

Zanda Davida, *Dr. iur.*

Lecturer at the University of Latvia Faculty of Law

BURDEN OF PROOF IN LAW PROHIBITING UNFAIR COMMERCIAL PRACTICES

PIERĀDĪŠANAS PIENĀKUMS NEGODĪGAS KOMERCPRAKSES AIZLIEGUMA TIESĪBĀS

Key words: law prohibiting unfair commercial practices, burden of proof, consumer decision-making autonomy, digital market

Atslēgvārdi: negodīgas komercprakses aizlieguma tiesības, pierādīšanas pienākums, patērētāja lēmuma autonomija, digitālais tirgus

Summary

Directive on unfair commercial practices (UCPD) is based on the industrial economy, therefore, it has been formulated before the development of the Internet and digital economy, and still remains in force with no major changes since its adoption. As the main legal tool for protecting consumer decision-making autonomy, which is not substantially amended following the Fitness Check of consumer law that resulted in the adoption of Directive 2019/2161/EU, it is questionable whether the UCPD ensures an effective protection of consumer decision-making autonomy in the digital environment. This paper analyses the potential of the burden of proof model of the UCPD, in unfair commercial practices' controls in digital environment, before demonstrating how the UCPD could be modernised while preserving the balance between commercial interests and consumer rights to free decision. This could be done by putting the burden of proof on trader in complex cases of unfair commercial practice in digital environment, especially in cases when the consumer is in a significant digital asymmetry with the trader due to the trader's usage of algorithms or other complicated digital practices or business models.

Kopsavilkums

Negodīgas komercprakses direktīva (NKD) ir izstrādāta industriālās ekonomikas apstākļos un bez būtiskām izmaiņām joprojām ir spēkā. Līdz ar to interneta un digitālās ekonomikas attīstības radītie riski NKD izstādes procesā nav ņemti vērā. Šobrīd NKD ir nozīmīgs juridisks instruments patērētāju lēmumu autonomijas aizsardzībai, taču pastāv bažas, vai NKD spēj

nodrošināt efektīvu patērētāju lēmumu autonomijas aizsardzību arī digitālajā vidē. Šajā rakstā tiek analizēts NKD ietvertā negodīgas komercprakses pierādīšanas modeļa potenciāls un atbilstība digitālās vides realitātei, secinot, ka NKD būtu ieteicams modernizēt, vienlaikus saglabājot līdzsvaru starp komercprakses īstenotāju interesēm veikt komercdarbību un patērētāju tiesībām pieņemt brīvus un negatīvi neietekmētus lēmumus. To varētu izdarīt, uzliekot pierādījumu slogu komercprakses īstenotājiem sarežģītos iespējamās negodīgas komercprakses digitālajā vidē gadījumos, īpaši situācijās, kad patērētājs atrodas būtiskā digitālās asimetrijas stāvoklī algoritmu vai citu sarežģītu digitālo prakšu vai biznesa modeļu izmantošanas no komercprakses īstenotāja puses dēļ.

Introduction

The digitalisation of societies and markets has led to consumers facing unprecedented challenges, where one of the most complex issues is protecting consumer decision-making autonomy in the digital environment from unfair use of digital asymmetry by traders.¹ The studies show that traders widely use the advantages of digital asymmetry to make such unfair practices as dark patterns (also called deceptive patterns), personalised advertisements based on profiling of children and sensitive data, data-driven advertisements which use consumers' vulnerabilities (for example, consumers' data related to credits and gambling), manipulative and deceptive online interface design and recommender systems, etc.² Those practices have a destructive influence on consumer decision-making autonomy, nudging consumers to make a transactional decision that they would not have taken otherwise. The recently adopted EU regulations, such as Digital Services Act, Digital Markets Act, the European Commission (henceforth, EC) recently proposed the Proposal for Artificial Intelligence Act to introduce several important provisions aiming to protect consumer decision-making autonomy against certain unfair commercial practices in a digital environment. However, they are fragmented and relegate the consumer to a minor role, hence, they do not introduce a major transformation of the EU consumer law *acquis*. Moreover, they do not change the EU law's old system dominance of mandatory information requirements and average consumer benchmark. The practice shows that a new

¹ Davida Z. Consumer Decision-making Autonomy in Law Prohibiting Unfair Commercial Practices in the Digital Environment. Summary of Doctoral Thesis. Riga: University of Latvia, 2024.

