

The Consumer Voice in Europe

# "DARK PATTERNS" AND THE EU CONSUMER LAW ACQUIS

Recommendations for better enforcement and reform



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## Why it matters to consumers

Consumers increasingly face “dark patterns” because on-line user interfaces are designed to deceive consumers to take decisions that are not in their favour but serve companies’ commercial interest. The use of unfair practices to distort consumers’ economic behaviour is not new, but it takes a new important dimension as a result of the massive collection of data and the use of technology to build consumer profiles and anticipate consumer behaviour. EU consumer law already has partial capacity to address these situations, but it is currently not sufficiently enforced. In addition, EU law must be updated to tackle these unfair practices and ensure consumers are not harmed by misleading user interfaces and data personalisation techniques.

## Summary

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While the digital economy has brought many benefits for consumers, it has also raised concerns as to how choice architecture is designed and presented to consumers. This becomes particularly relevant in online platforms, but the use of techniques to push consumers to take certain decisions is increasingly present across markets. This paper provides recommendations, both for better enforcement and reform, on how to tackle this problem from a horizontal consumer law perspective.

### **Recommendations for the Consumer Protection Cooperation Network:**

- Enforce more consistently the Unfair Commercial Practices Directive against dark patterns since, as shown in this paper, the Directive is capable of addressing many of these practices.
- Identify the widespread use of dark patterns by carrying out ‘sweep’ investigations in digital markets but also in specific sectors.
- Hold workshops involving stakeholders including consumer organisations in the context of the CPC-net to discuss enforcement challenges and approaches to dark patterns.
- Incorporate more behavioural insights into the enforcement investigations and activities to assess how a given practice is likely to affect the actual behaviour of consumers.
- In the context of an enforcement case, request companies to disclose complete information about the use of behavioural experiments for the design or optimisation of a given interface.
- Impose dissuasive sanctions on traders for misleading and unfair user interface design to create a truly deterrent effect.
- Compile and publicise national decisions of public authorities or civil courts on dark patterns under the coordination of the European Commission creating a database of unfair design practices.
- Provide guidance to companies on how to avoid designing their choice architecture in a way that can be unfair and misleading on consumers.

## **Recommendations for the European Commission regulatory intervention:**

### Review the Unfair Commercial Practices Directive (UCPD) to include:

- Introduce new benchmarks for the assessment of what constitutes (un)fairness in commercial communications to update the “average” consumer concept, including how digital asymmetry impacts consumers’ transactional decisions.
- Introduce a new rule alleviating the burden of proof for plaintiffs and enforcement authorities.
- The establishment of an obligation for business to respect the general principle of “fairness by design”.
- Certain dark patterns should be banned in the annex of the UCPD such as the practice of “confirm-shaming” which implies using language and emotion (e.g., shaming) to steer users into or away from - or make them feel guilty about - making a specific choice or from refraining to take action.

### Review the Consumer Rights Directive (CRD) to introduce:

- A specific obligation to have a contract cancellation button which should make the cancellation of the contract as easy as the agreement to enter into it.

Finally, the European Commission should, for both the CRD and the UCPD, propose to introduce an anti-circumvention clause. This clause prohibits traders from deploying contractual, technical and behavioural measures to bypass the obligations included in those Directives.

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## 1. Introduction

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While the digital economy has brought benefits for consumers, it has also raised concerns as to how choice architecture (i.e., options presented to consumers) is designed and presented to them. This becomes particularly relevant in online platforms, but the use of techniques to steer consumer choice is also a fast-growing phenomenon across markets. When the interest of companies and consumers do not match, it can happen that the user interface is designed in a way that triggers consumers to take decisions that are in the interest of companies and not in their own. The same applies to the use of algorithms by businesses to better target their choice architecture to a consumer, shaping individual decision-making<sup>1</sup>.

