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Applying Behavioural Insights to Consumer and Competition Policy and Enforcement

Workshop issues paper

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The OECD Committee on Consumer Policy and Competition Committee will jointly hold a workshop, "Applying Behavioural Insights to Consumer and Competition Policy and Enforcement", on 14 April 2023. This paper is intended to support discussion at the workshop by providing an overview of the issues for discussion in the panels. It was jointly prepared by the Secretariats to the Committee on Consumer Policy and the Competition Committee.

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Foreword

Competition and consumer policy share the goal of enhancing consumer welfare, by fostering markets that deliver better goods and services for consumers while empowering and protecting them from harm. Insights from behavioural science have long demonstrated that consumers are prone to a range of behavioural biases, particularly online, that may affect the way they make decisions. Examples are default bias (a tendency to remain with a default option) or myopia (a tendency to focus on the present and ignore future outcomes).

A better understanding of behavioural biases can greatly assist policy makers and enforcers from both policy areas in assessing how markets actually work, improving enforcement and designing effective policy interventions. Furthermore, with increased convergence in digital markets between competition and consumer policy and related areas (e.g. privacy and data governance), there is an increasing need for interdisciplinary and holistic policy perspectives to ensure that markets work well for consumers and businesses.

For these reasons, the OECD Committee on Consumer Policy and Competition Committee will hold a joint workshop on applying behavioural insights to consumer and competition policy and enforcement on 14 April 2023. The workshop will build on both committees' existing work on behavioural insights.[1]

This paper is intended to support discussion at the workshop, by providing an overview of the issues for discussion in the panels. It was prepared by Nicholas McSpedden-Brown, of the OECD Digital Economy Policy Division, and Tommaso Majer, of the OECD Competition Division, under the supervision of Brigitte Acoca and Audrey Plonk of the OECD Digital Economy Policy Division and Antonio Capobianco and Ori Schwartz of the OECD Competition Division. The opinions expressed and arguments employed herein are those of the authors and do not necessarily reflect the official views of the Organisation or of the governments of its member countries.

Executive summary

Behavioural insights are an inductive approach to policy making, combining insights from psychology, cognitive science, and social science with empirically-tested results to discover how people actually make choices.[2] They show how traditional understandings of markets do not account for consumers' departures from rational behaviour, i.e. behavioural biases, and are as such a powerful tool for consumer and competition policy to grasp how markets actually work. Indeed, such biases can both lead consumers to experience detriment and affect competition.

Behavioural insights can also play an important role in improving competition and consumer law enforcement. Consumer authorities increasingly apply behavioural insights to, for example, help identify deceptive and unfair business practices. Competition authorities can apply behavioural insights in their analysis to, for example, ensure that anti-competitive practices, such as abuse of dominance, are properly understood.

The design of policy interventions to improve consumer and competition outcomes is increasingly informed by behavioural insights as well. "Nudges", which often involve subtle modifications to the way choices are presented to consumers, are seen as a promising tool that can boost consumer engagement in markets, including by increasing shopping around and switching. But evidence suggests that sometimes more interventionist measures, such as prohibitions on practices triggering behavioural biases, may be needed.

Indeed, while businesses have long employed principles from behavioural insights to influence consumers, the digital environment has amplified their ability to do so with specific practices. Specifically, dark commercial patterns, i.e. business practices employing elements of digital choice architecture that subvert or impair consumer decision-making, are now highly prevalent. And thanks to data collection and machine learning techniques, businesses may increasingly be able to exploit consumers' individual biases and vulnerabilities, such as through personalised advertising and pricing. While such techniques can harm individual consumers – e.g. through financial loss, privacy harms or psychological detriment – they may also undermine competition, and market forces may sometimes further incentivise their use.

With the lines between consumer, competition (and privacy) policy becoming increasingly blurred in the digital transformation, each regime can play a role in addressing dark patterns and exploitative personalisation. Often measures from different regimes can be mutually reinforcing. But sometimes there may be a dilemma as to which is most suited, including because of trade-offs between them.

Such considerations make the case for holistic approaches to tackling such practices. A key avenue is to strengthen co-operation across disciplines, including through multidisciplinary investigation and enforcement. Addressing regulatory gaps in consumer, competition and privacy policies holistically might also mean going beyond traditional measures and disciplinary boundaries and fostering cross-fertilisation. Furthermore, a more integrated approach could involve behaviourally-informed initiatives that jointly serve various policy goals. In this regard, in addition to bans on harmful practices, many commentators consider that requirements could be introduced for businesses to achieve good consumer, competition and privacy outcomes.

1 Behavioural insights: a tool for better consumer and competition outcomes

Behavioural insights help understand how markets actually work

Markets work well when consumers can access and use information to choose products that meet their needs and interests, and when firms attempt to attract customers by offering better value products. The competitive process relies on consumers responding to market signals and firms expecting consumers to do so. Otherwise, firms do not have incentives to undercut rivals or offer higher quality products. Thus, understanding actual consumer behaviour is essential to understanding how markets work.

It has been some time since behavioural insights began to be incorporated into traditional ways of thinking about markets. While traditional models may make analysing markets more straightforward, they rely on the assumption that consumers are rational and that they can, for example, rapidly perform complex calculations or that they are unaffected by emotions. But such assumptions are unlikely to hold in practice and departures from the predicted rational behaviour – i.e. behavioural biases – may affect how markets work in practice, and thus actual outcomes for consumers.

Importantly, behavioural economics shows that biases are predictable and follow well-defined rules, such that they can be incorporated into policy analysis. Examples of consumer biases that may affect competition and consumer outcomes include the following:

- The *endowment effect* (a tendency to place a higher value on what one already has), *loss aversion bias* (a tendency to prefer to avoid losses than acquire equivalent gains) and *default bias* (a tendency to stick to the default option) may each increase consumer inertia and reduce the likelihood that consumers react to firms offering a cheaper or better product (OECD, 2022[1]). Accordingly, when faced with contracts that automatically renew, for example, consumers may be more likely to continue with their existing contract even if better options are available.
- *Salience bias* and *framing effects* may lead consumers to excessively focus on certain salient characteristics of an offer, such as certain price elements (e.g. the shipping fee compared to the overall price of a product), or to behave differently when a price is expressed in terms of a discount from a previous price (e.g. on travel booking sites). As a result, consumers may be less able to effectively compare prices of different offers.
- *Overconfidence* and *time inconsistency* may lead consumers to focus on elements of an offer today, be overoptimistic about their future behaviour and underestimate future costs. For example, consumers may underestimate the likelihood of making late credit card repayments or of needing mobile phone data beyond the amount included in their contract. Accordingly, they may incur higher costs and disregard products that could have been cheaper in the long term (Grubb, 2009[2]; Mehta and Sugden, 2013[3]).

