SVRV
SACHVERSTÄNDIGENRAT FÜR VERBRAUCHERFRAGEN

POLICY BRIEF

Perspectives for a Digital Fairness Act

Position Paper of the Advisory Council for Consumer Affairs (SVRV)

Summary

- The SVRV shares the European Commission's assessment that a reform of European consumer law is necessary. However, it is important to strike the right balance between competitiveness, consumer protection and fair competition.

- The Digital Fairness Act should not merely add a new layer of individual rules to existing EU consumer law. Rather, it should be aimed at closing specifically identified gaps in protection (particularly in the fields of influencer marketing, price personalisation and subscription models) and simplifying the existing rules (including in the fields of dark patterns and information obligations). The guiding principle here should be consumer protection by design. Furthermore, the protection of minors should be strengthened.

- Apart from amendments to substantive law, there is also a need for existing law to be more effectively enforced. But enforcement can only be as good as the rules to be enforced. When substantive law lacks legal clarity, the law can no longer be effectively enforced. In such cases, the best way to improve enforcement is to make the substantive legal provisions more precise.

- This position paper by the SVRV formulates a series of key points and recommendations for further legal policy discussions on the reform of European consumer law. It focuses on the following topics: (1) consumer protection and competitiveness, (2) price personalisation, (3) systemic emotion regulation, (4) dark patterns versus bright patterns, (5) influencer marketing, (6) subscription models, and (7) strengthening enforcement of the law.

- The SVRV also emphasises that strong and effective consumer research is needed in order to further develop consumer protection in the digital world, especially given the highly dynamic nature and economic significance of this field. Without such research, there is a risk of evidence asymmetry. It would then be virtually impossible to have a nuanced and informed political discourse that takes consumer interests into account and that can play a fundamental role in ensuring the fair design of the digital world.

1 Consumer protection and competitiveness

In December 2024, the European Commission announced a reform of European consumer law with the aim of strengthening consumer protection in digital markets. In her Mission Letter of 17 September 2024 to the EU Commissioner responsible for justice and consumer protection Michael McGrath, EU Commission President Ursula von der Leyen announced the development of a Digital Fairness Act designed to 'tackle unethical techniques and commercial practices related to dark patterns, marketing by social media influencers, the addictive design of digital products and online profiling, especially when consumer vulnerabilities are exploited for commercial purposes.'[1]

The planned revision of EU consumer law is based on a comprehensive evaluation of key pieces of European consumer legislation that was carried out within the scope of the Digital Fairness Fitness Check (DFFC). The focus here was on whether the Unfair Commercial Practices Directive (UCPD), the Consumer Rights Directive and the Unfair Contract Terms Directive provide adequate protection for consumers in the digital single market. In its final report[2] on the DFFC published on 3 October 2024, the European Commission identified a number of gaps in protection and saw the need for a reform of consumer law. The topics addressed in the DFFC report include dark patterns, influencer marketing, personalised advertising, consumer protection issues and subscription models. The Commission also saw deficits in how the law is enforced and how the rules of consumer legislation interact with recently adopted digital legislation such as the Digital Services Act (DSA), the Digital Markets Act (DMA) and the AI Regulation.

It can currently be assumed that the European Commission will put forward a legislative proposal in the second half of 2026. What a future Digital Fairness Act will look like in terms of form and substance is still largely open at present. This position paper does not therefore contain any comments on specific proposals. Rather, it formulates a number of key points and guidelines which the SVRV believes should be taken into account in the ongoing legal policy discussion on reforming European consumer law in the digital world.

The SVRV shares the European Commission's assessment that a reform of European consumer law is necessary. However, it is important to strike the right balance between competitiveness, consumer protection and fair competition. The Digital Fairness Act should not therefore simply add a new layer of individual rules to existing EU consumer law. Rather, it should be aimed at closing specifically identified gaps in protection (particularly in the fields of influencer marketing, price personalisation and subscription models) and simplifying the existing rules (including in the fields of dark patterns and information obligations). Furthermore, the Digital Fairness Act should serve to strengthen the protection afforded to minors.

The frequently raised criticism that the DSA and the UCPD are already sufficient to ensure consumer protection in digital markets is not convincing. The DSA only covers online intermediaries – platforms and online marketplaces in particular – but not traditional online retailers and direct-to-consumer business models. The extent to which new business models of AI commerce are covered by the DSA is still unclear. Moreover, a number of problem areas (such as in-app currencies, online games and influencer marketing) are not addressed by the DSA at all. The UCPD with its broad scope of application might possibly cover a wide range of problematic situations. However, the general-clause-like provisions do not offer sufficient legal certainty for consumers and companies. Here, the Digital Fairness Act can and should remedy the situation by introducing specific and targeted provisions, for example by supplementing the so-called 'black list' in Annex I of the UCPD.

---

1 *Mission Letter to Commissioner-Designate Michael McGrath*, 17 September 2024, p. 7.

2 European Commission, *Commission Staff Working Document Fitness Check on EU Consumer Law on Digital Fairness*, 3 October 2024, SWD(2024) 230 final (hereinafter: *Fitness Check Report*).

Another frequently raised criticism is that the strengthening of enforcement would be sufficient and that it is therefore unnecessary to amend substantive law. But this criticism likewise falls short. Enforcement can only be as good as the rules to be enforced. When substantive law lacks legal clarity (such as on the question of which cases are covered by the prohibition of dark patterns in Article 25 DSA),[3] the law can no longer be effectively enforced. In such cases, the best way to improve enforcement is to make the substantive legal provisions more precise. This increases legal certainty for all market players and thus creates a secure framework for investing in innovative business models. And this in turn strengthens the competitiveness of German and European companies.

At the same time, consideration should be given to the areas in which the Digital Fairness Act could help simplify the regulatory framework without lowering existing levels of consumer protection. There is potential for reducing the burden on companies – such as in the area of pre-contractual information obligations, which have been continuously expanded in recent years.[4] Companies and consumers alike benefit from greater consistency and legal clarity in the area of consumer law.

Last but not least, the SVRV points out that effective consumer protection can have a positive impact on the competitiveness of companies for at least three reasons:

1. One of the goals of consumer protection is to empower consumers to make informed and autonomous decisions. From the perspective of competition theory, this goal is of central importance because only when consumers are capable of reaching autonomous and informed decisions can they fulfil their role as choice-makers, which is essential in order for competition to work properly.[5] In this way, consumer protection helps ensure that companies operate on a level playing field. If we assume that effective competition is of fundamental importance for a company's competitiveness, the positive correlation between consumer protection and competitiveness is evident.

2. Modern economic research shows that companies with a strong customer focus, high customer satisfaction and high customer loyalty are more successful in business terms than companies where this is not the case.[6] Whenever consumer protection helps companies to become more customer-oriented and whenever it corrects negative developments, it directly contributes towards improving the competitiveness of those companies. One example of consumer protection's corrective role is in the regulation of dark patterns – an area scrutinised by the DFFC.[7] Here, consumer protection is ensuring that developments which are negative from the customer standpoint are corrected before large numbers of companies make bad investments in problematic technologies – bad investments that would otherwise only be corrected by the market at some later stage.

3. Lastly, when companies fail to take consumer interests into account, this often results in legal costs. One prominent example here is the diesel scandal, which has already begun to fade from public memory.[8] If we accept that a company's competitiveness is dependent on its cost situation and cost management, then the company's competitiveness could be improved by reducing the compliance

---

[3] See recent judgment issued by Bamberg Higher Regional Court on 5 February 2025 – 3 UKl 11/24 e, GRUR-RR 2025, 238.

