

# MARKET AND COMPETITION LAW REVIEW

M&  
CLR

VOLUME VII / No. 2  
October 2023



## **Unbalanced Power Relationship in Digital Markets Between Platforms and Their Complementors: Can Consumers Come to The Rescue?\***

*Jeanne Mouton\*\**

**ABSTRACT:** Acknowledging the unbalanced power relationship between online platforms and their complementors, the economic dependence relationship and fear of retaliation may prevent complementors from fighting against economically harmful practices implemented by online dominant platforms. The economic dependence relationship and fear of retaliation are illustrated by past antitrust cases on both sides of the Atlantic. Having set the scene in which complementors might be disincentivised to take up legal actions facing anticompetitive practices, this paper takes the example of two distortions of information practices, implemented by dominant online platforms, that are harmful to both consumers and complementors: dark patterns and ranking biased by fake reviews. Under the angle of consumer empowerment (through direct complaints) and consumer-oriented enforcement (relying on competition law, the UCPD, and the Digital Services Act Package), this paper shows that consumer empowerment and consumer-oriented enforcement of distortion of information practices can produce a positive externality for complementors. Sole claims for damages have the lowest probability of producing a positive externality unless they act as a signal against an obligation non-implemented by an online platform. Injunctions and commitments have the highest probability of producing a positive externality for complementors. However, one of the constraints of this proposal may be the limited detectability of these practices by consumers.

---

\* Date of Reception: 30 June 2023. Date of Acceptance: 23 July 2023.

DOI: <https://doi.org/10.34632/mclawreview.2023.15890>.

\*\* PhD Student, GREDEG, Université Côte d'Azur; Academic Assistant, European law & Economic Analysis, College of Europe (Brugge). I would like to thank Professor Laura Zoboli for her kind encouragement in submitting a proposal to the Market and Competition Law Review and Professor Mariateresa Maggolino for giving me the opportunity to present this research at the 4th APELIA annual conference and for her thoughts-provoking questions.

KEYWORDS: digital markets, economic imbalance, online platforms, consumer empowerment, manipulative online practices

## ***I. Introduction***

Classic Economics theory postulates that since consumers are rational, in their decision-making they will select the option that will bring the most utility and satisfaction, taking into account the constraints they face<sup>1</sup>. However, the rationality of consumers has been long ago challenged by behavioural economics which shed light on our constrained rationality. Consumers rely on shortcuts, called heuristics, and their judgment is biased, as a consequence of our constraint rationality<sup>2</sup>. Therefore, firms can exploit our constrained rationality and implement manipulative practices, among which, distortions of information practices.

Starting from the widely observed unbalanced power relations in digital markets, where small and medium sized enterprises, often complementors, are economically dependent on dominant platforms. This unbalanced power relationship in digital markets can result in platforms relying on their ability to implement retaliatory practices and abuse their economic power in order to secure their dominant position at the expense of their business partners. Consequently, business partners might be disincentivised from fighting against the anticompetitive practices of the platforms. This will be illustrated with antitrust cases from both sides of the Atlantic against Big Tech platforms.

Complementors being subject to an unbalanced power relationship and economically dependent, how can consumer empowerment and consumer-oriented enforcement come to the rescue?

There is a strong asymmetry of information between platforms and the consumers of digital goods and services. Online platforms can also use online architecture, dark patterns and design their algorithms resulting in unfair and deceptive commercial practices. However, these practices aim to keep the consumers and extract their consumer surplus. From a competition law perspective, these practices may be characterized as exploitative abuses. The platform will not implement exclusionary practices targeting

---

<sup>1</sup> Jeffrey M. Perloff, *Microeconomics, global edition*. Pearson Education Canada, 2018.

<sup>2</sup> Amos Tversky and Daniel Kahneman, "Judgment under uncertainty: Heuristics and biases: Biases in judgments reveal some heuristics of thinking under uncertainty", in *Uncertainty in economics*, 17-34. Elsevier, 1978.

its own consumers. Therefore, the consumers could be in a stronger position than complementors of a platform in denouncing competition law infringements.

This paper takes the example of two online manipulation practices implemented by platforms that are harmful to both complementors and consumers: dark patterns, and fake online reviews and biased rankings. Maggiolino and Colangelo have studied how information manipulation can be apprehended under competition law and whether competition law is well suited to deal with these practices<sup>3</sup>. For the authors, competition law should take an interest in information manipulation practices for several reasons, among which: the impact of information dissemination in digital markets can be quantitatively and qualitatively more significant compared to the market impact of a single misleading advertising campaign. Therefore, the negative effects of information manipulation take place on an unprecedented scale in digital markets.

First, I review the means for consumer empowerment and consumer protection in digital markets: focusing on competition law, the Digital Markets Act (DMA), the Digital Service Act (DSA), the Unfair Commercial Practices Directive (UCPD) and consumer complaints mechanisms in platforms. Then, I identify whether these legal grounds contain provisions aiming to protect consumers and how they can be articulated in the context of dark patterns and biased online reviews & rankings implemented by online platforms.

This paper does not suggest that consumer-oriented enforcement should have the goal of protecting complementors that are in a situation of economic dependence towards an online platform. Rather, in the occurrence of harmful practices for both complementors and consumers implemented by an online platform, to what extent can consumer empowerment and consumer-oriented enforcement result in a positive externality for complementors?

---

<sup>3</sup> Margherita Colangelo and Mariateresa Maggolino, "Manipulation of information as antitrust infringement", *Colum.J.Eur.L.* 26 (2019): 63.