- *Information overload*, when consumers face too many options (for example when choosing between mobile phone contracts or retail energy tariffs), can make it difficult for them to take informed decisions and trigger certain biases or heuristics. For example, consumers may ignore possible choices, choose not to choose, or resort to simple "rules of thumb" (such as choosing the most salient option) (OECD, 2017[4]).[3] As a result, they may miss out on better products (see Annex A for a fuller list of relevant behavioural biases).

These examples show how biases present challenges to consumers making informed decisions. This can lead to consumer detriment (e.g. financial loss), but also to difficulties in selecting the best products available, thus affecting competition. In turn, businesses may have fewer incentives to undercut rivals or offer higher quality products, thus further compromising the competitive process. And a further implication of biases, which is well described by the literature on behavioural industrial organisation (Heidhues and Koszegi, 2018[5]; Gabaix and Laibson, 2006[6]), is that firms may have incentives to exploit and, in some instances, exacerbate them (OECD, 2022[1]). For example, they may seek to intentionally confuse consumers by making comparisons difficult. Or they may design choice architecture to maximise the rent they extract from consumers. Section 2 discusses a specific set of such practices in digital markets known as dark commercial patterns.

Behavioural insights improve competition and consumer law enforcement

To the extent that consumer and competition law should take into account actual consumer behaviour rather than rely on hypothetical assumptions, behavioural insights have a key role to play in enforcement in both areas (Heinmann, 2019[7]).

Indeed, consumer authorities' interventions are increasingly informed by behavioural insights, which can help determine what practices should be considered deceptive or unfair. For example, consumer authorities in several jurisdictions have in recent years taken enforcement actions against pricing practices such as drip pricing (adding non-optional costs in the final stage of a transaction), reference pricing (presenting the price with reference to another higher price), or bait pricing (advertising a lower price than available), which may each trigger the anchoring or endowment effects (see OECD (2019[8]) for examples of enforcement actions). Other examples include actions against unfair contract terms, such as gym membership contracts with minimum membership periods, which may trigger biases such as overconfidence and time-inconsistency (OECD, 2017[4]).

As regards competition law enforcement, behavioural insights can, for example, help ensure that markets are properly defined. Specifically, often competition authorities rely on consumer surveys to define the boundaries of markets (by applying the "hypothetical monopolist test", involving asking consumers about their likelihood to switch in response to a hypothetical price increase). But consumers responding to the survey may neglect the extent to which biases affect their ability to switch, thus potentially affecting the robustness of survey responses and leading to a wider market definition than in reality (OECD, 2022[9]). The use of behavioural insights may also lead competition authorities to develop a narrower definition of markets in other ways. For example, cases of price discrimination based on the behaviour of different consumer segments, e.g. where firms charge higher prices to less active consumers, may be an indication that markets are separate (OECD, 2022[9]). As discussed in Section 2, personalisation practices might also mean developing even more granular market definitions.

Taking into account behavioural biases also has implications for analysing dominance and potential forms of abuse of dominance. For example, in markets with inactive consumers, it is harder for rival firms to attract consumers from an incumbent. This means it may be able to behave independently from them, which may characterise it as dominant in some jurisdictions (OECD, 2022[9]). In turn, a dominant firm's market practices may be more likely to be considered to have an exclusionary effect when analysing them through a behavioural lens. For example, seemingly small changes to a dominant firm's default options

could in fact substantially reduce the likelihood of consumers switching to rivals and thus make it difficult for competitors to enter a market and gain market shares (OECD, 2022[9]).

The box below provides specific examples of use of behavioural insights in competition and consumer law enforcement cases.

Box 1. Use of behavioural insights in competition and consumer law enforcement cases

Status quo and default bias in EC v Google Android:

In 2018, the European Commission (EC) found that Google had abused its dominant position in the national markets for general search services by sharing revenues with original equipment manufacturers and mobile network operators on condition that they would not pre-install any competing general search service on the devices. The decision refers to 'status quo' bias, explaining that "*pre-installation, like default setting or premium placement, can increase significantly on a lasting basis the usage of the service provided by an app [because] users that find apps pre-installed and presented to them on their smart mobile devices are likely to "stick" to those apps*". In addition to an over EUR 4 billion fine, the EC imposed a set of remedies, including requiring Google to display to Android users in Europe a "choice screen" for both search engines and web browsers.

Salience bias in EC v Google Shopping:

In 2017, the EC found that Google had abused its dominant position in online search by lowering the ranking of unpaid search results and granting more favourable placement to the results of its own vertical search services. The EC's decision relied on salience bias implicitly, in noting how websites ranked within the top three to five of generic search results received a vast proportion of traffic. The EC proposed remedies involving more prominent presentation of vertical search rivals and clearer labelling.

Present bias and loss aversion bias in ACCC v Trivago:

In 2018, the Australian Competition and Consumer Commission (ACCC) took action against Trivago, an online platform for hotel accommodation, for misleading consumers when representing that its website would quickly help users to identify the best deal available for a given hotel. However, Trivago used an algorithm that gave more prominence to hotel sites that were paying Trivago a higher cost-per-click fee, and used strike-through prices to frame the top offer as less expensive by comparison. In deciding that Trivago was in breach of consumer law, the Federal Court of Australia accepted evidence that in searching for hotels on the platform, consumers could be prone to present bias (and hence look to ways to expedite the search process by selecting the first available options) and loss aversion (and hence be more likely to select an option when it is framed as avoiding a loss with respect to a reference option).

Source: (OECD, 2022[10]; OECD, 2022[1]), Australian Competition and Consumer Commission v Trivago N.V. [2020] FCA.

Behavioural insights can inform consumer and competition policy interventions

The design of policy interventions to improve consumer and competition outcomes in markets is increasingly informed by behavioural insights, including through increasing use of evidence from behavioural studies (OECD, 2017[4]; OECD, 2018[11]; Baggio et al., 2021[12]). One example is "nudges", understood as modifications to consumers' choice architecture (i.e. the way choices are presented to them) that alter their behaviour in a predictable way, without eliminating options or significantly changing economic incentives (Thaler and Sustein, 2008[13]). To count as a nudge, an intervention must typically be easy and cheap to avoid (Thaler and Sustein, 2008[13]).

