Wettbewerbszentrale

Position Paper of the Wettbewerbszentrale regarding the Consultation on the Digital Fairness Act

October 2025

I. The Wettbewerbszentrale

The Wettbewerbszentrale (Center for Protection against Unfair Competition) is an independent, cross-industry trade association, founded in 1912. It promotes the principle of entrepreneurial self-regulation in matters of fair competition. As a qualified entity, it is authorized to enforce claims for injunctive relief in court if necessary, both under Sec. 8(3) No. 2 of the Act Against Unfair Competition (UWG) as well as under Sec. 3(1) No. 2 of the Injunctions Act (UKlaG).

In addition, the Wettbewerbszentrale provides legal advice to its members in competition-related matters. The non-profit organization is supported by over 1,000 companies from various industries, levels of distribution, and company sizes, as well as around 800 chambers and business associations (www.wettbewerbszentrale.de).

It does not represent any specific industry interests but rather serves as a neutral advisor to national and European legislators in shaping the legal framework for competition. The Wettbewerbszentrale is registered in the EU Commission's Transparency Register under ID number 241125238825-58 and the Lobby Register of the German Bundestag under registration number R001184.

In the event of violations of consumer protection regulations, the Wettbewerbszentrale generally acts by issuing a formal warning notice, a request to cease the violation, within a set deadline in order to stop unfair commercial practices by a company quickly, effectively, and out of court. The company in breach of the law is requested to sign a declaration of forbearance, including a penalty clause in case of recurrence. If an out-of-court agreement cannot be found, it resorts to the legal instrument of an injunction.

The Wettbewerbszentrale also acts as a designated body within the framework of the CPC network, as defined in Article 7 of Regulation (EU) 2017/2394 in conjunction with Sec. 7 of the German EU Consumer Protection Enforcement Act (EU-VSchDG).

II Introduction

The enforcement of consumer protection law, embedded in unfair competition rules, is one of the core tasks of the Wettbewerbszentrale. Therefore, in the interest of consumers as well as competitors, we support clear and strong rules to prevent unfair commercial practices, online as well as offline. At the same time, we call for a high level of legal certainty for companies, which is essential for businesses throughout Europe.

From our point of view and also taking our experience regarding enforcement into account, the current framework of European consumer law offers a very strong and broad basis for consumer protection and does not require further regulation. EU consumer protection law, most notably the Unfair Commercial Practices Directive (UCPD), but also the DSA, DMA and AIA in regard to the digital world, is already amongst the most comprehensive and consumer-centered regulatory systems throughout the world. It offers robust safeguards against misleading, aggressive, and unfair commercial practices, in addition it is flexible thereby empowering consumers to make confident and informed choices, also in the digital world. However, in some areas, non-regulatory measures may be of advantage.

III The Digital Fairness Act

In addition to answering the questions posed in the public consultation on the Digital Fairness Act, we would like to share our experience and the following thoughts on some specific topics addressed in the questionnaire:

1. Dark patterns (sec. 1)

In our view, the existing EU legal framework is adequate to prevent and sanction the unfair use of so-called "dark patterns." The Unfair Commercial Practices Directive (UCPD) is technology-neutral and flexible, enabling effective responses to new challenges in unfair competition and consumer protection.

Long before the term "dark patterns" even was coined, the Wettbewerbszentrale acted against unfair commercial practices in all its forms. This naturally included cases such as fake countdown timers that created a false impression of urgency and misled consumers. All categories of dark patterns can be addressed under the current framework where they meet the relevant de minimis threshold of Article 5 (2) b UCPD: a commercial practice has to **materially** distort behaviour. Without materially distorting consumer behaviour, no commercial practice should be prohibited, for this could severely harm entrepreneurial freedom as guaranteed in Article 16 CFR.

By way of illustration:

- **Click fatigue** may constitute an aggressive commercial practice within the meaning of Articles 8 and 9 UCPD.
- **False impressions** amount to misleading actions or omissions under Articles 6 and 7 UCPD.
- **Nagging** and **pressuring** can qualify as aggressive practices; the same applies to **confirm-shaming**.
- **Sneaking into the basket** is unlawful under the Consumer Rights Directive, which requires the consumer's express consent for any additional payments and prohibits pre-ticked boxes (e.g., Article 22).
- **Different outcomes than normally expected**, as well as the use of **ambiguous language**, can be misleading under the UCPD.
- Presenting choices in a **leading manner** is, to a certain extent, inherent in commercial freedom. Where such influence exceeds the materiality threshold of Art. 5 UCPD, this could be considered an aggressive practice.

