



Ministry of Economic Affairs

Non-paper by the Netherlands on the Digital Fairness Act

The Netherlands believes that it is key to create the right conditions for well-functioning markets in the digital economy. Clear rules contribute to a level playing field, provide fair opportunities for businesses and effective protection of consumers. At the same time, unnecessary regulatory burdens should be prevented.

Developments in digital markets, such as influencer marketing, generative AI and price personalization, have the potential to drastically alter the way products and services are marketed and consumed. Although digital innovations create enormous opportunities and benefits for companies and consumers, they are not without risks.

With this non-paper we provide input for the upcoming Digital Fairness Act (DFA) in order to maintain a high level of consumer protection in the EU and make consumer law futureproof. This non-paper is an addition to our non-paper for the European Consumer Agenda 2025-2030.

Our main priorities for the DFA are:

1. Effective enforcement and guidance for businesses

First of all, we would like to stress that a lot of legislation that focuses on digital developments has been introduced in a relatively short period of time (such as the Omnibus Directive for consumer law, the Digital Services Act, the AI Act, the Digital Markets Act and the Data Act). We consider it important to focus on the enforcement of the current legislation, help businesses to apply these rules and to make sure that there is a level playing field between traders based in the EU and traders from outside the EU. In this context, we also urge the Commission to submit a proposal for the revision of the Consumer Protection Cooperation Regulation. This should include enforcement powers at the European level, so that infringements of consumer law that occur in large parts of the EU can be effectively addressed.

2. Addressing harmful online commercial practices

Although we believe that enforcement of existing legislation is key in maintaining a high level of consumer protection in the EU. We see certain harmful online commercial practices that are not or only partially covered by current legislation.

For these practices, we believe that the DFA should serve as a harmonised European solution to address these practices by filling in the legal gaps in the existing consumer acquis. A key objective should be to prevent further fragmentation of the Single Market and to avoid additional regulatory burden.

We believe action should be taken in the following areas in the DFA:

- I. Commercial practices in games.
- II. Dark patterns.
- III. Addictive design of digital services or social media.
- IV. Influencer marketing.

For most of these practices, special attention should be given to vulnerable groups such as minors, since these groups are more prone to being manipulated.

I. Regulate harmful commercial practices in games

Over the years, business models utilised by the gaming sector have shifted. The significance of in-game purchases has increased compared to revenues from game sales. Especially vulnerable consumers (not exclusively minors) can make an irresponsibly large number of in-game purchases and are therefore more likely to engage in excessive spending. To better protect consumers against financial harm caused by commercial practices in games, we believe that certain commercial practices and features in games require regulation.

First of all, we support banning paid loot boxes (or other in-app purchases with randomised uncertain rewards) in video games by including them in Annex 1 of the Unfair Commercial Practices Directive (UCPD). This is due to their high potential to distort the economic behaviour of consumers and gambling-like features. Moreover, we support further regulation of pay-to-win mechanisms in multiplayer titles that pressure consumers to increase their in-game spending. Examples of such mechanisms are exclusive items or boosts that give competitive advantages or game mechanics that bypass excessive time-consuming tasks or waiting periods. To prevent unauthorised spending in games, there should be more safeguards to verify that the consumer is eligible to make a transaction.

In addition, the use of in-game currencies obscures the actual amount of money spent in a game. This distorts consumers' decision-making. We are therefore in favour of additional transparency measures for in-game currencies. This can be done by transposing the most important elements from the recently published

Consumer Protection Cooperation (CPC) Network's Key Principles on In-game Virtual Currencies' into legally binding rules. This not only gives consumers more insight into the actual cost of in-game items, but also gives businesses more certainty about the legal basis for in-game transactions.

Lastly, age classification systems can help guide parents to determine whether a game is age-appropriate or not. Because of the high prevalence of in-game purchases, age classification systems should take these business practices into account.

Proposed actions:

- Ban loot boxes in video games via inclusion in Annex 1 of the UCPD.
- Consider additional rules for pay-to-win mechanisms.
- Consider additional verification measures for in-game transactions.
- Transpose key elements from the CPC key principles on in-game virtual currencies into law.

