



ARTICLES

FUTURE-PROOF REGULATION AND ENFORCEMENT FOR THE DIGITALISED AGE

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CONSUMER PROTECTION IN THE AGE OF PERSONALISED MARKETING: IS EU LAW FUTURE-PROOF?

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ABSTRACT: While companies used to advertise primarily via mass media, marketing (in particular online) is becoming increasingly personalised. Personalised marketing offers benefits to consumers, but can also exploit their vulnerabilities. For example, personalised marketing enables companies to specifically target psychological weaknesses in consumers. This threatens their autonomy and increases the power asymmetry between companies and consumers. EU marketing law, and in particular the Unfair Commercial Practices Directive, aims at protecting consumers against economic harm by reducing power asymmetries between companies and consumers. This *Article* will discuss to what extent EU marketing law is future-proof in terms of its fitness to effectively protect consumers against personalised marketing techniques. It will be argued that the law is currently unfit to effectively protect consumers, and that recent legislative changes and proposals only address this problem to a limited extent. It is argued that a “quick fix” to make EU marketing law future-proof is not available, and that an overall redesign of EU marketing law is necessary to protect consumers against the personalised marketing techniques of today and tomorrow.

KEYWORDS: EU marketing law – personalised marketing – consumer protection – consumer vulnerability – Unfair Commercial Practices Directive – future-proofing.

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I. INTRODUCTION

Marketing is changing rapidly. In particular online, marketing is increasingly personalised to the specific interests and characteristics of consumers. While personalised marketing can be beneficial to consumers, it also raises consumer protection concerns and has led to debate in society and in politics.¹ This *Article* will discuss whether EU law is future-proof in terms of protecting consumers against harmful personalised marketing. In particular, this *Article* will address the following two questions:

i) Is EU marketing law currently future-proof in terms of its fitness to effectively protect consumers, taking into consideration the shift from mass media marketing to personalised marketing?

ii) What should be the main points on the research and policy agenda for the coming years in this regard?

After introducing personalised marketing and how it can be used to exploit consumer vulnerabilities (section II), this *Article* will discuss to what extent EU marketing law (with the Unfair Commercial Practices Directive at its centre) is currently future-proof in terms of its fitness to effectively protect consumers against harmful personalised marketing (section III). After concluding that EU marketing law is currently *not* future-proof, it will be discussed to what extent recent legislative changes and proposals (namely: the Modernisation Directive, the Digital Services Act and the Artificial Intelligence Act) address the shortcomings identified (section IV). Finally, it will be explained what the main points on the research and policy agenda should be for the coming years (section V).

As follows from the two research questions, future-proofness is addressed in this *Article* from the perspective of effectively protecting consumers against personalised marketing – a marketing technique which has advanced in the past years and is expected to continue to further develop in the years to come (see section II.1 below). In proposing a research and policy agenda for the coming years, the focus is on effectively protecting consumers, while at the same time leaving room for innovation.² This approach also makes sense from a political perspective: while EU institutions have shown to be open to increasing consumer protection in the digital context,³ an overall ban of online

¹ See *e.g.* A Mahwadi, 'Targeted Ads are One of the World's most Destructive Trends. Here's Why' (5 November 2019) *The Guardian* www.theguardian.com; N Lomas, 'EU's Top Privacy Regulator Urges Ban on Surveillance-based ad Targeting' (10 February 2021) *TechCrunch* techcrunch.com and C Goujard, 'European Parliament Pushes to Ban Targeted Ads Based on Health, Religion or Sexual Orientation' (20 January 2022) *Politico* www.politico.eu.

² The approach of this *Article* is therefore what you could call a typical example of future-proofing, addressing current and future challenges in a way that tries to give room to innovation. See similarly S Ranchordas and M van 't Schip, 'Future-Proofing Legislation for the Digital Age' in S Ranchordas and Y Roznai (eds), *Time, Law, and Change* (Hart 2020) 347.

³ See *e.g.* the recent changes in the Modernisation Directive and the newly adopted Digital Services Act (section IV of this *Article*) and the European Commission's fitness check of EU consumer law in terms of digital fairness ec.europa.eu.

behavioural advertising (one of the prime examples of personalised marketing) was discussed in European Parliament in the process of adoption of the Digital Services Act, but did not find a majority.⁴ In addition, the research and policy agenda seeks solutions that do not only address current harms of personalised marketing, but that also aim at protecting consumers in relation to future developments in terms of personalisation.⁵

II. PERSONALISED MARKETING AND ITS POTENTIAL TO EXPLOIT CONSUMER VULNERABILITIES

II.1. PERSONALISED MARKETING

Through their online activities, consumers produce large amounts of personal data that are collected and processed by companies.⁶ The personal data can be used by companies to build consumer profiles and disseminate personalised marketing output. For example, companies are increasingly able to target specific groups of consumers with personalised online advertising, and the content of webstores is increasingly tailored to the specific interests and characteristics of individual consumers.⁷

Personalisation can be based on earlier online behaviour of consumers that indicate preferences, such as search behaviour. It can also be based on the psychological characteristics of consumers (such as extraversion or impulsiveness), which are inferred from consumers' digital footprints (so-called psychological targeting).⁸ Personalisation can be optimised through A/B testing, in which the effectiveness of different versions of personalised marketing content is shown to different segments of consumers to determine which version is most effective.⁹ Machine learning algorithms are often applied to automate personalisation. This allows for the automated and continued prediction and testing of effective persuasion strategies for individual consumers.¹⁰

⁴ See C Goujard, 'European Parliament Pushes to Ban Targeted Ads Based on Health, Religion or Sexual Orientation' cit.

