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## SPECIAL SECTION

# PLATFORM ECONOMY AND ITS IMPACT ON VULNERABLE DIGITAL CONSUMERS

## RETHINKING THE EFFECTIVENESS OF UCTD

### **Abstract**

The rapid proliferation of digitisation processes has exponentially increased the number of international online transactions, including business-to-business (B2B), business-to-consumer (B2C), platform-to-business (P2B) and platform-to-consumer (P2C) relationships. The unlimited economic potential of the Internet for commerce, enables the aggregation and globalisation of markets by offering new opportunities, while also requiring new forms of regulation of the digitised landscape. In such scenarios, in recent years it is fundamental to define a regulatory framework and to ensure a greater protection to vulnerable digital consumers. On this point, the digital revolution, which has overwhelmed the European market, trying also to protect the ‘weak’ party of digital contracts: the consumer-user. The use of digital platforms in contracting, governed at European level by the P2B Regulation, requires the rethinking of the traditional civil law profiles and the promotion of fair and transparent contractual practices.

Moreover, the digital transformation is also reshaping standard contract terms, their application and functionality. Indeed, with the emergence of online platforms, supported by algorithmic data analysis and self-enforcing technologies, platform terms and conditions are becoming increasingly common. The digitisation of standard terms poses challenges to the existing regulatory model of Unfair Contracts Terms Directive - recently amended by the ‘*Omnibus*’ Directive - in several aspects: it needs updating to address the challenges posed by digital services.

In light of an analysis of the rapid evolution of the digital landscape, the work, starting from the vulnerable digital consumer, intended to examine the impact of the platform economy on the latter, the (in)adequacy of the UCTD in the digital world and, finally, how the ‘*Omnibus*’ Directive addresses unfair digital contract terms.

**JEL CLASSIFICATION:** K12, K15

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**SUMMARY**

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**1 Introduction**

The unstoppable technological development<sup>1</sup> has strongly influenced (and continues to influence) the traditional consumer's role.

Information technology and telematics have profoundly crossed the legal phenomenon causing radical transformations<sup>2</sup> in the way of organising thought, working, educating and even purchasing<sup>3</sup>. Moreover, the purchase of digital goods and services with the simple action of a click, has exponentially increased the number of international online transactions, including business-to-business (B2B), business-to-consumer (B2C), platform-to-business (P2B) and platform-to-consumer relationships (P2C)<sup>4</sup>.

Thus, the unlimited economic potential of the Internet for trade enables the aggregation and globalisation of markets by offering new opportunities<sup>5</sup> and, at the same time, presupposes new forms of regulation of the digital landscape.

As well known, the attention given today to the phenomenon of digitisation makes it possible to identify the close relationship between law and technology: law is called upon

<sup>1</sup> Rumana Bukht and Richard Heeks, 'Defining, Conceptualising and Measuring the Digital Economy' (2017) 68 Development Informatics Working Paper Series 4.

<sup>2</sup> See Oreste Pollicino and others, *Diritti e libertà in Internet* (Le Monnier Università 2017).

<sup>3</sup> Eurostat's Digital Economy and Society Statistics - Households and Individuals (September 2020) <[https://ec.europa.eu/eurostat/statisticsexplained/index.php?title=Digital\\_economy\\_and\\_society\\_statistics\\_households\\_and\\_individuals/en](https://ec.europa.eu/eurostat/statisticsexplained/index.php?title=Digital_economy_and_society_statistics_households_and_individuals/en)> accessed 25 October 2024, on Internet access, which has gained a wide spread in the European Union: 'in 2007 it reached 55% of the population, rising to 75% in 2012, 85% in 2014, 89% in 2018 and finally 90% in 2020. See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Identifying and tackling barriers to the single market" COM (2020)93/F1 (10 March 2020), which states that between 2012 and 2018, despite the sharp increase in online shopping, the lack of confidence in cross-border online shopping compared to domestic online shopping has not diminished but, on the contrary, the percentage of consumers shopping online within the EU has almost doubled.'

<sup>4</sup> Cf A de Streel, 'Online Intermediation Platforms and Fairness: An Assessment of the Recent Commission Proposal' [2018] SSRN <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3248723](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3248723)> accessed 25 October 2024.

<sup>5</sup> Consider, in this regard, the pandemic crisis, which, following the imposition of social distancing and quarantine measures by states, led to an increase in online shopping, the use of online entertainment and online tools for professional purposes. See MC Causarano, 'Le piattaforme online e la tutela degli utenti digitali al tempo della pandemia' (2020) 4 Persona e Mercato 467. See also O Dumitru and AV Tomescu, 'European Consumer Law in the Digital Single Market' (2020) 10(2) Juridical Tribune 223.



to regulate technologies, while at the same time using the innovations made available to mankind to pursue its own ends and determine the creation of new rules<sup>6</sup>.

