



Submission to UTP: Consultation on the Design of Proposed General and Specific Prohibitions

Centre for Artificial Intelligence and Digital Ethics (CAIDE), The University of Melbourne

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Jeannie Marie Paterson, Swetha Meenal Ananthapadmanaban and Eleanor Twomey

Introduction

We recommend revising the drafting of the provision providing for a general prohibition on unfair trading practices.

We are concerned that particular elements of the proposed provision (and their operation together) are not effectively directed to the kinds of practices identified in the Consultation Paper as causing consumer harm but falling through gaps in the existing regime under the ACL (eg dark patterns).

The Consultation Paper provides that a general prohibition on unfair trading practices will capture conduct where it:

- unreasonably distorts or manipulates, or is likely to unreasonably distort or manipulate, the economic decision-making or behaviour of a consumer, and
- causes, or is likely to cause, material detriment (financial or otherwise) to the consumer.

This definition is supported by a non-exhaustive list of examples of conduct which may meet this test ('grey list').

Our submission is separated into three parts. In Part 1 we will detail our concerns with the proposed drafting and make a recommendation for improvement. In Part 2 we make recommendations to improve the 'grey list'. In Part 3 we analyse two examples of 'dark patterns' to consider the application of the current drafting in comparison with our own.

To summarise, we are concerned with the following elements:

- The requirement that conduct must cause or be likely to cause 'material detriment'
- The inclusion of 'manipulation'
- The inclusion of a 'reasonableness' standard
- The reference to 'a consumer'
- The examples included in the grey list

Further, we do not recommend:

- The incorporation of a 'legitimate interest' test
- The incorporation of a transgression from a standard of behaviour (ie professional diligence or duty of reasonable care and skill)

Recommendation

We recommend that the prohibition on unfair trading practice should capture conduct where it:

- Materially distorts, or is likely to materially distort, the economic decision-making or behaviour of the consumers to whom it is directed.



Part 1. Concerns with Proposed Drafting

1.1. Removing the reference to ‘material detriment’

A requirement to demonstrate detriment (material or otherwise) is redundant and distracting. The harm and the problem the prohibition is directed to *is* the distortion of economic decision-making or behaviour.¹ Even where no further forms of harm are caused, or are likely to be caused, the Consultation Paper and many of the submissions recognise the need to respond to distorting practices in and of themselves.

Moreover, a requirement of harm will not catch the subtle but cumulative effects of unfair conduct. Particular examples of unfair trading practices (including dark patterns) may only cause ‘additional’ harm where they are used in combination, including by different operators.² The inclusion of a harm element will make it challenging to target particular conduct in isolation where bringing a claim against each piece of conduct proves difficult.

We understand Treasury’s view that a harm element may provide a threshold for enforcement and provide certainty for businesses.³ However, other elements included in the provision can effectively do this without obfuscating the problem the prohibition is directed towards.

1.2. Replacing ‘unreasonably manipulates or distorts’ with ‘materially distorts’

It is unnecessary to include reference to ‘manipulation’ or ‘unreasonableness’

The reference to conduct that ‘unreasonably manipulates or distorts’ is unnecessarily convoluted.

The concept of ‘reasonable’ distortion is oxymoronic. To ‘distort’ is defined in the Macquarie Dictionary as to ‘pervert’ or ‘misrepresent’⁴ and by the Oxford English Dictionary as ‘to give a twist or erroneous turn to (the mind, thoughts, views)’.⁵ Any kind of distortion of consumer choice is harmful and ‘unreasonable’ by definition.

Including conduct that manipulates consumers is too broad. To ‘manipulate’ is defined in the Macquarie Dictionary as ‘to manage or influence by artful skill, or deviousness’.⁶ Advertising that merely seeks to influence consumers by clever or artful means is not intended to fall within the scope of the unfair trading prohibition. It is possible to qualify manipulate by the requirement of unreasonableness, but we might then ask what this complicated drafting achieves that ‘distort’ does not.

Conduct that ‘distorts’ the economic decision-making or behaviour of consumers encompasses all the kinds of behaviours and practices raised in the Consultation Paper. This is further supported by the inclusion of the grey list.

¹ Consultation Paper, 4; Jeannie Marie Paterson and Elise Bant, ‘Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online’ (2020) 44 *Journal of Consumer Policy* 1, 14; Jeannie Marie Paterson et al, ‘Beyond the Unwritten Law: The Limits of Statutory Unconscionable Conduct’ (2023) 17 *Journal of Equity* 1, 29–30.

² Consultation Paper, 10. See also Jamie Luguri and Lior Jacob Strahilevitz, ‘Shining a Light on Dark Patterns’ (2021) 13(1) *Journal of Legal Analysis* 43.

³ Consultation Paper, 14.

⁴ *Macquarie Dictionary* (online at 13 December 2024) ‘distort’ (def 2).

⁵ *Oxford English Dictionary* (online at 13 December 2024) ‘distort’ (def 3).

⁶ *Macquarie Dictionary* (online at 13 December 2024) ‘manipulate’ (def 2).



Provision should instead target conduct that ‘materially distorts’

The Consultation Paper notes the use of ‘unreasonable’ draws in an objective standard and supports a commonsense approach.⁷ However, there are ways to bring in an objective standard that are more directed to the kinds of conduct Treasury seeks to capture, and not capture, under the prohibition.

Prohibiting conduct that ‘materially distorts’ economic decision-making or behaviour will capture distorting behaviour or practices that are ‘relevant’ and ‘not insignificant’.⁸ This language mirrors the prohibitions against unfair trading in the European Union⁹ (and the UK¹⁰) and will give courts greater reason to consider case law or other material from these countries in understanding the nature of distorting conduct (especially given the UK’s common law system).

Further, the use of ‘material’ has a limiting effect. The exclusion of ‘insignificant’ distortion gives the regulator a threshold for enforcement and the exclusion of ‘irrelevant’ distortion gives certainty in the sense that there must be some nexus between the conduct and its impact.

1.3. Possible outcomes of including a reference to ‘a consumer’

We want to ensure Treasury is aware of the potential ramifications of making reference to ‘a consumer’ in the provision.

We understand the proposed provision specifically captures conduct that impacts ‘a consumer’ in order to limit the application of the provision to those who fall within the definition of consumer in s 3 of the ACL, as opposed to small businesses or other entities.

Yet, this reference also raises possible issues around the relevant audience of the distortion. That is, does the prohibition capture conduct that materially distorts the economic decision-making or behaviour of **any consumer**, or just **the consumer(s) to whom the conduct was directed**? In our view, the court will read that conduct can only be captured in relation to consumers it was directed to, given the requirement of relevancy and the purpose of the provision. However, we suggest for the avoidance of doubt and to confine the scope of the section to reasonable bounds, the possible inclusion of the words ‘to whom the conduct was directed’.