⁵ In that sense, this *Article* aims at setting an agenda for sustainable and (and least to some degree) adaptable solutions, which are fit to address future challenges. See in this regard also S Ranchordas and M van 't Schip, 'Future-Proofing Legislation for the Digital Age' cit. 347.

⁶ A Acquisti, L Brandimarte and G Loewenstein, 'Privacy and Human Behavior in the Age of Information' (2015) *Science* 509.

⁷ J Strycharz, G van Noort, N Helberger and E Smit, 'Contrasting Perspectives: Practitioner's Viewpoint on Personalised Marketing Communication' (2019) *European Journal of Marketing* 635.

⁸ SC Matz and others, 'Psychological Targeting as an Effective Approach to Digital Mass Persuasion' (2017) *Proceedings of the National Academy of Sciences of the United States of America* 12714; SC Matz, RE Appel and M Kosinski, 'Privacy in the Age of Psychological Targeting' (2020) *Current Opinion in Psychology* 116.

⁹ M Esteller-Cucala, V Fernandez and D Villuendas, 'Experimentation Pitfalls to Avoid in A/B Testing for Online Personalization' (2019) *Adjunct Publication of the 27th Conference on User Modeling, Adaptation and Personalization* 153.

¹⁰ *Ibid.* 153; J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication: Are Consumers Protected?' (2021) *Internet Policy Review* 1.

Personalised marketing offers a number of benefits to consumers, such as increased relevance, informativeness and credibility of communication.¹¹ For companies, personalised marketing is the key to more effective persuasion. By collecting data on individual consumers, companies are better able to predict how consumers will react to marketing and what persuasion strategies are most effective.¹²

The shift towards personalised marketing is expected to continue to develop in the near future, leading to marketing content (such as apps and webstores) being increasingly personalised one-on-one, offering each consumer a unique experience.¹³

A specific development that may boost such one-on-one personalisation is the growing use of voice-operated smart assistants. While smart assistants (such as Google Assistant and Amazon's Alexa) are currently used for shopping purposes to a limited extent only, this may change when smart assistants become more advanced in the near future – and, as a result, become indispensable in our daily lives as well as for marketing.¹⁴ In terms of personalised marketing, smart assistants could become a particularly strong tool for consumer persuasion when making use of emotion recognition technology.¹⁵ Through the application of emotion recognition technology, e.g. on the basis of voice analysis, smart devices could potentially be used for the automated recognition of and response to consumers' real-time emotions. This feature would be particularly interesting for companies in terms of the promotion and sale of products through smart assistants, allowing companies to directly respond to real-time emotions of consumers.¹⁶ This would effectively bring companies closer to the holy grail of consumer persuasion: having direct access to the emotions that drive purchasing decisions. According to consultancy firm Accenture, big tech companies like Apple and Amazon are already performing large-scale research into the integration of emotion recognition technology in smart assistants.¹⁷

¹¹ SC Boerman, S Kruijkemeier and FJ Zuiderveen Borgesius, 'Online Behavioral Advertising: A Literature Review and Research Agenda' (2017) *Journal of Advertising* 363; TP Tran, 'Personalized Ads on Facebook: An Effective Marketing Tool for Online Marketers' (2017) *Journal of Retailing and Consumer Services* 230.

¹² J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication' cit. 1. Note however, that personalization can pose accuracy issues. See e.g. C Summers, R Smith and R Walker Reczek, 'An Audience of One: Behaviorally Targeted Ads as Implied Social Labels' (2016) *Journal of Consumer Research* 156.

¹³ See for an elaborate overview BB Duivenvoorde, 'Datagedreven marketing en de toekomst van het consumentenrecht: tijd voor een nieuwe beschermingsgedachte?' (2021) *Tijdschrift voor Consumentenrecht & Handelspraktijken* 189 (in Dutch).

¹⁴ N Dawar, 'Marketing in the Age of Alexa: AI Assistants Will Transform how Companies and Customers Connect' (2018) *Harvard Business Review* 80.

¹⁵ BGC Dellaert and others, 'Consumer Decisions with Artificially Intelligent Voice Assistants' (2020) *Marketing Letters* 335; BB Duivenvoorde, 'Datagedreven marketing en de toekomst van het consumentenrecht' cit.

¹⁶ D Rauschenfels, 'Is Emotional AI The Future of Advertising?' (11 July 2019) *Datadriveninvestor medium.datadriveninvestor.com*.

