

# Ecommerce Europe's reply to the Call for evidence on Digital fairness – fitness check on EU consumer law

## Introduction

Ecommerce Europe welcomes the opportunity to provide feedback to the call for evidence on Digital fairness – fitness check on EU consumer law.

We appreciate that following the adoption of the updated guidance documents in December 2021, the European Commission is carefully analysing whether the existing horizontal consumer law instruments are still adequate for ensuring a high level of consumer protection in the digital environment. We support the cautious approach in which it is thoroughly assessed whether current rules are sufficient to tackle consumer protection issues or if there are any legal gaps or enforcement problems reducing the effectiveness of the regulatory framework.

As the representative of the digital commerce sector, Ecommerce Europe, has witnessed the rapid developments the retail sector has experienced. In the last decade, and even further accelerated by the COVID-19 pandemic, our sector has grown from one in which online and offline operated separately, to a highly digitalised sector in which businesses largely adopted an omnichannel approach. The digital transformation of businesses was accompanied by a digital transformation of consumers, bringing both opportunities and challenges with it. Ecommerce Europe believes that the EU possesses a very complete and flexible legislative framework, in which the existing EU consumer rules, with the addition legislation currently being discussed by the institutions (DSA, DMA, AI Act, etc.), are capable of tackling the challenges brought by the digital age. We do, however, recognise that improvements can be made in the field of enforcement, interpretation, and harmonisation. With this short paper, we would like to take the opportunity to present the following key considerations for the evaluation of EU consumer law:

## Key considerations

1. Existing legal framework is generally fit for purpose.
2. Ensure that policy making is truly technology and channel-neutral.
3. Assess what can be done on the basis of existing legislation to improve enforcement.
4. Provide sufficient resources for enforcement bodies.
5. Facilitate and streamline national initiatives to improve consumer and business information.
6. Push for a more uniform interpretation of the existing rules.

## Existing legal framework

Ecommerce Europe believes that the **current legal framework is overall fit for purpose and has been generally effective in reaching its overall objective of ensuring a high level of consumer protection** in the Single Market. EU consumer protection rules, particularly the Unfair Commercial Practices Directive (UCPD), but also the General Data Protection Regulation (GDPR), the ePrivacy Directive, Unfair Terms in Consumer Contracts Directive, the Consumer Rights Directive, the E-commerce Directive, and the recently introduced updates in the Omnibus Directive, cover the entire customer journey perspective. For instance, there are extensive pre-contractual information obligations, a right to withdraw from contracts, rules on the fairness of contract terms and extensive case law and decisions for those instances where unfair contract terms were used. No clear gaps can be identified, in particular as the rules are generic and apply to all sectors. They have also been designed to be technology neutral and can therefore be applied to both online and offline situations. However, considering the ongoing discussions, we would like to remind the Commission to look at the issues raised in a broader context, not just in an online environment. When referring to retail, it is important for policymakers to start seeing the sector as one industry, in which retailers have moved beyond a distinction between online and offline commerce. We ask the Commission to **reflect these developments in their evaluation and ensure that policy making is truly channel-neutral, reflecting the consumer preference for omnichannel retail**. To ensure legal certainty, rules should be technology and channel-neutral, principle-based rather than technology or channel-based.

The legal assessment conducted in the Commission's behavioural study on unfair commercial practices in a digital environment<sup>1</sup> finds that the EU legal framework is generally strong. In particular, the UCPD is considered flexible enough to cover most unfair commercial practices due to its case-by-case approach based on broad criteria. The study states that legislation is generally sufficient, but that some adjustments may be necessary regarding the list of prohibited practices and the exact obligations that traders have under the professional diligence standard. In addition to existing legislation, it is important to consider the potential overlap with new legislation. For instance, the Digital Services Act, the Digital Markets Act, the Artificial Intelligence Act, and the Data Act are related to this discussion. We should ensure that there is consistency and complementarity between existing and new legislation, to avoid legal uncertainty and difficulties with compliance.