German courts have already been dealing with dark patterns on the basis of the Unfair Commercial Practices Directive (UCPD) and the Consumer Rights Directive (CRD).

Before the term "dark pattern" was used by German legislation, courts had already considered it **misleading** when companies employed **urgency patterns**, such as fake countdown timers, to pressure consumers (see, for example, Regional Court Bochum, judgment of 10 September 2015 – 14 O 55/15). The Wettbewerbszentrale has consistently taken legal action against such deceptive designs. Most recently, in September 2025 we have filed a lawsuit before the Regional Court Düsseldorf (38 O 209/2025) concerning a fake countdown timer (**fake urgency**) and false indications of limited product availability ("only 17 pieces left" - **fake scarcity**). The UCPD already expressly prohibits falsely advertising an offer as available only for a short time (**Annex I, point 7 UCPD**).

Also, the Wettbewerbszentrale successfully challenged a booking portal for **misleading** users with **scarcity patterns** by claiming that only one room remained available at a particular hotel, although the hotel was still offering additional rooms through other distribution channels (Regional Court Nuremberg-Fürth, default judgment of 3 February 2016 – 4 HK O 5203/15).

The Higher Regional Courts (Oberlandesgerichte) have deemed repeatedly extended discount campaigns (**fake urgency**) to be **misleading**. This was demonstrated in the case of a mattress retailer who repeatedly ran identical discount promotions one after another (Higher Regional Court Cologne, judgment of 3 December 2021 – 6 U 62/21).

Another Regional Court considered it an **aggressive practice** to **display a pop-up** to customers after logging into online banking, forcing them to either accept or reject amended general terms and conditions (Regional Court Düsseldorf, judgment of 13 September 2023 – 12 O 78/22).

The Wettbewerbszentrale also successfully challenged, in an out-of-court proceeding, a **misleading subscription trap** on a job portal which led to an unintended automatic contract renewal (see the German-language report available at https://www.wettbewerbszentrale.de/wettbewerbszentrale-beanstandet-vertragsverlaengerung-eines-stellenportals-als-intransparent/).

A Regional Court ruled that fitness studios may not **force their customers to consent** to an increase in membership fees by declaring the passage of the studio's turnstile as the customers' consent to the increase. The court qualified this practice as an **aggressive commercial practice** (Regional Court Bamberg, judgment of 15 March 2024 – 13 O 730/22).

A Higher Regional Court prohibited the **pre-selection** of a paid express shipping option for certain products, holding that this practice infringed **Article 22 CRD** (Higher Regional Court of Karlsruhe, judgment of 26 March 2024 – 14 U 134/23).

Even the Federal Court of Justice (Bundesgerichtshof) addressed a **sneak-into-basket** variant in 2024. A travel portal offered a paid premium membership alongside a flight booking. The Court held that the purchase button must clearly indicate that two separate contracts are being concluded (Federal Court of Justice, judgment of 4 June 2024 – X ZR 81/23, referring to **Article 8(2) CRD**).

The Higher Regional Court of Bamberg ruled that it constitutes an **aggressive commercial practice** in the form of a **nagging and framing** pattern when a ticketing platform repeatedly and with drastic wording urges consumers to additionally purchase ticket insurance with their tickets (judgment of 5 February 2025 – 3 U Kl 11/24 e).

A Regional Court held that an online retailer engages in an **aggressive commercial practice** if it only confirms an order after the customer has been **forced to view** two additional promotional offers (Regional Court Berlin II, judgment of 11 February 2025 – 15 O 287/24).

Keeping the price of an offer the same after the Black Friday countdown timer has expired was most recently considered **misleading** by the Frankfurt am Main Regional Court, the Wettbewerbszentrale brought this

case to court (**fake urgency**, judgment of 21 March 2025 – 3-10 O 77/24, now pending before the Higher Regional Court of Frankfurt – 6 U 128/25).

Relying on general prohibitions (i.e. Articles 6 to 9 UCPD) allows the legislator to address a diverse and constantly evolving marketplace more effectively than by resorting to increasingly granular, fast-outdated rules for individual sub-areas. It is for public authorities and private enforcement actors to enforce the existing rules efficiently and thereby ensure a level playing field. **Non-regulatory measures like guidance** can however support this by fostering a consistent understanding across all European Member States. Such guidelines could also provide robust arguments in court in favour of labelling certain practices as misleading or aggressive.