¹⁷ R Murdoch and others, 'Getting Emotional. How Platforms, Technology, and Communications Companies can Build a Responsible Future in Emotional AI' (2020) Accenture www.accenture.com. Note, however, that many are still sceptic about the current accuracy of emotion recognition technology. See e.g. A

II.2. POTENTIAL TO EXPLOIT CONSUMER VULNERABILITIES

While personalised marketing promises a number of benefits to consumers, the targeting of consumers' personal characteristics can make consumers more susceptible to persuasion attempts, blurring the line between persuasion and manipulation.¹⁸ This can result in the exploitation of vulnerabilities of consumers.¹⁹ For example, companies can specifically target psychological weaknesses such as impulsiveness or insecurity, taking advantage of consumers' vulnerabilities beyond the light of their own awareness.²⁰ For instance, Facebook allegedly offered advertisers the opportunity to target teenagers during moments of psychological vulnerability, such as when they felt insecure or stressed.²¹ Similarly, companies can exploit external circumstances that can make consumers vulnerable.²² Uber has been criticised for raising the price of a taxi ride when the battery of the consumer's mobile device is running low, forcing the consumer to accept a high price before his phone turns off.²³ In this context it is relevant that consumer vulnerability is highly situational and can apply to anyone – it is not limited to a small number of consumers who are categorically vulnerable.²⁴ The exploitation of vulnerabilities through personalised marketing can be seen as harmful for consumers, threatening their autonomy to make informed decisions.²⁵ The potential for exploitation

Hern, 'Information Commissioner Warns Firms over 'Emotional Analysis' Technologies' (25 October 2022) *The Guardian* www.theguardian.com.

¹⁸ R Calo, 'Digital Market Manipulation' (2014) *GWashLRev* 995; G Sartor, 'New Aspects and Challenges in Consumer Protection: Digital Services and Artificial Intelligence' (2020) Study for the committee on the Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament www.europarl.europa.eu.

¹⁹ OECD, 'Online Advertising: Trends, Benefits and Risks for Consumers' (2019) OECD Publishing digital economy papers www.oecd-ilibrary.org; J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication' cit. 1.

²⁰ R Calo, 'Digital Market Manipulation' cit. 995; K Ward, 'Social Networks, the 2016 US Presidential Elections, and Kantian Ethics: Applying the Categorical Imperative to Cambridge Analytica's Behavioural Microtargeting' (2018) *Journal of Media Ethics: Exploring Questions of Media Morality* 133.

²¹ N Tiku, 'Get Ready for the Next Big Privacy Backlash Against Facebook' (21 May 2017) *Wired* www.wired.com.

²² J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication' cit. 1.

²³ J Golson, 'Uber Knows you'll Probably Pay Surge Pricing if your Battery is About to Die' (20 May 2016) *The Verge* www.theverge.com.

²⁴ SM Baker, JW Gentry and TL Rittenburg, 'Building Understanding of the Domain of Consumer Vulnerability' (2005) *Journal of Macromarketing* 128; RP Hill and E Sharma, 'Consumer Vulnerability' (2020) *Journal of Consumer Psychology* 551. See also N Helberger and others, 'Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability' (2021) *Journal of Consumer Policy* 175.

²⁵ R Calo, 'Digital Market Manipulation' cit. 995; Q André and others, 'Consumer Choice and Autonomy in the Age of Artificial Intelligence and Big Data' (2018) *Customer Needs and Solutions* 28; D Susser, B Roessler and H Nissenbaum, 'Technology, Autonomy, and Manipulation' (2019) *Internet Policy Review* 1; G Sartor, 'New Aspects and Challenges in Consumer Protection' cit.

of consumers through personalised marketing increases the power asymmetry between companies and consumers.²⁶

III. CONSUMER PROTECTION AGAINST PERSONALISED MARKETING: SHORTCOMINGS OF THE CURRENT EU LEGAL FRAMEWORK

III.1. THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE

EU marketing law aims at protecting consumers against economic harm by reducing power asymmetries between companies and consumers.²⁷ This makes it the best placed legal field to protect consumers against the exploitation of their vulnerabilities through personalised marketing.²⁸

The legal instrument that is most relevant for protecting consumers against the exploitation of vulnerabilities through personalised marketing is the Unfair Commercial Practices Directive (“UCPD”).²⁹ The UCPD harmonises the regulation of business-to-consumer commercial practices (including marketing) in the EU. As confirmed by the European Court of Justice (“CJEU”), this includes one-to-one commercial practices.³⁰ This is relevant in the context of personalised marketing: even communications that are personalised at the level of one single consumer are “commercial practices” as defined by the UCPD.

The UCPD contains general prohibitions of misleading and aggressive commercial practices (arts 6 to 9 UCPD). In addition, the UCPD contains a list of specifically defined misleading and aggressive practices that are deemed unfair under all circumstances (Annex I UCPD). The list includes practices like falsely stating that a product will only be available for a very limited time (a misleading practice) and creating the impression that the consumer cannot leave the premises before signing a contract (an aggressive practice).³¹ Finally, art. 5 UCPD prohibits commercial practices that are “contrary to the requirements of professional diligence”. This notoriously vague general clause essentially functions as

²⁶ R Calo, ‘Digital Market Manipulation’ cit. 995; N Helberger and others, ‘EU Consumer Protection 2.0: Structural Asymmetries in Digital Consumer Markets’ (2021) Report for BEUC www.beuc.eu; BB Duivenvoorde, ‘Datagedreven marketing en de toekomst van het consumentenrecht’ cit. 189; N Helberger and others, ‘Choice Architectures in the Digital Economy’ cit. 175.

