



**Independent  
Retail Europe**

**CONSULTATION ON DIGITAL FAIRNESS  
- COMMENTS OF INDEPENDENT RETAIL EUROPE -**

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## EXECUTIVE SUMMARY

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The EU Commission announced in the New Consumer Agenda that it will analyse whether additional legislation or other action is needed in the medium-term in order to determine whether the existing key horizontal consumer law instruments remain adequate for ensuring a high level of consumer protection in the digital environment (Fitness check). The Fitness Check will evaluate three Directives:

- [Unfair Commercial Practices Directive 2005/29/EC](#);
- [Consumer Rights Directive 2011/83/EU](#);
- [Unfair Contract Terms Directive 93/13/EEC](#).

The Fitness Check will examine the adequacy of the existing EU rules in dealing with consumer protection issues such as, but not limited to, consumer vulnerabilities, dark patterns, personalisation practices, influencer marketing, contract cancellations, subscription service contracts, marketing of virtual items (e.g. in video games) and the addictive use of digital products.

Independent Retail Europe considers that the current EU consumer law framework is already well equipped to deal with the practices mentioned; while the omnichannel experience acquired by retailers shows that there is no evidence of a difference in vulnerability of consumers online or offline with bona fide retailers. Independent retailers consider that certain unfair commercial practices and the lack of enforcement do create an unlevel playing field that needs to be addressed. However, they call for caution when it comes to reversing the burden of proof or amending well-functioning established legal concepts such as the notions of average and vulnerable consumer.

### Key aspects covered in this paper:

- ➔ **The development of omnichannel retail offer valuable insights. The legislative framework must work for all sales channels without disproportionately burdening one of them.**
- ➔ **The need to distinguish between harmful and beneficial personalisation practices**
- ➔ **The existing legal concepts of the average and the vulnerable consumer as well as professional diligence work well for consumers and businesses**
- ➔ **The current legal framework on dark patterns offers sufficient protection to consumers but lacks enforcement**
- ➔ **A reversal of the burden of proof/argumentation equates to a presumption of non-compliance and should therefore be avoided**
- ➔ **Any withdrawal button needs to be carefully assessed in terms of costs and feasibility of IT infrastructure**
- ➔ **Possible changes to the presentation of the terms and conditions must ensure that only the full version of the T&Cs is legally binding**
- ➔ **Extending the blacklist of misleading commercial practices in Annex I of the UCPD, while maintaining the general legal concepts of the UCPD, is the preferred option for retailers**
- ➔ **The need for clear differentiation between dark patterns and advertisement**

## COMMENTS OF INDEPENDENT RETAIL EUROPE ON DIGITAL FAIRNESS

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Omnichannel retail, whereby retailers work to offer consumers a convenient, seamless off- and online service, seeks to ensure that consumers have the best experience possible on both channels, leaving it up to the consumer to choose his/her preferred channel. Personalisation practices, nudging and targeted promotions have existed offline in the retail sector for decades. The same practices are now deployed in retailers' online sales channels to develop a truly omnichannel and as much as possible uniform experience for consumers. Although online environments may create specific challenges for enforcement of consumer protection laws, retailers' experience with the development of omnichannel retail shows that there is no difference in the risks faced by consumers when switching from an offline to an online direct sales channel from a bona fide retailer.

Independently of whether the services are offered on- or offline, consumers should always be equally well protected. The channel in itself does not make a difference in whether consumers are or not well protected. Consumer protection should therefore not distinguish between the online and offline environments.

### The need to distinguish between harmful and beneficial personalisation practices

Personalisation is important for every sales channel in the retail sector, be it offline or online, as well as for customers. Knowing customers and catering to their needs means collecting and processing data with the view to understand these needs. Customer data can be used to create individual customer profiles as well as audience segments. Marketers can then dynamically adapt part of the website content (or shelf presentation in stores) based on these profiles and segments. The result is content that speaks directly to the interests and characteristics of the customer visiting the website (or the brick & mortar store). Customer satisfaction and relevant offers are key for every sales channel. Collection of data on past engagement, customers' sales history, age, income and gender helps to create relevant offers and personalise the "related content" section to make it highly relevant to customers. **Such personalisation is valued extremely positively by consumers and is a key driver of consumer satisfaction with a given brand or sales channel.** This is mostly due to the quest for convenience that has become an important factor for consumers when choosing a particular sales channel. **Various studies in the retail sector confirm consumers' quest for convenience when shopping online and consumers' appetite for personalisation.** According to a recent [McKinsey report](#), 71% of consumers expect companies to deliver personalised interactions and 76 % get frustrated when this does not happen. The [GfK white paper](#) indicates similar consumer trends. Especially Generation Y and Z are favorable to personalised commercial practices. 66% of millennials said that they "like it when a website keeps track of (their) visits and then recommends things to (them). 55% of millennials even like to be contacted via smartphone while shopping. This is mostly due to the quest for convenience that has become one of the most importance factors for consumers when choosing a particular sales channel. **Various studies in the retail sector confirm consumers' quest for convenience when shopping online and consumers' appetite for personalisation. Catering to these consumer trends and needs requires personalisation.** Legislators should not discuss *whether*

