</p> <p>Any such nuance in possible changes to existing legislation in relation to online subscriptions would do well to consider the general response of many other digital marketplace stakeholders to the Call for Evidence, including ecommerce Europe, Digital Europe and Eurocommerce, among others, that any policy approach should remain channel and technology neutral, so as to ensure that the clear consumer preference for omni-channel retail, as well as innovative business models and product designs, is not hindered. That said, initial observations from the German Federal Ministry of Economic Affairs (BMWK) and the European Law Institute (ELI) regarding the German introduction of a cancellation button, suggest that implementation would not necessarily pose a major barrier to compliance among traders, but will nonetheless require continued engagement in the form of clear guidance and case law rulings will likely be required to maximise the effectiveness of such legislation.</p> <p>The relevance of the market’s evolution towards micro subscriptions outlined in the market overview section is that new types of digital subscriptions are proliferating (mentioned by a legal academic). This requires regulators to keep track of market developments to ensure that this does not create any legal loopholes. There does not appear however to be any literature specifically focusing on cancellation problems linked to wider use of micro subscriptions driven by new forms of monetisation adopted by content creators. Nonetheless, this fast-evolving area of the market will need to be</p>

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	<p>monitored to ensure that cancellations to micro subscriptions can easily be made and that consumers' rights under the CRD (RoW) and contract cancellations are respected.</p> <p><b>RQ5 – Free trials</b></p> <ul style="list-style-type: none"> <li>• <b>Are there challenges in cancelling free trials that automatically convert into automatic subscriptions? Does this raise issues in relation to compliance with pre-contractual information requirements?</b></li> <li>• <b>Is passive consent sufficient for a free trial to automatically convert into a paid automatically renewed subscription service?</b></li> </ul> <p>Free trials allow consumers to try out and assess services at no charge, and are common in some digital sectors, such as for digital media, such as online publications, newspapers, and journals, but also Software-as-a-Service (SaaS) companies. The conversion rate from free trial users into paid-for subscriptions across different digital sectors has been estimated to be low, perhaps below 2% according to one estimate although higher in the case of SaaS (estimated at 25%). There is clearly a strong incentive for service providers to increase the availability of free trials for contracts, particularly SaaS, to increase also, therefore, percentage of free trials converted into paid subscriptions.</p> <p>The literature review and interviews suggest there is a problem in some digital market segments, despite a requirement for pre-contractual information to be provided at the point of signing up for a free trial that the trial constitutes entering into a contract and will automatically convert into paid-for subscriptions at the end of the free trial. Whilst the trader may send an email or a letter regarding the conversion into a paid-for subscription, the consumer may not be aware that the free trial would automatically convert into a paid subscription unless they took affirmative action to cancel the trial.</p> <p>However, it is necessary to distinguish between legitimate means that traders can adopt to promote the conversion of free trials into a paid-for subscription through automatic renewal and deceptive commercial practices leading to so-called “subscription traps”. Misleading trials trap the consumer into subscriptions to purchase the tested product or services. This raises consumer protection concerns regarding the automatic conversion of such customers in situations where they are not clearly informed about this when signing up for the free trial. However, subscription traps could already be tackled under the UCPD, for instance if they use the term “free online trial” in a way that is misleading.</p> <p>The 2016 DG JUST study identified a number of stages in the marketing, pre-contractual and contractual process when problematic practices relating to online free trials may arise. <i>“This can occur at the point of order/purchase when they incorporate any number of marketing methods which include false or deceptive statements/information, omit material information or the terms and conditions include unfair terms. Moreover, free trials which lead to some negative consumer problems following the purchase, such as unauthorised credit card charges, spam, etc., can also be considered as problematic and may breach applicable EU law”.</i></p> <p>The study made several recommendations to address the problems identified. Among the suggestions were that: (1) Alternative Dispute Resolution (ADR) bodies could gather information about actions undertaken to address the problem (2) Monitoring and stricter enforcement of cases that violate EU law could be assessed, (3) Actions involving traders could include indicating how traders can alter their marketing strategy to avoid misleading practices can be effective to avoid detriment and problems for consumers (4) Cooperation of enforcement authorities with social media and internet intermediaries could help to stop misleading free trials from circulating on internet platforms and strengthen traceability of the traders behind these. Lastly (5), the important role of credit card providers and banks in refunding consumers for unauthorised payments was stressed.</p> <p>In response to the public consultation question, “Signing up for a free trial should not require any payment details from consumers”, 81.6% of consumers strongly agreed and a further 12.6% agreed, compared with companies and trader associations, where only 2.5% strongly agreed and a further 9.9% agreed, whereas 25.9% strongly disagreed.</p>
<p><b>Conclusions (incl. assessment of</b></p>	<p><b>Growth in subscription economy could merit more regulatory attention</b></p>

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potential regulatory gaps).	<ul style="list-style-type: none"> <li>The growth in the subscription economy globally has led to a rapid proliferation in the number and type of subscriptions, and their value to the European Digital Single Market (DSM). Given that a number of problematic practices have been identified, the increased market size warrants more regulatory attention.</li> <li>Recognising the problem of subscription traps, there have been regulatory developments both in several EU Member States and in third countries (e.g. the UK and the U.S. regarding the need to regulate certain problematic practices relating to online subscriptions and to make cancellation rules fit for purpose in the digital age. This demonstrates that EU regulatory action could be warranted in the European Single Digital Market context given the economic importance of subscriptions in Europe and globally, and given the risk of divergent national legislation emerging.</li> <li>As far as the scale of subscription traps are concerned, looking ahead, evidence from the OECD suggests that traders will continue to evolve new and more effective approaches that will increase the nuance and complexity of subscription traps. The potential for these approaches to aid exploitation of consumers' individual susceptibilities is heightened by the ability of large online firms to test new approaches, such as the utilisation of AI and algorithmic marketing strategies.</li> </ul> <p><b>Key principles in ensuring fair digital contracts</b></p> <ul style="list-style-type: none"> <li>From a consumer protection perspective, but also to maximise efficiency for both traders and consumers, it ought to be as easy to cancel a subscription contract as it is to sign up for one, a principle already mentioned in the UCPD guidance (referring to Art. 9d UCPD). Making this more explicit in legislative provisions in future would help to enhance fairness and to foster the digital single market.</li> <li>Greater attention is needed to the issue of consent to ensure digital fairness. Whilst renewal reminders may be sent by email and/or text, consumers are busy and may not even notice these until the payment has been taken.</li> </ul> <p><b>Problematic practices</b></p> <ul style="list-style-type: none"> <li>Free trials were found to present various problems, such as (1) the requirement to provide credit card details upfront which could deter consumers from signing up both for fear of automatic renewals not being easily cancellable and due to security considerations (2) the inadequate levels of compliance with pre-contractual information requirements to ensure that consumers are aware that if they sign up for many free trials, they are entering into a legally-binding contract that will incur cost through an automatic conversion into a paid subscription unless they cancel (sometimes, even if they have not even used the service during the trial).</li> <li>Although the CRD already serves to harmonise the EU-wide legal framework on consumer rights such as the pre-contractual information they should receive when considering purchasing/subscribing, and relating to their right of cancellation, the introduction of clearer options regarding both consent and cancellation of contractual agreements, as seen in German law, remains a further option towards enhanced consumer protection against subscription traps.</li> <li>Means to reinforce or address such issues may come in the form of enhanced cancellation options such as that seen in Germany, whereby two-click cancellations enable consumers to end subscriptions without the possibility of convoluted or misleading steps.<sup>204</sup></li> </ul> <p><b>Possible regulatory and non-regulatory solutions</b></p> <ul style="list-style-type: none"> <li>There are some examples of successful non-regulatory solutions. For instance, engagement by the CPC with globally-leading credit card companies has led to</li> </ul>

<sup>204</sup> Ehle, Kristina., Stephan Kreß, 2021. New “Two-Click Cancellation” Button – German Exceptionalism for Subscription Terminations | Socially Aware. Socially Aware Blog: The Law of Business and Social Media. Morrison Foerster. <https://www.sociallyawareblog.com/topics/two-click-cancellation-button-german-exceptionalism-subscription-terminations>

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	<p>greater transparency about online subscriptions, the total amount due and their duration and helped to ensure that consumers receive reminders.</p> <ul style="list-style-type: none"> <li>• However, whilst credit card providers and many traders already provide such information to consumers, not all do so. In order to ensure uniform levels of consumer protection, automatic reminders informing consumers about the date of an automatic renewal and the total payment should be automatically sent to avoid consumers paying for services they didn't want.</li> <li>• Moreover, reflecting evidence that there are problems for consumers in cancelling and withdrawing from contracts as easily as it is to enter into them, this asymmetry between traders and consumers should be rectified. In the digital age, there is no reason why a consumer should be allowed to enter into a contract online but not to be able to cancel one. This could be explicitly written into EU consumer law, rather than left to guidance.</li> <li>• Whereas many free trials require payment information, this can deter consumers from signing up, given concerns regarding handing over credit or debit card details and regarding the potential to be caught in a subscription trap. Consumers could be allowed to participate in free trials without being automatically bound to enter into a paid-for contract without their active consent. This would avoid the current situation whereby many consumers end up being charged for a subscription despite not always being made aware through pre-contractual information that they are going to be billed unless they cancel the free trial. Even if they are informed in lengthy terms and conditions, there are no guarantees they will read the small-print, and therefore requiring active consent would alleviate this problem.</li> <li>• There should be greater transparency in informing consumers about subscriptions and their associated costs, from the pre-contractual through to the contractual stages and ahead of renewals. Much of this information could be provided automatically and would avoid consumers being ripped off without them being aware of what subscriptions they have running and what the associated costs are. Several measures could be taken: <ul style="list-style-type: none"> <li>▪ Automatic renewals – at least for annual and quarterly subscriptions consumers should receive pre-renewal reminders each time (monthly reminders were seen as too frequent by some stakeholders).</li> <li>▪ Mandating information about the total cost of the subscription – this should be clear and transparent as it would help to prevent hidden costs, part of the subscription traps problem.</li> <li>▪ Mandatory to provide subscription contract option without automatic renewal. Given that some traders take advantage of consumers that have automatic renewal set (inertia selling, difficulties in cancelling contracts, price differentials between customers on an auto-renewal and those renewing manually), this should be offered as a possibility.</li> <li>▪ A cancellation button should be mandated on websites to make it easier for consumers to cancel contracts. A right of withdrawal button could also be mandated. However, consideration as to the impact on SMEs of these measures should be given, and the need to avoid an overly-prescriptive design approach, so long as these cancellation and withdrawal possibilities are sufficiently easily accessible by website users.</li> <li>▪ Preventing deceptive designs in a way that prevents consumers from withdrawing from a contract (exercising their RoW under the CRD) or from cancelling a contract.</li> </ul> </li> <li>• On the last point, recent new EU legislation (e.g. the DSA's Article 25(3)(c)) demonstrates that it is possible to have short, but more explicit rules on online subscriptions regarding ensuring that it is not more difficult to enter into a contract than exit from it. This could be replicated in the UCPD, as it would prohibit traders use of deceptive practices to prevent EU consumers exercising their existing rights.</li> </ul>

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	<ul style="list-style-type: none"> <li>As per BEUC's 2022 recommendations for European Commission regulatory interventions on the UCPD and CRD, there is a need to tighten the definition of illegal practices to minimise or remove entirely the opportunity for both deceptive and unclear renewal practices. Here, there is a link with the horizontal issue of dark patterns in website design.</li> <li>A general principle of 'fairness by design' should be mentioned in the recitals of the UCPD. This would ensure that traders build in digital fairness for consumers from the outset of the design process, which would improve transparency and fairness of digital subscriptions, ensure technical capabilities such as auto-reminders of automatic renewals are sent out.</li> </ul>
<p><b>Supporting information</b></p>	<p><i>Bibliography - n.b. As the subscription economy is a fast-evolving area, and as national legislation is very new on automatic renewals, we have identified and utilised a series of relevant academic articles, but also legal analysis from grey literature including professional blog entries about the subject.</i></p> <p><i>AWS Marketplace introduces free trials for SaaS contracts (31/05/2022) Amazon Web Services, Inc. Available at: <a href="https://aws.amazon.com/about-aws/whats-new/2022/05/aws-marketplace-free-trials-saas-contracts/">https://aws.amazon.com/about-aws/whats-new/2022/05/aws-marketplace-free-trials-saas-contracts/</a> (Accessed: 1 June 2023).</i></p> <p>Barrett, C., 2021. How's your subscription addiction? Financial Times. <a href="https://www.ft.com/content/40f9b003-cf92-41d6-8236-b7b0bae3f59e">https://www.ft.com/content/40f9b003-cf92-41d6-8236-b7b0bae3f59e</a></p> <p>Bastian, K., 2021. The Subscription Economy: What It Is and How It's Changing The Way People Buy. Force Management. <a href="https://www.forcemanagement.com/blog/the-subscription-economy-what-it-is-and-how-its-changing-the-way-people-buy">https://www.forcemanagement.com/blog/the-subscription-economy-what-it-is-and-how-its-changing-the-way-people-buy</a></p> <p>BEIS - Consumer and competition reform: Subscriptions regulations (2021)<sup>205</sup></p> <p>BEIS - Consumer Protection Study (2022), Understanding the impacts and resolution of consumer problems, BEIS Research Paper Number 2022/005<sup>206</sup></p> <p>BEIS - Digital Markets, Competition and Consumers Bill <a href="https://bills.parliament.uk/bills/3453">https://bills.parliament.uk/bills/3453</a></p> <p>BEIS Consumer subscriptions regulatory reform proposals – a business perspective Qualitative research report, DBT Research Paper Number 2022/023</p> <p>Breen, Nick., 2014. How New EU Guidance On The Consumer Rights Directive Will Impact Online Digital Content Providers - Consumer Law - European Union <a href="https://www.mondaq.com/uk/consumer-law/322728/how-new-eu-guidance-on-the-consumer-rights-directive-will-impact-online-digital-content-providers">https://www.mondaq.com/uk/consumer-law/322728/how-new-eu-guidance-on-the-consumer-rights-directive-will-impact-online-digital-content-providers</a> (accessed 11.30.22).</p> <p>Busch, C., 2022. Editorial: Updating EU Consumer Law for the Digital Subscription Economy. Journal of European Consumer and Market Law 11.</p> <p>Busch, C., Risks for Consumers in the Digital Subscription Economy, Annual Conference on European Consumer Law, Academy of European Law, Trier, 6.10.2022</p> <p>Chartered Trading Standards Institute, 2017. Citizens Advice reveals consumers spend an average of £160 on unwanted subscriptions during National Consumer Week. <a href="https://www.tradingstandards.uk/news-policy/news-room/2017/citizens-advice-reveals-consumers-spend-an-average-of-160-on-unwanted-subscriptions-during-national-consumer-week/">https://www.tradingstandards.uk/news-policy/news-room/2017/citizens-advice-reveals-consumers-spend-an-average-of-160-on-unwanted-subscriptions-during-national-consumer-week/</a></p> <p>Daniel, Carlton., Ailin O'Flaherty, 2022. Consumer Law Focus: Subscription Auto-Renewals, New CMA Guidance. The National Law Review Vol.XII. <a href="https://www.natlawreview.com/article/consumer-law-focus-subscription-auto-renewals-new-cma-guidance">https://www.natlawreview.com/article/consumer-law-focus-subscription-auto-renewals-new-cma-guidance</a> (accessed 11.17.22).</p>

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<p><b>Completed targeted interviews:</b></p>	<ul style="list-style-type: none"> <li>• Agnieszka Jablonowska, Post-doctoral researcher in consumer law &amp; tech, Leiden University</li> <li>• Mario Muller: Consumer policy and competition, Bundesministerium für Wirtschaft und Klimaschutz (BMWK)</li> <li>• Teresa Rodríguez de las Heras Ballell, Assoc. Professor of Commercial Law, University Carlos III of Madrid; arbitrator at the Madrid Court of Arbitration and the Spanish Court of Arbitration.</li> <li>• Catalina Goanta, Assoc. Professor, University of Utrecht</li> <li>• Maike Jansen, ecommerce-europe.eu</li> <li>• Kasper Drazewski, BEUC</li> <li>• Lars Frolov-Hammer and Marie Asmussen, DI – Danish industry association</li> <li>• Sophia Kruegel and Alexis Waravka, Independent Retail Europe</li> </ul>
	<p><b>Glossary of relevant definitions:</b></p> <p><i>Negative option marketing</i> - Negative option offers come in a variety of forms, but all share a central feature: each contains a term or condition under which the seller may interpret a consumer’s silence or failure to take affirmative action to reject a good or service or to cancel the agreement as acceptance or continuing acceptance of the offer. – examples of such would include automatically renewing contracts/subscriptions, continuity plans or free-trial marketing.</p> <p><i>Automatic renewals</i> - Automatic renewals allow sellers (e.g., a magazine publisher) to unilaterally renew consumers’ subscriptions when they expire, unless consumers affirmatively cancel their subscriptions by a certain date.</p>



Case study headings	Description and analysis
	<p><i>Continuity plans</i> - Continuity plans allow consumers to agree in advance to receive periodic shipments of goods or provision of services (e.g., bottled water delivery), which they continue to receive until they cancel the agreement.</p> <p><i>Free trial marketing</i> - (e.g., free-to-pay conversions) provides consumers the opportunity to receive goods or services for free (or at a nominal fee) for a trial period. After the trial period, sellers can automatically begin charging a fee (or higher fee) unless consumers affirmatively cancel or return the goods or services.</p> <p><i>Prenotification plans</i> - (e.g., book-of-the-month clubs), sellers provide periodic notices offering goods to participating consumers and then send — and charge for — those goods only if the consumers take no action to decline the offer. The periodic announcements and shipments can continue indefinitely.</p>

## 4 Case study – Personalised advertising

Case study headings	Description of content under heading
<p><b>Introduction and case study objectives</b></p>	<p>This case study focuses on the issue of behavioural and personalised advertising, and the use of information gathered about consumers and the processing of personal data to target advertisements. The objectives of the case study are to:</p> <ul style="list-style-type: none"> <li>• Describe what behavioural or targeted advertising means, the players involved and how prevalent this practice is,</li> <li>• Understand to what extent consumers are aware that they are receiving behavioural/personalised advertising and circumstances in which they consider the lack of transparency or the practice itself problematic, including for vulnerable consumers,</li> <li>• Describe how existing provisions of the Unfair Commercial Practices Directive (UCPD), General Data Protection Regulation (GDPR) and Digital Services Act (DSA) address problematic practices regarding behavioural advertising (including transparency) and assess whether any emerging issues would result in certain types of practices not being addressed,</li> <li>• Consider whether the UCPD and associated guidelines provide sufficient scope to address problematic behavioural advertising on a case-by-case basis, or whether it may be justified to identify specific practices that should be prohibited.</li> </ul>
<p><b>Context</b></p>	<p><u>How big is the digital advertising market?</u></p> <p>In 2021, EUR 52 billion was spent on digital advertising in the EEA – more than all other advertising channels combined.<sup>207</sup> Digital advertising spend has experienced double-digit growth almost every year since 2002, while spending on advertising on traditional channels such as TV, print media and outdoor displays has been flat or in decline.<sup>208</sup></p> <p>Digital advertising is provided in different forms and contexts. The main “channels” are search (typically based on keywords), social media, “other” display, and classified advertising.</p> <p><u>What is behavioural advertising?</u></p> <p>Targeting of digital advertising can be based on the content of the visited website or search query (known as “contextual” advertising). This type of targeting does not require the use of personal data. However, advertisements can also be targeted using information gathered about the consumer e.g., via cookies or other tracking technologies. This type of targeted advertising – called “behavioural advertising” – can involve extensive processing of consumers’ data<sup>209</sup>, and may involve developing profiles of consumers based on information from various sources including cookie IDs, mobile advertising IDs, fingerprinting<sup>210</sup>, user IDs and IP addresses. The types of data gathered can include demographic and location data, information about interests or intent<sup>211</sup> and “measurement” data<sup>212</sup>.</p> <p><u>Prevalence of behavioural advertising</u></p>

<sup>207</sup> EC Study on the impact of recent developments in ad tech and their impact on privacy, publishers and advertisers (2023) <https://op.europa.eu/en/publication-detail/-/publication/8b950a43-a141-11ed-b508-01aa75ed71a1/language-en>.

<sup>208</sup> Zenith Advertising Expenditure Forecasts December 2021.

<sup>209</sup> WIK-Consult, VVA et al (2021) for the EP: Online advertising: the impact of targeted advertising on advertisers, market access and consumer choice. [https://www.europarl.europa.eu/thinktank/en/document/IPO\\_L\\_STU\(2021\)662913](https://www.europarl.europa.eu/thinktank/en/document/IPO_L_STU(2021)662913)

<sup>210</sup> Fingerprints are generated by combining attributes of the user device/browser with data provided in network requests such as IP address. EC Study on the impact of recent developments in ad tech and their impact on privacy, publishers and advertisers (2023) notes that this method is increasingly widespread and is deployed on 25% of the top 10 000 Alexa-ranked sites. It is considered difficult for users to circumvent or limit from a technical perspective.

<sup>211</sup> Intent data is a data about users’ behaviour and is mentioned in the GDPR’s definition of profiling

<sup>212</sup> The proposal for an ePrivacy Regulation includes a description of what is typically defined as “frequency data”, a subset of measurement data: data that is “necessary for web audience measuring, provided that such measurement is carried out by the provider of the information society service requested by the end-user.” Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), COM/2017/010 final - 2017/03 (COD), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0010>.

Case study headings	Description of content under heading
	<p>The Interactive Advertising Bureau (IAB Europe) estimates that as of 2020 EUR 16 billion was spent on data-driven advertisements in the EU.<sup>213</sup> Meanwhile, Statista<sup>214</sup> reports that so-called “programmatic” advertising represented 84% of digital advertising in Europe in 2022. They expect that this will expand to 89% by 2027. However, programmatic advertising<sup>215</sup> could also include forms of targeting that do not involve personal data. In the 2022 Consumer Conditions survey, 76% of consumers surveyed reported that they had experienced personally targeted online advertising.<sup>216</sup></p> <p><u>Why do advertisers engage in personalisation?</u></p> <p>There is evidence to suggest that advertisers place additional value on targeting. For example, a 2019 study of the US market suggests that advertisers were willing to spend 63% more on average for some form of targeting<sup>217</sup>. In a study funded by Facebook, SMEs in Europe reported that personalising advertisements assisted them to find new customers<sup>218</sup>.</p> <p>The click-through rate (the ratio of users who click on an ad to the number who visit a webpage) for personalised advertising is estimated to be 5.3 times higher than for non-personalised advertising<sup>219</sup>.</p> <p><u>Which players engage in behavioural advertising?</u></p> <p>Digital advertising is dominated by a handful of large platforms, which benefit from a widespread (often global) reach as well as extensive consumer datasets. These datasets enable them to offer targeting based on personal data, which may not be available to the same degree to smaller players, including many European publishers. For example, Statista<sup>220</sup> reports that in 2021, 8 players generated 88% of total digital advertising sales worldwide. Google and Meta, the owner of Facebook, represented 60% of the market.</p>
<p><b>Topics covered</b>  <b>Problematic practice – nature and magnitude</b></p>	<p>Behavioural advertising can, in some cases, have potentially positive effects, e.g., by providing advertising that is more relevant to consumers’ interests or if it is used to ensure that inappropriate content is not shown to children. Those involved in the interactive advertising industry also claim that behavioural ads are more effective than other types of advertising, such as contextual advertising<sup>221</sup>, and that the resulting additional revenue they provide is essential in supporting the provision of “free” services and applications to consumers.<sup>222</sup> There is evidence from surveys that many consumers recognise and accept the role played by advertising in supporting free services.<sup>223</sup> However, the increased effectiveness of behavioural over other forms of</p>

<sup>213</sup> IAB Europe AdEx Benchmark 2020 Report” (annual report of market for digital advertising in Europe, July 2021), <https://iab europe.eu/wp-content/uploads/2021/07/2020-Adex-Full-Report-1st-July-2020.pptx>.

<sup>214</sup> Statista Digital advertising: market data analysis & forecast

<sup>215</sup> Statista defines this concept as a “software-based method of buying, displaying, and optimising of advertising space”.

<sup>216</sup> Consumer conditions scoreboard 2023

<sup>217</sup> Marotta V, Abhishek V and Acquisti A, ‘Online Tracking and Publishers’ Revenues: An Empirical Analysis’ (2019) <[https://weis2019.econinfosec.org/wp-content/uploads/sites/6/2019/05/WEIS\\_2019\\_paper\\_38.pdf](https://weis2019.econinfosec.org/wp-content/uploads/sites/6/2019/05/WEIS_2019_paper_38.pdf)>.

<sup>218</sup> Deloitte LLP, “Dynamic Markets: Unlocking Small Business Innovation And Growth Through The Rise Of The Personalized Economy” (study commissioned by Facebook, May 2021), 16, <https://facebook.com/business/f/154745099959954>.

<sup>219</sup> Niklas Fourberg et al, Online Advertising: The Impact Of Targeted Advertising On Advertisers, Market Access And Consumer Choice (Luxembourg: Committee on the Internal Market and Consumer Protection, European Parliament, 2021), 19, [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662913/IPOL\\_STU\(2021\)662913\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662913/IPOL_STU(2021)662913_EN.pdf); Paul Alexander, “The Economic Value of Behavioral Targeting in Digital Advertising” (IHS Markit research paper, 2017), 3, [https://datadrivenadvertising.eu/wp-content/uploads/2017/09/BehaviouralTargeting\\_FINAL.pdf](https://datadrivenadvertising.eu/wp-content/uploads/2017/09/BehaviouralTargeting_FINAL.pdf).

<sup>220</sup> Statista Digital advertising: market data analysis & forecast

<sup>221</sup> The Center for Data Innovation claims that the click-through rate (the ratio of users who click on an ad to the number who visit a webpage) for personalized advertising is 5.3 times higher than for non-personalized advertising. In contrast, they suggest that “contextual ads are less useful for many other applications where the app developer, media company, or content creator does not have detailed information about its audience.” – see 2021 The Value of personalised advertising in Europe

<sup>222</sup> In The Value of personalised advertising in Europe (2021) the Center for Data Innovation claims that “targeted online advertising has supported the development of innovative and no-cost online products and services, including social media platforms, mobile apps, games, news media, and more.” Media publishers that offer targeted ad inventory can earn almost four times more per ad than with non-targeted ads Paul Alexander, “The Economic Value of Behavioral Targeting in Digital Advertising,” 4.

<sup>223</sup> For example, a survey conducted by GfK for IAB Europe in 2017 found that 50% of online users said that they did not mind seeing sponsored or branded content in exchange for free news, content or services. Your online voices –

Case study headings	Description of content under heading
	<p>advertising is disputed<sup>224</sup>, and it can also give rise to privacy and consumer protection concerns.<sup>225</sup></p> <p>A key concern is a lack of transparency regarding the use of data. Specifically, <b>consumers may not know that their data is being used to target advertising</b>, or they may be aware of being tracked but <b>do not recall having consented to this use of their data</b>. In the 2022 Consumer Conditions survey, 70% reported that they were concerned about the use and sharing of their personal data in the context of online advertising, and more than half expressed concerns about the installation of cookies and collection of online data. This is corroborated in a consumer research report funded by the digital advertising industry,<sup>226</sup> which noted that: <i>“The overarching feeling consumers come away with from online advertising is one of being overwhelmed by tracking. They shared that they feel like they very often see personalised ads without knowing how exactly advertisers could have got the data needed to target them, which left them with the feeling that they have little control over the use of their data and how to change things... Many consumers were concerned about their data being collected without them being fully aware and used by companies for their own profit.”</i> Sweeps conducted for this study confirm that there is limited transparency towards consumers regarding how their data is used to personalise advertisements. In 78% of the websites checked, users were informed that the user was being shown personalised adverts. However, the wording was typically very general and focused on the potential benefits to the users rather than the risks to their privacy in the use of these practices. Examples of wording used included: “cookies are used to make our advertising messages more relevant to you” (dating website).</p> <p>It is generally understood that, from a legal perspective, consumers’ consent is needed for behavioural advertising to be compliant with the GDPR.<sup>227</sup> However, concerns have been raised that consumers cannot provide valid consent for the process of displaying behavioural advertisements, which typically involves data passing between multiple parties and the use of real-time bidding mechanisms<sup>228</sup>. A 2018 study for DG Justice<sup>229</sup> similarly highlights a concern that “a majority of online social media users are likely to unknowingly consent to their personal data being used [for targeting] due to complex terms and conditions that they do not understand or take the time to read... There is a general lack of transparency regarding the data collection methods used by online social media providers”.</p> <p>A further concern is that <b>consumers may not wish to be subject to behavioural advertising but may find it challenging to opt-out or to seek redress</b>. 37% of consumers responding to the 2022 consumer conditions survey noted that a key concern about online advertising was that they could not opt-out or refuse to receive it. A 2021 poll conducted by YouGov for the Norwegian Consumer Council found that only 20% of consumers surveyed accepted that adverts should be based on personal information, with almost half thinking that adverts should never be based on personal</p>

conversation with consumers March-Apr 2022 England, France, Germany, Belgium and Latvia notes that there was some understanding that targeted ads were part of the internet business model and that they allowed users to have access to free content and services.

<sup>224</sup> Integrated Ad Science (2020) Importance of Contextual. Retrieved from: <https://integralads.com/uk/insider/power-of-contextual-ads/>. In a study designed with World Federations of Advertisers in Norway, Kobler documents that ads placed contextually are up to 7.5 times more effective than tracking-based adverts due to the impact of the relevant context. Ster ran an experiment with 10 different advertisers, including American Express, to compare the performance of ads shown to users who opted in or out of being tracked. On the most important metric, conversions – the share of people who ended up taking the action the advertiser cared about contextual ads did as well or better than microtargeted ones. Edelman, G. (2020) Can Killing Cookies Save Journalism?. Wired. Retrieved from <https://www.wired.com/story/can-killing-cookies-save-journalism/>.

<sup>225</sup> See for example WIK-Consult, VVA et al (2021) for the EP: Online advertising: the impact of targeted advertising on advertisers, market access and consumer choice. [https://www.europarl.europa.eu/thinktank/en/document/IPOL\\_STU\(2021\)662913](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2021)662913)

<sup>226</sup> “Your online voices”, 2022, a conversation with consumers in France, Germany, Belgium, and Latvia available at: <https://edaa.eu/your-online-voices-your-voice-your-choice/>. The study was funded by the European Interactive Digital Advertising Alliance <https://edaa.eu/who-we-are/edaa/>

<sup>227</sup> See Adtech and Real-Time Bidding under European Data Protection Law 2021 Michael Veale, and Frederik Zuiderveen Borgesius. Also in 2020, the Belgian data protection authority (DPA) ‘found serious GDPR infringements in the system Google and others use to legitimise online tracking.

<sup>228</sup> See for example Adtech and Real-Time Bidding under European Data Protection Law 2021 Michael Veale, and Frederik Zuiderveen Borgesius

<sup>229</sup> BEHAVIOURAL STUDY ON ADVERTISING AND MARKETING PRACTICES IN ONLINE SOCIAL MEDIA, (2018) GfK for the EC DG JUST

Case study headings	Description of content under heading
	<p>data<sup>230</sup>. Objections to the practice of behavioural advertising have also been found in surveys funded by the advertising industry.<sup>231</sup> However, surveys also confirm that stakeholders engaged in behavioural advertising often make use of “dark patterns” to obtain consent for the collection and use of data and make the process of opting out challenging. For example, a survey conducted in 10 European countries on behalf of the European Interactive Digital Advertising Alliance<sup>232</sup> found that 40% of consumers reported that they always or frequently accept all default settings, while only 22% did so rarely or never. In relation to cookie banners, the privacy rights organisation NoYB<sup>233</sup>, noted that:</p> <ul style="list-style-type: none"> <li>• 81% of the websites had no ‘reject’ option on the first page, but rather had hidden it on another page,</li> <li>• 73% of the websites used ‘deceptive colours and contrasts’ to lead users into clicking ‘accept’,</li> <li>• 90% of the websites provided no easy way to withdraw consent.</li> </ul> <p>These findings are confirmed in sweeps conducted for this study. Although the reviewed websites asked questions about the acceptance of cookies, there was no option to “turn off” personalisation practices. A study by the Norwegian Council<sup>234</sup> noted that “apps and third parties state in their privacy policies that if the consumer did not use the opt out device-level settings, they regard this as consent to being tracked. However, this setting is somewhat obscurely tucked away in the Android settings menu, and consequently many consumers may not be aware of its existence.” They also noted that the variety of different types of identifiers that can be transmitted makes it exceedingly difficult to opt out of being tracked.</p> <p>In addition, <b>multiple players</b> in the value chain typically share the <b>data used for behavioural advertising</b>, which significantly increases the risk of <b>privacy breaches</b>. In a study, the Norwegian Consumer Council observed ten apps each “transmitting user data to at least 135 different third parties involved in advertising and/or behavioural profiling”.<sup>235</sup> A large-scale study on the top 1 million websites found that on average each sends data to 34 third parties.<sup>236</sup></p> <p>Various studies have noted that <b>behavioural advertising can be used to exploit vulnerabilities</b>. “Your online voices”<sup>237</sup> notes that consumers fear that data could be used to exploit users’ vulnerabilities and potentially manipulate them. Vulnerabilities in this context can extend beyond specific consumer groups such as minors and can also affect consumers which might otherwise be considered as being “average”. Research shows that psychological characteristics such as impulsiveness and anxiety can be accurately inferred from digital footprints, such as likes or posts on social media, and that adjusting communication to these characteristics leads to higher persuasiveness of messages.<sup>238</sup> Thus, advertising can be tailored to target vulnerabilities of individual consumers based on personality traits. In this context, consumers may unknowingly be subjected to so-called “A/B testing”<sup>239</sup> to assess which type of messaging is most effective. This practice could also be used to create or adjust content in a way which</p>

<sup>230</sup> Forrukerrådet. (2021). Tracking-based advertising. Retrieved from <https://fil.forbrukerradet.no/wp-content/uploads/2021/06/consumer-attitudes-to-tracking-based-advertising.pdf>

<sup>231</sup> A survey conducted by GfK for IAB Europe in 2017 found that while 50% of online users said that they did not mind seeing sponsored or branded content in exchange for free news, content or services, just 42% were happy with their browsing data being shared as the basis for advertising.

<sup>232</sup> European Advertising Consumer Research Report 2021 Consumer Awareness & Impact of the European Self-Regulatory Programme for OBA for the European interactive digital advertising alliance

<sup>233</sup> The future of online advertising (2021) sponsored by the Greens.

<sup>234</sup> Out of control (2020): How consumers are exploited by the online advertising industry, Norwegian consumer council

<sup>235</sup> Out of control (2020): How consumers are exploited by the online advertising industry, Norwegian consumer council

<sup>236</sup> “Online Tracking: A 1-million-site Measurement and Analysis”, Steven Englehardt and Arvind Narayanan [http://randomwalker.info/publications/OpenWPM\\_1\\_million\\_site\\_tracking\\_measurement.pdf](http://randomwalker.info/publications/OpenWPM_1_million_site_tracking_measurement.pdf)

<sup>237</sup> “Your online voices”, 2022, a conversation with consumers in France, Germany, Belgium, and Latvia available at: <https://edaa.eu/your-online-voices-your-voice-your-choice/>. The study was funded by the European Interactive Digital Advertising Alliance <https://edaa.eu/who-we-are/edaa/>

<sup>238</sup> Strycharz, J. and Duivenvoorde, B. (2021). The exploitation of vulnerability through personalised marketing communication: are consumers protected?. Internet Policy Review, [online] 10(4). Available at: <https://policyreview.info/articles/analysis/exploitation-vulnerability-through-personalised-marketing-communication-are> [Accessed: 17 Apr. 2024].

<sup>239</sup> A/B testing involves the use of an experiment where two or more variants of a page are shown to users at random, and statistical analysis is used to determine which variation performs better for a given conversion goal.

Case study headings	Description of content under heading
	<p>exploits their specific vulnerabilities.<sup>240</sup> A 2023 report by the Swedish Consumer Agency<sup>241</sup> shows that consumers in debt regularly received targeted and personalised offers on new consumer credit, in a manner which implied that it would improve their financial situation. The report also shows that children’s understanding of data-driven marketing differed from that of adults, which, combined with other factors, such as high confidence in the digital environment, could make them particularly vulnerable to the impact of data-driven marketing. In sweeps conducted for this study, researchers found that in 42% of cases where adverts were shown, the ad impressions were for products or services linked to the vulnerabilities the user had previously searched for. For example, although a causal link could not be proven, advertisements for gambling were (in addition to being related to searches for gambling) somewhat related to searches regarding money problems and loans.</p> <p>Targeting could also seek to exclude certain sections of the population from accessing important services. A consumer protection organisation gave the example of insurance companies choosing to advertise only to low-risk individuals.<sup>242</sup> It is notable that around three quarters of respondents to the public consultation carried out in 2023 by the European Commission on digital fairness of EU consumer law, said that within the last 12 months they had experienced situations where their personal data was misused or used unfairly (e.g. to exploit information about weaknesses and vulnerabilities) to personalise commercial offers. 45% of respondents said this had occurred 3 or more times<sup>243</sup>, and 11% of respondents considered that this was the single most serious problem they had experienced online in the past 12 months.</p>
<p><b>How far does existing EU (and any national legislation where relevant) address the problem?</b></p>	<p>The EU legal framework includes the following provisions, which apply to players engaging in behavioural advertising or data gathering that could be used for this purpose.</p> <p><b>Processing personal data for the purposes of engaging in targeted advertising</b></p> <p>The ePrivacy Directive requires the user’s consent when cookies or other forms of accessing and storing information on an individual’s device (e.g., tablet or smartphone) are used. This creates a de facto opt-in mechanism for the use of cookies to target advertising. The existing Directive does not address the need for consent regarding other forms of tracking. However, the proposed ePrivacy Regulation from January 2017<sup>244</sup> (ePR) might address this. If current proposals are adopted, these will require the prior consent of the user to collect information on the terminal equipment and to use processing and storage capabilities of terminal equipment. The proposed ePrivacy Regulation may also permit users to opt-in through software technical settings. However, the ePrivacy Regulation has taken much longer than average to go through the co-decision procedure and was still not adopted as of March 2023, creating some regulatory uncertainty for traders given that the ePD dates back to 2002 and until such time as the Regulation’s adoption and entry into application, traders must follow the ePD, which is not fully aligned with the GDPR.</p> <p>The GDPR requires that personal data should be “processed lawfully, fairly and in a transparent manner” and should be “collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes”.<sup>245</sup> In principle therefore, processing personal data for the purposes of personalised advertising in a manner which is unfair or is not clearly explained amounts to a breach of the GDPR. Data controllers are responsible for compliance with this provision and must be able to demonstrate compliance. As regards the lawfulness of data processing, Article 6 requires that data subjects are given relevant information on the purposes for which data is processed and limits the legitimate processing of</p>

<sup>240</sup> See Joanna Strycharz, Bram Duivenvoorde (2021) The exploitation of vulnerability through personalised marketing communication: are consumers protected? <https://policyreview.info/articles/analysis/exploitation-vulnerability-through-personalised-marketing-communication-are>

<sup>241</sup> Swedish Consumer Agency (2023) People in debt and young people especially vulnerable to data-driven marketing <https://www.konsumentverket.se/aktuellt/nyheter-och-pressmeddelanden/nyheter/2023/skultsatta-och-unga-sarskilt-utsatta-for-datadriven-marknadsforing/>

<sup>242</sup> BEHAVIOURAL STUDY ON ADVERTISING AND MARKETING PRACTICES IN ONLINE SOCIAL MEDIA, (2018) GfK for the EC DG JUST

<sup>243</sup> Out of a total of 222 responses. These results are indicative, but cannot be considered representative

<sup>244</sup> Proposal for a Regulation on Privacy and Electronic Communications – January 2017

<https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-privacy-and-electronic-communications>

<sup>245</sup> GDPR Article 5(1)

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	<p>personal data to six grounds. One justification that can be used is the consent of the individual concerned.<sup>246</sup> Data controllers could cite grounds other than consent. However, EDPB Guidelines suggest that the use of other grounds should be limited.<sup>247</sup></p> <p>Moreover, the need for consent was reinforced in January 2023, when the Irish Data Protection Commissioner (DPC) published two decisions related to breaches of the GDPR by Meta’s Facebook and Instagram, in which it concluded that the company had used an invalid legal basis (the contract model) for processing personal data for the purpose of personalised advertising.<sup>248</sup> Consent would normally imply an “opt-in” to the collection of personal data for the purposes of targeted advertising, with the possibility for the consumer also to withdraw such consent. Moreover, even if data gathering for the targeting of advertising is permitted on other grounds, e.g., where the processing is considered to be based on the “legitimate interests of the controller”, the data subject should be able to object, which could be viewed as a means to “opt out”.</p> <p><b>Transparency regarding whether advertising is targeted and the mechanisms used to target advertising</b></p> <p>The DSA (Article 26) stipulates that online platforms that present advertisements on their online interfaces must ensure that for each specific ad presented to each recipient the latter is able to identify inter alia that the information is an advertisement and the main parameters used to determine the recipient to whom the advertisement is presented, and, where applicable, how to change those parameters. However, these provisions apply only to providers of online platforms and not to other entities that present advertisements.</p> <p>A lack of transparency regarding targeted advertising could in theory be viewed as a misleading action or omission under the UCPD (Article 5(2) or Articles 6 and 7). However, the claimant would need to demonstrate that their specific case fulfils the requirements, which could be challenging. Meanwhile, the Modernisation Directive added a requirement in Annex I UCPD that consumers should be informed “in response to a consumer’s online search query” about “any paid advertisement or payment specifically for achieving higher ranking of products within the search results”. However, this does not refer explicitly to any targeting practices. The GDPR also contains provisions that could provide for transparency in certain cases, in that the data subject should be informed when the data controller uses profiling techniques, but this may occur at a different time than the delivery of targeted advertising. A data subject could also obtain information about the segment in which they have been placed using profiling, but this requires the data subject to pro-actively exercise its right of access.</p> <p><b>Prohibitions of specific practices that could relate to targeted advertising</b></p> <p>There are no general prohibitions on targeted advertising. However, certain practices that could relate to targeted advertising are restricted.</p> <p>The GDPR (Article 9) prohibits processing of personal data which reveals racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, as well as the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person’s sex life or sexual orientation. This should mean that advertising which is personalised based on these factors is unlawful. However, an exemption from the prohibition is possible if the data subject provides explicit consent for the processing of this data for a specified purpose. The DSA (Article 26) goes further in stipulating that providers of <i>online platforms</i> should not present advertisements based on profiling which relies on special categories of personal data including data which reveals racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union</p>

<sup>246</sup> Other grounds are that the processing is necessary (b) for the performance of a contract, (c) for compliance with a legal obligation, (d) to protect the vital interests of the data subject or another natural person, (e) for the performance of a task carried out in the public interest; or (f) for the purposes of the legitimate interests pursued by the controller, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child

<sup>247</sup> EDPB has excluded the performance of a contract as a legal ground for behavioural advertising, and in recent guidelines on targeting social media users, the EDPB suggests that legitimate interest should be considered a valid legal ground only for targeted on the basis of data directly provided by data subjects and not for targeting based on inferred and observed data, where consent is considered more suitable. European Data Protection Board, 2019, Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects, 8 October 2019, p. 14.

<sup>248</sup> [https://edpb.europa.eu/system/files/2023-01/facebook-18-5-5\\_final\\_decision\\_redacted\\_en.pdf](https://edpb.europa.eu/system/files/2023-01/facebook-18-5-5_final_decision_redacted_en.pdf)

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	<p>membership, genetic data, data concerning health or a natural person's sex life or sexual orientation. It does not, however, prohibit profiling or targeting based on other factors and does not apply to stakeholders other than online platforms.</p> <p>The UCPD prohibits unfair practices, including commercial practices which are defined as "misleading" (articles 6 and 7) or aggressive (Articles 8 and 9). The application of these provisions, however, requires evidence that the practice "<i>materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.</i>" In addition, for a practice to be considered "aggressive" evidence is needed that it "significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise."</p> <p>There is also an absolute prohibition on "including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them" (UCPD Annex I point 28). In addition, the revised Audiovisual Media Services (AVMS) Directive introduces rules for commercial communications marketed, sold, or arranged by video sharing platforms. These platforms are required to ensure that their advertising is recognisable as such and does not discriminate based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation.</p> <p>Once approved, the draft Artificial Intelligence (AI) Act could also restrict the use of AI systems that exploit any of the vulnerabilities of a specific group of persons due to their age, physical or mental disability, as well as prohibiting AI systems which "deploy subliminal techniques... to materially distort a person's behaviour in a manner that causes or is likely to cause that person or another person physical or psychological harm"<sup>249</sup>. This could restrict the use of AI in the context of personalised advertising, where its use would have these effects.</p> <p><b>EC UCPD Guidance</b></p> <p>The EC Guidance on the UCPD<sup>250</sup> notes that data-driven business structures are becoming predominant and that the collection and processing of personal data in this context must comply with the legal requirements under the ePrivacy Directive and GDPR. The Guidance also notes that the UCPD has a broad scope of application as it covers the totality of business-to-consumer commercial transactions, whether offline or online. It applies to online intermediaries, including social media, online marketplaces and app stores, search engines, comparison tools and various other traders operating in the digital sector. The Directive applies also to practices and products that involve the use of technologies such as algorithms, automated decision-making, and Artificial Intelligence (AI). This includes all business-to-consumer practices taken by traders towards consumers in the advertising, sales, and after-sales phases, such as the use of tracking and targeting technologies, algorithmic personalisation, dynamic optimisation, and distributed ledger technologies.</p> <p>The Guidance further notes that social media platforms increasingly feature commercial practices that may be problematic under the UCPD and EU consumer law more broadly, such as problematic algorithmic practices, manipulative targeted advertising or practices to capture the consumer's attention to continue using the service.<sup>251</sup></p> <p>The Guidance notes that the UCPD covers advertising including the agreement to the processing and use of personal data for delivering personalised content and that the principle-based provisions and prohibitions in the UCPD can be used to address unfair data-driven business-to-consumer commercial practices in addition to other instruments in the EU legal framework, such as the ePrivacy Directive, the GDPR or sector-specific legislation applicable to online platforms.</p> <p>However, it notes that there may be a distinction between highly persuasive advertising that [implicitly] uses legally permitted data gathering analysis for personalisation purposes and commercial practices that are <b>opaque and conducted without the</b></p>

<sup>249</sup> Article 5(1) (a) and (b) draft AI Act <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206>

<sup>250</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021XC1229%2805%29&qid=1640961745514>

<sup>251</sup> Paragraph 4.2.5



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	<p><b>knowledge of the consumer that may be viewed as manipulative, and thus unfair under consumer law, as well as breaching transparency obligations</b> under the GDPR.<sup>252</sup></p> <p>The Guidance notes that, to be considered in breach of the UCPD, it remains necessary to demonstrate that the practice materially distorts or is likely to distort the economic behaviour of an average or vulnerable customer<sup>253</sup>. However, they also suggest that such practices may have a more significant effect on vulnerable consumers and therefore the use of information about the vulnerabilities of specific consumers or a group of consumers for commercial purposes is likely to influence the consumers' transactional decision. "Depending on the circumstances of the case, such practices could amount to a form of manipulation in which the trader exercises 'undue influence' over the consumer, resulting in an aggressive commercial practice prohibited under Articles 8 and 9 of the UCPD." Furthermore, the Guidance note that point 28 of Annex 1 prohibits direct exhortations targeting children. The Guidance provides the example of a trader that targets personalised commercial communications at a teenager based on their knowledge of this consumers' purchase history of games of chance and random content or which tailors advertisements to feature emotion-based messages based on information they have about the vulnerabilities of a teenager.</p> <p><b>Developments regarding the regulation of behavioural advertising outside the EU</b></p> <p>In January 2022, three US lawmakers tabled the "Banning Surveillance Advertising Act".<sup>254</sup> As of April 2024, this legislation would prohibit advertisers from using personal data other than location targeting in the US. However, it is viewed as unlikely that this bill will be adopted.<sup>255</sup></p>
<p><b>Assessment of stakeholder feedback</b></p>	<p>Interviews including questions regarding behavioural advertising were conducted with consumer organisations (BEUC and the Norwegian Consumer Council), representatives from large online platforms, a trade body representing a variety of stakeholders engaged in online advertising (Interactive Advertising Bureau (IAB) Europe)<sup>256</sup> and two academics: Dr Joanne Strycharz, assistant professor of persuasive communication at the Amsterdam School of Communication Research, University of Amsterdam and Dr Johann Laux, Postdoctoral Fellow at the Oxford Internet Institute, University of Oxford.</p> <p><u>Overview</u></p> <p>There are differences of view between the different stakeholder groups. While large platforms and advertisers generally consider that the existing data protection legislation and DSA should be sufficient to protect consumer interests and that any issues can be addressed through enforcement, consumer groups argue that consumers are not able to give meaningful consent to the use of their data for behavioural advertising and that transparency measures are largely ineffectual and contribute to increasing information overload. Consumer groups argue that certain practices relating to behavioural advertising should be prohibited, for example by adding a list of restricted practices as an Annex to the UCPD. The academics interviewed for the study were also of the view that the vulnerabilities of otherwise "average" consumers could be exploited through digital targeting practices and that it is not realistic to rely on consumers to be able to make informed choices regarding behavioural advertising. Their proposition was to establish monitoring mechanisms that could help to identify practices that exploit consumer vulnerabilities and take enforcement action against such practices under the UCPD, as a complement to measures such as education and "one-time" consent mechanisms that could help consumers to make and exercise informed consent in the context of the GDPR.</p>

<sup>252</sup> Paragraph 4.2.7

<sup>253</sup> Idem. An average consumer is one who is reasonably well-informed and reasonably observant and circumspect, but there are also provisions which seek to prevent exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. This could include children.

<sup>254</sup> <https://eshoo.house.gov/media/press-releases/eshoo-schakowsky-booker-introduce-bill-ban-surveillance-advertising>; H.R. 5534, the Banning Surveillance Advertising Act of 2023 (Rep. Eshoo)

<sup>255</sup> <https://www.adexchanger.com/podcast/the-big-story/the-big-story-google-gaslighting-reprise/>

<sup>256</sup> The Interactive Advertising Bureau (IAB) is a trade association representing national associations that are engaged in advertising including advertisers, platforms, publishers, and retailers.

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	<p><b>Consumer organisations</b></p> <p>BEUC considers that personalisation in general presents problems from a consumer perspective because there is a lack of understanding about how data is used for personalisation. They note that personalisation systems are complex and that transparency requirements cannot solve the problem because consumers do not read or understand disclosures. Another concern is that personalisation can identify and exploit “situational” vulnerabilities in all consumers. BEUC suggests that the UCPD blacklist could be extended to prohibit such “psychographic” profiling.</p> <p>The Norwegian consumer council (NCC) notes that when data is shared with third parties, it is not possible to conduct behavioural advertising in compliance with the GDPR because consumers cannot give informed consent when they do not know how data may be shared with third parties or used across different applications controlled by the same party. NCC is not convinced that transparency solutions would be effective for consumers. They note that even if advertisers found a mechanism to target advertisements that is compliant with the GDPR, this would not address the harms caused, which they claim include aggressive practices and manipulation, disinformation and security issues with certain players. According to the NCC, behavioural advertising should be prohibited because they consider that it is a harmful business model. They suggest strengthening the Annex to the UCPD to list the most common practices in the digital area that are by default not legal.</p> <p><b>Industry representatives engaged in behavioural advertising</b></p> <p>The IAB considers that advertising is not possible without the use of personal data. They note for example that personal data is needed to ensure that consumers are not shown the same ad repeatedly (a practice known as “frequency capping”). They note that if a consumer is informed, then they can make choices, which should be respected. In practice, many consumers make the choice to receive content in exchange for advertising. They consider that personalised advertising is possible in compliance with the GDPR. The IAB launched together with industry a “Transparency and Compliance Framework” (TCF), which seeks to provide a minimum best practice standard to help websites comply with the GDPR.<sup>257</sup> It contains basic elements of information that must be communicated to the user and standardised data processing purposes. However, it is not prescriptive with respect to user interface interaction. The IAB estimates that there are between 0.5 and 1 million websites in Europe that have implemented TCF. The IAB notes that the industry is also working on a standard for DSA information disclosures. The IAB is focusing on support for smaller platforms, which are required to meet the transparency conditions of the DSA by Q1 2024. The IAB believes that the GDPR and ePrivacy Directive already provide all the rules needed regarding profiling. The major issue has been the enforcement of the GDPR in the digital sector. The IAB considers that the decentralised approach, relying on national Data Protection Authorities (DPA) and their resources and knowledge in the digital area, did not work and that this failure of enforcement is the reason why other proposals (DSA, AI Directive) have included provisions and taken the opportunity to discuss profiling again. They consider that the proposed centralised enforcement by the Commission as seen in the DMA/DSA is a reaction to this as well. The IAB also cautions that actions such as prohibiting third-party data sharing in the context of behavioural advertising could be damaging for traditional or smaller publishers, as ad spend would then flow to the large platforms and big retailers that hold most data.</p> <p>A large online platform notes that personalisation is at the core of the data-driven Internet and has provided value to SMEs that was previously only available to larger firms. They highlight that they have provided tools for users so they understand how their data is used and enable them to control their data. They rely on a variety of legal bases under the GDPR to support personalisation in advertising, and provide information in their privacy policy about how data is shared between different parts of the organisation. They argue that certain data such as age may be shared to ensure that inappropriate content is not shown. They consider that EU consumer protection legislation is already robust and has recently been updated with the Modernisation</p>

<sup>257</sup> The legality of the TCF has been challenged in the Belgian courts and was referred to the CJEU for a preliminary ruling ([CJEU - C-604/22 IAB Europe 7 Mar 2024 \(dpcuria.eu\)](https://eur-lex.europa.eu/eli/jurispr/2024/31/oj)). As of March 2024, the CJEU ruling was handed down, offering clarity over what constitutes concepts of joint controllership and personal data. The Belgian Market Court has therefore resumed its examination of IAB Europe’s arguments in a process which could take several more months to conclude. [CJEU Ruling Clarifies Limited Role of IAB Europe in TCF - IAB Europe](https://www.iab-europe.com/news/2024/03/20/cjeu-ruling-clarifies-limited-role-of-iab-europe-in-tcf/)

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	<p>Directive. In addition, the DSA and DMA have been adopted and the AI Act is under review. The logical first step is to ensure that the existing framework is implemented across the EU before implementing new measures. They note that minors are already subject to protection and the provisions of the UCPD, and associated Guidelines enable other vulnerable customers to be protected. The rules are broad, but this is intentional. They allow for a case-by-case review considering consumer habits and service specifics. More specific measures could constrict innovation.</p> <p><b>Academics</b></p> <p>Dr Johann Laux notes that the GDPR has all the required elements to regulate, but enforcement is difficult. He does consider that there is a need to reopen the UCPD, but rather to enforce it differently. Dr Laux considers that the definition of vulnerability should be widened. Whereas previously assessment of vulnerability was conducted ex-ante, now an assessment should be made ex-post to assess who is made vulnerable because the options they were shown were limited as a result of personalisation and/or heavy targeting. Dr Laux has proposed an index (Concentration-after-Personalisation Index (CAPI)) that could be used to detect practices that lead to a narrowing of the information that consumers are shown. Consumer organisations could work with technology companies to implement an index of this kind, for example through a browser extension. Dr Laux does not advocate an overall ban on behavioural advertising, but rather suggests that enforcement against misleading practices could be improved through ex post analysis.</p> <p>Dr Joanne Strycharz started her research in 2016 with a focus on how consent mechanisms and the transparency paradigm could work. However, she concluded, after several studies involving behavioural experiments, that consumers were making decisions that were not in line with what they said they intended to do. She concluded that giving consumers more information is insufficient. While training people, ideally at school, could help, this may imply neglecting older people. More generally, Dr Strycharz notes that interviews she has conducted with consumers suggest that they expect that governments would protect them and that when their rights were explained to them in the context of an experiment, 80% opted out of personalised advertising. While Dr Strycharz considers that transparency frameworks such as the TCF of the IAB can help, it was still difficult for consumers to understand what they were consenting to. Consent could become even more challenging when broader techniques are concerned such as psychometric targeting. Dr Strycharz notes that additional transparency requirements, such as those that will be applied under the DSA, assume a certain understanding on the part of consumers and are likely to lead to an information overload. Dr Strycharz suggests that the solution may lie in ex-ante education on the whole system of behavioural advertising, an easy system to opt out, which can be done once (and amended) rather than case by case and increased trust that the sector is effectively regulated and monitored. In this context, there should be more focus on enforcement to protect vulnerable customers under the UCPD. Authorities could collaborate with universities to establish monitoring mechanisms e.g., via an AI sandbox. More use could also be made of the right to data access under the GDPR to assess problematic patterns or train algorithms to assess which ads are problematic. Dr Strycharz notes that going forward, AI models will become more important and could synthetically generate advertisements. This means that attention will need to be given not only to the targeting of advertising but also to the generation of advertisements. This will increase the number of “black boxes” and make monitoring and regulating even harder, but the technology is still at an early phase, so there is an opportunity to get engaged.</p>
<p><b>Conclusions (incl. assessment of potential regulatory gaps)</b></p>	<p>As noted earlier in this case study, surveys show that <b>consumers want to have control over whether they receive personalised advertising, but lack the knowledge to make meaningful choices and the tools to exercise them.</b><sup>258</sup></p> <p><b>Existing rules require consumer consent and provide transparency when adverts are personalised, but there is widespread non-compliance, the information may not be easy to comprehend, and it may not be straightforward for consumers to exercise the choices they wish to make.</b></p>

<sup>258</sup> A key challenge is that consumers may not be presented with an equally straightforward option to reject cookies, and so-called “cookie fatigue” can lead consumers to make choices that they would not otherwise have made in the absence of misleading presentation of the options, which could be seen as a form of “dark pattern”

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	<p>Many of the problems surrounding behavioural advertising relate to the obscure way in which data is collected, shared, and processed, the lack of transparency about when and how data is being used to develop targeted advertising and challenges for consumers to exercise their rights by withholding or withdrawing consent for behavioural advertising. The need for consent and transparency regarding the use of data for personalised advertising, should in principle be addressed through the effective enforcement of, the GDPR and e-privacy Directive, while the DSA will add important provisions (for online platforms) requiring transparency at the time when advertisements are shown. However, to date there has been widespread non-compliance.</p> <p>As a baseline, <b>more should be done by the industry to comply with the law and by authorities to enforce the existing rules.</b></p> <p>This could be supported by initiatives by large platforms and organisations to provide standards on how to communicate to consumers about how their data is being used and the options they have to control this. The provision of privacy training in schools could also help consumers to make use of available tools. The ability for consumers to establish one-time (amendable) settings for consent, which is proposed in the ePrivacy Regulation, could increase consumer engagement by avoiding information overload. Better coordination among DPAs to identify and pursue “test cases” for enforcement of the GDPR could also help.</p> <p>Going forwards, <b>consideration should be given to providing consumers with a clear option that does not involve personalisation (including in advertising).</b> This is already required for core services of “gatekeeper” platforms in the context of the DMA.<sup>259</sup> This option could be generalised to other services which host advertising and potentially integrated into the one-time consent settings envisaged in the ePrivacy Regulation. This solution was supported by many respondents to the Commission’s Public Consultation on digital fairness of EU consumer law, where a majority agreed with the statement that having the explicit option to receive non-personalised commercial offers including advertising could be beneficial in allowing consumers greater choice.<sup>260</sup> Surveys and experience e.g. with the option “ask app not to track” in Apple devices indicate that such an option could be chosen by a majority of end-users, which suggests that it should be welfare-enhancing from a consumer perspective, and serve to ensure that consumers can in practice exercise freedom of choice regarding the use of their data. However, as some studies suggest that personalised advertising can enhance revenues relative to non-personalised versions, an impact assessment should be conducted to evaluate the potential implications for companies relying on advertising and participants in the advertising ecosystem other than designated gatekeepers, and alternative solutions that they could pursue to maintain revenues.</p> <p>As transparency on parameters should still be provided for those that have opted to receive personalised ads, consideration should also be given to extending the transparency measures currently included in the DSA so that these apply to others beyond the online platforms which are addressed in the legislation.</p> <p><b>The UCPD provides important safeguards which effectively prohibit behavioural advertising in cases where it involves exploitation of vulnerabilities.</b> Interpretation of this case’s applicability could be further elaborated.</p> <p>Consumer groups and academics have raised concerns that relying on consumers to defend their interests with the aid of transparency may be insufficient when the mechanisms used to target advertising are so complex that they cannot be readily explained or understood by the average consumer. These information asymmetries are likely to be compounded when AI technology matures and can be used not only to assist in the targeting of advertising, but in designing advertising to exploit consumers’ vulnerabilities. There thus seems to be a valuable role for the UCPD – over and beyond other measures – to address practices in behavioural advertising that exploit consumers’ vulnerabilities. The potential for targeting to exploit vulnerabilities of</p>

<sup>259</sup> The DMA requires that gatekeepers should enable end users to freely choose to opt-in to data processing (personalisation, profiling) and sign-in practices (to multiple services of gatekeeper) by offering a less personalised but equivalent alternative, and without making the use of the core platform service or certain functionalities thereof conditional upon the end user’s consent. The end user should be informed at the time of giving consent. The alternative options not based on profiling should be directly accessible from the online interface where the recommendations are presented.

<sup>260</sup> Although the consultation results are not representative, the responses point in the same direction as those from representative consumer surveys

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	<p>otherwise “average” consumers is usefully reflected in the updated UCPD Guidance that states that “The use of information about the vulnerabilities of <i>specific consumers</i> or a group of consumers for commercial purposes is likely to have an effect on the consumers’ transactional decision.”</p> <p><b>Consumer protection authorities should implement measures to proactively detect exploitative conduct</b></p> <p>In line with recent academic research on this point, it may be helpful for consumer protection authorities to engage with consumer organisations and researchers to develop a system to monitor advertising practices and the associated output and identify cases that may exploit consumer vulnerabilities, so that enforcement action can be taken and precedents set by the competent authorities. The Concentration-after-Personalisation Index (CAPI) provides one example of initiatives in this area.</p> <p>Although there have been some requests from consumer representation groups to prohibit behavioural advertising altogether, this would seem premature, in view of the fact that existing rules regarding informed consent under the GDPR have not yet been fully enforced, and additional rules (e.g. under the DSA) are yet to come into effect. Further efforts should be made to enforce existing rules and implement measures which improve the ability of consumers to exercise their choice not to receive personalised material (e.g. in relation to the option to receive non personalised advertising) before considering a prohibition on the practice entirely.</p> <p>However, <b>consideration could be given to whether further examples of exploitative practices could be added to the UCPD blacklist or elaborated in Guidance.</b> The concept of targeting advertising based on psychological analysis (psychographic targeting) is one area which consumer groups have suggested further action may be needed, although it may be challenging to interpret this concept. Prohibitions of advertising targeted at children are addressed to some extent in the DSA concerning online platforms, but could be further reinforced concerning other traders.</p> <p><b>Simplification could aid implementation and enforcement</b></p> <p>The rules applying to behavioural advertising are complex and stem from different pieces of horizontal and sectoral legislation. It is notable that in some cases the scope of the obligations vary (e.g. DSA provisions applying only to online platforms), and different rules have been set for personalised advertising compared with other forms of personalisation e.g. in relation to the MD/CRD measures on personalised pricing. It could be helpful to harmonise measures or potentially rationalise certain measures in a single instrument. As trading increasingly moves online, including provisions in horizontal data and consumer protection legislation rather than in platform specific regulation could make sense.</p>
<p><b>Supporting information</b></p>	<p><u><a href="#">Bibliography</a></u></p> <p>EC Study on the impact of recent developments in ad tech and their impact on privacy, publishers and advertisers (2023) <a href="https://op.europa.eu/en/publication-detail/-/publication/8b950a43-a141-11ed-b508-01aa75ed71a1/language-en">https://op.europa.eu/en/publication-detail/-/publication/8b950a43-a141-11ed-b508-01aa75ed71a1/language-en</a>.</p> <p>WIK-Consult, VVA et al (2021) for the EP: Online advertising: the impact of targeted advertising on advertisers, market access and consumer choice. <a href="https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2021)662913">https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2021)662913</a></p> <p>IAB Europe AdEx Benchmark 2020 Report” (annual report of market for digital advertising in Europe, July 2021), <a href="https://iabeuropa.eu/wp-content/uploads/2021/07/2020-Adex-Full-Report-1st-July-2020.pptx">https://iabeuropa.eu/wp-content/uploads/2021/07/2020-Adex-Full-Report-1st-July-2020.pptx</a>.</p> <p>Marotta V, Abhishek V and Acquisti A, ‘Online Tracking and Publishers’ Revenues: An Empirical Analysis’ (2019) <a href="https://weis2019.econinfosec.org/wp-content/uploads/sites/6/2019/05/WEIS_2019_paper_38.pdf">https://weis2019.econinfosec.org/wp-content/uploads/sites/6/2019/05/WEIS_2019_paper_38.pdf</a></p> <p>Deloitte LLP, “Dynamic Markets: Unlocking Small Business Innovation And Growth Through The Rise Of The Personalized Economy” (study commissioned by Facebook, May 2021), 16, <a href="https://facebook.com/business/f/154745099959954">https://facebook.com/business/f/154745099959954</a></p> <p>Paul Alexander, “The Economic Value of Behavioral Targeting in Digital Advertising” (IHS Markit research paper, 2017), 3, <a href="https://datadrivenadvertising.eu/wp-content/uploads/2017/09/BehaviouralTargeting_FINAL.pdf">https://datadrivenadvertising.eu/wp-content/uploads/2017/09/BehaviouralTargeting_FINAL.pdf</a></p>

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	<p>Integrated Ad Science (2020) Importance of Contextual. Retrieved from: <a href="https://integralads.com/uk/insider/power-of-contextual-ads/">https://integralads.com/uk/insider/power-of-contextual-ads/</a></p> <p>Michael Veale, and Frederik Zuiderveen Borgesius (2021) Adtech and Real-Time Bidding under European Data Protection Law</p> <p>Your online voices”, 2022, a conversation with consumers in France, Germany, Belgium, and Latvia available at: <a href="https://edaa.eu/your-online-voices-your-voice-your-choice/">https://edaa.eu/your-online-voices-your-voice-your-choice/</a></p> <p>European Advertising Consumer Research Report 2021 Consumer Awareness &amp; Impact of the European Self-Regulatory Programme for OBA for the European interactive digital advertising alliance</p> <p>McCann, Stronge, Jones (2021): The future of online advertising (2021) sponsored by the Greens/EFA <a href="https://www.greens-efa.eu/en/article/study/the-future-of-online-advertising">https://www.greens-efa.eu/en/article/study/the-future-of-online-advertising</a></p> <p>Norwegian consumer council (2020) Out of control : How consumers are exploited by the online advertising industry, <a href="https://fil.forbrukerradet.no/wp-content/uploads/2020/01/2020-01-14-out-of-control-final-version.pdf">https://fil.forbrukerradet.no/wp-content/uploads/2020/01/2020-01-14-out-of-control-final-version.pdf</a></p> <p>Steven Englehardt and Arvind Narayanan Online Tracking: A 1-million-site Measurement and Analysis”, <a href="http://randomwalker.info/publications/OpenWPM_1_million_site_tracking_measurement.pdf">http://randomwalker.info/publications/OpenWPM_1_million_site_tracking_measurement.pdf</a></p> <p>Swedish Consumer Agency (2023) People in debt and young people especially vulnerable to data-driven marketing <a href="https://www.konsumentverket.se/aktuellt/nyheter-och-pressmeddelanden/nyheter/2023/skuldsatta-och-unga-sarskilt-utsatta-for-datadriven-marknadsforing/">https://www.konsumentverket.se/aktuellt/nyheter-och-pressmeddelanden/nyheter/2023/skuldsatta-och-unga-sarskilt-utsatta-for-datadriven-marknadsforing/</a></p> <p>Joanna Strycharz, Bram Duivenvoorde (2021) The exploitation of vulnerability through personalised marketing communication: are consumers protected? <a href="https://policyreview.info/articles/analysis/exploitation-vulnerability-through-personalised-marketing-communication-are">https://policyreview.info/articles/analysis/exploitation-vulnerability-through-personalised-marketing-communication-are</a></p> <p>GfK (2018) Behavioural study on advertising and marketing practices in online social media for the EC DG JUST <a href="https://commission.europa.eu/publications/behavioural-study-advertising-and-marketing-practices-social-media_en">https://commission.europa.eu/publications/behavioural-study-advertising-and-marketing-practices-social-media_en</a></p>

## 5 Case study – Personalised pricing and offers

Case study headings	Description of content under heading
<p><b>Introduction and case study objectives</b></p>	<p>Personal data can be used for detailed consumer profiling, which gives insights into socio-demographic characteristics (age, gender, financial situation) as well as personal or psychological characteristics (interests, preferences, psychological profile, mood).<sup>261</sup> Detailed consumer profiling based on the collection of personal data enables traders to tailor not only advertisements but also offers and pricing to identified consumer groups and even individual consumers.</p> <p>This case study focuses on online personalised offers including pricing in business-to-consumer (B2C) settings with a focus on its potential use in e-commerce, online travel and dating services. The case study covers the following aspects:</p> <ul style="list-style-type: none"> <li>• Describe the different ways in which offers including prices can be personalised and how prevalent these practices are.</li> <li>• Describe the positive and negative aspects of personalisation of prices and promotions online and how this can impact consumers as well as other actors in the value chain.</li> <li>• Analyse how the current EU consumer legislation addresses the issues in these digital areas.</li> <li>• Present stakeholders’ and academics’ point of view on these issues.</li> <li>• Explore the extent to which individual Member States have already, or are looking to regulate the problem</li> <li>• Outline possible solutions.</li> </ul>
<p><b>Context and review of market trends and developments</b></p>	<p><u>What do we mean by personalisation?</u></p> <p>Personalisation can involve the adaptation of ranking, the presentation of offers/promotions, pricing or the adaptation of content or appearance of a website, with a view to appealing to different customer groups or specific customers.</p> <p>Different “levels” of personalisation (or “discrimination”) are possible. For example, third degree price discrimination involves setting different prices for different groups of consumers which are partitioned based on verifiable demographic characteristics such as age (e.g. setting lower prices for seniors, who are assumed to have lower ability to pay). Second-degree price discrimination does not rely on information about consumers but enables consumers to “self-select” by offering versions of the same product at different prices. First-degree price discrimination refers to price discrimination in which each consumer is charged according to their willingness to pay. Although previously considered unachievable at a large scale, the increased depth of data available to major platforms and merchants and improvements in algorithms, alongside the potential to adapt and display personalised prices in real-time, could help merchants to come closer to realising this goal.<sup>262</sup></p> <p>In this case study, we focus on personalisation or discrimination which relies on personal data and therefore approaches “first-degree” discrimination. Personalised pricing based can be distinguished from dynamic pricing (in time) which is often applied in the travel online industry (flights and taxis) based on time of the year/day and/or when demand is high but does not rely on data relating to the individual.</p> <p><u>In which sectors is personalisation relevant?</u></p> <p>Personalisation practices could be applied to nearly all sectors, but are particularly widely used in the e-commerce, travel and online dating industries. In addition,</p>

<sup>261</sup> Ruth E. Appel, Sandra C. Matz, Chapter 6 - Psychological targeting in the age of Big Data, Editor(s): Dustin Wood, Stephen J. Read, P.D. Harms, Andrew Slaughter, Measuring and Modeling Persons and Situations, Academic Press, 2021; EC (2021): EC Guidance note on application of the UCPD and other consumer protection regulation.

<sup>262</sup> OECD (2018): The regulation of personalised pricing in the digital era - Note by Marc Bourreau and Alexandre de Streef, DAF/COMP/WD(2018)150, 21 November 2018. See <https://ssrn.com/abstract=3312158>.

Case study headings	Description of content under heading
	<p>price personalisation based on individual risk assessments has traditionally been used in sectors such as insurance or financial services.</p> <p>The European E-Commerce sector reached €718 bn in 2021, an increase of 13% from 2020. This acceleration was significantly influenced by the Covid-19 pandemic, during which e-commerce and retail played an essential role for both the economy and society. Growth rates are slightly stabilising, with an <b>expected growth rate of 11% and a turnover of €797bn for 2022</b>.<sup>263</sup> According to interviews with trade associations of retail and wholesale organisations, personalised pricing is used by both large and smaller e-commerce players.</p> <p>The travel and tourism sector in Europe was estimated to be in 2022 around €238 bn<sup>264</sup> but is expected to jump to 281 in 2023 (+18%) as post Covid effect. Over the long term between 2017 and 2027, the CAGR<sup>265</sup> is however much lower (1,9%). Worldwide, in 2022, <b>68% of the total travel industry (€735 bn) was generated online</b>. The share of online bookings has grown steadily with 5,7% annually between 2017 and 2027.<sup>266</sup></p> <p>The online dating segment consists of partner mediation, singles markets, and casual dating apps and/or websites. Compared to online travel, this segment is rather small; worldwide it is estimated to be around <b>€6.4 bn for 2024 but with a significant number of online users (up to 278 million)</b> and personalisation of offers (partners) by default.<sup>267</sup> Active companies like Match Group with Tinder are growing steadily worldwide (7% in 2022) and especially online singles markets are expected to grow strongly.</p> <p><u>How widespread are personalised offers?</u></p> <p>There is limited data on the prevalence of online personalised offers and pricing as this is not monitored or reported by the industry<sup>268</sup>. A 2022 study for the European Parliament on personalised pricing<sup>269</sup>, noted that the occurrence of 'first degree' personalisation (based on personal characteristics of individual consumers) "...in practice is contested." However, it observed that "While several studies failed to identify price personalisation in online offers, other studies, and press reports.. , show that this type of price personalisation has been occurring in some instances."</p> <p>One proven example is the case of the online platform Wish, which was found by the Dutch competition and consumer authority ACM to have engaged in amending prices based on consumers' purchase behaviour and location, among other factors. According to ACM, Wish had failed to disclose this practice sufficiently<sup>270</sup>. Wish discontinued these practices in May 2022 following the case.</p> <p>Other examples have been identified through mystery shopping exercises.</p> <ul style="list-style-type: none"> <li>• A 2018 study for the EC<sup>271</sup> found that 61% of e-commerce websites visited by mystery shoppers were personalising the ranking when searching a product online. This was especially the case for 92% of airline ticket websites and 76% for hotel room websites. The same study did not find evidence of consistent personalised pricing across 8 MS and</li> </ul>

<sup>263</sup> Lone, S., & Weltevreden, J.W.J. (2022). 2022 European E-commerce Report. Amsterdam/Brussels: Amsterdam University of Applied Sciences & Ecommerce Europe

<sup>264</sup> Original amounts were in USD. At this time, the exchange rate USD to EUR was almost equal.

<sup>265</sup> Compounded Annual Growth Rate

<sup>266</sup> Matheisl C., 2022. Statista, INDUSTRIES & MARKETS, Travel & Tourism - Market Data Analysis & Forecast

<sup>267</sup> Statista (2020) – digital market outlook report. See Statista. (29. Mai, 2020). Prognose zur Anzahl der Online-Nutzer für Dating Services weltweit für die Jahre 2017 bis 2024 (in Millionen) [Graph]. In Statista. Zugriff am 14. Februar 2023, von Prognosed users per segment for 2024: single markets: 278 mln, partner mediation: 114 mln and casual dating 70 mln. User overlap between different segment unknown.

<sup>268</sup> OECD (2018): The regulation of personalised pricing in the digital era - Note by Marc Bourreau and Alexandre de Streeel ,DAF/COMP/WD(2018)150, 21 November 2018. See <https://ssrn.com/abstract=3312158>.

<sup>269</sup> Rott, P., Strycharz, J., and Alleweldt, F., 2022, Personalised Pricing, Publication for the Committee on Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg. See: <http://www.europarl.europa.eu/supporting-analyses>

<sup>270</sup> <https://www.acm.nl/en/publications/following-acm-actions-wish-bans-fake-discounts-and-blocks-personalized-pricing#:~:text=In%20addition%2C%20Wish%20has%20blocked.and%20with%20the%20European%20Commission.>

<sup>271</sup> EC (2018): Consumer market study on online market segmentation through personalised pricing/offers in the European Union, 19 July 2018. See [https://commission.europa.eu/publications/consumer-market-study-online-market-segmentation-through-personalised-pricingoffers-european-union\\_en](https://commission.europa.eu/publications/consumer-market-study-online-market-segmentation-through-personalised-pricingoffers-european-union_en)



Case study headings	Description of content under heading
	<p>4 markets. Price differences for the same product were found in only 6% of situations and the differences were on average less than 1.6%. The online dating app Tinder charged older customers more in 2015 and mystery shopping showed that this was still the case in 2020.<sup>272</sup> The difference was more than double for Dutch consumers aged 30-49 compared with younger subscribers – the largest difference amongst all the countries studied.<sup>273</sup></p> <ul style="list-style-type: none"> <li>The study also found price differences for Dutch tinder users based on gender, sexuality, and area of residence (with subscribers from rural areas charged more than those living in metropolitan areas). Another mystery shopping exercise in 2021 across 6 countries worldwide conducted for Consumers International and Mozilla found also that there was strong evidence that dating app Tinder uses personal pricing based on age and other parameters, leading to a wide range of prices quoted.<sup>274</sup></li> <li>In a 2019 study by Verbraucherzentrale Brandenburg of German online retailers, differences in price were found on Amazon.de and Amazon Marketplace depending on whether the user connected from an Android or Apple device, with variations as high as 14%.<sup>275</sup> A 2019 market study by Arbeiterkammer (AK) also found device-dependent price differentiation on Booking.com and Opodo.com/at.<sup>276</sup></li> </ul> <p>In the sweeps conducted for this study, personalised pricing was identified in 6% of the transactions reviewed (12 instances overall), and in the majority of cases apparent price personalisation seemed to result in cheaper prices than where prices were presented without any access to personal data.</p> <p>Although evidence suggests that the personalisation of offers and pricing is limited today, it could become more widespread as ‘off the shelf’ technology to automate and personalise offers using techniques such as AI is now available for smaller online traders and platforms. One example is Monetate, which claims that it supported Reebok in using machine learning to (i) predict consumer intent and drive personalisation at scale; (ii) create a one-to-one journey that is relevant and consistent; and (iii) use explicit and implicit consumer data effectively from various sources<sup>277</sup>. Reebok was said to have used Monetate’s personalisation platform to deliver three different customer experiences based on personalising key elements of their website. These included personalised product pages, and a homepage tailored for returning visitors. A number of other cases are also listed.<sup>278</sup></p> <p><u>Why do traders engage in personalisation?</u></p> <p>Traders claim that personalisation has the potential to increase the effectiveness of their offerings, revenue, margin and to strengthen and reward customer loyalty. As illustration, we quote several examples from consulting firms working in this area:</p> <ul style="list-style-type: none"> <li>In a 2021 article by Boston Consulting Group (BCG)<sup>279</sup>, it was estimated that based on their experience from 100 clients across industries, for retailers the use of personalised offers is at least twice as effective than average mass promotions (offline through conventional sales channels). In 2021, US vendors and retailers spent about 5% of their marketing on personalised offers. BCG advises to increase this to at least 25% overall and for certain customer(group)s even to 50%.</li> </ul>

<sup>272</sup> CHOICE, 2020, *Tinder charges older people more*. Available at: <https://www.choice.com.au/consumers-and-data/data-collection-and-use/how-your-data-is-used/articles/tinder-plus-costs-more-if-youre-older>.

<sup>273</sup> The Netherlands was the only EU country included in the study.

<sup>274</sup> Consumers International and Mozilla (2021). Reviewed countries: New Zealand, the USA, the Netherlands, India, Brazil and the Republic of Korea

<sup>275</sup> <https://www.verbraucherzentrale.de/sites/default/files/2019-09/marktwaechter-untersuchung-individualisierte-preisdifferenzierung.pdf>

<sup>276</sup> See BEUC (2023) Each consumer a separate market: BEUC position paper on personalised pricing

<sup>277</sup> [https://monetate.com/wp-content/uploads/2023/01/Monetate-Reebok-Summary-Case-Study\\_FINAL.pdf](https://monetate.com/wp-content/uploads/2023/01/Monetate-Reebok-Summary-Case-Study_FINAL.pdf)

<sup>278</sup> [https://monetate.com/resource-center/?resource\\_type=31](https://monetate.com/resource-center/?resource_type=31)

<sup>279</sup> BCG (2021): Personalized Offers And The 70 Billion Dollar Prize, by Mark Abraham, Javier Anta Callersten, Sebastian Bak, and Roelant Kalthof, Boston Consulting Group, 14 September 2021. See <https://www.bcg.com/publications/2021/personalized-offers-have-a-potential-70-billion-dollar-growth-opportunity>

Case study headings	Description of content under heading
	<ul style="list-style-type: none"> <li>• BCG also refers to the case of Starbucks in the US, which achieved in 2020 an 8% year-on-year growth in member spending and related store sales after scaling up personalised offers. A second example is a European grocer, which traditionally generated 30% of revenue through mass promotions but increased its margins by more than 2% by applying data analytics and personalised promotions (which is a lot in grocery retailing which is characterised by a low margin).</li> <li>• An article from McKinsey from 2021<sup>280</sup> stated that their research found that ‘companies that excel at personalisation generate 40% more revenue from those activities than average players.’ This means tailoring offers and reach out to the right individual at the right moment with the right experiences.</li> <li>• McKinsey notes from its research that ‘personalisation most often drives 10 to 15% revenue lift’ and that it drives consumer engagement and loyalty over time (78% of researched consumers said personalised content made them more likely to repurchase).</li> </ul> <p><u>Which data is used for personalised offers and pricing?</u></p> <p>Online traders can use very detailed profiles for personalised offers as consumers visit their websites and online marketplaces repeatedly and frequently over time. These profiles can be based on different data. This ranges from the personal data provided by the customer itself to the trader (e.g. subscribing to newsletters, filled in forms online) to inferred data by the trader on a consumer’s behaviour while on the website/app and/or using the service (via cookies or other tracking technologies, registering from which websites the customer came, which site pages are scrolled, in which order, what has been searched on the site/app, content used etc.). This may include information about the use of the internet or digital media more generally. This data collection is sometimes done by the trader itself or by third parties via intermediate platforms.</p> <p>Furthermore, a trader can complement its data set on its consumers by buying data from third parties or using publicly available consumer data.</p> <p><u>How might strategies for personalisation evolve?</u></p> <p>In general, the article mentioned above from McKinsey identified 3 major trends regarding personalisation:</p> <ol style="list-style-type: none"> <li>1) <b>Digitalisation of ‘offline experiences’</b>. Based on AI-tools and augmented reality, personal shoppers can virtually try products on tailored by for example consumers skin tone, facial features or emotions or certain surrounding.</li> <li>2) Sophisticated algorithms enable the interpretation of <b>new kinds of data</b> (visual, auditory) and extrapolate emotions from these (emotions based on facial expressions, or mood from voice tone).</li> <li>3) As in the offline retail world, where a shopping mall contributes to the overall shopping experience, in the online world, <b>different traders will join in a partner ecosystem</b>, allowing consumers a seamless experience fine-tuned to their needs.</li> </ol> <p>An example of an application to the travel industry could be for travel companies to analyse customers’ previous trips, overall travel behaviour and online interests and consequently produce personalised travel recommendations.</p> <p>The use of AI in general could also increase automated personalisation of the online experience. For online travel bookings, artificial intelligence (AI) technologies are already implemented to aid customers before, during, and after the booking process, via chatbots or virtual assistants (Hello Hipmunk, for example which is available on Facebook and Slack). Chatbots can provide automated customer service on a travel website or through a messaging platform, conversing with travellers and assisting with the booking. More sophisticated AI could enable virtual assistants to engage in making recommendations as well.</p>

<sup>280</sup> McKinsey (2021), ‘The value of getting personalization right—or wrong—is multiplying’, 12 November 2021, from ‘This Next in Personalization 2021 Report’. See <https://www.mckinsey.com/capabilities/growth-marketing-and-sales/our-insights/the-value-of-getting-personalization-right-or-wrong-is-multiplying>

Case study headings	Description of content under heading																											
<p><b>Topics covered</b></p> <p><b>Problematic practice – nature and magnitude.</b></p>	<p><u>Concerns related to personalisation options</u></p> <p>The legitimate use of personalised offers should lead to more relevant offers to consumers and a more tailored experience, which might be appreciated, but there are also concerns about possible negative aspects which could be damaging to the consumer experience:</p> <ol style="list-style-type: none"> <li>a) <b>Data-gathering issues:</b> there are concerns about the extent of personal data collection for consumer profiles and with whom this data is shared.</li> <li>b) <b>Transparency issues:</b> Consumers may not be adequately informed that the offer/price/website is personalised or even if informed may not know how their data is used to perform that personalisation.</li> <li>c) <b>Financial and other exploitation of collected data:</b> there are concerns that detailed consumer profiling can be used to financially exploit consumers by:             <ul style="list-style-type: none"> <li>• <b>Excessive charging:</b> Traders can anticipate willingness to pay based on certain (group)profiles or even individual consumer profiles and set the highest achievable price, which could lead to consumers paying more than in a non-personalised environment.</li> <li>• <b>Exploiting other vulnerabilities:</b> Furthermore, traders can also anticipate and try to create circumstances in which consumers have a higher willingness to pay or a higher probability of making the transaction and misuse this knowledge to maximise profits.</li> </ul> </li> <li>d) <b>Increased search costs and narrowed perspective:</b> In addition to the above, if consumers are not shown the full range of alternative products and/or websites and/or opinions, it makes it harder to compare products and opinions and increases their search costs if they want to do so.</li> </ol> <p><b>Ad a) Data gathering issues</b></p> <p>Data collection can encompass not only personal data provided voluntarily but also data inferred from online behaviour and usage of content or applications. Furthermore, device-based information can be collected and combined with existing publicly available and or inferred data parameters based on sophisticated analysis and tools. An overview of the types of user data that can be volunteered, observed or inferred is shown in the following table, from the OECD.</p> <div style="text-align: center;"> <p><b>Table 1: Types of user data collected online</b></p> <table border="1"> <thead> <tr> <th>Volunteered data</th> <th>Observed data</th> <th>Inferred data</th> </tr> </thead> <tbody> <tr> <td>Name</td> <td>IP address</td> <td>Income</td> </tr> <tr> <td>Phone number</td> <td>Operating system</td> <td>Health status</td> </tr> <tr> <td>Email address</td> <td>Past purchases</td> <td>Risk profile</td> </tr> <tr> <td>Date of birth</td> <td>Website visits</td> <td>Responsiveness to ads</td> </tr> <tr> <td>Address for delivery</td> <td>Speed of click through</td> <td>Consumer loyalty</td> </tr> <tr> <td>Responses to surveys</td> <td>User's location</td> <td>Political ideology</td> </tr> <tr> <td>Professional occupation</td> <td>Search history</td> <td>Behavioural bias</td> </tr> <tr> <td>Level of education</td> <td>"Likes" in social networks</td> <td>Hobbies</td> </tr> </tbody> </table> </div> <p><small>Source: OECD, 2018, <i>Personalised Pricing in the Digital Era</i>, p. 11. Available at: <a href="https://one.oecd.org/document/DAF/COMP(2018)13/en/pdf">https://one.oecd.org/document/DAF/COMP(2018)13/en/pdf</a>.</small></p> <p>There is particular concern about third parties collecting consumer data which concerns - or could be used to infer - vulnerabilities such as addictions or debt history or reveal sensitive issues regarding sexual and political preferences etc.</p> <p>A study conducted by the Norwegian Consumer Council in 2020 found that these concerns could be well-founded. It found that the 10 most used/apps including app Grindr shared detailed user data with a large number of third parties that are involved in advertising and profiling. This data included IP address, Advertising ID, GPS location, age, and gender. Meanwhile, dating app OkCupid shared highly personal data about sexuality, drug use, political views, and more with the analytics company Braze.</p>	Volunteered data	Observed data	Inferred data	Name	IP address	Income	Phone number	Operating system	Health status	Email address	Past purchases	Risk profile	Date of birth	Website visits	Responsiveness to ads	Address for delivery	Speed of click through	Consumer loyalty	Responses to surveys	User's location	Political ideology	Professional occupation	Search history	Behavioural bias	Level of education	"Likes" in social networks	Hobbies
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Level of education	"Likes" in social networks	Hobbies																										

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	<p>The 2018 study for the EC on online market segmentation<sup>281</sup>, found that survey respondents were concerned about their personal data being used for purposes other than the ones for which it was gathered and/or not knowing with whom it might be shared (between 36% and 49% for the three practices). Although not based on a representative survey, a relatively high proportion of respondents to the public consultation (48%) claim to have experienced the misuse of their personal data to personalise a commercial offer, and around 7% cited the misuse of personal data for personalised offers as one of the most serious problems faced in the digital environment' in the last 12 months. The earlier referenced 2022 Study for the EP noted that "most experts agreed that...a key problem is the widespread collection of personal data across multiple platforms."<sup>282</sup></p> <p><b>Ad b) Transparency issues</b></p> <p>Hidden discounts for certain consumer groups can amount to non-transparent personalised pricing as well. Price differentiation with the help of discounts for example for students or the elderly is not forbidden, but should be transparent.</p> <p>The online dating app Tinder in Norway applied personalised pricing for premium subscriptions. However, it was unclear on which parameters this differentiated pricing was based. Tinder was not transparent about it, and it turned out to be an internal attractiveness score. The identified issue was the hidden price discrimination.<sup>283</sup></p> <p>The use of algorithms to determine how offers or prices are displayed can create a further lack of transparency and perception of a lack of control by consumers. A study by WIK in 2022 showed that even among 'true digital natives' in Germany there was a low level of awareness and knowledge of how algorithms work (non-existent or in best case superficial). The study concluded that does not allow consumers to make informed decisions about how to protect themselves or how they can deal with algorithmic decisions and their impact on them.<sup>284</sup></p> <p>Sweeps conducted for this study confirm that while users are typically informed that a website uses personalisation practices, there is very generic, there is rarely any specific information about how this is performed or the criteria used or option to turn off personalisation practices. In none of the cases where price differentiation was identified under the sweep was there any indication that personalised pricing was used. The terms and conditions or cookie policy section of the website did not include any indication that personalised prices were used either, beyond the general explanations on the use of cookies.</p> <p>The 2018 EC study found that respondents would be more positive about personalisation if they received more information and had more control over these practices; 60% of the respondents said they would be more positive if there was an easy option to refuse.<sup>285</sup></p> <p>However, earlier noted article from marketing adviser McKinsey in 2021 found that 72% of researched consumers said they expect companies to deliver personalised interactions, recognise them as individuals and know about their interests.</p> <p><b>Ad c) Financial and other exploitation of consumers</b></p> <p>Strategies such as price personalisation could in theory be welfare-enhancing by matching the price paid by different consumers to their willingness to pay. Discounts for certain categories of consumers such as the elderly, disabled and students are generally considered positive from a social impact perspective. Wider societal benefits could also be gained beyond this rough categorisation, if for</p>

<sup>281</sup> EC (2018): Consumer market study on online market segmentation through personalised pricing/offers in the European Union, 19 July 2018. See [https://commission.europa.eu/publications/consumer-market-study-online-market-segmentation-through-personalised-pricingoffers-european-union\\_en](https://commission.europa.eu/publications/consumer-market-study-online-market-segmentation-through-personalised-pricingoffers-european-union_en)

<sup>282</sup> Para 2.4.4, Rott, P., Strycharz, J., and Alleweldt, F., 2022, Personalised Pricing, Publication for the Committee on Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg. See: <http://www.europarl.europa.eu/supporting-analyses>

<sup>283</sup> Norwegian Consumer Authority, NCC, interview February 2023 with WIK Consult.

<sup>284</sup> WIK (2022): 'Nachvollziehbarkeit und Kontrolle algorithmischer Entscheidungen und Systeme, Serpil Taş, Lukas Wiewiorra, December 2022. See [www.wik.org](http://www.wik.org)

<sup>285</sup> EC (2018): Consumer market study on online market segmentation through personalised pricing/offers in the European Union, 19 July 2018. See [https://commission.europa.eu/publications/consumer-market-study-online-market-segmentation-through-personalised-pricingoffers-european-union\\_en](https://commission.europa.eu/publications/consumer-market-study-online-market-segmentation-through-personalised-pricingoffers-european-union_en)

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	<p>example higher prices paid by customers with greater capabilities to pay are used to subsidise the price for more disadvantaged consumers, thereby maximising the total number of consumers that can benefit from a product or service. This may even be in the interest of the trader, since a higher number of sold products may still lead to higher profits, even if the profit margins are slimmer than for others. However, where traders seek to maximise profits, additional profits reaped from customers that are charged a higher rate may not be used to support lower charges for others. Moreover, price personalisation may result in consumers who may not have greater ability to pay cross-subsidising those which are, if prices are based on individual need (characterised as a dependency situation).<sup>286</sup> Being offered the same product for a different price than that shared to another customer in similar circumstances is in any event likely to be viewed as unfair.<sup>287</sup></p> <p>Personalised offers and prices can also be associated with behavioural profiling which seeks to determine and exploit vulnerabilities. Detailed consumer (group) profiles can not only analyse the needs and preferences of a specific consumer, but with the help of sophisticated algorithms and AI can also predict certain behaviour and moods, for instance a time period during which the consumer might be more vulnerable and susceptible to buying certain products or services. This behavioural profiling would amount to manipulation, and thus considered an aggressive commercial practice prohibited under the UCPD. Targets could be those commonly considered to be vulnerable, such as children or the elderly, but also persons with certain issues like addiction or in a certain mood. One could even argue that every person might be more sensitive to certain manipulation at a given time when ‘pushing the right buttons’.</p> <p>Even without sensitive parameters, traders could use consumer profiles and sophisticated analytics to identify consumer vulnerabilities in certain situations and at that point make a personalised offer, which could for example involve a higher price. In addition, manipulative techniques could be applied as well. Using sensitive parameters such as addictions, debt situation<sup>288</sup>, gender and sexual preference open to the potential to exploit vulnerabilities.</p> <p>Based on a behavioural experiment testing consumers’ reactions to dark patterns and manipulative personalisation, the 2022 Commission study<sup>289</sup> found that personalisation has a reinforcing effect combined with dark patterns (toying with emotions) leading to a higher (+4 percentage points) preference inconsistency. All consumers could be susceptible, but the study noted that vulnerable consumers are more likely to make inconsistent choices with their preferences (51%) compared to average consumers (47%). Furthermore, sub-groups of the population may be more likely to make inconsistent choices like elderly and those with lower education when faced with personalisation and nudging. The study also identified a range of literature that highlighted the problem with personalisation practices that target consumer vulnerabilities. However, the mystery shopping exercise conducted for this study did not identify significant cases of manipulative personalisation. Moreover, the personalisation practices that were identified were mainly based on consumer’s navigation history and identified interests and that “most people were used to it and did not find it problematic”.</p> <p>Another concern is that “hyper-personalisation” could make certain individuals uninsurable, undermining the “collectivisation” of insurance systems and leading to exclusion from essential services.<sup>290</sup> In 2021, UK regulator Ofcom noted that personalisation is more likely to be exploitative if consumers are not aware that personalisation is occurring, or if it gives rise to unfair distributive effects, or harms</p>

<sup>286</sup> OECD (2021) Personalised Pricing in the Digital Era. Background Note by the Secretariat, 28 November 2018, [https://one.oecd.org/document/DAF/COMP\(2018\)13/en/pdf](https://one.oecd.org/document/DAF/COMP(2018)13/en/pdf), p. 24.

<sup>287</sup> The EP 2022 study notes that consumers tend to have a negative attitude towards price personalisation. While they accept second and third-degree personalisation, they perceive individually personalised prices as unfair. This attitude is partially driven by the lack of transparency of personalisation practices.

<sup>288</sup> Proposed AI Act classifies AI systems intended to evaluate the creditworthiness of natural persons as high-risk AI Systems (with the exception of systems put in place by small scale providers for their own use).

<sup>289</sup> Behavioural study on unfair commercial practices in the digital environment: dark patterns and manipulative personalisation, study by Open Evidence, LSE, BS and BDI Research for the EU Commission, April 2022.

<sup>290</sup> BEUC (2023) Each consumer a separate market: BEUC position paper on personalised pricing

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	<p>consumers who are vulnerable.<sup>291</sup> However, presence or nature of personalisation is difficult to monitor for relevant authorities; when a traditional complaint is filed, the authority can't reproduce with which personalised offer and/or manipulation the consumer was confronted.</p> <p><b>Ad d) Increased search costs and narrowed perspective</b></p> <p>Another challenge that personalisation may restrict consumers from being exposed to a wider range of offers and perspectives. A study commissioned by BEUC noted that personalisation can undermine the potential for consumers to use comparison engines to locate the most advantageous price.<sup>292</sup> Meanwhile, a 2021 study for the EP notes that "mystery shoppers acknowledged that personalised recommendations... could keep users in a bubble of similar content."</p>
<p><b>How far does existing EU (and any national legislation where relevant) address the problem?</b></p>	<p>Practices associated with personalisation including the gathering of data, transparency regarding personalisation and abusive practices are addressed by horizontal legislation such as the GDPR<sup>293</sup>, e-Privacy Directive, CRD<sup>294</sup> and UCPD<sup>295</sup> as updated by the Modernisation Directive (MD)<sup>296</sup> of 2019, as well as sector specific legislation applying to online platforms including the DSA and the DMA<sup>297</sup> of 2022.</p> <p><b>Data collection and processing for the purposes of personalisation</b></p> <p>Collecting and processing data for the purposes of personalisation of offers, pricing or content is in principle allowed, except for cases where such personalisation would involve discrimination on grounds such as sex, race, colour etc as provided for under Article 21 of the Charter of Fundamental Rights. However, data collection and processing for the purposes of personalisation is subject to conditions, which largely relate to the need to obtain the consumer's consent. The consent may however be obtained at a different stage in the consumer journey from the point at which they are presented with a personalised price or offer.<sup>298</sup></p> <ul style="list-style-type: none"> <li>• The e-Privacy Directive<sup>299</sup> requires the user's consent when 'cookies' or other forms of accessing and storing information on an individual's device (e.g. tablet or smartphone) are used, which creates a <b>de-facto opt-in mechanism for the use of cookies deployed for the purpose of personalisation</b>. The need for consent regarding other forms of tracking is currently not covered by the existing Directive, but might be addressed by proposed e-Privacy Regulation.<sup>300</sup> The current proposal states that it requires the prior consent of the user to collect information on the terminal equipment and to use processing and storage capabilities of terminal equipment. The proposal may also permit users to opt-in through software technical settings.<sup>301</sup></li> <li>• Furthermore, the GDPR provides that personal data cannot be collected, stored, processed and sold to advertisers unless justified (based on consumer consent, legal obligation legitimate interest of the data controller etc). The interpretative guidelines relating to the GDPR tend to emphasise the consent justification. This would normally <b>imply an "opt-in"</b> with the possibility for the consumer to withdraw such consent.</li> </ul>

<sup>291</sup> Ofcom (2022), Communications Market Report 2021, March 2022. See <https://www.ofcom.org.uk/research-and-data/multi-sector-research/cmr/cmr-2021>

<sup>292</sup> See discussion in Helberger, N. et al., 2021, *EU Consumer Protection 2.0: Structural asymmetries in digital consumer markets*. Available at: [https://www.beuc.eu/publications/beuc-x-2021-018\\_eu\\_consumer\\_protection\\_0\\_0.pdf](https://www.beuc.eu/publications/beuc-x-2021-018_eu_consumer_protection_0_0.pdf).

<sup>293</sup> General Data Protection Regulation (2016/679)

<sup>294</sup> Consumer Rights Directive (2011/83/EU)

<sup>295</sup> Unfair Commercial Practices Directive (2005/29/EC)

<sup>296</sup> Modernisation Directive (EU) 2019/2161

<sup>297</sup> Digital Markets Act (Regulation 2022/1925)

<sup>298</sup> See EP IMCO study 2022 on personalised pricing

<sup>299</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p.37).

<sup>300</sup> See Fourberg et al (2021) for the EP Online advertising: the impact of targeted advertising on advertisers, market access and consumer choice

[https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662913/IPOL\\_STU\(2021\)662913\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662913/IPOL_STU(2021)662913_EN.pdf)

<sup>301</sup> See [Proposal for an ePrivacy Regulation | Shaping Europe's digital future \(europa.eu\)](https://www.europa.eu/Proposals/e-privacy-regulation)

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	<p>The need for explicit consent in particular regarding personalised pricing (but perhaps not for other forms of personalisation) is reinforced by provisions in Article 22(1) and (2) of the GDPR which provide that data subjects have a right not to be subject to decisions based solely on automated processing, including profiling which produces legal effects or similarly significantly affects them. Consent is also required under article 9 GDPR for the processing of specific categories of data such as health-related data which always require a prior opt-in<sup>302</sup>. Consent in the context of the GDPR must be informed, which would tend to require information that data is being gathered for the purposes of personalising content, offers or prices and rule out the use of pre-ticked boxes to obtain such consent.<sup>303</sup></p> <p><b>Transparency regarding personalisation practices</b></p> <p><b>The GDPR includes certain provisions around transparency</b>, but these apply at the time when data are gathered. The CRD as updated by the MD includes an obligation to inform consumers about price personalisation on the basis of automated decision-making before the consumer is bound by a contract, but this does not provide information about how the personalisation was conducted or its consequences and does not cover all situations where personalisation may be used.</p> <ul style="list-style-type: none"> <li>• The GDPR<sup>304</sup> requires that data subjects are given relevant information on the purposes for which personal data is <b>processed</b>. It also obliges data controller to inform the data subject when <b>profiling techniques</b> are used, and a data subject can ask the data controller about the <b>segment in which they have been placed using profiling</b>.<sup>305</sup> In addition, Article 13(2)f GDPR requires data controllers to inform data subjects about the <b>existence of automated decision-making</b> (including profiling) and at least in those cases provide <b>meaningful information about the logic involved</b>, as well as the significance and envisaged consequences of such processing for the data subject. This information should be provided at the time when personal data are obtained.</li> <li>• The CRD, as amended by the Modernisation Directive includes an additional requirement (Art 4(4)(a)(ii) that “before the consumer is bound by a distance or off-premises contract, or any corresponding offer, the trader shall provide the consumer with <b>information in a clear and comprehensible manner... that the price was personalised on the basis of automated decision-making</b>”. Unlike the provisions of the GDPR, this should require information to be provided at the point when the contract is due to be entered into i.e. when a personalised price is proposed. However, it does not apply to certain categories of contracts e.g. healthcare, financial services, package travel and passenger transport, does not apply to pricing on-premise personalisation practices other than pricing, and does not cover personalisation practices other those applying to pricing. Transparency regarding non-pricing personalising is however addressed to some extent via information requirements for contracts concluded on online marketplaces, which were added via the MD. These include a requirement that, before being bound by a distance contract, customers must be informed via the online interface where the offers are presented, with <b>main parameters determining ranking of search query results and the relative importance of these as opposed to other parameters</b>.<sup>306</sup></li> </ul>

<sup>302</sup> See Fourberg et al (2021) for the EP Online advertising: the impact of targeted advertising on advertisers, market access and consumer choice

[https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662913/IPOL\\_STU\(2021\)662913\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662913/IPOL_STU(2021)662913_EN.pdf)

<sup>303</sup> See CJEU October 2019 Case C-673/17

<sup>304</sup> Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

<sup>305</sup> Articles 12,13,14

<sup>306</sup> Article 6a)

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	<ul style="list-style-type: none"> <li>The DSA includes measures to improve transparency regarding recommender systems<sup>307</sup> which could include personalised recommendations. Providers need to set out the main parameters (criteria and their relative importance) used in recommender systems, as well as any options for recipients of the service to modify or influence those parameters.</li> </ul> <p><b>Right to non-personalised services</b></p> <p><b>The DMA should result in consumers</b> having the option to receive a less personalised service. However, the relevant obligations apply only to platforms which have been designated as “gatekeepers”.</p> <ul style="list-style-type: none"> <li>The DMA requires that gatekeepers should enable end users to freely choose to opt-in to data processing (personalisation, profiling) and sign-in practices (to multiple services of gatekeeper) by offering a less personalised but equivalent alternative<sup>308</sup>, and without making the use of the core platform service or certain functionalities thereof conditional upon the end user’s consent. The end user should be informed at the time of giving consent.<sup>309</sup> The alternative options not based on profiling should be directly accessible from the online interface where the recommendations are presented.<sup>310</sup></li> </ul> <p><b>Prohibitions of personalisation practices</b></p> <p>In cases where data processing and profiling comply with the provisions of the GDPR and other relevant legislation, personalisation practices are generally permitted. However, personalisation which is not made transparent in accordance with relevant legal provisions or which can be proven to have exploited information about vulnerabilities of a specific consumer or consumer group (or which is not correctly labelled in accordance with the CRD) could be deemed unlawful under the UCPD. Price discrimination based on nationality or place of residence is also prohibited. The DSA does not prohibit personalisation practices, but seeks to support enforcement of fundamental rights (including consumer protection) by major online platforms and search providers.</p> <ul style="list-style-type: none"> <li>Personalised prices and offers could in some circumstances be viewed as aggressive practices under the UCPD (Articles 8-9). The 2021 UCPD Guidance notes that, to be considered in breach of the UCPD, it remains necessary to demonstrate that the practice materially distorts or is likely to distort the economic behaviour of an average or vulnerable customer<sup>311</sup>. However, they also suggest that the use of information about the vulnerabilities of specific consumers or a group of consumers for commercial purposes is likely to influence the consumers’ transactional decision. “Depending on the circumstances of the case, such practices could amount to a form of manipulation in which the trader exercises ‘undue influence’ over the consumer, resulting in an aggressive commercial practice prohibited under Articles 8 and 9 of the UCPD.” In addition, it could be argued that personalised pricing which is not accompanied by the information required in other instruments including the CRD constitutes a “misleading omission” and thus is in breach of Article 7 of the UCPD, while false information about the price or the manner in which the price is calculated or the existence of a specific price advantage could constitute a misleading action under Article 6 UCPD.</li> </ul>

<sup>307</sup> Article 27 DSA

<sup>308</sup> Unless a degradation of quality is a direct consequence of the gatekeeper not being able to process such personal data or signing in end users to a service (Recital 37)

<sup>309</sup> Recital 36,37, DMA

<sup>310</sup> Recital 94

<sup>311</sup> Idem. An average consumer is one who is reasonably well-informed and reasonably observant and circumspect, but there are also provisions which seek to prevent exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. This could include children.



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	<ul style="list-style-type: none"> <li>• Price discrimination for the same product is prohibited by the Services Directive 2006/123/EC if this is based on nationality and place of residence (unless justified by objective criteria, e.g. differences in transport costs for certain countries). The use of geo-localisation techniques in this context is also prohibited.<sup>312</sup></li> <li>• The GDPR (Article 9) prohibits processing of personal data which reveals racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, as well as the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation. This should mean that advertising which is personalised based on these factors is unlawful. However, an exemption from the prohibition is possible if the data subject provides explicit consent for the processing of this data for a specified purpose.</li> <li>• The DSA does not include measures which would directly prohibit personalisation practices other than personalised advertising addressed to minors.<sup>313</sup> However, it does seek to engage major platforms in enforcement by requiring providers of very large online platforms and search engines to analyse systemic risks stemming from the design or functioning of their service and its related systems, including algorithmic systems, or from the use made of their services.<sup>314</sup> Systemic risks include the dissemination of illegal content through their services and actual or foreseeable negative effects for the exercise of fundamental rights including a high level of consumer protection. In relation to recommender systems, Recital 94 also notes that very large online platforms and very large online search engines should assess on 'case-by-case basis whether they need to adjust the design of their recommender systems to 'minimise biases that lead to the discrimination of persons in vulnerable situations' especially when the information is personalised on the basis of special categories of personal data.<sup>315</sup></li> </ul>
<p><b>Assessment of stakeholder feedback</b></p>	<p><u>Overview</u></p> <p>Consumer organisations and academics interviewed consider that while presenting special offers to certain groups of consumers can be positive, individualised personalised pricing is typically viewed as unfair. Moreover, these stakeholders agreed that there are practical challenges with obtaining valid consent, that consumers are unlikely to understand complex processes involving algorithms or AI, and that transparency may lead to information overload. These interviewees suggested that all profiling based on sensitive data or in relation to minors should be ex ante prohibited.<sup>316</sup> Consumer organisations favoured a <b>widening of ex ante prohibitions</b> e.g. to include "psychographic profiling". 85% of stakeholders responding to the Commission's open public consultation also agreed that it would be beneficial to have the <b>explicit option to receive non-personalised commercial offers</b>. Regarding enforcement, consumer organisations argue that the burden of proof should be reversed as consumers may not be able to detect practices, while some academics suggested <b>greater use of monitoring tools and experimental techniques by consumer protection authorities and experts to detect aggressive practices</b> and aid in ex-post enforcement of consumer protection rules.</p> <p><b>On the other hand, while they confirm that personalised pricing</b> is used by very large e-commerce players and by traders selling on marketplaces, including some SMEs, associations representing retail and wholesale organisations in Europe argue that consumers expect customisation based on personalised preferences, and that the consumers benefit from customised pricing promotions.</p> <p>Online platforms further note that transparency obligations can impede the online user experience, in particular when using small screens or voice interfaces. In</p>

<sup>312</sup> Geo-Blocking Regulation (EU regulation 2018/302).

