Study on Digital Fairness: enforcement of EU law key to protecting consumers shopping online

Today, Ecommerce Europe, EuroCommerce and Independent Retail Europe presented the results of a study about "Digital Fairness in Online Retail". This study by Prof. Dr. Jürgen Kühling and Mr. Cornelius Sauerborn concludes that the current legal framework is mostly fit to ensure digital fairness and there is no need for a major overhaul of existing rules to address concerns against the backdrop of "dark patterns". Rather, it proposes a set of recommendations focused on stronger enforcement of the current rules and incremental adjustments.

The study assessed cases of so-called 'dark patterns'[1], brought up initially by the European Commission and consumer organisations and evaluated which cases most commonly occur in online retail and how current EU law could address these cases effectively.

In the past years, dark patterns and digital fairness have gained the attention of EU policymakers, seeking to amend horizontal EU consumer law which applies to all traders, including 3.5 million European retailers, while the most problematic examples put forward usually involve other sectors than retail. This could lead to the introduction of unnecessary restrictions for retailers limiting innovation and competition in the sector, as well as reducing product choice and affordability for EU consumers.

The three associations highlighted at the launch event that the EU already has the highest level of consumer protection. EU laws, such as the GDPR, the e-Privacy Directive, the AI Act, the DMA and DSA ensure the protection of consumers online. Furthermore, the UCPD's principle-based safety net acts as a comprehensive safeguard. The interplay between these laws effectively tackles dark patterns. Instead of new regulation, the three associations call for more effective and efficient enforcement to ensure that consumers are well-protected.

One final finding of the study focuses on the suggestion by stakeholders to reverse the burden of proof from the consumer to the trader regarding the accuracy of a claim. The study found that doing so would undermine the fundamental rights of traders in this specific context.

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[1] As defined in the study "*a type of interaction, whether online or offline, which is aimed at consumers and objectively take advantage of human behaviour with the purpose of enforcing the trader's unilateral interests without considering the interests of the addressee, regardless of whether they are also pursuing any public interests*".

Main recommendations of the study

The Digital Fairness in Online Retail study by Prof. Dr. Jürgen Kühling and Mr. Cornelius Sauerborn concludes that there is no need for a major overhaul of the legal framework to ensure digital fairness against the backdrop of "dark patterns" as it is mostly fit to address these concerns. Rather, it proposes a set of recommendations focused on stronger enforcement of the current rules and incremental adjustments:

1. **Enhanced Enforcement Mechanisms**: The study underlines that while closing some grey areas will provide some added value to legal certainty, the proper application of existing rules will be more effective in tackling existing practices.

2. **Sector-Specific Adjustments:** Any future changes should be made on a case-by-case basis, specifically addressing sectors where issues are prevalent without fragmenting the regulatory landscape. Such an approach would already be in line with the UCPD as it already makes sectoral distinctions, and the risk of fragmentation would be rather low. A narrowly defined case-by-case adjustment of Annex I of the UCPD could be a sensible approach.

3. **Proportionate Intervention**: Fundamental rights also encompass entrepreneurial freedom, therefore, it is essential to strike a fine balance between entrepreneurial freedom and consumer rights. The goal should be to find solutions that safeguard consumers without imposing restrictions that drastically interfere with the fundamental business freedoms.

4. **Evidence-Based**: Ensure that the burden of proof is sufficient to demonstrate the need for burdensome legislation and can thus justify the need for an intrusive and far-reaching intervention in the online retail sector.

5. **Soft Law and Self-Regulation**: Better guidelines can help businesses become even more compliant, and "soft law" measures (e.g. voluntary certification of compliance) can encourage best practices in digital fairness, providing a flexible approach to enforcement while avoiding the costs of rigid new legislation.

6. **Evolution not Revolution**: Legal certainty is a critical aspect of any business environment, therefore evolutionary steps of existing legislation will help businesses and consumers to the new digital environment. This is all the more important as the report shows that there is comprehensive legislation applicable to dark patterns and that new legislative interventions risk to deeply disrupt the interplay and coherence between these legislative measures.

Ecommerce Europe is the united voice of the European Digital Commerce sector, representing the interests of companies selling goods and services online to consumers in Europe. Our mission is to act at EU level by engaging with policymakers to create a better regulatory framework for all e-merchants. Ecommerce Europe is a platform where our members can stay informed, exchange best practices, and define common positions on EU legislation impacting the sector.

EuroCommerce is the principal European organisation representing the retail and wholesale sector. It embraces national associations in 28 countries and 5 million companies, including leading global players and many small businesses. Over a billion times a day, retailers and wholesalers distribute goods and provide an essential service to millions of business and individual customers. The sector generates 1 in 7 jobs, offering a varied career to 26 million Europeans, many of them young people. It also supports millions of further jobs throughout the supply chain, from small local suppliers to international businesses. EuroCommerce is the recognised European social partner for the retail and wholesale sector

Independent Retail Europe is the voice of groups of independent retailers and local SME retailers in Europe. Our members are groups of independent retailers, associations representing them as well as wider service organizations built to support independent retailers. Independent Retail Europe represents 24 groups and their over 501.000 independent retailers, who manage more than 764.000 sales outlets, with a combined retail turnover of more than 1.411 billion euros and generating a combined wholesale turnover of 604 billion euros. This represents a total employment of more than 6.400.000 persons. Find more information on our website, on X, and on LinkedIn.