



Annex 1

Date: May 1. 2023

Recommendations for the Unfair Commercial Practices Directive (UCPD)

The Danish government would like to give its recommendations on how the UCPD can be altered in order to protect consumers' interests and provide them with a basis for making informed choices and furthermore make it more manageable for enforcement authorities to enforce the rules in an increasingly digitalised environment.

Addressing digital asymmetry

Digital asymmetry occurs when a consumer is at a disadvantage, because the trader controls and shapes the digital environment in which the consumer operates, presumably often without the consumer having concrete knowledge of the underlying mechanisms. When engaging with the digital environment created by the trader the consumer gives access to detailed data, which allows the trader to develop a personal profile on the consumer including registering decision-making biases and preferences.

When traders use online choice architecture to control the arrangement of options and the decision-making format affecting consumers' behaviour and decisions problems can arise. The trader can adopt personalised persuasion practices that serve as a form of manipulation of the consumer by i.e. obscuring available choices, or burden the exercise of choice. Traders can also make adjustments to their digital environment to improve the effectiveness of their practices through e.g. A/B testing. The issues arising from this will most likely only be exacerbated with the increasing data collection combined with machine learning and other AI techniques. Ultimately this can lead to consumers not having enough transparency and control over the extent to which they wish to be the subjects of personalised practices, and make it difficult for authorities to enforce the existing rules. We therefore encourage the Commission to look into whether it would be necessary to supplement the existing rules, such as GDPR and ePrivacy, as well as the coming AI Act, with targeted and easily enforceable rules in consumer law.

The Commission could also look into, whether the largest traders or their third-party suppliers should be obliged to provide more transparency on internal tests (e.g. A/B tests) for authorities and researchers.

The Danish government finds that digital asymmetry and personalized persuasion practices should be addressed in the UCPD in a number of ways. The following sections will address this through these topics:

- *UCPD needs to address future challenges presented by AI*
- *Revise the concept of the average consumer*
- *Test and prove that transparency requirements are efficient*
- *Right to reset data generated personalized commercials*
- *Revise the definition of a transactional decision*
- *Clarify the concept of "undue influence" as an aggressive commercial practice and how it applies to digital asymmetry and personalized persuasion practices*
- *Apply a fairness by design obligation*

- *Reverse the burden of proof*
- *Prohibit specific practices in the blacklist in Annex I*

UCPD needs to address future challenges presented by AI

The digital commercial environments will continue to develop and new challenges will arise. The Danish government encourages the Commission to look into new digital trends in order to ensure the coming alteration of the UCPD will capture new and coming harmful commercial practices. There has been a boom in AI research and applications in recent years and the development will continue. Today and in the coming years, Europeans will be faced with new trends, such as Virtual Reality and AI generated content, that can greatly impact the way that businesses interact with consumers, and how consumers navigate markets. Artificial and Virtual Reality (AR/VR) is expected to increase in prominence over the coming years, with concepts such as the Metaverse proposing to make it the new normal for digital interactions. Virtual reality promises to create more immersive experiences, with novel ways to influence consumers. There is a need to examine whether the already established rights for the consumer as well as the upcoming AI Act will address these new domains appropriately.

While these technologies have the potential to increase consumer welfare, they also pose a number of risks to consumers. While some uses of AI make companies better at something they already do (eg. predicting consumer behavior), others seem to open up new domains. An example is the emergence of generative AI (such as language and image models), which promises to radically reduce the time and effort required to produce real-looking content, though not necessarily accurate content. This could increase the risk of consumers being misled, either by intention or accident. As the development of these technologies continues to speed up, it is important to make sure that they do not come at the expense of consumers, and therefore transparency is needed as proposed in the AI Act. The Danish Government encourages the Commission to continue to look into how new trends in the area of AI and new commercial practices can be covered by the UCPD or other relevant legislation.