² There are many studies of digital marketing practices that prove this point, for example, the most recent ones: Democratic Control Over Big Tech Business Models. Interim report from the Danish government's expert group on big tech. Copenhagen, July 2023. Available: <https://em.dk/aktuelt/udgivelser-og-aftaler/2023/jun/demokratisk-kontrol-med-tech-giganternes-forretningsmodeller> [viewed 28.11.2023.]; BEUC. Connected, but Unfairly Treated. Consumer Survey Results on the Fairness of the Online Environment. September 2023. Available: https://www.beuc.eu/sites/default/files/publications/BEUC-X-2023-113_Fairness_of_the_digital_environment_survey_results.pdf [viewed 28.11.2023.]; Guidelines on the Protection of the Online Consumer. Authority for Consumer & Markets, March 2023. Available: <https://www.acm.nl/en/publications/information-for-companies/acm-guideline/guidelines-protection-online-consumer> [viewed 28.11.2023.].

benchmark – digital vulnerability³ – comes to the fore in the digital market – consequently, this means the information paradigm failures. Thus, the current regulatory framework does not adequately react to the ongoing digitalization permeating the consumer market at large.

At present, the Unfair Commercial Practices Directive (henceforth, UCPD) is the main legal tool for protecting consumer decision-making autonomy against unfair practices, but it is not updated for digital economy and digital society, where a digital fairness is required.⁴ In light of the foregoing, this paper aims to evaluate, through the lens of consumer law, the efficacy of the UCPD in safeguarding consumer decision-making autonomy from unfair commercial practice in the digital environment. Importantly, the UCTD's regulatory framework has numerous legal aspects which could be used to strengthen the consumer's decision-making autonomy against the unfair use of digital asymmetry. However, this paper will exclusively focus on the burden of proof model in the UCPD, because the UCPD is based on principles, therefore conceptually it is flexible and future durable, whereas many problems in practice arise precisely because of ineffective enforcement of the material law prohibiting unfair commercial practices.⁵

The paper opens with an overview of the UCPD's contemporary relevance to digital economy and digital society in relationship between consumer and business. Particular attention will be given to the influence of the newly introduced EU law, addressing the issues of consumer decision-making autonomy – Digital Service Act, Proposal for Artificial Intelligence Act and others. Subsequently, the paper will highlight the burden of proof model as a shortcoming in the UCPD's protective framework, impeding the directive's potential to serve as an effective regulatory tool in the digital age. Finally, the paper will explore the potential solutions to the identified deficiency.

1. Where is the problem?

Intellectual design of the EU consumer acquis dates back to the 1962 Kennedy Declaration,⁶ where four consumer rights were identified – right to safety, right to

³ BEUC. EU Consumer Protection 2.0. Structural Asymmetries in Digital Consumer Markets. Brussels, March 2021, p. 14. Available: https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-018_eu_consumer_protection_2.0.pdf [viewed 28.11.2023.].

⁴ European Commission. Call for Evidence for an Evaluation / Fitness Check. Fitness Check of EU consumer law on digital fairness. 17 May 2022. Available: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digitalais-taisnigums-ES-pateretaju-tiesibu-aktu-atbilstibas-parbaude_lv [viewed 28.11.2023.].

⁵ Willis L. Deception by Design. Legal Studies Paper, 2020, No. 2020-25, p. 190.

⁶ Micklitz H.-W. The Role of Standards in Future EU Digital Policy Legislation. A Consumer Perspective. Brussels: BEUC, 2023, pp. 15, 154. Available: https://www.beuc.eu/sites/default/files/publications/BEUC-X-2023-096_The_Role_of_Standards_in_Future_EU_Digital_Policy_Legislation.pdf [viewed 28.11.2023.]; Micklitz H.-W. presentation in BEUC workshop "Fairness by design – what future for digital consumer rights?" 08.11.2023, Brussels. Unpublished.