Ecommerce Europe believes that the issues raised regarding so-called 'dark patterns' are not of a legal nature but are due to problems with enforcement. We would like to call for avoiding the use of the term 'dark patterns', which is not actually a defined concept, but rather vaguely refers to practices that are already deemed unfair. We would therefore suggest maintaining the term unfair commercial practice for practices that are not accepted according to EU legislation. When talking about general online practices, also those that may be acceptable to employ, we suggest using the concept of 'online choice architecture' and the relative design choices that may influence consumers' decisions<sup>2</sup>. With regards to the unfair commercial practices often referred to in the discussion on 'dark patterns', we would like to point to relevant existing legislation<sup>3</sup>, such as Article 5(3) of the ePrivacy Directive, which already describes that the storing of information (such as placement of cookies) in the terminal equipment of a user requires consent. If this

<sup>1</sup> 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, 2022, <https://data.europa.eu/doi/10.2838/859030>, p. 73 & 122

<sup>2</sup> Dutch Authority for Consumers and Markets (ACM). Guidelines: Protection of the online consumer Boundaries of online persuasion. <https://www.acm.nl/sites/default/files/documents/2020-02/acm-guidelines-on-the-protection-of-the-online-consumer.pdf>, p. 53

<sup>3</sup> Univ.-Prof. Dr. Iur. Jürgen Kühling, LL.M. & RA Cornelius Sauerborn, *Rechtsgutachten über die „Rechtlichen Rahmenbedingungen Sogenannter ‚Dark Patterns‘“*. Im Auftrag des Bundesverbands E-Commerce und Versandhandel Deutschland e.v. (bev), Februar 2022. Find the full legal opinion [here](#).

consent is given based on misleading information, it is not valid. In addition, according to Article 4(11) of the GDPR, this consent has to be freely given, specific, informed and unambiguous by a clear affirmative action signifying agreement to the processing of personal data. Furthermore, Article 7 of the GDPR requires that the request for consent shall be presented in a clear and easily accessible manner and must be as easy to withdraw as it is to give. Moreover, according to the Unfair Commercial Practices Directive, a commercial practice is already regarded as misleading if, through false or deceptive information, consumers are led to take a transactional decision he or she would not have taken otherwise, such as buying a product.

We would therefore urge the Commission to **first assess carefully what could be done, on the basis of existing legislation, to improve enforcement at Member State level**. We also point to the ongoing consultation on “Improving compliance with consumer rights across the EU”, which may be an opportunity to assess and provide solutions on how enforcement mechanisms can be improved.

### *Focus on enforcement*

Given that extensive legislation is already in place to ensure digital fairness and the consequent opportunity to properly enforce these rules, Ecommerce Europe encourages policymakers, consumer groups and enforcement bodies to engage in dialogues with each other and other stakeholders to jointly discuss how issues can be effectively addressed. For instance, we are actively in contact with consumer organisation and we very much welcome that the ECC-net will hold a dialogue with Ecommerce Europe and its members to exchange views, discuss potential remedies to certain challenges and to find potential synergies. Ecommerce Europe’s members are very much open to discussing initiatives with consumer groups to find new ways to ensure consumers are well informed about their rights and the enforcement of their rights.

As mentioned above, Ecommerce Europe believes that many of the concerns raised in the call for evidence are sufficiently covered by legislation, and the best way to address them should be by ensuring effective enforcement instead. In fact, the Commission’s behavioural study also points out that the “effectiveness of the existing EU legal framework may be undermined by insufficient public and private enforcement”<sup>4</sup>. To remedy this, the study suggests improving the resources and powers of enforcement authorities and making use of collective redress. Ecommerce Europe strongly welcomes the proposal to further empower national authorities by increasing their resources. We believe there are already some very helpful initiatives from national enforcement bodies aimed at facilitating compliance. For instance, the Dutch Authority for Consumers & Markets (ACM) has published guidelines<sup>5</sup> for designers and developers on how to protect consumers online against deception. The French General Directorate for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF) has also worked together with the Inter-ministerial Directorate for Public Transformation (DITP) to publish behavioural studies<sup>6</sup> aiming to reduce consumer vulnerability to online purchase fraud and facilitate awareness among consumers. In addition to ensuring sufficient resources for enforcement bodies, **we strongly recommend the European Commission to make efforts to streamline such initiatives so that consumers and businesses in all EU countries can benefit from better information and easier compliance**.