This leads (erroneously) to the assumption that the law-technology relationship is characteristic of more recent epochs, thus ending up by not giving so much prominence to the fact that law has always been related to technologies<sup>7</sup>. It is often the case, however, that technology evolves so rapidly that law cannot adapt or renew itself<sup>8</sup>.

In this context, it is necessary to dwell on another relationship: the one between technology, law and vulnerability<sup>9</sup>.

“The concept of vulnerability holds an important, yet often overlooked role. It is precisely in a digital era where technologies grow enormously and transactions are predominantly online that vulnerability becomes the breeding ground for exploitation techniques”<sup>10</sup>.

Indeed, the evolution of the European market pushes the legislator to prepare new regulatory initiatives aimed at realising and, at the same time, innovating the Digital

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<sup>6</sup> See CB Picker, ‘A View from 40,000 Feet: International Law and the Invisible Hand of Technology’ (2001) 23 *Cardozo Law Review* 149; J Babikian, ‘Justice in Flux: Evolving Legal Paradigms in Response to Technological Advancements’ (2023) 1(1) *Journal for Social Science Studies* 1, 16 <<https://journalofsocialscience.com/index.php/Journal/article/view/18>> accessed 25 October 2024; V Dudchenko, Y Tsurkan-Saifulina and K Vitman, ‘Legal Tech: Unravelling the Nature and Purpose of Modern Law in the Digital Era’ (2023) 6(3) *Social & Legal Studies* 24, 31; M Burri, ‘The Impact of Digitalization on Global Trade Law’ (2023) 24(3) *German Law Journal* 551, 573; V Zeno Zencovich and S Grumbach, ‘A Painful Divorce: Law vs Digital Technologies’ (2024) 1 *European Journal of Comparative Law and Governance* 1-22.

<sup>7</sup> See G Pascuzzi, *Il diritto dell’era digitale* (5<sup>th</sup> edition, il Mulino 2020) 26; A Manganelli and A Nicita, *Regulating Digital Markets - The European Approach* (illustrated edition, Springer International Publishing 2022) *passim*.

<sup>8</sup> G Giannone Codiglione *Internet e tutele di diritto civile: dati - persona - mercato: un’analisi comparata* (Giappichelli 2020) *passim*. An example comes from the issues raised on the subject of online standard contracts and digital platforms, where the need to adopt more modern rules and to update the list of unfair terms has recently been highlighted.

<sup>9</sup> With reference to the relationship between vulnerability and law: some scholars argue that the relationship between vulnerability and law has shown the presence of three elements that capture the essence of vulnerability: exposure to a risk, which is amplified for the vulnerable subject; lack of resilience: the vulnerable subject does not have the resources to avoid the risk that may cause the harm; the vulnerable subject is unable to respond adequately to the harm when the risk has materialised. The vulnerable subject’s greater exposure to risk determines the need to construct preventive protective measures, aimed at reducing the probability that such risks may materialise; and to provide for subsequent remedial measures, should the injury have occurred. On this point, see J Herring, *Vulnerable Adults and the Law* (Oxford 2016) 1; J Alwang, P Siegel and SL Jorgensen, ‘Vulnerability: a View from Different Disciplines’ [2001] *Social Protection Discussion Papers and Notes* 1; MA Fineman, ‘Introducing Vulnerability’ in MA Fineman and J Fineman (eds), *Vulnerability and the Legal Organization of Work* (first edition, Routledge 2017) *passim*.

<sup>10</sup> See G Guerra, *Redesigning Protection for Consumer Autonomy - The case-study of dark patterns in European private law* (Franco Angeli 2023) 169; C Lanza, ‘Vulnerability and AI-based technologies: European protection of vulnerable consumers in the digital market’ (Master thesis, Faculté de droit et de criminologie, Université catholique de Louvain 2023) <<http://hdl.handle.net/2078.1/thesis:42369>> accessed 25 October 2024; OECD, ‘Consumer vulnerability in the digital age’ [2023] 355 *OECD Digital Economy Papers* <<https://doi.org/10.1787/4d013cc5-en>> accessed 25 October 2024.

Single Market<sup>11</sup> (henceforth, DSM)<sup>12</sup> with specific regard to the area of European online contract law and to digital platforms, with the goal of guaranteeing protection to that ‘weak’ party of the digital contracting: the user-consumer<sup>13</sup>.

The research is structured to examine the notion of vulnerability, especially the concept of vulnerable consumer in the digital economy<sup>14</sup>, to ascertain what are the differences between the traditional consumer and the digital one (section 2).

Furthermore, the study also evaluates the impact of the platform economy on vulnerable consumers - whether digital technologies may exacerbate pre-existing vulnerabilities or create new ones - and some of the recent issues on digital contracts (para 2.3), discussing in which point the economy platform could make digital consumers even more vulnerable.

In conclusion, the work analyses common terms in contracts of digital services providers (DSPs), trying to understand whether this type of terms differs from traditional standard terms in various aspects, and whether the existing provisions against the Unfair Contract Terms Directive (UCTD) are still adequate for digital contracts (section 3).

