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SHAPING THE FUTURE OF EUROPEAN CONSUMER PROTECTION: TOWARDS A DIGITAL FAIRNESS ACT?

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Introduction

The Commission's Digital Fitness Check

On October 3, 2024, the European Commission presented its long-awaited final report of the Digital Fairness Fitness Check.[1] The report presents the results of a comprehensive evaluation of three Directives that form the core of EU consumer law: the Unfair Commercial Practices Directive (UCPD),[2] the Consumer Rights Directive (CRD),[3] and the Unfair Contract Terms Directive (UCTD).[4] The evaluation focused on the question of whether these Directives provide adequate protection for consumers in the digital environment.

The Commission's answer to this question is a clear "Yes, but…". It concludes that the three Directives have provided the necessary minimum of regulatory certainty and consumer trust, but that they can be considered only partially effective in the digital environment.[5] In particular, it identifies a variety of continuing concerns, such as transparency in advertising and pre-contractual information; problems associated with emerging technologies and practices for which there are no specific provisions in the Directives; regulatory fragmentation, that undermines the Digital Single Market; increasing regulatory complexity arising from wider digital-specific legislation which has a bearing on consumer protection issues; and also more general issues relating to insufficient compliance, ineffective enforcement, and legal uncertainty.

More specifically, the report highlights a reasonably long list of specific concerns, discussed further in an annex.[6] This list ranges from conduct that it considers insufficiently well addressed by existing legislation – such as harmful online choice architecture ("dark patterns") and unfair contract terms – to a set of emerging technologies for which there are limited or no specific provisions. The latter include addictive design and gaming; algorithmic personalisation; social media commerce and influencer marketing; contract cancellations and digital subscriptions; AI-enabled automated contracting; as well as a set of "other problems" (including dropshipping, AI chatbots, scalper bots, and ticket sales).

The Commission also identifies "five areas for improvement":

1. Addressing the most harmful problematic practices.
2. Reducing legal uncertainty, preventing regulatory fragmentation between Member States and promoting fair growth/competitiveness.
3. Consistent application of EU consumer law and other EU digital legislation.
4. More effective enforcement and compliance with EU consumer law.
5. Simplifying existing rules, without compromising a high level of consumer protection.

[1] European Commission, *Fitness Check of EU Consumer Law on Digital Fairness*, SWD(2024) 230 final (hereafter "Fitness Check Report").
[2] Directive 2005/29/EC
[3] Directive 2011/83/EU
[4] Directive 93/93/EEC
[5] Fitness Check Report, p. 36.
[6] Fitness Check Report, Annex VI, pp. 146-203.

The Fitness Check Report does not contain any specific recommendations as to how these improvements should be achieved.[7] However, in her mission letter to the new Commissioner for Justice, Michael McGrath, Commission President von der Leyen calls for the development of a "Digital Fairness Act" to address the issues identified. Complementing the Digital Services Act and the Digital Markets Act, a future Digital Fairness Act would be "the missing piece of the puzzle in the EU's digital rulebook".[8]

Our work

In May 2024, we published a CERRE report on Harmful Online Choice Architecture which was intended to feed into the Digital Fairness Fitness Check.[9] Many of the issues we raised have been reflected in the Fitness Check Report, and we broadly agree with the Commission's overall conclusions.

However, if these conclusions are to bear fruit as a new Digital Fairness Act, there is still much work to be done and many issues to be addressed. In this short issue paper, we do not endeavour to provide first policy recommendations, but rather focus on identifying some of the biggest overarching questions that will require further debate in the process of developing this new legislation and should be at the center of the upcoming policy debate. In our view, the Fitness Check Report marks the beginning of a broader debate on the future architecture of European consumer protection law. The overarching aim is to reconcile several policy objectives: ensuring a high level of consumer protection in the digital environment and facilitating effective enforcement, while promoting competitiveness and growth, which in turn requires avoiding over-regulation.

Our analysis follows the structure of the Fitness Check Report focusing on the "five areas for improvement", as listed above.