## ***II. Unbalanced power relationships in digital markets: between fear of retaliation for the complementors and economic power of the dominant online platform***

The characteristics of digital markets have been widely discussed in the literature: extreme returns to scale, network effects, barriers to entry, and the role of data<sup>4</sup>. Given the highly concentrated structure of digital markets, a few players can capture most of the profits and derive from their market power an unbalanced power relationship with their trading partners. These few players, benefiting from a high market power, are in a position in the market that allows them to abuse from their dominant position, either with exclusionary or exploitative practices. Graef distinguishes three types of differentiated treatment in platform-to-business relations that are abusive under Art 102 TFEU: self-preferencing (which will be referred later in this paper when taking the example of the Google Shopping case), “secondary line” differentiation (a non-vertically integrated platform engages in differentiated treatment among non-affiliated services), “hybrid differentiation” (a platform engages in differentiated treatment among non-affiliated services with the aim to favour its own business)<sup>5</sup>. The author analyses the boundaries of EU Competition law when dealing with differentiated treatment and concludes with the struggle of capturing the anti-competitive harm when a business is removed or blocked from a platform. Against this backdrop, the author draws lessons from national regimes on abuse of economic dependence which could provide more effective protection for businesses, acknowledging the Platform to Business Regulation as a “starting point” to target unfair practices arising from the dependence of businesses on a platform.

It is not the aim here to review all the categories of potential infringements from a dominant platform in digital markets, but rather to emphasize that not only can these market players abuse their dominant position, but they have the economic power to abuse from their position as long as possible, even after being sanctioned.

First, fearing retaliatory practices from the platform, the small and medium-sized enterprises are not incentivized to denounce the anticompetitive infringements from the platform.

---

<sup>4</sup> Jacques Crémer, Yves-Alexandre de Montjoye, and Heike Schweitzer, “Competition policy for the digital era”, *Report for the European Commission* (2019).

<sup>5</sup> Inge Graef, “Differentiated treatment in platform-to-business relations: EU competition law and economic dependence”, *Yearbook of European Law* 38 (2019): 448-499.

Cutolo and Kenney analyse the sources of the power asymmetry between the platform and its ecosystem members<sup>6</sup>. The authors outline the dynamics of digital markets as an origin of the power imbalance between the platform owner and platform-dependent entrepreneurs. They start by relying on the multi-sided model and network effects. Indeed, in a two-sided or multi-sided market, a platform acts as an intermediary, and each side's (group's) demand depends on the other group(s). Therefore, the level of activity in one group benefits the other group members, creating an attraction spiral<sup>7</sup>.

Cutolo and Kenney draw on the consequences of the power imbalance for platform-dependent-entrepreneurs, including being separated from consumers, the opacity of rating, rankings, and recommendations systems, changing the terms of participating by the platform, platform access, and delisting, and the risk of competing against the owner of the platform. Interestingly, the authors illustrate how platforms, private marketplaces, can provide access solely at their discretion. Taking the example of Apple agreeing to sell on Amazon, the counterparty was that unauthorized independent Apple resellers had their listings removed. This case illustrates a platform sacrificing its platform-dependent entrepreneurs for a bigger account, Apple. Following up on their illustration, on the 18th of July 2023, the Spanish Competition Authority (CNMC) fined Apple and Amazon with a 194,150,000 euros sanction for restricting competition on Amazon's website in Spain on the following grounds: including clauses to regulate the conditions of Amazon as an Apple distribution having the effect of affecting the sale of Apple products and other brands, unjustifiably restricting the number of resellers of Apple product and limiting the advertising space for Apple's competing products.

Acknowledging the dynamics behind the power imbalance in digital markets and their risks for the small and medium-sized enterprises, two examples can illustrate how platforms have the economic power to derive power from their dominant position even after being sanctioned: the fear of retaliation and economic imbalance in legal proceedings.

---

<sup>6</sup> Donato Cutolo and Martin Kenney, "Platform-dependent entrepreneurs: Power asymmetries, risks, and strategies in the platform economy", *Academy of Management Perspectives* 35, no. 4 (2021): 584-605.

<sup>7</sup> Paul Belleflamme and Martin Peitz, *The economics of platforms*. Cambridge University Press, 2021.

First, fearing retaliatory practices from the platform, small and medium sized enterprises are not incentivized to denounce the anticompetitive infringements from the platform. This will be illustrated with two US (United States) antitrust cases against Apple.

In the *Apple vs. Pepper* decision from the US Supreme Court on the 13th of May 2019, the Supreme Court held that app purchasers, consumers, have a standing to sue Apple for an allegedly anticompetitive commission it charged to app developers, who were then setting the prices at which consumers were purchasing applications on the Apple App Store. The Supreme Court was asked to interpret the Illinois Brick rule, which states that there should be no intermediary between the purchaser and the antitrust violator. The goal of this rule is to ensure an effective and efficient litigation scheme. This case is relevant for our discussion because Apple built its argument, and interpretation of the Illinois Brick rule, in favour of barring consumers' actions. According to Apple's argument, barring consumers from suing Apple will better promote effective enforcement of antitrust laws. Indeed, antitrust laws, according to Apple, would be better enforced if only upstream app developers could sue. The Supreme Court dismissed the argument:

*"Leaving consumers at the mercy of monopolistic retailers simply because upstream suppliers could also sue the retailers makes little sense and would directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases".*

In a note for the American Antitrust Institute, Stutz discusses the significance of the Court's ruling for two reasons<sup>8</sup>. First, the interpretation of the Illinois Brick rule ensured that dominant online platforms do not enjoy a "de facto immunity" from antitrust claims for damages by upstream suppliers and downstream purchasers. Second, the author rightly points out that upstream suppliers, when they are dependent on the platform, make for reluctant antitrust plaintiffs. It was in Apple's favour to bar consumers' actions, arguing that app developers could sue, knowing that they are locked in Apple's closed system and have no incentives to sue, in fear of retaliation.

---

<sup>8</sup> Randy Stutz, "Cracking Pepper: An analysis of the Supreme Court's latest pronouncement on the indirect purchaser rule", *American Antitrust Institute* (May 17, 2019). <https://www.antitrustinstitute.org/work-product/aai-unpacks-supreme-court-victory-for-plaintiffs-apple-v-pepper/>.