<sup>313</sup> Article 28 DSA

<sup>314</sup> Article 34 DSA

<sup>315</sup> As referred to in Article 9 of the Regulation (EU) 2016/679

<sup>316</sup> As noted in the previous section, certain practices are already prohibited, but prohibitions may not address all cases and personalisation can in some cases still be performed if consent is given

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	<p>general, traders and large online platforms call for the <b>existing measures to be implemented first (or according to one interview partner consolidated) before any additional measures are considered.</b> Some also highlight the need to consolidate and simplify the wide range of horizontal and vertical measures which apply to their services.</p> <p>Further details regarding the input of the interview partners are provided below:</p> <p><b>Retail and advertising sector</b></p> <p>An association, representing independent retailers, noted that individual pricing based on loyalty is relatively common but that it is less common to have differentiated pricing in retail sector based on personalisation. Trade association IAB representing the advertising ecosystem highlighted that there is no advertising without the use of personal data and that consumers expect a personalised shopping experience. It believed that there is existing regulation regarding profiling under the GDPR and ePrivacy Directive is adequate. Rather it considers that there have been problems with enforcement in the digital sector due to the decentralised approach and technical complexity of the issues.</p> <p><b>Consumer organisations</b></p> <p>BEUC noted that there is a general lack of understanding about how data is used for personalisation including pricing, and that providing greater transparency has limitations from the customer's view, as consumers generally do not read or understand disclosures, and in some cases the service does not work properly when personalisation is turned off. As regards personalised pricing specifically, BEUC noted that consumers perceive it as unfair and BEUC cannot see a way to conduct it fairly. In a July 2023 position paper,<sup>317</sup> BEUC clarified that there should be a general prohibition of pricing techniques which use personal data to adjust the price based on behavioural predictions about factors such as willingness to pay and likelihood of switching and that undesired consumers should not be offered over-inflated prices. BEUC notes that the prohibition should not include individual and group discounts which are not based on profiling as well as price differentiation techniques which are fully transparent about the data and assessments involved and limited to data and types of assessments that are strictly necessary and relevant to performing the given service, such as insurance risk assessments. BEUC also called for clarification about the applicability of Article GDPR to price personalisation, and suggests that authorities of the CPCN conduct sweep investigations to assess how traders have implemented the provisions of the Modernisation Directive.</p> <p>After conducting research in 2020, the Norwegian Consumer Council (NCC) observed that personalised offers are widespread, but that it has not seen many documented cases of price personalisation. Exceptions have been Tinder, where pricing was found to be based on an internal attractiveness score, and a travel company which charged higher prices for non-Norwegian travellers. However, it foresees that webpages may become completely personalised, tailored, so that the content functions as marketing but is camouflaged as something else. These tailored displays are likely to be heavily reliant on profiles based on intrusive data gathering. In the context of a study on behavioural advertising, the NCC noted that it found evidence that personal data is often shared with multiple parties and that data may be combined using profiling categories that are problematic from an ethical perspective and risk the exploitation of consumer vulnerabilities. Examples cited were: having a sexually-transmitted disease, gambling addiction, being victims of rape, or being recently bereaved. They consider that the system used to target communications is based on the comprehensive and systemic illegal collection and use of personal data,<sup>318</sup> and that there is no valid legal consent or legitimate interest that overrides the consumer's fundamental right to privacy. They consider that more transparency is needed in relation to how algorithms work and what criteria they use in profiling, but that this would not be helpful for consumers given the technical complexity, but rather as a tool to enable authorities to assess how profiles are created and used. Overall, NCC favours a ban on</p>

<sup>317</sup> BEUC (2023) Each consumer a separate market? - BEUC position paper on personalised pricing [https://www.beuc.eu/sites/default/files/publications/BEUC-X-2023-097\\_Price\\_personalisation.pdf](https://www.beuc.eu/sites/default/files/publications/BEUC-X-2023-097_Price_personalisation.pdf)

<sup>318</sup> See <https://www.forbrukerradet.no/out-of-control/>

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	<p>surveillance marketing and particularly in relation to children and for special categories of data.</p> <p><b>Perspective of online platforms</b></p> <p>A large online platform noted that personalisation has improved user experiences and search functionality and can also provide a safer experience e.g. to protect children.</p> <p>More generally they noted that content on certain types of online platforms like social media presents organic content which may involve for example following someone, reacting to content, sharing data. They considered that consumer law regarding personalisation and other issues covered by the consumer acquis is robust and has been recently updated, as well as being complemented by other measures such as the DMA, DSA. They consider that a logical first step is to ensure that the existing framework is implemented across the EU before implementing new measures.</p> <p>Another platform observed that they provide a clear consent path regarding data, and have engaged with data protection and consumer protection authorities and conducted experiments to assess the user friendliness of their approach regarding consent and transparency in relation to personalised content. They noted that personal data can be important to understand context e.g. current location when searching on a map or previous history when searching for a term such as “Jaguar” which could be interpreted in different ways (car or animal).</p> <p>Representatives from online platforms highlight that transparency requirements may negatively impact the user experience and that this can be even more pronounced when using devices with small screens or with speech interfaces. However, this is not adequately taken into account in legislation. Some also call for a simplification and consolidation of rules, noting that their services are covered by a multitude of horizontal and sector-specific instruments.</p> <p><b>Academics</b></p> <p>A Postdoctoral Fellow at Oxford University noted that even when consumers are perfectly informed via consent/opt-ins and there is transparency, they will not understand all aspects of how personalisation is carried out due to the complexity of data processing and the use of AI (including machine learning) technologies. He also noted that complexity may increase as machine learning creates new possibilities for price and content structure.</p> <p>As regards effects, the academic interviewed considered that some forms of personalisation might have positive effects, but that a higher degree of consumer segmentation could be exploited by merchants to increase rents. He also noted that personalisation could lead to restrictions in consumer choice because the market for data intermediaries (which are responsible for the consumer profiling) is concentrated and thus consumers were likely to see content based on that profile frequently.</p> <p>The academic saw no need to re-open the UCPD but suggested that enforcement could be improved by:</p> <ol style="list-style-type: none"> <li>a) interpreting the concept of an average consumer specifically in relation to digital markets</li> <li>b) widening the interpretation of vulnerability, noting that it can apply for all.</li> <li>c) using tools such as the Concentration-after-Personalisation Index (CAPI), to analyse the diversity of ads (or other content) seen by an average consumer, as a measure to test to degree of personalisation.</li> </ol> <p>The academic concerned did not consider that personalisation should be prohibited in general but rather than ex ante prohibitions e.g. regarding the use of certain sensitive data categories could be complemented with ex-post review which could be informed through the use of tools such as CAPI.</p> <p>Another academic interviewed from the University of Amsterdam noted that behavioural studies have shown that consent mechanisms and more transparency/information does not work as consumers do not change their behaviours. One of the reasons is that consumers do not understand the</p>

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	<p>technicalities of the legislation and expect that EU legislation and national governments will protect them from being misled or their data being exploited.</p> <p>Regarding the current framework, the academic noted that it is difficult to establish to what you are giving consent (which situation, parameters, which technique applied, how does it fit into used algorithm). This also means that while the additional DSA transparency measures were welcome in principle, showing the parameters used for behavioural advertising / or personalised offering, was likely to lead to an information overload.</p> <p>Regarding personalised pricing, the interviewee noted that although there are advantages, consumers generally perceive it as unfair and therefore don't want it. The interviewee also noted that personalised pricing could undermine equal access to basic necessities such as electricity and food.</p> <p>Based on GDPR experiences and social science research, the academic suggested that the best approach towards consumers would be to:</p> <ol style="list-style-type: none"> <li>a) train consumers to opt-out, install ad blockers etc. One experiment showed that 80% of opted out on personalised advertising when explained properly what their rights were.</li> <li>b) Include education on privacy and psychometric targeting, as well as behavioural advertising / offers in school</li> <li>c) Introduce an easy way to opt-out, perhaps through a centralised system, while maintaining the opportunity for consumers to revise these settings.</li> </ol> <p>In addition, for the relevant authorities the academic advised that:</p> <ol style="list-style-type: none"> <li>a) There should be more focus on enforcement. Hence, the relevant authorities should gather the technical knowledge and tools to be able to monitor the sector (on AI, algorithms etc), including via cooperation with universities and/or NGOs.</li> <li>b) Legal grey areas should be clarified, e.g. who are vulnerable consumers; which parameters are always considered sensitive in behavioural profiling</li> <li>c) Certain types of personalisation could be banned ex-ante.</li> </ol> <p>The academic noted that in future AI could synthetically generate advertisements or websites, thereby taking a step beyond targeting. She observed that the variety and scope of tailoring could make monitoring and regulating personalisation even harder. She suggested that law enforcement authorities should therefore use this period where AI is still evolving to gather experience and to determine how to strengthen enforcement. The academic highlighted the role that behavioural science could play in demonstrating the impact of certain practices on consumer behaviour and that this could support evidence-based law making and help in highlighting to enforcement bodies the vulnerabilities of otherwise "average" consumers</p>
<p><b>Conclusions (incl. assessment of potential regulatory gaps).</b></p>	<p>Based on a literature review, interviews with stakeholders and academics and a review of existing legislation and legislative gaps, we can draw the following preliminary conclusions:</p> <p>Informing consumers about automated decision making regarding personalised offers is important, but should be weighed against information overload and may not lead to better decision-making by consumers. Consideration should be given to providing consumers with tools that help them understand and make choices as well as identifying more streamlined mechanisms which allow consumers to exercise their choice (and later make changes).</p> <ul style="list-style-type: none"> <li>• Current regulations already provide for extensive consent obligations for collecting personal data and restrict the sharing of collected data with third parties. Furthermore, existing regulations already require transparency on personalised offers and the parameters use for profiling</li> <li>• Current rules on transparency could be improved, in particular to ensure that information that an offer, webpage or price is personalised and the parameters used is provided at the time when that offer, page or price is</li> </ul>

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	<p>presented rather than only when the data is collected or at the time of contract but with exceptions (as is currently the case); however</p> <ul style="list-style-type: none"> <li>• From interviews and behavioural experiments, it appears that transparency obligations in the GDPR have not necessarily led to better decision-making and comprehension by consumers. Therefore, it is expected that the obligation in the CRD to inform consumers when automated decision making is applied for pricing may similarly have a limited impact.</li> <li>• Consumer comprehension of how personalisation is performed may become even more difficult with the increased use of algorithms and deployment of AI.</li> <li>• Care is needed in balancing the desire for more transparency with the risk of information overload and impacts on the user experience, in particular where small screens or voice interfaces are used.</li> <li>• To improve consumers' ability to make informed choices, education programmes regarding privacy protection could be considered, in particular in schools.</li> <li>• To improve the ease with which consumers can exercise choice and reduce cookie fatigue, mechanisms should be introduced which allow consumers to highlight their default preferences regarding personalisation through device and/or browser settings.</li> <li>• It may be worth considering a wider application of the option to select a 'less personalised' alternative, which is currently available only in certain circumstances under the DMA (for gatekeeper platforms).</li> </ul> <p>Personalised prices and offers are not a problem per se, but certain practices are problematic. It may be worth considering whether these should be prohibited in general.</p> <ul style="list-style-type: none"> <li>• Certain personalisation practices such as first-degree price discrimination (achieved by inferring the consumer's willingness to pay or "dependency" on a service) are commonly viewed as unfair. Such practices would likely result in some consumers paying more for a certain product than would normally be the case. It is difficult to see how consumers would willingly consent to the use of their data in this way. It could be considered whether pricing personalisation which results in charging higher prices to certain consumers than would otherwise be the case in a scenario with non-personalised prices (with the exception of pricing for standard categories of consumer) should be prohibited. An alternative could be a requirement to show what the price would be in the absence of personalisation to provide "relational" information.</li> <li>• As informed consent may be difficult to attain, it may be worth considering tightening the conditions in which profiling based on sensitive parameters can be permitted i.e. reviewing the exceptions provided for in the GDPR.</li> <li>• It may be worth considering expanding the protections afforded to children in the DSA regarding advertising based on profiling to other personalisation practices.</li> </ul> <p>It is unlikely that consumers by themselves can act as enforcement agents for the consumer acquis and related rules. Enforcement efforts by the authorities should be stepped up.</p> <ul style="list-style-type: none"> <li>• Consumers may not know that they have been subject to personalisation practices and may not know how to exercise their rights regarding consumer or data protection. Moreover, consumers may expect that the authorities are protecting them from illegal practices.</li> <li>• Consumer protection authorities could work with NGOs and academics to develop tools to monitor and detect conduct which may be in breach of existing consumer protection rules and related sectoral regulations to</li> </ul>

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	<p>support enforcement action in this area. The Concentration-after-Personalisation Index (CAPI) provides one example in this area,</p> <ul style="list-style-type: none"> <li>The idea proposed by consumer organisations to reverse the burden of proof regarding personalisation practices could also be explored.</li> </ul> <p>Consideration should be given in future to streamlining the variety of rules e.g. regarding transparency and prohibited practices regarding profiling and personalisation to increase clarity for stakeholders and make implementation and enforcement less complex.</p> <ul style="list-style-type: none"> <li>There are a wide variety of instruments which contain provisions regarding profiling and personalisation. Most key issues are addressed, but the scope of the provisions varies with exceptions e.g. to the sectors covered (CRD) or to the types of actor addressed (DSA and DMA).</li> <li>It could be useful to conduct a mapping of the provisions by type and their scope and consider whether exceptions or limitations to the undertakings addressed are justified, or whether the principles should be generalised.</li> <li>Concepts in the UCPD could be further clarified, in particular 'situational' vulnerability and the conditions for aggressive commercial practices.</li> </ul>
<p><b>Supporting information</b></p>	<p>BCG (2021): Personalized Offers And The 70 Billion Dollar Prize, by Mark Abraham, Javier Anta Callersten, Sebastian Bak, and Roelant Kalthof, Boston Consulting Group, 14 September 2021. See <a href="https://www.bcg.com/publications/2021/personalized-offers-have-a-potential-70-billion-dollar-growth-opportunity">https://www.bcg.com/publications/2021/personalized-offers-have-a-potential-70-billion-dollar-growth-opportunity</a></p> <p>BEUC (2023) Each consumer a separate market? - BEUC position paper on personalised pricing <a href="https://www.beuc.eu/sites/default/files/publications/BEUC-X-2023-097_Price_personalisation.pdf">https://www.beuc.eu/sites/default/files/publications/BEUC-X-2023-097_Price_personalisation.pdf</a></p> <p>Consumers International and Mozilla (2021): A consumer investigation into personalised pricing. See <a href="https://www.consumersinternational.org/media/369070/personalized_pricing.pdf">https://www.consumersinternational.org/media/369070/personalized_pricing.pdf</a>.</p> <p>EC (2018): Consumer market study on online market segmentation through personalised pricing/offers in the European Union, 19 July 2018. See <a href="https://commission.europa.eu/publications/consumer-market-study-online-market-segmentation-through-personalised-pricingoffers-european-union_en">https://commission.europa.eu/publications/consumer-market-study-online-market-segmentation-through-personalised-pricingoffers-european-union_en</a></p> <p>EC (2021): EC Guidance note on application of the UCPD and other consumer protection regulation</p> <p>EC (2022b): Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ 2022 L 265/1</p> <p>EC (2022): Francisco Lupiáñez-Villanueva, Alba Boluda, Francesco Bogliacino, Giovanni Liva, Lucie, Lechardoy, Teresa Rodríguez de las Heras Ballell, April 2022. Open Evidence, LSE and BDI Research for the European Commission, Directorate-General for Justice and Consumers, 'Behavioural study on unfair commercial practices in the digital environment: dark patterns and manipulative personalisation'.</p> <p>Lone, S., &amp; Weltevreden, J.W.J. (2022). 2022 European E-commerce Report. Amsterdam/Brussels: Amsterdam University of Applied Sciences &amp; Ecommerce Europe</p> <p>Matheisl C., 2022. Statista, INDUSTRIES &amp; MARKETS, Travel &amp; Tourism - Market Data Analysis &amp; Forecast. See <a href="https://de.statista.com/statistik/studie/id/40385/dokument/reisen-tourismus/?locale=de">https://de.statista.com/statistik/studie/id/40385/dokument/reisen-tourismus/?locale=de</a></p> <p>McKinsey (2021),   Article, 'The value of getting personalization right—or wrong—is multiplying', 12 November 2021, from 'This Next in Personalization 2021 Report'. See <a href="https://www.mckinsey.com/capabilities/growth-marketing-and-">https://www.mckinsey.com/capabilities/growth-marketing-and-</a></p>

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	<p><a href="#">sales/our-insights/the-value-of-getting-personalization-right-or-wrong-is-multiplying</a></p> <p>NCC (2020): 'OUT OF CONTROL', How consumers are exploited by the online advertising industry, 14.01.2020.</p> <p>OECD (2018), The regulation of personalised pricing in the digital era - Note by Marc Bourreau and Alexandre de Stree, DAF/COMP/WD(2018)150, 21 November 2018. See <a href="https://ssrn.com/abstract=3312158">https://ssrn.com/abstract=3312158</a>.</p> <p>OECD (2021) Personalised Pricing in the Digital Era. Background Note by the Secretariat, 28 November 2018, <a href="https://one.oecd.org/document/DAF/COMP(2018)13/en/pdf">https://one.oecd.org/document/DAF/COMP(2018)13/en/pdf</a>, p. 24.</p> <p>OECD (2022): OECD DIGITAL ECONOMY PAPERS, 'ENHANCING ONLINE DISCLOSURE EFFECTIVENESS', October 2022, Paper No. 335. See <a href="https://www.oecd.org/sti/consumer/">https://www.oecd.org/sti/consumer/</a></p> <p>Ofcom (2022), Communications Market Report 2021, March 2022. See <a href="https://www.ofcom.org.uk/research-and-data/multi-sector-research/cmr/cmr-2021">https://www.ofcom.org.uk/research-and-data/multi-sector-research/cmr/cmr-2021</a></p> <p>Rott, P., Strycharz, J., and Alleweldt, F., 2022, Personalised Pricing, Publication for the Committee on Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg. See: <a href="http://www.europarl.europa.eu/supporting-analyses">http://www.europarl.europa.eu/supporting-analyses</a></p> <p>UK CMA report (2020)</p> <p>WIK (2022): 'Nachvollziehbarkeit und Kontrolle algorithmischer Entscheidungen und Systeme, Serpil Taş, Lukas Wiewiorra, December 2022. See <a href="http://www.wik.org">www.wik.org</a></p>

## 6 Case study – Addictive use of digital products

Case study headings	Description of content under heading
<p><b>Introduction and case study objectives</b></p>	<p>In this case study, we assess the extent to which current EU consumer protection legislation addresses the issue of digital addiction in answer to the following <b>research questions</b>:</p> <ul style="list-style-type: none"> <li>• RQ1: What kinds of consumer problems emerge due to the addictive use of digital products? What are the drivers of these problems (e.g., use of dark patterns like forced autoplay to induce continued use; providing incentives/rewards for more time spend using the service; ‘gamification’ of digital services, use of virtual items)?</li> <li>• RQ2: What problems do ‘loot boxes’ create?</li> <li>• RQ3: Do the Directives ensure the prevention of the potential negative effects on the social and financial situation of consumers due to addiction and prolonged use of certain digital content and services? Are there other regulations at national or EU level that sufficiently prevent or mitigate the risk from such negative effects?</li> <li>• RQ4: Are there any examples of legislation that limits either the money or time that can be spent using digital content and services and mandatory disclosures about their addictive nature?</li> <li>• RQ5: If not, to what extent is it necessary and is there scope for introducing specific rules which mitigate the potential negative effects on consumers due to addiction and prolonged use of certain digital content and services?</li> </ul> <p>For the analysis, we adapted a model for the development of non-addictive information systems<sup>319</sup> to assess the extent to which the Directives, other EU legislation and national legislation intervene in digital addiction development, and where there is scope to include specific rules in the Directives. The model is presented below, and for the purpose of this case study, we focus on three out of the four components:</p> <ul style="list-style-type: none"> <li>• <b>Situation management</b> – which addresses the deployment of addictive features.</li> <li>• <b>Access management/decision support</b> – which aims to ensure that transactional decisions are based on complete information and that problematic use is not the default.</li> <li>• <b>Gratification management</b> – which refers to mechanisms that can break the instant and limitless gratification provided through digital tools and thus curb digital addiction development.</li> </ul> <p>We did not include the component of expectation/education management, since we consider this to be a communication component falling outside of the scope of consumer protection legislation.</p>

<sup>319</sup> Klokner S. (2020) Non-addictive information systems. Information Systems Frontiers 22. Link: <https://link.springer.com/article/10.1007/s10796-020-10011-w>



Case study headings	Description of content under heading
<p><b>Context</b></p>	<p>A review by the European Parliament Research Service (EPRS) found that digital addiction is estimated to range from between 0.3% and 26.7% of the EU population, depending on how defined and varying by country. Another large-scale study with more than 5500 participants in nine EU Member States found the prevalence to range between 14.3% and 54.9%. While these estimates differ, even the lowest estimates imply that digital addiction negatively affects millions of people in Europe.</p> <p>According to US research, a small number of platforms primarily drive digital addiction, finding that US users in 2021 spent 90% of their time on social media on just five platforms: Facebook, Instagram, YouTube, Snapchat, and Twitter. Comparable data for Europe is limited, but a similar highly-concentrated usage pattern seems likely based on the market shares of the platforms within Europe. These digital platforms charge users very little or nothing for membership on the platform. Instead, their business model relies primarily on collecting data and monetising it through paid, targeted advertisements. Whilst major platforms have developed tools for users to monitor the time they spend on apps and some appear to be taking the problem of digital addiction seriously, they are nonetheless incentivised to design products in a way that maximise the time users spend on the platform.</p> <p>Moreover, the European digital single market area is the third-largest market for video games in the world. In 2021, it was worth EUR 23.2 billion. While historically, revenue in the gaming industry has been generated largely from the actual sale of video games, in the last two decades, in-game purchases have become a major source of revenue and integral to the business model of many gaming companies. Loot boxes alone generated \$15 billion worldwide in 2020, and projections suggest that 230 million people worldwide will spend real money on loot boxes by 2025. They are now prevalent across all gaming platforms and distribution channels, including both “free-to-play” and paid-for games. On Google Play and Apple’s App Store, about 60% of top mobile games contained loot boxes.</p> <p>Video games are extremely popular among children and adolescents, with 76% of those aged 6 to 15 playing video games on any device in Europe, and 36% spending money within games. On Google Play and Apple’s App Store, more than 90% of mobile games containing loot boxes were rated as suitable for children aged 12+. A study by the ISFE shows that 85% of parents supervise the in-game spending of their children, with 62% of children having a small average monthly spend (1 to 20 Euros) across all types of platforms and in-game transactions. Smaller shares of children spend intermediate to high amounts: 11% between 21 to 40 Euro, 5% between 41 to 60 Euro, and 1% between 61 to 80 Euro. However, 16% of parents did not know how much their child spends in-game in an average month.</p>

Case study headings	Description of content under heading
<p><b>Topics covered in case study</b></p>	<p><b>Digital addiction:</b> We define “digital addiction”<sup>320</sup> as a behavioural disorder that involves excessive and compulsive use of information technology (IT) despite significant negative consequences. This definition excludes all substance-related addictions, as well as addictions and disorders that are not related to the consumption or generation of information. However, it does include all addictions and disorders in which information technology potentially interacts with the addiction development process, and where it would be possible to intervene in this process via technological design. There are various sub-dependencies described as digital addiction in the literature. Among these, game addiction, social media (social network) addiction, internet addiction and mobile phone addiction are mentioned most frequently.</p> <p><b>“Attention-capture dark patterns”</b><sup>321</sup> are drivers of digital addiction, which differ from traditional dark patterns a) in the exploited methods and b) in how they influence human-technology interaction. These include recommender systems, autoplay, push-to-refresh, infinite scrolling, social investment, Non-Fungible Tokens, in-app and in-game purchases, and gamification.</p> <p><b>Loot boxes:</b> are digital lotteries in video games that – like gambling – offer <i>random</i> rewards to be used in-game. They are “mystery boxes” or “treasure chests” which contain randomised items, so players do not know what they will receive before opening them. Loot boxes vary in the way they are accessed, their cost, how the random reward is selected and in the content they return. Loot boxes or their content can sometimes be earned without paying real money, for example by achieving milestones, levelling up their character or finishing a multiplayer game. Loot boxes may also be given out through promotions outside of gameplay, such as watching certain streaming events. The items obtained from loot boxes usually exist only in a closed in-game economy, with no real monetary value outside of this economy. This means that it is usually not possible for gamers to obtain a real money return on their investment or trade loot box items between games.</p>
<p><b>Problematic practice – nature and magnitude</b></p>	<p><b>What kinds of consumer problems emerge due to the addictive use of digital products? What are the drivers of these problems (e.g., use of dark patterns like forced autoplay to induce continued use; providing incentives/rewards for more time spend using the service; ‘gamification’ of digital services, use of virtual items)?</b></p> <p>Digital addiction, or internet addiction is not currently listed in relevant collections among substance-related disorders (e.g., smoking, alcohol) and behavioural disorders (e.g., pathological gambling), and not included as a diagnosis in the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) or the International Statistical Classification of Diseases and Related Health Problems (ICD-10/ICD-11). However, in 2013, internet gaming addiction was entered into the DSM-V as the first digital addiction disorder. Other disorders triggered by digital products<sup>322</sup> are still only in the appendix of the DSM-V and under discussion, due to a lack of pathological evidence and research required to reach consensus that they should be entered into these collections.</p> <p>There are also discussions ongoing among researchers whether extensive use of digital products is an addictive tendency or merely a rapid adoption to new social norms (e.g., in the context of smartphones). Some researchers also find that since the symptoms of digital addiction have a strong overlap with tendencies toward depression and attention deficit hyperactivity disorder, digital addiction may just be a mere symptom of other disorders.<sup>323</sup></p> <p>However, research has also identified the extent to which disorders triggered by digital products share certain symptoms with other behavioural addictions (e.g., antisocial and risky use, altered value-based decision-making) and Kuss et al. (2014)<sup>324</sup> introduced an internet addiction model that summarises all symptoms used to diagnose internet addictions, namely salience, mood modification, tolerance, withdrawal, relapse and conflict – all of which resemble strongly symptoms observed in other substance and behavioural addictive disorders. Similar to substance-related addictions and behavioural disorders is also that disorders triggered by digital products do not only manifest via technology, gadgets and services, but the person’s context and personality, specific situation, resilience and coping strategies all influence the development</p>

<sup>320</sup> Vaghefi I. et al. (2016) A typology of user liability to IT addiction. Information Systems Journal, Vol. 27, Issue 2, Link: [A typology of user liability to IT addiction - Vaghefi - 2017 - Information Systems Journal - Wiley Online Library](#)

<sup>321</sup> Roffarello, A. and Russis, L. (2022) Towards understanding the dark patterns that steal out attention. CHI EA '22: Extended abstracts of the 2022 CHI conference on human factors in computing systems, Article 274.

<sup>322</sup> such as social media addiction, mobile phone addiction

<sup>323</sup> Leo K. et al. (2021) Depression and social anxiety predict internet use disorder symptoms in children and adolescents at 12-month follow-up: results from a longitudinal study. Front Psychol. Link: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8710475/>

<sup>324</sup> Kuss D. J. et al. (2014) Internet addiction: a systematic review of epidemiological research for the last decade. Curr Pharm Des. Link: <https://pubmed.ncbi.nlm.nih.gov/24001297/>

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	<p>of addiction.<sup>325</sup> As in other types of addictions, individuals become more prone to digital addiction due to reasons such as easy access, limited self-control and increased peer pressure.<sup>326</sup> In addition to these factors, exposure to technology can be considered another important antecedent.</p> <p>Choriz et al. (2012)<sup>327</sup> argue the possibility to analyse digital addiction in terms of addiction criteria (DSM-IV-R) to understand whether the abuse of the internet, mobile phones or video games meets these criteria. The criteria proposed for understanding digital addiction are as follows:</p> <ol style="list-style-type: none"> <li>1. Tolerance – the need for increased use of technology over time.</li> <li>2. Withdrawal – emotionally intense discomfort when an unusual amount of time passes or use is interrupted without using technology.</li> <li>3. Use of more technology than intended.</li> <li>4. Desire to stop using technology before doing so.</li> <li>5. Spending too much time in activities related to technologies.</li> <li>6. Stopping other activities to increase the use of the internet, mobile phone, or video games.</li> <li>7. Continuing to use the internet, mobile phones, or video games despite being conscious of the harm it caused.</li> </ol> <p>In terms of its consequences, digital addiction is similar to the consequences of other types of addictions. These include sleep problems, psychiatric problems, loneliness, anxiety, stress, and depression.<sup>328</sup> In addition, neglecting social life and family can be considered among social problems. Das et al. (2017)<sup>329</sup> state that almost 80% of online gamers have lost at least one element of their lives such as sleep, work, education, or socialising with friends or family. In terms of social media addiction, Moqbel and Kock (2018) found that addiction to social networking sites reduces positive emotions which increase performance and improve health, resulting in an increase in attention deficit.<sup>330</sup> Zheng and Lee (2016)<sup>331</sup> also show that social media addiction leads to three types of conflicts: tech-personal, tech-family and tech-work.</p> <p>In their recent report, the 5Rights Foundation also notes that children and young people themselves increasingly describe their usage and engagement with digital services using language associated with addiction. They quote a 2022 survey by YoungMinds<sup>332</sup> which found that 42% of young people self-reported what they considered to be early signs of addiction to social media.<sup>333</sup></p> <p>Apart from adverse psychological effects, researchers have also identified physical problems that may emerge due to prolonged use of digital tools, which include:</p> <ul style="list-style-type: none"> <li>• Eyestrain – symptoms include blurred vision and dry eyes; can also lead to pains in other parts of the body, such as head, neck, or shoulders; factors that main lead to eyestrain includes screen time, screen glare and brightness, viewing too close or too far away, poor sitting posture, underlying vision issues.</li> <li>• Poor posture – many technologies promote a “down and forward” user position, meaning the person is hunched forward and looking down at the screen, putting an unnecessary amount of pressure on the neck and spine (“text neck”).<sup>334</sup></li> </ul>

<sup>325</sup> Brand M. et al. (2016) Integrating psychological and neurobiological considerations regarding the development and maintenance of specific internet-use disorders: an interaction of person-affect-cognition-execution model. *Neurosci Biobehav Rev*. Link: <https://pubmed.ncbi.nlm.nih.gov/27590829/>

<sup>326</sup> Griffiths, M. and Wood, R (2000). Risk factors in adolescence: the case of gambling, video game playing and the internet. *Journal of Gambling Studies*, 16, 199-225.

<sup>327</sup> Choriz M. (2012) Mobile-phone addiction in adolescence: the test of mobile phone dependence. Department of Basic Psychology University of Valencia. Link: [https://www.umb.edu.pl/photo/pliki/progress-file/phs/phs\\_2012\\_1/33-44\\_choliz.pdf](https://www.umb.edu.pl/photo/pliki/progress-file/phs/phs_2012_1/33-44_choliz.pdf)

<sup>328</sup> Jorgenson, A. et al. (2016) Internet addiction and other behavioural addictions. *Child Adolesc Psychiatr Clin N Am*. Link: <https://pubmed.ncbi.nlm.nih.gov/27338971/>

<sup>329</sup> Das A. et al. (2017) Technology addiction and mental health. *Indian Journal of Psychological Medicine*, Vol. 39, Issue 1. Link: <https://journals.sagepub.com/doi/pdf/10.4103/0253-7176.198939>

<sup>330</sup> Moqbel M. and Kock N. (2018) Unveiling the dark side of social networking sites: personal and work-related consequences of social networking site addiction. *Information and Management* 55. Link: [http://cits.tamtu.edu/kock/pubs/journals/2018/Moqbel\\_Kock\\_2018\\_IM\\_DarkSideSocNtwk.pdf](http://cits.tamtu.edu/kock/pubs/journals/2018/Moqbel_Kock_2018_IM_DarkSideSocNtwk.pdf)

<sup>331</sup> Zheng, X. and Lee, M. (2016) Excessive use of mobile social networking sites: negative consequences on individuals. *Computers in Human Behaviour*, Vol. 65. Link: <https://www.sciencedirect.com/science/article/abs/pii/S0747563216305751>

<sup>332</sup> [A third of young people feel trapped on social media | YoungMinds](https://www.youngminds.com/press-releases/a-third-of-young-people-feel-trapped-on-social-media)

<sup>333</sup> [5Rights Foundation Disrupted Childhood 2023](https://www.5rights.org/5Rights-Foundation-Disrupted-Childhood-2023)

<sup>334</sup> Damasceno G. Et al. (2018) Text neck and neck pain in 18–21-year-old young adults. *Eur Spine J*. Link: <https://pubmed.ncbi.nlm.nih.gov/29306972/>

Case study headings	Description of content under heading
	<ul style="list-style-type: none"> <li>• Sleep problems – blue light from mobile phones, e-readers and computers was found to disturb the body’s natural circadian rhythm, making it more difficult for users to fall asleep.<sup>335</sup></li> <li>• Reduced physical activity – as most everyday digital technologies are sedentary, extended use can bring negative health effects, such as obesity, cardiovascular disease, type 2 diabetes, and premature death.<sup>336</sup></li> </ul> <p>In terms of drivers of addictive behaviours in the context of digital products, research<sup>337</sup> has identified the following as mechanisms that can exploit users’ psychological vulnerabilities to maximise time spent and daily visits, which can lead to problematic behaviour:</p> <ul style="list-style-type: none"> <li>• <b>Recommendations</b> – Recommender systems make personalised recommendations to users of any online application; they may be ads, trending content, posts, friends (“friends you may know” feature on social media) or comments. The main segment of any recommender system is an algorithm, which may be a set of simple straightforward rules dictating how the content is being processed, or it can use artificial intelligence. The main purpose of recommender systems is to keep users engaged by presenting personalised content to them by harvesting their data, analysing and delivering content based on the outputs of data analysis. While undoubtedly this is a mechanism that can improve the overall user experience with a service that is designed to maximise utility, they can become an instrument to “trap” the user into the system; this is especially the case, if there are misalignments between the goals of the service or app and the user’s utility in terms of digital wellbeing, and recommendations are delivered endlessly during and outside of the user’s interaction with the service or app.</li> <li>• <b>Autoplay</b> – a mechanism where new contents like videos or stories are sequentially and automatically played without the need for a user’s interaction, meaning it removes the need for autonomous decision-making; research found that autoplay often makes users feel less in control by undermining their sense of agency, as suggestions of new videos are “hard to decline”.</li> <li>• <b>Pull-to-refresh</b> – a mechanism allowing users to “pull” an interface, e.g., by swiping down on a mobile app, to manually reload the status of the system for new content; researchers have found that this mechanism offers a variable reward to users in that it may or may not reveal new content, meaning that it exploits the same psychological vulnerabilities that are targeted in gambling <b>addictions</b>.</li> <li>• <b>Infinite scrolling</b> – a mechanism through which new content emerges automatically and continuously as users scroll down a page, which researchers have also related to the concept of variable reward, since it creates the illusion that new interesting contents will “flow” forever, while the “quality” of the next shown item cannot be predicted.</li> <li>• <b>Social investment</b> – metrics like number of reactions, comments, followers and views can make users “invested” in a platform; this mechanism can instil in users the idea that they should continue using the platform to avoid losing the achieved progress; researchers also found that social networks are sometimes designed to structure rewards in a way that is likely to encourage use (e.g., notifications on Facebook about a “like” can be delayed to maximise its reward).</li> <li>• <b>Non-Fungible Tokens (NFTs)</b> – NFTs represent digital assets verified and stored using blockchain technology. Each NFT carries a unique signature that makes it difficult to replicate, which is why NFTs cannot be traded or exchanged at an equivalent price. They can be used to purchase digital items, such as objects in video games, pieces of art, or music. There have been attempts by Meta to launch a cryptocurrency payment system in the past, which were halted by US regulators. However, future tokens might be earned by engaging in social media platform’s activities, such as posting, commenting, providing reviews or linking/disliking content. NFTs have been likened to gambling in that participating in NFT transactions is characterised by taking risky actions with the hope that the result will be beneficial. Purchasing NFTs can thus trigger the brain’s reward system, and if these behaviours are not regulated, result in financial problems for the consumers, separate them from their loved ones, and lead to depression or anxiety.</li> </ul>

<sup>335</sup> Chang A. et al. (2014) Evening use of light-emitting eReaders negatively affects sleep, circadian timing, and next-morning alertness. PNAS 112(4). Link: <https://www.pnas.org/doi/10.1073/pnas.1418490112>

<sup>336</sup> Prakash J. et al. (2023) Mental health issues in information technology industry. Industrial Psychiatry Journal 31(1). Link: [https://journals.lww.com/inpi/Fulltext/2023/32010/Mental\\_health\\_issues\\_in\\_information\\_technology.1.aspx](https://journals.lww.com/inpi/Fulltext/2023/32010/Mental_health_issues_in_information_technology.1.aspx)

<sup>337</sup> Roffarello, A. and Russis, L. (2022) Towards understanding the dark patterns that steal out attention. CHI EA '22: Extended abstracts of the 2022 CHI conference on human factors in computing systems, Article 274.

Case study headings	Description of content under heading
	<ul style="list-style-type: none"> <li>• <b>In-app or in-game purchases:</b> In-app or in-game purchases can take many forms, like a virtual currency that enables faster progress in the game, power-ups to improve gameplay, items to personalise the player’s avatar, and premium content that grants access to exclusive features or levels. They usually require small amounts (e.g., between \$1 and \$5) to access virtual items or currency within the game. The basic design and implementation of in-game purchasing options, particularly their rapid pace, repeatability, and inherent randomness in some formats (e.g., loot boxes), has invited some comparisons to gambling products, particularly electronic gaming machines.<sup>338</sup> We discuss these more in our answer to the next research question on loot boxes.</li> <li>• <b>Gamification:</b> Gamification means the integration of game-like elements into non-gaming environments, such as training apps or mobile games in online casinos. The technology encourages users to compete against each other, collect points and increase levels. Gamers are rewarded for their achievements, and, at the same time, encouraged to continue to develop constantly. Gamification works as a strategy to influence and motivate people’s behaviour. However, according to literature, some game features and sensations like flow can be regarded as addictive factors, triggering a <b>dopamine rush in the human brain</b> – hence they are often harnessed by websites and apps to retain their users, who come back for more dopamine release.</li> </ul> <p>Roffarello and Russis (2022)<sup>339</sup> call these drivers “<b>attention-capture dark patterns</b>”, which differ from traditional dark patterns a) in the exploited methods and b) in how they influence human-technology interaction:</p> <ol style="list-style-type: none"> <li>Regarding exploited methods, traditional dark patterns describe situations in which user’s choices are typically manipulated through the usage of deceptive UX design. Attention-capture dark patterns, instead, can also exploit system functionalities that are independent from the underlying UX design, e.g., autoplay and pull-to-refresh.</li> <li>Regarding their influence on human-technology interaction, traditional dark patterns negatively influence the interaction between people and their devices and services and can prevent users from achieving their interaction goals. By contrast, attention-capture dark patterns do not necessarily influence the user’s interaction per se. Paradoxically, some of them aim to improving usability and simplifying the interaction. However, the dark side of this coin is that such improvements and simplifications are sometimes a deliberate choice to promote a frequent and continuous use of technology, to the point of undermining the user’s sense of agency.</li> </ol> <p>Nonetheless, research on digital addiction – its causes, drivers, and symptoms – is still relatively young – in their comprehensive study of digital addiction, Montag et al. (2018) classified it as “in its infancy” only five years ago.<sup>340</sup> This was also confirmed in our interviews with legal experts who work on digital addiction issues. While most mentioned, for example, that “personalisation” <i>can</i> contribute to addictive behaviours, they noted that there is currently no empirical research that clearly measures “how much personalisation” constitutes “harm”. The same absence of empirical research concerns the question about what measures can indeed effectively limit problematic behaviour and addiction as it relates to digital products. Such empirical research would require large-scale psychological studies and long-term evaluations of measures, which are out of the scope of this case study.</p> <p><b>What problems do ‘loot boxes’ create?</b></p> <p>Policymakers, the media and consumers are increasingly raising concerns over loot boxes inducing consumers (particularly those susceptible to gambling) to overspend on video games. In 2022, 20 consumer organisations from 18 European countries suggested that loot boxes should be classified as gambling and therefore regulated.<sup>341</sup> In the US, the Federal Trade Commission (FTC) is investigating loot boxes following concerns from US legislators that they may be considered to be gambling.<sup>342</sup> Most recently, the European Parliament adopted a report asking for harmonised rules to give parents a good overview of, and control over what games their children play as well as how much time and money they spend playing. This report specifically mentions wanting to protect minors from prompts to make in-game purchases and</p>

<sup>338</sup> King D. and Delfabbro P. (2018) Internet Gaming Disorder: Theory, Assessment, Treatment and Prevention. Academic Press.

<sup>339</sup> Roffarello, A. and Russis, L. (2022) Towards understanding the dark patterns that steal out attention. CHI EA '22: Extended abstracts of the 2022 CHI conference on human factors in computing systems, Article 274.

<sup>340</sup> Montag C. et al. (2018) Internet Communication Disorder and the structure of the human brain: initial insights on WeChat addiction. Scientific Reports 8. Link: <https://www.nature.com/articles/s41598-018-19904-y>

<sup>341</sup> 18 European countries’ consumer groups have joined the fight against loot boxes | VGC (videogameschronicle.com)

<sup>342</sup> FTC (2020) FTC Video Game Loot Box Workshop, Staff Perspective, Link: [https://www.ftc.gov/system/files/documents/reports/staff-perspective-paper-loot-box-workshop/loot\\_box\\_workshop\\_staff\\_perspective.pdf](https://www.ftc.gov/system/files/documents/reports/staff-perspective-paper-loot-box-workshop/loot_box_workshop_staff_perspective.pdf)

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	<p>from getting involved in practices of selling items obtained in a game for real money. Additionally, the report calls on game developers to avoid designing games that feed addiction and to consider children's age, rights, and vulnerabilities.<sup>343</sup></p> <p>These concerns are mainly based on loot boxes being designed and marketed in ways that obfuscate the chances of winning different rewards, leading to overspending.<sup>344</sup></p> <p>These include:</p> <ul style="list-style-type: none"> <li>• <b>limited or no provision of odds</b>, which may lead to gamers overestimating the value of loot boxes; linked to this is the practice of industry actors to use machine learning to personalise games based on behavioural data to maximise spending, which means that the rarity of various items can change daily, and probabilities can be altered based on user data;<sup>345</sup></li> <li>• selective feedback on <b>rewards</b> obtained by other players ("survivorship bias"<sup>346</sup>), which may lead to gamers only being made aware of a biased sample of the reward distribution, reinforcing the belief that they may be "similarly lucky" as others;</li> <li>• <b>time-limited offers</b><sup>347</sup>, which suggest items to be rare, limited in quantity, almost sold out or especially valuable, which can create a sense of urgency and scarcity in gamers, and may lead them to them purchasing more content than they had planned to;</li> <li>• <b>virtual currencies</b> – loot boxes can be bought with real-world money or sometimes through virtual, in-game currencies, which are typically paid for with real-world money; however, conversion rates of virtual currencies may be difficult to understand and lead to valuation bias and overspending;<sup>348</sup> Benti et al. (2021) have also found that the nominal value of in-game currency is much higher than the nominal value of real currency, leading to money illusion among consumers, which is when consumers think about money in nominal terms rather than in real terms, causing them to make a purchasing decision that is not based on the true value of the transaction.<sup>349</sup></li> <li>• <b>bundles</b>, which offer characters, in-game currencies, and other features as a package for a fixed amount, making it difficult for gamers to understand or identify the value of individual items, leading to "<b>bundling bias</b>"<sup>350</sup> (choosing bundles over single-priced items as it cuts down on effort and search costs), which may result in gamers buying more than they had initially planned to;</li> <li>• key mechanisms, which require gamers to purchase a specific key to open a loot box they acquired through gameplay and can be a misleading practice since the <b>additional price for the key is unknown to the player beforehand</b> and may motivate the gamer to spend additional money to open a loot box, which they had not originally planned to spend; and<sup>351</sup></li> <li>• <b>freemium</b>, meaning that in-game purchases are advertised as free to play, offering a frictionless gaming experience and high rewards for a limited amount of time (to get the gamer "hooked" by investing time and effort in the game, and giving the impression that generous in-game content will be rewarded simply by playing the game); however, after a set time has passed, the frictionless gaming experience comes to a halt, and gamers either have to wait, perform repetitive tasks, or spend money to</li> </ul>

<sup>343</sup> European Parliament (2023) Protecting gamers and encouraging growth in the video games sector, Press Releases, Link: <https://www.europarl.europa.eu/news/en/press-room/20230113IPR66646/protecting-gamers-and-encouraging-growth-in-the-video-games-sector>

<sup>344</sup> Cordes S. et al. (2023) What drives demand for loot boxes? An experimental study, Link: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4349674](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4349674)

<sup>345</sup> Games Press (2020) "Jump-Data Driven Intelligence and Digital Legends innovate in gaming monetization through artificial intelligence assets." - Games Press

<sup>346</sup> Forbrukerradet (2022) Insert Coin – how the gaming industry exploits consumers using loot boxes, Link: [2022-05-31-insert-coin-publish.pdf \(forbrukerradet.no\)](https://www.forbrukerradet.no/publisering/2022-05-31-insert-coin)

<sup>347</sup> Shibuya, A., Teramoto, M., & Shoun, A. (2015), Systematic analysis of in-game purchases and social features of mobile social games in Japan. In DiGRA Conference, Link: <http://www.digra.org/digital-library/publications/systematic-analysis-of-in-game-purchases-and-social-features-of-mobile-social-games-in-japan/>

<sup>348</sup> Zendle, D. et al. (2020). Paying for loot boxes is linked to problem gambling, regardless of specific features like cash-out and pay-to-win. Computers in Human Behavior, Vol. 102, Link: <https://www.sciencedirect.com/science/article/abs/pii/S0747563219302468>

<sup>349</sup> ACM desk research on virtual currencies, WORD document shared by the Commission

<sup>350</sup> Soman, D. & Gourville, J. T. (2001), Transaction decoupling: how price bundling affects the decision to consume. Journal of Marketing Research, Vol. 38(1), Link: [Transaction decoupling: How price bundling affects the decision to consume. \(apa.org\)](https://www.jstor.org/stable/3152222)

<sup>351</sup> Zendle, D. et al. (2020). Paying for loot boxes is linked to problem gambling, regardless of specific features like cash-out and pay-to-win. Computers in Human Behavior, Vol. 102, Link: <https://www.sciencedirect.com/science/article/abs/pii/S0747563219302468>

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	<p>return to frictionless gaming (but by that time, the gamer is already invested in the game, making it more difficult to walk away).<sup>352</sup></p> <p>However, there are also concerns related to game design that refer to mechanisms used to sustain a gamers' motivation in playing, leading to prolonged gaming times and repeated access to loot boxes. These have been identified as drivers in the development of gambling problems, and include:</p> <ul style="list-style-type: none"> <li>• unpredictable reward patterns, meaning that gamers who open loot boxes receive random content at an unpredictable pattern, paying for loot boxes in advance and receiving frequent small wins, followed by larger rewards only after several tries,<sup>353</sup></li> <li>• sounds and visual effects used upon the opening of a loot box, which may elicit excitement in the gamer and lead them to overestimate their win,<sup>354</sup></li> <li>• casino-like elements in loot boxes, which resemble wheels of fortune or roulette, and was found to make gamers develop a distorted picture about the probability of winning and make them less sensitive to costs or losses in the game,<sup>355</sup></li> <li>• competitive social elements, such as displaying how many loot boxes another gamer opened in the form of rankings and rewarding top-rated players with access to valuable or rare items, which have been proven to skew individual decision-making to conform to others in the gaming environment and extend the duration of gaming.<sup>356</sup></li> </ul> <p>Loot boxes have also been deemed problematic as regards <b>privacy, data protection and transparency</b>. In terms of privacy risks, research highlights that collecting behavioural data (biometric, identity, age, gender, emotions, skills, interest, consumption habits, personality traits) from millions of gamers may be used to create extensive user profiles for manipulative and discriminatory purposes.<sup>357</sup> There have also been data breaches reported from companies collecting extensive consumer data in the gaming industry.<sup>358</sup> The systems underlying many loot box designs also lack transparency, making it impossible for consumers and third parties to access raw data about the algorithms used to calculate and determine outcomes, how user data is exploited, etc. To date, these mechanisms have not been subject to regulation.<sup>359</sup></p> <p>One key area of controversy relates to video games that contain loot boxes being available to children and adolescents. In this context, research problematises the following developmental risk factors, making them potentially more vulnerable to problematic game designs, such as loot boxes:</p> <ul style="list-style-type: none"> <li>• <b>virtual currencies</b> making children more at risk of problem gambling behaviour compared to adults as they are less able to disentangle costs; this was also found by Wohn (2014) showing that children spend more money as they earn more in-game currency through playing time, leading a <b>dual currency system</b> to increase sales as young players are encouraged to spend more time and money on a game;<sup>360</sup></li> <li>• <b>difficulty understanding probabilities</b>, making them susceptible to overspending due to not being able to predict outcomes and value of loot boxes,</li> <li>• <b>hyperactivity</b>, as a psychosocial response to frequent reward mechanisms, such as in loot boxes, which makes children used to a constant input of new or exciting stimuli,</li> <li>• <b>impulse control issues</b>, as the ability to exert control over decisions is not yet fully developed in children and adolescents, making them less likely to be able to delay gratification and wait for obtaining a loot box through game play and thus more prone to overspending.</li> </ul>

<sup>352</sup> Forbrukerradet (2022) Insert Coin – how the gaming industry exploits consumers using loot boxes, Link: [2022-05-31-insert-coin-publish.pdf \(forbrukerradet.no\)](#)

<sup>353</sup> Zendle, D. (2019), Problem gamblers spend less money when loot boxes are removed from a game: a before and after study of Heroes of the Storm. PeerJ, 7, e770, Link: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6824327/>

<sup>354</sup> Wiltshire, A. (2017) Behind the addictive psychology and seductive art of loot boxes | PC Gamer

<sup>355</sup> Close J. & Lloyd, J. (2021) Lifting the Lid on Loot-Boxes: chance-based purchases in video games and the convergence of gaming and gambling, Gamble Aware Report, Link: [https://www.begambleaware.org/sites/default/files/2021-07/Gaming\\_and\\_Gambling\\_Report\\_Final\\_0.pdf](https://www.begambleaware.org/sites/default/files/2021-07/Gaming_and_Gambling_Report_Final_0.pdf)

<sup>356</sup> King, D. L. et al. (2011), The role of structural characteristics in problematic video game play: an empirical study, International Journal of Mental Health and Addiction, Vol. 9(3), Link: <https://link.springer.com/article/10.1007/s11469-010-9289-y>

<sup>357</sup> Kroeger, J. et al. (2021) Surveilling the gamers: privacy impacts of the video game industry, Link: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3881279](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3881279)

<sup>358</sup> Parijat, S. (2021) 5 Unfortunate Cyber Attacks Against Gaming Companies (gamingbolt.com)

<sup>359</sup> Forbrukerradet (2022) Insert Coin – how the gaming industry exploits consumers using loot boxes, Link: [2022-05-31-insert-coin-publish.pdf \(forbrukerradet.no\)](#)

<sup>360</sup> ACM desk research on virtual currencies, WORD document shared by the Commission

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	<p>However, research has also found that not all loot boxes carry risks, and that many video games and certain types of loot boxes are unproblematic with regards to their form of monetisation and design mechanisms. Moreover, loot boxes are not necessarily targeted at children, but there are games targeted at children which contain loot boxes, and there are games that contain loot boxes that are targeted at adults, but also played by children.</p>
<p><b>How far does existing EU (and any national legislation where relevant) address the problem?</b></p>	<p><b>Do the Directives ensure the prevention of the potential negative effects on the social and financial situation of consumers due to addiction and prolonged use of certain digital content and services? Are there other regulations at national or EU level that sufficiently prevent or mitigate the risk from such negative effects?</b></p> <p>To assess the extent to which the Directives ensure the prevention of the potential negative effects brought on by digital addiction, we adapted the four components model proposed by Kloker (2020)<sup>361</sup> for the design of non-addictive information systems. For this case study, we focus on three components (situational management, access management/decision support and gratification management), as one component (education/expectation management) is out of the scope of this case study. This is because education/expectation management would primarily focus on communication aspects (e.g., campaigns on the dangers of digital addiction), rather than legislative measures.</p> <ul style="list-style-type: none"> <li>• <b>Situation management</b> focuses on the deployment of “<b>attention-capture dark patterns</b>” and the consumer’s susceptibility for developing digital addiction. Here, we discuss the UCPD and other relevant EU legislation (Digital Markets Act, Digital Services Act, Artificial Intelligence Act) and other national legislation that addresses the deployment of “attention-capture dark patterns”; with reference to the case study on vulnerable consumers, we also discuss the vulnerable consumer concept and the extent to which the concept captures consumers susceptible to developing digital addiction.</li> <li>• <b>Access management/decision support</b> captures the moment where the decision for usage (e.g., of a certain application or purchase) is made, with the main goal to ensure that problematic use is not the default and that these decisions are based on complete information; here, we assess the transparency provisions in the CRD, UCTD and UCPD and other EU legislation as regards “attention-capture dark patterns”, and address the second part of <b>RQ49 – whether there are any examples of legislation on mandatory disclosures about the addictive nature of digital products.</b></li> <li>• <b>Gratification management</b> refers to mechanisms that have potential to break the instant and limitless gratification provided through digital tools and thus curb digital addiction development. Under this component, we assess EU and national legislation on time and cost limitations and parental controls, and answer the first part of <b>RQ49 – are there any examples of legislation that limits either the money or time that can be spent using digital content and services.</b></li> </ul> <p><b>1. Situation management:</b></p> <p>As noted above, many digital tools are designed to entice users to spend time and money and confront them with addiction-related cues (“attention-capture dark patterns”) that may lead them into a stressful situation to reduce inhibitory control and influence decisions, such as spending more time on a digital tool, or in-app or in-game purchasing decisions.</p> <p>In the context of designing non-addictive information systems, Kloker (2020)<sup>362</sup> emphasises that situation management is intended to assess the user’s current content (e.g., addictive cues) and his/her current susceptibility (e.g., stress) to the development or maintenance of addiction triggered by digital products, and to defuse the system. As noted by the author, this may warrant dispensing with addictive cues (or, what we call, “attention-capture dark patterns”) altogether.</p> <p>In terms of legislative measures that fall under situation management, we looked at EU and national legislation that addresses the deployment of “attention-capture dark patterns” as defined under RQ1, as well as the concept of the vulnerable consumer.</p> <p><i>1.1. EU legislation on the deployment of “attention-capture dark patterns”</i></p> <p>There is currently no universally-accepted definition of “dark patterns”, and especially of “attention-capture dark patterns”, the focus of this case study. Under the EU consumer law</p>

<sup>361</sup> Kloker (2020)

<sup>362</sup> Kloker (2020)



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	<p>acquis, the practices mentioned under RQ1 would need to be assessed on a case-by-case basis to establish whether there has been a breach of specific consumer protection provisions.</p> <p>Under the horizontal EU consumer law acquis, the situational management component of digital addiction development and maintenance, which focuses on the deployment of attention-capture dark patterns, can be addressed through the UCPD:</p> <p><b>The UCPD’s general provisions (Articles 5 to 9) cover unfair, misleading and aggressive commercial practices which are capable of distorting consumers’ economic behaviour</b> – under Article 5(2), a commercial practice is unfair if it is contrary to the requirements of professional diligence and “materially distorts or is likely to materially distort” the economic behaviour of the average consumer. Read in conjunction with Article 2(e), what determines whether a commercial practice “materially distorts or is likely to materially distort” the consumer’s economic behaviour is whether it causes or is likely to cause the consumer to “take transactional decisions that he would not have taken otherwise.” This is the same assessment that is made based on Articles 6-7 (misleading practices), and 8-9 (aggressive practices). Despite different wording, the requirement in relation to the material distortion of the consumer’s behaviour is the same.</p> <p>Of note for the topic of digital addiction is that, according to the updated UCPD Guidance 2021, a commercial practice may be considered unfair not only if it is likely to cause the average consumer to purchase or not to purchase a product, but the broad concept of transactional decision allows for the UCPD to apply also in cases where a commercial practice is likely to cause the consumer to spend more time on the internet and continue using a service by browsing or scrolling. This is not only the case if a particular commercial practice does so <i>in concreto</i> (it has done so as a fact), but also <i>in abstracto</i> – the likelihood of the impact of that practice on the transactional decision of the average consumer.</p> <p>In the context of digital addiction, this means that <b>traders must prevent consumers from being influenced by a user interface guiding them to take a certain decision</b> (e.g., spending more time and money on a particular digital tool) without having the possibility to understand the consequences of such a decision, as this could breach the trader’s professional diligence requirement. The UCPD does not require intention for the deployment of the (attention-capture) dark pattern, and – following case law of the Court of Justice of the EU – it is not necessary to prove that the trader breached this professional diligence duty, unless explicitly required like in Article 7(4)(d). Thus, <b>Article 5 can apply as a residual control mechanism when the practice is not captured by Articles 6 to 9 of the UCPD or its Annex I</b>. This is relevant for “attention-capture dark patterns” insofar, as the updated UCPD Guidance 2021 and Annex I cover data-driven personalisation practices (incl. recommender systems – see case study on personalised advertising) and several specific “dark patterns” in the context of “free” trials and subscriptions (see case study on online subscriptions), “bait and switch” practices, fake timers and limited stock claims, inaccurate information on market conditions, false claims of a product as “free” and false claims that a consumer has won a prize without awarding the prize as described (or a reasonable equivalent), and nagging (see case study on aggressive practices).</p> <p>Furthermore, the updated UCPD Guidance 2021 sets out the Commission’s position regarding the <b>UCPD’s applicability to ensuring fairness in online games</b>. It notes the presence of “gambling elements” in computer games, based on “addictive interface designs” incorporating slot machines, loot boxes or betting, as well as risks to children arising from known marketing practices and design strategies (No 28 of Annex I), warning against the use of aggressive practices and combinations of practices in breach of Articles 8 and 9 of the UCPD. Legal experts consulted also considered that the use of time-limited offers and freemium, which have been found in some loot box designs and are considered a risk for users overspending (see answer to the next RQ), is covered under the requirements of professional diligence in Article 5 UCPD.</p> <p>However, most of the “attention-capture dark patterns” listed under RQ1, such as infinity scrolling, pull-to-refresh and autoplay are not explicitly mentioned in the UCPD or the Guidance, albeit legal experts consulted for this case study considered them generally covered by the UCPD’s principle-based provisions and prohibitions of commercial practices which result in transactional decisions such as continuing to use the service (e.g., scrolling through a feed). With reference to the situation management component, they noted that these could be banned <i>if they were classified as causing too much harm</i>. The latter point is important, as legal experts emphasised that the current empirical evidence base that clearly shows a direct link between these “attention-capture dark patterns” and digital addiction development is insufficient, further exacerbated by the fact that digital addiction currently does not feature in relevant medical collections on addictive behaviours.</p> <p>However, considering that the situational management component in the design of non-addictive information systems includes the option to dispense of such features altogether, legal</p>

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	<p>experts noted that bans on specific design features<sup>363</sup>, while certainly very effective in tackling digital addiction, could eliminate the opportunity for users to use digital tools in a meaningful way. They further noted that such bans would generally have a limited legal basis, with companies likely adapting these features in a way that might change their classification, allowing room for legal challenges. Bans would also potentially disincentivise innovation, which could have a detrimental effect on business and innovation in Europe. Therefore, instead of an outright ban of loot boxes, legal experts emphasised the enhanced enforcement mechanism offered by the UCPD that could be applied to loot boxes alongside national rules of gambling, health, and safety (unlike most other transactional rules of the EU consumer acquis<sup>364</sup>).</p> <p>Another suggestion made by legal experts on the situation management component on loot boxes was that the Consumer Protection Cooperation network (CPC) take a collective position on the application of the UCPD to loot boxes, similarly to the position taken in 2014 concerning game apps.<sup>365</sup> Although the range of potential distributors/games providers for games containing loot boxes is much broader than was the case with the gaming apps, a common policy approach of the CPC Network with an agreed standard for the aspects of games considered to contain misleading, unfair, aggressive games monetisation elements etc., was felt to prove a very effective first step towards addressing some of the financial and health consequences of game monetisation.</p> <p>At the same time, there was consensus among legal experts that “attention-capture dark patterns” pose a risk for digital addiction development in <i>vulnerable consumers</i> – an issue which we discuss in the next section, as the current definition of vulnerable consumers in EU legislation was found insufficient to address digital addiction issues. Stakeholders also noted the increased need to strengthen child protection in the context of digital addiction development, as the updated UCPD Guidance 2021 only mentions online purchases in video games, mobile games or online games, and other “attention-capture dark patterns” aimed at maximising a child’s time spent on a particular digital product do not receive the same level of attention.</p> <p>In terms of other EU legislation, the issue of dark patterns has also been raised during the legislative discussions around the Digital Markets Act and the Digital Services Act proposals. Both the European Parliament and the Council decided in their respective positions to address dark patterns in the context of the anti-circumvention measures of the obligations for gatekeepers included in Article 5 and 6 of the DMA. It is important to highlight that this is not a general prohibition of the use of dark patterns but only in connection with the compliance assessment of the DMA obligations. In this regard, the UCPD is fully applicable to any dark pattern deployed by traders who would be designated as ‘gatekeepers’ under the DMA. The DSA also addresses the issue of dark patterns in the context of intermediation services. The Council required providers of online marketplaces, as well as providers of very large online platforms when dealing with recommender systems, to not seek to subvert or impair the autonomy, decision-making, or choice of the recipient of the service through the design, structure, function or manner of operating of their online interface (Council amendments to Article 24b (new) and Article 29 of the Commission proposal, respectively). The Parliament included a broader prohibition regarding applicable to all online interface design and organisation of providers of intermediaries’ services (European Parliament Article 13a). Like in the case of the DMA, the DSA is without prejudice to the application of the UCPD, which would complement this provision. However, these pieces of legislation also do not explicitly cover “attention-capture dark patterns” such as infinite scroll, pull-to-refresh, and autoplay. Still, drawing on the user thresholds defined in the DSA and DMA, targeting social media platforms with more than 45 million monthly users in the EU would be a useful basis for the regulation of “attention-capture dark patterns” aimed at maximising the time users spend on the platform, if these platforms were proven to contribute to digital addiction. This could be achieved by regulators requiring these platforms to report selected metrics such as the average daily time spent of users or of the 20% most active users. If these proxies for the prevalence of addiction on a platform were found to exceed certain thresholds, they would have to comply with new regulations posing restrictions or bans on attention-capture dark patterns or persuasive technologies.<sup>366</sup></p>

<sup>363</sup> This was also discussed in the specific context of loot boxes, and the recommendations of the Norwegian Consumer Council for an outright ban of loot boxes altogether if they fail to address the most pernicious issues they create. Here, findings from our desk research point to the example of Australia, where a review of existing regulatory frameworks in 2018, including consumer protection legislation, to establish whether they adequately address loot boxes found a lack of evidence of gambling harms from loot boxes (see Nettleton, J. & Pasternacki, A. (2020) Loot Boxes in Australia: gaming or gambling? Link: [https://issuu.com/lawsocietysa/docs/lbsb\\_february\\_2020\\_digital\\_h/s/10185900](https://issuu.com/lawsocietysa/docs/lbsb_february_2020_digital_h/s/10185900)).

<sup>364</sup> See also Leahy, D. (2022) Rocking the boat: loot boxes in online digital games, the regulatory challenge, and the EU’s Unfair Commercial Practices Directive, Journal of Consumer Policy Vol. 45, Link: <https://link.springer.com/article/10.1007/s10603-022-09522-7>

<sup>365</sup> [ec.europa.eu/commission/presscorner/detail/en/IP\\_14\\_847](https://ec.europa.eu/commission/presscorner/detail/en/IP_14_847)

<sup>366</sup> Hertie School Centre for Digital Governance: Digital addiction by design. How to regulate persuasive design by very large online platforms in Europe. March 2023. Link: [2023\\_Digital\\_Addiction\\_by\\_Design.pdf](https://www.hertie-school.org/documents/2023/03/2023_Digital_Addiction_by_Design.pdf) (kxcdn.com)

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	<p>Moreover, the Artificial Intelligence Act (AI Act) represents a legislative proposal that is relevant in the context of digital addiction insofar as it prohibits “dark pattern” AI based on Art. 5 and AI systems that manipulate and exploit the vulnerabilities of children and other people due to their age and mental and physical incapacities.</p> <p>Finally, the European Parliament Committee responsible for Internal Market and Consumer Protection is currently preparing an own-initiative report on addictive design of online services and consumer protection in the EU single market, a draft of which will be presented at the Committee meeting of 18-19 September 2023.<sup>367</sup></p> <p><i>1.2 Member States’ legislation on the deployment of “attention-capture dark patterns”</i></p> <p><b>Our research found no evidence of EU Member States regulating “attention-capture dark patterns” under the situation management component</b>, except for Belgium, where loot boxes are classified as gambling due to the wider scope of the definition of games of chance. Whilst the Netherlands and Spain have put forward proposed national legislation to regulate loot boxes, these proposals have not yet been adopted, and have thus far been blocked.</p> <p>In Belgium and the Netherlands, regulators requested video game publishers to remove loot boxes from the games offered in-country with the risk of receiving a fine of up to EUR 830,000 and criminal prosecution in case of non-compliance:</p> <ul style="list-style-type: none"> <li>• In <b>Belgium</b>, loot boxes are considered to fall within national gambling law, as the purchase of a loot box is found to be the legal equivalent of placing a wager, since a “win” does not have to be money or money’s worth and the element of chance can be a secondary aspect of the transaction. However, feedback was received through an interview with the trader association Video Games Europe that the enforcement authorities in Belgium have found the law difficult to enforce given that for instance, Apple’s App store and Google Play provide for an international market and loot boxes are not prohibited in other regulatory restrictions.</li> <li>• In the <b>Netherlands</b>, it was found not to be relevant whether virtual items can be legally traded or whether such trade is prohibited by the terms and conditions of the game publisher, making loot boxes with embedded real money purchase and isolated (virtual, unsellable object) reward gambling according to Dutch gambling legislation. Proposed legislation to prohibit loot boxes altogether outside of gambling legislation was introduced for in-game / in-app purchases. However, the legislation encountered a stumbling block, and has not yet been adopted by the Dutch Parliament due to uncertainty whether a national regulatory approach would be effective if European Commission would decide to take a different approach.</li> </ul> <p>A <b>draft bill in Spain</b><sup>368</sup> proposes to <b>prohibit access to loot boxes for minors</b>, meaning that anyone under the age of 18 will be prohibited from accessing loot boxes, and companies will have to verify user IDs before they can access a loot box, which may include biometric identification systems. However, the legislation has not yet been passed, meaning that Belgium remains the only MS to date to prohibit loot boxes altogether.</p> <p>In other Member States, loot boxes have been predominantly investigated in the context of gambling laws, but are not considered gambling in the legal sense in most national jurisdictions. This is because the key question for the application of gambling laws has been whether the content of loot boxes constitutes a “prize”. If the virtual items are valueless in terms of “real-world” money, then it is not a “prize” as conceptualised in most gambling laws (this is the case in Denmark, Finland, France, Sweden, the UK). In Germany and Poland, gambling law also does not capture loot boxes.<sup>369</sup> However, our research did not identify any national legislation on other “attention-capture dark patterns” listed in our answer to RQ1.</p> <p><i>1.3 Non-EU legislation on the deployment of “attention-capture dark patterns”</i></p> <p>Legal experts consulted for this case study pointed particularly to the United States for examples of legislative efforts that fall under the situation management component of digital addiction. One example was the proposed <b>Social Media Addiction Reduction Technology Act (SMART Act)</b> from 2019<sup>370</sup>, which aimed to prohibit social media companies from using “practices that exploit human psychology or brain physiology to substantially impede freedom of choice”, and to require social media companies to take measures to “mitigate the risks of internet addiction</p>

<sup>367</sup> [Addictive design of online services and consumer protection | Subject files | Home | IMCO | Committees | European Parliament \(europa.eu\)](#)

<sup>368</sup> [Spain - Breaking New Ground With Loot Box Regulation. - Conventus Law](#)

<sup>369</sup> Cerulli-Harms, A. et al. (2020) Loot boxes in online games and their effect on consumers, in particular young consumers, Link: [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652727/IPOL\\_STU\(2020\)652727\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652727/IPOL_STU(2020)652727_EN.pdf)

<sup>370</sup> [Social-Media-Addiction-Reduction-Technology-Act.pdf \(senate.gov\)](#)

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	<p>and psychological exploitation, and for other purposes”. Under Sec. 3 “Prohibited practices for social media companies”, the bill lists:</p> <ul style="list-style-type: none"> <li>• infinite scroll or auto refill,</li> <li>• elimination of natural stopping points (the use of a process that, without the user expressly requesting additional content, loads and displays more content into a content feed than the typical user scrolls through in 3 minutes),</li> <li>• autoplay,</li> <li>• badges and other awards linked to engagement with the platform.</li> </ul> <p>Other examples of legislation relevant for digital addiction included Republican Senator Rick Scott’s <b>Safe Social Media Act</b>, introduced in May 2021, which would require the Federal Trade Commission, in coordination with the Centers for Disease Control, to conduct a study on social media use among American teenagers and children including the use of personal information in algorithms, the mental health effects and the long-term impact of extended usage.<sup>371</sup></p> <p>Finally, in April 2023, a California bill (<b>Social Media Addiction Bill</b>) seeking to hold <b>social media companies legally responsible for addicting young users to their platforms</b> advanced after an amendment to allow lawsuits only by public prosecutors. This bill would prohibit companies such as Meta, Snap, TikTok and Google from designing social media to hook users younger than 16 years old, with penalties of up to \$250,000 for each violation.<sup>372</sup> The bill defines “addiction” as the use of one or more social media platforms that does both of the following:</p> <ul style="list-style-type: none"> <li>• indicates preoccupation or obsession with, or withdrawal or difficulty to cease or reduce use of, a social media platform despite the user’s desire to cease or reduce that use;</li> <li>• causes physical, mental, emotional, developmental or material harms to the user.</li> </ul> <p>The bill would prohibit a social media platform from using a design, algorithm or feature that the platform <i>knows, or which by the exercise of reasonable care should have known</i>, causes child users (defined as younger than 16 years of age), to do certain things, including experience addiction to the social media platform. It would provide that a social media platform is not in violation of the bill if it instituted and maintained a program of at least quarterly audits of its designs, algorithms and features that have potential to cause violations of these provisions, and corrected within 30 days of completion of the audit such designs, algorithms or features to present more than a de minimis risk of violating that provision.</p> <p>On loot boxes, a 2019 legislation in the US proposed their ban (<b>“Loot Box Bill”</b><sup>373</sup>), but has stalled since then as it was criticised by the industry as poorly conceived and lacking insight into the commercial structures of the gaming industry.</p> <p style="text-align: center;"><i>1.4 The concept of the vulnerable consumer in the context of digital addiction</i></p> <p>Since the situation management component also concerns consumers’ susceptibility to the development and maintenance of digital addiction, we considered the concept of the vulnerable consumer in EU legislation and whether it adequately addresses this issue. A comprehensive analysis of this concept in the Directives is covered in the case study on consumer vulnerability, which is why here we only highlighting aspects relevant to digital addiction, focused on the UCPD as the only one of the three Directives that explicitly refers to vulnerable consumers within an Article (as opposed to the Recital). As such, the UCPD remains the point of reference for how to interpret the concept of vulnerable consumers in consumer legislation.</p> <p>As noted in the case study on consumer vulnerability, the CRD and UCPD only list three groups of vulnerable consumers (infirmity, age and credulity), omitting several other important factors, such as low socio-economic status, low education level, not being able to speak a particular language, minority status, or gambling addiction and other psychological problems which have been found to exacerbate the potential for developing digital addiction, such as depression and anxiety. The case study has also found that experts have criticized the approach of identifying specific groups of vulnerable consumers, calling it the “victim approach” which draws attention to the inherent weakness of particular groups, and highlighted that consumer vulnerability is not a fixed characteristic but a consequence of human embodiment, carrying with it “the ever-</p>

<sup>371</sup> [Text - S.1630 - 117th Congress \(2021-2022\): Safe Social Media Act | Congress.gov | Library of Congress](#)

<sup>372</sup> [Bill Text - SB-287 Features that harm child users: civil penalty. \(ca.gov\)](#)

<sup>373</sup> [Library of Congress \(2019-2020\) Text - S.1629 - 116th Congress \(2019-2020\): A bill to regulate certain pay-to-win microtransactions and sales of loot boxes in interactive digital entertainment products, and for other purposes. | Congress.gov | Library of Congress](#)

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	<p>present possibility of harm, injury, and misfortune” and therefore “no individual can avoid vulnerability.”<sup>374</sup></p> <p>This is particularly relevant when it comes to the digital environment where all consumers can become vulnerable – also to digital addiction. Particularly, as research shows that each type of digital addiction (game addiction, social media addiction, internet addiction, mobile phone addiction) is observed in all age groups. It can thus be argued that social media addiction, for example, is effective not only in young people, but also older age groups. Gaming addiction, on the other hand, has been found to be more common in younger individuals.<sup>375</sup> In the context of loot boxes / virtual items, there are limited studies available on what proportion of the gaming industry profits from high-level spenders on loot boxes, and whether they are typically wealthy individuals and/or problem gamblers. However, recent research suggests that games developers are disproportionately profiting from moderate to high-risk gamblers, rather than high earning customers. It confirms that these patterns of spending mirror those observed with gambling revenues and have implications for harm minimisation and ongoing policy debates around loot boxes.<sup>376</sup></p> <p>Other findings from the case study on consumer vulnerability which are relevant for digital addiction include:</p> <ul style="list-style-type: none"> <li>• <b>The narrow focus of the UCPD</b> on a small set of personal characteristics limiting the application of the concept beyond age, physical or mental infirmity or credulity being <b>insufficient to take into account a wide array of potential vulnerabilities</b> – including those that might exacerbate the risk of developing digital addiction, such as environmental factors (early exposure to substance use) and underlying mental health conditions (anxiety or depression, social awkwardness / social isolation, loneliness).<sup>377</sup></li> <li>• The requirement that the practice should only target individuals within that group (and only that group) limiting the extent to which (and opportunities) where the vulnerable consumer concept can be applied as instances where practices target only specific groups of vulnerable consumers (but no one else) are <b>relatively rare and difficult to prove</b> – particularly as regards “attention-capture dark patterns” and persuasive techniques that are prevalent on social media platforms and used in the context of loot boxes which cannot be proven to only target one specific group of consumers.</li> <li>• The foreseeable argument that, according to experts, could be used by traders as a loophole – in the case of digital addiction, it would be the <b>trader stating that they “did not know”</b> a particular feature would lead to the development of digital addiction in a consumer.</li> <li>• The <b>burden of proof resting on consumers</b>, who must clearly demonstrate that they meet the three requirements mentioned above, which BEUC argued puts the trader in an advantageous position over the consumer due to the obscurity of algorithmic processes and the resulting difficulty to establish compliance with data-driven services throughout the supply chain, which makes it difficult for consumers to pinpoint unlawful behaviour and malpractices. BEUC recommends that the burden of proof and argumentation should be placed on the traders, requiring them to come forward with conclusive evidence on the details of the employed practice<sup>378</sup>. In the context of digital addiction this implies that it would be on the trader to prove that they did not purposefully use “attention-capture dark patterns” to increase time and money spent on an application resulting in the development of a consumer’s digital addiction.</li> </ul> <p>Of note is also BEUC’s concept of “digital asymmetry”<sup>379</sup>, which describes the growing power imbalance in the markets between data-empowered traders and consumers. That is, online traders control both the information that is presented to the consumer, and the entire choice architecture. Nearly all services that consumers encounter in the digital environment benefit from insights formed by detailed knowledge of their online searches. Even if consumers recognise that their online experience is personalised, they may not realise the extent of this personalisation, or the distortion it introduces into their view of the market, and the choices they make as a result. This concerns, for example, certain commercial practices in gaming, including embedded advertisements, that can be aggressive, notably as traders consider specific</p>

<sup>374</sup> (Albertson Fineman 2008)

<sup>375</sup> Choriz et al. 2017

<sup>376</sup> Close, J. et al. (2021) Secondary analysis of loot box data: are high-spending “whales” wealthy gamers or problem gamblers? Addictive Behaviors, Vol. 117, Link: <https://www.sciencedirect.com/science/article/abs/pii/S0306460321000368>

<sup>377</sup> reported by Richard Davis from the Psychology Department of York University in his article published in Computers in the Human Behavior journal,

<sup>378</sup> BEUC, 2022, EU Consumer Protection 2.0, ‘Protecting fairness and consumer choice in a digital economy.

<sup>379</sup> BEUC, 2021, Structural asymmetries in digital consumer markets

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	<p>information about the gamers' vulnerabilities to personalise their ads, including using algorithms to target addiction-prone players. More generally, online behavioural advertising combined with market power can lower the visibility of 'non-personalised' outside options, namely adverts that do not exploit consumers' irrationalities based on their inferred cognitive makeup. Moreover, even if they do realise, the consumer has no or limited bargaining power – they may either accept or leave, with limited alternatives. This resulting universal state of vulnerability, referred by BEUC as “digital vulnerability”, applies to virtually all consumers who are online.<sup>380</sup></p> <p>In the context of digital addiction and situation management, the main finding of the consumer vulnerability case study holds: <b>the concept of the average consumer defined as “reasonably well-informed and reasonably observant and circumspect”<sup>381</sup>, and the concept of the vulnerable consumer defined in narrow terms (i.e., age, infirmity, credulity) are no longer relevant in light of the digital environment whereby all consumers can become vulnerable regardless of their personal characteristics – also to digital addiction.</b></p> <p><i>2. Access management/decision support:</i></p> <p>The access management/decision support component captures the moment where the user makes the decision to use a certain application or make a purchase in an online app or game. In terms of non-addictive information systems design, the main goal of access management/decision support is to ensure that these decisions are based on complete information and that problematic use is not the default (Kloker 2020).</p> <p>In our assessment of the extent to which the Directives address digital addiction development under this component, we first focus on the CRD, UCTD and UCPD as well as other EU legislation that include requirements on transparency in transactional decisions as regards “attention-capture dark patterns”. Here, we also address the second part of RQ49 – whether there are any examples of legislation on mandatory disclosures about the addictive nature of digital products. We then assess legislation addressing “problematic use not being the default” in users' decision-making.</p> <p><i>2.1. Transparency requirements in EU legislation on “attention-capture dark patterns”</i></p> <p>The access management/decision support component of “attention-capture dark patterns” is addressed by the Directives insofar as:</p> <ul style="list-style-type: none"> <li>• CRD Articles 5(1)(c) and 6(1)(e) require traders to provide information about the “total price” before the consumer is bound by a contract, also if the price was personalised based on automated decision-making (Article 6(1)(ea)). Article 3(1a.) specifies that this also applies where the trader supplies or undertakes to supply digital content which is not supplied on a tangible medium or a digital service to the consumer. However, according to Article 3(3) (c), this does not apply for gambling, which involves wagering a stake with pecuniary value in games of chance, including lotteries, casino games and betting transactions (which is relevant for Member States that choose to regulate loot boxes within gambling framework, such as Belgium and the Netherlands). Article 9 of the CRD also affords consumers the right to withdraw from a contract within 14 days, without giving any reason, and without incurring any costs other than those provided for in Article 13(2) and Article 14, albeit Article 16(m) offers a waiver as regards contracts for the supply of digital content which is not supplied on a tangible medium if the performance has begun and if the contract places the consumer under an obligation to pay, where the consumer has provided prior express consent to begin the performance during the right of withdrawal period; the consumer has provided acknowledgement that he thereby loses his right of withdrawal; and the trader has provided confirmation in accordance with Article 7(2) or Article 8(7).</li> <li>• UCTD Article 3(1) states that a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Article 5 further provides for contracts where all or certain terms offered to the consumer are provided in writing, that these are done so in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This provision is also reflected in Article 4(2) which notes that assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter nor to the adequacy of the price and remuneration, on the one hand, as against the services or</li> </ul>

<sup>380</sup> BEUC, 2022, EU Consumer Protection 2.0, 'Protecting fairness and consumer choice in a digital economy.'

<sup>381</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market

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	<p>goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language.</p> <ul style="list-style-type: none"> <li>• UCPD Article 6 states that the assessment of whether a practice is misleading must consider whether the trader clearly discloses results and benefits that the average consumer can reasonably expect to achieve, including any applicable conditions or limitations. Failure to do so causes or might cause the consumer to take a transactional decision that he would not have taken otherwise. Article 6(d) also notes the element of the price or manner in which the price is calculated, or the existence of a specific price advantage. Article 7(1) specifies that a commercial practice shall be regarded as misleading if it omits material information that the average consumer needs to take an informed transactional decision. In the case of invitation to purchase, this includes the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the matter in which the price is calculated (Article 7(4)(c)).</li> <li>• The updated UCPD Guidance 2021 also specifies that under No 20 of Annex I and Article 7(4)(e) UCPD and Article 6(1)(e) CRD, <b>only games where in-app purchases are optional can be presented as “free” without misleading consumers</b> – however, that a game cannot be marketed as “free” if the consumer cannot play the game in a way that can be reasonably expected without making in-app purchases (this is to be assessed on a case-by-case basis for each app that includes in-app purchases). A game found in compliance with No 20 in Annex I UCPD as concerns the use of the word “free” can still be assessed under other provisions of the UCPD (Articles 6 to 9) to make sure that other elements, like how price information is displayed, are not misleading or aggressive. Under Article 7(4)(e) existence of the right of withdrawal or cancellation must be mentioned in invitations to purchase whenever applicable. Under this requirement, traders are only required to inform consumers about the existence of such rights, without detailing the conditions and procedures to exercise them.</li> </ul> <p>As noted in the updated UCPD Guidance 2021, the pre-contractual information requirements in the CRD are more detailed than the information requirements in Article 7(4) of the UCPD for the invitations to purchase. An invitation to purchase under the UCPD refers to both the information provided at the marketing stage (advertising) and before the contract is signed. Furthermore, the more exhaustive character of the information requirements in the CRD means that complying with the requirements laid down by the CRD for the pre-contractual stage should normally also ensure compliance with Article 7(4) UCPD, as far as the content of the information is concerned. But the UCPD will still be applicable for assessing any misleading or aggressive commercial practices including as regards the form and presentation of this information to the consumer. Furthermore, No 28 in Annex I UCPD and Articles 5(3) UCPD prescribe that those games targeted at children, or which traders can reasonably foresee to be likely to appeal to children, must not contain direct exhortations to children to buy additional in-game items.</p> <p>The UCTD applies to business-to-consumer contracts in all sectors of economic activity, meaning that it may apply in parallel to other provisions of EU law, including other consumer protection rules such as the UCPD. So should unfair terms be present in online games that contain loot boxes within the EU market, the UCTD rules will apply. Where EU law, sector-specific or other, is in place and its provisions overlap with the provisions of the UCPD, the corresponding provisions of the <i>lex specialis</i> will prevail (UCPD Article 3(4)). However, the UCPD (Recital 9) and UCTD could apply even if Member States choose to regulate such games within gambling frameworks<sup>382</sup>, as was done in the case of gambling regulators on certain types of loot boxes in Belgium, Netherlands. In this context, UCPD Article 3(3) and Recital 9 also state that the UCPD is without prejudice to national health and safety legislation, as well as rules relating to gambling activities – in the case of loot boxes, these may include health and safety aspects related to their potential addictive character.</p> <p>Legal experts consulted for this case study generally considered that the transparency requirements set out in the Directives sufficiently addressed the access management/decision support component of digital addiction development, but only in the context of loot boxes/virtual items and virtual currencies. They noted that the CRD and UCTD Articles mentioned above provided for traders to disclose the price of virtual items before a transaction is made, in plain and intelligible language, allowing the consumer to base his decision on a sound understanding of the real-money value of the purchase that he is making. Article 7 UCPD was also deemed to address the issue of providing prices for virtual items, or an approximate estimate in real currency, which in conjunction with the broad concept of transactional decisions in the UCPD</p>

<sup>382</sup> Leahy, D. (2022) Rocking the boat: loot boxes in online digital games, the regulatory challenge, and the EU’s Unfair Commercial Practices Directive, *Journal of Consumer Policy* Vol. 45, Link: <https://link.springer.com/article/10.1007/s10603-022-09522-7>

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	<p>was considered to not only cover the moment of the purchase, but that real currency should be displayed at the outset when the user “comes into contact” with the loot box or virtual item, also in their advertisements.</p> <p>The gaming industry, however, has noted concerns that the requirement of displaying real-world monetary equivalence or an exchange rate mechanism could lead to players believing that in-game virtual currency or digital items acquired through virtual currency have a real-world monetary value and lead to “confusion”. This was noted in the position paper by the ISFE (Europe’s Video Games Industry), referencing the Dutch ACM’s suggestion that video game publishers should include real-world monetary value alongside any in-game purchases made with virtual currencies. As the position paper states, clarity for the consumer should instead be achieved where the actual financial transaction takes places (i.e., when the consumer buys a digital item in-game using real-world money) by displaying the purchase price of the digital item in real currency, but not when the in-game currencies are subsequently used to acquire digital items. Particularly, since this would not only alleviate confusion in the consumer, but also <b>prevent the sharing of publisher price information</b>, a concern for competition law. Therefore, the ISFE points to guidelines recently adopted in the UK by the Committee on Advertising Practice<sup>383</sup> as a desirable approach for the European Commission to take in this regard.</p> <p>Legal experts consulted considered also other problematic practices, such as freemium or “survivorship bias” and the incomplete or false presentation of odds, to be addressed by UCPD Article 7 and – in the case of “freemium” - Annex I point 20. NFTs were found to fall under UCPD Article 6 on misleading actions and Article 7 on misleading omissions, which should apply irrespective of the payment methods used (including tokens), and prohibit traders from misrepresenting the nature and characteristics of the products or leaving out material information about the product. In addition, CRD Article 3(1) covers all transactions between a consumer and a trader. Legal experts also noted the additional provisions provided for children as regards in-game/in-app purchases under No 28 in Annex I UCPD and Articles 5(3) UCPD.</p> <p>However, beyond the above, the Directives do not address transparency requirements as regards other “attention-capture dark patterns” as specified in our answer to RQ1. These would require specific transparency provisions about their addictive nature in line with the “real price” disclosure requirements listed above. This would mean that social media platforms would be required to label certain design features, such as infinite scroll, and provide information (e.g., via disclaimers) on their effects on average time spent on the platform, for example, asking users to consent to the use of such features after being informed of their addictive nature. Nonetheless, our legal experts highlighted that “information alone may not be sufficient to protect players” and others who come into contact with virtual items/currencies, particularly since it was not clear whether or how gamers would use this information in their decision-making. Evidence from other harmful products, such as smoking, suggests that labelling has a very limited effect on addictive behaviour.<sup>384</sup> Also given that loot box content is digital in nature, rights of withdrawal may be worked around through the waiver specified in CRD Article 16(m).</p> <p>Apart from these suggestions, legal experts again emphasised “enforcement” and utilising this UCPD mechanism in the first instance. In their response to the OPC, the EGDF also notes that new and forthcoming legislation such as the Digital Services Act, the Digital Markets Act, the AI Act, the Data Governance Act and the Data Act will “substantially impact the functioning of the digital markets for consumers and businesses alike”, and that it was therefore important for the Commission to wait for their full implementation before introducing new regulations. Legal experts interviewed and OPC respondents also emphasised that the video game industry abides by the Pan European Game Information System (PEGI), which provides a Europe-wide age-appropriate labelling scheme of video game content, and an enforceable Code of Conduct applicable to the video game companies that receive and display the age label. Some stakeholders deemed PEGI to be the most effective system for reducing harm on children due to loot boxes.</p> <p>In terms of other EU legislation, dark patterns, in general, may also constitute a breach of GDPR, in particular regarding the principles of Article 5 GDPR, of the requirements for consent to be given freely, specific and informed (Article 4 No. 11, Article 7 GDPR), of the transparency requirements, and of the principle of privacy by design (Article 25 GDPR). The GDPR complements other EU legislation by making it clear that consumers should opt-in transparently in terms of providing their personal data, and therefore dark patterns could be used to trick users into handing over personal data whose ultimate purpose may be unclear. Data protection authorities (DPAs) are responsible for sanctioning the use of deceptive design patterns if these breach GDPR requirements.</p>

<sup>383</sup> [Guidance on advertising in-game purchases - ASA | CAP](#)

<sup>384</sup> [OP-HEAL190011 321..331 \(cmu.edu\)](#)



Case study headings	Description of content under heading
	<p>The EDPB<sup>385</sup> developed examples of dark patterns on platforms in Guidelines of March 2022 which provided best practice recommendations to designers and social media platform providers on how to assess and avoid dark / deceptive patterns in social media interfaces that violate the GDPR's requirements. The guidelines were updated in March 2023<sup>386</sup>.</p> <p style="text-align: center;"><i>2.2.2. Transparency requirements in Member States' legislation on "attention-capture dark patterns"</i></p> <p><b>RQ5 (2) – Are any examples of legislation on mandatory disclosures about the addictive nature of digital products.</b></p> <p>Our research did not identify any national legislation with transparency obligations as regards "attention-capture dark patterns". However, in the specific context of loot boxes, the Spanish draft Bill<sup>387</sup> sets out the following obligations:</p> <ul style="list-style-type: none"> <li>• <b>Advertising loot boxes</b> – this may not encourage "impulsive or thoughtless" use of loot boxes, including misleading statements about odds; it must include a statement encouraging moderate participation in loot boxes and warning <b>against</b> minors accessing them; such advertisements may only be broadcasted between 1am and 5am.</li> <li>• <b>Information obligations</b> – users have the right to obtain clear and accurate information on the terms of use and the probability of obtaining a reward when accessing loot boxes; they also have the right to know, at any time, the number of loot boxes activated as well as the amount of time spent using them; companies will need to provide specific information for safe use of loot boxes, including information on the risks arising from "thoughtless or impulsive activation".</li> </ul> <p style="text-align: center;"><i>2.2.3 Transparency requirements in non-EU legislation on "attention-capture dark patterns"</i></p> <p>Here, we address the second part of <b>RQ5 – whether there are any examples of legislation on mandatory disclosures about the addictive nature of digital products.</b></p> <p>Our research only identified the examples of Japan and China as regards transparency obligations in consumer protection mechanisms that address "attention-capture dark patterns", although these are also only limited to the specific case of loot boxes / virtual items:</p> <ul style="list-style-type: none"> <li>• In <b>Japan</b>, the focus is on the exploitative elements of loot boxes, with specific rules aimed at redressing disparities between the cost of obtaining loot box items and the value of the prize or pay-out for completing a set of virtual items.<sup>388</sup></li> <li>• In <b>China</b>, specific rules were introduced setting mandatory disclosure obligations for percentage chance of a particular item appearing in a loot box.<sup>389</sup></li> </ul> <p style="text-align: center;"><i>2.2.4 Problematic use as default</i></p> <p>The updated UCPD Guidance 2021 references "default settings" as having a significant impact on the transactional decision of an average consumer, mentioning the example of pre-ticked boxes (which are also not allowed under the GDPR), which may be considered misleading. However, the Guidance does not address default settings as they pertain to "attention-capture dark patterns". The DSA Article 29(2), however, allows users to easily adapt their interface and deactivate recommender systems' usage of user profiling. Building on this provision, there may be scope for the UCPD Guidance to specify that features, such as infinite scroll or autoplay, which are captured by the broad concept of transactional decision of the UCPD to apply in cases where a commercial practice is likely to cause the consumer to spend more time on the internet and continue using a service by browsing or scrolling, should be deactivated as a default setting – just as is the case of pre-ticked boxes (Annex I UCPD). In line with the transparency considerations mentioned above, a user trying to activate this feature could be prompted by a disclaimer informing him about the risks to digital addiction associated with these attention-capture dark patterns.</p>

<sup>385</sup> European Data Protection Board (EDPB)'s Guidelines on "Dark patterns in social media platform interfaces" of 14.03.2022.

<sup>386</sup> EDBP Guidelines 2.0 - Deceptive design patterns in social media platform interfaces: how to recognise and avoid them - [https://edpb.europa.eu/system/files/2023-02/edpb\\_03-2022\\_guidelines\\_on\\_deceptive\\_design\\_patterns\\_in\\_social\\_media\\_platform\\_interfaces\\_v2\\_en\\_0.pdf](https://edpb.europa.eu/system/files/2023-02/edpb_03-2022_guidelines_on_deceptive_design_patterns_in_social_media_platform_interfaces_v2_en_0.pdf)

<sup>387</sup> [Spain - Breaking New Ground With Loot Box Regulation. - Conventus Law](#)

<sup>388</sup> Liu, K. (2019) A global analysis into loot boxes: Is it "virtually" gambling? Washington International Law Journal Vol. 28, Link: <https://digitalcommons.law.uw.edu/wilj/vol28/iss3/11/>

<sup>389</sup> Xiao, L. Y. (2022) What next for video game regulation in 2022, Computers & Law, Vol. 144, link: <https://pure.itu.dk/en/publications/what-next-for-video-game-regulation-in-2022>

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	<p>Such an approach would also be in line with guidelines by the European Data Protection Board on dark patterns in social media platform interfaces.<sup>390</sup> Of relevance regarding “attention-capture dark patterns” are two recommendations, namely for platform designers to:</p> <ul style="list-style-type: none"> <li>• turn off autoplay by default, if the feature is reactivated, it must be disabled again by default in the case of children users;</li> <li>• turn off default notifications and alerts, such as “push” messages, pings, read receipts and any non-specific alerts.</li> </ul> <p><b>3. Gratification management:</b></p> <p>According to Kloker (2020) another digital feature that promotes the reinforcement cycle of digital addiction is that the gratification is often provided instantly and that there is no natural limit of gratification. As he notes, information systems can provide gratification that are often unlimited and, if the user develops a tolerance towards gratifications, the system can easily alter the intensity or type of gratification. Which is why, under this component, we focus on legislation that considers gratification management, namely time and cost limitations and parental controls. Here, we also answer the first part of RQ49 – are there any examples of legislation that limits either the money or time that can be spent using digital content and services.</p> <p>In terms of EU legislation, the updated UCPD Guidance 2021 acknowledges the role of parental controls, recommending that traders should make use of “platform-level controls” offered by hosting platforms and recommends consent for time-setting. Legal experts consulted for this case study noted that there is a precedent for deploying the UCPD - in 2020 the Italian Autorità Garante della Concorrenza e del Mercato (AGCM) required two games operators to improve their labelling, content and positioning of information about cost and features of in-game purchases, together with more user-friendly parental controls.<sup>391</sup> However, our desk research and legal experts consulted noted that parental control measures are ineffective if not activated by default and if parents are not aware of their existence or did not know how to use them correctly.<sup>392</sup> Other measures, such as financial control tools used to curb spending in online gambling, were also deemed to be an appropriate measure, but to fall outside the scope of the UCPD.</p> <p>In terms of Member States’ legislation, the draft Spanish bill aimed at regulating loot boxes sets out the following obligations relevant for gratification management:</p> <ul style="list-style-type: none"> <li>• <b>Self-exclusion mechanisms</b> – such mechanisms will need to be enabled by companies to allow users to temporarily (3 months to 5 years) suspend the activation of loot boxes; once activated, it is not reversible.</li> <li>• <b>Expenditure limits</b> – companies need to offer users the possibility of limiting their spending on loot boxes, and once set, limits may not be changed for three months.</li> <li>• <b>Loot box session</b> – companies will need to enable sessions for users to set the maximum time and amount of money they are willing to spend before accessing each loot box session; users will not be able to access loot boxes unless this session has been set.</li> <li>• <b>Parental controls</b> – companies will have to ensure that there are parental controls that can be used to block access to loot boxes.</li> </ul> <p>In terms of other “attention-capture dark patterns” as specified in our answer to RQ1, in <b>France</b>, an additional piece of law to protect minors is the recently proposed “age verification bill”. France approved a law in June 2023 requiring social media platforms, such as TikTok to verify users’ ages and obtain parental consent for those under 15 years to protect children online.</p> <p>Outside of the EU, “attention-capture dark patterns” are regulated under this component as follows:</p> <ul style="list-style-type: none"> <li>• In the <b>United Kingdom</b>, the government introduced a self-regulatory initiative which involved “11 principles” from the UK video games industry and guidance on paid loot boxes.<sup>393</sup></li> <li>• In <b>Utah (USA)</b>, a bill effective from March 2023 restricts under-18-year-olds from accessing TikTok, Instagram, Facebook and other platforms, without parental consent. This bill also prohibits social media companies from employing techniques</li> </ul>

<sup>390</sup> European Data Protection Board: Guidelines 3/2022 on dark patterns in social media interfaces: how to recognise and avoid them. Link: [edpb\\_03-2022\\_guidelines\\_on\\_dark\\_patterns\\_in\\_social\\_media\\_platform\\_interfaces\\_en.pdf](https://edpb.europa.eu/our-work-and-activities/guidance-standards-and-recommendations/recommendations-and-guidelines/guidelines-3-2022-on-dark-patterns-in-social-media-platform-interfaces_en.pdf) (europa.eu)

<sup>391</sup> Nabel, D. (2020) Italian regulator’s recent loot box decision relating to hearthstone and overwatch (updated), Game Changers, A Video Game Law Blog, Link: <https://www.gamechangerslaw.com/blog/italian-antitrust-authoritys-recent-activision-blizzard-lootbox-decision>

<sup>392</sup> See also Ibid.

<sup>393</sup> [New Principles and Guidance on Paid Loot Boxes - Ukie](#)

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	<p>that could cause minors to develop an addiction to the platform. The platforms will also be required to block users younger than 18 from accessing accounts between 10.30pm and 6.30am unless parents modify the settings.<sup>394</sup></p> <ul style="list-style-type: none"> <li>• The proposed <b>SMART bill in the US</b> also requires social media platforms to automatically limit the amount of time that a user may spend on those platforms across all devices to 30 minutes a day unless the user elects to adjust or remove the time limit and, if the user elects to increase or remove the time limit, resets the time limit to 30 minutes a day on the first day of every month. In addition, it requires social media platforms to provide users with regular disclosures, including immediate disclosures when prompted by the user, of the amount of time the user has spent on those platforms across all devices, broken down by day, week, month, year, and platform; and to display a conspicuous pop-up to a user not less than once every 30 minutes that the user spends on those platforms, regardless of whether the user spent the 30 minutes on multiple devices, that shows how much time the user has spent on those platforms a day.<sup>395</sup></li> <li>• In <b>China</b>, specific rules were introduced making loot box games subject to spending limits and creating specific safeguarding measures to protect children through rules of identification, registration and payment confirmation<sup>396</sup>, which also include curfews on underage players.<sup>397</sup> TikTok has also implemented rules regarding access to the app for children under 15 years old in response to gaming and media addiction in young people, making it possible to use the platform for 40 minutes a day between 6am and 10pm. While proof of age is not required upon registration, parents are advised to help children register their age in the app.</li> <li>• In <b>South Korea</b>, games containing loot boxes are rated by the national regulator proactively, with discretion to refuse approval on grounds including a “game’s potential to constitute online gambling”.<sup>398</sup> Rated games are then subject to parental control and supervision of children playing; South Korea also adopted rules on game spending limits for minors under the age of 19 and for adults.<sup>399</sup> Curfews for children in place for gaming in general, not just loot boxes.</li> </ul> <p>However, according to our legal experts, self-regulation is only effective if most companies and platforms complied with them to the best of their abilities. They also noted that historically, companies and platforms have only acted when faced with explicit regulation, albeit Meta, for example, has introduced design features allowing for users to opt out of notifications and to monitor their time – <b>though not by default.</b></p>
<p><b>Conclusion</b></p>	<p>In this section, we provide our <b>conclusions about the extent to which the Directives address “attention-capture dark patterns” in the three components</b> identified for non-addictive information systems design: situation management, access management/decision support, and gratification management.</p> <p><b>RQ6 – to what extent is it necessary and is there scope for introducing specific rules which mitigate the potential negative effects on consumers due to addiction and prolonged use of certain digital content and services?</b></p> <p><b>1. Conclusions:</b></p> <p><b>1.1. Situation management</b> – addresses the issue of deployment of “attention-capture dark patterns” in the first place.</p> <p>This case study finds that the UCPD and updated UCPD Guidance 2021 address “attention-capture dark patterns” insofar as according to Articles 5 to 9 UCPD, a commercial practice may be considered unfair not only if it is likely to cause the average consumer to purchase or not to purchase a product, but the broad concept of transactional decisions allows for the UCPD to</p>

<sup>394</sup> [Utah bans under-18s from using social media unless parents consent | Utah | The Guardian](#)

<sup>395</sup> [Social-Media-Addiction-Reduction-Technology-Act.pdf \(senate.gov\)](#)

<sup>396</sup> Xiao, L. Y. & Henderson, L. (2021) Towards an ethical game design solution to loot boxes: A commentary on King and Delfabbro. *International Journal of Mental Health and Addiction* Vol. 19, Link: <https://link.springer.com/article/10.1007/s11469-019-00164-4>

<sup>397</sup> Xiao, L. Y. (2022) What next for video game regulation in 2022, *Computers & Law*, Vol. 144, link: <https://pure.itu.dk/en/publications/what-next-for-video-game-regulation-in-2022>

<sup>398</sup> Derrington, S. et al. (2021) The case for uniform loot box regulation: A new classification typology and reform agenda, *Journal of Gambling Issues*, Vol. 46, Link: <https://www.researchgate.net/publication/349350605> *The Case for Uniform Loot Box Regulation A New Classification Typology and Reform Agenda*

<sup>399</sup> Xiao, L. Y. (2021) Conceptualising the loot box transaction as a gamble between the purchasing player and the video game company, *International Journal of Mental Health and Addiction*, Vol. 19, Link: <https://link.springer.com/article/10.1007/s11469-020-00328-7>

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	<p>also apply in cases where a commercial practice is likely to cause the consumer to spend more time on the internet and continue using a service by browsing and scrolling – not only <i>in concreto</i>, but also <i>in abstracto</i>. Article 5 can also apply as a residual control mechanism when the practice is not captured by Articles 6 to 9 of the UCPD or its Annex I. Furthermore, the updated UCPD Guidance 2021 sets out the Commission’s position regarding the UCPD’s applicability to ensuring fairness in online games, noting the presence of “gambling elements” and “addictive interface designs” in games, as well as risks to children arising from this and other known marketing practices and design strategies (No 28 of Annex I). However, most “attention-capture dark patterns” identified in this case study, such as infinite scroll, pull-to-refresh and autoplay are not explicitly mentioned in any EU legislation, even if they can be considered generally covered by the UCPD’s principle-based provisions and prohibitions. Still, blacklisting these types of “attention-capture dark patterns” through explicit inclusion in Annex I UCPD could eliminate the opportunity for users to use digital tools in a meaningful way, allow for legal challenges by the industry which is likely to adapt such features in a way that might change their classification, and disincentivise innovation in the EU market. At the same time, our case study found that through revisions to the vulnerable consumer concept in the UCPD, digital addiction could be better addressed (see section 2 below). Similarly, we found that in terms of children’s protection, the updated UCPD Guidance 2021 currently focuses explicitly on those practices aimed at direct exhortations of children to buy products, and video games, mobile games, or online games. Other “attention-capture dark patterns” aimed at maximising a child’s time spent on a particular digital product do not receive the same level of attention.</p> <p><b>1.2. Access management/decision support</b> – aims to ensure that transactional decisions are based on complete information and that problematic use is not the default.</p> <p>This case study finds that the transparency requirements set out in the Directives sufficiently address the access management/decision support component of digital addiction development, but only in the context of loot boxes / virtual items and virtual currencies. They do not address transparency requirements as to the addictive nature of other “attention-capture dark patterns”, such as infinite scroll and autoplay. Moreover, the updated UCPD Guidance 2021 only references “default settings” with the example of pre-ticked boxes as a misleading practice, and not default settings as they pertain to “attention-capture dark patterns”.</p> <p><b>1.3. Gratification management</b> – refers to mechanisms, such as time and cost limitations and parental controls, which have potential to break the instant and limitless gratification provided through digital tools and thus curb digital addiction development.</p> <p>This case study finds that the updated UCPD Guidance 2021 acknowledges the role of parental controls, however, these are ineffective if not activated by default and if parents are not aware of their existence or do not know how to use them correctly. Other potential measures, such as financial control tools used to curb spending in online gambling, were found to fall outside the scope of the UCPD.</p> <p><b>2. Necessity and scope for introducing specific rules which mitigate the potential negative effects on consumers due to addiction and prolonged use of certain digital content and services</b></p> <p>This case study finds that <b>there is necessity and scope for introducing specific rules to ensure that the EU consumer protection framework and its enforcement adequately address the risk of digital addiction development in consumers</b>. Particularly, as sectoral frameworks at EU level do not adequately and comprehensively address this issue, and the currently fragmented approach allows for some sectors to lag behind in terms of safety standards. In addition to this, enforcement is made difficult by being scattered among different regulatory agencies. We therefore propose the following options for the Commission’s consideration as regards digital addiction:</p> <ul style="list-style-type: none"> <li>• To revise the updated UCPD Guidance 2021 to include specific reference to a broader range of “attention-capture dark patterns”, including infinite scroll, autoplay, and pull-to-refresh. This should be done in general, but especially with reference to children’s protection to account for features aimed at maximising a child’s time spent on a particular digital product or platform.</li> <li>• To revise the UCPD to set minimum standards of age assurance.</li> <li>• To revise the vulnerable consumer concept in the UCPD to:</li> </ul>

Case study headings	Description of content under heading
	<ul style="list-style-type: none"> <li>▪ account for environmental factors (such as early exposure to substance abuse) and underlying mental health conditions (e.g., anxiety or depression, social isolation) that may exacerbate the risk of digital addiction development,</li> <li>▪ place the burden of proof on traders rather than consumers.</li> </ul> <ul style="list-style-type: none"> <li>• To revise the UCPD to address transparency requirements of “attention-capture dark patterns” other than virtual currencies and virtual items, obliging traders to label these design features and disclose their addictive nature to consumers (e.g., via disclaimers showing their effects on average time spent) and information provision on transparent information of likelihood of gains, and request consent following this information and prior use.</li> <li>• To revise the UCPD reference to “default settings” to address default settings in the context of “attention-capture dark patterns”, including virtual items and currencies, and to mandate that these should be deactivated as a “default setting” just as is the case for pre-ticked boxes.</li> <li>• To strengthen enforcement of the transparency and child protection obligations covered in Articles 5 to 9 and Annex I UCPD as regards virtual items and virtual currencies.</li> </ul>
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Case study headings	Description of content under heading
	<p>Zendle, D. et al. (2020a) Paying for loot boxes is linked to problem gambling, regardless of specific features like cash-out and pay-to-win. <i>Computers in Human Behavior</i>, Vol. 102, Link: <a href="https://www.sciencedirect.com/science/article/abs/pii/S0747563219302468">https://www.sciencedirect.com/science/article/abs/pii/S0747563219302468</a></p> <p>Zheng, X. and Lee, M. (2016) Excessive use of mobile social networking sites: negative consequences on individuals. <i>Computers in Human Behaviour</i>, Vol. 65. Link: <a href="https://www.sciencedirect.com/science/article/abs/pii/S0747563216305751">https://www.sciencedirect.com/science/article/abs/pii/S0747563216305751</a></p> <p><b>Interviews conducted:</b></p> <ul style="list-style-type: none"> <li>• Julia Hornle, Chair of Internet Law, Queen Mary University</li> <li>• Deirdre Leahy, Adjunct Lecturer, University College Cork</li> <li>• Vasiliki Panousi, The European Gaming and Betting Association (EGBA)</li> <li>• Jonathan Van Damme, Jurist, Kansspelcommissie (BE)</li> <li>• Leon Y. Xiao, PhD Fellow, IT University of Copenhagen</li> <li>• Additionally, interview feedback from some of the wider Part 1 interviews as various stakeholders commented on loot boxes and digital addiction. For instance, the European Games Developer Federation (EGDF) took part in an interview.</li> </ul>



## 7 Case study – Social commerce and social media influencers

<b>Case study</b>	<p>1) The impact of social media on online purchasing: A study of the social commerce phenomenon</p> <p>2) the future of social media as a marketplace: a case study on (emerging) trends and innovations in social media marketplaces</p> <p>3) the rise of social media content monetisation: how social media platforms evolved into marketplaces</p>
<b>Introduction and case study objectives</b>	<p>This case study examines the recent developments in social media content monetisation, focusing specifically on the social commerce phenomenon. More specifically, it explores different ways in which social media can be used to advertise and sell products, services and content to consumers as well as new emerging trends (e.g., augmented and virtual reality, the use of tokens, livestream shopping, and the metaverse) that might create legal uncertainty and potentially pose risks to consumers. The objectives of the case study are to:</p> <ul style="list-style-type: none"> <li>• Provide an overview of the <b>different types of social commerce</b> currently used on social media platforms and ascertain their prevalence</li> <li>• Provide an overview of <b>emerging trends in social commerce</b> (such as augmented and virtual reality, the use of tokens, livestream shopping, and the metaverse);</li> <li>• Investigate the nature and extent of the problems related to social commerce;</li> <li>• Analyse the extent to which existing <b>EU legislation</b> (e.g., UCPD, CRD, UCTD, MD, AVMSD, DSA and DMA) addresses market practices related to social commerce effectively;</li> <li>• Explore the extent to which Member States have already, or are looking to regulate social commerce; and</li> <li>• Consider how EU consumers might be affected by non-EU traders in terms of influencers and/ or social media platforms located outside the EU.</li> </ul>
<b>Case study method</b>	<p>The evidence base presented draws on:</p> <ol style="list-style-type: none"> <li>1) Desk research (note – bibliography included at end of the case study)</li> <li>2) Interviews (list of organisations/types of stakeholders consulted in annex)</li> <li>3) Public consultation responses and position papers.</li> <li>4) Findings from a sweep on transparency of online marketplaces on the involved contractual parties and targeted survey</li> </ol>
<b>Context and market trends</b>	<p><b>Key market highlights:</b></p> <ul style="list-style-type: none"> <li>• <b>In recent years, both consumers and enterprises have started to use social media as an e-commerce tool and research suggests this trend is likely to increase in the coming years</b><sup>400,401</sup></li> <li>• <b>According to some estimates, social commerce could possibly outpace the growth of e-commerce by three times.</b><sup>402</sup></li> <li>• <b>Newly emerging technologies (such as metaverse, virtual reality, and tokens) are also changing how social media could be used as a marketplace or e-commerce platform in the future</b></li> </ul> <p>In 2020 nearly 57% of the EU population aged 16-74, equivalent to almost 253.5 million people, used social media.<sup>403</sup> Furthermore, it is evident that number of users of social media platforms in Europe from 2017 has been growing steadily across platforms such as Facebook, Instagram, LinkedIn, Pinterest, Reddit, Snapchat, TikTok, and Twitter.<sup>404</sup> Research shows that a typical social media user now spends about 15%<sup>405</sup> of their waking life on social platforms. Furthermore, more than two-thirds (68%) of consumers globally</p>

<sup>400</sup> Sprout Social, 98% of consumers plan to make a purchase on social media in 2022; Available at :<https://www.globenewswire.com/news-release/2022/02/15/2385456/0/en/98-of-consumers-plan-to-make-a-purchase-on-social-media-in-2022.html>

<sup>401</sup> Statista, 2023, Value of social commerce sales worldwide from 2022 to 2026. Available at :<https://www.statista.com/statistics/1251145/social-commerce-sales-worldwide/>

<sup>402</sup> Could social commerce spark a turnaround in Alphabet's stock?, 2022, Available at : <https://www.cmcmarkets.com/en/opto/could-social-commerce-spark-a-turnaround-in-alphabets-stock>

<sup>403</sup> Eurostat 2021, Do you participate in social networks?, Available at : [Do you participate in social networks? - Products Eurostat News - Eurostat \(europa.eu\)](https://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&plugin=1)

<sup>404</sup> Statista 2023, Number of users of selected social media platforms in Europe from 2017 to 2027, by platform. Available at : [Europe social media users by platform 2027 | Statista](https://www.statista.com/statistics/1251145/social-commerce-sales-worldwide/)

<sup>405</sup> Datareportal 2023, Global Social Media Statistics. Available at : [Global Social Media Statistics — DataReportal – Global Digital Insights](https://www.datareportal.com/reports/global-social-media-statistics/)

Case study	<p>1) The impact of social media on online purchasing: A study of the social commerce phenomenon</p> <p>2) the future of social media as a marketplace: a case study on (emerging) trends and innovations in social media marketplaces</p> <p>3) the rise of social media content monetisation: how social media platforms evolved into marketplaces</p>
	<p>have already made purchases using social media and nearly all (98%) consumers planned to make at least one purchase through social shopping.<sup>406,407</sup></p> <p>Unsurprisingly, brands seeking to reach more customers are increasingly using social media platforms for commercial purposes<sup>408</sup>. Gradually, brands realise the potential of using social media as a marketing and sales channel where they may interact with their target groups in real-time. Recent Eurostat data reveals that more and more enterprises in the EU use social media. In 2021, more than half of the enterprises (59%) reported that they were using at least one type of social media, an increase of 22 percentage points since 2015 (37%).<sup>409</sup> From a consumer perspective, using social media as an e-commerce platform provides enterprises with a seamless and convenient experience that can be accessed from anywhere at any time via a virtual storefront<sup>410,411</sup>. Therefore, it is not surprising that estimates show that on a global scale, sales made through social commerce are expected to grow by 25% annually in the next three years.<sup>412</sup> There are even estimates that social commerce could possibly outpace the growth of e-commerce by three times in the next few years.<sup>413</sup></p> <p><b>Mapping different types of social commerce</b></p> <p>The success of using social media as a new type of sales channel in recent years has led to the rise of the so-called <i>social commerce phenomenon</i>.<sup>414</sup> In this regard, <b>social commerce refers to e-commerce that takes place on social media platforms</b>.<sup>415</sup></p> <p><b>Social commerce refers to the use of social media platforms and networks to facilitate the buying and selling of products and services. It allows users to discover, research, and purchase products without leaving social media platforms or being directed to brands' separate online shops.</b> The popularity of social commerce seems to be rising mainly because it creates advantages for both consumers and businesses.</p> <p>This facilitation can be done through different features such as buy buttons on posts, social media shopping carts, and the ability to complete transactions within the social media platform. In other words, all stages of the consumer's journey (from product research to checkout) can now happen within the social media platform. Also, social media provides consumers with an opportunity to learn about certain products or services before being directed to a separate website to complete their purchase in a way which does not interrupt their usage of the social media platform. This is considered to be another advantage of social commerce.</p> <p>Since social commerce has become an important aspect of the digital economy, leading technology companies such as Google and Meta have started to recognise this trend as well. Currently, the biggest social media platforms including Facebook, Instagram, Pinterest, Twitter, and TikTok, have built-in social commerce features. For example, Google has been working to integrate social commerce into its platforms such as Google Shopping, which enables users to browse and purchase products from a range of</p>

<sup>406</sup> Sprout Social, *98% of consumers plan to make a purchase on social media in 2022*; Available at: <https://www.globenewswire.com/news-release/2022/02/15/2385456/0/en/98-of-consumers-plan-to-make-a-purchase-on-social-media-in-2022.html>

<sup>407</sup> Ibid.

<sup>408</sup> Shopify, *What is Social Commerce? Definition and Guide*. Available at: <https://www.shopify.com/enterprise/social-commerce-trends>

<sup>409</sup> Eurostat, June 2022, *More than half of EU enterprises use social media*. Available at: <https://ec.europa.eu/eurostat/en/web/products-eurostat-news/-/edn-20220629-1>

<sup>410</sup> Accenture, 2022. *The Future of shopping and social commerce*. Available at: <https://www.accenture.com/us-en/insights/software-platforms/why-shopping-set-social-revolution>

<sup>411</sup> Ibid.

<sup>412</sup> Ibid.