Persuasion and influence of consumption patterns is not new. For decades, businesses have tried to gain customers by applying various marketing techniques. However, digitalisation brings a new dimension to this discussion. The use of technology and behavioural experimentation on choice architecture such as user-centred design (UCD)<sup>2</sup>, user experience design (UX design)<sup>3</sup> and testing methods applied by interface designers such as A/B testing, coupled with the collection of vast amounts of data revealing consumers' most personal characteristics, enables businesses to identify which design decision leads to which change in user behaviour.

As evidenced in a study of 11,000 websites,<sup>4</sup> design choices and patterns of operation that steer the user's decision-making (such as by creating a false sense of urgency) but also hijack the transaction (e.g., sneaking a subscription into the basket) are nearly omnipresent. With the effect of scale increasing the economic incentives to deploy such techniques, small changes in consumers' behaviour in the online environment translate into considerable benefits to companies reaching beyond plain financial gain from a manipulated transaction. For example, a cookie consent banner or privacy disclosure will render it much easier to obtain consent to processing, which in turn may increase efficiency of further manipulation by making it personalised and targeted.<sup>5</sup>

We have also seen a rise in the number of consumer law cases targeting dark patterns. In May 2020, the Hungarian Competition Authority fined Booking.com for unfair business practices for misleading advertisements claiming free cancellation for some accommodation offers as well as by exerting aggressive psychological pressure to facilitate faster bookings. Social media platforms like Facebook or Twitter have also been found to design their interface in a way that consumers would share more data than they would normally do, or by making it harder to deactivate privacy-intrusive features.<sup>6</sup> This was put in evidence in the recent decision by the French data protection authority CNIL against

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<sup>1</sup> This is phenomenon is conceptualised by Karen Young as 'hypernudging', see: Young (2016), 'Hypernudge': Big Data as a Mode of Regulation by Design', *Information, Communication & Society* 1,19, TLI Think! Paper 28/2016, <https://ssrn.com/abstract=2807574>

<sup>2</sup> User-centred design (UCD) is defined as a framework of process (not restricted to interfaces or technologies) in which usability goals, user characteristics, environment, tasks and workflow of a product, service or process are given extensive attention at each stage of the design process.

<sup>3</sup> User experience design (UX design) is the process of creating evidence-based, interaction designs between human users and products or websites.

<sup>4</sup> Mathur et al., (2019), "Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites. Proceedings of the ACM on Human-Computer Interaction", <https://dl.acm.org/doi/10.1145/3359183>

<sup>5</sup> Helberger, Micklitz et al. (2021), Structural asymmetries in digital consumer markets, study for BEUC, at 108, [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>6</sup> Norwegian Consumer Council (2018), "Deceived by Design. How tech companies use dark patterns to discourage us from exercising our rights to privacy", report <https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf>

Google.<sup>7</sup> Amazon has also been subject to a complaint by the Norwegian Consumer Council for making it harder for consumers to cancel their Prime subscriptions than to sign up for it.<sup>8</sup> Most recently, BEUC together with several of its individual members introduced an external alert to the Consumer Protection Cooperation network against WhatsApp for the deployment of design techniques to force consumers to agree to changes in the terms and conditions<sup>9</sup>.

## 2. What are 'dark patterns'?

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There is currently no legal concept of what "dark patterns" are. The original term was coined by Harry Brignull, founder of [darkpatterns.org](http://darkpatterns.org), who spoke of, "tricks used in websites and apps that make you do things that you didn't mean to, like buying or signing up for something".<sup>10</sup> It can also be referred to as online interface or a part thereof that via its structure, function or manner of operation, subverts or impairs the autonomy, decision-making, or choice of recipients of the service. A related concept is that of "nudge",<sup>11</sup> which refers to initiatives inviting people to take certain decisions by playing on their choice architecture but without constraining them and of "sludge", defined as a means of inducing friction to steer the user away from certain choices or induce deliberation. Specific features of "dark patterns" include relying on user interfaces to influence and manipulate users, subverting intent or preferences and abusing knowledge of human behaviour to predict decisions of users and influence them<sup>12</sup>.