In the Apple vs. Epic case, the retaliation had already occurred before the introduction of the claim of damages. Apple, per contract clauses, requires all in-app purchases to use Apple's own in-app purchase system, charging a 30 percent commission on app developers and restricting them from informing users of purchasing alternatives. These are called anti-steering clauses. Epic, which created the video game Fortnite, tried to circumvent the anti-steering clauses by offering a direct payment system on the Fortnite app, which was beneficial for consumers. Apple reacted by removing Fortnite from its App Store in August 2020. Therefore, Epic Games brought an antitrust case against Apple, claiming that the removal of the Fortnite app was an act of retaliation, and that the exclusivity and anti-steering provisions amounted to the maintenance of a monopoly, denial of essential facilities, and unfair trade conditions. In September 2021, the US District Court of Northern California ruled that Apple was not a monopolist on a market definition of mobile game transactions but imposed an injunction against anti-steering clauses. Epic Games lost on the grounds that they unilaterally breached the contract's terms. Apple appealed this decision (because of the injunction), and in April 2023, the 9<sup>th</sup> U.S. Circuit Court of Appeals confirmed that Apple did not violate U.S. Antitrust provisions but did violate California State unfair competition law. The battle is not over since Apple announced that they will ask for a U.S. Supreme Court hearing, to challenge the injunction prohibiting the anti-steering fees in the App Store in the U.S. To this day, Fortnite is still not available on the App Store.

Second, in the event of an infringement procedure, public sanction, or private parties initiated, there is a distortion of means, resulting in lengthy procedures which can have the effect of perpetrating anticompetitive harm or blocking private enforcement actions. The Google Shopping case is an example of how a lengthy legal procedure may block potential follow-on damages actions, and the Dutch ACM App Store case illustrates how a platform can use their economic power to delay the implementations of remedies, choosing to pay periodic penalty payments up to the maximum amount.

The Google Shopping case started on the 30th of November 2010, when the EU Commission decided to open proceedings concerning the "the unfavourable treatment by Google Inc. (Google) of competing vertical search service providers in Google's unpaid and sponsored search results coupled with an alleged preferential placement of Google's own services".



The EU Commission released its decision on the 27th of June 2017, sanctioning Google for giving an illegal advantage to its own comparison-shopping service. Appealed by Google, the General Court released its decision on the 10th of November 2021, confirming the EU Commission's decision. Appealed again, the legal team of Google is expected for a hearing at the Court of Justice on the 19th of September 2023.

In the meantime, damages actions are on hold, and Google has the strongest incentives to fight the public enforcement case. Indeed, under the Directive 2014/104/EU, Article 9, an infringement sanctioned by a final decision from a national competition authority, or a review court irrefutably is deemed established. There are ongoing private enforcement cases relating to the Google Shopping case on hold for the final public sanction, for example, in Italy and France. Price comparison services competitors have also announced that they will introduce actions for damages, which is the case of Price Runner in Sweden, and would benefit from a follow-on action.

Turning to the Dutch ACM case, in a decision of the 24th of August 2021, the Authority for Consumers and Markets ordered Apple to adjust the conditions for access to the Dutch App Store in order to allow dating app developers to use payment systems other than Apple's App Store Payment Processing System. The Dutch Authority for Consumers & Markets (ACM) ruled that the prohibition imposed on app developers when agreeing to the contractual conditions package imposed by Apple from referencing within their app any alternative payments outside the App Store was an anti-steering clause. Apple introduced interim proceedings to block the publication of the decision and suspend the penalties in case of non-compliance with the orders. The interim proceedings were denied by a judgment from the Rotterdam District Court on the 24th of December 2021.

This can also illustrate how platforms have the economic power to derive power from their dominant position even after being sanctioned, since Apple remained reluctant to comply with the order from the ACM. Instead, the platform cumulated penalties until the maximum of periodic penalty payment of 50 million euros. And this is not the end, yet. In a decision from the 13<sup>th</sup> of July 2023, the ACM rejected Apple's objections against the order that was subject to penalty payment. Since, Apple complied with the part of the order targeting anti-steering clauses and imposing the Apple payment system. However, there was a third part in the order, that is

confidential and that was also subject to penalty payment. Apple has filed an appeal against the decision from the 13<sup>th</sup> of July, but should the ruling be in the favour of the ACM, the ACM will have to enforce this third elements on conditions and will be able to publish the stayed part of the order.

### ***III. Consumers' empowerment and consumers' protection in digital markets***

Consumers are the first judges of the market and, therefore, of firms' behaviours. Advances in technology and the use of the Internet provide endless sources of information for consumers and should benefit consumers' empowerment. However, as Broniarczyk and Griffin point out, the same tools that can empower consumers, freedom of choice, and expansion of information capabilities are also sources of decision difficulties<sup>9</sup>. The authors focus on three sources of difficulties (task complexity, trade-off difficulty, and preference uncertainty) and review key moderators to exacerbate or moderate the effect of these sources of decision difficulties. While the authors find that growing expansion of information, both in quantity and quality, brings closer a situation of perfect information for consumers; consumers might need to rely on decision aids, for which future research should be conducted to identify which decision aids would be the best fitted to tackle the burden of processing huge amount of information.

Consumer empowerment can take several forms in digital markets, among which: online complaining behaviours, consumers' complaints, and introducing legal actions.

Zongchao designed an experiment to test how psychological empowerment affects individuals' use of online complaining behaviours to publicly punish a company with whom they had an unsatisfactory experience<sup>10</sup>. In the author's study, the public punishment takes the form of either a punitive public complaint on the internet or on social media. Zongchao presents online complaining as revenge behaviour from consumers in a negative context of an unsatisfactory experience. While online complaining might not only be linked with revenge motives, by complaining publicly, online consumers publicize the service failure to a bigger audience.

---

<sup>9</sup> Susan M. Broniarczyk and Jill G. Griffin, "Decision difficulty in the age of consumer empowerment", *Journal of Consumer Psychology* 24, no. 4 (2014): 608-625.

<sup>10</sup> Zongchao Li, "From power to punishment: Consumer empowerment and online complaining behaviors", *Internet Research* 29, no. 6 (2019): 1324-1343.

The author finds that interactional empowerment was a key determinant for revenge-driven online complaints.

While this angle of consumers' empowerment through online revenge behaviours is truly relevant for digital markets, this paper will focus on consumers' complaints to authorities or on the platforms and on introducing legal actions.

Consumers can either take part of a public enforcement action, by signalling the infringement in the form of a complaint to a public authority or introduce a private enforcement action.

