

## Manipulation

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### 1. Introduction

There exists a widespread worry among consumers, policymakers and regulators that the digital choice environments mediating many of our decisions become increasingly good at subtly and sneakily steering our behaviour towards particular ends. The concept of manipulation gained traction in recent years in both philosophical and legal discourse because the concept seems especially suitable to capture this widespread worry (Susser *et al.* [2019], Sax [2021]).

The concept of manipulation is, however, as challenging as it is promising. Philosophical literature has tried to formulate a sufficiently coherent conception of manipulation that sets it apart from other types of (problematic) influences on behaviour, such as coercion, persuasion, nudging or dark patterns (Coons and Weber [2014], Susser *et al.* [2019], Jongepier and Klenk [2022]). Despite the absence of a consensus on manipulation's proper definition, some common threads in the ongoing conceptual work can be identified. Manipulation can be understood as an influence the manipulator exerts on the manipulee to make the manipulee serve the manipulator's ends; manipulators turn manipulees into proverbial pawns to be used in their schemes. Moreover, manipulators typically target known or presumed exploitable weaknesses or circumstances to infiltrate the decision-making of their targets and to make them serve their ends. Lastly, manipulators will try to keep their manipulative practices hidden. Together, these characteristics of manipulation explain why it is seen as a sneaky, insincere and problematic form of influence that warrants moral, legislative and regulatory attention (Sax [2021] at 86-94).

While conceptual disagreements remain, the language of 'manipulation' is increasingly used by legislators and regulators to describe challenges posed by the digital economy. In the US, the concept of 'market manipulation' was introduced in 1999 (Kysar and Hanson [1999]) and the popularity of the concept of 'nudging' generated even more attention for (the risks of) the manipulation of behaviour. The European Commission and the European Parliament followed suit and are also increasingly using the language of manipulation. Manipulation is explicitly mentioned in recent legislative initiatives for the digital economy, such as the Digital Services Act (DSA), the Artificial Intelligence Act (AIA) and the Political Advertising Regulation (PAR). Interestingly, no legal definition or conceptualization of manipulation is provided. It, therefore, remains unclear how manipulation relates to other forms of influence, such as persuasion, deception and dark patterns.

## 2. Substance

### Scope

The term ‘manipulation’ is used widely in everyday parlance. Not only can one manipulate other persons, but also objects, information and data, as well as entire institutions (e.g. elections). This broad use of the term is mirrored by its wide use in recent European legislation and legislative proposals. For example, Art. 25(1) DSA speaks about the manipulation of people's decisions. In contrast, the PAR speaks of the manipulation of information and of the democratic debate. This entry focuses on the manipulation of people's behaviour.

Because the attention to online manipulation as a regulatory issue is so recent, a robust legal framework for capturing manipulation does not exist. What emerges is a patchwork of new framework regulations like the DSA, which mention manipulation explicitly, and existing consumer law (Unfair Commercial Practices Directive) that does not mention manipulation explicitly but can nonetheless be used to capture manipulation. The regulation of manipulation will increasingly rely on bringing together dedicated consumer law and framework regulations that address (sector) specific elements of (digital) commercial environments.

To make sense of the still-emerging legal framework for addressing manipulation, at least two approaches can be identified. These approaches are not mutually exclusive. The first approach is to look at the quickly developing European legislative agenda for the digital economy and focus on the regulations that explicitly mention manipulation. The second approach is to look at legislation that does not mention manipulation explicitly, but that can nonetheless be used – indirectly, as it were – to capture manipulation.

### Legal framework: direct ways of addressing manipulation

If we adopt the first approach, the DSA, the AI Act and the Political Advertising Regulation are relevant. The DSA seems the most relevant because it contains an explicit manipulation clause. Article 25(1) states that online interfaces cannot be designed, organized or operated “in a way that deceives or manipulates recipients of their service in a way [that] impairs the ability of the recipients of their service to make free and informed decisions”.