Dark patterns can be data-driven and personalised or implemented on a more general basis, tapping into heuristics and behavioural biases, such as default effects or scarcity biases<sup>13</sup>. There is not a single way to classify dark patterns<sup>14</sup>. For purely illustrative purposes, we can distinguish dark patterns as those that:

- (1) Make certain decisions more prominent or easier to make;
- (2) Create a false feeling of urgency/scarcity and a 'fear of missing out' (e.g., the use of a "high-demand" message);
- (3) Shame consumers (i.e., creating a feeling of guilt via social influence or peer pressure (e.g., "confirm-shaming");
- (4) Obstruct or confusing consumers (e.g., use of questions with "double negative");
- (5) Blind consumers (e.g., sneaking items into the basket).

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<sup>7</sup> CNIL, Cookies: the CNIL fines GOOGLE a total of 150 million euros and FACEBOOK 60 million euros for non-compliance with French legislation, press release: <https://www.cnil.fr/en/cookies-cnil-fines-google-total-150-million-euros-and-facebook-60-million-euros-non-compliance>

<sup>8</sup> Norwegian Consumer Council (2021), "Amazon manipulates consumers to stay subscribed", press release <https://www.forbrukerradet.no/news-in-english/amazon-manipulates-customers-to-stay-subscribed/>

<sup>9</sup> BEUC (2021), "Consumer groups file complaint against WhatsApp for unfairly pressuring users to accept its new policies", press release:

<https://www.beuc.eu/publications/consumer-groups-file-complaint-against-whatsapp-unfairly-pressuring-users-accept-its/html>

<sup>10</sup> <https://www.darkpatterns.org/>, "What Are Dark Patterns?"; The recent California privacy law defines a dark pattern as 'a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice, as further defined by regulation'.

<sup>11</sup> Term developed by Richard Thaler and Cass Sunstein, see: Thaler and Sunstein (2009), *Nudge: Improving Decisions About Health, Wealth, and Happiness*, Penguin Books.

<sup>12</sup> Mathur et al (2021), at 4-5.

<sup>13</sup> Commission notice p. 126.

<sup>14</sup> Mathur et al, "What Makes a Dark Pattern... Dark? Design Attributes, Normative Considerations, and Measurement Methods", Proceedings of the 2021 CHI Conference on Human Factors in Computing Systems, May 2021 Article No.: 360, Pages 1-18, <https://arxiv.org/abs/2101.04843>

Under the EU consumer law *acquis*, these practices would need to be assessed on a case-by-case basis in order to establish whether there has been a breach of specific consumer protection provisions. In the next section we assess how the EU consumer law *acquis* can apply to these practices as well as identifying limitations in the current framework and recommendations for reform.

### 3. Assessing dark patterns in the light of the EU consumer law *acquis*

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Under the horizontal EU consumer law *acquis*, dark patterns can be addressed by the Unfair Commercial Practices Directive<sup>15</sup>, the Consumer Rights Directive<sup>16</sup> and, the Unfair Contract Terms Directive.<sup>17</sup> Below we explain how each of these instruments are relevant to these practices.

#### 3.1. Application of the Unfair Commercial Practices Directive (UCPD) to dark patterns

The UCPD provides the legal framework regulating business practices affecting consumers' economic interests before, during and after the conclusion of a contract. The new Commission notice on the guidance on the interpretation and application of the UCPD<sup>18</sup> confirms that the Directive covers dark patterns and dedicates a section (4.2.7) to explain how the relevant provisions of the Directive can apply to data-driven business-to-consumer commercial practices. The Commission also indicates that when dark patterns are applied in the context of business-to-consumer commercial relationships, the UCPD can be used to challenge the fairness of such practices, in addition to other instruments such as the GDPR.