## 1.1 The Ascent and the Rapid Evolution of the Digital Market

In order to better understand the evolution of the digital consumer and the subsequent impact of the platform economy on it, it is fundamental to focus on the DSM.

The European Union has recently issued a large number of directives and regulations to keep pace with the high rate of innovation of the DSM. European consumer law has started

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<sup>11</sup> G Alpa, ‘Towards the Completion of the Digital Single Market: The Proposal of a Regulation on a Common European Sales Law’ (2015) 26(3) *European Business Law Review* 347.

<sup>12</sup> In this sense, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘A Strategy for a Digital Single Market in Europe’, COM (2015) 192 <<https://eur-lex.europa.eu/legal-content/IT/TXT/HTML/?uri=CELEX:52015DC0192&from=EN>> accessed 25 October 2024.

<sup>13</sup> See J Ouyang, “‘Embedded Consumer’”: Towards a Constitutional Reframing of the Legal Image of Consumers in EU Law’ (2024) *Journal of Consumer Policy* 2, 4.

<sup>14</sup> N Helberger and others, ‘Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability’ (2022) 45 *Journal of Consumer Policy* 175. The paper focuses on the notion of consumer vulnerability for the digital economy. “The idea of the ‘average consumer’ permeates large parts of European consumer law and has been pivotal in building a narrative of consumer empowerment and enabling consumers to protect themselves through active and well-informed choices in the marketplace. This is contrasted by the ‘vulnerable consumer’- a concept that singles out certain groups of consumers that are more susceptible to unfair commercial practices than others, and less able to protect themselves. It is argued that, in digital markets, consumer vulnerability is not simply a vantage point from which to assess some consumers’ lack of ability to activate their awareness of persuasion”.



from a minimum harmonisation approach<sup>15</sup> to arrive at new acts that seek to harmonise<sup>16</sup> the sector completely in order to achieve a functional and uniform internal market (a Single Market, precisely), increasingly driven by the technological revolution and digitisation processes to change perspective, as users interact with commerce in different ways than in the past, with digital content becoming the main product or service to be provided.

As is well known, the strategy on the DSM<sup>17</sup> has been adapted to the ‘digital age’, precisely because of the recognised importance of digital technologies and the Internet.

Indeed, until then, the use of online tools and services severely limited both businesses and consumers, preventing not only citizens, but also governments, from fully benefiting from the advantages of the digitisation phenomenon.

The DSM strategy is nothing more than the European Commission’s reaction to the latest online development to pursue a digital transformation for the benefit of the European community. The DSM envisaged the free movement of goods, persons, services and capital, a market where, irrespective of their citizenship or nationality or place of residence, individuals and businesses face no obstacles to accessing and conducting online activities<sup>18</sup>, specifically aimed at preventing or removing unfair commercial practices and

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<sup>15</sup> On the dichotomy between minimum and maximum harmonisation, compare also GA Benacchio, ‘Pregi e difetti del modello europeo di tutela del consumatore’ (2021) 11 *Revista Universul Juridic* 13 <<http://revista.universuljuridic.ro/>> accessed 25 October 2024; T Dalla Massara, ‘L’imminente attuazione della Dir. UE 2019/771 e il problema del coordinamento con il codice civile: una proposta per il futuro art. 135 c. cons.’ (2021) 38(10) *Il Corriere giuridico* 1278; E Bertelli, ‘L’armonizzazione massima della direttiva 2019/771/UE e le sorti del principio di maggior tutela del consumatore’ (2019) 4 *Europa e diritto privato* 953; F Galli, *Algorithmic Marketing and EU Law on Unfair Commercial Practices, Law, Governance and Technology* (Springer 2022) 181. See also, A Savin, ‘Harmonising Private Law in Cyberspace: The New Directives in the Digital Single Market Context’ [2019] Copenhagen Business School, CBS LAW Research Paper 19; S Weatherill, ‘10 Maximum versus Minimum Harmonization: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market’ in NN Shuibhne and L W Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A. Usher* (online edn, Oxford 2012) 175; S Weatherill, ‘Models of Harmonisation: Maximum or Minimum’, in S Weatherill (ed), *Contract Law of the Internal Market* (Intersentia 2016) 223; J Drexler, ‘Continuing Contract Law Harmonisation under the White Paper of 1985? Between Minimum Harmonisation, Mutual Recognition, Conflict of Laws, and Uniform Law’ in S Grundmann and J Stuyck (eds), *An Academic Green Paper to European Contract Law* (The Hague 2002) *passim*.

<sup>16</sup> See S Pagliantini, ‘Armonizzazione massima, parziale e temperata della Direttiva UE 2019/771: una prima lettura’ in the paper given at the Conference ‘What is European in European Private Law’ (Florence 13 September 2019) 44; G D’Amico and S Pagliantini, *L’armonizzazione degli ordinamenti dell’Unione europea tra principi e regole* (Giappichelli 2018) 117; H W Micklitz, ‘The Targeted Full Harmonisation Approach: Looking Behind the Curtain’ in G Howells and R Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (Sellier European Law Publishers 2009) 47.