²⁷ Apart from protecting consumers, EU marketing law also aims at boosting the EU internal market, by providing a level playing field for companies and by increasing consumer confidence. See e.g. art. 1 of the Unfair Commercial Practices Directive.

²⁸ J Strycharz and BB Duivenvoorde, ‘Vulnerability Arising from Personalized Marketing Communication’ cit. 1.

²⁹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’).

³⁰ Case C-388/13 *UPC* ECLI:EU:C:2015:225.

³¹ See points 7 and 24 of Annex I to the UCPD.

a “safety net” in the UCPD: if a practice is neither misleading nor aggressive, the practice may still be prohibited as unfair under Article 5 UCPD.³²

III.2. THREE MAIN OBSTACLES IN EFFECTIVELY PROTECTING CONSUMERS

While the UCPD aims at providing a high level of protection to consumers,³³ it fails to effectively protect consumers against the exploitation of their vulnerabilities through personalised marketing.³⁴ The UCPD essentially raises three main obstacles in this regard.

Firstly, the UCPD is designed to assess the lawfulness of mass media marketing in relation to the general public, and is much less suitable to assess whether personalised marketing is unlawful to the targeted consumer.³⁵ When assessing whether a commercial practice is unfair, courts and enforcement authorities must apply the benchmark of the average consumer.³⁶ If the average consumer is not manipulated by the practice, the practice will in principle not be prohibited. This may make sense when assessing mass media marketing (and in that sense the choice for the average consumer benchmark was understandable at the time of the UCPD's adoption in 2005), but application of the average consumer benchmark makes much less sense for personalised marketing. The UCPD does provide exceptions to the average consumer benchmark, but these essentially apply only if a specific group can be identified, which must have uniform characteristics that are different to those of the average consumer.³⁷ In practice this requirement is difficult to satisfy, since companies may base their targeting on a combination of different characteristics (such as several demographics as well as past search behaviour), rather than on a specific group characteristic. The alternative benchmarks are even more difficult to apply to marketing that is personalised at the individual level.³⁸

Secondly, while the UCPD primarily provides protection by ensuring the supply of sufficient and correct information to the consumer, exploitation of consumer vulnerabilities through personalised marketing calls for further-reaching consumer protection

³² W van Boom, 'Unfair Commercial Practices' in C Twigg-Flesner (ed.), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar 2016) 388.

³³ Art. 1 UCPD.

³⁴ N Helberger and others, 'EU Consumer Protection 2.0' cit.; BB Duivenvoorde, 'Datagedreven marketing en de toekomst van het consumentenrecht' cit. 189.

³⁵ J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication' cit. 1; J Laux, S Wachter and B Mittelstadt, 'Neutralizing Online Behaviour Advertising: Algorithmic Targeting with Market Power as an Unfair Commercial Practice' (2021) CMLRev 719.

³⁶ See art. 5(2) UCPD.

³⁷ See the target group benchmark and the vulnerable group benchmark in arts 5(2) and 5(3) UCPD.

³⁸ J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication' cit. 1, 11-12. See similarly N Helberger and others, 'Choice Architectures in the Digital Economy' cit. 175 and A Davola, 'Fostering Consumer Protection in the Granular Market: The Role of Rules of Consent, Misrepresentation and Fraud in Regulating Personalized Practices' (2021) *Technology and Regulation* 76, 82.

measures.³⁹ Through its prohibitions of providing misleading information and omitting material information, the UCPD's primary focus is on ensuring that consumers are correctly informed about the price and characteristics of a product.⁴⁰ The UCPD also prohibits its aggressive marketing practices by use of harassment, coercion (including the use of physical force) or undue influence. However, this prohibition is essentially limited to blatant infringements of consumer autonomy, while personalised marketing often relies on more subtle forms of manipulation.⁴¹ In this context it is relevant that the average consumer is expected to be reasonably informed, observant and circumspect, while personalised marketing has the potential to recognise and exploit situations in which consumers are not informed, observant or circumspect.⁴² The UCPD does provide room to protect particularly vulnerable consumers, but this protection is limited to groups that are seen as categorically vulnerable (such as elderly consumers and children), rather than recognising that consumer vulnerability is situational and can apply to anyone.⁴³

Thirdly and finally, personalised marketing presents challenges in terms of enforcement, for which the UCPD does not provide a solution.⁴⁴ The UCPD is enforced in the EU Member States by civil courts and public enforcement authorities, but also by self-regulatory advertising standards authorities. In order to assess whether personalised marketing is unlawful, it is essential that enforcement authorities are able to assess exactly what marketing content was disseminated to what consumers. This is typically easy for mass media marketing, where there is usually one advertisement that is being disseminated to the general public. Determining what marketing content was disseminated to what consumers can be much more difficult for personalised marketing, where marketing content can be adapted automatically, can be different for each targeted consumer and can be

³⁹ P Hacker, 'Manipulation by Algorithms: Exploring the Triangle of Unfair Commercial Practice, Data Protection, and Privacy Law' (2021) ELJ 1; BB Duivenvoorde, 'Datagedreven marketing en de toekomst van het consumentenrecht' cit. 189; J Laux, S Wachter and B Mittelstadt, 'Neutralizing Online Behaviour Advertising' cit. 719; J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication' cit. 1.