##### 3.1.1. Dark patterns and professional diligence under Article 5 UCPD

According to the Commission's notice, the notion of "professional diligence" encompasses principles such as "honest market practice", "good faith" and "good market practice". These principles emphasise normative values that apply in the specific field of business activity.<sup>19</sup> Consequently, businesses, when designing the interface through which they will interact with consumers, must follow those principles. This means that traders must prevent consumers from being misled or influenced by a user interface guiding them to take a certain decision without having the possibility to understand the consequences of such a decision. In other words, any manipulative practice that materially distorts or is likely to distort the economic behaviour of an average or vulnerable consumer could breach the trader's professional diligence requirement. However, as confirmed in the Commission's notice, "the UCPD does not require intention for the deployment of the dark pattern".<sup>20</sup>

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<sup>15</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 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 of the Council ('Unfair Commercial Practices Directive').

<sup>16</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 (Consumer Rights Directive).

<sup>17</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

<sup>18</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.

<sup>19</sup> Commission notice, page 46.

<sup>20</sup> Commission notice, page 127.

It is worth noting that, following the case law of the Court of Justice of the EU, when assessing a practice in light of other provisions of the Directive, it is not necessary to prove that the trader breached this professional diligence duty (Case C-435/11, *CHS Tour Services GmbH v Team4 Travel GmbH*<sup>21</sup>) unless explicitly required like in Article 7(4) (d)). Thus, 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.

### **3.1.2. Dark patterns as misleading actions or misleading omissions under Articles 6 and 7 UCPD**

Article 6 of the UCPD protects consumers against misleading practices which contain false information, even if factually correct, *including overall presentation*, and which deceive or are likely to deceive the average consumer. The emphasis of this provision on the presentation through which the information is provided to consumers is very relevant to dark patterns. This is because in many cases of dark patterns, relevant information is hidden or provided in a way that makes the consumer take a certain decision which, in absence of that specific practice, they otherwise would not have taken. This of course would require a case-by-case assessment taking into consideration the effect of a given practice on consumers. However, we consider it important to make clear that the user interface should be considered as a material element to assess the presentation of information to consumers, as indicated in the Commission notice regarding manipulative practices including visually obscuring important information or promoting a specific option, using trick questions and ambiguous language or deploying default interface settings e.g., using pre-ticked boxes, *inter alia*<sup>22</sup>.

In a similar way, Article 7 concerns misleading omissions which can become relevant when it comes to dark patterns used to hide information from consumers to make them take a certain transactional decision. This can happen, for example, in the context of cost-traps when consumers are induced to believe that a digital service is provided after a one-off payment but later subsequent payments are needed to continue using the service. In video games, a common issue is that it is made technically possible to continue using the service without paying, but the experience is severely diminished, e.g., a gamer cannot stay competitive without spending money, or has to spend significant amount of time on the game or waiting if no payment is made.

### **3.1.3. Dark patterns as a form of aggression under Articles 8 and 9 UCPD**

Articles 8 and 9 of the UCPD regulate aggressive practices. According to Article 8, a commercial practice, "shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, 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". This provision is completed by Article 9 which provides the material elements to take into account when assessing an aggressive practice, including the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product.

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<sup>21</sup> "(...) having regard both to the wording and to the structure of Articles 5 and 6(1) of that directive, and to its general scheme, a commercial practice must be regarded as 'misleading' within the meaning of the second of those provisions if the criteria set out there are satisfied, and it is not necessary to determine whether the condition of that practice's being contrary to the requirements of professional diligence, laid down in Article 5(2)(a) of that directive, is also met."

<sup>22</sup> Commission notice, page 127.



Many forms of dark patterns can be captured by this provision particularly because the trader, via the techniques used to revamp the user interface (e.g., A/B testing), is aware of the choices that are most likely to be made by consumers under different circumstances and therefore can use that fact to their own advantage.

