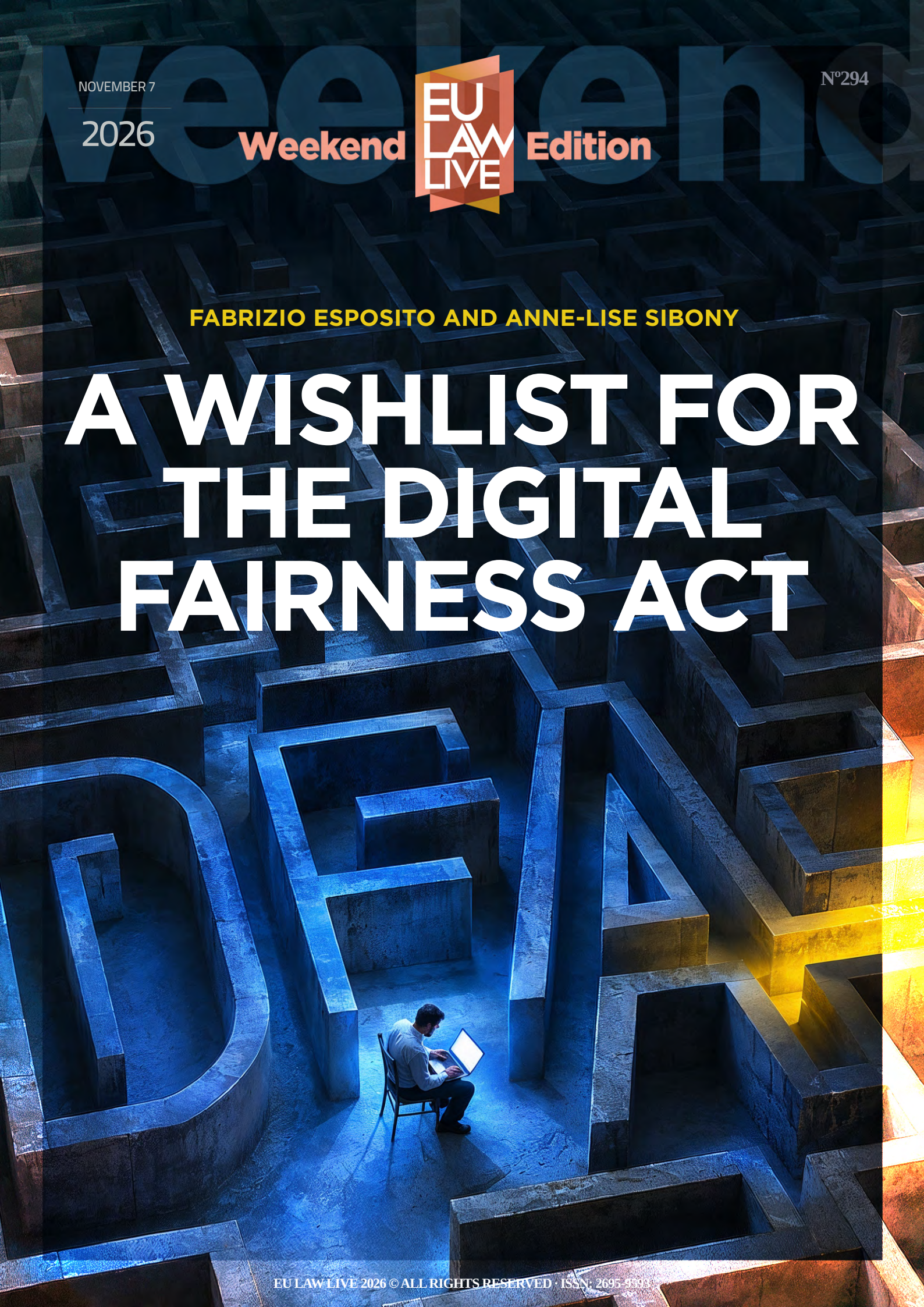
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A WISHLIST FOR THE DIGITAL FAIRNESS ACT



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A Wishlist for the Digital Fairness Act

Fabrizio Esposito and Anne-Lise Sibony [1]

On November 11th, the Commission will announce its proposal for a Digital Fairness Act (DFA). Ahead of that proposal and the discussion it will kick-start, we offer several suggestions based primarily on our research.[2] Our proposals do not aim to innovate; they build on elements already present in EU law. We offer ready-to-use provisions to (1) take the title of the 'act' seriously and articulate fairness standards, (2) update the average consumer standard in a way that codifies the recent case law an is workable for enforcers, (3) empower consumers meaningfully in relation to price personalisation and (4) improve the interaction between the Unfair Commercial Practices Directive (UCPD) and the Digital Services Act (DSA).