<sup>17</sup> Adopted by the European Commission Juncker on 6 May 2015 who decided to commit to innovating Europe’s single market. See European Commission, Press Release, ‘A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen’ (6 May 2015) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_15\\_4919](https://ec.europa.eu/commission/presscorner/detail/en/ip_15_4919)> accessed 25 October 2024.

<sup>18</sup> See C Ratcliff, B Martinello and V Litos, European Parliament, ‘Ubiquità del mercato unico digitale, Note tematiche sull’Unione europea’ <<https://www.europarl.europa.eu/factsheets/it/sheet/43/ubiquita-delmercato-unico-digitale>> accessed 25 October 2024.

better delineating the latest unfair terms<sup>19</sup>, so as to ensure a high level of consumer and personal data protection<sup>20</sup>.

In particular, as of 2015, a legislative initiative was announced with the aim of harmonising the online sale of goods and the provision of digital content and services within the platform economy<sup>21</sup>.

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<sup>19</sup> E Pedilarco, 'Il mercato unico digitale per l'integrazione europea. La prospettiva del Fin Tech' (2018) 3 MediaLaws <<https://www.medialaws.eu/il-mercato-unico-digitale-per-l-integrazione-europea-la-prospettiva-del-fintech/>> accessed 25 October 2024; J Pelkmans, 'What Strategy for a Genuine Single Market?' (2016) 126 CEPS 1-4 <<https://www.ceps.eu/ceps-publications/what-strategy-genuine-single-market/>> accessed 25 October 2024; S Montaldo, 'Internet Governance and the European Union: Between Net Neutrality and the Implementation of the Digital Single Market' (2015) 3 Diritto dell'economia 601.

<sup>20</sup> See European Parliament - Fact Sheets on the European Union, 'The Ubiquitous Digital Single Market' (2024) <<https://www.europarl.europa.eu/factsheets/en/sheet/43/the-ubiquitous-digital-single-market>> accessed 25 October 2024: The goals explicitly stated by the European Commission are fundamental for the achievement of the integration of the digital economy.

<sup>21</sup> This initiative took the form of targeted legislation that was the springboard for the Directive on the Provision of Digital Content and Digital Services (EU Directive 770/2019 - DCD), the Directive on the Online Sale of Goods (EU Directive 771/2019 - SGD), the Digital Services Act (Regulation EU 2022/2065 - DSA), the Digital Market Act (Regulation EU 2022/1925 - DMA), the P2B Regulation (EU 1150/2019). See E Battelli, 'Questioni aperte in materia di contrattazione nelle piattaforme online' (2022) 5 I Contratti 563, 575; On digital platforms see also P D'Elia, *Commercio elettronico e nuove frontiere dell'autonomia privata - Contrattazione online e tutele dell'utente nelle esperienze europee e statunitensi* (Giappichelli 2022); E Battelli, 'Il contratto di accesso a Internet' (2021) 1 MediaLaws <<https://www.medialaws.eu/rivista/il-contratto-di-accesso-ad-internet/>> accessed 25 October 2024, "The use of digital platforms in contracting requires a reconsideration of the purely civil law profiles that seemed to be exhausted in the study of the telematic contract and the consumer protection of the online contracting party. For this reason, one may ask oneself whether the most recent contracting in the virtual dimension of the Internet requires to be declined in a new way, in order to better adapt to the role of online platforms". L Floridi, *La quarta rivoluzione. Come l'infosfera sta trasformando il mondo* (Raffaello Cortina Editore 2017) 5. The Regulation (EU) 2019/1150 (see Regulation (EU) 2019/1150 of the European Parliament and of the Council (20 June 2019) Eur Lex, <<https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32019R1150>> accessed 25 October 2024, whose main purpose is to promote fairness and transparency for business users of online intermediation services in the different areas of digital markets, is of importance. For more on this topic, see C Ogriseq, 'Il mercato unico digitale e il nuovo assetto di tutele che attende il consumatore' (2022) 2 Ciberspazio e diritto 346; E Bargelli and V Calderai, *A Contract Law for the Age of Digital Platform?* (Pacini 2021) 38; L Guffanti Pesenti, 'Some Considerations about Digital Platforms and Consumer Protection' (2021) 2 European Journal of Privacy Law & Technologies 76; G Smorto, 'La tutela del contraente debole nella platform economy dopo il Regolamento UE 2019/1150 e la Direttiva UE 2019/2161 (c.d. Omnibus)' in V Falce (ed), *Fairness e innovazione nel mercato digitale* (Giappichelli 2020) 64; S Martinelli, 'Contratto e mercato ai tempi dell'algoritmo: reputational feedback system e ranking nella platform economy' Final report of the 15th S.I.S.Di.C. Conference - Naples, 14, 15, 16 May - Rapporti civilistici e intelligenze artificiali: attività e responsabilità (ESI 2020) 2; A D'Alessio, 'Online Platforms: New Vulnerabilities to be Addressed in the European Legal Framework. Platform to Business User Relations' (2020) 2 European Journal of Privacy Law & Technologies 38. This legal framework has been supplemented by the very recent 'Omnibus' Directive (EU Directive 2161/2019), the preliminary regulatory intervention of which is part of the package of measures presented by the EU Commission on 11 April 2018, under the name 'New Deal for Consumers. See Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, A New Deal for Consumers, COM (2018) 183 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0183>> accessed 25 October 2024.