personalisation is legitimate but rather give guidance on *how* to enable legitimate personalised practices and transparency in the offer.

The EU Commission study<sup>1</sup> rightfully draws attention to the fact that online practices that consumers consider obviously too aggressive (and possibly banned by the UCPD) may put customers off and make them switch to other operators. The online sales market is very competitive. The risk of a backlash from those practices is thus very real and our member retailers are therefore very careful of how they behave/present themselves online. This risk of a backlash is considerably lower for dominant platforms acting as gatekeepers and which consumers cannot effectively avoid. The same Mc Kinsey report (see above) shows that consumers nowadays change their consumption patterns very easily. 75% tried a new shopping behaviour during the pandemic. Therefore, retailers have a keen interest in keeping customer satisfaction at a maximum.

Most – if not all - questionable commercial practices cited in the [EU Commission's study](#) are already covered by the EU consumer acquis, in particular by the UCPD. Creating situations of urgency, confirm shaming, hiding necessary information or threatening to “curse the entire family” in case a subscription is cancelled are obviously in breach of the obligation of professional diligence contained in the UCPD and therefore illegal. We are concerned about these practices, since they undermine the trust in online sales and disrupt fair competition as they constitute unfair behaviour from untrustworthy traders towards bona fide traders.

**However, personalisation practices enable also the personalised shopping experience that consumers actively look for and value positively when shopping online (and offline).** Receiving relevant product recommendations or offers based on their previous purchases, is something that consumers generally appreciate when visiting shops online and offline. This is confirmed by numerous marketing studies for both offline and online retail. Restricting the possibility of personalising the offers online would not lead to less promotional ads online but possibly to an even higher amount of advertisement that is of little interest to consumers (due to the continued need to attract consumers' interest whilst the efficiency generated by personalisation has been lost).

**Personalised advertisements or offers can be highly beneficial to consumers, as they also allow to nudge consumer choices into a positive direction.** Some retailers, for example, use algorithms to offer consumers the choice of less expensive or healthier alternatives to the product they initially chose. These product recommendations are based on personal data from previous purchases. This can be highly positive for consumers' health of purchasing power (especially in the current inflationary context), and could also be used to nudge towards more sustainable products. A number of similar examples illustrate that personalisation practices and nudging practices can actually support consumers in making different purchasing decisions that will have a positive impact on them or on the common good. Personalisation practices that help consumers make more informed and consistent choices or choices that will bring additional consumer or sustainable welfare, for instance, should be valued positively, also by the legislation and policy makers.

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<sup>1</sup> European Commission, Behavioural study on unfair commercial practices in the digital environment, May 2022, p.40.

Therefore, the fitness check should be extremely cautious in respect of the issue of personalisation, and provide a clear distinction between dark patterns and nudging/positive personalisation. In this context, the notion of ‘consumer harm’ is crucial to distinguish between positive personalisation practices and negative practices. We therefore urge the Commission to be cautious on this key aspect, and to ensure that this distinction and the notion of harm will be at the heart of any future initiative taken on the basis of the result of the fitness check. Moreover, retailers need a framework which is clear as to what is allowed and not allowed, something that the UCPD actually provides. Thus, updating Annex I of misleading unfair commercial practices with a complementary list of new practices based on existing enforcement actions taken – as highlighted by the JRC ([Study on unfair commercial practices in the digital environment](#), cf. table 4, p. 32) seems a good way forward for both consumers and independent retailers, whereas diverging from well established/functioning existing legal concepts (such as the notions of average consumer or professional diligence) would create major legal uncertainties for businesses.