As a way of example, a trader knows that consumers are less likely to cancel a contract if they need to go through multiple steps and therefore designs its contract termination interface to discourage consumers from making such a choice. This is the case of the complaint against Amazon by BEUC's Norwegian member, the Norwegian Consumer Council, regarding obstacles to cancel the Amazon Prime subscription: it is much easier to subscribe to Amazon Prime services than to unsubscribe from the same service<sup>23</sup>. Similarly, our UK member Citizens Advice found evidence of a "loyalty penalty" in car and home insurance markets: long-standing consumers often pay higher premiums for their insurance policies compared to consumers that regularly switch contracts. At least one of the reasons for this loyalty penalty (though there are others), is that insurance providers often make it more difficult for consumers to cancel their insurance contract at the point of renewal by hiding information or imposing many steps to terminate the contract<sup>24</sup>.

Choice architecture regarding privacy configurations is often designed in a way in which consumers must take so many steps to opt for more privacy-friendly options that they simply give up before making their choices. This is the case of "click fatigue", a form of dark pattern which discourages consumers from changing default configurations. This technique has been for example identified in the way Facebook or Google designed their privacy settings.<sup>25</sup> This is also the case with cookie policies on many websites, where instead of a button or option to select only those cookies that are strictly necessary, the consumer must deselect an extensive set of options that are previously selected, sometimes more than once in a single visit to the website.

#### **3.1.4. UCPD Annex I**

Annex I of the UCPD contains some prohibitions, which are relevant to dark patterns. For example, practice 6 regarding the technique of "bait and switch" (making an invitation to purchase a given product with the intention of making the consumer purchase a different one) could be materialised by means of dark patterns. For example, where the user interface creates an expectation for the desired item, offered at an attractive price, then discloses its unavailability, substituting it with a different one instead. Similarly, practice 7 regarding pushing consumers to take a quick decision instead of giving the opportunity to make an informed choice can also be induced via dark patterns as seen in the case of booking platforms (falsely stating that a product will only be available on particular terms for a very limited time).

It is therefore important that enforcement authorities, when considering breaches to the practices prohibited in the annex of the UCPD, consider whether these practices could be materialised by means of user interface and dark patterns. In addition, we consider that certain practices should be added to the Annex I of the Directive, including "confirm-shaming" which implies using language and emotion (e.g., shaming) to steer or guilt users into or away from making a specific choice or action.

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<sup>23</sup> Norwegian Consumer Council (2021), "You can log out, but you can never leave. How Amazon manipulates consumers to keep them subscribed to Amazon Prime": <https://fil.forbrukerradet.no/wp-content/uploads/2021/01/2021-01-14-you-can-log-out-but-you-can-never-leave-final.pdf>

<sup>24</sup> <https://www.citizensadvice.org.uk/cymraeg/amdanom-ni/our-work/policy/policy-research-topics/consumer-policy-research/consumer-policy-research/the-insurance-loyalty-penalty-unfair-pricing-in-the-home-insurance-market/>

<sup>25</sup> Norwegian Consumer Council (2018), "Deceived by Design. How tech companies use dark patterns to discourage us from exercising our rights to privacy", report: <https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf>

### 3.1.5. Digital asymmetry and the UCPD average consumer benchmark

In the digital consumer-trader relationship, the trader has access to the consumer's detailed personal profile including decision-making biases and pressure points. As the same time, the trader controls and shapes the entire environment in which the consumer operates.<sup>26</sup> This translates into a new position of digital asymmetry of the consumer that is relational (due to the position they have in a digital environment whose complexity prevents equal interaction), architectural (due to the way interfaces are designed and operated) and knowledge-based (as the trader benefits from detailed insights about the consumer while the consumer often knows - or understands - very little of how the trader and the service operate). This imbalance and the embedded vulnerability are referred to in current policy debate as 'digital asymmetry'.<sup>27 28</sup>

Under conditions of digital asymmetry, all digital consumers are rendered vulnerable; hence vulnerability as an exception to the average consumer benchmark becomes less useful to assess the behavioural distortion an interface could cause. Every person can be temporarily in a very vulnerable position: emotionally, psychologically or physically. For example, AI systems could exploit vulnerabilities caused by emotional distress, pressure, exhaustion, inattention, tiredness, grief, sorrow, mental agitation, physical pain and injuries or influence of medication or medical treatments. Importantly, the Commission acknowledges that the UCPD average consumer benchmark must be interpreted in light of these changing market realities<sup>29</sup>. However, this approach falls short in addressing the scale of the problem. Therefore, a more throughout reform of the UCPD should be envisaged as suggested by BEUC in the context of its ongoing work on adapting consumer law to the digital economy.