In dealing with this issue, we do not support limiting the protection to the ‘average’ consumer. The courts will also need to consider from whose perspective it will be determined whether conduct is distorting. The EU provision in the *Unfair Commercial Practices Directive* (‘UCPD’) has had a narrowing effect by making reference to the ‘average consumer’. According to the European Court of Justice, an ‘average consumer’ is someone who is ‘reasonably well-informed and reasonably observant and circumspect’.¹¹ This standard has been criticised as disadvantaging consumers who are vulnerable.¹² It also ignores the reality that consumers are a heterogenous group, experiencing and engaging with

⁷ Consultation Paper, 14.

⁸ Ibid.

⁹ Council Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council; Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22 (‘UCPD’).

¹⁰ *Consumer Protection from Unfair Trading Regulations 2008* (UK) pt 2.

¹¹ See UCPD (n 9) arts 5(2), 5(3), recital 18. See also *Gut Springenheide v Tusky* (C-210/96) [1998] ECR I-4657, [31].

¹² See OECD, ‘Consumer Vulnerability in the Digital Age’ (OECD Digital Economy Papers No 355, June 2023) 29–31; Jeannie Marie Paterson and Gerard Brody, ‘Safety Net Consumer Protection’ (2015) 38 *Journal of Consumer Policy* 331.



information and the marketplace in varying ways (especially given rapid developments in information provision and the digital marketplace).¹³

We also do not support including a category of ‘vulnerable consumer’ in the way that is done in the EU’s UCPD.¹⁴ The OECD has also recently recognised that we can not only consider the impact of distortion on vulnerable consumers as defined by personal characteristics (age, gender, educational status etc). Instead, and especially in the digital marketplace, consumers are generally vulnerable due to the nature of distorting conduct itself, other situational characteristics (grief, poor mental health, negative body image etc) and any compounding personal characteristics.¹⁵ This is especially so in instances of personalised advertising or pricing.

In our view, the courts will approach the question ‘based on whose perspective will it be determined whether conduct is unfair’ in a similar way to misleading or deceptive conduct or unconscionable conduct. For the former, this would involve considering the boundaries of reasonable responses for conduct directed to the public or a section of the public, or the specific characteristics of an individual/s to whom conduct is directed to.¹⁶

1.4. Concerns with alternative elements

We have explained why the provision will be sufficiently limited. It picks up distorting conduct that is harmful to consumers but currently falls through gaps in the ACL, as well as conduct that may emerge in the context of a rapidly changing marketplace. However, businesses can be certain that well accepted marketing techniques that are fair for consumers will not be picked up. Regulators can recognise a threshold for enforcement that accords with community.

For this reason, there is no need to include additional limiting factors beyond the terms themselves (ie the definition of ‘distortion’ and the standard imparted by the reference to ‘unfair’ practices) and the requirement that distortion is ‘material’.

No need to include a legitimate interest test

There is no need to include a legitimate interest test because the prohibition is sufficiently limited.

Further, several submissions sent in response to the 2023 Consultation Paper explained why the inclusion of a legitimate interest was not suited to the prohibition. These concerns remain relevant and include:

- Allowing the ‘legitimate interests’ of businesses to weigh into the determination of whether a practice is unfair could override the considerations of harm caused to consumers. We note that in the context of unfair terms, ‘legitimate interests’ has been interpreted broadly by the courts.¹⁷

¹³ OECD (n 12) 14–28.

¹⁴ Ibid 30. See also UCPD (n 9) art 5(3).

¹⁵ OECD (n 12) 14, 23 citing among others E Mik, ‘The Erosion of Autonomy in Online Consumer Transactions’ (2016) 8(1) *Law, Innovation and Technology* 1; N Helberger et al, *EU Consumer Protection 2.0: Structural Asymmetries in Digital Consumer Markets* (Report, 2021); OECD, *Quality Considerations in Digital Zero-Price Markets: Background Note by the Secretariat* (Report, 2018).

¹⁶ See *Russell v Miller*, *Miller’s Australian Competition and consumer Law Annotated* (Thomson Reuters, 44th ed, 2022) 1426–32.

¹⁷ See *Jetstar Airways Pty Ltd v Free* [2008] VSC 539; *Pacciocco v Australia and New Zealand Banking Group* (2016) 258 CLR 525.



- Systemic and industry-wide business practices that should be considered unfair may be seen as 'legitimate' given the need to consider 'broad business practices in the relevant industry' and 'standard industry practices'.

No need to include a standard of behaviour

There is no need to include a limb that the business has breached a particular standard of behaviour (such as professional diligence) because the prohibition is sufficiently limited.

Even though our proposed drafting no longer makes reference to 'unreasonable' manipulation or distortion, the notion of a contravention of good faith or special care or skill is still incorporated by prohibiting conduct that materially distorts consumer's economic decision-making and behaviour.

1.5. Recommended drafting

For these reasons, we propose that a general prohibition on unfair trading practices capture a business's conduct where it

- Materially distorts, or is likely to materially distort, the economic decision-making or behaviour of the consumers to whom the conduct was directed.



Part 2. Improving the Grey List

We submit that while the proposed grey list captures a range of unfair trading practices, it also allows room for ambiguity and uncertainty (as we demonstrate in Part 3 of this submission). Given that the grey list is important in illustrating the kind of conduct that distorts the economic decision-making or behaviour of a consumer, we suggest the following additions to the grey list to provide further clarity on what constitutes an unfair trading practice without creating an overly restrictive framework.

We propose adopting language that would capture OECD's categories of dark patterns listed in Appendix B of the Consultation Paper to the grey list of examples, including dealing with the following:

- **False Hierarchy:** Highlighting or awarding visual prominence to options that least favour consumers or using visual symmetry to nudge customers toward specific choices.¹⁸
- **Confirm Shaming:** Using wording that deters users from certain choices or frames alternatives as poor decisions.¹⁹
- **Pre-selection:** Setting defaults that benefit the trader — this should include requiring consumers to opt into favourable options, or treating inaction as implied consent to trader's practices (eg, Epic Games' opt-in checkbox to avoid storing credit card details)

While we acknowledge that in the OECD's list 'sneaking' acknowledges default-bias, it is anchored in the practice of sneaking costs (that consumers are not aware of) into shopping cart — and does not capture conduct like the above where financial or personal information is collected by capitalising on default-bias. Hence, we propose a general prohibition on 'pre-selection' where any default that benefits the trader (and materially distorts or is likely to materially distort consumer economic decision making or behaviour) must be captured.