[4] See SVRV, *The Evolution of Information Obligations: Information Provision as a Consumer Protection Instrument*, 22 December 2023.

[5] See Kenning/Ahlert/Olbrich/Grewe/Schröder, *Vielfalt durch Gestaltungsfreiheit im Wettbewerb. Ein ökonomisches Manifest zur Deregulierung der Konsumgüterdistribution*, 1st ed., 2012, p. 44. In this context, the authors refer to 'preference autonomy' (p. 40).

[6] Reinartz/Krafft/Hoyer, *The Customer Relationship Management Process: Its Measurement and Impact on Performance*, Journal of Marketing Research 2004, 293.

[7] Witte/Kenning/Brock, *Consequences of User Manipulation Through Dark Patterns*, in: *Rising like a Phoenix: Emerging from the Pandemic and Reshaping Human Endeavors with Digital Technologies*, ICIS 2023 Proceedings, 2023.

[8] See Schiermeier, *The Science Behind the Volkswagen Emissions Scandal*, Nature 2015. The German Insurance Association states that 'the total value of all the claims handled by legal expenses insurers in the diesel affair [...] now amounts to 10.8 billion euros' (German Insurance Association, *Abschlusszahlen zum Diesel-Skandal: Streitwert bei 10,8 Milliarden Euro*, 19 December 2023, available at: https://www.gdv.de/gdv/medien/medieninformationen/abschlusszahlen-zum-diesel-skandal-streitwert-bei-10-8-milliarden-euro-162788 [last accessed: 10 July 2025]).

costs incurred in legally safeguarding the strategies and measures that are problematic from a consumer protection perspective – for example by allowing the corresponding funds to be used (more effectively) for research and development purposes.

Overall, it is clear that the sustained success which helps to make a company competitive is due in some part to effective consumer protection. In other words, well-designed consumer protection does not necessarily have to reduce a company's competitiveness. Under certain circumstances, it can actually improve it.

2 Price personalisation in the digital context

One area in which the European Commission sees a need for EU consumer law reform concerns the increasing personalisation of advertising and sales practices.[9] This particularly applies to the new possibilities for price personalisation in the digital context.[10]

As mentioned earlier, the DSA only covers online intermediaries – platforms and online marketplaces in particular – but not traditional online retailers and direct-to-consumer business models. But it is precisely these business models that – in order to improve the effectiveness and efficiency of their operations – regularly use customer data that is now increasingly available thanks to the advance of digitalisation. One of the main strategies here is the personalisation of marketing tools.[11] Digital price personalisation – which falls within this area – is relevant from a consumer policy and scientific perspective for several reasons.

Firstly, from a neoclassical economic perspective, price personalisation enables **first-degree price differentiation**.[12] This means that customers pay exactly the price they are willing to pay. The underlying principle of price differentiation[13] is based on the assumption that customers have different levels of willingness to pay for a product or service. If providers in this situation were to charge all customers the same undifferentiated price, they would not exploit the willingness of those customers to pay. But if a provider differentiates their prices, some customers who previously paid a price (p^*) below their willingness to pay would now pay a higher price $(p1)$ in accordance with their higher willingness to pay. This would tap into the so-called 'consumer surplus' of these customers. These customers are therefore disadvantaged by price personalisation, as they are now paying a higher price $(p1 > p^*)$. At the same time, there would also be customers who have a positive willingness to pay but who had not enjoyed any advantage under the undifferentiated pricing policy. This group now benefits from price personalisation, as these customers now pay a lower price $(p2 < p^*)$. Here too, the provider can extract the consumer surplus that had previously been lost as this price is still above its marginal cost (K'). In summary, from a neoclassical economic perspective, the first-degree price differentiation enabled by price personalisation allows providers to fully extract the consumer surplus and increase their profit. From the provider's point of view, it is therefore fundamentally advantageous.

By contrast, the effects on consumers are not so clear-cut. While personalisation means that some consumers gain access to services they would otherwise be unable to afford, other customers may have to pay a

---

[9] *Fitness Check Report*, p. 162 ff.

[10] *Fitness Check Report*, p. 169.

[11] See Bleier/Eisenbeiss, *Personalized Online Advertising Effectiveness: The Interplay of What, When, and Where*, Marketing Science 2015, 669; Kenning, *Personalisierte Werbung*, in: SVRV (ed.) *Personalisierte Verbraucherinformation: Ein Werkstattbericht; Dokumentation einer Veranstaltung des SVRV*, 2022, p. 13.

[12] See Kenning/Pohst, *Dynamic Pricing*, WISU – Das Wirtschaftsstudium 2016, 1125; Genth/Schleusener/Kenning/Prohst/Remmel/Weber/Gier/Schmidt-Kessel, *Dynamische Preissetzung — Wer profitiert?*, Wirtschaftsdienst 2016, 863.

[13] There are many examples of price differentiation in everyday consumer life: differentiated prices based on timing (e.g. for cinema tickets or package holidays), differentiated prices for different seats on flights, quantity discounts in retail, special fares for schoolchildren and senior citizens in the transport sector.

higher price in accordance with their willingness to pay. In other words, price personalisation has **redistributive effects** and trade-offs that could be of relevance to consumer policy.

However, the neoclassical perspective is insufficient to fully grasp the consumer policy issues surrounding price personalisation. Ultimately, psychological aspects have an important role to play in the context of consumer behaviour.[14] This is particularly true in the area of pricing policy.[15] With price personalisation in the digital world, it is important to note that many customers are unlikely to be capable of evaluating how advantageous a particular price is. One reason for this is that, regardless of sector, many people lack the necessary **implicit and explicit price knowledge**.[16] These customers, who are often not even aware of this,[17] can benefit in an analogue world without personalised prices from the fact that it is sufficient for providers to exercise a certain price discipline if only a few customers have price knowledge. Thus, for individual customers in the analogue world, it is often ecologically rational[18] not to remember prices, even when favourable prices are important to them. These customers are protected by the few customers who know the prices and whose departure would be sufficient to cause the provider to make a loss.

But with price personalisation in the digital world, customers with no price knowledge lose the often unconscious protection afforded by these 'born market watchdogs'[19]. This is because price personalisation allows providers to retain highly price-conscious customers by offering them attractive prices. Meanwhile, with customers who for whatever reason (age, time pressure etc.) are 'unaware' or 'oblivious', providers can demand and – under certain circumstances – successfully implement higher prices.[20] Here too, price personalisation is likely to have a redistributive effect. However, since the group of people with strong price knowledge is relatively small at around 20%,[21] the overall effect on consumers is likely to be negative. In addition, it can be significant for consumer policy if price-knowledge-oriented profit optimisation[22] is based – consciously or unconsciously – on discrimination (e.g. on the basis of age).[23]

A third important aspect in this context is linked to the concept of **indirect pricing policy**. This refers to price elements that do not directly affect the offered price. More specifically, this includes elements such as discounts and bonuses granted on the basis of coupons or points (e.g. the Payback system in Germany). Here too, as digitalisation continues to advance, retailers can use price personalisation without customers

---

[14] Gröppel-Klein/Kroeber-Riel, *Konsumentenverhalten*, 12th ed., 2025.

[15] Simon/Fassnacht/Schmitz, *Preismanagement: Strategie – Analyse – Entscheidung – Umsetzung*, 5th ed., 2025, p. 175 ff.