[7] We note that the supporting study was more forthright in providing recommendations, if at a high level. See European Commission, Study to support the fitness check of EU consumer law on digital fairness and report on the application of the Modernisation Directive: Final Report.
[8] Commission-designate Michael McGrath, Written answer to the questions from the European Parliament's Committee on Internal Market and Consumer Protection, October 2024, p. 4, https://hearings.elections.europa.eu/documents/mcgrath/mcgrath_writtenquestionsandanswers_en.pdf
[9] https://cerre.eu/publications/harmful-online-choice-architecture/

1. Addressing the most harmful problematic practices?

As discussed in the introduction, the Fitness Check Report includes the following list that the Commission refers to as "problematic" practices:

- dark patterns[10]
- unfair contract terms
- addictive design and gaming
- algorithmic personalisation (advertising, ranking, recommendations, pricing/offers)
- social media commerce and influencer marketing
- contract cancellations and digital subscriptions
- AI-enabled automated contracting
- "other problems" (including dropshipping, AI chatbots, scalper bots and ticket sales[11])

In our view, this list of practices that according to the Commission require regulatory action seems comprehensive (we assume that the use by consumers of AI-based assistants for purchasing decisions is included under "AI-enabled automated contracting"). However, the list is also long and some of the topics rather broad. Moreover, for some practices, a more nuanced assessment seems appropriate. For example, algorithmic personalisation also has a number of positive effects for consumers, for example by making more relevant content available. Similarly, the use of AI chatbots cannot be considered "problematic" as such. Therefore, in the further debate, it should be more clearly identified which aspects of the respective practices are actually "problematic".

In addition, we would suggest focusing on the primary list for now, while continuing to monitor developments in respect of the secondary list of "other problems" in the final bullet. For the primary list, there is substantial content and analysis within the Fitness Check Report, but the report stops short of specific regulatory proposals, which will now need to be developed.

Substantial research to elaborate possible solutions is already ongoing. For example, the European Law Institute is currently working on "Model Rules on Algorithmic Consumer Contracts".[12] The model rules, which will be published in early 2025, could serve as a source of inspiration for future EU consumer rules for AI assistants. There are also several proposals for how to regulate the subscription economy.[13]

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[10] In our previous CERRE report we recommended moving away from the use of the "dark patterns" terminology in favour of "harmful online choice architecture". However, the terminology has been retained in the Fitness Check Report. We therefore use it here, but continue to consider that more inclusive language should be used.

[11] This secondary set of issues is set out in the Fitness Check Report, Annex VI.2.

[12] See European Law Institute, *EU Consumer Law and Automated Decision-Making (ADM): Is EU Consumer Law Ready for ADM?*, Interim Report of the European Law Institute, December 2023.

[13] Prentiss Cox and Kaitlin Caruso, *Silence as Consumer Consent: Global Regulation of Negative Option Contracts,* 73 American University Law Review 1611 (2024); Christoph Busch and Christian Twigg-Flesner, *A Roadmap for Regulating Subscriptions in the Digital Fairness Act*, Journal of European Consumer and Market Law (forthcoming).

For some, there are also already specific regulations in place in other jurisdictions that could provide a template for EU legislation. For example, within the EU, France has recently introduced legislation relating to influencer marketing.[14] In addition, several member states including France,[15] Germany,[16] and Italy[17] have recently updated their rules on subscription contracts. In the latter area, the UK's new Digital Markets, Competition and Consumer Act 2024 (DMCCA) also introduces new rules for subscriptions.[18] On the other side of the Atlantic, the US Federal Trade Commission recently announced a new "click to cancel" rule, designed to make it as easy for consumers to cancel an enrolment as it was to sign up, as well as a new requirement that consumers must know what they are getting into before they sign up to a subscription, and that sellers have to be able to demonstrate this.[19] In addition, several US states have their own automatic renewal laws, such as the recently updated California state law which imposes additional requirements in relation to auto-renewing products.[20] The California law, which became operative on 1 July 2022, requires traders to send consumers a reminder before the end of a free trial period and before an automatic renewal of their subscription.[21] In addition, the law requires traders to provide a simple cancellation mechanism.[22]

In principle, CERRE could usefully do work to promote debate in one or more of the above problematic areas, albeit it may be sensible to focus on areas where others are not active. In our previous CERRE study on harmful online choice architecture, we outlined "ten principles for effective policy" when developing legislation in this area. We continue to believe that these principles could usefully be applied when considering legislation for harmful online choice architecture ("dark patterns"), and some may have wider application too.