Recommendations:

- **The Commission should look into whether new trends in AI such as AI generated content in relation to i.e. commercial fraud, is adequately covered by the proposed AI Act or should be specifically covered by the UCPD.**

Revise the concept of the average consumer

The Danish government recommends that the normative image of the “the average consumer” under EU law needs to be revisited. The definition of the average consumer as a reasonably critical person, as stated in the Commissions guidelines to the directive, is not fit for purpose in the digital sphere as new technologies have enabled digital asymmetries to occur, when consumers engage with traders online.

Consumers can be subject to permanent profiling, complex manipulation and automated decisions. In the digital consumer-trader relationship, the trader has access to the consumer’s detailed personal profile including decision-making biases and pressure points and can use this in a commercial context. This makes the consumer vulnerable, which needs to be reflected in the level of protection afforded.

The Danish Government encourages the Commission to look into and further analyse, how the concept of the average consumer can be evolved. The Commission should look into expanding the non-exhaustive characteristic of the average consumer by altering the definition to contain whether the consumer has been exposed to emotional appeals, social constellations such as framing, reference prices etc. which may, and often do lead the consumer to deviate from normal decision-making. The definition of an average consumer should thus be changed to reflect actual decision making processes, including biases and heuristics that often lead to non-rational behavior. Businesses should be expected to design information and purchasing environments that do not mislead the consumer in that context.

A way forward could be to appoint an expert panel to research and discuss the future framework of the average consumer, especially in light of the fact that it is a term used across consumer protection legislation. Further, in order for courts and judges to apply the term of an average consumer in the digital sphere, it should be stated clearly in the UCPD that empirical evidence, where such exists, should be given a special status as evidence. Finally, it is of great importance that the definition of average consumer is identical across the consumer legislation in the EU.

Recommendations:

- **The concept of the average consumer should be revised in order to capture the actual decision-making process in the digital sphere.**

Transparency requirements should be tested and proven efficient

Following the Danish government's considerations on the concept of the "average consumer" a closer look is also needed on the effectiveness of transparency requirements.

Providing consumers with relevant information about products and purchase conditions as well as privacy settings and the use of AI tools serves a good purpose. However, in practice these well-meant intentions are not always adequately reaching the consumer in a helpful manner. This is in part due to behavioural factors, such as limited attention, inaction and overconfidence on the consumers part for example due to an overload of information. It can also be a result of traders hiding or obscuring information by for example presenting the information in a small, subdued font or by using ambiguous terminology. Particularly, more vulnerable groups are less likely to benefit from the advantages offered by the provided information.

Disclosure and transparency measures can therefore prove insufficient and regulatory solutions should rely less on the consumers' willingness and ability to inform themselves but rather place the responsibility on traders to ensure salience and transparency. See more on this in the section below regarding fairness by design.

In general, the Commission should be cautious about introducing new transparency requirements. When transparency requirements are considered, these requirements should be thoroughly tested and proven effective in addressing the matter at hand. Furthermore, it would be beneficial if the Commission were to evaluate existing transparency requirements in the same manner, in order to identify inefficient and unnecessary requirements that burdens companies and contribute to information overload for the consumers.

Recommendations:

- **Transparency requirements should be tested and proven efficient before introduced to law.**

Right to reset data generated personalized commercials

Today the rules in the GDPR and E-privacy directive allows consumers to control cookie-generated commercial content by disagreeing to accept commercial cookies on websites and by deleting the cookies in their browser. However, in regard to personalized commercial content on social medias, consumers do not have a legal right to avoid or reset content that is generated on the basis of data collected. By introducing a reset button in relation to social media content, the consumer would have the option to reset his or her historical personal account data – such as clicks and likes and tracking – which are used to deliver personalized commercials and content – without having to reset or delete account-settings, such as connections. Thus after a reset request the social media platform would only be able to use data collected after the reset request was made to create personalized commercials. The right to reset could be manifested in a salient reset button. We encourage the Commission to investigate the effect of such a reset-button, for instance in collaboration with the larger social media platforms, to reach the most effective solutions for the consumers.