The “New Deal for Consumers” initiative, aimed at strengthening enforcement of EU consumer law in light of a growing risk of EU-wide infringements and at modernising EU consumer protection rules in view of digital market developments<sup>22</sup>.

Its primary aim is to strengthen the enforcement of EU consumer law in the light of the increasing risk of infringements at EU level and to modernise the rules for better enforcement in view of market developments<sup>23</sup>.

This project shed light on the digital consumer, the consumer-user who buys (digital) goods and services on online marketplaces<sup>24</sup>.

With the ‘*Omnibus*’ directive, the European legislator focused particularly on the consumer acting in the DSM. In particular, the transposition of the directive in question in the various member States aimed to implement a real modernisation of the consumer code, through a greater openness to digitisation, thanks also to the inclusion of new notions, such as, for instance: ‘online marketplace’, ‘digital services’, ‘digital content’ and ‘online search’. The main innovations brought about by the directive concern transparency in the online marketplaces, unfair terms, increased penalties, online reviews, price reductions, and the role of the consumer even in cases where the purchase of a digital product or service takes place through the payment of personal data<sup>25</sup>.

The main purpose of the directive is to require online shop providers to fulfil specific information obligations in order to close information gaps that may, in some way, influence the consumer’s decision-making capacity and, thus, prevent unfair commercial practices or the introduction of new unfair terms.

The purpose of the ‘Package’ seems particularly clear: to offer legal certainty and protection to European consumers and to facilitate transactions of digital content and

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<sup>22</sup> See Ouyang (n 13). About the New Deal see also M Grochowski, ‘European Consumer Law after the New Deal: A Tryptich’ (2020) 39 Yearbook of European Law 387 <<https://academic.oup.com/yel/article/doi/10.1093/yel/yeaa016/6204745#302918654>> accessed 25 October 2024 “Particularly, the New Deal put considerable emphasis on online commerce. As part of this package, it primarily seeks to provide a better framing not only for the new ways of concluding agreements and the novel types of tradeable objects (including consumer data as a counter-performance), but also to address the evolving structure of the market as such (in an attempt to tackle the new modes of concluding and executing agreements online)”.

<sup>23</sup> I Speciale, ‘La Dir. 2019/2161/UE tra protezione dei consumatori e promozione della competitività sul mercato unico’ (2020) 4 Il Corriere giuridico 441.

<sup>24</sup> L Ammannati, ‘Il paradigma del consumatore nell’era digitale Consumatore digitale o digitalizzazione del consumatore?’ (2019) 1 Rivista trimestrale di diritto dell’economia 8; F Foltran, ‘Professionisti, consumatori e piattaforme online: la tutela delle parti deboli nei nuovi equilibri negoziali’ (2019) 3 MediaLaws 162 <<https://www.medialaws.eu/rivista/professionisti-consumatori-e-piattaforme-online-la-tutela-delle-parti-deboli-nei-nuovi-equilibri-negoziali/>> accessed 25 October 2024; G Sartor, *New Aspect and Challenges in Consumer Protection - Digital Services and Artificial Intelligence* (Strasburgo: European Parliament 2020) 9 <[https://www.europarl.europa.eu/thinktank/en/document/IPOL\\_STU\(2020\)648790](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2020)648790)> accessed 25 October 2024.

<sup>25</sup> VSZ Bonamini Pepoli, ‘L’evoluzione del consumatore nell’era del digitale’ (2023) 10 Federalismi.it 243 <<https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=48719>> accessed 25 October 2024; C Cauffman, ‘New EU Rules on Business-to-Consumer and Platform-to-Business Relationships’ (2019) 26(4) Maastricht Journal of European and Comparative Law 469.

goods, all specifically at cross-border level, demonstrating the persistent discrepancies in the field of user-consumer protection<sup>26</sup>.

On the basis of these considerations, it should be noted that the technological revolution does not only bring about (undoubtedly) positive effects, but also appears to produce numerous challenges and high risks, influencing the way traditional sectors operate, turning, for instance, more interest towards intangible goods and services<sup>27</sup>.

## 2 Digital Asymmetries: A (New) Role for the Vulnerable Consumer-User?

The development of new digital technologies has had a profound impact especially on the legal relations between consumer-users and web-based economic operators, leading to the emergence of new issues concerning the digital consumer and his position in the digitised ecosystem.