Under competition law, the Damages Directive 2014/104/EU provides a framework to foster the incentives for private enforcement actions following an infringement of Arts. 101 or 102 TFEU. The introduction of a damages action under the Directive implies an infringement of competition. The claimants can rely on a previous sanction from either a national competition authority or the EU Commission, in which case the infringement is presumed to be irrefutably established (Art 9 of the Directive). This is the configuration of a follow-on claim, which differs from a stand-alone claim, in which the claimants need to first demonstrate the infringement to competition law provisions. The aim of the Directive is to ensure that "any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm" (Article 3). Therefore, once the claimants have shown the infringement to competition law or relying on a public final decision, they must show a causal link between their harm and the infringement, and they quantify their harm to be compensated. The Directive provides a strict right for monetary compensation, excluding punitive damages. The Directive does not provide a harmonised ground for injunctions or collective actions, but some Member States have national provisions allowing them.

Since this paper focuses on consumer-oriented enforcement, it is necessary to remind here that the goal of competition is not only to protect consumers but to protect the market and its players, as Jenny would put it: "*en promouvant la concurrence, l'antitrust vise à maximiser la taille du gâteau économique*"<sup>11</sup>. Nevertheless, relying on private enforcement of competition law would seem intuitively a good option, when considering the latest

---

<sup>11</sup> Frédéric Jenny, "Droit européen de la concurrence et efficacité économique", *Revue d'Économie Industrielle* 63, no. 1 (1993): 193-206.

sanctions for infringement Art. 102 in digital markets. Unfortunately, the high burden of proof set by the Damages Directive is not playing in the favour of consumers in designing the rights incentives. The difficulty in quantifying the damages is an additional reason behind nascent and shy private enforcement practices in competition law in digital markets.

The Unfair Commercial Practices Directive pursues the objective of achieving a high level of consumer protection. The punishable infringements are unfair commercial practices, in particular, commercial practices shall be unfair when misleading and aggressive (Art 5). Moreover, Annex 1 of the Directive provides a blacklist of those commercial practices which shall in all circumstances be regarded as unfair. The UCPD is a flexible legal instrument because it does not restrictively list practices. Instead, all unfair commercial practices are prohibited if they meet two cumulative criteria set up in Article 5 (2):

*“(a) it is contrary to the requirements of professional diligence, and (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers”.*

The UCPD is also flexible when it comes to private enforcement. Consumers can introduce claims for damages, seeking compensation, but also requesting remedies, including termination of contract. Consumers can also rely on the European Small Claim procedures (Regulation No. 861/2007), which are cheaper, and quicker, for claims that are under an upper value. Additionally, consumers can benefit from the Collective Redress Directive 2020/1828, providing a harmonised ground for collective proceedings for European consumers, for damages claims or injunctions requests.

The Digital Services Act package directly aims at digital markets; however, each Regulation has specific, complementary goals. On the one hand, the DMA aims to ensure that platforms designated as gatekeepers behave in a fair way online and focus on contestability and fairness in digital markets. The DMA addresses first the relationship of gatekeepers with their business users, rather than the end users. While there are some (limited) specific provisions relating to end users, Podszun would call the DMA a “missed opportunity” in the sense that “The DMA could have been a

market regulation that officially recognises that consumers are independent market actors with an active role, and not just passive recipients of what markets hold for them”<sup>12</sup>. On the other hand, the DSA directly aims at protecting consumers and their fundamental rights online.

The Recitals of both the DMA and the DSA open the possibility for private enforcement, §104 of the DMA and §121 of the DSA. Both Regulations also fit within the scope of the Collective Redress Directive 2020/1828. The DMA goes one step in business users’ and end users’ empowerment, should they wish to complain about unfair practices, since any practice implemented by the gatekeeper aiming to inhibit or hinder those users is prohibited (§42). Finally, the DMA also provides safeguards for whistleblowers, protecting them from retaliation (§102).

Finally, consumers can directly introduce complaints on the platform or to consumer protection authorities about the practices on the platform. The OECD published a report in 2022 on the role of online marketplaces in protecting and empowering consumers. The aim of the report was to better understand the business models of these marketplaces and identify the most common consumer protection issues the marketplaces initiatives to address them. The survey results in the report gathered input from participants from 28 countries and 15 online marketplaces.

#### ***IV. Dark patterns & online reviews: consumers-oriented enforcement***

Dark patterns and online reviews manipulation are two harmful practices in digital markets under the broader scope of information. Both practices are under the radar of regulators and are harmful to both the consumers and the complementors of online platforms.

##### ***a. Dark patterns***

Dark patterns is a term that can be used to cover practices that aim to manipulate the decision-making process of the users. The goal of these dark patterns is to trick people into making decisions that are in the interests of the online business but at the expense of consumers. They rely on consumers’ cognitive biases to modify their conduct. Hence, consumers are not choosing the service or good that suits best the characteristics they

---

<sup>12</sup> Rupperecht Podszun, “The Digital Markets Act: What’s in it for consumers?”, *Journal of European Consumer and Market Law* 11, no. 1 (2022).

were looking for, but the service or good they were influenced to choose. Dark patterns are a hot topic for regulators, with reports from the US FTC<sup>13</sup> and the EU Commission<sup>14</sup> in 2022.

Some authors categorize dark patterns on their techniques, ends, and consumers' activities, but there are no perfect or definite taxonomies of dark patterns because new practices are constantly emerging. Their detectability seems harder on small screens and mobile devices<sup>15</sup>, and their effectiveness varies depending on the consumers and whether they are cumulated. For example, mild patterns would seem more effective than aggressive dark patterns<sup>16</sup>. Some examples of dark patterns are toying with emotions (eliciting and exploiting consumers' emotions), fake countdown timers (creating a fake sense of emergency), or hidden costs.

Dark patterns are directly harmful to consumers who are influenced into purchasing goods that do not necessarily meet their needs. Hence, they cannot fully express their actual preferences. In the insurance market, dark patterns may also lead consumers to make decisions that do not meet their risk profile<sup>17</sup>.

Dark patterns are also of concern for the collective welfare due to detrimental effects on competition, price transparency, and trust on the market<sup>18</sup>. Marty and Torregrossa, under the angle of the economic risks posed by dark patterns, differentiate between the concerns for inter-ecosystems and intra-ecosystems competition<sup>19</sup>. The risks posed by inter-ecosystems competition consist of a decrease in the competitive pressure and the

<sup>13</sup> US FTC, "Bring dark patterns to light". Staff Report. (2022) Bringing Dark Patterns to Light (ftc.gov).

