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Digital Fairness and the Burden of Proof

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Abstract

Digital infrastructures, such as online platforms, and digital services, such as scoring, and the algorithms behind them, have often been described as a “black box.” This is a problem for consumers and consumer organizations that wish to enforce their individual rights or collective remedies in civil law litigation. The reason is that traditionally, the burden of proof is normally on the claimant, who has to prove those elements of a legal provision that act in their favour, whereas the burden of proof for defences is normally on the defendant. Burden of proof has therefore been identified as a major obstacle in the fight against digital unfairness. This means, at the same time, that the important element of private enforcement is insufficient, which hampers the effectiveness of EU consumer law in general. On this background, this article discusses, after some preliminary remarks addressing the scope of the problem, (1) to what extent EU law already requires alleviations of the burden of proof in litigation around unfair digital commercial practices in national courts and (2) how a tailor-made regime of specific provisions related to the burden of proof could, or should, be designed.

Keywords Burden of proof · Digital services · Product Liability Directive · Unfair Commercial Practices Directive

Introduction

Over the last decades, the EU has developed an impressive body of consumer rights. These rights, however, are meaningless, or limited in their practical relevance, if they are not enforced. EU law, and in particular the case law of the Court of Justice, has always demanded that individuals must be able to enforce the rights that EU law confers on them. Moreover, from the outset, the EU legislator has placed great importance on collective enforcement of consumer law, recognising that individuals will often not be able or willing to litigate their rights and that aggregated individual litigation will not bring about an internal market in which consumer rights are honoured.

Since enforcement of consumer law has been a problem in many Member States, the EU has gradually taken over and regulated aspects of enforcement in EU legislation. Recent

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examples are new rules on public law sanctions in the Modernisation Directive (2019) and the Representative Actions Directive (2020) that forces Member States to introduce redress actions by qualified entities, thus public bodies and/or consumer organizations. While the enforcement systems of the Member States differ, consumer organizations are certainly the main enforcers in Germany and Austria (Micklitz et al. 2007).

Potential obstacles preventing individual consumers taking action in court are numerous, and indeed the Court of Justice has addressed many of them in its case law on the principle of effectiveness (see *infra*). Obstacles include short prescription periods, formal requirements and the complexity of procedures, excessive fees, but also the burden of proof that is traditionally placed on the claimant. In that latter regard, the EU legislator has already taken action in specific legislation and imposed the burden of proof, for example, for compliance with information obligations of traders, expressly on traders (see Art. 6(9) Consumer Rights Directive 2011). Burden of proof is also a problem for consumer organizations that, unlike public authorities, do not normally have investigative powers.

Digitalisation including the development of AI has generally aggravated that problem for claimant consumers and consumer organizations. In its evaluation of the Product Liability Directive (1985) of 2018, the European Commission identified the burden of proof of the defect and the causal link to damage as a significant obstacle for consumers to obtain redress, and while the report in this regard mainly mentioned complex products such as pharmaceuticals, it also extended this issue to digital technologies (European Commission, 2018, p. 61). The proposal of 2022 for a new Product Liability Directive reiterated this diagnosis, expressly mentioning smart products and AI-enabled products (European Commission, 2022a, p. 1; see also Veldt 2023, pp. 30 f). The European Commission therefore concluded that ease of the burden of proof in complex cases was needed to ensure a fair balance of the legitimate interests of manufacturers, injured persons, and consumers in general (European Commission, 2022a, p. 2). The European Commission also adopted a proposal for an AI Liability Directive (European Commission, 2022b) whose sole purpose is to ease the burden of proof for AI-related claims that do not fall into the scope of application of the Product Liability Directive.

Digital infrastructures, such as online platforms, and digital services, such as scoring, and the algorithms behind them, have often been described as a “black box” (European Commission 2022b, p. 1). When it comes to digital unfairness, thus, to unfair business-to-consumer practices by online platforms or other traders on internet, it is always the consumer organization or the individual consumer who is in the position of the claimant, either for an injunction or for individual or collective redress. Without access to relevant information and evidence, their chances of proving a breach of law, for example, unfair commercial practices law, are slim, and they are likely to shy away from litigation. Such a scenario limits the incentive for traders to comply with EU legislation, such as the Unfair Commercial Practices Directive (2005; UCPD) and the Digital Services Act (2022; DSA), and poses the risk to reduce the level of digital fairness in practice. Consequently, the European Commission has, in its public consultation on digital fairness (European Commission, 2022c), asked stakeholders to comment on the following thesis:

“The burden of proof of compliance with legal requirements should be shifted to the trader in certain circumstances (eg when only the company knows the complexities of how their digital service works).”