II. Clarify the regulatory framework to better address the issues regarding dark patterns

Dark patterns² are present in a lot of digital services and can negatively influence consumers' online behaviour, potentially to the detriment of their finances and their mental well-being. Although various recent legal acts explicitly regulate the use of dark patterns, there is legal uncertainty about the scope for both businesses and consumer authorities. This can be illustrated by Article 25 of the Digital Services Act (DSA): this article only applies to providers of online platforms that are using dark patterns, and in cases where these practices are not already covered by the UCPD and General Data Protection Regulation. We therefore believe that regulation on dark patterns should be converged between the UCPD and other legislation like the DSA and the Distance Marketing of Financial Services Directive. A way to achieve this is to ensure alignment with the provision of Article 25 DSA that requires platforms to avoid deceptive or manipulative design interfaces in the DSA to be laid down in the UCPD.³

Additionally, research by the European Commission⁴ and the OECD⁵ has shown that there are certain dark patterns that have a particularly high potential to harm consumers. These dark patterns have a high prevalence, are often unnoticed by consumers, are likely to be financially harmful and are not adequately covered by current legislation. For these dark patterns, inclusion in Annex 1 of the UCPD should be considered.

In our view, the following dark patterns should especially be taken into account:

- False hierarchy that promotes a certain option that is less favourable for consumers and hidden information that obscures important details and options for consumers.
- Confirm-shaming and other forms of emotional manipulation: making consumers feel bad when they make a choice that is not beneficial to the trader (like unsubscribing from a newsletter).
- Roach motels that make the cancellation of subscriptions or other agreements difficult for consumers. We should ensure that online termination is not more complicated than subscribing. To combat this, we advocate for the introduction of a clear and easily accessible termination function for subscriptions offered online. If such regulation is envisaged, experiences with the withdrawal function under the Distance Marketing of Financial Services Directive should be taken into account.

In addition, the general terms and conditions of digital services are often not properly read, due to their excessive length and complexity. As a result, consumers are not always aware of their rights, nor of the data

¹ https://commission.europa.eu/document/download/8af13e88-6540-436c-b137-9853e7fe866a_en?filename=Key%20principles%20on%20in-game%20virtual%20currencies.pdf

² Dark patterns are manipulative or deceptive techniques that can lead consumers to make choices that are not in their best interest.

³ Art.25 (1), Regulation (EU) 2022/2065: "Providers of online platforms shall not design, organize or operate their online interfaces in a way that deceives, manipulates or otherwise materially distorts or impairs the ability of recipients of their service to make free and informed decisions."

⁴ https://ec.europa.eu/commission/presscorner/detail/en/ip_23_418

⁵ https://www.oecd.org/en/publications/dark-commercial-patterns_44f5e846-en.html

(including personal data) they provide to businesses. We emphasize the importance of making terms and conditions more accessible, possibly through a standardized list of key terms. This could help consumers make better-informed choices before signing up for digital services.

Finally, data processing for personalisation requires consumers to grant consent specifically for these purposes. In practice, however, consumers are often persuaded to grant such consent through often complicated consent forms, a lack of transparency regarding personalisation purposes, and as a result of information overload and consent fatigue, even though their actual preferences might differ. Therefore, a European approach is needed to give citizens more control over their own data.

Proposed actions:

- Regulate dark patterns under the UCPD and converge the definition and scope of dark patterns in the current legal acts.
- Consider a prohibition on false hierarchy, confirm-shaming and roach motels by including them in Annex 1 of the UCPD.
- Propose and implement a European initiative to make the online termination of subscriptions easy for consumers.

III. Take action against addictive algorithms and harmful design techniques in digital services

We are committed to taking further European action against addictive algorithms and harmful design techniques in digital services, such as social media.

Designs in digital services that harm the well-being of consumers, for example techniques that cause overuse or harmful/unhealthy behavior, should be forbidden. Although such practices are partly covered by existing European legislation (under the Digital Services Act (DSA) and consumer law), there are legal gaps in the current framework.

Additionally, we suggest to explicitly include commercial practices which capture the consumer's attention under the scope of the UCPD. This could for example be done by transposing essential parts⁶ of paragraph 4.2.7 of the UCPD guidance into the UCPD. Clarification in the UCPD enables regulatory authorities to conduct a *case-by-case assessment* to determine whether the design of a digital service can lead to harmful outcomes.

Whether a design stimulates overuse depends on the specific situation and the combination of techniques or features used in the digital service. Especially the interplay of multiple techniques can lead to overuse. For example, to keep consumers engaged for a long time, the features endless scroll or autoplay are often combined with algorithms to show personalised content.