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<sup>4</sup> 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, 2022, <https://data.europa.eu/doi/10.2838/859030>, p. 122

<sup>5</sup> Dutch Authority for Consumers and Markets (ACM). Guidelines: Protection of the online consumer Boundaries of online persuasion. <https://www.acm.nl/sites/default/files/documents/2020-02/acm-guidelines-on-the-protection-of-the-online-consumer.pdf>

<sup>6</sup> French General Directorate for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF) & Inter-ministerial Directorate for Public Transformation (DITP). Sciences comportementales appliquées : mieux protéger le consommateur en ligne. <https://www.modernisation.gouv.fr/publications/comment-mieux-protger-le-consommateur-des-fraudes-lachat-en-ligne-la-ditp-mobilise>

## Need for harmonised interpretation

As Ecommerce Europe, we are working together with our national members to assess the implementation of EU rules across Member States. Similarly, in the field of consumer law, a recent example being the Omnibus Directive, we are working on flagging issues with regards to implementation as early as possible. We are noticing that EU countries are implementing the rules differently, sometimes making use of a regulatory choice provided, sometimes simply adopting their own interpretation of the rules. For instance, with regards to the Price Indication Directive, some countries are including services in the scope, while others only include goods. These differences in implementation do not help businesses, which in the digital commerce sector are increasingly operating cross-border, but also do not help consumers understand their rights in an already complex regulatory landscape. In any next steps taken by the Commission, **we want to stress the need for harmonised solutions, preferably in the form of more uniform interpretation of the existing rules.**

We welcome that the Commission has provided extensive (updated) guidance documents on the directives covered by the Omnibus Directive. We fully recognise the importance of detailed guidances. We would however ask the Commission to ensure that any future guidance documents are published well in advance of the transposition deadline, allowing both authorities and businesses to properly prepare for the entry into application.

Beyond fragmentation between EU countries, we would also like to point to fragmentation within country borders. Often, different enforcement bodies deal with specific implementation, for instance data protection authorities and consumer protection authorities. However, with the rapid digital developments, it becomes increasingly difficult to separate online from offline, and various pieces of legislation apply to the same issue. It is therefore crucial for effective enforcement that there is structural and efficient coordination between authorities. A good example is the Dutch 'Cooperative Platform for Digital Supervision' (SDT) which brings together the Authority for Consumers and Markets (ACM), the Dutch Data Protection Authority (AP), the Dutch Authority for the Financial Markets (AFM), and the Dutch Media Authority (CvdM). We would strongly welcome any further such initiatives in other member states.

## Concluding remarks

We very much applaud that the behavioural study of the Commission concludes that “remedies should go beyond regulatory interventions and involve businesses and the designer community directly, for example by developing guidelines and practical examples, which allow them to determine *ex ante* whether the practices that they are considering may be unfair”<sup>7</sup>.

Ecommerce Europe and its members are willing to constructively cooperate with EU policymakers and other EU stakeholders on ensuring that the EU legislative framework is effectively applied and enforced so that consumers can benefit from a safe and transparent digital economy.

## Relevant evidence to consider

- Univ.-Prof. Dr. Iur. Jürgen Kühling, LL.M. & RA Cornelius Sauerborn, *Rechtsgutachten über die „Rechtlichen Rahmenbedingungen Sogeannter ‚Dark Patterns‘*“. Im Auftrag des Bundesverbands E-Commerce und Versandhandel Deutschland e.v. (bev), February 2022. You can find the full legal opinion [here](#).
- Thuiswinkel.org. *Free Consumer Choice and Algorithms - Nudge for Good?* You can find the full paper [here](#).

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<sup>7</sup> 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, 2022, <https://data.europa.eu/doi/10.2838/859030>, p. 123