be informed, right to choose and right to be heard.⁷ Thus, the UCPD is based on the same principles – right to choose and to be informed, namely, right to take a decision based on information.⁸ Therefore, the mandatory information requirements dominate in the UCPD framework. However, the decade back, before the Internet revolution in the society, scholars drew attention to the aspect that the freedom of decision-making can in theory also be affected by advertising efforts that transport not information but emotions.⁹ The digitalization of the consumer market has made scholars' theoretical assumptions an everyday reality, because the fact that consumer is circumspect, observant and well informed¹⁰ will not always safeguard consumer's autonomy and protect the freedom of their choices in the marketplace. On the contrary, informational overload can lead to 'decision fatigue',¹¹ whereby overwhelmed users are prone to making less well-considered decisions that may, as a result, not align with their best interests.¹² Consequently, in contemporaneity the Court of Justice of the European Union (henceforth, CJEU) has settled the benchmark of an average consumer, who is used to assess unfair commercial practice,¹³ as not appropriated to digital reality. The studies show that the average consumer's ability to discern the use of unfair digital practices such as dark patterns, is rather limited and, even more concerning, consumers appear to accept the presence of unfair practices as part of their normal digital experience and have become accustomed to them.¹⁴

⁷ Kennedy John F. Excerpts from a Message to the Congress Protecting the Consumer Interest on Consumer Products, 15 March 1962. Available: <https://www.jfklibrary.org/asset-viewer/archives/JFKWHA/1962/JFKWHA-080-003/JFKWHA-080-003> [viewed 28.11.2023.].

⁸ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'). OJ L 149, 11.6.2005., Article 2 Point (k).

⁹ Reich N., Micklitz H.-W., Rott P. Tonner K. *European Consumer Law*. 2nd edition. Cambridge: Intersentia, 2014, p. 78.

¹⁰ CJEU judgement of 16 July 1998 in Case No. C-210/96 Gut Springenheide and Tusky, ECR I-4657, para. 31. Later, the concept of the average consumer formulated by the CJEU was included UCPD Recital 18.

¹¹ Busch K. Implementing Personalized Law: Personalized Disclosures in Consumer Law and Data Privacy Law. *University of Chicago Law Review*, Vol. 86, Iss. 2, Article 9, 2019, p. 322.; Vohs K. D., Baumeister R. F., Schmeichel B. J., Twenge J. M., Nelson N. M., Tice D. M. Making choices impairs subsequent self-control: A limited-resource account of decision making, self-regulation, and active initiative. *Journal of Personality and Social Psychology*, 94(5), 2008, pp. 883, 895–96.; Levav J., Heitmann M., Heitmann A., Iyengar S. S. Order in Product Customization Decisions: Evidence from Field Experiments, *Journal of Political Economy*, Vol. 118, No. 2, 2010, pp. 274, 296.

¹² Durovis M., Poon J. Consumer Vulnerability, Digital Fairness, and the European Rules on Unfair Contract Terms: What Can Be Learnt from the Case Law Against TikTok and Meta? *Journal of Consumer Policy*, 2023, p. 9.

¹³ Waddington L. Reflections on the Protection of 'Vulnerable' Consumers Under EU Law. *Maastricht Faculty of Law Working Paper No. 2013-2*, 2014, p. 5.

¹⁴ For example, European Commission. Behavioural study on unfair commercial practices in the digital environment: dark patterns and manipulative personalisation, Final report. April 2022, p. 6.

Legal science discussions increasingly consider the need of new benchmark. A new concept is created – ‘consumer digital vulnerability’ – where digital vulnerability is indicated as a universal state of defencelessness and susceptibility to (the exploitation of) power imbalances that are the result of the increasing automation of commerce, datafied consumer-seller relations, and the very architecture of digital marketplaces.¹⁵ Consumer digital vulnerability mostly results from digital asymmetry – the unequal position in digital environment between consumer and performer of commercial practice resulting from the use of data and technology.¹⁶ Digital asymmetry is not an unfair practice in itself,¹⁷ but it creates favourable conditions for the performer of commercial practice for easy, effective and imperceptible ways of using it unfairly in relation to the consumer. Moreover, the use of unfair digital asymmetry is difficult to identify and prove. Here, the model of burden of proof comes into play. Before analysing the UCPD’s model of burden of proof, it is useful to look at the EU regulation, especially to the new one, attempting to protect consumers’ decision-making autonomy in the digital environment from an unfair use of digital asymmetry.