⁴⁰ Arts 6 and 7 UCPD. Note that the UCPD does not require companies to disclose that marketing communication is personalised, although it could be argued that personalisation of *offers* does constitute a misleading omission under art. 7 UCPD.

⁴¹ See for an elaborate analysis J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication' cit. 1; P Hacker, 'Manipulation by algorithms' cit. 1.

⁴² BB Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer 2015); J Laux, S Wachter and B Mittelstadt, 'Neutralizing Online Behaviour Advertising' cit. 719; J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication' cit. 1.

⁴³ J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication' cit. 1.

⁴⁴ P Hacker, 'Manipulation by algorithms' cit. 1; J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication' cit. 1.

determined on the basis of many different parameters.⁴⁵ The UCPD currently does not offer authorities any tools in this regard.

IV. RECENT LEGISLATIVE CHANGES AND PROPOSALS: ONLY A PARTIAL SOLUTION

IV.1. INTRODUCTION

While the UCPD contains obstacles in protecting consumers against the exploitation of their vulnerabilities, the EU has not been sitting still in developing new laws to better protect EU citizens against online practices, including personalised marketing. Three recent legislative initiatives are particularly relevant in this respect: the Modernisation Directive, the Digital Services Act and the Artificial Intelligence Act. To what extent do these initiatives take away the obstacles identified in the previous section?

IV.2. MODERNISATION DIRECTIVE

In 2019, several EU consumer protection directives were updated by the so-called Modernisation Directive (also known as “Omnibus Directive”).⁴⁶ The Modernisation Directive aims at bringing EU consumer law up to date with technological and societal developments, including the shift from offline to online marketing and purchasing in recent years.⁴⁷ However, while the Modernisation Directive does introduce changes to the UCPD, the amendments in the UCPD do not address personalised marketing, or take away the obstacles identified in the previous section.

The Modernisation Directive did introduce a specific rule in relation to personalised pricing in the Consumer Rights Directive.⁴⁸ Companies that apply personalised pricing (e.g. offering consumers a higher or lower price depending on their location) will have to disclose that they do so, without having to disclose what data the personalisation has

⁴⁵ J Strycharz and BB Duivenvoorde, ‘Vulnerability Arising from Personalized Marketing Communication’ cit. 1; see similarly for US law: L Willis, ‘Deception by Design’ (2020) *Harvard Journal of Law & Technology* 115.

⁴⁶ Directive (EU) 2019/2161 of the European Parliament and of the European Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules.

⁴⁷ C Twigg-Flesner, ‘Bad Hand? The “New Deal” for EU Consumers’ (2018) *Zeitschrift für Gemeinschaftsprivatrecht* 166; MBM Loos, ‘The Modernisation of European Consumer Law: A Pig in a Poke?’ (2019) *European Review of Private Law* 133; BB Duivenvoorde, ‘The Upcoming Changes in the Unfair Commercial Practices Directive: A Better Deal for Consumers?’ (2019) *Journal of European Consumer and Market Law* 219.

⁴⁸ Recital 45 of the Preamble to the Modernisation Directive and art. 4(4)(a)(ii) Modernisation Directive. The Consumer Rights Directive deals with several aspects of consumer contracts, including the conclusion of distance contracts (such as online purchases). See Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

been based on and to what extent the personalised price is different to the price offered to other consumers.⁴⁹ This makes it a partial solution only: it only addresses price personalisation and not other forms of personalised marketing, and does not go beyond informing consumers that a price has been personalised.

IV.3. DIGITAL SERVICES ACT

The Digital Services Act (“DSA”) is an ambitious attempt to regulate online intermediaries (like online marketplaces and social media platforms) in relation to a broad range of issues.⁵⁰ The original proposal was published by the European Commission in December 2020.⁵¹ The European Parliament approved the proposal in its first reading on 20 January 2022, making a large number of amendments.⁵² Following negotiations between the European Parliament and the Council, the DSA was adopted on 4 October 2022 and published in the Official Journal on 27 October 2022.⁵³ It will be applicable as of 17 February 2024.⁵⁴ The DSA will specifically regulate personalised marketing in several ways.⁵⁵

Firstly, online platforms that display advertising will have to provide their users with “*meaningful information about the main parameters used to determine the recipient to whom the advertising is displayed*”.⁵⁶ In essence, this means that platforms will have to let consumers know on the basis of what data their ads are personalised. It is questionable

⁴⁹ The information duty does not apply to techniques such as “dynamic” or “real-time” pricing that involve price changes in response to market demands. See Recital 45 of the Preamble to the Modernisation Directive.

⁵⁰ See on the DSA also e.g. M Eifert and others, ‘Taming the Giants: The DMA/DSA Package’ (2021) CMLRev 987; D Savova, A Mikes and K Cannon, ‘The Proposal for an EU Digital Services Act – A Closer Look from a European and Three National Perspectives: France, UK and Germany’ (2021) Computer Law Review International 38; A Savin, ‘The EU Digital Services Act: Towards a More Responsible Internet’ (2021) Journal of Internet Law 1; C Cauffman and C Goanta, ‘A New Order: The Digital Services Act and Consumer Protection’ (2021) European Journal of Risk Regulation 1; C Busch and V Mak, ‘Putting the Digital Services Act in Context: Bridging the Gap Between EU Consumer Law and Platform Regulation’ (2021) Journal of European Consumer and Market Law 109; S Tommasi, ‘The Liability of Internet Service Providers in the Proposed Digital Services Act (2021) ERPL 925.

