



Digital Fairness – fitness check on EU Consumer law

Submission to the European
Commission

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Coimisiún um
Iomaíocht agus
Cosaint Tomhaltóirí

Competition and
Consumer Protection
Commission

Digital Fairness Fitness Check

Introduction

The Competition and Consumer Protection Commission (CCPC) welcomes the opportunity to respond to the Digital Fairness Fitness check, evaluating three consumer protection directives: The Unfair Commercial Practices Directive (Directive 2009/25/EC); the Consumer Rights Directive (Directive 2011/83/EU) and the Unfair Terms in Consumer Contracts Directive (Directive 93/13/EC).

The Competition and Consumer Protection Commission ('the CCPC') is the statutory body responsible for promoting compliance with, and enforcing, competition and consumer protection law in Ireland. We strive to improve consumer welfare across the economy by enforcing over 40 legislative instruments, including product safety legislation.

Our aim is to make markets work better for consumers. To achieve this, we work to influence public debate and policy development, grow public understanding of the importance of open and competitive markets, promote competition and highlight the interests of consumers.

Our role and functions include the enforcement of competition law; consumer protection law and product safety regulations, as well as encouraging business compliance. We also have a regulatory role in relation to merger assessments, Platform-to-Business Regulation, authorisation of credit intermediaries and alternative dispute resolution. We have a statutory role in influencing public debate and policy development.

We provide information to consumers about their rights, personal finance and product safety, through a consumer helpline, a dedicated section of our website, public awareness campaigns and through our various financial education initiatives.

Consultation paper

In relation to the statements set out in the consultation paper the CCPC provides answers where we have had experience and data to support our views. These are set out below. While we agree that traders generally comply well with the existing EU consumer laws, we believe there are gaps and/or uncertainties in existing consumer laws, particularly in the digital environment. We also believe harmonised legislation in this area, given that there are no borders in the digital environment, is a preferred option.

Digital Practices that unfairly influence decision-making

There is a need for stronger protection against digital practices that unfairly influence consumer decision-making (e.g. manipulative website/app designs such as misleading presentation of ‘yes’ and ‘no’ choices; or creating multiple obstacles before reaching a cancellation/unsubscribing link).

- The CCPC participated in a coordinated Consumer Protection Cooperation Network (CPC Network) ‘sweep’ of retail ecommerce websites in 2022 to identify the use of ‘dark patterns’. That sweep only focussed on three specific types of dark pattern: ‘fake countdown timers’, ‘false hierarchies’ and ‘hiding information’. Within those criteria the sweep found at least one instance of such dark patterns in nearly 40% of included websites within these three criteria. The CCPC is aware that such commercial practices can fall within the scope of the Unfair Commercial Practices Directive (UCPD), although the bar to prove a dark pattern under the UCPD is high. The CCPC would welcome better protections for consumers experiencing dark patterns which do not meet the current threshold under the UCPD, up to and including a black list.
- It is also noted that Article 25 of the Digital Services Act will act as a safety net provision for dark patterns on online platforms that do not fall within the scope of the UCPD or General Data Protection Regulation (GDPR). It is recognised that consumer decision making can be significantly influenced by the ‘choice

architecture' employed by traders online, and the potential for consumer detriment is clear where consumers can be manipulated into making a purchasing decision. The CCPC also notes that requiring clear technical means of cancellation, as proposed below, could also assist in reducing the capacity to create obstacles to cancellation, making it possible to cancel a subscription by the same means used to sign up.

Clarity of terms and conditions in consumer contracts

Where traders require consumers to agree to terms and conditions (T&C), consumers should receive an easily understandable summary of the key T&C in an easily accessible manner.

- The CCPC would welcome proposals to ensure that traders provide an easily understandable summary of the key terms and conditions. Such an approach should be informed by relevant studies of consumer decision making in relation to T&Cs. Such a requirement would in turn build on Article 14 of the Digital Services Act which will require providers of intermediary services to set out their terms and conditions in clear, plain, intelligible, user-friendly and unambiguous language. It also supports existing consumer protection legislation where pre-contractual information should be easily accessible. Notwithstanding these protections the CCPC regularly receives complaints from consumers regarding contractual disputes which exhibit a low level of awareness of the T&Cs attached to those contracts. Even with the longstanding requirements from the Unfair Terms in Consumer Contracts Directive, consumers are still subject to unilateral terms that are in technical and ambiguous language by traders, often presented in formats that are difficult to read and understand prior to entering into a transaction, particularly online. However, careful consideration is required to establish how “key” terms and conditions are potentially defined in legislation or accompanying guidance to mitigate against a risk that a consumer only receives what a trader determines to be “key” in their summary, while unknowingly missing out on an important term.