In theory, any new legislation should be evidence-based. Regulations risk creating both false positives (capturing conduct that is not harmful, also known as "Type I errors"), and false negatives (failing to capture conduct that is harmful, also known as "Type II errors"). Both types of errors are costly, and a strong evidence base can help policy makers to ensure that legislation strikes an appropriate balance.

We note, however, that there may be a limit to the evidence base that can realistically be developed in this area, given the novel nature of many of the practices. Given the ongoing potential for harm, including irreversible harm, we would not suggest that the Commission delay acting. However, in designing legislation, it does need to allow for the greater risk of error inherent in legislating in the absence of a strong evidence base. We note that in relation to environmental policy, under Article 191

[14] See French Law no. 2023-451 of June 9, 2023 on influencer marketing.
[15] Loi n° 2022-1158 du 16 août 2022 portant mesures d'urgence pour la protection du pouvoir d'achat, Art. 17, 18 (introducing a cancellation button); see Grégoire Loiseau, *La résiliation des contrats par voie électronique*, Communication Commerce Electronique, No. 12, December 2022, p. 28; see also Thibault Douville, *La résiliation par voie électronique*, Receuil Dalloz, No. 32, 22 September 2022, p. 1602.
[16] Gesetz für faire Verbraucherverträge, 10 August 2021, Bundesgesetzblatt 2021 I 3433 (regulating automatic renewals of subscriptions and introducing a cancellation button); see Hannes Wais, *Das Gesetz für faire Verbraucherverträge – Weitere Reaktionen auf die Digitalisierung*, Neue Juristische Wochenschrift 2021, 2833; Philipp Sümmermann and Konstantin Ewald, *Das Gesetz für faire Verbraucherverträge: Die neuen Regelungen für Abo-Verträge in der Praxis*, MMR-Beilage 2022, 713.
[17] Art. 65-bis Codice del consumo, Law n. 214/2023 (requiring traders to send a reminder 30 days before the automatic renewal of a service contract).
[18] DMCCA, section 253 et seq.; see Busch and Twigg-Flesner (n. 13) for an overview of the DMCCA rules on subscriptions.
[19] *Federal Trade Commission Announces Final "Click-to-Cancel" Rule Making It Easier for Consumers to End Recurring Subscriptions and Memberships*. (FTC, 16 October 2024), https://www.ftc.gov/news-events/news/press-releases/2024/10/federal-trade-commission-announces-final-click-cancel-rule-making-it-easier-consumers-end-recurrin.
[20] California AB-390 Advertising: automatic renewal and continuous service offers: notice and online termination, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB390
[21] California Bus. & Prof. Code 17602(b).
[22] California Bus. & Prof. Code 17602(d)(1).

TFEU, the Commission applies a “precautionary principle” where there are evidence gaps. Something similar could be applied here.

More generally, we consider that it will be critical to continue monitoring and assessing the impact of the legislation over time and remaining open to further changes where necessary if it proves to be either disproportionate (creating “false positives” or Type I errors) or unduly weak (creating “false negatives” or Type II errors). We note that there are formal requirements on the Commission to evaluate the impact of both the new Digital Services Act (DSA) (see Art. 91 DSA) and the new Digital Markets Act (DMA) (see Art. 53 DMA), reflecting the novel nature of these regulations.

2. Reducing legal uncertainty, preventing regulatory fragmentation, and promoting fair growth

There are a number of ways in which legal certainty could be enhanced, regulatory fragmentation across Member States reduced, and which would promote fair growth/competitiveness.

Addressing the problematic practices, as described in the previous section, will help, as this will supersede the national laws that have emerged to address these practices. But there is more that could be done.