Nudges have been in governments' toolkit for over a decade, with many countries establishing "nudge units" – specialised teams in government agencies that apply behavioural insights to research the drivers underlying people's behaviour and design and evaluate interventions. They have attracted attention because they do not involve mandates or prohibitions restricting consumer choice and have been seen as cost-effective (Benartzi et al., 2017[14]). One of the most successful examples of a nudge is the setting of defaults, which can involve pre-set courses of action that take effect if nothing is specified by the decision-maker (such as contributing a certain amount of savings to a pension plan). Nudges are also employed by some businesses; examples include use of social norms in hotels to encourage re-use of towels or of reminders by banks to avoid late payment fees.[4]

Many demand-side interventions to address consumer and competition concerns can be considered nudges, including those relating to improved disclosure, facilitating shopping around and switching (OECD, 2018[11]). Examples of nudges demonstrated to improve switching include ones that activate or remind consumers to make a choice regarding their current provider and other potential offers (see box below). Research also shows how disclosures can be more effectively designed with behavioural insights to support both consumer and competition goals (OECD, 2022[15]; OECD, 2018[16]; Fletcher, 2019[17]).

Box 2. Nudges shown to improve consumer switching in behavioural experiments

Several behavioural experiments have demonstrated how certain nudges can be effective in increasing switching rates in markets. For example:

- In 2022, the Danish Competition and Consumer Authority found, in a natural experiment, that when consumers were prompted to actively restart a subscription (due to payment card rejections), they were 70% more likely to cease their subscriptions.
- In 2020, researchers at the European Commission found, in a randomised control trial, that sending reminders about the pros and cons of switching and comparative tables highlighting the potential forgone gains from not holding the best deal were effective in increasing switching rates in payment accounts and mortgages. Similarly, in 2015 the UK Financial Conduct Authority (FCA) found, in a randomised control trial, that sending reminders to consumers around the time of interest rate decreases in savings accounts made a notable difference to switching behaviour.
- In 2017, the UK's Office of Gas and Electricity Markets (Ofgem) found, in a randomised control trial, that sending consumers a letter with information about the cheapest energy deal available tripled the likelihood of their switching suppliers.

Source: (DCCA, 2022[18]; EC, 2020[19]; FCA, 2015[20]; Ofgem, 2017[21])

The above examples notwithstanding, evidence indicates that the effectiveness of nudges on search and switching varies significantly across interventions. A review of 35 studies testing nudge interventions in retail financial markets found that they increased search and switching by only 2-3 percentage points on average (Vasas, 2022[22]). Structural nudges that change the choice architecture more profoundly were found to have a higher impact on search and switching than nudges that provide, simplify or highlight information (Vasas, 2022[22]). Other studies have also found that when implemented on a large scale, nudge interventions failed to meet the expectations set by the randomised controlled trials published in academic journals (DellaVigna and Linos, 2022[23]). Furthermore, it has also been argued that while nudges typically involve low implementation costs, once other costs they may generate are accounted for, the net benefits of most nudges could be significantly lower than assumed, and some may be less efficient or less cost-effective than traditional instruments (such as mandates or taxes) (Tor, 2022[24]). Such other costs

may arise because some consumers forgo opportunities they may have preferred or undergo certain emotional and psychological harms (Tor, 2022[24]). Some nudges may even be counterproductive, for example when some consumers are already behaving as desired (e.g. nudges aimed at increasing savings may lead some consumers to over-save) (Sunstein, 2017[25]).

Sunstein (2017[25]) offers several reasons why nudges involving defaults may not be as effective on consumers as expected. First, some consumers may have different preferences from the default and may thus be unaffected. Second, other nudges, "counter nudges", may operate in other directions by providing alternative information or incentives. Moreover, impersonal default rules may not work as well as expected in presence of heterogeneous consumers (Sunstein, 2012[26]). Indeed, the effectiveness of nudges in general also depends on the characteristics of the consumers being nudged (including when in the form of disclosures (OECD, 2022[15])), such that a "one-size-fits-all" approach may often be ill-suited. Nudges to switch have also been judged insufficient specifically for consumers who have become disengaged from markets (OECD, 2018[11]), who may be disproportionately from older age, less educated and lower-income groups (OECD, forthcoming[27]).

Nudges that are more customised or personalised may offer an alternative (Sunstein, 2012[26]). For example, "smart defaults" (Smith, Goldstein and Johnson, 2013[28]), i.e. defaults that are customised to consumers' situations, have been proposed in relation to consumer pension funds and energy deals, involving, respectively, defaulting consumers who have just signed up into the best performing pension funds (BIT, 2020[29]) or defaulting consumers who have not switched recently into a capped tariff (BIT, 2016[30]). Similarly, a nudge to increase savings for retirement could steer consumers who systematically under-save to high-savings products and those who over-save to low-savings products (Mills, 2020[31]). A more dynamic and frictionless form of defaults involves regularly switching consumers to the best deal (e.g. by a third party), based on pre-set preferences (BIT, 2019[32]). Alternatively, personalised nudging could involve using consumer data to determine the best way to nudge consumers based on their circumstances (Mills, 2020[31]). For example, some consumers may be best influenced by default options, while for others social norms may work best (Mills, 2020[31]). Moreover, given the time consumers spend interacting online and the large availability of data for personalisation purposes, nudges in digital environments may be more effective than offline (Tor, 2022[33]). Yet some digital nudges may also come with risks and costs, including the limited transparency of algorithms on which they may rely on and the greater influence of online platforms or websites on such interventions (Tor, 2022[33]).

Accordingly, while nudges may at times be effective, the fact that they may not always be so and may generate costs suggests that they should not be relied on alone to improve competition and consumer outcomes (Vasas, 2022[22]; OECD, 2018[11]). For example, data portability and interoperability initiatives being introduced in several jurisdictions (e.g. the Australian Consumer Data Right, UK Smart Data initiative or the proposed EU Data Act) may more readily address structural barriers to switching, and could potentially incorporate consumers' consumption data to suggest personalised alternative offers (BIT, 2020[34]). [5] While the initial focus of such initiatives has been mainly on key regulated services (e.g. telecommunications, energy, banking), BIT (2020[34]; 2020[29]) suggests that they could potentially also be extended to other areas, such as online platforms and retailers, and paired with nudges prompting consumers to switch.

Moreover, more interventionist measures such as prohibitions, specifically on business practices that might trigger behavioural biases, should not be neglected. Here again, behavioural insights have often informed their design (and some may also be considered nudges, depending on the perspective adopted)[6]. For example, one of the first major EU consumer policy reforms reflecting behavioural evidence was an express ban in 2011 on pre-checked boxes in e-commerce, [7] recognising the power of default and status quo bias (Baggio et al., 2021[12]). Similarly, in recognition of such biases and the risk of consumer inertia, legislation adopted in 2021 in Germany requires businesses to provide a specifically labelled button allowing cancellation of subscriptions in two clicks and prohibits automatic extensions of a year after the first two years.[8] Furthermore, recognising the power of overconfidence and myopia, in the United States

legislation in 2009 prohibited credit card businesses from accepting transactions that go over the credit card limit and charging a fee, unless consumers expressly opted in to such transactions (OECD, 2017[4]). The next section explores in greater detail how specific practices in the digital environment can exploit behavioural biases and harm consumers and competition, and how they can be addressed.