A Future-Proof Fairness Standard

Adopting a Regulation called the 'Digital Fairness Act' is not a technical or legal necessity. Limited modifications to existing texts could have sufficed. It is a political choice to mobilise the expressive function of the law. Including explicit fairness standards in this Regulation would honour this choice.

The DFA is thus an opportunity to articulate fairness standards fit for digital markets. These standards need not be entirely new. They can build on the traditions common to the EU Member States and on EU law. EU fairness standards exist not only in consumer law, where they are explicit, but also in competition law and sectoral regulation. In the law as it stands, the core fairness standard holds an economic transaction as unfair if there is a significant imbalance in the rights and obligations of the parties or if it confers on the trader an advantage which is disproportionate to the value of the goods or services provided.

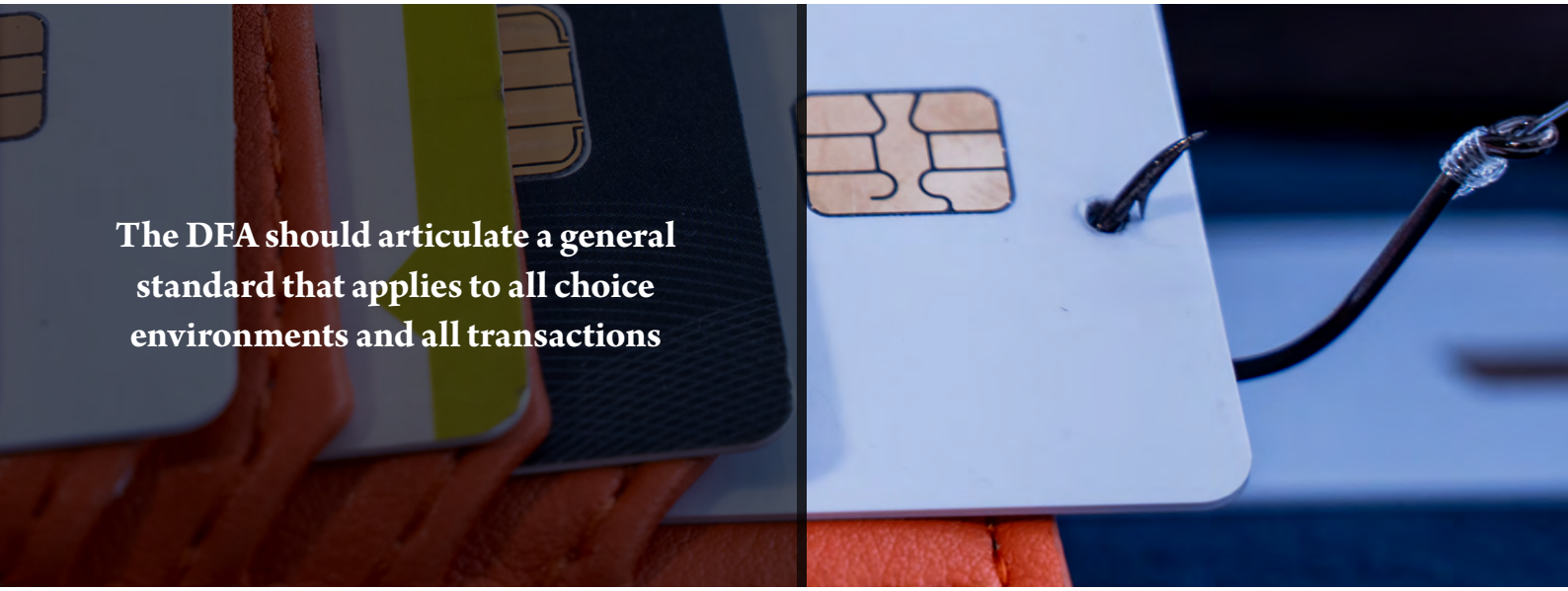
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2. We draw on Fabrizio Esposito, Mateusz Grochowski, Alexandre Piron and Anne-Lise Sibony, 'The National Lives of EU Consumer Standards: How Courts Develop the Average and Particularly Vulnerable Consumer and Create the Above-Average Consumer', *European Review of Private Law*, 2026 (forthcoming); C. Isola and Fabrizio Esposito, 'A systematic literature review on dark patterns for the legal community: definitional clarity and a legal classification based on the Unfair Commercial Practices Directive', *Computer Law & Security Review* 58, 2025, article 106169; Fabrizio Esposito, Cecilia Isola, Cristiana Santos and Martim Farinha, 'Back to the Future-Proof: Four Reforms for the Better Regulation of Dark Patterns Under the Unfair Commercial Practices Directive and Article 25 of the Digital Services Act', *European Journal of Risk Regulation*, 2026, pp. 1–23; Fabrizio Esposito, 'The GDPR enshrines the right to the impersonal price', *Computer Law & Security Review* 45, 2022, article 105660; Fabrizio Esposito, 'Price personalisation: Walking the not-so-blurred line between innovation and exploitation', 1 *Journal of Law, Market & Innovation* 3, 2024, p. 1; Fabrizio Esposito and Mateusz Grochowski (Eds.), *The Cambridge Handbook of Algorithmic Price Personalization and the Law*, Cambridge University Press, 2025.