Addressing regulatory fragmentation

As is highlighted in the Fitness Check Report, under the current system, there are substantial problems arising from regulatory fragmentation across Member States.[23] This is partly a result of the Commission's use of Directives instead of Regulations. When implementing the Directives, each Member State enacts its own version of the rules. This has the benefit of enabling a smooth implementation of EU law into the existing national contract laws or consumer codes.[24] However, the result can be that the law is combined with other legislation, that it need not even be enacted in one piece but rather split across a variety of pieces of domestic legislation, and that the meaning can vary subtly across languages. The fact that UCPD and CRD are maximum harmonisation directives is helpful but is not a complete solution.

Commission-level guidelines such as the Guidance on the UCPD[25] and the CRD[26] can facilitate uniform interpretation and application, but these are not binding and therefore do not create full legal certainty.[27] According to a stakeholder survey carried out for the Fitness Check "100% of traders and business associations claimed to face moderate to great costs due to a lack of familiarity with national legislation and implementation".[28] Coherent enforcement across this growing number of scattered pieces of domestic legislation can also be difficult.

These issues raise the question of the appropriate form for a future Digital Fairness Act. This is currently still an open question and a number of options are possible.

- A minimalist solution would be a new version of the Modernisation Directive (EU) 2019/2161 which makes a few targeted amendments to the existing Directives.
- An alternative would be to create a new digital-specific Regulation, to sit alongside the existing Directives, similar to the DMA and DSA. This would contain rules that applied immediately EU-wide, without requiring further Member State enactment. It could also include some targeted

[23] Fitness Check Report, p. 71.
[24] European Commission, Proposal for a directive on consumer rights. COM (2008) 614 final, p. 8.
[25] 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, OJ C 526, 29.12.2021, p. 1–129.
[26] Commission Notice, Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights, OJ C 525, 29.12.2021, p. 1–85.
[27] Fitness Check Report, p. 88.
[28] Fitness Check Report, p. 71.

amendments to the existing Directives. This would have the advantage of providing for greater cross-EU clarity and consistency for the new rules. However, a possible downside is that it would further increase regulatory complexity. Digital firms seeking to comply with EU consumer law would need to be aware of both the existing EU consumer law, as embedded in Member State legislation, and the new rules within the Regulation. It may also be difficult to assess what is "digital" and what is not. For example, when a waiter in a restaurant hands a customer a card machine to input a tip, the interface is digital, but is this a digital or a physical transaction?

- A bolder approach would be to change the existing Directives into Regulations (as well as amending them). As the European Commission has itself stated: "replacing directives with regulations can, when legally possible and politically acceptable, offer simplification as they enable immediate application and can be directly invoked before courts by interested parties".[29] In our view, the more that consumer law can be transformed into EU-wide regulation(s), the less fragmentation there will be, and this will in turn facilitate both compliance and enforcement, as well as better enabling businesses and consumers alike to participate confidently in the single EU digital market. However, it is clear that such an ambitious approach requires a deeper debate about the pros and cons of comprehensive harmonisation of consumer law by means of Regulations.
- A more ambitious approach still would be to combine the existing regulations into a single new horizontal Regulation. The creation of such omnibus legislation has been suggested before.[30] In fact, it was already a matter of debate in the months and years following the publication of the Green Paper on the Review of the Consumer Acquis in 2006.[31] We believe that the increased prevalence of EU-wide issues, combined with the blurring of issues across the existing Directives, enhances the rationale for such an approach. However, we also recognise that there would be risks associated with revising existing consumer law in such a wholesale way, as well as significant political resistance to such a change.

Overall, we would propose that the Commission gives serious consideration to taking a bold approach in terms of the form of the new Digital Fairness Act, and move toward the use of Regulations, in place of Directives, to the greatest extent feasible.

Addressing legal certainty

Second, we would propose that any Digital Fairness Act includes the clarification/redefinition of some key concepts, which would then apply across relevant consumer law. This should aid legal certainty.

