

Position Paper

Consumer Empowerment in the Digital Fairness Act¹

For over a decade, Panoptikon has advocated against intrusive and harmful personalisation in digital interfaces and algorithmic systems, commonly used by online platforms. Our empirical research² and policy reports³ speak to the urgency of addressing this issue at the EU level.

The Digital Fairness Act represents a unique opportunity to correct a **multifaceted imbalance** that existing regulation fails to address. We advocate against personalisation that is optimised for short-term user engagement and driven solely by platforms' own commercial interests. At the same time we argue that **personalisation of digital interfaces and algorithmic systems can serve long-term consumer value, if it is controlled by the user and/or designed with user wellbeing as the primary objective.**

This shift from 'unfair' to 'authentic and fair' personalisation of digital services will require two significant corrections in how digital services are designed. The first one concerns the choice of input data: instead of relying mainly on behavioural data (collected beyond consumer control), online platforms should prioritise data explicitly provided by consumers for this very purpose. The second one concerns how companies measure the success of personalised services: instead of looking at short-term consumer engagement (esp. time spent and advertising revenue) as the main metric, companies should look at long-term engagement, explicit user feedback and loyalty.

Building on the existing academic and civil-society work that has clarified the conceptual foundations of digital fairness, most notably the work of M. Namysłowska, N. Helberger et al.,⁴

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² D. Głowacka, K. Szymielewicz, P. Sapieżyński (2023) "Algorithms of Trauma #2: Stuck in a 'Doomscrolling Trap' on Facebook? The Platform Will Not Let You Escape – Case Study Report", https://panoptikon.org/sites/default/files/2023-12/panoptikon_algorithms-of-trauma-2_case-study-report_dec-2023.pdf.

³ See for example: Panoptikon Foundation (2024) "Safe by Default", https://panoptikon.org/sites/default/files/2024-03/panoptikon_peoplevsbigtech_safe-by-default_briefing_03032024.pdf.

⁴ BEUC: N. Helberger, B. Kas, H.-W. Micklitz, M. Namysłowska, L. Naudts, P. Rott, M. Sax, M. Veale, M. (2024) "Digital fairness for consumers", https://www.beuc.eu/sites/default/files/publications/BEUC-X-2024-032_Digital_fairness_for_consumers_Report.pdf.

and the European Commission's own Digital Fairness Fitness Check,⁵ this paper concentrates on four areas, in which Panoptykon Foundation's empirical research and policy analysis can add more value:

1. Defining Unfair Personalisation
2. New Obligations Related To Personalisation
3. New Per Se Prohibitions
4. Comprehensive Enforcement

1. New Concepts for the Digital Era

Long overdue: recognising digital asymmetry and digital vulnerability

Panoptykon Foundation endorsed the concept of **digital asymmetry** in 2024,⁶ as defined by M. Namysłowska⁷ and built upon three pillars – **informational asymmetry, relational asymmetry and structural asymmetry**. Panoptykon Foundation strongly supports the introduction of this definition into the Digital Fairness Act as a self-standing provision.

While digital asymmetry describes the structural relationship between a platform and a consumer, **digital vulnerability denotes the condition of the consumer: the effect of that asymmetry on their capacity to act autonomously**.⁸ We believe that codifying this concept is therefore equally necessary so it can function as a modifier of the average consumer standard, enabling recognition of a vulnerable consumer in circumstances where, under existing law, a lower threshold of protection would apply.

Panoptykon Foundation has endorsed the introduction of **fairness by design** as a foundational principle of the Digital Fairness Act since 2024.⁹ As argued by BEUC,¹⁰ businesses that benefit from digital asymmetry should bear a positive obligation to that end. We propose that this

⁵ European Commission (2024) Commission Staff Working Document: Fitness Check on EU Consumer Law on Digital Fairness, https://commission.europa.eu/document/download/707d7404-78e5-4aef-acfa-82b4cf639f55_en?filename=Commission%20Staff%20Working%20Document%20Fitness%20Check%20on%20EU%20consumer%20law%20on%20digital%20fairness.pdf.

⁶ Panoptykon Foundation (2024) “Safe by Default”, https://panoptykon.org/sites/default/files/2024-03/panoptykon_peoplevsbigtech_safe-by-default_briefing_03032024.pdf.