'Interface–interference' suggested in the OECD's list could potentially capture this behaviour as well. However, this would more adequately capture practices such as Adobe's design of pre-selecting an annual subscription plan for its consumers and only partly revealing the existence of an early termination fee (with full disclosure hidden only in the fine print)²⁰ — such practices tend to exploit default bias by hiding material information *and* pre-selecting options that benefit businesses. Again, the bar for interface–interference is slightly higher than the threshold for pre-selection and default-bias we suggest here.

The clarification we provide here is to expand the application of law to subtle design choices that leverage behavioural biases exhibited by consumers as well, and not to limit the scope of protection to only to these explicitly enumerated practices.

We submit that the examples in the grey list must remain dynamic and only serve to *inform* in illustrating the kind of conduct that distorts decision-making, without becoming a rigid checklist that inadvertently creates loopholes for novel forms of unfair practices. Thus the direction as to the grey list should be similar for unfair contract terms, emphasising that they are examples of the kinds of conduct

¹⁸ Federal Trade Commission, *Bringing Dark Patterns to Light* (Staff Report, FTC Bureau of Consumer Protection, September 2022)

¹⁹ *Ibid.*

²⁰ United States of America, 'Complaint for Permanent Injunction, Monetary Judgment, Civil Penalty Judgment, and Other Relief', Submission in *United States of America v Adobe Inc*, Case No 5:24-cv-03630-BLF, 17 June 2024 <https://www.ftc.gov/system/files/ftc_gov/pdf/040-UnredactedComplaint.pdf>. See also Dark Patterns Laboratory, 'Breaking Down Adobe's Missteps: Why the FTC Stepped In' (Blog Post) <<https://www.darkpatternslab.com/article/breaking-down-adobes-missteps-why-the-ftc-stepped-in>>.



that *may* be unfair. There may in some instances be examples where the conduct listed above protects consumer interests. For example, some degree of friction in the unsubscription process may be important where the consequence of unsubscribing is consumers lose unsaved digital conduct.



Part 3. Testing Dark Patterns

This section will apply our proposed definitions and the provided examples in the grey list to two distinct scenarios:

- Amazon Audible’s unsubscription process (which, to date, has not been subject to legal scrutiny); and
- Epic Games’ billing practices (which have been held to have violated s 5 of the *Federal Trade Commission Act*).

3.1. Amazon Audible’s unsubscription process

The following analysis dissects each step of the unsubscription process and then the entire process collectively, to demonstrate how seemingly compliant practices can cumulatively create barriers that materially distort consumer behaviour.

3.1.1. Use of False Hierarchy

- The interface, as shown in image 1.1, prominently features the ‘switch membership’ option over other options like ‘cancel membership’. This design is known as a ‘false hierarchy’ in the Dark Patterns literature

It is not clear if the current grey list sufficiently captures this behaviour

- The use of brighter colours or bigger font size to place emphasis on one option strategically directs the consumer’s attention to options that benefit the business. This can have the effect of subtly discouraging service termination by guiding users into alternatives that help the business retain the consumer on the platform. According to a study by the Consumer Policy Research Centre, one in four Australians perceive these tactics as manipulative. Hence, empirically, this does distort the economic behaviour of a consumer. However, whether the proposed grey list adequately captures this is questionable.
- These tactics could potentially be seen as undermining the consumer’s ability to make a free and uninfluenced choice, for they subtly obstruct a straightforward cancellation process by making it less visible or intuitive. However, whether this constitutes ‘undue pressure, obstruction, or undermining’ of a consumer’s economic decisions under the grey list is not entirely clear.
- Therefore, we propose that the non-exhaustive examples within the grey list explicitly include the use of false hierarchy and the strategic awarding of visual prominence to options that disproportionately benefit businesses over consumer-friendly alternatives as a potentially unfair trading practice.

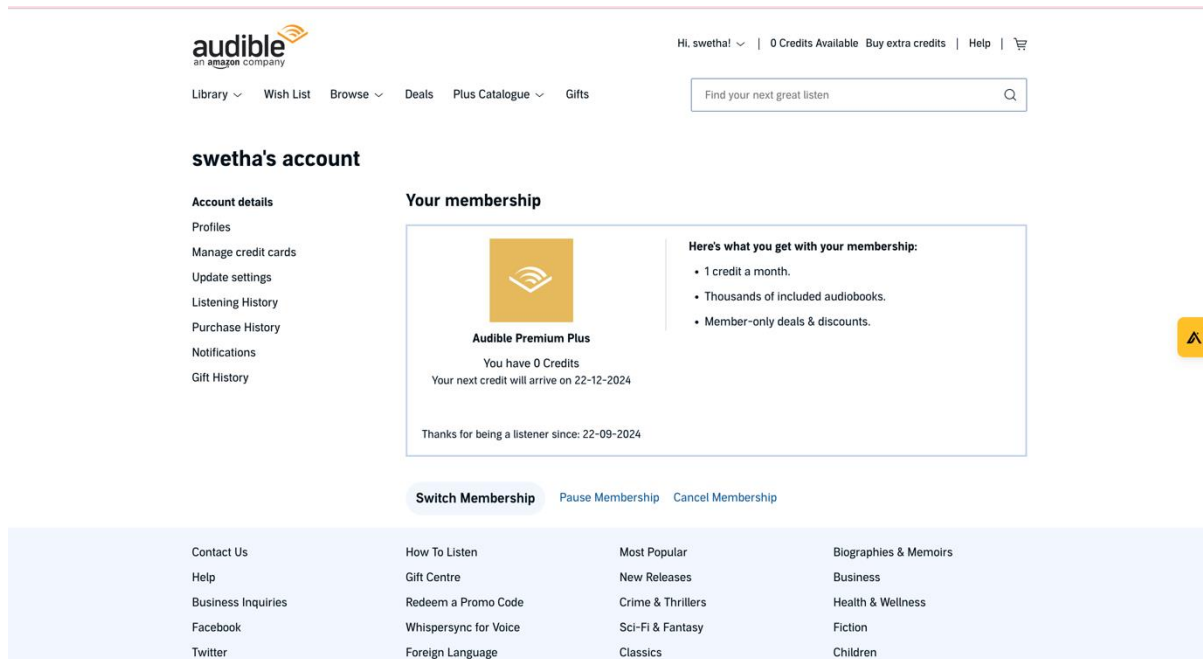


Image 1.1

3.1.2. Visual Prominence and Confirm Shaming

- First, Audible sets 'pause membership' as the primary visible option and places the 'cancel membership' option at the bottom of the screen (see image 2.1).
- Second, Audible uses 'confirm shaming', whereby the consumer is prompted to reconsider their choice several times (eg: 'When you leave, you will lose access to these exclusive member benefits') with prominent messages and images of benefits lost upon leaving (see image 2.1, 2.2, 2.3).
- The user must scroll to the bottom of the screen to locate the 'continue cancelling' option.