[16] See Evanschitzky/Kenning/Vogel, *Consumer Price Knowledge in the German Retail Market*, Journal of Product and Brand Management 2004, 390; Kenning/Evanschitzky/Vogel/Ahlert, *Consumer Price Knowledge in the Market for Apparels*, International Journal of Retail and Distribution Management 2007, 97; Schneider/Kenning/Hartleb/Eberhardt, *Implizites Preiswissen von Konsumenten – wirklich genauer als ihr explizites Preiswissen?*, Marketing ZfP 2009, 219.

[17] See Eberhardt/Schneider/Kenning, *On the Validity of Price Knowledge Measurements via Self-Assessment-Scales: Two Studies in Retailing*, Journal of Targeting, Measurement and Analysis for Marketing 2009, 93.

[18] See Hertwig/Hoffrage, *Eingeschränkte und ökologische Rationalität: Ein Forschungsprogramm*, Psychologische Rundschau 2001, 11; Goldstein/Gigerenzer, *Models of Ecological Rationality: The Recognition Heuristic*, Psychological Review 2002, 75.

[19] Genth/Schleusener/Kenning/Prohst/Remmel/Weber/Gier-Reinartz/Schmidt-Kessel, *Dynamische Preissetzung – Wer profitiert?*, Wirtschaftsdienst 2016, 863 (874).

[20] See Kenning/Zimmermann, *Verbraucherschutz und Digitalisierung: Ausgewählte Problemfelder und aktuelle Themen in der digitalen Welt*, Zeitschrift für Wettbewerbsrecht – ZWeR 2021, 62 (70). Also see Kenning/Evanschitzky/Vogel/Ahlert, *Consumer Price Knowledge in the Market for Apparels*, International Journal of Retail and Distribution Management 2007, 97 (98): 'A discussion of the findings, and especially the fact that estimated prices are generally higher than actual prices, leads to the conclusion that, without losing consumers, sales managers may be able to increase revenue and c.p. profit through moderate price increases.'

[21] See Evanschitzky/Kenning/Vogel, *Consumer Price Knowledge in the German Retail Market*, Journal of Product and Brand Management 2004, 390 (401): 'Consumers overestimate prices in almost 80 percent of all cases.'

[22] See Linzmajer/Kenning, *Wissensorientiertes Preismanagement – Ausgewählte Implikationen für das betriebliche Preiscontrolling*, Controlling: Zeitschrift für erfolgsorientierte Unternehmenssteuerung 2012, 610.

[23] In this context, research into price knowledge in the food retailing sector has come to the following conclusion among others: 'it was found that there was no significant influence of age, gender, price-consciousness, duration of customership, and shopping transactions per week on price recall and/or price recognition.' Kenning/Schneider/Hartleb, *An Empirical Multi-Method Investigation of Price Knowledge in Food Retailing*, International Journal of Retail and Distribution Management 2011, 363 (363).

being able to recognise what kind of advantage they are actually being offered. The potential **price confusion**[24] associated with this can have several negative effects. Firstly, reduced price clarity can unsettle customers to the extent that, in order to avoid making a mistake, they decide not to buy the desired product or they delay their purchase. Secondly, the company may not generate any sales and the state may ultimately lose out on the revenue associated with the corresponding taxes (including VAT). This raises the additional consumer policy question of how price personalisation based on indirect pricing policy should be regulated in the digital world within the framework of the Digital Fairness Act in order to avoid these negative effects as far as possible.[25] When discussing this question, three things should be borne in mind in accordance with the SVRV's TOP rule:

1. **T**ransparency: It should be clear and easy for consumers to recognise whether the offered price is personalised or not.

2. **O**pt-out: In the event that a consumer does not wish to be given personalised prices, he or she should have alternative options such as being offered a non-personalised price.

3. Legal **P**rotection: In the event that the two above conditions are not met, legal remedies should be available to enable consumers to assert their interests.

So far, the European regulation of price personalisation has been confined to the first aspect, i.e. to individual rules on transparency. For example, retailers engaged in distance selling are obliged to inform consumers if the offered price has been personalised on the basis of automated decision-making.[26] However, there is currently no corresponding transparency obligation for bricks-and-mortar stores. Furthermore, the use of personalised discounts and digital coupons, which can also be used in bricks-and-mortar stores (e.g. via a smartphone app) could lead to gaps in protection and distortions of competition between online and offline retailers.

Against this background, the SVRV recommends examining whether the obligation to disclose the use of price personalisation under the planned Digital Fairness Act should be extended to bricks-and-mortar retailers and indirect pricing instruments (e.g. discounts, coupons, loyalty points). In order to ensure that the consumer information is effective, legislators should take the findings of behavioural science into account when designing the specific details of the information obligation. For example, consideration should be given to the form in which the respective information is made available.[27] One possibility could be to make it compulsory to introduce certain filter options that enable customers to block offers with personalised prices.[28] This would at least partially comply with the second aspect of the above rule, namely that there must be an opt-out option. Art. 38 of the DSA could serve as a model for an opt-out rule. According to that provision, providers of very large online platforms and very large search engines are obliged to provide at least one option for their recommender systems which is not based on profiling (Art. 4 point (4) GDPR). Furthermore, it would have to be ensured that the legal remedies available to consumers in connection with an opt-out rule are sufficient. It also needs to be examined whether a ban on price personalisation should

[24] Kenning/Pohst, *Von der Customer Confusion zur Price Confusion? – Die verbraucherwissenschaftliche Perspektive*, Wirtschaftsdienst 2016, 871.

[25] Bender, *„Preise müssen klar kommuniziert werden"*, Lebensmittel Zeitung, 24 January 2025, available at: https://www.lebensmittelzeitung.net/handel/nachrichten/interview-zu-app-rabatten-preise-muessen-klar-kommuniziert-werden-182152 (last accessed: 8 July 2025).

[26] See Art. 6(1) ea) of the Consumer Rights Directive (EU) 2011/83/EU. The German legislator transposed this EU requirement in Art. 246a section 1 (1) sentence 1 no. 6 of the Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche*). Art. 13 of the Consumer Credit Directive (EU) 2023/2225 also sets down a transparency obligation for personalised credit offers based on automated data processing.

[27] See SVRV, *Effektive Verbraucherkommunikation*, 28 November 2024.

[28] SVRV, *Plattformökonomie und nachhaltiger Konsum: Unterstützung nachhaltiger Konsumentscheidungen auf Online-Handelsplattformen*, 29 August 2024.

be introduced to protect certain consumer groups (in particular minors) or for certain offers (such as services of general interest).

3 Decision-delaying mechanisms: systemic emotion regulation in the digital context

As digitalisation progresses, it is becoming increasingly clear that providers are using a variety of techniques (including avatars, anthropomorphised chatbots and virtual influencers) to emotionalise purchasing decisions.[29] The emotions evoked by such techniques can sometimes have a negative effect on consumer behaviour.[30]

Emotions play a role in many areas of digital marketing.[31] One way in which companies try to influence customers is by emotionalising the decision-making process to steer them in a direction that is desirable for the company. The emotionalisation of retail situations, for instance, can increase the likelihood of unplanned and impulse purchases.[32] One example of this is the 'fear of missing out', which is often mentioned in discussions regarding the impact of dark patterns.[33] However, decisions made on an emotional basis may have negative consequences for consumers. This raises the question of which tools and concepts can be used to reduce the impact of emotions on purchasing behaviour, and how emotionally fair decision-making architectures can be developed.

Various theories, concepts and techniques for emotion regulation have been developed through research.[34] These often focus on individual decision-making behaviour. To accompany this research, consumer policy could work towards creating decision-making architectures that reduce the influence of emotions on purchasing decisions and consumer behaviour. When designing these fair decision-making architectures, it might be useful to consider that emotions often fluctuate over time, and to consciously incorporate elements into the decision-making process that can prolong, delay or interrupt it.[35] This approach is based on the idea that decisions should ideally be made in a state where emotional biases are (once again) unlikely.