<sup>413</sup> Could social commerce spark a turnaround in Alphabet's stock?, 2022, Available at: <https://www.cmcmarkets.com/en/opto/could-social-commerce-spark-a-turnaround-in-alphabets-stock>

<sup>414</sup> Niemann, F., 2023, *Social Commerce as a Value Driver—Opportunities and Limitations of Direct Sales*. In *Digital Management in Covid-19 Pandemic and Post-Pandemic Times*. Available at: [Social Commerce as a Value Driver—Opportunities and Limitations of Direct Sales | SpringerLink](#)

<sup>415</sup> Accenture, 2022. *The Future of shopping and social commerce*. Available at: <https://www.accenture.com/us-en/insights/software-platforms/why-shopping-set-social-revolution>

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	<p>retailers.<sup>416</sup> In addition, Google-owned YouTube has introduced a feature where users can make purchases when watching live-stream videos.<sup>417</sup> In the same vein, Meta has also been investing in social commerce, with the company launching a feature that allows businesses to create online stores on Facebook and Instagram allowing people to browse, explore, and purchase products directly from platforms.</p> <p>Although there is no exact figure that could be associated with the overall global monetary value of social commerce, the market is expected to grow in the upcoming years.<sup>418</sup> For example, some estimates indicate that in 2021, global social commerce sales reached \$492 billion and are expected to nearly triple by 2025<sup>419</sup>. Alternative estimates show that the global value of social commerce may reach about \$2.9 trillion<sup>420</sup> by 2026.<sup>421</sup></p> <p>While it is not entirely clear what share of online purchases are made through social media in Europe, estimates indicate that the social commerce market in Europe might be worth billions of euros and be expected to continue to grow in the coming years due to the increasing popularity of mobile commerce.<sup>422</sup> Also, the proportion of internet users who are shopping online is steadily growing, although there are considerable variations across EU countries ranging from 42% in Bulgaria to 94% in the Netherlands.<sup>423</sup></p> <p>For consumers, social commerce creates a seamless and social shopping experience while for businesses it provides a tool with a wide range of options to leverage social media to boost sales and customer engagement.<sup>424</sup> Social media providers can incorporate commerce onto their platforms in several ways:<sup>425</sup></p> <ul style="list-style-type: none"> <li>• Implementing commercial features into social media tools. These features allow both individuals (e.g., Facebook Marketplace), companies and brands (e.g., Instagram Shopping) as well as influencers to sell products or services to consumers</li> <li>• Integrating social media features into e-commerce websites (e.g., Amazon or booking.com reviews). User-generated content, such as reviews and recommendations may influence purchasing decisions,</li> <li>• Increasing use of social media by traditional offline firms to improve business performance (e.g., customer service or Chatbot)</li> </ul> <p>As social commerce has been gaining traction in recent years, different types of social commerce have emerged with <b>social media marketplaces, livestream shopping, and influencer marketing</b> being some of the most popular.<sup>426</sup> Each type of social commerce comes with its own unique features and benefits and could broadly be categorised into three main types:<sup>427</sup></p> <ul style="list-style-type: none"> <li>• <b>“Shop now” links:</b> brands can share their products in social media posts via so-called shoppable posts, videos, or stories that have a “buy now” button,</li> </ul>

<sup>416</sup> Google, How Google Shopping works, 2023. Available at:

<https://support.google.com/faqs/answer/2987537?hl=en#zippy=%2Cwhat-is-google-shopping>

<sup>417</sup> Google, buy products on YouTube. Available at:

[https://support.google.com/youtube/answer/9162845?hl=en&co=YOUTUBE\\_YTVideoType%3Dvideo&oco=0](https://support.google.com/youtube/answer/9162845?hl=en&co=YOUTUBE_YTVideoType%3Dvideo&oco=0)

<sup>418</sup> Accenture, 2022. *The Future of shopping and social commerce*. Available at: <https://www.accenture.com/us-en/insights/software-platforms/why-shopping-set-social-revolution>

<sup>419</sup> Ibid.

<sup>420</sup> Statista, 2023, *Value of social commerce sales worldwide from 2022 to 2026*. Available at:

<https://www.statista.com/statistics/1251145/social-commerce-sales-worldwide/>

<sup>421</sup> Yahoo Finance, 2022. *98% of consumers plan to make a purchase on social media in 2022*. Available at:

[https://finance.yahoo.com/news/98-consumers-plan-purchase-social-150000262.html?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuYmluZy5jb20v&guce\\_referrer\\_sig=AQAAADi8EyoLS\\_uUeBZ2IvM8AnGFZzYaNyWypz7dUfg0KcWEmm2QkzQLVWV0lgjMf5Zakz3MJrOldMOw\\_P92M0hKVatGX0jUm5QV22K\\_zZoQEi2QvH33Wk\\_qLZIGZHn27s8X\\_WbzZb0b2czNMzdEHFf8zHo8lLACVITauoSqnU\\_zne](https://finance.yahoo.com/news/98-consumers-plan-purchase-social-150000262.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuYmluZy5jb20v&guce_referrer_sig=AQAAADi8EyoLS_uUeBZ2IvM8AnGFZzYaNyWypz7dUfg0KcWEmm2QkzQLVWV0lgjMf5Zakz3MJrOldMOw_P92M0hKVatGX0jUm5QV22K_zZoQEi2QvH33Wk_qLZIGZHn27s8X_WbzZb0b2czNMzdEHFf8zHo8lLACVITauoSqnU_zne)

<sup>422</sup> KBV Research, Market Research Report, 2021. Available at: [Social commerce market in Europe](https://www.kbv-research.com/research-report/social-commerce-market-in-europe)

<sup>423</sup> Eurostat, *E-Commerce statistics for individuals*, 2022. Available at: [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=E-commerce\\_statistics\\_for\\_individuals#Main\\_reason\\_for\\_not\\_buying\\_online](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=E-commerce_statistics_for_individuals#Main_reason_for_not_buying_online)

<sup>424</sup> Kem Z.K. Zhang, Morad Benyoucef,; Consumer behavior in social commerce: A literature review, *Decision Support Systems*, Volume 86, 2016, Available at: <https://www.sciencedirect.com/science/article/abs/pii/S0167923616300458>

<sup>425</sup> Xiaolin Lin, Yibai Li, Xuequn Wang, Social commerce research: Definition, research themes and the trends, *International Journal of Information Management*, Volume 37, Issue 3, 2017. Available at:

<https://www.sciencedirect.com/science/article/abs/pii/S0268401216303784>

<sup>426</sup> Shopify, *What is Social Commerce? Definition and Guide*. Available at: <https://www.shopify.com/enterprise/social-commerce-trends>

<sup>427</sup> Simplicity Marketing, *Types of Social Commerce*. Available at: <http://www.simplicitymktg.com/blog/types-of-social-commerce/>

Case study	1) The impact of social media on online purchasing: A study of the social commerce phenomenon 2) the future of social media as a marketplace: a case study on (emerging) trends and innovations in social media marketplaces 3) the rise of social media content monetisation: how social media platforms evolved into marketplaces
	<p>swipe-up feature, or checkout feature. These features can direct users either to the brand's social media product page or to a separate e-commerce site. In the first case, users may complete all steps of purchasing social media platforms for instance within the in-app store or catalogue. For example, some platforms such as Facebook, Instagram, and TikTok allow brands to use videos to present their products in a way that is tailored and optimised to the platform's interface creating a seamless experience for consumers. For instance, this so-called 'native content' may include images and videos formatted to Instagram's vertical layout, making use of popular features such as filters, hashtags, and stories. On Twitter, native content could include short tweets that make use of hashtags and other platforms specific features that allow engaging with the platform's audience without disrupting the users' social media experience.</p> <ul style="list-style-type: none"> <li>• <b>User-generated content:</b> brands might encourage users to produce their own content about brands' products or services. That might take the form of challenges where users need to use hashtags, follow the brand social media pages, answer polls write comments or tag their friends to participate in giveaways. This type also includes testimonials, and user reviews.</li> <li>• <b>Influencer marketing/affiliate marketing:</b> brands can also cooperate with influencers who will share a product or service on their own social media platforms encouraging consumers to engage with the brands' social media or website. This type of social commerce allows brands to leverage the connection and trust that users share with an influencer.</li> </ul> <p>The phenomenon of influencer marketing also called affiliate marketing has become increasingly popular in recent years. In fact, across the globe the amount spent on influencer marketing increased by 700% since 2016.<sup>428</sup> Furthermore, the data shows that overwhelming majority of marketers report that social media efforts generate more online traffic, interest, and sales.<sup>429</sup> It seems evident that brands understand the power of influencer marketing and are investing more money and resources into it. For instance, a national level study in Finland estimates that 80% of the companies surveyed had at least one contract with an influencer.<sup>430</sup> In France, marketers have stated that they spend around 45% of their total marketing budget on influencer marketing each year.<sup>431</sup> Moreover, in Italy, the value of influencer marketing was estimated to be 280 million euros in 2021.<sup>432</sup></p> <p>It is clear that brands invest in influencer marketing, however it is essential to assess how do brands' efforts influence consumers' decision-making processes. There is a growing body of research on this topic, and the results suggest that brands' efforts can have a significant impact on consumers' decision-making. A survey of consumers found that 53% of them have bought products or services recommended by influencers.<sup>433</sup> In the same vein, a survey conducted in France, Germany, the United Kingdom, Australia, and the United states revealed that among consumers who actively engage on social media platforms 41% frequently discover new brands and products through influencers, and 80% of them also purchase the products directly via the influencer's link provided on the social media platform. Additionally, 88% of the surveyed users stated that they were at least inspired by the post.<sup>434</sup> These findings suggest that influencer marketing is an effective way to reach consumers and influence their purchasing decisions.</p>

<sup>428</sup> The impact of influencers on advertising and consumer protection in the Single Market. Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies, Frithjof MICHAELSEN, Luena COLLINI et al., Available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL\\_STU\(2022\)703350\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf)

<sup>429</sup> Social Media Examiner, 2021. Social media marketing industry report, how marketers are using social media to grow their businesses. Available at : <https://www.socialmediaexaminer.com/social-media-marketing-industry-report-2021/?ref=buffer-library>

<sup>430</sup> Indieplace, 2021, Vaikuttajamarkkinointi vuonna 2022 – miksi sille kannattaa leikata isompi pala kakkua ensi vuoden budjetista? Available at: <https://www.indieplace.fi/vaikuttajamarkkinointi-vuonna-2022/>

<sup>431</sup> Rakuten Advertising, 2021 Report. Available at: <https://rakutenadvertising.com/fr-fr/resources/rapportmondial-influence/%20-%20https://blog.rakutenadvertising.com/fr-fr/insights/etude-influence-marketingmarketeurs/>

<sup>432</sup> Ibid.

<sup>433</sup> BEUC, 2023. From influence to responsibility - Time to regulate influencer marketing. Available at: [https://www.beuc.eu/sites/default/files/publications/BEUC-X-2023-093\\_From\\_influence\\_to\\_responsibility\\_Time\\_to\\_regulate\\_influencer-marketing.pdf](https://www.beuc.eu/sites/default/files/publications/BEUC-X-2023-093_From_influence_to_responsibility_Time_to_regulate_influencer-marketing.pdf)

<sup>434</sup> Rakuten marketing, 2019. Available at: <https://www.iab.com/wp-content/uploads/2019/03/Rakuten-2019-Influencer-Marketing-Report-Rakuten-Marketing.pdf>

Case study	1) The impact of social media on online purchasing: A study of the social commerce phenomenon 2) the future of social media as a marketplace: a case study on (emerging) trends and innovations in social media marketplaces 3) the rise of social media content monetisation: how social media platforms evolved into marketplaces
	<p><b>Emerging trends and technologies</b></p> <p>As both social media platforms and consumers' expectations continue to evolve and new technologies emerge, the future of social commerce is likely to be shaped by a combination of innovative business models and new technologies.<sup>435</sup> Social media platforms are also well-positioned to implement emerging technologies such as the Internet of Things (IoT)<sup>436</sup>, Web 3.0<sup>437</sup>, metaverse<sup>438</sup>, augmented and virtual reality, and the use of tokens. For example, blending entertainment with instant purchasing possibilities supported by augmented or virtual reality has the potential to even further transform consumers' shopping experience in the future<sup>439</sup> using AR, VR, and 3D, consumers could select a product such as pair of trousers, a car, or a dining table, and interactively customise and achieve the perfect dimensions, colour style, size of the product they selected. Technology might make it possible to try on (jewellery, glasses, and shoes), try out (furniture, and home accessories), or interact (electronics) with products in any environment all from the comfort of any location.</p> <p>For instance, the furniture industry often offers virtual product placement in any given space so that consumers can reliably visualise furniture in their room prior to purchasing it<sup>440</sup>. At the same time, the IoT can potentially enhance social commerce by providing real-time data about consumer behaviour and preferences, enabling more personalised and targeted marketing efforts.<sup>441</sup> Additionally, in the context of social commerce, Web 3.0 can potentially enable more secure and transparent transactions as well as more personalised and immersive shopping experiences through the use of virtual and augmented reality technologies. Presently, projects of immersive technology integration remain in their infancy, and the fulfilment of the seamless convergence of the physical and virtual worlds will rely on the pace of scale-up and adoption by the mass market. An interview with one of the stakeholders confirmed that social commerce is expected to become part of the metaverse although it is still too early to assess regulatory implications as the next generation of the Internet is still evolving.</p> <p>Although currently social commerce model already delivers a potentially superior shopping experience, emerging technologies such as Web 3.0 and the metaverse, may be integrated into social commerce in the coming years producing new challenges.</p> <ul style="list-style-type: none"> <li>• <i>Livestream shopping</i></li> </ul> <p>One of the main emerging trends in social commerce involves <i>livestream shopping</i>, which allows consumers to shop and purchase products in real time through a live video broadcast. A live stream host will typically showcase products, provide information about them, and interact with viewers who can ask questions and make purchases directly through the live stream. Livestream shopping may be interesting for consumers since it</p>

<sup>435</sup> Lianos, I. and Smichowski, C. (2021), *Economic Power and New Business Models in Competition Law and Economics: Ontology and New Metrics*. Available at SSRN: <https://ssrn.com/abstract=3818943>

<sup>436</sup> Internet of Things (IoT) refers to the network of physical devices, vehicles, home appliances, and other items embedded with electronics, software, sensors, and connectivity that enables these objects to collect and exchange data. Rose, K., Eldridge, S. and Chapin, L., 2015. The internet of things: An overview. *The internet society (ISOC)*, 80, pp.1-50./ Available at: [The internet of Things: An overview](#)

<sup>437</sup> Web 3.0 refers to the next generation of the Internet which emphasises decentralisation, blockchain technology, and artificial intelligence to provide users with more control over data and online experiences. Forbes, A Brief History Of Web 3.0. Available at: <https://www.forbes.com/advisor/investing/cryptocurrency/what-is-web-3-0/>

<sup>438</sup> Metaverse refers to a concept of a virtual shared space, usually built upon the internet or other digital technologies, where users can interact with a computer-generated environment and with each other through avatars. The metaverse is also an extension of the real world, where people can participate in various activities such as gaming, socialising, learning, and commerce. (Laeq, K., 2022. Metaverse: why, how and what. *How and What.*, Available at: [https://www.researchgate.net/profile/Kashif-Laeq/publication/358505001\\_Metaverse\\_Why\\_How\\_and\\_What/links/62053bb0afa8884cabd70210/Metaverse-Why-How-and-What.pdf](https://www.researchgate.net/profile/Kashif-Laeq/publication/358505001_Metaverse_Why_How_and_What/links/62053bb0afa8884cabd70210/Metaverse-Why-How-and-What.pdf); Mystakidis S. Metaverse. *Encyclopedia*. 2022; 2(1):486-497. <https://doi.org/10.3390/encyclopedia2010031>. Available at : <https://www.mdpi.com/2673-8392/2/1/31>

<sup>439</sup> McKinsey Digital, It's showtime! How live commerce is transforming the shopping experience, 2021. Available at: <https://www.mckinsey.com/capabilities/mckinsey-digital/our-insights/its-showtime-how-live-commerce-is-transforming-the-shopping-experience>

<sup>440</sup> Deloitte, *Augmented shopping: The quiet revolution*. Available at: <https://www2.deloitte.com/us/en/insights/topics/emerging-technologies/augmented-shopping-3d-technology-retail.html>

<sup>441</sup> Social Media Today, The Internet of Things and the Future of Social Commerce. Available at: <https://www.socialmediatoday.com/technology-data/2015-02-20/internet-things-and-future-social-commerce#:~:text=The%20Internet%20of%20Things%20is%20the%20connectivity%20of,data%20collection%2C%20and%20the%20future%20of%20social%20commerce.>

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	<p>combines entertainment with the convenience of online shopping.<sup>442,443</sup> However, these live streams could <i>create a sense of urgency to purchase a product</i> (e.g., if advertised products are limited in stock and many users are looking to purchase it at the same time or if the influencer/brand indicates that the offer is available only for a limited time). In some cases, these situations could qualify as ‘aggressive’ or ‘misleading’ practices prohibited by the UCPD<sup>444</sup>. Although livestream shopping time-limited offers might be not necessarily false, the use of timers might be problematic as it creates a sense of urgency among potential customers, motivating them to make a purchase quickly. That might go against the spirit of the UCPD.</p> <p>It is important to note that it shares some similarities to shopping TV channels<sup>445</sup> which have existed for several decades. However, livestream shopping offers greater interaction between viewers and the influencers – for example, the viewers are able to ask questions and receive responses in real-time and hosts able to tailor their presentations based on audience feedback.<sup>446</sup> Furthermore, livestream shopping may involve payments using virtual currencies and in some cases these currencies might be developed specifically for certain social media platforms (e.g., Twitch has recently launched ‘Bits’<sup>447</sup>).</p> <p>Even though currently, China is the leading country in terms of livestream shopping<sup>448</sup>, it also seems to be gradually growing in Europe as well. Data show that nearly 40% of European consumers are interested in purchasing electronics during live streams and 34% would be interested in fashion shopping.<sup>449</sup></p> <p>Nevertheless, there seem to be several <i>legislative challenges that prevent the wider adoption of livestream shopping on social platforms in Europe</i>. For instance, in 2020, the major obstacles to the growth of livestream shopping appear to be unclear information regarding cost, shipping times and return policies and finding exclusive offers.<sup>450</sup> An interview with an industry stakeholder also revealed that the latest technological developments are more easily introduced in non-EU countries due to the existing requirements imposed by EU legislation.</p> <ul style="list-style-type: none"> <li>• <i>Metaverse shopping</i></li> </ul> <p>A metaverse is a virtual world that users can access and interact with through VR or AR technology. Within this virtual world, there is another emerging trend also known as metaverse shopping<sup>451</sup> While shopping in the metaverse, consumers can explore and shop in virtual storefronts, try on virtual clothes, and purchase products in an immersive and interactive shopping experience. Metaverse shopping is a relatively new concept, but it is expected to grow in popularity as VR and AR technology becomes more widespread and accessible creating both new challenges and opportunities.<sup>452,453</sup> The emergence of the metaverse has already drawn mixed reactions from the industry, gamers’ community, software developers, and policymakers alike. Some point to its potential, while others</p>

<sup>442</sup> Chen, Lisa Y., 2019, *The Effects of Livestream Shopping on Customer Satisfaction and Continuous Purchase Intention*.

Available at: <https://www.proquest.com/openview/4994902d0af245ca6b0303165de5e4d0/1?pg-origsite=gscholar&cbl=2028729>

<sup>443</sup> McKinsey Digital, It’s showtime! How live commerce is transforming the shopping experience, 2021. Available at: <https://www.mckinsey.com/capabilities/mckinsey-digital/our-insights/its-showtime-how-live-commerce-is-transforming-the-shopping-experience>

<sup>444</sup> Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (Text with EEA relevance), 2021. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021XC1229%2805%29>

<sup>445</sup> TV shopping is a type of retail format where products are promoted and sold through television programs. In these situations the consumer usually has to call a (premium) number to make the purchase

<sup>446</sup> Royal Television Society, The new retail revolution, 2014. Available at: <https://rts.org.uk/article/new-retail-revolution>

<sup>447</sup> [https://help.twitch.tv/s/article/guide-to-cheering-with-bits?language=en\\_US](https://help.twitch.tv/s/article/guide-to-cheering-with-bits?language=en_US)

<sup>448</sup> McKinsey Digital, It’s showtime! How live commerce is transforming the shopping experience, 2021. Available at: <https://www.mckinsey.com/capabilities/mckinsey-digital/our-insights/its-showtime-how-live-commerce-is-transforming-the-shopping-experience>

<sup>449</sup> Statista, *Interest in buying selected product categories via livestreams on e-commerce and social media platforms in Europe in 2020*. Available at: <https://www.statista.com/statistics/1277172/interest-live-commerce-europe-by-category/>

<sup>450</sup> Statista, *Main challenges consumers face when using livestream shopping in Europe in 2020*. Available at: <https://www.statista.com/statistics/1277201/main-challenges-livestream-shopping-europe/>

<sup>451</sup> Shopping in virtual reality (VR) or augmented reality (AR) environments

<sup>452</sup> Forbes, 2022, How The Metaverse Will Reshape E-Commerce Forever. Available at:

<https://www.forbes.com/sites/theyec/2022/01/24/how-the-metaverse-will-reshape-e-commerce-forever/?sh=de65ea069d9f>

<sup>453</sup> Copenhagen Institute of Future Studies (2022) *The Future of the Metaverse White Paper*

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	<p>view it as another way for the biggest online platforms to expand their market dominance without much-added value for the ultimate users.<sup>454</sup> In the context of social commerce, some experiments indicate that <i>integrating social media platforms with the metaverse may give rise to a new type of social commerce</i> introducing new opportunities as well as challenges for consumer and industry alike.<sup>455</sup></p> <p>In fact, the metaverse virtually hosts a plurality of digital platforms with characteristics that are not necessarily like each other, but with the common purpose of providing a seamless continuum between real and virtual life, which poses several challenges for the European Union’s regulatory framework for digital platforms.<sup>456</sup> The metaverse platforms are rapidly evolving into virtual spaces managed by the companies acting as platform operators, where business users can advertise their products before consumers and even make transactions in dedicated multi-sided marketplaces (such characteristics can be found in The Sandbox, Decentraland, Roblox, just to mention a few).<sup>457</sup></p> <ul style="list-style-type: none"> <li>• <i>Tokenisation</i></li> </ul> <p>Recent years indicate there has been a rise in the tokenisation/ usage of social tokens. Tokenisation/social tokens are a type of cryptocurrency that allows creators or brands to monetise their goods, services, content and experiences. Social tokens allow anyone who creates digital products/content including streamers to monetise social engagement. They offer additional revenue for creators along with sponsored posts, advertising, or subscriptions.<sup>458</sup> Online users are progressively adopting tokens since they could be used to access privileged content and services (such as one-of-kind merchandise or private Q&amp;A sessions), or provide additional benefits such as exclusive products, services, and experiences.<sup>459</sup> For instance, a subsidiary of Amazon, a video live-streaming service Twitch, offers users to buy “Bits”, which can be used to cheer and support content creators on the platform.<sup>460,461</sup></p> <p><b>Non-Fungible Tokens (NFTs)</b> are a specific type of tokens that have gained in popularity in recent years. These tokens function as a type of digital asset that gives consumers ownership of a unique item or piece of content, such as a piece of artwork, music, or even social media content (e.g., tweets).<sup>462</sup> NFTs have become popular in the art world, where they are being used to sell digital art, but they can also be used in other areas such as gaming, collectibles, and virtual real estate. Despite being rather a new movement in digital consumerism, seemingly it might have a considerable influence on social commerce.<sup>463</sup> According to the Head of Crypto at Visa, a multinational financial services corporation, NFTs help to develop a new form of social commerce, particularly in industries like music, gaming, art, and sports.<sup>464</sup> NFTs can be used to create unique digital assets that can be sold on social media platforms.<sup>465</sup> For example, musicians can sell NFTs of their music on social media platforms like Twitter and Instagram. Another example is the use of NFTs in gaming. Players can buy and sell NFTs of in-game items</p>

<sup>454</sup> See, for example: [https://www.wired.com/story/metaverse-big-tech-land-grab-hype/?fbclid=IwAR1E\\_hbb3i2Rj4Dml6qS0HfeefHsV0lmzOp6blqdoHWURCV6MhbDmAGAdq0](https://www.wired.com/story/metaverse-big-tech-land-grab-hype/?fbclid=IwAR1E_hbb3i2Rj4Dml6qS0HfeefHsV0lmzOp6blqdoHWURCV6MhbDmAGAdq0)

<sup>455</sup> MIT Management, Sloan School, What Second Life and Roblox can teach us about the metaverse? Available at: <https://mitsloan.mit.edu/ideas-made-to-matter/what-second-life-and-roblox-can-teach-us-about-metaverse>

<sup>456</sup> European Parliament Think Tank, Metaverse: Opportunities, risks, and policy implications, 2022. Available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733557/EPRS\\_BRI\(2022\)733557\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733557/EPRS_BRI(2022)733557_EN.pdf)

<sup>457</sup> Ibid.

<sup>458</sup> Arslanian, H. (2022). Utility Tokens and Social Tokens. In: The Book of Crypto. Palgrave Macmillan, Cham. Available at: [https://doi.org/10.1007/978-3-030-97951-5\\_11](https://doi.org/10.1007/978-3-030-97951-5_11)

<sup>459</sup> Pixelplex.io, *What Are Social Tokens and How Can Your Business Use Them?*, 2022. Available at: <https://pixelplex.io/blog/what-are-social-tokens/>

<sup>460</sup> Twitch, *Cheer with Bits to celebrate and show support!* Available at: <https://www.twitch.tv/bits>

<sup>461</sup> Pixelplex.io, *What Are Social Tokens and How Can Your Business Use Them?*, 2022. Available at: <https://pixelplex.io/blog/what-are-social-tokens/>

<sup>462</sup> Sotheby’s, NFT, 2023. Available at: <https://www.sothebys.com/en/departments/nft>

<sup>463</sup> Creator.co, *Welcoming NFTs – New Social Commerce for the New Era*. Available at: <https://creator.co/nfts-new-social-commerce-new->

[era/#:~:text=NFTs%20are%20starting%20to%20usher%20in%20a%20new,should%20brands%20and%20influencers%20pay%20attention%20to%20NFTs%3F](https://creator.co/nfts-new-social-commerce-new-era/#:~:text=NFTs%20are%20starting%20to%20usher%20in%20a%20new,should%20brands%20and%20influencers%20pay%20attention%20to%20NFTs%3F)

<sup>464</sup> Visa Navigate, *How NFTs can revolutionise social commerce*, 2021. Available at: <https://navigate.visa.com/europe/future-of-money/how-nfts-can-revolutionise-social-commerce/>

<sup>465</sup> Harvard Business Review, 2022. *How Your Brand Should Use NFTs*. Available at: <https://hbr.org/2022/02/how-your-brand-should-use-nfts>

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	<p>on social media platforms like Discord.<sup>466</sup> In fact, alone in August 2021, NFTs recorded over \$1 billion in payment volume.<sup>467</sup> Notably, the market cap of NFT experienced fast development between 2020 and 2021 growing more than 3,000% worldwide<sup>468</sup>. Moreover, famous brands appear to be interested in investing in NFTs as it might enhance user experience, increase brand awareness, and expand brand engagement. For example, one of the world's largest brokers of fine and decorative art, jewellery, and collectables, Sotheby's, launched its metaverse and NFT trading platform where users can sell digital artwork.</p> <p>While tokens are growing increasingly popular<sup>469</sup>, social media platforms continue to experiment with different types of tokens, payments, and cryptocurrencies. Early experiments by social media platforms with virtual currencies at the beginning of 2010s such as Facebook Credits lacked success.<sup>470</sup> Nearly a decade later Meta announced the launch of Libra (Diem), the cryptocurrency payment system, that aimed at making it cheaper and faster to send money around the world for billions of Meta users.<sup>471</sup> Nevertheless, similarly to an earlier project, Meta's cryptocurrency did not materialise as USA regulators did not allow the cryptocurrency to move ahead.<sup>472</sup> Despite these failed attempts, in the future tokens might be earned by engaging in a social platform's activities such as posting, commenting, providing reviews, or liking/disliking.<sup>473</sup> Presently the relationship between creator and fans is usually intermediated through a third party such as social media platforms. Tokens might disrupt this model and allow users to directly reward creators avoiding intermediaries in transactions. Although tokens in social commerce seem to gain their popularity the existing legislation on consumer protection might not necessarily cover this relatively novel trend.<sup>474</sup></p>
<p><b>How far does existing EU (and any national legislation where relevant) address the problem?</b></p>	<p>As social media platforms become a more important channel for online shopping, it is important to have a sound legislative framework and for consumers to be aware of risks and take steps to protect themselves when making purchases via social media platforms.<sup>475</sup></p> <p>The rules applicable to influencers marketing vary in different jurisdictions and include both statutory law and soft law.</p>

<sup>466</sup> Visa Navigate, How NFTs can revolutionise social commerce, 2021. Available at: <https://navigate.visa.com/europe/future-of-money/how-nfts-can-revolutionise-social-commerce/>

<sup>467</sup> Ibid.

<sup>468</sup> Statista, *Market capitalization of transactions globally involving a non-fungible token (NFT) from 2018 to 2021*. Available at : <https://www.statista.com/statistics/1221742/nft-market-capitalization-worldwide/>

<sup>469</sup> Business Insider, The next big thing in crypto is here, and it will revolutionize the future of work, 2022. Available at: <https://www.businessinsider.com/social-tokens-next-big-thing-crypto-revolutionize-how-people-work-2021-11?r=US&IR=T>

<sup>470</sup> Investopedia, Facebook Credits, Available at: <https://www.investopedia.com/terms/f/facebook-credits.asp>

<sup>471</sup> Currency.com, Facebook Libra Explained, 2019. Available at: <https://currency.com/facebook-libra-explained>

<sup>472</sup> Diem, *Statement by Diem CEO Stuart Levey on the Sale of the Diem Group's Assets to Silvergate*, 2022. Available at: <https://www.diem.com/en-us/updates/stuart-levey-statement-diem-asset-sale/>

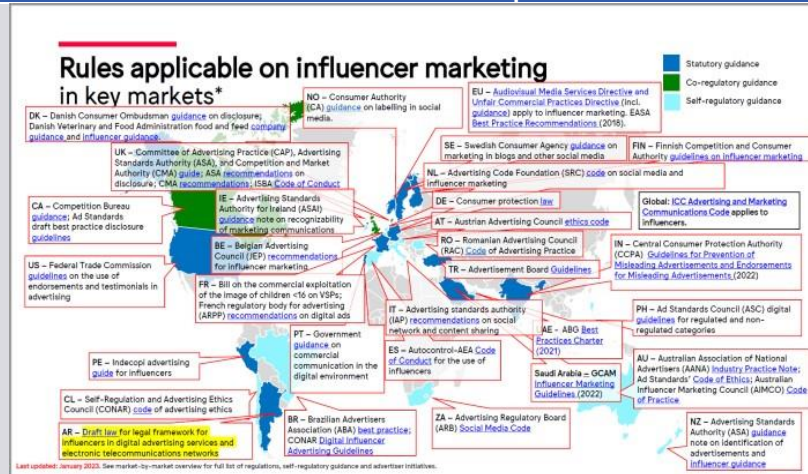
<sup>473</sup> Blockonomi, Beginner's Guide to Minds.com: The Social Media Site That Pays You in Crypto. Available at: <https://blockonomi.com/minds-com-guide/#:~:text=To%20earn%20tokens%20on%20the%20platform%2C%20all%20you,upload%20a%20video%2C%20or%20write%20a%20blog%20post.>

<sup>474</sup> Forbes.com, Social Tokens: A Web 3.0 Playbook For Monetizing Yourself, Available at: <https://www.forbes.com/sites/forbesfinancecouncil/2021/09/20/social-tokens-a-web-30-playbook-for-monetizing-yourself/?sh=789ab86a2e44>

<sup>475</sup> European Parliament Think Tank, 2022. The impact of influencers on advertising and consumer protection in the Single Market. Available at: [https://www.europarl.europa.eu/thinktank/en/document/IPOL\\_STU\(2022\)703350](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2022)703350)



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Source: Rules applicable on influencers - World Federation of Advertisers 2022

With a focus on the EU, we underline that the following provisions may apply upon the circumstances of the case.

The **Audiovisual Media Services Directive 2010/13/EU, as revised by Directive (EU) 2018/1808 (“the AVMSD”)**, aims to create and ensure the proper functioning of the single market for audiovisual media services, while contributing to the promotion of cultural diversity and providing an adequate level of consumer and protection of minors.<sup>476</sup> While the directive was not initially designed with influencer marketing in mind, the revised AVMSD extends obligations to video-sharing platforms and, consequently, to some extent, cover content created by influencers.

Key articles of the AVMSD that may be relevant to influencer marketing include:

Art. 9(1): Audiovisual Commercial Communications: This provision stipulates that commercial communications must be readily recognisable as such. It can directly require influencers, as long as they classify as on-demand audiovisual media service providers, to clearly label or disclose sponsored or paid content. Among other things, the provision also stipulates that audiovisual commercial communications shall not include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation and that all forms of audiovisual commercial communications for cigarettes and other tobacco products are prohibited. Audiovisual commercial communication must not be surreptitious nor use subliminal techniques, they must not encourage behaviour prejudicial to health or safety. Importantly, audiovisual commercial communication must respect specific rules to protect minors from advertising harms.

Art. 10(1)(c): Transparency and Sponsorship: Article 10 states that sponsored programmes must be clearly identified as sponsored. This article aims to make viewers aware of any commercial interest behind the content, which also can apply directly to influencers, as long as they classify as on-demand audiovisual media service providers.

**Art.28b:** Video-Sharing Platforms: The article outlines rules for video-sharing platforms, emphasizing the need for appropriate measures to protect minors and the general public from harmful content. Given that influencers often disseminate content via video-sharing platforms like YouTube and Instagram, they must adhere to guidelines that protect these vulnerable groups. When it comes to audiovisual commercial communications, video-sharing platforms must ensure that audiovisual commercial communications that are marked, sold or arranged by them comply with the requirements of Article 9(1). With

<sup>476</sup> 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 L 95, 15.4.2010, p. 1–24., at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32010L0013>.

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	<p>respect of other audiovisual commercial communications, video-sharing platform providers must take appropriate measures to comply with the requirements set out in Article 9(1), taking into account their limited control over the content. They must clearly inform users where programmes and user-generated videos contain audiovisual commercial communications, provided that such communications have been declared or where they have knowledge of the fact. Video-sharing platforms also must make available a functionality for users to declare when a user-generated video that they upload contains audiovisual commercial communication.</p> <p><b>Art. 28a:</b> Jurisdiction: Influencer marketing often has a global reach, complicating regulatory oversight. Article 28a clarifies jurisdictional issues, stating that member states have regulatory control over video-sharing platform providers that are established on their territory. AVMSD also applies this country-of-origin principle to audiovisual media service providers.</p> <p>To summarise, the directive emphasises <b>transparency, clear identification of commercial content, and the protection of vulnerable groups (in particular, minors)</b>, which can be applied to the activities of influencers on video-sharing platforms. While the AVMSD primarily focuses on traditional audio-visual service providers, <b>the revised directive</b> has extended rules to video-sharing platforms, reflecting a growing awareness of the evolving media landscape, including influencer marketing</p> <p>The EU legal framework applicable to social commerce, and social media platforms also include the GDPR: actually, platforms increasingly collect data on about consumers' behaviour and interests while they use the social media platform. This also includes collecting data on decisions made during the different stages of the purchasing process.<sup>477</sup> In fact, social commerce platforms collect a significant amount of user data including personal information and purchasing habits however it is not always clear how this data is protected and whether it is used only for legitimate purposes.<sup>478</sup> It is not entirely clear what personal information social media platforms collect.<sup>479</sup> Social media companies might secretly acquire users' personal private data without informed consent such as attitudinal data, which captures feelings and emotions. This data measures how users feel about certain messages and content.</p> <p>Under the GDPR, any organisation or business that processes personal data of EU residents is obligated to comply with its stipulations. Given that social commerce platforms typically collect, store, and process a significant amount of personal data—ranging from basic identification information to consumer preferences and behavioural data—these platforms are unequivocally subject to GDPR regulations.</p> <p><b>Article 6 of the GDPR</b> outlines the lawful bases for processing personal data, one of which is the necessity of data processing for the performance of a contract. In a social commerce context, this could mean that processing customer data is essential for fulfilling purchase orders, customer service, and delivery. Additionally, explicit consent, another lawful basis detailed in <b>Article 7</b>, can be particularly relevant. Platforms often rely on user consent to collect data for personalized marketing, a core feature of many social commerce strategies.</p> <p><b>Article 15</b> provides the "Right of Access," enabling individuals to know what data is being processed about them and how. Given the interactive nature of social commerce—where personal recommendations, tailored advertising, and direct user engagement are common features—consumers may exercise their right to know how their data is being used to customize their experience.</p>

<sup>477</sup> Mou, J. and Benyoucef, M., 2021. Consumer behavior in social commerce: Results from a meta-analysis. *Technological Forecasting and Social Change*, Available at: <https://www.sciencedirect.com/science/article/abs/pii/S0040162521001669?via%3Dihub>

<sup>478</sup> Riefa, Christine and Clausen, Laura, *Towards Fairness in Digital Influencers' Marketing Practices*, 2019, *Journal of European Consumer and Market Law (EuCML)*. Available at SSRN: <https://ssrn.com/abstract=3364251>

<sup>479</sup> Forbes, 2018. Social Media Companies Collect So Much Data Even They Can't Remember All The Ways They Surveil Us. Available at: <https://www.forbes.com/sites/kalevleataru/2018/10/25/social-media-companies-collect-so-much-data-even-they-cant-remember-all-the-ways-they-surveil-us/>

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	<p>Moreover, <b>Articles 17 and 18</b> offer the "Right to Erasure" ('Right to be Forgotten') and the "Right to Restriction of Processing," respectively. These are particularly relevant in scenarios where a user decides to delete their account or restrict how their data is used, impacting the social commerce platform's data-driven algorithms and personalization features.</p> <p>Importantly, GDPR's reach extends to third-party affiliations that social commerce platforms may engage with, such as payment gateways, logistics providers, or marketing services, amplifying the need for end-to-end data protection measures. This is primarily governed by <b>Article 28</b>, which places obligations on data processors and controllers to secure any personal data they handle.</p> <p><b>Applicability of EU Consumer Law to Social Commerce and Influencers</b></p> <p><b>The EU legal framework for consumer protection</b> that may apply to the case of social commerce shopping is summarised as follows:</p> <ul style="list-style-type: none"> <li>• <b>Unfair Contract Terms Directive (UCTD), 1993</b>, that prohibits unfair contract terms in consumer contracts.</li> <li>• <b>Unfair Commercial Practices Directive (UCPD), 2005</b>, which prohibits unfair commercial practices at all stages of the consumer transaction, including in the marketing phase. Additional explanations can be found in the Commission Notice on the interpretation and application of the Unfair Commercial Practices Directive ('the UCPD Guidance').</li> <li>• <b>Consumer Rights Directive (CRD), 2011</b>, which provides for a set of obligatory pre-contractual information duties by traders.</li> <li>• <b>Modernisation Directive (MD), 2019</b>.<sup>480</sup></li> </ul> <p><b>Social Commerce in General</b></p> <p>EU Law, and in particular EU consumer law, has profound implications for social commerce. Social commerce involves leveraging social media platforms for online buying and selling, and as such, it comes under the purview of various EU directives and regulations. The UCPD is especially relevant. Articles 5 to 7 of the UCPD focus on prohibiting unfair commercial practices, including misleading and aggressive practices. Given that social commerce often involves complex marketing tactics that blend seamlessly into social media content, these articles serve as a critical regulatory check. They ensure that consumers are not misled by the nature or the main characteristics of the product, which is vital in a setting where the lines between advertising and content are often blurred.</p> <p><b>Influencer Marketing</b></p> <p>In the sphere of social commerce, influencers play a pivotal role. They use their social media platforms to recommend products or services to their followers, making their activities particularly subject to Articles 5 to 7 of the UCPD. Additionally, the UCPD Guidance document has a section specifically aimed at influencers, emphasising that if they are paid or otherwise compensated, their posts become commercial practices and are subject to UCPD rules.</p> <p>Point 11 under the UCPD pertains to editorial content in media. This is particularly relevant for influencers who often embed advertisements within what appears to be editorial content, making it challenging for the average consumer to distinguish between the two. According to Point 11, when commercial intent is masked as editorial content, it can be considered a misleading practice. Therefore, influencers are required to make clear disclosures to indicate that their content is sponsored or promotional, thereby avoiding misleading their audience. This aligns with Articles 6 and 7 of the UCPD, which respectively deal with misleading actions and omissions.</p>

<sup>480</sup> Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328, 18.12.2019, 7-28.

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	<p>Points 22, 8, 9, and 28 in the UCPD Guidance also offer further clarifications. Point 22 deals with the use of 'likes,' testimonials, and endorsements, which are often key elements in an influencer's presentation of a product.<sup>481</sup> Points 8 and 9 elaborate on misleading actions and omissions, which as previously discussed, are already covered under Articles 6 and 7 of the UCPD. Point 28 focuses on the use of asterisks or footnotes to provide additional information. If not handled correctly, these can also be considered misleading, a concern which influencers must consider when framing their commercial communications.</p> <p><b>UCPD</b></p> <p>Although not specifically designed for social commerce, the UCPD is particularly relevant to this emerging field, given that social commerce involves the promotion and sale of products or services directly through social media platforms.</p> <p><b>Article 5</b> of the directive outlines the general prohibition against unfair commercial practices, which is particularly important for social commerce platforms that engage in direct or indirect marketing. These platforms must ensure that their advertising and promotional materials are accurate and do not mislead consumers regarding the characteristics, availability, or price of the product.</p> <p><b>Article 6 and 7</b> of the UCPD, which deal with misleading actions and omissions, respectively, are especially pertinent. Social commerce often employs personalised advertising and recommendation algorithms. These algorithms may sometimes highlight only positive reviews or omit certain details about additional costs like shipping or handling. Under these articles, such actions could be construed as misleading. Therefore, to be in compliance, social commerce platforms must present a balanced and transparent view of products, including all relevant costs and potential drawbacks.</p> <p><b>Article 8 and 9</b>, addressing aggressive commercial practices, might also be relevant, especially given the interactive nature of social commerce platforms. Pop-up ads, limited-time offers, or direct messages could potentially be seen as coercion under certain circumstances. The platforms must, thus, be careful to ensure that their engagement strategies are not overly aggressive or do not place undue pressure on the consumer to make a purchase.</p> <p>The UCPD also contains an annex that lays out specific examples of unfair commercial practices. For instance, claiming that a product can only be available for a very limited time to prompt immediate action from consumers can be considered a banned practice unless it is true. Many social commerce platforms often employ scarcity tactics to encourage immediate buying decisions. While this is not inherently unfair, it must be genuinely reflective of stock levels to comply with the UCPD.</p> <p>More recently, two EU provisions entered into force that specifically addresses issues related to the digital markets, specifically:</p> <ul style="list-style-type: none"> <li>• <b>Digital Services Act (DSA)</b> which entered into force on 16 November 2022.<sup>482</sup> It is important in the context of social commerce since it applies to all digital services that connect consumers to goods, services, or content. It creates new obligations for online platforms aiming to reduce harm and counter risks online and introduces protections for users' rights online.</li> </ul>

<sup>481</sup> Commission Notice, Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, C/2021/9320, OJ C 526, 29.12.2021, 1–129, at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021XC1229%2805%29>

<sup>482</sup> Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services, OJ L 277, 27.10.2022, p. 1–102, [https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2022%3A277%3ATOC&uri=uriserv%3AOJ.L\\_.2022.277.01.0001.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2022%3A277%3ATOC&uri=uriserv%3AOJ.L_.2022.277.01.0001.01.ENG)

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	<ul style="list-style-type: none"> <li>• <b>Digital Markets Act (DMA)</b> that establishes a set of clearly defined objective criteria to identify "gatekeepers".<sup>483</sup> Gatekeepers are large digital platforms providing so-called core platform services, such as for example online search engines, app stores, and messenger services. Gatekeepers will have to comply with the do's (i.e., obligations) and don'ts (i.e., prohibitions) listed in the DMA.</li> </ul> <p>In a preliminary assessment of the impact of the DSA and DMA on social commerce platforms, it is possible to note a few main points.<sup>484</sup></p> <p><b>DSA</b></p> <p>The recent DSA has several articles that could be relevant to the practice of social commerce, as it sets out to establish clearer responsibilities for online platforms and to ensure a safer and more transparent online environment.</p> <p><b>Article 5 and Article 6</b>, which mandate that service providers based in the EU or offering services within the Union designate legal representatives, have direct implications for social commerce platforms operating across national borders. Compliance with these articles ensures that there is a point of legal contact within the EU jurisdiction, thus enhancing accountability and facilitating regulatory oversight.</p> <p>Transparency is a key focus of the DSA, with <b>Article 15</b> emphasising the need for platforms to make it explicitly clear when users are viewing advertisements and who is responsible for those ads. Given the blended nature of content on social commerce platforms, where user-generated content and advertisements often coexist, compliance with this article would necessitate the clear labelling of all sponsored posts, affiliate links, and other forms of paid promotion.</p> <p><b>Articles 24</b> requires platforms to publish an annual report on content moderation practices, would compel social commerce platforms to be more transparent about how they handle user-generated content, such as reviews or comments that can impact consumer decisions. This increased transparency could, in turn, bolster consumer trust and foster a more reliable marketplace.</p> <p><b>Article 22</b> introduces the role of "trusted flaggers," recognized entities with expertise in identifying illegal content. This provision has important implications for social commerce by expediting the process of flagging and removing illegal or counterfeit goods from the platform, thereby protecting both consumers and brands.</p> <p>Emergency orders and judicial directives, stipulated in <b>Articles 30 and 31</b>, enable authorities to directly instruct platforms to take action against illegal goods, services, or content. In the context of social commerce, this could result in the faster removal of fraudulent listings, enhancing the overall safety of the platform for consumers.</p> <p><b>Finally, Article 44-48 of the DSA</b> calls for the establishment of shared standards and codes of conduct, providing an opportunity for social commerce platforms to contribute to or adopt these codes proactively. This would not only demonstrate their commitment to safe and fair trading practices but also potentially offer them a competitive advantage in an online marketplace that increasingly values accountability and transparency.</p> <p><b>DMA</b></p> <p>While the <b>DMA</b> focuses on platforms that serve as critical intermediaries within the digital ecosystem, social commerce platforms may find themselves subject to some of its stipulations, either directly or indirectly.</p> <p>For instance, <b>Article 5 of the DMA</b> proposes a list of obligations for gatekeeper platforms, such as prohibitions on combining personal data sourced from their services with</p>

<sup>483</sup> Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector, OJ L 265, 12.10.2022, p. 1–66, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R1925>

<sup>484</sup> Hiltunen, M. (2022). Social Media Platforms within Internal Market Construction: Patterns of Reproduction in EU Platform Law, 23(9) German Law Journal, <http://dx.doi.org/10.2139/ssrn.4285737>.

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	<p>personal data from other services, unless the user has explicitly consented. Although social commerce platforms may not necessarily be the primary target of these regulations, given that they often integrate with larger social media platforms (which may qualify as gatekeepers), these rules could affect how social commerce platforms collect and use consumer data.</p> <p><b>Article 6 of the DMA</b> outlines further obligations, such as allowing third-party software to interoperate with the gatekeeper's services. For social commerce platforms that are owned by or highly integrated with larger gatekeeper platforms, this could require changes in how they allow for interconnectivity with other services or apps, potentially broadening the marketplace and increasing competition.</p> <p>One of the more overarching aims of the DMA is to ensure <b>fair competition in digital markets</b>. Articles 15 and 16 propose the ability to designate companies as gatekeepers and to conduct market investigations, respectively. For burgeoning social commerce platforms, this could mean increased scrutiny if they grow to a size where they become critical intermediaries within the digital economy. Even if they are not designated as gatekeepers, the DMA's focus on fair competition could influence regulatory attitudes toward any anticompetitive practices in the social commerce space.</p> <p>Although the DMA is not specifically tailored to social commerce, its implications for larger platforms could have downstream effects. For example, if <b>a major social media platform used for social commerce is designated as a gatekeeper<sup>485</sup></b>, this could impact how it interacts with smaller social commerce vendors that operate on its platform, potentially affecting the terms of service, data-sharing policies, or interoperability features.</p> <p><b>Influencer marketing under the DSA and DMA</b></p> <p>The notion of influencer marketing does not fit within the definition of advertising under the DSA, but under the definition of "commercial communications" under the same provision. In any case, the DSA introduces at least three different set of rules about liability, content moderation, advertising and disclosure that may specifically apply to the case of influencers' marketing<sup>486</sup>, precisely:</p> <ul style="list-style-type: none"> <li>• The DSA provides for a strengthened liability framework for online platforms, requiring responsibility for certain types of illegal content or activities on their platforms. This could potentially affect influencers who generate or share content that falls within the scope of this liability framework.</li> <li>• The DSA emphasises the importance of effective content moderation and transparency in platform policies. Platforms may need to enhance their content moderation mechanisms, which could impact the visibility and reach of influencer content.</li> <li>• As noted before, the DSA addresses online advertising practices, including transparency requirements and rules against deceptive advertising. Influencers who engage in "commercial communications", which could include various promotional activities, endorsements, or sponsored content, need to ensure compliance with advertising rules and disclose any paid collaborations or relationships. Concerning the labelling of advertisements, Article 44 requires the development of voluntary standards for interface design, . Additionally, Articles 45 and 46, which focus on the development of codes of conduct related to online advertising, can play a significant role in addressing the growing influence of social commerce and establishing effective best practices for influencers. By</li> </ul>

<sup>485</sup> Commission designates six gatekeepers under the Digital Markets Act. Today (6 September 2023) the European Commission has designated, for the first time, six gatekeepers - Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft - under the DMA at [https://digital-markets-act.ec.europa.eu/commission-designates-six-gatekeepers-under-digital-markets-act-2023-09-06\\_en#:~:text=Commission%20designates%20six%20gatekeepers%20under%20the%20Digital%20Markets%20Act,-European%20Commission&text=Today%20\(6%20September%202023\)%20the.Digital%20Markets%20Act%20\(DMA\).](https://digital-markets-act.ec.europa.eu/commission-designates-six-gatekeepers-under-digital-markets-act-2023-09-06_en#:~:text=Commission%20designates%20six%20gatekeepers%20under%20the%20Digital%20Markets%20Act,-European%20Commission&text=Today%20(6%20September%202023)%20the.Digital%20Markets%20Act%20(DMA).)

<sup>486</sup> Michaelsen, F., Collini, L. et al., 2022, The impact of influencers on advertising and consumer protection in the Single Market, Publication for the Committee on Internal Market and Consumer Protection (IMCO), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, at 63-88. Available at: [https://www.europarl.europa.eu/ReqData/etudes/STUD/2022/703350/IPOL\\_STU\(2022\)703350\\_EN.pdf](https://www.europarl.europa.eu/ReqData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf)

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	<p>adhering to these standards and codes, social commerce platforms and influencers could offer greater transparency, user protection, and responsible advertising practices.</p> <p>With respect to the DMA, major social commerce platforms will have to adhere to provisions that concern the so-called gatekeepers.<sup>487</sup> Once a provider of a core platform service is designated as a “gatekeeper”, it becomes subject to the “directly applicable” obligations stipulated in Articles 5 and 6 in respect of each of its core platform services. In particular, the substantive obligations in the DMA are all automatically applicable rules that every gatekeeper “shall” ensure full and effective compliance with. The DMA did not contain specific rules concerning influencer marketing, although Recital 72 is perhaps the most relevant element of the DMA as it reaffirms the need for minimum industry standard levels of effectiveness relating to transparency obligations for profiling practices.</p> <p><b>Influencer Marketing and EU Member States</b></p> <p>EU Consumer Law and the UCPD, specifically, requires that businesses provide clear and transparent information about their products or services including pricing, terms and conditions, delivery and payment methods, and any other relevant information that may impact a consumer’s decision to make a purchase. However, the existing EU legislation does not explicitly provide definitions for the terms that emerged with the development of social commerce, for instance, “influencer”, although definitions under the current legislative framework might be broad enough to encompass new trends.<sup>488</sup> Some EU Member States seek to provide precise definitions (see the section before).</p> <p>As a result, the question arises with regard to how well existing EU legislation covers generally social commerce and specifically influencer marketing.<sup>489</sup> Overall, the main problems in social commerce from the point of view of EU consumer protection and the UCPD relate to issues of transparency<sup>490</sup>, accuracy, and consumer rights.<sup>491,492</sup></p> <p>Concerning the most recent developments in the EU Member States, an interesting <b>case study</b> on influencers comes from the Directorate-General for Competition, Consumer Affairs and Fraud Prevention (DGCCRF) in <b>France</b>. In 2023, it investigated the commercial practices of influencers and found that 60% of influencers did not comply with regulations on advertising and consumer rights.<sup>493</sup> Furthermore, a new French law was adopted in May 2023. Among others, the new legislation aims to (i) provide a definition of an influencer and an agent of an influencer, (ii) ban of marketing pharma products, medical devices, plastic surgery, and financial investments, (iii) ban (unless indicated that it is for adults) of marketing sports prognoses, vocational training, gambling, (iv) penalty of 5 years imprisonment and 375 000 euro fine for deceptive commercial practices, and (vi) obligations for platforms to have mechanisms to flag illegal content.</p> <p>France has also previously fined influencers for unfair commercial practices. For instance, in July 2021, France’s DGCCRF’s investigation led to the payment of 20,000 euros by the influencer for misleading commercial practices relating to the promotion on the social</p>

<sup>487</sup> Akman, P. (2022). Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act, 47 European Law Review 85, doi.org/10.2139/ssrn.3978625

<sup>488</sup> Riefa, Christine and Clausen, Laura, Towards Fairness in Digital Influencers’ Marketing Practices (April 12, 2019). 8 (2019) Journal of European Consumer and Market Law (EuCML), Available at SSRN: <https://ssrn.com/abstract=3364251>

<sup>489</sup> Twitter, 2021, *Twitter shopping: Testing the Shop Module*. Available at: [Twitter Shopping: Testing the Shop Spotlight](https://twitter.com/shopping)

<sup>490</sup> Unilever, *Unilever calls on industry to increase trust, transparency and measurement in influencer marketing, 2018*. Available at: <https://www.unilever.com/news/press-and-media/press-releases/2018/unilever-calls-on-industry-to-increase-trust-transparency-and-measurement-in-influencer-marketing/>

<sup>491</sup> European Commission, *A New Deal for Consumers: Commission Strengthens EU Consumer Rights and Enforcement, 2018*. Available at: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_18\\_3041](https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3041)

<sup>492</sup> Riefa, Christine and Clausen, Laura, *Towards Fairness in Digital Influencers’ Marketing Practices, 2019, Journal of European Consumer and Market Law (EuCML)*. Available at SSRN: <https://ssrn.com/abstract=3364251>

<sup>493</sup> Direction générale de la concurrence, de la consommation et de la répression des fraudes, *Marketing d’influence : 60% des influenceurs ciblés par la DGCCRF en anomalie, 2023*. Available at : <https://www.economie.gouv.fr/dgccrf/marketing-dinfluence-60-des-influenceurs-cibles-par-la-dgccrf-en-anomalie-0>

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	<p>network Snapchat of an online trading training site.<sup>494</sup> The new rules aim to introduce more severe fines for such breaches. Furthermore, to monitor compliance with commercial practices laws, France's DGCCRF put at the disposal of consumers a monitoring tool called Signal Conso.<sup>495</sup> This tool allows consumers to report problems they encounter related to influencers, purchases on the Internet, selling via a mobile application, and hacking credit cards or bank accounts.</p> <p>It is also worth mentioning that France introduced a definition of "influencer" in its national law.<sup>496</sup> The law defines influencers as 'individuals or legal entities who for a fee, mobilise their notoriety with their audience to promote goods and services online.'<sup>497</sup></p> <p>In Belgium, the Code of Economic Law was used as a legal ground by the Belgian administration's intention to impose fines of up to EUR 80,000 on professional influencers who do not disclose mandatory information about their businesses, such as addresses (usually home address of influencer), over social media.<sup>498</sup> Prior to that in 2022, the Belgium's Ministry of Economy and the State Secretary for Consumer Protection released influencer guidelines clarifying that influencers must comply with advertising provisions set out in the Code of Economic Law.<sup>499</sup></p> <p>In Bulgaria, the National Council for Self-Regulation has issued the Influencer Marketing Recommendation.<sup>500</sup></p> <p>In Germany, although there is no specific law for influencer marketing, several court cases have ruled on labelling requirements for editorial and commercial influencer posts on social media.<sup>501</sup></p> <p>The Advertising Standards Authority for Ireland's (ASAI) issued a Guidance Note on the Recognisability of Influencer Marketing Communications.<sup>502</sup> Similar guidance notes were also issued by authorities in the Netherlands, Poland, Portugal, and Spain.<sup>503</sup></p> <p>In <b>Poland</b>, the Office of Competition and Consumer Protection (UOKiK) fined three influencers for not clearly labelling their sponsored posts on social media. The fines target a major player in the dietary supplements market and three social media stars who promote fitness. This is the first time that both creators and advertisers have been penalized for failing to properly disclose sponsored content. The investigation determined that the company advised influencers to use unclear language for advertising materials,</p>

<sup>494,494</sup> Direction générale de la concurrence, de la consommation et de la répression des fraudes, *Paiement d'une amende de 20 000€ par l'influenceuse Nabilla BENATTIA-VERGARA, pour pratiques commerciales trompeuses sur les réseaux sociaux, 2021*. Available at: <https://www.economie.gouv.fr/dgccrf/paiement-dune-amende-de-20-000eu-par-linfluenceuse-nabilla-benattia-vergara-pour-pratiques-0>

<sup>495</sup> Available at: <https://signal.conso.gouv.fr/>

<sup>496</sup> Politico, *France targets scandal-hit world of online influencers, 2023*. Available at: <https://www.politico.eu/article/frances-emmanuel-macron-target-social-media-influencers/>

<sup>497</sup> Legifrance. Journal officiel, 2023. LOI n° 2023-451 du 9 juin 2023 visant à encadrer l'influence commerciale et à lutter contre les dérivés des influenceurs sur les réseaux sociaux (1). Available at: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000047663185>

<sup>498</sup> CMS Law Now, 2022, *A legal storm rages in Belgium about the addresses of influencers, but what about stock-listed companies?* (cms-lawnow.com). Available at: <https://cms-lawnow.com/en/ealerts/2022/08/a-legal-storm-rages-in-belgium-about-the-addresses-of-influencers-but-what-about-stock-listed-companies>

<sup>499</sup> Belgium's Ministry of Economy, 2023. *U bent content creator of influencer? Dan moet u deze verplichtingen rond commerciële communicatie naleven*. Available at: <https://economie.fgov.be/nl/themas/verkoop/reclame/u-bent-contentcreator>

<sup>500</sup> The National Council for self-regulation, *Influencer Marketing Recommendation*. Available at: <https://www.nss-bg.org/en/influencer>

<sup>501</sup> Kolsquare, 2023, *How are influencer marketing regulations evolving in Europe?*. Available at: <https://www.kolsquare.com/en/blog/how-are-influencer-marketing-regulations-evolving-in-europe/#:~:text=The%20European%20Union%20does%20not,communications%2C%20including%20the%20advertiser%27s%20n ame.>

<sup>502</sup> The Advertising Standards Authority for Ireland (ASAI). Available at: <https://www.asai.ie/wp-content/uploads/ASAI-Guidance-Note-Recognisability-of-Influencer-Marketing-Communications-Feb-21.pdf>

<sup>503</sup> Kolsquare, 2023, *How are influencer marketing regulations evolving in Europe?*. Available at: <https://www.kolsquare.com/en/blog/how-are-influencer-marketing-regulations-evolving-in-europe/#:~:text=The%20European%20Union%20does%20not,communications%2C%20including%20the%20advertiser%27s%20n ame.>



<p><b>Case study</b></p>	<p>1) The impact of social media on online purchasing: A study of the social commerce phenomenon                  2) the future of social media as a marketplace: a case study on (emerging) trends and innovations in social media marketplaces                  3) the rise of social media content monetisation: how social media platforms evolved into marketplaces</p>
	<p>and also developed and made accessible to cooperating influencers guidelines that were not consistent with the law. The penalty is close to 112,000 euros.<sup>504</sup></p> <p>Finally, it should be underlined that <b>most online social commerce platforms operate in multiple countries</b> and national laws are difficult to enforce in an inherently cross-border online platform economy.</p>
<p><b>Problematic practice – nature and magnitude</b></p>	<p>The section aims to highlight some of the practices in social commerce and specifically among influencers that could be considered unfair under EU consumer law, particularly the UCPD. For example, when influencers mask commercial intent within what appears to be editorial content, without clear disclosures, they risk engaging in misleading practices according to Point 11 of the UCPD Guidance. Similarly, the use of 'likes,' testimonials, and endorsements in a misleading manner can fall afoul of Point 22. By closely adhering to the articles and points in the UCPD and its accompanying guidance, social commerce platforms and influencers can navigate the regulatory landscape more effectively, ensuring both legal compliance and enhanced consumer trust.</p> <p>More specifically, <b>disguised advertising practices, social proof practices (likes or follows), data gathering practices, and enforcement of consumer law seem to be the major challenges.</b><sup>505</sup> For instance, fake or biased reviews can mislead consumers, and social commerce platforms might fail to disclose accurate or complete information about products and services which is required by the UCPD.<sup>506</sup> The UCPD does not capture practices which are intended to “<i>legitimately influence the consumer behaviour without impairing the consumer’s ability to make an informed choice. Product placement, brand differentiation and the offering of incentives are seen as legitimate influence</i>”.<sup>507</sup> In addition, social media platforms, social influencers and traders seem to fail to disclose commercial intent correctly in particular it is the case for non-EU traders as pointed out in the interview with the industry stakeholder.<sup>508</sup> Enforcement actions against influencers could be more effective.<sup>509</sup> In this regard, the UCPD can offer some assistance but seemingly there remain some problematic grey areas.</p> <p>As the European Commission’s recent study on dark patterns shows,<sup>510</sup> there are many new practices of different nature and magnitude that are rapidly emerging in the digital environments and these developments are also relevant in social commerce. Such practices include: disguised advertising practices (i.e. native advertising), social proof practices (i.e. artificial boosting of social proof indicators), data gathering and targeting practices (i.e. user tracking), or use of false limited offers. Native advertising is a type of paid advertising that matches the form and function of the platform upon which it appears. In many cases it functions like an advertorial, and manifests as a video, article or editorial. The word native refers to this coherence of the content with the other media that appear on the platform. These ads reduce a consumers' ad recognition by blending the ad into the native content of the platform, even if it is labelled as "sponsored" or "branded" content.<sup>511</sup> Social proof indicators are elements of marketing that use the power of social influence to persuade people to take a desired action. They work by showing people that other people have already taken the action, which can make them more likely to do the same.<sup>512</sup> The practices are generally related to the specific characteristics of the digital platform concerned and its supporting technologies. Also, new practices are likely to</p>

<sup>504</sup> Office of Competition and Consumer Protection, 2023. Over 5 million fine for surreptitious advertising on Instagram. Available at : [https://uokik.gov.pl/news.php?news\\_id=19863](https://uokik.gov.pl/news.php?news_id=19863)

<sup>505</sup> Ibid.

<sup>506</sup> European Commission; *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market*. Available at: [EUR-Lex - 02005L0029-20220528 - EN - EUR-Lex \(europa.eu\)](https://eur-lex.europa.eu/eur-lex.do?uri=CELEX:32005L0029-20220528-EN-EN-20220528-EN-20220528-EN)

<sup>507</sup> Christian Twigg-Flesner et al., 2005, 'An Analysis of the Application and Scope of the Unfair Commercial Practices Directive' (London, Department for Trade and Industry). Available at: [\[ARCHIVED CONTENT\] \(nationalarchives.gov.uk\)](https://www.nationalarchives.gov.uk/ukri/documents/record-102222/)

<sup>508</sup> European Commission, *Behavioural Study on Advertising and Marketing Practices in Online Social Media*, 2018. Available at: [https://commission.europa.eu/document/5bfb0ebf-22ef-41d9-aab0-12d3a82ac449\\_en](https://commission.europa.eu/document/5bfb0ebf-22ef-41d9-aab0-12d3a82ac449_en)

<sup>509</sup> Ibid.

<sup>510</sup> EC Commission (2022), *supra*, p. 10 fs.

<sup>511</sup> Microsoft Advertising Blog, 2021. What is native advertising? Available at : <https://about.ads.microsoft.com/en-us/blog/post/april-2021/what-is-native-advertising>

<sup>512</sup> Shopify, 2022. How to use social proof in marketing? Available at: <https://www.shopify.com/blog/social-proof>

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	<p>emerge in connection with tokenisation and the metaverse as mentioned before. Brands seem to be interested in exploring virtual worlds' opportunities.<sup>513</sup> For instance, eye-tracking via a headset could be used by brands to analyse visual attention and emotional activation in an immersive retail environment.<sup>514</sup></p> <p>Several challenges with social commerce can be outlined:</p> <ul style="list-style-type: none"> <li>• Behavioural studies suggest that social media users form <b>an emotional bond</b> with a creator which influences their buying decisions of the endorsed products. Moreover, the perceived popularity of the influencers is affected by their attitude, values, and appearance.<sup>515</sup> Also, behavioural studies show that children are more susceptible to persuasion and deception than adults. They have a higher level of trust, curiosity and impressionability. Therefore, it is essential to consider how they can be safeguarded from harmful influences. Studies have indicated that parental digital literacy<sup>516</sup> and mediation strategies are key factors in protecting children online.<sup>517</sup></li> <li>• <b>With a focus on dark patterns:</b> users of social media platforms may be harmed by obscure digital practices which can be used to steer their decisions.<sup>518</sup> Consumers may be (i) subconsciously nudged into certain behaviours on online platforms through their choice architecture, and (ii) platform algorithms may amplify certain products and services that induce harmful behaviours, spread misinformation, or show illegal content to citizens.                         <ul style="list-style-type: none"> <li>▪ <b>Targeting vulnerable consumer groups via optimisation:</b> marketing that targets specifically vulnerable groups and induces them to buy a good or a service, exploiting their inexperience or credulity. In the case of TikTok, although in terms of services, the minimum age to register on the platform is 13 years, users under that age could potentially register as well. In fact, BEUC's testing and research revealed that numerous children under this age are present on the platform. That means social media platforms and marketplaces will need to monitor accounts from underaged users to remove them. Furthermore, as pointed out in the BEUC report, digital platforms sometimes might offer an option for businesses to target children aged 13 and 17, potentially exposing them to misleading and hidden commercial practices. For instance, that was the case of TikTok. Targeted advertising on TikTok or any other online platform for minors can expose them to inappropriate content.<sup>519</sup></li> <li>▪ <b>Promoting unethical products:</b> Some creators including influencers may promote unethical or harmful products, such as weight loss supplements, which may negatively impact their audience's health. However, it might be a challenge to manage the high volume of user-generated content on social media platforms. In June 2023, France adopted a law to regulate social media influencers' activities. The law prohibits the promotion of cosmetic surgery, therapeutic abstention, products containing nicotine, and subscriptions to sports forecasts.</li> </ul> </li> </ul>

<sup>513</sup> Harvard Business Review, 2022. How brands can enter the metaverse. Available at : <https://hbr.org/2022/01/how-brands-can-enter-the-metaverse>

<sup>514</sup> Kim Nayeon, Lee Hyunsoo, 2021. Assessing Consumer Attention and Arousal Using Eye-Tracking Technology in Virtual Retail Environment. Available at: <https://www.frontiersin.org/articles/10.3389/fpsyg.2021.665658/full>

<sup>515</sup> Ladhari et al., 2020. Social media influencer marketing: A systematic review, integrative framework and future research agenda. Available at: <https://onlinelibrary.wiley.com/doi/full/10.1111>

<sup>516</sup> Ahn, 2021. Exploration of Parental Advertising Literacy and Parental Mediation: Influencer Marketing of Media Character Toy and Merchandise. Available at: <https://www.tandfonline.com/doi/abs/10.1080/00913367.2021.1944935?journalCode=ujoa20>

<sup>517</sup> Rozendaal, E., Buijzen, M., & van Reijmersdal, E. A. (2022). Persuasive Messages and the Development of Advertising Literacy in Children and Adolescents. Available at: <https://www.taylorfrancis.com/chapters/edit/10.4324>

<sup>518</sup> Luguri, J. and Strahilevitz, L.J., 2021. *Shining a light on dark patterns*. *Journal of Legal Analysis*, 13(1), pp.43-109.

<sup>519</sup> BEUC, 2022. *One year has passed and TikTok continues to infringe EU consumer rights*, at <https://www.beuc.eu/letters/one-year-has-passed-and-tiktok-continues-infringe-eu-consumer-rights>

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	<p>Furthermore, the law regulates the promotion of medical devices, and the promotion of money games.</p> <ul style="list-style-type: none"> <li> <b>Non-compliance with transparency requirements with regards to advertisements and promoted content.</b> The UCPD stipulates that consumers must be informed when the content they view contains paid promotions and/or advertisements. The lack of disclosure may lead to misleading or false advertising in form of comments, likes, and reactions “fake reviews” or providing incorrect, ambiguous, exaggerated, or inaccurate information on the goods and services.<sup>520</sup> Also, social commerce sellers may fail to provide clear and accurate information about the price, delivery times, and other key features of a product.<sup>521</sup> An interview with an industry stakeholder revealed that it is technically “close to impossible” for social media platforms to constantly monitor all content that is being released for instance livestreams due to the large amount of it. For instance, in 2021, the analysis found that (criminal) organisations were selling counterfeit Apple products such as EarPods, AirPods, power chargers, and cables via Instagram.<sup>522</sup> A study based on 400 influencers both micro and macro from the Netherlands, Brazil, Germany, and the United States analysed posts between 2012 and 2022. In total, the study analysed over one million posts trying to characterise self-disclosure practices by influencers. The study indicates that on average, below 5% of influencers’ content was labelled as advertising. An exception is Germany where the disclosure rate was much higher.<sup>523</sup> According to a study by Princeton University researchers in 2018, adequate disclosures of affiliate marketing are rare.<sup>524</sup> With the emergence of new trends such as metaverse shopping and live stream shopping there might be a higher risk of non-compliance. Firstly, industry stakeholders indicated that it is difficult to check compliance during livestream session due to their nature. Secondly, the consultation with the industry suggests that it may not always be clear to sellers and social platforms which EU legislation applies to newly emerging features such as live stream shopping.                 </li> <li> <b>In-app browsers:</b> In-app browser is a blind spot of social commerce and consumer protection. The Instagram in-app browser could interact with other applications, and other open tabs on the cell phone. Also, in app-browser could collect data on keyboard inputs such as an address, credit card, password, and cookies. Although Instagram provides an option to use the external browser to open a link from social media post users do not necessarily understand that their data might be collected extensively via in-app browsers including access to third parties or that they are entering a different website and contracting with a new trader, if they decide to purchase products. Consumers may not realise that they are no longer dealing with original merchant. This can create confusion and legal uncertainty. In addition to Instagram also Facebook and TikTok use in-app browsers. Neither Instagram nor TikTok terms of service provide detailed information about in-app browsers and how data is collected although some information is mentioned in privacy policy. Overall, terms and conditions are not clear regarding the use of in app browser and providing access to data to the third parties.<sup>525</sup> </li> <li> <b>“Shop now” and “buy” buttons:</b> Direct buying buttons might be problematic for several reasons. First, they create a sense of urgency and impulse that may                 </li> </ul>

<sup>520</sup> [Devumi, Owner and CEO Settle FTC Charges They Sold Fake Indicators of Social Media Influence; Cosmetics Firm Sunday Riley, CEO Settle FTC Charges That Employees Posted Fake Online Reviews at CEO’s Direction | ICPEN](#)

<sup>521</sup> Catalina Goanta, 2023. The Complicated World of Influencers: <https://www.cecluxembourg.lu/wp-content/uploads/4-Catalina-Goanta.pdf>

<sup>522</sup> PR News Wire, 2021, *Ghost Data report exposes a multi-million dollar business of wholesalers that use Instagram to sell Fake Apple Products WorldWide*, at <https://www.prnewswire.com/news-releases/ghost-data-report-exposes-a-multi-million-dollar-business-of-wholesalers-that-use-instagram-to-sell-fake-apple-products-worldwide-301248788.html>

<sup>523</sup> Catalina Goanta, 2023, before.

<sup>524</sup> Arunesh Mathur, Arvind Narayanan, and Marshini Chetty. 2018. Endorsements on Social Media: An Empirical Study of Affiliate Marketing Disclosures on YouTube and Pinterest. Available at: <https://dl.acm.org/doi/10.1145/3274388>

<sup>525</sup> Expert interview with Catalina Goanta.

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	<p>lead to overspending and regret.<sup>526</sup> Second, they reduce the opportunity for consumers to compare prices, quality, and reviews of different products and sellers<sup>527</sup>. Third, they may expose consumers to privacy and security risks as their personal and financial data may be shared or hacked by third parties<sup>528</sup>. Social media platforms may collect and use customer data without their consent or knowledge, exposing them to potential risks such as identity theft, fraud, or hacking.<sup>529,530</sup> Data based on a bi-annual survey of 600+ U.S. adults in January 2023 shows that 41% of social media users feel comfortable buying products on social apps, and only 37% trust platforms with credit card info. Regarding the quality of products sold on social platforms, 21% of social media users see them as high quality. Also, the survey shows that 45% of adults have no interest in clicking on a 'buy now' button, while 25% are not aware that such an option exists.<sup>531</sup></p> <ul style="list-style-type: none"> <li>• <b>Disputes:</b> Social commerce transactions can lead to disputes between consumers and sellers which can be difficult to resolve. Disputes might happen due to (i) growth in social commerce transactions, (ii) service errors, (iii) customer confusion about some parts of transactions, and (iv) fraud or misuse. Therefore, to address possible disputes social commerce businesses need to provide clear and accessible information about dispute resolution mechanisms.<sup>532</sup></li> </ul>

<sup>526</sup> Lifewire, 2020. Buy Buttons: What they are and how they work. Available at : <https://www.lifewire.com/what-is-a-buy-button-4684601>

<sup>527</sup> Washington Post, 2016. Why the social media 'buy button' is still there, even though most never use it. Available at: <https://www.washingtonpost.com/news/business/wp/2016/01/14/why-the-social-media-buy-button-is-still-there-even-though-most-never-use-it/>

<sup>528</sup> Hubspot, 2023. Why Consumers Still Hesitate to Shop on Social Media Platforms [New Data]. Available at: <https://blog.hubspot.com/marketing/why-consumers-dont-shop-on-social-media>

<sup>529</sup> Francisco J. Martínez-López, Yangchun Li, Wan Su, Changyuan Feng, To have or have not: Buy buttons on social platforms, Journal of Business Research, Volume 105, 2019, pages 33-48, Available at: <https://www.sciencedirect.com/science/article/abs/pii/S0148296319304461>

<sup>530</sup> Twice, 2016. Why social media buy buttons have failed. Available at: <https://www.twice.com/blog/why-social-media-buy-buttons-have-failed-61469>

<sup>531</sup> Hubspot, 2023. Why Consumers Still Hesitate to Shop on Social Media Platforms [New Data]. Available at: <https://blog.hubspot.com/marketing/why-consumers-dont-shop-on-social-media>

<sup>532</sup> PYMNTS, 39% of eCommerce Shoppers Are Initiating More Disputes, 2022. Available at: <https://www.pymnts.com/news/e-commerce/2022/39-pct-e-commerce-shoppers-are-initiating-more-disputes/>

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	<p><b>Case Law: Swedish Patent and Market Court's decision, case PMT 798-19.</b></p> <p><b>Background.</b> A Swedish influencer and sunglasses company agreed that the influencer was to publish one post on Instagram, and one post on her blog to market a sunglasses company. The influencer got financial compensation from the company and the company also paid for a photographer and a trip to Zanzibar, where the photos for the posts were taken. The Swedish Consumer Agency noticed in a supervisory action that a total of 30 social media posts published by the influencer (on Instagram, Facebook, the influencer's blog and YouTube) in which the influencer was posing with sunglasses from the company or which pictured only the sunglasses. The Consumer Ombudsman filed a summons application against the influencer's company due to these posts, claiming that the posts constituted unfair marketing and should be prohibited.</p> <p><b>Court ruling</b> - the court stated that when deciding which posts by an influencer that should be regarded as marketing, the mere fact that the influencer has received a trip as payment does not mean that all posts published in connection with that trip shall be considered as marketing. The court held that such an interpretation would limit the influencer's opportunities to publish pictures from trips, restaurant visits or similar activities. Also, the fact that an influencer shows or mentions a certain product from a company, which the influencer has an ongoing collaboration with, does not automatically make the posts commercial content and therefore marketing. Further, the court stated that the fact that a post is marked with "in collaboration with..." or similar text is not essential for the assessment whether the posts constitute marketing or not, since such interpretation would mean that an influencer alone can decide which posts should be marketing and not.</p> <p>According to the court the average consumer, who should be used as basis to determine whether the marketing is unfair, was considered to have at least fundamental knowledge of English and be aware that many influencers' activities on social media, at least to some parts, are commercial. However, the court stated that there should be high requirements on the design of marketing content</p> <p><b>Source</b> - Bird and Bird.  <a href="https://www.twobirds.com/en/insights/2020/sweden/swedish-case-law-influencers-have-to-properly-identify-marketing-content-but-only-if-it-is-marketing">https://www.twobirds.com/en/insights/2020/sweden/swedish-case-law-influencers-have-to-properly-identify-marketing-content-but-only-if-it-is-marketing</a></p> <p><b>Problematic practices and influence marketing</b></p> <ul style="list-style-type: none"> <li>Influencers play an important part in social commerce. They are highly trusted by their followers and are able to genuinely integrate the product into their content, making the purchase flow smooth and frictionless.<sup>533</sup> For instance, Accenture predicts that the rise of social commerce will create a new era of influencer marketing which is expected to triple in value to \$1.2 trillion by 2025.<sup>534</sup></li> <li>In 2022, the European Parliament conducted a study on the impact of influencers,<sup>535</sup> the study emphasises the above-mentioned practices and their risks for consumers. Below are some of the potentially unfair practices that are especially pertinent to influencers:</li> <li><b>Non-Disclosure of Sponsored Content:</b> One of the most significant issues is the non-disclosure of paid or sponsored content. Influencers often receive compensation for promoting a product or service but may not make this clear to</li> </ul>

<sup>533</sup> Insider intelligence, 2019 . Influencers Could Help Drive Social Commerce. Available at : <https://www.insiderintelligence.com/content/influencers-could-help-drive-social-commerce>

<sup>534</sup> Accenture, 2022. Why shopping's set for a social revolution. Available at : <https://www.accenture.com/us-en/insights/software-platforms/why-shopping-set-social-revolution?>

<sup>535</sup> European Parliament, Directorate-General for Internal Policies of the Union, 2022, Michaelsen, F., Collini, L., *The impact of influencers on advertising and consumer protection in the single market*, Publications Office of the European Union. Available at: <https://op.europa.eu/en/publication-detail/-/publication/7fab08c8-a991-11ec-83e1-01aa75ed71a1/language-en#>

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	<p>their followers, which is misleading and considered unfair under Articles 6 and 7 of the UCPD.</p> <ul style="list-style-type: none"> <li>• <b>Masking Commercial Intent in Editorial Content:</b> As per Point 11 of the UCPD Guidance, disguising commercial communications as editorial content can be misleading. For example, if an influencer posts a "review" of a product but doesn't disclose that they've been paid or gifted the product for the review, this is deceptive.</li> <li>• <b>Misleading Use of 'Likes,' Testimonials, and Endorsements:</b> Point 22 of the UCPD Guidance talks about this aspect. An influencer might artificially inflate 'likes' or use fake testimonials to make a product or service appear more popular or effective than it actually is.</li> <li>• <b>Misleading Omissions:</b> According to Articles 6 and 7 of the UCPD, and further elaborated in Points 8 and 9 of the UCPD Guidance, influencers are required to provide all the information that the average consumer would need to make an informed decision. Omitting crucial information, such as side effects of a product or additional costs, is deemed unfair.</li> <li>• <b>Manipulation of Reviews and Comments:</b> Influencers sometimes manage or curate the comments on their posts to remove negative opinions about a product or service they are promoting. This practice can distort consumer perception and is considered misleading.<sup>536</sup></li> <li>• <b>Unclear Use of Affiliate Links:</b> When influencers benefit from sales through affiliate links, this becomes a commercial practice. Not disclosing these links is a violation of the requirement for transparency.</li> <li>• <b>Irresponsible Health or Financial Claims:</b> Making exaggerated or unsupported claims, especially about health products or financial investments, can not only be misleading but also potentially harmful. Such practices are strictly monitored and considered unfair.</li> </ul>

<sup>536</sup> Goanta, C. Spanakis, G., 2020, Influencers and Social Media Recommender Systems: Unfair Commercial Practices in EU and US Law, TTLF Working Paper No. 54 at <https://ssrn.com/abstract=3592000> or <http://dx.doi.org/10.2139/ssrn.3592000>

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	<p><b>Case Law example: Influencer marketing action by the Italian consumer protection agency (AGCM)</b></p> <p>In June 2019, Italy’s consumer protection agency AGCM ruled on the first influencer marketing case involving Italian flagship airline Alitalia, fashion group Aeffe (owner of the Alberta Ferretti brand) and several Italian influencers. AGCM investigated these parties because it was alleged that certain influencer marketing campaigns could be classified as “hidden advertising,” in violation of the Italian Consumer Code.</p> <p>The proceedings ended without fines but with AGCM accepting certain strict undertakings from the parties under investigation. The standards set out in this decision are to be considered as the Italian regulatory standards for influencer marketing. Influencer marketing campaigns in Italy in future need to ensure compliance with standards set by AGCM else traders not complying would be in violation of the Italian Consumer Code with fines from 5,000 euros to 5,000,000 euros.</p> <p>In its ruling, the AGCM recommended that there is a need to:</p> <ul style="list-style-type: none"> <li>i) Educate the management of firms working in influencer marketing as to the importance of ensuring transparency in all advertising to avoid “hidden advertising” practices;</li> <li>(ii) adopt specific corporate policies that provide for rules of conduct that must be complied with by influencers (and incorporated into the relevant agreements) and that trigger contractual sanctions in the event of a breach;</li> <li>iii) Include in co-marketing agreements and, in general, in all trademark license agreements that have a promotional purpose, a standard clause obliging the business partner/licensee to take appropriate measures to avoid “hidden advertising” and providing for the application of a sanction for violations of this clause, in addition to the licensor’s right to terminate the agreement.</li> </ul> <p>Source: <a href="https://itmedialaw.com/en/influencer-marketing-and-the-law-in-italy/">https://itmedialaw.com/en/influencer-marketing-and-the-law-in-italy/</a> with study team edits</p> <p>Many problematic practices associated with social commerce were also recognised by the European Consumer Organisation (BEUC)<sup>537</sup> In its report on influencer marketing, BEUC recommends reforms to influencer marketing regulations and better enforcement of existing EU legislation. BEUC recommends to provide a definition of an ‘influencer marketing in the UCPD, to introduce the concept of ‘user generated content’ instead of ‘editorial content, to introduce EU wide disclosure standards for influencers as well as make all actors in the influencer business such as brands and influencer agencies liable, and clarify the role of online platforms regarding influencer marketing.<sup>538</sup> These risks specifically include <b>hidden advertising, drop shipping, the promotion of dangerous and risky financial products, and the promotion of unhealthy food to children.</b> The report highlights that European consumer law is only partly able to deal with these situations, and it is currently insufficiently and inconsistently enforced across EU Member States. The report suggests that there is a need to update EU law to provide harmonised solutions to unfair commercial practices as this would clarify the rules and responsibilities of the different actors operating in the influencer marketing ‘value chain’, and ensure a fair and safe online environment for consumers.<sup>539</sup></p> <p>To conclude, both social commerce platforms and influencers are subject to a range of EU laws that aim to protect consumers from unfair, misleading, or aggressive commercial practices. While the EU legal framework presented before may impose some restrictions,</p>

<sup>537</sup> BEUC, *One year has passed and TikTok continues to infringe EU consumer rights, 2022*, Available at: [https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-064\\_tiktok\\_letter\\_cpc\\_-\\_may.pdf](https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-064_tiktok_letter_cpc_-_may.pdf)

<sup>538</sup> BEUC, 2023. *From influence to responsibility. Time to regulate influencer marketing*. Available at : [https://www.beuc.eu/sites/default/files/publications/BEUC-X-2023-093\\_From\\_influence\\_to\\_responsibility\\_Time\\_to\\_regulate\\_influencer-marketing.pdf](https://www.beuc.eu/sites/default/files/publications/BEUC-X-2023-093_From_influence_to_responsibility_Time_to_regulate_influencer-marketing.pdf)

<sup>539</sup> BEUC, 2023. *From influence to responsibility - Time to regulate influencer marketing* at <https://www.beuc.eu/position-papers/influence-responsibility-time-regulate-influencer-marketing>

<p><b>Case study</b></p>	<p>1)The impact of social media on online purchasing: A study of the social commerce phenomenon                  2) the future of social media as a marketplace: a case study on (emerging) trends and innovations in social media marketplaces                  3) the rise of social media content monetisation: how social media platforms evolved into marketplaces</p>
	<p>it also presents an opportunity for social commerce entities and influencers to build greater trust with consumers by adhering to transparent and ethical practices.</p>
<p><b>Conclusions (incl. assessment of potential regulatory gaps).</b></p>	<p>Using social media to purchase products or services presents several advantages for both consumers and business alike which has led to the rise of the so-called social commerce phenomenon. However, as social media platforms become a more important channel for online shopping, it is important to have a sound legislative framework and for consumers to be aware of risks and take steps to protect themselves when making purchases via social media platforms.</p> <p>The case study shows that the very nature of social media platforms, where user-generated content dominates, makes it <b>difficult to monitor and regulate commercial activities comprehensively</b>. Unlike traditional commerce platforms where transactions and promotions are more clearly defined and easier to oversee, social commerce is embedded within a web of social interactions, making it far more difficult to distinguish between what constitutes a commercial practice and what is merely social engagement.</p> <p>Moreover, the case study confirms that social commerce does not operate in isolation; it often interfaces with other digital ecosystems like online marketplaces, payment systems, and advertising networks, each with their own set of regulations and jurisdictional challenges. <b>The integrated nature of these services complicates oversight, as regulators must consider multiple legal frameworks that often have overlapping and sometimes contradictory requirements.</b></p> <p>Adding to the complexity is the rapid pace of <b>technological innovation</b>, regulatory frameworks often lag behind technological advancements, making it difficult for laws to adapt swiftly to new forms of commercial practices, platforms, or consumer behaviours that emerge in the social commerce sphere.</p> <p>The study confirms that social commerce falls under the scope of existing EU consumer legislation, including the UCPD, CRD and UCTD. With the DSA, online advertising and consumer sales through online marketplaces will become more transparent, but the law did not explicitly address specific issues regarding social commerce, such as influencer marketing, in-app browsers or buy buttons.</p> <p>Despite the presence of a developed EU framework, several problems have emerged. Future challenges arise with emerging trends such as the increasing use of tokens, the metaverse and the growing popularity of livestream shopping. to name a few. Taking this into account, regulatory and compliance challenges are likely to emerge in future with the most important including lacking or unclear legal definitions<sup>540</sup>, lack of clarity and challenges in monitoring compliance.</p> <p>We have identified the <b>following recommendations</b> pertaining to the regulatory framework for social commerce and influencers:</p> <ul style="list-style-type: none"> <li>• <b>Define influencers and their responsibilities.</b> EU Consumer Law and the UCPD specifically, requires that businesses provide clear and transparent information about their products or services including pricing, terms and conditions, delivery and payment methods, and any other relevant information that may impact a consumer’s decision to make a purchase. However, the existing EU legislation does not explicitly provide definitions for the terms that emerged with the development of social commerce, for instance, “influencer”, although definitions under the current legislative framework might be broad enough to encompass new trends.<sup>541</sup> Some EU Member States seek to provide precise definitions (see the section before).</li> </ul>

<sup>540</sup> Lexology, 2022. Welcome to the Metaverse: Legal Issues Marketers Need To Consider. Available at: <https://www.lexology.com/library/detail.aspx?q=75628f2a-82a8-436a-9938-037f62cb6fbc>

<sup>541</sup> Riefa, C. and Clausen, L., Towards Fairness in Digital Influencers’ Marketing Practices (April 12, 2019). 8 (2019) Journal of European Consumer and Market Law (EuCML), at <https://ssrn.com/abstract=3364251>



Case study	1) The impact of social media on online purchasing: A study of the social commerce phenomenon 2) the future of social media as a marketplace: a case study on (emerging) trends and innovations in social media marketplaces 3) the rise of social media content monetisation: how social media platforms evolved into marketplaces
	<ul style="list-style-type: none"> <li>As a result, the question arises with regard to how well existing EU legislation covers generally social commerce and specifically influencer marketing.<sup>542</sup> Overall, the main problems in social commerce from the point of view of EU consumer protection and the UCPD relate to issues of <b>transparency</b>,<sup>543</sup> <b>accuracy</b>, and <b>consumer rights</b>.<sup>544</sup> <b>Define influencer marketing as commercial activity</b>. The definition should also clarify what qualifies as a commercial intent and what content is a subject to disclosure requirements.<sup>545</sup></li> <li><b>Introduce the concept of ‘user generated concept’ (to replace ‘editorial content’)</b>. Introduction of the concept would aim to bring legal clarity and ensure that all content posted by content creators is subject to the transparency rules, regardless of whether the users promote products on a sporadic or recurrent basis.<sup>546</sup></li> <li><b>Influencer agencies and brands</b>. The update to EU law could take into account the entire influencer marketing value chain including agencies and brands. Influencer agencies and brands could be required to monitor the compliance of influencers with EU and national laws, and they could be held liable for any violations that occur.<sup>547</sup></li> <li><b>Hold influencers accountable for misleading or deceptive content</b>. Influencers should be held accountable for any misleading or deceptive content that they post. This could include fines, or other penalties.</li> <li><b>Create a self-regulatory body for influencers</b>. A self-regulatory body could be created to oversee the activities of influencers and to develop and enforce codes of conduct. This would help to ensure that influencers are held to high standards and that they are accountable for their actions.</li> <li>Ban the promotion of <b>harmful products and services</b>. Influencers should be prohibited from promoting products or services that are harmful to consumers, such as tobacco, alcohol, aesthetic surgeries, financial services which expose consumers to a high risk of financial loss and gambling. <b>Role of online platforms</b>. The Digital Fitness Check of EU Consumer Law and the implementation of the Digital Services Act (DSA) are both opportunities to update EU law to address the challenges posed by influencer marketing. This opportunity could be used to create EU-wide and standardised features across platforms that allow influencers to clearly and unambiguously declare whether their content constitutes or contains a commercial communication.<sup>548</sup></li> <li>In the context of the EU, the UCPD aims to establish a harmonised set of rules across member states, the <b>cross-border aspect</b> of social commerce can still pose challenges. For instance, <b>an influencer based in a non-EU country</b> promoting products to an EU audience would technically fall under the scope of EU Law when directing commercial practices toward EU consumers. Enforcing this, however, can be complex, time-consuming, and costly. Thus, the <b>international cooperation</b> between regulatory bodies can lead to more robust enforcement mechanisms. Also, technology itself can be leveraged to develop</li> </ul>

<sup>542</sup> Twitter, 2021, *Twitter shopping: Testing the Shop Module*. Available at: [Twitter Shopping: Testing the Shop Spotlight](#)

<sup>543</sup> Unilever, 2018, *Unilever calls on industry to increase trust, transparency and measurement in influencer marketing*, at <https://www.unilever.com/news/press-and-media/press-releases/2018/unilever-calls-on-industry-to-increase-trust-transparency-and-measurement-in-influencer-marketing/>

<sup>544</sup> European Commission, 2018, *A New Deal for Consumers: Commission Strengthens EU Consumer Rights and Enforcement*, at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_18\\_3041](https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3041)

<sup>545</sup> Trzaskowski, J., 2018, Identifying the Commercial Nature of ‘Influencer Marketing’ on the Internet, *Scandinavian Studies in Law*, 65, 81-100., Copenhagen Business School, CBS LAW Research Paper No. 19-06 at <https://ssrn.com/abstract=3324103> <https://www.beuc.eu/position-papers/influence-responsibility-time-regulate-influencer-marketing>

<sup>546</sup> *Ibid.*

<sup>547</sup> *Ibid.*

<sup>548</sup> *Ibid.*

<p><b>Case study</b></p>	<p>1)The impact of social media on online purchasing: A study of the social commerce phenomenon                  2) the future of social media as a marketplace: a case study on (emerging) trends and innovations in social media marketplaces                  3) the rise of social media content monetisation: how social media platforms evolved into marketplaces</p>
	<p><b>automated compliance checks and reporting tools</b> (see before under the DSA) that can aid in the monitoring of cross-border activities in real time.</p>
<p><b>References</b></p>	<p>BEUC, 2023. From influence to responsibility - Time to regulate influencer marketing, at : <a href="https://www.beuc.eu/position-papers/influence-responsibility-time-regulate-influencer-marketing">https://www.beuc.eu/position-papers/influence-responsibility-time-regulate-influencer-marketing</a><a href="https://www.beuc.eu/position-papers/influence-responsibility-time-regulate-influencer-marketing">https://www.beuc.eu/position-papers/influence-responsibility-time-regulate-influencer-marketing</a></p> <p>European Commission, Directorate-General for Justice and Consumers, Lupiáñez-Villanueva, F., Boluda, A., Bogliacino, F., et al., Behavioural study on unfair commercial practices in the digital environment : dark patterns and manipulative personalisation : final report, Publications Office of the European Union, 2022, <a href="https://data.europa.eu/doi/10.2838/859030">https://data.europa.eu/doi/10.2838/859030</a></p> <p>European Parliament, Directorate-General for Internal Policies of the Union, 2022, Michaelsen, F., Collini, L., The impact of influencers on advertising and consumer protection in the single market, Publications Office of the European Union. Available at: <a href="https://op.europa.eu/en/publication-detail/-/publication/7fab08c8-a991-11ec-83e1-01aa75ed71a1/language-en#">https://op.europa.eu/en/publication-detail/-/publication/7fab08c8-a991-11ec-83e1-01aa75ed71a1/language-en#</a></p> <p>European Commission, 2021, 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, at: <a href="https://eurlex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC1229(05)&amp;from=EN">https://eurlex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC1229(05)&amp;from=EN</a></p> <p>European Commission, 2021, Standard Eurobarometer 94. Media use in the European Union, at <a href="https://europa.eu/eurobarometer/surveys/detail/2355">https://europa.eu/eurobarometer/surveys/detail/2355</a>.</p> <p>European Commission, 2020, Commission Staff Working Document impact assessment on a single Market for Digital Services, SWD(2020)348 final.</p> <p>European Commission, 2020, On Artificial Intelligence – A European approach to excellence and antitrust, COM(2020) 65, p 2 final. Available at: <a href="https://ec.europa.eu/info/sites/info/files/commissionwhite-paper-artificial-intelligence-feb2020_en.pdf">https://ec.europa.eu/info/sites/info/files/commissionwhite-paper-artificial-intelligence-feb2020_en.pdf</a>.</p> <p>European Commission, 2020, Shaping Europe’s Digital Future, at <a href="https://ec.europa.eu/info/sites/info/files/communication-shaping-europes-digital-futurefeb2020_en_4.pdf">https://ec.europa.eu/info/sites/info/files/communication-shaping-europes-digital-futurefeb2020_en_4.pdf</a>.</p> <p>European Parliament, 2020, Digital Services: managing harmful content while protecting freedom of expression. Available at: <a href="https://www.europarl.europa.eu/news/en/pressroom/20200925IPR87926/digital-services-managing-harmful-content-while-protectingfreedom-of-expression">https://www.europarl.europa.eu/news/en/pressroom/20200925IPR87926/digital-services-managing-harmful-content-while-protectingfreedom-of-expression</a>.</p> <p>European Commission, Directorate-General for Justice and Consumers, Lupiáñez-Villanueva, F., Boluda, A., Bogliacino, F., et al., Behavioural study on unfair commercial practices in the digital environment : dark patterns and manipulative personalisation : final report, Publications Office of the European Union, 2022, <a href="https://data.europa.eu/doi/10.2838/859030">https://data.europa.eu/doi/10.2838/859030</a></p> <p>European Parliament, Directorate-General for Internal Policies of the Union, 2022, Michaelsen, F., Collini, L., The impact of influencers on advertising and consumer protection in the single market, Publications Office of the European Union. Available at: <a href="https://op.europa.eu/en/publication-detail/-/publication/7fab08c8-a991-11ec-83e1-01aa75ed71a1/language-en#">https://op.europa.eu/en/publication-detail/-/publication/7fab08c8-a991-11ec-83e1-01aa75ed71a1/language-en#</a></p> <p>Goanta, C., Bertaglia, T., Iamnitchi, A., 2022, The Case for a Legal Compliance API for the Enforcement of the EU’s Digital Services Act on Social Media Platforms. Available at: <a href="http://computationsocialmedia.tech/wp-content/uploads/2022/02/DSA_API.pdf">http://computationsocialmedia.tech/wp-content/uploads/2022/02/DSA_API.pdf</a>.</p>

Case study	<p>1)The impact of social media on online purchasing: A study of the social commerce phenomenon</p> <p>2) the future of social media as a marketplace: a case study on (emerging) trends and innovations in social media marketplaces</p> <p>3) the rise of social media content monetisation: how social media platforms evolved into marketplaces</p>
Supporting information	<p>Goanta C., 2021, Human Ads beyond targeted advertising. Content monetization as the blind spot of the Digital Services Act. Available at: <a href="https://www.maastrichtuniversity.nl/blog/2021/09/humanads-beyond-targeted-advertising-content-monetization-blind-spot-digital-services">https://www.maastrichtuniversity.nl/blog/2021/09/humanads-beyond-targeted-advertising-content-monetization-blind-spot-digital-services</a>.</p> <p>Goanta, C., 2021, Monetizing philanthropy: Our browser extension, interdisciplinary research findings &amp; plans ahead. Available at: <a href="https://community.webmonetization.org/philanthropy/monetizingphilanthropy-our-browser-extension-interdisciplinary-research-findings-plans-ahead-16c8">https://community.webmonetization.org/philanthropy/monetizingphilanthropy-our-browser-extension-interdisciplinary-research-findings-plans-ahead-16c8</a>.</p> <p>Goanta, C. and Ranchordás S., 2020, The regulation of social media influencers: an introduction, at <a href="https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3457197">https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3457197</a>.</p> <p>Goanta, C. Spanakis, G., 2020, Influencers and Social Media Recommender Systems: Unfair Commercial Practices in EU and US Law, TTLF Working Paper No. 54 at <a href="https://ssrn.com/abstract=3592000">https://ssrn.com/abstract=3592000</a> or <a href="http://dx.doi.org/10.2139/ssrn.3592000">http://dx.doi.org/10.2139/ssrn.3592000</a></p> <p>Goanta, C., Wildhaber, I, 2019, In the Business of Influence: Contractual Practices and Social Media Content Monetisation, SZW / RSDA 4/2019 at <a href="https://www.alexandria.unisg.ch/259558/1/02_SZW_4-2019_Goanta_Wildhaber.pdf">https://www.alexandria.unisg.ch/259558/1/02_SZW_4-2019_Goanta_Wildhaber.pdf</a>.</p> <p>Martínez-López F.J, Li Y., Su W., Feng C., 2019, To have or have not: Buy buttons on social platforms, Journal of Business Research, 105, 33-48 at <a href="https://www.sciencedirect.com/science/article/abs/pii/S0148296319304461">https://www.sciencedirect.com/science/article/abs/pii/S0148296319304461</a></p> <p>Mathur A, Narayanan A., and Chetty M.. 2018. Endorsements on Social Media: An Empirical Study of Affiliate Marketing Disclosures on YouTube and Pinterest at: <a href="https://dl.acm.org/doi/10.1145/3274388">https://dl.acm.org/doi/10.1145/3274388</a></p> <p>Riefa, C. and Clausen, L. 2019, Towards Fairness in Digital Influencers' Marketing Practices, 2019, Journal of European Consumer and Market Law (EuCML), at: <a href="https://ssrn.com/abstract=3364251">https://ssrn.com/abstract=3364251</a></p> <p>Trzaskowski, J., 2018, Identifying the Commercial Nature of 'Influencer Marketing' on the Internet, Scandinavian Studies in Law, 65, 81-100., Copenhagen Business School, CBS LAW Research Paper No. 19-06 at <a href="https://ssrn.com/abstract=3324103">https://ssrn.com/abstract=3324103</a></p> <p>List of interviewees:</p> <p><b>Meta</b>  <b>Google</b>  <b>Euro commerce</b>  <b>Catalina Goanta, Associate Professor, Utrecht University</b>  <b>BEUC</b></p>

## 8 Case study – Unfair contract terms

Case study headings	Description and analysis
<p><b>Introduction and Case Study Objectives</b></p>	<ul style="list-style-type: none"> <li>• Fitness for purpose of principles introduced by the UCTD to eliminate the presence of unfair contract terms in digital markets: identification of new unfair contract terms, as well as issues and market developments in the digital environment with implications on relevance and usefulness of the UCTD.</li> <li>• Improvements to the UCTD’s application and enforcement, given the UCTD is a minimum harmonisation Directive , and taking account also (1) CJEU clarifications outlined in the <a href="#">Commission notice — Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts Text with EEA relevance. (europa.eu)</a><sup>549</sup> and (2) changes that have already been introduced by the Modernisation Directive.</li> <li>• Coherence and complementarity of UCTD and consumer protection provisions included in sector-specific legislation, including EU digital market legislation (i.e. the Digital Content Directive, and Digital Services Act (‘DSA’), Digital Markets Act (‘DMA’), Artificial Intelligence Act (‘AIA’) and Data Act).</li> <li>• Ultimately, the case study should establish whether the UCTD remains sufficiently relevant and effective to address online terms and conditions which are unfair, with a view to identifying possible scope for updating the annex of the UCTD or to introducing another regulatory change or a soft measure.</li> </ul>
<p><b>Case study method</b></p>	<ul style="list-style-type: none"> <li>• The trade of products online and digital content and services<sup>550</sup> has grown exponentially as a result of globalisation and digital technology developments.</li> <li>• Traders have been able to develop new (including international) markets and services online, e.g. social media and content sharing platforms, tech services such as productivity tools and business management; web search and analytics; communication tools, services in the sectors of travel, accommodation, home delivery, transportation, health and well-being, gaming and entertainment, online dating.<sup>551</sup></li> <li>• Online trade is often based on platform business models and on domestic or international direct B2B or B2C trade.</li> <li>• Mass market actors, such as Google, Apple, Facebook, Amazon and Microsoft, “<i>exert huge power and control over markets and attract billions of users worldwide</i>”. The terms and conditions of the largest digital market traders thus affect millions of consumers worldwide.</li> <li>• Their size and reach (and their monopolistic position, in some cases) have an effect on the asymmetry of information, expertise or bargaining power consumers have when entering a contract. As a result, risks in terms of (1) lack of transparency in mass market online contracts and (2) the presence of unfair terms have increased.<sup>552</sup></li> </ul>
<p><b>Research questions</b></p>	<ul style="list-style-type: none"> <li>• EQ15 – How far has the Modernisation Directive (MD) ensured fitness for purpose in the underlying consumer legislation it supports (e.g. the UCPD, CRD and UCTD) through regulatory amendments?</li> <li>• RQ13 – Is it necessary to introduce a new obligation about the parameters upon which personalised commercial practice is based, in particular for sensitive parameters? Is it necessary to introduce an option of non-personalisation?</li> <li>• RQ21 – What changes are necessary to adapt or complement the existing provisions of the UCTD to better address digital challenges?</li> <li>• RQ22 – Given the UCTD’s minimum harmonisation nature, to what extent should Member States be able to regulate consumer contract terms and/ or develop national blacklists?</li> </ul>

<sup>549</sup> The Commission notice builds on the extensive case law of the CJEU, supports the correct interpretation and implementation of the UCTD by authorities and legal practitioners, and thus contributes to improved legal certainty.

<sup>550</sup> Digital services have been defined in Article 2(2) Modernisation Directive (MD) as services that “allow consumers to create, process, store or access data in digital form, or allow sharing of or any other interaction with data in digital form uploaded or created by consumers or other users of those services. These are, therefore, services accessed and provided in the online environment”.

<sup>551</sup> F. Lagioia, A. Jabłonowska, R. Liepina, K. Drazewski, “AI in Search of Unfairness in Consumer Contracts: The Terms of Service Landscape”, *Journal of Consumer Policy* (2022) 45:481–536, <https://link.springer.com/article/10.1007/s10603-022-09520-9> , Published: 18 July 2022.

<sup>552</sup> Caterina Gardiner, Introduction to Unfair Contract Terms in the Digital Age, *Unfair Contract Terms in the Digital Age. The Challenge of Protecting European Consumers in the Online Marketplace*, 2022 <https://www.elgaronline.com/display/book/9781800886179/9781800886179.xml>

Case study headings	Description and analysis
	<ul style="list-style-type: none"> <li>RQ52 - Given the minimum harmonisation nature of the UCTD, to what extent do Member States have the ability to regulate contract terms? What are the advantages and disadvantages of a minimum harmonisation approach?</li> </ul> <p>Whilst the following personalisation-related questions are not the focus of the UCTD case study, it covers the issue based on evidence available:</p> <ul style="list-style-type: none"> <li>RQ53 - To what extent does the use of standard terms remain relevant for consumers? What changes have there been in terms of trends towards the personalisation of contracts in a digital context and how far has this impacted on the ongoing relevance of the UCTD?</li> <li>RQ54 - To what extent are there issues around personalised pricing? How far can these be resolved through the UCTD?</li> <li>RQ55 - To what degree is there evidence of different default rules being personalised in consumer contracts in the digital space? How far is this a problem and what have been the consequences? Does this leave in regulatory gaps in the UCTD?</li> </ul>
<p><b>Topics covered in case study</b></p>	<p>Consumer protection rules aim to ensure that B2C relationships remain fair because consumers have less bargaining power and knowledge than traders. They do so by introducing certain obligations on traders. In the case of contract terms in the EU, transparency obligations and the prohibition of contracts terms unfair to consumers<sup>553</sup> were introduced by the UCTD in 1993.<sup>554</sup></p> <p><b>Scope of UCTD</b></p> <p>At EU level, the UCTD regulates contract terms which are not individually negotiated; including, but not limited to non-individually negotiated terms contained in pre-formulated standard contracts. The UCTD established rules to evaluate the substantive fairness of the contract terms themselves, and all EU Member States were required to enact a minimum set of measures to protect consumers agreeing to non-individually negotiated terms, including transparency control and a requirement to ensure that any unfair terms are not binding on consumers.<sup>555</sup></p> <p>The CJEU case law clarified that transparency is linked to unfairness and is a positive information duty, not just a procedural one.<sup>556</sup> The Directive requires written contract terms to be drafted in plain and intelligible language. Contract terms whose meaning is unclear must be interpreted as favourably as possible for the consumer, and contract terms which are not transparent and do not allow consumers to understand their rights and obligations under the contract may be considered as unfair.</p> <p>The UCTD contains an indicative and non-exhaustive list of standard terms that may be considered as unfair. This list was introduced to guide courts and administrative authorities in their application of the UCTD.</p> <p>The UCTD is a minimum harmonisation instrument. As such, it sets a minimum EU level of consumer protection and allows Member States to provide more protective consumer protection rules in their national legislation, i.e. a broader scope of the national rules transposing the UCTD, or more detailed or stricter rules regarding the unfairness of contract terms.<sup>557</sup></p> <p>Several Member States have used this possibility by, for example, introducing ‘black lists’ of unfair terms (contract terms considered unfair in all circumstances) and/or ‘grey lists’ of contract terms (terms presumed to be unfair unless proven to the contrary)<sup>558</sup>. This is the case under Dutch law: it contains a black list, a form of a grey list (i.e. a list of contract terms which may be considered as unfair), as well as a ‘blue’ list (“an indication that the contract term should be paid attention to”<sup>559</sup>). Belgium, on the other hand, has transposed the UCTD into national law and applied the same rules also to individually negotiated contract terms. Other Member States have applied the UCTD in relation to the adequacy of the price and the main subject even if those terms are transparent. The full set of national rules (status of 31 May 2019) which contain stricter standards</p>

<sup>553</sup> Commission Notice – [Guidance on the interpretation and application of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts](#), OJ C 323, 27.9.2019, p. 4, COM(2019) 5325 final.

<sup>554</sup> [Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts](#), OJ L 95, 21.4.1993, p. 29–34.

<sup>555</sup> Caterina Gardiner, Introduction to Unfair Contract Terms in the Digital Age, *Unfair Contract Terms in the Digital Age. The Challenge of Protecting European Consumers in the Online Marketplace*, 2022 <https://www.elgaronline.com/display/book/9781800886179/9781800886179.xml>

<sup>556</sup> Judgment of 30 April 2014, Kásler, case C-26/13, EU:C:2014:282, paragraphs 71 and 72; judgment of 26 February 2015, Matei, case C-143/13, EU:C:2015:127, paragraph 73; judgment of 23 April 2015, Van Hove, case C-96/14, EU:C:2015:262, paragraph 40 and interview with Prof. Gardiner.

<sup>557</sup> Commission Guidance document: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC0927\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC0927(01)&from=EN)

<sup>558</sup> Civic Consulting, *Study for the Fitness Check of EU consumer and marketing law - Final report*, 2017,

<https://op.europa.eu/en/publication-detail/-/publication/f7b3958b-772b-11e7-b2f2-01aa75ed71a1/language-en>

<sup>559</sup> Stakeholder interview.

Case study headings	Description and analysis
	<p>or extend the scope of the national rules transposing the UCTD are listed at <a href="https://commission.europa.eu/content/notifications-under-article-8a-directive-9313eec-0_en">https://commission.europa.eu/content/notifications-under-article-8a-directive-9313eec-0_en</a></p> <div style="border: 1px solid black; padding: 5px;"> <p><b>Case Study summary</b></p> <p>1) the literature reviewed for this case study has identified a set of online contract clauses which merit monitoring as either potentially problematic or clearly unfair, e.g. broadly framed liability exclusions; unilateral change clauses; unilateral termination and content removal clauses which do not state reasons for such actions; and clauses stating that disputes should exclusively be settled by way of arbitration.<sup>560</sup></p> <p>2) online contract terms have been monitored by national consumer authorities and consumer associations. Whilst there is more cause for concern over potential breaches by major market players, stakeholders also reported that small market players which operate online can lack knowledge of their obligations under the UCTD.</p> <p>3) where such monitoring culminated in court actions, national case law reveals that numerous mass market contract terms were ruled by courts as unfair.</p> <p>4) in some countries, concerns raised by national consumer protection authorities and consumer associations led to negotiations with global online traders to attempt to bring their contract terms into compliance with the UCTD, thus avoiding potential lengthy court cases.</p> <p><b>The key issue for the case study is that establishing unfairness was based on principles established in the UCTD and on national law transposing the UCTD, which in some cases goes beyond UCTD requirements.</b></p> <p><b>This being said, new practices, specific to the digital environment have arisen that may require additional clarifications in terms of the UCTD's application.</b></p> </div>
<p><b>Problematic practices – nature and magnitude. address the problem?</b></p>	<p><b>Evidence of problematic or unfair terms in the digital space</b></p> <p>By way of introduction, we note that 62,5% (n=222) of respondents to question 4 of the <b>public consultation</b><sup>561</sup> reported having perceived (between one or more than three times) a contract term to be unfair when buying a digital service or digital content in the past 12 months, yet <u>nevertheless having to agree</u>. In contrast, 26,5% reported never having experienced this issue in the past year.</p> <p><b>Academic research</b> has contributed to establishing the prevalence of unfair terms online. Marco Loos and Joasia Luzak from the University of Amsterdam, exposed, in an article published in 2016, terms and conditions in consumer contracts of a sample of online service providers (e.g. Google, Twitter, Facebook, and Dropbox) as not complying with the UCTD, and could as such be contested in more than one Member State.<sup>562</sup> The contractual terms that, according to Loos and Luzak in 2016, could be contested by clients of these online service providers, were those that allowed for (1) unilateral changes of other contractual terms or of the service itself, (2) terms that allow for unilateral termination of the contract by the online service provider, (3) exclusions or limitations of liability, (4) international jurisdiction clauses, and (5) choice-of-law clauses. Loos and Luzak found that lack of transparency of several online contractual terms was the central issue.</p> <p>Similar findings were found in a more recent (2022) research piece. The article “Artificial Intelligence (AI) in Search of Unfairness in Consumer Contracts: The Terms of Service (ToS) Landscape” published in the Journal of Consumer Policy<sup>563</sup> reviewed terms included in a sample</p>

<sup>560</sup> F. Lagioia<sup>1</sup>, A. Jabłonowska, R. Liepina, K. Drazewski, “AI in Search of Unfairness in Consumer Contracts: The Terms of Service Landscape”, *Journal of Consumer Policy* (2022) 45:481–536, <https://link.springer.com/article/10.1007/s10603-022-09520-9>, Published: 18 July 2022.

<sup>561</sup> Question 4 of public consultation on Have Your Say portal: « In the past 12 months, have you experienced any of the following problems online? : I perceived a contract term to be unfair when buying a digital service or digital content but nevertheless had to agree ; Website or app design was confusing, which made me uncertain about what I was signing up for or about which rights and obligations I have”.