### **The legal concept of the average/ vulnerable consumer as well as professional diligence work well for consumers and businesses**

The Unfair Commercial Practices Directive defines the average consumer in recital 18 as follows: “[the average consumer]” is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors”. The guiding notice further specifies that a “reasonably acting consumer is not suspicious and tends to trust that the received information is valid and accurate”. Article 5(3) of the UCPD defines a consumer as vulnerable because of his/her “mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee”. The ‘vulnerable consumer’ criteria apply if a commercial practice distorts the economic behaviour of a group of consumers who are vulnerable ‘in a way which the trader could reasonably be expected to foresee’ (Article 5(3) of the UCPD). In our opinion, there are reasonably foreseeable behaviours online that are common to all consumers. A reasonably well informed consumer may be misled by unfair commercial practices online (in a similar way as offline). This might even be the case for the majority of European consumers, meaning that the existing notion of ‘average consumer’ already exist and is working well in online environments. Therefore, an overhaul of this legal concept does not seem necessary at this stage. Blindly accepting the terms and conditions is reasonably foreseeable (and happens similarly online and offline). This does not require an update of the legal concepts as such. It rather requires reflection on what exactly terms and conditions should include and for what purposes cookies may be used. This would truly generate trust in online sales channels.

Consumers’ Organisations argue that the concept of the average consumer is outdated in the digital age. According to BEUC, “The line between a vulnerable and an average consumer is blurred, since vulnerability online does not depend on being physically impaired”. Our members recognise that anyone who is not a proficient user of the worldwide web may have difficulties to safely operate online. This is particularly common for elderly people, a group that is already identified as vulnerable under the UCPD. This is why we consider that the concept is still up to date, especially as it has a certain inherent flexibility which makes it easily applicable to both online and offline contexts.

Our members, SMEs and most of them omnichannel retailers, depend on their online sales channel to be able to compete with large online marketplaces and integrated retail chains. They depend on clear guidance in order to operate online. They must be able to rely on characteristics that are common to all consumers, when they design their web shop. A large number of consumers browse daily online, it is impossible to evaluate the digital proficiency or the mental health of each and every single one of them. Businesses must be able to expect a certain level of proficiency from consumers when it comes to purchasing goods online. It is a matter of defining what can be expected and what cannot. Overthrowing a well-functioning legal concept such as the notion of ‘vulnerable consumer’ as a whole is unnecessary and will create mayhem for all businesses.

The counter part of the concept of consumer is the concept of ‘professional diligence’ as defined in Article 2(h) of the UCPD, meaning *“the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity”*. This implies ‘honest market practice’, ‘good faith’ and ‘good market practices’ according to the Commission guidance. As mentioned earlier, the notion of consumer harm is key to assess the need to update the EU consumer acquis to address dark patterns and distinguish them from positive personalisation and nudging practices. This notion of harm seems to be indirectly covered by the concept of ‘professional diligence’, reason why the UCPD and its existing definitions represent a fit for purpose and flexible enough framework to address dark patterns and digital unfairness. It is important that consumers can expect a certain level of consumer protection when they shop online in order to trust the market. Once again, the level of general protection they can reasonably expect needs to be redefined, however, we call upon the Commission not to diverge from the existing general legal concepts of the average and vulnerable consumer.

### **The current legal framework on dark patterns is sufficient but lacks enforcement**

The [study on unfair commercial practices in the digital environment](#) concludes that the legal framework can in principle address all practices cited in the study. The study lists many cases where the Unfair Commercial Practices Directive or the Consumer Rights Directive were successfully used to remove certain practices from the market. Hence, the current legal framework is sufficient.

The fitness check and the EU impact assessment study should thoroughly examine the alleged legal shortcomings of the framework. The study should list cases where practices that the Commission considered “unfair” or “misleading” could not be banned from the market because the legal framework was not strong enough. This has never been assessed. Without such an assessment, any revision will be arbitrary and not in line with the principles of Better Regulation.

In parallel, the fitness check should analyse how enforcement authorities can be supported, how consumers could be better informed about their rights and encouraged to notify any unfair practice to their respective authorities.