⁵¹ Communication COM(2020) 825 final Proposal for a Regulation of the European Parliament and of the Council of 15 December 2020 on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC. The Digital Services Act forms part of the “Digital Services Act Package”, which also includes the proposal for the Digital Markets Act, see *Ibid*.

⁵² P9_TA (2022)0014 Amendments Adopted by the European Parliament on 20 January 2022 on the Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (COM (2020)0825’ – C9-0418/2020 – 2020/0361(COD)).

⁵³ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act).

⁵⁴ Art. 93(2) DSA.

⁵⁵ See elaborately B Duivenvoorde and C Goanta, ‘The Regulation of Digital Advertising under the DSA: A Critical Assessment’ (2023) Computer Law & Security Review (forthcoming).

⁵⁶ Art. 26(1)(c) DSA.

whether the information that will need to be provided will actually make consumers understand whether and how their vulnerabilities are being targeted.⁵⁷ In addition, the transparency obligation will be limited to advertising via online platforms and will not apply to other forms of personalised marketing, such as personalised advertising via other media and personalised marketing via the own channels (such as apps and web-stores) of companies.

Secondly, the DSA will introduce an obligation for *very large online platforms* like Google and Facebook to publish a database containing, for each ad displayed, whether the advertisement was intended to be targeted at specific groups and, if so, on the basis of what main parameters these groups were targeted.⁵⁸ Since the database will be publicly available, this will likely help to effectively enforce the UCPD in relation to personalised marketing that is disseminated through very large online platforms. In particular, such a register may make it easier for courts and public enforcement authorities to determine who is targeted by an ad and, as a consequence, what the appropriate consumer benchmark would be. At the same time, similar to the duty to inform users on the basis of what data their ads are personalised, the question will be whether the data provided by platforms will be sufficient for enforcement authorities to actually determine that consumer vulnerabilities are being targeted. In addition, the solution will be partial in the sense that it will apply to personalised advertising that is disseminated via very large online platforms, and not to other forms of personalised marketing.

Thirdly and finally, the DSA will specifically prohibit targeted advertising based on profiling using personal data of minors, or using sensitive data such as health, religion or sexual orientation.⁵⁹ These prohibitions will at most provide a partial solution: all sorts of data can be used to exploit consumer vulnerabilities through personalised marketing, and personalisation is not just applied by online intermediaries.

II.4. ARTIFICIAL INTELLIGENCE ACT

Another ambitious attempt in making the EU fit for the digital age is the Artificial Intelligence Act, proposed by the European Commission in 2021.⁶⁰ The proposed Artificial Intelligence Act aims at protecting EU citizens against certain risks of the use of artificial intelligence. The proposal by the European Commission contains two prohibitions of manipulation through artificial intelligence, which could (at least in theory) also be relevant for personalised marketing. However, these prohibitions are limited to forms of

⁵⁷ See more elaborately B Duivenvoorde and C Goanta, 'The Regulation of Digital Advertising under the DSA' cit. (forthcoming).

⁵⁸ Art. 39 DSA.

⁵⁹ Arts 26(3) and 28(2) DSA.

⁶⁰ Communication COM(2021) 206 final Proposal for a Regulation of the European Parliament and of the Council of 21 April 2021 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (hereinafter, Artificial Intelligence Act).

manipulation that cause physical or psychological harm.⁶¹ For protection against other types of harm, the proposal explicitly refers to existing EU law, including (for protection against economic harm to consumers) the existing consumer acquis.⁶² Hence, the prohibitions of manipulation in the Artificial Intelligence Act will not be relevant for the economic protection of consumers through personalised marketing.⁶³

At the same time, the Artificial Intelligence Act will become relevant for certain forms of personalised marketing. In particular, companies will have to inform consumers if they make use of an emotion recognition system, for instance if such a system is integrated into a voice-operated smart assistant.⁶⁴ This is, however, “transparency-light”: companies will not have to inform how emotion recognition technology is used to influence consumers.⁶⁵

II.5. CONCLUSION

In conclusion, the Modernisation Directive, the Digital Services Act and the Artificial Intelligence Act can help protect consumers, but at most provide partial solutions to the obstacles identified above.⁶⁶

V. RESEARCH AND POLICY AGENDA: TOWARDS FUTURE-PROOF MARKETING LAW

V.1. AN OVERALL REDESIGN OF EU MARKETING LAW

Taking into consideration that the recent legislative initiatives regulate only specific aspects of personalised advertising, or apply only to certain parties, the UCPD remains the

⁶¹ Arts 5(a) and 5(b) of the Artificial Intelligence Act.

⁶² See pages 12-13 of the the European Commission's proposal for the Artificial Intelligence Act.