In digital environments, the existing fairness standards did not permit tackling imbalance at the transaction level. Imbalance became apparent at the systemic level, when the massive extraction of behavioural data was used to personalise services, make them addictive, and extract more data. Going forward, it is advisable to recognise that typical forms of consideration in the modern economy include money, attention and data, personal or not. It is also important to assess fairness having regard to the cumulative effect of numerous similar transactions (thus repurposing a cumulative-effects doctrine that has long existed in competition law). This is particularly important for violations that may impose small or difficult-to-quantify harm at the individual level but become extremely concerning in the aggregate, like addictive design.

Fairness should not be assessed based on positive contributions only: what each party gives that is of value (money, attention, data) or performs (service). Negative aspects, too, matter: what a service user loses (time) or suffers (loss of functionality) should count in the balancing exercise that is central to a fairness assessment. A modern fairness standard holds choice architects to a standard of simplicity, assessed from the service users' perspective, having regard to the needs of all generations, and people with different cognitive styles. A choice environment which makes the user's decision or action unnecessarily complex or effortful is unfair. The notion of effort is central: it captures a key reality of market practices in a non-technical way, so that it is easy to mobilise for enforcers. Indeed, it already plays a decisive role in practice.[3]

There is no good reason to limit the reach of this standard to consumer transactions or to digital environments. Indeed, the line between consumers and professionals is increasingly blurred (prosumers). Equally, there is increasing porosity between physical and digital environments ('augmented' reality). Therefore, the DFA should articulate a general standard that applies to all choice environments and all transactions. It simplifies and future-proofs EU legislation, thereby contributing to a truly level playing field.



3. For an elaboration on this point, see Esposito, Grochowski, Piron and Sibony (n 2).

The updated fairness standard could be placed in the recitals of the DFA and read as follows:

> Traders have a duty to treat service users fairly. A transaction is unfair if it confers on the trader an advantage which is disproportionate to the value of the service provided. A transaction is also unfair if it imposes a substantial disadvantage on the service user. An advantage can result from payment, time and attention spent using the service, or data, personal or not. A disadvantage can result from the time and attention required to use or stop using the service. The advantage and disadvantage should be appraised having regard not only to the individual transaction but also to the cumulative effect of similar transactions.
>
> The duty to treat service users fairly extends to the design of choice environments. A choice environment which makes the user's decision or action unnecessarily complex or effortful is unfair. The effort that can reasonably be required from service users should be appraised considering the abilities and needs of all generations, and people with different cognitive styles.