2 Using behavioural insights for bad: dark commercial patterns and exploitative personalisation

Dark commercial patterns exploit biases and harm consumers and competition

Businesses have long employed principles from behavioural insights to influence consumer decisions, including through practices that exploit common behavioural biases and heuristics. But in the online environment, businesses may repeatedly run experiments to hone their user interfaces, so as to more readily steer consumers into making choices that may not be in their best interests. Such practices are commonly known as dark (commercial) patterns, and are highly prevalent on e-commerce websites, apps, cookie consent notices, search engines and games (OECD, 2022[9]). For example, one study identified at least one dark pattern in 95% of 240 popular apps (Di Geronimo et al., 2020[35]).

The OECD Committee on Consumer Policy proposes the following working definition to facilitate discussion about such practices among regulators and policy makers across jurisdictions: *"Dark commercial patterns are business practices employing elements of digital choice architecture, in particular in online user interfaces that subvert or impair consumer autonomy, decision-making or choice. They often deceive, coerce or manipulate consumers and are likely to cause direct or indirect consumer detriment in various ways, though it may be difficult or impossible to measure such detriment in many instances."* (OECD, 2022[9]). This definition highlights a contrast with the policy intent of nudges, which is to employ choice architecture with a view to improving outcomes for consumers.[9]

Examples of biases or heuristics that dark patterns may exploit include default or status quo bias (e.g. by preselecting options favourable to the business by default); the scarcity heuristic (e.g. by providing misleading indications of an expiring deal); social proof bias (e.g. by providing misleading indications of other consumers' interest in a product); or framing effects (e.g. by giving visual precedence to options favourable to the business) (OECD, 2022[9]) (see Annex B for a list of examples of dark patterns).[10] They can be highly effective, with one experiment finding that 41.9% of consumers exposed to dark patterns accepted a dubious hypothetical identity theft program - around four times more than for a control group exposed to no dark patterns (Luguri and Strahilevitz, 2021[36]).

Some dark patterns, such as hidden costs/drip pricing or subscription traps, may cause substantial financial loss. For example, a field experiment demonstrated that drip pricing resulted in consumers spending 21% more than otherwise (Blake et al., 2021[37]). As an indication of magnitude, action by the US FTC against an online gaming company for use of dark patterns to charge players for unwanted in-game purchases led to USD 245 million in refunds to consumers affected by such practices in 2022.[11] Other dark patterns may cause significant privacy harms, psychological detriment or time loss, and some subsets of consumers, such as children or less educated consumers, may be disproportionately affected (OECD, 2022[9]).

Dark patterns may also weaken competition. For example, a firm may use dark patterns to hinder or disincentivise the process of shopping around and comparing offers, such as drip pricing through reduced price transparency (Rasch, Thöne and Wenzel, 2020[38]). It may also use them to hamper switching, for instance by nagging a consumer to stay with an incumbent search engine or browser or forcing them to take certain actions to switch (ACCC, 2021[39]). Thus firms employing dark patterns may be able to extract more sales, personal data, or attention time than rivals that do not, without offering better quality goods or services (Morton and Dinielli, 2020[40]). A dominant firm could also use dark patterns to leverage its position to obtain market power in a related or downstream market (Day and Stemler, 2020[41]), which is how some have understood Google's conduct in the EC's case against Google Shopping regarding self-preferencing (Himes and Crevier, 2021[42]).

Broader market use of dark patterns can also distort the competitive process as a whole, to the extent they impede consumers' ability to select the best firms on the merits of their product offerings (Kemp, 2020[43]; Day and Stemler, 2020[41]) and generate unnecessary transaction costs (Stigler Committee, 2019[44]). Competitive pressures may lead some businesses to employ dark patterns to remain competitive, particularly where consumers cannot detect the dark patterns and switch to firms who do not use them (Stigler Committee, 2019[44]), potentially leading to a sub-optimal market equilibrium (Akerlof and Shiller, 2016[45]; Willis, 2020[46]). Furthermore, consumers affected by dark patterns may also lose trust in markets and disengage, which can further dampen competition to the extent they cease to shop around and discipline businesses using dark patterns (Siciliani, Riefa and Gamper, 2019[47]). Accordingly, market forces may in some cases worsen the problem, which may further bolster the case for intervention.

Personalisation practices may also exploit consumer biases and undermine competition

Today businesses are able to collect highly granular data about consumers' online behaviour (OECD, 2019[48]). The processing of such data through algorithms allows for fine-grained consumer profiles to be developed,[12] which are claimed to allow businesses to make predictions about a vast range of different aspects of consumers, including their identity, preferences, habits, moods, behaviour, values and opinions (Helberger et al., 2021[49]; Hirsch, 2020[50]; Willis, 2020[46]). Such predictions may allow the consumer experience to be highly personalised, particularly through advertising, pricing or ranking of offers.

Benefits of personalisation include online experiences that are more tailored to consumers' needs or preferences, increased user engagement and convenience (CMA, 2022[51]), and, in the case of advertising, the funding of "free" services paid with consumer data (OECD, 2019[48]). Personalised pricing, also known as first-degree price discrimination, may lead some consumers to pay less than they otherwise would (though others may pay more) (OECD, 2018[52]). However, many scholars argue that the information asymmetry between businesses and consumers inherent in personalisation creates a transactional advantage allowing businesses to exploit not only generally known behavioural biases that most consumers share - as is the case for most dark patterns - but also the situational and idiosyncratic biases and vulnerabilities of individual consumers (Mik, 2016[53]; Helberger et al., 2021[54]; OECD, 2018[55]; OECD, 2015[56]; Strycharz and Duivenvoorde, 2021[57]; Calo and Rosenblat, 2017[58]).[13] This could mean, for example, serving advertising for casinos specifically to consumers seeking advice about or attempting to stop gambling (Satarino, 2021[59]) or charging a higher price specifically to consumers with low mobile phone battery who are urgently seeking a ride-share service (Vedantam and Penman, 2016[60]; Spencer, 2020[61]).