⁷ BEUC: N. Helberger et. al. (2024) “Digital fairness for consumers”, https://www.beuc.eu/sites/default/files/publications/BEUC-X-2024-032_Digital_fairness_for_consumers_Report.pdf.

⁸ Panoptykon Foundation (2024) “Safe by Default”, https://panoptykon.org/sites/default/files/2024-03/panoptykon_peoplevsbigtech_safe-by-default_briefing_03032024.pdf.

⁹ Ibidem.

¹⁰ BEUC: N. Helberger et. al. (2024) “Digital fairness for consumers”, https://www.beuc.eu/sites/default/files/publications/BEUC-X-2024-032_Digital_fairness_for_consumers_Report.pdf.

principle be codified as a **general clause of horizontal effect**, modelled on Article 25 GDPR, which established data protection by design and by default as a binding legal standard.

At the same time experts and academics quoted in this position paper warn that the notion of fairness by-design, as codified in the DFA, **must not be interpreted restrictively**: it should encompass a broader range of social, technological, and organisational measures, thereby addressing digital asymmetries and vulnerabilities.

Unfair personalisation: defining new category of unfair practice

Panoptikon Foundation considers that key conceptual contribution that the Digital Fairness Act can bring to EU consumer law is the recognition of unfair personalisation as a distinct category of unfair (commercial) practice within the meaning of Article 5 UCPD, anchored in the structural logic of Article 5 UCPD (as updated or replaced by the Digital Fairness Act).

EU regulation should not aim at prohibiting personalisation as such. Instead, the Digital Fairness Act should establish a structural test under which personalisation is deemed unfair.

We propose that personalisation should be qualified as unfair only where it breaches one of the following conditions:

- **Data basis** – personalisation should only use data knowingly provided or explicitly authorised by the consumer for this very purpose;
- **User control** – the consumer should retain meaningful and operational control over the parameters of personalisation;
- **Optimisation goal** – personalisation should be designed to serve long-term consumer value, which can include: reducing information overload, developing healthy media consumption habits, matching consumers conscious aspirations (rather than momentary impulses), adapting to evolving consumer preferences, rabbit-holes, encouraging experimentation and broadening horizons, eliminating content that is harmful or triggering for a particular individual.

This structural test consolidates the existing regulatory and scholarly work on personalisation and translates it into rules and notions rooted in EU consumer law. It is based on the premise that personalisation should serve long-term objectives of the consumer and never maximise their short-term engagement at the cost of their wellbeing. This is where the notion of digital vulnerability becomes legally relevant: the more a given system exploits asymmetry, the less it can claim to serve long-term consumer value.

The operationalisation of each of the three criteria is set out in the following section.

2. New Obligations Related to Personalisation

Data Basis

Panoptikon Foundation has long argued that the aim of regulating personalisation is not to prohibit it, but to **ensure that the consumer's exposure to personalised content, offers, and pricing relies on data the consumer has knowingly provided and/or has explicitly authorised for this purpose.**

As the Commission's own Fitness Check has acknowledged, the structural use of behavioural signals against consumers' interests is a primary mechanism undermining **fairness by design**. Where personalisation is based on data inferred from passively collected behavioural signals, the consumer cannot meaningfully assess, contest, or withdraw from a personalisation logic whose inputs they have not provided and whose inferred outputs they cannot observe.

Panoptikon Foundation therefore proposes that the Digital Fairness Act should explicitly require that **by default traders only use for personalisation data that consumers have actively and knowingly provided for that purpose.**

Such data includes input signals – interests, preferences, or attributes the consumer has declared when building their profile or configuring the service – as well as **explicit feedback provided by consumer** – signals consciously transmitted, deliberate reactions such as a “show me more” or “show me less” indication sent by clicking a dedicated control.

The use of **data shared by the consumer for other purposes** (such as account creation, service delivery, or transaction processing), **behavioural data** (i.e. passively collected data) and **inferred data** (i.e. the results of big data analytics, using other people's data) to determine characteristics, vulnerabilities and interests of a particular consumer, **should be permissible only following the consumer's freely given, specific, and informed consent**. It should specifically refer to the use of behavioural and inferred data for personalisation purposes.