⁶³ Note that the European Parliament has proposed to broaden the scope of protection of art. 5 to include any “significant harm”. It remains to be seen whether this suggestion will be followed by the European Council and the European Commission. See P9_TA(2023)0236 Amendments adopted by the European Parliament on 14 June 2023 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)). In any case, the Artificial Intelligence Act would only provide a partial solution to the obstacles identified above, since it is limited to AI-based personalisation only, and would not extend to other types of (manual or automated) personalisation.

⁶⁴ Art. 52(2) of the Artificial Intelligence Act. In addition (see art. 52(1)), companies will have to inform consumers that they make use of AI systems that are intended to interact with humans (like chatbots), unless this is obvious from the circumstances and the context.

⁶⁵ Note that the European Parliament has proposed to emphasize that consent for processing personal data in this context is required. Again, it remains to be seen whether this suggestion will be followed by the European Council and the European Commission. See P9_TA(2023)0236 Amendments adopted by the European Parliament on 14 June 2023 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)).

⁶⁶ BB Duivenvoorde, ‘Datagedreven marketing en de toekomst van het consumentenrecht’ cit. 189; P Hacker, ‘Manipulation by algorithms’ cit. 1.

central legal instrument to protect consumers against unfair marketing, including personalised marketing.⁶⁷ However, while the UCPD is clearly the most suitable instrument to protect consumers against personalised marketing, changes are necessary to effectively protect consumers against harmful personalised marketing.

Some suggestions for reform of marketing law have been made in legal literature, which could be applied to the UCPD in order for it to more effectively protect consumers against personalised marketing. For example, Willis has suggested for US law that the lawfulness of personalised marketing could be assessed by testing whether a commercial practice is *fair by design*, similar to the notion of *privacy by design* in EU data protection law.⁶⁸ Hacker has suggested that a similar test could be incorporated into the UCPD to assess the lawfulness of mind-reading algorithms.⁶⁹ This would require companies using mind-reading algorithms to proactively audit their algorithms in order to prevent breaches of the UCPD. Another amendment to the UCPD is suggested by Laux, Wachter and Mittelstadt, who have proposed that a stricter unfairness test could be applied to dominant market actors such as Google and Facebook, when they act as advertising intermediaries.⁷⁰ Helberger et al have suggested yet a different approach, arguing that consumers could be protected more effectively against data-driven marketing practices by reversing the burden of proof as to the fairness (and thus the lawfulness) of the commercial practice.⁷¹

These suggestions aim at tweaking the UCPD in a way that make it more suitable to protect consumers against personalised marketing. They are all useful suggestions that could improve the position of consumers, but are insufficient to make the UCPD future-proof. The suggested amendments largely leave the fundamental problems of the UCPD in place and offer only partial solutions. For example, the stricter fairness test for dominant market actors, proposed by Laux, Wachter and Mittelstadt, will leave all personalised marketing that is not disseminated via parties like Google and Facebook untouched. Similarly, the implementation of a test that is based on fairness by design (as suggested by Willis and Hacker) could indeed form an essential element of a UCPD reform, but would on its own not take away the substantive barriers in the UCPD, such as the unsuitability of the consumer benchmarks to assess the fairness of personalised marketing and the UCPD's lack of protection against more subtle forms of manipulation (see section III.2). Finally, a reversal of the burden of proof, as suggested by Helberger et al, would

⁶⁷ P Hacker, 'Manipulation by algorithms' cit. 1.

⁶⁸ L Willis, 'Deception by Design' cit. 115.

⁶⁹ P Hacker, 'Manipulation by algorithms' cit. 1, 34.

⁷⁰ J Laux, S Wachter and B Mittelstadt, 'Neutralizing Online Behaviour Advertising' cit. 719.

⁷¹ N Helberger and others, 'EU Consumer Protection 2.0' cit. 77. The idea of the authors is that the unfairness of "data exploitation strategies" is presumed, and that it would be up to the company to demonstrate that the practice complies with the law. The company could do so through an impact assessment by the controller under the GDPR, or through a certificate provided by an auditor.

only truly be effective if the UCPD would first be amended to make it more suitable to deal with personalised marketing. Hence, a quick fix to make the UCPD future-proof is not available.⁷²

What is therefore needed is an overall redesign of the UCPD. This redesign should move past the existing obstacles in the UCPD in order to effectively protect consumers against personalised marketing. Hence, the UCPD should be redesigned in order to make it suitable to assess the lawfulness of both mass media and personalised marketing, to offer consumer protection beyond providing information and preventing blatant infringements of consumers' autonomy, and to provide better enforcement tools for civil courts, public enforcement authorities and advertising standards authorities.

V.2. RESEARCH AND POLICY AGENDA

Hence, the central issue on the research and policy agenda in terms of EU marketing law should be the overall redesign of the UCPD, in order to make it fit to effectively protect consumers against personalised marketing.⁷³ More in particular, the following main points should in my view be on the research and policy agenda for the coming years.

i) In order to redesign the UCPD effectively, it will be important to gain further insight into what exact personalised marketing techniques are currently applied and how they can be used to exploit consumer vulnerabilities. Within the fields of communication and marketing research, there is a growing body of literature on personalised marketing techniques as well as their potential to exploit consumer vulnerabilities. In order to redesign the UCPD in a way that is future-proof, it will also be important to explore what personalised marketing techniques are likely to be applied in the future. For example, what will marketing personalisation look like if voice-operated smart assistants indeed become indispensable personal assistants, as Dawar suggests?⁷⁴ What would be the impact of emotion recognition technologies on personalised marketing, its effectiveness and its potential to exploit consumer vulnerability? And what forms of personalised marketing are likely to emerge in the metaverse?⁷⁵ Discussions amongst marketing professionals and academics can provide useful insights in this respect. While it is impossible to predict the future, it does make sense for policy makers and researchers to take into account likely developments in personalised marketing in preparing the UCPD's redesign.