On this background, this article discusses, after some preliminary remarks addressing the scope of the problem, (1) to what extent EU law already requires alleviations of the burden of proof in litigation around unfair digital commercial practices in national courts

and (2) how a tailor-made regime of specific provisions related to the burden of proof could, or should, be designed. The article focuses on the UCPD, as this is still the regime that requires traders to abstain from unfair commercial practices, including in a digital environment, despite the plethora of recent EU legislation dealing with the digital market, such as the DSA, the Digital Markets Act (2022), the Data Act (2023), and the Artificial Intelligence Act (2024).

The article starts by concretising what exactly the claimant needs to prove before it analyses the status quo of burden of proof under the UCPD and, more generally, the principle of effectiveness. It then unfolds regulatory options, drawing inspiration from other EU legislation, the case law of the Court of Justice, and national rules, and addresses the special topic of the responsibility of players behind the trader, such as platforms and providers of web design. The article concludes with recommendations for an amendment of the UCPD.

Burden of Proof and Unfair Commercial Practices

At the outset, it should be clarified that the burden of proof does not relate to the breach of or compliance with the law as such but only to those elements of a legal provision that determine the breach of or compliance with the law. Thus, it is not the unfairness of a commercial practice that is to be proven but the facts that make the practice unfair. In this regard, we need to distinguish objective elements (facts) and subjective elements (intention or negligence).

Objective Facts

There will be many unfair commercial practices law cases where burden of proof is not an issue because the facts lie on the table. Let us take the example of a website where relevant information is hidden in small print at the bottom of the page. Whether or not this design complies with the law is a question of law. Indeed, courts often base their decisions on screenshots provided by the claimants and present them in their judgments as visual illustration of the facts of the case.

Slightly more burdensome, but still feasible, is the documentation of a certain phenomenon on a website. For example, one could take screenshots of a website to demonstrate that different consumers are shown different prices of the same product at the same time. Whether or not this qualifies as an unfair commercial practice is then a question of law.

Intention or Negligence

Importantly, the unfairness test of the UCPD is an objective test. According to Article 5(1) UCPD, a commercial practice is unfair if (a) it is contrary to the requirements of professional diligence, and (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers. Similarly, under Article 6(1) UCPD, a commercial practice is misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional

decision that he would not have taken otherwise (...). Thus, in an injunction procedure, a consumer organization does not need to prove any kind of subjective element, and in particular, no intention of the trader to manipulate the consumer (see also *CHS Tour v Team4 Travel* 2013).

This may be different when it comes to damages. Article 11a UCPD (as amended by the Modernisation Directive) provides for a damage claim. The provision implies that there must be a causal link between unfair commercial practices and damage suffered by consumers. However, Article 11a UCPD leaves some leeway to Member States as for the details of the claim. For example, the damage claim can be designed as fault-based, as Germany has done with § 9 para. 2 of its Unfair Commercial Practices Act. In this case, the issue of the burden of proof arises.

“Burden of Proof”

Looking more closely, the “burden of proof” debate includes a variety of legal issues that are related to each other. The *burden of proof* relates to the question as to who has to prove the elements of a legal provision, or their absence. A different issue is the *standard of proof*, thus what a party must do to provide sufficient evidence. Finally, *accessibility of evidence* needs to be taken into account. This includes potential information rights of one party but also documentation obligations of the other party, which secure information to be available in the first place.

Status Quo in Unfair Commercial Practices Law

The UCPD itself addresses the issue of burden of proof in its Articles 11 and 12 but does not deal with the above-mentioned issues comprehensively. Under Article 11(1) UCPD, Member States shall ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers. This codification of the principle of effectiveness implicitly touches on the burden of proof and the standard of proof, as set will be discussed below.

As a starting point, it is then, according to recital (25) of the UCPD, for national law to determine the burden of proof, although the EU legislator regards it as appropriate to enable courts and administrative authorities to require traders to produce evidence as to the accuracy of factual claims they have made. In that latter regard, Article 12 UCPD specifies that Member States shall confer upon the courts or administrative authorities powers enabling them (...) (a) to require the trader to furnish evidence as to the accuracy of factual claims in relation to a commercial practice if, taking into account the legitimate interest of the trader and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case and (b) to consider factual claims as inaccurate if the evidence demanded in accordance with (a) is not furnished or is deemed insufficient by the court or administrative authority.

Article 12 UCPD

Article 12 UCPD only relates to statements on facts. Thus, it applies, for example, to practices of time pressure. For example, under Annex I no. 7, it is prohibited to falsely state that a product will only be available for a very limited time, or that it will only be available

on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice. A statement related to the availability of the product is a statement on facts, and the national court or authority can ask the trader to furnish evidence of the particular times when a product was actually available.

In contrast, Article 12 UCPD does not deal with manipulative web design or with personalised pricing (unless of course the trader claims not to apply personalised pricing). At best, one could discuss whether silence is a statement of fact where the trader is under an obligation of disclosing a certain fact. For example, under new Article 6(1)(ea) Consumer Rights Directive, the trader must inform the consumer, “where applicable, that the price was personalised on the basis of automated decision-making.” Silence on this issue could be interpreted as a statement of the fact that no such price personalisation is applied. This is, however, somewhat stretching the wording of Article 12 UCPD, and it may not even be necessary (see *infra*).