This limitation should **not preclude the use of behavioural data and inferred data for other purposes than service personalisation**, if these purposes are expected by an average consumer (e.g. data analytics, cybersecurity), as explained by the EDPB guidelines on processing of personal data based on Article 6(1)(f) of the GDPR.¹¹

¹¹ EDPB, Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR, https://www.edpb.europa.eu/our-work-tools/documents/public-consultations/2024/guidelines-12024-processing-personal-data-based_en.

User Control

For user control to be effective and to neutralise the conditions under which personalisation becomes unfair, it must operate both at the level of **algorithmic logic** and the level of **interface design**. This means that the consumer should be able to influence what they see and interact with and have access to the mechanisms that curate their experience across all interactions with the trader. Traders should, from the outset, design their personalised digital interfaces and systems to counteract the digital asymmetry that is – otherwise – inherent in their relationship with consumers.

The Digital Fairness Act should, therefore, impose on traders the following obligations:

- **Basic design duties counteracting deceptive design**

These duties should include symmetry and equal prominence of options, plain language and accessibility, and other safeguards developed in existing academic work on dark patterns.¹² In this regard, Panoptikon Foundation endorses the body of recommendations already developed within the framework of UCPD enforcement and Article 25 DSA, and proposes that the Digital Fairness Act consolidate these requirements as horizontally applicable obligations on traders operating personalised digital interfaces and systems;

- **Operationalising user control through granular settings**

Traders should be required to implement granular controls in the form of personalised prompts, grids and sliders (such tools have already been prototyped)¹³ that allow consumers to make informed decisions regarding personalisation of their service, including its objectives. In order to make consumer choice meaningful, such control tools should induce configuration rather than mere acceptance;

- **Machine-readable refusal and consent signals honoured across services**

Traders should be required to honour standardised machine-readable signals, such as those transmitted through the consumer's browser, operating system, or third-party agent. Unlike existing voluntary mechanisms, this obligation would create a binding requirement to recognise and act upon such signals across digital services, ensuring that user control is not fragmented.

¹² Colin M. Gray, Nataliia Bielova, Cristiana Santos, and Thomas Mildner (2023) “An Ontology of Dark Patterns: Foundations, Definitions, and a Structure for Transdisciplinary Action”, 1, 1, <https://doi.org/10.1145/nnnnnnn.nnnnnnn>.

¹³ Panoptikon Foundation (2024) “Safe by Default”, https://panoptikon.org/sites/default/files/2024-03/panoptikon_peoplevsbigtech_safe-by-default_briefing_03032024.pdf.

The premise of these obligations is our attempt to operationalise the principle of consumer autonomy and our belief that consumers should be able to engage with personalisation in a manner consistent with their **autonomous decision-making**.

As Naudts, Helberger, Veale and Sax have argued, where automated systems shape people's fundamental freedoms and affect their socio-economic mobility, consumers should be able to exercise **meaningful agency over how those systems are built** – under conditions of inclusive governance, rather than under platform logics driven solely by commercial considerations.¹⁴

Optimisation Goal

In the context of personalised digital interfaces and algorithmic systems, structural digital asymmetry between traders and consumers is so acute that it may **make consumer agency illusory**. No consumer can exercise meaningful agency over experience which they cannot comprehend.

Therefore in this paper we argue that optimisation goals in personalised interfaces and services should be:

- **designed to serve long-term consumer value by default;**
- **communicated to consumers in an accessible language;**
- **documented and subjected to regulators' oversight.**

According to Knight-Georgetown Institute, the concept of 'long-term consumer value' encapsulates the objective of "aligning recommender system design to outcomes that prioritize users' deliberative, forward-looking aspirations or preferences (...) while remaining generic enough to allow different platforms to design their own way of achieving it."

"For example, platforms that are optimized to support long-term value to users:

1. may ask users directly to state their explicit preferences;
2. may rely on surveys, quality indicators selected by the user, or predictions of each;
3. may rely on signals that are deliberative, clear, or onerous;
4. may combine aspects of these or other approaches."¹⁵

¹⁴ L. Naudts, N. Helberger, M. Veale, M. Sax, M (2025) "A Right to Constructive Optimization: A Public Interest Approach to Recommender Systems in the Digital Services Act", Journal of Consumer Policy 48, <https://link.springer.com/article/10.1007/s10603-025-09586-1>.