<sup>14</sup> European Commission, Directorate-General for Justice and Consumers, F. Lupiáñez-Villanueva, Boluda, A., Bogliacino, F., et al., *Behavioural study on unfair commercial practices in the digital environment: Dark patterns and manipulative personalisation: Final report*, Publications Office of the European Union, 2022, <https://data.europa.eu/doi/10.2838/859030>.

<sup>15</sup> OECD (2022), "Dark commercial patterns", *OECD Digital Economy Papers*, No. 336, OECD Publishing, Paris, <https://doi.org/10.1787/44f5e846-en>.

<sup>16</sup> Jamie Luguri and Lior Jacob Strahilevitz, "Shining a light on dark patterns", *Journal of Legal Analysis* 13, no. 1 (2021): 43-109.

<sup>17</sup> EIOPA, 2022, at: [https://www.eiopa.europa.eu/tools-and-data/behavioural-insights-insurance-and-pensions-supervision/dark-patterns-insurance-practices-exploit-consumer-biases\\_en](https://www.eiopa.europa.eu/tools-and-data/behavioural-insights-insurance-and-pensions-supervision/dark-patterns-insurance-practices-exploit-consumer-biases_en).

<sup>18</sup> European Commission, Directorate-General for Justice and Consumers, F. Lupiáñez-Villanueva, Boluda, A., Bogliacino, F., et al., *Behavioural study on unfair commercial practices in the digital environment: dark patterns and manipulative personalisation: Final report*, Publications Office of the European Union, 2022, <https://data.europa.eu/doi/10.2838/859030>.

<sup>19</sup> Frédéric Marty and Jeanne Torregrossa, *Tackling dark patterns: How to reasonably prevent consumer manipulation and competition distortions?* No. halshs-04109558. 2023.

introduction of unfair competition, since information on the characteristics of the products is biased. From an intra-ecosystem perspective, dark patterns have the potential to reinforce self-preferencing strategies. Therefore, at the level of complementors, they may suffer from a diversion of profits when dark patterns are implemented by the dominant platform. Day and Stemler argue that increased competition could reduce digital manipulation, as through choices, users would be able to punish firms employing manipulative designs<sup>20</sup>.

While dark patterns are without a doubt on the radar of regulators, Anderson et al. point out that dark patterns “did not start as a legal concept”, therefore there is no consistent definition in EU regulations<sup>21</sup>. Leiser et al. already advocated for a regulatory pluralism approach to dark patterns, relying on the data protection regime and consumers protection provisions at the EU level<sup>22</sup>.

In this paper, the regulatory framework compares competition law provisions, the DMA, the DSA and the UCPD.

First, competition policy “may not be enough” to tackle dark patterns<sup>23</sup>. Indeed, dark patterns are not *per se* infringements of competition law. To sanction dark patterns, one would first need to prove that the online platform is in a dominant position. Then, one would need to demonstrate how dark patterns can amount to an infringement of competition law, either exploitative or exclusionary, which would highly depend on the type of dark patterns. It sets the burden of proof high. Even in antitrust cases in which dark patterns were implemented, if the regulator has the possibility between sanctioning under the exploitative effects of dark patterns or the exclusionary ones of practices that rely on these same dark patterns, he should choose the infringement that is the easiest to prove, less likely to be appealed, in order to maximize his resources.

Turning to the UCPD, as already mentioned, the Directive opens the possibility of claims for damages and injunctions introduced by consumers. Also, the Directive is a flexible legal instrument, under which any

<sup>20</sup> Gregory Day and Abbey Stemler, “Are dark patterns anticompetitive?” *Ala.L.Rev.* 72 (2020): 1.

<sup>21</sup> Katrina Anderson, Johnson Nick, and Hodder Amelia. “Dark Patterns – A European regulatory perspective”, *Competition Policy International* no. Tech Reg Chronicle May 2023 (May 17, 2023).

<sup>22</sup> M. R. Leiser, E. Kosta, R. Leenes, and I. Kamara. “Dark patterns: The case for regulatory pluralism between the European Unions Consumer and Data Protection regimes.” *Research Handbook on EU Data Protection Law* (2022): 240-269.

<sup>23</sup> Lirio Barros et al. “The rise of dark patterns: does competition law make it any brighter?”, *Competition Law Journal* 21.3 (2022): 136-144.

business-to-consumer practice can be sanctioned if it materially distorts or is likely to distort the economic behaviour of an average or vulnerable consumer. The Commission notice from 2021 on the interpretation of the UCPD dedicates a sub-section to data-driven practices and dark patterns and reminds us that the principle-based provisions and prohibitions in the UCPD apply to unfair-data-driven business-to-consumer practices. Specifically, Articles 6 and 7 of the UCPD can tackle dark patterns that amount to misleading actions or misleading omissions<sup>24</sup>. There is no legal definition of dark patterns in the UCPD, but some practices, labelled under dark patterns, are already expressly prohibited in Annex I, including fake timers or nagging (repeated interruptions of users' interactions online). The Commission notice adds to the multi-regulatory framework perspective, underlining that these manipulative practices can be unfair under consumer law, but also in breach of transparency obligations under the General Data Protection Regulation (GDPR) and the ePrivacy Directive.

Finally, both the DMA and the DSA prohibit the use of dark patterns by gatekeepers. Under the DMA, without explicitly mentioning dark patterns, the chosen extract of Recital 70 reads as follows:

*Gatekeepers should not engage in behaviour that would undermine the effectiveness of the prohibitions and obligations laid down in this Regulation. Such behaviour includes the design used by the gatekeeper, the presentation of end-user choices in a non-neutral manner, or using the structure, function or manner of operation of a user interface or a part thereof to subvert or impair user autonomy, decision-making, or choice.*

The DSA, because of a difference of objectives between the two complementary regulations, provides a clear definition of dark patterns in Recital 67:

*Dark patterns on online interfaces of online platforms are practices that materially distort or impair, either on purpose or in effect, the ability of recipients of the service to make autonomous and informed choices or decisions. Those practices can be used to persuade the recipients of the service to engage in unwanted behaviours or into undesired decisions which*

---

<sup>24</sup> BEUC. "Dark Patterns" and the EU Consumer Law Acquis. (2022) beuc-x-2022-013\_dark\_patterns\_paper.pdf.