The deliberate inclusion of such decision-delaying mechanisms[36] in the decision-making process could prompt consumers to interrupt their decision or even allow the system to do this for them. One example of this in consumer law can be found in the notarial recording of real estate transactions. In the case of consumer contracts, section 17(2a) of the Notarial Recording Act (*Beurkundungsgesetz*) requires the notary to ensure that consumers are given sufficient opportunity to consider the proposed transaction. For this reason, the notary must provide the consumer with the proposed text at least two weeks before the notarial recording takes place. The purpose of the time interval between receipt of the draft text – which must be

---

[29] 'Emotions' can be understood as 'those internal, physiological states of stimulation (physical states) which are perceived as pleasant and unpleasant, and which are, to a greater or lesser extent, experienced consciously (see Foscht/Swoboda/Schramm-Klein, *Käuferverhalten: Grundlagen – Perspektiven – Anwendungen*, 6th ed., 2017, p. 45). Consciously experienced and verbalisable emotions are referred to as 'feelings' (see Meffert/Burmann/Kirchgeorg/Eisenbeiß, *Marketing: Grundlagen marktorientierter Unternehmensführung; Konzepte – Instrumente – Praxisbeispiele*, 13th ed., 2019, p. 110).

[30] For an overview of the influence of emotions on decisions, see for example Lerner/Li/Valdesolo/Kassam, *Emotion and Decision Making,* Annual Review of Psychology *2015*, 799.

[31] Among others, Rüeger/Hannich/Fuchs/Müller/Klaas/Suvada (eds.), *Emotionalisierung im digitalen Marketing: Erfolgreiche Methoden für die Marketingpraxis*, 1st ed., 2018.

[32] Iyer/Blut/Xiao/Grewal, *Impulse Buying: A Meta-Analytic Review*, Journal of the Academy of Marketing Science 2020, 384.

[33] See vzbv, *Manipulatives Design auf Online-Marktplätzen und Social-Media-Plattformen: Eine Untersuchung zur Umsetzung von Artikel 25 Digital Services Act (DSA)*, 15 January 2025, p. 4.

[34] See, among others, Egloff, *Emotionsregulation*, in: Brandstätter/Otto (eds.) *Handbuch der Allgemeinen Psychologie: Motivation und Emotion*, 1st ed., 2009, p. 714.

[35] Kenning, *Consumer Neuroscience und Brain Based Behavioral Engineering*, in Freytag (ed.) *Verbraucherintelligenz: Kunden in der Welt von morgen*, 1st ed., 2011, p. 79; Lerner/Li/ Valdesolo/Kassam, *Emotion and Decision Making,* Annual Review of Psychology 2015, 799.

[36] Kenning, *Consumer Neuroscience und Brain Based Behavioral Engineering*, in Freytag (ed.) *Verbraucherintelligenz: Kunden in der Welt von morgen*, 1st ed., 2011, p. 79 (88)

sent to the parties by the notary and not by the seller or estate agent – and the actual notarial recording is to protect consumers from, among other things, 'acting too hastily'.

Another example can be found in the key area of finance, namely in section 25 of the Stock Exchange Act (*Börsengesetz*). According thereto, the management may

1. suspend trading in financial instruments, economic goods or rights if proper stock exchange trading is temporarily jeopardised or if this appears necessary to protect the public; and

2. discontinue trading if proper stock exchange trading no longer appears to be guaranteed.

The use of such statutory decision-delaying mechanisms would be feasible in many situations. In a digital context, an order placed through an online retailer or within a game might only be triggered after a certain time delay. Additional confirmation could also be required to counteract the potentially negative effect of the aforementioned 'fear of missing out'.

However, there is still a considerable need for research into the development, design, effectiveness and efficiency of such measures, as they are still a new type of instrument that could be used in consumer policy to influence the design of decision-making processes. In terms of consumer acceptance, which is crucial for the effectiveness of such measures, it is important to ensure that consumers are able to opt in and do not feel like they are being patronised. Otherwise, this could quickly lead to reactance, which is undesirable from a consumer policy perspective.[37]

4 Fairness by design: from dark (deceptive) patterns to bright (transparent) patterns

One particular focus of the legal policy debate surrounding a future Digital Fairness Act is the issue of dark (deceptive) patterns.[38] These are manipulative practices in user interface design that aim to persuade users to unconsciously take actions that are not in their own interests, such as 'accidentally' taking out a subscription or making it difficult to cancel.[39] Examples include cookie banner designs, hidden costs, ordering processes with pre-selected additional services, emotionally manipulative 'confirm shaming' with rejection buttons, and artificial time or availability pressure.[40]

There are a number of prohibitions in European secondary law that target the use of deceptive patterns in various contexts.[41] This includes provisions in the DSA[42], Data Act[43], Consumer Rights Directive[44], UCPD[45], AI Act[46] and GDPR[47]. The regulatory framework is becoming increasingly confusing, with numerous overlaps and inconsistent terminology. This not only creates legal uncertainty for market participants, but also hinders the effective enforcement of the law. In the context of a future Digital Fairness Act, it is important that the existing regulations on dark patterns are not supplemented by additional individual regulations. A more

---

37 See SVRV, *Effektive Verbraucherkommunikation*, 28 November 2024.

38 *Fitness Check Report*, p. 146 ff.

39 Brignull, *Dark Patterns: Deception vs. Honesty in UI Design*, 1 November 2011, available at: https://alistapart.com/article/dark-patterns-deception-vs-honesty-in-ui-design/ (last accessed: 8 July 2025).

40 Gray/Kou/Battles/Hoggatt/Toombs, *The Dark (Patterns) Side of UX Design*, in: *CHI '18 Extended Abstracts*, 2018.

41 See overview in Busch/Fletcher, *Harmful Online Choice Architecture*, May 2024.

42 Regulation (EU) 2022/2065, OJ L 265/1 of 27 October 2022.

43 Regulation (EU) 2023/2854, OJ L 2023/2854 of 22 December 2023.

44 Directive (EU) 2011/83/EU, OJ L 304/64 of 22 November 2011.

45 Directive (EG) 2005/29/EU, OJ L 149/22 of 11 June 2005.

46 Regulation (EU) 2024/1689, OJ L 2024/1689 of 12 July 2024.

47 Regulation (EU) 2016/679, OJ L 119/1 of 4 May 2016.

effective approach would be to coordinate the existing regulations more closely and to merge them where possible. With this in mind, it might be logical to include an explicit ban on deceptive patterns in the UCP Directive, supplemented by additional bans in Annex I of the Directive if necessary. Conversely, existing individual provisions in other legal acts (e.g. Article 16e of the Consumer Rights Directive) could be repealed. In the interests of evidence-based consumer policy, the influence of different types of dark patterns on consumer behaviour should also be investigated.

As well as consolidating the current regulatory framework, it is important to consider areas where existing (negative) prohibitions could be supplemented with **positive design requirements**. Such **'bright (transparent) patterns'** can offer greater transparency as well as flexibility in response to evolving digital practices. Awareness campaigns and ethical UX guidelines can help users recognise dark patterns more easily, enabling them to actively decide against them.[48] These initiatives can also be profitable for companies.[49] Ultimately, this could lead to the development of standards that improve ease of use and access to information for consumers.[50] At the same time, design requirements can provide companies with legal certainty when creating their designs, thereby reducing the need for lengthy court proceedings to clarify the legal situation.