Furthermore, consumers do not always have effective control over their consumption and user experience. For example, it is not always possible to switch off certain features, such as endless scroll, engagement features or autoplay. Therefore, we ask the European Commission to consider regulation that empowers consumers to customise their experience in an easy and accessible way. Consumers (or their parents/guardians in the case of minors) should be able to decide whether they want these features to be enabled.

Proposed actions:

- Consider a ban on design techniques that harm consumer well-being in digital services.
- Transpose essential parts of paragraph 4.2.7 of the UCPD guidance into the UCPD directive.
- Consider regulation that gives consumers more effective control over their usage of digital services by giving them the possibility to customise their experience in an easy and accessible way.

⁶ Paragraph 4.2.7 of the UCPD guidance states: "[...] the Directive would also cover commercial practices such as capturing the consumer's attention, which results in transactional decisions such as continuing to using the service (e.g. scrolling through a feed), to view advertising content or to click on a link".

IV. Clarify the regulatory framework to better address the issues regarding influencer marketing

Influencers have become an important marketing route for businesses. They can have a significant influence on the purchasing behavior of –primarily young- consumers. A notable example of this is the role of social media influencers in promoting fast fashion. This marketing practice can pressure consumers to adapt to new trends and lifestyles, which has several negative effects including overconsumption and shopping addiction.

At this moment, it is not always clear which rules take precedence, especially in relation to the consumer law directives and the Audiovisual Media Services Directive (AVMSD). It is important that it is clear for influencers which rules apply to them in order to improve compliance.

In the Netherlands a certification system⁷, in combination with a control and monitoring mechanism, has been put in place and has had positive results.⁸ In order to ensure that businesses only collaborate with certified influencers³, certification systems could be given a more prominent role in consumer legislation. We therefore ask the Commission to consider introducing a responsibility for Member States to encourage the certification and registration of influencers.⁹ Additionally, large businesses could be required to collaborate only with influencers who have been certified.

Finally, the rapid growth of marketing of financial services via influencers raises concerns. This is specifically the case when so-called finfluencers are promoting the goods and services of unlicensed and thus illegal investment firms. These activities fall outside the scope of EU financial regulations.¹⁰

Proposed actions:

- Provide more clarity in the application of the rules between the consumer directives and the AVMSD.
- Give self-regulation a more prominent role in clarifying the rules and to encourage behavioral change and compliance.
- Consider an obligation for member states to establish a national certification register of influencers and require businesses to work with certified influencers.
- We advocate that the UCPD explicitly includes influencers' promotion of illegal financial products and services as an unfair commercial practice under Annex I of the UCPD.

⁷ The Dutch Advertising Code Committee (ACC) has gathered all relevant rules for influencers in one place and allows influencers to obtain a certificate to demonstrate compliance with the guidelines (www.influencerregels.com)

⁸ According to the ACC, compliance among certified influencers has nearly tripled in 2025.

⁹ An example of such an approach can be found in article 7 of the *Right to Repair Directive*, which provides for a online repair platform with an overview of qualified repair services.

¹⁰ We refer to the Annex to this non-paper for a further explanation.

Preventing consumer harm caused by (f)influencers by asserting promotion of illegal financial products and services as an unfair commercial practice

The growing number of (f)influencers cooperating with a variety of investment firms poses risks for consumers, especially when (f)influencers promote (knowingly or unknowingly) the products or services of unlicensed investment firms operating illegally in the EU.

To prevent consumer harm, we propose to assert that the promotion of illegal financial products and services and cooperation with illegal investment firms should be explicitly included in Annex I of the Unfair Commercial Practices Directive.

Background

There is growing concern in the Netherlands with regard to (f)influencers promoting high-risk financial products, particularly to young consumers. One of the most pressing points of concern regards finfluencers promoting the goods and services of unlicensed and thus **illegal investment firms**. While the investment firms themselves are illegal, the third-party promotion (by e.g. finfluencers) of their products currently falls into a legal void: while EU financial regulations are already adapted (or being adapted, for example by the proposal for a Retail Investment Strategy (RIS)) for the growing trend of (f)influencer promotion of financial products, these EU rules do not cover the marketing of unregulated products and services, because these products and services themselves fall outside the scope of these EU financial regulations. This legal void means national financial markets' supervisory authorities have difficulties acting against these marketing activities, especially when the finfluencers take care to ensure they obey the supervisory authorities' guidelines on prudential norms regarding financial advice (e.g., if they make sure not to provide *personalised* investment advice, which would require a licence). This allows for the finfluencer marketing of unregulated financial products and services to continue unchallenged, posing a risk to consumers. Also, relative to other (f)influencers that promote sound, regulated (financial) products or help consumers with making healthy financial choices, this poses a market risk of an unlevel playing field.