Recommendations:

- **Consumers should have the right to avoid and reset personalized commercial content that is generated on the basis of data collected.**

The definition of transactional decision

The Danish Government encourages the Commission to revise the scope of transactional decision in the directive.

At the heart of consumer protection is the protection from loss of autonomy. Retention mechanisms that influence consumers to spend excessive time on platforms, decrease the likelihood that consumers make a decision on whether to continue or discontinue to use the service should be clearly covered by the UCPD.

Design practices that automatically load and displays additional content without requiring the user to specifically request it or precompile it, like i.e. *infinite scroll* and *auto-play* on social media and similar mechanisms can cause unwanted time-loss as it eliminates natural decision points. Similarly, mechanisms that reward users for uploading content or sharing messages can make users spend more time on platforms than they would have otherwise. Recommended content can, however, also enhance the user experience and lead consumers to discover new content within their fields of interest. However, when the consumer is offered new content without the choice to easily opt out of exposure, the practice could be considered to be an issue of undue influence. This is particularly true, when it comes to children, who do not have the same skills to manage their time and interaction with platforms.

The Danish government finds that retention mechanisms should be addressed in the UCPD by revising the scope of “*transactional decision*” and the understanding of the “*economic behaviour of the consumer*” as defined in the guidelines to ensure clarity and to make the concept more operational for enforcement agencies.

The UCPDs concept of ‘transactional decision’ should be broadened and the wording adapted to reflect all cases where the behaviour of the consumer is connected to the revenue-earning model of the trader. This can be done by extending the understanding of economic behaviour and transactional decision of the consumer to include situations where transactional value is built on the user’s engagement with the digital choice environment. This will be the case, when the undertakings revenue is generated on the basis of the length and level of activity of the consumer’s engagement rather than the consumer being involved in a purchasing process.

This is especially relevant when the trader is a social media platform, as they usually provide unpaid access for consumers but monetize consumer interactions with the platform (e.g., exposure to ads and other content, scrolling the feed, sharing, liking). In short, they make money through grasping, retaining and utilizing consumer attention, and any application on their part that materially distorts attention is therefore transactional per default. The fact that the consumer is not in a purchase-related situation does not alter this, as the consumer is in actuality paying with their attention, engagement, activity and behavioural data and allowing the platform to sell advertising space to other traders for exposure to the consumer. Consequently, commercial practices which distort the consumer’s decision-making in this context should also be treated as a material distortion of economic behaviour and this be seen as an unfair practice under the UCPD. In revising the UCPD, the Danish government encourages the Commission to look at including harms such as time loss and addiction, when describing the negative distortion of the consumer behavior.

Recommendations:

- **Revise the scope of transactional decision and economic behaviour of the consumer as defined in the guidelines to the directive in order to address retention mechanisms.**

Aggressive commercial practices and the concept of “undue influence”

Unfair commercial practices are sometimes applied simultaneously. Many websites and apps use several dark patterns at the same time. They can therefore, when used in combination, make it hard to distinguish the effects of a consumers’ decisions from a single individual practice. This can exacerbate the undue influence on consumers and complicate enforcement, which is often based on a practice-by-practice investigation.

In order to address the effects of harmful online choice architecture the Commission should examine “structural undue influence” and circumstances such as the online choice architecture, the technical infrastructure, and the degree of informational asymmetries when establishing whether a practice ‘significantly impairs or is likely to significantly impair the conduct of the consumer’, causing them to ‘take a transactional decision they would not have taken otherwise’.

The guidance states that “certain commercial practices in games, including embedded advertisements, could amount to an aggressive practice under Articles 8-9 UCPD. This may be the case if the practices involve the use of behavioural biases or manipulative elements relating to, e.g. the timing of offers within the gameplay (e.g. offering micro-transactions during critical moments in the game), pervasive nagging or the use of visual and acoustic effects to put undue pressure on the player.”