- First, the concept of "average consumer" should be clarified/redefined to reflect the digital asymmetry and cognitive limitations faced by the genuinely "average" consumer. In its *Compass Banca* judgment of 14 November 2024, the European Court of Justice provided some clarity on the appropriate legal interpretation of the current law. More specifically, the Court underlined that the concept of the "average consumer" within the meaning of the UCPD does not exclude "the possibility that an individual's decision-making capacity may be impaired by

[29] European Commission, A Europe of results - Applying community law. COM (2007) 502 final, n. 12.
[30] See e.g. Christian Twigg-Flesner, Time to Do the Job Properly—The Case for a New Approach to EU Consumer Legislation, Journal of Consumer Policy 2010, 355 (arguing for an EU consumer law regulation applicable to cross-border transactions).
[31] European Commission, Green Paper on the Review of the Consumer Acquis, COM(2006) 744 final.

constraints, such as cognitive biases".[32] In doing so, the Court affirmed that the concept of the "reasonably well-informed and reasonably observant and circumspect" consumer is flexible enough to consider insights of behavioral research. This conclusion should be codified by a new legal definition.

- Second, it would also be useful to confirm that any assessment of "plain, intelligible language" under the UCTD should reflect the cognitive limitations of the average consumer.
- Third, the concept of "vulnerable consumer" could be redefined to include temporary vulnerability, due to contextual or psychological factors. It could usefully also specifically reference minors, as there are a wide selection of issues relating to minors highlighted in the Fitness Check Report.
- Fourth, the concept of "professional diligence" could usefully be fleshed out, to ensure its consistent application, and potentially strengthened. Particular issues that it would be useful to debate further include:
    - To what extent are traders who sell through digital interfaces required to engage in upfront "best efforts" to ensure that these interfaces are "fair by design"?
    - To what extent are platforms required to make "best efforts" to verify that traders using their platform are complying with consumer law? (Note that this goes beyond Art. 31 DSA, but Art. 34/35 DSA arguably already require more than this for Very Large Online Platforms (VLOPs)).
    - To what extent, where firms utilise influencers, are they required to make "best efforts" to verify that those influencers comply with consumer law when marketing their product?
    - To what extent, where firms use external providers (such as Shopify) to provide their sales interface, do the latter also take on a professional diligence responsibility.
- Fifth, it could usefully be confirmed in legislation that choice architecture which unfairly steers consumers, without necessarily misleading them, can constitute an "aggressive practice" under UCPD (this is already stated in UCPD Guidance but is non-binding).

Finally, we believe that reduced regulatory fragmentation and greater legal certainty will play an important role in enhancing growth.

[32] European Court of Justice, Judgment of 14 November 2024, ECLI:EU:C:2024:957, Case C-646/22, Compass Banca, para. 59.

3. Consistent application of EU consumer law and other EU digital legislation

The Fitness Check Report emphasises that the complexity of the regulatory landscape has increased significantly since the last Fitness Check in 2017.[33] This applies both to the EU level and to the law of the Member States. At the EU level, complexity has increased due to the latest digital legislation, including the DSA, DMA, the Data Act, and the AI Act. The Fitness Check refers to this as part of an overarching issue of "external coherence".[34] While these various laws state that they are "without prejudice to" existing consumer law,[35] and typically only apply to specific categories of firms, they nonetheless introduce new obligations which could have a bearing on consumer protection.

Our previous CERRE report discussed the issue of regulatory complexity across the different regulations in relation to the treatment of harmful online choice architecture. The different legal instruments impose different requirements and utilise different definitions. Some firms will be subject to a range of these rules, and thus face the risk of regulatory overlap. Some will be subject only to consumer law, which in turn creates a risk of regulatory gaps.

One particular area of concern relates to the cancellation of subscription contracts, where Art. 25(3)(c) DSA introduces a new requirement for platforms only, which partly overlaps with Art. 3 UCTD,[36] Art. 11a CRD, and Arts. 6, 7 and 8 UCPD.[37] Concerns have also been raised about the fact that e-commerce sales through platforms are now more heavily regulated (under the DSA) than retail sales through firm's own sites.