In this regard, targeted amendments to the UCPD concerning the introduction of new concepts such as digital asymmetry, the adaptation of the concept of transactional decision and the alleviation of the burden of proof should be introduced. This reform would serve as a concretisation of a general principle of 'fairness by design' which should be introduced into the UCPD to mirror the principle of data protection by design and by default of Article 25 GDPR.

### 3.2. Application of the Consumer Rights Directive (CRD) to dark patterns

The CRD is relevant in this discussion since it provides for information obligations and information requirements before the conclusion of a contract. The Directive indicates that in distance contracts, the information needs to be provided in a "way appropriate to the means of distance communication used in plain and intelligible language". This transparency requirement has been extrapolated from the Unfair Contract Terms Directive (see below) and requires consumers to be able to understand the information that is being provided and the consequences of entering into a contract. Through the design of the interface, the trader can breach this transparency requirement by hiding some material information and deviating the consumer's attention to other elements. For example, the trader can include the information regarding shipping costs in case of withdrawal from the contract in a separate place while promoting free delivery and giving the impression to consumers that any potential return is also for free.

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<sup>26</sup> Helberger, Micklitz H.-W. et al. (2021) "Structural asymmetries in digital consumer markets", study for BEUC, [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), at 106.

<sup>27</sup> Id, at 46.

<sup>28</sup> Addendum to the report 'Structural asymmetries in digital consumer markets', [https://www.beuc.eu/publications/beuc-x-2021-116\\_the\\_regulatory\\_gap-consumer\\_protection\\_in\\_the\\_digital\\_economy.pdf](https://www.beuc.eu/publications/beuc-x-2021-116_the_regulatory_gap-consumer_protection_in_the_digital_economy.pdf)

<sup>29</sup> Commission notice, page 125.

The prohibition of Article 22 of the CRD on pre-ticked boxes is also relevant since the very essence of the prohibition was to prevent traders from taking advantage of consumers' status quo biases. It is unfortunate however, that this provision does not apply to the sectors excluded from the CRD, such as financial services. It would be therefore important to address this issue in the upcoming review of the Distance Marketing of Financial Services Directive<sup>30</sup>.

While complying with the prohibition of pre-ticking boxes implying additional payments, companies can still push consumers to un-tick boxes via a misleading user interface, for example, by placing the button to go to the next page (e.g., in a booking site) right next to the ticked box or in a very similar shape and colour or by making it look like ticking the box is required in order to proceed. Thus, we consider that it would be important to add also to the CRD an anticircumvention clause preventing traders from relying on dark patterns to bypass the requirements included in the Directive (see below point 4.4).

Furthermore, except for the right of withdrawal, the CRD does not regulate the conditions for contract termination. In this regard, to prevent consumers from facing difficulties to terminate contracts, in particular subscription contracts, it would be appropriate to follow at EU level the proposal discussed in Germany in the fair consumer contracts bill (*faire Verbraucherverträge*<sup>31</sup>) to include an obligation to have a contract cancellation button. This would mean that traders need to display a functionality which allows consumers to terminate long-term contracts, particularly subscriptions, in an easy manner and without having to go through multiple steps and confirmation requests. It should be possible that once the consumer confirms their intention to end the contract, the termination takes place.

### **3.3. Application of the Unfair Contract Terms Directive (UCTD) to dark patterns**

The UCTD is relevant in this discussion particularly regarding its transparency test in Article 5 requiring non-individually negotiated terms to be provided in "in plain intelligible language". The Commission indicated in the guidance document on the Directive that when assessing compliance with this requirement it needs to be considered the "way in which contract terms are presented," including aspects such as "the clarity of the visual presentation, including font size, the fact of whether a contract is structured in a logical way and whether important stipulations are given the prominence they deserve and are not hidden amongst other provisions".