Recommendations:

- **The Commission should examine structural undue influence in order to ensure the rules are fit for purpose to establish whether a practice significantly impair or is likely to impair the conduct of the consumer.**

Apply a fairness by design obligation

The scope of the UCPD is quite broad. It applies to all commercial practices that occur before, during and after a business-to-consumer transaction has taken place. The decision to enter for instance an e-commerce site can fall under its remit, even if a user does not buy a product or a service and can also apply after a transaction has been completed. Accordingly, every user interface that either pushes consumers into agreeing to terms and conditions or indicating consent could fall under its scope.

Art. 5 of the UCPD requires traders to exhibit “professional diligence”. According to the guidance the notion of “professional diligence” encompasses principles such as honest and good market practice and good faith. Consequently, traders must follow those principles, when designing their online interface through which they will interact with consumers.

The Danish government finds that the reflections on the professional diligence duty on user interface design in the guidance should be clearly reflected directly in the UCPD. This could be done by either expanding the scope of art. 5 in the UCPD or by drafting a new obligation entirely.

A fairness by design obligation could require traders to design interfaces that clearly hinders consumer welfare-reducing choices. This would mostly be done by obscuring information that is choice-enhancing. At a minimum it should extend to a requirement for traders to not feature any manipulative online choice architecture or deceptive designs, which might mislead or influence users through website interfaces.

Such an approach could take inspiration from the GDPR’s requirements for data protection to be “by design and by default” (Art. 25). It would be adamant for the enforceability of the duty of fairness that it be applicable in its own right and not just as a supplement to the violation of an existing prohibition such as those in art. 6-9 in the UCPD.

Recommendations:

- **The Commission should look into either expanding the scope of article 5 on professional diligence or introduce a new obligation on fairness by design.**

Reverse the burden of proof

The UCPD must reflect that digital asymmetry also affects enforcers. Pinpointing unlawful behaviour is made more difficult as authorities can have trouble identifying a single transactional moment for examination. Lengthy and resource-consuming investigations can be very difficult from an evidence perspective and enforcement authorities can have a hard time keeping up with platforms that are constantly updating and making use of new online choice architecture.

The Danish government therefore encourage the Commission to look into, whether certain practices should be subject to a reversal of burden of proof. In this examination the Commission should particularly explore practices that are an expression of digital asymmetry, which materially distorts the decision-making autonomy of the consumer.

Recommendations:

- **It should be considered to introduce a reversed burden of proof regarding online choice architecture that raises issues of digital asymmetry.**

Expand the blacklist

The Danish government recommends that the UCPD introduces new prohibitions for specific practices concerning deceptive design, manipulative online choice architecture and aggressive personalised persuasion techniques, which in our experiences always are to the detriment of the consumer. Many of these practices are already unlawful, but by listing them in the blacklist it will be easier for the authorities to enforce the existing rules.

The Danish government recommends that the blacklist in Annex I of the UCPD include the following practices:

1. Recommending products without making the objective parameters for the recommendation available to the consumer at the point of purchase.
2. Personalising prices without informing consumers in a salient manner about the fact that the price is personalized.
3. Adding new and potentially significant non-optional charges to the total price when a consumer is about to complete a purchase (Drip pricing).
4. Sneaking an item into a consumer's basket without consent e.g. via a checkbox on a prior page.
5. Transitioning the consumer from a free or reduced-price trial period, at the point of expiration without the consumer's explicit consent (subscription traps).
6. Displaying a discounted price with reference to an original misleading or false higher price (misleading reference pricing).
7. Using ambiguity with trick questions (e.g. double negatives).
8. Manipulating the consumer toward a particular choice through emotive language or framing (confirmshaming).
9. Revising No 7, so it explicitly prohibits countdown timers on websites regardless of, whether it is a reflection of falsity or not.

The Danish government further recommends that the Commission look into, which specific commercial practices relating to the following issues could be part of the blacklist in Annex I of the UCPD:

1. Algorithmic exploitation of natural decision-making biases to the detriment of the consumer. The Commission can look at this issue in coherence with the proposed requirement in the AI Act.
2. Making it hard to opt out of privacy-intrusive settings rather than to make privacy-friendly settings. This could be analysed in conjunction with the ePrivacy rules and the GDPR.