Evidence of personalised pricing and ranking of offers is still emerging (OECD, forthcoming[27]) and while targeted advertising appears common (EC, 2018[62]) there is not yet evidence of advertising targeting transitory or persistent individual vulnerabilities at scale (OECD, 2019[48]; EC, 2022[63]). Nonetheless, some scholars expect that with ever greater data collection and improvements in machine learning, businesses

will increasingly be able to identify and exploit individual biases and vulnerabilities with greater accuracy (Spencer, 2020[61]), such as through "persuasion profiling", involving use of fine-grained psychographic profiling to deliver the right advertising at the right time and place to the consumer (Helberger et al., 2021[54]; Calo, 2021[64]). Personalised forms of common dark patterns, such as personalised drip pricing (CMA, 2021[65]) or time-limited offers (CMA, 2022[51]), are also expected to emerge, and may involve serving consumers the specific dark patterns that they are likely to be most susceptible to (Luguri and Strahilevitz, 2021[36]; Helberger et al., 2021[54]; Stigler Committee, 2019[44]; Weinzierl, 2020[66]; Willis, 2020[46]).[14]

Accordingly, similar to dark patterns, broader market use of exploitative personalisation practices may increasingly undermine consumer autonomy and cause personal detriment in terms of financial, privacy or psychological detriment (Calo, 2014[67]; Zarsky, 2019[68]). Personalised pricing may furthermore disproportionately harm some consumers, such as those who are less discerning and engaged (Wagner and Eidenmüller, 2019[69]) or have less ability to switch e.g. owing to poor credit ratings (Graef, 2021[70]).

Likewise, exploitative personalisation may also undermine competition. For example, a dominant firm could employ personalised advertising, pricing or ranking to restrict consumers' ability to choose, thus making shopping around and switching harder (CMA, 2021[65]; Graef, 2021[70]). Market use of personalisation, by restricting consumers' exposure to advertising, prices or offers of competing businesses, may compromise the mechanism of supply and demand and thus the competitive process as a whole (Graef and van der Sloot, 2022[71]). The potential anti-competitive effects of specific dark patterns could also be exacerbated when personalised with personal data.

Consumer, competition and privacy policy can each play a role…

Consumer and competition policy play mutually reinforcing and overlapping roles in safeguarding consumer welfare (OECD, 2008[72]). But the rise of the digital economy has further blurred the lines between them, as well as with privacy and data protection (Graef, 2018[73]; Jin and Wagman, 2021[74]; ICN, 2021[75]). As a result, increasingly there are cases of digital practices that could be tackled under multiple enforcement regimes (see examples in the box below).

Box 3. How consumer, competition and privacy law can each apply to similar digital practices

In 2019, the German competition authority, the Bundeskartellamt, took action against Facebook for a breach of German competition law. It argued Facebook had abused its dominance in the social media market by forcing consumers to agree to Facebook's collecting their data both on the Facebook platform and across an extensive range of third-party websites and apps. In contrast, in 2018, the Italian competition authority (Autorità Garante della Concorrenza e del Mercato or AGCM) took action against Facebook for a breach of Italian consumer law for similar conduct. Specifically, it argued that, inter alia, Facebook engaged in an aggressive commercial practice by discouraging consumers from changing the default setting of allowing transfer of their personal data to third-party websites.

As another example, in 2019 the French data protection authority (Commission nationale de l'informatique et des libertés or CNIL) took action against Google for a breach of EU data protection law. It argued that Google did not provide adequate transparency or information when users configured their Android mobile device and created a Google account and that it failed to obtain valid consent to process their personal data for ad personalisation. In contrast, the ACCC took action against Google for a breach of Australian consumer law, arguing it made misleading representations to consumers about the collection and use of their personal location data during the account setup process on Android phones.

Source: (Botta and Wiedemann, 2019[76]; CNIL, 2019[77]; ACCC, 2022[78]).

Such overlaps have benefits, including by offering multiple enforcement routes to regulators. But they may also create a regulatory dilemma and foster legal uncertainty for businesses (through the possibility that firms are sanctioned multiple times for the same type of conduct) (Botta and Wiedemann, 2019[76]). Such considerations particularly apply to dark patterns and exploitative personalisation.

Specifically, many OECD jurisdictions have consumer laws prohibiting practices associated with many dark patterns. Examples include the EU Unfair Commercial Practices Directive (UCPD) prohibiting unfair commercial practices, which include misleading and aggressive practices as well as a range of specific practices, or Section 5 of the US Federal Trade Commission Act (FTC Act), which prohibits unfair or deceptive acts or practices in or affecting commerce. Several dark patterns are likely to fall foul of privacy and data protection laws, such as the EU's General Data Protection Regulation, to the extent they facilitate transactions that do not meet appropriate levels of transparency or consent (OECD, 2022[9]). Consumer and data protection authorities in various jurisdictions have accordingly successfully taken action against dark patterns on the basis of such laws, and issued guidance to support compliance (OECD, 2022[9]).[15] Scholars suggest exploitative personalisation could also be challenged under existing prohibitions on unfair practices or on practices seeking to exploit a consumer's weakness, or alternatively under data protection laws relating to e.g. fairness, transparency, data minimisation or purpose limitation (OECD, forthcoming[27]).

While case law is lacking, competition laws relating to abuse of dominance may also address use of dark patterns and exploitative personalisation practices by a dominant firm to unfairly gain advantages. Abuses of dominance are typically divided into two broad categories: exclusionary and exploitative. Use of dark patterns with the effect of excluding rivals from a market, e.g. by obstructing consumer switching, could amount to exclusionary conduct, which may contravene laws in several jurisdictions (e.g. the laws against monopolisation in the United States or misuse of market power in Australia) (Kemp, 2020[43]; Day and Stemler, 2020[41]). Personalisation could similarly be seen as exclusionary abuse to the extent it involves, in the case of personalised pricing, prevention of resale among consumers (Woodcock, 2019[79]), targeting lower prices to rival firms' customers to foreclose the market (OECD, 2018[52]); or, in the case of personalised ranking, preferentially ranking one's own products (CMA, 2021[65]). In jurisdictions where exploitative conduct constitutes an abuse of dominance (e.g. in the EU, under Article 102 of the Treaty on the Functioning of the European Union), the use by a dominant firm of privacy-intrusive dark patterns to collect personal data above competitive levels could potentially be seen as such conduct (Kemp, 2020[43]). Similarly, scholars suggest use of personalised practices by dominant firms may also be seen as such, e.g. where they involve excessive pricing, unfair contract terms or price discrimination (OECD, 2018[52]; ICN, 2021[75]; Graef, 2021[70]; Botta and Wiedemann, 2020[80]).