<sup>562</sup> Marco Loos and Joasia Luzak (Centre for the Study of European Contract Law, University of Amsterdam), “Wanted: a Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers”, *Journal of Consumer Policy*, March 2016, 39:63–90, DOI:10.1007/s10603-015-9303-7

<sup>563</sup> F. Lagioia, A. Jabłonowska, R. Liepina, K. Drazewski, “AI in Search of Unfairness in Consumer Contracts: The Terms of Service Landscape”, *Journal of Consumer Policy* (2022) 45:481–536, <https://link.springer.com/article/10.1007/s10603-022-09520-9>,

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	<p>of one hundred contracts - across sectors - in order to establish the prevalence of unfair terms. The review led to the identification of the following:</p> <ul style="list-style-type: none"> <li>• 629 (potentially) unfair <i>limitation of liability</i> clauses were identified. Such clauses were present in 98 out of 100 Terms of Service, across all market sectors. The most common practices were <i>general and non-specific limitation and/or exclusion of liability</i> (20%), followed by <i>liability limitation for third-party actions</i> (12%), <i>for any damage</i> (9%), and <i>for interruption and/or the unavailability of the service</i> (8%).</li> <li>• The most common <i>contract modification</i> practice concerned the <i>ability to unilaterally change the contract without giving reasons</i> (60% of all unilateral change practices). Such clauses were found all contracts in five out of nine sectors (e-commerce, productivity tools and business management, Web search and analytics, health and well-being, and content sharing platforms).</li> <li>• <i>Content removal at trader's sole discretion</i> was relatively frequent across most sectors: such clauses were found in over 50% of contracts in seven out of nine sectors, and their presence was especially high for gaming and entertainment and in social networks and dating.</li> <li>• In contrast, <i>problematic arbitration practices</i>, relating to the application of extra-legal rules and the place of arbitration outside the consumer's residence, were identified in less than 50% of contracts. The authors considered this may be on account of the "<i>clarification of the fairness standard in this area, both through the grey list in the Annex to the UCTD and through subsequent case law, [which] may have positively affected the development of the market practice, at least for EU users</i>".</li> <li>• The piece of research also found that certain terms contained in privacy policies "<i>serve to authorize a pervasive collection and AI processing of personal data</i>"<sup>564</sup> and as such are also problematic.</li> </ul> <p><b>National consumer authorities and associations</b> have had a key role in monitoring the presence of unfair or problematic terms online.</p> <ul style="list-style-type: none"> <li>• For example, the Norwegian Consumer Authority, Forbrukerrådet, investigated the Terms of Services of national and global <b>cloud</b> storage service providers (Jottacloud, Telenor Sky, Dropbox, Google Cloud (disk), Microsoft OneDrive) considered as "nebulous", following complaints lodged by Norwegian consumers. Consumers were experiencing full loss of data saved on the cloud due to breaches of T&amp;C yet they were not informed about which term(s) (e.g. breach by user of "acceptable" use of cloud storage service beyond the restriction of illegal content, missed payment) had been broken, nor given any chance to recover their data. Forbrukerrådet's short study was limited to the terms of service and acceptable use policies for the most common cloud storage service providers (Google, Microsoft, Dropbox), and for a few Norwegian cloud storage service providers<sup>565</sup>. We were able to see a short summary of Forbrukerrådet's initial findings.<sup>566</sup> They found, for example, that (1) what "normal" or "acceptable" use of their cloud storage service entails is unclear and may be difficult to understand for the average consumer, (2) one service provider may shut down accounts, for any reason, without a warning, and potentially other accounts if they are connected (3) for some service providers, the consumer must accept terms which contain clauses that restrict use beyond the limits of the law. Forbrukerrådet concluded that consumers' position ought to be strengthened.</li> <li>• The French consumer protection association Que Choisir flagged similar problematic areas, e.g. (1) lack of clarity on the commercial basis for service provision, e.g. what is being monetised in the case of services presented as free to consumers, and especially in relation to lack of clarity over the commercial exploitation of private data; (2) in relation</li> </ul>

Published: 18 July 2022. The paper reviewed the fairness of clauses, pertaining to (i) liability, (ii) changes to the contract and/or service, (iii) termination of the contract, (iv) content management, and (v) arbitration - in one hundred contracts in nine digital market sectors.

<sup>564</sup> F. Lagioia et al. 2022.

<sup>565</sup> The Dutch ACM interviewed for the purpose of this Case Study also referred to a study on domotica (by ACM and RDI) but this study is not published yet. It shows the importance of terms and conditions in the digital domain especially related to IoT-products and related cloud services.

<sup>566</sup> The previous study of the Forbrukerrådet (Norwegian Consumer Authority) on cloud services is summarised: [Online Terms of Services: Cloud Storage \(uio.no\)](https://www.uio.no/online-terms-of-services)

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	<p>to intellectual property rights, users' waiver of their ownership of pictures and content created online, (3) significant damage caused to consumers in case of account closure or deletion with no or insufficient prior notice, including financial damage in case of loss of videogames account or LinkedIn account, (4) exclusion of liability in case of data breaches. (1) and (2) have an effect on redress and enforcement, where consumers do not seek redress since digital services seem to be provided for free and they do not believe they have entered a commercial relationship.<sup>567</sup></p> <p><b><u>Violations to the UCTD uncovered by national judicial and enforcement authorities</u></b></p> <p><b>The prevalence of unfair contract terms in online contracts in violation to the UCTD, especially from global, mass market players,</b> is demonstrated by national case law and by the work of the European network of national consumer protection (CPC) authorities. Findings are presented below and in the annex at the end of the case study.</p> <p><b>Examples of national case law</b></p> <p>In 2018 and 2019, the <b>French Tribunal de Grande instance (TGI) de Paris</b>, in response to three cases brought forward by the French consumer association <i>UFC Que Choisir</i>, respectively against Twitter, Google and Facebook on the basis that they had unclearly presented general terms and conditions to consumers, and that <b>a very high number of their online contract clauses were unfair</b>.<sup>568</sup> The TGI de Paris found that:</p> <ol style="list-style-type: none"> <li>(1) the collection of personal data <b>was not sufficiently transparent</b>, omitting informing users that the collection of personal data had a commercial value and would be used for such purposes,</li> <li>(2) as such, <b>users should have been requested to give their specific consent directly in the contract itself</b>, rather than only in the terms and conditions for the use of the service</li> <li>(3) <b>a new agreement from users was also required in the case of substantial amendments to privacy policies and terms of use</b>,</li> <li>(4) <b>the trader could not suspend/delete an account without justification or recourse</b>,</li> <li>(5) <b>the trader could not exclude any liability on the part of the online service provider</b>.</li> </ol> <p>The reasoning was based on the <b>French Civil Code and the French Consumer Code</b>.<sup>569</sup> Following an appeal from Twitter, the Paris Court of Appeal (Cour d'appel)<sup>570</sup> on 14 April 2023 not only upheld the finding that Twitter's successive versions of its general terms and conditions of use, between 2012 and 2018, contained a series of "unfair and unlawful" clauses, but also increased the compensation to UFC-Que Choisir to EUR 50,000 (from EUR 30,000).<sup>571</sup> A more recent (2022) court case regarding unfair terms in the digital field involved a German consumer protection association taking legal action against a French bank as the lessor of an e-car battery.<sup>572</sup> The German Federal Court of Justice ruled that the use of a clause in its general terms and conditions was invalid due to a breach of section 307(1) <u>of the German Civil Code: namely, that this clause gave an unreasonable disadvantage to the lessee</u>.<sup>573</sup> Equally, the clause was deemed to also breach section 307 (2) of the civil code as limiting the essential duties inherent in the nature of the</p>

<sup>567</sup> Interview: Frithjof Michaelsen, UFC-Que-Choisir, French consumer association, 1st February 2023

<sup>568</sup> [French court issues decision on legality of Privacy Rules and Terms of Use under data protection and consumer law | Data Protection Report; France, Paris First Degree Court , 9 April 2019 14/07298 | FRICoRe](#)

<sup>569</sup> Depending on the case, the basis for demonstrating the pecuniary interest of the contract was Article 1107 of the French Civil Code. The TGI's findings were also supported by Article L. 211-1 of the French Consumer Code, imposing a clarity obligation on the drafting of clauses, and Article L. 111-1, imposing a general obligation of pre-contractual information, and Article L. 212-1 which stipulates that contractual terms "which have the object or effect of creating a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer" shall be regarded as unfair.

<sup>570</sup> CA Paris, 14 April 2023, n° 19/09244, available at : <https://www.courdecassation.fr/en/decision/643a42acd83dbd04f5fb2a86>

<sup>571</sup> Le Monde, "Twitter condamné à payer 100 000 euros pour la non-conformité de ses conditions d'utilisation", 4 May 2023.

Available at: [https://www.lemonde.fr/pixels/article/2023/05/04/twitter-condamne-a-payer-100-000-euros-pour-la-non-conformite-de-ses-conditions-d-utilisation\\_6172039\\_4408996.html](https://www.lemonde.fr/pixels/article/2023/05/04/twitter-condamne-a-payer-100-000-euros-pour-la-non-conformite-de-ses-conditions-d-utilisation_6172039_4408996.html) and Le Point, « Twitter condamné pour « atteinte à l'intérêt des consommateurs », 9 May 2023, available at: [https://www.lepoint.fr/justice/twitter-condamne-pour-atteinte-a-l-interet-des-consommateurs-09-05-2023-2519455\\_2386.php](https://www.lepoint.fr/justice/twitter-condamne-pour-atteinte-a-l-interet-des-consommateurs-09-05-2023-2519455_2386.php)

<sup>572</sup> BGH (XII. Zivilsenat), Urteil vom 26.10.2022 – BGH Aktenzeichen XII ZR 89/21 Titel: Fernsperrung der Auflademöglichkeit durch Vermieter einer Autobatterie Normenkette: BGB § 307 Abs. BGB § 307 Absatz 1, § BGB § 858 Abs. BGB § 858 Absatz 1, § BGB § 862, § BGB § 866

<sup>573</sup> <https://beck-online.beck.de/?typ=reference&y=200&az=XIIZR8921&ge=BGH>.



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	<p>contract as, under the clause, if the lease were to be terminated, the bank would be permitted to remotely (digitally) deactivate the car battery.</p> <p>According to one <b>Austrian</b> stakeholder consulted, the Austrian consumer organisations (Federal Chamber of Labor and Association for Consumer Information) have since the 1990s been strategically litigating consumer law issues under a contract with the Ministry of Consumer Protection, including to obtain injunctive relief against unfair contract terms. A rich and differentiated body of case law of the highest court on UCTD-related national provisions (included in the Austrian General Civil Code (“ABGB”) Art 864a ABGB and Art 879 para 3 ABGB, and in the Consumer Protection Act (Konsumentenschutzgesetz “KSchG”) exists, in particular to concretise the transparency requirement. According to the stakeholder, Austrian civil courts apply provisions analogously to EU digital consumer law, and if necessary, interpret the general clause Art 879 Para 3 of the Austrian General Civil Code (“ABGB”) “differently in order to be able to solve certain newly arising problems”<sup>574</sup>.</p> <p><b>Importantly, national courts’ legal reasonings were based on the UCTD as per the transposed versions of the Directive in national law (which can go beyond the basic standards of the UCTD).</b></p> <p><b><u>Joint action taken by European consumer protection (CPC) authorities</u></b></p> <p>The <b>pan-European enforcement network of national consumer authorities</b> was activated to investigate problematic contract terms in the digital domain,<sup>575</sup> based on the EU Consumer Protection Cooperation (CPC) Regulation.<sup>576</sup> In 2021, following joint action by the European network of national consumer protection authorities, the Chinese marketplace AliExpress committed to making their General Terms and Conditions clearer for consumers by 1 May 2021.<sup>577</sup> Contract clauses related to (1) the right of withdrawal and legal guarantees, for example for faulty goods, also by AliExpress’ listed traders, (2) lack of transparency on the possible application of additional costs linked to customs clearance, which had been a concern for several European consumer organisations. AliExpress committed to bringing terms and practices in line with EU consumer rules. In 2021 a dialogue started between Google and the CPC Network, coordinated by the European Commission and led by the Dutch Authority for Consumers and Markets and the Belgian Directorate-General for Economic Inspection.<sup>578</sup> The dialogue was initiated to address a concern expressed by several European regulators over the lack of transparency about purchases via Google Store, Google Play Store, Google Hotels or Google Flights. Improvements to transparency were requested as a way to provide support to consumers before they make a purchase decision.<sup>579</sup> In 2018-2019 the CPC Network carried out a joint assessment of Facebook’s terms of service under the coordination of the French Directorate General for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF) and asked the company, as well as Twitter and Google+ to improve a number of contract terms.<sup>580</sup> In the case of improvements made by Facebook to its contract terms, several stakeholders considered that further improvements were needed to be brought in line with national consumer law. Unfair terms within digital platform contracts have recently been assessed in Durovic and Poon’s August 2023 academic article on the basis of case law.<sup>581</sup> Specifically the adequacy of the current regulatory response to terms in Meta and TikTok’s user agreements concerning the handling of users’</p>

<sup>574</sup> Written exchange with the Austrian Federal Ministry of Social Affairs, Health, Care and Consumer Protection, dated 22 May 2023. The exchange specifies that “The Austrian General Civil Code (“ABGB”) provides protection mechanisms against unfair clauses for both consumers and businesses (Art 864a ABGB and Art 879 para 3 ABGB). In addition, the Consumer Protection Act (Konsumentenschutzgesetz “KSchG”) provides for further provisions on clause control, which only apply to a consumer transaction (Art 6 KSchG)” and that “Art 879 para 3 ABGB stipulates that a provision in general terms or in contract forms which determines subsidiary obligations, is invalid, if it grossly discriminates against one of the parties. Art 879 para 3 ABGB is only applicable to agreements regarding supplementary obligations, but not to agreements regarding the mutual major obligations of the parties. Gross discrimination within the meaning of Art 879 para 3 ABGB exists if the intended legal positions of the contracting parties are in obvious disproportion to each other and therefore there is no legitimate deviation from the dispositive law (as a model for a fair balance of interests)”.

<sup>575</sup> [https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/coordinated-actions\\_en](https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/coordinated-actions_en)

<sup>576</sup> [Regulation \(EU\) 2017/2394](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_367) on cooperation between national authorities responsible for the enforcement of consumer protection laws lays down a cooperation framework to allow national authorities from all countries in the European Economic Area, coordinated by the Commission, to jointly address breaches of consumer rules when the trader and the consumer are established in different countries..

<sup>577</sup> [Following ACM action. AliExpress adjusts its conditions in favor of consumers](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_367) published on 28-07-2022.

<sup>578</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_367](https://ec.europa.eu/commission/presscorner/detail/en/ip_19_2048)

<sup>579</sup> [Google to provide consumers with better information after joint action by European regulators | ACM.nl](https://ec.europa.eu/commission/presscorner/detail/en/ip_19_2048)

<sup>580</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_19\\_2048](https://ec.europa.eu/commission/presscorner/detail/en/ip_19_2048)

<sup>581</sup> Durovic and Poon, *Consumer Vulnerability, Digital Fairness, and the European Rules on Unfair Contract Terms: What Can Be Learnt from the Case Law Against TikTok and Meta?*. Journal Consumer Policy, 2023. <https://doi.org/10.1007/s10603-023-09546-7>

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	<p>personal data, and their policies that limit or exclude the company's liability<sup>582</sup> are looked at, with a specific focus on three key areas: transparency and accessibility of terms, the core terms exemption, and penalties.</p> <p><b><u>Digital design and its effect on the transparency of contract terms online</u></b></p> <p>One issue highlighted by all stakeholders is that <b>users of digital services or purchasers of products online rarely read contract terms</b>. Whilst skipping contract terms applies somewhat to offline trade, it is more prevalent online. Reasons relate to the specificities of the online environment, characterised by (1) the dematerialisation of the contract, (2) the spread of contract terms across several webpages, in the form of Terms and Conditions, Terms of Service and Policies, Payments Terms of Service and the Privacy Policy, leading to difficulties with locating them online, (3) their reported length, complexity and/or ambiguity (e.g. whether a privacy policy determines contractual rights and obligations)<sup>583</sup>, (4) a new trend to change T&amp;Cs progressively in a manner that is progressively unfair, i.e. the successive iterations of T&amp;C over time are increasingly unfair.<sup>584</sup> In an article published in August 2023<sup>585</sup>, Durovic and Poon consider that <i>"online contracts are often of a long-term nature and are subject to much more extensive changes than the UCTD may have originally taken into account"</i> and <i>"the combination of lengthy T&amp;Cs and the limitations of mobile device interfaces poses a significant obstacle to user comprehension of privacy policies and the terms pertaining to data handling"</i>.</p> <p>In addition, according to Prof. Gardiner <i>"the electronic environment may [...use] strategies to encourage consumers to click through contracts without taking notice of the terms"</i>. For example, the "click and browse wrap" presentation of terms, the use of hybrid contract forms with terms hidden under a hyperlink, and "'sign-up' equating to agreeing to contract terms" formats, were considered problematic. When asked if they felt that the design of a website or app was confusing, which made them uncertain about what they were signing up for and their rights and obligations, 49% of respondents to the public consultation (n=222) said this problem was experienced 3 times or more, while 40% had encountered this issue once or twice. Under 10% responded that they had never experienced this problem.<sup>586</sup></p> <p>Some stakeholders agreed that such design measures incentivise users to click fast and enter the contract within a couple of minutes, thus putting into question the validity of consumers' consent when clicking online. For Prof. Gardiner, consumers <i>"may not realise the significance of the legal terms or may indeed not be aware of the existence of binding terms at all"</i>. Combined, such digital design issues make it difficult for consumers to obtain a clear overview of rights and obligations, and therefore challenge the transparency requirement.</p> <p><b><u>Enforcing the UCTD</u></b></p> <p>Several stakeholders recognised that enforcement efforts at EU and national level focused less on contract terms than on commercial practices. One national consumer authority reported that this was the result of a prioritisation strategy reflecting comparative enforcement effectiveness, and that comparatively fewer resources were placed on the monitoring of unfair contract terms.</p> <p>In parallel, one barrier to enforcement is the lack of complaints about problematic contract terms placed by consumers who do not understand their rights clearly when digital services seem to be provided for free. In such cases, one national consumer association reported that some consumers may not seek redress since it is not clear that they have entered a commercial</p>

<sup>582</sup> « Facebook and TikTok have often attempted to limit their obligations to users in respect of monetary liability for negligence » and *"In practice, the inclusion of a low limit on negligence liability is unlikely to be legally enforceable and may amount to an unfair term. Given the large proportion of Facebook and TikTok's revenues generated by advertising, which in turn heavily relies on the processing of user data, the low cap on negligence liability may represent a significant financial imbalance to the detriment of users under Article 3(1). It is worth noting that the low limit itself aligns with a term specified in the indicative list, as it purports to 'inappropriately...limit the legal rights of the consumer...[for] inadequate performance by the supplier' (UCTD, Annex A, Para 1(c)). However, the indicative list in itself provides no clear indication as to whether particular terms are unfair (European Commission, 2019a) and, even though Facebook has now deleted the reference to a \$100 cap or sums paid by the user, the fact that TikTok now uses a virtually identical clause in its limitation of liability illustrates the ineffectiveness of the indicative list as a deterrent to firms' use of such terms"* in Durovic and Poon, 2023.

<sup>583</sup> European Parliament, *Update the Unfair Contract Terms directive for digital services*, PE 676.006, p. 14, and Caterina Gardiner, *Introduction to Unfair Contract Terms in the Digital Age, Unfair Contract Terms in the Digital Age. The Challenge of Protecting European Consumers in the Online Marketplace*, 2022 <https://www.elgaronline.com/display/book/9781800886179/9781800886179.xml>

<sup>584</sup> Stakeholder interview.

<sup>585</sup> Durovic, M., Poon, J. Consumer Vulnerability, Digital Fairness, and the European Rules on Unfair Contract Terms: What Can Be Learnt from the Case Law Against TikTok and Meta?. *J Consum Policy* (2023). <https://doi.org/10.1007/s10603-023-09546-7>

<sup>586</sup> The survey also gave the option of responding "I don't know" or leaving no answer.

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	<p>relationship. Similarly, Gardiner argues that some consumers may mistakenly believe that some terms are enforceable, when they are in fact unfair, and as such, would not seek legal redress.<sup>587</sup></p> <p>Another limitation to enforcing the UCTD in the online environment relates to the vagueness of some of the wording in the Directive's indicative list in annex and how they apply in digital contexts. For example, Durovic and Poon argue that ““reasonable notice” in the UCTD’s indicative list is so vague as to be potentially meaningless. As a result, its effectiveness in regulating large social media contracts is arguably compromised”.<sup>588</sup> Despite the helpful clarifications provided under the Commission notice - Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts, some stakeholders noted that the Guidance document could helpfully integrate further specificities of the online contractual environment (see related section below).</p> <p>Stakeholders interviewed also highlighted the limited deterrent effect of the UCTD, especially for global digital players, in the absence of substantial sanctions or systematically coordinated action amongst Member States. In the case of Facebook condemnation by the Paris Tribunal de Grande Instance in 2019, the social network was ordered to pay UFC-Que Choisir the sum of EUR 30 000 as compensation for non-material damage to the collective interests of consumers.<sup>589</sup> Twitter appealed, and on 14 April 2023, the Paris Court of Appeal (Cour d’appel) not only upheld the finding that Twitter’s successive versions of its general terms and conditions of use, between 2012 and 2018, contained a series of “unfair and unlawful” clauses, but also increased the compensation to UFC-Que Choisir to EUR 50,000 (from EUR 30,000).<sup>590</sup> The Court also warned that “There is still a long way to go before we end up with conditions that are easily accessible and intelligible to the average user”.<sup>591</sup> One stakeholder reported “this represents what Facebook makes in 12 seconds. When almost all T&amp;C were deemed illegal. [...] Also, by the time the court decision was made, some of T&amp;C that were ruled upon were no longer in place and had been updated”, when the investment made by the French consumer association was substantial, given major imbalance in resources available to both parties.</p> <p>Whilst the deterrent effect has been addressed to some extent by the Modernisation Directive (e.g. turnover-based sanctions), according to some stakeholders the conditions to activate them are high (e.g. infractions twice in a row). To improve the UCTD’s deterrent effect, some stakeholders suggested testing the feasibility of (1) putting fines against major global players on par to those available under the GDPR and competition policy, ranging in millions of euros, (2) blocking websites, (3) making the contract void.</p> <p>Moreover, the restitutory effect based on economic harm incurred and restoring the consumer’s position in the absence of the contract are difficult to operationalise by national courts in the case of digital trade, e.g. no pecuniary exchange in the case of registration to social networks.</p> <p>In the case of cross-border infringements, stakeholders also considered that the fragmented nature of the enforcement system was a limitation. Further, stakeholders suggested that it is difficult to obtain an outcome for collective actions in cross-border cases, with national penalties</p>

<sup>587</sup> The preliminary results of the Public Consultation are similar: One question asked whether respondents had perceived a contract term to be unfair when buying a digital service or digital content (e.g. a contract term enabling the company to terminate the service unilaterally) but nevertheless had to agree. Specifically, 3 respondents claimed they experienced this problem when asked to indicate one of the most serious problems faced in the digital environment (and had managed to solve the problem, to some extent). However, overall, around a quarter of respondents (25.9%), or 38, indicated that they had perceived a contract term to be unfair 3 or more times, while 42 (28.6%) responded once or twice. 36 (24.5%) had never experienced this problem. Therefore, over half of the respondents had experienced a problem with an unfair contract term, though it was not necessarily indicated as the most serious problem faced in the digital environment. However, despite encountering such problems, 116 (79%) of the respondents said that they did not take any action, such as lodging a complaint or legal action. Indeed, only 15 (10.2%) took any action, with the majority submitting a complaint to the service provider and only 3 using other methods: 2 complained to a public authority while one respondent brought the matter to an out-of-court dispute resolution body.

<sup>588</sup> Durovic, M., Poon, J. Consumer Vulnerability, Digital Fairness, and the European Rules on Unfair Contract Terms: What Can Be Learnt from the Case Law Against TikTok and Meta?. J Consum Policy (2023). <https://doi.org/10.1007/s10603-023-09546-7> and « *It is plausible that the continued ambiguity concerning the indicative list’s legal effect across the EU, as under Irish law which governs TikTok’s T&Cs (Moncrieff, 2020), may facilitate a favourable environment for companies to ignore the indicative list rather than make efforts to craft T&Cs in conformity with it* ».

<sup>589</sup> [Données personnelles, l’UFC-Que Choisir obtient la condamnation de Facebook - UFC-Que Choisir and Legalis | L’actualité du droit des nouvelles technologies | TGI de Paris, jugement du 9 avril 2019](#)

<sup>590</sup> Le Monde, “Twitter condamné à payer 100 000 euros pour la non-conformité de ses conditions d’utilisation”, 4 May 2023. Available at: [https://www.lemonde.fr/pixels/article/2023/05/04/twitter-condamne-a-payer-100-000-euros-pour-la-non-conformite-de-ses-conditions-d-utilisation\\_6172039\\_4408996.html](https://www.lemonde.fr/pixels/article/2023/05/04/twitter-condamne-a-payer-100-000-euros-pour-la-non-conformite-de-ses-conditions-d-utilisation_6172039_4408996.html) and Le Point, « Twitter condamné pour « atteinte à l’intérêt des consommateurs », 9 May 2023, available at: [https://www.lepoint.fr/justice/twitter-condamne-pour-atteinte-a-l-interet-des-consommateurs-09-05-2023-2519455\\_2386.php](https://www.lepoint.fr/justice/twitter-condamne-pour-atteinte-a-l-interet-des-consommateurs-09-05-2023-2519455_2386.php)

<sup>591</sup> Le Point, « Twitter condamné pour « atteinte à l’intérêt des consommateurs », 9 May 2023, available at: [https://www.lepoint.fr/justice/twitter-condamne-pour-atteinte-a-l-interet-des-consommateurs-09-05-2023-2519455\\_2386.php](https://www.lepoint.fr/justice/twitter-condamne-pour-atteinte-a-l-interet-des-consommateurs-09-05-2023-2519455_2386.php)

Case study headings	Description and analysis
	<p>difficult to establish and enforce, partly on account of difference in the interpretation of transparency requirements and of the unfairness test.</p> <p>Stakeholders also pointed that lengthy procedures (several years) and significant investments required when seeking redress through court action, to bring traders into compliance, undermined the practical enforceability of the UCTD, given also the limited deterrent effect of the sanction regime, despite improvements introduced by the Modernisation Directive (e.g. turnover-based sanctions).</p> <p>Given the substantial resources needed for court action, further engaging traders in 'preventive' or 'positive' enforcement, i.e. negotiations and dialogue to address consumers and enforcement authorities' concerns, or cooperative enforcement preventive work with traders, has been recommended as a more effective way forward by some stakeholders. For example, in the Netherlands, terms and conditions of national traders are mutually negotiated with consumer associations, within a formal process supported formally by the Socio-economic Council. As a result, SMEs compliance is reportedly comparatively high. A similar set-up at EU level with major online traders could perhaps be considered.</p> <p>Providing at national level further information to SMEs on their obligations under the UCTD was considered as needed, as well as promoting existing EU support measures, such as Consumer Law Ready, an EU-wide training programme in consumer law for SMEs.<sup>592</sup></p> <p><b><u>Personalisation of terms of contract</u></b></p> <p>Traders' ability to process data to profile customer practices gives traders a detailed understanding of (1) the consumer's willingness to purchase, and thus enter into a contract, (2) their willingness to pay, and of (3) other information of potential relevance to individually negotiated and non-individually negotiated contract terms.</p> <p>With regards (1) and (2), the adequacy of price &amp; remuneration, in so far as these terms are in plain intelligible language (Art. 4(2)) are excluded from the 'unfairness test' / fairness of terms review under the UCTD. Moreover, Modernisation Directive includes an obligation to inform consumers when a price is personalised.<sup>593</sup></p> <p>No such information obligation exists regarding the presence of non-individually negotiated personalised contract terms, should this practice exist and be significant.</p> <p>At this stage, stakeholders agreed that customer profiling and technology hold the <i>potential</i> of creating an additional imbalance in the business-to-consumer relationship. Similarly, according to a study requested by the JURI committee<sup>594</sup>, big data exacerbates the contractual imbalance between digital service providers (DSPs) and consumers.</p> <p>Given difficulties in monitoring the use of consumer profiling for the personalisation of <i>any</i> contract terms, partly due to the covert nature of such practices, this is an area to be explored further. Specifically, the following should be explored further: effect of consumer profiling on the balance in the business-to-consumer relationship (1) <i>before</i> entering a contract online, (2) when negotiating the terms (both 1 and 2 are out of the UCTD's scope) and (3) over non-individually negotiated contract terms. In the case of (3) which is of relevance to the UCTD, where the <i>unilaterally</i> (by the trader) customised contract term creates a significant imbalance in the relationship, there may be a case to invoke the UCTD. One stakeholder considered that because personalised terms are not individually negotiated, Art. 3 of UCTD should apply. Other stakeholders consulted would welcome clarity on the matter, especially in view of future proofing, and the risks mentioned previously.</p> <p>Prof. Gardiner also argues in favour of considering how personalised contract terms might affect different types of consumers. She also argues that using the current 'average consumer' bar, in respect of the transparency assessment under Article 5, would be insufficient to sufficiently protect consumers and that digital consumer vulnerability should be considered instead. It may be useful</p>

<sup>592</sup> <https://www.consumerlawready.eu/>

<sup>593</sup> Directive 2019/2161 on the better enforcement and modernisation of Union consumer protection rules indicates (Rec.45) that "Traders may personalise the price of their offers for specific consumers or specific categories of consumer based on automated decision-making and profiling of consumer behaviour allowing traders to assess the consumer's purchasing power. Consumers should therefore be clearly informed when the price presented to them is personalised on the basis of automated decision-making, so that they can take into account the potential risks in their purchasing decision. Consequently, a specific information requirement should be added to Directive 2011/83/EU to inform the consumer when the price is personalised, on the basis of automated decision-making". See Article 6(1)(ea) of CRD.

<sup>594</sup> European Parliament, *Update the Unfair Contract Terms directive for digital services*, PE 676.006.

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	to consider whether the UCTD should apply to both individually negotiated and non-individually negotiated contract terms if those terms are personalised.
<p>How far does existing EU (and any national legislation where relevant) address the problem?</p>	<p><b><u>Fitness for purpose of the UCTD in digital markets</u></b></p> <p>In light of the above as well as stakeholder feedback, the unfairness test and transparency principles introduced by the UCTD remain useful in a digital environment and should be untouched.</p> <p>This being said, additional guidance for economic operators is needed (1) on what compliant T&amp;C in digital business should look like (e.g. in relation to consent to collect and use personal data in line with GDPR; or to changes to T&amp;Cs, or to copyright and ownership of consumer-generated content) and (2) how they would best be presented online (digital design). Moreover, given the inequality of bargaining power between major online platforms and players and their users, the level of effectiveness of the UCTD in addressing consumers' digital vulnerability has been questioned.<sup>595</sup></p> <p><i>There is evidence of support measures at national level, especially for smaller traders, who, reportedly can copy-paste T&amp;C from existing websites without checking the extent to which they apply to their own business. For example, Unioncamere, the Italian Chambers of Commerce, have developed, together with representatives of the Ministry of Economic Development, trade associations and consumer associations, contract templates containing general contract conditions in compliance with rules of transparency and fairness between the parties, in the context of online shopping<sup>596</sup>. However, such templates apply to contractual relationships in the national territory (Italian seller/Italian consumer). In the Netherlands, a certification process, resulting in trust mark, is offered by Thuiswinkel, the Dutch interest group for online retailers (2000 members, 5000 webshops in the Netherlands), to online traders in order to guarantee to online customers that they are compliant with legislation, including the UCTD, and have been audited. Thuiswinkel has also been working on improving the digital readability of online terms and conditions, e.g. simplifying privacy statements, to make them more understandable. However, stakeholders call for a certain level of standardisation or guidance at EU level. Whilst some stakeholders considered the indicative list in Annex to the UCTD could be updated or partially turned into a blacklist, other found the above-mentioned guidance to be more helpful to consumers, economic operators and to law enforcement actors.</i></p> <p>Stakeholders mentioned additional potential measures to introduce a <b>certain level of standardisation or guidance at EU level on the application of the UCTD in digital environments specifically:</b></p> <ul style="list-style-type: none"> <li>• One stakeholder organisation was in favour of introducing obligations for large international traders in particular to (1) clearly indicate where T&amp;C are located online in case of complaints, (2) centralise them all in one single pdf document, (3) have older versions of T&amp;Cs easily accessible (considering regular updates which make tracing back to rights and obligations at the time of sign-up difficult).</li> <li>• For Prof. Gardiner the following measures, investigated in existing studies, could facilitate giving consumers a real opportunity to become acquainted with contract terms <i>before</i> the conclusion of the contract: layering information, with the most important information presented first followed by a summary highlighting key contractual aspects and providing a link to full contract terms (summary box on icons, mouse-over strategy) and that using visual cues and graphics also contributes to digital design fairness. On the summary measure, we note that 63% of respondents (n = 221) to the public consultation agreed with the statement that “where traders require consumers to agree to terms and conditions (T&amp;C), consumers should receive an easily understandable <u>summary of the key T&amp;C</u> in an easily accessible manner” (out of which 49% strongly agreed). 26% disagreed with this statement.<sup>597</sup></li> <li>• Developing EU templates with standard contract terms</li> <li>• In order to “<i>combat the UCTD’s current deficiencies</i>”, Durovic and Poon propose, in their August 2023 academic paper, the use of personalized terms in lieu of the current system of default terms in social media platforms’ user agreements: “<i>This proposed approach is</i></li> </ul>

<sup>595</sup> Durovic and Poon for example consider that “*The UCTD’s current ineffectiveness in preventing the use of unfair terms in the digital sphere is arguably attributable to both its procedural and substantive provisions*”.

<sup>596</sup> <https://regolazionemercato.camcom.it/P42A0C0S952/Contratti-tipo.htm>

<sup>597</sup> The survey also gave the option of responding “I don’t know” (4,5%) or being neutral (6,3%).

Case study headings	Description and analysis
	<p><i>dual-pronged, consisting of (1) a refinement of procedural notification requirements and (2) a replacement of substantive prohibitions of particular unfair terms</i>".<sup>598</sup></p> <p>The development of such EU level standards of guidance will be more so relevant in relation to the application of UCTD considering (1) lessons learnt from the application of the GDPR and links with privacy contract terms, as well as (2) the raft of planned or new legislation to regulate the digital sphere.</p> <p>BEUC contends that full access and ownership of data generated by consumers' use of digital services and devices to data holders and to third parties could lead to an increase in complex, burdensome and unfair terms in contracts, and would not provide 'meaningful control' to users.<sup>599</sup> BEUC also recommends, in light of the risk of using data generated for profiling purposes, that bundling necessary and un-necessary data processing purposes together should be excluded from contractual clauses in B2C contracts, and therefore included in an EU 'blacklist'.</p>
<p><b>Conclusions (incl. assessment of potential regulatory gaps).</b></p>	<p>The principles introduced by the UCTD, its unfairness test and transparency requirements, remain relevant in the digital world. Some improvements, in relation to specificities of the online market, e.g. using digital vulnerability principles, embedding digital design fairness, and what digital transparency means, would usefully be further specified in existing EU and national guidance documents, or perhaps in an updated version of the Annex to reflect the specificities of the digital contractual environment.</p> <p>Simplifying or standardising at EU level the presentation of contract terms (providing minimum digital fairness design requirements, and/or embedding them in a template or checklist format) and limiting certain practices (e.g. click and browse wrap" presentation of terms) were also called for by some stakeholders.</p> <p>There are suggestions to consider (1) clarifying whether Art. 3 can be invoked in the case of personalised terms in the future, (2) and clarifying links between the UCTD's horizontal requirements and sectoral obligations under the new digital pieces of legislation, for example through further guidance.</p> <p>Additional focus is suggested on coordinated enforcement at EU level to address cross-border infringements by large market players which affect a significant number of consumers online, and also on positive and preventive enforcement, including through negotiation, so that court action is used as a last resort. In view of the insufficient deterrent effect, additional compliance incentives for online sellers and service providers are needed.</p>
<p><b>Supporting information</b></p>	<p><b>List of sources:</b></p> <ul style="list-style-type: none"> <li>Public consultation results</li> <li>European Commission website and press releases</li> <li>Dutch ACM website, ACM.nl</li> <li>French UFC Que Choisir website</li> <li>Unioncamere, the Italian Chambers of Commerce, website</li> <li>Website of Dutch e-commerce association, Thuiswinkel.org</li> </ul>

<sup>598</sup> i.e. "The solution proposed in this article to combat the ineffectiveness of the current UCTD involved the replacement of default terms in social media user agreements with personalized terms based on data collection. The reform to the UCTD would be dual-pronged, involving the refinement of procedural notification requirements, and the addition of substantive prohibitions of certain unfair terms. This approach arguably strikes the appropriate balance between the protection of consumers and the assurance of certainty for social media companies. Various improvements on the procedural requirements of the UCTD were explored in this article. One key suggestion was for the modification of Article 5 to explicitly require terms to be made prominent, and to extend its application to encompass cases where terms are not adequately clarified or unilaterally altered. In this regard, the UCTD's application to social media platforms cannot be viewed in isolation but must be recognized as part of the larger corpus of European Consumer legislation that has developed over the last decade. Particularly, recognition should be given to the different protective needs of certain user groups, such as minors, the elderly, the illiterate, or those with different mother tongues. The paper further proposed a number of substantive modifications to the UCTD to increase its effectiveness in regulating social media platform user agreements, which are crucial for addressing the issue of consumer vulnerability in the digital realm. One such proposal was for the introduction of a blacklist of terms that will be deemed automatically unfair. Implementation of effective, uniform standards is eminently achievable and would arguably be less invasive and involve less of a root-and-branch overhaul of the UCTD than if we were to fine-tune the Directive by incorporating various existing commercial practices.". in Durovic and Poon, 2023.

<sup>599</sup> BEUC, *Giving Consumers control of their data - BEUC position paper on the Data Act proposal*, Ref: BEUC-X-2022-103-07/10/2022, 2022. Available at [https://www.beuc.eu/sites/default/files/publications/BEUC-X-2022-103%20BEUC Position paper on the Data Act proposal.pdf](https://www.beuc.eu/sites/default/files/publications/BEUC-X-2022-103%20BEUC%20Position%20paper%20on%20the%20Data%20Act%20proposal.pdf)

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	<p>Legal resources websites: <a href="https://www.elgaronline.com/">https://www.elgaronline.com/</a>; <a href="https://www.legalis.net/">https://www.legalis.net/</a>, <a href="https://beck-online.beck.de/">https://beck-online.beck.de/</a></p> <p>F. Lagioia, A. Jabłonowska, R. Liepina, K. Drazewski, “AI in Search of Unfairness in Consumer Contracts: The Terms of Service Landscape”, <i>Journal of Consumer Policy</i> (2022) 45:481–536, <a href="https://link.springer.com/article/10.1007/s10603-022-09520-9">https://link.springer.com/article/10.1007/s10603-022-09520-9</a> , Published: 18 July 2022.</p> <p>Caterina Gardiner, <i>Unfair Contract Terms in the Digital Age. The Challenge of Protecting European Consumers in the Online Marketplace</i>, 2022, publicly available chapters available at <a href="https://www.elgaronline.com/display/book/9781800886179/9781800886179.xml">https://www.elgaronline.com/display/book/9781800886179/9781800886179.xml</a></p> <p>Commission notice — Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts: <a href="https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC0927(01)&amp;from=EN">https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC0927(01)&amp;from=EN</a></p> <p>Civic Consulting, <i>Study for the Fitness Check of EU consumer and marketing law - Final report</i>, 2017, <a href="https://op.europa.eu/en/publication-detail/-/publication/f7b3958b-772b-11e7-b2f2-01aa75ed71a1/language-en">https://op.europa.eu/en/publication-detail/-/publication/f7b3958b-772b-11e7-b2f2-01aa75ed71a1/language-en</a></p> <p>Marco Loos and Joasia Luzak (Centre for the Study of European Contract Law, University of Amsterdam), “Wanted: a Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers”, <i>Journal of Consumer Policy</i>, March 2016, <i>J Consumer Policy</i> (2016) 39:63–90, DOI:10.1007/s10603-015-9303-7</p> <p>European Parliament, <i>Update the Unfair Contract Terms directive for digital services</i>, PE 676.006, p. 14, and Caterina Gardiner, <i>Introduction to Unfair Contract Terms in the Digital Age, Unfair Contract Terms in the Digital Age. The Challenge of Protecting European Consumers in the Online Marketplace</i>, 2022 <a href="https://www.elgaronline.com/display/book/9781800886179/9781800886179.xml">https://www.elgaronline.com/display/book/9781800886179/9781800886179.xml</a></p> <p>OECD, <i>Personalised Pricing in the Digital Era</i>, 2018 <a href="https://www.oecd.org/competition/personalised-pricing-in-the-digital-era.htm">https://www.oecd.org/competition/personalised-pricing-in-the-digital-era.htm</a></p> <p>BEUC, <i>Giving Consumers control of their data - BEUC position paper on the Data Act proposal</i>, Ref: BEUC-X-2022-103-07/10/2022, 2022. Available at <a href="https://www.beuc.eu/sites/default/files/publications/BEUC-X-2022-103%20_BEUC_Position_paper_on_the_Data_Act_proposal.pdf">https://www.beuc.eu/sites/default/files/publications/BEUC-X-2022-103%20_BEUC_Position_paper_on_the_Data_Act_proposal.pdf</a></p> <p>Le Monde, “Twitter condamné à payer 100 000 euros pour la non-conformité de ses conditions d’utilisation”, 4 May 2023. Available at: <a href="https://www.lemonde.fr/pixels/article/2023/05/04/twitter-condamne-a-payer-100-000-euros-pour-la-non-conformite-de-ses-conditions-d-utilisation_6172039_4408996.html">https://www.lemonde.fr/pixels/article/2023/05/04/twitter-condamne-a-payer-100-000-euros-pour-la-non-conformite-de-ses-conditions-d-utilisation_6172039_4408996.html</a></p> <p>Le Point, « Twitter condamné pour « atteinte à l’intérêt des consommateurs » 9 May 2023, <a href="https://www.lepoint.fr/justice/twitter-condamne-pour-atteinte-a-l-interet-des-consommateurs-09-05-2023-2519455_2386.php">https://www.lepoint.fr/justice/twitter-condamne-pour-atteinte-a-l-interet-des-consommateurs-09-05-2023-2519455_2386.php</a></p> <p>Durovic, M., Poon, J. <i>Consumer Vulnerability, Digital Fairness, and the European Rules on Unfair Contract Terms: What Can Be Learnt from the Case Law Against TikTok and Meta?</i>. <i>J Consumer Policy</i>, 2023. <a href="https://doi.org/10.1007/s10603-023-09546-7">https://doi.org/10.1007/s10603-023-09546-7</a></p> <p><b>List of interviews:</b></p> <ul style="list-style-type: none"> <li>• Ioana Patrascu, European Commission, DG JUST on 10th January 2023</li> <li>• Dr Caterina Gardiner, Lecturer at National University of Ireland Galway, College of Business Public Policy and Law; School of Law, on 9th February 2023. In June 2022, Dr Gardiner published a book entitled <i>Unfair Contract Terms in the Digital Age - The Challenge of Protecting European Consumers in the Online Marketplace</i><sup>600</sup></li> <li>• Angelo Grieco and Clemens Schubert, Consumer law enforcement unit, European Commission, DG JUST, on 14th February 2023</li> <li>• Dries Cuijpers , Bob Boelema , Anne-Jel Hoelen, the Netherlands Authority for Consumers and Markets (ACM) on 31st January 2023</li> </ul>

<sup>600</sup> <https://www.elgaronline.com/display/book/9781800886179/9781800886179.xml>

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	<ul style="list-style-type: none"><li data-bbox="400 293 1433 353">• Djim Segers, Vincent Romviel, Thuiswinkel.org, Dutch e-commerce association, on 27th February 2023</li><li data-bbox="400 369 1433 398">• Frithjof Michaelsen, UFC-Que-Choisir, French consumer association, 1st February 2023</li><li data-bbox="400 414 1433 504">• Email exchange with Marilies Zinner from the Austrian Federal Ministry of Social Affairs, Health, Care and Consumer Protection. Section III – Consumer Policy and Consumer Health, 22 May 2023</li></ul>



## Annex 6: Consultation feedback

Extensive stakeholder consultations were undertaken during the fitness check on digital fairness and the assessment of the transposition and initial application of the Modernisation Directive. The results of the different consultations are provided in a separate annex. These are:

- Summary of the Call for Evidence responses received in May and June 2022;
- Summary of the OPC findings and an assessment of the position papers received (OPC undertaken November 2022 – February 2023);
- Summary of the targeted consultation findings and a synthesised overview of the supplementary position papers received;
- The results from the enterprise survey of 1,000 enterprises; and
- The results from the consumer survey of 10,000 individuals.

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## 1 Stakeholder feedback

This standalone report provides an assessment of stakeholder feedback. In particular, the following analysis of the consultations is presented:

- Summary of the Call for Evidence responses received in May and June 2022;
- Summary of the OPC findings and an assessment of the position papers received (OPC undertaken November 2022 – February 2023);
- Summary of the targeted consultation findings and a synthesised overview of the supplementary position papers received
- The results from the enterprise survey of 1,000 enterprises.
- The results from the consumer survey of 10,000 individuals.

Useful findings and evidence from the various stakeholders consultations has been integrated into the main evaluation report, but given length, this document provides a more complete evidence base to substantiate the evaluation findings.

### 1.1 The call for evidence

A Call for Evidence relating to the fitness check on digital fairness<sup>601</sup> was undertaken by the European Commission from 17 May 2022 - 14 June 2022. During this time 68 responses were received from 14 Member States and the United Kingdom, and in addition a few responses after the deadline, which have also been analysed and included in this summary. Responses were received from a broad spectrum of stakeholders, including national, EU and international consumer and industry organisations, individual companies, and from across sectors as diverse as airlines and food delivery services, and from online platforms. The categories of respondents were divided between EU citizens n=39 (54.9%), business associations n=13 (18.3%), companies n=7 (9.9%), non-governmental organisations n=4 (5.6%), consumer organisations n=1 (1.4%), public authorities n=4 (5.6%) and others (4.2%). The countries with the major share of respondents were Slovakia n=18, Germany n=16 and Belgium n=14 (25.4%, 22.5% and 19.7%, respectively).<sup>602</sup>

A synthesis of the Call for Evidence is presented below. There is an initial overview of stakeholder attitudes to the breadth and effectiveness of current legislation, followed by further stakeholder evidence, ordered by common themes emerging from the feedback.

#### 1.1.1 Overall assessment of state of play

In relation to the overall state of current legislation, there are clear variations among respondents to the Call for Evidence. Digital-focused business innovation associations and industry representative bodies, among others, assert that the existing legal framework is generally fit for purpose and does not present obvious gaps. An organisation representing the financial interests of 460 private insurers, goes further, to comment directly that any possible new measures or legislative proposal that could come out of the Fitness Check “seems premature”.

Similarly, there are several respondents who believe the current rules in the European Union already provide a high level of protection for consumers, also in the digital environment, but have called for ongoing nuance when differentiating between business models in any further legislation or greater recognition of particular issues. drop-shipping marketplace platform provider asserts that the Commission should recognise that European business models are inherently different to “Anglo-Saxon or Asian” approaches, with a foundation of shared values such as responsible sales

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<sup>601</sup> [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law_en)

<sup>602</sup> European Commission, *Statistics, Digital fairness – fitness check on EU consumer law*, (2022) [Online] <[https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law/feedback\\_en?p\\_id=30798773](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law/feedback_en?p_id=30798773)> n.b. figures rounded to 1 decimal place, percentages reflective of additional submissions made directly to the report authors after the closing of the Public Consultation submission portal.

and high customer satisfaction, they imply that European traders should be assumed to be acting in good faith and towards an improved digital environment for consumers.

Although neither an industry- or consumer-focused entity, one independent institute which supports the development of a digital system from the perspective of the European citizens, in competition with major gatekeepers recognises that more detailed regulation is not necessarily conducive to achieving greater fairness in the digital environment, but rather increases the administrative burden both upon the consumer and the trader. Likewise, a European-level alliance, representing in-part 27 national level self-regulatory organisations, supports the UCPD as it stands, as capable of tackling all kinds of misleading advertising, including dark patterns. This alliance also emphasises the effectiveness, in their view, of self-regulation among national advertising authorities as an important complementary system to existing laws, and acknowledge their collective awareness of, and interest in further addressing dark patterns, albeit solely through their own internal online advertising guidelines. Contrary to this, a large multi-national centre for the management of waste electrical and electronic equipment responded to the call with some scepticism of self-regulation, as a limited approach which in their view has not yielded significant effects.

In the specific case of industry with subscription-based business models, one trader's concern relates specifically to future of "rolling flexible subscription contracts". Not wishing to see their practices restricted in broad-stroke legislation, they encourage the Commission to focus only upon problematic practices and contracts where customers are tied into lengthy contracts without the ability to pause or cancel. Moreover, multiple other trader associations and a major product and services review platform recommend that the Commission focusses on and maps out unfair commercial practices [...] not already covered by the existing EU rules through greater clarity and streamlining of the relevant texts and a focus upon full harmonisation for cross-border transactions.

Some industry associations and firms have also made consumer-focused suggestions to the Commission drawing from their experiences as stakeholders in the digital marketplace. In relation to the aviation sector, one Germany trader reports that customers are regularly exposed to unfair contractual terms by air carriers and impair the rights of consumers. Alternatively, one major European air carrier suggests that the current legislative framework requires strengthening against "harmful" online travel agents and their resale of airlines' flights as unauthorised intermediaries. In a similar vein, another industry association stated that they recognise the value of existing legislation, but wish to highlight to the Commission two ongoing "key realities" facing EU consumers, namely the sale of counterfeit products and the presence of online scams and fraud. Alternatively, in line with the broad concerns for consumer protection and knowledge asymmetry, one industry association suggests the Commission should instead be focused on Art. 13 (Consumer information by traders) of the CRD, having observed that entrepreneurs in retail have a tendency not to inform the consumer about existing rights of withdrawal.

A primary concern for European consumer associations is the need to introduce a cancellation button for subscriptions in line with regulation seen at national level already (most notably in Germany).

Conversely to the trader and industry representative positions, consumer-focused organisations and sector or national regulation authorities tend to raise greater concerns both over the current state of the legislation and towards future concerns over potential marketplace developments. The European Consumer Organisation (BEUC) asserts that the consumer must be better protected. In particular, BEUC see a need for the Commission to keep pace with technological developments, such as the greater proliferation of AI systems and biometric technologies, which present an opportunity for traders to strengthen their position over that of the consumer. Moreover, in relation to ticketing, one consumer alliance points to significant gaps in the legislation, which can raise legal uncertainty for consumers and traders, and present subsequent barriers to effective enforcement, leaving consumers vulnerable to exploitation from dark patterns and practices. Agreeing with this view, but from the perspective of safeguarding legitimate business, one industry representative would like the Commission to address the issue of unfair

competition by rogue traders through the creation of a strict verification mechanism that would forbid traders from trading on their services until their data has been routinely validated.

### 1.1.2 Concerns relating to consumer protection

In discussing the overall position of the various stakeholders in the Call for Evidence, some issues relating to consumer protection have been raised, however there are further specific concerns and requirements sought by stakeholders. BEUC posits that the UCPD should recognise that material distortion of the consumer's autonomous decision-making may result from the trader's practices using digital asymmetry and insists that any burden should lie with the trader to provide evidence that they do not utilise digital asymmetry. Likewise, other consumer associations across the EU assert that consumers should never be led to believe that consent to data processing for all purposes listed is compulsory when obtaining a requested item or service.

However, as a point of further clarification on this, an association representing national retail and wholesale associations across the EU 27, emphasises that any transparency requirements should be balanced between all parties in the chain of commerce, and not just be imposed on retailers (as the easiest party to identify by competent authorities).

Further specific practices which exploit the vulnerability of consumers form the majority of concerns raised by stakeholders, with those raising concerns acknowledging that most if not all consumers are potentially vulnerable in different ways and at different times. In summary, these include practices which:

- 1) trigger addictive responses in consumers;
  - Related to and within this issue: gamification, loot boxes, in-game and in-app currencies, NFT and possibly wider blockchain transactions.
- 2) retain and exploit the consumer's attention, feeding off their personal data and time as currency;
  - Infinity scroll, auto-play, notifications.
- 3) take advantage of consumers' dynamic inconsistent preferences and can result in significant consumer harm without necessarily being misleading or aggressive.
  - Algorithmic profiling, automated decision-making, and predictive analysis.

In contrast to the view that misleading or harmful practices should be regulated to protect vulnerable audiences such as children, a consumer choice-focused independent research institute suggests that some responsibility lies nonetheless with consumers "who must learn to evaluate products objectively" in a system which is inherently biased. Acknowledgement of the pervasive and inevitable bias of the relationship between consumers and traders, specifically online, could nonetheless be interpreted as a justification for further action from the Commission in relation to redefinition of terms to acknowledge the broad vulnerability of all consumers.

### 1.1.3 Concerns and suggestions relating to restrictions upon business practices

Just as consumer protection issues are highly significant to the development of the digital marketplace, so too are stakeholder concerns relating to potential restrictions of business practices and their implications towards limiting opportunities for both traders and consumers to benefit from innovation. One digital consumer organisation highlights that within the roadmap for legislation, there is an assumption that personalised offerings and marketing are overall harmful, in contradiction to the Commission's own 2018 study, which highlighted that two-thirds of consumers knowingly choose to use personalised services.<sup>603</sup> In line with this, an independent retail representative organisation suggests that practices around personalised offers are already

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<sup>603</sup> European Commission, *Consumer market study on online market segmentation through personalised pricing/offers in the European Union* (2018)

<[https://ec.europa.eu/info/sites/default/files/aid\\_development\\_cooperation\\_fundamental\\_rights/aid\\_and\\_development\\_by\\_topic/documents/synthesis\\_report\\_online\\_personalisation\\_study\\_final\\_0.pdf](https://ec.europa.eu/info/sites/default/files/aid_development_cooperation_fundamental_rights/aid_and_development_by_topic/documents/synthesis_report_online_personalisation_study_final_0.pdf)>

successfully regulated. Other stakeholder firms and associations likewise request that any changes that lead to an innovation-unfriendly standardisation of products be avoided, with one subscription based food-delivery trader in particular suggesting that a one-size-fits-all approach will fail to capture the complexity and differentiation of business models.

Trader, platform and consumer stakeholders call for a need to strike a careful balance between more requirements, such as greater transparency, and no overburdening of traders or limiting of product variety and innovation among business. Reflective of the need for this is that various of the views of an industry stakeholder who suggests the possibility of putting in place limitations on the regulatory burden upon innovative European actors, whilst one European federation adds to this its concern that young digital companies (where innovation is more likely to arise) should not be subject to less stringent consumer protection requirements than those of their established competitors.

#### 1.1.4 Enforcement of existing legislation

Central to the efficacy of existing legislation is the issue of enforcement. It is the view of several stakeholders that the effectiveness of current enforcement measures, should be fully implemented (and adequate time passed for experience to develop) before any further legislative changes are considered. A doorstep selling association elaborates on this by asking the Commission to consider carefully whether any problematic online practices have emerged as a result of ineffective enforcement which could be rectified without the need for legislative changes.

A non-EU Chamber of Commerce in Europe, a digital association and the a national industry confederation see dialogues between stakeholders (the Commission, industry, consumer associations and regulatory authorities) as key to better awareness, application and enforcement of rules, as well as the potential development of self-regulatory initiatives such as those carried out in the advertising sector. Similarly, European industry associations, representing companies selling goods and services in the digital sector, believe that enforcement authorities have strong powers, but need to be provided with sufficient resources and skills to act effectively in their investigations and handing down of judgements.

#### 1.1.5 Need for the (re)definition of terms or boundaries of practices

The redefinition of existing terms and clarification of boundaries of practices in digital legislation is seen by stakeholders as a crucial initial step towards improving and enhancing the enforcement of EU law. Given that digital technologies and practices are constantly evolving and innovating, both greater clarity and flexibility in the potential application of law helps to align the legal framework with the growing complexities of the digital world. This, in turn, helps to provide a clearer and more consistent approach to enforcement, making it easier for organizations and individuals to understand their obligations and for regulators to hold them accountable.

According to BEUC, the blacklist and grey-list of practices in digital legislation should be updated to provide clearer statements and definitions of terms and practices. However, it is understood that these lists should not be given too much focus, as the rapidly changing nature of digital technologies may make the enforcement and identification of such practices quickly outdated.

One direct selling association believes that the European Commission should distinguish between unfair online manipulative practices such as dark patterns and legitimate marketing techniques and identify the criteria that differentiate the two. Other industry and consumer associations also take the view that the term "Dark Patterns" specifically needs clarification. They believe that influencing is a basic element of economic communication with consumers, and a normative limit must be established beyond which influence is no longer acceptable, considering the interests of all parties involved. In the same sense, these associations believe that the Directive should be reconsidered to also offer an updated view of what constitutes harassment, coercion and undue influence. One European industry association suggests that the term "Dark Patterns" is too broad and covers a wide range of undefined practices, from clearly illegal manipulation to common marketing practices. As far as resolving the lack of definitions and the clarity of appropriate terms employed by the legislation and stakeholders, this association makes a suggestion, that a more appropriate phrase would perhaps be "online choice architecture". This phrase is for example

used by the UK's Consumer and Competition Authority's behavioural hub – and allows for a much more nuanced debate on what should in fact be illegal as well as what already is. Following on from this, one online review platform calls for greater nuance in the hopes of more effective enforcement within their area of commercial interest. Specifically, this platform seeks further clarification within the guidance and legislation, to demonstrate awareness of the fact that what is “reasonable and proportionate” differs depending on the type of reviews hosted, and the review collection model.

BEUC argues that notion of vulnerability among consumers within current EU legislation requires further clarification. This is equally as crucial to understanding when and in what ways practices can be judged to have moved beyond the threshold of a reasonable market practice, allowing for more efficient monitoring and enforcement of guidelines and laws. BEUC argues for a comprehensive definition of vulnerability that takes into account multiple factors that can harm consumers' rights, choices, and freedoms, and calls for a universal state of susceptibility to be recognized in EU legislation.

### 1.1.6 The balance between the regulation of commercial practices versus a principled, technology-neutral approach

The regulation of specific practices and actions raises the question of how to balance the need for consumer protection with the need for a technology-neutral approach that does not stifle innovation and growth, a concern which has been raised by several stakeholders. A technology-neutral approach, which is guided by principles rather than the regulation of specific practices or actions, can be seen as more flexible and adaptable in the face of technological advancements. On the other hand, a regulation of specific practices and actions can be seen as more straightforward and effective in addressing specific problems and protecting consumers.

Several industry stakeholders assert that policy making should be technology and channel-neutral. It is their view that law and policy should not be focussed on specific practices, but also even more broadly reflecting the consumer preference for omni-channel retail, avoiding fragmentation by providing consistency and clarity in legislation across the EU, whether online or in physical stores.

### 1.1.7 Specific responses from national authorities

Four EU Member states provided a response to the Call for Evidence. The following synthesis of responses have been ordered in line with the thematic structure of the above synthesis of the Call for Evidence.

On the merit of the overall assessment of the state of play, national regulation authorities tend to argue that the current legal framework might entail potential risks in terms of consumer protection and might not be fit to face the challenges of the technological development. The first authority points to significant gaps in the legislation and subsequent enforcement, as well as uncertainties which affect interpretation, leaving consumers vulnerable to exploitation from dark patterns and practices. They further call for the Commission to look into the practices of stakeholders that facilitate or act as intermediaries between traders and consumers in the digital environment. According to the second authority, further studies are necessary at both national and EU level to identify challenges for consumers in the digital sphere. The second authority finds there is a need to look into existing legislation in order to ensure that the regulatory setup in place is providing the right level of protection for consumers, when they shop online or sign up for subscriptions. The third and fourth national authorities, respectively, cite similar concerns to BEUC in relation to asymmetry between trader and consumer, believing that the legislation needs to be clarified, with additional interpretation of current EU consumer laws, in order to sufficiently protect consumers online. The fourth authority suggests specific legislative amendments to Art 6 (1) (e) of the CRD, to make it compulsory for traders to provide information of the total cost of a subscription contract and in general further information on the nature of a continuing obligation. Alongside strong support for the retention of the Council Directive 93/13/EEC of 5 April 1993, on unfair terms contracts (UCTD) in its current form, the fourth authority expressed support towards the possibility of terminating contracts more easily through a cancellation button. ACM, when discussing



possible future approaches and adaptations to the legal framework, asserted their view that self-regulation among national advertising authorities is not a positive or viable solution to the current problems emerging. This view is not unique among stakeholders more broadly, as although UCPD guidance acknowledges the potential benefits of effective enforcement through independent self-regulatory bodies<sup>604</sup>, this does not appear to have materialised thus far.

Regarding consumer protection, national authorities shed light on multiple concerns. The third national authority finds that transparency requirements are often less effective for consumers than assumed by policy makers. Factor potentially explained by the lack of consumer understanding of issues such as tracking. The first national authority proposes that consumer protection should be embedded “by-design” as a way to challenge AI and algorithmic biases and digital asymmetry, with another authority adding that greater responsibility should lie with the digital service provider in making sure that the design of these platforms, functions and the products provided on the platforms are not to the detriment of vulnerable consumers. In addition, the two of the national authorities also both call for third-party facilitators, including platforms, to have their liability reconsidered.

With regards to concerns relating to restrictions upon business practices, the third national authority argues that there ought to be a careful balance between adding requirements—like more transparency—and preventing traders from being overburdened or businesses from developing innovative products.

Speaking on the topic of enforcement of existing legislation, this same authority sees the need to provide enforcement authorities with sufficient resources and skills to act effectively in their respective investigations and handing down of judgments. However, they also believe a further cultural shift is required, meaning a redrafting of legislation, whereby greater inter-agency cooperation and exchange of research is to be encouraged. This is considered to be particularly relevant for keeping up with persuasive techniques.

Regarding the need for re-definition of specific concepts, national authorities concur that further explanation is needed for the concepts of consumer vulnerability and dark patterns as it is defined under present EU law. One authority stated that behavioural insights are important in understanding vulnerability but acknowledges the presence of unavoidable biases and the need to identify and protect “weak groups”. Despite acknowledging that influence is a fundamental component of economic communication with customers, one authority suggested there must be a normative limit to the exploitation of consumer behaviour and the definition of vulnerability. Furthermore, this authority suggests addressing vulnerability through a focus on the need to instead define the “average” consumer, rather than to risk expanding and diluting too-far the concept of vulnerability, and to consider the practical implications of this differentiation in EU legislation. Two other authorities suggest that vulnerability, specifically relating to children, should be clarified via alignment of the legislation with the BIK+<sup>605</sup> strategy focus on creating more age-appropriate digital services. In direct connection to this, one of the same authorities also calls on loot boxes to be recognised as gambling across the EU and to be banned therefore from being targeted at, or available to, children.

When addressing the topic of the balance between the regulation of specific practices and actions, versus a principled, technology-neutral approach, national authorities seem to be more leaning in favour of principle-based legislation. One national authority posits that traders should be obliged to respect individual autonomy in all their practices and business models. In terms of reflecting this in current legislation and guidance, their view supports a simplification of contractual information and the way in which it is distributed/presented to the consumer. It also means the need for clear opt ins and consent to contracts from consumers, with the notion of opt-outs seen as unfair for entering consumers into a contract. Another authority argues for omni-channel neutrality but highlights also the need to anticipate in legislation the effects upon consumer choices brought about by more immersive digital spaces, and an awareness of the differences across platforms and digital ecosystems. A third authority demonstrates how principled

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<sup>604</sup> Commission Notice (2021/C 526/01), 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

<sup>605</sup> A European strategy for a better internet for kids, <https://digital-strategy.ec.europa.eu/en/policies/strategy-better-internet-kids>

approaches need to be repeatedly applied to the digital environment in order to identify and update explicitly which practices may be considered as harmful or unfair. In particular, considering the addictive nature of certain practices and the open-ended UCPD guidance of 2022, they call for an assessment of whether features such as snap streaks, auto play and infinity scrolling should be considered for banning. Another national authority however also strongly recommends that existing empirical evidence and insights from behavioural sciences, such as behavioural economics, marketing science, and psychology, are used to evaluate and underpin the legal requirements in relation to online persuasive techniques. In comparison to the view of one authority that there is a need to consider banning certain practices, another authority suggests the need for a nuanced balance between principles and specific blacklists is necessary for the consumer, but more so to provide legal certainty for the business community as well as enforcers. This authority further justifies the need for a holistic and principle-led approach, citing the business community's tendency for a strong focus on increasing conversion rates and sales, with an insufficient focus on the ethical and legal limitations of the use of persuasive techniques.

### 1.1.8 Summary of specific recommendations

#### Recommendations from stakeholder responses

- Further **clarify the term "Dark Patterns"**.
- To define/**reconsider the "average" consumer** (whilst avoiding diluting too-far the concept of vulnerability).
- **Update the blacklist and grey-list of practices** in digital legislation to provide clearer statements and definitions of terms and practices (e.g. requiring payment details for free trials; manipulations aimed at children).
- Provide greater clarity and streamlining of the relevant texts and a **focus upon full-harmonisation for cross-border transactions**.
- Amendments to Art 6 (1) (e) of the CRD, **to make it compulsory for traders to provide information of the total cost of a subscription** contract and in general further information on the nature of a continuing obligation.
- Terminating contracts more easily through a **cancellation button**.
- Simplification of contractual information and the way in which it is distributed/presented to the consumer. It also means the need for **clear opt ins and consent to contracts from consumers**, with the notion of opt-outs seen as unfair for entering consumers into a contract.
- **Assess whether specific features** (such as snap streaks, auto play and infinity scrolling) **should be banned**.
- The **creation of a strict verification mechanism that would forbid traders from trading on their services until their data has been validated**, in order to address the issue unfair competition by rogue traders.
- **Strengthen against "harmful" online travel agents** and their resale of airlines' flights as unauthorised intermediaries.

## 1.2 Public consultation

### 1.2.1 Introduction

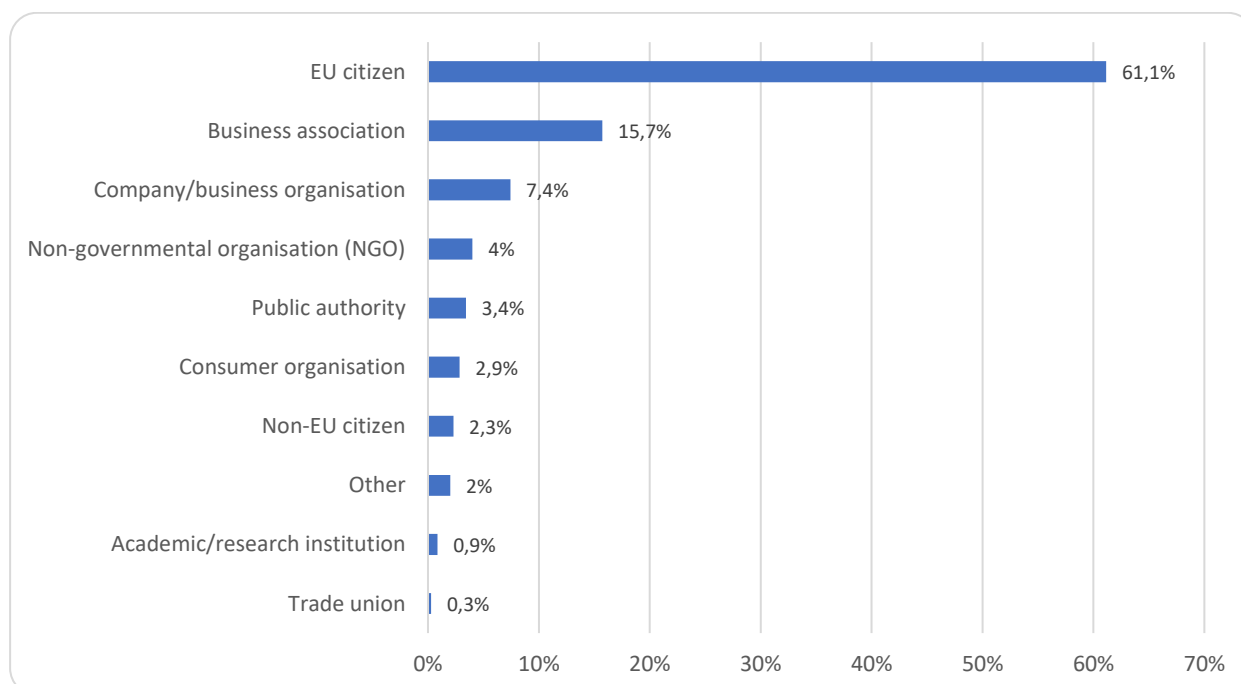
The public consultation on the Fitness Check of EU consumer law on digital fairness ran between 28 November 2022 and 20 February 2023. The objective was to obtain the views of citizens and relevant stakeholders on whether EU consumer protection legislation ensures a high level of protection in the digital environment. The consultation included questions aimed at assessing the effectiveness, efficiency, relevance, coherence, and EU added value of the three legal acts within the scope of the Fitness Check, namely the Unfair Commercial Practices Directive 2005/29/EC ('UCPD'), Consumer Rights Directive 2011/83/EU ('CRD'), and Unfair Contract Terms Directive 93/13/EEC ('UCTD'). The public consultation was preceded by a Call for Evidence which ran between 17 May and 14 June 2022.

The questionnaire was tailored to two main categories of stakeholders. Part I, "consumer questionnaire" was addressed to citizens (consumers) and only respondents selecting EU or non-EU citizen in a question at the beginning of the questionnaire were directed to this part. Part II "In-depth questionnaire" targeted stakeholders involved in the implementation of the three Directives who would have a more detailed knowledge of the functioning of the EU consumer law legal framework (all stakeholder types other than EU citizen or non-EU citizen started directly in this second part). Citizens could choose to continue to second part too. The consultation was available in all 24 official EU-languages.

### 1.2.2 Overview of respondents

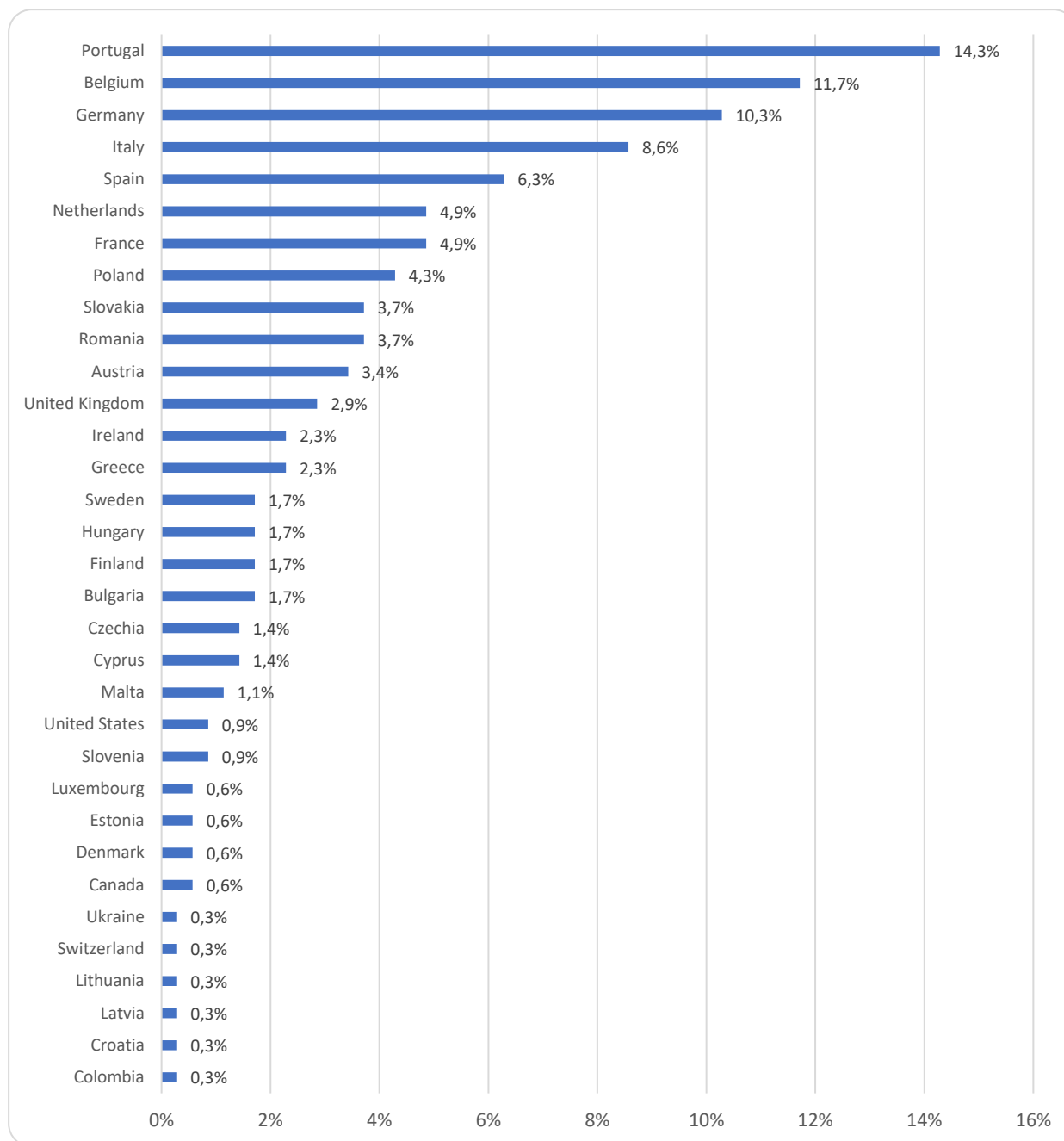
The public consultation received 350 online responses to the questionnaire. Alongside the questionnaire responses, there were also 71 supplementary position papers submitted. Most responses came from EU citizens 61% (214 out of 350 responses), followed by business associations 15.7% (55) and companies 7.4% (26). Other respondents included NGO's 4% (14), public authorities 3.4% (12), consumer organisations 2.9% (10), non-EU citizens 2.3% (8), academic/research institutions 0.9% (3), trade unions 0.3% (1) and others 2.0% (7).

**Figure 47 - Profile of respondents (n=350)**



Most of the responses came from **EU countries**, notably from Portugal, Belgium, Germany, Italy, and Spain. From the overall total, 95% (332) of responses came from within the EU and 5% (18) were **non-EU countries**.

**Figure 48 - Country of origin (n=350)**



128 respondents answered the question on the **organisation size**. Out of those responses, 26.6% (34) responded that they are large (250 or more employees), 17.19% (22) medium (50 to 249 employees), 24.2% (31) small (10 to 49 employees) and 32% (41) micro (1 to 9 employees), representing a good balance across the sample from traders by firm size.

### 1.2.3 Analysis of responses - introduction

Selected examples of questions of the questionnaire will be presented .For part 2 this will be done in aggregate (i.e. covering all stakeholders replying to part 2). While further aggregation is not necessary for part 1, because only respondents choosing EU citizen or non EU citizen in a previous mandatory question could fill in part 1.<sup>606</sup>It should be noted that in part 2 , industry stakeholders accounted for 36% of responses and individual consumers and other stakeholders accounted for 64%, which should be considered when interpreting the data in the analysis.

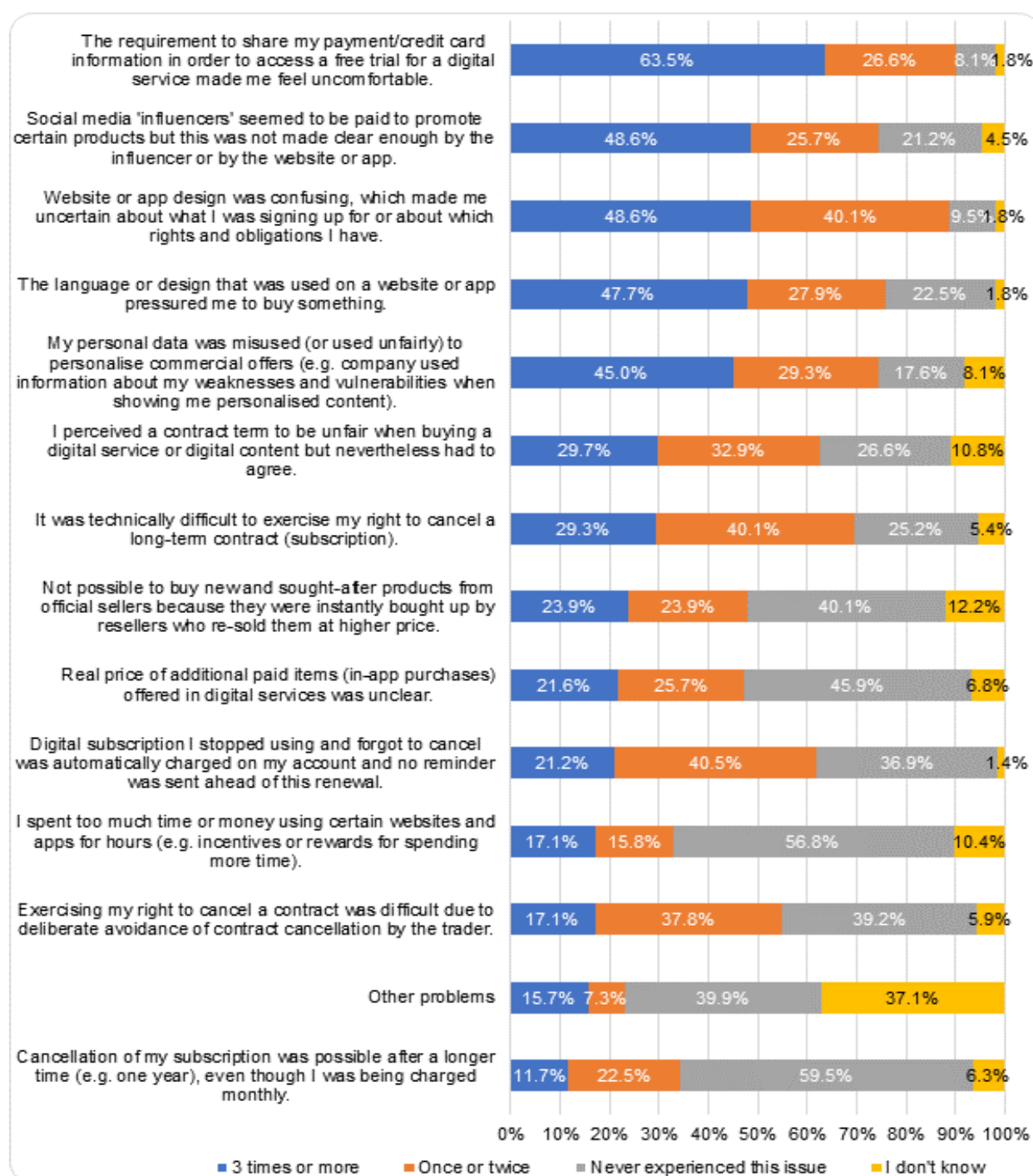
<sup>606</sup> In the analysis of part 1, the respondents (citizens) will be called “consumers”.

The questionnaire addressed perceptions as to how prevalent problematic practices are in the digital environment, what actions consumers took to resolve problems, perceptions of the current level of consumer protection in the digital environment and possible solutions to the identified problems.

### 1.2.4 Problematic practices faced by consumers

Consumers' perceptions about the prevalence of different types of problematic commercial practices and contract terms were sought.

**Figure 49 - In the past 12 months, have you experienced any of the following problems online, and if yes, what frequency? (n=222)**



The problematic practice mentioned as occurring most frequently was the requirement to share payment/credit card information to access a free trial for a digital service, 91% of consumers faced this issue, with 63.5% (141 out of 222) experiencing it three times a year or more. 74.3% experienced a lack of disclosure regarding paid promotions by social media influencers. 88.7% mentioned they found website or app designs confusing or deceptive, suggesting that despite being subject to different provisions in EU consumer law, dark patterns remain a problem.

In relation to the suggestion of continued prevalence of dark patterns was the complementary perception of consumers that they were victims of data misuse for personalised commercial offers (74.3%), showing content which potentially utilised information about a consumer's weaknesses or vulnerabilities. Not only were **digital subscriptions sometimes viewed as being difficult to cancel** (69.4%) and consumers were **automatically charged for a subscription without receiving any reminder** about the renewal (61.7%), but more broadly consumers (62.6%) felt that they had been faced with **unfair terms when buying a digital service or content** but had nevertheless agreed.

Less frequently mentioned were **challenges in cancelling contracts due to the long time period** foreseen before cancellations (34.2%) and issues around **digital addiction to websites and apps** (32.9%), where also, for example 56.8% of consumers reported having **never faced an issue in terms of time or money spent using websites or apps**, it is of course argued and understood in the wider literature that digital addiction, like many other addictions, may be neither realised nor accepted by the individual in some cases. In relation to **the pricing of in-app purchases**, 47.3% of consumers reported experiencing issues with a lack of transparency and understanding.

Consumers were then asked to recall a specific problem from the last 12 months that they considered to be **most serious**, from their perspective, among the problematic practices previously identified. 35.9% of consumers (79 out of 222) considered the most serious issue to be the requirement to share payment/credit card details to access a free digital service. The second most serious problem at 11.4% (25) was that personal data was perceived as having been used in a misleading way and/or information about a consumers' vulnerability was exploited. The third most serious problem the misleading design of a website or app, 9.1%, (20). The fourth most serious problem was the difficult cancellation of a long-term contract, 8.2% (18). It should be noted that these percentages pertain to the most serious problem only, rather than to frequency of experiencing the problem.

Regarding the **geographic location of traders** with whom the problems were encountered, approximately one-third of traders were located in the consumers' own Member State, one-third in another EU Member State and one-third were traders from third countries.

Regarding **knowledge of EU consumer rights in the digital environment**, 21.6% (48 out of 222 consumers) stated that they have sufficient knowledge, 55.4% felt they had had some knowledge, and 23% felt they did not have enough knowledge.

**The majority of consumers (88%, 193 of 220) did not take action to solve the problems they encountered. Only 12% (27) said they did.**

Out of those 27, most of them (70% or 19 out of 27 respondents) complained to the service provider, such as a website or app developer. 8<sup>607</sup> consumers complained to consumer protection authorities (30%), and two (7%) to a consumer association. Reflecting the cross-border dimension of complaints, one (4%) complained to a European Consumer Centre (ECC) and 1 (4%) complained to an ADR, such as a Consumer Ombudsman.

Only 20% (44 out of 220) were able to solve the problem fully, a further 7.7% to a large extent and 14.5% to some extent. However, **44.5% stated that they were not able to solve the problem at all.**

That concluded the questions for citizens/consumers (Part 1). Part 2 provided an in-depth questionnaire that was mainly targeting other stakeholders but remained open also to

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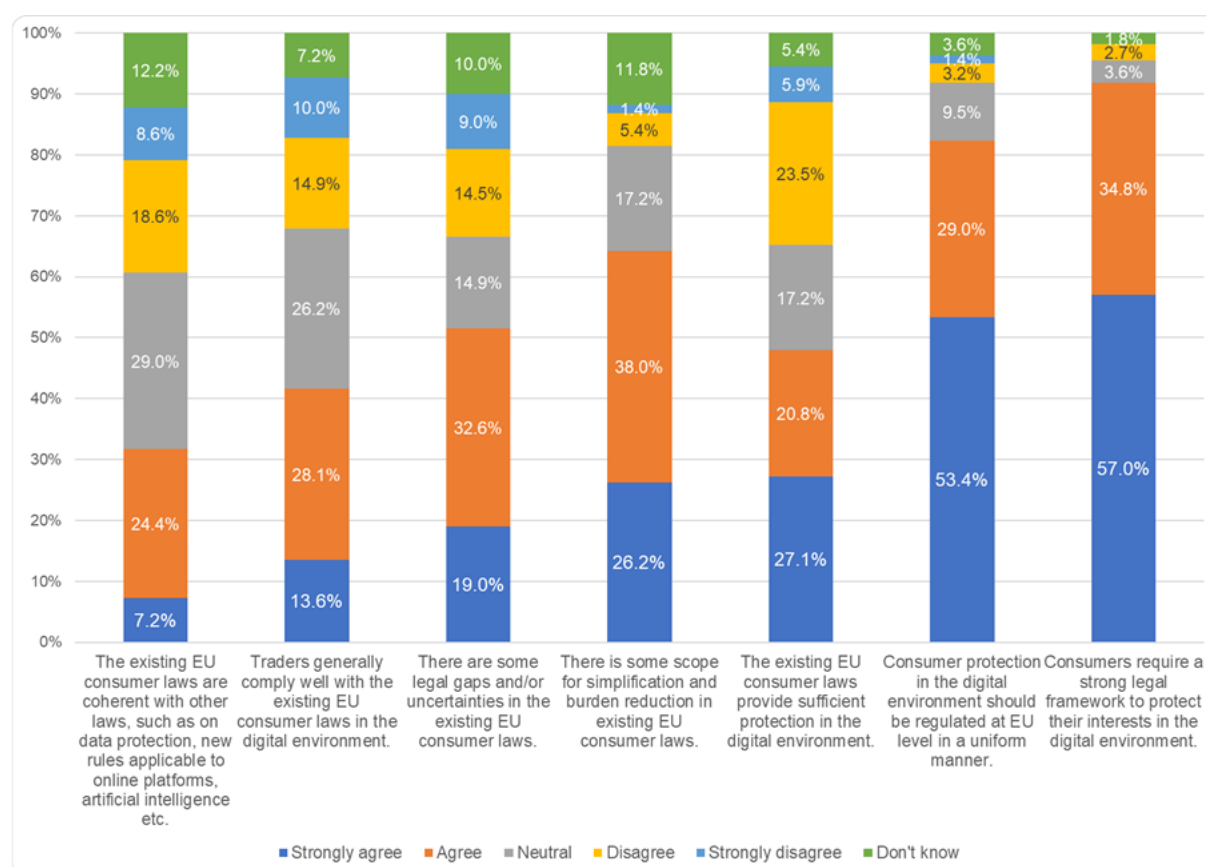
<sup>607</sup> Please note that some respondents selected more than one answer option as they had taken different types of action, therefore there is some overlap between the numbers, and the total of the selected answers is more than 27 (i.e. 32).

citizens/consumers. However, citizens (consumers) who filled in part 1, could also choose to continue to part 2: 58.1% (129) answered Part 1 only, and a further 41.9% (93) answered both Parts 1 and 2, in addition to all those stakeholders (127) that started directly in part 2 (i.e. all types other than EU citizens and non-EU citizens).

### 1.2.5 Perceptions of the current state of consumer protection in the digital environment

Stakeholders were first asked about their perception of the adequacy of the existing level of consumer protection in the digital environment, whether traders comply with their obligations under EU consumer law, the scope for simplification and other issues (see Figure 50 below).

**Figure 50 - To what extent do you agree or disagree with the following statements? (n=221)**

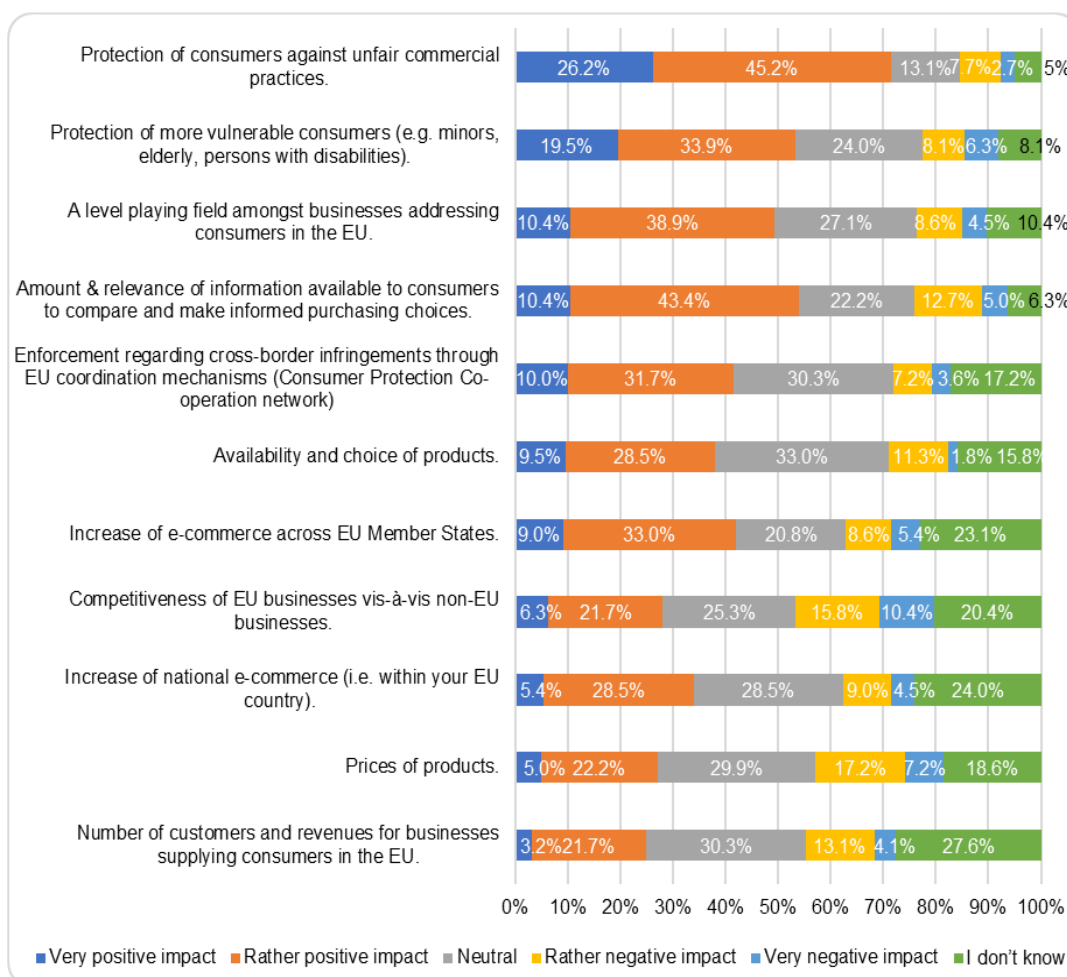


There was a consensus that **a strong legal framework is required to protect consumer interest** in the digital environment with 92% (n=203) of respondents agreeing (116 agreeing strongly and 87 agreeing). A similar percentage of respondents either agreed strongly (53%, n=118) or agreed (29%, n=64) that there **needs to be uniform legislation across the EU**. It was also recognised that:

- There is some **scope for simplification and burden reduction in existing EU consumer laws** (26%, n=58 strongly agree, 38%, n=84 agree), this is supported further in the stakeholder position papers by both trader and consumer representatives.
- The existing legal framework sufficiently protects consumers in the digital environment (27%, n=60 strongly agree and 21%, n=46 agree).
- There are some legal gaps and/or uncertainties in the current EU consumer law framework (19%, n=42 strongly agreed and 33%, n=73 agreed)
- Traders comply well with existing EU consumer law in the digital environment (42%), 15% (n=33) of respondents disagreed and 10% (n=22) strongly disagreed with this assertion.

Many respondents (27%, n=60) **disagreed or strongly disagreed**, with a further 41% (n=91) neutral to or with no view to the statement that **existing EU consumer laws are coherent with other EU legislation** in the digital area (e.g. data protection, regulations applicable to online platforms, artificial intelligence). Respondents were also asked about the positive or negative impacts of the consumer law framework on the following aspects of the digital environment.

**Figure 51 - How positive / negative has the impact of the existing EU consumer law framework been on the following aspects in the digital environment? (n=221)**



- The majority of respondents considered that EU consumer law positively impacts on several areas relevant for consumer well-being: **Protecting consumers against unfair commercial practices (71.4% (n=158) total, of which n=58 were very positive and n=100 rather positive).**
- **The protection of vulnerable consumers (53.4% (n=118) total, very positive n=43 and n=75 rather positive).**
- **Amount and relevance of information provision to consumers (53.8%, n=119, positive in total, with n=23 very positive and n=96 rather positive).**
- **A level playing field among businesses addressing the needs of consumers (49.3% n=109 positive in total, with n=23 very positive and n=86 rather positive).**
- **Enforcement regarding cross-border infringements through the CPC network (41.7%, n=92 positive overall, with n=22 very positive and n=70 rather positive).**
- **Increasing cross-border e-commerce, 42% (n=93) considered it to be positive (9.0% stated very positive and 33.0% rather positive).**
- Regarding the increase of national e-commerce, 33.9% (n=75) in total were positive, 5.4%



(n=12) were very positive compared with 28.5% (n=63) that were rather positive. However, whilst a significant proportion of respondents were neutral (28.5%/n=63), 9.0% (n=20) were rather negative and 4.5% (n=10) very negative.

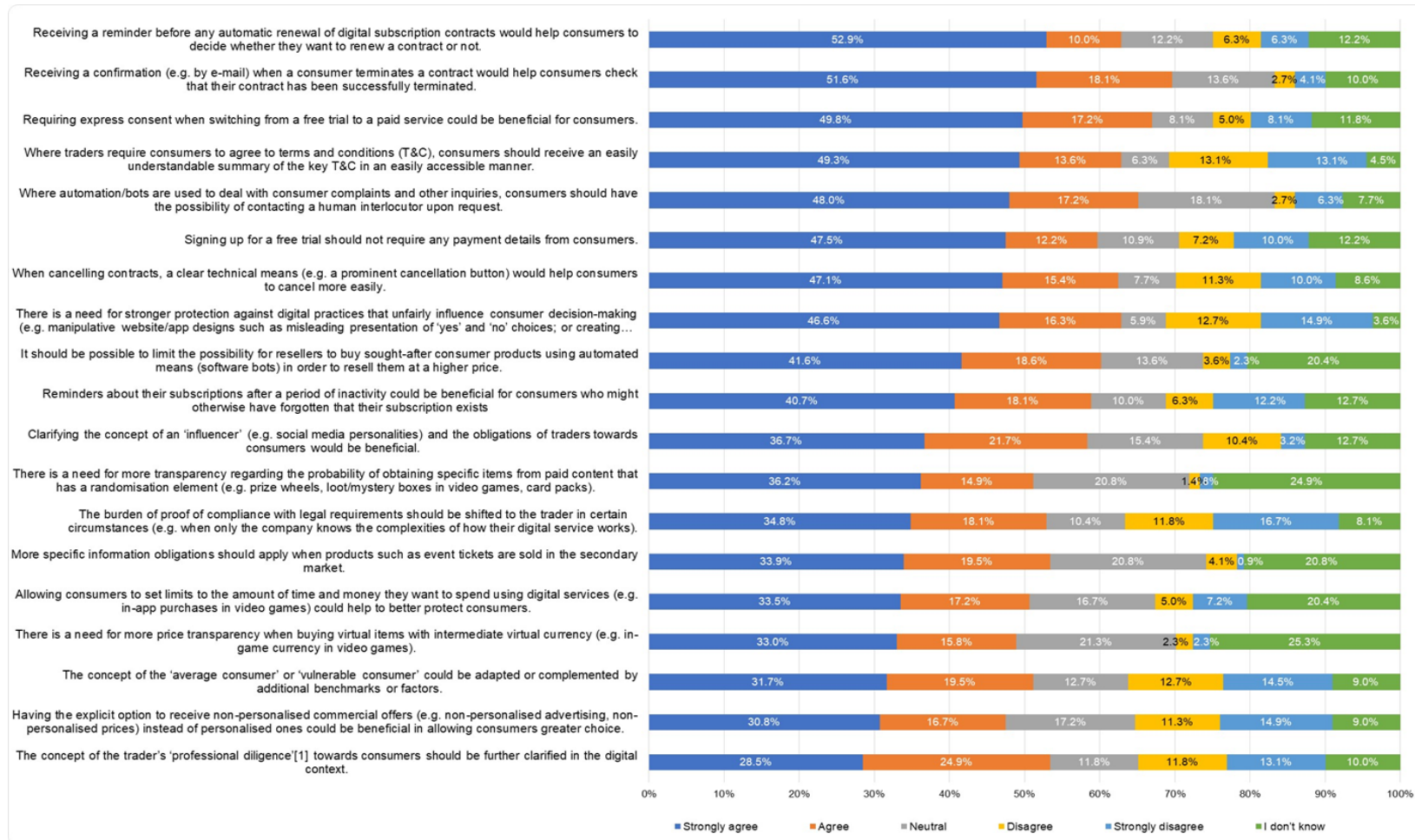
- The **competitiveness of EU vs. non-EU businesses** – **28.0% (n=62) were positive overall**, with 6.3% very positive and 21.7% rather positive. However, **25.3% (n=56) were neutral, 15.8% (n=35) were rather negative and 10.4% (n=23) were very negative**. This shows that there are **perception differences between traders and consumer representatives** and among wider interested stakeholders.
- **Regarding the impact of EU consumer law on the prices of products, 27.2% (n=60) in total were positive, 5.0% (n=11) were very positive, 22.2% (n=49) rather positive, 17.2% (n=38) rather negative and 7.2% (n=16) very negative. A large cohort were however neutral (29.9%, n=66).**
- **In terms of the number of customers and revenues for businesses supplying consumers in the EU**, in total, 24.9% (n=59) were positive, of which 3.2% (n=7) very positive, 21.7% (n=48) rather positive, 30.3% (n=67) neutral, 13.1% (n=29) rather negative and 4.1% (n=9) very negative.

Overall, the impacts of EU consumer law in achieving a variety of outcomes were positive. In the interpretation by the evaluation team, the less positive responses with a high level of neutrality are influenced by the fact that whilst trader associations accept and welcome the importance given to ensure high levels of consumer protection through EU consumer law, as the legislation has been in existence for a considerable period, e.g. 18 years for the UCPD, 30 years for the UCTD etc., they do not always see direct benefits for their business from the legal framework. Rather, the benefits are less directly on competitiveness and on the level of cross-border trade and trader generally and more indirect benefits through having a uniform regulatory framework in which traders can operate within the (Digital) Single Market. In contrast, many individual consumers and their representative organisations perceive there to be direct benefits from EU consumer law.

### 1.2.6 Potential improvements in EU consumer law to address problematic practices

All stakeholders were then asked about possible ways of improving the fitness for purpose of EU consumer law in the digital environment.

**Figure 52 - How strongly do you agree or disagree with each of the following statements about potential suggestions to improve EU consumer law for the benefit of consumers? (n=221)**



Many suggestions for improvement received strong support from the majority of respondents. An overview of the responses – ordered from strongest support through to support but less unequivocal - is now provided:

- 70% (n=154) supported a requirement of receiving an **email confirmation when a contract has been terminated** (51.6% strongly agreed, 18.1% agreed);
- 67% (n=148) supported requiring express consent when **switching from a free trial to a subscription service** (49.8% strongly agreed, 17.2% agreed);
- 65.2% (n=144) supported the statement that where **automation bots** are used to deal with consumer complaints and other inquiries, consumers should have the possibility of contacting a human interlocuter upon request (48.0% strongly agreed, 17.2% agreed).
- 62.9% (n=139) supported providing consumers a **summary of T&Cs** (49.3% strongly agreed, 13.6% agreed, whilst 13.1% disagreed, a further 13.1% strongly disagreed);
- 62.9% (n=139) supported sending a reminder about a **subscription automatically renewing** (52.9% strongly agreed, a further 10.0% agreed);
- 62.9% (n=139) agreed that there is a need for stronger protection against digital practices that unfairly influence consumer decision-making (e.g. manipulative website design or misleading presentation of yes/ no answers). 46.6% strongly agreed, 16.3% agreed, whilst 12.7% disagreed and 14.9% strongly disagreed;
- 62.5% (n=138) supported mandating **cancellations easier** (e.g. using buttons) (47.1% strongly agreed, 15.4% agreed);
- 60.2% (n=133) supported limiting the possibility of **scalping** (i.e. automated buying using bots) of products for reselling purposes (41.6% strongly agreed, 18.6% agreed);
- 59.7% (n=132) supported the statement that 'signing up for a free trial should not require any payment details from consumers' (47.5% strongly agreed, 12.2% agreed);
- 58.8% (n=130) supported **reminders about subscriptions** after a period of inactivity (40.7% strongly agreed, 18.1% agreed);
- 58.4% (n=129) supported the statement that **clarifying the concept of an influencer and the obligations of such traders towards consumers** would be beneficial (36.7% strongly agreed, 21.7% agreed);
- 53.4% (n=118) agreed with the statement that **more specific information obligations should apply when products such as event tickets are sold in secondary markets** (33.9% strongly agreed, 19.5% agreed).
- 53.4% (n=118) agreed with the statement that the **concept of the trader's professional diligence towards consumers should be further clarified in the digital context** (28.5% strongly agreed, 24.9% agreed, but 11.8% disagreed, and a further 13.1% strongly disagreed);
- 53.4% (n=118) agreed with the **need for more price transparency** when buying virtual games with intermediate virtual currency (28.5% agreed and 24.9% agreed strongly, whilst 11.8% disagreed and 13.1% disagreed strongly).
- 52.9% (n=117) supported the idea of **shifting the burden of proof of compliance with legal requirements to the trader in certain circumstances** (34.8% strongly agreed, 18.1% agreed). However, there was some disagreement from a combined 28.5% of respondents, with 11.8% disagreed and 16.7% disagreed strongly.
- 51.2% (n=113) agreed with the statement that the **concept of the average consumer**

**or vulnerable consumer could be adapted or complemented by other digital benchmarks** (31.7% strongly agreed, 19.5% agreed, 12.7% disagreed and 14.5% disagreed strongly);

- 51.1% (n=113) agreed with the statement that there is a need for **more transparency regarding the possibility of obtaining specific items from paid content that has a randomisation element** (e.g. paid lootboxes). (36.2% strongly agreed, 14.9% agreed). There was a relatively high neutral response here, reflecting the fact that many stakeholders don't know about lootboxes.
- 47.5% (n=105) supported the possibility of having an **explicit option to receive non-personalised offers** (30.8% agreed and 16.7% agreed strongly, although 11.3% disagreed, and 14.9% disagreed strongly);

For certain more technical topics, namely the suggestions of allowing consumers to set **limits to the amount of time and money spent** using digital services and mandating more price transparency when buying virtual items with **intermediate currency**, although majority<sup>608</sup> of respondents supported these ideas, there was a relatively high percentage of "don't know" responses, as high as 25.3% in the case of virtual items and currencies.

### 1.2.7 Qualitative feedback from open responses to the OPC

The problem of **information overload and the intelligibility of the language used in consumer law and in contract terms**, was a key theme. An EU citizen commented that "The current amount of EU consumer law is too burdensome; the language is complicated even for lawyers and this is not helpful for the public; consumer and personal data protection should be simplified in favour of both business and consumers". A further EU citizen made the suggestion that "summaries should be provided of the most important consumer right laws and clear indications where to find more in-depth information". A further priority they identified for EU policy makers was to "guarantee a smooth and equal application of the consumer law in all countries, especially regarding services and their contents".

The Dutch consumer enforcement authority provided feedback on the limitations of transparency requirements in addressing problems with **virtual items and virtual currencies**: "The statements on virtual items and virtual currencies imply that the problem can be solved by introducing more transparency requirements. Based on academic research and our enforcement experiences, we have reasons to believe that more transparency requirements will not provide the envisaged results for consumers".

An EU citizen observed in relation to **online subscriptions** that they do not subscribe to free trial periods any longer to avoid spending a long time to find ways of getting out of the "free" trial subscription without being charged for the subscription subsequently. The person commented that "especially in Italy I would never subscribe any online service offers for e.g. a Telco company or an energy supplier whereas I would be more positive for doing so in Germany. The legal system in some countries is not as consumer friendly as in others". This relates to the issue as to whether there is sufficiently uniform application of EU consumer law, but also divergence in the level of protection provided for in national consumer law, which in some countries appears to go beyond the minimum requirements in EU legislation (e.g. in Germany, national legislation on online subscriptions and the requirement for traders to provide a cancellation button).

A trade association responding anonymously mentioned the issue of the consumer law framework not being fit for purpose from their perspective due to not yet considering the need for products to be repurposed, remanufactured and / or repaired. They also raised the issue

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<sup>608</sup> In some cases, relative majority, meaning the support was by just below 50% which was still the highest share in the responses, with much less respondents disagreeing and some indicating being neutral or do not know.

of the right to “disconnect” from digital products as this “should represent the end of life of a product”.

The **difficulty for European consumers in identifying where traders are based** and therefore associated uncertainties regarding how easily their consumer rights can be protected through enforcement was stressed by a non-EU citizen. They pointed to a lack of transparency regarding the location from which products are shipped. “There are too many online shops that claim to be in the EU [...] that hide their location. Even in their T&C and privacy details, they do have not proper contact details or information and sometimes do not even include an email address”.

## 1.2.8 Analysis of the position papers received to public consultation

In total, 71 position papers were received to the public consultation in addition to the response of 350 questionnaire responses to the closed question consultation. Some of these were elaborations on questionnaire submissions while others were submitted by email separately to the questionnaire. Stakeholders represented vary from national and EU-level consumer organisations, to EU and national trader federations representing the collective position of their members such as Ecommerce Europe (on behalf of over 150,000 large firms and SMEs). Likewise, large multinational firms including online marketplaces and platforms such as Amazon, Google, Meta and Apple responded, as significant actors across the digital economy in terms of both market share and as industry innovation and best practice pace-setters, have made their positions clear through their own individual position papers. In addition, a wide range of other sectors were represented in the response, such as trader associations and individual traders in sectors such as e-commerce retailers, software, computer and telecoms companies, the gaming industry, travel industry, the restaurant and hotel industry, food industry, film distributors, etc. This demonstrates the very wide-ranging sectors that either operate in the digital environment mainly, or which conduct at least some of their business activities digitally given multi-channel is common.

## 1.2.9 Positions of stakeholders

### 1.2.9.1 Does the framework offer adequate consumer protection and help to ensure digital fairness?

Overall, many but not all stakeholders agreed that the current EU consumer law framework offers broadly adequate consumer protection in the digital environment. However, many stakeholders that are applying the laws in practice (especially consumer associations, Ministries and CPAs submitting position papers) expressed the view that EU consumer law could be strengthened in a few areas to tackle some specific problematic practices. Some stakeholders requested greater clarity as to the overarching concept of ‘digital fairness’ introduced in the Commission Communication on a new Consumer Agenda from 2020 and what this means in the context of the review of EU consumer law and its fitness for purpose. For instance, bol.com notes that if the Commission wishes to move forward with new regulatory measures on consumer protection, there needs to be “a clear definition of the concept of ‘digital fairness’”.

Reflecting the various priorities and concerns of stakeholders, approaches to the current legislation’s fitness are by no means uniform. That said, the position paper responses to the public consultation cannot simply be delineated between trader representatives, consumer representatives and public authorities responsible for applying the legislation and for enforcement. Furthermore, there are some differences in opinion within the same category of stakeholder, depending on the specific topic. For example, major players in the digital marketplace, such as Amazon and Meta, as well as the Computer and Communication Industry Association (CCIA), suggest respectively that the presently strong EU consumer law framework offers effective and sufficient protection for EU citizens, both online and offline. Apple’s position paper does not seek to make a judgement regarding the adequacy of existing

legislation, alternatively, however, the firm acknowledges the general need for continuous assessment and development by industry of tools to combat bad practices, specifically in their case relating to third-party applications on their devices.

The view of Amazon and Meta is at odds however with the position of BEUC and that of the European Law Institute (ELI), who cite a series of different trends, relating to the case study topics that address problematic practices elaborated below, that in their view point towards the degradation of consumer freedoms in the digital environment. Whilst a number of "big tech" stakeholders but also many trader associations stressed the need to maintain technology neutrality in EU consumer law such as to achieve parity between online and offline businesses operating in Europe, BEUC and others recognise that the complexity and fast-changing realities of business models and practices in the digital environment are inherently not the same as for physical, offline traders. BEUC for instance, emphasised the concept of digital asymmetry being different from that of conventional information asymmetries, which was also alluded to by some CPAs.

In this respect, the European Commission should consider what parity might look like, whether this should translate solely to the uniform applicability of laws online and offline, or whether in fact the focus should be towards an equal level of protection for consumers, which may at least necessarily require greater scrutiny by and responsiveness of regulators and platforms to changes in the digital environment. This latter position, namely that consumers are increasingly and disproportionately vulnerable online in comparison to offline environments, is taken up by UFC – Que Choisir, a major consumer association in France, in calling for protective measures to be adapted to maintain adequate consumer protection when consumers make purchases online.

Generally, both European and national-level consumer associations share a view that the existing legislation has not "kept up" with technology, leading to gaps and inadequacies across a range of problematic areas: from fake reviews to secondary ticket sales, to counterfeit and sub-standard products sold online.<sup>609</sup> As raised by a major airline who responded anonymously, in particular scalper bots and unofficial intermediary traders, limit the rights of consumers as well as harm their trust and confidence in utilising the digital environment. However, different viewpoints were expressed as to what should be done to enable EU consumer law to keep up with technological developments, with opinions split between many traders and their representative associations, who favoured guidance as being the optimal means to reflect emerging digital practices and other stakeholders, many of whom perceived there to be a need for more specific rules in some areas.

In relation more broadly to the study at hand, the Swedish Trade Federation (Svensk Handel) points to a need for the Commission to consider wider applicable EU legislation in helping to protect consumers, such as the GDPR and e-Privacy Directive, which work "behind the scenes" to inform the data processing processes and privacy-related practices of traders. Whilst this wider framework remains nonetheless insufficient in the eyes of many of the stakeholders already mentioned, and of national bodies such as the Finnish Competition and Consumer authority (FCCA). Furthermore, the FCCA seeks to warn the Commission against further regulation that might see more information presented to consumers by traders; the concern being that an overload will only result in existing and new pre-contractual and other information being disregarded. In an interview, BEUC also supported the point about the risk of information overload, though also welcoming increased transparency for online platforms through the Modernisation Directive and information disclosure requirements pertaining to who is the seller, as this will help consumers to understand if the seller is really in a third country and to make more informed purchasing choices.

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<sup>609</sup> Respectively: IFLA; European Games Developer Federation; Weet Waar Je Koop – Know Where You Buy; AIM Brand association; Consumer Council Tænk Denmark; Competition and Consumer Protection Commission Ireland (CCPC).

### 1.2.9.2 A principle-led, technology-neutral legislative approach?

It is important to note upfront that whilst many stakeholders have not explicitly highlighted their position on the overall approach that should underlie the legislation, it is possible to see that many of the practice-specific concerns and priorities of stakeholders (such as the Netherlands Authority for Consumers and Markets' concerns for a redefinition of the 'average consumer' in relation to vulnerability) arise from a broader principled standpoint, and of course that principled rules already form an important part of the UCPD and its guidance, as well as in the CRD and other relevant legislation. Support for this approach is explicit in the case of AIM, the European Brands Association. AIM focuses in its own work with traders upon sustainability and rights protections as an embedded core element of business, alongside innovation and competitiveness in the marketplace. In line with this, AIM suggests that such an approach towards the legislation of digital marketplaces and practices would improve consumers' awareness and understanding in common areas of uncertainty, such as the right of withdrawal for digital products and services. In this regard, Apple highlights the importance of its own principled-focus upon the implementation of guidelines and measures, particularly in relation to the protection of minors, against applications that seek to trick or scam users through aggressive practices and misleading online subscriptions. Although not explicit on the importance of a principled approach in terms of consumer protection issues, from the perspective of a trader and digital distribution platform, Google emphasises the need for a principle of technology-neutrality in the development of legislative measures and guidelines to all for new developments and innovation.

It is clear from the position papers that firms and industry representatives, as well as competition and consumer authorities, understand that digital markets and the innovative practices of traders can evolve unpredictably. In a rule-focused legislative approach, the rapid emergence and prevalence of innovative business models and practices can in themselves spark concern among authorities and consumer associations, as uncertainty over legal coverage can leave the door open for significant harm if unchecked. However, it is important in the view of firms such as Hello Fresh, as traders with an innovative and flexible business model, that the application of *either* principle- or rule-based judgements be given due time and consideration, underpinned by clear evidence in the identification of the "concrete dangers". Indirectly responding to this, the FCCA support the notion of due consideration of legislation, but point to the prior establishment of "consistent concepts" as key to ensuring a responsive and coherent framework for consumer protection.

The promotion of a principle-led approach to consumer protection is evidently not alien to traders and platforms, with Apple describing at length the efforts they have made to ensure that consumer trust is maintained and the wellbeing of minors and vulnerable users is preserved. The importance of investing in tools that protect consumers, especially minors, was also stressed in an interview with Google.

Allwyn, a market-leading lottery-focused gambling operator across five Member States, highlights their own utilisation of a principle-led approach in their interpretation of the DSA. Specifically, Allwyn notes that whilst "gambling is not expressly covered by the Digital Service Act Directive" they see their gambling practices as already implicitly covered under the regulation due to the principle that "what is illegal offline, is illegal online" applies to the gambling sector and their duty to protect consumers. At the same time, however, Allwyn also notes their support for specific provisions that exist in the legislation: Art.25 banning dark patterns, and Art.27 on recommender system transparency, and Art.28 towards the protection of minors online. Their "responsible gambling" view therefore also represents a significant trader voice in favour of a legislative approach which remains flexible and ready to utilise both general principles and occasional direct action to provide further clarity and certainty for the mitigation of any potential consumer harm. It is worthy of note that the issue of gambling and related to this the case study topics of addictive practices and vulnerable consumers form a key issue for greater consideration among stakeholders and for the Commission.

### 1.2.9.3 Implementation and enforcement

In line with stakeholder interviews and the Call for Evidence analysis carried out thus far in the study, there were calls for improved implementation of existing EU consumer law before any revision of the legal framework, especially given that recent regulatory amendments to the UCPD, UCTD and CRD have only recently been introduced through the Modernisation Directive. This forms a significant recurring element across stakeholder position papers. There is uniform acknowledgement across industry and consumer organisations that the recent introduction of legislative changes in the Modernisation Directive have yet to be assessed in full for their impact and effectiveness, in large part due also to the still-ongoing implementation and harmonisation processes that are occurring among firms and across Member States. A number of stakeholders, such as the World Federation of Advertisers (WFA), The European Direct Selling Association (Seldia), UFC-Que Choisir, and the European Games Developer Federation, Motion Picture Association, to name but a few, share this view.

Key to uniform implementation according to the WFA, is the need to enforce more clearly, and to work with all stakeholders to ensure shared understanding and application of the rules. In a similar vein, BEUC takes a holistic view, in insisting that public and private enforcement must go hand in hand. It can also be observed from the examples of self-regulation and monitoring put forward by Apple, that leading platforms and technology developers are engaging with enforcement through a recurring assessment of its own principle-led policies and guidelines. Moreover, engagement with the likes of Apple may offer some solutions for SMEs and other firms that struggle in meeting the demands of implementation both currently and in the future. Through the provision of tools and infrastructure to developers, such as Apple's 'in-app purchase', the App Store's private and secure payment system for digital goods and services, and the Manage Subscriptions StoreKit API, developers can build upon Apple's existing interface coding to easily implement compliant practices without the need to develop independent high-cost coding, or having to pay or trial third-party tools. Ultimately, the view of the majority of traders and consumer organisations, even those who see gaps in the existing legislation, is summarised by Independent Retail Europe in their view that "effective enforcement, not stricter rules, is the sine qua non condition for a level playing field in the Single Market."