There are also grey areas. For example, a particular concern arises in respect of Art. 25 DSA which is disapplied if UCPD applies,[38] but since the boundaries of UCPD are not entirely clear, this in turn creates a lack of clarity in respect of the application of Art. 25 DSA. Likewise, the use of AI-enabled marketing (including using emotion-recognition) is arguably captured under Art. 5(1)(a) AI Act if consumers are impaired in their ability to make informed decisions by purposeful manipulation or deception, but otherwise left to the general rules of consumer law.

The Fitness Check Report highlights regulatory complexity as a particular area for concern.[39] It concludes that "such regulatory complexity increases the risk of authorities and courts arriving at diverging interpretations concerning the same or similar types of practices".[40]

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[33] Fitness Check Report, p. 87.
[34] Fitness Check Report, p. 55.
[35] See e.g. Art. 2(4)(f) DSA.
[36] See e.g. German Federal Supreme Court, Judgment of 14 July 2016, Case III ZR 387/15.
[37] UCPD Guidance 2021, p. 101; see also Busch & Fletcher (n. 19) p. 18.
[38] See Art. 25(2) DSA.
[39] Fitness Check Report, pp. 58-59.
[40] Fitness Check Report, p. 59.

To help address these concerns, we propose that the following are considered for inclusion within the Digital Fairness Act:

- Firstly, it could seek to harmonise definitions of concepts across legal instruments. The most notable example of this is "dark patterns". This would include using one or two terms in place of the following: "coerce", "deceive", "undermine", "manipulate", "subvert", "impair" and "distort". We would also propose adopting the more inclusive language of "harmful choice architecture".
- Second, it could seek to harmonise requirements across legal instruments, to the extent that this can be done without imposing requirements that are disproportionate. Subscription contracts would be an obvious area for focus.
- Third, and consistent with the previous two, we note that the concepts of "average consumer" and "professional diligence" have their roots in consumer law but that they could have potential relevance to wider digital regulation. In fact, Art. 6(3) DSA explicitly refers to the concept of "average consumer". Moreover, the standard of "best efforts" which is used several times in the DSA[41] could be understood as a reference to the concept of "professional diligence". Against this background, these concepts could be employed consistently across EU consumer law and EU digital law.

[41] See e.g. Art. 30(2), Art. 31(3) DSA.

4. More effective enforcement and compliance with EU consumer law

In introducing new consumer protection rules for digital markets, it is also important to consider the enforceability of these rules. Many fair-dealing businesses will seek to comply with all relevant consumer protection legislation, irrespective of whether they would otherwise face enforcement action. However, it is critical that such businesses do not face unfair competition from less scrupulous businesses who continuously flout the rules. As such, rules should only be introduced if they can realistically be enforced.

The Fitness Check Report identifies a clear need for enhanced enforcement in the digital environment. This is also being considered in relation to the reive of the EU Consumer Protection Cooperation (CPC) Regulation.[42] In our view, it is especially important in digital markets that EU-wide enforcement is enabled, so far as is possible, given the EU-wide nature of many of the sites and conduct involved, and the budget pressures faced within many Member States. We note that there is a link here to the above discussion on the use of Regulations in place of Directive, since the European Commission is only able to enforce Regulations on an EU-wide level. Enforcement of Directives can only be done at Member State level.

To this end, we make the following suggestions for further discussion:

- First, when discussing rules to address problematic practices (see section 1 above), it will be important to also consider their likely enforceability.
- Second, while there are clearly improvements that could be made to the CPC arrangements for multi-lateral enforcement, we consider that consideration should be given to the introduction of centralised EU enforcement in relation to EU-wide conduct, wherever possible, working in parallel to Member State level enforcement. This could work in a similar way to the existing competition law regime. Making the Digital Fairness Act a Regulation would clearly be helpful in this regard.
- Third, we note that the enforcement situation is complicated by the landscape described above, whereby general consumer law sits alongside specific digital law (such as the DSA and DMA), given that these different instruments have different enforcement pathways. While the CPC Network brings together consumer protection authorities,[43] we see a need for greater engagement and collaboration between the CPC Network and other relevant regulators, including national Digital Services Coordinators[44] and also the part of the European Commission which is enforcing the DSA and DMA.
- Fourth, we consider that serious consideration should be given to ways of enhancing the "automatability" of checking adherence to the law. This is likely to become increasingly important in the future when it comes to selecting the optimal regulatory design, both for

[42] Regulation (EU) 2017/2394.