Recital 74 of the PAR deals with the use of personal data in the context of political campaigns. It describes how, in the targeting of political advertising, “different groups of voters or individuals can be segmented and their characteristics or vulnerabilities exploited” and that this “has specific and detrimental effects on individuals’ fundamental rights and freedoms, such as to be treated fairly and equally, *not to be manipulated* [...] [emphasis added]”. Recital 78 mentions the risk of “manipulative microtargeting” as a reason to regulate the use of personal data by “political advertising services”. The provisions of the PAR do not explicitly mention manipulation of behaviour.

The AI Act mentions manipulation in several places. In most instances, the term manipulation is used in the earlier-mentioned sense that falls outside of the scope of this entry (e.g. ‘use of an AI system to generate or manipulate image, audio or video content’ in Recital 134). The AI

Act also uses the term manipulation to refer to the manipulation of behaviour. Recital 28 highlights that technology “can also be misused and provide novel and powerful tools for manipulative, exploitative and social control practices”. Recital 29 introduces a harm requirement while listing various technologies (e.g. ‘machine-brain interfaces or virtual reality’) that can result in harm through AI-enabled “manipulative or deceptive techniques”. It is also made clear that the intention of the provider does not matter “provided that such harm results from the manipulative or exploitative AI-enabled practices”. Article 5(1) uses more general language to describe the prohibition to place on the market or put into service “an AI system that deploys subliminal techniques beyond a person’s consciousness or purposefully manipulative or deceptive techniques” coupled with a harm requirement.

### Legal framework: indirect ways of addressing manipulation

If we turn to the second approach of ‘capturing’ manipulation indirectly, the Unfair Commercial Practices Directive (UCPD) is most relevant. The two types of unfair commercial practices – misleading commercial practices (Articles 6 and 7) and aggressive commercial practices (Articles 8 and 9) – can potentially be used to address manipulative (digital) influences on the consumer-citizen.

Intuitively, Articles 6 and 7 seem most relevant because misleading and deceiving feels – conceptually – close to what it means to manipulate. It should, however, be noted that Articles 6 and 7 focus almost exclusively on how traders (fail to) inform consumers. Such a narrow focus on information provision does not get to the heart of the manipulation problem. This is why Articles 8 and 9 are more promising. Aggressive commercial practices are practices where unfair pressure and influences are exerted on consumers. This focus brings us much closer to the issue of manipulation. The concept of undue influence in Art. 8 is of special interest, which is defined as “exploiting a position of power in relation to the consumer to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer’s ability to make an informed decision” (Art. 2(j)). Providers of online choice environments are – almost by definition – in a position of power vis-à-vis consumers because of their ability to continuously optimize their commercial environments for self-serving ends. If one then turns to Art. 9(c), which explicitly mentions exploitation of “any specific misfortune or circumstance” to use one’s position of power to exert an undue influence on consumers, one has most of the ingredients to capture manipulation. Strycharz and Duivenvoorde [2021] also acknowledge this potential of the Articles on aggressive commercial practices but question whether the language of Articles 2(j), 8 and 9 will be enough to capture more subtle forms of manipulation reliably. Hacker [2021] describes similar worries. This inspired Duivenvoorde [2023] to propose adding a new provision on manipulative practices to the UCPD.

The general clause on unfair commercial practices in Art. 5, which holds that “a commercial practice shall be unfair if it is contrary to the requirements of professional diligence”, should not be overlooked. Professional diligence is defined in Art. 2(h) as commercial practices “commensurate with honest market practices and /or the general principle of good faith in the

trader's field of activity". Hacker [2021] has recently argued that commercial practices with a strong manipulative character should be deemed a violation of professional diligence.

Having explained the UCPD's potential to regulate manipulative commercial practices, one should ask what Art. 25(1) of the DSA can still achieve, given the fact that Art. 25(2) of the DSA specifies that 25(1) does not apply to practices covered by the UCPD. Given the absence of a clear (approximation of a) definition or theory of manipulation in the DSA, coupled with the UCPD's potential to capture manipulation, one may expect that Art. 25(1) DSA will prove to be of limited regulatory value.