### 1.2.9.4 Unfair contract terms

BEUC wish to see the reinforcement of the principle of fairness by design, in part by considering whether "a general obligation to provide consumers with a summary of the General Terms and Conditions, based on a harmonised template" should be introduced. BEUC highlighted also in their position paper the prevalence of abusive contractual clauses in which 'fine print' reveals an obligation upon the consumer to enter further contracts (potentially either a recurring subscription or one-time purchase) to use their newly purchased device. This could prove to be an important issue in relation to the digital environment as physical devices may prove to be useless, or become obsolete, without a supplementary digital service subscription.

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

As such, in their position paper BEUC propose an updating of the UCTD to ban:

- Contract terms which oblige the consumer to conclude an additional digital content contract or another contract pertaining to hardware with a third party.



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

In terms of further legislative action from consumer authorities, UFC offer an additional consideration beyond that of BEUC in their recommendation to extend the scope of the Unfair Terms Directive to personalised contractual terms, something that would move to protect the consumer more broadly in all contractual agreements, beyond the main current focus upon pre-determined 'cookie-cutter' template contracts.

#### 1.2.9.5 Aggressive practices (including dark patterns)

Aggressive practices can be identified variously with relevance to the full range of case study topics raised by stakeholders, present throughout the report. The horizontal nature of these practices, e.g., dark patterns, psychological pressuring, is seen through stakeholder concerns in the cases of consumer vulnerability, digital addiction, and online subscriptions, elaborated below. Likewise, in acknowledging and responding to the pervasive scope and scale of aggressive practices, stakeholders and regulators in concert can mitigate harm across several areas, although as with the above overarching issue, implementation and enforcement remain lacking.

In particular, the Digital Services Act (DSA) has been identified by many stakeholders as key to this discussion, with major online marketplaces and national authorities both viewing it as providing an appropriate level of protection. A major industry body for digital marketing further points to the Modernisation Directive (UCPD and UCTD) as extensively covering the issues relevant to a fitness check. In addition to this, however, there remain calls for broader recognition of the specific types of dark patterns, noting that not all practices which influence consumer decision making fall under the current category of unfair commercial practice, and that the blacklist of aggressive commercial practices in Annex I of the UCPD must be added-to as a complement to the general clauses of the legislation. In terms of implementation and harmonisation, it is emphasised from the perspective of consumer protection organisations that traders should be further required to provide easily accessible and understandable terms and conditions, suggesting that this is often not the case. Across traders and national authorities there is a recognition of the need to respond to evolving unfair design elements and techniques that can mislead consumers. In one case, a major airline highlighted a lack of coverage in relation to unauthorised intermediaries causing harm to consumer rights.

Considering the various, recently updated, legislative acts regulating across dark patterns and unfair practices there is a concern across trade federations that further legislative changes ahead of great enforcement and implementation could lead to confusion and uncertainty for all parties, a more fragmented legislation, and a bias against digital trade which fails to promote an approach of channel-neutrality, to the detriment of EU consumer choice and the competitiveness of EU businesses globally.

#### 1.2.9.6 Consumer vulnerability

The topic of consumer vulnerability, and specifically among consumer associations, the issue of what defines an 'average consumer', is a prominent topic raised across EU stakeholder position papers. Trade organisations typically agree that the current legislative framework already successfully addresses consumer vulnerability, both through prohibitions on misleading practices and through the right to withdraw from contractual agreements under the Consumer Rights Directive. Nonetheless, however, industry generally expresses common concern with consumer rights groups regarding the need for ongoing efforts to protect minors in the online environment. Given the concern already shown by regulators in the US, UK, and EU, towards related issues of algorithmic design and control of data by platforms, addressing consumer vulnerability requires (at least in part) a collaborative and practical approach to enforcement (of, and with, platforms) through the implementation of checks and safeguards in line with the general principles of clauses under the UCPD.

The independent European Law Institute stresses that concepts of 'average' and 'vulnerable' consumer have rightly been criticised for being unrealistic in the context of the Single Market, with consumer associations calling for these terms to be redefined or complemented by additional benchmarks or factors. Further to this, BEUC adds that the UCPD should recognise digital vulnerability as a universal state of susceptibility to distortion of decision-making under conditions of digital asymmetry. Conversely, large multinational traders, such as Amazon, Apple, as well as the World Federation of Advertisers, asserted explicitly that the current legislation is already extensively addressing the topic of vulnerable/average consumer. While the WFA recognises the need for ongoing considerations when it comes to vulnerable consumers, such as minors, Apple similarly points to its own record on innovation and protection of consumers and their wider families, particularly work to safeguard minors and vulnerable groups online, saying that they understand that this is a process which requires them to "keep innovating every day to empower people to protect their families online".

According to industry associations and traders, there is consensus that the definitions of "professional diligence", "average consumer", and "vulnerable consumer" do not require any modification.<sup>610</sup> This view is supported by Google and Seldia, who argue that the use of open concepts like the "average consumer" or the "vulnerable consumer" allows for flexibility in considering common and foreseeable consumer characteristics and vulnerabilities without compromising legal certainty. Additionally, Independent Retail Europe highlights that the omnichannel experience acquired by retailers shows no discernible difference in consumer vulnerability online or offline with reputable retailers. Furthermore, Google contends that achieving a higher level of consumer protection based on individual characteristics and personal circumstances can be done more effectively through consumer education and information campaigns.

In terms of consensus among position papers, there is a clear call for transparency and protection for minors regarding the topic of vulnerable consumers. The French national authority, Finnish Ministry of Justice, UFC-Que Choisir, and European Games Developer Federation all advocate for strong commitments to protect minors. Particularly, UFC-Que Choisir stresses the importance of determining whether strict protections, including bans, should be implemented to safeguard consumers against the addictive effects of gaming features that mimic real gaming experiences, paying particular attention to their impact on minors.

#### 1.2.9.7 Digital addiction

Overall, there is an acknowledgement across stakeholders that digital addiction, in particular the inclusion of addictive practices such as risk elements (gambling) in games, pose a threat to the most vulnerable consumers. In line with this, the greater focus of stakeholder concern

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<sup>610</sup> The European Games Developer Federation, Bol.com, Amazon, The Confederation of Danish Industries, Google, Seldia and Independent Retail Europe

in the position papers relates to the utilisation of 'loot boxes'. Entities, assert that the widespread use of loot boxes is concerning from a consumer protection perspective. The particular risk of harm that loot boxes pose to minors as game-players is recognised by Allwyn. Several entities do not believe that video games with a loot box component should be considered as falling under the definition of an online gambling service as set out in Recommendation (2014/478/EU). Instead, Allwyn believes that legislation around loot boxes should be assessed and agreed at a national level. From their trader's perspective, changes to the current regulation of all gambling practices, to apply across a broader, less clear-cut scope of online business models and practices, may have unintended consequences and burdens for traders.

Although there is hesitancy on the part of incumbent gambling operators in regard to the classification and appropriate level of regulation of games with loot box elements, it is more broadly accepted by firms and consumer associations that there is a need for more transparency regarding the probability of obtaining specific items from paid content that has a randomisation element (e.g. prize wheels, loot/mystery boxes in video games, card packs).<sup>611</sup> In this regard, the Europe Video Games Industry (ISFE), highlights for the Commission its own 2019 voluntary commitment to provide improved transparency for consumers regarding purchasable random content, such as loot boxes. The commitment requires the disclosure of the relative rarity, or probability of obtaining randomised virtual items in paid loot boxes. The disclosure commitment applies to all new games and any updates made to existing games that subsequently add this type of in-game purchase. On the consumer side, BEUC agrees that solutions are needed for more transparency, and that researchers and regulators should have access to the algorithms and datasets that are involved in the loot boxes to conduct independent research in the public interest. Similar to ISFE, Apple also pointed to its own guidelines (App Review Guidelines 3.1.1) as a leading best practice approach for platforms to take the initiative in raising the bar of transparency requirements for any apps offering randomised virtual items for purchase.

Moreover, BEUC agrees that addiction created and encouraged by manipulative service design is an important issue that requires greater consideration. Suggestions in line with this include the disabling of in-game payments and loot box mechanisms by default, and that consumers should have the option to use the game without algorithmically driven decision-making that aims to influence consumer behaviour. With respect to minors playing online games BEUC suggests that a ban should be introduced on offering loot boxes, 'pay-to-win' mechanisms or other randomised content in exchange for real money in games that are likely to be accessed by minors.

A case study on digital addiction (including loot boxes) is provided in Annex 3.

#### 1.2.9.8 Online subscriptions

The position papers portray a full spectrum of views relating to online subscriptions and potential amendments to current EU legislation in this regard. In general, stakeholders tend to agree that greater consumer accessibility to online subscription information could be highly beneficial in addressing knowledge imbalances; with Amazon, for example, stressing that subscription information should be openly available both during the sign-up process and for as long as consumers remain subscribed. Moreover, where contracts are agreed, it is widely understood that a simple cancellation process would be of benefit to the consumer, particularly by enhancing consumer choice (although the feasibility of the subsequent burden that these measures may place upon traders is hotly debated).

Especially with respect to the simplified 'two-click' cancellation of an online subscription (via a 'cancellation button'), EU associations appear to be more clearly divided. Consumer organisations and national authorities tend to be in favour of introducing further regulations and policies which shift the burden of responsibility towards traders, whilst trade organisations

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<sup>611</sup> In particular: European Games Developer Federation; Competition and Consumer Protection Commission (CCPC)

including ISFE are more sceptical of such changes without the Commission first carrying out a due diligence impact assessment. In general, traders cite concern for the direct costs of further implementation, as well as the impact of potential unforeseen consequences. Additionally, Google, Ecommerce Europe and News Media Europe, among others, share the view that a one-size-fits-all approach would be problematic also for consumers, in limiting the potential variety of digital services and architectures employed by traders.

On the topic of free trial periods and the automatic renewal/conversion to a paid subscription, several stakeholders including BEUC and CCPC assert that a free trial should not require any payment details from consumers; suggesting that express consent should be required when switching from a free trial to a paid service.

The consumer-focused stakeholders mentioned above are similarly in favour of obligating traders to send reminders to consumers before automatic subscription renewals occur. It is argued that this would present an excellent example of fairness by design, by preventing known decision-making biases (in this case, aiding consumers who may likely forget they have a subscription). Pushing back, Meta however has expressed concern that the introduction of notifications and requests for further consent may risk confusing, panicking or irritating the consumer. In addition, as a point of detail, Ecommerce Europe stressed that traders should not be expected in future to provide instant confirmation of cancellation, but should be able to do so only after the trader has had the chance to check that the consumer is eligible to cancel the service and is following the agreed terms and conditions.

On the other hand, online traders and organisations such as the Motion Picture Association (representing Netflix Studios, Paramount Pictures Corporation, Sony Pictures Entertainment, Universal City Studios, Walt Disney Pictures and Warner Bros. Entertainment Inc.), tend to agree that the current provisions successfully protect consumers who benefit from online subscriptions. However, these stakeholders, including also Google, Digital Europe and News Media Europe, state that requesting payment information from consumers during free-trials is a necessary element of their business model, and that the implementation of further regulations in this regard may disrupt their business practices. Specifically, the Association of Commercial Television and Video on Demand Services in Europe insist that requesting payment details is an effective way to avoid the abuse of free trials, including by malicious actors or bots to access (and/or spread) content for free. They argue that changes to this model would lead to the unintended yet inevitable consequences of increased piracy and fewer free trials available to consumers. Similarly, restrictions against the requirement to provide credit card details for free trials was also raised during interviews, as some stakeholders were concerned that this could lead to unintended consequences, namely that traders could become more reluctant to offer free trials. A case study on online subscriptions is provided in Annex 3.

#### 1.2.9.9 Personalisation practices (marketing/advertising; pricing)

Whilst personalisation practices are widespread across ecommerce and online platforms, feedback from the position papers highlights disagreement on whether personalisation practices represent a benefit to consumers. Whilst trade organisations argue in favour of such a benefit, consumer-oriented organisations tend towards the view that giving (or removing) consent for personalised offers, products and advertising allows for greater consumer choice. In this regard, Consumer Council Tænk Denmark, CCPC, UFC-Que Choisir and the European Law Institute (ELI) state directly that personalisation can cause harm to consumers and limit their freedom online without specific consent. The ELI elaborates on this point, insisting that consent must be explicit (not a pre-ticked box in the T&C), and that consideration should be given towards making non-personalisation of offers the default for consumers.

Conversely to ELI et al., most trade organisations, online and ecommerce platforms tend to believe that current EU consumer legislation successfully regulates personalisation practices relating to advertising and promotions by keeping a general principles-based approach; whilst

further regarding such practices as generally beneficial both to consumers and retailers. Ecommerce Europe, Bol.com, Swedish Trade Federation (Svensk Handel), Google, Meta, Independent Retail Europe, Association of Commercial Television and Video on Demand services in Europe, Digital Europe, European Video Games Industry (ISFE) and News Media Europe advocate that the personalisation of advertising is an essential tool for online traders and is to the benefit of consumer experience, by helping them to connect quickly to relevant information, products, and services. In addition to this, the World Federation of Advertisers points to the DSA as a newly introduced, and not yet fully implemented but crucial piece of legislation, offering “vital” protection against misleading advertising and exploitation of vulnerabilities. For some traders and marketplace platform service providers, the ability to rely on targeted – or personalised – advertising is reported as essential. In the context of advertising firms and websites which utilise heavily personalised advertising, such as many news media providers, regulation seeking to restrict advertising practices could have a significant impact on an important source of funding, for both large and smaller independent digital media providers. Furthermore, Meta suggests that any such a reduction in funding streams would surely have an implication also for innovation activities as well as harming the quality of consumer experience in using their digital services. On balance, there appears however to be a middle-ground which can be struck which takes into consideration both above positions. The World Federation of Advertisers (WFA) recognises the benefits for consumer experience and the desirability of personalisation in the eyes of consumers. Freedom on the part of the trader to use personalisation should exist up to the point that practices become “intrusive, annoying or which exploit vulnerabilities.”

Despite being an independent concern of this wider study, and explored in more detail through the Case Studies (in annex 3 of this report), personalisation in relation to pricing was not mentioned particularly often by stakeholders in the OPC position papers. Nonetheless, it follows that many of the issues around personalised advertising can also relate to pricing, such as the exploitation of vulnerabilities. Of those stakeholders that raised similar issues in this topic, BEUC viewed that the personalisation of prices based on an algorithmic assessment of one's lifestyle, attitudes, values, habits, beliefs, interests (psychographic profiling) as being harmful and needing prohibition. It should be noted that the DSA, in line with GDPR, recently introduced the prohibition of personalised advertising using sensitive data, plus a general ban on personalised advertising aimed at minors. The ‘safety net’ of the UCPD does not include such detailed requirements, but an explicit reference to GDPR in relation to data-use for personalised advertising in the UCPD guidance could prove useful for emphasising coherence and legal certainty.

#### 1.2.9.10 Influencers

A further topic of debate across the different position papers consisted of the matter influencers and their marketing practices. Overall opinions were divided between three main opinions. Consumer-oriented organisations were generally strong advocates of the need to better define the concept of influencers at European level (including to prevent regulatory fragmentation through national legislation). Trader-oriented organisations however argued that influencers are already extensively *de facto* regulated in current EU consumer law, even if there is no definition of an influencer as a specific category of trader. Finally, a few entities requested further transparency requirements for influencers, especially when they are engaging in paid promotions.

The Irish Competition and Consumer Protection Commission (CCPC) and the European Law Institute (ELI) agreed that clarifying the concept of an ‘influencer’ and the obligations of traders towards consumers would be beneficial. They argue that the current situation is one of high legal uncertainty, and legislative action to clarify this concept would in their view be highly advisable. BEUC in particular confirms the need to better define the term influencer. BEUC considers that the promotion of illegal products and services by influencers should constitute an unfair commercial practice and be blacklisted in the UCPD. In addition, they consider

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

Conversely, Amazon, the Confederation of Danish Industries, Seldia (the European Direct Selling Association), the Association of Commercial television and Video on Demand services in Europe and Digital Europe argue that Influencer marketing is already adequately regulated by existing EU legislation. This does however raise the issue of what constitutes a trader, and whether a distinction can be made between a professional influencer and a sole trader, perhaps based on the number of followers.

Digital Europe states that hidden advertising/marketing is already covered extensively in the UCPD guidance and that any infringement is also heavily monitored and action taken by responsible brands. Digital Europe moreover notes that the DSA and Audio-visual Media Services Directive (AVMSD) also introduce helpful transparency standards on user-generated commercial content. Moreover, Digital Europe believes that consumers are increasingly savvy to the world of influencer marketing and sales of products and they understand that the promotion of products and services by individuals through digital channels is often part of a commercial agreement.

A limited number of position papers, including from WFA and UFC-Que Choisir, advocate in favour of more transparency requirements for influencers, particularly as regards certain practices. UFC-Que Choisir advocates that hidden or misleading advertising relating to commercial practices used in influencer marketing could be prohibited, such as risky financial products, gambling, sports betting, medical products and services and pharmaceuticals. However, trader associations argue that the general principles-based clauses of the UCPD combined with the guidance are sufficient as they already outlaw such practices. In interviews, the issue was seen as more related to improving monitoring of compliance by CPAs and more proactive enforcement. However, platforms themselves stress in their T&Cs that paid promotions should be made transparent by content creators (including influencers). This is designed to prevent hidden advertising but also to improve user experience when watching content on particular platforms. In response to this, academic respondents, Aade, Goanta and Riefa argue that translating legal concepts and guidance into daily terminology runs the risk of reducing legal certainty, additionally they point to the potentially manipulative use of language in social media platforms' terms and conditions as in need of examination.

In relation to the regulation of influencers, Kelder, Goanta, et al. proposed three options for potential action on the part of the Commission. Two of these options, namely the adoption of a new definition for influencers or the creation of a new definition for 'prosumers', require a significant disruption to the status quo. The latter approach would instead recognise the development of a category of economic activity which falls between traders and consumers. In both cases, however, it is noted that the development or widening of definitions poses a potential risk for further legal uncertainty to arise especially among micro- and nano-influencers who may hold different perceptions of their activity. The third, least disruptive policy proposal from this submission relates to the expanding of the definition of traders. Kelder and Goanta envisage this option achieving its objective through the addition of a recital including influencers in the definition of 'trader' as already acknowledged in the Commission's guidelines. Although this would still require considerations on the part of the Commission regarding selection of relevant criteria and ensuring legal certainty, Kelder and Goanta insist that the perfect does not become the enemy of the good, and that incremental measures for improvement of the legal framework are better than none, regardless of their potential shortcomings.

## Conclusion

In conclusion, the synthesis analysis of stakeholder positions reflects the complex and dynamic landscape. While there is general agreement among stakeholders that consumer protection laws are necessary, there are divergent views towards both the overarching state-of-play of current legislative framework, and in terms of the need and definition of specific provisions and their implementation. Consumer representative groups and national authorities have generally shown support for stricter laws and enforcement, while traders and industry groups tend to favour a more flexible approach, albeit with some recognition of the need to maintain consumer trust through their own guidelines and support for vulnerable consumers. The positions shown among stakeholders encapsulates the nature of the challenge facing this legislation in meeting the disparate expectations and needs of stakeholders. While balancing these generally competing interests, further assessment of the impact and effectiveness of current legislation must consider industry calls for evidence-based action on problematic practices, whilst also establishing clearer definitions and guidelines that allow for greater clarity and stability for consumers and traders. Overall, the synthesis analysis highlights the need for ongoing dialogue and collaboration among stakeholders to ensure that the EU's digital consumer protection laws meet the needs of all parties involved.

### 1.2.10 National authority perspectives

National authorities across the Member States also shared their opinion through position papers to the public consultation. Eight relevant position papers were received: Denmark, Finland, France, Germany (Bavaria), Ireland, Italy, the Netherlands and Sweden. The national authorities highlighted contrasting views regarding the ranking of priorities of actions regarding the Directives under review, despite, showcasing how other views are shared across different nations. On the merit of the discussion of the adequacy of the legislative framework to protect consumers, the Finnish Competition and Consumer authority (FCCA) believes that the wider framework remains nonetheless insufficient to protect consumers. Italy highlights how the legal framework leaves multiple concepts up to interpretation and believes that the current framework can disproportionately affect SMEs, lacking proportionality. In addition, Italy discusses that the previous fitness check was completely lacking a discussion around a strategy for the simplification of the legal framework and other substantial aspects. The Danish Government encourages the fitness check should hence take a holistic approach to the legislation impacting consumer welfare in a digital environment. Whilst discussing the topic of reversing the burden of proof, the Danish Government encourages the Commission to look into the possibility of reversing the burden of proof in areas, where there is a significant digital asymmetry to the detriment of the consumer. They believe that such strategy could help alleviate enforcement agencies.

Regarding the burden of proof for compliance with legal requirements in the digital environment, the Bavarian Ministry believes that they should be adjusted case-by-case. On the topic of implementation, enforcement and transparency, the Danish Government believes that the Commission should consider which regulatory tools are best suited to address these practices and especially how the rules simply and effectively can support the efforts of enforcement authorities. This also means ensuring that the scope of the legal acts is clear, and that the legislation is easily manageable for enforcement agencies and the judiciary, when handling concrete cases. In addition, The Danish Government further encourages the Commission to investigate new digital trends (e.g., artificial intelligence, virtual, augmented, and extended reality, cryptocurrency) as enforcement agencies will most likely have to adapt their tools of investigation and identification of violations through a machine-based approach, such as web crawling.

The Netherlands Consumers and Markets authority (ACM) believes that consumer policy should be cautious about introducing additional transparency requirements, as firstly, current ones should be evaluated for effectiveness. On aggressive practices' the Bavarian ministry argues that the GDPR provides some protection regarding dark patterns, with, however, low

intervention intensity. ACM adds, on the topic of aggressive practices, that commercial digital environments should be fair to consumers. Stressing that websites should not contain design choices or techniques that harm consumers, whether that is financially, emotionally, in terms of time lost, privacy lost or by creating addiction. On the topic of consumer vulnerability, a meeting ground is found across Member States. ACM, the Danish Government and the French national authority are concerned with the protection of minors and harmful commercial practices in the digital environment that do not consider the vulnerabilities of young consumers. ACM goes further saying that in the digital domain, the 'average consumer' term should be redefined, reflecting actual consumer behaviour and capacities. On the topic on digital addition too, Member States are aware that addictive practices pose a risk to the most vulnerable consumers and especially minors. ACM asserts that the widespread use of loot boxes is concerning from a consumer protection perspective. ACM also stresses that the use of in-game and in-app currencies obscures the fact that consumers, particularly children, spend real money. Therefore, it should be considered whether in game and in-app currencies serve consumers in any way whatsoever and should therefore be prohibited. FCCA believes that addictive contents and practices which might be hazardous to minors and young adults are not solely a consumer law issue but have wider societal implication. With regards to online subscription, the Bavarian Ministry takes a strong stand recommending the implementation of a withdrawal button, in line with its prior implementation in Germany. FCCA and the Danish Government, however, also encourage amendments to the legal framework to protect consumers. The Danish Government pushes for the Commission to address issues of consumer inactivity in online contracts.

The FCCA argues that customers should not be asked for payment information during a free trial and that explicit authorization should be needed when moving from a free trial to a paid service. On personalisation practices the FCCA believes that there is a need for nuance in the application of price personalisation rules in general terms, considering that non-personalisation is simply not suitable for certain products such as personal insurance. ACM is aware that personalisation of commercial practices comes with benefit also to consumers, however, it is made clear that it should not exploit, discriminate, or exclude consumers. Finally on the topic of influencers, in general Member States are in favour of a need for further clarification of the concept of an "influencer". According to the French national authorities, there is now a lot of legal confusion, thus passing legislation to clarify this idea would be strongly advised. On the other hand, according to FCCA, current EU law already sufficiently regulates influencer marketing. The UCPD, in the opinion of the FCCA, is already applicable to influencers who are merchants. However, this raises the question of what qualifies as a trader and if it is possible to distinguish between a sole proprietor and a professional influencer, maybe based on the number of followers.

### 1.2.11 Summary of specific recommendations

The following table presents of recommendations for changes to the existing legislation from the position papers.

Topic	Recommendations
<b>Unfair contract terms</b>	<ul style="list-style-type: none"> <li>● Ban contract terms which oblige the consumer to conclude an additional digital content contract or another contract pertaining to hardware with a third party</li> <li>● Ban contract terms preventing consumers from exercising rights under copyright law, e.g. format shifting, sharing content within family, or private copies.</li> <li>● Ban contract terms misrepresenting a service as acquisition of content, using tacit consent and 'browsewrap' contracts or misrepresenting the service as free where the trader monetises</li> </ul>



Topic	Recommendations
	<p>their personal data, time or attention.</p> <ul style="list-style-type: none"> <li>● Ban contract terms forcing the consumer to waive ownership of content they share on the service (videos they produce, photos uploaded on social media, etc.).</li> <li>● Ban contract terms giving the trader the right to unilaterally delete a consumer's user account (this can have a huge impact on consumers, for many their online accounts are an important part not only of their social but also their professional activity).</li> <li>● Create a list of prohibitions to protect consumers from abusive clauses in contracts pertaining to their connected products.</li> <li>● A free trial should not require any payment details from consumers.</li> </ul> <p>Extend the scope of the Unfair Terms Directive to personalised contractual terms</p>
<p><b>Need for Stronger Protection Against Unfair Digital Practices</b></p>	<ul style="list-style-type: none"> <li>● The term 'dark pattern' does not have a legal definition in the Directive.</li> <li>● A horizontal prohibition on dark patterns reinforced by an anti-circumvention clause is needed in the UCPD. 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.</li> <li>● Standardised designs should be mandatory where there is no justification for individual designs, as in the context of cookie consent banners.</li> <li>● Article 25(2) DSA, which limits the scope of the dark patterns prohibition, should be deleted.</li> <li>● Regarding aggressive advertising, it could be considered for consumer to have the option to purchase an ad-free version of the platform (e.g. newspaper websites).</li> </ul> <p>Penalties for unlawful use of data should be further clarified.</p>
<p><b>Clear Technical Means for Contract Cancellation</b></p>	<ul style="list-style-type: none"> <li>● There should be a button for the termination of long-term contracts.</li> <li>● Implementation of a withdrawal function/button clause in the Consumer Rights Directive.</li> </ul> <p>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.</p>
<p><b>Confirmation of Contract Termination</b></p>	<p>Traders must be obliged to have a system in place that guarantees automated confirmation of termination messages.</p>
<p><b>Automatic Subscription Renewals Reminder</b></p>	<p>The implementation of an email reminder before any automatic renewal of digital subscription contracts, to decide whether consumers want to renew a contract or not.</p>
<p><b>Reminder After a Period of Inactivity</b></p>	<p>Implementation of a subscriptions reminders for consumers who might otherwise have forgotten that their subscription exists.</p>

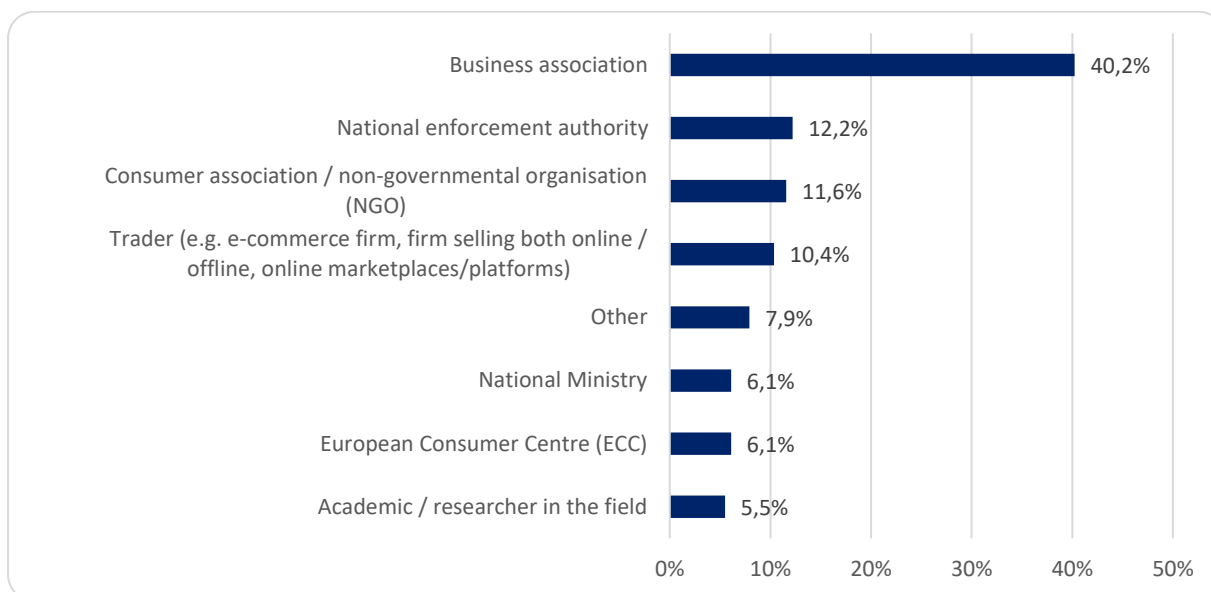
Topic	Recommendations
<b>Free Trial</b>	Cancellation of the requirement to provide payment details when signing up for a free trial.
<b>Express Consent for Paid Service</b>	Make mandatory to require consent when switching from a free trial to a paid service
<b>Personalisation of Commercial Offers</b>	<ul style="list-style-type: none"> <li>● Personalisation practices should be rendered fair and empowering to consumers.</li> <li>● Have the explicit option to receive non-personalised commercial offers (e.g. non-personalised advertising, non-personalised prices) instead of personalised ones.</li> </ul> <p>To investigate the unlawful profiling of consumers.</p>
<b>Fake Reviews</b>	The Modernisation Directive's measures against fake and sponsored reviews should be assessed to verify if stricter protection is needed.
<b>Virtual Reward Transparency</b>	<ul style="list-style-type: none"> <li>● Prohibition of in-game or in-app currencies</li> </ul> <p>Offering loot boxes, 'pay-to-win' mechanisms or other randomised content in exchange for real money in games that are likely to be accessed by minors should be banned.</p>
<b>Limiting Time and Money Spent on Digital Services</b>	To allow consumers to set limits to the amount of time and money they want to spend using digital services, especially referring to minors. (e.g. in-app purchases in video games).
<b>Influencers</b>	<ul style="list-style-type: none"> <li>● To clarify the concept of an 'influencer' (e.g. social media personalities) and the obligations of traders towards consumers</li> <li>● To clearly display the word 'advertisement' when marketing a product, using a unifying and standardized term.</li> <li>● Transparency and disclosure requirements should be further defined, standardised, and harmonised at EU level to clarify the rules and facilitate compliance monitoring and enforcement.</li> </ul> <p>Promotion of illegal products and services by influencers should constitute an unfair commercial practice and be blacklisted in the UCPD.</p>
<b>Customer Complaints</b>	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.
<b>Limitations on Reselling Sought-after Products</b>	<ul style="list-style-type: none"> <li>● To limit the possibility for resellers to buy sought-after consumer products using automated means (software bots) to resell them at a higher price.</li> <li>● The Modernisation Directive' measures applicable to ticket resale should be reassessed and complemented to include important material information, namely the main characteristics of the event ticket, such as its face value, indication of the seat/row/section or existing restrictions imposed by third parties to use the ticket.</li> </ul>

## 1.3 Targeted Consultation

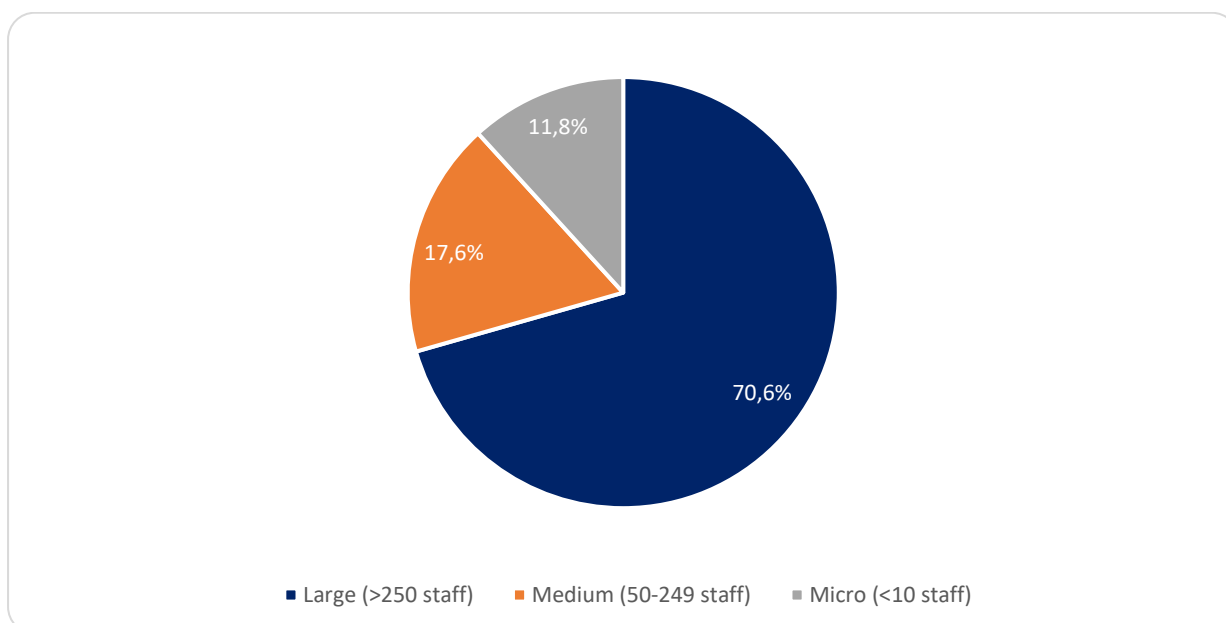
The analysis in this section provides some descriptive framing of the data presented in this exercise. Although there is some limited triangulation of the survey results in relation to the other evidence gathered in this study, this section is not intended to provide or repeat the topic-specific analyses, which are found throughout the relevant evaluation sections of the main report.

### 1.3.1 Overview of respondents

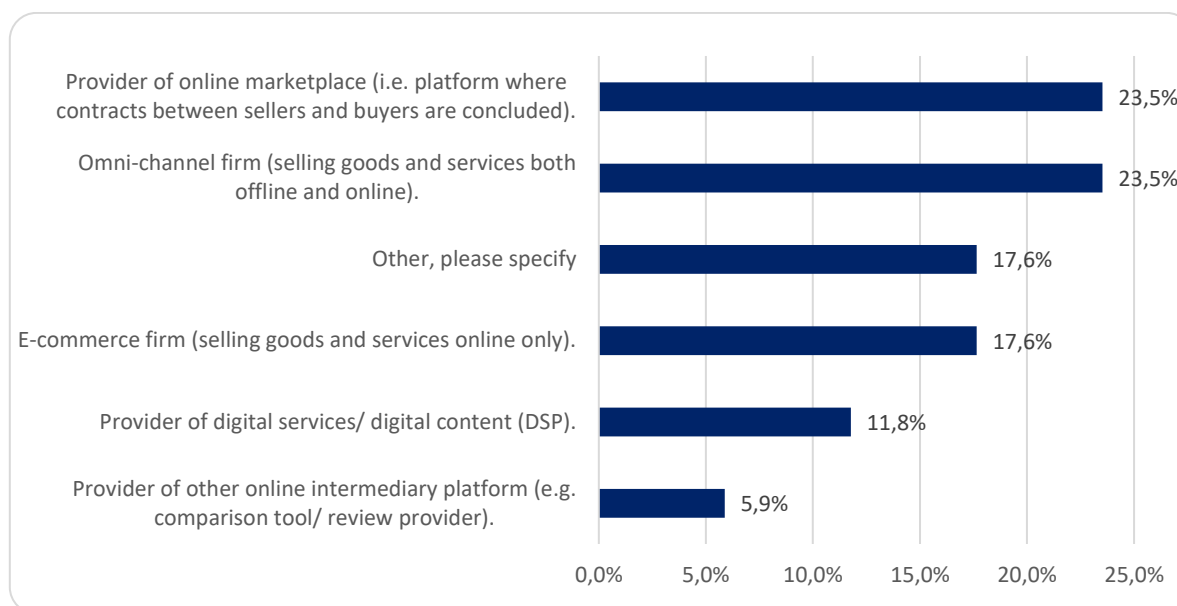
**Figure 53: Q1. What type of stakeholder are you? (n=164)**



**Figure 54: Specify the size of your firm (n=17)**



**Figure 55: Q3. Please specify the types of trader (n = 17)**



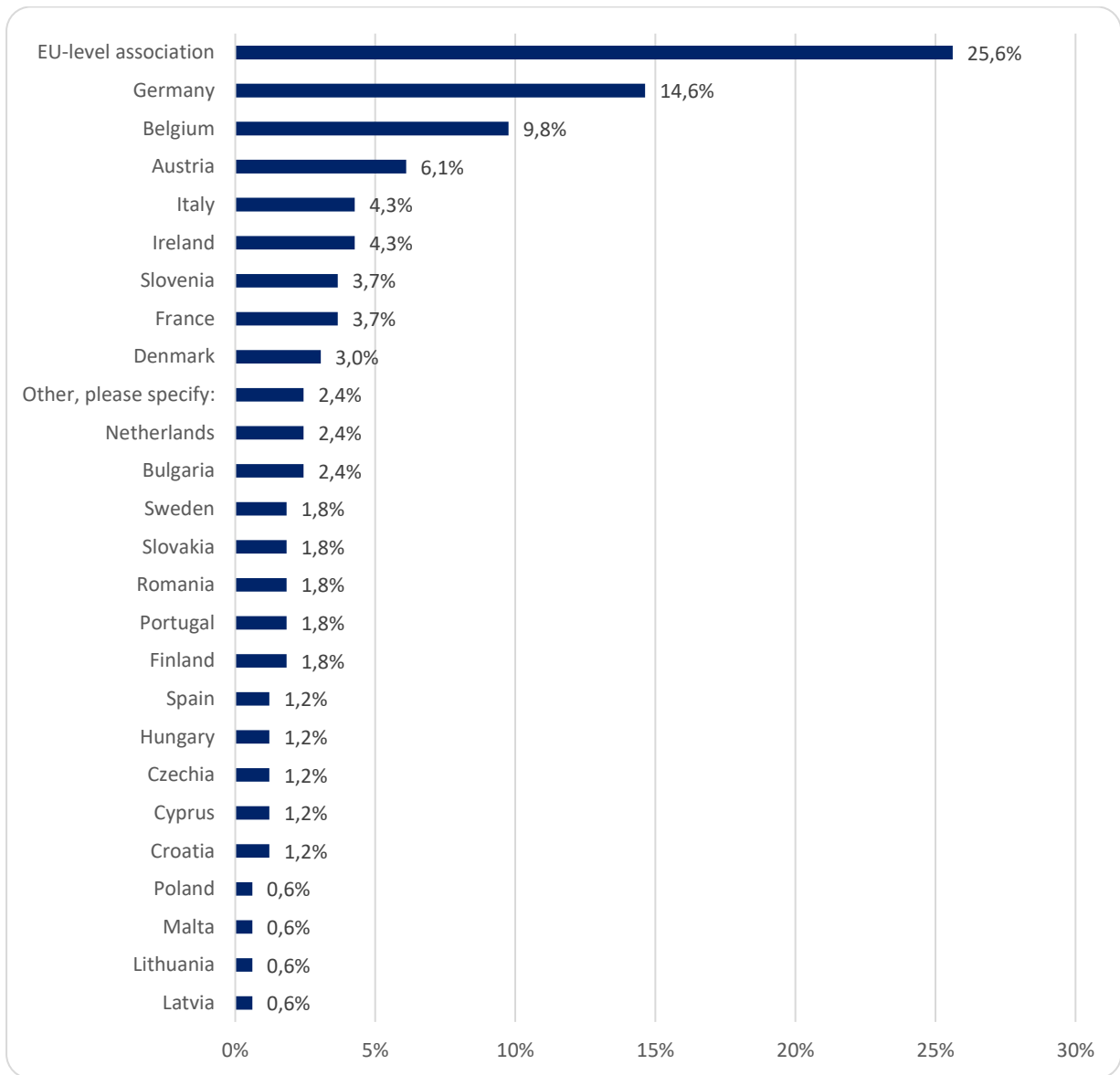
Of 164 respondents to the targeted survey, the view of business associations (40.2%, n=66) and traders (10.4%, n=17) is represented with a combined total of 50.6% (n=83). Conversely, consumer associations and NGOs concerned predominantly with consumer advocacy (11.6%, n=19), European Consumer Centres (6.1%, n=10), as well as national ministries (6.1%, n=10) and national enforcement authorities (12.2%, n=20) represented a total of 36% (n=59). Academic researchers and others contributed the remaining 13.4% (n=22). Individual traders responding to the survey tended to be large firms of 250 or more staff (70.6% n=12), with many SMEs represented as members of business associations.”

Overall, one quarter (25.6%), of respondents represented EU-level associations. This was followed by respondents from Germany (14.6%), Belgium (9.8%) and Austria (6.1%). There was representation from at least one individual respondent across most member states (24/27; no respondents identified as either an Estonian, Luxembourger or Greek stakeholder). Respondent organisations largely operate at the EU-Level (56%). Looking at respondent stakeholder categories by country breakdown, of the 66 Business associations, 32 identified as EU-level associations, while a further 12 identified as being German associations. There were 6 Belgian associations, 5 Italian, 2 from France and Sweden respectively, and 1 association each from Austria, Bulgaria, Czechia, Finland, Netherlands, Spain and ‘Other’. For consumer associations (n=19), 6 identified as from Austria, while 4 were EU-level associations and 3 from Germany. Beyond this, there were also individual consumer associations responding from Croatia, France, Germany, Italy, Portugal, Romania and Slovakia. National enforcement authorities and national ministries (n=30) represented 18.3% of respondents overall, with 4 respondents from Slovenia; 3 from Austria; 2 from Belgium, Bulgaria, Denmark, Netherlands, Romania, Slovakia; and 1 each from Croatia, Cyprus, Czechia, Finland, Hungary, Ireland, Lithuania, Poland and Spain, respectively.

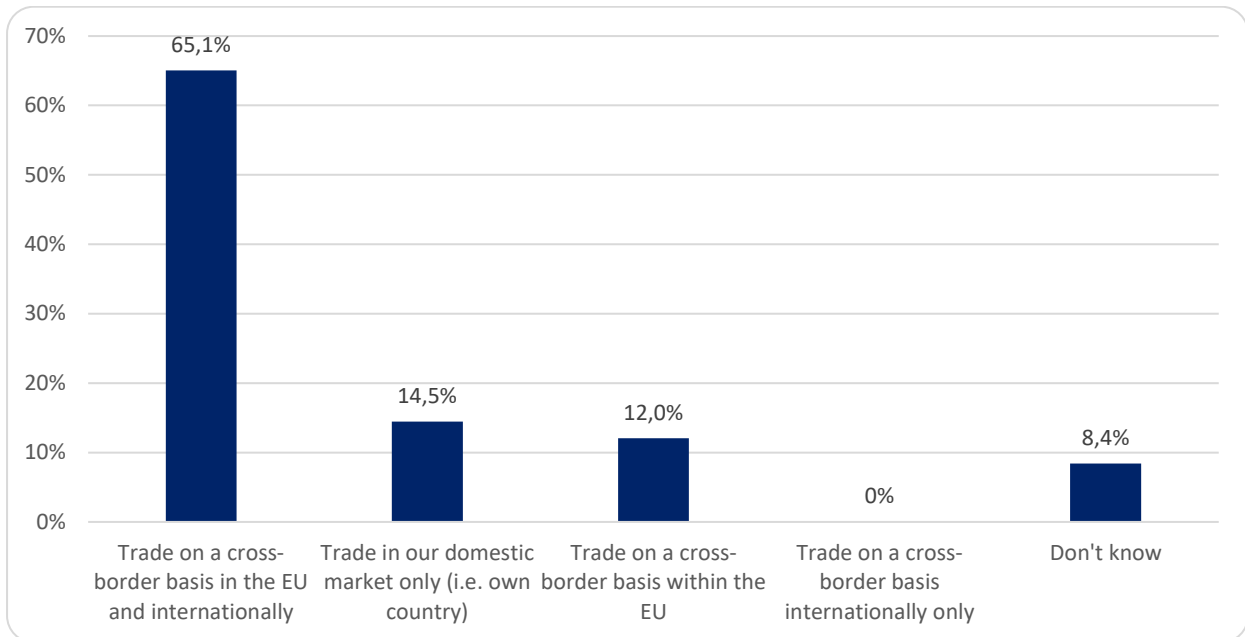
65% of enterprises (traders and SMEs speaking independently, as well as those represented through associations) engage in trade on a cross-border basis within the EU and internationally. Only 12% of enterprises operate cross-border but solely within the EU, emphasising the importance of minimising regulatory burden/ensuring clarity for EU SMEs that trade cross-border (as most will also operate internationally). The above-mentioned breakdown of stakeholders was anticipated in the development of the targeted survey, particularly the strong representation of business associations. It is worth noting, that numerically underrepresented groups such as the EU consumer association have been considered carefully with this bias in mind, and with due significance given to their position

papers and survey responses as representative of many national level consumer associations, and with contributions which are grounded in extensive academic research.

**Figure 56: Q5. Which country are you responding from? (n=164)**



**Figure 57: Q7. Does your enterprise (or for associations, enterprises belonging to your association) trade on a cross-border basis? (n=83)**

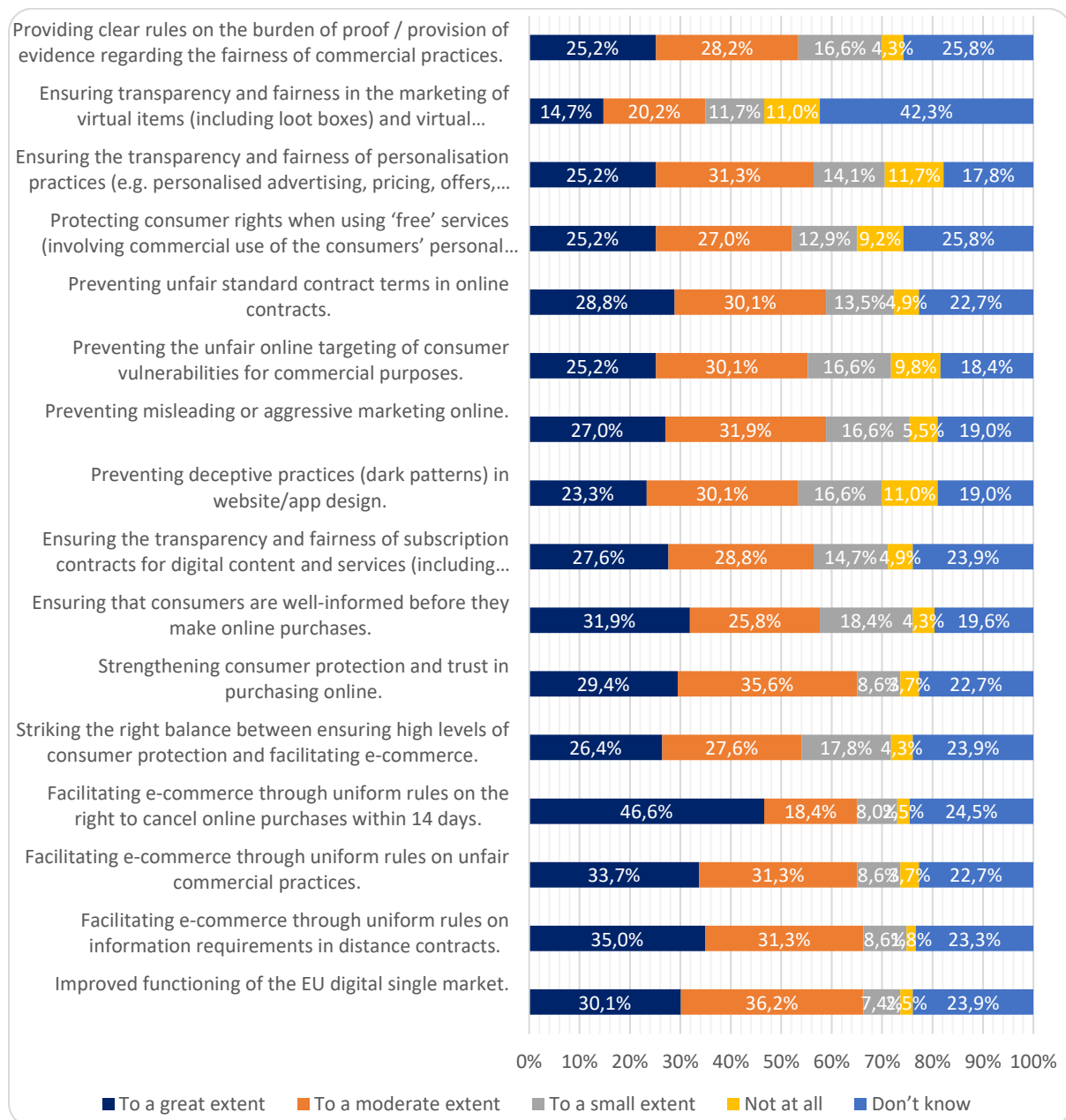


### 1.3.2 Responses to the consultation

#### 1.3.2.1 Review of digital fairness in EU consumer law and the application of the Modernisation Directive

Looking at the (Q10) aggregated data from all stakeholders, inclusive of ‘don’t know’ responses, highlighted that the most prominent contribution of the EU consumer law directives as perceived by stakeholders is the facilitation of e-commerce through uniform rules on the right to cancel online purchases within 14 days (46.6% to a great extent). Stakeholder uncertainty was greatest regarding ensuring transparency and fairness in the marketing of virtual items (42.3% do not know, 11% not at all).

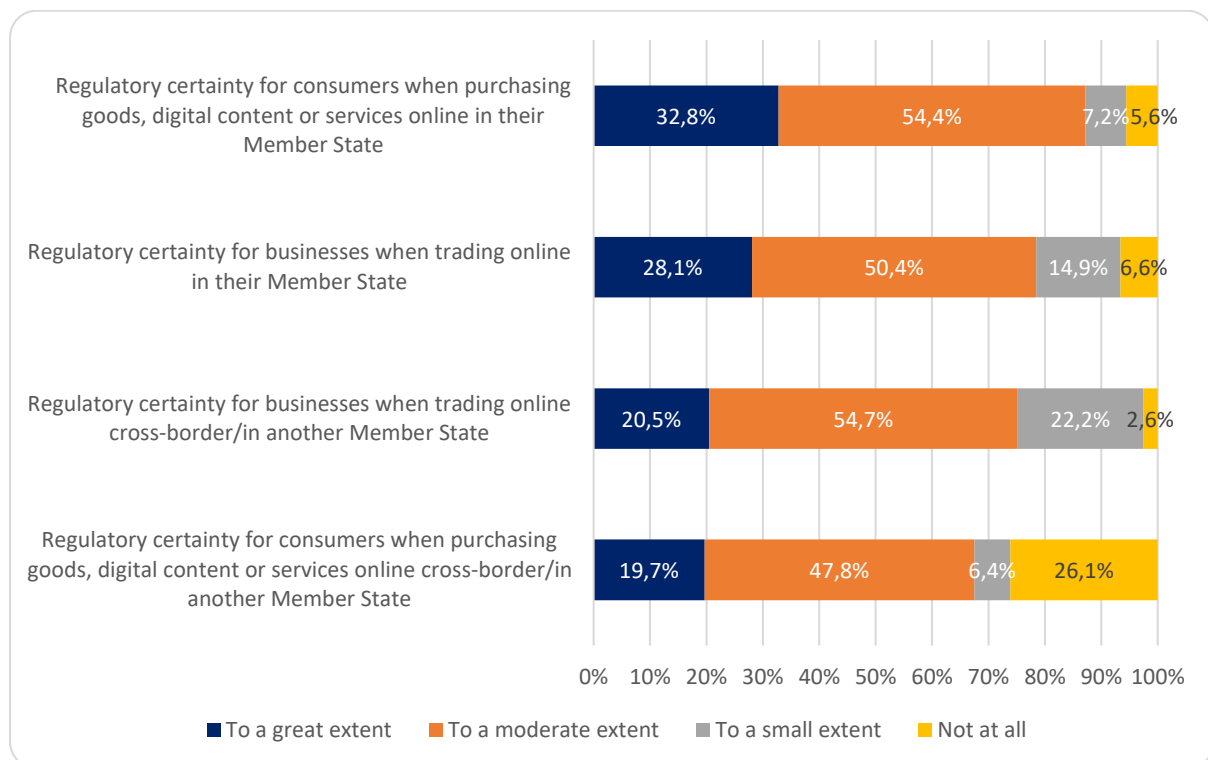
**Figure 58: Q10. To what extent have the EU consumer law Directives contributed towards achieving the following objectives? (n=163)**



Beyond these stand-out points, the most positively perceived impacts of the EU consumer law directives are the role it has played in strengthening consumer protection and trust, facilitating e-commerce through uniform rules on both unfair commercial practices and distance contracts; and the overall functioning of the EU digital single market.

Responses to Q12 highlighted stakeholders have reported an increase in regulatory certainty (between 73.4 and 94.4.4% positive across all sub. Qs), although one quarter (26.1%) reported negatively that cross-border purchasing of goods. Digital content or services in another MS had 'not at all' been improved.

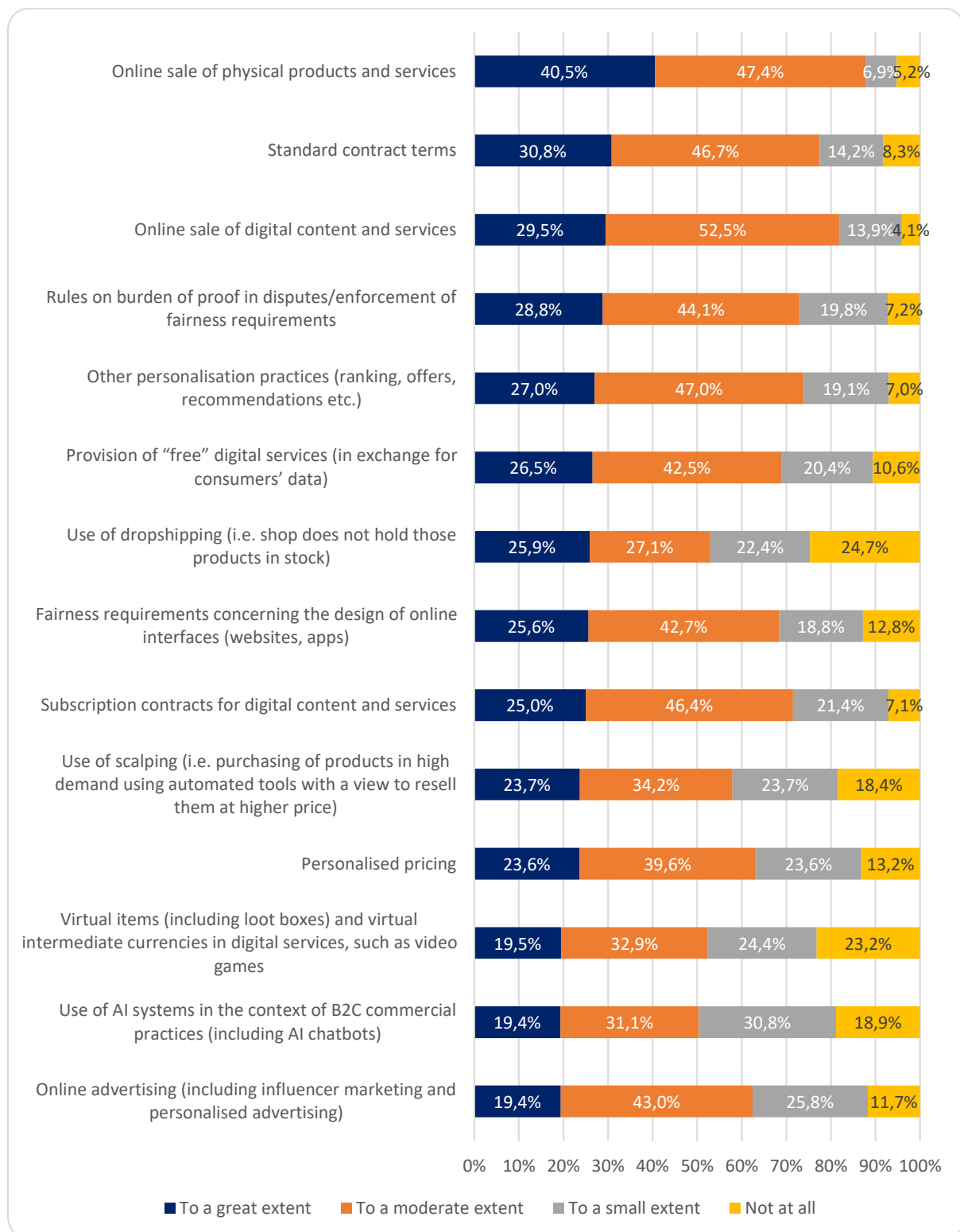
**Figure 59: Q12. Overall, to what extent have the EU consumer law Directives provided regulatory certainty in the digital environment (n=157)**



Q13 investigated the extent of regulatory certainty provided by the Directives within specific areas. All the specific areas analysed were perceived to have gained a moderate extent of regulatory certainty from the Directives. The areas which are perceived by most respondents to have been provided with **legal certainty** are: **digital content and services** (95.9%, n=123), **online sale of physical products and services** (94.8%, n=121), rules on **burden of proof** (92.8%, n=119), **subscription contracts** for digital services (92.9%, n=119), personalisation practices relating to **ranking and offers** (93%, n=119), and **standard contract terms** (91.7%, n=117).

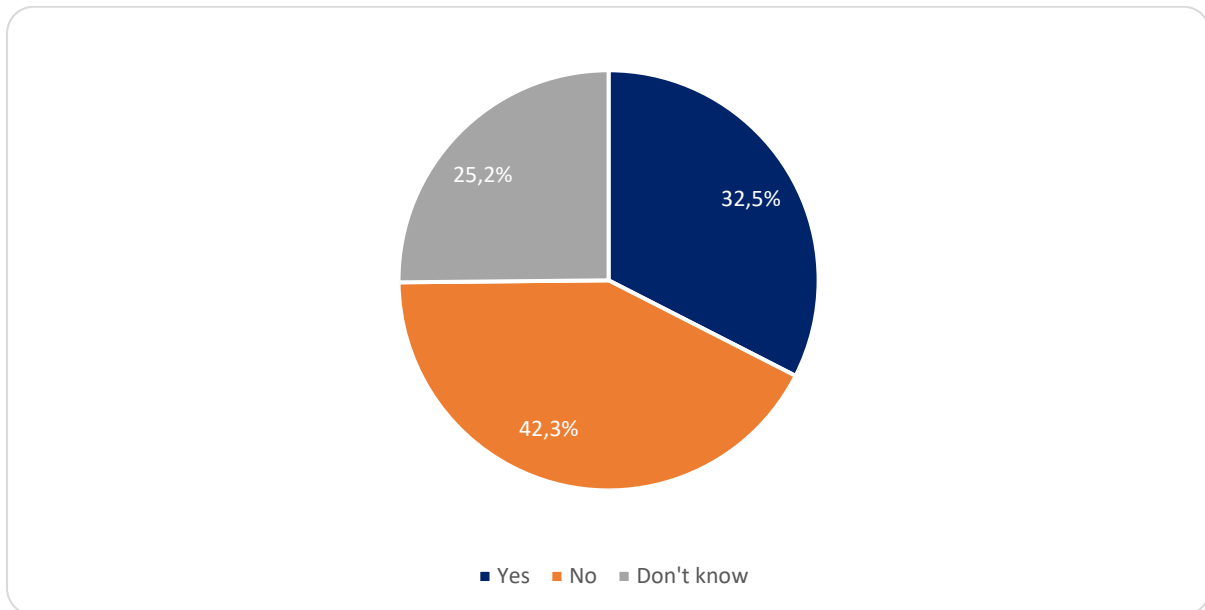


**Figure 60: Q13. To what extent have the EU consumer law Directives provided regulatory certainty about the applicable rules in the following specific areas? (n=128)**



When the survey investigated the topic of legal gaps, it can be seen from Q14 that the responses are vastly divided. A moderate majority of responses recorded an absence of outstanding legal gaps (42.3%). However, it must be considered that almost one third of the respondent (32.5%) perceive that there are outstanding legal gaps.

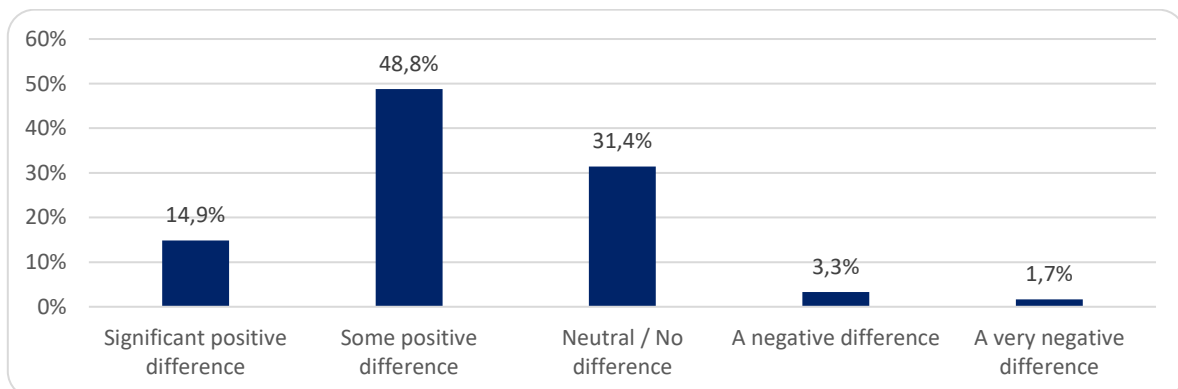
**Figure 61: Q14. Do you perceive that there are any outstanding legal gaps? (n=163)**



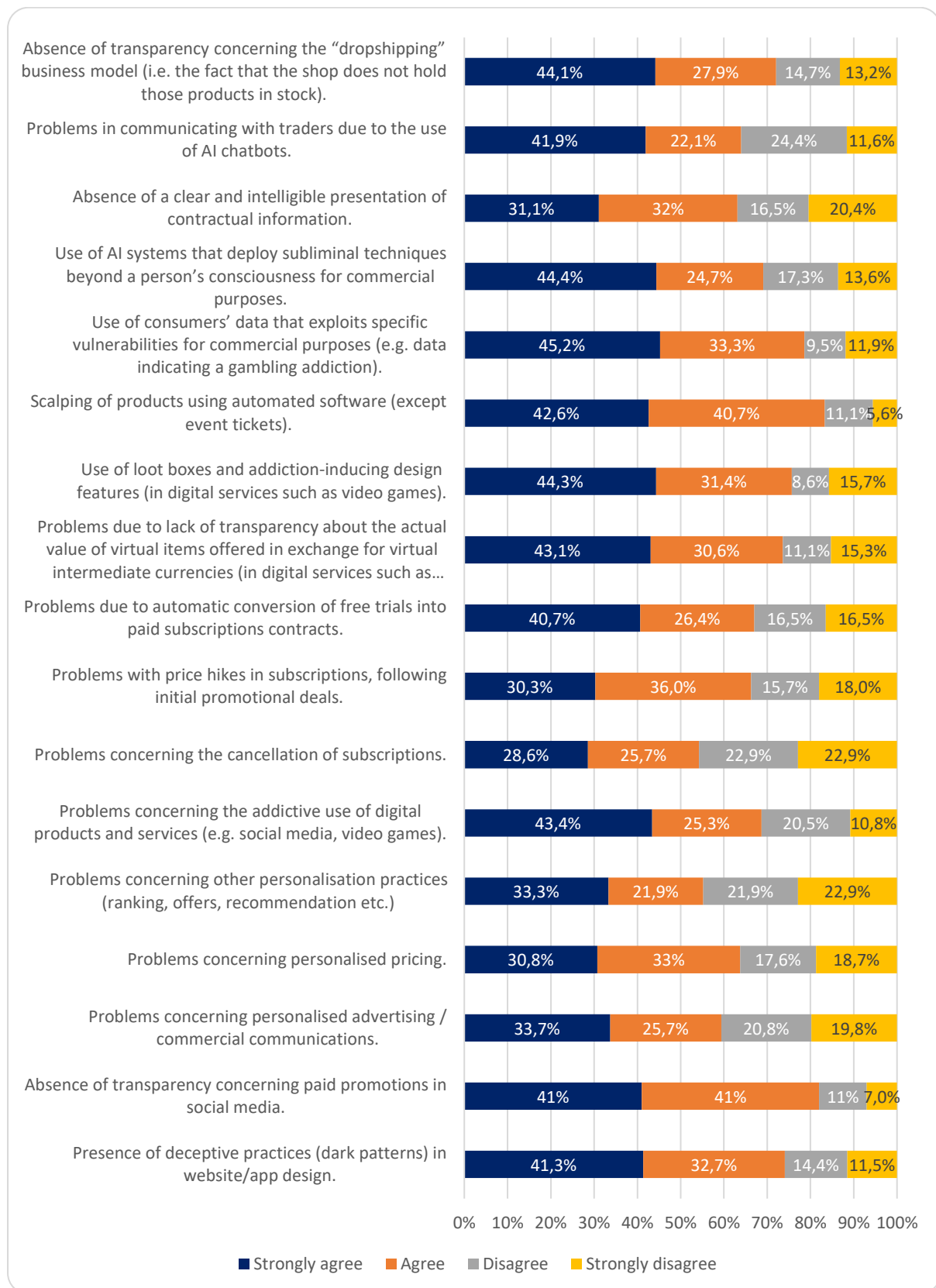
Questions about problematic practices

When, in Q16, respondents were asked which of the following practices were problematic, a number of 'don't know' responses were recorded. Although these numbers are not relevant when seeking to understand the most pressing perceived issues from stakeholders in the above graph, it nonetheless speaks to the potential high level of uncertainty among respondents as to what may constitute a problematic practice in certain cases and contexts. Likewise, a further suggestion that it might be too premature to ensure fitness for purpose of the Modernisation Directive can be seen from Q66. The application of the Modernisation Directive was perceived overall to strengthen the "fitness for purpose" and relevance of the underlying EU consumer law Directives concerned with addressing problematic practices.

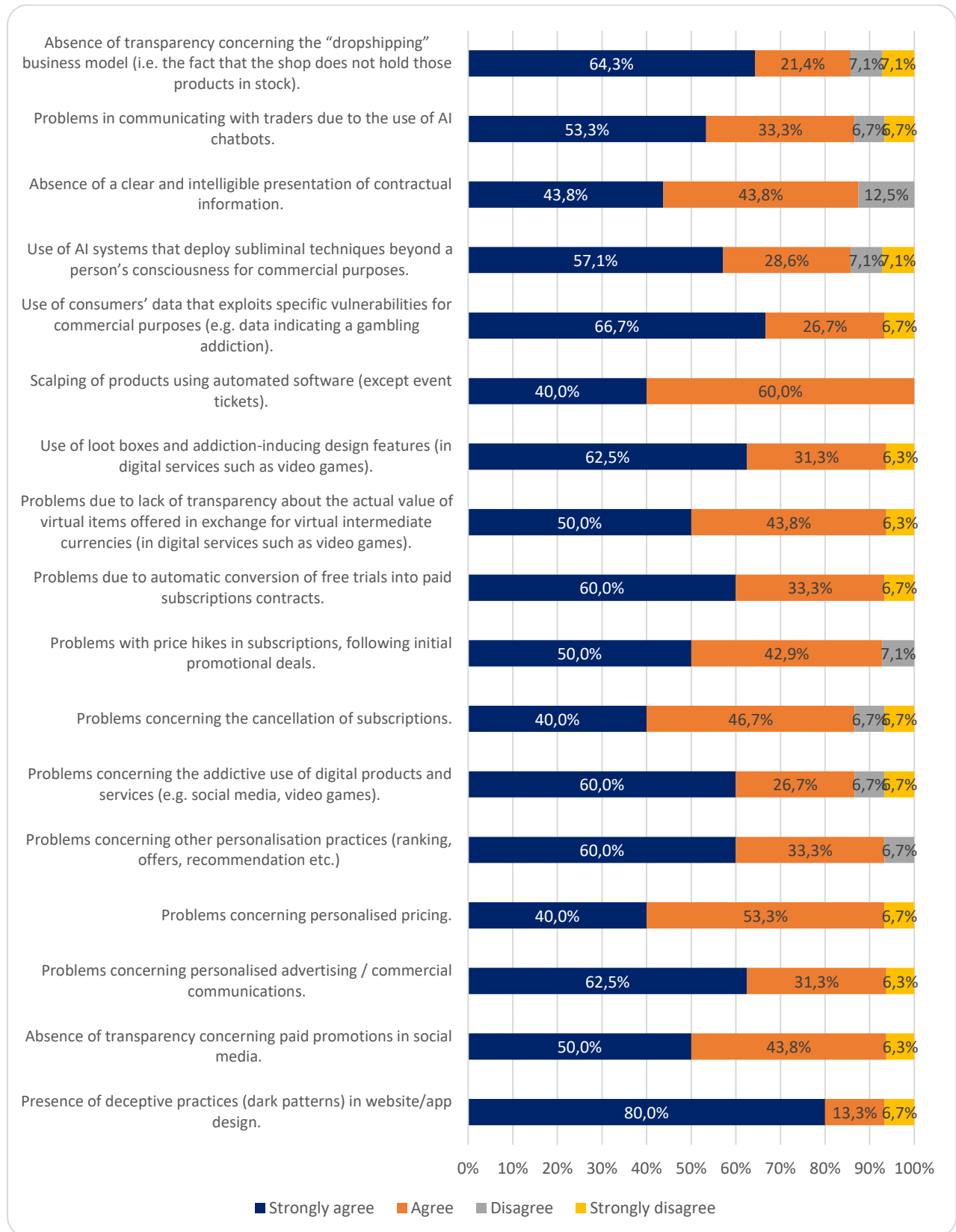
**Figure 62: Q66. How far has the application of the Modernisation Directive strengthened the 'fitness for purpose' and relevance of the underlying EU consumer law Directives concerned with addressing problematic practices? (n=121)**



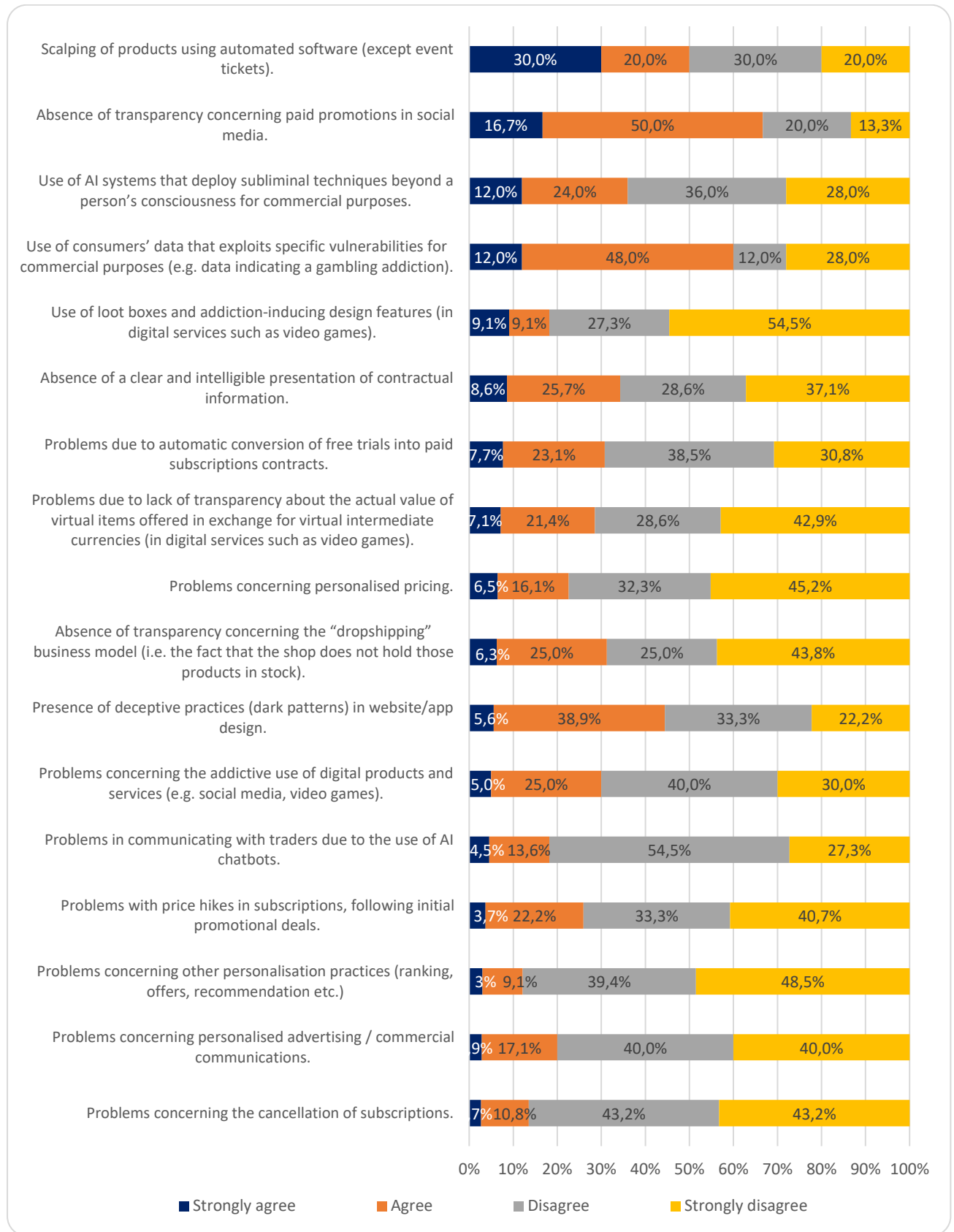
**Figure 63: Q16. To what extent do you agree or disagree that the following practices are problematic? (n=105)**



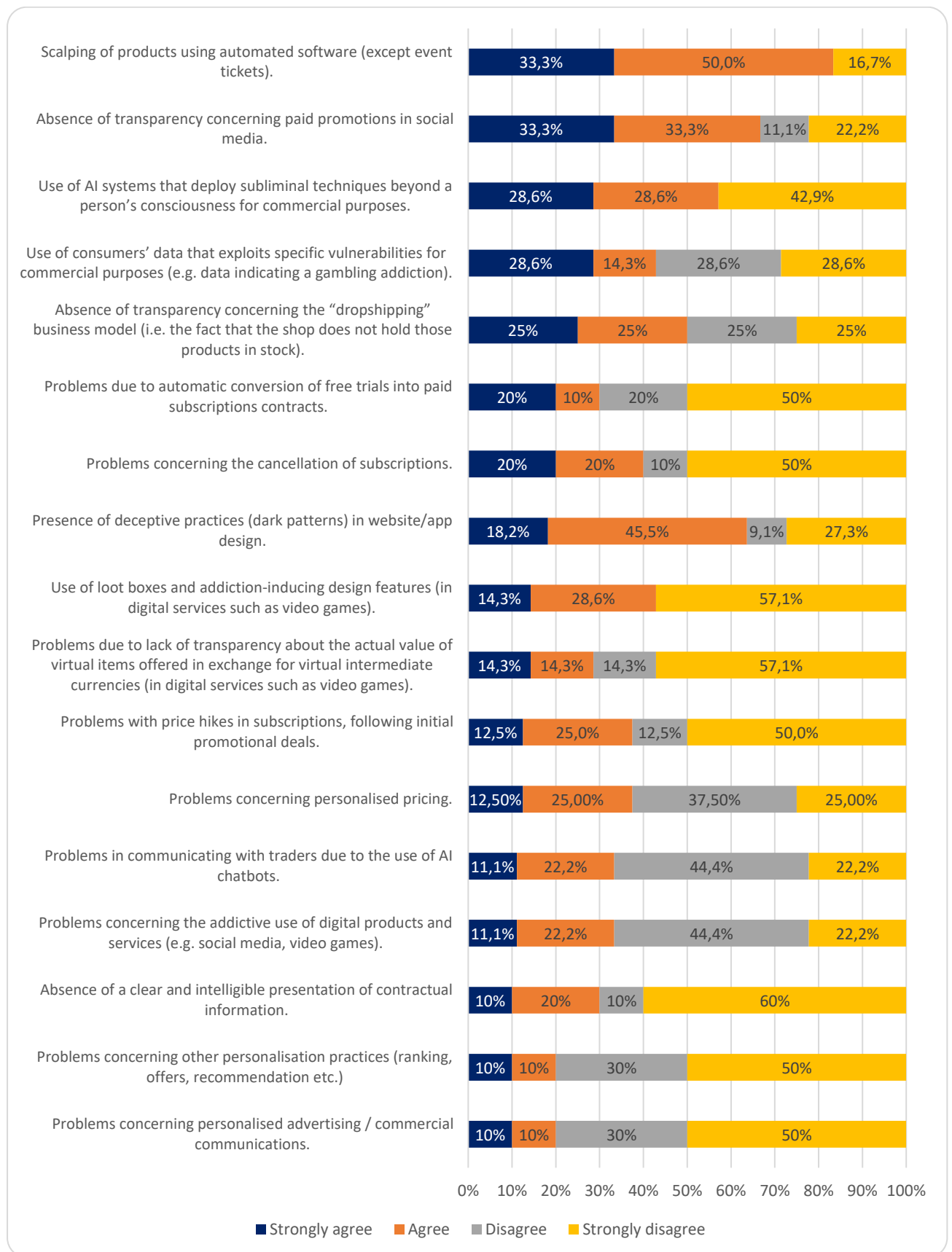
**Figure 64: Q16. To what extent do you agree or disagree that the following practices are problematic? Consumer Associations/NGOs**



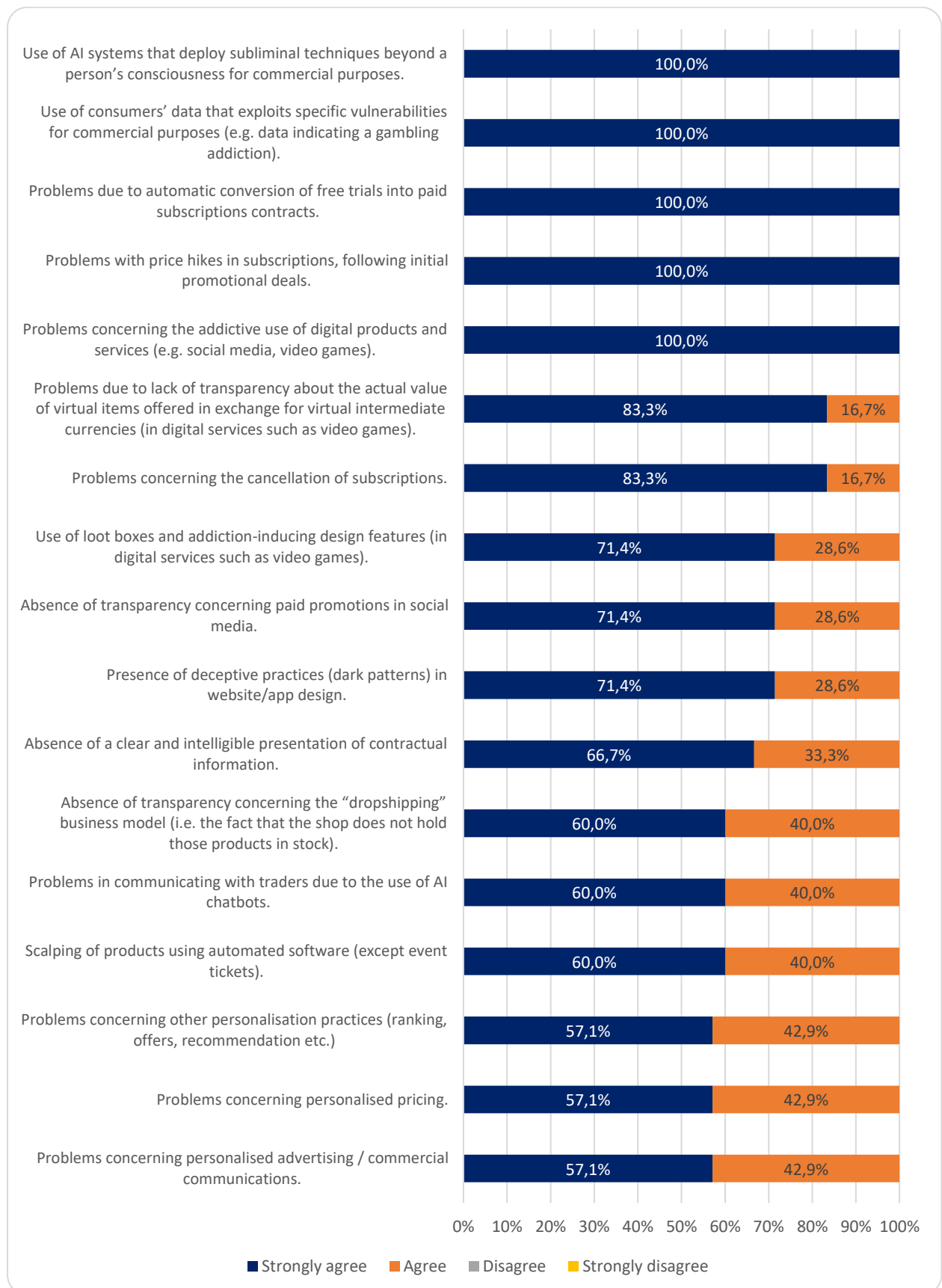
**Figure 65: Q16. To what extent do you agree or disagree that the following practices are problematic? Business Associations**



**Figure 66: Q16. To what extent do you agree or disagree that the following practices are problematic? Traders**



**Figure 67: Q16. To what extent do you agree or disagree that the following practices are problematic? National Ministry**

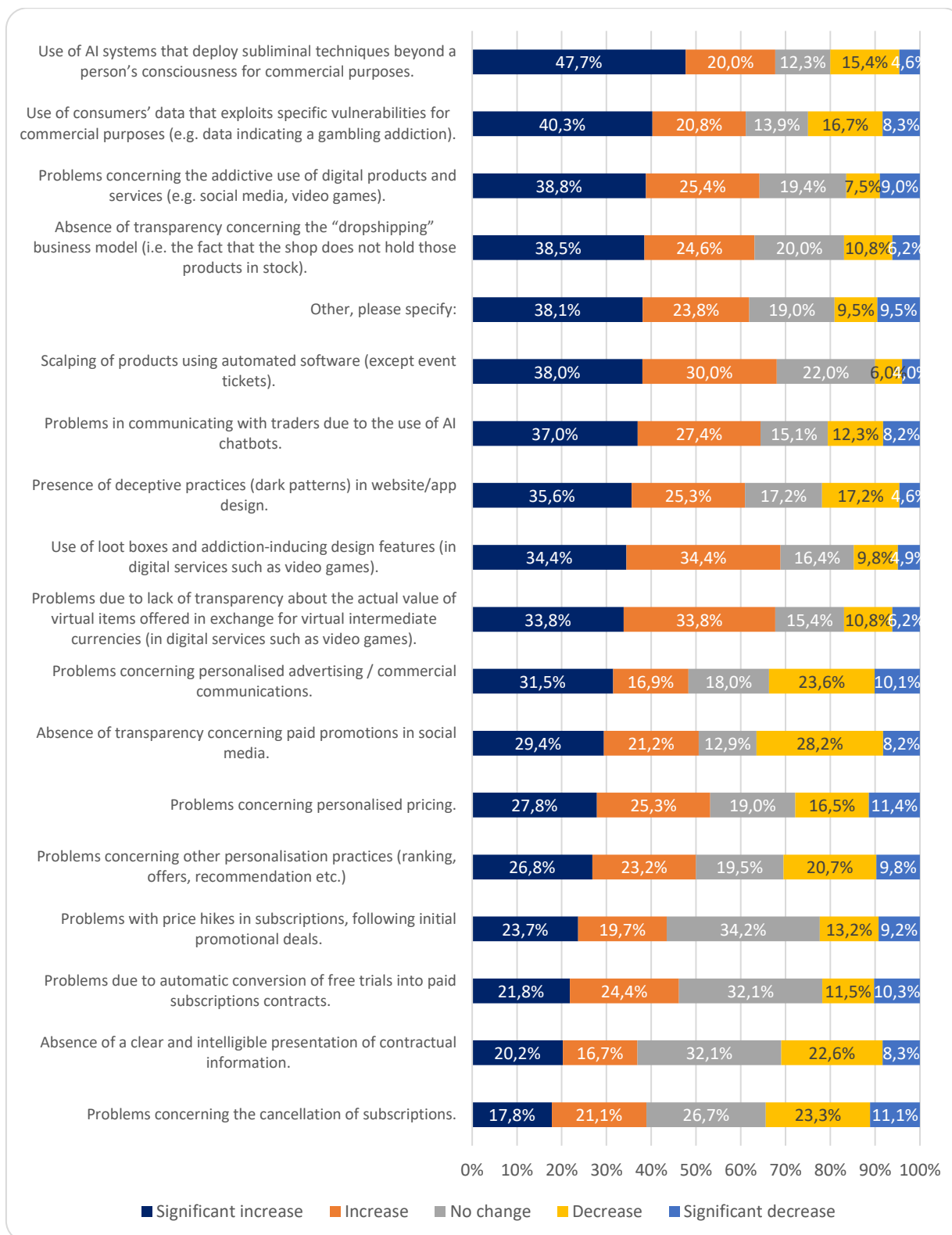


Illustrative of the divergence in stakeholder positions, figures 19-22 present the perceptions by different types of stakeholders of practices that are problematic in Q16 of the targeted survey. Business Associations and Traders are aligned in strongly disagreeing far more frequently that practices are problematic. Conversely, National Ministries and Consumer Associations show far greater concern in relation to these practices, with up to 100% of consulted ministries viewing several practices as problematic.

Despite this, it is clear in the full graph below for Q17 that stakeholders perceive potentially problematic B2C digital practices as increasing in a general trend, with highest share of “significant increase” selected for AI systems deploying subliminal techniques beyond a person’s consciousness for commercial purposes (48% reporting an increase) and highest score in overall increase for use of loot boxes and addiction inducive design features (69% combined “significant increase” and “increase”). Although all issues have been perceived as more increasing than decreasing, it is worth noting that personalised pricing and problems concerning the cancellation of subscriptions showed the greatest perceived decrease as problems (11.4% and 11.1%, respectively), both of which have been areas of particular interest to legislators and consumer protection authorities, both across the EU and globally, in the past 5 years.

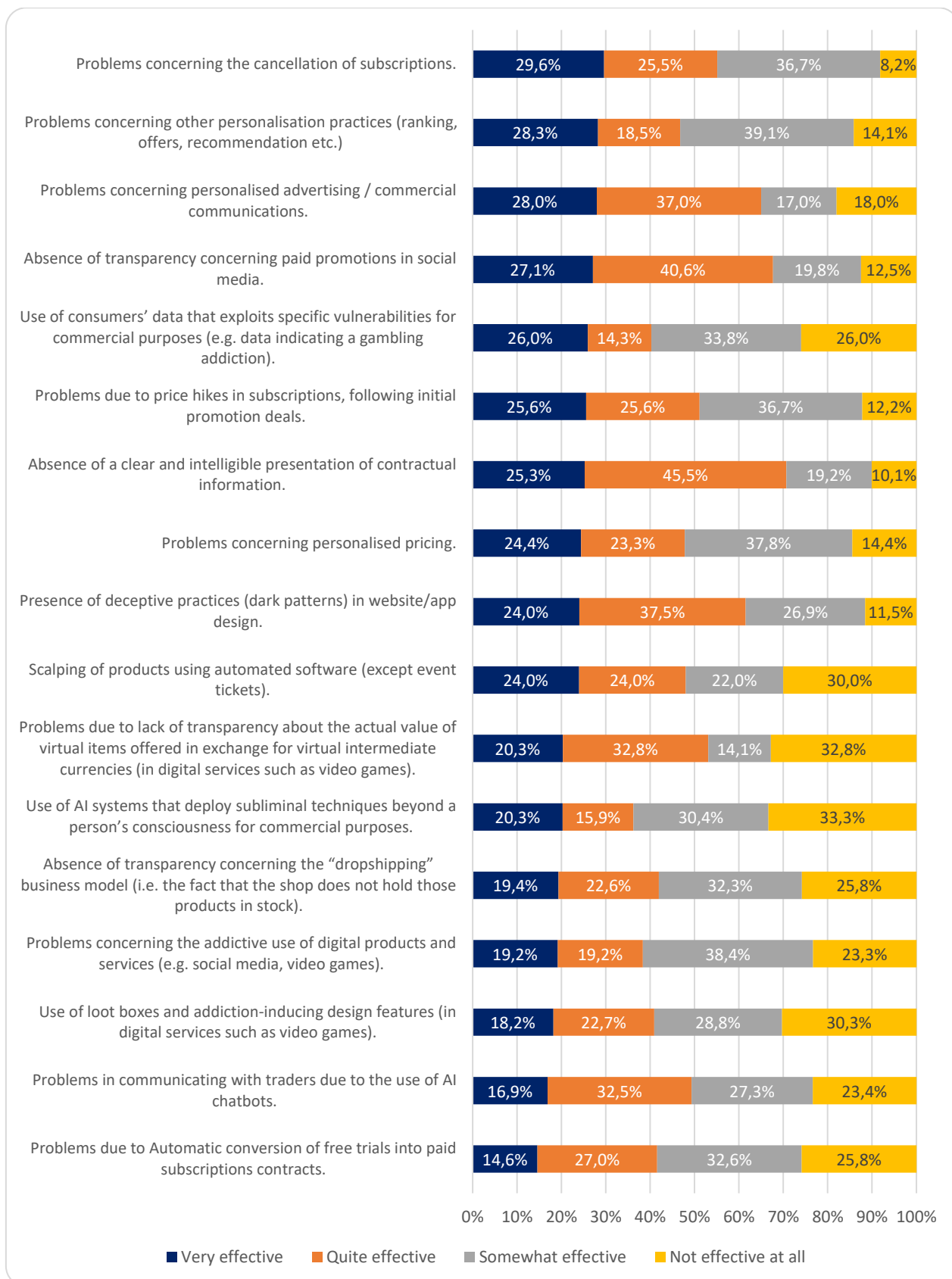


**Figure 68: Q17. In the past five years, how far have the following potentially problematic B2C digital practices increased or decreased in frequency? (n=90)**



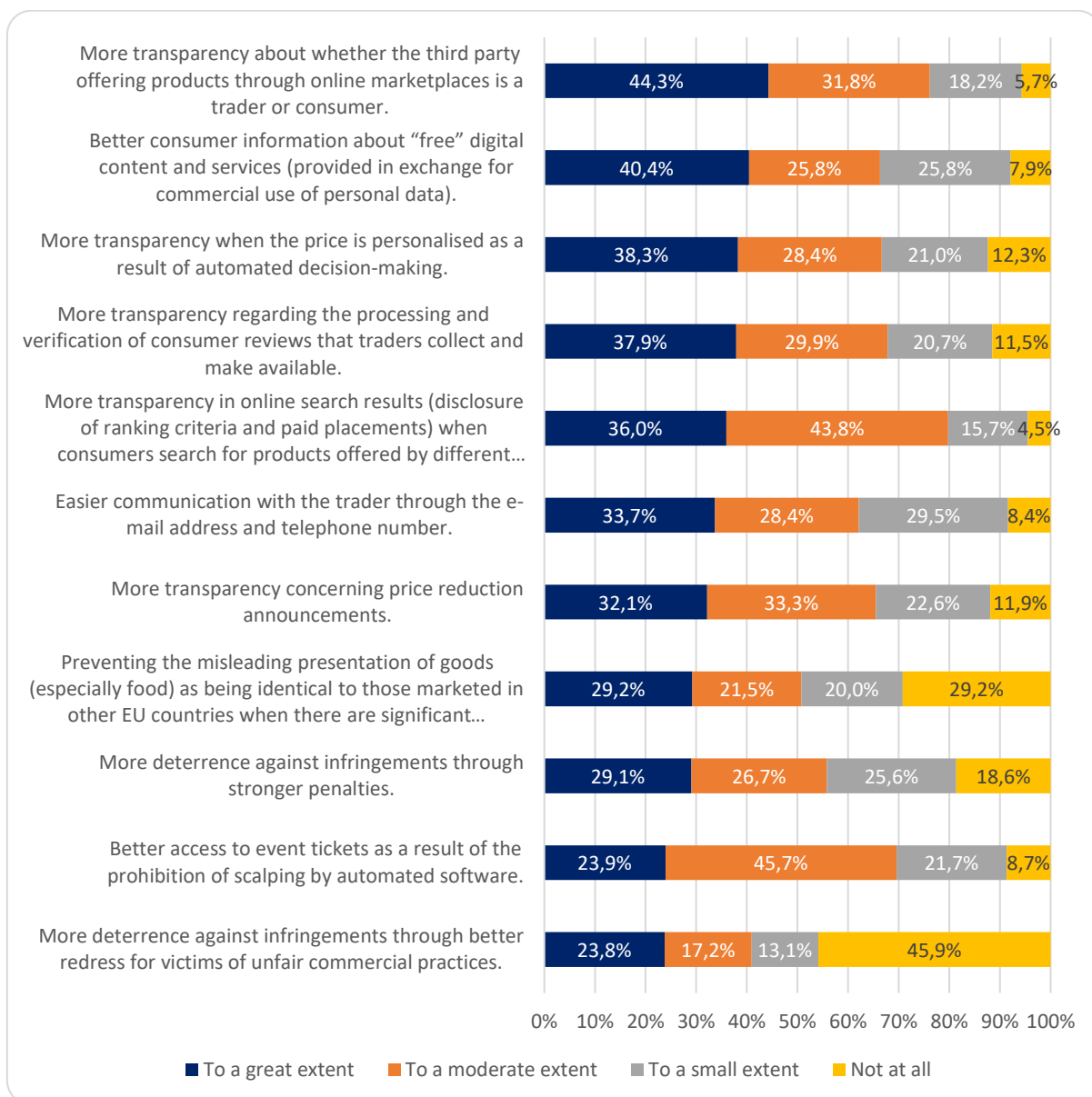
The chart below (Figure 69, Q19) highlights to what extent the three Directives are perceived to have been effective in tackling problematic practices. The three Directives are being perceived to be effective to tackle all the problematic practices listed. Problematic practices such as problem concerning the cancellation of subscription, problems concerning personalised advertising (ranking, offers, recommendation etc.), and problem concerning personalised advertising/commercial communication scoring the highest percentages, with respectively 29.6%, 28.3% and 28.0% of stakeholders indicating the directives being “very effective” in addressing them. Therefore, the data underlines that the rules are regarded to be overall effective in addressing the multiple problematic practices.

**Figure 69: Q19. To what extent have the three core EU consumer law Directives been effective in tackling perceived problematic B2C practices? (n=104)**



The Modernisation Directive and its likely impacts on effectiveness and relevance of EU consumer law

**Figure 70: Q21. To what extent, in your opinion, has the Modernisation Directive strengthened consumer protection in the following areas it covers? (n=122)**

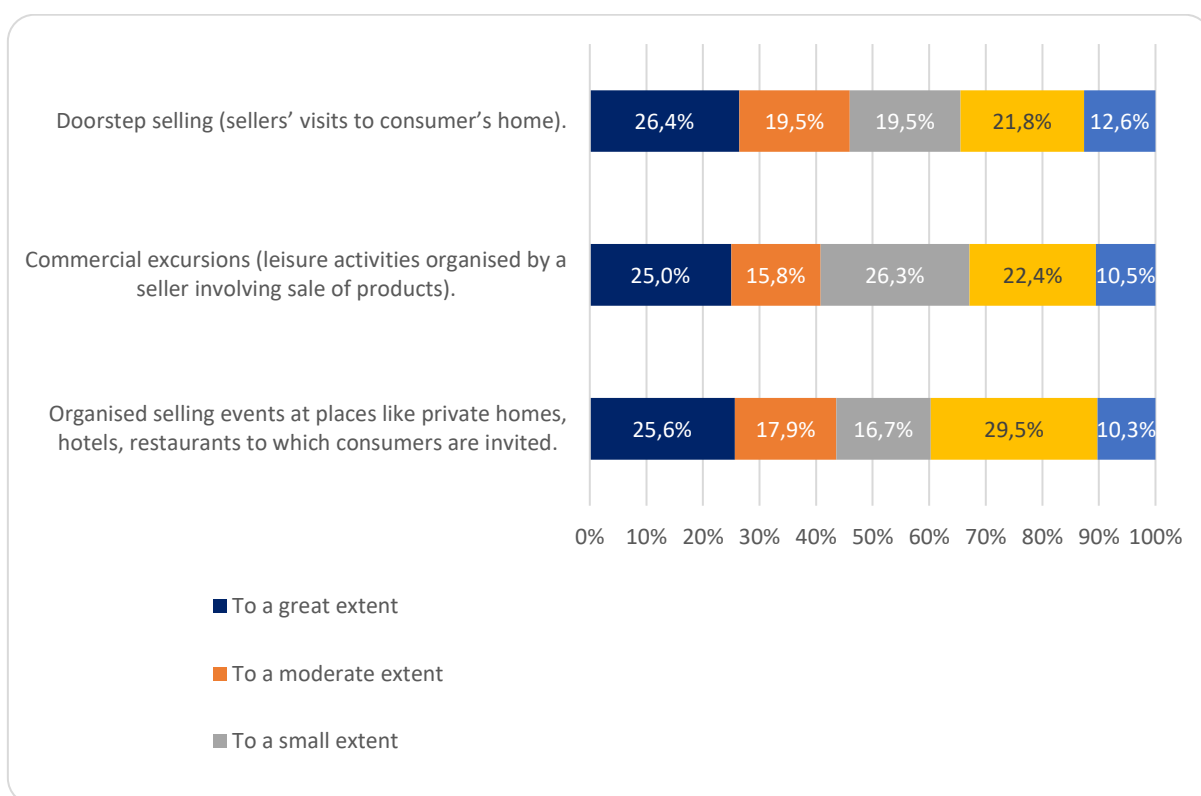


Respondents have reported strengthened consumer protection across several areas under the Modernisation Directive relating to transparency and provision of information to consumers. Respondents pointed to greater transparency about the status of third parties as either traders or consumers (76.1% to a great or moderate extent) and greater transparency in online search result ranking criteria and paid placements (79.8%). Conversely, 45.9% of respondents reported no effect in terms of deterring from infringements through better redress for victims of unfair commercial practices, followed second by the prevention of dual quality goods (especially food) as unimpacted (29.2%).

Regarding **doorstep selling, commercial excursions and sales events**, although a non-digital sector, these sectors were included in the targeted consultation as they are relevant

to the Modernisation Directive and to changes introduced such as the regulatory option for Member States to extend the Right of Withdrawal for doorstep selling from 14 to 30 days. , Two questions (Q22, Q23) were included about the sector to ascertain the perceived extent of detriment and what should be done about any outstanding challenges in terms of measures to improve the situation.

**Figure 71: Q22. Do you consider that consumers suffer detriment due to unfair commercial practices (i.e. pressure selling, misleading information) in the context of the following selling techniques taking place outside the seller’s regular business premises (n=87)**

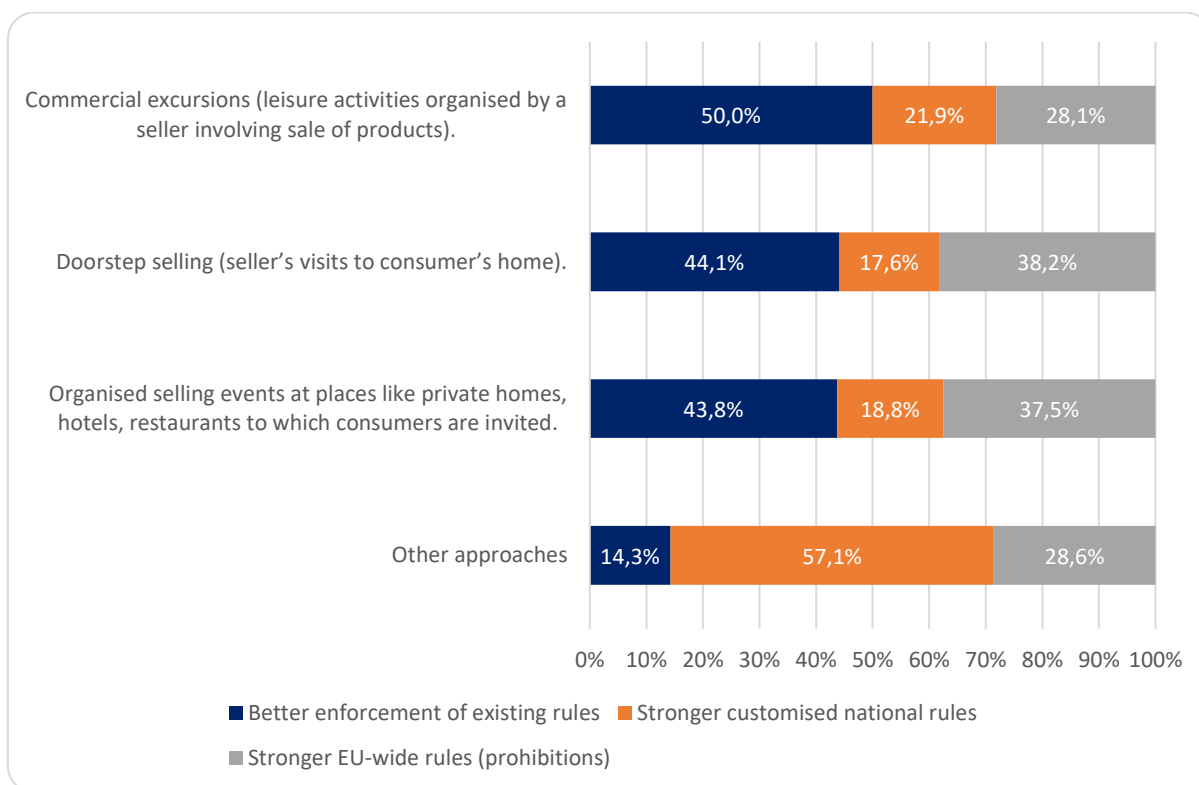


Regarding doorstep selling, commercial excursions and sales events, respondents stated that detriment had been experienced due to techniques such as pressure selling or misleading information in respect of:

- Doorstep selling (26.4% to a great extent and 19.5% to a moderate extent);
- Commercial excursions (25.0% to a great extent and 15.8% to a moderate extent); and
- Organised settings to which consumers are invited (25.6% to a great extent and 17.9% to a moderate extent).

However, it should be noted that 40.6% of respondents indicated that they did not know. This suggests that many stakeholders are not familiar with the business model and the extent to which there may be misleading practices. Only respondents expressing a view were analysed.

**Figure 72: Q23. What measures are needed to protect consumers better in such cases? (n=34)**



Regarding **which types of measures might be needed to address problems** in relation to doorstep selling and commercial excursions, better enforcement of the existing rules scored the highest. This was suggested by 50% of respondents overall in the case of commercial excursions and 44% in the case of doorstep selling and 43.8% for organised selling events to which consumers are invited. However, stronger rules at national level were supported by 21.9% of respondents in the case of commercial excursions and 17.6% for doorstep selling and 18.8% for organised selling events to which consumers are invited. Lastly, regarding those favouring EU-wide rules and/ or the prohibition of these practices were supported by 28.1% of respondents in the case of commercial excursions and 38.2% for doorstep selling and 37.5% for organised selling events to which consumers are invited.

It should be noted that the Modernisation Directive has however already strengthened EU consumer law in respect of unsolicited visits to consumers home and commercial excursions by extending the Right of Withdrawal (RoW) to 30 days from 14 days and providing for possibility not to apply exemptions from the RoW, as regulatory options for Member States.

Looking further at Q23 and Q23 by disaggregated stakeholder type, it is clear that divergent views exist between consumer-oriented organisations, Ministries and public authorities, to those of business associations and traders:

**Q22. Do you consider consumers suffer detriment due to unfair practices such as:**

**1. Doorstep selling (visits to a consumer's home):**

There were 87 individual responses to Q22.1, the largest proportion of which came from business associations (32%, n=28), of these 28, none saw doorstep selling as causing great levels of consumer detriment, with 3 not recognising this as a method used in the EU country where their members operate. **13 of 28 (46% business associations did not see**

**doorstep selling as an issue at all**, and 11 (39%) believed it may cause small detriment to the consumer. Likewise, of 6 respondents identifying themselves as traders, only 1 believed that doorstep selling causes detriment to a great extent, with a further 1 seeing it as to a small extent, the remaining 4 either claiming no consumer detriment or that the practice is not used.

Conversely, of the 17 **national enforcement authorities responding to Q22.1**, **8 (47%) see doorstep selling as a causing consumer detriment to a great extent**. This position is shared by the majority of national ministries, who see this as causing consumer detriment to a great or moderate extent (5 out of 7, 71%).

Of the 34 individual responses to **Q23.1**, better enforcement of existing rules relating to doorstep selling is seen as the most important measure required across different industry and consumer stakeholders, supported not only by the singular business association respondent, but also supported by 6 out of 9 national enforcement authorities, and 3 out of 5 European Consumer Centres (ECC). Second to this is the need for stronger EU-wide rules (prohibitions), which were supported by an academic respondent, 6 out of 11 NGO consumer associations, and 3 out of 5 national ministries.

A more detailed disaggregation of the targeted responses to survey questions on doorstep selling is provided in the application report on the Modernisation Directive which disaggregates the responses from Ministries, CPAs and consumer associations by Member State.

## **2. Commercial excursions (leisure activities organised by a seller involving sale of products):**

The 76 respondents to Q22.2 follow a similar breakdown by stakeholder as seen in 22.1, namely that the largest proportion of respondents (n=27) identified as **business associations (36% of all respondents)**, just over half of whom believe that this is not an issue at all in relation to consumer detriment, with a further 40% seeing commercial excursions as only contributing a small extent to consumer detriment. Moreover, 25% (n=5) or responding national enforcement authorities view commercial excursions as causing consumer detriment to a great extent. In fact, business associations and traders (n=16, 21% of all respondents) were the only stakeholders by type to claim that no detriment is caused to consumers through this practice.

**Q23.2 Response of measures to protect against this:** Traders (1), Business associations (1), European Consumer Centres (3), National level ministries (3), enforcement authorities (4), and other (2) are aligned in their view that better enforcement is once more the best approach to protect against consumer detriment caused by commercial excursions (n=14, 44% of all respondents). While 18% (n=2) of consumer associations (NGOs) agree with this, 55% (n=6) believe that stronger EU-wide rules (prohibitions) are necessary.

A detailed disaggregation of targeted responses to survey questions on excursions is provided in the application report on the Modernisation Directive which disaggregates the responses from Ministries, CPAs and consumer associations by Member State.

## **3. Organised selling events at places like private homes, hotels, restaurants to which consumers are invited:**

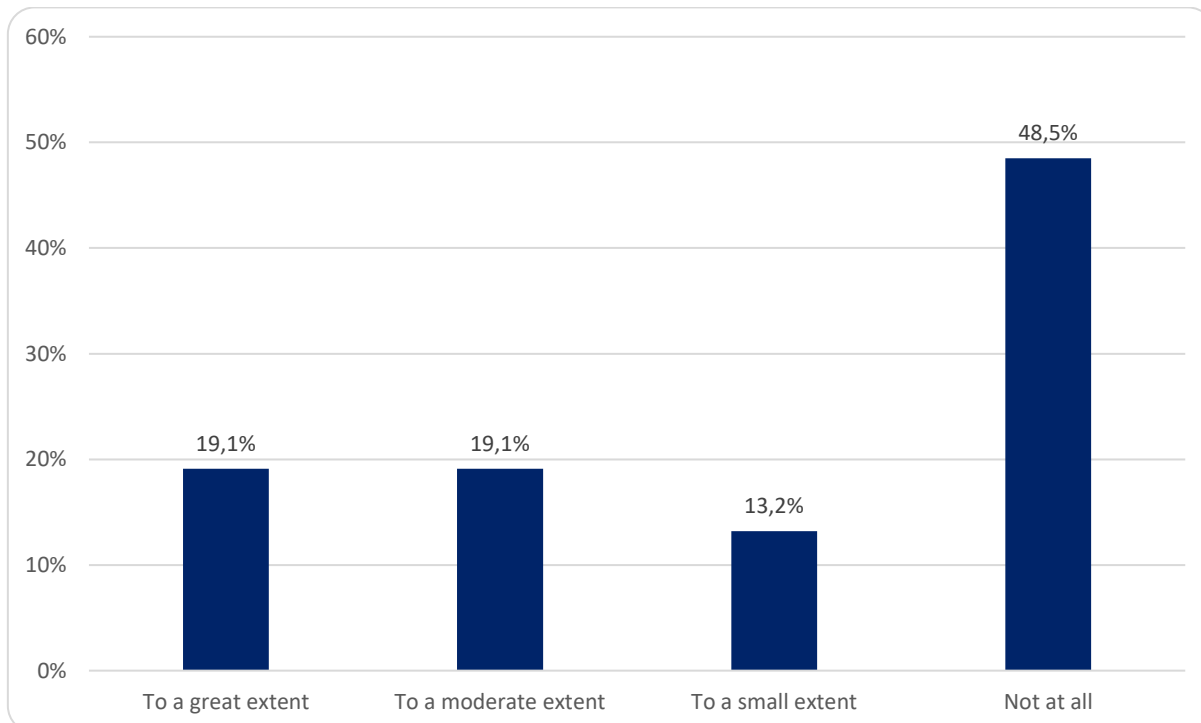
Stakeholder views on the extent to which consumer detriment is caused by organised selling events are starkest in their disaggregation by stakeholder type. Of the **27 business associations responding to Q22.3**, representing 35% of all respondents, 78% assert

that these events do not cause detriment at all. By contrast, **88% (n=14) of national enforcement authorities, see these as causing consumer detriment to at least a small extent.** On this activity consumer associations are also strongly aligned in their view, with 62% (n=8) supporting that organised selling events cause detriment to a great extent, and a further 23% (n=3) to a moderate extent. As for the other activities, **it is only those stakeholders identifying as business associations and traders that claim no detriment is caused to consumers through organised selling events.**

A detailed disaggregation of targeted responses to survey questions on excursions is provided in the application report on the Modernisation Directive which disaggregates the responses from Ministries, CPAs and consumer associations by Member State.

**Q23.3 Response of measures to protect against this:** Of the 32 stakeholders viewing organised selling events as causing harm to at least a small extent, once more better enforcement of existing rules is seen as a priority among a majority of national enforcement authorities (3), national ministries (2), traders (1), business associations (1), European Consumer Centres (4) and other (1). As seen regarding commercial excursions, a majority of consumer associations (NGOs) (55%, n=6) believe that stronger EU-wide rules (prohibitions) are required.

**Figure 73: Q24. Do you consider that consumers suffer detriment due to traders' practices of marketing goods (through their branding and presentation) as being identical to those goods in other EU countries notwithstanding their differences in composition and characteristics ('dual quality')? (n=68)**



Questions 26 and 27 of the survey asked respondents to share their views on the current approach of EU rules and the appropriate measures required to strengthen the legal framework on 'dual quality'. While Q24 shows that a majority of respondents (48.5%) do not see dual quality as a cause of consumer detriment, Q26 nonetheless highlights that

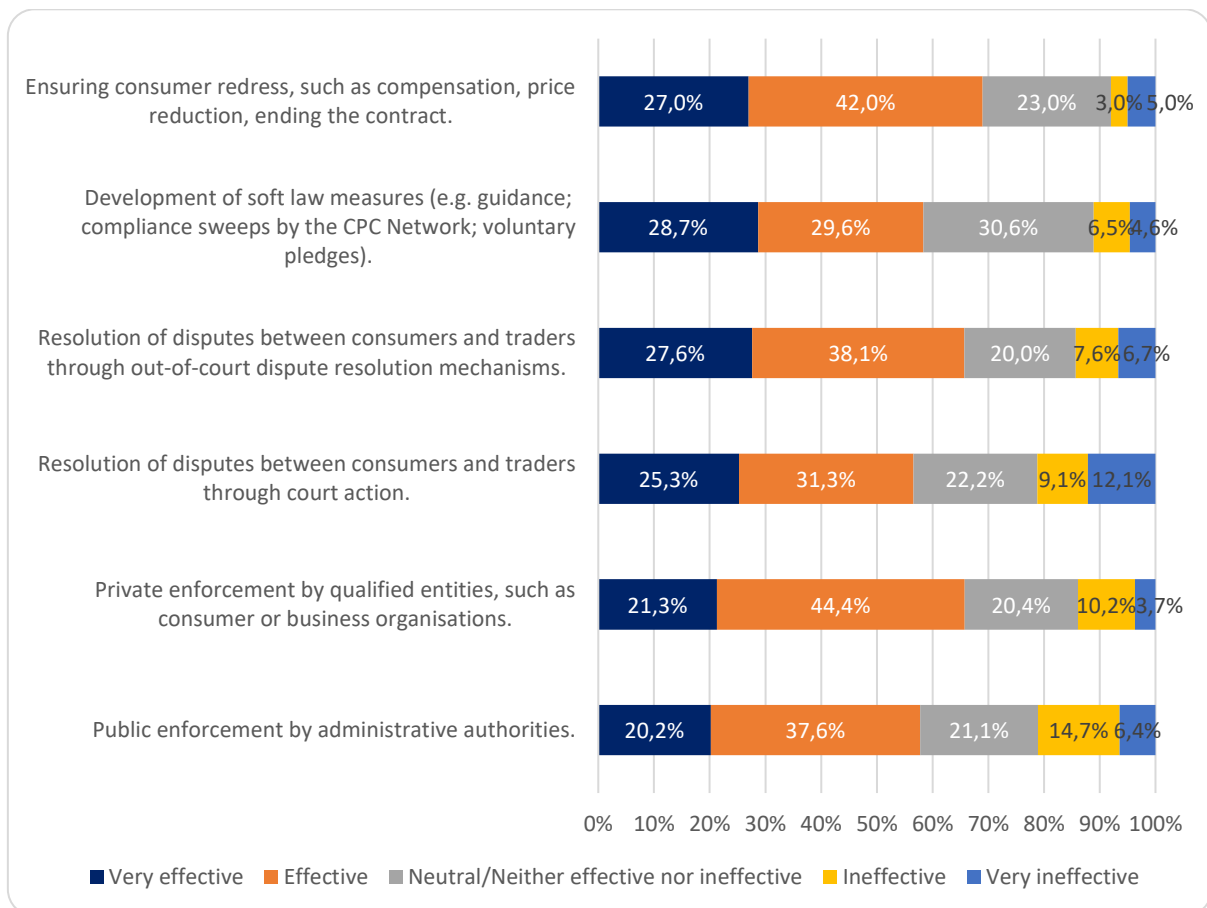


among respondents offering a view, 73.9% see that stronger legal rules are needed, in particular the introduction of ‘additional rules about informing consumers when national product versions are differentiated due to ‘legitimate and objective’ factors’ (Q27). 26% of the respondents consider that the EU rules based on case-by case assessment are adequate (Q26).