Finally, Article 12 UCPD only seems to place powers on national courts or administrative bodies without requiring them to make use of these powers. Thus, consumers or consumer organizations cannot rely on courts to require traders to furnish evidence of their statements, which increases their litigation risk.

In many cases, a statement is not clearly false but leaves room for interpretation. This applies, for example, where products are attributed certain characteristics, such as environmentally friendly, climate friendly, healthy, or safe. Whether or not such a characterisation is accurate depends on standards. The problem here is the concretisation of the standard.

The EU legislator has addressed this problem in relation to nutrition and health claims and to environmental claims. The solution lies in placing the burden of proof on the trader who has to demonstrate that a certain pre-defined standard is met. Thus, in relation to “health claims,” the EU has adopted the Health Claims Regulation (2006). The rules of the Regulation apply to nutrition claims (such as “low fat,” “high fibre”) and to health claims (such as “Vitamin D is needed for the normal growth and development of bone in children”). Any claim made on a foods labelling, presentation, or advertising in the EU must be clear, accurate, and based on scientific evidence, which is for the trader to supply. The same concept is applied with the Empowering Directive (2024), that amends the UCPD with rules to combat greenwashing. For example, according to new Annex I no. 4a of the UCPD, traders are prohibited to make a generic environmental claim for which they are not able to demonstrate recognised excellent environmental performance relevant to the claim.

A further step towards ensuring the truthfulness and accuracy of factual statements lies in the integration of an external control mechanism. This is the system that the EU Commission has proposed for “green claims” (EU Commission 2023; Jung & Dowse, 2023, 286 ff.). The proposed Directive provides for *ex-ante* verification of environmental claims as well as environmental labels carried out by independent accredited bodies, similar to the system that has been applied for a long time in EU product safety law.

The Principle of Effectiveness

Beyond Article 12 UCPD, Member States appear to be free to introduce alleviations of the burden of proof. The principle of effectiveness as codified in Article 11 UCPD may, however, require alleviations of the burden of proof. According to the case law of the Court in *Rewe* (1976) and *Comet* (1976), the principle of effectiveness prohibits Member States to frame the conditions for the enforcement of individual rights in such a way that it makes it

virtually impossible or excessively difficult to obtain reparation. The principle of effectiveness also applies to the activities of consumer organizations, as their right to take action under various legislative acts of the EU is meant to ensure effective protection of the collective interest of consumers (Rott 2003, p. 7 f.). For example, according to recital (12) of the Representative Actions Directive, “(...) national rules should not hamper the effective functioning of the procedural mechanism for representative actions required by this Directive.”

San Giorgio (1983) was the first case in which the Court applied the principle of effectiveness to issues of proof. The case concerned a reimbursement claim of an enterprise against the Republic of Italy for fees that the enterprise had been charged without a valid legal basis. The Republic of Italy argued that San Giorgio had passed the fees on to its customers and therefore had not suffered any damage. Thus, San Giorgio was supposed to prove that it had not passed the fees on to its customers. The Court held that “any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law is incompatible with Community law,” and it has confirmed this stance in numerous decisions (Rott 2006, pp. 44 ff.), including in consumer law (see *infra*).

Generally speaking, the principle of effectiveness, however, only marks the outer limit of what lies otherwise in the competence of the Member States. According to the principle of procedural autonomy, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law (*Rewe* 1976, para. 5).

Nevertheless, in individual cases, the principle of effectiveness may require certain alleviations to the burden of proof, as the Court of Justice first held in the famous case of *Danfoss* (1989) in relation to equal payment between men and women. The Employees’ Union had first brought *Danfoss A/S* before the Industrial Arbitration Board, basing its case on the principle of equal pay for the benefit of two female employees, one of whom worked in the laboratory and the other in the reception and despatch department. In support of its action, it had shown that in these two wage groups, a man’s average wage was higher than that of a woman’s. In its decision, the Industrial Arbitration Board had however considered that in view of the small number of employees on whose pay the calculations had been based the Employees’ Union had not proved discrimination. The Employees’ Union thereupon brought fresh proceedings in which it produced more detailed statistics relating to the wages paid to 157 workers between 1982 and 1986 and showing that the average wage paid to men is 6.85% higher than that paid to women.