2. Protection of consumer decision-making autonomy in the digital environment under EU regulation

In the last years, a variety of new acts in EU consumer law have been already adopted or presently are in the process of adoption, such as Digital Markets Act, Digital Services Act, Data Act,¹⁸ Artificial Intelligence Act, etc. However, what are the benefits for the consumers in the new digital market order?

The recently adopted EU regulations introduce several important provisions aiming to protect consumer decision-making autonomy against certain unfair commercial practices in a digital environment. The prohibitions against personalised advertisement based on profiling of children and sensitive data by providers of intermediary services are expressed in Article 28, Para. 2, and Article 26 Para. 3 of the Digital Services Act, as well as the prohibition against manipulative and deceptive online interface design, which is expressed in

¹⁵ Helberger N., Sax M., Strycharz J., Micklitz H.-W. Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability. *Journal of Consumer Policy*, 45, 2022, p. 175.

¹⁶ Davida Z. Chatbots by business vis-à-vis consumers: a new form of power and information asymmetry. In: *Globalization and its Socio-Economic Consequences 2021*. Zilina: SHS Web Conferences, Vol. 129, Article No. 05002, 2021, pp. 1–6.

¹⁷ BEUC. *EU Consumer Protection 2.0: Protecting fairness and consumer choice in a digital economy*, 2022, Ref: BEUC-X-2022-015, p. 4. Available: https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-015_protecting_fairness_and_consumer_choice_in_a_digital_economy.pdf [viewed 28.11.2023.].

¹⁸ Proposal for a Regulation of the European Parliament and the Council on harmonised rules on fair access to and use of data (Data Act), COM (2022) 68 final, 23.2.2022.

Article 25.¹⁹ The Digital Markets Act will prohibit gatekeepers from using self-preferencing practices (Article 6 Point 5), tying consumers (Article 5 Point 5 and 7) and tracking consumers without their proper consent (Article 5 Para.1(a), (b), (c) and (d)).²⁰ In addition, the European Commission recently proposed the Proposal for Artificial Intelligence Act, where Article 5 Para. 1(a) and (b) will prohibit artificial intelligence practices that have a significant potential of manipulating persons through subliminal techniques beyond their consciousness or exploiting vulnerabilities of specific vulnerable groups such as children or persons with disabilities to materially distort their behaviour in a manner that is likely to cause them or another person psychological or physical harm.²¹ The new regulation is welcome, but it is not sufficient to protect consumer decision-making autonomy in the digital environment due to the reasons that will be defined below.

Firstly, new regulations apply to certain subjects, i.e., the Digital Services Act applies to providers of intermediary services, the Digital Markets Act – to gatekeepers, and the Artificial Intelligence Act – to providers of artificial intelligence systems. Thus, the same protection is not guaranteed to consumers who are not interacting with certain subjects within the scope of the certain regulation, for example, protection of Digital Services Act will not cover traders selling goods through their own web shops or in an online game. Secondly, none of the three regulations integrates protection of the consumer decision-making autonomy as a standalone objective in a systemic manner. Thus, in the development of regulations, the risks created by the digital environment for consumer decision-making autonomy have not been seriously analysed and considered. Thirdly, with respect to consumers, the new regulations are fragmented, opaque and complicated, therefore, it will be difficult for consumers to use new law to protect their rights. Furthermore, the consumers cannot use the regulation directly in all cases, for example, the right to request a proof of the artificial intelligence practice conformity with the Artificial Intelligence Act is intended to be given to the national competent authority, and such rights are not intended for consumers.

In the fourth quarter of 2022, a public consultation was held on the Fitness Check of EU consumer law on digital fairness.²² The results showed that the majority of consumers had not taken any action to solve the problems they encountered

¹⁹ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act). JO L 227, 27.10.2022.

²⁰ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act). JO L 265, 12.10.2022.

²¹ Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain legislative acts of the Union. COM(2021) 206 final, 21.4.2021.

²² European Commission. Call for Evidence for an Evaluation / Fitness Check. Fitness Check of EU consumer law on digital fairness. 17 May 2022. Available: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digitalais-taisnigums-ES-pateretaju-tiesibu-aktu-atabilstibas-parbaude_lv [viewed 28.11.2023.].

in the digital market and, at the same, time more than a half of respondents supported the idea of shifting the burden of proof of compliance with legal requirements onto the trader. This indicates that consumers do not feel sufficiently empowered to protect their decision-making autonomy in the digital environment by the current legal means. At the same time, the arguments advanced by the businesses against a reversal of the burden of proof are not sufficient. The main arguments named in this context were disproportional costs, especially for startups, small and medium businesses, an increase of frivolous claims and malicious litigation, and an assumption that a practice should not be presumed unfair for consumers simply because it is digital and complex.