#### Enforcement and regulatory compliance

Respondents from Q31 reported positive feedback on the effectiveness of the enforcement of EU consumer law in the digital environment. Consumer redress, the resolution of dispute between consumers and traders through out-of-court dispute resolution mechanisms, and the private enforcement by qualified entities were the most effective enforcement tools/strategies with respectively 69.0%, 65.7% and 65.7% of respondents claiming them to be either very effective or effective.

**Figure 74: Q31. How effective is the enforcement of EU consumer law in the digital environment? (n=109)**



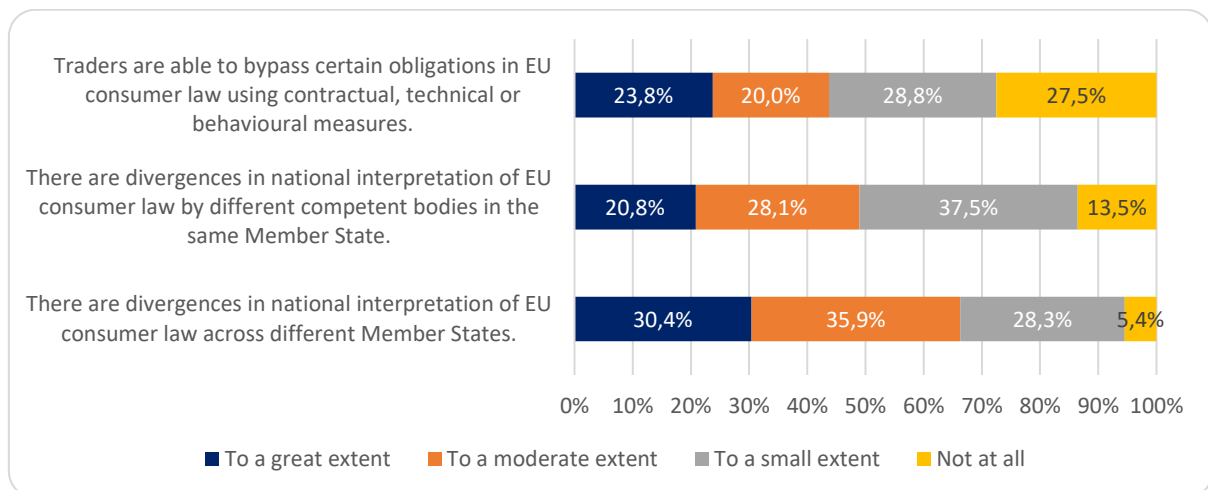
#### Q32. Follow-up qualitative responses to Q31

Video Games Europe ‘is led to believe that the number of consumer complaints are low, and that there is generally high compliance’ given the lack of enforcement activities by authorities and rare occurrence of court actions. One example relating to in-game purchases (Loot boxes, specifically) was resolved in the court through application of the UCPD, with a ‘good outcome for both the consumer and the business’. Compliance is seen as essential to ensure a fair consumer experience in the online gaming market, soft law measures such as guidance and use of self-regulatory bodies such as PEGI are seen as welcome. This view is supported by Allgemeiner Deutscher Automobil-Club e.V., who see

that in Germany the national ministry (VZBV) enforces regulations effectively. They also point to the out-of-court dispute resolution mechanism as crucial to limiting the number of cases decided by courts. Meanwhile, Alliance Digitale agree with ADAC e.V., they point to the national rules of France as a good example of supplementary regulation, ranging from contractual protection to pricing transparency. As suggested by this praise of both the German and French approaches, Classified Marketplaces Europe note that while enforcement is effective nationally across Europe, there remains a lack of a harmonised approach across Member States, which leads to inconsistencies in enforcement and interpretation. A consideration put forward by Meta is to see the formalisation of the status of the CPC Network such that it represents all Member State consumer protection authorities, providing greater legal clarity and certainty across the EU by limiting the opportunity for individual national authorities to pursue potentially parallel or conflictual cases upon their own initiation. Thuiswinkel and EuroCommerce see lack of enforcement as the main problem, with the former highlighting a lack of national authority action. EuroCommerce take further the suggestion also raised by Meta, arguing that the CPC should take a leading role in bringing forwards more cross-border joint actions to enforce the issues raised, and test whether the existing consumer acquis is sufficient to ensure consumers are well-protected online. Case law will provide more guidance and could be codified, addressing major issues, in their view, such as the compliance of non-EU based traders with EU regulation.

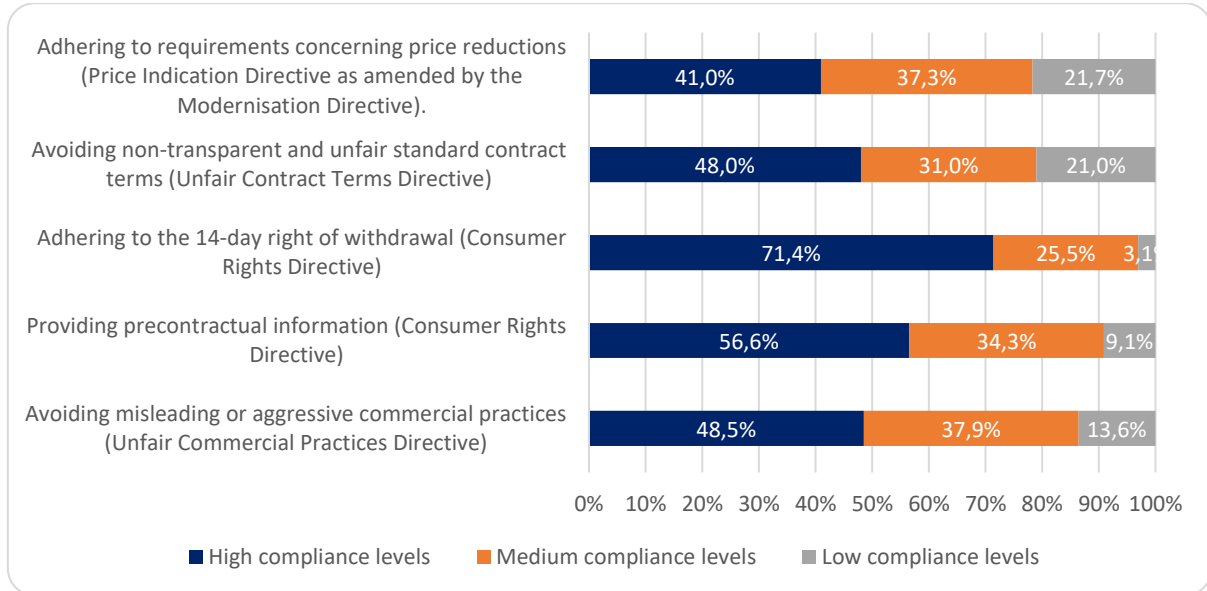
Compliance and cost

**Figure 75: Q33. To what extent do you agree with the following statements concerning the functioning of the EU consumer law Directives in the digital environment? (n=96)**



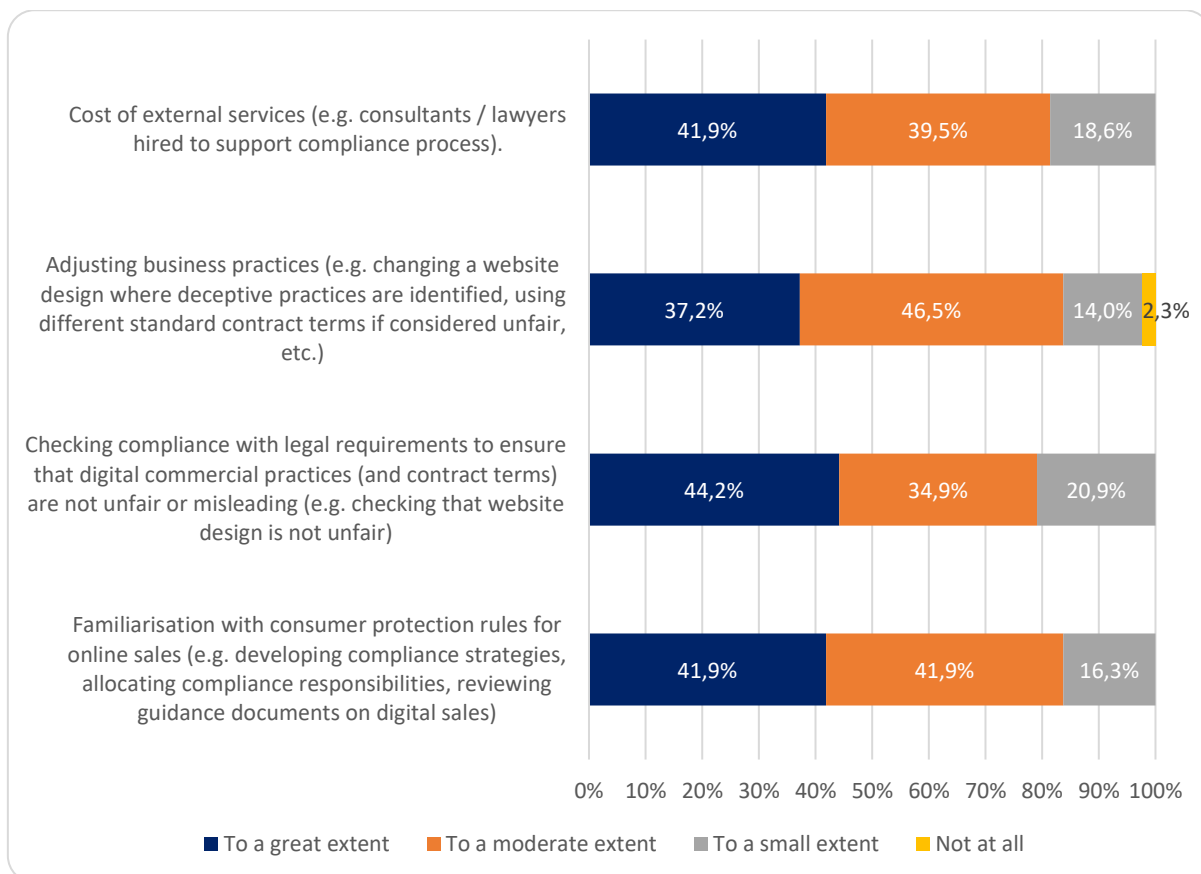
94.6% of respondents noted some divergence in the national interpretation of EU consumer law across Member States, including 30.4% who saw this as occurring to a great extent. Moreover, fragmentation in interpretation and implementation are also viewed between different competent bodies at the respective national level, for example between consumer protection authorities such as national ministries and advertising standards. Less extreme compliance issues were reported generally at the trader level among respondents, with 27.5% reporting no occurrence of traders bypassing obligations in EU consumer law. However, just under a quarter of respondents (23.8%) nonetheless reported severe compliance issues among traders using contractual, technical or behavioural measures.

**Figure 76: Q35. What are your perceptions regarding the level of compliance among traders in relation to the following main requirements of the EU consumer law Directives? (n=103)**



Among the issues with compliance raised in Q33, Q35 specified that respondents saw adherence to requirements on price reductions (PID) and non-transparency in contract terms (UCTD) as areas in need of greater compliance. Conversely, while high levels of compliance were generally reported by a majority of respondents, adherence to the 14-day right of withdrawal (CRD) was viewed as the least problematic, and most complied-with requirement (71.4% reporting high compliance levels).

**Figure 77: Q36. To what extent has compliance with EU consumer law requirements in the digital environment resulted in any additional types of general compliance costs for your business? (n=43)**

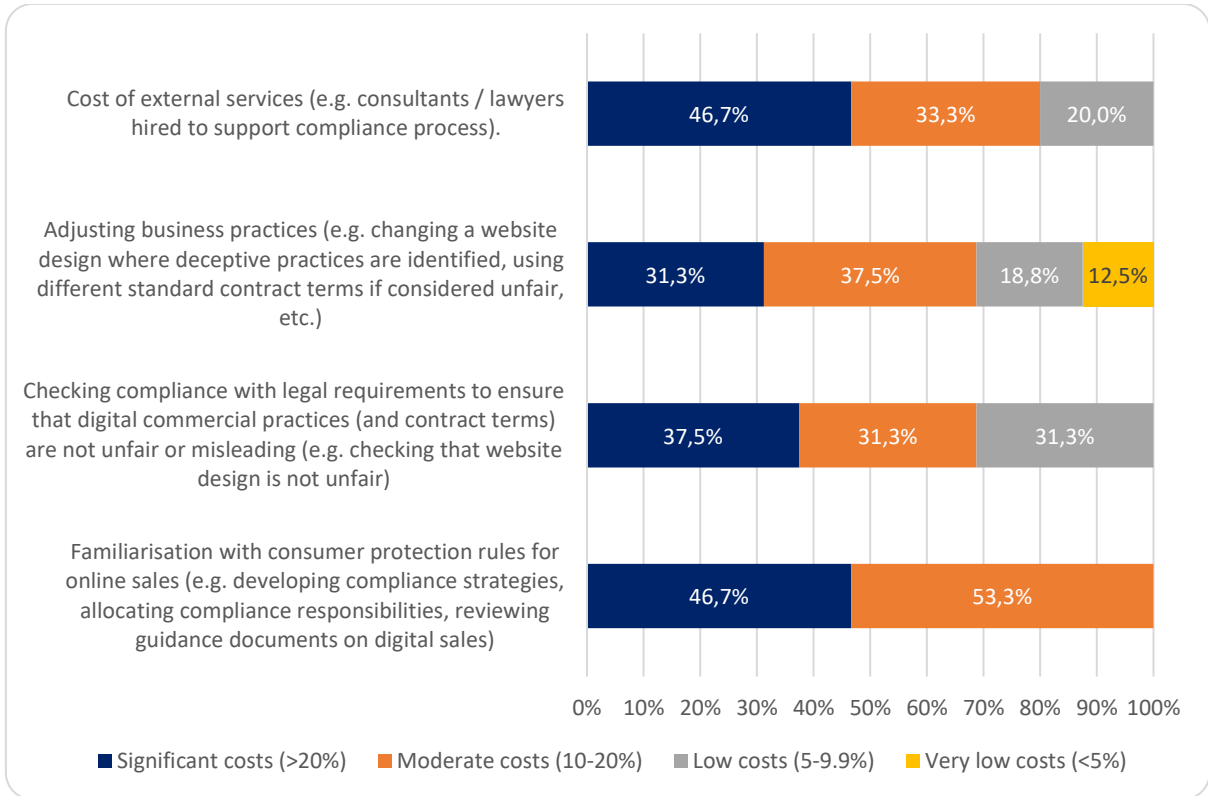


Traders have reported additional costs associated with compliance in the digital environment across all options provided by the survey. One option, adjusting business practices where deceptive design practices are featured, noted at least moderate costs in 83.7% of traders, which as a proxy suggests that 83.7% of traders identified that they had been using deceptive practices, whereas only 2.3% reported no additional costs on this. The broad imposition of costs for traders on this aspect appears to suggest good compliance and greater uniformity in relation to non-utilisation of deceptive practices among traders due to the EU requirements. This factor also appears to potentially explain the need also in many cases of high costs to traders in their use of internal or external services to check compliance and to develop compliance strategies.

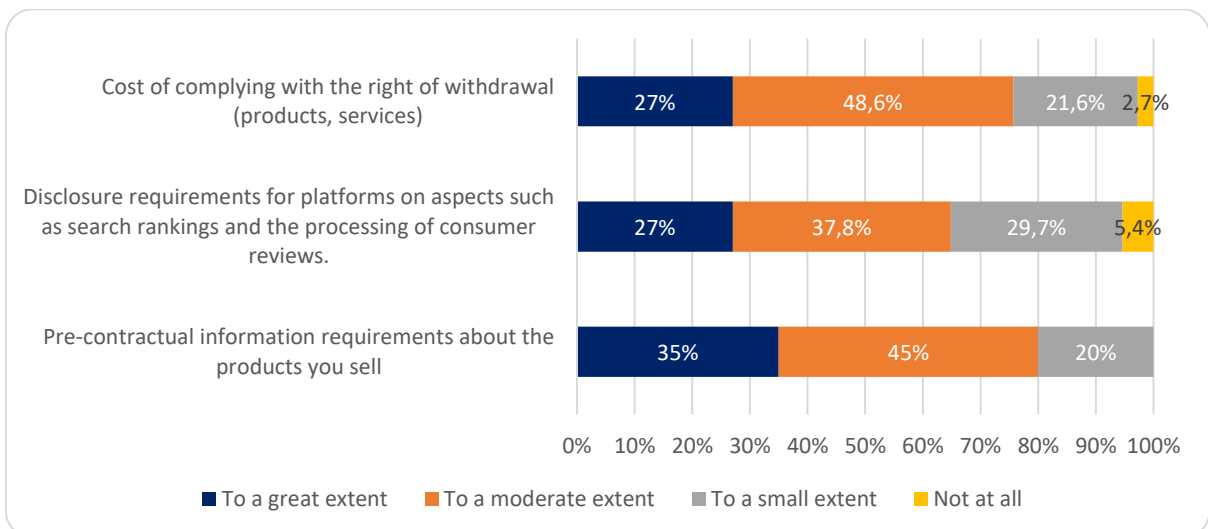
Of course, the fear of industry that further changes to requirements will lead to further costs, effective management strategies and adherence to principles set out in existing regulation and guidance should support the minimisation of future implementation of requirements. As seen in Q37, below, the predominant cost of compliance has been through familiarisation with consumer protection rules and the use of external services to check or update compliance, whereas the adjustment of business practices (such as updating a website) have been shown to have less significance as a cost for traders. The key takeaway here would be to note that clear and comprehensible guidance or additional legislation, with clear and coherent requirements across EU consumer law would allow traders to implement adjustments without accumulating additional costs from the employment of external services. Q38 asked traders about additional **costs arising from information requirements of EU consumer law – with information requirement costs relating to the right of withdrawal, disclosure requirements relating to search rankings and**

reviews, and pre-contractual information requirements about products and services recognised as great or moderate by  $\geq 64.8\%$  of respondents.

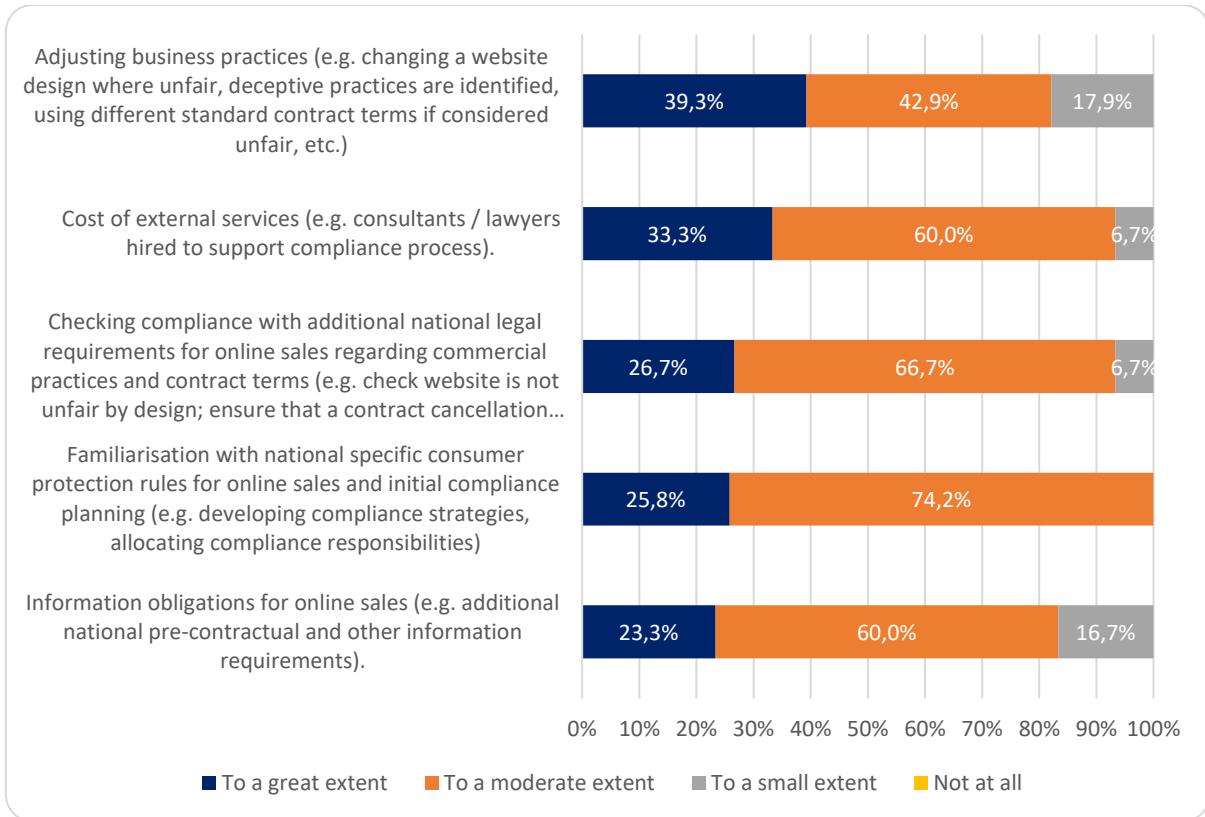
**Figure 78: Q37. If costs have increased to a great extent or to a moderate extent, please comment on how significant these additional costs were (n=16)**



**Figure 79: Q38. To what extent has compliance with EU consumer law requirements in the digital area resulted in the following additional types of costs relating to information obligations for your business? (n=40)**

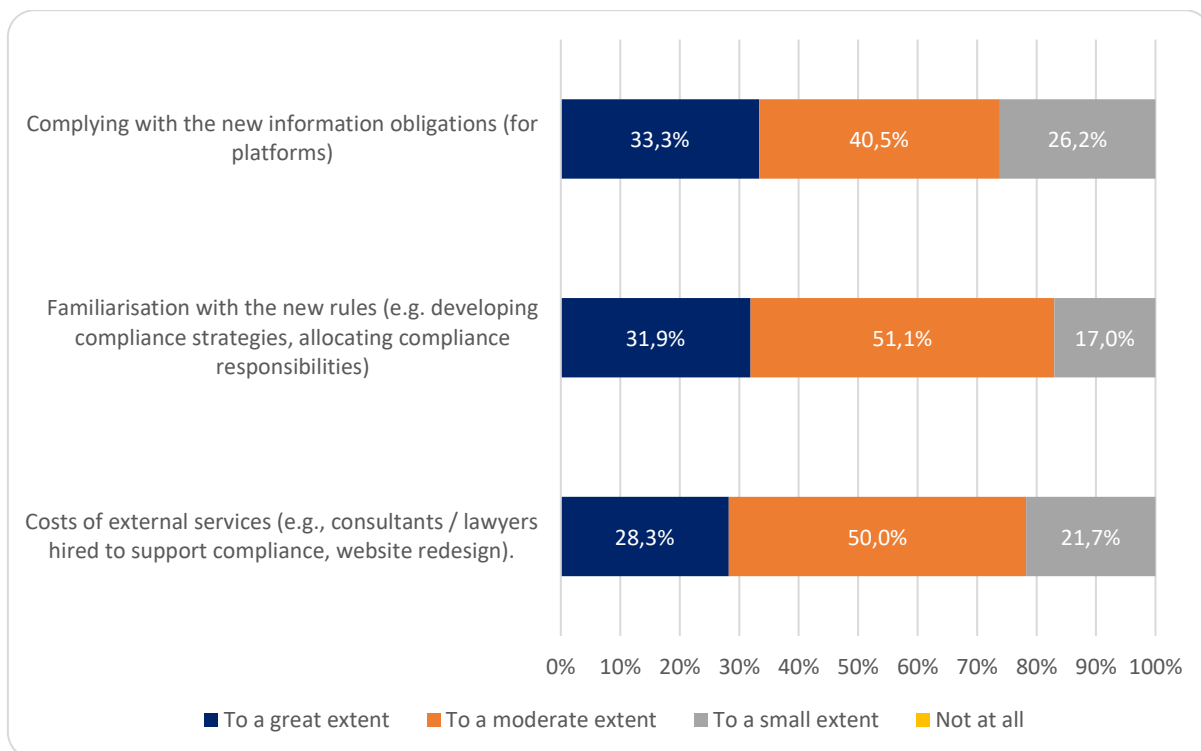


**Figure 80: Q45. To what extent when trading cross-border has compliance with consumer law requirements resulted in the following additional types of costs for your business in the digital area due to differences in national transposition and interpretation? (n=31)**



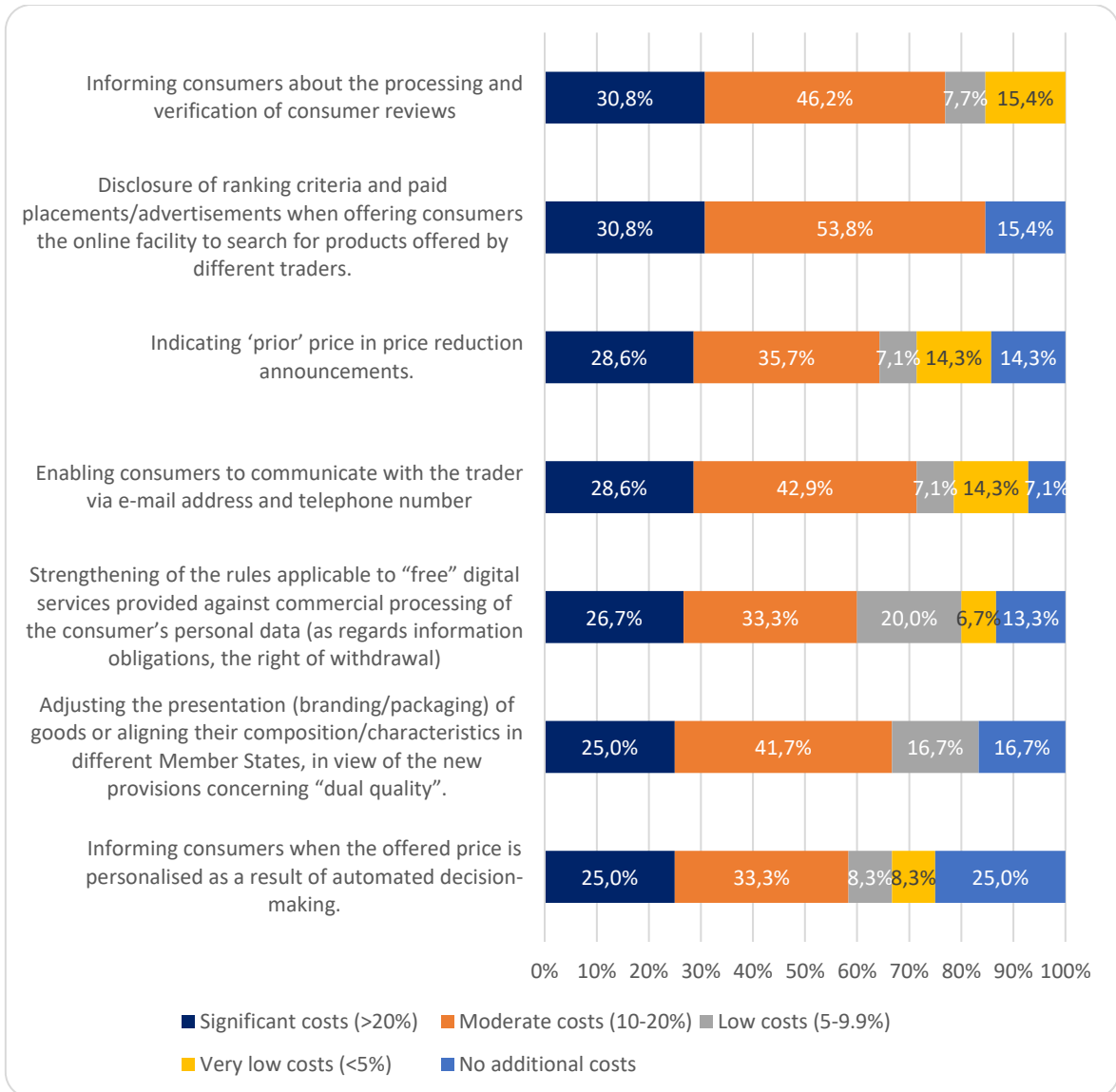
For cross border traders specifically, Q45 suggests that adjusting business practices to comply with differences across the single market relating to perceived unfair or deceptive practices or unfair contract terms represented the most common ‘great’ cost for traders, reported by 39.3%. As with the costs reported in Q37 and 38, respectively, Q45 and Q48 generally highlight costs for all respondents due to national transposition and interpretation of digital consumer law requirements: costs relating to external services to support compliance processes; checking compliance; planning compliance implementation and strategies; making adjustments to be compliant; and information obligations for online sales. Of all these areas, both questions show that ‘familiarisation with national specific consumer protection rules’ and familiarisation more broadly with the new rules stemming from the Modernisation Directive represent the most significant cost for traders.

**Figure 81: Q48. To what extent have the regulatory amendments stemming from the Modernisation Directive’s adoption resulted in new or increased costs in the following areas? (n=47)**



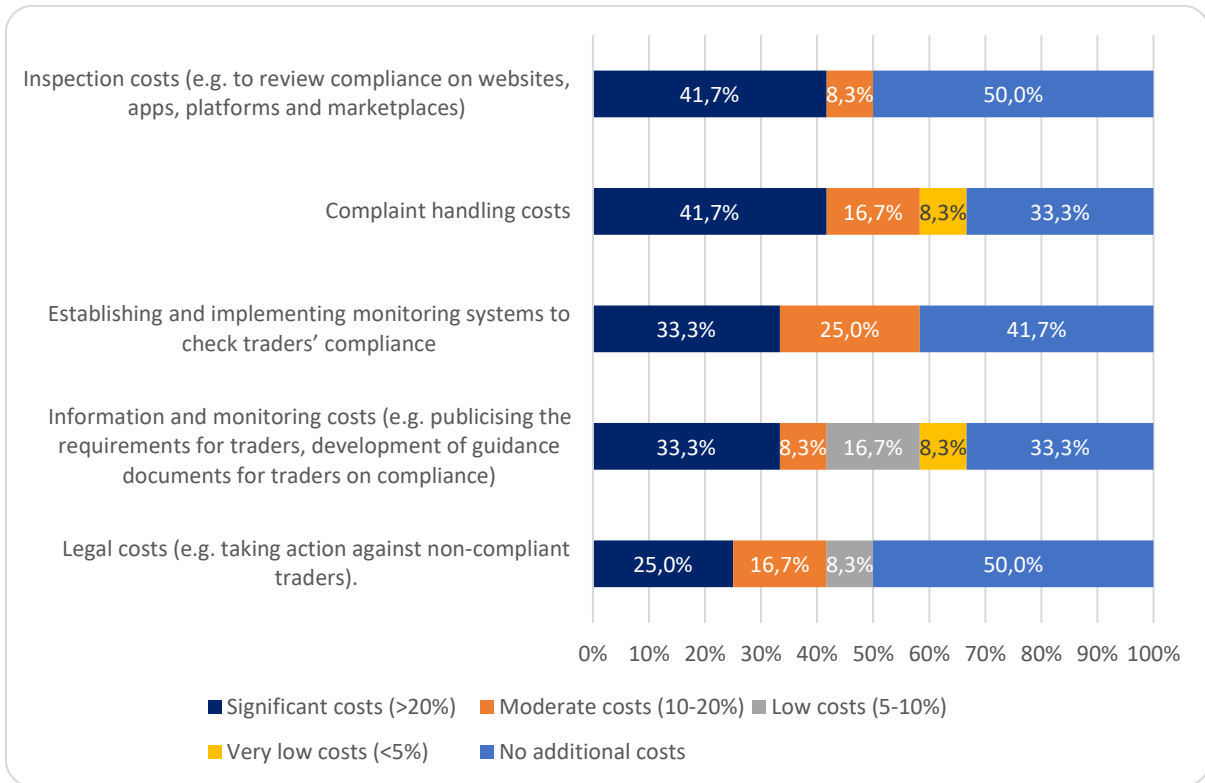
Q49. expands on specific examples of costs experienced by traders to a great, moderate or small extent due to the Modernisation Directive in respect to the following of new requirements. Most common across-the-board reported costs came from informing consumers about the processing and verification of consumer reviews (all respondents reported some level of additional cost), whereas the cost reported most commonly as **significant or moderate relate to the disclosure of ranking criteria and paid placements/advertisements** when offering consumers the online facility to search for products offered by different traders (84.6%). Generally, other costs recorded related also to the updating of product presentation and informing customers of price changes or personalisation.

**Figure 82: Q49. If you responded that compliance costs have either increased to a ‘great or moderate’ extent due to the Modernisation Directive, please provide an indication of the scale of increase in different types of costs in respect of the following new requirements**





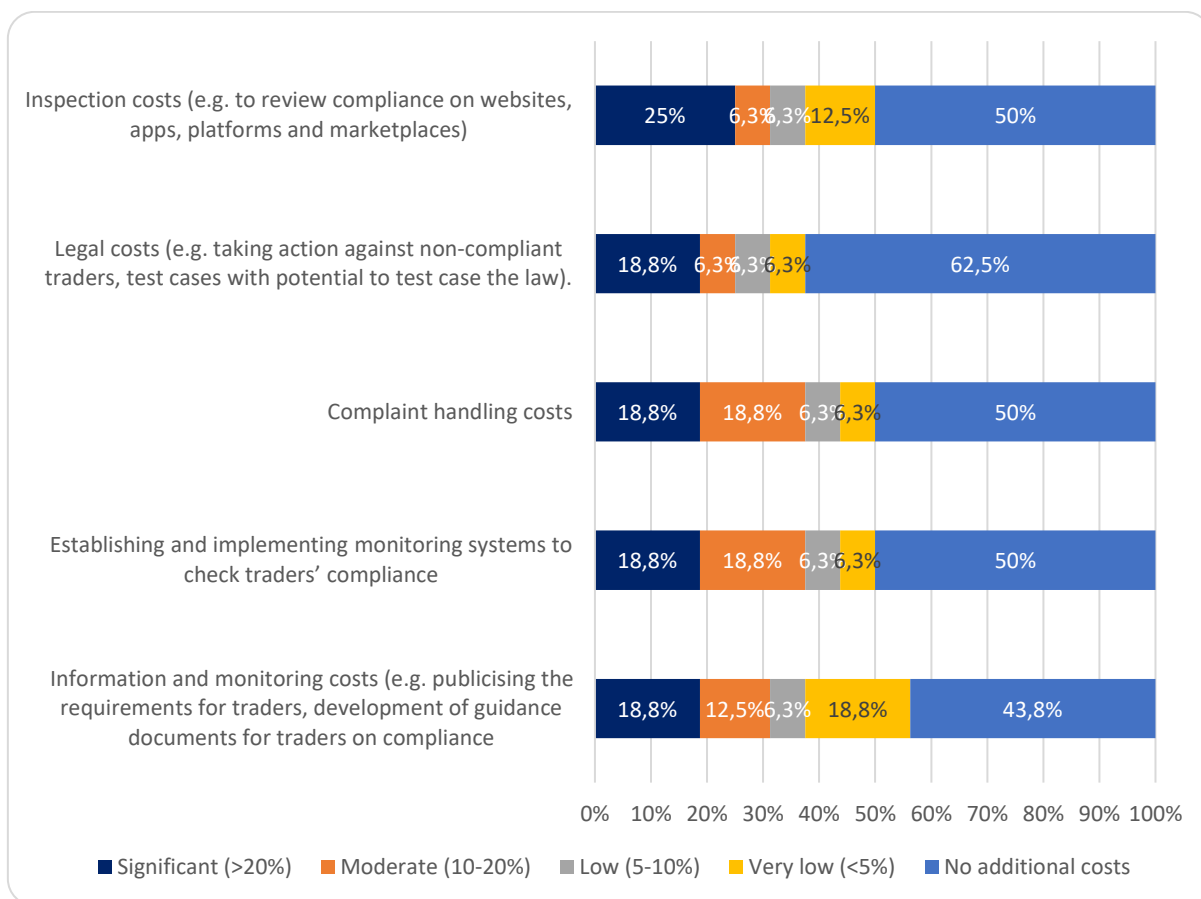
**Figure 82: Q53. What have been the additional costs of the enforcement of the provisions in the three core EU consumer law Directives (i.e. CRD, UCPD, UCTD) being applied in the digital environment? Have the enforcement costs for your authority been significant, moderate, low or did they not have any impact at all for each of the following cost types? (n=43)**



In terms of additional **costs from the perspective of enforcement authorities**, the picture is more balanced, with half of respondents reporting no additional costs stemming from reviews of compliance or legal action taken against non-compliant traders. In all areas (also including information and monitoring costs, implementing compliance-check systems and handling complaints) at least a third of respondents in all cases reported no additional costs. Conversely, at least a third of other authorities reported significant costs in enforcement, with a particularly strong responses in relation to complaint handling and inspection costs (41.7% reporting significant costs, respectively).

Q55 also asks authorities to report on enforcement costs stemming from the regulatory amendments **under the Modernisation Directive**, in this case the overwhelming response is clear, that no additional costs have been reported across enforcement authorities in **half** of all cases. That is not to say, however that those **≈20%** of authorities that have reported significant costs in implementation, monitoring and legal action relating to the Modernisation Directive are insignificant, but that they are divergent from the majority experience across the single market and may have specific national contexts to take into consideration.

**Figure 83: Q55. To what extent have the regulatory amendments made to the three consumer law Directives as a result of the Modernisation Directive led to any additional costs for your authority? Have the enforcement costs for your authority been significant, moderate, low or not impacted at all across each of the following cost types**

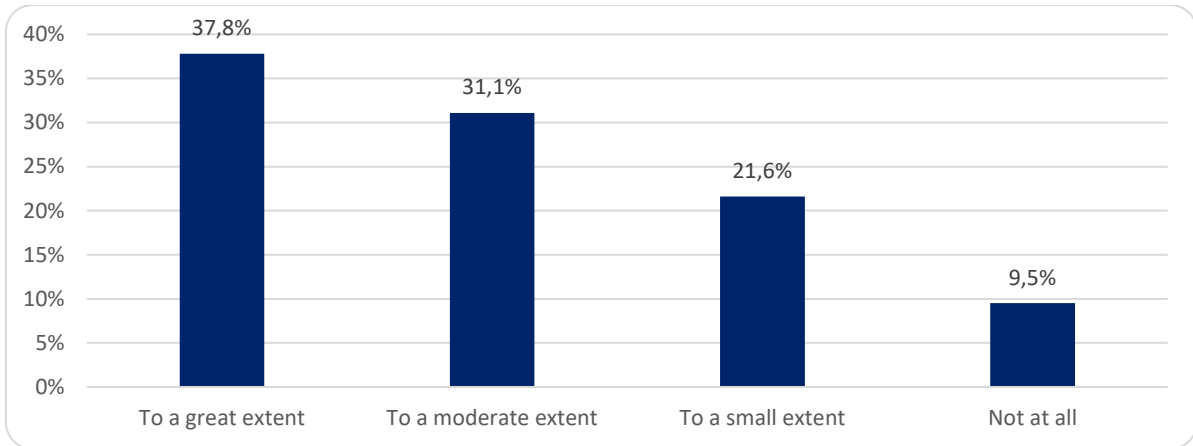


Building on the responses in Q53 and 55 (Figure 83 and 84), Q54 and 56 requested qualitative information regarding the nature and magnitude of enforcement costs stemming from EU law provisions facing enforcement authorities. Reflective of the high reporting of no additional costs, descriptive responses were limited. However, the one national ministry pointed costs from awareness-raising measures (especially on provisions where there are a lot of open questions in practice, such as Art. 6a PID), including the production of information material (for companies and enforcement authorities).

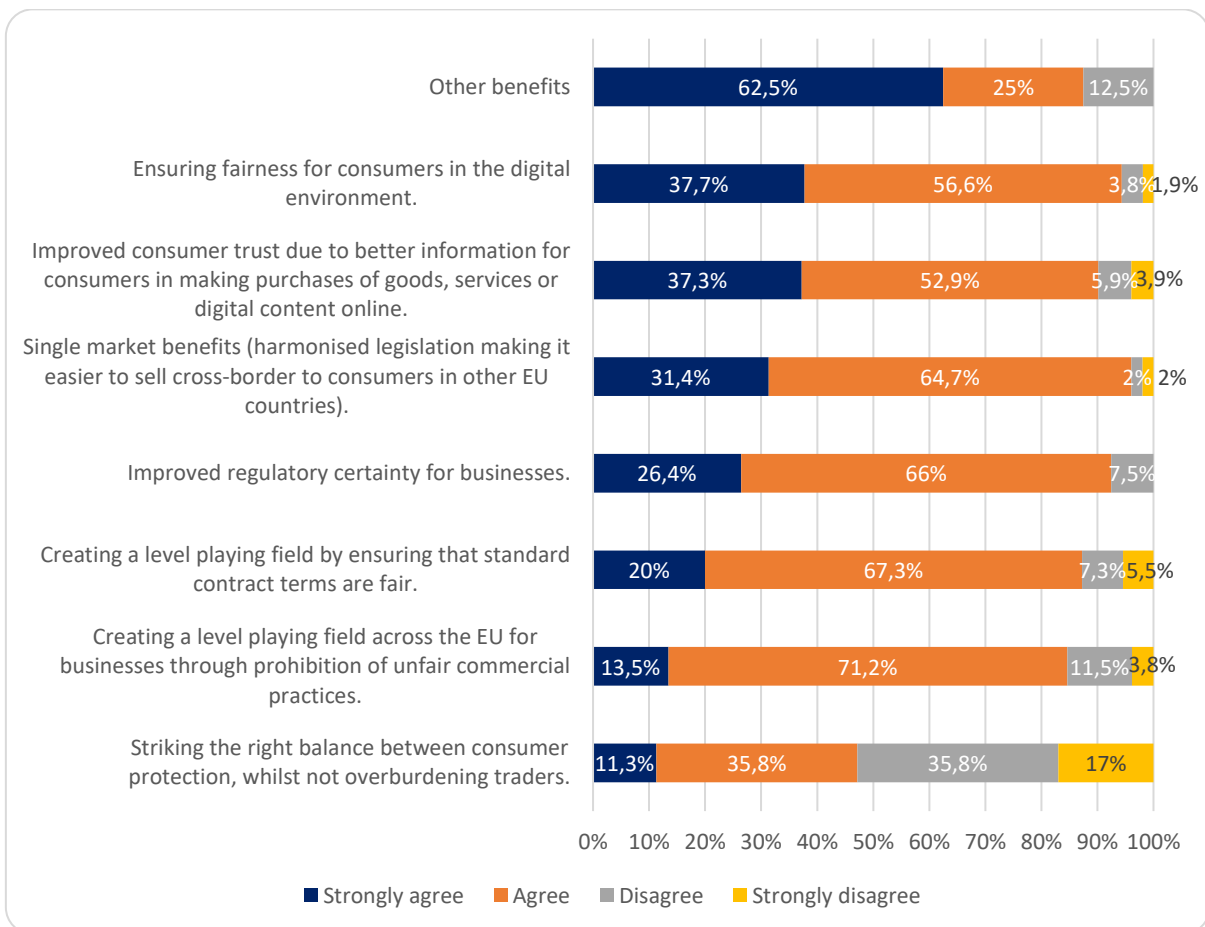
### Regulatory simplification & burden reduction

Looking forward, respondents to the consultation generally acknowledge that there are further opportunities to simplify or reduce regulatory costs without compromising on the objectives or effectiveness of EU consumer legislation (Figure 85). Moreover, it is agreed by responding individual traders and industry associations (Figure 86) that harmonisation efforts thus far have led to considerable benefits for traders (easier to sell cross-border in single market, improved regulatory certainty, a level playing field for all traders regarding standard contract terms and business practices) as well as for consumers (increased trust due to better information and fairness in equality of treatment in the digital environment through regulation of practices and unfair contract terms).

**Figure 84: Q57. To what extent are there opportunities to simplify the legislation or reduce unnecessary regulatory costs without undermining the objectives of the three EU consumer law Directives (i.e. CRD, UCTD, UCPD) in the digital area? (n=74)**



**Figure 85: Q59. To what extent does your company (or for industry associations, your member companies) agree that the harmonisation of consumer protection rules at EU level has led to the following benefits in the digital area? (n=55)**



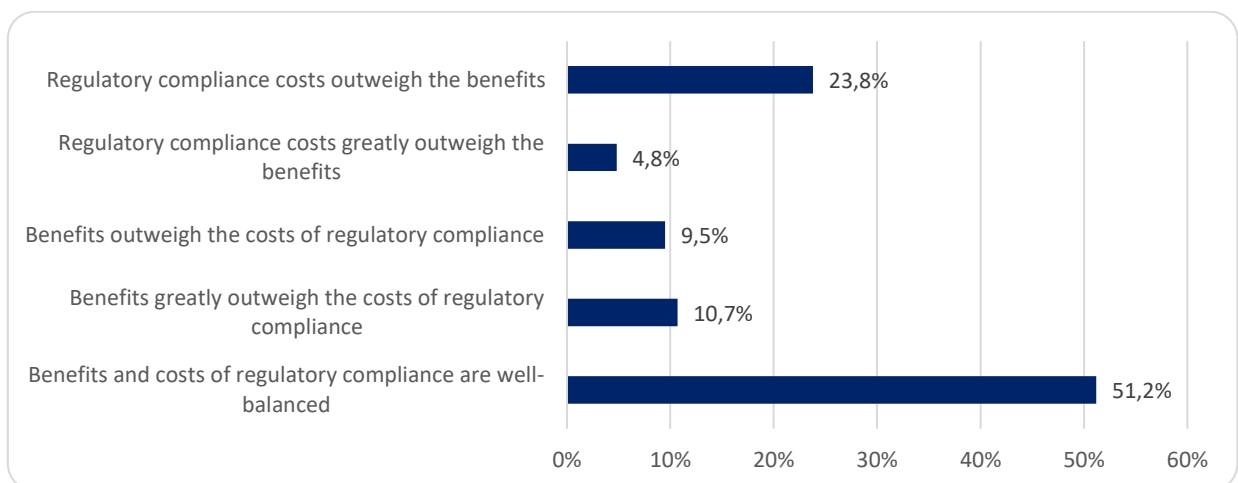
Q60 and 61 requested further qualitative explanations from stakeholders, to identify the **benefits from the harmonisation of EU consumer law and the Modernisation Directive**, respectively, in the digital area and, where possible, explain their nature and scale.

Mirroring the benefits highlighted in Figure 85, national ministries and consumer protection authorities singled-out the “Uniformisation of the consumer law within the whole EU” and “Easier access to cross-border goods and services through better consumer trust in EU law” as broad benefits across the EU.

Speculating on further potential benefits and actions that could be taken to increase benefits from harmonisation, one consumer protection ombudsman recommended that centralised regulatory responses going forward will facilitate the creation of a digital environment that is safe by design and overcomes fragmentation on specific issues such as cancellation buttons and the characterisation or influencers. Likewise, one major platform and an industry association supported a continued harmonised approach as a means towards a uniform legal framework without the need for businesses and enforcement authorities to develop different solutions to regulatory differences and compliance.

In the responses relating to **the Modernisation Directive’s purported benefits**, industry associations saw the Directive as helping to further facilitate the reduction of the fragmentation in national rules on penalties and “acknowledges the principle of proportionality while adopting common criteria to facilitate a more consistent application of penalties which will ensure that more effective, proportionate and dissuasive fines can be imposed.” One national ministry and two platforms suggested that “all extra rules are positive” and have increased notably both consumer trust increased clarity towards the implementation of digital legislation.

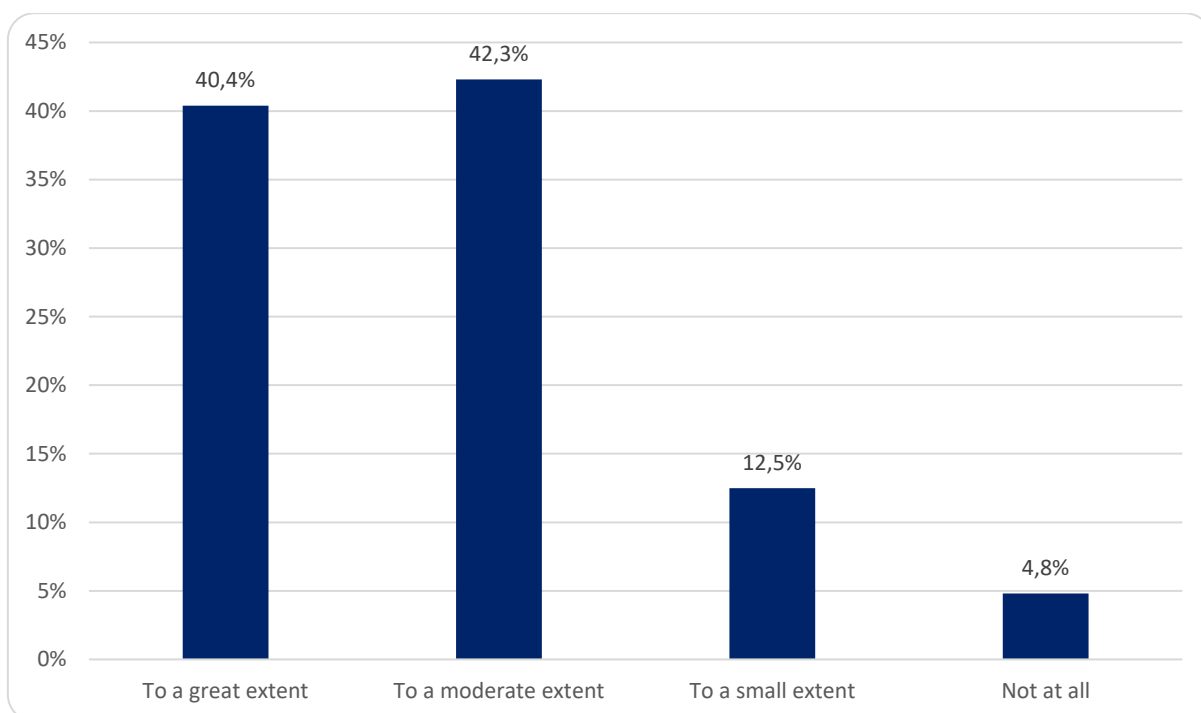
**Figure 86: Q62. At the societal level, to what extent do the provisions of the three EU consumer law Directives (i.e. CRD, UCTD, UCPD) achieve an adequate balance between regulatory costs for traders and benefits for consumers and other stakeholders? (n=84)**



Relevance and fitness for purpose

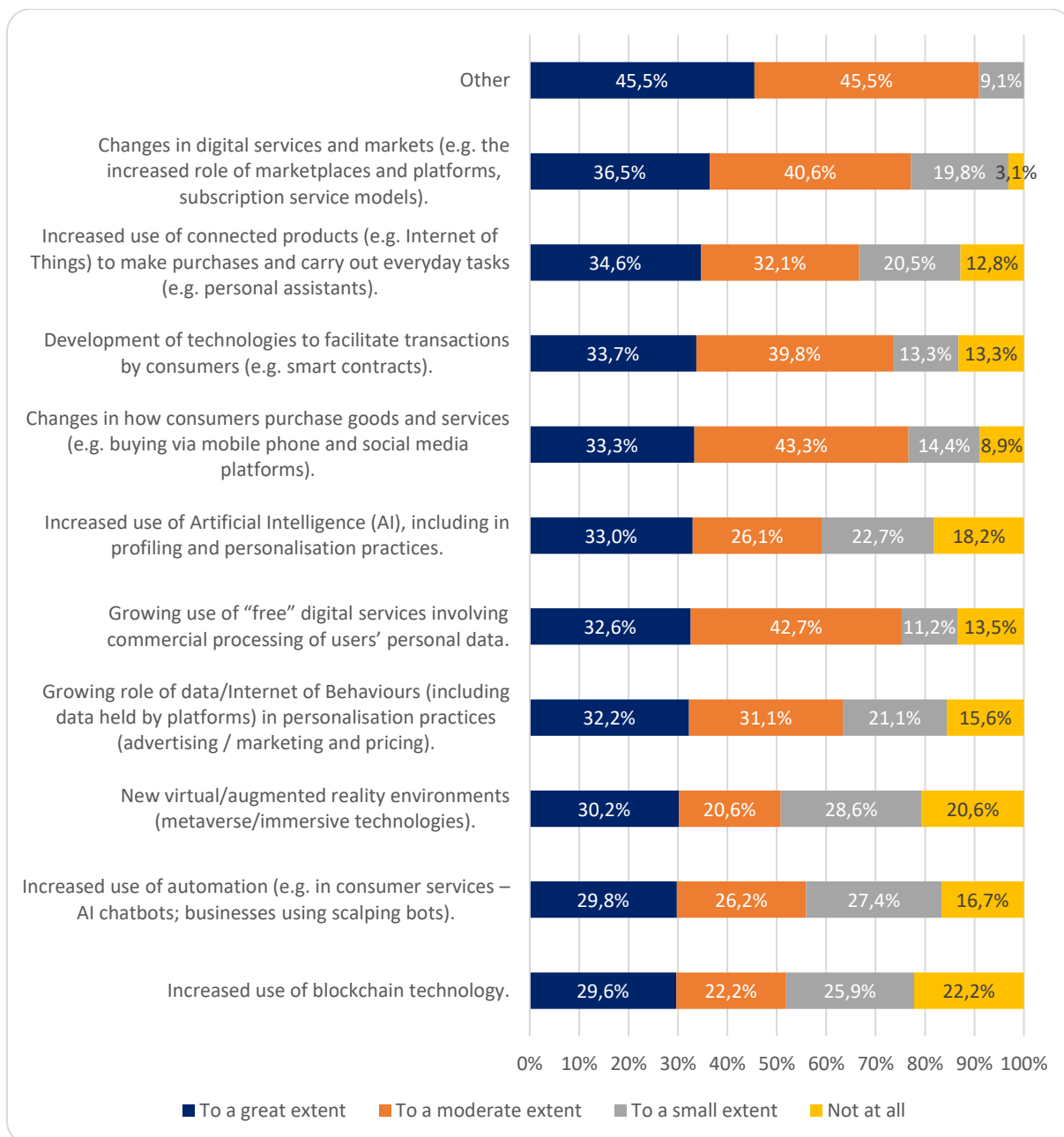
Q63 investigates to what extent the provisions of the three EU consumer law Directives adequately address digital markets trends. The majority of respondents (82.7%) agreed either to a great or to a moderate extent that the Directives adequately address digital markets trends.

**Figure 87: Q63. Overall, to what extent do the provisions of the three EU consumer law Directives adequately address digital market trends? (n=104)**



The targeted survey, in Q64, investigated the degree to which the three EU consumer law Directives kept up with evolving developments in digital markets and new technologies. The change in digital services and markets (e.g. the increased role of marketplaces and platforms, subscription service model) was perceived to be best addressed by the Directives. On the other hand, respondents indicated that the new developments in digital markets which the EU Directives have adapted less with are the increase use of blockchain technology new virtual augmented reality environments (metaverse/immersive technologies), with respectively 22.2% and 20.6% of respondents arguing that no attention to such developments was devolved at all.

**Figure 88: Q64. To what extent do the three EU consumer law Directives keep up with the following specific evolving developments in digital markets and new technologies? (n=96)**



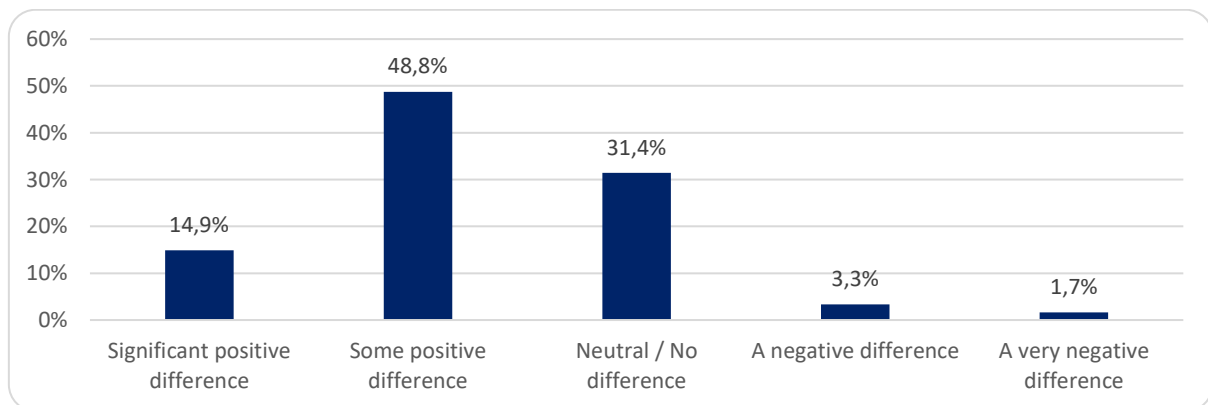
Despite a general trend in Figure 86 towards positive support for the directives’ ability to keep up with evolving developments in digital markets and new technologies, specific comments from stakeholders (Q65) elaborated on ways in which the directives should be updated further. There appears to be a mixed range of views which may not simply be disaggregated by stakeholder type, with one national consumer association offering a strong rebuttal of the existing EU acquis as “not fit for the digital age”, while another national authority more specifically pointed to “Art 2 (d) UCPD, [that] the general clause of the UCPD is flexible enough to cover new evolving developments.” Industry representatives and consumer protection authorities have each suggested that clear responsibilities for each actor in the value chain may help to reduce burdens placed unduly upon traders and produce a more effective system. Issues such as information requirements and customer

support and wellbeing were identified as areas where the clarified roles played by both individual consumers and platforms in particular, as facilitators and potential gatekeepers of business practices by traders using their service could be beneficial to consumers and traders. Related to this, consumer protection authorities also specifically suggested that clarity regarding actors in the value chain is needed to enhance consumer redress processes and enforcement.

The EU-level consumer protection ombudsman has also noted ongoing legal gaps in need of consideration:

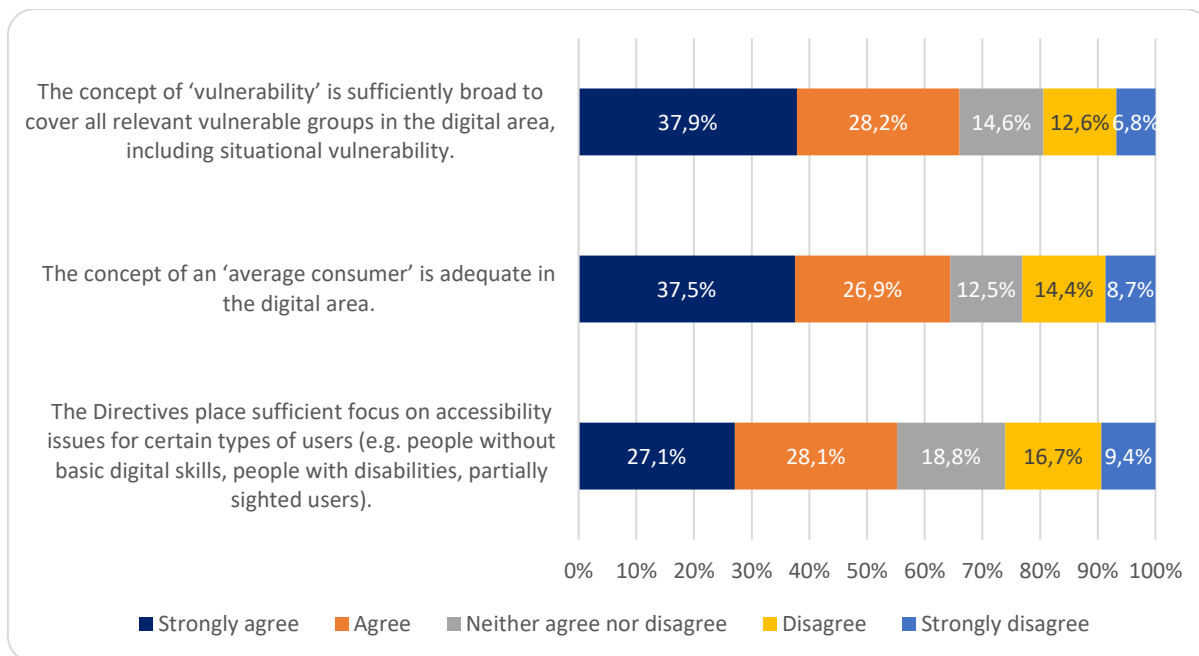
**“CRD rules on pre-contractual information become useless when voice-shopping via digital assistants (terms and conditions sent via email will never be read). Consumers paying for services with their time, engagement and often mental health are not protected by unfair commercial practices law (leaving out the forward-looking, yet non-binding interpretation on what constitutes a 'transactional decision' of the 2021 Commission Guidance document). Dark patterns and other behavioural tricks are notoriously difficult to enforce against under the UCPD and the GDPR [...] The solution is to impose duties on traders to safeguard, rather than seek to skew, consumers' autonomous choice (fairness by design) and to revise the Unfair Commercial Practices Directive to render it into an effective tool against unfair practices benefiting from digital asymmetries of power and knowledge. [...] As such, in enforcement cases involving significant power and knowledge asymmetries, the burden of providing information to prove compliance must lie on the traders deploying and controlling the digital environment.”**

**Figure 89: Q66. How far has the application of the Modernisation Directive strengthened the ‘fitness for purpose’ and relevance of the underlying EU consumer law Directives concerned with addressing problematic practices? (n=121)**



Stakeholder qualitative inputs in Q65 (question is responded to as free-text written by respondent) highlight the view that greater clarity of actor responsibilities and burdens placed upon them are of broad concern across the value chain. Figure 90 demonstrates this further in highlighting the variance among stakeholders in relation to concept definitions and their implications for the burden of proof and information requirements (and presentation of information). While the majority position in figure 90 holds that ‘vulnerability’ and ‘average consumer’ definitions are sufficient at present to protect consumers in the digital environment, there is a considerable proportion of stakeholders that share an ambivalent or negative view, >30% of respondents.

**Figure 90: Q67. To what extent do you agree with the following statements regarding the extent to which vulnerable consumers are appropriately addressed in the three EU consumer law Directives (i.e. CRD, UCTD, UCPD): (n=104)**



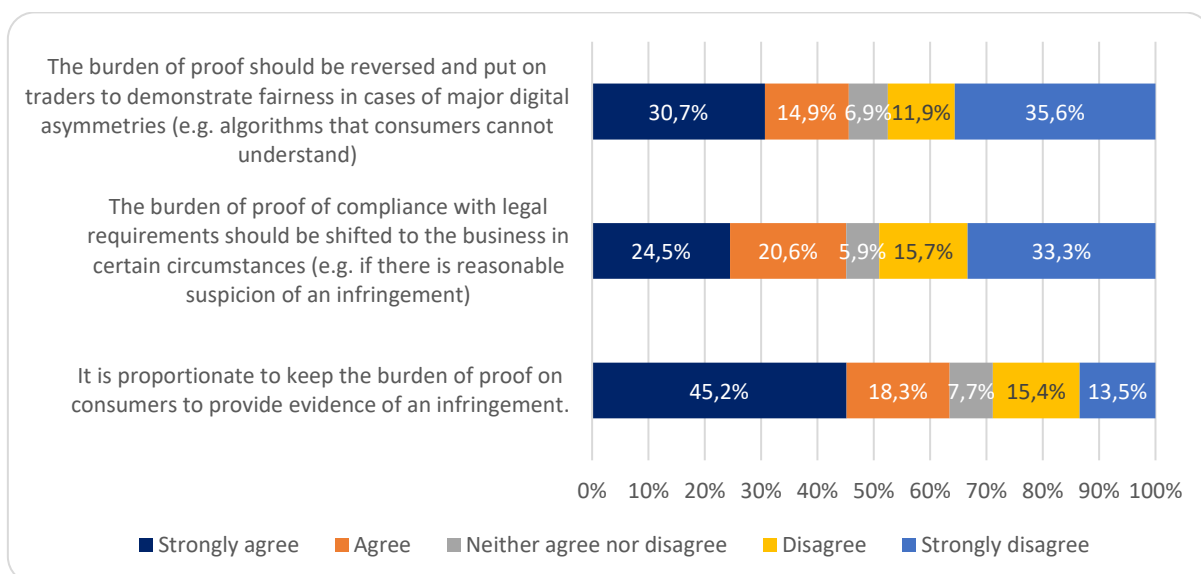
*Note - 'Situational vulnerability' is a situation whereby consumers may be vulnerable only in particular circumstances, even if they do not fall under any classic vulnerability category – all consumers could be vulnerable online*

### The burden of proof

As shown in the graph below (Q69), 45% of respondents strongly agree that it is proportionate to keep the burden of proof on consumers in relation to a perceived infringement. However, the opinion on the reversal of the burden of proof appears to be quite divided. Whilst 30.7% strongly agree that the burden of the proof should be reversed and put on traders to demonstrate fairness in cases of major digital asymmetries, 35.6% of the respondents strongly disagree. In addition, 25.4% strongly agree that the burden of proof of compliance with legal requirements should be shifted to the business in certain circumstances (e.g. if there is reasonable suspicion of an infringement). Whilst, 33.3% strongly disagree with such statement. From qualitative comments in response to Q68 of the survey, national ministries and consumer protection authorities asserted that the burden of proof at member state level largely already places the burden upon the trader. Other national ministries and enforcement bodies also suggested that precontractual information requirements and the UCPD Art. 12 (also largely transposed into national law) is sufficient in covering the burden of proof relating to commercial practices. One national ministry highlighted that while the burden of proof often lies with the party bringing forward a claim, this is “often reversed” and put on traders in consumer cases, considering also the information and power asymmetry of parties.



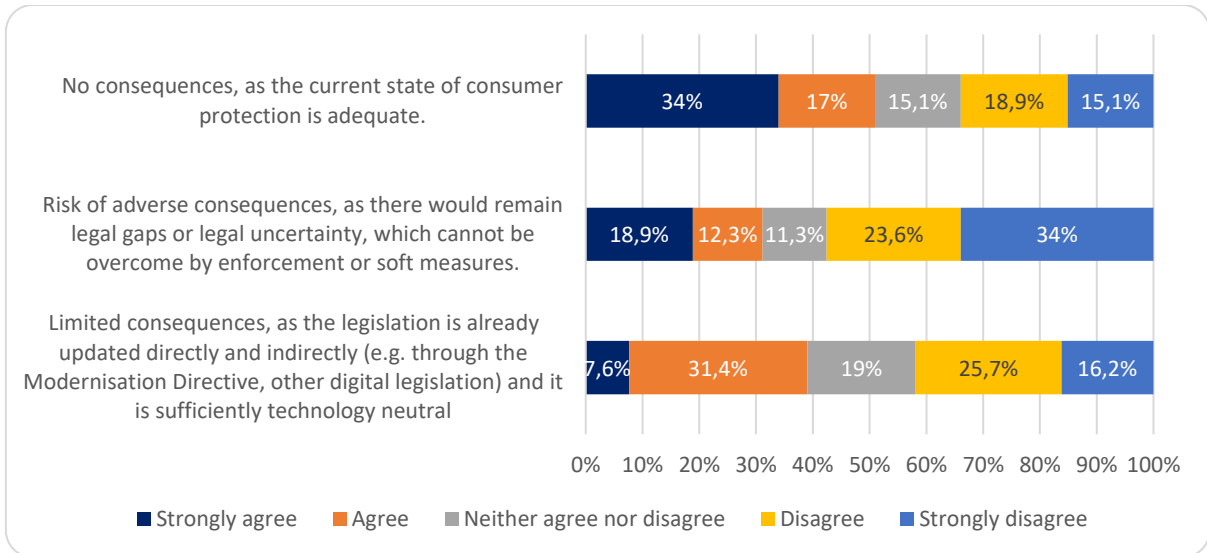
**Figure 91: Q69. To what extent do you agree or disagree with the following statements (n=104)**



Q70 asked for qualitative inputs from stakeholders on potential adaptations to the current rules on burden of proof. One national consumer association noted their preference for a general ban on personalised commercial practices, as these are viewed as opaque in all circumstances for the consumer and associations. In practice, however, they propose that personalised commercial practices should only be allowed under strict requirements of fairness, transparency, compliance with data protection law and fully effective voluntary consent according to the (amended) UCPD without the use of dark patterns.”

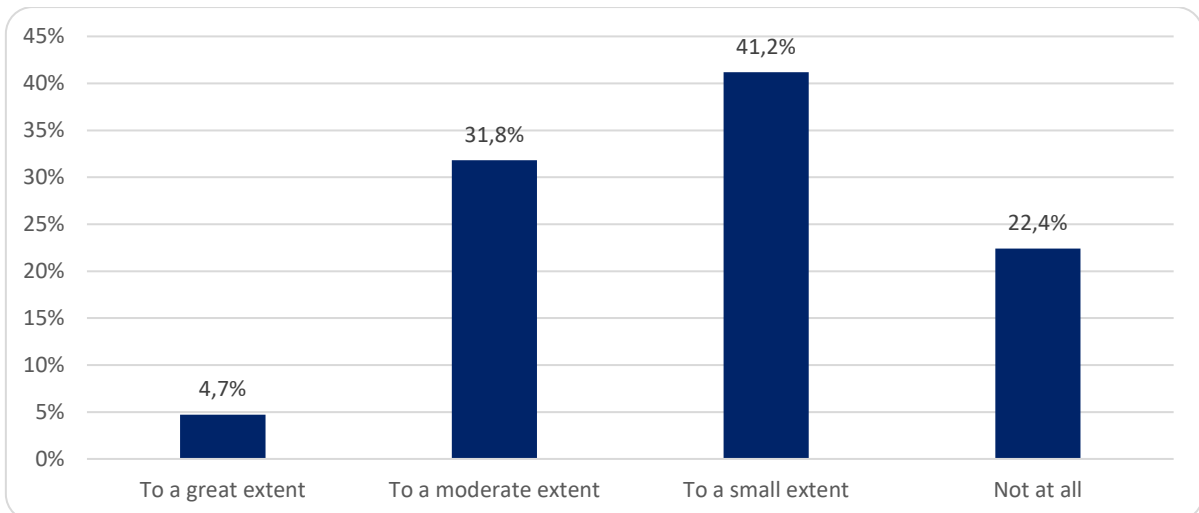
In line with the response to Q69, free-text answers by national ministries in Q70 warned against a blanket reversal of the burden of proof, as “shifting the burden of proof from the consumer to the trader could have a lot of negative consequences and interference with the fundamental rights (esp. Art. 6 ECHR) of the trader”. Nonetheless, industry associations and consumer authorities do share the view that sector-specific or practice-specific reversals may be a more proportionate, effective and evidence-led way to bring about swift benefits for consumer protection and trader compliance without hindering industry innovation.

**Figure 92: Q71. What would be the most likely consequences if there is no further strengthening of the Directives with respect to consumer protection in the digital environment? Indicate the extent to which you agree or disagree. (n=106)**



Internal coherence

**Figure 93: Q72. To what extent are there internal inconsistencies, overlaps or gaps between the provisions of the three EU consumer law Directives in the digital environment? (n=85)**



Following up on Q72 (Figure 93), Q73 asked stakeholders to provide qualitative details on the nature and extent of internal inconsistencies between the current EU consumer law Directives. One national consumer authority noted **that transparency requirements did not equally apply to marketplaces and platforms**, with the latter which may offer access to traders and products for consumers. Alongside this concern, a further point was made that providing mandatory transparency information only upon signing a contract or concluding a purchase, that the effect and purpose of the information is rendered useless. One academic stakeholder commented that they are more concerned with gaps than with

overlaps. Specifically, that traders and platforms should use uniform disclosure templates for competing products and the interface should include simple compare options – perhaps by the introduction of a 'book of complaint' that authorities can inspect (cfr. Portuguese experience).

One industry association offered an extensive comment in relation to the cancellation of contracts for non-essential or financial goods and services, calling upon the commission through this study to consider:

“[G]uidance on Directive 93/13/EEC (UCTD) with regard to price variation clauses in easily cancellable contracts of indeterminate duration for non-essential or financial goods and services to:

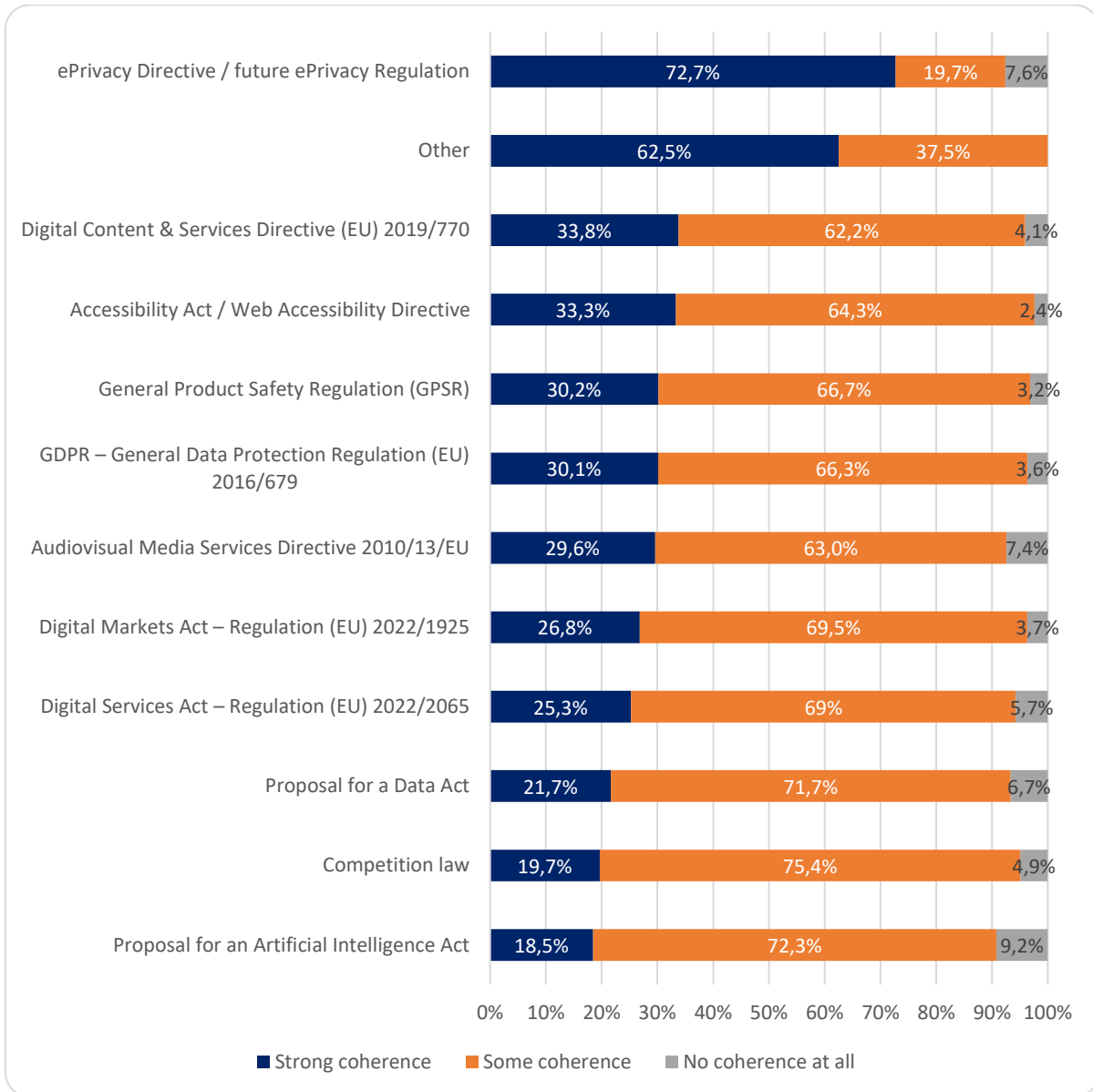
1. Clarify how the list of exemptions in point 2 of the annex should be understood in relation to point 1 of the annex.
2. Specify that a case-by-case assessment is needed with regard to transparency obligations and the circumstances listed in Article 4(1) UCTD.
3. Include examples of contracts that may be subject to more flexible transparency requirements.
4. Clarify that the option to cancel a contract and easily move to another provider are important factors to consider when assessing the potential unfairness of a price change clause.
5. Provide examples of circumstances that should be taken into account when assessing the unfairness of a price variation clause.”

One online video and digital content provider pointed out a potentially significant loophole inconsistency in the legislation that could foreseeably harm the digital content and services industry. Through the ability of consumers to use personal data deletion requests under the General Data Protection Regulation (GDPR) to erase any notion of personal data or billing information the provider may have. Combined with a right of withdrawal this would mean that certain **individuals could sign up to subscription video on-demand services, use them as much as they desire for two weeks, request a refund and delete their personal data and engage in the same practice in perpetuity.**

Lastly, an EU-level consumer association highlighted the irreconcilable price personalisation provisions (allowed by CRD) with the provisions of the UCPD on misleading and aggressive practices and the UCTD where it requires transparency based on explanation in a plain intelligible language, which is impossible in respect of complex data-driven systems). It is also impossible to classify under Article 22 GDPR based on the current EDPB Guidelines.

External coherence

**Figure 94: Q74. To what extent is there coherence between the provisions of key EU consumer legislation (i.e. CRD, UCTD, UCPD) and the following existing and proposed EU legislation as regards regulating consumer protection in the digital environment?**



As seen in Figure 94, stakeholders responding to the targeted survey show an overwhelmingly positive view of coherence between EU consumer legislation, especially in relation to introduction of the ePrivacy directive. Qualitative details provided by stakeholders on coherence and legal gaps in Q75 and Q76 are noted subsequently:

An academic noted that the **notion of data as remuneration** “still remains a bit puzzle” especially in terms of how to assess the substantive fairness of the transaction. **When consumers both pay and give their data, the academic believes that the DSA and DMA provisions on dark patterns should be better coordinated with the UCPD (concept of undue influence).**

One national ministry suggested that **the general provision “without prejudice to..” does not provide legal certainty** in many cases. Another national ministry raised concerns about the inconsistency of transparency and information requirements, commenting that: “to ensure that the DSA and UCPD complement each other, we recommend the UCPD article 5, 6 and 7 to contain requirements for more visually and salient disclosure forms. Moreover, the interplay between the rules on dark patterns in DSA and UCPD is briefly touched upon in recital 67 of the DSA. However, the interrelationship between the rules should be further elaborated in the UCPD.”

An industry association raised **concerns for coherence between different European Union bodies** (e.g. Consumer Protection Cooperation Network and European Data Protection Board) and Member States. Their conclusion being that there is a need to provide unambiguous definitions for key concepts (e.g., personal data or dark patterns) used across policy sectors. The legislative environments for the different sectors must constitute a consistent whole. **“As legal frameworks become increasingly interlinked, collaboration and coordination between enforcement authorities must become standard practice.”**

Other specific legislative gaps highlighted include:

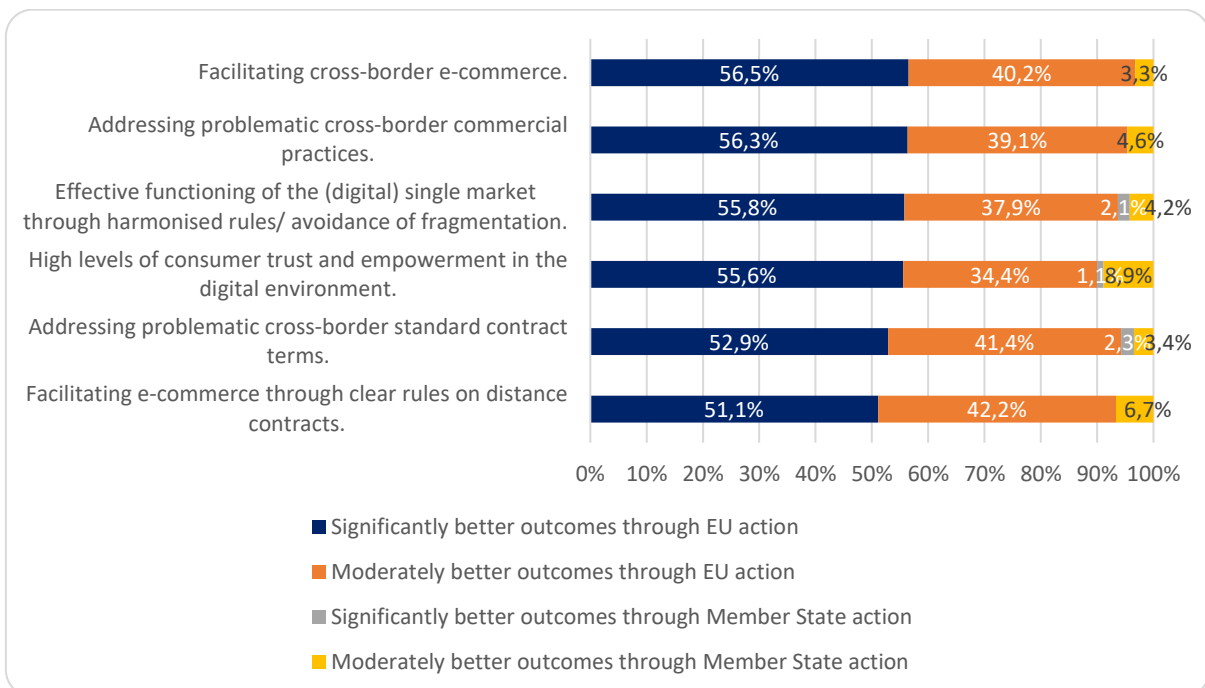
“The prohibitions in Article 5 of the AI Act as well as the obligations for High-risk AI Systems should also apply to all algorithmic systems: The AIA bans subtle manipulation (Article 5 (1) a)) and the exploitation of people’s vulnerabilities (Article 5 (1) b) unfortunately **the AI Act only includes physical or psychological harm. Consumer protection law must protect consumers from all kinds of harm caused by such practices.**”

“Article 38 of the Digital Markets Act only applies to recommender systems that perform 'profiling' within the meaning of the GDPR – this leaves open-cluster systems like e.g. Monolith (used by TikTok) which do not perform profiling in that sense but are no less harmful. **The closed classification of intermediary services under the Digital Services Act (Art. 4-6 DSA) does not allow to include services which consist in mandating an AI-powered service to act on behalf of the consumer when making purchase decisions** (like AI voice-controlled assistants).”

### EU Added Value

The graph below (Q77) highlights the unequivocal EU added-value brought to traders and consumers across the EU and in their activities. The EU consumer law framework has generally provided significantly better outcomes than national level regulation could alone in all cases of addressing problematic practices and ensuring ease of trade and consumer redress across the single market. The areas of facilitating cross-border e-commerce, addressing problematic cross-border commercial practices, effective functioning of the digital single market through harmonized rules/avoidance of fragmentation were the areas where EU-added value was most valued with respectively 96.7%, 95.4% and 93.7% of respondents claiming them to record significant or moderate better outcomes.

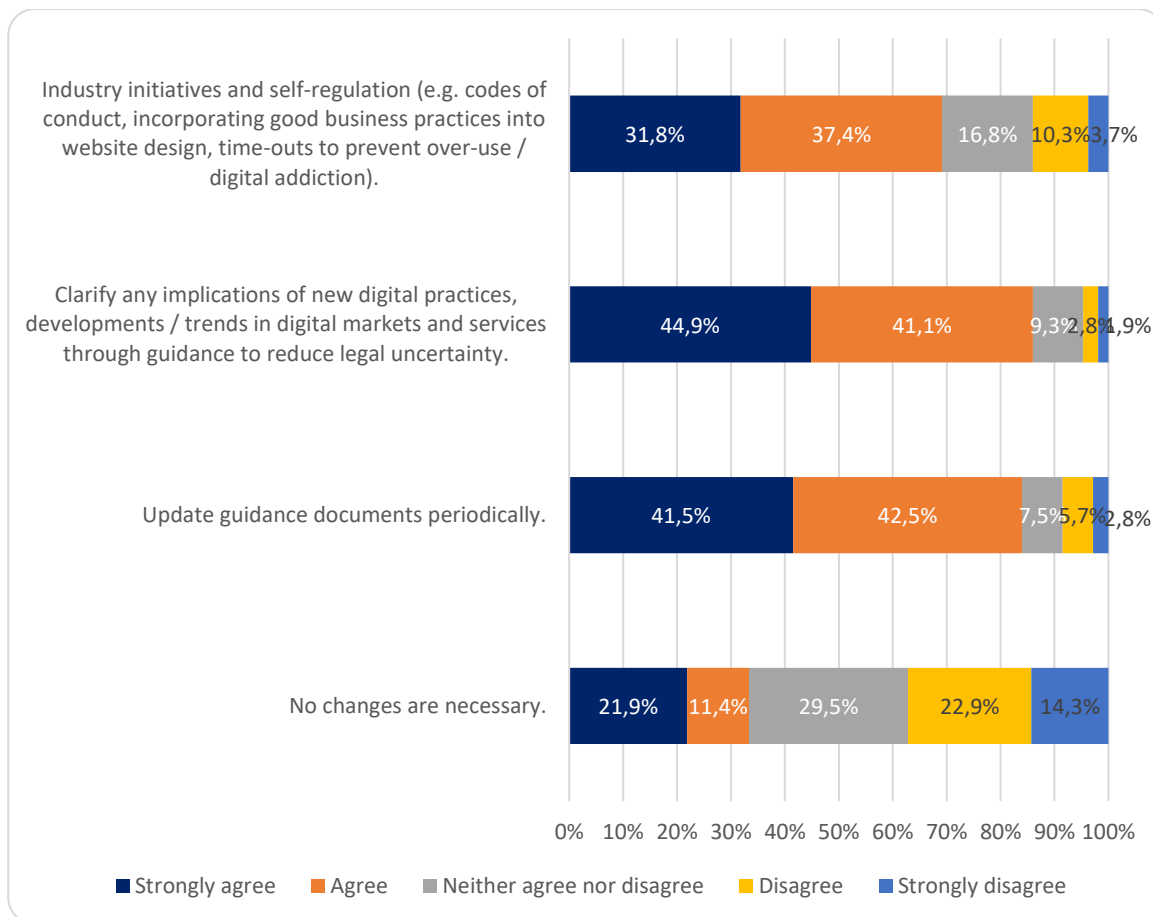
**Figure 95: Q77. To what extent has the EU consumer law framework achieved better outcomes than could have been achieved by Member States regulating these areas themselves? (n=95)**



### Possible strengthening of the consumer law framework

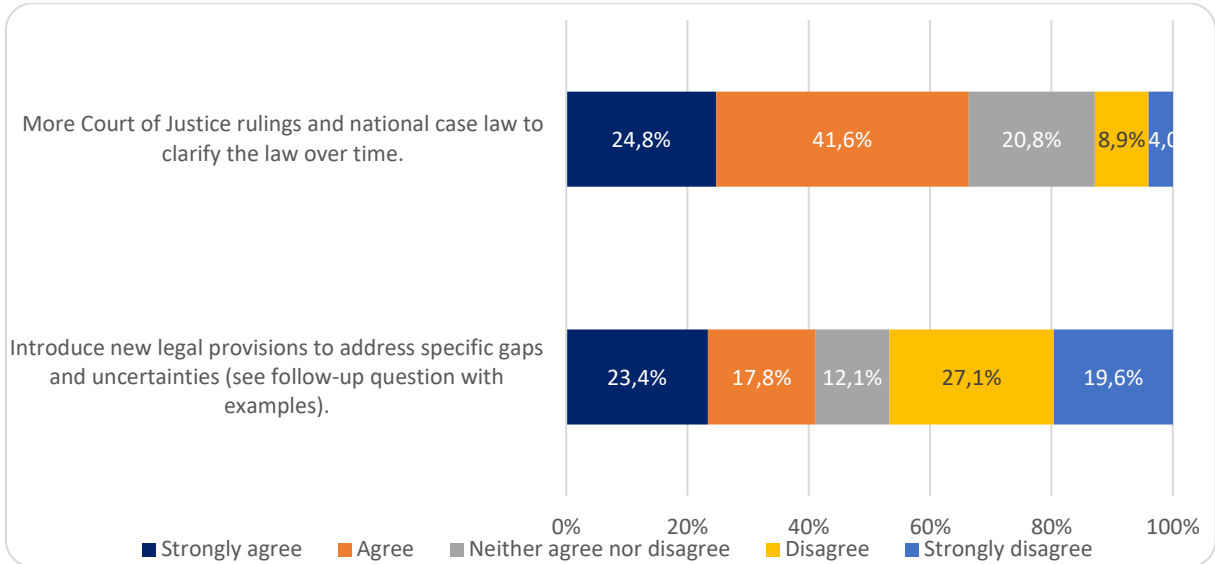
Q78 investigates to what extent the EU consumer law framework and its application should be strengthened to address existing and/or anticipated future challenges through soft law mechanisms, such as guidance. The results see that in general respondents agree that EU consumer law framework and its application should be strengthened to address existing and/or anticipated future challenges. 69.2% of the stakeholders either strongly agree or agree that industry initiatives and self-regulation mechanisms should be implemented. 86.3% agree with clarifying any implication of new digital practices, developments/trends in digital markets and services through guidance to reduce legal uncertainty. Finally, 84% believes in the value added of updating guidance documents periodically.

**Figure 96: Q78. How far do you agree that the EU consumer law framework and its application should be strengthened to address existing and/or anticipated future challenges through soft law mechanisms, such as guidance?**



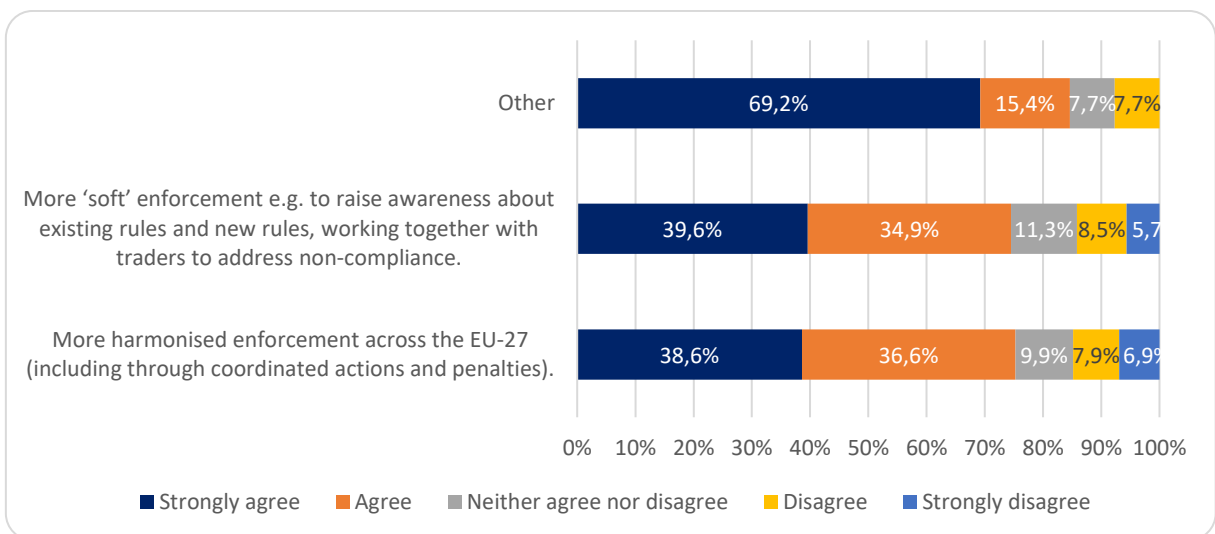
From Q79, overall, EU stakeholders tend to believe that EU consumer law framework and its application should be strengthened to address existing and/or anticipated future challenges through legal mechanisms. However, the responses vary depending on the legal mechanism chosen. Two-thirds of respondents (66%) collectively, agreed in favour of more Court of Justice rulings and national case law to clarify the law over time. On the other hand, quite a high percentage of respondents (47%) disagree with the introduction of new legal provision to address specific gaps and uncertainties.

**Figure 97: Q79. How far do you agree that the EU consumer law framework and its application should be strengthened to address existing and/or anticipated future challenges through legal mechanisms?**



From Q80 the data shows that the majority of the respondents either strongly agree or agree that the EU consumer law framework and its application should be strengthened to address existing and/or anticipated future challenges in enforcement. More soft enforcement and more harmonised enforcement across the EU-27 were both agreed to be viable strategies to strengthen enforcement, respectively, 74.5% and 75.2%. However, other non-mentioned enforcement strategies recorded the highest votes, suggesting the need to continue researching innovative enforcement strategies.

**Figure 98: Q80. How far do you agree that the EU consumer law framework and its application should be strengthened to address existing and/or anticipated future challenges in enforcement?**

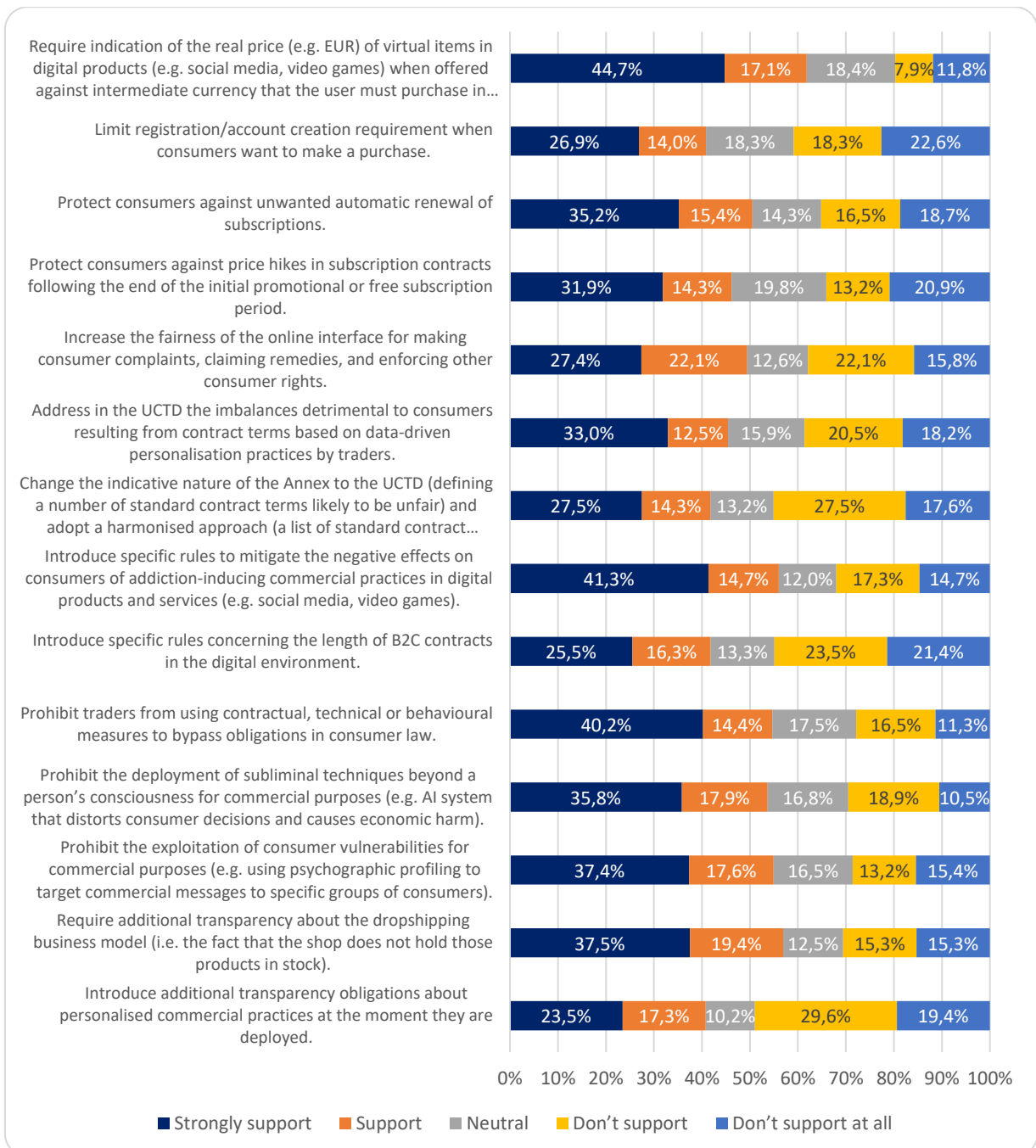


Finally, in Q82 it was analysed what are the respondents' views on specific possible changes to the existing EU legal framework which could be considered to strengthen consumer protection and to address problematic practices and/ or legal gaps. The specific changes which were perceived to be the most beneficial for consumer protection and the



addressing of problematic practices combined were the requirement to indicate the real price of virtual items in digital products (61.8%), the requirement to provide additional transparency about the drop shipping business model (i.e. the fact that the shop does not hold those products in stock) (56.9%), the introduction of specific rules to mitigate the negative effects on consumers of addiction inducing commercial practices in digital products and services (56.0%), and the prohibition for traders to use contractual, technical or behavioural measures to bypass obligations in consumer law (54.6%).

**Figure 99: Q82. What are your views on specific possible changes to the existing EU legal framework which could be considered to strengthen consumer protection and to address problematic practices and/ or legal gaps? (n=98)**



Q83 offered respondents the opportunity to make other comments and the following further recommendations and concerns were raised:

It was suggested to change the indicative nature of the Annex to the **UCTD** (defining a number of standard contract terms likely to be unfair) and adopt a harmonised approach (a list of standard contract terms that are always unfair or a list of terms that are presumed to be unfair). Similarly, it was commented that the length and content of the lists of unfair contract terms in the Member States vary greatly, and accordingly, the Annex of the UCTD should continue to apply only as an indicative list to allow for this. The continuation of an indicative list - which the EU should also be free to extend - opens up a great amount of flexibility for the Member States. It enables them to keep their previous lists and the case law that has been established in this respect, but also to extend them if new problem situations arise (possibly only in one member state). As a result of this move, it would then not be necessary to conduct potentially complicated and possibly unsuccessful votes to change the list at EU level. Respondents asserted that, should the list be designed as exhaustive at EU level, this would be a significant and serious intervention in the existence of the national level of consumer protection. In Germany, for example, large parts of §§ 308 and 309 of the German Civil Code would probably fall by the wayside.

**National consumer authority:** [Dropshipping] **traders need to inform consumers that they are getting products delivered directly by a third party in another country outside the EU** and specify which country the product is delivered from. This information requirement can be specified in the **CRD article 6 (g) about delivery and article 8 nr. 2**. Another suggestion is that webshops that are using drop shipping should **not be able to use a national web domain** (country code top-level domain). A national domain can give the consumer an expectation that the online store holds the products in stock within their own geographical area and not outside the EU, when this is not the case.

**ECC (network)** “a ban on dropshipping websites would be welcome”

#### Q85-86: Examples of national level legislation relevant to the Fitness Check

- **France:** 3 click cancellation, LOI n°2022-1158 du 16 août 2022;
- **France:** LOI n° 2023-451 du 9 juin 2023 visant à encadrer l'influence commerciale et à lutter contre les dérives des influenceurs sur les réseaux sociaux;
- **Germany:** FCC act and cancellation/termination button;
- **Austria:** Contract renewal can only be effected under the strict conditions of Section 6 (1) (2) of the Consumer Protection Act (KSchG);
- **Denmark:** Amendment of the Marketing Act in 2021, rules regarding commercial practices aimed at children and young people were tightened up;
- **Norway:** Since July 1st, 2022, the Norwegian Marketing Control Act Section 2 Second Paragraph has required a standardised label to be applied to all advertising in which body shape, size, or skin is altered through retouching or other manipulation, Norwegian Marketing Control Act Chapter 4 is dedicated to the protection of children;
- **The Netherlands:** Wet van Dam (2011), consumers may terminate their long-term contracts (such as subscriptions) at any time with a notice period of up to one month after the first tacit renewal;
- **Ireland:** national law on banning secondary selling of tickets (Sale of Tickets (Cultural, Entertainment, Recreational and Sporting Events) Act 2021);
- **Belgium:** Loi du 30 juillet 2013 n.2013011413, national law on banning secondary

#### Q85-86: Examples of national level legislation relevant to the Fitness Check

selling of tickets;

- **Italy:** The 2023 'Omnibus' decree law n.104, intervenes in airline technologies related to user profiling and imposes specific restrictions on algorithms that influence air ticket prices.

The 'Omnibus' decree law encompasses three key measures:

- Prohibition of dynamic pricing by airlines under certain conditions: This prohibition applies to national routes connecting the Italian islands, during periods of high seasonal demand or in conjunction with a national emergency.
- Airlines are prevented from setting ticket or accessory service prices that exceed 200% of the average flight fare.
- End to user profiling: In cases related to transportation to Italian islands and national connections during states of emergency or movements hindered by exceptional circumstances, user profiling is deemed an unfair commercial practice, as it results in economic harm.

## 1.4 Analysis of the position papers received to the Targeted Consultation

Alongside the submitted responses to the targeted consultation survey, 16 stakeholders (both EU-Level and from across various member states) have taken the opportunity to submit additional 17 position papers addressing various observations and concerns relating to legal gaps and recommendations for the Commission to take into consideration.

Considering the limited number of position papers in comparison to those received as a part of the OPC, the following synthesis is primarily structured by thematic issues raised by the stakeholders and includes, where provided, specific recommendations to address perceived legal gaps and/or uncertainties in the existing EU consumer law. It should be considered as supplementary to the overall findings of the targeted consultation survey and the position paper recommendations already outlined through the Call for Evidence and the OPC.

### 1.4.1 Positions of Stakeholders

#### 1.4.1.1 General comments on the effectiveness of current legislation and guidance

In terms of general comments made by stakeholders on the approach of the commission towards any legislative changes or additional guidance that may be provided, many traders (both online and offline focused) repeated prior calls to respect principles of technology and channel neutrality, and a need for further enforcement and implementation of existing legislation. Caution has also been called for regarding the presentation of potentially problematic practices (e.g. personalisation) which have been shown to have many benefits for consumers, a finding which is also supported in the website sweeps of this study. Specifically, EGDF has called upon the EU to “aim to mainstream European regulatory standards on a global level”, to ease regulatory burden on traders by encouraging the proliferation of its own best practice standards.

Regarding the current state of play and effectiveness of EU consumer legislation and guidance documents, individual traders, trade associations and platforms (Meta, DOT Europe, Computer and Communications Industry Association, Classifieds Marketplaces

Europe, Digital Europe, European Tech Alliance) praise the flexibility and future-proof nature of the legislation as open for interpretation by judges and authorities. As European Game Developers Federation (EGDF) add, for this effectiveness to continue and to be further enhanced, technical understanding by judges must be sufficiently high. This could require traders and authorities to coordinate further to facilitate knowledge transfer and greater transparency around new technological practices and innovative business models.

#### 1.4.1.2 Dark patterns

On the level of effective coverage and enforcement against **dark patterns**, traders and platforms suggest that the concept of dark patterns is rather “a new branding of a well-known activity, which refers to deceptive commercial practices – covered by UCPD, complemented by DSA”, as such they have cautioned that new definitions may lead to more uncertainty. However, the Dutch Consumer and Markets Authority (ACM) recognise the ongoing need to consider the **cumulative effects of dark patterns on consumers**, especially in vulnerable categories, and the interplay of this alongside targeted personalised offers and content, they argue that such an issue requires a concerted approach between actors across policy fields.

#### 1.4.1.3 Burden of proof and information/transparency requirements for different types of trader/worker

Furthermore, ACM hope to see a greater awareness of this issue through a shift in the Burden of proof placed upon stakeholders in the digital goods and services supply chain, by creating legal liability for third-party facilitators. This suggestion in particular aligns also with some trader concerns who are wary of increased burdens and requirements, and subsequent **liability risks, especially for SMEs** who cannot afford it. In relation to this, the European VOD coalition suggested that to draft a contract which “lists all the elements that could lead to a variation in the subscription fee in sufficient detail for the user to understand when price change may be expected” is impossible. As a first step, ACM see a need for the Commission to re-evaluate existing **transparency requirements** for effectiveness and usefulness, and encourage businesses to inform themselves about the effects of their own current digital commercial techniques.

Of course, the prospect of increased restrictions on trader behaviour still presents concerns for traders and their associations. DOT Europe, Buglas, Seldia (in coordination also with Doorstep Selling Europe) remain defensive of business practices such as Doorstep selling and Drop shipping. Additionally, with a focus upon the current burdens placed upon traders, EGDF (along with Digital Europe) questions the need for a subscription cancellation button in view of the Digital Contract Directive (DCD), which already includes detailed provisions on contract termination, but still in an early transposition phase. EGDF also made some specific recommendations to support **remote and freelance-working** traders, and in their view reflect more fairly the different realities and constraints affecting new start-up SMEs. call upon the Commission to consider greater nuance in the **information requirements** of the current consumer law framework to protect remote workers from having to publish online their geographical address, which is often both their professional and personal home address. As an alternative approach, to ensure that compliance and effective enforcement is maintained, in their view it would be sufficient to require the publication of a registered business ID number, an email address, phone number and a country of establishment; so that consumers and enforcement authorities can nonetheless access geographic addresses through local business registers.

#### 1.4.1.4 Consumer vulnerability relating to digital addiction and influencer marketing

In relation to consumer vulnerability and the potential abuse of information asymmetries, addictive design and dark patterns by traders and platforms, it has been recognised by

ACM, EGDF and Française des Jeux (FDJ) that the lines between gaming and gambling have become blurred, as in-game purchases of virtual goods and games of chance form a key social or gameplay component of the many gaming experiences. While **loot boxes** are no longer a new phenomenon, their prevalence in combination with the rise of online promotional activities, such as **influencer marketing** (where influencers are able to spend vast sums of money far beyond that of an average consumer, let alone a child, paid for by the trader) and the pervasive promotion of gambling websites and betting by influencers (e.g. the professional relationship on social media platforms like Instagram between betting website Stake.com and the rapper Drake) present a significant challenge to the online vulnerability of consumers.

It is crucial therefore that the Commission consider more **transparency requirements** on the probability of obtaining specific items from paid content with randomised elements (e.g. loot boxes). EGDF also point to the example of recent 2022 UK Enforcement Notice by the Advertising Standards Authority which highlights potential confusion for consumers when purchasing cryptocurrencies and other virtual products.<sup>612</sup> ACM take this further in a way which relates also to the prevalence and potential misleading of consumers when dealing with **virtual tokens, crypto-currencies and NFTs**, by asking that the Commission consider also “Demand[ing] from businesses that, when presenting prices that are displayed in in-game or in-app currency, those prices are also presented in real money – and to consider further action than just transparency requirements and legal regime, but prohibiting loot boxes, specifically in relation to children.” ACM propose that the Commission considers affording consumers the “same or similar rights when in-game and in-app purchases are made with in-game or in-app currencies as for in-game or in-app purchases with real money”. This recommendation means effectively for the Commission to add contractual terms that stipulate that **in-game and in-app currencies to be non-refundable as an unfair contract term** to the Unfair Contract Terms Directive.

The use of **influencer marketing** to promote games with randomised elements and of gambling as a game in itself occurs almost exclusively through **third party social media platforms** such as TikTok, Twitch and Instagram, EGDF noted however that some platforms (marketplace platforms that provide social media applications and games to consumers, but also including those streaming platforms that host influencers) do not allow European game developers and publishers to use European co-regulatory PEGI age ratings parallel to the platforms’ own age rating system. PEGI age ratings are a crucial part of the **pre-contractual information** for European consumers, and therefore their use should always be enabled in marketplaces. However, while EGDF believe that platforms and marketplaces should introduce complementary and added-value safeguards and restrictions for minors, they see no need to redefine the concepts of average or vulnerable consumer. In terms of legislative actions for the Commission, however, they point to the 2022 French ruling on the reinforcement of parental controls as a guide.<sup>613</sup> ACM however disagree, citing the vulnerability of children in the gaming and online environment, and recommend as such that the commission **explicitly extend the protection of consumers to other types of harms** such as time lost, emotional harm, privacy lost or addiction created.

As a focus for future legislation, ACM suggested for the Commission to clarify that the legal yardstick of the **average consumer does not apply in the case of personalised commercial practices**; and to draft legislation with consideration of the growing phenomenon of **AR and VR** devices, platforms and consumer spaces, and the potential emergence of new and cumulative dark patterns in this virtual environment.

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<sup>612</sup> [EnforcementNoticeCryptoassetsCryptocurrencies.pdf \(asa.org.uk\)](#)

<sup>613</sup> [LOI n° 2022-300 du 2 mars 2022 visant à renforcer le contrôle parental sur les moyens d'accès à internet \(1\) - Légifrance \(legifrance.gouv.fr\)](#)

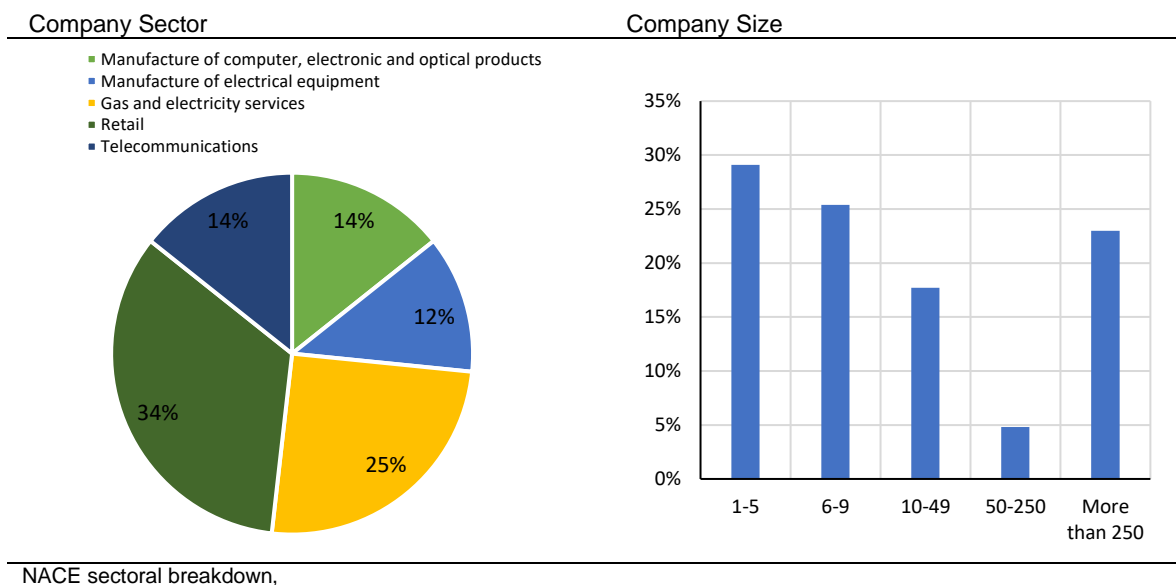
EGDF suggest that a gap exists in the current EU consumer protection framework when it comes to addressing copycat games. It is suggested that this can be addressed by the Commission through the **covering of copycat games in article 6(2)(a) of UCPD**.

## 2 Enterprise Survey

The enterprise survey contains responses from a sample of 1000 companies of various size, sector and business focus from a selection of 10 Member States (France, Germany, Italy, Spain, Sweden, Portugal, Poland, Romania, Hungary, Estonia). In terms of the sectoral breakdown- (Figure 100a), 34% of companies are from the retail sector however this can be further broken down into; retail sale of computers, peripheral units and software (17%), information and communication equipment (6%), retail sale of telecommunications equipment (6%) and retail sale of audio and video equipment (5%). The next largest share is from gas and electricity services (25%). The majority of participating companies are small businesses, with 55% noting they have 9 employees or fewer (figure 100b). Estonia and Spain have the highest percentage of small companies, with 28% and 24% respectively with 9 employees or fewer. Portugal has the lowest percentage of small companies at only 10% of participating companies. 49% of Portuguese companies have noted they have more than 50 employees, German companies were the next largest at 23%.