The Court of Justice found that “the issue between the parties to the main proceedings has its origin in the fact that the system of individual supplements applied to basic pay is implemented in such a way that a woman is unable to identify the reasons for a difference between her pay and that of a man doing the same work. Employees do not know what criteria in the matter of supplements are applied to them and how they are applied. They know only the amount of their supplemented pay without being able to determine the effect of the individual criteria. Those who are in a particular wage group are thus unable to compare the various components of their pay with those of the pay of their colleagues who are in the same wage group.” The Court continued that “in a situation where a system of individual pay supplements which is completely lacking in transparency is at issue, female employees can establish differences only so far as average pay is concerned. They would be deprived of any effective means of enforcing the principle of equal pay before the national courts if the effect of adducing such evidence was not to impose upon the employer the

burden of proving that his practice in the matter of wages is not in fact discriminatory.” Thus, “(to) show that his practice in the matter of wages does not systematically work to the disadvantage of female employees the employer will have to indicate how he has applied the criteria concerning supplements and will thus be forced to make his system of pay transparent” (*Danfoss* 1989, paras 10, 13 and 15).

In the area of consumer credit law, in the case of *CA Consumer Finance* (2014), the question arose whether and how the consumer could prove that the creditor has breached his obligation to assess the consumer’s creditworthiness. The Court of Justice noted that “compliance with that principle would be undermined if the burden of proving the non-performance of the obligations laid down in Articles 5 and 8 of Directive 2008/48 lay with the consumer. The consumer does not have the means at his disposal to enable him to prove that the creditor, first, did not provide him with the information required under Article 5 of that directive and, secondly, did not check his creditworthiness” (*CA Consumer Finance* 2014, para. 27). In the same way, the Court argued in *BNP Paribas Personal Finance* (2021) in relation to the transparency requirement of Article 4(2) of the Unfair Contract Terms Directive (1993), that “observance of the principle of effectiveness and the attainment of the underlying objective of Directive 93/13, consisting in protecting consumers by rebalancing the asymmetry between the position of the seller or supplier and that of the consumer, could not be ensured if the burden of proving that a contractual term is plain and intelligible, for the purposes of Article 4(2) of that directive, is borne by the consumer” and that “the effective exercise of the rights conferred by Directive 93/13 could not be ensured if consumers were required to prove a negative fact, namely that the seller or supplier did not provide them with all the information necessary to satisfy the requirement of transparency” (*VB and others v BNP Paribas Personal Finance SA* 2021, paras 83 and 84).

Similarly, in the area of unfair commercial practices law, the principle of effectiveness, as codified in Article 11(1) UCPD, is relevant where traders work with hidden unfair features, such as the undisclosed personalisation of prices. The situation is comparable to the ones in *Danfoss* and in *CA Consumer Finance*: The consumer, or the consumer organization, has no chance to find out what happens within the sphere of the trader.

It should be noted though that the employer’s obligation to lay open the criteria for distinguishing salaries in *Danfoss* was not unconditional but it was triggered by indicators that demonstrated the possibility of unequal pay for men and women. This case law was later codified in anti-discrimination law (see Art. 8(1) of Equal Treatment Directive 2000 and Art. 9(1) of Equal Treatment Directive 2004). Similarly, in *CA Consumer Finance*, there was an indication that the creditworthiness assessment had not been performed at all, or insufficiently, as the consumer actually was not able to meet her obligations arising from the credit contract. Finally, we can also see the necessity of an indication in other areas of Europeanised procedural law, such as the courts’ obligation to review compliance of the trader with EU consumer law of their own motion. In the unfair contract terms case of *Kancelaria Medius* (2020), the court saw such an indication in the fact that the claimant trader did not produce the contract on which they based their claim (*Kancelaria Medius* 2020, para. 46).

In the case of unfair commercial practices law, it would thus be necessary to show some sort of anomaly that indicates the potential presence of a breach of law. For example, in case of the suspected personalisation of prices, an indication of an infringement could simply consist of two screenshots taken at the same time concerning the same product with different prices (Gleixner, 2020, p. 420).

Moreover, EU law takes into account the defendant's position, in the sense that it wants to achieve a fair balance between the legitimate interests of—in this case—traders and consumers (see, for example, European Commission, 2022a, p. 1). Thus, it would not shift the burden of proof in such a way that it is virtually impossible or excessively difficult for the trader to prove compliance with the law. This is, however, not a problem in the case at hand, as the trader merely would have to show and explain the website design or algorithm applied, which he should be able to do. Indeed, it is for the same reason that in Article 12(2) and (3) of the Digital Content and Digital Services Directive (2019), the burden of proof for the conformity of digital content and digital services with the contract falls largely on the trader.

Overall, although this may be the preferred solution by consumer organizations, it is most unlikely that the EU legislator would shift the burden of proof in unfair commercial practices law entirely on the trader. Given the fact that even in a digital environment, many instances of unfair commercial practices are easily visible and therefore easy to prove, there is no reason for such a complete shift of the burden of proof. Rather, targeted measures to facilitate the situation of the claimant consumer or consumer organization in situations where special difficulties arise should be taken into account. Facilitation of proof can be constructed in different ways, including through rebuttable presumptions, through lowering the standard of proof, and through information rights and documentation duties.