Which regime is best suited may depend on the case at hand; each may have its advantages (Day and Stemler, 2020[41]). For instance, establishing abuse of dominance often requires a complex assessment of the relevant market and of the effects of the dominance, which competition authorities have struggled with in digital markets. In contrast, consumer law enforcement, being often based on *per se* violations (i.e. where no analysis of effects is needed) of e.g. prohibitions on deceptive practices, may be seen to have a lower "threshold" for finding violations and be swifter (Botta and Wiedemann, 2019[76]; Graef and Van Berlo, 2021[81]; Riefa, 2021[82]). This may be particularly relevant to taking action against clearly deceptive dark patterns. And by applying to all, not just dominant, firms, consumer law's scope of application as regards such practices is broader than that of competition law. Yet as dark patterns and personalisation can restrict consumer choice, they can also raise competition concerns that are unlikely to be addressed through consumer or data protection rules alone, particularly in increasingly concentrated digital markets (Graef, 2021[70]). Moreover, depending on the jurisdiction, competition law penalties may be higher and thus offer a greater deterrent remedy (Botta and Wiedemann, 2019[76]);[16] or consumer may lack relevant provisions (such as a prohibition on unfair practices (ACCC, 2022[83])), or may not apply to non-monetary transactions (OECD, 2020[84]). Competition law remedies may also in some instances offer some greater flexibility, in that they could be applied asymmetrically to dominant firms so as to spur competition, or be in the form of

negotiated commitments that can be reviewed in line with market conditions (Botta and Wiedemann, 2019[76]; OECD, 2022[10]).[17] There may also be trade-offs between regimes: specific consumer or data protection rules (such as complex disclosure requirements) may risk entrenching market positions of firms best able to comply with them or hindering innovation; fostering more competition risks encouraging further behavioural exploitation from firms and spurning of consumer and data protection rules in a "race to the bottom" (Leiser, 2022[85]).[18]

… but are holistic, multidisciplinary approaches possible?

Such considerations make the case for holistic, multidisciplinary approaches. A key avenue is to strengthen co-operation across disciplines. Indeed, researchers have, for example, suggested a pluralistic approach mixing strengths of different regimes may best address dark patterns (Leiser, 2022[85]). Several jurisdictions have set up initiatives enhancing co-operation among consumer, competition and data protection and other regulators,[19] and various models of multidisciplinary enforcement have been proposed (Reyna, 2021[86]). Such co-operation may also extend to more integrated approaches to analysing and investigating digital markets, including through setting up specialised units to oversee digital matters holistically (see e.g. G7 (2022[87])) and conducting market studies that jointly analyse policy issues in digital markets (ICN, 2021[75]; OECD, 2021[88]). Similarly, greater use of economic analysis can help draw out tensions between consumer and competition policy goals and determine the appropriate intervention (Jin and Wagman, 2021[74]; Riefa, 2021[82]).

Still, there is broad consensus that existing consumer, competition and privacy rules in many jurisdictions leave regulatory gaps. Addressing such gaps holistically might mean going beyond traditional measures and disciplinary boundaries. For instance, traditional disclosure measures in consumer and privacy policy are widely considered insufficient to protect against dark patterns and exploitative personalisation owing to behavioural biases, such that prohibitions may be more effective (OECD, 2022[9]; OECD, forthcoming[27]; OECD, 2022[15]). Likewise, traditional competition law measures addressing anti-competitive conduct after it has occurred ("ex post") may need to be complemented by certain forms of up front ("ex ante") regulation (OECD, 2021[89]; ACCC, 2022[83]). There may also be a need for more inter-disciplinary cross-fertilisation. For example, to address exploitative personalisation efficiently, consumer and data protection law may need to incorporate notions of market power into the design of laws and setting of enforcement priorities (Laux, Wachter and Mittelstadt, 2021[90]; Graef and Van Berlo, 2021[81]; Kerber and Specht, 2021[91]). Conversely, some commentators suggest that competition law should incorporate notions of fairness (Dunne, 2021[92]) and consider consumer vulnerability and effects on specific consumer groups (Graef, 2021[70]; BEUC, 2019[93]). [20] In that context, notwithstanding ongoing debate on the different welfare standards traditionally applied in competition law, Graef (2021[70]) suggests that applying a "personalised consumer welfare" standard could help address personalised exploitation of vulnerabilities. This would mirror calls for the consumer law legal standards used in some jurisdictions of the "average" or "reasonable" consumer[21] to be reinterpreted to better account for behavioural biases and address personalised exploitation (OECD, 2022[9]; OECD, forthcoming[27]), including by considering the "average" consumer to be the individually targeted consumer (ACM, 2022[94]; EC, 2021[95]).

A more integrated approach could involve adopting behaviourally-informed initiatives that tackle such practices in ways that jointly serve competition, consumer and privacy goals. For example, interoperability and data portability initiatives, as discussed in Section 1, have the potential to mitigate both consumer and competition harms, including by facilitating consumers' ability to switch to honest traders (Kemp, 2020[43]). Though effectively accounting for consumer inertia might mean shifting more of the burden of good consumer, competition and privacy outcomes to businesses. In this regard, some jurisdictions have introduced or proposed bans on techniques involved in dark patterns (including, as discussed in Section 1, pre-ticked boxes or making contracts hard to cancel; see OECD (2022[9]) for an overview)[22] as well as some personalisation practices (see OECD (forthcoming[27]) for an overview).[23] Many commentators have

however considered that a positive duty for businesses to trade fairly (sometimes termed “fairness by design”, analogously to “privacy by design”) could address harms holistically and avoid risks that such practices fall outside the scope of a ban. Such a duty could foster more consumer-friendly digital choice architecture, such as consumer- and privacy-protective defaults (Strahilevitz and Luguri, 2019[96]) and the use of opt-ins over opt-outs e.g. for personalisation (ACM, 2022[97])). Some propose that such duties apply economy-wide (Willis, 2020[46]; Siciliani, Riefa and Gamper, 2019[47]; BEUC, 2022[98]; Ohm, 2018[99]; Hacker, 2021[100]; ACM, 2022[97]), while others suggest that they could be asymmetric in applying essentially to major digital platforms, in consideration of their heightened potential to cause harm (CMA, 2020[101]; ACCC, 2021[39]; Fletcher et al., 2021[102]; VZBV, 2021[103]), including as a form of duty of care for dominant firms to prevent exploitation (Sauter, 2020[104]).[24] Another form of positive duty that some commentators have proposed - from the perspectives of both consumer law (Willis, 2020[46]; Helberger et al., 2021[54]) and competition law (Crémer, De Montjoye and Schweitzer, 2019[105]) (OECD, 2020[106]) - is one to show compliance with the law. While there is debate about such a proposal, proponents consider that by reversing the burden of proof[25] such a duty could alleviate enforcers’ evidentiary burden of establishing, for example, the exploitative character of a personalised practice (Willis, 2020[46]; Rott, Strycharz and Alleweldt, 2022[107]).