[43] See Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ L 345, 27.12.2017, p. 1–26.

[44] The Digital Services Coordinators are responsible for national level enforcement of the DSA. They are typically the communications regulator or competition authority in each Member State.

compliance (RegTech) and enforcement (EnfTech[45]). This should be a key design principle in developing further law in this area. However, such "automatability" is by no means straightforward, and would need to be used with care given the risk of both false positives and false negatives, but it nonetheless has the potential to substantially aid wide-scale enforcement and compliance.

- Fifth, it should be further discussed to what extent enforcement can be facilitated by reversing the burden of proof. The Fitness Check Report highlights that one way of doing this would be to require businesses to keep records to explain and evidence their practices. The lack of such records then creates a rebuttable presumption of infringement. However, while beneficial for enforcement, such a reversal carries a serious risk of imposing disproportionate burdens on business, and over-intervention. As such, we would propose that discussions about any such burden-reversal should be restricted to the complex issues arising in relation to "AI black box" issues, such as personalisation or automated contracting, where enforcement may otherwise be very difficult. Moreover, In considering the merits of any such burden-reversal, it will be important to assess the extent to which these issues are (likely to be) addressed by other EU legislation, such as the AI Act,[46] the AI provisions within the newly revised Product Liability Directive,[47] or the potential AI Liability Directive.[48]
- Sixth, for personalised services, we note that enforcement would also be aided by a requirement that firms must be able to provide to an authority or Court – on request – the information that was served to any given consumer at any given time. On the other hand, this may impose a substantial data collection burden on firms that could inhibit positive innovation. This is an area that would merit futher discussion.
- Seventh, similar issues arise in relation to the potential to require firms to retain records on any A-B testing (or equivalent) that they carry out, so that they can provide these to relevant public authorities on request. On the one hand, this would be valuable for enforcement. On the other, it could be unduly burdensome and might even discourage positive A/B testing. Again, this issue would merit further debate.
- Eighth, given that there is some wording that might suggest otherwise, we consider that it could usefully be clarified that there is no need under any of the relevant legislation to show (i) intention or that the firm benefited from its conduct or (ii) actual harm to consumers – likely harm is enough.
- Ninth, consideration could usefully be given to requirements under which data collected from firms by authorities can be shared with vetted researchers for research which contributes to the detection and understanding of consumer protection risks in the Union. This would be similar to Art. 40(4) DSA, which is applicable only to VLOPs and VLOSEs.

[45] See Christine Riefa and Liz Coll, The transformative potential of Enforcement Technology (EnfTech) in Consumer Law, January 2024; see also Christine Riefa, Transforming consumer law enforcement with technology: from reactive to proactive?, Journal of European Consumer and Market Law 2023, 97.
[46] Regulation (EU) 2024/1689.
[47] P9_TA(2024)0132, Liability for defective products European Parliament legislative resolution of 12 March 2024 on the proposal for a directive of the European Parliament and of the Council on liability for defective products (COM(2022)0495 – C9-0322/2022 –
[48] European Commission (2024) *Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive) - Updated version in light of changes in the AI Act*.

Finally, as mentioned above, we consider that making the Digital Fairness Act a Regulation, not a Directive, would also aid effective enforcement and compliance.

5. Simplifying existing rules, without compromising a high level of consumer protection

The Fitness Check Report confirms the technology-neutral nature of horizontal EU consumer law. This is valuable, especially given that there is sometimes a very blurred line between digital and physical services, and we would thus not propose changing that.[49]

However, consumer law – and especially UCPD – contains a combination of principle-based rules and more prescriptive rules. This combination seeks to gain the benefits of both types of regulation.