*have negative consequences for them. Providers of online platforms should therefore be prohibited from deceiving or nudging recipients of the service and from distorting or impairing the autonomy, decision-making, or choice of the recipients of the service via the structure, design or functionalities of an online interface or a part thereof. This should include, but not be limited to, exploitative design choices to direct the recipient to actions that benefit the provider of online platforms, but which may not be in the recipients' interests, presenting choices in a non-neutral manner, such as giving more prominence to certain choices through visual, auditory, or other components, when asking the recipient of the service for a decision.*

Additionally, Article 25 of the DSA expressly prohibits online interface design aiming at deceiving or manipulating consumers:

*Providers of online platforms shall not design, organise or operate their online interfaces in a way that deceives or manipulates the recipients of their service or in a way that otherwise materially distorts or impairs the ability of the recipients of their service to make free and informed decisions.*

As mentioned earlier, both the DMA and the DSA can be subject to private enforcement by consumers who can rely on a harmonized collective action framework. However, the implementation of the private enforcement of the DMA and the DSA is still blurry. While private enforcement of the DMA is granted, Komninos reminds us that the fact that a regulation is directly applicable does not mean that every single provision has a direct effect<sup>25</sup>. Taking the example of the DMA, direct effect can only arise from substantive provisions, which, one might argue, do not cover dark patterns. Therefore, the DSA would seem a better candidate for a consumers' private enforcement of the prohibition of dark patterns. One thing yet to be clarified, Recital 67 of the DSA stands that the DSA prohibition on dark patterns does not apply to practices covered by the UCPD and the GDPR. This creates a potential issue of enforcement, since the UCPD could arguably cover most dark patterns practices with a broad definition and the

---

<sup>25</sup> Assimakis Komninos, "The Digital Markets Act and private enforcement: Proposals for an optimal system of enforcement", in *Eleanor M. Fox liber amicorum, antitrust ambassador to the world* (Concurrences, 2021), *Forthcoming* (2021).

enforcement of both the UCPD and GDPR have been mostly constrained to narrow contexts, for example, cookies consent<sup>26</sup>.

### ***b. Online reviews***

The UK (United Kingdom) CMA, in a report published in 2015, identified several practices of concerns when it comes to online reviews and endorsements, among which: businesses writing or commissioning fake positive or negative reviews, reviews sites' moderation rules having the effect of not publishing negative reviews, and cherry-picking reviews. These practices are of utmost concern when the results of the survey presented in the report show that consumers use and trust these reviews when assessing the quality of goods and services.

These practices are harmful for consumers since they may select goods and services based on manipulated information, not purchasing a product or a service matching their expectations. For complementors, biased online reviews may amount to less visibility, and if the online reviews are considered in ranking the products and services on the platforms, the ranking may be influenced at the disadvantage of new entrants.

The Amazon's Buy Box commitments decision from the EU Commission, of December 2022, is an example of how the rules of products ranking on a vertically integrated platform may advantage the platform, amounting to self-preferencing practices at the expense of its complementors. Amazon's Buy Box in itself could be labelled as a dark pattern, since this "purchase box" displays the winner among all sellers, for the same product, according to Amazon's rules. The winner of the Buy Box is framed as the best seller and the box is in a prominent position, catching consumers' full attention, which would result in more than 80% of the purchases made on the platform going through the Buy Box. In the EU Commission investigation, it was found that the rules and criteria for the Buy Box were unduly favouring Amazon's own retail business. Therefore, the platform proposed to commit to treating all sellers equally when ranking the offers for the purposes of determining the Buy Box's winner and to display a second competing offer to the Buy Box winner.

Moving to the UCPD, the Commission notice guideline from 2021 also dedicates a sub-section to user reviews. The notice also emphasizes the

---

<sup>26</sup> Jennifer King, "Do the DSA and DMA have what it takes to take on dark patterns?", *Tech Policy Press* (2022).

importance of reviews for consumers' purchasing decisions. Taking the example of sponsored reviews without sponsorship disclosure and fake reviews, they constitute a distortion of consumers' choices. The notice also mentions the risks of these reviews when the platform's search parameters consider the reviews in ranking products. Fake consumer reviews and endorsements can be sanctioned under Article 7 (2) of the UCPD, requiring traders to identify the commercial intent of the commercial practice if not already apparent from the context. And since the EU Omnibus Directive 2019/2161, some specific practices in the area of consumer reviews and endorsements are now blacklisted in Annex 1.

While fake reviews are not expressly sanctioned in the DMA and in the DSA, they could fall under the broad definition of deceptive practices of the DSA. Consumers also might benefit from the transparency obligation imposed on very large online platforms, specifically on the transparency obligation on how content is recommended to them. Additionally, the risk of fake reviews influencing rankings of products favouring the vertically integrated platform can be addressed under Article 6 (5) of the DMA, which prohibits self-preferencing practices by gatekeepers.

Consumers' empowerment in digital markets can also take place through complaints. In the OECD report on the role of online marketplaces in protecting and empowering consumers, the country questionnaire aimed to collect data about consumer complaints received by consumer protection and product safety authorities for 2020. At the 8<sup>th</sup> place of the main subject matter of consumers complaints we can find fake ratings and reviews. While an 8<sup>th</sup> place might not seem impressive, I would counter argue that it requires real awareness from consumers to be able to identify potential fake ratings and reviews.

Finally, coordinated actions of consumer protection regulators are a powerful tool in digital markets. On January 2023, following an exchange with the EU Commission and national consumer authorities, Google committed to the Consumer Protection Cooperation network to implement changes in its commercial and contractual practices concerning Google Store, Google Play Store, Google Flight, and Google Hotels. One of the commitments targets the reliability of online reviews on Google Hotels, for which Google will need to provide more information about how they collect reviews. Google will also need to make clear that the company does not verify reviews on Google Hotels.