We should start from the fact that “in the digital society, vulnerability is architectural because the digital choice architectures we navigate daily are designed to infer or even to create vulnerabilities”<sup>28</sup>. Hence, “digital choice architectures are designed to infer

<sup>26</sup> See on this point, Camera dei Deputati, Temi dell’attività parlamentare, XVII legislature, ‘The Digital Single Market’ <[https://temi.camera.it/leg17/temi/il\\_mercato\\_unico\\_digitale\\_](https://temi.camera.it/leg17/temi/il_mercato_unico_digitale_)> accessed 25 October 2024, as well as ‘Digitisation Index of the Economy and Society (DESI) 2021 (Italy)’ (2021) 2, as well as DESI <<https://digital-strategy.ec.europa.eu/it/policies/desi>> ‘The Digital Single Market: the Italian position’ (2022) AgID, 2 <[https://www.agid.gov.it/sites/default/files/repository\\_files/documentazione/position\\_paper\\_on\\_dsm\\_italia\\_0.pdf](https://www.agid.gov.it/sites/default/files/repository_files/documentazione/position_paper_on_dsm_italia_0.pdf)> accessed 25 October 2024.

In particular, reference is made to the Digitisation of Economy and Society Index (DESI), developed by the European Commission to assess the state of progress of the EU Member States towards a digital economy and society, as there are still considerable differences between the Member States.

See, in particular, European Commission, ‘Shaping Europe’s digital future 2023 Report on the state of the Digital Decade’ (2023) <<https://digital-strategy.ec.europa.eu/en/library/2023-report-state-digital-decade>> accessed 25 October 2024. “This report highlights the need to accelerate and deepen the collective efforts, including through policy measures and investment in digital technologies, skills and infrastructures. It includes concrete recommendations to Member States ahead of the adoption of their national strategic roadmaps and for their future adjustments’.

<sup>27</sup> Cf G Alpa, ‘Il mercato unico digitale’ (2021) 1 *Contratto e impresa Europa* 2; E Tulli, *Filosofia e rivoluzione digitale. Echi dal futuro* (Stilo Editrice 2020) 114; L Taddio and G Giacomini, *Filosofia del digitale* (Mimesis 2020); O Dimitru and AV Tomescu, ‘European Consumer Law in the Digital Single Market’ (2020) 10(2) *Juridical Tribune* 222; S Montaldo, ‘Internet Governance and the European Union: Between Net Neutrality and the Implementation of the Digital Single Market’ (2015) 3 *Diritto dell’economia* 601; C Riefa, ‘Protecting Vulnerable Consumers in the Digital Single Market’ (2022) 33(4) *European Business Law Review* 607.

<sup>28</sup> This situation might be related to dark patterns. See J Luguri and L Strahilevitz, ‘Shining a Light on Dark Patterns’ (2021) 13 *Journal of Legal Analysis* 43, 44; A Mathur, J Mayer and M Kshirsagar, ‘What Makes a Dark Pattern... Dark? Design Attributes, Normative Considerations, and Measurement Methods’ *Proceedings of the 2021 CHI Conference on Human Factors Computing Systems* (Article no. 360, 2021) 3 <<https://doi.org/10.1145/3411764.3445610>> accessed 25 October 2024; MR Leiser and M Caruana, ‘Dark Patterns: Light to be found in Europe’s Consumer Protection Regime’ (2021) 10(6) *Journal of European Consumer and Market Law* 237, 251; OECD, ‘Dark commercial patterns’, *OECD Digital Economy Papers*, No. 336 (OECD Publishing 2022) <<https://doi.org/10.1787/44f5e846-en>> accessed 25 October 2024; M R Leiser, ‘Dark Patterns: The Case for Regulatory Pluralism between the European Union’s Consumer and Data Protection Regimes’ in ‘*Research Handbook on EU Data Protection Law*’ (Edward Elgar Publishing, 2022) 240; M Leiser and C Santos, ‘Dark Patterns, Enforcement, and the Emerging Digital Design Acquis: Manipulation beneath the Interface’ (2024) 15(1)





vulnerabilities, that can be considered the product of digital consumer markets. As consumers keep using the same services, apps, or platforms over time, the commercial entities offering those services, apps, or platforms will be able to collect and analyse more user data and, as a result, be better able to identify exploitable vulnerabilities. So far, the usual asymmetrical nature of commercial relationships become even more significant”<sup>29</sup>.

The notion of vulnerability<sup>30</sup> is very complex and is not defined within rigid boundaries because it is universal and individual (it does not affect all individuals in the same way); potential, relational and contextual (we are vulnerable in a certain context and not in another)<sup>31</sup>. Very often the Society itself makes individuals vulnerable.