Facilitation of Proof Below the Reversal of the Burden of Proof

The following considerations apply to individual litigation and collective proceedings initiated by consumer organizations in the same way. First, both actors face the same difficulties in relation to the internal circumstances of the trader but also to their web design. Second, as far as collective redress actions are concerned, such actions merely aggregate the individual claims of consumers and should therefore not be treated less favourably than individual litigation.

Rebuttable Presumption

The strongest form (below the reversal of the burden of proof) is the rebuttable presumption. We can find this instrument, for example, in the Sale of Goods Directive (2019). According to its Article 11(1), any lack of conformity which becomes apparent within one year of the time when the goods were delivered *shall be presumed* to have existed at the time when the goods were delivered, unless proved otherwise or unless this presumption is incompatible with the nature of the goods or with the nature of the lack of conformity. In other words, the trader must prove that the lack of conformity did not exist at the time of delivery. The reason for this rule is that the consumer will normally not avail of the expertise to demonstrate the defectiveness of a good that worked initially but failed to do so after some time.

A similar rule can be found in the new Product Liability Directive (2024). According to its Article 10(2)(c), the defectiveness of the product shall be presumed if the claimant demonstrates that the damage was caused by an obvious malfunction of the product during reasonably foreseeable use or under ordinary circumstances.

In the context of the UCPD, one could think of a rule, according to which there is a rebuttable presumption of an unfair commercial practice where there is an indication of such a practice, based on factual evidence. For example, as mentioned above, there could

be a presumption that different prices for different persons at the same time are prompted by price personalisation unless the trader proves otherwise.

Rebuttable presumptions are also sometimes used for the proof of causation. According to Article 10(3) of the new Product Liability Directive, the causal link between the defectiveness of the product and the damage shall be presumed, where it has been established that the product is defective and the damage caused is of a kind typically consistent with the defect in question.

A rebuttable presumption may also be used where a legal provision only applies if the claimant has reacted to a breach in a certain manner. For example, in German law, it is presumed that the insured person or an investor would have taken the right decision (and therefore not suffered damage) if he or she had been correctly informed (BGH 1985 and 2012). In the context of the UCPD, a rebuttable presumption could apply to the damage claim under Article 11a UCPD in the sense that the consumer would be presumed to have made a different decision had he or she not been misled, harassed, coerced, or unduly influenced.

Lowering the Standard of Proof

As mentioned above, the standard of proof determines what a party must do to provide sufficient evidence. Typically, the standard of proof is not regulated in EU law, and, therefore, its regulation has remained within the competence of the Member States even if EU law regulates the burden of proof as such (*Novo Nordisk* 2014, paras 25 ff.). For example, in the case of *Sanofi Pasteur* (2017), the Court of Justice held that it is for the national legal order of each Member State to establish the ways in which evidence is to be elicited, what evidence is to be admissible before the appropriate national court, or the principles governing that court's assessment of the probative value of the evidence adduced before it and also the level of proof required. The only limitation of the Member States' leeway is that the rules on the standard of proof must not undermine the distribution of the burden of proof (*Sanofi Pasteur* 2017, paras 25 and 27).

Traditionally, Member States apply different formulas for the establishment of proof. Germany, for example, is particularly strict in requiring the full persuasion of the court of the facts. According to § 286 para. 1 of the Civil Procedural Code, the court is to decide, at its discretion and conviction, and taking account of the entire content of the hearings and the results obtained by evidence being taken, if any, whether an allegation as to fact is to be deemed true or untrue. German courts require, at least, a very high degree of likelihood, whereas "mere likelihood" has explicitly been ruled out as insufficient (BGH 1970, p. 948).

English law, in contrast, traditionally applies the balance of probabilities test in the area of causation, which means that the claimant only needs to show that what he or she claims is "more likely than not" (*In re H (Minors)* 1996, p. 586).

However, we can also see that Member States may adjust the standard of proof where a strict standard is (too) difficult to meet in a particular area of law or life. Advocate General Bobek indicated in *Sanofi Pasteur*, related to product liability law, that given the very different nature of the products covered by the Product Liability Directive, the type of damage they could cause, and the way that damage might be caused, detailed rules on proof and evidence may not be identical in all cases (*Sanofi Pasteur* 2017, Opinion para. 22). In the case at hand, his statement aimed at the particular difficulties of proving vaccination damages, but it would equally apply to opaque algorithms (Rott 2017, p. 28).

One example from German law is the area of social law concerning compensation for vaccination damage. As it is very difficult to establish with a high degree of certainty that a

certain health issue was caused by a particular vaccination, the victim merely has to show that causation is more likely than not (§ 61 Act on Protection against Infections; Rott 2020, p. 211).

A very recent example from EU law is Article 10(4) of the new Product Liability Directive. According to this provision, a national court shall presume the defectiveness of the product or the causal link between its defectiveness and the damage, or both, where, despite the disclosure of evidence in accordance with Article 9 and taking into account all the relevant circumstances of the case, (a) the claimant faces excessive difficulties, in particular due to technical or scientific complexity, in proving the defectiveness of the product or the causal link between its defectiveness and the damage, or both, the defectiveness of the product or causal link between its defectiveness and the damage, or both; and (b) the claimant demonstrates that it is likely that the product is defective or that there is a causal link between the defectiveness of the product and the damage, or both.