It is not sufficiently clear whether the grey list would cover this practice.

- Making cancellation less accessible introduces friction and increases the effort required to cancel. Unless the consumer scrolls down to the very bottom of the page, the consumer is not made aware of the existence of alternate options.
- Furthermore, as the consumer scrolls down the page, the display of benefits that consumers will not have access to upon cancelling the service exploits loss aversion, a cognitive bias where people fear losing what they already have more than they value potential gains. This can delay a consumer's evaluation of whether the service is worth cancelling. These intentional design choices create a layered effect of obstacles, all of which is intended to make a consumer reconsider their choice (see image 2.3).
- In the EU, Guidelines 526/102 ('Guidelines') to the UCPD make it clear that steps like confirm shaming that employ language such as 'here are the benefits you will lose' are prohibited under art 9(d).²¹ Specifically, this provision prohibits use of 'any onerous or disproportionate

²¹ Commission Notice: Guidance on the Interpretation and Application of Directive 2005/29/EC of the European Parliament and of the Council Concerning Unfair Business-to-Consumer Commercial Practices in the Internal

non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader'. The Guidelines also require businesses to present consumers with free and clear choices that are proportionate and specific to the decisions that consumers intend to make.²²

- The proposed grey list in the Consultation Paper mentions the use of design elements that unduly pressure, obstruct, or undermine a consumer's decision-making as an example of unfair trade practice. However, it is not entirely clear if this unequivocally prohibits use of language and visual prominence (as argued under 3.1.1) that subtly exploits the cognitive bias of loss aversion. Hence, in line with our proposal in Part 2 of this submission, the addition of 'False Hierarchy' and 'Confirm Shaming' to the grey list examples can guide interpretation of this conduct.

The screenshot shows the Audible website interface. At the top, there is a navigation bar with the Audible logo, user information (Hi, swetha!), and account options (0 Credits Available, Buy extra credits, Help, and a shopping cart icon). Below the navigation bar, there are links for Library, Wish List, Browse, Deals, Plus Catalogue, and Gifts, along with a search bar. The main content area features a heading: "When you leave, you'll lose access to these exclusive member benefits." followed by "You've still got time to listen" and a paragraph explaining the consequences of canceling. A prominent "Pause membership" button is displayed. Below this, a "Bestsellers" section is shown with a "View all" link. The bestsellers are presented as a row of book covers with their titles and authors: "Wind and Truth" by Brandon Sanderson, "Quicksilver" by Callie Hart, "Lights Out" by Navessa Allen, "Atomic Habits" by James Clear, "Fourth Wing" by Rebecca Yarros, and "The Anxious Generation" by Jonathan Haidt. Each book cover includes a "1 CREDIT" badge.

Image 2.1

Market (Text with EEA Relevance) [2021] OJ C 526/1, [102] <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC1229\(05\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC1229(05))>.

²² Ibid.

Get member-only pricing and deals on select audiobooks

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Don't lose access to the Plus Catalogue

After your membership is cancelled, you'll no longer be able to listen to thousands of titles in the Plus Catalogue.

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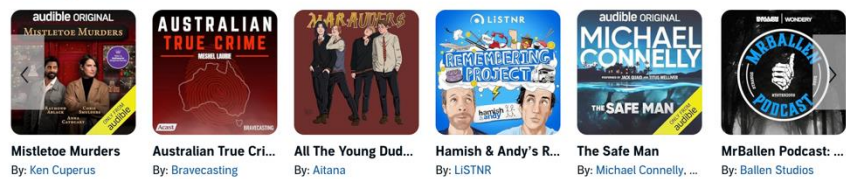


Image 2.2

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Trending podcasts



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Image 2.3

A user must scroll down to locate the option that would allow them to continue cancelling.



3.1.3. Offering Incentives to Retain Subscribers

- Various enticing offers (eg discounts, subscription pauses) are presented to exploit consumer susceptibility to immediate rewards (see image 3.1). Additionally, the user must scroll down to locate 'Finish Cancelling' (see image 3.2).

Analysis

- Here, Audible presents a discounted 'Premium' option, a low-cost 'Standard' plan (not initially offered at the time of subscription — see image 3.3), and a 'Pause Membership' option. Studies indicate that presenting consumers with too many options can lead to decision fatigue, regret, and reduced satisfaction with their ultimate choice.²³ This step forces consumers attempting to cancel their subscription to navigate through discounted offers, upsells, and alternative options. By emphasising these alternatives over cancellation, the interface encourages consumers to reconsider their decision, impacting long-term decision-making.
- While it may be argued that these alternatives benefit consumers terminating their service due to high costs, the interface employs a false hierarchy by awarding visual prominence to the discounted offers over the cancellation option. This design exploits consumer susceptibility to immediate rewards, creating friction in the cancellation process, and is likely to materially distort consumer decision-making.
- Under the Federal Trade Commission's ('FTC') Negative Option Rule (adopted October 2024)²⁴ such practices are permissible, pending further clarification, only if they do not erect further barriers to cancellation. By implication, the design must be free of dark patterns. The Guidelines to the UCPD also discuss how the use of prominent images that encourage the use to continue with the subscription instead of cancelling constitute 'visual interference' and could breach art 9(d) as well. Consequently, according to both US and EU regulatory standards, the design of this interface, even if not the practice of offering discounts per se, fails to meet the legal requirements.
- Similar to the EU's position, although the principle of offering discounts does not necessarily contravene any guidelines, the deliberate design choice to make these options more visually prominent than the cancellation option could be considered a form of obstruction, as listed in the grey list. Hence, in line with our proposal in Part 2 of this submission, the addition of 'False Hierarchy' can provide further clarity in such situations.

²³ Forbrukerrådet, *You Can Log Out, But You Can Never Leave: How Amazon Manipulates Consumers to Keep Them Subscribed to Amazon Prime* (Final Report, 14 January 2021) <<https://storage02.forbrukerradet.no/media/2021/01/2021-01-14-you-can-log-out-but-you-can-never-leave-final.pdf>>.

²⁴ Federal Trade Commission, 'Rule Concerning Recurring Subscriptions and Other Negative Option Programs' (Final Rule, Federal Register, 15 November 2024) <<https://www.federalregister.gov/documents/2024/11/15/2024-25534/negative-option-rule>>.

WE HEAR YOU.

We'd love to make Audible work for you. Would you be interested in the offer below?