Vulnerability, to be understood as the widespread potential to be injured, also tends to be found in all those cases where there is a structurally asymmetrical legal relationship and where a subject, on the basis of personal and external factors, is considered the weak party of the relationship. It is necessary to try to identify which subject can be considered vulnerable in the digital environment (this is the case of the consumer operating on the web<sup>32</sup>), as it cannot simply be based on the assumption that in the face of technology

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European Journal of Law and Technology *passim* “The term ‘dark patterns’ is commonly used to describe manipulative or exploitative techniques implemented into the user interface of websites and apps that lead users to make choices or decisions that would not have otherwise been taken. Legal academic and policy work has focused on establishing classifications, definitions, constitutive elements, and typologies of dark patterns across different fields. Regulators have responded to these dark patterns with several enforcement decisions related to data protection, privacy violations, and rulings protecting consumers”. Specifically, “The term ‘Dark patterns’ or ‘deceptive design’, commonly refers to design practices that manipulate or exploit users to achieve specific outcomes, often at the expense of their autonomy, decision-making, or choices. The use of dark patterns has become a growing concern. The response to dark patterns has evolved from theoretical problem-based academic work and behavioural studies to active enforcement by regulatory bodies worldwide”. This concept is also related to the one of ‘Psychological Patterns’. In this sense, see also M Leiser ‘Psychological Patterns and Article 5 of the AI Act: AI-Powered Deceptive Design in the System Architecture and the User Interface’ (2024) 1(1) Journal of AI law and Regulation 5 which “emphasises the urgency of addressing the risks posed by AI-powered deceptive design strategies intricately woven into online platforms. These ‘psychological patterns’ mislead users into making decisions contrary to their intentions, exploiting psychological vulnerabilities”; CM Cascione, ‘Art 5, co. 1, lett a)’ in A Mantelero, G Resta and GM Riccio (eds), *Intelligenza artificiale. Commentario* (Kluwer 2025) forthcoming.

<sup>29</sup> See Alpa (n 11); D Susser, B Roessler and H Nissenbaum, ‘Online Manipulation: Hidden Influences in a Digital World’ (2019) 4(1) Georgetown Law Technology Review 27; J Strycharz and B Duivenvoorde, ‘The exploitation of vulnerability through personalised marketing communication: are consumers protected?’ (2021) 10(4) Internet Policy Review 1.

<sup>30</sup> A definition of vulnerability can be found in the document ‘United Nations Report on the World Social Situation: Social Vulnerability: Sources and Challenges’ (2003) United Nations Department of Economic and Social Affairs 3 <<https://www.un.org/esa/socdev/rwss/docs/2003/RWSSOverview.pdf>> accessed 25 October 2024 in which the following is stated: “In essence, vulnerability can be seen as a state of high exposure to certain risks and uncertainties, in combination with a reduced ability to protect or defend oneself against those risks and uncertainties and cope with their negative consequences. It exists at all levels and dimensions of society and forms an integral part of the human condition, affecting both individuals and society as whole”.

<sup>31</sup> Cf E Ferrarese, ‘Vulnerability: A Concept with which to undo the World as it is?’ (2016) 17(2) Critical Horizons 149.

<sup>32</sup> See P Stanzione, ‘Data Protection and Vulnerability’ (2020) 2 European Journal of Privacy Law and Technology 9. In particular: “We can outline a basic notion of ‘vulnerability’ as a common connotation of the human condition, next to

everyone is vulnerable, but that it is necessary to go further, providing special protection mechanisms.

The examination of the different forms of vulnerability<sup>33</sup> inherent in these individuals has the twofold objective of improving aspects related to consumer protection<sup>34</sup> and of obtaining useful information to direct regulatory choices with a view to greater fluidity in the functioning of the markets, especially in view of the problems associated with the emergence of new forms of abuse and unfair commercial practices.

It is necessary to start from the assumption that consumers of digital products are less protected than consumers of traditional goods, probably due to opaque and fragmented legislation. This leads to a precise question: should all consumers, belonging to different social groups, be guaranteed equal protection, or should additional special protection measures for these categories be envisaged in the face of the emergence of ‘new’ vulnerable groups?

In this regard - albeit briefly and without claiming to be exhaustive - it is necessary to dwell on the legal notion of vulnerability<sup>35</sup>, reconsidering the role it plays in strategic marketing and non-marketing choices<sup>36</sup>.

This condition has always involved consumer-behaviour, according to which the vulnerable consumer is qualified as such due to a lack of resources and information, as well as a loss of control of the situation in which he becomes the object of deception. His fragile condition stems from his unawareness.

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which it can be seen the variability of the situations in which it is declined: conditions due to age, gender, health and other discriminating factors. One of these conditions may however also be the relationship, legal and socio-economic, structurally asymmetrical, of which the subject is a weak part: so for the consumer or the user of digital platforms”.

<sup>33</sup> On the more generic concept of vulnerability, see G Maragno, ‘Alle origini (terminologiche) della vulnerabilità: vulnerabilis, vulnus, vulnerare’ in O Giolo and B Pastore (eds), *Vulnerabilità. Analisi multidisciplinare di un concetto* (Carocci 2018) 13, 187.