The SVRV recommends regulating dark (deceptive) patterns by establishing binding design requirements, which could be referred to as 'bright' or 'transparent' patterns. This would strengthen the 'consumer protection by design' approach. The German cancellation button is an example of why this paradigm shift is necessary. For around two years now, the somewhat vague regulations[51] surrounding the structure and design of the button have meant that every variation has had to be renegotiated. If more precise and binding design requirements had been in place from the outset, this would have provided greater legal certainty for consumers and businesses while also supporting the consistent enforcement of the law. Bright (transparent) patterns, including the aforementioned decision-delaying mechanisms, facilitate the implementation of consumer protection by design. This approach benefits both consumers, who are protected from unfair practices, and companies, who can build long-term trust by offering clear and fair designs. At the same time, they make it possible to sanction manipulative practices in a targeted manner without hindering innovation in user-centred design. The interests of consumers and providers can therefore be considered equally, enabling them to work in synergy.

5 Influencer marketing: a balance between advertising impact, consumer protection and regulation

Influencer marketing is another area of the digital economy for which the European Commission has identified a need for regulation.[52] This aspect of corporate marketing has evolved significantly in recent years, becoming an important additional advertising strategy within the digital landscape. Global revenues generated through influencer marketing totalled 21.1 billion US dollars in 2023, representing a threefold increase since 2019. It is anticipated that revenues will reach approximately 32.5 billion US dollars by 2025.[53]

At the same time, reports of **legal violations by influencers** are also increasing. A study by the European Commission found that 80% of influencers analysed did not correctly indicate the commercial nature of

[48] Obremski/Wienrich, *Autonomous VR Exposure Therapy for Anxiety Disorders Using Conversational AI—Ethical and Technical Implications and Preliminary Results*, Journal of Computer and Communications 2024, 111.

[49] See Center for Humane Technology, available at: https://www.humanetech.com/ (last accessed: 8 July 2025).

[50] SVRV, *Report on the Position of Consumers 2021*, 20 April 2021, p. 401.

[51] See Halm/Neumann, *Der Kündigungsbutton – eine erste Bewertung der Umsetzung!*, VuR 2023, 83.

[52] *Fitness Check Report*, p. 146 ff.

[53] Statista, *Ausgaben von Unternehmen für Influencer-Marketing auf Social Media weltweit bis 2025*, available at: https://de.statista.com/statistik/daten/studie/1325021/umfrage/ausgaben-von-unternehmen-fuer-influencer-marketing-weltweit/ (last accessed: 3 February 2025).

their online content.[54] The Fraunhofer Institute for Systems and Innovation Research also found that a quarter of young people regularly experience 'negative reactions to influencer marketing, such as making impulse purchases or experiencing buyer's remorse'.[55] This age group is particularly vulnerable, as they often struggle to distinguish advertising from authentic content. Furthermore, they often 'do not yet have sufficient impulse control to resist the incentives.'[56]

In May 2024, the Council of the European Union published recommendations on enhancing the legal and social responsibility of influencers in the digital media environment. These recommendations highlight the importance of including influencers in the development of media guidelines, raising their awareness of applicable laws and encouraging the creation of self-regulatory mechanisms.[57] The Influencer Legal Hub launched by the European Commission also serves this same purpose.[58] It is an online collection of materials designed to help influencers, agencies and providers understand and apply European consumer protection standards.

In a series of **rulings** over the last few years, the **German courts** have provided significant clarification on transparency requirements in influencer marketing.[59] This includes clarifying that influencers must always label any posts for which they have received compensation as advertising, whether this compensation takes the form of monetary payments, free products, or other benefits. Clarification is furthermore required as to whether the commercial nature of a post must be disclosed in order to avoid misleading followers – even if the influencer did not directly receive compensation.[60] The standards developed by the German courts could serve as a basis for EU-wide harmonisation in this regard. Detailed requirements for influencer marketing also exist in other Member States of the European Union. In France, influencers are prohibited from promoting certain products (including cosmetic surgery, nicotine products and certain financial services).[61] To counteract unrealistic beauty standards that pressurise consumers, Norway has introduced regulations prohibiting the editing of advertising images without proper labelling.[62] In Spain, specific requirements have been introduced for influencers with a large audience in order to prevent misleading advertising.[63] These examples demonstrate the relevance of the issue while also highlighting the risk of internal market barriers resulting from an increasing number of different national regulations.

---

[54] EU Commission, *Ergebnisse einer Überprüfung („Sweep") von Posts in den sozialen Medien*, available at: https://ec.europa.eu/commission/presscorner/detail/de/ip_24_708 (last accessed: 3 February 2025).

[55] Fraunhofer Institute for Systems and Innovation Research, *Kritischer Konsum wegen Social-Media-Influencer:innen: Politische Maßnahmen zum Schutz von Jugendlichen nötig*, available at: https://www.isi.fraunhofer.de/de/presse/2024/presseinfo-03-social-media-influencer-marketing-jugendliche-kritischer-konsum-schutz-noetig.html (last accessed: 3 February 2025).

[56] FAIR_V, *Förderung adoleszenter Influencer-Resilienz (Kurzfassung)*, 2023, p. 4.

[57] Council of the European Union, *Support for Influencers as Online Content Creators (Council Conclusions)*, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52024XG03807 (last accessed: 3 February 2025).

[58] European Commission, *Influencer Legal Hub*, available at: https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/influencer-legal-hub_en (last accessed: 4 February 2025).

[59] Federal Court of Justice, judgments of 9 September 2021 – I ZR 90/20, I ZR 125/20, I ZR 126/20, and judgments of 13 January 2022 – I ZR 35/21, I ZR 9/21.

[60] See Federal Court of Justice, judgment of 9 September 2021, I ZR 90/20 –, headnote 2-4, paragraph 60. '[...] if the overall impression of the post is that it is excessively promotional, i.e. if it contains an excessive amount of advertising to the extent that the promotion of third-party competition plays a greater role than merely a necessarily accompanying role'.

[61] Law No. 2023-451 of 9 June 2023 requires influencers to clearly label paid partnerships as 'advertising' or 'commercial collaboration' and prohibits the promotion of certain products such as cosmetic surgery and nicotine products.

[62] Maack, *Feiert den Allerweltskörper!*, DER SPIEGEL, 1 July 2022, available at: https://www.spiegel.de/panorama/gesellschaft/norwegen-retuschierte-werbebilder-muessen-gekennzeichnet-werden-feiert-den-allerweltskoerper-a-ebc17fea-dd92-4073-8d92-3bf17ee6703e (last accessed: 8 July 2025). N.B.: the regulation was later relaxed; see *Norwegen entschärft Kennzeichnung von retuschierten Bildern*, DER SPIEGEL, 29 July 2022, available at: https://www.spiegel.de/wirtschaft/norwegen-entschaerft-kennzeichnung-von-retuschierten-bildern-a-e0ac9749-9f55-411b-a6ab-770faaf3637d (last accessed: 4 February 2025).

[63] Royal Decree 444/2024 of 30 April 2024 stipulates that influencers with over one million followers and who earn above certain income thresholds must clearly label any advertising and categorise their content according to age group.

Against this background, **EU-wide harmonisation of the rules for influencers** could help provide greater legal clarity and facilitate compliance with legal requirements.[64] It would appear logical to create a uniform legal framework that takes into account both consumer protection and the interests of influencers and companies. Particular attention should be paid to protecting minors and other vulnerable groups who are especially susceptible to manipulative practices in the area of influencer marketing.