YOUR CURRENT PLAN
Audible Premium Plus
\$16.45 a month

- ✓ 1 credit a month to use on any title, yours to keep
- ✓ Access the Plus Catalogue—unlimited listening to select audiobooks, Audible Originals, podcasts, and more



SPECIAL OFFER

50% off Premium Plus

\$8.00/mo for 3 months then \$16.45/mo after

- ✓ Get 1 credit a month to buy any audiobook from our entire collection. Yours to keep, even if you cancel.
- ✓ Listen to thousands of

Pause your membership

Take a break

Sometimes you just need a break. Keep your credits and pause payments for the next 30, 60, or 90 days.

- 30 days

LOWER PRICE PLAN

Save with Standard

Only \$8.99 a month

- ✓ Select 1 audiobook a month from our entire collection.
- ✓ Listen to your selected audiobooks as long as you're a member.

Image 3.1

This step prioritises lower-price plans, causing a user to interact with these options at some level before they could scroll down to cancel the service.

SPECIAL OFFER

50% off Premium Plus

\$8.00/mo for 3 months then \$16.45/mo after

- ✓ Get 1 credit a month to buy any audiobook from our entire collection. Yours to keep, even if you cancel.
- ✓ Listen to thousands of additional audiobooks and Originals from the Plus Catalogue.
- ✓ Enjoy member-only deals & discounts.

Claim offer

Pause your membership

Take a break

Sometimes you just need a break. Keep your credits and pause payments for the next 30, 60, or 90 days.

- 30 days
- 60 days
- 90 days

[Learn more about pausing your membership.](#)

Pause membership

LOWER PRICE PLAN

Save with Standard

Only \$8.99 a month

- ✓ Select 1 audiobook a month from our entire collection.
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Select this plan



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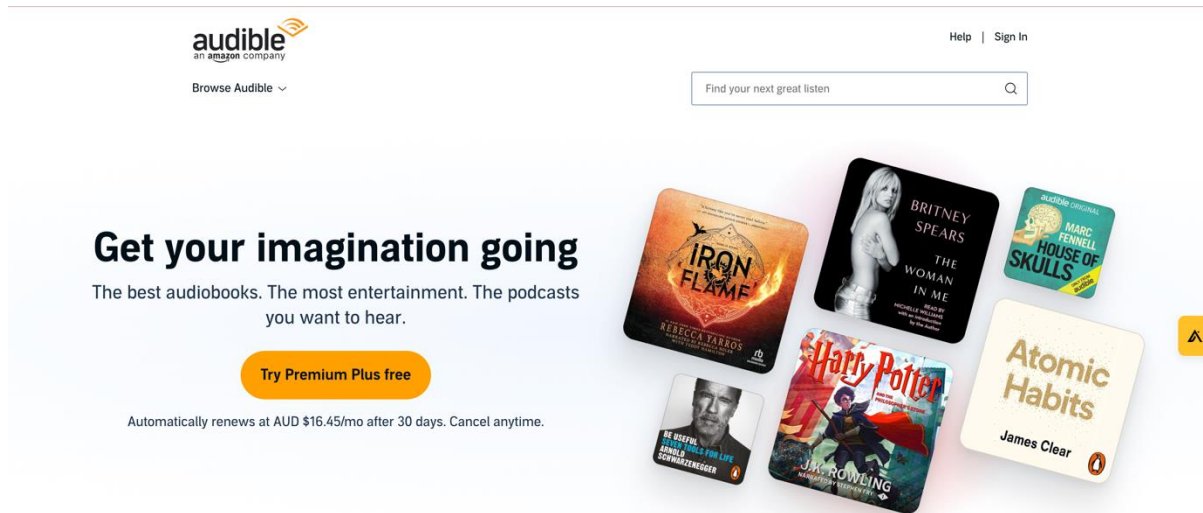
From account queries to tech support- if there's anything that would change your mind about canceling, please give us a call. Contact Customer Care

[Back to my account](#)

Finish Cancelling

Image 3.2

A user must scroll down to the screen to locate 'Finish Cancelling'.



We've got what everyone's listening to

Best sellers. New releases. That story you've been waiting for.

Image 3.3

A user is presented with a free trial to the Premium Plus option (as opposed to the Standard option) as their gateway to Audible.

3.1.4. Feedback

- This step can be seen as justified in serving the trader's interests. It fulfills a dual purpose: allowing the company to collect valuable feedback for improving its services while providing consumers an opportunity to share their experiences.

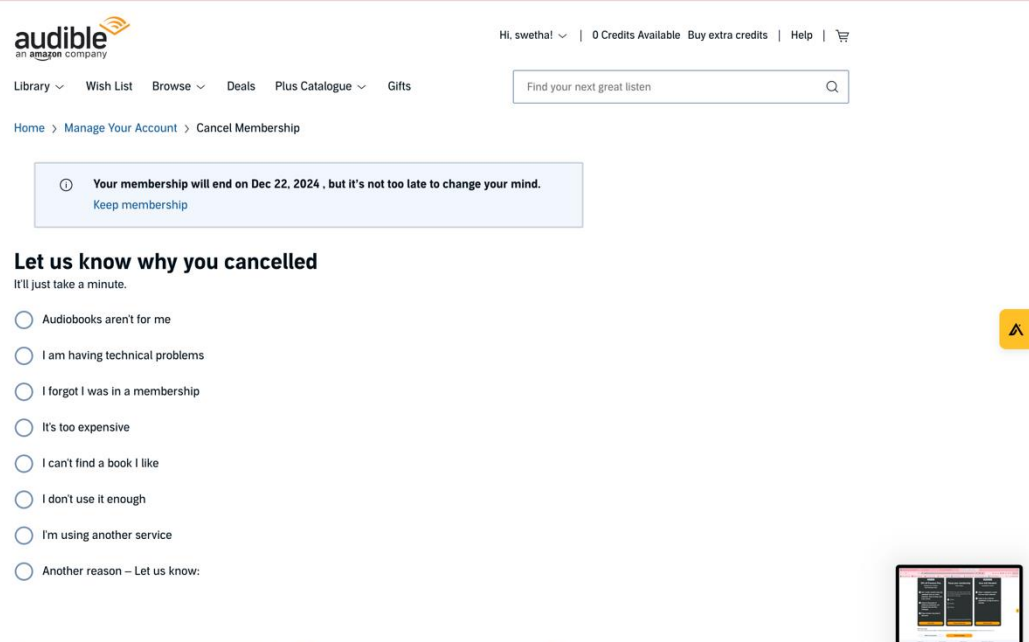


Image 4.1

Image 4.2

3.1.5. Simplified Resubscription

- After completing the cancellation survey, consumers are directed back to a screen that facilitates resubscription with just a single click (image 5.1).
- Users are also emailed about the termination (image 5.2), with the body of the email containing a bright option that would help them resubscribe with one-click (image 5.3).