To ensure that the DSA and UCPD complement each other, the Danish government recommends the UCPD article 5, 6 and 7 to contain requirements for more visually and salient disclosure forms. All commercial content on online platforms should be marked using a standardized commercial disclosure provided by the platforms. A standardized commercial disclosure should not be the same across platforms, but what is important is a standardization on the individual platform, such that consumers only have to familiarize themselves with one salient type of disclosure on the platform they are using.

Recommendations:

- **The Commission should introduce an obligation on visually salient standardized commercial disclosures on social media, correspondent to the requirement in the DSA.**

Value of in-app and in-game currencies must be displayed in real currency

The Danish government finds there is a need to address in-app and in-game currencies in the directive by requiring businesses to display in-app currencies in real currencies.

Paying with coins and tokens can disconnect consumers from the awareness that they are spending actual money. Subsequently consumers can have a hard time with converting the actual value and price of items in the game. Moreover, these effects are reinforced in cases where multiple in-game currency is used by the same game. On top of this, there are several factors, which can lead to overspending on the part of the consumer. Firstly, in-game and in-app purchases often take the form of micro-transactions, constituting small amounts, which lies within a threshold that consumers are quick to accept and forget about. Hence micro-transactions are designed in a way that makes it possible for consumers to accumulate large spending within an app or a game without being much aware of this. Furthermore, as different games and platforms use different exchange rates for their currency against the relevant real currency it can be difficult for consumers to keep track of the cumulative spending, as some sites might have coins with the value calculated in euros, where another game might have tokens that are presented in US dollars. The issues arising from this are further exacerbated when games offer currency-bundles. When the player is a child or young person comprehension is even less customary.

The Danish government recommends a requirement in the UCPD, as stated in the guidelines, that the real value of in-app purchases and in-game currencies must be displayed in real currency and in a clear and salient manner in the context of the transaction. Further, the real value should be displayed in the currency of the country, where the player in question is established or entering the game from combined with a requirement to show the consumer accumulated spending when offering consumers new purchases.

However, in order to ensure better protection of children and ease the oversight for enforcers it should be considered to introduce a prohibition on in-app and in-game currencies, when games can be accessed by children. This would effectively also mean setting requirement for age-verification. In the same vein the issue of age-verification and what constitutes effective age barriers could be further dealt with in the UCPD. The UCPD guidance states that the check to determine whether a commercial practice falls under point 28 of Annex I must be carried out taking into account all the facts and circumstances of an individual case including the presence of age-restrictions and taking account of the steps that the trader has taken in protecting minors from direct exhortation.

Recommendations:

- **Require in-game and in-app currencies to be displayed in real value currencies, including in the real currency of the country of the player.**
- **Consider addressing the issue of effective age-restrictions in relation to the assessment under annex 1 point 28.**

Regulate harmful loot box designs in the UCPD

The Danish government expresses concern for the harmful nature of certain loot boxes and find there is a need to look into whether there should be a prohibition on specific harmful commercial practices related to loot boxes, where monetary transactions are involved. Loot boxes have many of the same characteristics as used in gambling. Prizes are distributed randomly, the values of prizes are variable and players are provided with uncertainty, which keeps players going. For this reason there are concerns that loot boxes in gaming can serve as a gateway to gambling. Several EU member states are looking into national legislation. Since the gaming sector is cross border by nature, there is a need for a clear and harmonized approach to avoid fragmentation.

Some of the online persuasive techniques used by games trigger addictive responses in consumers. Furthermore, opaque offer and pricing techniques could cause unwanted or uncontrolled spending on loot boxes. This is further exacerbated by the fact that the consumer is not always attentive to the long-term cost of purchasing loot boxes through small in-game micro-transactions (as mentioned above), until players are already financially and psychologically committed in the game.