2. Unfair personalisation practices (sec. 4)

As an organisation that handles numerous cases of unfair practices every day, we are not able to determine that the „personalisation" of advertising based on user data plays a particular role in competition law practice. As the Commission states, there may be certain „concerns" or "impressions" of „unfair practices" among digital services' users. However, based on our extensive case experience, we are unable to confirm that there is a significant number of demonstrable „unfair" practices in this area.

Where „unfair" behaviour (as addressed by competition law) can actually be identified, the existing legal framework already provides sufficient remedies to take action against such practices:

In particular, violations of the information obligations under the **GDPR** or the use of personal data without a legal basis (in particular: without the consent of users in accordance with Art. 6 lit. a GDPR or a contractual basis in accordance with Art. 6 lit. b GDPR) can be addressed and sanctioned under competition law (particularly by means of sec. 3a **German Act against Unfair Competition** – Gesetz gegen den unlauteren Wettbewerb, UWG).

The unauthorised setting of non-essential cookies without the consent of users, which may lead to personalisation, is also prohibited under sec. 25 **German Telecommunications-Digital Services-Data Protection Act** (Telekommunikation-Digitale-Dienste-Datenschutz-Gesetz – TDDDG); this provision is based on Art. 5 (3) of **Directive 2002/58/EC** as amended by Directive 2009/136/EC (ePrivacy Directive).

In addition, the **German Act on Injunctions** (Unterlassungsklagengesetz – UKlaG), which is based on **Directive (EU) 2020/1828**, already provides remedies to take action against violations of consumer protection laws (which include, *inter alia*, GDPR provisions on consumer information and protection).

Finally, **Art. 246a sec. 1 para. 1 no. 6 German Introductory Code to the Civil Code** (Einführungsgesetz zum Bürgerlichen Gesetzbuche – EGBGB), based on Art. 6 of the **Consumer Rights Directive 2011/83/EU,** provides for the information of consumers where prices are personalised.

From our expertise and practical experience, the existing legal framework therefore already offers sufficient opportunities to take action against „unfair" personalisation of data. In our view, therefore, no further EU action is required in this regard.

3. Harmful practices by social media influencers (sec. 5)

The Commission correctly states that the importance of social media is increasing in respect to consumer transactions. The aspects of hidden marketing and the promotion of potentially harmful products are explicitly addressed in the public consultation on the Digital Fairness Act. However, even keeping this in mind, no new legislation is needed in this area for the following reasons:

Existing legislation such as the UCPD already covers influencer marketing practices, including transparency and product safety rules. This means that influencers are already obliged to disclose marketing practices as ads. In the past, we have enforced the rules on transparency against several influencers successfully. In some cases the influencers signed the declaration of forbearance, in other cases we had to initiate court proceedings. For more information see our news dated December 14, 2024 https://www.wettbewerbszentrale.de/wettbewerbszentrale-setzt-werbekennzeichnung-im-influencer-marketing-durch/ as well as March 14, 2024 https://www.wettbewerbszentrale.de/wettbewerbszentrale-schreitet-ein-etliche-influencer-posts-in-social-media-nicht-als-werbung-erkennbar/ . In all, new regulatory measures such as further legislation is not needed in the area of influencer marketing.

Saying this, for influencers as well as for enforcement bodies it can be helpful to provide **guidance and training instruments**. Our organization for example published guidance for influencers, explaining in detail when and how social media posts need to be flagged : https://www.wettbewerbszentrale.de/wp-content/uploads/2024/08/270824-Leitfaden-der-Wettbewerbszentrale-Werbekennzeichnung-WBZ.pdf . Also, the State Media Authorities (Landesmedienanstalten) have published an extensive and interactive guidance paper, including recommendations on how to disclose promotional posts: https://www.die-medienanstalten.de/service/merkblaetter-und-leitfaeden/leitfaden-werbekennzeichnung-bei-online-medien/

It is also worth mentioning that the European Advertising Standards Alliance (EASA), where we are a member, has developed the program „adEthics“ which provides training as well as a certification option: https://www.easa-alliance.org/responsible-influence/ . The training aims at increasing knowledge and sensitivity of influencers regarding legality and social responsibility. This training is already available in France, Germany, Ireland, the Netherlands, Slovakia, Sweden and the UK. Read more on the implementation in Germany here https://influencertraining.de/ .