Principles-based regulation has the major benefit that it is sufficiently flexible to cover new practices in new markets, as they arise. The downside of such regulation is that it does not provide substantial legal certainty about what is, and what is not, allowed. Firms therefore find it difficult, and potentially costly, to comply with. Moreover, as highlighted by the Fitness Check Report "the effectiveness of the three Directives is diminished by insufficient legal certainty about the application of the existing general principle-based rules to complex online practices".[50]

More detailed rules thus have an important role to play, and in partifular the compliance costs for firms will tend to be much lower. But such rules are hard to design. If drawn too widely, they risk restricting positive pro-consumer behaviour. But if drawn too narrowly, they can be more easily game-able by firms, and can quickly become out of date.[51]

Overall, we feel that the combination of overarching principles and prescriptive rules within consumer law has worked fairly well in the digital environment. We would therefore not propose the abandonment of this combination of principles-based and rules-based regulation. However, we think it would be useful to debate whether the prescriptive elements could be developed further.

- First, consideration should be given to adding new conduct to the list of prohibited practices in Annex 1 of the UCPD. As discussed above, it is unlikely that the Commission will have an ideal evidence base on which to do this, so it is important that the rules are framed in a way that recognises that, to the extent possible, and the Commission should continue to evaluate the rules to assess whether changes are merited over time.
- Second, we support consideration of the proposal floated within the Fitness Check Report to extend this architecture to UCTD, by introducing additional prohibited contract terms.[52]
- Third, for all prohibited practices in Annex 1 of the UCPD, we would propose consideration of a new "anti-circumvention rule" modelled on Art. 13(4) DMA, designed to prevent firms from gaming the rules through their interface design.
- Fourth, one reason for supporting the greater use of clear prohibitions is that they are typically likely to be more suitable than principle-based rules for the use of automated enforcement

[49] Fitness Check Report, p. 86.
[50] Fitness Check Report, p. 87.
[51] See Louis Kaplow, A Model of the Optimal Complexity of Legal Rules, 11 Journal of Law, Economics & Organization, 150 (1995).
[52] Fitness Check Report, p. 79.

and compliance tools.[53] However, this may also require additional prescriptive rules related specifically to automatability. For example, could there be a requirement that disclosures be publicly available in an easily accessible and machine-readable format?[54] The potential for, and implicaitons of, automated enforcement merit further debate.

- Fifth, we note that, with greater automation of enforcement and compliance, the precision of rules may be more critical than their simplicity. Nonetheless, we would propose that consideration be given to simplifying the CRD's mandatory disclosure requirements, which are currently extremely complex.
- Sixth, we consider that some areas of consumer protection could usefully take a more design-based approach.[55] This reflects the idea that, to effectively protect consumers in the digital environment, it is not sufficient to enshrine consumer rights in legislation and to inform consumers about their rights. Rather, the exercise of consumer rights must be facilitated by designing the user interfaces in such a way that consumers can easily exercise their rights. A simple example would be prescriptive requirements around the design and use of cancellation buttons.[56] Further debate of such design-based requirements would be valuable.

Finally, we also consider that making the Digital Fairness Act a Regulation not a Directive, as discussed above, would aid simplification without compromising a high level of consumer protection.

[53] Fitness Check Report, p. 87.
[54] We note that Art. 14(1) DSA already imposes a similar provision on platforms in relation to their terms and conditions.
[55] See e.g. Anne-Lise Sibony and Alexandre de Streel, Towards Smarter Consumer Protection Rules for the Digital Society, CERRE Report, October 2017.
[56] Building on Art. 11a CRD.

A final word

We consider that there is a strong case for creating a new Digital Fairness Act. However, it is critical that this does not substantially increase the regulatory complexity, and indeed regulatory burden, on firms active in marketing and selling their products digitally. It is important that EU consumers can purchase confidently and widely across the EU internal market, but it is also critical that fair-dealing firms can thrive in the EU. In identifying the above issues as meriting further debate, we have had this requirement very much in mind.

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