Empowerment of consumers, in this context, is not only about compensation and re-distributive justice, but is also beneficial for the public interest and whole economy.

### ***c. Positive externality and detectability***

Now that we have reviewed how consumer-oriented enforcement can tackle the manipulation of information implemented by dominant platforms, we can rank them according to their potential to produce a positive externality for complementors. An externality occurs when a person's well-being or a firm's production capacity is directly affected by the actions of other consumers or firms rather than indirectly through changes in price<sup>27</sup>.

In the context of this paper, consumers' empowerment and consumer-oriented enforcement of dark patterns and online reviews would produce a positive externality when they prohibit dominant platforms from using fake reviews or implementing dark patterns. Therefore, their action would correct the risk of profit diversion at the benefit of the platform (potentially vertically integrated) and at the expense of the complementors.

Turning to which consumers empowerment or consumer-oriented enforcement have more potential in terms of producing a positive externality for complementors. Pure damages claims have the lowest potential, since they aim to monetarily compensate consumers directly. In theory, they might signal an infringement and trigger a public investigation but, in practice, consumers would benefit from higher incentives in follow-on claims, particularly in competition law. Private enforcement of directly applicable Regulations' provisions (in the DSA or in the DSA) drastically increases the potential of producing a positive externality, since it signals that an obligation was not correctly implemented. Directly signalling the infringement to a regulator, when the harmful practice is not *per se* sanctionable and needs a by-effect assessment (competition law) or a principle-based assessment (UCPD, if not blacklisted), has a high potential, but will depend on the priorities of the regulators and on its own capacities to prove the infringement, and it might be time-consuming before making a final decision. Injunctions required by consumers and commitments required by Consumer protection authorities have the highest potential of producing a positive externality for complementors. Indeed, injunctions or commitments for the platform to clarify reviews, rankings, or remove

---

<sup>27</sup> Jeffrey M. Perloff, *Microeconomics, global edition*. Pearson Education Canada, 2018.

dark patterns practices, even if directly aimed at protecting consumers, will have the indirect effect of providing a fairer competitive environment for complementors.

Finally, while consumers do not fear retaliatory practices from the platform, complementors do have the advantage of receiving the signal of the infringement. Therefore, much is left to address the elephant in the room: the detectability of dark patterns and fake online reviews by consumers.

As already discussed, both dark patterns and fake reviews (and potentially biased rankings) distort the information that we perceive and rely on our constrained rationality as consumers. As the behavioural experiments study of the EU Commission in 2023 rightly points out: “Dark patterns are hidden, subtle and manipulative in nature, so it is difficult to spot and report them”<sup>28</sup>.

Therefore, it seems crucial to increase consumers’ awareness of manipulative practices in digital markets and have strong public enforcement of consumer protection provisions. Increasing consumers’ awareness when it comes to dark patterns can reside in educative campaigns, to alert consumers to the different forms that dark patterns can take. There are also direct consumer empowerment initiatives. The EU Commission behavioural study on unfair commercial practices takes the example of Grease Droid, introduced by Kollnig et al., a community-driven app modification that enables non-expert users to disable dark patterns in smartphone apps selectively<sup>29</sup>. A strong consumer protection enforcement in digital markets also calls for cooperation in digital markets, as the work of the CPC network, which was reinforced with CPC regulation 2017/2394, granting stronger powers to national authorities.

Finally, this paper quickly discussed how fake reviews, if reviews are included in a ranking algorithm, can bias the outcome of the “best” product or service. Additionally, when a ranking algorithm is part of a recommender system, Fletcher et al. (2023) discuss how recommender systems on digital platforms help predicting consumers’ preferences but can also create systemic biases in the recommendations. These systemic biases

---

<sup>28</sup> European Commission, Directorate-General for Justice and Consumers, F. Lupiáñez-Villanueva, Boluda, A., Bogliacino, F., et al., *Behavioural study on unfair commercial practices in the digital environment: Dark patterns and manipulative personalisation: Final report*, Publications Office of the European Union, 2022, <https://data.europa.eu/doi/10.2838/859030>.

<sup>29</sup> Siddhartha Datta, Konrad Kollnig, and Nigel Shadbolt, GreaseVision: Rewriting the rules of the interface”, *arXiv preprint arXiv:2204.03731* (2022).

might also harm competition between suppliers, increasing concentration and barriers to entry on the market, increasing homogeneity of products and increasing market segmentation. Going back to dark patterns, not only they are diverse, but they also grow in sophistication in online personalised interface. Therefore, in this context of sophistication of harmful practices implemented by large platforms at the detriment of consumers, Fletcher et al. call for a regulator or regulators with expertise in technical issues to enforce consumer protection provisions. The authors take several examples enhancing risks of harmful practices for consumers, including the exploitation of behavioural biases, and provide policy proposals<sup>30</sup>.

## ***V. Conclusion***

While this paper focused on two harmful practices in digital markets, the benefits of digitalization, both for businesses and consumers, should not be undermined. The digitalization of the economy comes with both benefits and challenges. However, practices involving the manipulation of information and consumers' behaviour touch upon discussions that go far beyond legal and economic analysis. It is not only about legal infringement and loss of profits, but also about freedom of choice, transparency of motives, and ethics. While consumers and complementors are allegedly aware of the terms and conditions of services of digital products, there are countless behavioural economics studies that demonstrated that consumers do not read these terms and conditions and complementors may be in a position of economic dependence towards a dominant platform, therefore forced to accept unfair trading conditions.

Sunstein and Thaler have provided examples of occurrences under which consumers can be nudged for their own benefit<sup>31</sup>. However, when dominant platforms try to influence consumers, with practices that may also negatively impact complementors, in an economic dependence relationship, it triggers regulatory initiatives. Therefore, as seductive as this proposal may be, of empowering consumers to compensate for the imbalance between trading partners and platforms, is it the right direction? Or should complementors be able to stand for themselves against law infringements without fear of exclusion from the ecosystems? The EU seems to

---

<sup>30</sup> Amelia Fletcher, Gregory S. Crawford, Jacques Crémer, David Dinielli, Paul Heidhues, Michael Luca, Tobias Salz, Monika Schnitzer, Fiona M. Scott Morton, and Katja Seim.