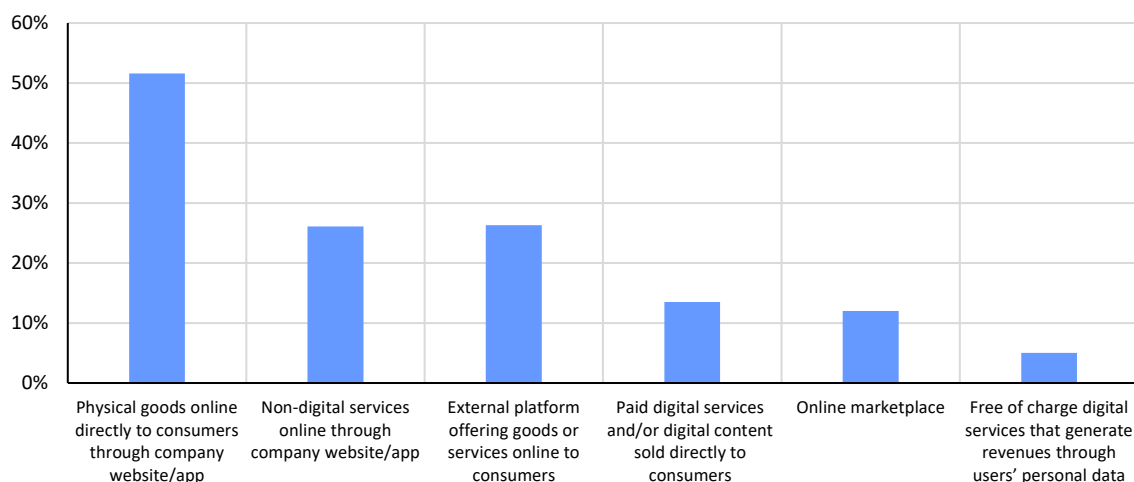
### 2.1 Company details

**Figure 100 - Company characteristics (n=1000)**



In terms of the products and services offered by businesses, a narrow majority of businesses (52%) indicated that they sell physical goods online directly to consumers through their company website or app. 26% have indicated that they sell non-digital services online (e.g. accommodation), this was particularly high in Germany (43%), as well as in Portugal and Poland (35%). Companies that use an external platform to offer goods or services online to consumers are popular in Hungary (39%) and Italy (37%), while online market places that allow other companies to sell goods directly to consumers were particularly popular in Poland (28% of companies) (figure 101).

**Figure 101: Products offered by companies (n=1000)**



## 2.2 EU consumer law

**Q.7. Are the current legal obligations from the EU and national consumer legislation applicable to your company clear?**

66% of companies have indicated that they feel current legal obligations to their company are clear. A further 32% have indicated that they are somewhat clear. While companies across Member States generally responded positively to this question, Portuguese companies provided the least positive response, with 48% indicating legal obligations are clear, 46% indicating they are somewhat clear and 6% indicating they are not clear. The most positive responses came from Swedish and French companies with 87% and 83% respectively indicating that the legal obligations applicable to their company are clear.

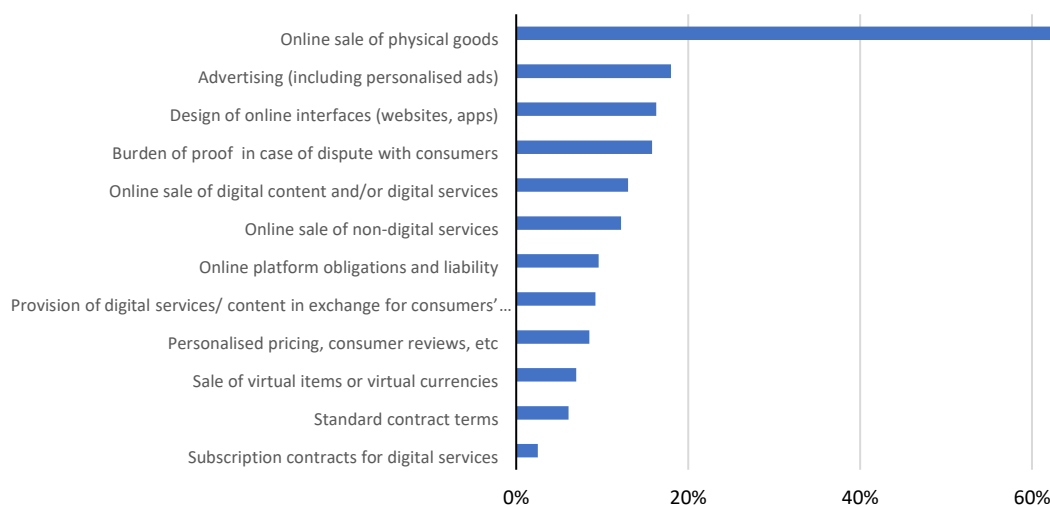
**Q.8 In your opinion, do any of the following involve legal uncertainty for your company? Please select all that apply.**

- Online sale of digital content and/or digital services
- Online sale of physical goods
- Online sale of non-digital services
- Provision of digital services/digital content in exchange for consumers' personal data
- Advertising (including personalised ads)
- Personalised pricing, offers, ranking, consumer reviews, etc.
- Design of online interfaces (websites, apps)
- Sale of virtual items or virtual currencies
- Standard contract terms
- Subscription contracts for digital services and their renewal
- Online platform obligations and liability
- Burden of proof / provision of evidence in case of dispute with consumers

When questioned on what areas of their business led to legal uncertainty, the majority indicated the sale of online goods (64%). This was higher for smaller companies (76% for companies of 1-5 people), than for larger companies (44% in companies of 55-250 employees), it was also particularly high in the sector *Manufacture of electrical equipment*.



**Figure 102: Legal obligations (n=1000)**



**Q.9** *In your experience, is the current consumer legislation well adapted to new technological developments?*

Overall, 92% of respondents found the legislation was either very well adapted (16%) or well adapted (76%) to new technological developments. On this point, responses were relatively consistent and positive across Member States. Portugal provided the most negative responses with 22% of companies indicating legislation is poorly adapted (though 78% indicated legislation was well or very well adapted). Spanish companies were the most positive with 100% indicating legislation was well or very well adapted. Companies of 50-250 employees were the most negative with 21% indicating legislation was poorly adapted. On a sectoral level, respondents from the sector *Retail sale of computers, peripheral units and software in specialised stores* were the most negative with 14% indicating legislation was poorly or very poorly adapted. In all other sectors over 90% of responses indicated legislation is well or very well adapted.

**Q.10** *Have you ever taken any specific measures to ensure that the online interface (meaning the design of your website or app) is fair, user-friendly and transparent?*

**Q.10.1** *Please estimate the initial resources you invested to implement the measures.*

**Q.10.2** *Please estimate the recurring annual costs related to these measures.*

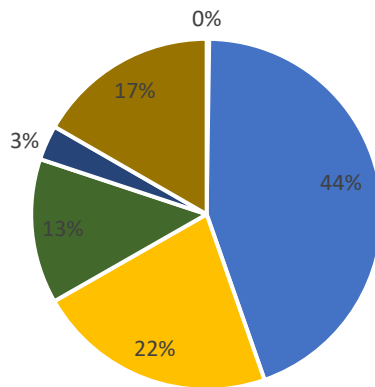
When questioned on whether they had ever taken specific measures to ensure that their online interface is user-friendly and transparent, 87% indicated they had taken specific measures, while 13% indicated they had not. Of the 869 respondents that stated they had taken these measures, 44% of respondents indicated that 1-2 employees worked on these measures (figure 103). Overall, companies dedicated an average of 3.1 employees to initially implement these measures and 2.7 on a recurring annual basis. Naturally, larger companies can dedicate more resources to these measures, with 64% of companies with 250+ employees indicating they had dedicated 5 or more employees to the initial measures. In terms of the number of days dedicated to the measures, 47% of companies dedicated between 11 and 20 days to these activities. Those in the sectors, *Gas and electricity* and *Retail sale of audio and video equipment in specialised stores* dedicated the most days to these activities as 50% of companies in both sectors indicated they dedicated 20 or more days.

Companies were also asked how much, if any they had spent on external experts to implement the measures. Whilst a significant proportion of respondents were not aware of this figure, those that were, most commonly indicated that both the initial and recurring costs fall between EUR 1000 and 2000.

**Figure 103: Resources dedicated (n=869)**

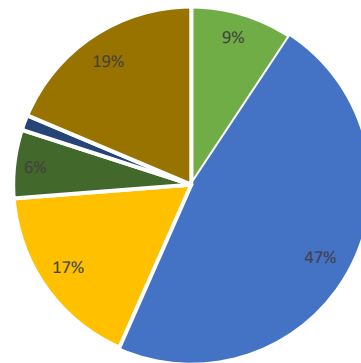
Employees working on measures (initial)

0 1-2 3-4 5-7 8-10 Unknown



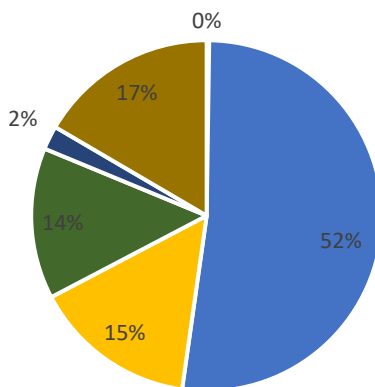
Dedicated days to working on measures (Initial)

10 or fewer 11-20 21-30 31-40 41+ Unknown



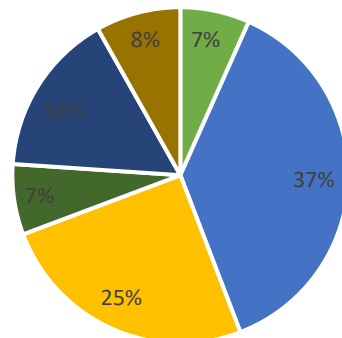
Employees working on measures (recurring annual)

0 1-2 3-4 5-7 8-10 Unknown



Dedicated days to working on measures (recurring annual)

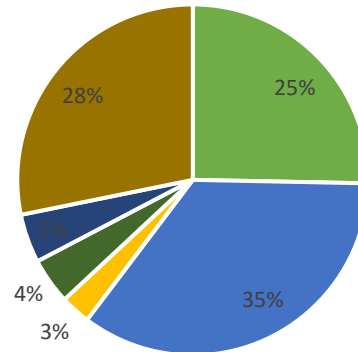
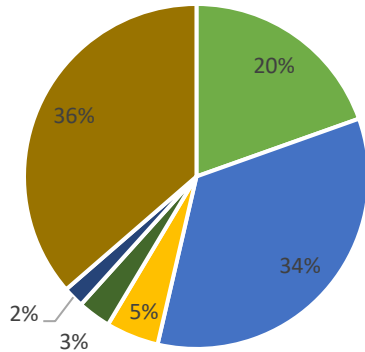
10 or less 11-20 21-30 31-40 41+ Unknown



2-4e Cost of external experts (initial)

2-4f Cost of external experts (recurring annual)

■ 1000 or less    ■ 1001-2000    ■ 2001-3000    ■ 1000 or less    ■ 1001-2000    ■ 2001-3000  
■ 3001-4000    ■ 4000 or more    ■ Unknown    ■ 3001-4000    ■ 4001 or more    ■ Unknown



Participants were also asked a series of questions concerning if and how they gather personal data from customers.

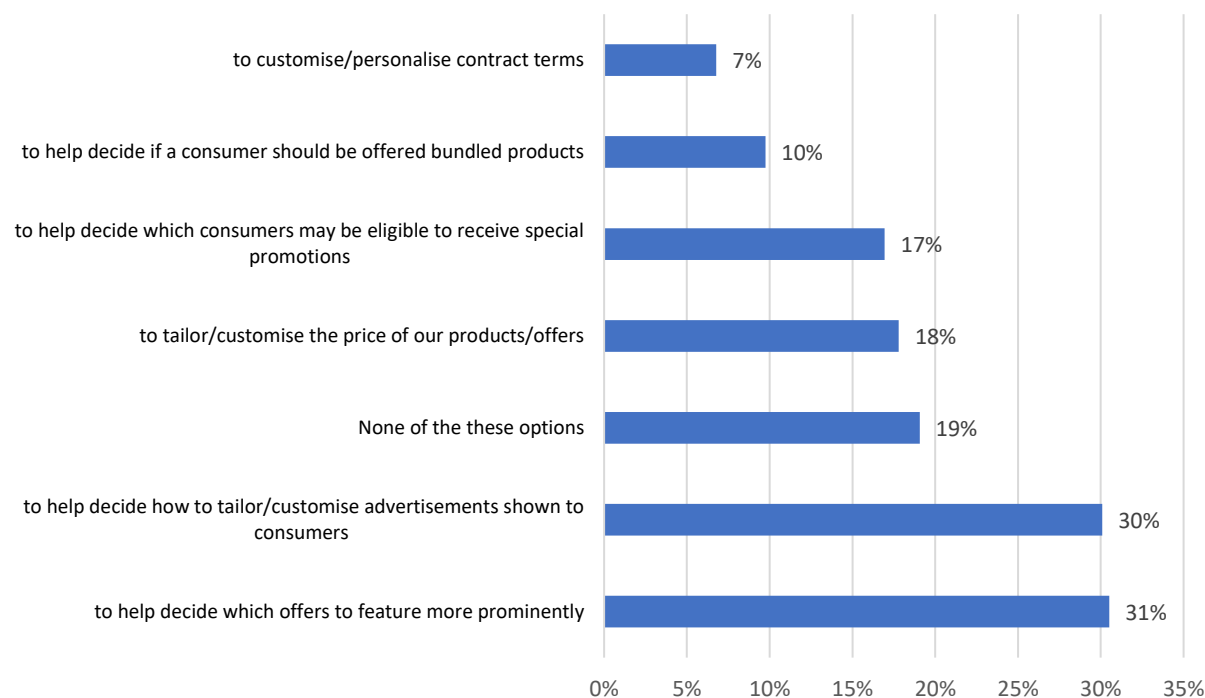
*Q.11 In the past 12 months, have you gathered personal data from customers that have visited your website?*

76% of respondents indicated they had not collected personal data from customers, whilst 24% indicated they had collected data. Romania (39%) and France (35%) had the highest proportion of respondents indicate they had collected personal data from customers. Larger and medium sized companies were more likely to have gathered personal data from companies, with the highest portion from companies of 10-49 employees (32%).

*Q.11.1. In the past 12 months, have you used customers' personal data to tailor/customise/optimize the appearance of your website, or the content displayed on your website?*

Of those that answered positively to the above questions (24% = 236 respondents), most used the data to help decide which offers to feature more prominently (31%), or to help decide how to tailor or customise advertisements shown to customers (30%). Notably, a high proportion of Spanish respondents (54%) and Italian respondents (50%) indicated that they use personal data to decide how to tailor or customise the advertisements shown to consumers.

**Figure 104: Personalised customer data usage (n=236)**



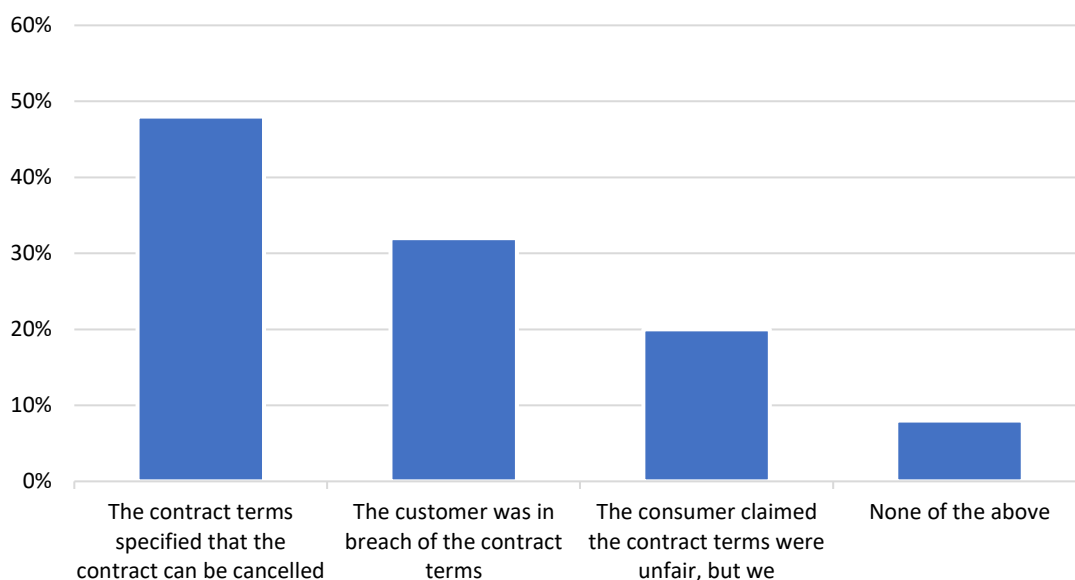
*Q.12 In the past 12 months, has your company offered subscriptions to consumers for any type of product or service offered online (e.g., via an app or website), including digital content and digital products or digital services (software, apps, e-books, online)?*

In the past 12 months, 20% of companies (203 respondents) had offered subscriptions to consumers for a type of product or service offered online. Most who indicated positively were from the retail sector; *Retail sale of computers, peripheral units and software in specialized stores (26%); Retail sale of telecommunications equipment in specialized stores (29%); Retail sale of audio and video equipment in specialised stores. (23%).*

*Q.13. In the past 12 months, has your company refused to cancel subscription contracts after a customer requested it? [Question for the 20% of companies which are subscription providers based on replies to Q12]*

In the past 12 months, **87% of subscription providers (177 respondents) had not refused to cancel subscription contracts after a customer requested it:** Of the 20% that had refused to cancel, 48% did so because the contract terms specified that the contract can be cancelled only at the end of the contractual period or after a certain time period has passed (figure 105).

Figure 105: Reasons behind cancellations (n=25)



### 2.3 Costs experienced by participants to comply with existing consumer legislation

Q.14 To what extent has compliance with consumer law requirements resulted in the following types of costs for your business in the digital area:

- Familiarisation with rules and obligations and initial compliance planning (e.g., developing compliance strategies, allocating compliance responsibilities)
- Checking your business's compliance with legal requirements to ensure that digital commercial practices (and contract terms) are not unfair or misleading (e.g. check website design has no unfair practices)
- Information obligations (e.g., pre-contractual and contractual information requirements, disclosure requirements for platforms on search ranking and reviews.
- Adjusting business practices (e.g., changing a website design where unfair, deceptive practices are identified, using different standard contract terms if considered unfair, etc.).

Respondents were questioned about the type of costs their company had experienced to ensure that advertising, marketing practices and standard contract terms comply with legislative requirements in the digital area. Approximately half of respondents indicated that overall, their business had experienced low cost impacts in each of the identified areas stemming from compliance with consumer law in the digital environment. The issue for which the largest percentage of respondents indicated high costs was **Familiarisation with rules, obligations and initial compliance planning**, however there was some variation among the sampled Member States, with 29% of companies in Portugal and 26% in Germany and Sweden having experienced high costs. Costs relating to familiarisation and compliance planning appear to be higher for larger companies, as 29% of companies with 50-250 employees (highest of size subsections) recorded this issue. Despite this however, 40% of similarly sized companies also indicated no costs relating to familiarisation with rules and obligations and initial compliance planning, indicating a wide disparity among companies. Furthermore, the largest percentage of companies who experienced low costs

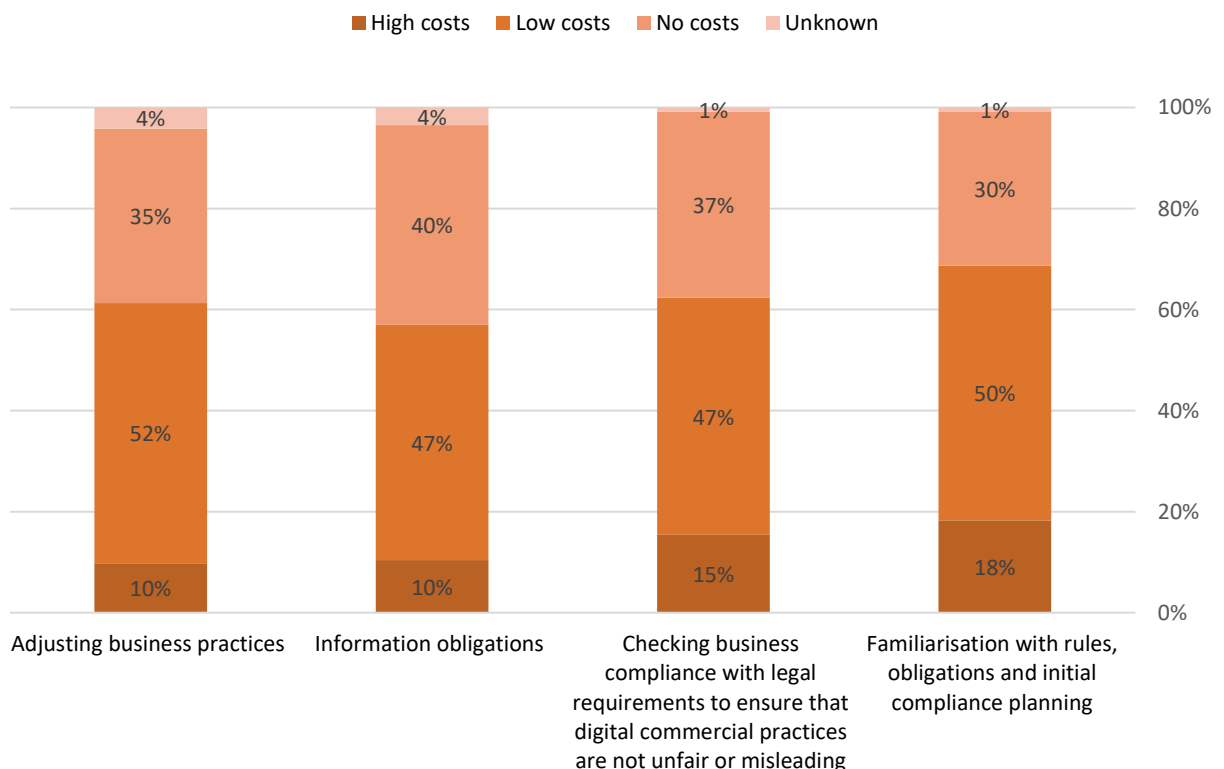
were in Spain (64%) and Estonia (60%), and on a sectoral level within *Retail sale of audio and video equipment in specialised stores* (62%).

On the issue of **Checking business compliance with legal requirements to ensure fairness of digital commercial practices**, 25% of companies in Portugal and 24% of companies in Sweden recorded high costs. On a sectoral level the largest proportion of high costs were recorded within *Retail sale of telecommunications equipment in specialised stores* (24%) and *Retail sale of audio and video equipment in specialised stores* (23%). Alternately, low costs were most significantly reported by Romanian companies (62%), while 46% of companies in Spain and 48% of the sector *Retail sale of information and communication equipment in specialised stores* recorded no costs relating to this issue.

**Information obligations** recorded the greatest percentage of no costs. Most significantly, the largest proportion of companies in Sweden (50%) and companies in Hungary (43%) noted no costs. On a sectoral level, 54% of *Retail sale of audio and video equipment in specialised stores* reported no costs from information obligations. The highest costs in this area appear to be concentrated in the *Telecommunications* sector (15%) indicated high costs and *Retail sale of information and communication equipment in specialised stores* (14%) indicated high costs. However, as with other areas the largest proportion overall recorded low costs relating to this issue.

For the issue of costs arising from **Adjusting business practices**, the largest percentage of respondents indicated low costs across the board, with companies from Spain (72%) and *Retail sale of telecommunications equipment in specialised stores* (61%) as a sector most prominent. Notably, 45% of companies in France and 46% of *Retail sale of audio and video equipment in specialised stores* also saw no costs arising from this issue (Figure 106).

**Figure 106: Costs associated with compliance with consumer law in the digital area (n=1000)**

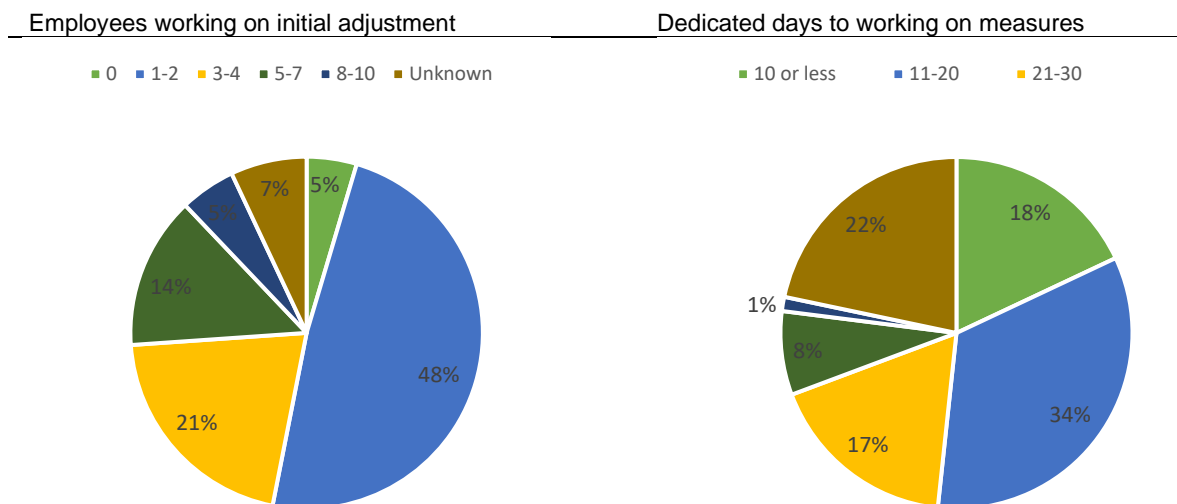


14.1 Please estimate the resources you invested in implementing the legal requirements into your business procedures. Here we are interested in the initial costs you may have faced to adjust your business practices to comply with the requirements mentioned in the previous question.

In terms of the resources invested in implementing these legal requirements into business procedures, respondents were questioned on how many employees were dedicated to the initial adjustment of business practices to ensure compliance, they were also questioned on how many days were dedicated to this process and the costs they incurred if any for external experts.

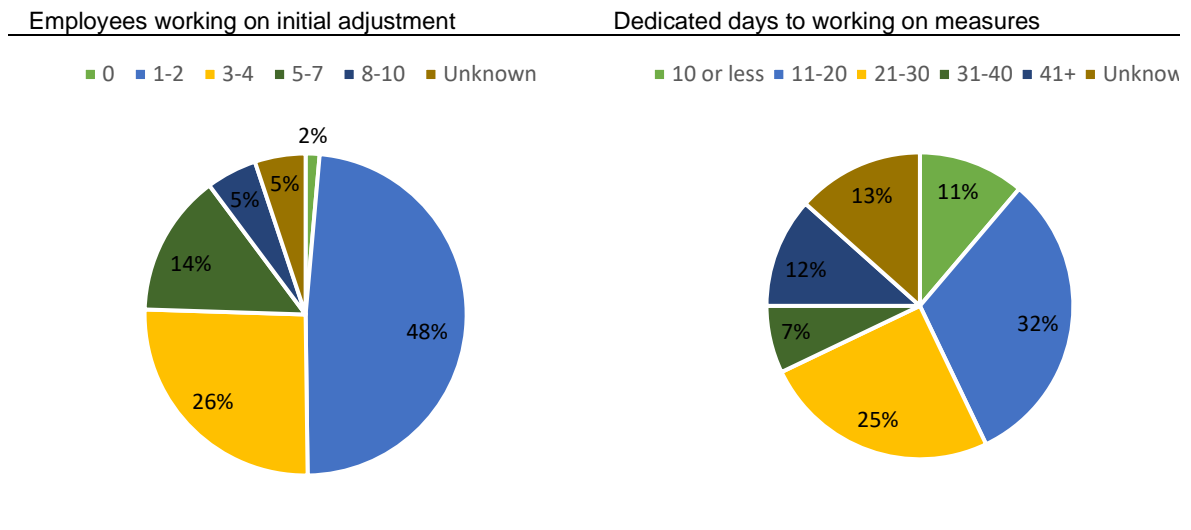
On average 2.9 employees were dedicated to the adjustment of business practices, with the majority dedicating between 11 and 20 days (figure 107). The average costs for companies to acquire external services was EUR 2331. The average was greater for Italy however (EUR 2910), within the sector, *Retail sale of telecommunications equipment in specialised stores* (EUR 3055) and companies with 1-5 employees (EUR 2698).

**Figure 107: Initial resource dedicated (n=1000)**



In terms of the resources used annually, the resources dedicated were largely similar. On average, 3 employees are dedicated to this work on an annual basis with the largest proportion dedicating between 11 and 20 days. The average for costs of external services annually is EUR 2539.

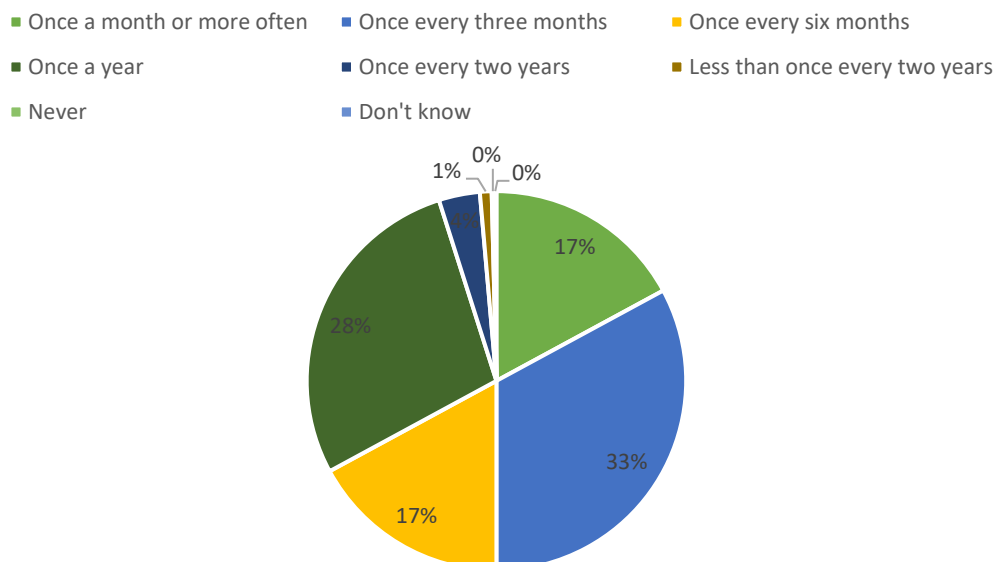
**Figure 108: Resources dedicated annually (n=1000)**



*Q15. In recent years, how frequently have you checked that your advertising/marketing and standard contract terms for online sales still comply with national legislation?*

67% of respondents checked at least once every six months that advertising/marketing and standard contract terms for online sales are still complying with national legislation. More specifically, 50% checked at least once every three months (figure 109).

**Figure 109: Ongoing checks of compliance (n=1000)**





## 2.4 Sales and business in other EU countries

Q16. In the past 12 months have you been selling or providing your products or services online to consumers in other EU countries?

Q16.1. When you first entered the market in another EU country, did you face any additional costs to check compliance with and adjust your business practices to the legal requirements of that country, for example rules regarding advertising/marketing, cancellation of contracts and standard contract terms? This may include costs for legal advice, costs for adapting standard contract terms etc.

Q16.2 Which other EU countries did you target for the online sales of your products/services?

Q16.3 Considering only online sales to consumers in other EU countries, to what extent has compliance with consumer law requirements resulted in the following additional costs for your business:

- *Familiarisation with rules and obligations and initial compliance planning (e.g., developing compliance strategies, allocating compliance responsibilities)*
- *Checking your business's compliance with legal requirements to ensure that digital commercial practices (and contract terms) are not unfair or misleading (e.g., check website design has no unfair practices; ensure that a contract cancellation button exists, if specifically required by national law)*
- *Information obligations (e.g., additional pre-contractual and contractual information requirements).*
- *Adjusting business practices (e.g., changing a website design where unfair, deceptive practices are identified, using different standard contract terms if considered unfair, etc.).*

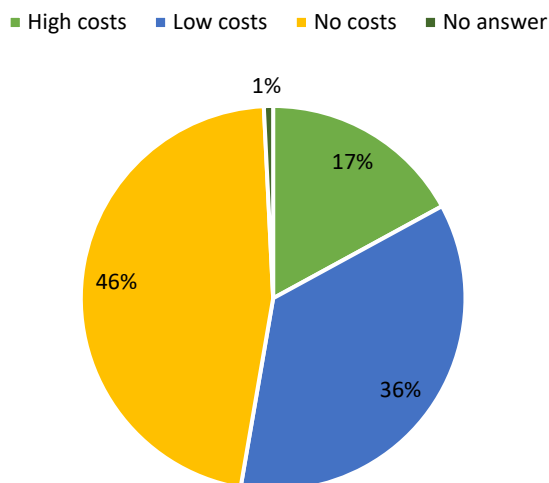
Q16.4 Please provide estimates of the additional costs of complying with consumer law when trading cross-border.

When asked about business practices in other EU countries, only 13% of respondents indicated that in the last 12 months, they had sold or provided products or services online to consumers in other EU countries. This was greatest in France, Italy, Poland, Romania and Estonia (all 15%) and, in very small companies (14% in companies 1-5 employees) and very large companies of over 250 employees (14%). On a sectoral level it was most prevalent in *Retail sale of computers, peripheral units and software in specialised stores* (18%). Of those that responded yes, the greatest percentage (46%) experienced no additional cost. The greatest percentage of companies indicating no costs came from Sweden (62%).

Of those respondents who had provided products or services to consumers in other EU countries (129 respondents), when asked about the costs associated with entering new markets, 17% of respondents indicated they had experienced high costs. Poland had the greatest proportion of companies reporting high costs (33%). In terms of company size, the greatest percentage of those paying high costs were companies with over 250 employees (28%), though 53% of companies with over 250 employees indicated they experienced no costs, while 19% experienced low costs. On a sectoral level the highest proportion of companies indicating high costs were from the *Telecommunications* sector (29%), while the highest percentage experiencing no costs were within the sector, *Retail sale of telecommunications equipment in specialised stores*. (figure 110).

**Figure 110: costs of compliance checks in new EU countries (n=129)**

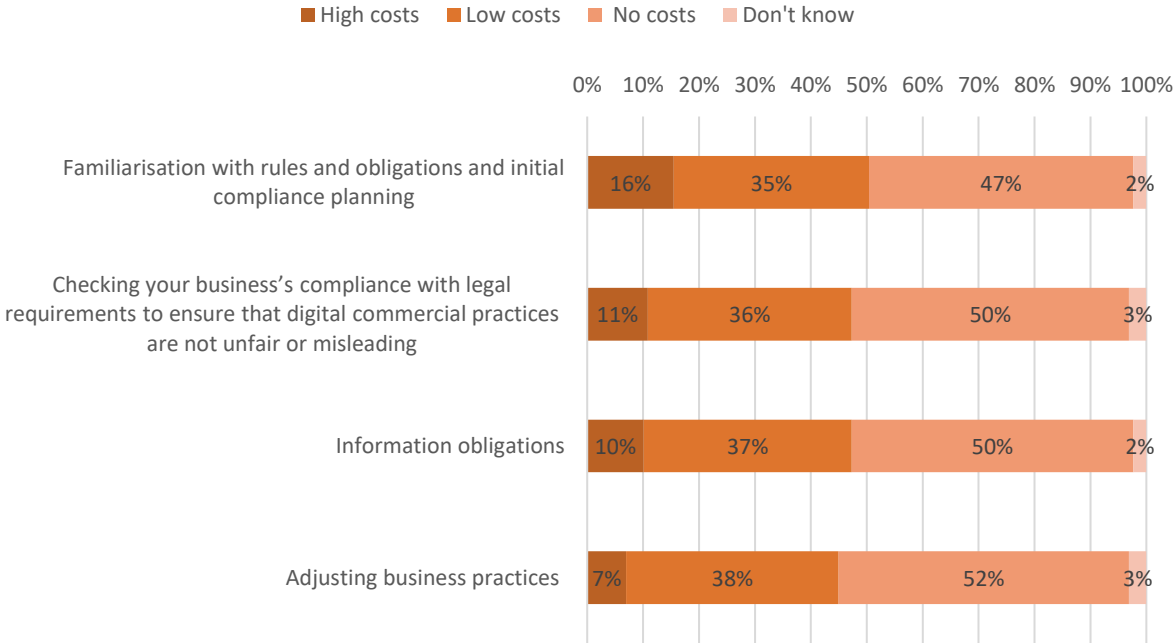
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The majority of companies indicated no costs in response to any compliance issues (figure 110). Where costs were reported, the greatest issue facing companies was high costs arising from **Familiarisation with rules and obligations and initial compliance planning** (16%). Polish companies indicated this most strongly (27%). Contrastingly in Romania 60% of companies indicated no costs in this area. On a sectoral level, *Retail sale of computers, peripheral units and software in specialised stores*, indicated the largest percentage of high costs (37%), while the highest percentage indicating no costs was *Manufacture of computer, electronic and optical products* (75%).

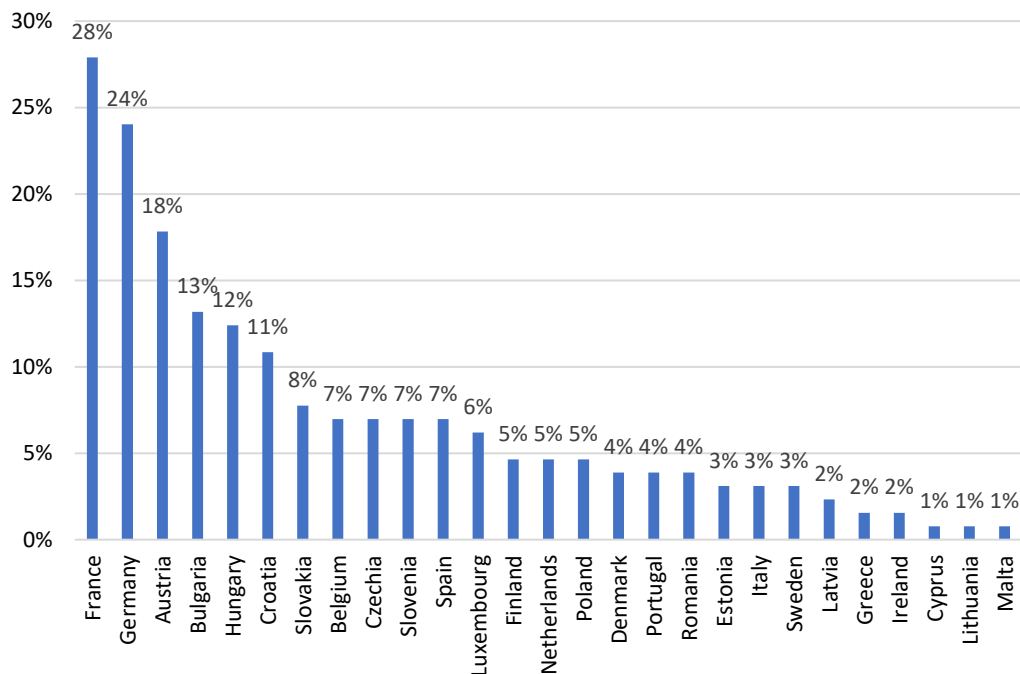
**Adjusting business practices** recorded the largest percent of companies indicating no costs. This was highest in Sweden (77%) and France (75%). Very few companies indicated high costs in this area, with the highest concentration being 13% of companies with over 250 employees (13%).

**Figure 111: Costs by area (n=129)**



In terms of where companies have indicated they conducted new business, the graph below provides a breakdown, the most popular countries were France (28%), Germany (24%) and Austria (18%).

**Figure 112: Countries in which companies did business in other EU countries. (n=129)**



When respondents were questioned about resources they dedicated to compliance when trading cross border. 63% of respondents indicated they dedicated 1-2 employees, 88% indicated 4 or fewer. The average of costs of external services needed to comply with consumer law trading across borders was EUR1286. This was greatest in Estonia (EUR1623) and Germany (EUR1529), and lowest in Italy (EUR836). On a sectoral level this was greatest within the sector, *Gas and electricity services* (EUR1561).

## 2.5 New legal requirements under the Modernisation Directive

*From (mid) 2022, new requirements apply to companies which amongst others include:*

- *Specific rules on the indication of price reductions*
- *Informing consumers how online search results are ranked*
- *Informing consumers when prices are personalised by automated processing of personal data*
- *Informing consumers if and how the origin of online reviews is checked*
- *Informing consumers whether third parties selling on the platform are traders or not.*

*To accommodate these new requirements, you have most likely had to implement new procedures, or change the information displayed on your website, app or platform, which may have induced additional costs.*

*Q.17 Please estimate the resources you invested in **implementing** these new requirements into your business procedures. Here we are interested in the initial costs you may have faced to adjust your business practices to comply with the new requirements.*

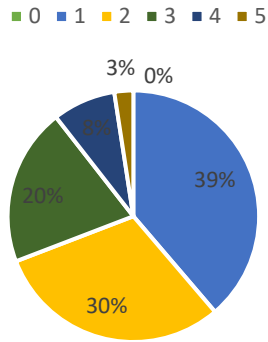
When questioned on the resources dedicated to implementing these new requirements, the respondents indicated as follows. (figure 113).

- For Incorporating **information on third party sellers**, the average of employees working on this was 2.41 and the average of days dedicated was 26.47, this was higher for companies with more than 250 employees (32 days) and within the sector, Retail sale of computers, peripheral units, and software in specialised stores (32 days). For Incorporating information on how **online search results are ranked** and disclosing paid placements in search results, the average of employees working on this was 2.2 and the average of days is 22.53. It is highest in Poland (27 days) and for companies with more than 250 employees, (26 days).
- For Incorporating information on how **online customer reviews** are processed and checked, the average of employees working on this was 2.13, this was highest for Poland (2.6). The average number of days spent on this was 23.90, this was higher in Spain and Sweden (approximately 27 days).
- For Informing consumer when **the price offered is personalised** by automated processing of consumers' personal data, the average employees working on this was 2.05, this was higher in Romania (2.5). It was lowest in Hungary and Italy (1.6) and for companies with 1-5 employees (1.5) the average of days spent on this activity is 20.15. In this case the amount is quite uniform across Member States and among the different companies' sizes.
- For Incorporating procedures to adapt to the new rules on **displaying the "prior" price** in price reduction announcements, the average of employees working on this was 1.95, higher in the sector Retail sale of information and communication equipment in specialised stores (2.24). The average of days spent on this activity was 18.4 days, this was higher for Poland 23 days.

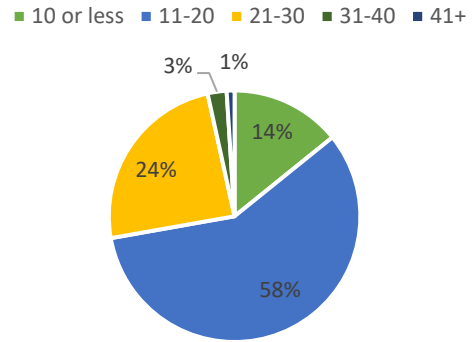
**Figure 113**

**Informing consumer when the price offered is personalised by automated processing of personal data (n=493)**

Dedicated employees

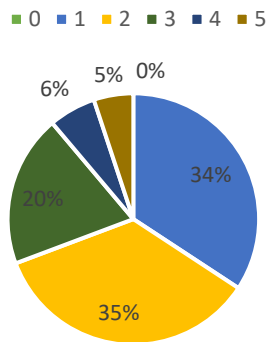


Dedicated days

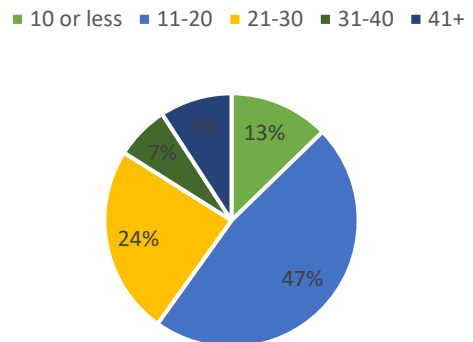


**Incorporating information on how online customer reviews are processed and checked (n=511)**

Employees

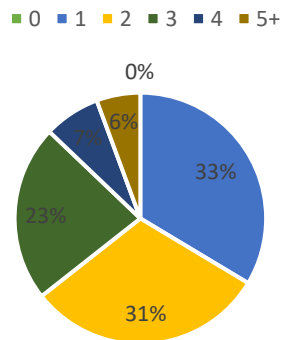


Days spent

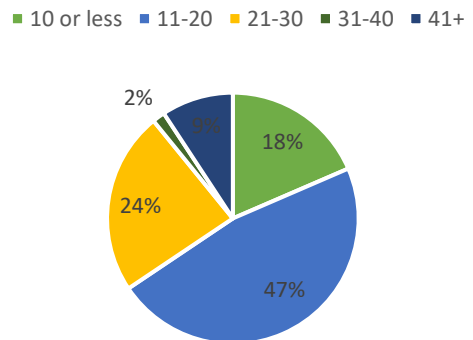


**Incorporating information on how search results are ranked and disclosing paid placements in search results (n=511)**

Employees working



Days spent

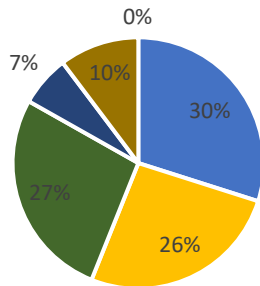


**Incorporating information on third party seller (n=107)**

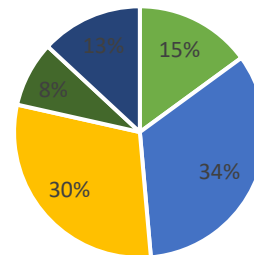
Employees working

Days spent

0 1 2 3 4 5



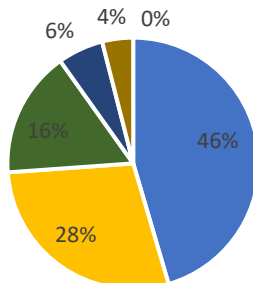
10 or less 11-20 21-30 31-40 41+



### Incorporating procedures to adapt to the new rules on displaying the “prior” price in price reduction announcements (n=528)

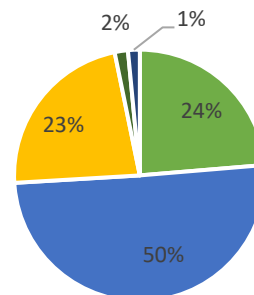
Employees

0 1 2 3 4 5



Days Spent

10 or less 11-20 21-30 31-40 41+



## 2.6 Benefits related to EU legislation

Q.18 Please indicate if the harmonisation of rules concerning advertising/marketing and standard contract terms for online sales has had a positive or negative impact on your company:

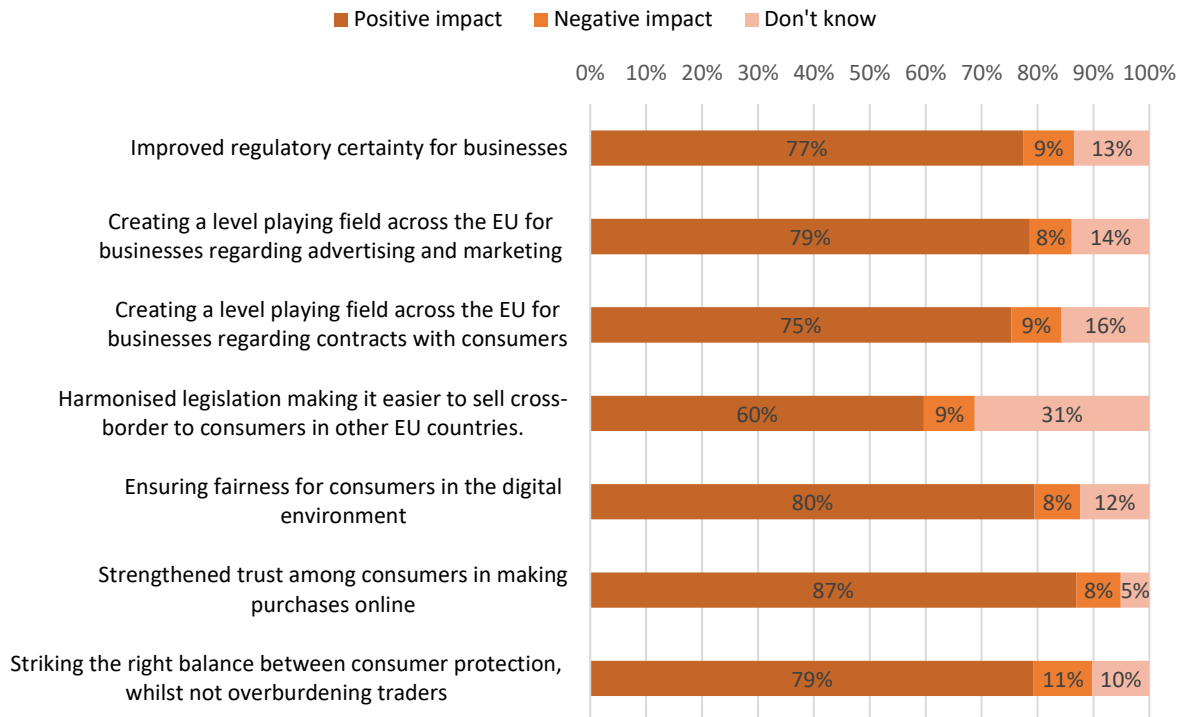
- Improved regulatory certainty for businesses Creating a level playing field across the EU for businesses regarding advertising and marketing to consumers by eliminating (or reducing the prevalence of) unfair and / or misleading market practices.
- Creating a level playing field across the EU for businesses regarding contracts with consumers by safeguarding that standard contract terms are fair.
- Harmonised legislation making it easier to sell cross-border to consumers in other EU countries.
- Ensuring fairness for consumers in the digital environment
- Strengthened trust among consumers in making purchases of goods, services, or digital content online
- Striking the right balance between consumer protection, whilst not overburdening traders

Finally, respondents were questioned on the potential benefits related to EU-level harmonisation. The majority of respondents noted a positive impact for each of the listed categories. The highest positive impact was reported for Strengthened trust among consumers in making purchases online (87%). This was greatest in Spain (96%) and within

the sector Retail sale of information and communication equipment in specialised stores. The largest proportion indicating a negative impact was in Portugal (21%).

The area in which the largest proportion of respondents indicated a negative impact was within the area Striking the right balance between consumer protection, whilst not overburdening traders, though still low at 11%, the largest proportion indicating a negative impact in this area were companies with 50-250 employees (19%) and France (18%).

**Figure 114: Impact of legislation (n=1000)**





## 3 Consumer Survey

This analysis is based on a consumer survey carried out on a sample of 10,000 respondents. The survey respondents are based in ten countries, these are Germany, Estonia, Spain, France, Italy, Hungary, Poland, Portugal, Romania and Sweden. Consumers were first asked a series of questions to determine their key characteristics as well as a number of profiling questions regarding their preferences. The survey results explored in this document present a sample of composition questions in section one. Consumer experience in the digital environment is assessed in section 2. Next, the costs and benefits associated with being a consumer in the online environment, including issues such as financial and psychological detriment are explored in section 3. Finally, consumer's knowledge and their interpretation of consumer rights are assessed in section 4.

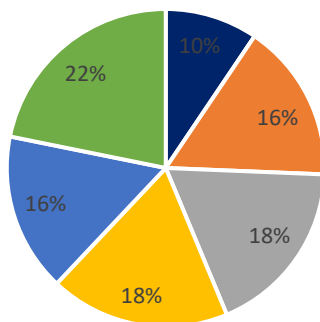
### 3.1 Sample composition

In terms of the composition of the sample, a number of questions were asked of respondents to determine their socio-demographic characteristics. A breakdown of the composition of the sample based on a number of characteristics is outlined below. Further details regarding all characterisation questions can be found in Annex 1.

**Figure 115: Age and Gender Distribution (n=10000)**

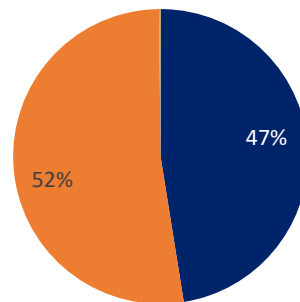
**Age groups distribution**

■ 18-25    ■ 26-35    ■ 36-45  
■ 46-55    ■ 56-65    ■ 65+

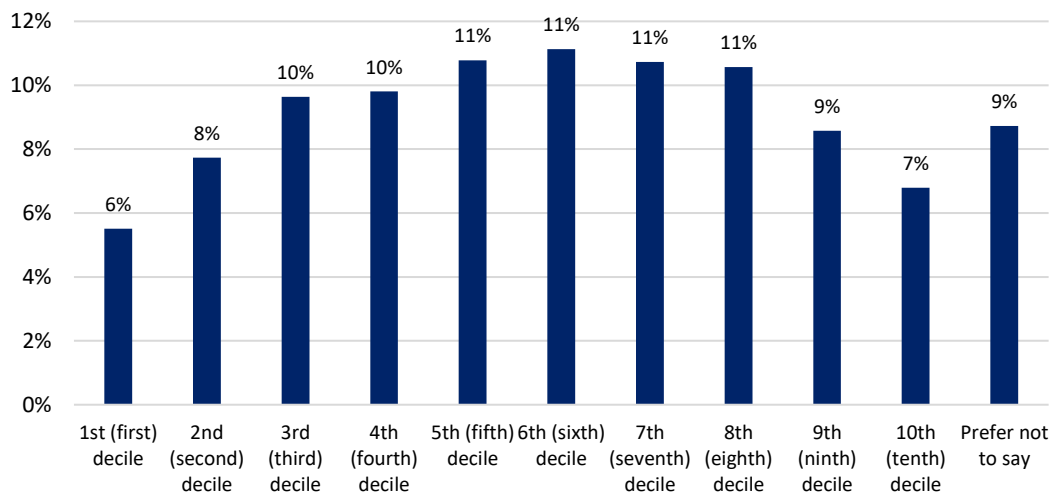


**Gender distribution**

■ Male    ■ Female    ■ Other    ■ Prefer not to say



**Figure 116: Household total net income – Deciles distribution (n=10000)**



## 3.2 Consumer experience in the digital environment

Section two of the survey assesses the experience of respondents when purchasing or using online products or services. This includes any type of physical goods or services purchased online (e.g., via an app or website), as well as digital content, services or subscriptions (e.g., social media; software, apps; video games; e-books; online courses; and digital subscriptions such as Spotify, Netflix, Amazon Prime, newspaper access etc). Questions covered in this section<sup>614</sup> address consumers recent experiences in the context of such purchases. An assessment of responses to questions asked of respondents in this section is included below.

Throughout the analysis in this section, boxes which present a behavioural economic view regarding online consumer behaviour are included. These insights explore the implications of the prevalence of certain consumer experiences online, making use of insights from behavioural economics. Behavioural economics looks at decision making through a psychological lens to better understand why people behave as they do. In contrast to traditional economics, behavioural economics recognises that individuals do not always make choices that are rational or perfectly calculated. Humans are limited in their cognitive ability and are prone to certain biases that lead to predictable deviations from the theoretically perfectly rational choice.

<sup>614</sup> Q6. In the past 12 months, have you purchased or used any type of products or services online, including digital content/services/subscriptions?

Q6.1 Have you experienced the following situations in the past 12 months when you purchased or attempted to purchase any type of products or services online, including digital content/services/subscriptions?

Q7 In the past 12 months, how often have you encountered the following price promotions/offers?

Q.8 In the past 12 months have you used or purchased digital content/services/subscriptions (e.g., social media, software, apps, video games, e-books, online courses, digital subscriptions like Spotify, Netflix, Amazon Prime, newspaper access etc.).?

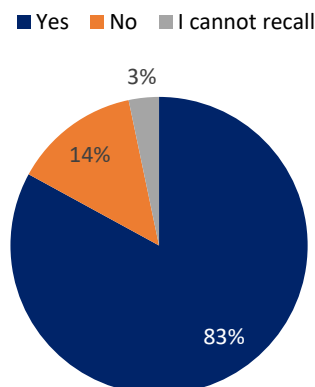
Q8.1 Have you experienced the following situations in the past 12 months while using or purchasing digital content/services/subscriptions?

### Online consumer purchases

According to the consumer survey, **the majority of consumers (83%) had made some form of online purchase, or used a product or service online in the past 12 months, whilst approximately 14% indicated they had not (figure 117)**. Those in the older age cohorts were the least likely to have made purchases online; 22% of those aged 65+ and 17% of those aged 56-65, indicated they had not purchased or used any type of product or service online in the last 12 months, this is compared to 8% of respondents in both the 18-25 and 26-35 year old cohorts. Responses also indicate that the likelihood of consumers making an online purchase are proportionate to income levels, with those on the highest income more likely to have purchased or used products or services online, than those in the lower deciles; 75% of consumers on average in the lowest 3 income deciles had made this type of purchase, this compares to 90% on average across the top 3 deciles.

In all countries in which consumers were surveyed, the majority of consumers had made an online purchase in the past 12 months, however there was variation. The lowest percentage was amongst French consumers, with 68% of consumers indicating they had made a purchase of this type in the past 12 months, Sweden was the highest at 90%. With regards to characterisations made by profiling questions people who enjoy gambling (or playing games of chance) several times per week were most likely to have made a purchase or used an online product (93%), as well as those who have indicated they are trusting of online businesses and websites (95%).

**Figure 117: Consumers who purchased or used any type of products or services online (n=10000)**



### Situations experienced online

In the digital environment, consumers must navigate the online environments of retailers and service providers from whom they wish to make a purchase from. These interactions may involve interpreting the information that is presented regarding the products or services, or may involve finding additional information they may need, such as how to find a contact email or phone number. These experiences may be a positive for the consumer enabling them to complete the purchase they had intended to make, or at times they can face challenges. As these challenges can occur if the information is presented not in a clear way (for instance presenting prices in a particular way), or through other practices implemented by the retailer or website/app designer (dark patterns). These practices may deter the consumer from making their intended purchase, or encourage them to make a purchase they had not intended to make.

In this regard, consumers who indicated they had purchased or used a products or service online, were also asked about the experiences they have had in doing so. As exhibited in figure 118 some of the most common experiences indicated by consumers are explored below:

- 54%<sup>615</sup> of respondents indicated that when making an online purchase **they had found a company phone number or email address with ease**. Over 50% of respondents in all age categories indicated they have this experience either 'most of the time' or 'always'. In terms of those who had problems locating this information 16%<sup>616</sup> of consumers indicated significant issues. This was slightly higher among consumers who feel spending time online negatively effects their life (20%) and among those who are very untrusting of inline businesses (23%). Outside of this, patterns were relatively consistent.
- **Online reviews** are a tool which many consumers use to inform themselves about a potential or intended purchase. However, it is important that these reviews are trustworthy and credible. 30%<sup>617</sup> of respondents indicated that when looking at customer reviews on websites, they **could not find information about how the reviews are collected and whether the company ensures that published reviews are made by real customers**. The likelihood of this experience showed a correlation with age, with younger age profiles indicating less of a challenge in locating the information than older groups.
- As elaborated in **the box below**, consumer behaviour may be influenced by how scarce a consumer may perceive a product to be. 26%<sup>618</sup> of respondents indicated that while making purchases online, they had noticed a product they were looking at **was low in stock or in high demand**. This practice was identified most often by those who often engage in gambling (or games of chance); 42% of those who engage in this activity daily and 39% of those who engage several times a week encountered this messaging regularly. Further, on a country level, this was reported particularly highly among respondents from Romania (37%) and France (31%).

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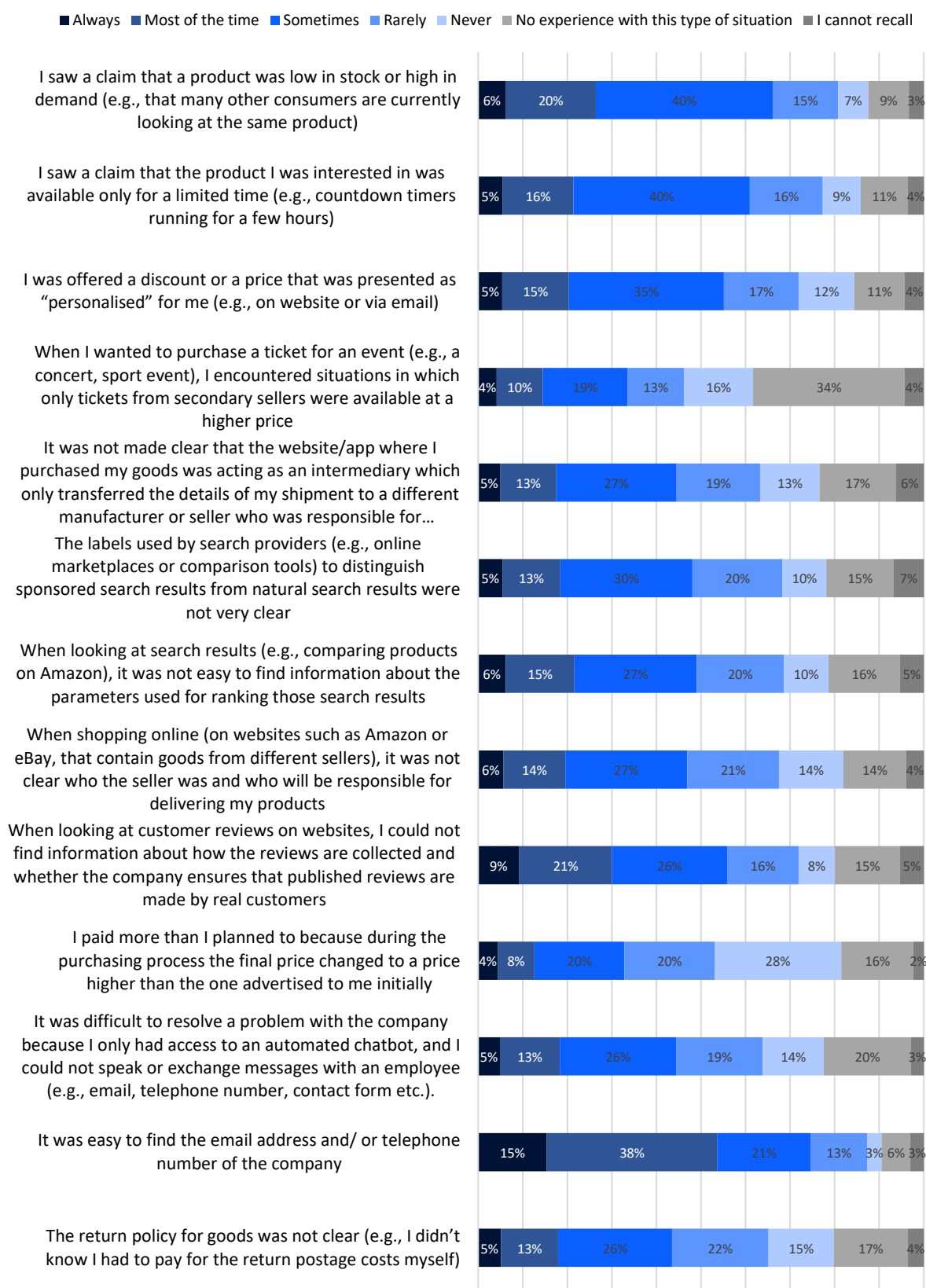
<sup>615</sup> This figure represents the sum of 15% who indicated *always* and 38% who indicated most of the time.

<sup>616</sup> This figure represents the sum of 13% who indicated *they can rarely find this information* and 3% who indicated never.

<sup>617</sup> This figure represents the sum of 9% who indicated *always* and 21% who indicated most of the time.

<sup>618</sup> This figure represents the sum of 6% who indicated *always* and 20% who indicated most of the time.

**Figure 118: Situations experienced while purchasing or attempting to purchase products or services online (n=8302)**



In the digital context, it is important to recognise how sellers can influence the choices that individuals make online. The way that information is presented to consumers is known as the choice architecture.<sup>619</sup> Online sellers can use choice architecture and so-called ‘nudges’ to encourage consumers to interpret particular options as more or less appealing than others. The results of the digital fairness consumer survey shed light on the extent to which choice architecture is used online. This box expands on the implications of these strategies and how they might affect consumer behaviour.

### The Effect of Scarcity

**People tend to place more value on products that are seen as scarce or exclusive and tend to dismiss relatively abundant goods.**<sup>620</sup> This effect has the power to change the decision made by a consumer. The use of choice architecture that frames a good or service as scarce is prevalent in the digital environment. For example, Figure 118 shows that 26% of respondents have, either always or most of the time, seen a claim that a product is low in stock or high in demand. 21% of respondents also said they have seen limited time offers, either always or most of the time. Both these frames are intended to make the consumer perceive the product as more valuable than they might otherwise have done. This is likely to make the viewer more inclined to purchase the item.

### Social Proofing

**People tend to place more value on doing something if they think that other people are also doing it.** This concept is known as social proofing and relates to the idea of social norms.<sup>621</sup> When sellers claim that a product or service is high in demand consumers will take this information as an indication that a lot of other people are buying the item. Again, this is likely to encourage people to value it more highly and therefore make it more likely they will want to purchase it. From figure 118, 66% of respondents said: “I saw a claim that the product was low in stock or high in demand (e.g., that many other consumers are currently looking at the product)” sometimes, most of the time, or always.

## Pricing in the digital environment

Consumers may also be influenced by how prices are presented to them; this is known as price framing and is expanded upon below in section 3. Online retailers are obliged to follow specific rules regarding price promotions which aim to enhance transparency and protect consumers from unfair practices.

Consumers were questioned on the type of price promotions they encountered online and the frequency with which they had encountered them **in the past 12 months**. In response, the answers were relatively consistent. The most common response for every experience offered was ‘sometimes’ with a further 15-20% of consumers indicating they ‘always’ or ‘most of the time’ experienced the promotion. The below experiences were most common among consumers;

- Conditional offers when buying more than one item (such as ‘30% off when buying 2 items).

<sup>619</sup> Thaler, R. H. & Sunstein, C.R. (2008), *Nudge: Improving Decisions about Health, Wealth, and Happiness*. See also Johnson E.J, Shu, S.B, Dellaert, B.G.C., Fox, C., Goldstein, D.G., Häubl, G., Larrick, R.P., Payne, J.W., Peters, E., Schkade, D., Wansink, B. & Weber, E.U. (2012), *Beyond nudges*.

<sup>620</sup> Aggarwal, P., Jun, S. Y., & Huh, J. H. (2011). Scarcity messages. *Journal of Advertising*, 40(3), 19-30.

<sup>621</sup> Sunstein, C. R. (2014). Nudging: a very short guide. *Journal of Consumer Policy*, 37, 583-588.

- One way in which consumers can be presented with price promotions is through conditional offers when buying multiple items. This means they will receive an overall discount if they purchase, for example, 2 items. This can provide consumers with a good value option; however, it can also be a practice which is used by retailers to encourage consumers to spend more than initially intended. 23% of respondents indicated that they had encountered **conditional offers when purchasing multiple items**.<sup>622</sup> This response was higher among respondents in the higher income deciles 21% on average experienced this always or most of the time in the lowest three income deciles; compared with 27% on average across the top three deciles). Additionally, this was particularly high among respondents in Hungary (28%) and Romania (28%).
- Conditional offers when buying for more than a certain amount (e.g., 30% off when buying for at least 100 EUR)
  - Conditional offers can also be presented to consumers as a discount if they spend over a certain amount of money. 23%<sup>623</sup> of respondents indicated they encountered conditional offers for purchases above a certain amount. Again, this response was higher among respondents in the higher income deciles; 21% on average experienced this 'always or 'most of the time' in the lowest three income deciles; compared with 27% on average across the top three deciles.
- Parallel presentation of a lower price for members of the 'loyalty programme' and a higher price for the general public:
  - Price framing can also be used to encourage consumers to sign up to loyalty programs, newsletter, or other types of 'member programs' which often come with the promise of future discounts. 23%<sup>624</sup> of respondents indicated they had experienced a presentation of a lower price for members of a loyalty programme.

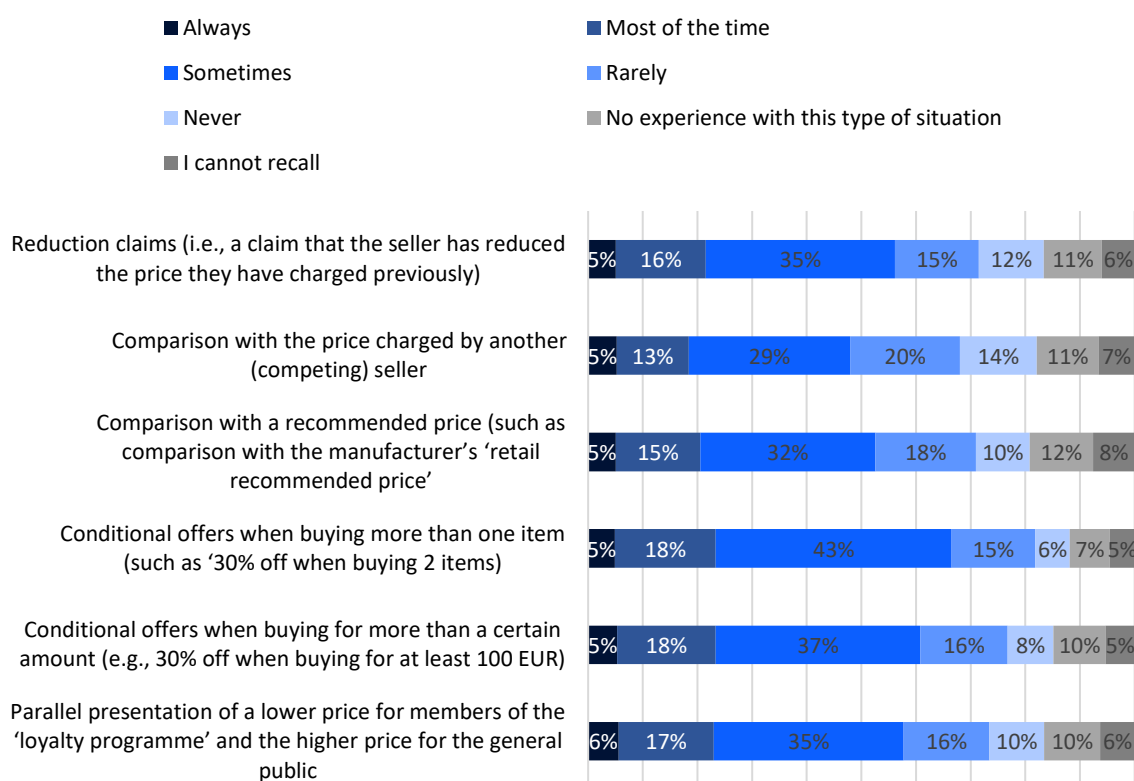
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<sup>622</sup> This figure represents the sum of 5% of consumers who indicated always and 18% who indicated most of the time.

<sup>623</sup> This figure represents the sum of 5% of consumers who indicated always and 18% who indicated most of the time.

<sup>624</sup> This figure represents the sum of 6% of consumers who indicated always and 17% who indicated most of the time.

**Figure 119: The frequency of price promotions/offers (n=10000)**



### Digital content, services and subscription in the online environment

The use or purchase of digital content/services and subscriptions brings its own set of challenges to the consumer. Digital services encompass a variety of online services from websites to internet infrastructure services and online platforms.<sup>625</sup>

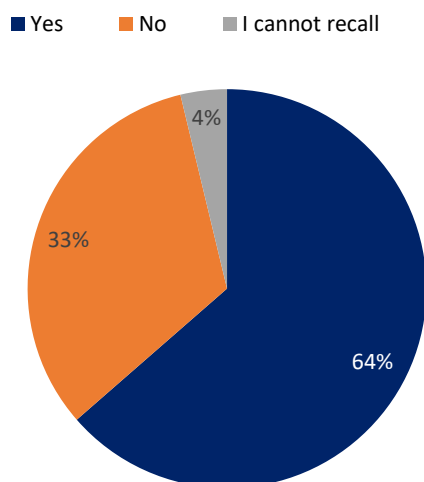
**Almost two-thirds of respondents indicated that in the preceding 12 months, they had used or purchased digital content/services/subscriptions (figure 120).** This was particularly high for consumers within the youngest age groups (83% for those 18-25 years old; 82% for those 26-35 years old). This was particularly low for respondents in the older age groups (41% amongst those 65+). On a country level this was highest among consumers from Spain (76%).

Further, this was particularly high for consumers who have indicated they are 'very' trusting of online businesses and websites (84%), and amongst those who have indicated they are inclined to act impulsively (77%). Responses were particularly low for those who have indicated they are 'not at all' trusting of online businesses and websites (46%).

<sup>625</sup> European Commission, 2022, The Digital Services Act Package, available at: <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>



**Figure 120: Consumers who have used or purchased digital content/services/subscriptions (n=10000)**



When asked to expand upon their experiences when making these purchases, consumers commonly indicated they rarely or never experienced the below-listed experiences. The findings below are those that consumers commonly indicated they have experienced while using or purchasing digital content/services/subscriptions (figure 121).

- **After purchasing digital content/service, I realized that I could access certain features only if I paid additional fees which I was not informed of before the purchase.**

**18%** of respondents who had made these types of purchases indicated that they have regularly had an experience where they have realised post-purchase that **additional fees were required to access certain features and that they had not been informed of this pre-purchase**.<sup>626</sup> This was particularly high amongst younger respondents, with 25% of those aged 18-25 and 26% of those aged 26-35 years indicating they had this experience regularly, with a further 27% and 25% respectively indicating they have had this experience 'sometimes'. Within the older cohorts, on the other hand, respondents were more likely to respond negatively (of those aged 65+ only 7% indicated this happens 'always' or 'most of the time' while 26% indicated they have 'no experience with this situation'). These results may reflect differences in the type of digital content/services/subscriptions popular among different age groups. Furthermore, consumers who have indicated they are likely to act on impulse are most likely to have had this experience regularly; of those who act on impulse almost daily 41% indicated this occurs regularly, compared to 10% of those who never act on impulse.

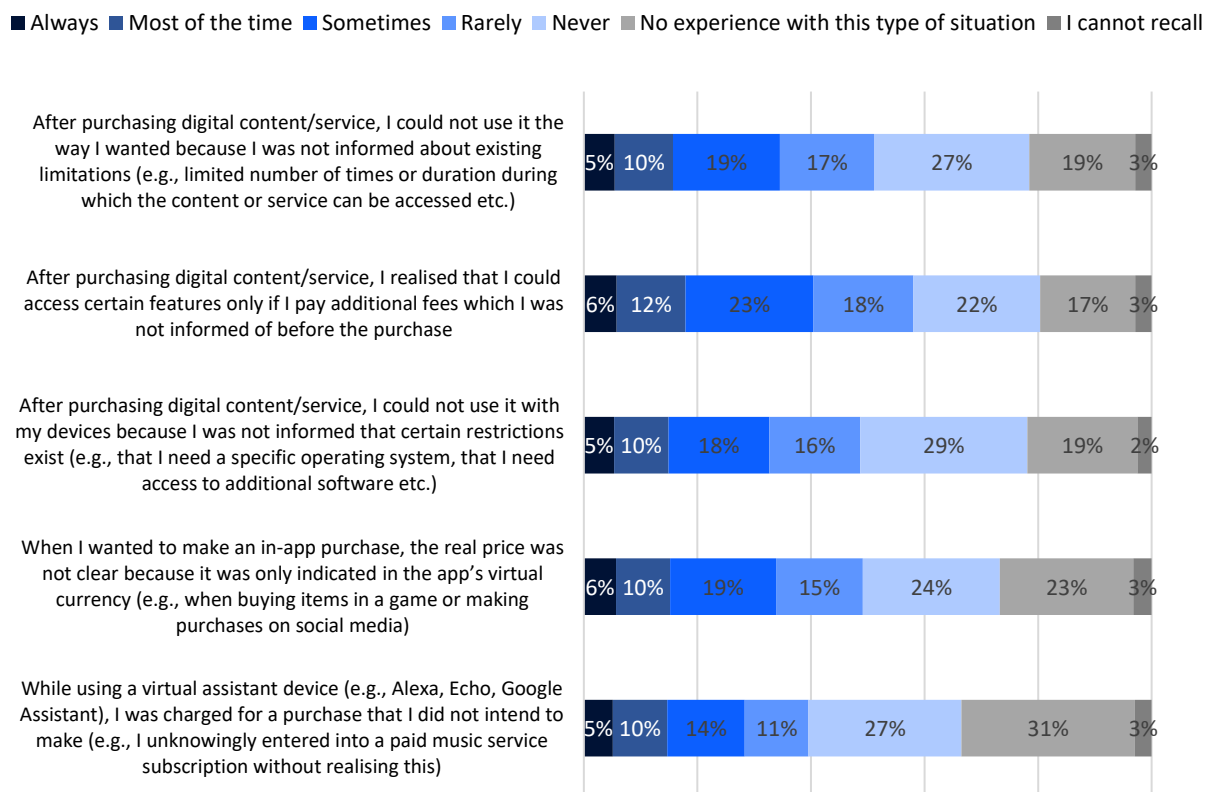
- **When I wanted to make an in-app purchase, the real price was not clear because it was only indicated in the app's virtual currency (e.g. when buying items in a game or making purchases on social media).**

In some cases, consumers deal with virtual currencies which only exist in the digital environment of the app or website they are using (for instance in gaming or on social media). Of the consumers who had used or purchased digital content/services/subscriptions in the past 12 months **16%** of consumers indicated

<sup>626</sup> This figure represents the combined sum of 6% of those who responded always and 12% of those who indicated most of the time.

experiencing challenges when making in-app purchases because prices were displayed in the app's virtual currency.<sup>627</sup> Additionally, this was particularly high amongst those who have indicated spending time online negatively affects their daily life; 48% of those who feel spending time is very negative on their daily lives indicated they had regularly<sup>628</sup> experienced this. On a country level, this was particularly common for consumers from Romania (25%) Hungary (24%) and France (23%).

**Figure 121: Consumers experience while using or purchasing digital content, services, or subscriptions (n=6362)**



### 3.2.1 Experience with the design of websites and apps

The experience of consumers when making or attempting to make purchases online is often determined by the design of the online environment in question. As explored in our report, consumers' experiences in this regard can be impacted by a practice known as dark patterns. Dark patterns are a type of manipulative practice by designers of e-commerce websites and other online user interfaces that deceive consumers and can influence them into making decisions that are not in their favour but serve enterprises' commercial interests. This section of the analysis assesses the experiences of consumers which relate to the design of websites and/or apps. Questions<sup>629</sup> asked of consumers in this section focus is on experiences that they have had in the past 12 months.

<sup>627</sup> This figure represents the combined sum of 6% of those who responded always and 10% of those who indicated most of the time.

<sup>628</sup> This figure represents the combined sum of those who responded always and most of the time.

<sup>629</sup> Question addressed: Q9 In the past 12 months, have you experienced the following situations online?

When questioned about their experiences online relating to the design of websites and apps. The most common experiences for respondents were:

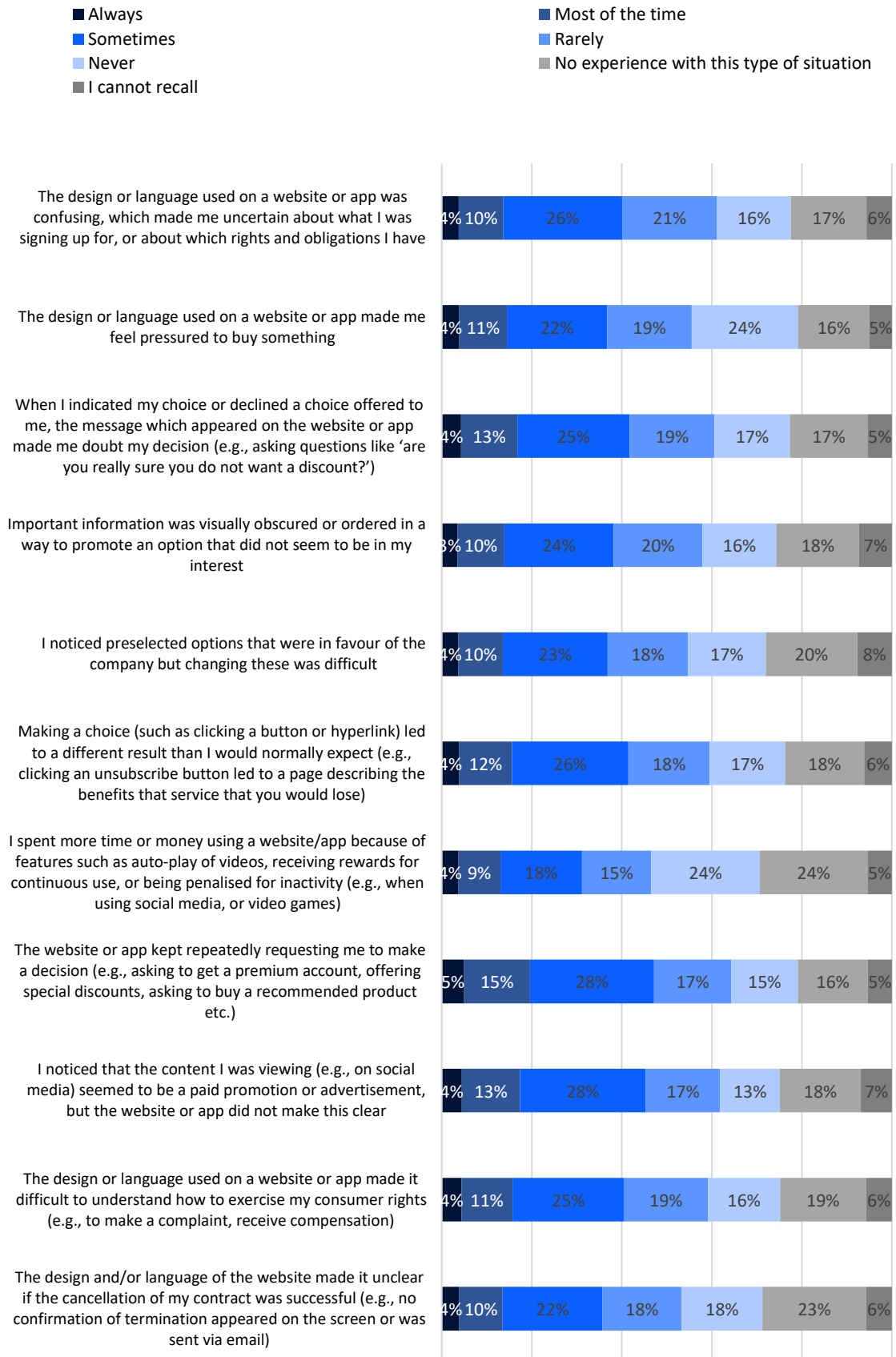
- The website or app kept repeatedly requesting me to make a decision (e.g., asking to get a premium account, offering special discounts, [...])
  - As mentioned in our report, the repeated request for a consumer, or recipient of an online service to make a choice, can be an exploitative design choice. 20%<sup>630</sup> of consumers surveyed indicated that they ‘always’ or ‘most of the time’ have experienced a website or an app repeatedly asking them to ‘make a decision’ online, while a further 28% of respondents had experienced this ‘sometimes’. This response was particularly high among the younger cohorts (36% of 18-25-year-olds; and 31% of 26-35-year-olds, compared to 12% of 56-65-year-olds and 11% of those aged 65+). This experience was also more common among those consumers who have indicated their daily activities have been severely limited for health reasons in the past 6 months, with 28% in this category experiencing this, compared to 16% of those who have not been limited for health reasons.
- I noticed that the content I was viewing (e.g., on social media) seemed to be a paid promotion or advertisement, but the website or app did not make this clear.
  - Another practice that can influence consumers is the presentation of paid promotions or advertisements which are unclear as advertisements to the consumer. This was experienced either ‘always’ or ‘most of the time’ by 17%<sup>631</sup> of consumers, while a further 28% had experienced this ‘sometimes’. This was particularly high amongst those in the younger age cohorts (28% of 18-25 year olds, and 29% of 26-35 year-olds, compared to 11% of 55-64 year olds, and 10% of those aged 65+).

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<sup>630</sup> This figure represents the combined sum of those who responded always 5% and most of the time 15%.

<sup>631</sup> This figure represents the combined sum of those who responded always 4% and most of the time 13%.

Figure 122: Situations experienced online (n=10000)



## Behavioural Insight: Pricing and Dark Patterns

### Price Framing

**Price framing is a type of choice architecture that exploits the tendency of individuals to make different choices based on how price information is presented.**<sup>632</sup> As the survey results have indicated online sellers use several forms of price framing, to varying extents.

The most prevalent type of price framing is the use of reduction claims and comparisons to make prices look more attractive. Figure 119 shows that always or most of the time:

- 21% of people see reduction claims;
- 18% see a comparison with the price charged by another seller;
- 20% see comparison with a recommended price;
- 23% see parallel presentation of a lower price for members of the 'loyalty programme'.

Reduction claims and comparisons (both with another seller or with the recommended price) act as a reference point. People tend to have reference dependent preferences, that is, they tend to value an outcome relative to a reference point. Comparing the price of a product with the price charged by another seller, or comparing with a recommended price, has the power to influence how a consumer values a product. Often these techniques will make it more likely that a consumer will purchase the product.

Another price framing strategy that is evident in the responses is drip pricing.<sup>633</sup> Figure 118 shows that 12% of people responded with "always" or "most of the time" to the statement: "I paid more than I planned to because during the purchasing process the final price changed to a price higher than the one advertised to me initially." Similarly, figure 124 shows that 18% of individuals responded with "always" or "most of the time" to the statement: "After purchasing digital content/service, I realised that I could access certain features only if I pay additional fees which I was not informed about before the purchase".

These are both examples of drip pricing, a strategy whereby the final price of a product or service is not initially advertised. As the consumer clicks through different pages, additional fees are added, making the actual price they need to pay higher than the one they first saw. For example, when booking a hotel room, a consumer might add an item to the basket under some listed price. When they go to pay, there is then subsequently added fees (e.g., cleaning fees, booking fees, or similar). This strategy appeals to several human tendencies. Consumers will anchor to the first price they see<sup>634</sup>, which means that the final price will then always be viewed with the first price as a reference point. This also relates to the endowment effect<sup>635</sup>, which is the tendency to value things you own more highly than those you do not. In this case, once the consumer has decided to buy the item and are proceeding to pay, they already feel as if they own the item. This means they are then more likely to pay the additional charges, compared to if the full price had been listed from the beginning because they do not want to experience the loss of no longer owning it. Drip pricing also makes it more difficult to compare prices across sellers because the price listed is not the final price the buyer will have to pay. All these effects result in consumers being more likely to buy particular products.

### Dark Patterns

**Techniques used to get consumers to make decisions that they did not mean to make are known as dark patterns.**<sup>636</sup> Figure 124 shows that 15% of consumers said that, always or most of the time, they have experienced a situation with a virtual assistant device where they were charged for a purchase that they did not intend to make. A further 14% said this had happen "sometimes". This has an obvious monetary cost to the consumer when the unintended purchase happens. Moreover, there might be additional costs to the consumer as they spend time making a complaint, cancelling the purchase, or trying to obtain a refund. Dark patterns can therefore be detrimental to the consumer in multiple ways.

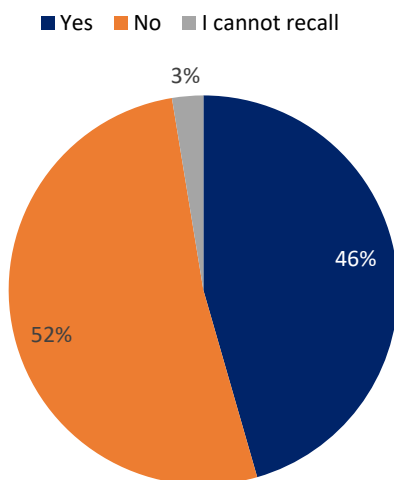
### 3.2.2 Withdrawing from online purchases

The right of withdrawal is an important requirement for all consumers when making a purchase online. Rules surrounding this practice are laid out within the **Consumer Rights Directive (CRD)**. Consumers who participated in our survey were asked about their experience regarding the right of withdrawal when making purchases online.<sup>637</sup>

**When questioned about whether or not they had experienced problems relating to the right of withdrawal, responses indicate approximately half of consumers (46%) indicated they had experienced issues.**<sup>638</sup> (figure 123). These figures were higher among younger consumer cohorts, with 55% of 26-35 year olds and 52% of 18-25 year old indicating they had experienced issues. This was also particularly high for those who have indicated that spending time online has a very negative impact on their daily life (72%), as well as among those who gamble (or play games of chance online); 73% of those who bet or play daily, and 62% of those who bet or play several times a week, compared to 32% of those who never engage with this type of activity.

On a country level, the largest proportion of respondents who encountered problems with the right of withdrawal were consumers based in France and Sweden (52%), as well as Romania (51%), with the lowest percentage from Poland (33%) and Italy (35%).

**Figure 123: Consumers who have encountered problems with exercising the right of withdrawal from online purchases (n=2745)**



<sup>632</sup> Weng, X. (2021) Impact of Price Frames on Consumers, *Advances in Economics, Business and Management Research* Vol. 28.

<sup>633</sup> Office for Fair Trading (2010) The impact of price frames on consumer decision making.

<sup>634</sup> Tversky, A. & Kahneman, D. (1974). Judgment under Uncertainty: Heuristics and Biases. *Science*, 32(5), pp. 1124-1131. Ariely, D., Loewenstein, G. & Prelec, D. (2003). "Coherent Arbitrariness": Stable Demand Curves Without Stable Preferences. *The Quarterly Journal of Economics*, 118(1), pp. 73-106.

<sup>635</sup> Kahneman, D., Knetsch, J. L., & Thaler, R. H. (1991). Anomalies: The endowment effect, loss aversion, and status quo bias. *Journal of Economic Perspectives*, 5(1), 193-206.

<sup>636</sup> Mathur, A., Acar, G., Friedman, M. J., Lucherini, E., Mayer, J., Chetty, M., & Narayanan, A. (2019). Dark patterns at scale: Findings from a crawl of 11K shopping websites. *Proceedings of the ACM on Human-Computer Interaction*, 3(CSCW), 1-32.

<sup>637</sup> Questions addressed: Q10.1: Have you encountered problems with exercising your right of withdrawal from online purchases of goods in the past 12 months? Q10.2: Please indicate if you have experienced the following problems in the past 12 months

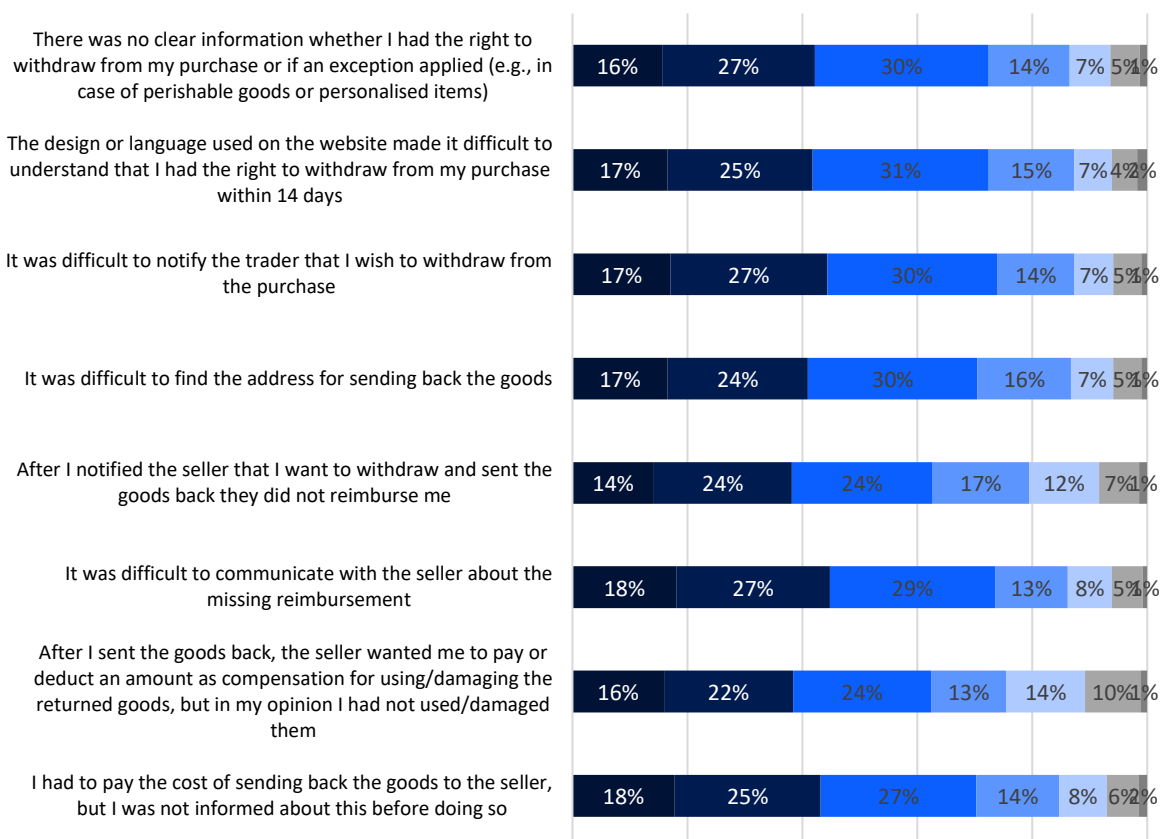
<sup>638</sup> The results are reflective of the sample of consumers who have indicated they have indeed tried to withdraw from a purchase in the past 12 months (2745).

When attempting to withdraw from a purchase, 45% of consumers indicated<sup>639</sup> they commonly found it difficult to *communicate with the seller about the missing reimbursement*, and a further 29% of respondents indicated they had experienced this issue on occasion (sometimes). This issue was most common among younger consumers with 52% of respondents in the 26-35 age group, and 42% of the 18-25 years age group experiencing this issue. Further to this:

- 44% of consumers indicated a common issue is experiencing *difficulty when notifying the trader that they wish to withdraw from a purchase*. This issue was most commonly reported by consumers aged 26-35, of which 50% indicated they experienced this issue.
- 42% of consumers reported *not receiving clear information regarding whether they had the right to withdraw from a purchase or if an exception applied*. This response was also strongest among 26-35 year old respondents, with 49% reporting this issue.
- 42% of consumers also indicated that *the design or language used on the website made it difficult to understand that they had the right to withdraw from their purchase within 14 days*.

**Figure 124: Problems experienced by consumers regarding the right of withdrawal (n=1250)**

■ Always ■ Most of the time ■ Sometimes ■ Rarely ■ Never ■ No experience with this type of situation ■ I cannot recall



<sup>639</sup> The sum of 18% of consumers indicated they experience this issue 'always', and 27% indicated 'some of the time'

## Behavioural Insight: Withdrawing from online purchases

### Status Quo Bias

**Part of the digital experience is how consumers are treated when they want to withdraw from a purchase, return an item, or cancel a subscription.** One of factors that might influence consumers in not pursuing a cancellation is status quo bias. This is the tendency of individuals to place higher value the current state of affairs.<sup>640</sup> Status quo bias causes people to be disproportionately likely to stick with what they have, rather than make an active decision to do something else.

Even if the consumer is unhappy with their purchase, they might be unwilling to undertake actions such as making a complaint or asking for a refund. **Figures 138 and 139 show that 7% of consumers took no action to sort a problem they encountered with physical goods and 8% of consumers took no action to sort a problem they encountered with digital content or services.** One factor that causes people not to take an action to sort a problem is that the status quo bias means the current situation is valued more highly than it should be. Consumers might feel that it is easier to leave the situation as it currently is than to spend time and energy on trying to change it.

### 3.2.3 Experiences with digital subscriptions

As is explored in our report, the subscription economy has grown exponentially in recent years and is a large financial cost every month for many households. It is also an economy that, thanks to digitalisation, is evolving and expanding in scope. Consumers who engage with the subscription economy can face issues, such as getting tied into unfair contracts, or experiencing other unfair practices related to subscriptions. In this regard, consumers who participated in our survey were asked a number of questions regarding their experiences when purchasing, using, renewing or cancelling paid subscription services.<sup>641</sup>

**Approximately half of all consumers surveyed (51%) indicated that they had purchased, used, renewed, or cancelled a digital subscription in the preceding 12 months** (figure 125). Younger consumers were the more likely to have engaged in this type of activity (74% of those aged 18-25, and 71% of those aged 26-35) in comparison to older cohorts (29% of those aged 56-65 and 31% of those aged 65+). Subscription services were also more popular among consumers in the higher income deciles - 63% of consumers on average had used these services in the top three deciles vs 43% in the bottom three.

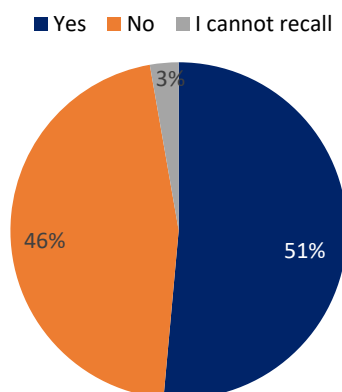
Further, subscription services were used most frequently by people who have indicated they are inclined to bet or play online games of chance (71%) and by consumers who have indicated that they are trusting of online businesses and websites (75%). On a country level, subscription services were most popular in Spain (63%) and Sweden (57%) and were least popular in France (47%) and Hungary (37%).

<sup>640</sup> Kahneman, D., Knetsch, J. L., & Thaler, R. H. (1991). Anomalies: The endowment effect, loss aversion, and status quo bias. *Journal of Economic Perspectives*, 5(1), 193-206.

<sup>641</sup> Questions addressed: Q11 In the past 12 months, have you purchased, used, renewed or cancelled a paid digital subscription (e.g., Spotify, Netflix, Amazon Prime, newspaper access)? Q12 In the past 12 months, have you activated a free trial for a digital subscription service?

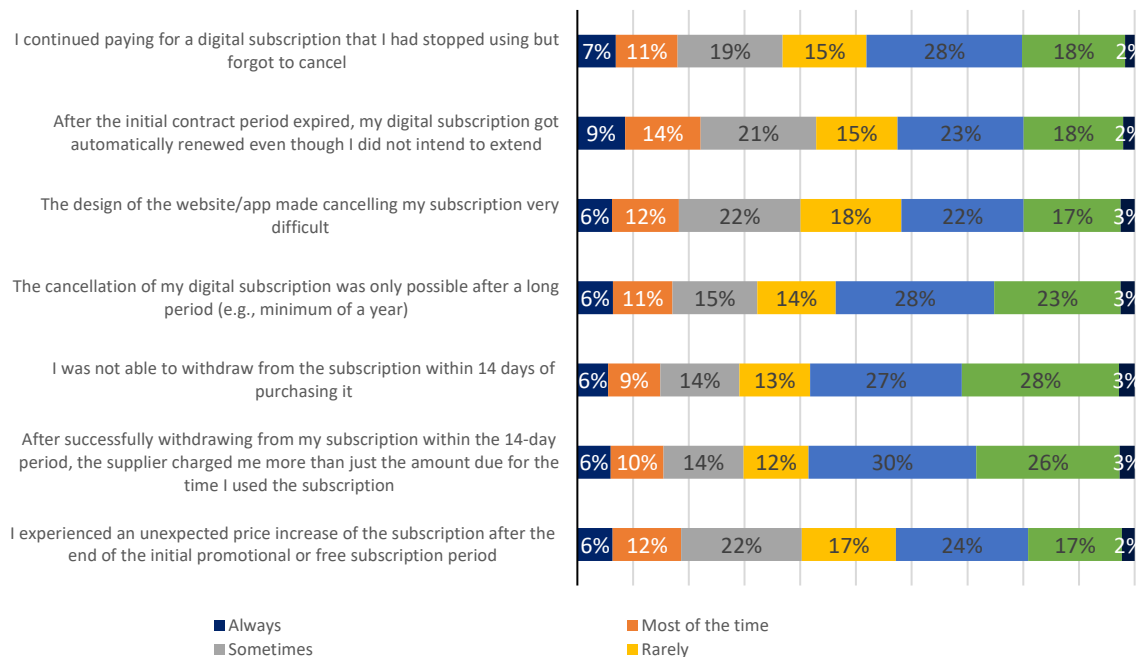


**Figure 125: Those who have purchased, used, renewed or cancelled a paid digital subscription (n=10000)**



Our report describes some of the problematic practices in the online subscription economy. As outlined in the graph below (figure 126), one of the most common issues consumers indicated they experienced was that *'After the initial contract period expired, their digital subscription got automatically renewed even though I did not intend to extend'* 43% of consumers indicated they either always, frequently, or sometimes have had this experience. 37% indicated they rarely or never had this experience. This was more common for younger consumers than for older consumers, 55% of 18-25 year olds and 53% of 26-35 year olds, compared with 32% of 56-65 year olds and 27% of those 65+, however those in the older age categories were more likely to say that they had no experience with this type of situation.

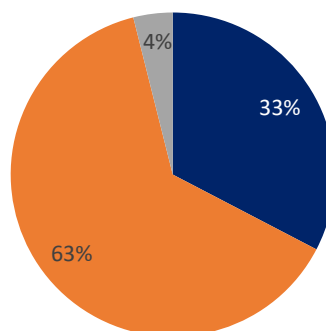
**Figure 126: Situations experienced with online subscriptions n= 5147**



Some of these issues experienced by consumers relating to subscriptions are linked to consumers signing up for free trials, which can lead to consumers trapped into subscription contracts. One in three consumers (33%) surveyed indicated they had activated a free trial user account in the preceding 12 months (figure 127). Once again, younger consumers were more likely to have activated a free trial with over half of consumers in the younger age cohorts (54% of 18-25 year-olds and 51% 26-35) indicating they had activated a free trial in the past 12 months. Responses were relatively consistent among Member States except for higher results from consumers in Estonia and Sweden in which 44% and 43% respectively indicated they had activated a free trial.

**Figure 127: Activated a free trial for a digital subscription service (n=10000)**

■ Yes ■ No ■ I cannot recall

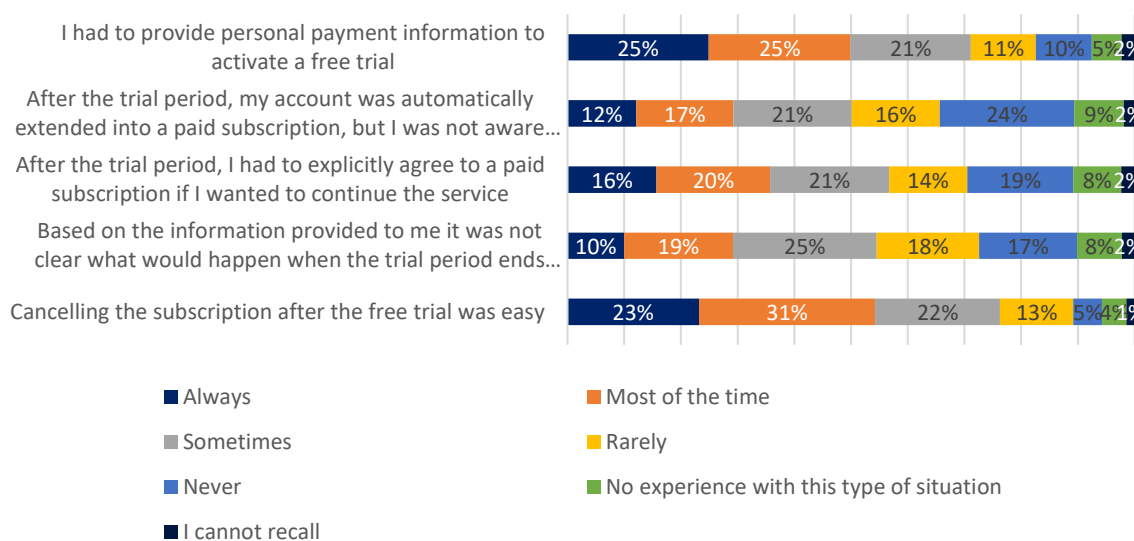


When questioned further about this activation, **50% of consumers indicated that providing personal payment information for a free trial is common**<sup>642</sup>, with only 10% of respondents who had activated a free trial indicating they were never asked for their payment information. Older consumers were more likely to indicate that they do not input payment information when activating a free trial; 17% of 56-65-year-olds and 19% of those 65+ noted they never have to provide this information, compared to only 4% of those aged 18-25 and 6% of those aged 26-35. Those who indicated they bet or play games of chance daily were also likely to have provided payment information for a free trial (62%), however, those who bet or play games of chance less frequently including those who engage several times a week, a month, a year, and those who never engage were all relatively consistent with the average response rate of 50%. On a country-level responses were also relatively consistent with Swedish consumers showing the highest response of 60% of respondents.

**Of those who had activated a free trial, 29%<sup>643</sup> of consumers indicated that their accounts in these instances are regularly automatically extended into a paid subscription, without them being aware this would happen**, while a further 21% indicate this happens 'sometimes'. 24% of respondents indicated this 'never' happens. 24% of respondents indicated this 'never' happens.

When questioned about cancelling the subscription at the end of the free trial, 54%<sup>644</sup> indicated this was easy 'always' or 'most of the time'.

**Figure 128: Experiences with free trials n=3266**



<sup>642</sup> This is the sum of 25% of consumers who have indicated they always provide this information and 25% indicate they provide this information most of the time.

<sup>643</sup> This is the sum of 12% of consumers who have indicated this occurs always and a further 17% which indicates this happens most of the time.

<sup>644</sup> This is the sum of 23% of consumers who have indicated always and 31% who indicated most of the time.

### 3.2.4 Personal data

Online retailers can use techniques to steer consumers towards certain choices, based on their behaviour, informed by personal data. GDPR regulations put in place by the EU in 2018<sup>645</sup> aim to protect consumers' data and provide rules on how it can be processed and used by businesses. As discussed in our report the online digital environment is a rapidly evolving marketplace, and in line with this businesses develop new and diverse ways to influence consumers using their data. Concerns about consumer data collection and processing therefore remain for consumers. Consumers who participated in our survey were questioned<sup>646</sup> about the types of experiences they have had regarding their personal data online.

When asked if they had experienced particular experiences online with regard to personal data, the proportion of those indicating they had had issues, as well as the proportion of those who had not was relatively consistent across each issue. By a small margin, the most common experience indicated by consumers as occurring regularly was that *the design or language of the website/app made it difficult to understand how the consumer's personal data would be used*. **18%<sup>647</sup> of consumers indicated happens always or frequently with a further 23% of consumers indicating this happens sometimes**. This was particularly high for those consumers who consider themselves highly impulsive, and among those who find that spending time online negatively affects their daily lives, with 40% of these consumer groups respectively indicating that they regularly (or always) have this experience online.

17%<sup>648</sup> of consumers indicated that they regularly (or always) have had difficulty understanding *what kind of profile a platform created for them based on personal data and how this might affect the content* presented to them, with a further 21% experiencing this some of the time. This issue was particularly prevalent among those who are inclined to bet online (33% of those who bet online daily), as well as among those who feel spending time negatively affects their daily lives (42% who feel spending time online has very negative effects).

16% of consumers got the impression that companies had knowledge about their vulnerabilities and used it for commercial purposes. This was the most prominent issue among the youngest cohort (age 18-25) 27% of respondents of this age experienced this always or most of the time with a further 24% experiencing this some of the time. Among this younger age group more generally, each of these issues listed below was experienced by approximately 1 in 4 consumers in this age group. Among the older consumers, the percentage of consumers indicating issues in this area was much lower, the most common issue indicated by the two oldest cohorts was that the design or language of a website/app made it difficult to understand how my personal data would be used (13% of those 55-64 and 12% of those 65+). Despite this, however, a large percentage of consumers in these older age cohorts indicated they did not have experience with this type of situation (between 25% and 33% of consumers in these cohorts selected this option for all experiences below).

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<sup>645</sup> European Parliament, 2018, the general data protection regulation, Available at:

<https://www.consilium.europa.eu/en/policies/data-protection/data-protection-regulation/>

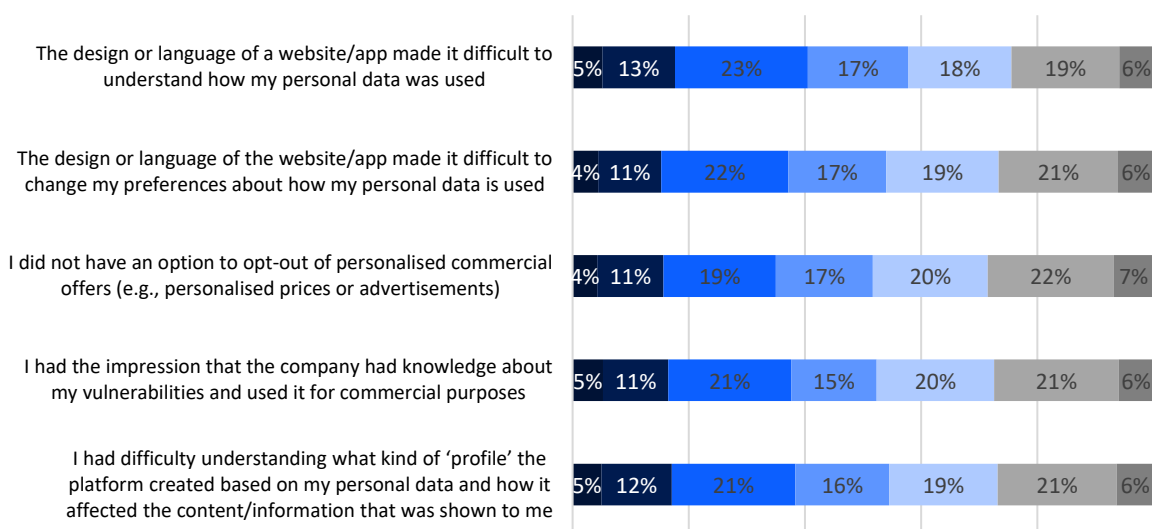
<sup>646</sup> Question addressed: Q13 *In the past 12 months, have you experienced the following situations online?*

<sup>647</sup> This figure is the sum of 5% of those who indicated this experience 'always' and 13% of those who indicated 'most of the time'

<sup>648</sup> The sum of 5% of those who indicated this experience 'always' and 12% of those who indicated 'most of the time'

**Figure 129: Situations experienced by consumers online (n=10000)**

■ Always ■ Most of the time ■ Sometimes ■ Rarely ■ Never ■ No experience with this type of situation ■ I cannot recall



### 3.2.5 Contracts you concluded in the digital environment.

In this section, the focus of the analysis is on experiences respondents have had with contracts concluded online. This includes any type of physical goods or services purchased online (e.g., via an app or website) as well as digital content/services/subscriptions (social media, software, apps, video games, e-books, online courses, digital subscriptions like Spotify, Netflix, Amazon Prime, newspaper access etc.). Consumers were questioned about their experiences in this regard, and about what type of issues they have faced.<sup>649</sup>

#### Terms and Conditions

Regarding consumers' experiences with Terms & Conditions, the most mentioned aspects are described below (figure 130)

**36% of consumers indicated that they usually (or always) read the Terms & Conditions that apply** with a further 23% indicating they do this some of the time.<sup>650</sup> The older the consumer cohort, the more likely they were to indicate they regularly read the Terms & Conditions: 26% of consumers aged 18-25 indicated they read them regularly (or always); this rose to 31% for those 25-36; 34% for those aged 46-55; 40% for those aged 55-64 and 46% for those aged 65+. Further, those who indicated they were 'very untrusting of online businesses' were less likely to indicate they read the terms and conditions, than those who indicated they were very trusting (33% vs 48% respectively). Further;

- 29% of consumers indicated that it was possible to *agree to the Terms and Conditions automatically by completing the payment process, by signing up etc.*<sup>651</sup>

<sup>649</sup> Questions addressed: Q14 In the past 12 months, have you experienced any of the following situations related to the terms and conditions of your contract concluded online? Q15 In the past 12 months, have you experienced any of the following terms in your contracts concluded online?

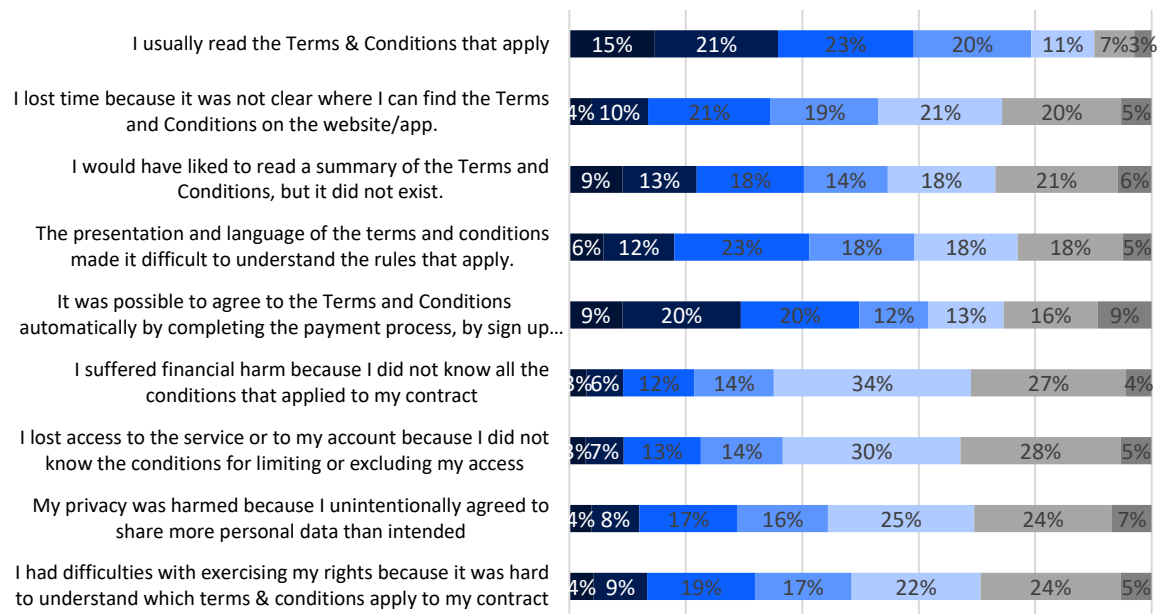
<sup>650</sup> The sum of 5% of those who indicated this experience 'always' and 21% of those who indicated 'most of the time'

<sup>651</sup> The sum of 9% of those who indicated this experience 'always' and 20% of those who indicated 'most of the time'.