Unfair commercial practices law could generally establish the standard of balance of probabilities (“more likely than not”), thus making sure that national courts do not apply an excessively high standard of proof, or at least do so when it comes to website architectures that are certainly beyond the expertise of the average consumer.

Accessibility of Evidence

Due to digital asymmetry, evidence may be inaccessible for consumers or consumer organizations, and the success of litigation may depend on the right to obtain information and meaningful explanations from the defendant (or from a third party), as a first step. The UCPD does not touch upon that issue, and it is therefore in the competence of the Member State.

As a starting point in general civil procedural law, it is for the claimant to produce evidence, whereas in many legal systems, the defendant is under no obligation to help the claimant with this exercise. German courts, for example, have often emphasised that German law prohibits any form of pre-trial discovery. Thus, in the context of the breast implant scandal around the French producer Poly Implant Prothèse (PIP), the claimant could not ask for TÜV Rheinland’s monitoring reports and therefore was not able to show what TÜV Rheinland has done or has failed to do (OLG Karlsruhe 2018).

We find exceptions to that rule in EU law and in national law, however, where it is deemed appropriate to grant the claimant access to information. For example, Article 3 Enforcement Directive (2004) provides for an information right in favour of the claimant, under certain circumstances (although this only applies to a “justified and proportionate request” of the claimant, which leaves the Member States some leeway).

Germany has introduced a right of information in the Pharmaceuticals Act (*Arzneimittelgesetz*; AMG), responding to the fact that it is very difficult for the claimant, who has no insights into the development and the manufacturing of the pharmaceutical product, to prove the existence of a design defect or a manufacturing defect. Thus, according to § 84a AMG, the victim can request information related to effects, side effects, and interaction of medical products that are known to the producer and to suspected effects, side effects, and interaction of medical products that were brought to the producer’s attention and all further knowledge which could be of significance in assessing the justifiability of harmful effects, provided that facts exist that justify the assumption that a medical product has caused the damage in question. This special right of disclosure aims to improve the claimant’s procedural position (BGH 2015) and to re-establish equal terms between the parties (Spickhoff, 2022, § 84a AMG para 1).

As a recent example, the new Product Liability Directive provides for disclosure of evidence. According to Article 9(1), Member States shall ensure that, at the request of a person

who is claiming compensation in proceedings before a national court for damage caused by a defective product (the “claimant”) and who has presented facts and evidence sufficient to support the plausibility of the claim for compensation, the defendant is required to disclose relevant evidence that is at the defendant’s disposal. A similar rule was introduced in Article 9(2) to the benefit of the defendant. In the following, the EU legislator is committed to strike the balance between the interests of the victim and the producer. According to Article 9(3), Member States shall ensure that the disclosure of evidence pursuant to paragraphs 1 and 2, and in accordance with national law, is limited to what is necessary and proportionate. When determining whether the disclosure requested by a party is necessary and proportionate, national courts shall, according to Article 9(4), consider the legitimate interests of all parties, including third parties concerned, in particular in relation to the protection of confidential information and trade secrets. Finally, Member States shall ensure that, where a defendant is required to disclose information that is a trade secret or an alleged trade secret, national courts are empowered, upon a duly reasoned request of a party or on their own initiative, to take the specific measures necessary to preserve the confidentiality of that information when it is used or referred to in the course of the legal proceedings (Article 9(5)). Notably, the EU legislator found it necessary to state that national courts are empowered, upon a duly reasoned request of the opposing party or where the national court concerned deems it appropriate and in accordance with national law, to require such evidence to be presented in an easily accessible and easily understandable manner, if such presentation is deemed proportionate by the national court in terms of costs and effort for the required party. This would seem to mean that, for example, it is not sufficient to grant access to an algorithm but that this algorithm must be explained. Article 9 is designed as a minimum harmonisation rule. It does not prohibit national rules related to the pre-trial disclosure of evidence, according to Article 9(7).

The detailed rules of the new Product Liability Directive appear to fit perfectly for the situation of opaque web designs. If the claimant individual or consumer organization can show some anomaly, such as different prices shown to different consumers at the same time, the trader would have to lay open his web design. At the same time, the rule would ensure that his trade secrets in relation to that web design will not enter the public sphere.

Documentation Duties

Accessibility of evidence often requires that relevant information has been collected and stored in the first place. Where the burden of proof lies with the defendant trader, he would be well advised to collect and store relevant evidence anyway. For example, as the creditor has to prove that he performed a creditworthiness assessment before giving out credit, according to the decision of the Court of Justice in *CA Consumer Finance* on Article 8 Consumer Credit Directive (2008), he would surely document what he has done.