Cancellation of consumer contracts

- **When cancelling contracts, a clear technical means (e.g. a prominent cancellation button) would help consumers to cancel more easily.**
 - **Receiving a confirmation (e.g. by e-mail) when a consumer terminates a contract would help consumers check that their contract has been successfully terminated.**
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- The CCPC notes that the proposal for a Directive amending the Consumer Rights Directive concerning financial services contracts concluded at a distance and repealing Directive 2002/65/EC includes, at Article 16b, a proposal for a ‘withdrawal button’. The ‘withdrawal button’, as proposed by the European Commission, is intended to ensure that, for distance contracts concluded by electronic means, the trader provides a possibility to use a withdrawal button in order to facilitate the consumer’s exercise of the right of withdrawal¹. (The CCPC notes that the Council negotiating position on the Proposal may include extending the ‘withdrawal button’ to include all distance contracts².) The CCPC notes proposals to both provide a technical means for cancellation and subsequent email confirmation that a contract is terminated would complement existing strong protections for cancellation of contracts for goods e.g. the Model Cancellation form under the Consumer Rights Directive. The CCPC would welcome further consideration of requirements on the technical means to exercise both the right to withdraw and the right to cancel, including any requirement to issue a confirmation of cancellation to a consumer.

¹ https://finance.ec.europa.eu/system/files/2022-05/1_1_189477_prop_dis_en.pdf

² See here at Recital 25: <https://ccpc.cloud.gov.ie/apps/eDocs/S/CCPC152/Files/CCPC152-016-2020/Distance%20Marketing%20of%20Financial%20Services%20Directive/2023.01.18%205th%20Draft%20of%20DMFSD.pdf>

Digital subscriptions

- **Receiving a reminder before any automatic renewal of digital subscription contracts would help consumers to decide whether they want to renew a contract or not.**
- **Reminders about their subscriptions after a period of inactivity could be beneficial for consumers who might otherwise have forgotten that their subscription exists.**

- In regard to whether consumers should receive a reminder before any automatic renewal of digital subscription contracts, it is noted that businesses in regulated markets, such as telecoms, energy and financial services providers, are increasingly required to provide such reminders to consumers. Otherwise, where a subscription automatically renews it is possible for a trader to take advantage of a consumer's behaviour (such as their inattention) and renew the subscription where a consumer does not wish to continue to subscribe. It is proposed that the CCPC welcome a measure to introduce reminders to consumers in advance of a subscription's automatic renewal or inactivity.

- **Signing up for a free trial should not require any payment details from consumers.**
- **Requiring express consent when switching from a free trial to a paid service could be beneficial for consumers.**

- The CCPC has, through its compliance and enforcement activities, noted a number of examples where consumers are unfairly exploited through subscription traps which results in consumers signing up for a free trial, only to later be enrolled in a paid subscription without expecting it. These consumers would not have ended up in this situation if they had not been required to provide payment details when signing up for the trial, and if they had been asked for consent before switching from the free trial to a paid service. The CCPC has seen financial consumer detriment in this area, where redress and enforcement has been difficult. Based on this

experience, placing a positive obligation on traders to ensure express consent before switching from a free trial to a paid service would be beneficial to consumers.

Personalised offers

Having the explicit option to receive non-personalised commercial offers (e.g. non-personalised advertising, non-personalised prices) instead of personalised ones could be beneficial in allowing consumers greater choice.

- In regard to whether consumers should have an option to receive non-personalised commercial offers, the CCPC notes that the DSA will require providers of very large online platforms and of very large online search engines that use recommender systems to provide at least one option for each of their recommender systems which is not based on profiling as defined in the GDPR. The CCPC would support a proposal to request the option of non-personalised offers, potentially to all traders who have the capacity to offer personalised offers and therefore have the capacity to provide opt-out mechanisms, is aligned to those provisions in the DSA and would benefit those consumers that may receive personalised offers that are objectively more expensive than those offered to another consumer with a different profile.