An Updated Average Consumer Standard

The average consumer is a central concept in the existing legal regime. It serves as the benchmark for assessing whether a commercial practice is unfair. In the UCPD, it is described as 'the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice.' Recital 18 adds that 'The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.'

Legal Uncertainty Affecting the Interpretation of the Average Consumer

The Court of Justice's case law sends mixed signals about the average consumer. In *Compass Banca*,[4] the Court accepted that cognitive biases may be relevant when appraising the typical reaction of the average consumer, provided they are likely to materially distort the behaviour of a reasonably well-informed, observant, and circumspect person.

Ten weeks later, in *NEW Energie*,[5] the Court reverted to a stricter line. An online tariff calculator displayed a price that left out a 'compensatory amount' charged by the network operator. A link to the general terms, which mentioned the charge, was held sufficient. Unconvincingly, the average consumer was expected to read the terms and redo the maths.

National courts mostly follow the more realistic line. For example, a Luxembourg court held that users of a dating app should not have to add an upfront fee to a monthly fee to work out the real price.[6] The point is not that consumers cannot add two numbers. It is that they should not have to, given the countless such demands that modern markets place on their attention.

4. Judgment of the Court of Justice of 14 November 2024, *Compass Banca* (C-646/22, EU:C:2024:957, para 59).
5. Judgment of the Court of Justice of 23 January 2025, *NEW Niederrhein Energie und Wasser* (C-518/23, EU:C:2025:35, paras 50–51).
6. Tribunal d'arrondissement de Luxembourg 17 February 2012, Roll No. 251/2012.



In this context, it is necessary to re-articulate the average consumer standard bearing in mind the EU commitment to a high level of consumer protection (Article 114(3) TFEU; Article 38 of the Charter of Fundamental Rights of the EU).

The reference to 'cognitive biases' is a welcome recognition of the relevance of behavioural insights for consumer law. However, it risks stifling enforcement. This could happen if public enforcers and consumer associations were unsure whether they need to adduce empirical evidence and what the standard of proof is. The opening to behavioural insights could unduly work to the advantage of professionals engaging in unfair commercial practices, as they could always call into question the reliability of the behavioural findings claimants or enforcers rely on.

EU consumer law already contains a feature that mitigates this risk and deserves to be made explicit in the law: the *in abstracto* approach. The Court's case law is very clear: it uses language such as the average consumer 'is deemed to know', clearly indicating that courts *know* how consumers behave and do not need evidence.[7] In *Gut Springenheide*, the case where the Court coined the average consumer formula that was then codified in the UCPD, it was very explicit that expert evidence is not normally required. It stated that 'the Court [takes] into account the *presumed* expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect, *without ordering an expert's report or commissioning a consumer research poll*'.[8] This *in abstracto* approach means that it is irrelevant if a defendant shows, for example, that, according to available data, only 4% of consumers are influenced by a certain choice environment. The UCPD guidelines spell out this *in abstracto* approach.[9] To avoid possible pitfalls of the behavioural turn, reiterating this approach in the law is important to reassure behaviourally minded enforcers and claimants.

7. Judgment of the Court of Justice of 6 July 1995, *Mars* (C-470/93, EU:C:1995:224, para 24).

8. Judgment of the Court of Justice of 16 July 1998, *Gut Springenheide and Tusky* (C-210/96, EU:C:1998:369, para 31). Our emphasis.

9. 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 2021 C 526, p. 1, para 2.4 *in fine*.

Necessary Additions to the UCPD

To ameliorate these problems, four new paragraphs should be added to the text of Article 5 UCPD. The first would give the average consumer benchmark a definition that takes stock of behavioural findings without completely changing the language that has been in use for the past decades:

> The average consumer is deemed reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice. The average consumer can be influenced by choice environments, particularly those that exploit cognitive biases, trigger impulsivity or induce emotional states.

The suggested drafting codifies *Compass Banca* but does not reproduce the Court's exact formula. This is because referring only to 'cognitive biases' could invite a restrictive reading. Enforcers are not familiar with behavioural science terminology. They may view 'cognition' as distinct from emotions and therefore think the *Compass Banca* formula excludes emotions, even though they are an important channel of influence. The definition remains neutral as to whether influence is lawful, since that aspect is covered by the professional diligence requirement.