Finally, the business community as a whole has an important role to play in tackling the consumer and competition harms of such practices. Various business initiatives have been proposed or implemented, including relevant self-regulatory initiatives (ICAS, 2022[108]), ethical standards, and digital choice architecture self-audits (OECD, 2022[9]).

Annex A. Examples of behavioural biases relevant to consumer and competition policy

The following is provides a list of examples of key consumer behavioural biases relevant to consumer and competition policy based on OECD (2017[4])

Choice/information overload: When faced with either complex products or a bewildering array of choices, consumers can sometimes ignore possible choices, walk away from markets, or choose not to choose. Consumers can also rely on relatively simple "rules of thumb" or "heuristics" to make decisions.

Default and status quo effect: Presenting one choice as default option can induce consumers to choose that option. The power of default is related to the status quo effect, where consumers have a strong tendency to remain at the status quo, since the disadvantages of leaving it loom larger than advantages of leaving.

Endowment effect: Consumers often demand much more to give up an object than they would be willing to pay to acquire it. The value of a good for consumers increases when it becomes a part of a consumers' endowment.

Anchoring: Consumers "anchor" decisions around information that they think is the most important and may fail to adjust their perception of the value of an offer sufficiently when additional information is provided to them.

Framing: Consumers are influenced not only by the content of information provided, but also by how it is presented. Presenting an option in a certain way may induce consumers to evaluate the choice from a particular reference point.

Priming effect: When consumers are repeatedly exposed to certain messages or images (e.g. via advertising) certain attributes can play an undue role in their decisions. Priming can influence preferences by making certain dimensions salient that would otherwise have been considered as less important.

Overconfidence: Consumers tend to think that they are more likely to experience better than average outcomes (e.g. when consumers are told that 20% of customers benefit from a product, they tend to expect to be part of that 20%).

Hyperbolic discounting / myopia: Consumers tend to treat the present as more important than other time periods, explaining outcomes such as low retirement savings in the absence of compulsion.

Time-inconsistency: Consumers tend not to make choices consistently across time periods and face conflict between short-term urges and long-term interests.

Annex B. Examples of dark commercial patterns

Category	Name of dark pattern	Description
Forced action	Forced registration	Consumer forced to register or tricked into thinking registration necessary
	Forced disclosure / Privacy zuckering	Consumer tricked or forced into sharing more personal information than desired
	Friend spam / Social pyramid / Address book leeching	Manipulative extraction of information about other users
	Gamification	Certain aspects of a service can only be "earned" through repeated use of service
Interface interference	Hidden information	Important information visually obscured
	False hierarchy	Visual prominence given to firm's preferred setting or version of a product
	Preselection	Firm-friendly default is preselected (e.g. more expensive or less privacy-protecting option)
	Misleading reference pricing	Price shown as a discount from a misleading or false reference price
	Trick questions	Intentional or obvious ambiguity (e.g. double negatives)
	Disguised ads	Consumer induced to click on something that isn't apparent advertisement
	Confirmshaming / Toying with emotion	Emotionally manipulative framing to make consumer select a particular option
Nagging	Nagging	Repeated requests to do something firm prefers
Obstruction	Hard to cancel or opt out / Roach motel / Click fatigue / Ease	Asymmetry in ease of signing up/opting in to a product or firm-friendly choice versus cancelling/opting out
	(Price) comparison prevention	Frustrates comparison shopping regarding price or content
	Immortal accounts	Account and consumer information cannot be deleted
	Intermediate currency	Purchases in virtual currency to obscure cost
Sneaking	Sneak into basket	Item consumer did not add is in cart
	Hidden costs / Drip pricing	Costs obscured or disclosed late in transaction
	Hidden subscription / Forced continuity	Unanticipated or undesired automatic renewal of a service
	Bait and switch, including bait pricing	Consumer is offered product or price different from that originally advertised
Social proof	Activity messages	Indications about other consumers' actions, which may be misleading or false
	Testimonials	Statements from other consumers regarding a product, which may be misleading or false
Urgency	Low stock / High demand message	Indication of limited quantities of a product, which may be misleading or false
	Countdown timer / Limited time message	Indication of an expiring deal or discount, which may be misleading or false

Source: (OECD, 2022[9]).

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Notes

[1] Consumer behavioural insights has been a key focus of both committees for a number of years. The Committee on Consumer Policy first began its work on behavioural insights over 15 years ago with a roundtable discussion on the potential for the field to provide a new source of insights for better consumer policies, particularly in relation to information disclosure (OECD, 2006[111]). Its growing expertise in the field provided the foundations for its 2010 Consumer Policy Toolkit, which includes a six-step framework for authorities to define and respond to consumer problems (OECD, 2010[109]). More recently, the Committee on Consumer Policy developed a detailed report on the use of behavioural insights in consumer policy (OECD, 2017[4]), as well as background reports on enhancing online disclosure effectiveness (OECD, 2022[15]) and on dark commercial patterns (OECD, 2022[9]).

The Competition Committee has also been examining the value of incorporating behavioural insights into competition analysis, beginning with a discussion on the differences between behavioural economics and neoclassical economic theory in 2012 (OECD, 2012[110]). More recently, it held roundtables in 2018 on consumer-facing remedies, reflecting behavioural insights (OECD, 2018[11]), and in 2022 on integrating consumer behaviour insights in competition enforcement (OECD, 2022[1]).

The committees have also previously held joint workshops on the topics of personalised pricing (OECD, 2018[52]) and quality considerations in zero-priced markets (OECD, 2018[55]).

See also OECD (2019[122]) for an OECD toolkit providing practitioners and policy makers with a step-by-step process for analysing a policy problem, building strategies, and developing behaviourally informed interventions.

[2] See https://www.oecd.org/gov/regulatory-policy/behavioural-insights.htm for this definition.

[3] The extent to which consumers are affected by choice overload depends on many factors. For example, consumers are less likely to be overwhelmed when they know their own preference (e.g., the choice in a supermarket versus the choice of a pension plan) (Mehta and Sugden, 2013[3]).

[4] See e.g. https://www.bankwest.com.au/help/online-banking/can-i-get-a-reminder-for-credit-card-payments

[5] The Committee on Consumer Policy in 2021 organised a roundtable on consumer access and use of their own data, which inter alia discussed the opportunities of such initiatives to allow consumers to access and make use of their own data for better purchase decisions.