The basic prerequisite for European regulation of influencer marketing is a **definition of the term 'influencer' (including virtual influencers) under EU law**, as this is currently lacking at European level.[65] In particular, it must be clarified whether the term 'influencer' also includes individuals who wish to engage in self-promotion and who do not yet receive financial compensation, but already publish content for commercial reasons. One argument in favour of including this group is that, in such cases, the visibility – and thus also the 'advertising value' – of the social media profiles in question is increased, meaning that commercial activity can be assumed.[66] In this context too, the influencers' statements can be considered to be advertising rather than personal recommendations. The situation regarding links to manufacturers' websites (known as 'tap tags') and the relationship with content creators also remains unclear. There is currently a lack of clear definitions and regulations on these issues.

To improve transparency and fairness in influencer marketing, the SVRV believes it is crucial to introduce binding EU-wide regulations. The SVRV therefore advocates a **package of measures** to regulate key aspects of influencer marketing. First, a uniform definition of the term 'influencer' should be established at European level. Clear criteria as to when a person is considered an influencer and what legal obligations this entails would not only provide greater legal certainty, but also facilitate the enforcement of existing regulations.

In addition, the introduction of clear **labelling requirements** for advertising-related content is recommended. This includes the clear, uniform and immediately identifiable labelling of advertising in influencer posts. In order to protect consumers from being misled and to strengthen their trust in digital content, advertising material should be clearly and immediately identifiable as such.[67] To complement this, the introduction of specific design requirements could improve the visibility and recognition of advertising even further. This could include the mandatory placement of notices, the use of a specific colour scheme, or the use of symbols in order to visually emphasise the commercial nature of a post. This would make it easier to distinguish the post from editorial content.

In the view of the SVRV, particular attention should also be paid to the **protection of vulnerable groups**. Specific protective measures should be developed, particularly for minors, who are especially vulnerable to manipulative advertising strategies. This includes placing restrictions on the advertising of particularly high-risk products and services, introducing stricter labelling requirements, and ramping up educational initiatives to promote media literacy.[68] Implementing these measures could offer vulnerable groups greater protection from the dangers of influencer marketing and empower them to make their own decisions.

---

64 *Fitness Check Report*, p. 170.

65 Research Services of the German Bundestag, *Rechtlicher Rahmen für Influencer*, 2023, p. 4.

66 Martinek/Semler/Flohr, *VertriebsR-HdB/Krüger/Peintinger*, 5th ed., 2025, § 32. paragraph 192.

67 See SVRV, *The Evolution of Information Obligations: Information Provision as a Consumer Protection Instrument*, 22 December 2023, p. 8.

68 For possible measures such initiatives could take, see for example the five policy recommendations from the Fraunhofer Institute for Systems and Innovation Research (FAIR_V, *Förderung adoleszenter Influencer-Resilienz [Kurzfassung]*, 2023).

6 Subscription economy

A need for action also exists in the area of the so-called subscription economy.[69] In recent years, business models offering consumers goods and services on a subscription basis have experienced significant growth.[70] Subscription models are now used across a wide range of sectors.[71] As well as subscriptions for digital content and services, such as music and video streaming, subscription models for consumer goods (so-called subscription boxes) have recently gained in significance. These range from food and cosmetics to clothing. Subscription models are also playing an increasingly important role in the platform economy.[72]

The shift in business models from one-off exchanges of services to time-based contracts and continuing obligations means that, from a consumer perspective, the risks involved are changing.[73] While one-off exchange contracts are primarily about enabling free and informed contractual decisions as well as ensuring a fair balance between performance and counter-performance, the risk profile of continuing obligations and time-based chain contracts is usually more complex. This raises questions such as under what conditions the provider is entitled to change the contractual terms and adjust prices. Questions also arise regarding automatic contract renewals, termination modalities, and the portability of user profiles when switching providers.

As the emphasis shifts from one-off exchange contracts to subscription contracts, the focus of consumer law instruments is also changing. According to the traditional information model, the primary aim of consumer law is to ensure that consumers make informed decisions about entering into contracts. From this perspective, consumer protection is mainly about protection when *entering into* contracts.[74] But in the subscription economy, besides 'protection against unwanted contracts'[75], there is an increasing focus on protection against unwanted (automatic) contract renewals or unfavourable changes to contractual terms. Risks also arise from the opaque, dark pattern design of cancellation options.[76] Another new development is the fact that digital subscription models enable comprehensive data on user behaviour to be collected and used to personalise offers.

The distinctive features of subscription contracts briefly outlined here have long been neglected in German contract and consumer law. Contract law has traditionally focused on the kind of one-off exchange typical in the sale of goods. The sales contract was considered the prototype of contractual obligation. This 'fixation on sales law'[77] in German contract law is particularly evident in the fact that it somewhat neglects the time factor in contractual relationships. For instance, the Civil Code (*Bürgerliches Gesetzbuch*, BGB) still lacks a general regulation governing the ordinary termination of continuing obligations that is applicable to all types of contracts.[78] However, the German legislature has recently started to address some of these regulatory loopholes. Examples include the introduction of a cancellation button on 1 July 2022 (section 312k of the Civil Code) and an amendment to the rules on the automatic renewal of contractual relationships

---

[69] See Busch/Loer, *Verbraucherresilienz in der Subscription Economy*, 2025; see also Busch/Twigg-Flesner, *A Roadmap for Regulating Subscriptions in the Digital Fairness Act*, Journal of European Consumer and Market Law 2024, p. 234.

[70] Einav/Klopack/Mahoney, *Selling Subscriptions*, NBER Working Paper 2023.

[71] See Bischof/Boettger/Rudolph, *Curated Subscription Commerce: A Theoretical Conceptualization*, Journal of Retailing and Consumer Services 2020, 101822; Chen/Fenyo/Yang/Zhang, *Thinking Inside the Subscription Box: New Research on E-commerce Consumers*, 2018.

[72] For more details, see Busch, *Pay to Play: Social Media Meets the Subscription Economy*, VerfBlog, 23 May 2023, available at: https://doi.org/10.17176/20230523-140405-0 (last accessed: 8 July 2025).

[73] Schmidt-Kessel, *Wandlungen des Privatrechts – Erwartungen an ein Privatrecht* 2050, in: Beyer/Erler/Hartmann/Kramme/Müller/Pertot/Tuna/Wilke (ed.) *Privatrecht 2050 – Blick in die digitale Zukunft,* Jahrbuch Junge Zivilrechtswissenschaft 2019, 2020, p. 9.

[74] Latzel, *Verhaltenssteuerung, Recht und Privatautonomie*, 1st ed., 2020, p. 411; see also SVRV, *Report on the Position of Consumers 2021*, 20 April 2021, p. 376 ff.

[75] Lorenz, *Der Schutz vor dem unerwünschten Vertrag*, 1st ed., 1997.

[76] Luguri/Strahilevitz, *Shining a Light on Dark Patterns*, Journal of Legal Analysis 2021, p. 42; Martini/Drews/Seeliger/Weinzierl, *Dark Patterns: Phänomenologie und Antworten der Rechtsordnung*, ZfDR 2021, p. 47.

[77] Wendehorst, *Das Vertragsrecht der Dienstleistungen im deutschen und künftigen europäischen Recht,* AcP 2006, 205 (279).

[78] With effect from 1 January 2002, extraordinary termination of continuing obligations has been governed by section 314 of the Civil Code.