This interpretation makes the UCTD a relevant instrument to scrutinise whether through dark patterns suppliers are not rendering terms and conditions unfair by lack of transparency. However, transparency goes beyond the contractual terms as it relates to the way consumers are informed, but also how it allows them to make a conscious and informed transactional decision.

### **3.4. Anti-circumvention**

Neither the UCPD nor the CRD contain any "anti-circumvention" provision, which prevents a party breaching an obligation not directly but with measures of equivalent effect. While this issue has not been discussed outside the remit of competition law enforcement, we consider that the proliferation of design techniques to bypass legal requirements in consumer law requires introduction of anti-circumvention clauses which authorities could take into account when assessing compliance with a given legal requirement. In this sense,

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<sup>30</sup> BEUC response to the Commission public consultation on the Distance Marketing of Financial Services Directive (DMFSD), [https://www.beuc.eu/publications/beuc-x-2021-085\\_response\\_to\\_ec\\_public\\_consultation\\_on\\_dmfsd.pdf](https://www.beuc.eu/publications/beuc-x-2021-085_response_to_ec_public_consultation_on_dmfsd.pdf)

<sup>31</sup> <https://www.bundestag.de/dokumente/textarchiv/2021/kw08-de-verbrauchervertraege-821794>

the Directives could include a provision indicating that traders shall not undermine the compliance with the provision of the Directives by measures of equivalent effect including contractual, commercial, technical means. Anti-circumvention is however a topic exceeding the remit of this paper and should be considered as a common element in EU decision-making.

#### **4. Dark patterns in the Digital Markets Act and the Digital Services Act**

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The issue of dark patterns has also been raised during the legislative discussions around the Digital Markets Act and the Digital Services Acts 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.

BEUC welcomes these provisions in the DMA and the DSA, but they are not enough to sufficiently protect consumers against dark patterns. In the case of the DMA, it only concerns the anticircumvention of the obligations included in articles 5 and 6 and, in the case of the DSA, the rules are limited to intermediation services. Thus, most dark pattern practices would fall under the scope of the UCPD and as explained above, there are several loopholes that need to be addressed by means of legislation.

#### **5. BEUC Recommendations**

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BEUC welcomes the fact that the European Commission is conducting a study on unfair commercial practices in the digital environment<sup>32</sup> and that it has clarified how several provisions of the UCPD are applicable to dark patterns in its notice.

Without prejudice to the outcome of the study, we would like to already provide recommendations for better enforcement of the EU consumer law acquis against dark patterns as well as preliminary recommendations for legislative reform.

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<sup>32</sup> Ongoing Behavioural Study on Unfair Commercial Practices in the Digital Environment, under Specific Services 2020 85 06 for the implementation of the Framework Contract no CHAFEA/2019/CP/01.

### 5.1. Recommendations for the CPC Network for better enforcement

The current horizontal consumer protection rules should be enforced more consistently against dark patterns. This systemic behaviour by many traders requires consumer protection bodies to take a broad perspective in the interpretation of the rules of the Directives as transposed by Member States, taking into account user interfaces and techniques applied by traders to make consumers take a certain decision as well as to carefully consider how traders' practices may impact consumer behaviour. To do so, consumer protection bodies should:

- Enforce more consistently the UCPD against dark patterns and impose dissuasive sanctions on cases related to misleading and unfair user interface to create a deterrent effect on traders relying on dark patterns.
- Identify such practices by carrying out "sweep" investigations on the use of dark patterns both regarding digital services but also in specific sectors.
- Hold workshops involving stakeholders and consumer organisations in the context of the CPC-net to discuss enforcement challenges and approaches to dark patterns.
- Incorporate more behavioural insights into their work in order to assess how a given practice is likely to affect the actual behaviour of consumers and not merely based on the hypothetical average consumer benchmark. In this regard, authorities can conduct their own testing of user interfaces with consumers to assess the real impact of such design on consumers. It is worth recalling that the CJEU acknowledged in the cases *Springenheide*<sup>33</sup> and *Estée Lauder*<sup>34</sup> that different market characteristics can impact the conception of consumers and their reasonable expectations.