The UCPD is best-suited for strengthened consumers' ability to protect their rights individually against an unfair use of digital asymmetry in all points for certain subjects, because the definition of the performer of commercial practice is wide and future-proof. It can apply to all the agents – traders, providers of intermediary services, gatekeepers, providers of artificial intelligence systems and others, because the UCPD eligibility depends on the assessment whether a certain subject is interacting with consumers for the purposes relating to his trade, business, craft, or profession, and also applies to anyone acting in the name of or on behalf of a trader. Moreover, the UCPD is horizontal, hence, a violation of another EU law may lead to a violation of the UCPD – i.e., unfair commercial practice. Consequently, it is useful to start the discussion about the shortcomings of burden of proof related to the protection of consumer rights with the UCPD analysis.

3. Burden of proof model as a shortcoming of the UCPD

Under the current Article 12 a) of UCPD, the burden of proof may be placed upon the trader by the court on a case-by-case basis, but it is not sufficient in digital reality due to the following reasons.

Firstly, it is a choice of the court, which can be influenced by various subjective factors, including the fact that the courts themselves may not understand the operating principles of digital business, for example, how the algorithms have worked in the specific case, and may not even identify an unfair use of digital asymmetry. Felix Methmann has emphasized that consumers and authorities can see what algorithms and consumer data are used by a business, nevertheless, proving what the algorithms are actually doing might be extremely difficult.²³ Thus, the seemingly public information about the use of algorithms may be contrary to their use in practice. Courts suffer from the same universal vulnerability.

²³ Felix Methmann as a representative of Verbraucherzentrale Bundesverband opinion in BEUC workshop "Fairness by design – what future for digital consumer rights?" 08.11.2023, Brussels. Unpublished.

Judges are not smarter than the parties before the court.²⁴ It is unreasonable to ask the consumer to be able to identify unfair algorithms and prove that they have unfairly influenced his transactional decision against his interests. Hence, the consumer will not always be able to point out these facts and indicate them to the court, therefore it is necessary to develop a regulation that facilitates the ability of the court and the consumer to understand, identify and obtain actual evidence about the operation of the complex digital practice.

Secondly, each national court needs to follow the national procedural law. The UCPD Recital 21 reads: “While it is for national law to determine the burden of proof, it is appropriate to enable courts and administrative authorities to require traders to produce evidence as to the accuracy of factual claims they have made.”²⁵ Consequently, the court’s request to the traders to produce an evidence as to the accuracy of factual claims they have made, depends on national law, national case-law and legal traditions. Thus, even though consumers are in the same factual circumstances, their opportunities to protect their consumer rights in court proceedings will differ depending on the legal system of the particular country. This goes against EU consumer laws, including the UCPD, which aims to equally protect all consumers from unfair commercial practices.²⁶ Moreover, the UCPD Recital 21 relate to traders’ obligation to produce evidence about accuracy of factual claims, but it does not solve the problem which arises, when the trader does not provide information at all and does not claim anything, for example, a trader does not provide any information explaining how the algorithms were used to profile consumer. Thus, one can agree with Peter Rott’s opinion that the courts of national states already have various legal instruments that can be used to achieve the aim of a fair trial (for example, standard of proof, right to disclose, explain and receive documents, even become acquainted with trade secrets),²⁷ whereas it is difficult to concur with another P. Rott’s opinion – that these instruments are currently sufficient for contemporary digital economy and ensuring equality of consumer protection in EU digital market.

²⁴ BEUC. EU Consumer Protection 2.0. Structural Asymmetries in Digital Consumer Markets. Brussels, March 2021, p. 77. Available: https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-018_eu_consumer_protection_2.0.pdf [viewed 28.11.2023].

²⁵ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’). OJ L 149, 11.6.2005., Recital 21.

²⁶ *Ibid.*, Recital 4, 18 and others.