### Case law of the CJEU

No case law explains the concept of manipulation in the context of EU consumer law in detail. There is, however, case law in the interpretation of Articles 2(j), 8 and 9 of the UCPD that can help determine the potential of these provisions to capture manipulation.

Case C-628/17 *Orange Polska* specifies how the concept of undue influence should be interpreted, arguing that influences that make a consumer feel uncomfortable and/or confuse their thinking when making a transactional decision can qualify as undue influence. Advocate-General Opinion in joined cases C-54/17 and C-55/17 *AGCM v Wind and Vodafone* discusses how to interpret the concept of 'pressure' when interpreting what constitutes an undue influence under Article 2(j) of the UCPD. The AG proposes a rather restrictive interpretation of 'pressure' as "the forced conditioning of the consumer's will" and states that the consumer "must be forced to enter the contract against his will".

### III. Practical relevance for consumer law

It remains to be seen how relevant the phenomenon of manipulation will be for consumer law. If one looks at the challenges posed by the digital economy, manipulation of behaviour could indeed be seen as a major challenge of our time that is here to stay. At the same time, the law operates through legal theory and concepts. Recent legislation (DSA, AIA) contributes to the conceptual underdetermination of manipulation, which can undermine manipulation's relevance for consumer law.

The DSA is an informative example. Article 25(1) contains a manipulation ban, but manipulation is never defined. One might turn to Recital 67, which addresses the interrelations between various forms of problematic behaviour influence. Dark patterns are presented as the overarching umbrella concept encompassing several other forms of influence: persuasion, deception, nudging, exploitation, nagging and roach hotels. None of these forms of influence are defined and their interrelations are not explained consistently, except for general remarks that these forms of influence can distort/impair/undermine consumers' ability to make informed/autonomous choices.

Another challenge to the relevance of manipulation in the legal context is that manipulation is typically understood as a success concept and philosophical accounts emphasize the intentional

nature of manipulation. Manipulation is a success concept because “the claim that someone has been manipulated refers not only to the strategies employed by the influencer but also to the effect of those strategies on the influenced” (Susser *et al.* [2019] at 27). If, however, proving the actual and intentional occurrence of manipulation in individual cases becomes a legal requirement, the resulting burden of proof would be difficult to meet. Manipulation can happen at scale and the techniques used are typically understood as sneaky and partly hidden, so how does one prove intent? A possible solution is to shift the focus to the intentional design choices and operation of (digital) choice environments that can reasonably be expected to lead – at least in some instances – to manipulation (Susser *et al.* [2019] at 27-29).

Despite these possible obstacles, there are good reasons to believe that manipulation will become increasingly relevant for EU consumer law. For example, the European Commission announced a fitness check on the UCPD, the Consumer Rights Directive, and the Unfair Contract Terms Directive. In the call for evidence, language that is closely related to manipulation problems is used. The Commission mentions “data-driven practices” that can “undermine consumer choice”, influencing consumers to “take decisions that go against their interest”, as well as “consumer protection issues such as, but not limited to, consumer vulnerabilities, dark patterns, personalisation practices, [...] and the addictive use of digital products” (European Commission [2022]).

A similar development can be observed among regulators. For example, the Dutch consumer law regulator – Authority for Consumer & Markets (ACM) – has recently issued an elaborate updated guidance document on their interpretation of the UCPD with a specific focus on digital commercial practices (ACM [2023]). These new guidelines address many issues usually associated with what are seen as manipulative design practices: exploiting default settings, exploiting unconscious clicking behaviour, personalisation and targeting, and influencer campaigns. The ACM’s effort is a clear example of an attempt to address commercial practices considered manipulative by targeting practices and circumstances that can (indirectly) contribute to manipulative influences.

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