In case of a legal proceeding, require the trader to come forward with conclusive evidence on the details of the employed practice that will allow to establish whether the practice establishes digital asymmetries and uses them to materially distort the choices of the consumer. Failing to provide such evidence must result in a legal presumption in the affirmative.

- Compile and publicise cases of dark patterns under the coordination of the European Commission creating a database of unfair design practices.
- Provide guidance to companies on the legal boundaries regarding the persuasion of consumers in their decisions and how to avoid designing their choice architecture in a way that can be unfair and misleading to consumers. The guidelines recently published by the Dutch Authority on Consumers and Markets "*Protection of the online consumer. Boundaries of online persuasion*"<sup>35</sup> contain a useful model that could serve as inspiration for other authorities and at EU level complementing the new Commission notice.

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<sup>33</sup> Judgement of 16 July 1998, C-210/96, *Gut Springenheide GmbH, Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung*, EU:C:1998:369.

<sup>34</sup> Judgement of 13 January 2000, C-220/98, *Estée Lauder Cosmetic GmbH & Co. KG v Lancaster Group Limited*, EU:C:2000:8.

<sup>35</sup> ACM (2021), "Protection of the online consumer. Boundaries of online persuasion", guidelines <https://www.acm.nl/sites/default/files/documents/2020-02/acm-guidelines-on-the-protection-of-the-online-consumer.pdf>

## 5.2. Recommendations for the European Commission for legislative reform

While the current EU consumer law acquis provides for important mechanisms to protect consumers against dark patterns in addition to sector-specific instruments, it falls short in addressing the scale of this phenomenon and the widespread use of dark patterns. This is why we consider that there is scope for further regulatory intervention, particularly on the following elements of the UCPD and the CRD:

The UCPD should introduce:

- New concepts of digital asymmetry updated concept of transactional decisions and new rules on burden of proof. In the context of the project “Consumer Protection 2.0” BEUC published a study looking at the impact of structural asymmetries in digital markets on consumers and its implications for consumer law.<sup>36</sup> A list of specific policy recommendations will be published in the coming months.
- A general principle of “fairness by design”. Taking inspiration from the principles-based system of the GDPR, EU consumer law, and in particular the UCPD, should incorporate a general principle of fairness by design. This principle, rooted in already well-known consumer law principles like good faith and fair dealing, would mean that products, user interfaces and commercial communications need to be designed in a fair manner. This principle would complement the professional diligence requirement of the UCPD but it is broader on scope as it should go beyond the behaviour of a trader in relation to a given practice.

Additionally, it should be considered if specific provisions safeguarding transactional decisions by mandating interface neutrality are necessary under conditions of digital asymmetry as well as whether certain dark patterns practices should be banned in the annex of the UCPD. Examples include the practice of ‘confirm-shaming’ which implies using language and emotion (e.g., shaming) to steer or users into or away from (or make them feel guilty about) making a specific choice or action.

Finally, it is essential that consumers can rely on individual remedies (e.g., contract termination) when the contract is concluded as a result of an unfair commercial practice.

The CRD should introduce:

- A specific obligation to have a contract cancellation button which should make the cancellation of the contract as easy as the agreement to enter into it. This solution would prevent consumers from being locked into subscriptions contracts because of obstacles put in place to make it difficult to cancel them.

Finally, we consider that both the CRD and the UCPD should introduce an anti-circumvention clause. This clause could be modelled following article 11 of the proposed Digital Markets Act prohibiting traders from deploying contractual, technical and behavioural measures, including dark patterns, to bypass the obligations included in those Directives. These instruments must work in tandem in order to ensure consumers are protected against these new unfair business practices.

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<sup>36</sup> Helberger, Micklitz et al. (2021), fn.5.



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