⁷² J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication' cit. 1.

⁷³ This is not to say that other legal instruments can also (remain to) play a role in the protection of consumers against harmful personalised marketing. For example, processing of certain types of data for personalised marketing purposes could be further limited (or prohibited) through the GDPR.

⁷⁴ N Dawar, 'Marketing in the Age of Alexa' cit. 80. See also section II.1 of this *Article*.

⁷⁵ See e.g. The Guardian, 'Facebook Gives a Glimpse of Metaverse, its Planned Virtual Reality World' (2021) www.theguardian.com.

ii) An overall redesign of the UCPD calls for a reconsideration of the notion of fairness in the UCPD.⁷⁶ The UCPD does not clearly define fairness, but is implicitly based on the idea that consumers are adequately protected if they have sufficient and correct information, and are not subjected to blatant infringements of their autonomy.⁷⁷ This does not suffice to effectively protect consumers in the age of personalisation. The conceptualisation of unfairness as being “contrary to professional diligence” (see the general clause, art. 5 UCPD) does not suffice either, since it essentially refers to industry standards rather than providing a substantive notion of fairness.⁷⁸

iii) The substantive rules of the UCPD should be redesigned, including a fundamental redesign of the UCPD’s fundamental notions (including the consumer benchmarks) and general clauses.⁷⁹ As part of the redesign, a new list can be compiled of personalised marketing practices that should be deemed unfair under all circumstances. In this regard, inspiration can be sought in communication and marketing literature (see point 1 above). Moreover, in order to make the list adaptable to new developments in the field of personalised marketing, a more flexible way to amend it could be considered.

iv) The redesign should not be limited to substantive regulations, but should also cover the enforcement framework. As explained, the UCPD currently falls short in providing effective enforcement tools to national authorities, for whom it is often difficult to determine exactly what marketing content is disseminated to what consumers. The enforcement tools should be designed to accommodate the diverse enforcement practices in the EU Member States, including enforcement through civil courts, public enforcement authorities and advertising standards authorities. Inspiration can be drawn from the proposed personalised advertising database for very large platforms in the Digital Services Act (see section IV.3), and – taking into consideration the diverse enforcement practices in the EU Member States – possibly also from innovative enforcement practices initiated at the national level.

V. CONCLUSION

This *Article* has shown that EU marketing law, with the UCPD at its centre, is not future-proof in terms of its fitness to effectively protect consumers, taking into consideration the shift from mass media marketing to personalised marketing. The UCPD essentially

⁷⁶ See similarly N Helberger and others, ‘Choice Architectures in the Digital Economy’ cit. 175, 195-196.

⁷⁷ See section III.2 of this *Article*.

⁷⁸ See art. 5(2) UCPD and the definition of professional diligence in art. 2(h) UCPD: “professional diligence” means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity”.

⁷⁹ See for an attempt to redesign the UCPD’s consumer benchmarks and general clauses, written after this *Article* was submitted for review: B Duivenvoorde, ‘Redesigning the UCPD for the Age of Personalised Marketing: A Proposal to Redesign the UCPD’s Consumer Benchmarks and General Clauses’ (2023) *Journal of European Consumer and Market Law* (forthcoming).

raises three obstacles in this regard. Firstly, the UCPD is designed to assess the lawfulness of mass media marketing in relation to the general public, and is much less suitable to assess whether personalised marketing is unlawful to the targeted consumer. Secondly, while the UCPD primarily provides protection by ensuring the supply of sufficient and correct information to the consumer, exploitation of consumer vulnerabilities through personalised marketing calls for further-reaching consumer protection measures. Thirdly and finally, personalised marketing presents challenges in terms of enforcement, for which the UCPD does not provide a solution. The recently adopted Modernisation Directive and Digital Services Act and the proposed Artificial Intelligence Act can help protect consumers against personalised marketing, but at most provide partial solutions to the UCPD's obstacles. While the UCPD remains the most suitable instrument to protect consumers against personalised marketing, changes are necessary.

Since a "quick fix" to the UCPD is not available, the central issue on the research and policy agenda in terms of EU marketing law should in my view be its overall redesign, in order to make it fit to effectively protect consumers against personalised marketing. In particular, such a redesign requires researchers and policy makers to *i)* gain further insight into what exact personalised marketing techniques are currently applied and will likely be applied in the future, and how they can be used to exploit consumer vulnerabilities; *ii)* reconsider the underlying notion of fairness in the UCPD; *iii)* redesign the substantive provisions of the UCPD, including its fundamental notions, general clauses and its blacklist and *iv)* redesign the enforcement framework in order to provide effective enforcement tools to civil courts, public enforcement authorities and advertising standards authorities.