The Danish government believes that the current disclosure requirements does not sufficiently mitigate the various risks to consumers in relation to the deceptive designs and the aggressive marketing practices that are connected to the use of loot boxes in today's gaming environment. Although, the UCPD guidance in large focus on disclosure requirements in loot boxes, especially disclosure around probability and the real costs of in-game currency, there is, however, a lack of evidence with regards to the extent to which transparency and information requirement achieve their goal of protecting players from harmful effects. This is partly due to the timing of disclosure, as the information needs to be provided at the right time, in the right format and to the right audience. For example, the effects of disclosing the probabilities of winning can be expected to be marginal, if they are provided on the publisher's website. Consequently, the Danish government believes that it is necessary to evaluate the effectiveness of current disclosure mechanism related to loot boxes.

Further, the Danish Government encourages the Commission to look into the prohibition of certain persuasive designs and harmful practices in relation to children as regards to loot boxes, such as *near misses* that have strong relations to gambling and *personalized timing of in-game offerings* of loot boxes as some games target loot boxes more aggressively to the users that are already spending more than average in vulnerable or pressured situations.

Even though many games with loot boxes are not specifically targeted at children, children still engage with them. This is problematic as children can be more vulnerable to problematic game designs compared to adults and children have a reduced ability to exert self-control and more difficulties in understanding valuation and probabilities in games. The Danish government believes that the internet should be a safe space for children and minors and easy for them to navigate within. The

impact on children as regards methods used for commercial purposes such as persuasive designs in games, e.g. loot boxes, need to be studied more and handled upon. So far point 28 of Annex I and Article 5(3) in the UCPD have not sufficiently protected children from the harms loot boxes.

In relation hereto the limits of Annex I, point 28 should be further clarified as regards to how “*direct exhortation*” to children to buy advertised products should be understood in relation to loot boxes.

The guidance states that “point No 28 of Annex I and Article 5(3) UCPD prescribe that games targeted at children, or which traders can reasonably foresee to be likely to appeal to children, must not contain direct exhortations to children to buy additional in-game items.” It could from this be argued that loot boxes in games that are accessible to children would already be covered by point 28. However, it is often hard to distinguish marketing directed at children from marketing directed at consumers in general. It would therefore be beneficial, if the Commission clarify, as to which extent loot boxes are covered by Annex I point 28, when they occur in games that are accessible to play by children.

It should further be clarified, whether the prohibition in Annex I point 20 on falsely describing a product as free would cover games, where the consumer cannot without making in-game purchases, access content integral to gameplay or play the game in a way that a consumer would reasonably expect, given the information provided up-front. If this is the case, it should be made clear in the UCPD and the concept of “integral to gameplay” should be clarified in the guidelines.

Recommendations:

- **Need to evaluate the effectiveness of current disclosure mechanism as relates to loot boxes.**
- **Examine whether there is a need to prohibit certain persuasive designs and harmful practices as regards to loot boxes, such as *near misses* and *personalized timing of in-game offerings* of loot boxes.**
- **The impact on children as regards methods used for commercial purposes such as persuasive designs in games, e.g. loot boxes, should be examined more in depth. Clarify whether the current black list point 28 on direct exhortation to children to buy advertised products should be understood in relation to loot boxes.**
- **Clarify whether the current black list point 20 on falsely describing products as free cover games.**

Extend the application of consumer law beyond traders to third-party facilitators

The Danish government encourages the Commission to consider if the scope of the UCPD should cover third parties facilitators that enable traders to deploy misleading practices or persuasive techniques on their digital sales environments. Such third party facilitators can be providers of online platforms, including online marketplaces, online marketing companies or other business-to-business suppliers of software or services. For example, online marketplaces may facilitate use of fake discounts and personalised pricing. In examining whether introducing legal liability for third parties the Commission should consider the possible gained effect on unfair practices.

Recommendations:

- **Consider extending the scope of the UCPD to cover third-party facilitators, such as online marketplace providers and software suppliers, that facilitate deployment of misleading practices or persuasive techniques in their digital sales environments.**