EU Consumer Protection 2.0

Framing study: Surveillance, consent and the vulnerable consumer. Regaining citizen agency in the information economy

A study for BEUC, The European Consumer Organisation

Terms of Reference

Background

The context for this framing study is the rise of a digital ecosystem dedicated to behavioral surveillance and exploitation of consumers, constantly perfected by large Internet platforms as an essential part of their business model. Throughout their interaction with the digital world, the consumer has become a source of behavioral surplus. Thanks to seamless integration of data harvesting, sharing and processing systems with behavioral analysis and influence technology, the consumer becomes locked in a vicious circle of monitoring, behavioral analysis and nudging towards desired behavior.

These developments lay bare the blind spots of the current consumer protection framework in the EU. The continued relevance of notions of ‘average consumer’ and ‘vulnerable consumer’ as used in the Unfair Commercial Practices Directive needs to be put in question where the consumer is faced with constant monitoring and manipulation when interacting with necessary intermediaries of the digital world, creating a state of permanent digital vulnerability, or ‘vulnerability by default’.

The EU is posed to protecting individual privacy, on a theoretical level, through a comprehensive legislative data protection model that has been meticulously crafted over decades, with the General Data Protection Regulation being its most recent embodiment. However, the implementation of this framework now fails where data subjects are flooded with hundreds of requests for consent every week, each with an elaborate privacy policy in tow. Data subjects are rendered unable to carry the burden of managing the consent they have given, or even fully understand its parameters and implications.

Those willing to invest into maintaining control by dedicating time and effort to analyzing the true nature of their relationship with online service providers discover how different the underlying information is to the friendly and simple-sounding surface-level communication. From privacy-washing assurances and campaigns to labels in e-book stores, to using euphemisms like discussing ‘digital exhaust’ or ‘digital breadcrumbs’ in order to denote harvesting of behavioral information, the language used by service providers is also a product of careful analysis and a tool in social programming. The truth lies obscured in the meanders of voluminous terms of use and privacy policies; yet their wording will sooner give one an illusion of comprehension and knowledge than convey the full picture of the underlying business practice.

Focus

The report should cover two main areas of research.

First, the study should offer a fitness assessment of the fairness paradigm enshrined in the Unfair Commercial Practices Directive in the context of behavioral monitoring, data mining and nudging practices
of surveillance capitalism. In particular, it should evaluate the shortcomings of the average / vulnerable / targeted consumer conceptual framework in the face of profiling and behavioral influence practices of online businesses. It should also explore the implications of the language used by online traders to obscure the real nature of their business practices.

Second, the analysis should also examine the feasibility of the current information and consent implementation paradigm of the GDPR in addressing real-world management of access to personal data and the capacity of the data subject to give valid informed consent when flooded with information which is impossible to process and keep track of. As a way of addressing the identified shortcomings, the study should propose a systemic solution on the level of implementation of the GDPR to allow data subjects to give consent in an informed manner as well as manage and withdraw it at will.

Reference questions

- How should the average / targeted / vulnerable consumer paradigm and its implications in terms of legal protection change to reflect and respond to the surveillance and behavioral exploitation practices in the digital environment?
- How could substantive consumer law contribute to strengthening the consent requirements enshrined in the GDPR in terms of transparency and meaningful choice (e.g. by addressing misleading communication in terms of default privacy choices?)
- Should certain market practices relating to how consumer’s choice is influenced, including the circumstances under which consent to processing data is obtained, be made prohibited or presumably unfair by means of a black/grey list annexed to the UCPD?
- Is the current UCPD model, in particular the general clauses on aggressive practices, sufficient to address misleading practices of online traders including the use of language and so-called “dark patterns” of online operators and if not, how should it change? How can the directive be amended to better tackle these practices?
- How could the implementation of the GDPR Article 25 protection by design and by default be complemented with a mandatory tool for simplified granting and management of consent to protect citizens from agreeing to risks of unclear scope, as well as burdening the citizen with voluminous policy information and managing multiple instances of consent? Could such a solution be helpful in combating unlawful data trading practices?

Project planning and timeline

The closing date for submitting tender proposals is May 5, 2020. BEUC reserves the right to disregard any proposals received after this date.

The study commissioned under this call is expected to be finalized by September 30th, 2020 which is the deadline for the submission of the final report.

An interim report should be presented one month before due date. A meeting or videoconference should take place to discuss out comments on the draft report.

The final report must be approved by BEUC.
Contractor requirements
The successful contractor must have an appropriate track record in this type of research in the specific area of consumer law, data protection and the digital society. The contractor should provide information on the experience of the personnel who will manage and undertake the project.

Costs
A full outline of the costs shall be submitted with the proposal giving details of how the costs are to be attributed. The contractor will be asked to break down the overall costs of a maximum of 12,000 € (VAT excluded) based on work-days needed, including the time required for the different personnel who will be involved in the project.

Publication and dissemination of the report
The contractor is expected to send the report electronically in pdf and in word version. Unless agreed otherwise between BEUC and the authors, the copyright of the report is granted to BEUC under a non-exclusive license. The authors are free to use the data and information collected in the context of the study for publication in peer reviewed journals provided two conditions:

- Inform BEUC before any publication and seek prior approval.
- Indicate clearly that the article is a study carried out for BEUC but does not reflect the position of BEUC or their members.

Contact information
Finalized proposals to conduct the proposed research should be sent to consumer-rights@beuc.eu.