<sup>31</sup> Richard Thaler and Sunstein, Cass. "Nudge. Improving decisions about health, wealth and happiness". (2008).

have made the decision in favour of ex-ante obligations with the Digital Act Services Package, not yet fully empowering consumers and complementors, but promising a faster implementation of the obligations than a by-effect assessment by a regulator.

## VI. Bibliography

- Anderson Katrina, Johnson Nick, and Hodder Amelia. “Dark patterns – A European regulatory perspective”. *Competition Policy International – Tech Reg Chronicle* May 2023 (May 17, 2023).
- Barros, Lirio, et al. “The rise of dark patterns: Does competition law make it any brighter?”. *Competition Law Journal* 21.3 (2022): 136-144.
- Belleflamme, Paul, and Martin Peitz. *The economics of platforms*. Cambridge University Press, 2021.
- BEUC. “‘Dark patterns’ and the EU Consumer law acquis”. (2022). beuc-x-2022-013\_dark\_patterns\_paper.pdf.
- Broniarczyk, Susan M. and Jill G. Griffin. “Decision difficulty in the age of consumer empowerment”. *Journal of Consumer Psychology* 24, no. 4 (2014): 608-625.
- Colangelo, Margherita and Mariateresa Maggolino. “Manipulation of information as antitrust infringement”. *Colum.J.Eur.L.* 26 (2019): 63.
- Crémer, Jacques, Yves-Alexandre de Montjoye, and Heike Schweitzer. “Competition policy for the digital era”. Report for the European Commission (2019).
- Cutolo, Donato and Martin Kenney. “Platform-dependent entrepreneurs: Power asymmetries, risks, and strategies in the platform economy”. *Academy of Management Perspectives* 35, no. 4 (2021): 584-605.
- Datta, Siddhartha, Konrad Kollnig, and Nigel Shadbolt. “GreaseVision: Rewriting the rules of the interface” (2022) <https://doi.org/10.48550/arXiv.2204.03731>.
- Day, Gregory and Abbey Stemler. “Are dark patterns anticompetitive?”, *Ala.L.Rev.* 72 (2020): 1.
- European Commission, Directorate-General for Justice and Consumers, Lupiáñez-Villanueva, F., Boluda, A., Bogliacino, F., et al. *Behavioural study on unfair commercial practices in the digital environment: Dark patterns and manipulative personalisation: Final report*. Publications Office of the European Union, 2022, <https://data.europa.eu/doi/10.2838/859030>.
- Fletcher, Amelia, Gregory S. Crawford, Jacques Crémer, David Dinielli, Paul Heidhues, Michael Luca, Tobias Salz, Monika Schnitzer, Fiona M. Scott Morton, and Katja Seim. “Consumer protection for online markets and large digital platforms”. Available at SSRN 3923588 (2021).

- Fletcher, Amelia, Peter Ormosi, and Rahul Savani. "Recommender Systems and Supplier Competition on Platforms." *Journal of Competition Law & Economics* (2023). doi:<https://doi.org/10.1093/joclec/nhad009>.
- Graef, Inge. "Differentiated treatment in platform-to-business relations: EU competition law and economic dependence". *Yearbook of European Law* 38 (2019): 448-499.
- Jenny, Frédéric. "Droit européen de la concurrence et efficience économique". *Revue d'Économie Industrielle* 63, no. 1 (1993): 193-206.
- King, Jennifer. "Do the DSA and DMA have what it takes to take on dark patterns?". Tech Policy Press. (2022) Blog post: Do the DSA and DMA Have What It Takes to Take on Dark Patterns? ([techpolicy.press](https://techpolicy.press)).
- Komninos, Assimakis. "The Digital Markets Act and private enforcement: Proposals for an optimal system of enforcement". In *Eleanor M. Fox liber amicorum, antitrust ambassador to the world (Concurrences, 2021), forthcoming* (2021).
- Leiser, M. R., E. Kosta, R. Leenes, and I. Kamara. "Dark patterns: The case for regulatory pluralism between the European Union's consumer and data protection regimes". In *Research handbook on EU Data Protection Law* (2022): 240-269.
- Luguri, Jamie and Lior Jacob Strahilevitz. "Shining a light on dark patterns". *Journal of Legal Analysis* 13, no. 1 (2021): 43-109.
- Marty, Frédéric, and Jeanne Torregrossa. *Tackling dark patterns how to reasonably prevent consumer manipulation and competition distortions?* No. halshs-04109558. 2023.
- OECD (2022). "The role of online marketplaces in protecting and empowering consumers: Country and business survey findings". *OECD Digital Economy Papers*, No. 329, OECD Publishing, Paris, <https://doi.org/10.1787/9d8cc586-en>.
- OECD (2022). "Dark commercial patterns". *OECD Digital Economy Papers*, No. 336, OECD Publishing, Paris, <https://doi.org/10.1787/44f5e846-en>.
- Perloff, Jeffrey M. *Microeconomics, global edition*. Pearson Education Canada, 2018.
- Podszun, Rupprecht. "The Digital Markets Act: What's in it for consumers?". *Journal of European Consumer and Market Law* 11, no. 1 (2022).
- Randy Stutz. "Cracking Pepper: An analysis of the Supreme Court's latest pronouncement on the indirect purchaser rule". American Antitrust Institute (May 17, 2019). <https://www.antitrustinstitute.org/work-product/aai-unpacks-supreme-court-victory-for-plaintiffs-apple-v-pepper/>.
- Thaler, Richard and Sunstein, Cass. "Nudge. Improving decisions about health, wealth and happiness" (2008).
- Tversky, Amos and Daniel Kahneman. "Judgment under uncertainty: Heuristics and biases: Biases in judgments reveal some heuristics of thinking under uncertainty". In *Uncertainty in Economics*, 17-34: Elsevier, 1978.



US FTC. “Bring dark patterns to light”. Staff Report. (2022) Bringing Dark Patterns to Light (ftc.gov).

UK CMA. “Online reviews and endorsements. Report on the CMA’s call for information”. (2015).

Li, Zongchao. “From power to punishment: Consumer empowerment and online complaining behaviors”. *Internet Research* 29, no. 6 (2019): 1324-1343.