¹⁵ Knight-Georgetown Institute (2025) "Better Feeds: Algorithms That Put People First. A How-To Guide for Platforms and Policymakers", p.29, <https://kgi.georgetown.edu/research-and-commentary/better-feeds/>.

In practical terms, **long-term consumer value may include: reducing information overload, developing healthy media consumption habits, matching consumers conscious aspirations (rather than momentary impulses), adapting to evolving consumer preferences, preventing rabbit-holes, encouraging experimentation and broadening horizons, eliminating content that is harmful or triggering for a particular individual.**

In addition to making responsible, consumer-centric choices when setting their optimisation goals, **traders shall keep track of the goals against which their personalisation system has been optimised**, and make that information available to the competent authorities upon request. Documentation obligation should apply to all traders operating personalised digital interfaces and algorithmic systems. At the same time we recognise the need to adjust specific obligations to the size of the enterprise and the risk it poses for consumers.

Last but not least, traders should be required to communicate their optimisation goals (i.e. real objectives behind service personalisation) to affected consumers in a manner that is accessible, intelligible and integrated into the interface.

Positive obligations set out in this section, which should be further specified in DFA recitals, guidelines or delegated acts, need to be complemented by the per se prohibitions set out below, which establish clear rules for traders designing personalised digital interfaces.

3. New Per Se Prohibitions

Prohibition of Behavioural Profiling by Default

Where a trader chooses behavioural profiling as the **default setting** of the service, the practice ceases to be a matter of context-sensitive assessment and qualifies as a per se prohibited practice.

Affective profiling, that is: behavioural profiling specifically directed at inferring and exploiting the consumer's emotional states, represents a paradigmatic case of this prohibition.

This practice institutionalises digital asymmetry as the condition for consumers to access the service. As such, **it stands in direct contradiction to the principle of fairness by design, which should be at the core of the Digital Fairness Act.** In our opinion a per se prohibition is the only logical way to resolve this contradiction.

Prohibition of Lock-in Practices

Where a trader prevents the consumer from importing or exporting their data, the trader does not merely restrict a technical operation – they construct a personalised digital environment as

a gated garden – a trap – rather than space within which the consumer can freely curate their experience.

As with the prohibition of behavioural profiling by default, the aim of prohibition proposed in this section is not to deprive traders of legitimate means to retain consumers, but to **ensure that consumer retention is pursued through the quality of the service, rather than through structural exit barriers.**

The **asymmetric treatment of data import and data export**, allowing the consumer to easily import their data into the service while making the export of that data unavailable, technically obstructed, or commercially disproportionate, represents a paradigmatic case of such barriers.

The same applies to design practices that allow the consumer to migrate their account but *not* their **accumulated content, social graph, history, and account settings**; or that condition the technical possibility of exporting data on the consumer's acceptance of onerous terms unrelated to data portability itself.

When a trader bars the consumer from alternative services not by competing with service quality but by leveraging consumer's accumulated investment as a constraint on their freedom to leave, the practice does not merely limit consumer access to alternative services. It deepens the digital asymmetry that the Digital Fairness Act is meant to redress.

4. Comprehensive Enforcement

Shifting the Burden of Proof

Panoptikon Foundation, alongside academics,¹⁶ other civil society organisations,¹⁷ and the Commission's own Fitness Check,¹⁸ advocates for a shift of the burden of proof:

¹⁶ P. Rott “Burden of Proof” in BEUC: N. Helberger et. al. (2024) “Digital fairness for consumers”, https://www.beuc.eu/sites/default/files/publications/BEUC-X-2024-032_Digital_fairness_for_consumers_Report.pdf;

H.-W. Micklitz, N. Helberger, B. Kas, M. Namysłowska, L. Naudts, P. Rott, M. Sax, M. Veale (2024) “Towards Digital Fairness”, 13 Journal of European Consumer and Market Law, <https://kluwerlawonline.com/JournalArticle/Journal+of+European+Consumer+and+Market+Law/13.1/EuCML2024004>.

¹⁷ European Digital Rights (2026) “Breaking the Extractive Digital Business Model: A Rights-Based Digital Fairness Act”, https://edri.org/wp-content/uploads/2026/02/EDRI_DFA-position-paper.pdf.