Strengthening the legal framework whilst not addressing the inefficiencies of enforcement will lead to a situation where businesses that already comply with the current rules will be confronted with

additional rules and administrative burdens, while businesses that do not comply with the current rules will certainly not adapt to the new ones! This will merely further deepen the trench between reputable traders and rogue traders, and indirectly between EU traders and non-EU traders (against whom it is difficult to enforce EU consumer protection rules). Successfully operating in the online market is already extremely tough. Competition in the online market should not be reduced at the costs of good faith traders. Effective enforcement, not stricter rules, is the sine qua non condition for a level playing field in the Single Market.

We do see difficulties when it comes to large open marketplaces allowing third-party sellers in third countries who do not have a legal representative in the EU. Through this gap a considerable amount of unsafe goods enter the EU market, while non-EU traders benefit from this 'enforcement challenge' to use illegal unfair commercial practices. Enforcing fair commercial practices abroad does seem challenging so rethinking the consumer acquis in this regard might be useful. We would like to recall, however, that any revision of the existing legal framework needs to prevent the "black sheep" from operating on the European market while trustworthy European business activity should be able to continue undisturbed.

### **A reversal of the burden of proof/argumentation is very close to a presumption of non-compliance and should be avoided**

When they suspect a breach of the UCPD, enforcement authorities must prove that data exploitation strategies are aggressive in the meaning of Articles 8 and 9, or fulfil both conditions of Article 5(2) (professional diligence and material distortion of consumer behaviour). Consumer organisations argue that this may be hard to prove, as enforcement authorities do not have the necessary insights in the data structure and the means of data collection) and therefore suggest to introduce a (partial) reversal of burden of proof or burden of argumentation.

**We would like to strongly caution against such a reversal of the burden of proof/argumentation, as this comes very close to a presumption of non-compliance.** The presumption of compliance/innocence must apply to everyone, including businesses, including in the online environment. It is a key principle of the EU legal order enshrined in the EU Charter of Fundamental Rights, which the European Court of Justice and the European Court of Human Rights recognise to be fully applicable to enforcement issues subject to strong administrative fines<sup>2</sup>, as is the case with EU and national consumer laws (while breaches of EU consumer law may also lead to criminal/jail sanctions under many national consumer laws implementing the EU consumer acquis). Any reflection on how to facilitate the work of enforcement authorities in areas of digital fairness and dark patterns should ensure that this presumption of innocence is respected, and that businesses do not have to 'prove' that they are compliant, but rather that non-compliance should be proven by enforcement authorities and courts.

### **A withdrawal button needs to be carefully assessed**

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<sup>2</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62002TJ0279>, Paragraph 115

A generic withdrawal button for all goods and services would be very impractical in the case of sales of goods, as it would make buying and withdrawing processes more complex for consumers and represent a huge challenge for small retailers with rudimentary/simple online shops.

As opposed to services, a two-click-solution is technically not possible to make the withdrawal from a sale of goods safe and effective in practice. The specificity of the online sale of goods requires a differentiated approach with a tailored solution for withdrawals. We propose to explore alternative approaches that will facilitate consumers' ability to return goods, and thereby effectively withdraw from the purchase of the good(s).

The return process requires the exercise of the right of withdrawal via a return form (either accessible online with the order number or provided with the product in the box) and the return by postal means of the good(s) together with the return form. A generic 'withdrawal button' on the online interface overlooks the critical importance of the return process and of the forms to be used to make the withdrawal from the sales contract effective in practice. It is crucial for traders to have a return slip in the parcel with the returned product to allow for the identification at the warehouse. This means that the consumers needs to fill in and possibly print out the withdrawal form in any case (even if there would be a withdrawal button in place). We do therefore not see much added value of withdrawal button in the context of the online sales of goods, as it would in practice lead to an additional step in the withdrawal process, repeating what will have to be done anyway when shipping back the product.

We urge the EU Commission to carefully assess the possibilities of IT infrastructure. SME's retailers have often only very simple web shops without a customer account. Without customer account the website cannot access the personal data and the order details of the customer. Any individualized display of a withdrawal button (during the time of withdrawal only, differing from consumer to consumer) or a personalized confirmation email confirming that the right of withdrawal has been successfully exercised (within the 14 day withdrawal period) is not possible without a customer account. Most SME's cannot afford such a complex IT infrastructure. This would be problematic, as SME retailers' ability to compete online against large marketplaces and integrated chains largely depends on their capacity to have a well-functioning web shop with low start-up and running costs. Retailers should be able to decide freely on how they want to build technically the return process.