Purchasing of virtual items

- **There is a need for more price transparency when buying virtual items with intermediate virtual currency (e.g. in-game currency in video games).**
- **There is a need for more transparency regarding the probability of obtaining specific items from paid content that has a randomisation element (e.g. prize wheels, loot/mystery boxes in video games, card packs).**

- In regard to whether there is a need for more transparency regarding the probability of obtaining specific items from paid content that has a randomisation element, the CCPC notes that a study conducted for the European parliament identified how exploitation of consumer behaviour, as well as potential risks to minors, can arise from the design of 'loot boxes'. That study noted the need for further research to establish the degree of harm that could arise from loot boxes.

Definition of influencer

- **Clarifying the concept of an 'influencer' (e.g. social media personalities) and the obligations of traders towards consumers would be beneficial.**

- In regard to whether a definition of 'influencer' should be provided, the CCPC noted in *Online Behaviour*, our study of influencer marketing in 2022, that there is currently no commonly accepted definition in law³. The study found that influencers were more likely to take direction on how to identify commercial content from brands as opposed to consulting official guidelines. It would be necessary to distinguish in any definition as to how an influencer is responsible for commercial content, and thereby acting as a trader, and where they are acting in the name of or on behalf of the trader (as is noted in the '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

³ The study is available here: <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2022/12/2022.12.12-172837-CCPC-Influencer-marketing-report.pdf>

market'⁴ (‘the UCPD Guidance’) at paragraph 4.2.6). The CCPC believes that if a separate legal definition of ‘influencer’ is to be provided, it should be future-proof and construed as imposing additional obligations on top of the existing obligations for traders, as opposed to providing less stringent requirements for influencers. These additional obligations could extend to platforms, brands and agents who represent influencers to increase co-responsibility and facilitate compliance and enforcement.

Automation in consumer services/complaints

- **Where automation/bots are used to deal with consumer complaints and other inquiries, consumers should have the possibility of contacting a human interlocutor upon request.**

- The CCPC notes that the proposal to amend the Consumer Rights Directive includes a right to request human intervention in relation to financial services⁵. The CCPC is aware that a persistent ‘digital divide’ in Member States such as Ireland is likely resulting in consumers with low levels of digital literacy engaging less with their service providers, which is borne out by research. While the Digital Transition envisages increased automated solutions by the trader the CCPC believes that further consideration be given to the proportionality of mandating an ability to request human intervention, while recognising that it could in part remedy the problem of the digital divide by providing consumers with an option to engage directly with traders.

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021XC1229%2805%29&qid=1640961745514>

⁵ See here at Article 16d: https://finance.ec.europa.eu/system/files/2022-05/1_1_189477_prop_dis_en.pdf

Vulnerable consumer

The concept of the ‘average consumer’ or ‘vulnerable consumer’ could be adapted or complemented by additional benchmarks or factors.⁶

- The concepts of ‘average consumer’ and ‘vulnerable consumer’ are used to assess how individual consumers or groups of consumers might be affected by potential breaches of consumer laws. The CCPC notes that the UCPD Guidance recognises that the concept is based on the principle of proportionality. This means that an average consumer is ‘not somebody who needs only a low level of protection because they are always in a position to acquire available information and act wisely on it’. This means that contextual factors are important to consider when assessing the impact on a consumer of a commercial practice. The concept of vulnerable consumer is related to membership of an identifiable group of consumers that may have certain characteristics which is foreseeable by a trader. The CCPC further notes the findings of a European Commission study on consumer vulnerability published in 2016, and cited in the UCPD Guidance, which found that consumers that are more credulous are less likely to seek to assert their rights. That study proposed a new definition of vulnerability as follows:

“A consumer, who, as a result of socio-demographic characteristics, behavioural characteristics, personal situation, or market environment:

- *Is at higher risk of experiencing negative outcomes in the market;*
- *Has limited ability to maximise his/her well-being;*
- *Has difficulty in obtaining or assimilating information;*
- *Is less able to buy, choose or access suitable products; or*
- *Is more susceptible to certain marketing practices.”*

⁶ According to the case law of the EU Court of Justice, the average consumer is defined as reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors. Under current EU law, vulnerable consumers are those that are particularly vulnerable to unfair commercial practices, for example because of their mental or physical infirmity, age or credulity.

- The CCPC is of the view that any adaptation of the definitions of average consumer and/or vulnerable consumer should be done in keeping with a review of the expectations of professional diligence on traders to ensure overall coherence.

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