(section 309 no. 9 of the Civil Code) that took effect on 1 March 2022. Other Member States have also adopted new consumer protection regulations for subscription contracts. For instance, the French legislature introduced a cancellation button ('bouton résiliation') on 1 June 2023 with a view to making it easier to terminate subscriptions.[79]

At European level, there has to date been a lack of effective instruments for consumer protection in the area of subscription models. At the same time, the increasing number of different rules at Member State level is resulting in a fragmented regulatory framework within the EU, thereby creating new barriers to the internal market. The SVRV therefore advocates creating a uniform European regulatory framework for subscription models. The following guidelines relate to the future design of a European regulatory framework for the subscription economy:

- **Risk-based regulation of different subscription models:** The subscription economy is characterised by a wide range of different business models. The various subscription models have different risk profiles depending on the respective product category, consumption pattern, pricing model, and contract duration. For effective consumer protection and in accordance with the principle of proportionality, these different business models should not be subject to uniform regulation ('one size fits all'). Instead, a differentiated, risk-based regulatory approach that takes into account the different risk profiles of the respective business models appears to be more appropriate.

- **From the information model to consumer protection by design:** Effective consumer protection in the area of subscription models requires the regulatory framework to not only establish new information obligations with regard to termination and withdrawal rights, but also to provide specific requirements for the design of online user interfaces. Furthermore, statutory requirements should not be limited to a (negative) ban on manipulative designs (dark patterns), but should also stipulate (positive) design requirements. This regulatory approach expands the consumer information model[80], widely criticized as ineffective, into a consumer 'design model'. The core idea of this new regulatory model is to ensure that consumers are not only adequately informed, but also supported in exercising their rights through user-friendly design, for example by introducing a European cancellation button.

- **Including regulatory intermediaries in the 'subscription ecosystem':** Furthermore, regulation of subscription models should look beyond the direct contractual relationship between providers and consumers and also consider other stakeholders in the subscription ecosystem, in particular operators of online marketplaces, app stores, payment service providers, and providers of subscription management software. As 'regulatory intermediaries', these actors can make an important contribution to the enforcement of consumer protection regulations.[81]

---

[79] *Loi n° 2022-1158 du 16 août 2022 portant mesures d'urgence pour la protection du pouvoir d'achat,* Art. 17, 18; see also Petiprez, *Loi pouvoir d'achat et résiliation du contrat d'assurance*, 15 September 2022, available at: https://www.dalloz-actualite.fr/flash/loi-pouvoir-d-achat-et-resiliation-du-contrat-d-assurance (last accessed: 23 June 2025).

[80] See for example Ben-Shahar/Schneider, *More than You Wanted to Know: The Failure of Mandated Disclosure*, 1st ed., 2014; Busch, *The Future of Pre-contractual Information Duties: From Behavioural Insights to Big Data*, in: Twigg-Flesner (ed.) *Research Handbook on EU Consumer and Contract Law*, 1st ed., 2016, p. 221.

[81] One recent example is Mastercard's 'Smart Subscriptions' software tool, launched in March 2024: through an application programming interface (API), banks and other payment service providers can offer their customers a tool to manage their subscriptions (see Businesswire, *Mastercard Simplifies Subscription Management With Smart Subscriptions*, 12 March 2024, available at: https://www.businesswire.com/news/home/20240312014594/en/Mastercard-Simplifies-Subscription-Management-With-Smart-Subscriptions [last accessed: 23 June 2025]).

7 Structural weaknesses in digital consumer protection law and measures to ensure more effective enforcement of the law

The final report on the Digital Fairness Fitness Check revealed significant shortcomings in the current mechanisms for **enforcing the law**, particularly in the digital environment. Digital markets are developing rapidly, enabling illegal practices to spread more quickly and easily across borders.[82] Meanwhile, institutional and legal structures are often not flexible enough to protect consumers effectively.

A key problem is the **distribution of the burden of proof**. The complexity and lack of transparency of digital business models – particularly with regard to algorithmic decisions and personalised offers – makes it difficult for consumer protection organisations and public authorities to prove violations of consumer protection regulations. Currently, the burden of proof often lies with the claimants, while companies retain exclusive control over essential information on how their digital business models work. As a result, violations often cannot be sufficiently prosecuted. The European Commission has correctly pointed out that rules on the burden of proof which require victims to explain the inner workings of highly complex, intransparent and autonomous systems (particularly AI systems) may effectively render the right to compensation invalid.[83] Therefore, a fairer distribution of the burden of proof is necessary in order for legal remedies to be effective, particularly when companies hold an information advantage due to their market power and control over data. It should therefore be up to the companies to provide a meaningful explanation of any phenomenon that suggests unfair commercial practices, and to disclose any relevant evidence.[84, 85]

In addition to the burden of proof issue, inadequate **public enforcement** poses a significant challenge. National authorities and consumer protection organisations often lack sufficient resources to systematically prosecute infringements in the digital environment. Although the Consumer Protection Cooperation Network (CPC Network) facilitates coordinated enforcement of the law at EU level, the number of proceedings brought against digital market participants remains too low to have a lasting deterrent effect. Furthermore, proceedings are often too lengthy and not sufficiently adapted to the dynamics of digital markets, thus enabling illegal business practices to continue unhindered for extended periods.[86]

Another structural deficit is that in some areas, **substantive law is imprecise**. Vague legal terms and unclear provisions enable companies to exploit loopholes in the law and evade effective regulation by taking advantage of legal uncertainties.[87] This often poses challenges for consumer protection organisations and national authorities in applying the provisions, making enforcement even more difficult. More precise consumer protection rules could reduce the scope for interpretation and address the EU Commission's criticism regarding the lack of uniform application of the provisions within the EU.[88]

---

[82] *Fitness Check Report*, p. 50.

[83] *Fitness Check Report*, p. 51.

[84] Rott, *Article 12 UCPD: Burden of Proof*, in: Helberger/Kas/Micklitz/Namysłowska/Naudts/Rott/Sax/Veale (ed.) *Digital Fairness for Consumers*, 2024, p. 277.

[85] In this context, consideration could also be given to integrating information and reporting obligations into the ongoing development of the non-financial reporting framework. The ESRS-S4 standard could serve as a reference point in the context of reporting under the CSRD (see https://www.haufe.de/id/beitrag/15-esrss4-verbraucher-und-endnutzer-12-abzudeckende-themen-HI15754705.html).

[86] European Commission, *Report to the European Parliament and the Council on the Application of Regulation (EU) 2017/2394 on Cooperation between National Authorities Responsible for the Enforcement of Consumer Protection Laws*, COM(2024) 311 final, 25 July 2024, p. 24.

[87] The following example is cited in Podszun/Busch/Henning-Bodewig, *Behördliche Durchsetzung des Verbraucherrechts? Darstellung und Systematisierung von Möglichkeiten und Defiziten der privaten Durchsetzung des Verbraucherschutzes sowie Einbeziehung der Kartellbehörden zu dessen Durchsetzung*, 2018, p. 107: While the Guidance on Directive 2005/29/EC unreservedly affirms the applicability of point 22 (no. 23 of the annex to the Act Against Unfair Competition – *Gesetz gegen den unlauteren Wettbewerb*, UWG) to fake customer reviews, German literature predominantly rejects this. The reason for this is the unclear wording, which allows for different interpretations, in particular with regard to the limitation to 'offers' and their relevance to false customer reviews.

[88] Federal Government, *Verbraucherpolitischer Bericht 2024*, 2024, p. 24.

Moreover, in order to further enhance legal certainty, consideration should also be given to having **any outstanding legal issues resolved** by the European Court of Justice (CJEU) **at an early stage**. Currently, it often takes years for binding judgements to be issued. In the meantime, consumers and businesses face considerable uncertainty. The accelerated processing of preliminary ruling procedures and the proactive use of CJEU referrals by national courts could help to harmonise consumer protection standards across the EU and improve the enforceability of the relevant Directives.