Analysis

- While this practice might not be questionable in isolation, the ease of re-engagement starkly contrasts with the multiple, complex steps required to cancel the subscription
- By making resubscription significantly easier and prominently accessible at the conclusion of the cancellation process, and by sending consumers an email with a prominent resubscribe button, Audible introduces a design that undermines the consumer's earlier decision to cancel. This practice likely distorts decision-making by exploiting friction asymmetry (fewer steps to subscribe vs several steps to unsubscribe), nudging consumers toward reversing their choice despite the initial effort to terminate the service.

swetha's account

Feedback sent
Thank you for submitting your cancel reason

Account details
Profiles
Manage credit cards
Update settings
Listening History
Purchase History
Notifications
Gift History

YOUR MEMBERSHIP ENDS SOON
Stay and save with our membership offers

Your membership

Your membership will expire on Dec 22, 2024. You have less than 12 days left to enjoy your Audible Premium Plus plan and use any remaining credits — but it's not too late to change your mind.
[Keep membership](#)

Audible Premium Plus
You have 0 Credits
Membership ends 22-12-2024
Thanks for being a listener since: 22-09-2024

Here's what you get with your membership:

- 1 credit a month.
- Thousands of included audiobooks.
- Member-only deals & discounts.

Keep membership

You will be billed \$16.45 per month. Cancel anytime.

[Switch Membership](#)

Image 5.1

swetha's account

Account details
Profiles
Manage credit cards
Update settings
Listening History
Purchase History
Notifications
Gift History

YOUR MEMBERSHIP ENDS SOON
Stay and save with our membership offers

Your membership

Your membership will expire on Dec 22, 2024. You have less than 9 days left to enjoy your Audible Premium Plus plan and use any remaining credits — but it's not too late to change your mind.
[Keep membership](#)

Audible Premium Plus
You have 0 Credits
Membership ends 22-12-2024
Thanks for being a listener since: 22-09-2024

Here's what you get with your membership:

- 1 credit a month.
- Thousands of included audiobooks.
- Member-only deals & discounts.

Keep membership

You will be billed \$16.45 per month. Cancel anytime.

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Image 5.2



Hi swetha,

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Sincerely,
Audible

Image 5.3

3.1.6. The Entire Process

- Even if the individual steps such as displaying discounts or requiring feedback do not independently constitute a compelling barrier, the cumulative effect of these measures creates a framework that materially distorts consumer behaviour in the following manner:
 - Structurally, consumers are pressured into reconsidering their cancellation at every step, through a series of psychological and design-based interventions aimed at convincing them to reconsider their decision against appealing alternatives.
 - Design-wise, the interface redirects their attention by awarding visual prominence to options that would retain them on the platform and distorts consumer behaviour toward actions that benefit the trader (eg switching plan, pausing subscription, or resubscribing).
 - Allowing consumers to resubscribe at the final step, and email nudges that allow them to resubscribe creates a stark contrast to the complex, multi-step cancellation process.



This friction asymmetry undermines the consumer's earlier decision to cancel and nudging them toward reversing it, often against their initial intent.

- Framing the question to thus shape the nature of inquiry into the conduct places emphasis on the nature of the design and the trade practice itself rather than the 'detriment' caused to the consumer. The entire process is also captured by the prohibition on 'use of design elements in online consumer interfaces that unduly pressure, obstruct or undermine a consumer in making an economic decision' as in the grey list.

3.2. Epic Games' credit card authorisation practice

This analysis evaluates Epic Games' billing practices by referencing the FTC's complaint against Epic Games.²⁵ We use the evidence (screenshots of dark patterns) gathered by the FTC for the following analysis.

Relevant to this analysis is the fact that Fortnite, developed by Epic Games, is listed in the Epic Games Store under the 'Free to Play' category, attracting a significant young audience among its 400 million registered users. While the game itself can be downloaded at no cost, it features in-game purchases and a premium version available for a fee. The Epic Games Store, which also offers other video games, saved the credit card details of users who made purchases on the platform. This information was then used to facilitate transactions in Fortnite. However, users were not informed that their payment information would be stored indefinitely.

This section analyses Epic's billing practices for the free version of the game.

3.2.1. Representations at the time of downloading the game

- When the game is accessed via one's personal computer, users encounter a bright yellow 'GET' button prominently displayed next to the word 'Free' (see image 2.1).
- When the user scrolls to the bottom of the page, they may notice a white box with the words 'in-game purchases', along with the age-rating for the game.
- In a subsequent update, the phrase 'in-game purchases' was moved to a more visible position at the top of the page. However, the interface awarded visual prominence to 'Get', still accompanied by the 'Free' label — while 'in-game purchases' was displayed in a smaller, less noticeable grey font (see image 2.2). Neither version disclosed how and whether authorisation would be sought for in-game purchases.
- After downloading the game, users (including children or their parents) could begin playing immediately. Players could compete with others, customise their characters, or create mini-games. However, many of these features required in-game purchases, which children could make freely with a single click, without obtaining parental or cardholder consent.

²⁵ Federal Trade Commission, 'Complaint', Submission in *Epic Games*, Docket No C-4790, 13 March 2023 <https://www.ftc.gov/system/files/ftc_gov/pdf/1923203epicgamesfinalconsent.pdf>.