²⁷ Peter Rott as a representative of Carl von Ossietzky Universität Oldenburg opinion in BEUC workshop “Fairness by design – what future for digital consumer rights?” 08.11.2023, Brussels. Unpublished.

Thirdly, many EU Member States have a strong tradition of adversarial principle in the civil procedural law.²⁸ Therefore, the effectiveness of the UCPD's new Article 11a, which has been introduced by the EU Omnibus Directive²⁹ and contains individual remedies for consumers who suffer from unfair commercial practices, is doubtful. Under this new provision, the consumers harmed by unfair commercial practices should have access to proportionate and effective remedies, including a compensation for damage suffered and, where relevant, a price reduction or termination of the contract. The Dieselgate cases in Germany showed how difficult it was for the consumers to prove an unfair commercial practice.³⁰ It can be predicted that the cases of proving unfair commercial practices in the digital environment, for example, algorithms that consumers cannot understand, could be even more complicated than the Dieselgate cases, because the unfair commercial practice established in the Dieselgate cases was similar and applied to a wide number of consumers, whereas frequently an unfair commercial practice in the digital environment is personalized to one individual consumer.³¹

Fourthly, the legal history shows that shifting the burden of proof onto the stronger party is a reasonable and effective method. For example, Article 3, para. 3 of Directive 93/13/EEC has shifted the burden of proof regarding the existence of preformulated contract terms onto the supplier;³² in case of a conflict, the processor (user) of data must demonstrate that collection and processing of data has been lawful according to General Data Protection Regulation;³³ in discrimination and labour law, the burden of proof is placed on the stronger party. Practice shows that the aforementioned models of proof have

²⁸ Davida Z. Sacikstes princips un patērētājs [Adversarial Principle and Consumer]. In: Protecting values enshrined in Constitution: Perspectives of different fields of law. Collection of research papers of the 77th International Scientific Conference of the University of Latvia. Riga: University of Latvia Press, 2019, pp. 265–273; see also Davida Z. Consumer Decision-Making Autonomy in the Digital Environment: Towards a New Understanding of National Courts' Obligation to Assess Ex Officio Violations of Fair Commercial Practices. European Journal of Risk Regulation. Accepted, pending publication.

²⁹ Directive (EU) 2019/2161 on the better enforcement and modernisation of Union consumer protection rules (2019) OJ L 328/7.

³⁰ Alexander Ch. Unfair Commercial Practices and Individual Consumer Claims for Damages – The Transposition of Art. 11a UCP Directive in Germany and Austria. GRUR International, Vol. 72, Iss. 4, April 2023, pp. 327–336. See also BEUC. Seven Years of Dieselgate. A never-ending story, 2022. Ref: BEUC-X-2022-130. Available: https://www.beuc.eu/sites/default/files/publications/BEUC-X-2022-130_Dieselgate_7th_report.pdf [viewed 28.11.2023.].

³¹ Davida Z. Consumer Rights and Personalised Advertising: Risk of Exploiting Consumer Vulnerabilities. Socrates: Riga Stradiņš University Faculty of Law Electronic Scientific Journal of Law. Riga: RSU, No. 1 (16), 2020, pp. 76–86. Jablonowska A., Kuziemski M., Nowak A. M., Micklitz H.-W., Palka P., Sartor G. Consumer Law and Artificial Intelligence Challenges to the EU Consumer Law and Policy Stemming from the Business' Use of Artificial Intelligence. Final report of the ARTSY project, EUI Working Paper LAW 2018, No. 2018/11, Italy, p. 48.

³² Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. OJ L 095, 21.04.1993.

³³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). OJ L 119, 04.05.2016.

not caused significant legal obstacles or disproportionate costs for the stronger party, on the contrary, the common legal climate of the sectors has only gained.