[6] See e.g. Lunn (2014[125]) who notes that “whether an intervention counts as a nudge in part depends on the perspective adopted. For instance, in markets where consumers appear to be taking suboptimal decisions by selecting disadvantageous deals, a proposed nudge might involve a standardised form of product information disclosure that aims to make product comparison easier, perhaps by making the

disadvantages salient. Thus, consumers can continue to select the apparently disadvantageous deals if they really want to, but are nudged towards better ones. Yet an element of compulsion is nevertheless involved in any regulation that mandates a certain type of information disclosure or prevents others. The mandate does limit the firm's choice-set and, by extension, the availability to consumers of firms that do not wish to describe their products as mandated. In other words, the distinction between a nudge and an intervention that is not a nudge is not entirely clean. In practice, nudges may to some extent constrain the choices of some economic actors, often firms."

[7] Article 22 of the Consumer Rights Directive, adopted by the European Union in 2011.

[8] See e.g. https://www.osborneclarke.com/insights/new-consumer-contracts-rules-germany-tighten-regulatory-regime for details.

[9] Indeed, the term "digital dark nudges" have also been used to characterise dark patterns. See e.g. Hornuf and Mangold (2022[117])

[10] See OECD (2017[4]) for a list of common behavioural biases relevant for consumer policy and a detailed discussion of the use of behavioural insights in consumer policy. See also Mathur et al. (2019[116]), who set out cognitive biases linked to specific dark patterns.

[11] See https://www.ftc.gov/news-events/news/press-releases/2022/12/fortnite-video-game-maker-epic-games-pay-more-half-billion-dollars-over-ftc-allegations

[12] The EU General Data Protection Regulation, Article 4, defines profiling as "any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements".

[13] Manipulative or exploitative personalisation practices are typically distinguished from dark patterns in the classic sense (see e.g. EC (2022[63])). However, some personalisation practices could be considered dark patterns where they chiefly rely on elements of choice architecture, such as certain instances of personalised ranking of offers.

[14] Relatedly, dynamic, highly personalised digital choice architectures have been termed "hypernudging" (Morozovaite, 2021[114]; Yeung, 2017[113])

[15] The Netherlands Consumers and Markets Authority, for example, in late 2022 updated its Guidelines on the Protection of the Online Consumer; see https://www.acm.nl/nl/publicaties/voorlichting-aan-bedrijven/acm-leidraad/leidraad-bescherming-online-consument (in Dutch).

[16] However, in recent years some jurisdictions have raised or plan to raise the maximum penalties for breaches to consumer law to align with those under competition law, such as Australia (see https://www.accc.gov.au/media-release/consumer-law-penalties-set-to-increase and https://www.accc.gov.au/media-release/accc-welcomes-new-penalties-and-expansion-of-the-unfair-contract-terms-laws) or the United Kingdom (see https://www.gov.uk/government/news/new-rules-to-protect-consumers-hard-earned-cash).

[17] In some consumer law regimes, enforcement may similarly involve requirements for a business found to violate consumer law to make commitments going beyond ceasing the unlawful conduct. For example,

in the UK's consumer protection enforcement regime, such commitments could include measures to provide redress to consumers harmed by the unlawful conduct; to prevent or reduce the risk of the occurrence or repetition of the unlawful conduct; or to enable consumers to choose more effectively between persons supplying or seeking to supply goods or services (CMA, 2016[123]).

[18] See also Jin and Wagman (2021[74]) for more examples of conflicts between antitrust and consumer protection in the digital economy.

[19] Examples include the UK (see https://www.gov.uk/government/collections/the-digital-regulation-cooperation-forum and https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2021/05/ico-and-cma-set-out-blueprint-for-cooperation-in-digital-markets/)S; the Netherlands (see https://www.acm.nl/en/about-acm/cooperation/national-cooperation/digital-regulation-cooperation-platform-sdt) ; Australia (see https://www.acma.gov.au/dp-reg-joint-public-statement) and the EU (see https://www.digitalclearinghouse.org/)

[20] A forthcoming report by the Committee on Consumer Policy on consumer vulnerability in the digital age (OECD, forthcoming[27]) identifies several digital trends, including proliferation of dark patterns and the growing potential for exploitative data-driven personalisation practices, which illustrate how vulnerability can increasingly be experienced by the vast majority of, if not all, consumers, at different times and depending on the role of various market factors – even if some consumers may experience it disproportionately. Many scholars and other stakeholders have accordingly called for a new conceptualisation of consumer vulnerability in the digital sphere, according to which digital vulnerability is "universal" or "systemic" and where all consumers could be vulnerable. Such a conceptualisation largely aligns with the conceptualisation of consumer vulnerability reflected in the 2014 OECD Recommendation on Consumer Policy Decision Making, which recognises that all consumers, regardless of education or experience, may at times be vulnerable to detriment, depending on the interplay of their personal attributes and circumstances attributes, as well as market characteristics, product qualities, the nature of a transaction and the circumstances.

[21] The EU UCPD provides that the unfairness of a practice shall be assessed by the impact it has on the "average consumer", understood as a "reasonably informed, circumspect, and observant consumer, taking into account social, cultural and linguistic factors". Similarly, the FTC Act in the United States considers how a "reasonable consumer" would be affected by allegedly deceptive advertising or marketing, and courts in Australia have applied an "ordinary or reasonable consumer" test when assessing misleading or deceptive conduct (OECD, forthcoming[27]).

[22] As an additional example, the EU's Digital Services Act prohibits online platforms from designing, organising or operating online interfaces in a way that deceives, manipulates or otherwise materially distorts or impairs the ability of recipients of their service to make free and informed decisions (EP, 2022[112]). Moreover, in the United States, the California Privacy Rights Act, which was passed in 2020, banned the use of dark patterns to obtain consumer consent (CPRA/ Cal. Civ. Code § 1798.140(l)). See (OECD, 2022[9]) for details.

[23] For example, in 2022 US lawmakers, with the support of several scholars and public interest organisations, introduced the Banning Surveillance Advertising Act (BSAA), a bill that would prohibit targeting advertisements to consumers based on personal information all together (while allowing contextual advertising). Other stakeholders, including regulators (the European Data Protection Supervisor (EDPS, 2021[118])) consumer and other public interest organisations (e.g. (Forbrukerrådet, 2021[119])) and

researchers (e.g. (Woodcock, 2018[120]; Rahman and Teachout, 2020[121]), have similarly supported such a ban. See OECD (forthcoming[27]) for more details.

[24] A similar example of such a duty was implemented by the UK financial regulator (FCA) as a legal instrument in 2022, requiring firms "to act to deliver good outcomes for retail customers." (FCA, 2022[124]).[24] A related concept with origins in privacy law is that of an "information fiduciary", described as a duty to use personal data in ways that do not betray end users and harm them (Balkin and Zittrain, 2016[115]).

[25] In EU anti-discrimination law, such rules have already been enshrined in legislation (see Article 8(1) of Directive 2000/43/EC and Article 9(1) of Directive 2004/113/EC) (Rott, Strycharz and Alleweldt, 2022[107])