Case Example: Grinta Invest

The issue is exemplified by a particularly large scandal in the Netherlands involving Grinta Invest, a former investment firm based in Bermuda that promoted speculative financial investments in the Netherlands without the required license from the Dutch financial markets authority (*Autoriteit Financiële Markten*, AFM). Grinta Invest marketed its products through finfluencers who received substantial financial compensation of up to 10% of the money invested by clients they brought on. Initially, investors indeed made some of the promised returns, but suddenly, Grinta Invest went dark, shut down their website, and left hundreds of victims with total losses of more than EUR 5 million.

The actions of the finfluencers involved had added considerably to the damage. Firstly, because of their promotional activities, Grinta Invest had been able to sell so many of its illegal financial products. This effect was only exacerbated by the **substantial inducements** paid by Grinta Invest. Secondly, the finfluencers had exposed consumers to an investment firm that was able to shut down its Dutch operations in a heartbeat, did not provide any recourse, and which could not be summoned before a Dutch court for civil-law proceedings. Victims tried claiming some of their losses from the finfluencers. However, even though the finfluencers had promoted the products of an illegal investment firm, in at least one court case, **the court ruled against the**

claimant, mostly because the claimant (bearing the burden of proof) was unable to sufficiently substantiate her claims that the influencer had breached prudential norms.¹

Proposed solution: promotion of illegal financial products and services = unfair commercial practice

As noted, the framework of EU financial regulations provides no adequate consumer protection against influencers promoting unregulated products and services, because the rules on marketing in these financial regulations only apply to regulated financial products and services. Promoting products and services outside of this EU framework puts the promotional activities themselves also beyond the regulatory reach of this EU legislation.

To solve this issue, we should therefore look beyond financial legislation. Influencers promoting unregulated financial products and services may fall outside the scope of financial regulations, they are however still subject to the overarching principles of commercial practices, in particular, the Unfair Commercial Practices Directive (UCPD), providing the overall framework on practices infringing consumer protection rules. In recent years, the European Commission has put forward guidance specifying the applicability of the UCPD to the practices of influencers, for instance providing further clarification on when, for the purposes of the UCPD, an influencer would qualify as a trader or, alternatively, as a person acting in the name of or on behalf of a trader.² Furthermore, the CJEU ruling in Case-371/20 clarifies that the UCPD-rules on disclosure are also applicable in the case of editorial content that was paid for, even when this payment was non-monetary or any other counter-performance.³ The Audiovisual Media Services Directive (AVMSD) also includes rules for commercial communication, which apply to influencers when they fulfil certain criteria. Next to this, the Consumer Rights Directive (CRD) applies to influencers who act as sellers with regard to the obligations of online traders to disclose a wide array of information to consumers before the conclusion of a contract. The Digital Services Act (DSA) also adds to this framework with rules regarding online advertising and traceability of traders, intermediary liability, due diligence, and enforcement.⁴

With this overarching set of EU rules applicable to the marketing practices of influencers, one could argue that the promotion of illegal financial products *already* qualifies as an unfair commercial practice. However, the **UCPD does not yet explicitly qualify this promotion as such**, leaving room for multiple interpretations which hinder consumer protection (either by national authorities or civil law lawsuits). Accordingly, we propose to amend the UCPD to explicitly include the promotion of illegal financial products and services by adding this influencer practice to the list in Annex I of the Unfair Commercial Practices Directive, the list of marketing practices that are considered unfair in all circumstances. In our view, this will have a **preventive effect** as influencers will be forced to (i) conduct heavier checks on the investment firms and products or services they promote and (ii) refrain from promoting illegal financial products and services. Furthermore, it will (iii) provide a clear legal framework for national authorities (including soft-law/self-regulatory organizations in advertising and consumer rights organizations) and consumers to take action against influencers who engage in promoting illegal financial products and services.

¹ ECLI:NL:RBMNE:2023:7516.

² European Commission, 2021, 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, 2021/C 526/01.

³ This CJEU ruling is especially relevant when looking at the practice of influencers pretending their investment advice is objective and non-personalized, while receiving inducements for the products they advise.

⁴ A more in-depth analyses of EU law applicable to influencers can be found in the report by the IMCO committee of the European Parliament, "The impact of influencers on advertising and consumer protection in the Single Market" (2022).

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