4. The way forward

This paper proposes, as a way to combat the UCPD's current deficiencies, to change a burden of proof model in the UCPD (namely, in cases of digital asymmetry and where there are reasonable suspicions of the existence of a violation the burden of proof should be placed on the performer of commercial practices – an obligation to prove that the commercial practice used by the performer is fair³⁴), offering specific legal aspects which must be addressed. The burden of proof should be placed upon the performer of commercial practices in complex cases, especially where there are perceived indications of digital asymmetry between a consumer and a business. For example, personalisation practice must be recognised as a complex case, because it creates significant risks for consumer decision-making autonomy. A consumer does not know how their data is used. If a trader does not disclose it, a consumer does not have a choice, and any capacity to detect it. A consumer must be able to detect personalisation by himself and take a free decision. Hence, only a trader can prove that his personalisation has been fair. Likewise, the cases concerning an age-appropriate digital design³⁵ – the trader should prove that his online age verification methods are appropriate and effective to avoid children using his digital content if it is not intended or appropriate for children. Digital design by default must be safe for everyone, hence, the algorithms in default should be in favour for consumer, excluding the usage of addictive, behaviour or dark patterns, not employing attention traps which include creating a pressure on the consumer to remain in the digital platform as long as possible.

The complex cases just described are not exclusive, but only mark the most pressing problem situations at present. Therefore, this discussion should be continued. Updating the UCPD to modernizing the burden of proof would represent an important initial step toward enhancing the effective enforcement of rules that prohibit unfair commercial practices.

³⁴ Davida Z., 2023. See also Davida Z. Patērētāja lēmuma autonomijas ievērošana digitālajā vidē: pierādīšanas pienākums [Respecting the Consumer Decision-Making autonomy in the Digital Environment: Burden of Proof]. In: Admissibility and Justifiability of Restrictions of Rights in a Democratic State Governed by the Rule of Law. Article collection in legal science, The 81st International Scientific Conference of the University of Latvia. Riga: The University of Latvia Press, 2023, pp. 167–173; Davida Z. Consumer Decision-making Autonomy in the Digital Environment: Towards a New Understanding of National Courts' Obligation to Assess Ex Officio Violations of Fair Commercial Practices. *European Journal of Risk Regulation*. Accepted, pending publication.

³⁵ European Parliament. Online age verification methods for children, 2023. Available: [https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/739350/EPRS_ATA\(2023\)739350_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/739350/EPRS_ATA(2023)739350_EN.pdf) [viewed 28.11.2023.]. See also TikTok fined 345 million euros over handling of children's data in Europe. Reuters, 16.09.2023. Available: <https://www.reuters.com/technology/tiktok-fined-345-million-euros-over-handling-childrens-data-europe-2023-09-15/> [viewed 28.11.2023.].

Conclusions

1. The UCPD is based on mandatory information requirements and benchmark of an average consumer. It is not suitable for the contemporary digital economy and society, because consumers are overloaded with information and the average consumer benchmark has changed toward consumer's digital vulnerability. This means that each one of us can become vulnerable in the digital environment and be nudged by means of unfair practices, because a consumer can be addressed individually and personally in the particularly well-chosen time, when the consumer is most vulnerable.
2. The recently adopted EU regulations, for example, the Digital Services Act, the Digital Markets Act and the Artificial Intelligence Act are fragmented (because they apply to certain subjects) and relegate the consumer to a minor role (because none of the three regulations integrates protection of the consumer decision-making autonomy as a standalone objective in a systemic manner), consequently, the new regulation will not make a major change to the EU consumer law *acquis*.
3. The UCPD is the best-suited for strengthened consumers' ability to protect their rights against an unfair use of digital asymmetry, because it is based on principles, thus, conceptually it is flexible and future durable, but many problems in practice arise precisely because of an ineffective enforcement of the material law prohibiting unfair commercial practices. Hence, it is necessary to review the burden of proof model as one of the enforcement tools in the UCPD.
4. Under UCPD, the burden of proof may be placed on the trader by the court on a case-by-case basis, but it is not enough in digital reality, because 1) it is a discretion of the court, which can be influenced by various subjective factors; 2) each national court is compelled to follow the national procedural law, therefore, a consumer will not have an equal protection and procedural rights in all EU Member States; 3) many EU Member States have a strong adversarial principle tradition in the civil procedural law, which is unfavourable to the weaker party, mostly to consumers; 4) the legal history shows that shifting the burden of proof upon the stronger party is a reasonable and effective method.
5. The burden of proof in the UCPD should be placed upon the performer of commercial practices in complex cases, especially where there are indications of digital asymmetry between consumer and business. These cases are related to personalisation practice, online age verification methods, safe digital design – that means no unfavourable algorithmic defaults, no usage of addictive, behaviour or dark patterns, and no attention traps, including creating pressure for the consumer to remain in the digital platform as long as possible.

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