The second paragraph to be added offers guidance through a series of examples derived from existing decisions (EU or national). This paragraph would read:

> The average consumer is sensitive to the design of choice environments, in particular where default options are used, where some elements of a commercial offer are more salient than others, and where the choice environment makes the consumer's decision or action unnecessarily complex or effortful. The average consumer shall not be expected to deactivate default options, to detect and analyse elements which are not salient, or to piece together information which the trader has artificially scattered.

This language covers artificially split prices, offers made hard to compare through different units or parameters, and convoluted digital pathways for changing settings, unsubscribing or asking to be left alone. It does not raise the bar beyond existing rules but articulates existing principles in line with national court decisions.[10]

'Effort' is a key notion. It conveys in plain language a key lesson from behavioural science that aligns with common sense, making it easy for enforcers and courts to adopt. In essence, it requires enforcers and courts to ask (i) how much effort consumers must expend to navigate the choice environment successfully (as judged by themselves) and (ii) whether the professional put effort into making the choice environment more complex (which strongly suggests unfairness) or at least did not put enough effort into making the choice environment as simple as possible.

The third new paragraph targets an existing anomaly, which a survey of national case law uncovered:[11] the 'above-average' consumer. In a number of jurisdictions, national courts reduced or denied protection to consumers because they were held too competent or too rich to deserve the protection of the law. For example, a Polish court inferred from the purchase of basmati rice a degree of sophistication incompatible with consumer status. Greek courts invoked the abuse-of-rights doctrine against consumers deemed able to protect themselves because they engaged in speculative financial transactions.[12]

10. Esposito, Grochowski, Piron and Sibony (n 2).
11. Esposito, Grochowski, Piron and Sibony (n 2).
12. Esposito, Grochowski, Piron and Sibony (n 2).

Such decisions contradict EU law, under which the notion of consumer is objective. The Court of Justice held that a bank employee who knew more about her loan than the average borrower remained a consumer.[13] Equally, the riskiness of a transaction and the profit sought are irrelevant.[14] The proposed text makes the point explicit. More generally, no consumer may be held to a standard of diligence higher than the average consumer's.

> All consumers are entitled to the full protection conferred by this [Directive or Regulation], irrespective of their socio-economic circumstances or level of expertise.

The fourth new paragraph, about the *in abstracto* nature of the test, could be taken from the existing guidelines, with slight adaptations:

> [This Directive or Regulation] does not require demonstrating *in concreto* whether the consumer's economic behaviour has actually been distorted. It requires assessing *in abstracto* whether a commercial practice is 'likely' to have such an impact on the average consumer.

To combine the *in abstracto* approach with the behavioural turn in consumer law, evidence syntheses are necessary to help claimants and enforcers put forward behaviourally plausible theories of harm. Guidelines could provide the vehicle for disseminating such knowledge syntheses.

Exception to the Average Consumer Standard: Particular Vulnerability

Article 5(3) UCPD introduced the notion of 'particularly vulnerable consumers' as an exception to the average consumer standard. It names three sources of vulnerability: mental or physical infirmity, age or credulity. Scholars have criticised this category approach.[15] National courts have largely ignored the particularly vulnerable consumer standard altogether, using instead the possibility to contextualise the average consumer standard when a practice targets a group of consumers.

In recent years, the notion of 'digital vulnerability' has gained traction. Yet it may be the wrong vehicle for the message that all users are susceptible to online influence. Indeed, in the existing legal framework, the particularly vulnerable consumer is the exception. It is a standard that, in specific circumstances, can be used alternatively to the average consumer standard. It is not fitting to link the findings of massive consumer harm online to an exception. Cognitive biases or emotional make-up do not characterise particularly vulnerable consumers, but the average consumer. This is why reference to online susceptibility to manipulation should be added to the description of the average consumer, as suggested above.