Documentation duties can also be stated in legislation, and the EU legislator has done so in relation to the creditworthiness assessment under the Mortgage Credit Directive (2014). According to its Article 18(2), Member States shall ensure that the procedures and information on which the assessment is based are established, documented, and maintained. The same now applies to consumer credit, under Article 18(4) of the new Consumer Credit Directive (2023).

In the context of “black boxes,” the German legislator has introduced the duty for automated cars to store the position and time information determined by a satellite navigation system when there is a change in vehicle control between the driver and the highly or fully automated system. The same applies if the vehicle driver is asked by the system to take over control of the vehicle or a technical malfunction occurs in the system (§ 63a para. 1 Road Traffic Act). This shall

allow, after an accident, to find out whether the accident was the fault of the driver or of the car and therefore its producer (Armbrüster 2017, p. 85; Schirmer 2017, pp. 256 f.).

In the same way, German case law on medical malpractice has triggered the need for doctors and hospitals to document closely what they have done. This documentation duty has in the meantime been codified in § 630f:

(1) For the purpose of documentation, the treating party is obliged to keep medical records in paper form or as electronic documentation in close time with the treatment. (...).

(2) The treating party is obliged to record all measures in the medical records that are relevant in medical terms for the current and future treatment and its results, in particular the establishment of the medical history, diagnoses, examinations, results of examinations, findings, therapies and their effects, procedures and their impact, consent, and information. Physicians' letters are to be included in the medical records.

(3) The treating party is to keep medical records for a period of 10 years following the conclusion of the treatment unless other periods for their retention govern in accordance with other provisions."

A breach of this documentation duty is, among others, sanctioned by the reversal of the burden of proof. According to § 630h para. 3 of the German Civil Code (*Bürgerliches Gesetzbuch*; BGB), where the treating party has not recorded a medically required major measure and its result in the medical records, contrary to what is stipulated in § 630f paras 1 or 2, or where, contrary to § 630f para. 3, they have not retained the medical records, it is to be presumed that they have not carried out this measure.

In the same way, the German Supreme Court has decided in relation to documentation duties of insurance intermediaries. Disregard of those duties can lead to the alleviation of the burden of proof of a breach (that is otherwise on the insured person) and even to the reversal of the burden of proof (BGH 2014).

A prominent area where documentation obligations have just been introduced is the regulation of artificial intelligence in the Artificial Intelligence Act, which relies heavily on technical documentation. According to its Article 11(1), technical documentation of a high-risk AI system shall be drawn up before that system is placed on the market or put into service and shall be kept up-to-date. Details are set out in Annex IV. That documentation is, first of all, meant to allow public authorities to exercise *ex ante* market control. It could, however, also be used in private litigation to show, for example, the unfairness or otherwise of a commercial practice. And even beyond the AI Act, a factual documentation duty triggered, under certain circumstances, by the reversal of the burden of proof would not seem to overburden the trader when it comes to web designs that are easy to store.

Combination

Finally, several of the above-mentioned elements can be combined. In particular, the failure to supply information or to provide documentation can be sanctioned with disadvantages in the burden of proof. For example, according to Article 10(2)(a) of the new Product Liability Directive, the defectiveness of the product shall be presumed if the defendant has failed to disclose relevant evidence pursuant to Article 9(1).

The Ignorant Trader and the Players Behind

In practice, it is often, or usually, not the final trader alone that designs a website and its functionalities, but there are one, or often more, layers behind (Naudts et al. 2024, pp. 38 ff.). The final trader may not even be aware of all the functionalities, which may ultimately trigger the unfairness of his own commercial practices.

No Exclusion of Liability

Unfair Practices

First of all, we should remember that unfair commercial practices law is not fault-based. Thus, for a commercial practice to be unfair, it does not matter whether the trader knew of its unfair functionalities. In the same vein, if there is an indication that a commercial practice is unfair and the burden is on the trader to explain why the website produces a certain result, the responsibility to be able to do so rests on the trader. If he cannot explain the functionality because it is hidden in a deeper layer of the website, which he has not designed, he will not be able to rebut any assumption of unfairness. Certainly, he cannot be “excused” simply by not knowing what he is doing or using.

In relation to remedies of individual consumers based on Article 11a UCPD, this may be different if the national implementation has based the remedies on the trader’s fault and the trader had no reason to believe that there was an unfair commercial practices embedded in the website design as supplied by another player. As soon as the trader is made aware of such suspicion though, he would be required to investigate the potentially unfair design. By not doing so, he would act negligently.

Remedies Against Other Players?

Remedies of the Trader

The only one that could help the trader in such a situation is the player that is responsible for the website design. This could be, in the first place, a contracting partner, for example, the operator of a platform that the trader uses, or a service provider who designed the website for the trader.