- 9% of consumers indicated they had *suffered financial harm because they did not know all the conditions that applied to their contract*. This was particularly high for those consumers who indicated they are highly likely to act on impulse 31% of those who act on impulse daily (and 25% of those who act on impulse several times a week), compared to only 4% who never act on impulse. It was also particularly high for those who have indicated spending time online has a highly negative impact on their daily life.<sup>652</sup>

**Figure 130: Situations experienced related to the Terms & Conditions of contract concluded online (n=10000)**

■ Always ■ Most of the time ■ Sometimes ■ Rarely ■ Never ■ No experience with this type of situation ■ I cannot recall

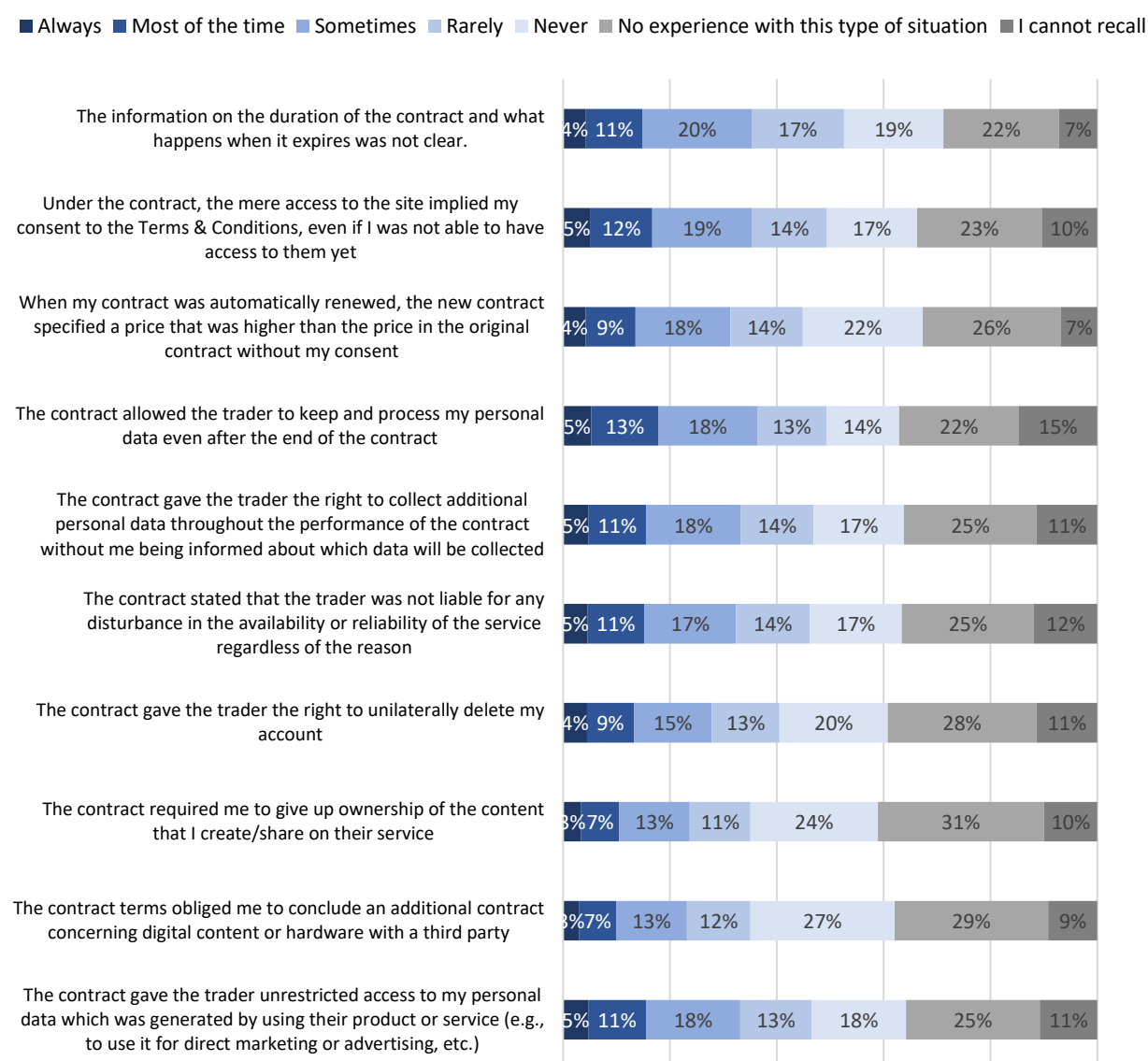


<sup>652</sup> The sum of 3% of those who indicated this experience 'always' and 6% of those who indicated 'most of the time'.

## Contract Terms

When specifically asked about the terms in their online contracts, respondents most commonly experienced two aspects: *the contract allowed the trader to keep and process their personal data even after the end of the contract* (18%); and *under the contract, the mere access to the site implied consent to the Terms & Conditions, even if they were not able to have access to them yet* (17%) (figure 131).

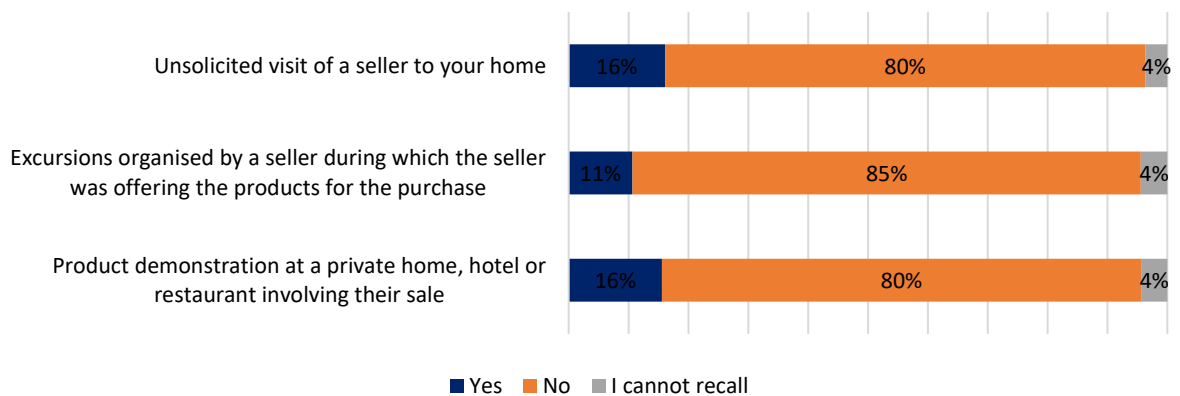
**Figure 131: Terms experienced in contracts concluded online (n=10000)**



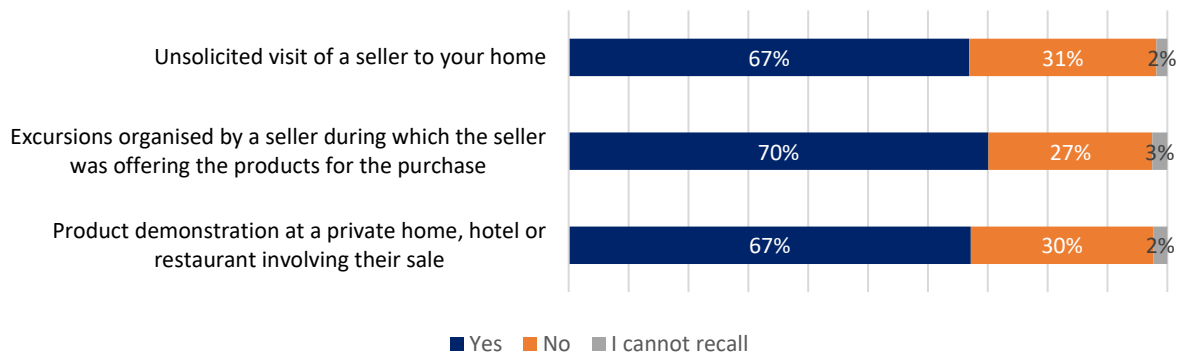
### 3.2.6 Selling practices outside of the trader's business premises

Consumers were also asked about their experiences with selling practices outside of a business premises (figure 132). The majority of consumers (over 80%) surveyed indicated they had not experienced the situations depicted in the below graph including unsolicited visits of a seller to their home, excursions organised by a seller, or product demonstrations at a private home, hotel or restaurant. Despite this, of those who had experienced these situations, the majority (over 65%) indicated these selling practices did lead them to feeling pressurised to purchase (figure 133).

**Figure 132: Selling practices. (n=10000)**



**Figure 133: Pressure due to selling practices (n=10000)**





## Behavioural Insight: Sludge and Cognitive Limitations

### Sludge and Cognitive Limitations

The survey also reveals that online sellers often present information in a way that is difficult to understand. This is known as sludge and is the opposite of a nudge. Figure 122 shows the frequency of certain features of online platforms make information more difficult to understand, including:

- The design or language used on a website or app was confusing, which made me uncertain about what I was signing up for, or about which rights and obligations I have.
- The website or app kept repeatedly requesting me to make a decision (e.g., asking to get a premium account, offering special discounts, asking to buy a recommended product etc.)
- The design or language used on a website or app made it difficult to understand how to exercise my consumer rights (e.g., to make a complaint, or receive compensation).
- The design and/or language of the website made it unclear if the cancellation of my contract was successful (e.g., no confirmation of termination appeared on the screen or was sent via email).

**Figure 129** reveals in more detail how sludge is used to make it difficult to understand what is done with personal data. For example, 18% of respondents said that (always or often) “the design or language of a website/app made it difficult to understand how my personal data was used.”

Humans are also limited in their cognitive abilities, which makes sludge more effective. An example of where this is relevant is in reading Terms and Conditions, which is technically challenging to do and not an easy or quick task. **Figure 130** shows that 31% of respondents said they rarely or never read the Terms and Conditions that apply, and a further 23% said they do only sometimes.

### 3.3 Costs and benefits – Issues experienced in the digital environment

For this section, the main focus is on problems consumers have experienced in the past 12 months when purchasing or using any type of products or services online. This may include problems with any type of physical goods or services purchased online (e.g., via an app or website) as well as digital content/services/subscriptions (social media, software, apps, video games, e-books, online courses, digital subscriptions like Spotify, Netflix, Amazon Prime, newspaper access etc.). Consumers were asked<sup>653</sup> about the type of problems they have experienced and what actions they may have taken to resolve them. Issues may include:

- *Returning a product or cancelling a service/subscription*
- *Confusing or misleading design or language on websites/platforms*
- *Problems with customer service*
- *Not being able to use the product/service/content as intended*
- *Unclear prices and discounts*
- *Misleading or missing information*
- *Problems with Terms and Conditions*
- *Problems with subscriptions*

#### 3.3.1 Issues you experienced in the digital environment

Our study finds that there is a general lack of consumer awareness regarding the use of unfair practices, however, it is also found that once an unfair practice is identified, consumers perceive these practices negatively. Issues of this nature can lead to consumer detriment, which may involve financial loss, time loss or emotional distress for the consumer. When questioned about their experiences in this regard, **27% of consumers (approximately 1 in 3 consumers surveyed) indicated they have experienced situations that have caused them financial loss, time loss or emotional distress (figure 134)**. This was highest amongst the youngest age groups; 43% of those aged 18-25 and 38% of those aged 26-35, compared to 19% of those aged 56-65 and 16% of those aged 65+.

48% of consumers who engage in gambling activities daily have experienced these kinds of issues, this compares with 37% of those who engage with these activities several times a week and 20% of those who never engage in gambling activities.

Further, 42% of consumers whose daily activities are ‘severely limited’ due to a health problem indicated experiencing these issues, this is in comparison to 31% of those who are ‘somewhat limited’ and 21% of those who have no health-related limitations.

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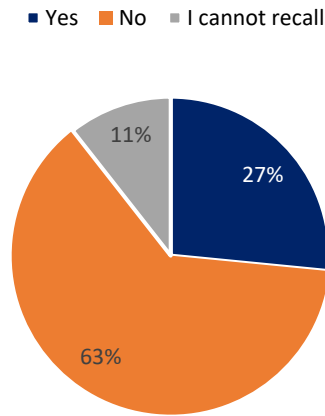
<sup>653</sup> Questions addressed: Q16 Does looking at the list above remind you of any problems you may have experienced in the last 12 months that caused you any amount of financial loss, time loss or emotional distress (e.g., feeling angry, frustrated or worried)?

Q17 Thinking about the most serious problem you have experienced in the past 12 months, which type of product or service was involved?

Q22 Which of these, if any, have you done to sort out the problem? Multiple choice.

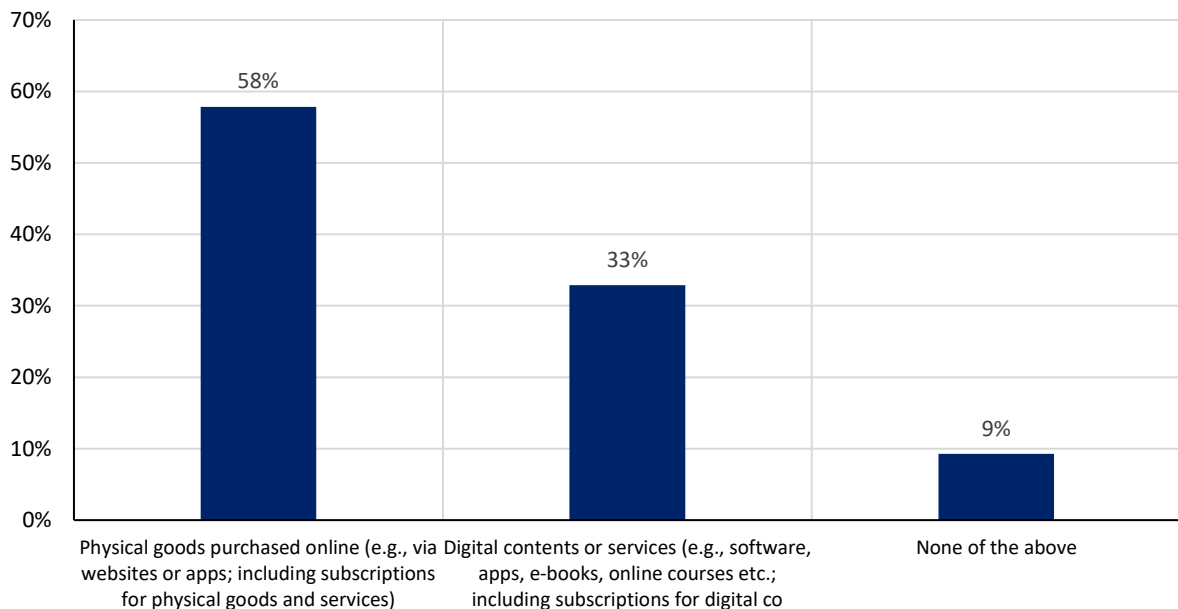
Q23 Which of these, if any, has the seller/provider done so far in response to the problem?

**Figure 134: Problems experienced that caused financial loss, time loss or emotional distress (n=10000)**

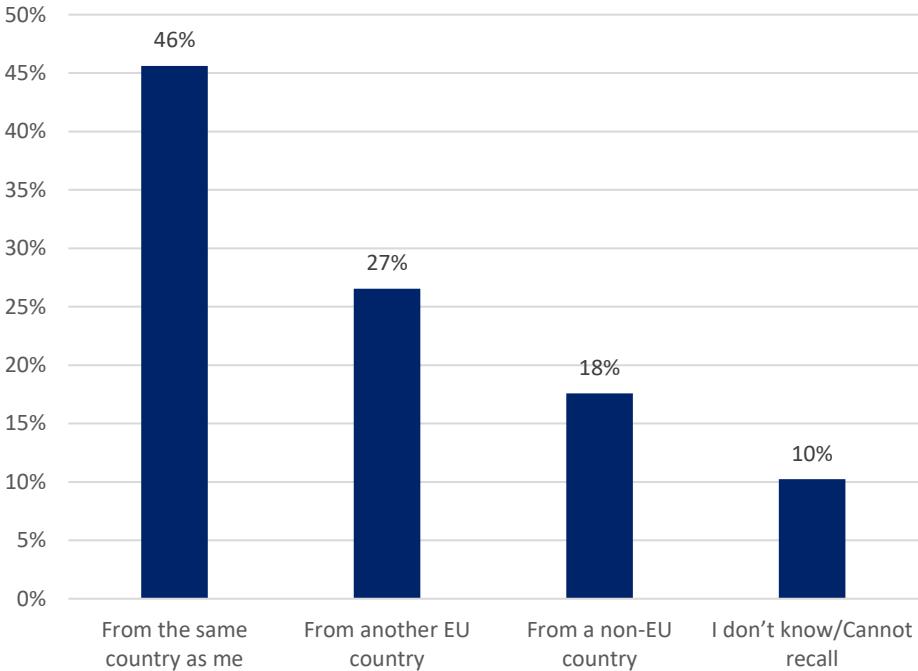


Of the survey respondents who indicated they had experienced financial loss, time loss or emotional distress, when questioned about what product or service was involved in their most negative experience, **58% of respondents indicated the experience occurred when purchasing physical goods online**, while one-third of the sample (33%) indicated it was an issue with digital content or services (figure 135)

**Figure 135: Product or service involved in the most serious problem experienced (n=2657)**



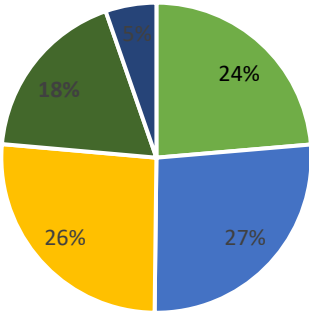
**Figure 136: Origin of product n=2411**



When asked the extent to which the product or service could be used as intended after the problem occurred, 76% of respondents indicated some level of difficulty with the problem, 24% indicated they could not use the product at all.

**Figure 137: Usefulness of product n=2411**

- Not at all
- Partly, with major difficulty
- Partly, with minor difficulty
- Fully
- I cannot recall



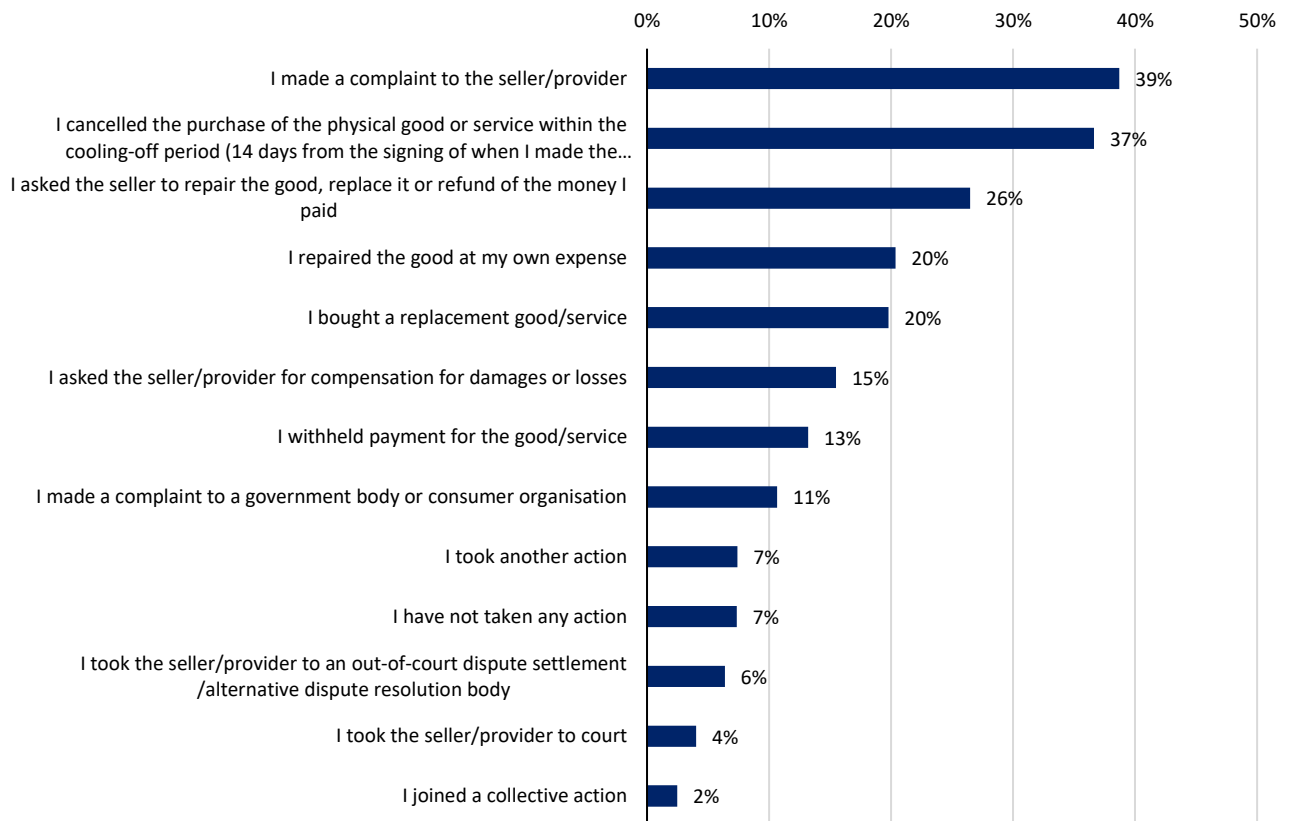
## Resolution of issues

Our report finds that consumers often appear to accept the presence of unfair practices as part of their experience when navigating the digital environment and have become accustomed to them. This in turn, may affect how consumers attempt to address issues when they do occur.

Focusing on physical goods, when consumers who had experienced an issue were asked how they attempted to resolve it the most common actions mentioned were *making a complaint to the seller or provider* (39%); and *cancelling the purchase of the physical good or service within the cooling-off period* (37%) (figure 138). Making a complaint to the seller or provider was most prevalent among older consumers, 50% of those aged 56-65-year-olds compared to 28% of those aged 18-25. Of those who chose to cancel the purchase, this was most common among the younger cohort of consumers; 43% of those aged 18-25 years old compared with 25% of those aged 65+.

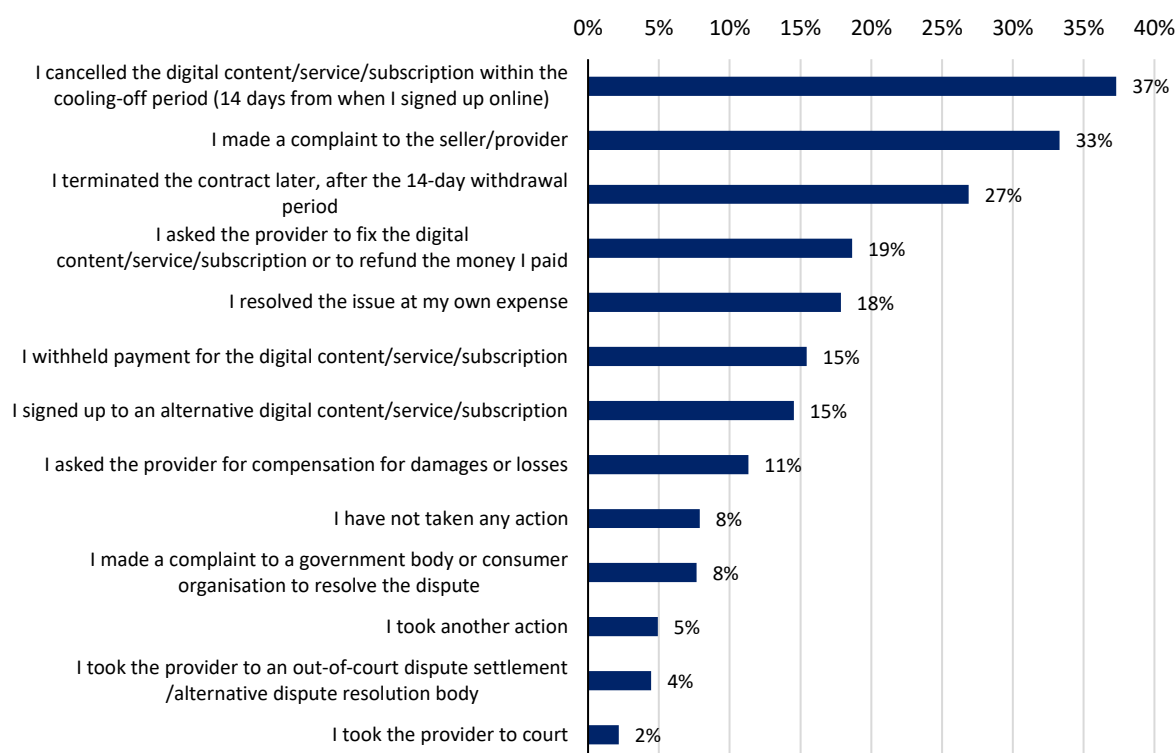
20% of consumers indicated that they chose *to repair the product themselves*, while a further 20% chose to *replace the item at their own expense*. In both instances, it was younger consumers who most commonly reported taking this action; 33% of 18-25-year-olds and 25% of 26-35-year-olds reported repairing the product themselves, compared to 12% of those aged 65+ and 14% of those aged 56-64. Similarly; 25% of those aged 18-25 and 27% of those aged 26-35 reported replacing the item at their own expense. while only 10% of those aged 65+ and 14% of those aged 56-64 reported this.

**Figure 138: Actions taken to sort the problem – physical goods (n=1537)**



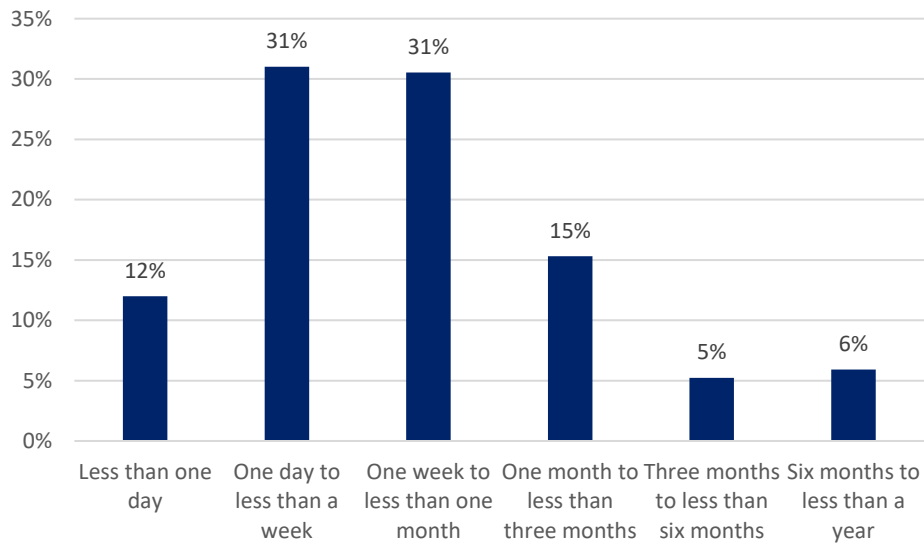
Regarding problems with digital content or services, respondents most commonly indicated that they; *cancelled the digital content/service/subscription within the cooling-off period* (37%) or that they *made a complaint to the seller/provider* (33%) (figure 139). Cancelling the digital content/service/subscription within the reflection period is a solution mostly adopted by younger consumers, 46% of those aged 18-35 years old. It was also most prevalent on a country level in France (46%). Sending a complaint to the seller/supplier was most common among the oldest age cohort 65+ (55%), and on a country level was most common amongst consumers in Portugal (46%).

**Figure 139: Actions taken to sort the problem – digital contents or services (n=874)**



When questioned about how long it took the company to resolve the issue 43% of consumers indicated less than a week, while for 74% of consumers the issue was resolved in less than a month.

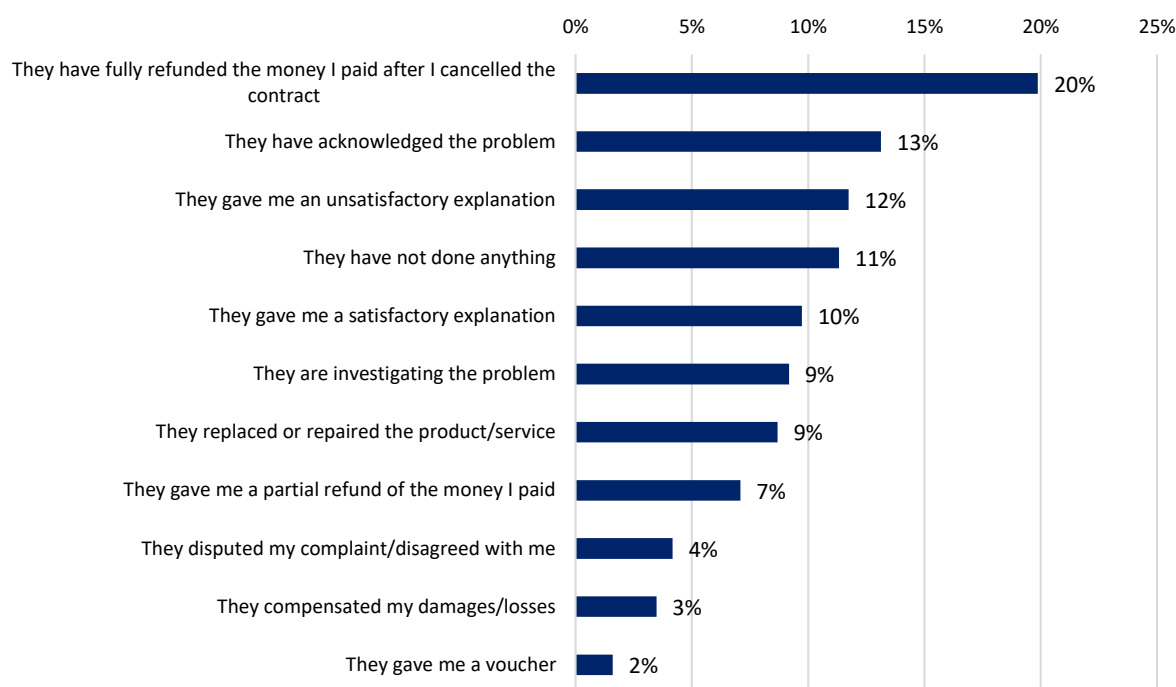
**Figure 140: Resolution of the issue n=2411**



### Post-redress detriment

Consumers may face difficulties or obstacles when attempting to remedy these problems wither directly with the retailer or through other channels. According to respondents who attempted to resolve the issue (figure 141), 20% of sellers/providers involved chose to refund the money paid by the respondents, after the cancellation of the contract. Other actions indicated were; they acknowledged the problem (13%); they gave me an unsatisfactory explanation (12%); and they did not do anything (11%).

**Figure 141: Actions done by the seller/provider in response to the problem (n=1439)**



In most cases in which issues arise, the burden of proof is on the consumer to show that a company has breached the law, and that they have suffered harm as a result. 37%<sup>654</sup> of consumer who had attempted this process found they regularly *experienced difficulties or failed to solve a problem with the trader because it was difficult to supply the required evidence* either ‘almost every time’ or ‘all of the time’. A further 24% indicated this had happened several times.

### 3.3.2 Time loss and psychological detriment

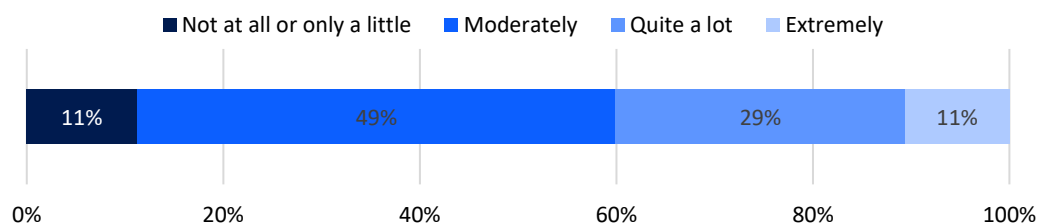
Consumers were further asked about their emotional reaction to problems which arose as a result of their experiences making purchases online.<sup>655</sup> **Approximately half of the respondents mentioned a moderate level of distress, while a further 29% indicated quite a lot of distress** (figure 142). Of those who indicated they experienced an ‘extreme’ amount or ‘quite a lot’ of distress, this was higher among the older cohorts; while 36% of those aged 18-25 and 33% of those aged 26-35 indicated a high level of distress, this rose to 43% for those aged 46-55, 51% of those aged 56-65 and 49% for those aged 65+. This response was also particularly prevalent among those who have indicated they do not trust online businesses (55%).

<sup>654</sup> This figure represents the combined sum of those who responded almost every time 16% and most of the time 16%.

<sup>655</sup> Question addressed: Q30 To what extent have you felt emotionally distressed (e.g., angered, frustrated, or worried) as a result of the problem



**Figure 142: Distress as a result of the problem (n=2657)**



### 3.4 Consumer rights in the EU

To make informed choices in the online environment, it is essential that consumers are aware of, and have the ability to, ensure their rights when purchasing or using a product/service online. This section of our analysis explores the level of knowledge consumers have concerning their rights, and how comfortable they are in exercising them in relevant situations.<sup>656</sup>

When questioned about how important they feel consumer rights are for decisions related to the purchase or use of a product or service online, **48% of all consumers felt they are ‘very important’ whilst a further 43% indicated them to be ‘important’**. On a country level this was most important for consumers from Portugal (91% of consumers in Portugal indicated this was very important or important), whilst it was least important in Spain and Estonia (77% and 76% respectively). On average the percentage of consumers indicating that consumer rights are important was greater across consumers in the higher income deciles (86% on average across the top three deciles compared to 76% across the bottom three deciles).

Despite the majority of consumers indicating that they are aware of the importance of their consumer rights, **approximately 60% of all consumers surveyed indicated they have not been able to use EU or national consumer legislation to ensure respect for their rights (figure 143)**. Those in the older age cohorts were most likely to indicate this; 74% of respondents aged 65+ and 67% of those aged 56-65, compared to 46% of those aged 18-25 and 48% of those aged 26-35. On average, across the three lowest-income quartiles 65% of respondents indicated they had not been able to use the legislation compared to an average of 55%. On a country level, this percentage was strongest in France (82%) and Hungary (77%).

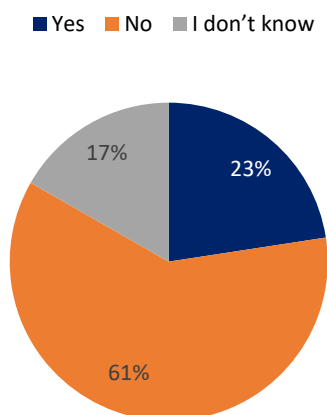
<sup>656</sup> Questions addressed: Q.31 Overall, how important are consumer rights for your decisions to purchase or use a product/service online?

Q32 Have you previously been able to use EU or national consumer legislation to ensure your rights are respected when purchasing or using a product/service online?

Q33 Do you think your consumer rights have sufficiently kept up with technological developments, such as the evolution of social media or the use of Artificial Intelligence?

Q34 In general, how would you rate your knowledge about consumer rights that may apply to you in the digital environment (e.g., when purchasing digital content and services, or when using digital platforms such as social media)?

**Figure 143: Use of EU or national consumer protection legislation to ensure online rights are respected (n=10000)**



### Consumer rights and technological development

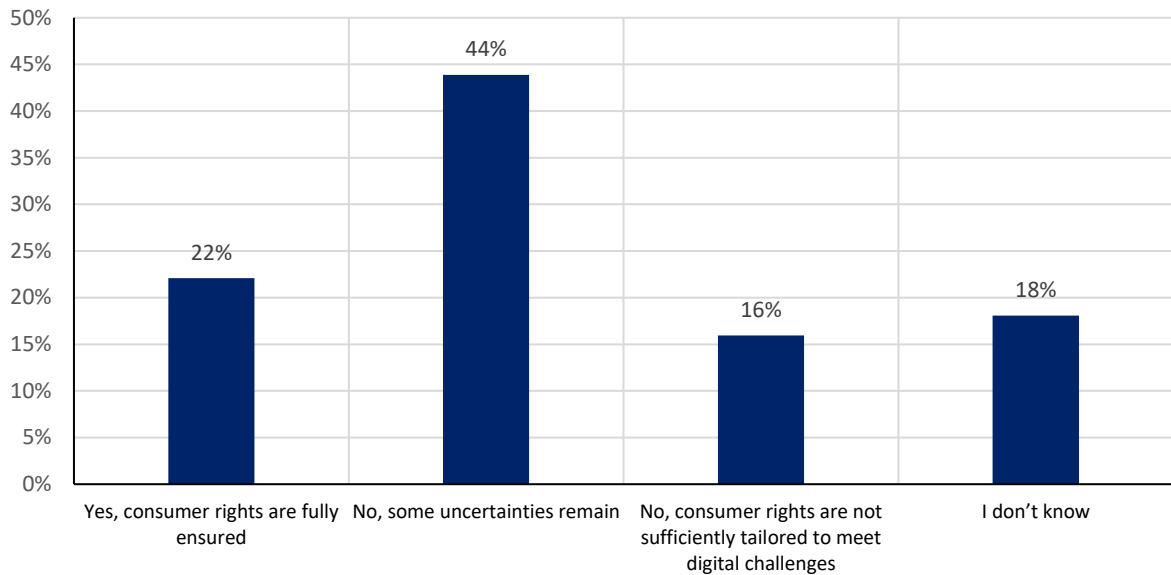
Our report examines a number of European directives in the context of how they have kept up with technological developments, in particular, with developments such as digitalisation, the evolution of social media and the use of Artificial Intelligence. From the perspective of the consumer, approximately **60% have indicated they feel consumer rights have not kept up with technological developments**. This includes 44% who believe that their rights have not sufficiently kept up with technological developments and that some uncertainties remain, while a further 16% indicated they are not sufficiently tailored to meet digital challenges (**figure 144**). 22% of consumers indicated that consumer rights are fully ensured. Consumers with the lowest levels of education were more likely to indicate that they felt consumer rights were fully ensured; 59% of those with ISCED 0<sup>657</sup> and 30% of those with ISCED 2<sup>658</sup>. Responses across all other educational levels were relatively consistent, with approximately 20% of consumers on average indicating consumer rights were ensured. Further, consumers who have indicated that spending time online is 'very positive' to their daily lives were most likely to indicate that consumer rights are ensured (55%).

On a country level, consumers from Portugal were the most pessimistic about how consumer rights have kept up with technological developments, with 77% of consumers indicating they are insufficient to meet digital challenges or that uncertainties remain. Consumers in Spain were the most positive with 32% indicating that consumer rights are fully ensured.

<sup>657</sup> Early childhood education ('less than primary' for educational attainment) Not completed primary

<sup>658</sup> Lower secondary education

**Figure 144: Advancement of consumer rights in line with technological developments (n=10000)**

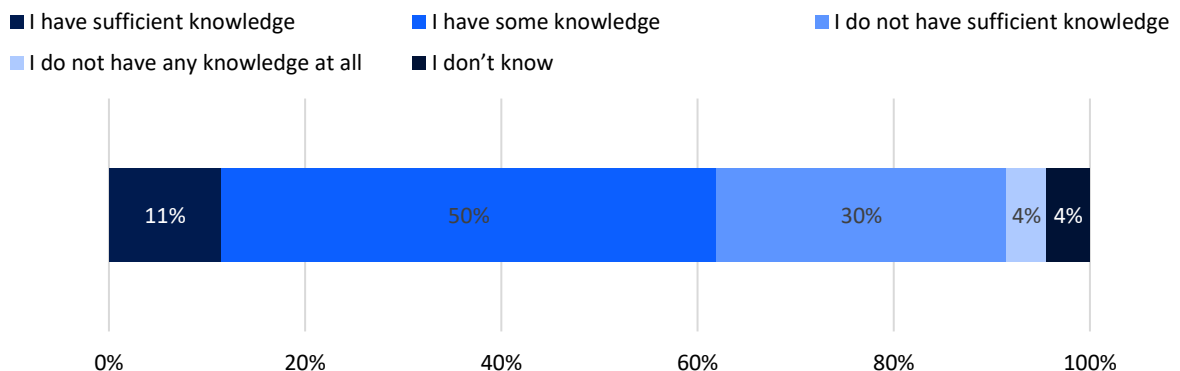


### Consumer rights knowledge

Lastly, when questioned about their level of knowledge about consumer rights that apply in the digital environment (e.g., when purchasing digital content and services, or when using digital platforms such as social media), half of consumers indicated they have some level of knowledge (50%), whilst 11% indicated they have sufficient knowledge (**figure 145**).

There appears to be a link between consumers who have strong feelings regarding spending time online and their confidence regarding their knowledge of consumer rights; among those who felt spending time online was 'very positive' for their daily lives 38% indicated sufficient knowledge, whereas among those who indicated spending time online was 'very negative' 35% indicated they had sufficient knowledge. In contrast of those with more neutral feelings about spending time online on average, only 11% had confidence in their knowledge.

**Figure 145: Knowledge about consumer rights applied in the digital environment (n=10000)**



## Annex A: Characterisation questions

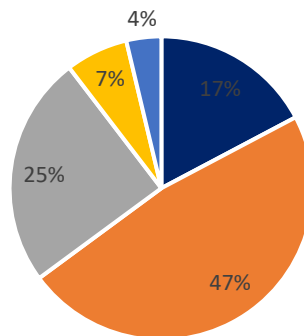
**Q35 How confident do you feel about navigating the internet and using digital tools and services?**

**Figure 146: Digital Skills**

**Digital skills (n=10000)**

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■ Confident      ■ Somewhat confident   ■ A little confident  
■ Not confident at all   ■ I don't know



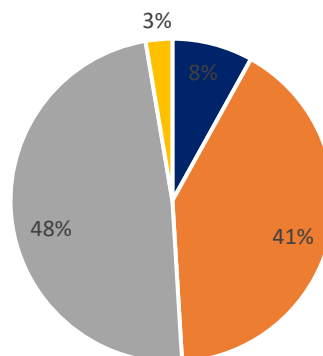
**Q36: For at least the past 6 months, to what extent have you been limited because of a health problem in daily activities? Would you say you have been ...**

**Figure 147: Limitations in activities due to health problems**

**Limitations in activities due to health problems (n=10000)**

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■ Severely limited   ■ Limited to some extent   ■ Not limited at all   ■ I don't know

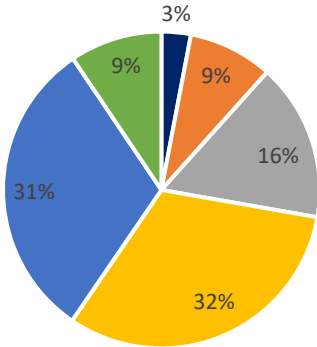


**Q37: How often do you act on impulse without thinking through the consequences?**

**Figure 148: Impulsiveness**

**Impulsiveness (n=10000)**

- Almost every day or every day
- Several times a week
- Several times a month
- Several times a year
- Never
- I don't know

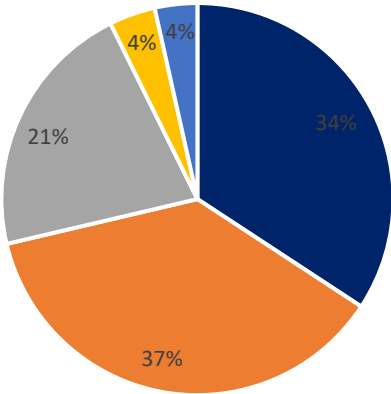


**Q38: How willing are you to take risks in your daily life, including financial risks?**

**Figure 149: Risk Preferences**

**Risk preferences (n=10000)**

- Not at all willing
- A little willing
- Somewhat willing
- Very willing
- I don't know

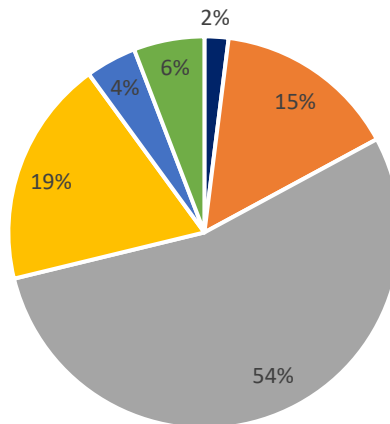


**Q39: How does the time you spend online (using a computer or smartphone) affect your daily life (e.g., does it affect your job performance, household work, sleep schedule, personal relationships etc.)?**

**Figure 150: Internet Addiction**

**Internet addiction (n=10000)**

■ Very negatively ■ Negatively ■ No effect ■ Positively ■ Very positively ■ I don't know

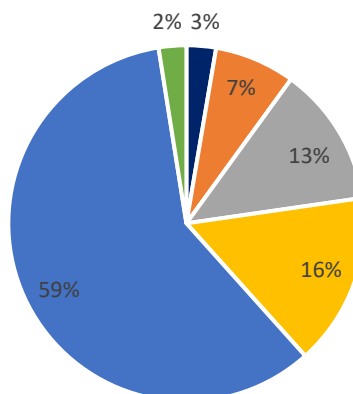


**Q40: How often do you play games of chance (e.g., poker, slot machines, sports betting etc.) or go to the casino?**

**Figure 151: Gambling tendencies**

**Gambling tendencies (n=10000)**

■ Almost every day ■ Several times a week ■ Several times a month  
■ Several times a year ■ Never ■ I don't know



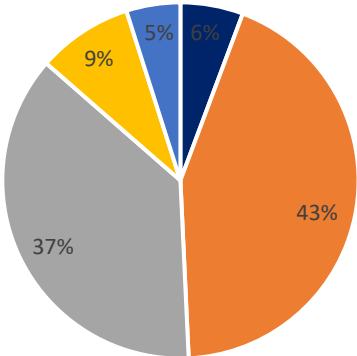
**Q41 How trusting are you of online businesses and websites?**

**Figure 152: Truthfulness of online businesses and websites**

**Trustfulness (n=10000)**

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- Very trusting
- Somewhat trusting
- A little trusting
- Not at all trusting
- I don't know



## Annex 7: Estimating costs and benefits of current regulatory framework for traders and consumers

### Introduction

This methodological annex summarises the **methodology** used on the assessment of costs and benefits, relevant for the **evaluation of efficiency, for traders and consumers**.

The assessment has been carried out in accordance with the Better Regulation Guidelines and toolbox. Tool #56 presents a typology of costs and benefits, distinguishing between one-off and recurring costs, direct and indirect contexts, etc. In the context of this fitness check, a distinction has been made between:

- **Administrative costs** - costs borne by businesses and public authorities (e.g. Ministries responsible for national transposition and CPAs dealing with the enforcement of EU consumer law) resulting from administrative activities performed to comply with the information obligations included in EU consumer law;
- **Adjustment costs** – compliance costs that traders incur to adjust their activity to the requirements contained in legal rules.

Generally, administrative costs tend to be recurrent costs, whereas adjustment costs tend to be one-off costs.

**Adjustments costs** include the one-off costs of having to change practices, such as upgrading software or modifying design interfaces such as e-commerce websites, apps, platforms, and marketplaces to comply with any new regulatory requirements. There are other adjustment costs related to becoming familiar with the changes (also called familiarisation costs).

This section analyses **regulatory compliance costs** for traders needing to comply with and CPAs applying and enforcing EU consumer law. As per the BRG, this includes the direct (administrative and adjustment) costs and the indirect costs. It can be noted that some regulatory obligations may imply both minor administrative and adjustment costs. For instance, regarding disclosure rules under the MD (information obligations for platforms and marketplaces), administrative costs for traders could include the costs of sub-contracting a company to ensure that online reviews are genuine. Other administrative costs could include company's time needed to produce precontractual information regarding automated decision-making tools and price personalisation. There is then the adjustment cost, possibly minor, of including this type of information in the websites and the disclosure via a link added to a platform or marketplace, which needs to be incorporated into the design interface.

#### Examples of costs for different stakeholders

*Costs to traders (examples):*

- **Costs of producing information** required under **new information disclosure requirements** under the MD.
- **Costs of calculating an average previous price** within the past 30 days when indicating promotional price reductions under the PID (change through the MD).
- **Costs of checking** that any new standard **contract terms comply with existing** legislative requirements under the UCTD.

*Costs for consumers:*

- **Costs (financial, non-financial harms) of consumer detriment**, both in relation to i) incurred costs from non-compliance by traders under the existing legislative requirements of EU consumer law and ii) perceived detriment of additional problematic practices not presently



prohibited. These include not only direct financial costs, but indirect costs such as time wasted and annoyance.

*Costs for MS authorities:*

- **Reporting and monitoring requirements to check compliance** with obligations on traders across the pieces of EU consumer law within scope.

Efficiency assesses whether these costs can be justified given the potential benefits of the efficient and effective application of EU consumer law to traders, consumers and relevant national authorities and CPAs. These benefits would accrue under the assumption that there are high levels of compliance among traders with EU consumer rules and that there are high levels of enforcement by CPAs to promote high compliance. Examples of the expected benefits that were investigated through the research by type of stakeholder are included below. The benefits to both traders and consumers would materialise if there are high levels of compliance in the digital environment by traders with existing consumer law rules, supported by effective and proactive enforcement.

#### Examples of benefits for different stakeholders

*Benefits to traders (examples):*

- **Reduced barriers to cross-border digital trade through the implementation of EU consumer law in a Digital Single Market context, through the maximum harmonisation approach** of the UCPD and the CRD;
- **Regulatory certainty** in the digital environment through the application of technology-neutral core pieces of EU consumer law, which have provided stability over a 10-year (CRD), almost 20-year (UCPD) and 30-year period (UCTD). Whilst the recent entry into application of the MD from May 28<sup>th</sup> 2022, introduced further regulatory amendments to the underlying legislation, overall stakeholders perceived there to be strong overall stability.
- A **more level playing field for traders through reduced non-compliance with EU consumer law obligations and information requirements by traders** in digital markets and services.

*Benefits for consumers:*

- **High levels of consumer protection, ultimately, bringing about 'digital fairness'** through the effective application of EU consumer law by traders in different digital contexts (given the legal framework aims to be technologically-neutral);
- **Enhanced consumer trust** in relation to digital transactions, leading to more cross-border e-commerce and other forms of trade in the digital environment (including growth in digital markets and services);
- A **reduction in levels of consumer detriment regarding online transactions**, with consumers experiencing fewer problems when making transactional decisions, and entering into contracts online (though it should be recalled that whilst some reductions in detriment on the benefits side may be noted, there are equally ongoing costs where problematic practices persist leading to ongoing detriment);

*Benefits for MS national authorities and enforcement authorities:*

- **Increased compliance** with EU consumer law obligations and information requirements by traders in digital markets and services, with fewer infringements of consumers rights. This should lead over time to a reduction in the costs of enforcement activities through a reduced need to take enforcement actions, fewer judicial proceedings, etc.
- Higher levels of consumer protection through **reduced digital asymmetries for consumers**, for instance due to the application of increased transparency requirements. National Ministries have responsibility for national consumer protection policies. Therefore, effective application of EU consumer law in the digital environment should help to achieve broader policy objectives, for instance by improving information provision to consumers to overcome digital

asymmetries faced by consumers.

## Impacts on traders

### Approach and sources of data

Traders were asked in the enterprise survey and targeted survey about the costs of compliance with, and the benefits of EU consumer law when applied in the digital environment.

The **targeted survey** received 164 responses, however only some of these were from individual firms and trader associations (83 responses), who were asked a specific set of questions on costs and benefits. Not all respondents were able to provide quantitative responses although there were some responses in terms of the incidence of costs as a % increase. Feedback on costs was also analysed quantitatively to the degree feasible.

**Enterprise survey** respondents were predominantly SMEs<sup>659</sup>. The survey was carried out with 1,000 enterprises in 10 countries (FR, DE, EE, IT, ES, HU, SE, PT, PL and RO). Respondents were questioned about the type of costs their company had experienced to ensure that advertising, marketing practices and standard contract terms comply with legislative requirements in the digital area. An example question is provided below.

**Question – to what extent has compliance with consumer law requirements resulted in the following types of costs for your business in the digital area?**

- Familiarisation with rules and obligations and initial compliance planning (e.g., developing compliance strategies, allocating compliance responsibilities)
- Checking your business's compliance with legal requirements to ensure that digital commercial practices and contract terms are not unfair or misleading (e.g. check website design has no unfair practices)
- Information obligations (e.g., pre-contractual and contractual information requirements, disclosure requirements for platforms on search ranking and reviews.
- Adjusting business practices (e.g., changing a website design where unfair, deceptive practices are identified, using different standard contract terms if considered unfair, etc.).

In addition, **interviews with trader associations and individual traders** were undertaken. These included consideration of costs and benefits and an attempt to gather both quantitative and qualitative data. Interviewees were often however only able to provide qualitative feedback (for reasons explained later in this section).

As regards how far these benefits materialised, the real picture based on the primary evidence base gathered through interviews and the various surveys (OPC, consumer survey) is more nuanced. A set of **benefits** was identified derived from key literature and from the intervention logic mapping analysis. The extent to which these benefits have materialised was then examined through interviews with trader and consumer representatives and wider stakeholders.

**Secondary data and information sources** were also used to quantify the costs and benefits. Examples include: the 2017 fitness check, the impact assessment of the Modernisation Directive, the Consumer Conditions Scoreboard which monitors consumer

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<sup>659</sup> 77% were SMEs (N=1,000). 23% of the companies reported to be large (+250 employees).

conditions and the incidence of problems encountered, Eurobarometer surveys<sup>660</sup> and specific studies / research papers on consumer detriment. The findings from some of these earlier studies have been incorporated into the following sub-sections; including an assessment of their utility for this fitness check (see section below on the challenges in assessing the costs and benefits of EU consumer law in the digital environment and the section on the costs and benefits for traders).

All the companies consulted and participating in this study have a strong digitalization component. These have been complemented by secondary data, allowing for some triangulation of the assumptions for the purposes of estimating the costs and benefits but with the shortcoming that very little secondary data are available on the costs and benefits that are specific to business trading on a digital environment.

## Assumptions for quantification and extrapolation

In order to produce the cost-benefit assessment (CBA), various data was gathered and reviewed to facilitate the development of assumptions, such as:

- Data on traders operating in digital markets and services. Data was obtained on market size and structure e.g. on turnover and where possible the number of enterprises. The analysis of market trends and developments covering e-commerce, the subscription and platform economy is presented in Section 1.5. Factors relating to the size of different markets and the implications on the cost-benefit ratio are considered in the section on the proportionality of costs and benefits.
- Data limitations on specific sectors of the digital economy. Data on the number of enterprises was available for some digital sectors, but not others. Therefore, the online retail sector was used as a proxy for the extrapolation of costs, but with some adjustments being made to incorporate data estimates from other digital sectors, such as online platforms and the subscription economy. Moreover, the data on estimated compliance costs by traders came from the enterprise survey, which covered all types of digital economy players (not only online retailers involved in paid-for transactions but also traders involved in data-paid transactions in the EU data economy).
- Assumptions were made regarding what percentage of the total market is digital based on different secondary sources, as explained later in this section. We drew on Eurostat data on the proportion of retailers that operate online. This was chosen as a proxy for the e-commerce sector as Eurostat data is quite weak in differentiating between B2B and B2C e-commerce, whereas consumer law is applicable only to the latter.
- Compliance costs with EU consumer law in the digital environment were then estimated. These were based on assumptions regarding feedback on 1) median compliance costs as estimated through feedback from the enterprise survey (but also considering trader feedback in the targeted survey) with 2) an extrapolation of these costs to the EU-27 level based on the total estimated number of enterprises in the market.
- These estimates relate to the costs of complying with EU consumer law for traders across digital markets and services, rather than stemming from digital-specific requirements. This was logical given that the general principles-based approach is applicable in EU consumer law. However, consideration is also given in the subsequent sub-section to the costs of complying with digital-specific requirements in EU consumer law, but many of these are new and were introduced through the MD.

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<sup>660</sup> Flash Eurobarometer 396, 2014, [https://data.europa.eu/data/datasets/s2032\\_396\\_eng?locale=en](https://data.europa.eu/data/datasets/s2032_396_eng?locale=en) - relevant questions are: Please tell me whether you strongly agree, agree, disagree, or strongly disagree with each of them: 'It is easy to comply with consumer legislation in your sector.' / 'The costs of compliance with consumer legislation in your sector are reasonable.'

- As in other recent studies (evaluations and IAs) of EU consumer law, using the median was found to be more accurate than using the average. The reason for this was that data on compliance costs for medium and large firms active in the digital environment could distort the average costs, due to them being outliers with multiple different business divisions. The median was therefore found to be more realistic.
- Large firms are significantly fewer in number but can spread compliance costs. There are a large number of e-commerce firms in the European digital economy. Whilst there are fewer marketplaces and platforms, these are frequently of significant scale with very high turnover and employees. Many of these have a market-leading position and are significant-sized businesses with turnover in the tens to hundreds of millions of EUR to billions of EUR (although there are a few smaller players present in some national markets). Although large firms are likely to face greater cumulative compliance costs reflecting their larger average size, these costs can be spread across a wider range of consumers (i.e. users of digital services). In total, therefore, compliance costs per transaction are unlikely to be that different from SMEs due to their volume.

More detailed data is available on the number of retailers operating in digital markets than for other types of traders in the digital economy. In carrying out an extrapolation to scale up costs, we therefore considered the online retail sector as a proxy for the e-commerce sector more broadly. However, other traders in wider digital services and markets were also considered when making the extrapolation of costs based on median costs estimates and on data covering the total number of enterprises active in the digital environment. The following table summarises the assumptions for data extrapolation on costs.

**Table 6 Key assumptions for estimating the costs**

Sector	Key assumptions	Additional notes
<b>On-line retailers</b>	5.5m enterprises in the retail sector of which 22.80% of traders operate on-line (c. 1.254m companies)	In the <a href="#">EU</a> , during the period 2012 to 2021, the share of enterprises that had e-sales increased from 16.4 % in 2012 to 22.8 % in 2021. Data source is Eurostat <sup>661</sup>
<b>On-line platforms economy</b>	10,000	The Impact Assessment to the DSA noted that while there are approximately 10.000 micro, small or medium size online platforms, millions of users concentrate around a small number of very large online platforms, be it in e-commerce, social networks, video-sharing platforms etc . According to the European Commission, 1 million EU businesses are already selling goods and services via online platforms
<b>Subscription economy</b>	28,000	In 2017, the total number of companies offering a service based on subscription was estimated to be around 28,000 globally and it has experienced remarkable growth, especially during the COVID-19 pandemic. They offer both B2C and B2B. On-line retailers and platforms can also offer subscription models.
<b>Total number of enterprises potentially impacted by costs</b>	<b>1.3m companies</b>	1.3m companies could potentially be affected. The figure has been rounded up to account for growth in the last few years. Note that not all companies will see an increase in costs.

<sup>661</sup> [E-commerce statistics - Statistics Explained \(europa.eu\)](#)

## Estimating the adjustment costs

Due to the size of the sample (N=1,000), the enterprise survey was considered the most robust source of data on costs.

Respondents to the enterprise survey were questioned about how many employees were dedicated to the initial adjustment of business practices to ensure compliance:

- 10% of respondents noted high costs related to adjustment of business practices.
- A large percentage of respondents (48%) noted that between 1 and 2 employees were responsible for the adjustment of business practices, with the majority dedicating between 11 and 20 days. The median was 20 days.
- The most frequent value however was 1 employee (the mode) and the median is 2 employees.
- The average costs for companies to acquire external services was EUR 2331 and the median EUR 1600.

There are two different estimates of adjustment costs for traders. The first relates to traders that have dealt with managing compliance in-house. The second higher figure relates to traders that have used a combination of in-house resources and external expertise (e.g. legal services, professional advice).

- Applying the same 10% and a value of **EUR 1,600 in adjustment costs** for these companies (based on the median), the adjustment costs can be estimated at **EUR 208m across the EU**;

### Adjustment costs – lower bound

There are a total number of 130,000 companies affected by costs of familiarisation and adjusting to the legislation.

The median number of employees and days of companies that reported costs are 2 employees and 20 days in a year per employee. It is expected that existing employees will include these activities as part of their everyday activities and not likely to spend a full day on familiarisation and adjustment.

The average hourly wage in 2022 was estimated at 30.5 EUR/hr (according to Eurostat figures). Assuming each employee spends 1.25hours a day, the total cost per company can be estimated at c. EUR 1,600 (*2 employees x 20 days per employee x 1.25hours/day x EUR 30.5/hr; rounded up*). *Should more hours be needed per employee, the median costs of external services could still be used as a lower bound.*

The total adjustment costs, including familiarisation costs, across all companies are estimated at EUR 208m (130,000companies\*1600 EUR/company)

- If a higher **average value** were to be assumed of the adjustment costs (which also includes the costs of hiring external services is EUR 2,331), **then total costs would increase to EUR 303m.**

For comparison, the earlier fitness check considered that one-off costs of compliance checks and adjusting business practices concerning advertising and marketing targeted towards both consumers and businesses to range between EUR 1 160 and EUR 8060 per business across the five sectors covered in the study (CIVIC, 2017).

Adjustment costs would mainly be one-off costs, though not exclusively, as there may be some recurrent costs. An example is that prior to new T&Cs being published, even if a trader has already complied with the UCTD previously, the new T&Cs will need to be carefully checked for any potential standard unfair contract terms.

## Estimating administrative costs

The enterprise survey also asked about any administrative costs, which includes resources required to ensure compliance on an ongoing basis annually. On the issue of checking compliance with legal requirements to ensure the fairness of digital commercial practices, 67% of respondents checked at least once every six months that advertising/marketing and standard contract terms for online sales still comply with national legislation. However, 50% also checked more frequently, at least once every three months. Yet, 84% of companies reported no costs or low costs. 15% reported high costs; and 1% did not know.

In terms of the **resources used annually**, the resources dedicated were largely similar to those highlighted under the adjustment costs. On average, 3 employees are dedicated to this work on an annual basis but in this case the median was **2 employees** (and mode is 1). The most frequent response by percentage of respondents (32%) was that enterprises dedicated between 11 and 20 days (with 27% of respondent indicating more days than 20). However, given that responses varied across the remaining respondents with some indicating a higher number of days, we have taken the median of 21 days as the benchmark. The average costs of **external services annually were estimated at EUR 2,547; but the median is EU 1,800.**

- Based on the number of traders reporting high costs, 15% of the total, and as costs of **EUR 1,280 a year** (2 employees as reported in the median spending 21 days annually but an hour a day), the total administrative costs of checking compliance can be estimated at **EUR 249.8m.**

### Administrative costs – lower bound

There are a total number of 1950,000 companies affected by costs of checking compliance with the legislation.

The median number of employees and days of companies that reported costs are 2 employees and 21 days in a year per employee. It is expected that existing employees will include these activities as part of their everyday activities and not likely to spend a full day on checking compliance.

The average hourly wage in 2022 was estimated at 30.5 EUR/hr (according to Eurostat figures). Assuming each employee spends 1 hours a day<sup>662</sup>, the total cost per company can be estimated at c. EUR 1,280 (*2 employees x 21 days per employee x 1 hours/day x EUR 30.5/hr*).

The total costs of checking and ensuring compliance across all companies are estimated at EUR 249.8m (195,000companies\*1280 EUR/company)

- A larger annual costs of **EUR 2,500 by** company (based on average costs of external services) could yield compliance costs of around **EUR487.5m annually.**

<sup>662</sup> We have assumed a bit less time in checking compliance per day per employee assuming they are already familiar with the legislation.

## Impacts on consumers

### Approach and sources of data

The approach to estimating the costs and benefits to consumers is based on the concept of consumer detriment.

The OECD<sup>663</sup> defines consumer detriment as:

*“The loss or damage experienced by a consumer when she encounters a problem relating to the purchase of a good or service. This could be because the good or service does not meet her requirements, is faulty, over-priced, or otherwise sub-optimal in some way. Consumer detriment can be defined as comprising personal and structural detriment. In addition, consumer detriment can be **financial or non-financial**.”*

This same definition was carried forward into a digital context in the 2022 OECD ‘Measuring Consumer Detriment in E-Commerce’ report. They added – “... for example, the goods and services they purchased through e-commerce do not conform to their (reasonable) expectations with respect to quality, performance or delivery conditions; when they suffer from unfair contract terms; or when they have to pay more for a product than what they could have reasonably expected (e.g. due to hidden or extra costs).”<sup>664</sup> Detriment is assessed based on the nature of the harm which may involve loss of welfare.

- **Financial detriment** – situation when an individual suffers a direct financial loss or disadvantage in monetary terms. For instance, a consumer wishes to cancel their online subscription but cancellation procedures are overly-opaque leading to the subscription to renew.
- **Non-financial detriment** - losses or disadvantages not directly involving monetary loss but which still negatively impact an individual, including emotional detriment, physical harm or impact on mental health, etc.

Beyond harms linked to consumer detriment, there are also other types of harms, such as data protection harms, that are relevant to consumers in the digital environment.

- **Data protection harms** - unwarranted intrusion and compromising of privacy, loss of control or autonomy, annoyance and inconvenience. Whilst it is debatable how harms due to data protection and privacy problems should be dealt with in this assessment of consumer law (given that from a legal perspective data protection rules are applied in parallel with consumer law, as the latter has not been updated to fully reflect developments in the DSM, the experience of digital consumers is that such harms are encountered in the context of digital transactions, and may be linked to particular problematic practices, such as the misuse of data, use of sensitive data for personalised ads without consent etc.

Distinctions have been made in literature between “structural detriment” and “personal detriment.”

- **Structural detriment** arises from a situation in which market conditions may limit choice or result in inflated prices. An example is the use of scalper bots to inflate event ticket prices, recently prohibited in the MD.
- **Personal detriment** arises from the negative outcomes for individual consumers once a decision has been made compared to their reasonable expectations (OECD, 2010 based on the earlier Europe Economics study, 2007).<sup>665</sup>

In a digital context, consumer detriment could be defined as a situation in which consumers experience negative outcomes from their experiences of conducting digital transactions of goods

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<sup>663</sup> OECD Recommendation on Consumer Policy Decision Making (OECD, 2014).

<sup>664</sup> [Measuring Financial Consumer Detriment in E-Commerce \(oecd-ilibrary.org\), 2022](#)

<sup>665</sup> Europe Economics (2007), An Analysis of the Issue of Consumer Detriment and the Most Appropriate Methodologies to Estimate It.

and services, irrespective of the specific interface i.e. covering paid-for transactions on e-commerce websites and online marketplaces, using free services on apps or platforms, etc.

### Categories of harm in the digital environment

Many different **categories of harm in the digital environment** were identified in relevant literature in previous attempts to develop taxonomies. EU consumer law (in conjunction with wider EU digital, competition and data laws) seeks to address different types of detriment pertaining to unfair practices.

Examples are unfair consumer data practices such as the mis-use of personal data and exploitation of sensitive data relating to the vulnerabilities of specific consumers, barriers to informed consumer decision-making, limitations of consumer choice, harmful or discriminatory advertising content and harmful advertising targeting and placement.

Detriment can take the form of financial harm, including direct financial costs and non-financial harms, such as time lost, annoyance and disappointment. In some instances, consumers' mental health and well-being may also be affected by detriment, for instance, due to digital addiction, which may result in a combination of both financial and non-financial harm. For this study, the types of **consumer detriment** of interest relate to financial or non-financial impacts of the problematic practices identified.

### Causes of detriment in a digital fairness context and difficulties in measuring it

Among the causes of detriment in a consumer law and digital fairness context are:

- **Non-compliance with existing EU consumer law** - a number of problematic practices relating to applying the law in the digital environment have been identified. These can cause different types of detriment.
- **Problematic practices where EU consumer law** in theory regulated transactions in the digital environment, but through the general provisions which means that there may be grey areas regarding what traders are allowed to do, and prohibited from doing, such as the design of online interfaces and dark patterns. This can cause detriment even if it may be difficult for a CPA to prove non-compliance. This demonstrates the challenges in measuring consumer detriment, as there are differing perceptions as to whether traders have not complied with their legal obligations.
- **Problematic practices across new business practices in the digital environment where EU consumer law may not yet regulate the practice at all.** Here, consumer detriment will be experienced, but the legislation does not currently provide any specific protections.

Regarding indicators that can be used to measure consumer detriment based on previous literature, these include: the volume of complaints made, levels of consumer (dis)satisfaction based on survey data, for instance experience of the incidence of unfair commercial practices and occurrences of unfair standard contract terms, the extent of price distortions, and perceptions of the adequateness of redress. Some of these have been used in the present study where possible mainly through the gathering of survey data.

Consumer detriment has been calculated based on data obtained from the consumer survey, and the OPC and targeted surveys (the latter two surveys asked respondents about the frequency with which consumers experienced problematic practices and whether this led to any form of financial or non-financial detriment), as well as secondary data. In the following-sub-section, the approach to quantification and the data sources used for the analysis are explained in detail.



The approach to estimating consumer detriment has included the following steps:

**Step 1:** to estimate the number of consumers experiencing detriment;

**Step 2:** to estimate the financial and non-financial loss from the experience for each consumers experiencing consumer detriment;

**Step 3:** Calculate the overall consumer detriment based on steps 1 and 2<sup>666</sup>.

The consumer survey has been used to assess benefits in terms of reduced consumer detriment due to EU consumer law and/ or disbenefits due to the persistence of problematic practices, thereby leading to ongoing consumer detriment. Other surveys such as the public consultation have also been under the efficiency section for triangulation purposes. The consumer survey was the main data source due to a lack of available data, such as:

- The lack of monitoring data from CPAs on actual or estimated non-compliance levels among traders with EU consumer law (including in the digital environment, but also offline). CPAs do not generally collect such data.
- Difficulties in ascertaining what constitutes non-compliance, as whereas some complaints and enforcement activities relate to clear breaches of EU consumer law requirements, in other cases, the extent to which a particular practice is formally non-compliant, as opposed to simply bad practice but borderline as to whether non-compliance has occurred makes the assessment of detriment more complicated. An example is a perceived dark pattern in design interface where a consumer complaint has been received, but the trader claims they are still technically compliant.
- However, we have overcome the problem of the lack of robust data on compliance levels by drawing on consumer survey and public consultation data regarding perceived levels of detriment and on CPC Network sweeps data, and on the sweeps undertaken as part of the present study.

The consumer survey was based on a sample size of 10,000 consumers and asked consumers to reflect on the most problematic practice they experienced in the previous year and quantified the detriment they suffered as a result. This may include problems with any type of physical goods or services purchased online (e.g., via an app or website) as well as digital content/services/subscriptions (social media, software, apps, video games, e-books, online courses, digital subscriptions to entertainment services, newspaper access etc.). Issues may include:

- Returning a product or cancelling a service/subscription
- Confusing or misleading design or language on websites/platforms
- Problems with customer service
- Not being able to use the product/service/content as intended
- Unclear prices and discounts
- Misleading or missing information
- Problems with Terms and Conditions

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<sup>666</sup> The formula used to calculate the consumer detriment is as follows: Consumer detriment (EUR) = number of consumers experiencing a problem when buying on-line x (financial detriment from problematic experience + non-financial detriment from problematic experience )

- Problems with subscriptions

## Estimating the number of consumers experiencing detriment (Step 1)

There are around 440million consumers in the EU, of which 71% are buying on-line<sup>667</sup>. Thus, the number of consumers that could experience detriment in the EU is estimated at 312.4m.

The survey revealed that 27% of consumers (approximately 1 in 3 consumers surveyed) buying on-line have experienced situations that have caused them financial loss, time loss or emotional distress (out of 10,000 respondents). Assuming a slightly larger number of 30% (this is because the public consultation revealed a larger number suffering consumer detriment of 50%), the total number of consumers experiencing detriment is estimated at 93.72m consumers.

## Valuing consumer detriment overall (Step 2+3)

The consumer survey also asked about consumer detriment and financial and non-financial costs implications. The results show the following:

- 41% of respondents ended up over-paying / experiencing extra charges as a result of a problem (n=992 out of 2441). The average costs to consumers in terms of being over-charged or encountering additional extra charges that were not expected was estimated at EUR 137. The median was EUR 35 (n=989).
- The average costs to consumers of repairs or replacement were estimated at EUR 161 and the median was EUR 30.
- The costs of dispute resolution or court proceedings were estimated, in average, at EUR 214 (median EUR 40).
- The costs of experts' advice were EUR 208 on average for those that sought advice (and the median EUR 40).
- There were other additional costs such as phone call, postage and travel costs being reported. The average was EUR 159 and the median was EUR 20.
- Respondents received on average, EUR 251 of compensation; but only 174 respondents answered this question (the median was EUR 50)
- 27% of respondents noted this financial detriment from companies from another EU country but the problem was from a national trader for 46% of respondents (n=2411).
- 43% of respondents noted that the problem did not last more than a week and 31% from one to week to a month, and 62% reported that the amount of time lost did not exceed more than 4 hours.

The difference between the average and the median above reflects the high variation in the costs experienced by consumers as consumer detriment. The median is less affected by outliers and skewed data than the mean and is usually the preferred measure of central tendency when the distribution is not symmetrical. It is also important to note that both metrics include those respondents that provided a value above zero, which may skew the results towards higher values. Using the median, two values for consumer detriment have

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<sup>667</sup> [E-commerce statistics for individuals - Statistics Explained \(europa.eu\)](#)

been calculated:

- 1- A cost of detriment, **pre-redress**, that includes extra charges and costs of repairs: estimated at **EUR 65**;
- 2- A cost of detriment, **post-redress**, that includes all costs (inc. costs of dispute resolution and expert advice but also the reimbursement) estimated at **EUR 115**.

The following table shows the values from the consumer survey that make up the figures for the consumer detriment; pre and post-redress.

<b>Consumer survey: detriment results</b>		
	<b>Average</b>	<b>Median</b>
Price paid for products	245	50
<b>1. Extra charges as result of problem</b>	137	35
<b>2. Costs of repairs or replacement at your own expense:</b>	161	30
3. Costs of dispute resolution	214	40
4. Costs of experts advice	208	40
5. Extra costs	159	20
6. Reimbursement	251	50
Consumer survey detriment	Average	Median
<b>Total costs of detriment (1+2) PRE-REDRESS</b>	298	<b>65</b>
<b>Total costs of detriment (1+2+3+4+5 - 6) POST-REDRESS</b>	628	<b>115</b>

Applying the above values per episode to all consumers experiencing detriment in the EU, the total consumer detriment has been estimated at between **EUR 6.1bn and EUR 10.7 bn**.

### Interpretation of data findings

#### Limitations and caveats in methodological approach

- There were challenges in generalising about costs across all types of traders active in digital markets and services. There were found to be wide variations in compliance costs across different types of traders depending on which digital markets and services they focus on, and whether they are a large firm or SME.
- There are relatively small numbers of online marketplaces and platforms in Europe, but these are often large-scale. There is no Eurostat data available specifically on online marketplaces and platforms. Nonetheless, estimates were obtained from other sources. For example, there are some 17 very large platforms and search engines in the EU-27<sup>668</sup>. The Impact Assessment to the DSA noted that there are approximately 10.000 micro, small or medium size online platforms.
- Large tech platforms and marketplaces will have significantly higher compliance costs in total but relative to business size this ought not be disproportionate. Many large firms trade cross-border and on a pan-European and/ or global basis and may have dozens of different business divisions. This can be contrasted with the online retail sector where there are a significant number of enterprises (of all size thresholds). Therefore, we have focused on the median costs in order to reflect the costs for a typical firm, whilst acknowledging that there are outliers for compliance costs depending on their size.
- Consequently, there are different dynamics in terms of market size and structure across online retail, the platform economy and subscription economy. These were considered when scaling up compliance costs in the digital environment to the EU-level. As a result, any figure should be used knowing these caveats.

<sup>668</sup> See <https://digital-strategy.ec.europa.eu/en/news/commission-sends-requests-information-17-very-large-online-platforms-and-search-engines-under>

We have made a significant effort to validate the figures with other relevant Impact Assessments.

It is important to consider some of the specific challenges related to the scarcity of secondary data in assessing the costs and benefits of EU consumer law in the digital environment, and those more generally relating to assessing the costs of applying the specific Directives within scope.

### **General limitations due to absence of comprehensive baseline data on costs and benefits from previous impact assessments**

- There is a **lack of baseline data or information about one-off compliance costs** about the costs of compliance with EU consumer law generally and more specifically for two out of the three Directives within scope. The UCTD and UCPD were adopted and entered into application prior to the Commission's impact assessment (IA) system's introduction in 2006. Therefore, there was limited data about ex-ante projections of costs as no IA exists for either Directive.
- However, a 2008 impact assessment (IA) study of the CRD was undertaken by the Commission.<sup>669</sup> This includes some estimates based on a Eurobarometer survey of the cost of regulatory fragmentation due to the lack of harmonisation in distance contracts, including those online, as well as a discussion on the benefits. Some of this data has been used in the section on the costs / benefits for traders.
- Moreover, in 2018, an IA study in relation to the Modernisation Directive was published.<sup>670</sup> This provides some useful data, but there are also limitations (as explained later in detail in the various sections on costs by stakeholder type).

### **Limitations in comparability between the previous fitness check and the present study, with a lack of disaggregation of the costs of the relevant legislation by Directive and sector**

- The 2017 fitness check covered a **wider set of EU consumer and marketing law Directives** than the present study. However, the quantification of costs focused on **the costs of entering new markets in five sectors, but did not estimate the Directive-specific costs across all sectors operating in the internal market or disaggregate compliance costs from other types of costs**. Data from the previous study is thus useful for validation, but not directly comparable.
- A further challenge in using the earlier fitness check costs estimates relates to the **sectoral coverage**, given the focus was not specifically on digital sectors.<sup>671</sup>
- The **additional costs of doing business cross-border** were estimated in the 2017 Fitness check but there may be differing reasons for the wide diversity in these costs by sector. For instance, these could be related to sectoral legislation, rather than EU consumer law, which may explain the much higher estimates in some sector e.g. gas and electricity services. Given the different sectoral mix in the 2017 and 2023 fitness checks, the sectoral coverage is not directly comparable.

Whilst consumer law facilitates the single market, hence the focus in the earlier 2017 fitness check on cross-border costs, many traders (e.g. content creators/ influencers, small e-commerce firms) do not trade cross-border, but are still subject to national consumer laws derived from transposition of EU consumer law. The 2017 fitness check noted that around

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<sup>669</sup> Commission staff working document accompanying the proposal for a directive of the European Parliament and of the Council on consumer rights - Impact assessment report {COM(2008) 614 final}. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52008SC2544>

<sup>670</sup> Brussels, 11.4.2018, SWD(2018) 96 final, Parts 1, 2 and 3.

<sup>671</sup> The product scope covered the following product sectors - large household appliances, electronic and ICT products, gas and electricity services, telecommunication services and pre-packaged food and detergents. Some of these products are sold both online and offline, so there are no estimates specifically for digital.

three-quarters of traders did not operate cross-border. However, a greater proportion of respondents participating in the targeted consultation undertaken for our study operated cross-border. This was possibly due to the nature of the respondents, which included trade associations, many of whose members either operated cross-border or in several EU countries.

The difficulty in using the 2017 fitness check data as a baseline for compliance costs data given the lack of disaggregation (by Directive, between EU and national rules and shopping channel) is clear from the study itself: *"These estimates refer to the overall compliance costs for businesses related to the national legal framework, and therefore are caused by the combined effects of EU and Member States legislation in the area of consumer and marketing law, as well as sectoral legislation."* (pg. 146).

However, there is some useful data, such as that 39% of total one-off costs for traders were estimated as being related to checking standard contract terms in consumer contracts.

**Some sectoral data was available for the assessment of the baseline on digital markets and services, but there are limitations in relying on Eurostat data.** In Section 3.22, an overview of key trends in the growth and development of digital markets and services is provided, focusing on e-commerce, the platform and subscription economy. It can be observed that whilst there is data available from different industry associations and previous studies, Eurostat data generally does not cover digital sectors that well. Whilst Eurostat data is available on the percentage of enterprises that trade online, this does not distinguish between B2C (relevant to EU consumer law) and B2B (outside the scope of EU consumer law).

Given the lack of systematic data collected by CPAs on complaints by consumers relevant to EU consumers in the digital environment, and the level of compliance by traders, it was not possible to make direct correlations between trends and developments in markets, and levels of detriment. However, average levels of consumer detriment have been assessed across all digital markets and services.

### **Challenges in disentangling compliance costs with EU consumer law for the digital environment**

**In the absence of robust baseline data on compliance costs generally,** a further challenge was the **lack of any costs data specifically pertaining to digital-specific requirements within the legal framework.** To remedy this, an effort was made to develop a costs dataset that covers compliance in the digital sphere through primary data collection from both the **enterprise and targeted survey, supported by interviews and the OPC.** It is also important to provide feedback as to difficulties that firms experienced in providing compliance costs data. For example:

- Some traders expressed the view that given the technology-neutral nature of the legislation, it would be difficult to separate the costs of compliance with EU consumer law in the digital environment with the costs of applying the law offline. Many traders are multi-channel and even for traders that are digital only, the same rules are broadly applicable in the digital environment, except a few digital-specific rules introduced due to regulatory amendments.
- Some traders struggled to be able to quantify the costs of compliance with EU consumer law and other types of laws e.g. digital, audiovisual and media, data protection/ privacy-related as they are all seen as being inter-related. A large trader in the online platforms sector responding to the targeted consultation noted that whilst compliance with major consumer law directives and EU law requires financial and human resources, these are not quantifiable since the costs cannot easily be delineated per Directive or policy area, which reinforces the point above.

## Challenges in the measurement of compliance costs in the digital environment

Other key challenges in performing a cost-benefit assessment of EU consumer law in terms of progress towards achieving digital fairness.

- Whilst **digital markets and services account for an increasing share of the single market**, driven by developments in new technologies and the broader digitalisation phenomenon, EU consumer law itself is designed to be technology-neutral and applicable to offline and online transactions (e.g. for all three Directives). Therefore, it is **difficult to isolate the compliance costs of EU consumer law specific to the digital environment**. Notwithstanding, some business practices are prevalent in digital markets and services, where compliance costs are applicable to traders operating mainly or exclusively in the digital environment (e.g. information obligations for online platforms in the form of disclosure rules and transparency requirements).
- Despite these difficulties, assessing compliance costs in the digital environment is still possible, given that assumptions can be made as to what proportion of the total market is digital vs. non-digital. Whilst the **CRD covers distance contracts generally**, irrespective of whether by telephone, doorstep selling or e-commerce, the latter accounts for a greater share of the European market. Many of the **costs of CRD** compliance can be mainly **attributed to the digital environment** and specific provisions such as the Right of Withdrawal,
- Disentangling the compliance costs of EU consumer law in the digital environment is complicated at the level of **individual firms**. Whilst some traders are digital only (e.g. online marketplaces, online platforms), many traders (especially e-commerce firms) are **multi-channel**.
- Likewise, whilst some of the problematic practices are specific to the digital environment (e.g. digital addiction), others such as **subscription traps are present both offline and online**. Whereas online subscription traps are today becoming highly prevalent, they have long existed offline e.g., difficulties in cancelling gym memberships, subscriptions to publications, etc.

In estimating the costs, it is important to compare the costs from the legislation applicable to digital channels will have to be compared against the 'business as usual' (BaU) costs to traders. Business as Usual costs are costs that would have been incurred anyway by traders regardless of whether there are information obligations in place due to EU consumer law. These enable a discount to be made in terms of estimating the difference between the gross and net costs of compliance. For example:

- Under the CRD, Art. 8(2), the obligation to pay button requires that at the end of the transactional process, the consumer should be informed about the obligation to pay the trader the final amount stipulated. However, prior to the CRD, most traders would already have had a transactional stage whereby the consumer confirms the transaction, for instance, the final price, acceptance of the terms and conditions with a link through to the payment page. Therefore, it is likely that there were only minimal additional costs from introducing the obligation to pay button.
- All three Directives (and especially the UPCD and CRD) have been in existence for a long period. High BaU costs can be assumed for most traders given that many compliance costs would have been one-off, and many of the core consumer law requirements are by now well-known. However, ongoing costs will still arise due to applying consumer law requirements in the digital environment, given that new types of traders and new types of digital markets and services are having to apply consumer law in changing business contexts.

Many traders operating e-commerce websites will already be familiar with the application of EU consumer law through offline sales channels. Therefore, familiarisation costs with the legislation (and specific information requirements for traders) are likely to be negligible for traders operating in a multi-channel environment as they are already experienced in applying the legislation. Notwithstanding, there will be new one-off compliance costs for traders that operate digital only, an increasing trend in the past decade for some apps and websites. However, based on Eurostat data, it is estimated that less than a quarter (22.8%) of traders operate online only<sup>672</sup>. Familiarisation costs are only likely to be relevant to this group, i.e. traders that are digital only and which are therefore applying EU consumer law for the first time.

A final and important challenge is that of **reconciling the primary data gathered through the different tools**; and of particular relevance are the following:

- The estimated costs for traders of complying with EU consumer law in the enterprise survey and the targeted consultation show divergent and sometimes conflicting results. The targeted consultation responses identified a more significant incidence of costs among traders. Due to the sample sizes of both surveys (N=1,000 for the enterprise survey and 83 for the targeted survey), it was considered that the enterprise survey findings were more robust for the extrapolation of costs for traders; whereas the targeted survey has provided further insights into the different type of costs and qualitative open feedback on cost drivers from traders and their representative associations). Moreover, the targeted survey included a much higher % of businesses trading cross-border than the enterprise survey. As a result, the targeted survey is considered more valuable for extrapolating findings on the functioning of intra-EU e-commerce in a qualitative manner.
- the OPC survey results have been incorporated, but it can be noted that compared with the consumer survey, there are differences between the two surveys in terms of the proportion of consumers affected by problematic practices and in their perceptions as to whether consumers have been affected by detriment. In estimating detriment, divergence between consumers and their representative associations surveyed across the different surveys were considered.

It is important to explain how the measurement of compliance costs has been approached. The focus is on distinguishing conceptually between:

- **Compliance costs relating to any digital-specific requirements applicable to traders;**
- **General compliance costs of EU consumer law**, with a focus on the percentage of these costs applicable to traders operating in the digital environment (but that could also operate in a non-digital environment). Most consumer law rules are applicable whether a business operates online, offline or is multi-channel. Therefore, beyond the costs of digital-specific rules, it was also necessary to consider compliance costs by traders when operating digitally.

Regarding compliance costs relating to specific requirements applicable to traders in the digital environment, it should be reiterated that as the legal framework is technology-neutral, and most consumer law requirements apply both offline and in the digital environment, there are relatively few digital-specific requirements. However, there are a few specific requirements, such as:

- **New requirements introduced through the MD specific to digital**, such as: transparency requirements for online marketplaces to provide information disclosures

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<sup>672</sup> In 2021, 16.8% of EU enterprises conducted e-sales using only websites or apps, 3.4% used only EDI-type sales while another 2.6% used both. Source: Eurostat

(search engine rankings, informing consumers that their price has been personalised and whether a seller is an individual or a professional trader, prohibition of scalper bots for event tickets and fake reviews). These changes are quite new so some one-off costs (adjustment costs) can potentially be quantified, but it may be too early to assess recurring costs;

- **Requirements under the CRD that are applicable to digital-specific distance contracts**, such as the obligation to pay button within e-commerce transactions;

However, under the UCPD and UCTD, whilst traders apply the legislation's general principles in the digital environment, there are no digital-specific rules and therefore no digital-only channel related compliance costs. As a result, it would be difficult for businesses to distinguish between *general compliance cost estimates* relating to the implementation of these Directives and any *specific costs* relating to provisions affecting traders in the digital environment.

This challenge was partially overcome through the enterprise panel survey by screening for and focusing on businesses operating mainly in the digital environment. Therefore, although some respondents could sell multichannel and therefore also have an offline presence, any respondents that did not sell on-line was excluded from the survey group. Regarding the sectoral mix of firms, whilst it was investigated how far the firms included in the panel survey could be aligned with the earlier 2017 fitness check, the five sectors covered in the previous study<sup>673</sup> were not specifically digital (although many of the products could be sold either offline or online). During the construction of the enterprise panel, consideration was given to the sectoral mix from the earlier Fitness Check but this could not be replicated as in order to construct a representative sample of 100 enterprises in 10 MS, it was necessary to have a broader sectoral mix.

A further reason for not having an identical sectoral mix is that costs data generated from the two samples would not have been directly comparable, as the earlier study gathered costs data on the costs of compliance domestically and cross-border not only of EU consumer law, but also marketing law, sectoral laws and national consumer and other rules. As a result, the costs derived from the enterprise panel survey were considered to be more robust than any earlier estimates found in secondary sources of data.

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<sup>673</sup> Large household appliances; electronic and ICT products; gas and electricity services; telecommunication services; and pre-packaged food.





STUDY TO SUPPORT THE FITNESS CHECK OF EU CONSUMER LAW ON DIGITAL FAIRNESS AND THE REPORT ON THE APPLICATION OF THE MODERNISATION DIRECTIVE (EU) 2019/2161

Domains	Examples of problematic practices identified	Year*	Study/ studies	Baseline on extent of problem (evidence from research findings, survey data)	Data on consumer detriment (where available) and types of detriment
					possible. Financial losses amounting to anything between <b>80-280€</b> if the consumer decides to pay".  A 2022 study in the <b>UK</b> for BEIS on consumer protection researched the extent of consumer detriment. It found that on average, consumers experienced four problems per year, each of which caused EUR 30 (£28) of estimated detriment or a total of EUR 120 / consumer/ annum. <sup>675</sup>
<b>Subscripti on traps</b>	As above	2017	ECC-Net: Subscription Traps in Europe EU Study into Public Experiences of Subscription Traps in Six Countries in 2017 -	In 2017, the Swedish ECC led a study six EU countries to understand the extent and nature of the problem with subscription traps. <sup>676</sup> Based on a survey of 1,000 people per country (random sample from different web-panels and through online interviews), the study also showed that: <ul style="list-style-type: none"> <li>• 7% of respondents have experienced subscription traps (8 % of men and 6 % of women).</li> <li>• Concerning the type of products, these included tablet/mobile phone or antivirus products/computer services (for men) and diet/slimming products or beauty products. (for women).</li> </ul>	The study showed that on average, consumers in Belgium, Austria, Sweden, Finland, Norway and the Netherlands <b>had paid EUR 116</b> over the last three years as a result of having been taken in by online subscription traps of the type covered in this study.
<b>Subscripti on traps</b>	As above	2017	Study on Measuring consumer detriment in the EU <sup>677</sup>	Examples of different types of services or goods are given where consumers experienced problems most frequently: <ul style="list-style-type: none"> <li>• Mobile telephone subscriptions - 58% of consumers had problems with subscriptions entered into online (54% F2F).</li> <li>• Electricity subscription (with regular payments), 51% had problems online compared with 68% offline).</li> </ul>	To estimate detriment of subscriptions, study assessed the cost of the good or services, the duration of the problem and whether there was a loss in the usability of the good or service provided through subscription. In subscription services markets, substantial redress accounted for the lowest proportions of pre-redress financial detriment (12% for electricity services and 14% for mobile telephone services bought online ,

<sup>675</sup> Consumer Protection Study 2022: Understanding the impacts and resolution of consumer problems, BEIS Research Paper Number 2022/005.

<sup>676</sup> ECC-Net (2017): Subscription Traps in Europe EU Study into Public Experiences of Subscription Traps in Six Countries in 2017 - [https://epc.si/media/media\\_2017/Subscription\\_traps\\_in\\_Europe\\_2017\\_Report.pdf](https://epc.si/media/media_2017/Subscription_traps_in_Europe_2017_Report.pdf)

<sup>677</sup> [https://commission.europa.eu/document/download/a48e1d90-6728-4e46-bf64-6f0e9f15a935\\_en?filename=consumer-detriment-study-final-report\\_en.pdf](https://commission.europa.eu/document/download/a48e1d90-6728-4e46-bf64-6f0e9f15a935_en?filename=consumer-detriment-study-final-report_en.pdf)

STUDY TO SUPPORT THE FITNESS CHECK OF EU CONSUMER LAW ON DIGITAL FAIRNESS AND THE REPORT ON THE APPLICATION OF THE MODERNISATION DIRECTIVE (EU) 2019/2161

Domains	Examples of problematic practices identified	Year*	Study/ studies	Baseline on extent of problem (evidence from research findings, survey data)	Data on consumer detriment (where available) and types of detriment
					compared with 21% and 14% respectively for such services purchased face-to-face. (pg. 139).
<b>Dark patterns</b>	Dark patterns in online interfaces and choice architectures can cause problems.	2022	OECD (2022), "Dark commercial patterns", OECD Digital Economy Papers, No. 336, <a href="https://doi.org/10.1787/44f5e846-en">https://doi.org/10.1787/44f5e846-en</a>	OECD paper stated that "some dark patterns, such as drip pricing and subscription traps, can cause substantial financial loss. Others may cause significant privacy harms or psychological detriment. They may also harm consumers collectively, by weakening competition and sowing distrust, and can disproportionately harm certain consumers such as less educated consumers or children". (pg. 5) "Some dark patterns may cause personal consumer detriment in terms of financial loss (e.g. drip pricing and subscription traps), privacy harms, psychological detriment (relating to expended energy or attention and emotional distress) as well as time loss". (pg. 21). Annex E provides overview of other studies that examined detriment. However, no new quantification of detriment in OECD paper itself is provided.	Types of detriment linked to dark patterns: Financial detriment – higher final cost due to dark patterns and / or reduced choices, difficulties in cancelling online subscriptions leading to cost of maintaining an unwanted subscription.  Impact on consumer choice – detriment due to some consumers being shown fewer options than others leading to reduced choices and potentially higher prices.  Examples of financial detriment are provided, drawing on examples from wider literature:  <b>Friend spam / address book leeching:</b> class action law suit in US against business social media firm for use of the friend spam dark pattern, involving automatically sending emails to consumers' contacts while making it appear they came from consumers themselves. USD 13 million out-of-court settlement to affected consumers for the practice. Each affected consumer could receive compensation of up to USD 1 500. <sup>678</sup>  <b>Hidden costs / drip pricing: Blake et al (2021).</b> Large-scale field experiment on StubHub.com involving several million participants showed that drip pricing techniques resulted in consumers spending 21% more than they would otherwise have done and being 14% more likely to complete a purchase

<sup>678</sup> <https://time.com/4062519/linkdn-spam-settlement/>

STUDY TO SUPPORT THE FITNESS CHECK OF EU CONSUMER LAW ON DIGITAL FAIRNESS AND THE REPORT ON THE APPLICATION OF THE MODERNISATION DIRECTIVE (EU) 2019/2161

Domains	Examples of problematic practices identified	Year*	Study/ studies	Baseline on extent of problem (evidence from research findings, survey data)	Data on consumer detriment (where available) and types of detriment
					<p>compared with those who saw all-inclusive prices from the start.<sup>679</sup></p> <p><b>Rasch, Thöne and Wenzel (2020).</b> According to an experiment, when businesses used drip pricing, consumers were worse off but firms benefited; in contrast, a regulation banning drip pricing led to higher consumer surplus and lower business profits.<sup>680</sup></p> <p><b>Tran (2020).</b> Model using web-scraped data of posted price transactions on eBay Germany, consumers behaved as if they ignored 12 to 85 percent of shipping fee, on average, depending on the product analysed. Average consumer surplus losses were found to be around 6%.</p> <p><b>US FTC took action against international tech firms</b> (e.g. Apple, Google and Amazon) <b>alleging billing user interfaces for child-directed free apps was unfair</b> because such designs resulted in children racking up charges without parents' knowledge or authorisation. Settlements reached required the three companies to fully refund consumers for such charges, resulting in refunds of &gt;USD 50 million.<sup>681</sup></p> <p><b>Hidden and/ or hard to cancel subscriptions</b> DCCA (2018). Subscription traps in Denmark were found to result in monthly costs to consumers of up to DKK 699.</p> <p><b>FTC, 2018, Limiting disclosure of essential information until user is substantially invested in activity</b>, such as a fee that is often not disclosed until late in the purchasing process. Such a dark pattern may arise if a consumer is unable to proceed to certain</p>

<sup>679</sup> Timeline of Fee Presentation at StubHub. Blake et al.: Price Salience and Product Choice. Marketing Science, 2021, vol. 40, no. 4, pp. 619–636, <https://faculty.haas.berkeley.edu/stadelis/AIP.pdf>

<sup>680</sup> Alexander Rasch, Miriam Thöne, Tobias Wenzel, Drip pricing and its regulation: Experimental evidence, Journal of Economic Behavior & Organization, Volume 176, 2020, Pages 353-370, ISSN 0167-2681, <https://doi.org/10.1016/j.jebo.2020.04.007>.

<sup>681</sup> <https://www.ftc.gov/news-events/news/press-releases/2014/12/ftc-approves-final-order-case-about-google-billing-kids-app-charges-without-parental-consent> and <https://www.ftc.gov/news-events/news/press-releases/2014/03/ftc-approves-final-order-case-about-apple-inc-charging-kids-app-purchases-without-parental-consent>

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					<p>websites without payment. A consumer advocacy group observed that over 6,000 consumers had complained to the FTC in 2018 about lack of fee transparency in online ticketing services. One paper studied several million online ticket shoppers who were not presented with upfront fees. Such users ended up spending 20% more than the control group and were 14% more likely to complete the transaction on the platform.<sup>682</sup></p> <p><b>ECC Sweden. (2017).</b> On average, consumers in the six countries reviewed in the study - Belgium, Austria, Sweden, Finland, Norway and the Netherlands - had paid EUR 116 over the last three years due to having fallen into an online subscription trap of the type covered in the study.</p> <p><b>Citizens Advice Bureau, UK (2016).</b> More than half of respondents to a survey of over 2,000 UK consumers had suffered financial detriment under study from subscription traps, on average costing between GBP 50 to 100 per person.<sup>683</sup></p>
<b>Dark patterns</b>	As above	2023	CPC Network online retail shops sweep (2023). Consumer protection: manipulative online practices found on 148 out of 399 online shops screened. <sup>684</sup>	<b>CPC Network (2023)</b> released the results of a screening (“sweep”) of retail websites which covered 399 online retail stores. 148 sites/ 399 had at least one of three dark patterns. 23 websites were hiding information with the aim of manipulating consumers into entering into a subscription.	No estimates of consumer detriment are provided.

<sup>682</sup> <https://buckleyfirm.com/sites/default/files/Buckley-Article-CSLR-Shedding-Light-on-Dark-Patterns-072121.pdf>

<sup>683</sup> Locked in consumer issues with subscription traps (2016) - [https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Finaldraft-Lockedinconsumerissueswithsubscriptiontraps%20\(1\).pdf](https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Finaldraft-Lockedinconsumerissueswithsubscriptiontraps%20(1).pdf)

<sup>684</sup> Press release of 30 January, 2023 - [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_418](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_418)

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<b>Dark patterns</b>	Drip pricing	2018	2018 - sweep on price transparency and drip pricing <sup>685</sup>	EU-wide screening of 560 e-commerce sites offering a variety of goods, services and digital content, such as clothing or footwear, computer software or entertainment tickets. On 211 websites the final price at payment was higher than the initial price offered. 39% of those traders did not include proper information on extra unavoidable fees on delivery, payment methods, booking fees and other similar surcharges. EU consumer law obliges traders to present prices inclusive of all mandatory costs, and where such costs cannot be calculated in advance, their existence at least needs to be clearly presented to the consumer.	No estimates of consumer detriment are provided.
<b>Dark patterns</b>	As above	2023	Estimating the prevalence and impact of online drip pricing (2023, DBT, UK) <sup>686</sup>	Out of the 525 providers across four sectors (entertainment, hospitality, retail, transport & communication) in our sample, slightly less than half (46%) use drip pricing. Dripped fees (other than delivery fees) are relatively uncommon in the retail sector (15% of providers) but occur in more than half of providers in the entertainment (54%), hospitality (56%) and transport & communication (72%) sectors.	Study Estimating the prevalence and impact of online drip pricing (DBT, UK). The 2023 study estimated the total amount of UK consumer spending attributed to dripped fees (excluding delivery fees), by sector. They estimated additional consumer spending online in all sectors of 1.6 bn (Entertainment £266.2m, Hospitality £389.4m, Retail £478.7m, Transport & Communication £473.8m with All sectors £1.6bn.
<b>Personalised advertising</b>	Whilst personalised advertising accounts for a big share of digital markets, there is some evidence of exploitation of sensitive data. Privacy concerns, lack of free choice,		Research article (2017) - Exploring how consumers cope with online behavioral advertising. International Journal of Advertising, ,	According to the 2017 online survey of 1,000 consumers ages 18-64, the appeal for personalization is high, with 80% of respondents indicating they are more likely to do business with a company if it offers personalized experiences and 90% indicating that they find personalization appealing. <sup>688</sup>  An online survey conducted by CloudSense found that 51% of respondents do not want more	Types of detriment: Financial detriment – risk of increased consumer spending of up to 30% due to personalised ads, especially if behavioural marketing used. Non-financial detriment – nuisance and annoyance about privacy being compromised through over-targeted and/ or repeatedly personally targeted ads without opt-out possibilities.

<sup>685</sup> [https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/previous-sweeps\\_en#ref-2018---sweep-on-price-transparency-and-drip-pricing](https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/previous-sweeps_en#ref-2018---sweep-on-price-transparency-and-drip-pricing)

<sup>686</sup> Estimating the prevalence and impact of online drip pricing (September 2023), Alma Economics for the DBT, UK Government Department. <https://assets.publishing.service.gov.uk/media/64f1ebd7a78c5f000dc6f448/estimating-the-prevalence-and-impact-of-online-drip-pricing.pdf>

<sup>688</sup> The power of me: The impact of personalization on marketing performance. <https://www.slideshare.net/EpsilonMktg/the-power-of-me-the-impact-of-personalization-on-marketing-performance>

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	can be perceived as intrusive.		published in the International Journal of Advertising and shared by Taylor & Francis Online  Study on Impact of Personalized Social Media Advertisements on Consumer Purchase Intention (2020) <sup>687</sup>	personalised ads. In another survey conducted by Razorfish Global Research, 77% of respondents believed their privacy was being invaded by targeted advertising. <sup>689</sup>  Study on Impact of Personalized Social Media Advertisements on Consumer Purchase Intention. Study in India investigated the direct impact of personalised ads was studied (frequency of display, relevance and usefulness of advertisements) encountered on social media platforms and consumers' intent of purchase in conjunction with their perception of personalised ads and privacy controls. Key findings were that increased interaction with personalised ads influences the consumer's psyche and behaviours to make purchases.	This study explored how consumers cope with a technology-driven persuasion tactic called online behavioural advertising. Study found that many consumers are worried about the risks to their privacy that come with personalized ads. The results of the study revealed that <sup>690</sup> <ul style="list-style-type: none"> <li>• Persuasion knowledge was indirectly associated with coping behaviour of ad avoidance throughout cognitive appraisal process (perceived risks; perceived benefits; self-efficacy).</li> <li>• Privacy concerns partially mediated such associations with ad avoidance. -</li> <li>• Interestingly, cognitive processing variables (reactance; perceived personalization) were significantly associated with ad avoidance without being related to persuasion knowledge.</li> <li>• A study in the Journal of Marketing Research highlighted that personalised ads could increase consumer spending by up to 30% compared to non-personalised ads, leading to regret and financial strain, especially among more vulnerable consumers.</li> </ul>
<b>Personalised pricing</b>	Whilst personalised pricing can benefit consumers in some circumstances (e.g. discounting to loyal customers or to local		Study on Personalised Pricing for EP's IMCO Committee (2022) <sup>691</sup>	EP study on Personalised Pricing (2022) found that consumers tend to have a negative attitude towards price personalisation. While they accept second and third-degree personalisation, they perceive individually personalised prices as unfair. This attitude is partially driven by the lack	Types of detriment: financial detriment due to price difference between personalised and non-personalised pricing if disadvantageous for the consumer (it may sometimes be beneficial due to price promotions – to reward repeat customers), non-financial detriment – time wasted due to a consumer having to

<sup>687</sup> Mehta, Reena & Udit, Kulkarni. (2020). Impact of Personalized Social Media Advertisements on Consumer Purchase Intention. Annals of Dunarea de Jos University of Galati. Fascicle I. Economics and Applied Informatics. 26. 15-24. 10.35219/eai15840409101

<sup>689</sup> <https://blogs.brighton.ac.uk/rhysrants/2017/05/05/personalised-ads-and-avoiding-creepiness-in-targeted-advertising/>

<sup>690</sup> Ham, C. D. (2017). Exploring how consumers cope with online behavioral advertising. International Journal of Advertising, 36(4), 632–658. <https://doi.org/10.1080/02650487.2016.1239878>  
<https://www.tandfonline.com/doi/abs/10.1080/02650487.2016.1239878?scroll=top&needAccess=true&journalCode=rina20>

<sup>691</sup> EP's IMCO Committee - Personalised Pricing (2022). Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies: Authors: Peter ROTT, Joanna STRYCHARZ, Frank ALLEWELDT  
[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)

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	clientele), lack of transparency by some traders can lead to a situation where some consumers pay higher prices than others without justification.		<p>Consumer market study on online market segmentation through personalised pricing/offers in the European Union (2018), European Commission, DG JUST.<sup>692</sup></p> <p>Accenture research (2018) on personalised pricing (large survey)<sup>693</sup></p> <p>Consumer survey in the Netherlands (2019)<sup>694</sup></p>	<p>of transparency of personalisation practices. Study also identified consumer concerns about the risk of discrimination due to personalised pricing. However, as a small study, no data on estimated costs or impacts.</p> <p>EU market study on the online market segmentation through personalised pricing/offers (2018) Study did not find problems of a significant scale in terms of prevalence of personalised pricing Consumers who had bad experiences relating to personalised pricing in the EU.</p> <p>Yes (20%), no (67%) and don't know (13%). Source - European Commission, 2018</p> <p>Mystery shopping did not find evidence of consistent and systematic personalised pricing (prices being customised for some users for the same products) across the 8 Member States and 4 markets covered. Price differences between personalisation and 'no personalisation' scenarios were observed in only 6% of situations with identical products. Where observed, price differences were small, the median difference being less than 1.6%.</p> <p><u>NL study, 2019</u>: 56.9% of respondents indicated they never experienced online price personalisation.</p> <p><u>Accenture study (2018)</u></p>	<p>investigate whether a personalised price benefited or disadvantaged them.</p> <p>There was a lack of data considering detriment of personalised pricing in secondary research.</p> <p>However, if this were to be estimated in future, worth noting that in first instance, the proportion of EU consumers subject to first-degree and second-degree price personalisation would need to be obtained, before detriment can be quantified. However, previous studies e.g. for JUST, 2018, suggest that price differentials between personalised and non-personalised pricing were modest, suggesting low detriment.</p>

<sup>692</sup> [https://commission.europa.eu/publications/consumer-market-study-online-market-segmentation-through-personalised-pricingoffers-european-union\\_en](https://commission.europa.eu/publications/consumer-market-study-online-market-segmentation-through-personalised-pricingoffers-european-union_en)

<sup>693</sup> <https://www.accenture.com/content/dam/accenture/final/a-com-migration/pdf/pdf-83/accenture-making-personal.pdf#zoom=50>

<sup>694</sup> Poort, J. and Zuiderveen Borgesius, F., 2019, Does everyone have a price? Understanding people's attitude towards online and offline price discrimination, Internet Policy Review



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				83% of consumers are willing to share their data to enable a personalised experience.	
<b>Loot boxes</b>	Lack of transparency in real-world pricing, children spending money on games without parents' permission, digital addiction, internet gambling addiction, internet gaming disorder	2018, 2019	Young People and Gambling 2019, UK Gambling Commission. <sup>695</sup> Loot boxes in three video games violate gambling legislation. <sup>696</sup>	<p>53% of the population between the ages of 6 and 64 plays video games.</p> <p>52% of young people say they have heard of in-game items, of which 44% who say they have paid money to open loot boxes to get other in game items within the game they were playing, and 6% said that they have bet with in-game items either with friends or through unlicensed third party sites (so called 'skins' gambling).</p> <p>Of those that have paid for money to open loot boxes/crates/packs and remember where they got the money from 49% spent money that they received for birthday or Christmas presents, with 34% saying the money was given to them by parents/relatives to specifically buy loot boxes/crates/packs.</p> <p>The problematic practice which was perceived to have increased the most in frequency in the last five year was the use of loot boxes and addiction-inducing design features, as 68.8% respondents of the targeted survey noted either an increase or a significant increase (combined).<sup>697</sup></p> <p>75.7% of respondents to the targeted either agreed or strongly agreed that usage of loot boxes and addiction-inducing design features</p>	<p>Types of detriment are: financial detriment - higher spending than intended due to addictive nature of loot boxes, parents receiving bills for loot box purchases without parental permission, regret if those making purchases were disappointed with whether they received the anticipated rewards for purchasing a loot box, etc.</p> <p>No estimates of detriment were available. However, some data on spending on loot boxes was obtained. This is a starting point for estimating detriment in that only a percentage of the total would be considered detriment due to consumers' experience.</p> <p>In 2019, the average lifetime spending on loot boxes in the US was 217 USD per player (200 EUR).<sup>706</sup></p> <p>According to an annual survey by IPSOS (for Video Games Europe), just 9% claim to have spent real money on in-game currency and less than 4% on loot boxes.<sup>707</sup> The study found that in selected EU countries, the majority of children (64%) spends between €1-20 average / month. On average, spend has increased by €6 per month amongst those who claim to spend, vs. 2020, in line with inflation.</p>

<sup>695</sup> <https://www.gamblingcommission.gov.uk/statistics-and-research/publication/young-people-and-gambling-2019>

<sup>696</sup> <https://www.koengeens.be/news/2018/04/25/loot-boxen-in-drie-videogames-in-strijd-met-kansspelwetgeving>

<sup>697</sup> Targeted Survey: (Qs. In the past five years, how far have the following potentially problematic B2C digital practices increased or decreased in frequency? (N = 90)

<sup>706</sup> The U.S. console gamer average lifetime loot box spend 2019 - published by J. Clement, Aug 25, 2023.

<sup>707</sup> <https://www.videogameseurope.eu/wp-content/uploads/2023/09/Video-Games-Europe-In-Game-Spending-2023-Final-Sept.pdf>

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				<p>(in digital services such as video games are problematic.<sup>698</sup></p> <p>59.1% of respondents in the targeted survey reported that EU consumer law is not effective in addressing issues associated with loot boxes.<sup>699</sup></p> <p>From the public consultation results, 51.1% of respondents either agreed or agreed strongly that there is a need for more transparency regarding the probability of obtaining specific items from paid content that has a randomisation element (e.g. prize wheels, loot/mystery boxes in video games, card pack)<sup>700</sup></p> <p>The purchasing of loot boxes with real-world currency is asserted to have produced 15 billion dollars for the video game industry in 2020 (Juniper Research, 2021).<sup>701</sup></p> <p>A review of top mobile games and desktop games found that 58% and 59% of the top games on the Google Play Android store and the Apple iPhone store respectively, and 36% of desktop games contained loot boxes (Zendle et al., 2020).<sup>702</sup> A follow-up study found that the percent of mobile games containing loot boxes had increased to 77% as of mid-2021 (Xiao, Henderson &amp; Newall,</p>	

<sup>698</sup> Targeted survey. (Qs. To what extent do you agree or disagree that the following practices are problematic? Use of loot boxes and addiction-inducing design features (in digital services such as video games) tot:70).

<sup>699</sup> Targeted survey:(Qs. To what extent have the three core EU consumer law Directives been effective in tackling perceived problematic digital B2C practices? (n=104))

<sup>700</sup> Public consultation. (Qs. There is a need for more transparency regarding the probability of obtaining specific items from paid content that has a randomisation element (e.g. prize wheels, loot/mystery boxes in video games, card packs)

<sup>701</sup> Juniper Research (2021) Juniper Research Video game loot boxes to generate over \$20 billion in revenue by 2025, but tightening legislation will slow growth. 2021.

<sup>702</sup> Zendle et al. (2020) Zendle D, Meyer R, Cairns P, Waters S, Ballou N. The prevalence of loot boxes in mobile and desktop games. *Addiction*. 2020;115(9):1768–1772.

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				<p>2022).<sup>703</sup> In the European context a report found that 82% of Belgium's 100 highest-grossing iPhone games continued to generate revenue by selling loot box products.<sup>704</sup></p> <p>In 2023 IPSOS reported that the majority of children (64%) spend between €1-€20/month on average on loot boxes. This has increased by €6 per month amongst those who claim to spend, versus in 2020, in line with inflation. The most popular purchases (34%) are those that affect the gameplay. Cosmetic purchases come next. It turns out that loot boxes are not as interesting to children.<sup>705</sup></p>	

\*Studies should be sought that are close as possible to 2017, which is the baseline

<sup>703</sup> Xiao, Henderson & Newall (2022) Xiao LY, Henderson LL, Newall P. Loot boxes are more prevalent in UK video games than previously considered: updating Zendle et al. (2020) *Addiction*. 2022;117:2553–2555.

<sup>704</sup> <https://osf.io/preprints/osf/hnd7w>

<sup>705</sup> IPSOS for Video Games Europe, 2023