13. Judgment of the Court of Justice of 21 September 2023, *mBank* (C-139/22, EU:C:2023:692, para 71).

14. Judgment of the Court of Justice of 3 October 2019, *Petruchová* (C-208/18, EU:C:2019:825, para 53).

15. Natali Helberger et al., *EU Consumer Protection 2.0: Protecting fairness and consumer choice in a digital economy*, BEUC, 2021; Mateusz Grochowski, 'Consumer Vulnerability: A Genealogy', in Stefan Grundmann and Pietro Sirena (Eds.), *European Contract Law and Future Challenges*, Intersentia, 2025.

The notion of 'digital vulnerability' has gained traction. Yet it may be the wrong vehicle for the message that all users are susceptible to online influence

In the language of EU law, the general concept for the asymmetry between professionals and consumers is weakness, not particular vulnerability.[16] Consumer weakness affects all consumers because they are in a position to take, not shape, the decision environments and contracts professionals craft. Although this is not the intention, the notion of digital vulnerability obscures this simple articulation of the basic *raison d'être* of consumer protection and creates conceptual confusion. It should not be used in the Digital Fairness Act.

Instead, the update to the particularly vulnerable consumer standard should reflect a conceptual shift in legal thinking about vulnerability over the last decade. In the UCPD, the particularly vulnerable consumer standard is operationalised through categories: consumers are deemed possibly more susceptible to influence because of 'their mental or physical infirmity, age or credulity' (Article 5(3) UCPD). Scholarship and reports have underscored the limitations of this approach, prompting a shift away from the category approach toward the understanding that vulnerability is situational. The 2021 UCPD Guidelines reflect this shift. Section 4.2.7 states:

The concept of vulnerability in the UCPD is dynamic and situational, meaning, for instance, that a consumer can be vulnerable in one situation but not in others. For example, certain consumers may be particularly susceptible to personalised persuasion practices in the digital environment, while less so in brick-and-mortar shops and other offline environments.

The conceptual disconnect between the UCPD and the guidelines on this point should be resolved. The language used in the UK Digital Markets, Competition and Consumers Act 2024 can help combine the existing EU law provisions with a situational understanding of vulnerability. This has the advantage of not deleting existing provisions but completing them by adding situational sensitivity. The new text replacing Article 5(3) UCPD could read:

16. See Judgment of the Court of Justice of 27 June 2000, *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346, para 25) (on unfair terms).

> A consumer may be particularly vulnerable as a result of (among other things) their age, their physical or mental health, their credulity, or the circumstances they are in.

Naming 'circumstances', as UK law does,[17] alongside personal traits not only reflects scholarly work. It also aligns with national courts' practice, which tends to treat context as a reason for protection. For example, Italian courts consider buyers of financial services vulnerable by default, and energy legislation in several countries treats low-income customers as vulnerable.

The proposed change also deserves consideration in light of another difficulty with the category approach as it stands. Under the UCPD regime, enforcers can only depart from the average consumer standard and reason based on the average consumer of the targeted group if the trader could reasonably foresee the effect of the commercial practices on that group. When the drafters of Article 5(3) wrote this provision, they likely envisioned groups that make sense to a human. Now that marketing relies on machine-made groupings based on data, it is questionable whether they qualify as 'groups that the trader can be expected to identify'. This difficulty again underscores the importance of adjusting the average consumer standard rather than relying on alternative standards, which could be harder to mobilise.

Updating the Blacklist by Delegated Acts

The blacklist is valuable for enforcers and should be updated without undue delay, particularly when behavioural findings show that a commercial practice demonstrably causes harm or is as distortive as another blacklisted practice. The Commission should be empowered to update it by way of delegated acts.

Such a proposal appears to be in line with the established practice regarding the reliance on delegated acts.[18]

Price Personalisation: Opting out in Full Knowledge of the Economic Consequences

Price personalisation is a complex matter. In terms of outcomes, price personalisation can stimulate competition and benefit consumers. At the same time, it can lead to systematic consumer exploitation. Therefore, it should not be prohibited, but needs to be carefully regulated.

Outcomes are not all that matter. Studies on consumers' perception of personalised prices suggest they are very unpopular on two counts of fairness: first, because different clients pay different prices and second, because price differentiation is based on personal information analysed by a dehumanised agent. Thus, it would make sense to empower consumers to opt out of personalised prices.