Of course, the trader could include a contractual term into such contracts, according to which his contracting partner would have to explain the functionality of the website design if the trader is approached by a consumer, a consumer organization, or a public authority, due to an indication of an unfair commercial practice, ideally accompanied by a redress mechanism in case the trader has to pay damages or a fine. Not all traders will be in the position though to achieve the inclusion of such a term if they lack the necessary bargaining power.

In sales law, EU law tries to help the final seller, who is ultimately liable for any lack of conformity of a good with the contract, with a right of redress enshrined in Article 18 Sale of Goods Directive. Likewise, if digital content or digital services are not supplied at all, or lack conformity with the contract, as a result of an act or omission by a person in previous links of the chain of transactions, the supplier of digital content or digital services has a right of redress against the person or persons liable in the chain of commercial transactions, according to Article 20 Digital Content and Digital Services Directive. In the same way, the UCPD could be

amended with a provision that provides for such an internal solution, leaving the trader as the only person responsible for the unfair commercial practice towards consumers.

Remedies of Consumers or Consumer Organizations

Alternatively, those that are truly responsible for an unfair commercial practice in terms of having designed the trader's website in a particular manner, or having infiltrated an unfair element into the website, could be made additional addressees of claims by consumers or consumer organizations.

This is already true for online platform operators that are themselves traders in the terms of Article 2(b) UCPD. Moreover, additional duties have recently been imposed on online platforms by the Digital Services Act, including the prohibition under Article 25 DSA to design, organize, or operate their online interfaces in a way that deceives or manipulates the recipients of their service or in a way that otherwise materially distorts or impairs the ability of the recipients of their service to make free and informed decisions.

Other players that may have added unfair elements to a deeper layer of the website, in contrast, are neither traders in the terms of the UCPD nor online platforms. Thus, they could only be targeted if they were added by the legislator to the list of potential addressees of action under the UCPD. One model for this would be product liability law, with liability being imposed on the producer and also on the producers of components of the product. As in product liability law, one could foresee a system whereby each player who is not ultimately responsible will have to name its contracting partner (or be liable themselves) so that finally the truly responsible person could be found and targeted.

Again, this should not absolve the final trader from liability though but only the other players that are involved but not themselves responsible.

Proposed Regulation of the Burden of Proof in Unfair Commercial Practices Law

In the light of the principle of effectiveness, it is a requirement of EU law to improve the position of consumers and of consumer organizations, as otherwise the enforcement of the UCPD in relation of those unfair commercial practices that are hidden in algorithms behind the website design is virtually impossible or excessively difficult. This could be done in different ways, which all find precedents in EU legislation, draft legislation, and/or the case law of the Court of Justice, as analysed above.

It seems clear that there will be no unconditional reversal of the burden of proof or information right. Rather, the consumer or consumer organization will have to show an indication that the trader uses an unfair commercial practice. In the light of the digital asymmetry between the trader and consumers as well as consumer organizations, requirements on that indication should be moderate though, where the suspected unfair commercial practice would be hidden.

Once that indication is established, the trader should be required to give a meaningful explanation of the observed phenomenon. The notion of meaningful explanation is borrowed from Articles 13(2)(f) and 14(2)(g) General Data Protection Regulation (2016). In these provisions relating to automated decision-making, meaningful information (about the logic involved in personalisation) does not necessarily require a full explanation of the

details, or even the disclosure of the algorithm, but it does require the trader to disclose the relevant criteria that are used.

Thus, in the context of the UCPD, the trader would not necessarily have to lay open the algorithm as such, but explain (in plain and intelligible language) how the algorithm functions and why it has produced the observed phenomenon. If instead consumers or consumer organizations were only granted access to some sort of technical documentation, the consumer organization would probably need to hire an expert that explains the functionalities, which would be costly and another obstacle to effective enforcement, contrary to the principle of effectiveness (*Levez v Jennings* 1998, para. 51; *Shirley Preston and others v Wolverhampton Healthcare NHS Trust* 2000, para. 60).

If the trader fails to provide a meaningful explanation, it would be presumed that the observed phenomenon has been caused by an unfair commercial practice.

Documentation will be crucial. In order to ensure that documentation is available, one would not necessarily have to introduce express documentation obligations, as in the AI Act. Instead, the trader could also produce documentation ad hoc, if needed, as the algorithm should still be available, whereas the unavailability of documentation should be sanctioned with the reversal of the burden of proof.

Traders cannot be excused because they do not have documentation and/or are unable to provide meaningful explanations because they are using infrastructure that was provided by third parties. However, the (EU) legislator could consider helping such traders with a right to redress. Moreover, in order to address structural problems, the legislator could introduce separate liability of third parties that supply elements to the infrastructure that make commercial practices of the trader unfair.

Finally, the protection of trade secrets will need to be taken into account—not as a defence that would allow the trader to reject an explanation without being sanctioned, but procedurally in terms of disclosure only in a protected manner. Article 9(5) of the new Product Liability Directive points the way forward.

Author contributions I am the sole author.

Declarations

Competing Interests The authors declare no competing interests.

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