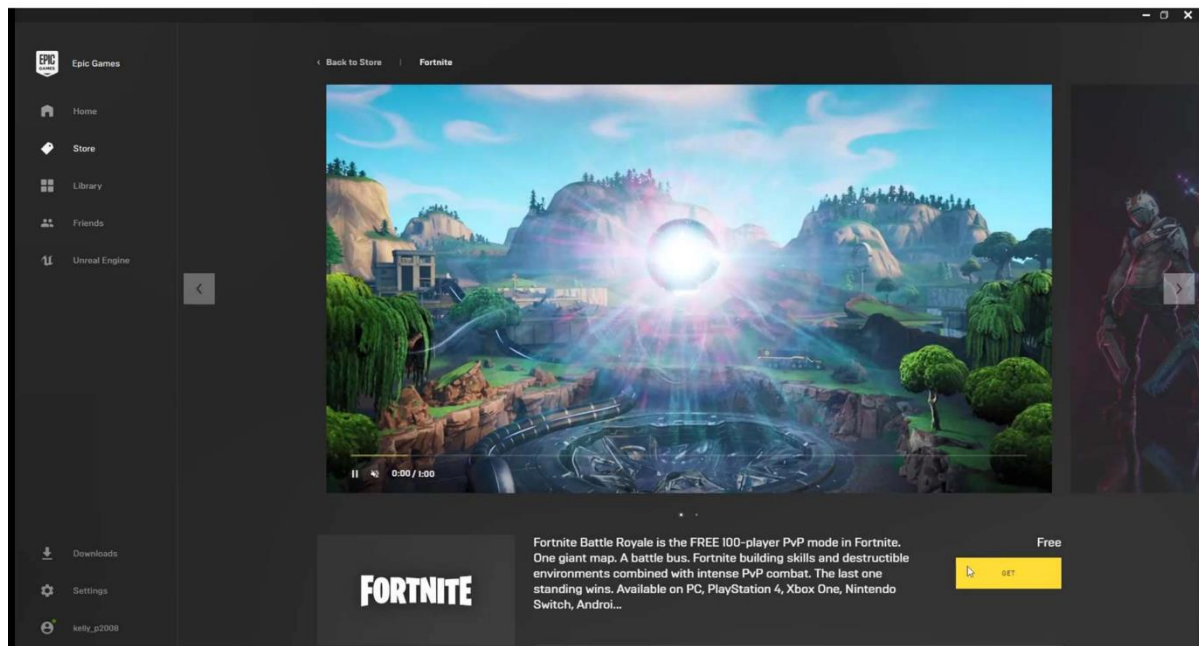


Image 2.1 (Image taken from FTC's complaint against Epic Games)

Analysis

- In both these images, Epic Games employs a visual hierarchy strategy, emphasising certain elements while downplaying others, which capitalises on the typical internet user behaviour of scan-reading. This behaviour involves users focusing on one visual element at a time and swiftly moving on, often missing essential information that could influence their decision-making.
- By failing to communicate whether and how authorisation will be sought to confirm a purchase, Epic omits material information. This conduct is sufficiently captured by the grey list.
- The positioning of 'in-game purchases' at the bottom of the screen, as opposed to the bright yellow 'GET' button on the top of the screen, falsely shapes their understanding of the game. This conduct is captured by the grey list's prohibition on 'the use of design elements in online consumer interfaces that unduly pressure, obstruct, or undermine a consumer in making an economic decision'.
- Even where the 'In Game Purchases' representation has been moved to the top of the screen (as shown in image 2.2), the information is provided in an unclear or unintelligible manner. It employs visual hierarchy to highlight 'Get' and 'Free' over other material information. This can arguably fall under one of the grey list examples. However, we submit that, in line with our proposal in Part 2 of this submission, the inclusion of 'False Hierarchy' to the grey list can remove any ambiguity or uncertainty in regulating this conduct.

Fortnite

Overview Add-Ons

The IO has lined up guards and sky stations, but the Resistance is equipped with new tactics like sprinting, mantling, and more. Board an Armored Battle Bus to be a powerful force or attach a Cow Catcher to your truck for extra ramming power. Take on your opponents in the ultimate battle for the Zero Point in Chapter 3 Season 2: Resistance!

Genres: Action, Shooter

Features: Co-op, Multiplayer, Single Player, Controller Support

Fortnite Chapter 3 Season 2: Resistance

Join the Resistance in the final battle to free the Zero Point!

The IO has lined up guards and sky stations, but the Resistance is equipped with new tactics like sprinting, mantling, and more. Board an Armored Battle Bus to be a powerful force or attach a Cow Catcher to your truck for extra ramming power. Take on your opponents in the ultimate battle for the Zero Point in Chapter 3 Season 2: Resistance!

The Chapter 3 Season 2 Battle Pass includes the Master of the Mystic Arts, Doctor Strange. Joining him in the Battle Pass are characters like Tsuki 2.0, the familiar foe Gunnar, and revealed at last: The Origin. Also, complete special Quests to "reprogram" the Omni Sword Pickaxe. Configure it with a different blade, guard, color, and even sound!

Battle. Build. Create.

Fortnite is the free, always evolving, multiplayer game where you and your friends battle to be the last one standing or collaborate to create your dream Fortnite world. Play both Battle Royale and Fortnite Creative for FREE. Download now and jump into the action. This download also gives you a path to purchase the Save the World co-op PvE campaign.

Fortnite Crew is the ultimate subscription offer for getting can't-miss Fortnite content! Join for only \$11.99 each month to get everything below:

- Battle Pass Included for the full Season - As a member of the Fortnite Crew, you'll always have access to the current season's Battle Pass!

BASE GAME

Free

GET

ADD TO CART

ADD TO WISHLIST

TEEN
Violence
Users Interact, In-Game Purchases

Developer	Epic Games
Publisher	Epic Games
Release Date	07/21/17
Initial Release	07/21/17

Image 2.2 (Image taken from FTC's complaint against Epic Games)

3.2.2. Opt-in to avoid storing credit-card information

- After receiving consumer complaints about unauthorised charges, Epic Games later amended the checkout interface to include an option stating 'Make this a one-time payment. Don't save my credit card.' However, this option was presented in a smaller font and required users to opt-in actively, which maintained the default setting of storing credit card information.

It is not clear if the grey list sufficiently captures this behaviour:

- This strategy leverages the default bias, where individuals tend to stick with pre-selected options unless prompted otherwise. Given that Epic Games did not inform account holders that their cards would be stored unless they opted-in, consumers felt no need to, or were not directed to, opt-in to the check box and express their preference.



- In evaluating Epic Games' practice of requiring an opt-in for consumers who do not wish to store their credit card information, it is unclear if this specific conduct falls under the current grey list provisions concerning distortion of consumer behaviour.
- Notably, two potential categories might encompass this issue:
 - **The provision of material information in a manner that is unclear, unintelligible, ambiguous, or untimely, including information that overwhelms, or is likely to overwhelm, a consumer:** The fact that 'Make this a one-time payment. Don't save my credit card' is presented in smaller font as compared to the other elements on the screen could bring this conduct within the ambit of the grey list.
 - **The use of design elements in online consumer interfaces that unduly pressure, obstruct or undermine a consumer in making an economic decision:** It can be argued that had consumers been clearly presented with the requirement to opt-in to avoid storing credit card details, they would have intently opted in.
- While it is evident that the conduct distorts the economic behaviour of consumers, it remains unclear whether the current provisions of the grey list fully capture practices where businesses tend to capitalise on behavioural biases exhibited by consumers.
- Hence, in line with our proposal under Part 2 of this submission, the addition of 'Pre-Selection' can guide the interpretation of the legality of this conduct.