The GDPR already gives consumers the right to refuse processing of their personal data for personalisation purposes. It follows that traders have the duty to calculate an impersonal price. Under the law as it stands, however, enforcing this right is truly effortful.[19] There seems to be no good reason to make exercising a right justified by

17. Digital Markets, Competition and Consumers Act 2024, section 247.
18. Esposito, Isola, Santos and Farinha (n 2).
19. Esposito, 'The GDPR enshrines the right to the impersonal price' (n 2).

reasonable demands of autonomy and fairness in consumer markets this difficult.

Moreover, EU law specifically requires disclosing 'where applicable' and before the consumer is bound by a contract 'that the price was personalised on the basis of automated decision-making'.[20] The only specification is that the information should be disclosed 'in a clear and comprehensible manner'. This is a very thin substantive requirement. Merely knowing that the price one sees is personalised does not do much if one does not know how much or why the price was personalised.[21]

EU law can do better. Requiring that information about price personalisation be not only timely, clear and comprehensible but also meaningful and concrete to the consumer is possible and in line with EU law. The Court showed the way in its case law on unfair clauses in consumer loans in foreign currency. In *Kásler*, the Court held that it is not enough that the contract term explaining the conversion formula is grammatically intelligible to the consumer. The trader must put the consumer 'in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it'.[22] This was in response to a question pointing to the vagueness of the legal requirement that contract clauses should be 'clear and comprehensible'.

The same techniques could be mobilised in relation to personalised prices in a very simple way: consumers should be informed about the personalised price together with the impersonal one – the price that would be applied in the absence of processing of personal data. In practice, this would simply mean that a consumer is given three pieces of information at the same time: impersonal price, personalised price, and the information that the second price displayed is personalised; for example:

~~25~~ 22* EUR

*We have personalised this price for you

Traders who want to offer a personalised surcharge could still do so, but then would need to explain to the consumer why they think the consumer should accept. They would also put effort into making the information salient and comprehensible to consumers. This approach would be especially plausible in contexts such as donations to NGOs. Since consumers would have the right to opt out from the personalised price, it would be difficult to exploit them – and in any case protection against misleading and aggressive practices would still apply.

A consequential concern is that if disclosure focuses on the impersonal price, traders can artificially increase it. This concern is not new. To address it, the 2019 Omnibus Directive introduced in the Price Indication Directive (PID) a provision regulating the way discounts are calculated.[23] The Commission Guidance Notice explains how similar concerns related to recommended reference prices can be addressed under the UCPD.[24] Moreover,

20. Article 6(1)(ea) of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (Consumer Rights Directive), as amended by Directive (EU) 2019/2161.

21. Esposito, 'Price personalisation: Walking the not-so-blurred line between innovation and exploitation' (n 2).

22. Judgment of the Court of Justice of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, para 75).

23. Article 6a of Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers (consolidated version).

24. Commission Notice (n 9), section 1.2.5.

consumers who strongly dislike personalisation and systematically choose to opt out will act as a countervailing force against the artificial inflation of the impersonal price. Therefore, for the moment at least, the integrity of the impersonal price is governed by existing general rules. In any case, since the PID is a minimum harmonisation directive, Member States may introduce specific rules if needed.

Accordingly, we propose two amendments to Directive 2011/83/EU.

First, the following Article could be inserted:

> 'Right to an impersonal price
>
> 1. Traders must offer a price that is not personalised to consumers who refuse the processing of their personal data. This impersonal price must be available to all consumers.
>
> 2. Consumers have the right to choose the impersonal price over the personalised price.
>
> 3. The exercise of that right shall not be made more burdensome than giving consent to the processing of personal data for the purposes of personalising the price.
>
> 4. The impersonal price must appear next to the personalised price, as clearly and legibly as the personalised price. A concise, salient and clear mention must indicate which is the personalised price and which is the impersonal price.'

Second, in Article 6(1), the following point could be added:

> [x] where the price is personalised on the basis of the processing of the consumer's personal data, including by means of automated decision-making, the impersonal price, together with the personalised price.