To conclude, we would highly recommend to **strengthen enforcement and influencer education on a national level**. At the same time, voluntary initiatives should be supported. We consider these measures to be more effective than new specific regulation that may cause overlapping rules, legal uncertainty. It should also be kept in mind that the Audiovisual Media Services Directive (AVMSD) and further rules already regulate advertising for sensitive products such as tobacco, alcohol and food, including food supplements. There is therefore no legal loophole that needs to be closed.

4. Unfair marketing related to pricing (sec. 6)

In our view, there is no need for additional EU-level regulatory measures with regard to pricing. The existing legal framework already provides sufficient remedies for misleading practices in this area.

First and foremost, the UCPD sets out a broad prohibition of misleading commercial practices, which explicitly covers misleading information about the price or the manner in which the price is calculated, as well as the existence of a specific price advantage. Accordingly, Section 5(2) No. 2 of the German Act against Unfair Competition (UWG) explicitly provides that a commercial practice is misleading if it contains false information or other information likely to deceive concerning, inter alia, about the existence of a particular price advantage, the price or the manner in which the price is calculated. Even where information is missing and prevents consumers from making a fully informed decision, enforcement can take place under the UCPD. Traders who advertise fake discounts, hide extra charges or present prices in a deceptive manner can already be challenged based on the UCPD.

In addition, more specific rules already set out detailed requirements on pricing. Traders are, for example, obliged to indicate the final selling price and the unit price in a transparent manner, and when announcing price reductions, they must refer to the lowest price applied in the previous 30 days. These obligations, arising from EU laws, namely the EU Price Indication Directive (Directive 98/6/EC) which was fundamentally revised by the Omnibus Directive (Directive (EU) 2019/2161), and its national implementations such as the German Preisangabenverordnung (PAngV), already ensure a high level of transparency for consumers in relation to price advertising and price indications. Moreover, fundamental principles embedded in the PAngV, such as the principles of price truth and price clarity, further support enforcement against misleading practices.

German courts have already dealt with various questions relating to price presentation and advertisement on the basis of the Unfair Commercial Practices Directive (UCPD) and the EU Price Indication Directive. The following judgments concern the issue of misleading pricing practices, also focusing on whether consumers are sufficiently well informed and not misled by the price indications:

Drip Pricing:

The Federal Court of Justice (Bundesgerichtshof) ruled that airlines must **indicate the total price including taxes, fees, and surcharges** from the outset, and that subsequently adding unavoidable costs during the booking process constitutes a misleading commercial practice (judgment of 30 July 2015 – I ZR 29/12).

The Higher Regional Court of Cologne held that hotel and booking platforms must **display the full price including obligatory local taxes** (e.g. city or bed tax) from the first price indication; any later addition of such costs is deceptive and violates price transparency obligations (judgment of 14 March 2014 – 6 U 172/13).

The Federal Court of Justice found that charging a “print@home” **service fee without any real additional service is unlawful**, as **it imposes a disguised surcharge** and misleads consumers about the actual ticket price (judgment of 23 August 2018 – III ZR 192/17).

Dynamic Pricing:

The Higher Regional Court of Frankfurt confirmed that varying prices between sales channels or branches are not misleading per se, provided that the **price differences are transparent and consumers are not deceived by inconsistent indications** (judgment of 3 March 2011 – 6 U 231/09).

The Federal Court of Justice clarified that minor or technical discrepancies in price indications do not automatically amount to an unfair commercial practice; dynamic pricing models remain **permissible as long as the pricing is clearly communicated and non-deceptive** (judgment of 4 October 2007 – I ZR 182/05).

The Higher Regional Court of Düsseldorf held that unilateral or opaque price adjustments - even in the context of variable pricing or "dynamic" models - are **unlawful** when the **contractual basis and transparency requirements are not met** (judgment of 23 February 2023 – I-20 U 318/22).

Misleading price comparisons:

The Federal Court of Justice ruled that **price reduction advertising must clearly display the lowest price of the past 30 days** in accordance with § 11 PAngV, and that relegating this information to footnotes constitutes misleading advertising (judgment of 9 October 2025 – I ZR 183/24).