3.2.3. In-game design interface

- Epic Games charged users during gameplay if they inadvertently pressed buttons while browsing or previewing items for purchase. It also swapped the preview buttons and purchase buttons for 'Battle Pass' purchases.
- While player could accidentally make a purchase with one click, to cancel an accidental purchase, players had to press and hold a specific button and then further confirm their intent to request a refund. On the other hand, the interface did not present users with a confirmation pop-up, that would alert them to a potential purchase or spend.
- Later, Epic Games relocated the 'undo' button to a less conspicuous position at the bottom of the screen, embedding it in the page footer in a smaller font. This made it more challenging for users to notice and access the cancellation option (refer to images 2.3 and 2.4).

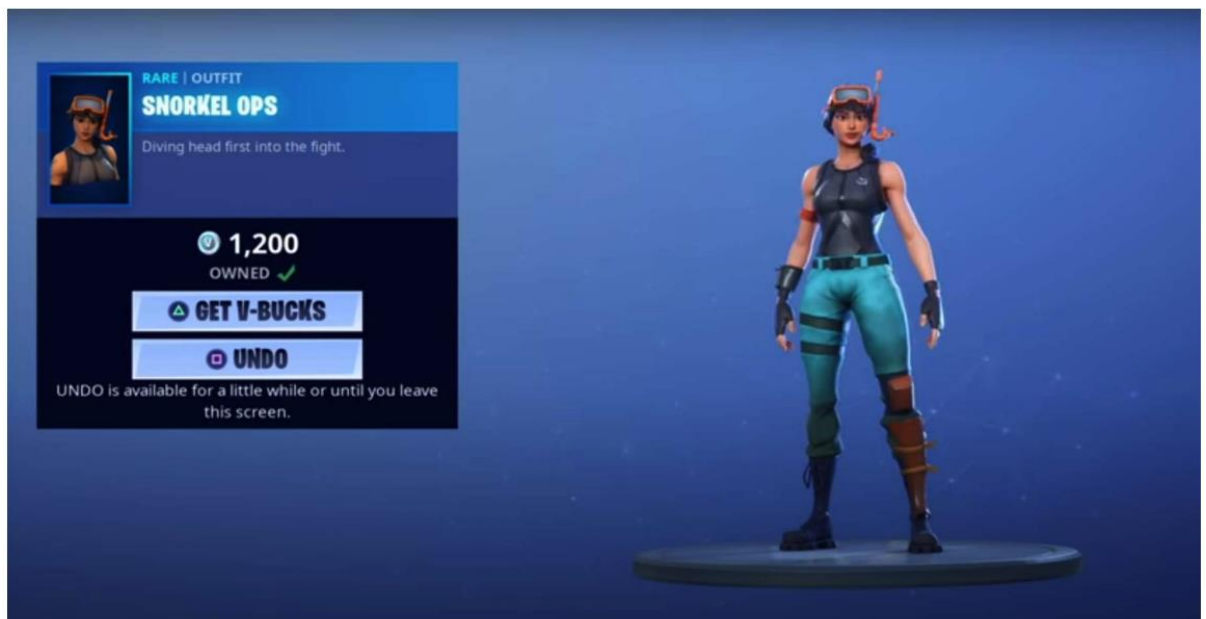


Image 2.3

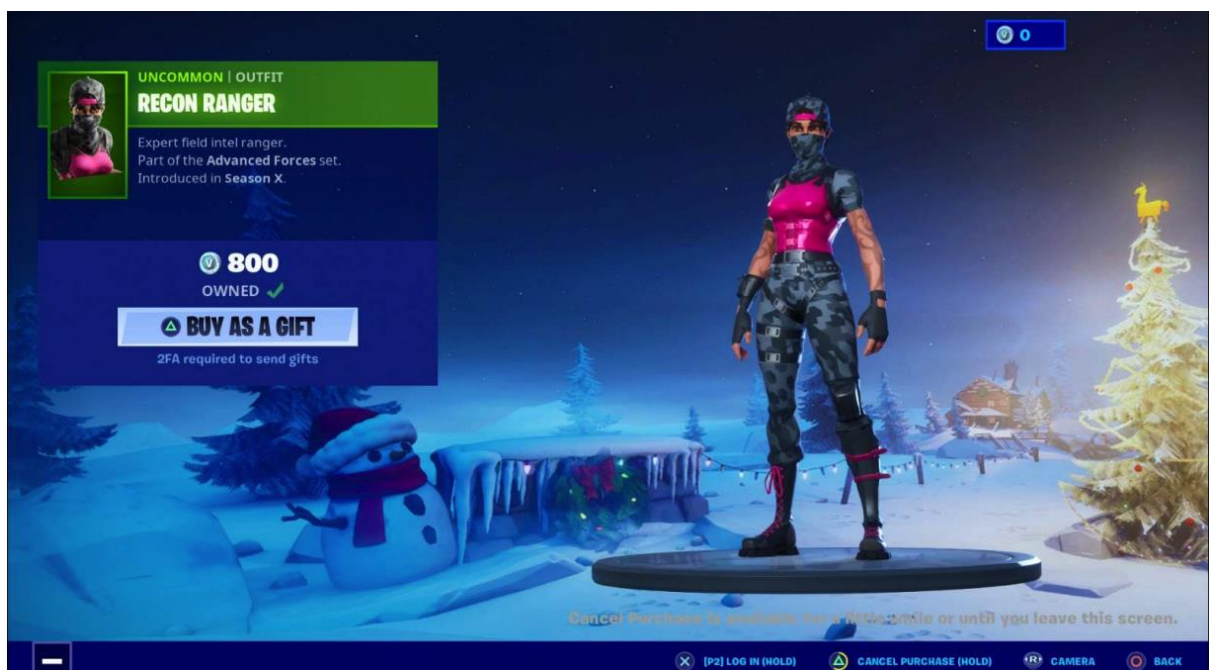


Image 2.4

The 'CANCEL PURCHASE (HOLD)' option has been moved to the footer, making it relatively inaccessible to users.



Analysis

- Here again, Epic Games employs a visual hierarchy strategy that emphasises options facilitating purchases while simultaneously relocating the 'undo' function to a less conspicuous area of the interface, reducing its font size.
- This design choice, aimed at deterring users from discovering their right to cancel a purchase and receive a refund, leverages the common internet behaviour of scan-reading or information-foraging discussed above in 3.2.1. After these changes were implemented, Epic observed a 35% decline in the undo rate, indicative of a significant impact on consumer behaviour.²⁶ This practice exemplifies the type of conduct that the grey list seeks to prohibit, specifically the use of design elements that unduly undermine the consumer's ability to make informed economic decisions, and would be adequately captured by the grey list.

²⁶ Ibid [40].