Based on the identified shortcomings, the SVRV calls for a number of measures to strengthen consumer law enforcement: Consideration should be given to adjusting the distribution of the burden of proof, for example by introducing rebuttable presumptions for certain digital business practices. This is especially important in cases where companies have knowledge sovereignty over internal business processes and technical operations. In such cases, it should be up to the companies to prove that their business models are in conformity with the law. Furthermore, access to evidence should be facilitated by strengthening information rights and enhancing disclosure requirements for companies, particularly with regard to algorithmic decisions.[89] In addition, more efficient public enforcement is needed. This requires national authorities, consumer protection organisations and the CPC Network to be better equipped and have their competencies extended. Procedures for combating digital infringements at EU level would have to be simplified and accelerated. Furthermore, substantive legal provisions should be reviewed to determine where more precise regulations could increase legal certainty. Harmonising key terms, particularly in the area of digital business models, could help ensure the uniform application of the law within the EU.[90] In addition, the SVRV suggests exploring ways to integrate the CJEU more closely into the enforcement process. Simplifying and accelerating preliminary ruling procedures could provide legal clarity at an early stage. Furthermore, national courts should be encouraged to refer more matters to the CJEU for clarification, particularly in the area of digital consumer protection. These measures could not only improve enforcement of the law, but also contribute to greater legal certainty, more effective consumer protection and fair competition within the EU.

8 Outlook

The recommendations for reforming European consumer law set out in this policy brief only cover a small selection of the broad spectrum of relevant consumer policy issues that could be addressed in the context of the planned Digital Fairness Act. The ongoing legal policy discussion should consider the areas where technological innovations and market developments require additional regulation.

For instance, legislative action may be necessary in connection with the use of AI agents in online commerce.[91] Currently, it is impossible to predict with certainty how quickly new forms of 'AI commerce' (or 'agentic commerce') will be adopted by the market. Another issue requiring further clarification is the opportunities and risks this poses from a consumer perspective. Nevertheless, the growing use of AI agents in the conclusion of consumer contracts could have significant implications for the shaping of consumer law in the medium term. Until now, German and European consumer law has been based on the premise that consumer choices are made by humans. Accordingly, consumer law has been geared towards the needs and weaknesses of human consumers. However, this basic assumption could be called into question if, in future, purchasing decisions are no longer only made by human consumers, but also by AI agents acting as 'algorithmic consumers'[92] and taking these decisions on behalf of consumers. Clarification is needed, in particular, as to how such a change in purchasing behaviour affects the consumer model: Does the decision-making of AI agents differ from that of human consumers? Does the model of the reasonably well-informed

[89] Helberger/Kas/Micklitz/Namysłowska/Naudts/Rott/Sax/Veale, *Digital Fairness for Consumers*, 2024, p. 249.

[90] Federal Government, *Verbraucherpolitischer Bericht 2024*, 2024, p. 24.

[91] See Busch, *Consumer Law for AI Agents*, German Law Journal 2025 (forthcoming), preprint available at: http://dx.doi.org/10.2139/ssrn.5187056.

[92] Gal/Koren, *Algorithmic Consumers*, Harvard Journal of Law & Technology 2017, p. 309.

average consumer need to be adapted to reflect the new reality of AI commerce? What impact would this have for the consumer information model?

If it becomes clear that AI agents will indeed determine the future of online commerce, it would be advisable, especially with regard to the competitiveness of European providers, to include provisions in the Digital Fairness Act that allow innovative business models involving AI agents, while at the same time protecting consumers from newly emerging risks.[93] In particular, effective protection against manipulation by providers of AI agents must be ensured. The SVRV is currently addressing this issue and will shortly present a Policy Brief on it. The European legislature should also address this issue with a view to forward-looking consumer policy-making. Otherwise, there is a risk that the Digital Fairness Act will be outdated before it comes into force.

Another issue that could be addressed in the context of the Digital Fairness Act is what requirements should be placed on consumer-friendly customer communication. Consumers are increasingly complaining about the limited availability of customer services, whether due to long waiting times on telephone hotlines or the inefficiency of digital channels such as chatbots, which are often unable to resolve complex issues. The widespread use of digital customer mailboxes is also a frequent cause of consumer complaints.[94] Currently, there are no clear German or European standards for consumer-friendly customer communication, such as maximum response times or regulations on customer services availability. The SVRV will also present a Policy Brief on this issue shortly.

Finally, alongside the question of which topics the European legislature should address, there is also the question of selecting the appropriate legal instrument. A minimal solution would be to revise the Modernisation Directive (EU) 2019/2161 along with making some targeted amendments to existing Directives. However, this would risk further increasing the complexity of existing legal acts, which would subsequently have a negative impact on the competitiveness of companies. It would also be likely to make the interaction between individual legal acts even more complex. Therefore, it seems preferable to consolidate the existing rules into a new legal act with the aim of establishing a coherent legal framework for consumer protection in digital markets. This could also improve interaction with the Digital Rulebook (particularly, the DSA, DMA, Data Act and AI Act). Furthermore, it might make sense to adopt the Digital Fairness Act in the form of a Regulation. This would make it possible to grant the EU Commission its own enforcement powers regarding violations of consumer law that affect the entire internal market. This could strengthen the cross-border enforcement of the new rules.

These considerations reinforce the point already made that powerful and effective consumer research is needed to further develop consumer protection in the digital world. Without such research, there is a risk of evidence asymmetry. It would then be virtually impossible to have a nuanced and informed political discourse that takes consumer interests into account and that can play a fundamental role in ensuring the fair design of the digital world. An important task of consumer policy-making would therefore be to ensure that this aspect is not overlooked in the current debate, which currently focuses on the often short-term implementation of legal policy initiatives such as the DFFC. Instead, it should be considered in a more integrative manner that goes beyond the usual impact assessments and opinion polls.

[93] See the European Law Institute's proposals, *Guiding Principles and Model Rules on Digital Assistants for Consumer Contracts*, 19 May 2025.

[94] See vzbv, *Kundenkommunikation digital fair: Digitale Kundenkommunikation und digitale Kundenpostfächer*, 13 May 2024.

Citing reference

SVRV (2025). Perspectives for a Digital Fairness Act: Position Paper of the SVRV. *Publications of the Advisory Council for Consumer Affairs.* Berlin: Advisory Council for Consumer Affairs

ISSN: 2365-919X

Authorship

Prof. Dr. Christoph Busch, Tatjana Halm, Prof. Dr. Peter Kenning and Prof. Dr. Carolin Wienrich are the main authors of this Policy Brief.

Philipp Andree, Prof. Dr. Nina Baur, Prof. Dr. Oliver Büttner and Prof. Dr. Christa Liedtke contributed to the Policy Brief in its initial stages.

Imprint

Advisory Council for Consumer Affairs
at the Federal Ministry of Justice and Consumer Protection
Anton-Wilhelm-Amo-Straße 37
10117 Berlin
Germany

Tel: +49 (0) 30 18 580-0
Email: info@svr-verbraucherfragen.de
Internet: www.svr-verbraucherfragen.de

Editorial deadline: 7 July 2025

The Advisory Council for Consumer Affairs is an independent body tasked with advising the Federal Ministry of Justice and Consumer Protection on consumer policy on the basis of scientific evidence and practical experience.

The Advisory Council has nine members. The Chair of the Advisory Council is Professor Christoph Busch.