¹⁸ European Commission (2024) Commission Staff Working Document: Fitness Check on EU Consumer Law on Digital Fairness, https://commission.europa.eu/document/download/707d7404-78e5-4aef-acfa-82b4cf639f55_en?filename=Commission%20Staff%20Working%20Document%20Fitness%20Check%20on%20EU%20consumer%20law%20on%20digital%20fairness.pdf.

the burden of proving that the obligations established under this Act have been complied with should rest on the **trader**.

This requirement applies to both the positive obligations of Block II and the per se prohibitions of Block III, and it should be assumed **ab initio**.

To discharge this burden, the trader should be required to provide a meaningful explanation, in **plain and intelligible language**, of how the design and operation of their personalised digital interface or system complies with the obligations of this Act.

Simultaneously, a trader cannot – as a defence – rely on the fact that the design of the interface or system, or any of its components, was developed by a **third party**. The trader who deploys a personalised digital interface or system in their relationship with the consumer bears responsibility for its compliance with this Act, irrespective of who designed it.

In the structurally asymmetric environment of personalised digital interfaces and systems, any other allocation of proof would deprive consumers of access to an **effective remedy**, contrary to the principle of effectiveness.

Role of Civil Society Organizations

As a civil society organisation, Panoptykon Foundation considers meaningful participation of **civil society** in enforcing the Digital Fairness Act not as an optional complement to public enforcement, but as a structural condition for its effectiveness.

The structural digital asymmetry that the Act is intended to address operates at a scale and complexity that public authorities, working alone, cannot adequately monitor. Civil society organisations active in this field have, over the past decade, consistently identified, documented and contested the design practices that the Act now seeks to regulate. The Digital Fairness Act should give this work an **operational legal foundation** through two complementary mechanisms.

First, the Digital Fairness Act should establish a **horizontal right** of consumer organisations and civil society organisations with relevant subject-matter expertise and mission to bring **representative actions** concerning systemic violations of the DFA, irrespective of whether individual consumer harm has materialised. Structural character of the harms the DFA aims to address cannot be reduced to the sum of individual detriments. In particular, it will require specialised know-how and significant capacity to challenge design choices made by large technological companies.

Second, the Digital Fairness Act should establish a right of vetted civil society organisations to **access the information** that is necessary to assess trader's compliance with obligations and per se prohibitions proposed in this paper. Such information includes, but is not limited to: documented optimisation goals; A/B testing logs; design choice registers; aggregated data on user behaviour disaggregated by relevant personalisation parameters.

Institutional Architecture and Sanctions

The effectiveness of the Digital Fairness Act will be determined not only by the substantive obligations it establishes, but by the **institutional architecture** through which it is enforced. Panoptikon Foundation considers that enforcement at the national level should be embedded within the existing institutions rather than constructed in parallel to them.

Reflecting the Digital Fairness Act's position as an instrument of consumer law, national **consumer authorities** should be designated as the lead authorities for its enforcement. Digital Services Coordinators, Data Protection Authorities and national authorities safeguarding equality rights should be assigned a role (and adequate resources) as supporting bodies.

The cross-border dimension of enforcement should be addressed by including the Digital Fairness Act within the scope of the **Consumer Protection Cooperation** framework established by Regulation (EU) 2017/2394.

Substantive obligations developed in the preceding sections require that competent authorities be equipped with adequate enforcement powers and resources.

These should include:

1. **investigative powers**, including access to personalised digital interfaces and algorithmic systems, and access to the documentation referred to in section II.c;
2. **substantive remedies**, including cease-and-desist orders, mandatory design changes, and interim measures preventing the deployment of new design choices during enforcement proceedings;
3. **procedural standing for civil society**, in particular the right of consumer and civil society organisations to lodge complaints and trigger enforcement action.

As regards **financial penalties**, drawing on the framework established by the Digital Services Act, the fines should be up to **6%** of the trader's global annual turnover, with higher thresholds for repeated infringements. Setting the threshold below the level applicable under the Digital Services Act would create incentives for regulatory arbitrage, as the same systemic design practices fall within the scope of both instruments.

Finally, consumers should have the **right to compensation** for harms caused by infringements of new obligations established under this Act. The principle of effective remedy requires that a complementary individual remedy be available, building on the framework already established under the GDPR and the amended UCPD.