In practice, a withdrawal button in the context of the online sales of goods would lead (as a minimum) to an electronic withdrawal form, such as a simple contact form. In order to allow the trader to identify the order, the consumer will need to indicate once more the order details. This will have to include order number, contact details and also the product number in case the order consists out of several products. Entering all these details again could potentially be very burdensome for consumers. Since easy returns are key for consumers, reputable traders have already very efficient return processes in place, that do not require the consumer to repeatedly indicate their order details. As one can see, a withdrawal button in the context of the online sales of goods, would actually add repetitive new steps for the consumers willing to withdraw, making it more complex and therefore does not facilitate the withdrawal in practice. Indeed, displaying the return/withdrawal form as well as the return instructions more prominently in the confirmation email of the order would be a much better alternative for traders as well as consumers.



### Presentation of the terms and conditions (T&Cs)

Terms and conditions are not always very clear to consumers. Consumers are likely to give their consent and to confirm to have read the terms and conditions without having actually done so. For businesses, it is important to have clear rules in place on how they have to inform consumers. Having a simplified version of terms and conditions can be further explored but must provide businesses with an equally high level of legal security. We would like to remind the EU Commission that two different versions of terms of conditions open the door to possible contradictions or differing interpretation, while, legally speaking, only the full version of the T&Cs is valid in case of disputes. This issue was discussed at length during the previous Commission mandate in particular within the framework of the Stakeholder Consultation Group for the *Fitness check of EU consumer and marketing law*. It led to the publication of Recommendations for a better presentation of information to consumers<sup>3</sup>. In principle, our organisation is open to discuss alternative means of presentation, and is ready to build on these recommendations and on the work previously done by the stakeholder group, as long as it is clear that only the full version of the T&Cs is binding. One should also be careful not to create indirectly ‘unfair’ practices through the presentation of ‘simplified’ T&Cs.

### Extending the blacklist of misleading commercial practices in Annex I of the UCPD

Adding additional practices to the blacklist of misleading commercial practices in Annex I of the UCPD, based on the categorisation of dark patterns based on Leiser & Yang ([Study on unfair commercial practices in the digital environment](#), cf. table 4, p 32) could be a good way forward to modernise the UCPD and facilitate compliance and enforcement. We represent trustworthy traders who do not engage in misleading consumers. Such practices could include: hiding information, misleading interfaces (if clearly defined and distinguished from positive nudging and personalisation where there is no harm to consumer), bait and switch practices, nagging (repeatedly making the same request again and again), false or intransparent product ranking, autoselection consenting to data collection or newsletters, forced registration, or countdown timers. Additional practices to be listed in Annex I should be clearly and precisely defined, and based on past/ongoing EU/national enforcement cases.

### Need for clear differentiation between dark patterns and advertisement

When it comes to the reproach of ‘toying with emotions online’ our members would like to call for caution. The use of emotion is a practice very common in all (commercial) advertisements. For instance, brands use emotions to convey a certain image of their products, which closely relates to what they perceive as a key expectation of actual or potential customers. Certain practices that are commonly cited, may actually rather qualify as advertisement than dark patterns and should be regulated as such. Dark patterns and regular advertisement should be clearly distinguished. In this context, rules for advertisement online should be consistent with those offline.

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<sup>3</sup> [https://www.buinessurope.eu/sites/buseur/files/media/reports\\_and\\_studies/2019\\_refit\\_group\\_-\\_recommendations\\_better\\_presentation\\_consumer\\_information.pdf](https://www.buinessurope.eu/sites/buseur/files/media/reports_and_studies/2019_refit_group_-_recommendations_better_presentation_consumer_information.pdf)

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*Established in 1963, **Independent Retail Europe** (formerly UGAL – the Union of groups of independent retailers of Europe) is the European association that acts as an umbrella organisation for groups of independent retailers in the food and non-food sectors.*

*Independent Retail Europe represents retail groups characterised by the provision of a support network to independent SME retail entrepreneurs; joint purchasing of goods and services to attain efficiencies and economies of scale, as well as respect for the independent character of the individual retailer.*

*Our members are groups of independent retailers, associations representing them as well as wider service organizations built to support independent retailers.*

*Independent Retail Europe represents 23 groups and their over 417.800 independent retailers, who manage more than 753.500 sales outlets, with a combined retail turnover of more than 1,320 billion euros and generating a combined wholesale turnover of 513 billion euros. This represents a total employment of more than 6.500.000 persons.*

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