Substance and Enforcement: Taking the Best of the UCPD and the DSA

The UCPD offers a perfectly suitable normative framework to tackle dark patterns.[25] The DSA also includes provisions on dark patterns. This situation has created confusion about the respective scope of application of both texts. The DFA is an opportunity to clarify and unify one set of provisions on dark patterns. The suggestion is to keep (and update) the substantive provisions currently contained in the UCPD, delete confusing provisions of the DSA, and keep the powerful enforcement mechanisms the DSA introduced. Smooth articulation between substantive and procedural provisions would be facilitated if the UCPD were turned into a regulation.

Present Situation: Poor Articulation between the UCPD and the DSA

Article 25(1) DSA prohibits online platforms from designing interfaces that deceive, manipulate or otherwise impair users' free and informed decisions. Unlike the UCPD, it does so without definitions or a list of prohibited practices. Article 25(2) DSA disapplies the prohibition of the first paragraph to practices 'covered' by the UCPD or the GDPR, without saying what 'covered' means. On one reading, Article 25(1) never applies in consumer relations. On another, it applies only to practices the UCPD deems fair, a residual space that is hard to find.

25. Isola and Esposito (n 2).

Practice confirms the confusion. In its 2025 report on the interaction between the DSA and other EU acts, the Commission itself acknowledged the legal uncertainty.[26] In December 2025, its first DSA non-compliance decision fined X €120 million,[27] partly for the deceptive design of its 'blue checkmark'. The decision applied Article 25(1) without engaging with Article 25(2) at all, although the practice in issue is both consumer-facing and business-facing, and probably mostly consumer-facing.

The real added value of the DSA regarding dark patterns is not the substantive provision.[28] It is centralised enforcement against the largest platforms, higher sanctions, and extended protection to all service recipients, not just consumers. The strengths should remain, and the confusion should disappear.

A Proposal to Ameliorate the Situation

Since Article 25(1) DSA does not add substance to the UCPD rules, the ban on dark patterns can be deleted without losing any information about what service users are protected from. If the legislature wants to keep the expressive function of a ban on dark patterns, it should be included in Article 5 of the UCPD. Article 25(1) DSA's useful effect concerns who is protected. The provision should do just that: state that service users who are not consumers are protected. The provision should be reworded to extend to all online service users the protection that the UCPD rules afford to consumers.



26. European Commission, Report on the application of Article 33 of Regulation (EU) 2022/2065 (DSA) and the interaction of that Regulation with other legal acts, COM(2025) 708 final, p. 8.

27. Commission Decision of 5 December 2025, C(2025) 8630 final, pursuant to Articles 73(1), 73(3) and 74(1) of Regulation (EU) 2022/2065 (Cases DSA.100101, DSA.100102 and DSA.100103 – X (formerly Twitter)).

28. Esposito, Isola, Santos and Farinha (n 2).

Transforming the UCPD into a regulation (Unfair Commercial Practices Regulation) would make this easier and simplify the convergence of enforcement mechanisms. National enforcers and the Commission would have concurrent competence to enforce EU fairness rules.

The exclusion clause should be deleted from Article 25(2) DSA. There is no need for it at present. In EU law, the principle is cumulative application of overlapping provisions when they are compatible. Only when overlapping provisions are in conflict does the *lex specialis* principle give priority to the specific rule. After the ban on dark patterns is removed from Article 25(1), it will be even less necessary, as there will be no possibility of conflict.

Concluding Remarks

We hope that the arguments, recitals and provisions proposed here will inspire the drafters of the DFA. As such, there is no need for a new 'act' with a new name, but since one is proposed, lawmakers should seize the opportunity to articulate the EU fairness standards by which provisions will be interpreted. The DFA also offers a welcome opportunity to update the average consumer standard, which is the correct locus for incorporating the reference to behavioural insights made explicit in the *Compass Banca* judgment. The DFA can also provide meaningful protection against personalised prices, a practice that, irrespective of its economic characteristics, consumers do not like. It can do so simply by redesigning transparency obligations. Finally, the DFA must end the confusion regarding the interaction between the UCPD and the DSA. It can do so by keeping the best of both texts: substantive protection from the UCPD, scope and enforcement mechanisms from the DSA.

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