The District Court of Düsseldorf held that price advertising must clearly indicate the basis of the price comparison. Where it is not evident to consumers whether the comparison refers to a former selling price, a recommended retail price, or another reference point, **the advertisement is to be interpreted as a price reduction, rendering the obligations under Section 11 PAngV** (judgment of 4 April 2025 – 38 O 284/24).

Taken together, the existing legal bases already ensure a sufficient high level of consumer protection. They provide sufficient grounds to take action against unfair or misleading pricing practices. Introducing additional EU-level legislation would risk duplication and legal uncertainty rather than improving enforcement.

For these reasons, we recommend against introducing new regulatory requirements on pricing within the framework of the Digital Fairness Act.

5. Simplification measures (sec. 8)

In recent years, numerous new **information requirements** for digital business models have been created. Even for legal experts, it is now difficult to keep track of all existing requirements in e-commerce.

We support examining these requirements to see whether they can be simplified. To that end, we consider it sensible to **empirically examine all information requirements** and to assess which of these requirements actually help a purchasing decision and which requirements rather lead to **information overload** or distraction.

For example, with the coming introduction of the so-called withdrawal function into Article 11a CRD by DIRECTIVE (EU) 2023/2673, the so-called **Model withdrawal form** (Annex I B. CRD) becomes superfluous. Up to now, the form has to our knowledge scarcely ever been used in practice. Anyone who in future is not

sure how to exercise their withdrawal can use the withdrawal function and can even expect the company to acknowledge receipt.

The model form therefore merely lengthens the model instructions without creating any added value.

6. Horizontal issues (sec. 9)

Under number 2, the questionnaire mentions the **reverse of the burden of proof** in cases where interested parties or authorities have disproportionate difficulty in obtaining information to prove a trader's wrongdoing. The way the question has been posed suggests that the burden of proof always lies in the sphere of the enforcing party / plaintiff. This is however not always the case. Already to date, the enforcing body / plaintiff may benefit from simplified proof requirements when it comes to clarifying facts that fall within the advertisers area of responsibility and that are not easily accessible to third parties. The principle of the plaintiff's full burden of proof especially requires a restriction when the plaintiff cannot establish the facts on his own initiative, whereas the defendant can easily and reasonably be expected to provide the necessary factual clarification and proof. This means that the advertiser has a **secondary burden of proof** for the accuracy of such advertising claims which concern internal company processes and about which only the advertiser can provide information (see also Art. 12 (1) UCPD). Reversing the burden of proof in specific cases is essential for effective law enforcement. However, this principle should already be in place in all Member States so that further legislative regulations should not be necessary.

Regarding the discussion point on changing the **definition of an average consumer**, we would advise to keep to the definition as established by the ECJ as a "reasonably well-informed, observant and circumspect" person. The legal framework already allows Courts and enforcement bodies to take targeted vulnerable consumers or specific circumstances into account and also to be stricter in certain areas of the law (in Germany this is for example the case in the area of health and environmental claims, where higher information standards apply – "Strengeprinzip"). Instead of changing the definition of an average consumer, efforts in strengthening consumer education and digital literacy would be favorable.

IV Summary / Conclusion

Emerging commercial phenomena such as influencer marketing and the use of manipulative interface designs ("dark patterns") are already adequately addressed through existing EU legislation. The UCPD, along with the Consumer Rights Directive, the DSA, DMA and related instruments, provides for a sufficient foundation for tackling these issues, also in the future. It is not rules and regulations that are missing, but more consistent and effective enforcement measures across all Member States.

While strong consumer protection must remain a priority, future regulatory initiatives should avoid duplicating existing laws or generating legal uncertainty. In some Member States, enforcement and not legislation is the real bottleneck. It is therefore important to ensure that existing laws are applied and enforced in a consequent manner. This will not only enhance consumer confidence but also create the conditions for a more dynamic and innovative European economy.

Contact:

Wettbewerbszentrale e. V.

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Office Berlin

Jennifer Beal

Nürnberger Str. 49

10789 Berlin

Tel.: + 49-30 - 326 5656

Mail: beal@wettbewerbszentrale.de

Head Office

Kai-Oliver Kruske

Tannenwaldallee 6

61348 Bad Homburg

Tel: + 49-6172 - 121514

Mail: kruske@wettbewerbszentrale.de

www.wettbewerbszentrale.de

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