<sup>34</sup> Cf C Goanta, ‘European Consumer Law: The Hero of Our Time’ (2021) 10(5) *Journal of European Consumer and Market Law* (EuCML) 177.

<sup>35</sup> On this topic see EC, ‘Digital Fairness, Fitness check on EU Consumer Law’ (2023) <[https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumerlaw\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumerlaw_en)> accessed 25 October 2024; A Ruiz Arranz, ‘The Commencement of Prescription (and what the Consumer’s Awareness of the Unfairness is) within the Unfair Contract Terms Directive’ (2023) 19(3) *European Review of Contract Law* 181, 214 <<https://doi.org/10.1515/ercl-2023-2011>> accessed 25 October 2024 at 181 “Closely linked to the phenomenon of the effectiveness of the UCTD is the idea of vulnerability, which is at the core of consumer protection and is the very reason that pushed consumer protection onto the EU policy agenda. Vulnerability is associated directly with the experience of consumption. Unlike the trader, the consumer is not doing business and lacks the experience to handle economic transactions and legal contracts. To that end, consumers need information and a means to prevent imbalanced relationships. This imbalance was traditionally expressed with the notion of the consumer as a ‘weaker party’ and has progressively emerged as a general principle of EU law. The Member States would be left free to provide the consumer with additional protective standards that, despite shared minimum rules, would indeed have enhanced the weaker position of consumers”.

<sup>36</sup> M Durovic and J Poon, ‘Consumer Vulnerability, Digital Fairness, and the European Rules on Unfair Contract Terms: What Can Be Learnt from the Case Law Against TikTok and Meta?’ (2023) 46 *Journal of Consumer Policy* 419.



Inevitable is the need to innovate and expand this notion<sup>37</sup>.

However, the economic concept of the consumer has appeared over the years to be far too restrictive, as technology, emerging as an amplifier of inequalities, has begun to require interpreters to look at the consumer from a perspective increasingly connected to his or her own social fragility.

This need stems from the fact that the role of the consumer in the new digital marketplace has changed radically, making it possible to speak of a Consumer 5.0<sup>38</sup> and, therefore, of a new phase in the evolution of consumer law.

A further reason indicating the need to innovate the notion is connected to the fact that, at present, the only and explicit regulatory reference, on the subject of vulnerability, at European level, derives from the dictate of Directive (EC) 2005/29 on unfair commercial practices<sup>39</sup>, which has a particularly circumscribed scope of application.

In fact, it is inferred from the rule that some consumers may be considered constitutively vulnerable due to physical or sensory disabilities. This is because the hypothesis could also derive from a psycho-behavioural state that then flows into the social sphere, involving a consumer in perfect physical and mental condition, whose fragility depends, instead, on different so-called extrinsic factors (think, for instance, of the digital divide<sup>40</sup>, which provides for an uneven distribution of ICTs in society)<sup>41</sup>.

In this regard, the World Economic Forum's (WEF) Global Risks Report 2022<sup>42</sup> indicated that the excessive use of the web and digital platforms brings with it socio-psychological problems. Individuals/users are so affected by digital exposure that their physical and emotional well-being is severely affected<sup>43</sup>.

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<sup>37</sup> See L Cappello, *L'evoluzione del consumatore negli ecosistemi decentralizzati - L'impatto della digitalizzazione e della Blockchain* (Giappichelli 2022) 7, in which it is pointed out that "Even the subjective dimension of the role of economic actors changes in the new digital market in which consumer and producer not only converse on the same level, but also join to the point of blurring their respective roles with the diffusion of the figure of the prosumer, producer and consumer at the same time".

<sup>38</sup> *ibid* 5.

<sup>39</sup> Cf Recital 18 of the UCPD.

<sup>40</sup> See again G Pascuzzi, *La cittadinanza digitale* (Il Mulino 2021) 36, "The digital divide, as clarified by the OECD (2001) identifies the gap existing between individuals, households, businesses and geographical areas at different socio-economic levels with reference both to the opportunities to access information and communication technologies and to the use of the Internet for a wide variety of activities".

See, in this regard, also G Suffia, 'Smart cities and the digital divide: una proposta di analisi' (2021) 2 *Cyberspazio e diritto* 287, as well as G Pesci, 'The digital divide, l'uguaglianza sostanziale e il diritto all'istruzione' (2021) 2 *Cyberspazio e diritto* 259.

<sup>41</sup> See Article 13-bis of Decree-Law 179/2012.

<sup>42</sup> Cf 'Digital Dependencies and Cyber Vulnerabilities, in *The Global Risks Report 2022*' (2022) 3 *The World Economic Forum* (in collaboration with Marsh & McLennan Companies, Sk Group and Zurich Insurance Group) 45 <[https://www3.weforum.org/docs/WEF\\_The\\_Global\\_Risks\\_Report\\_2022.pdf](https://www3.weforum.org/docs/WEF_The_Global_Risks_Report_2022.pdf)> accessed 25 October 2024.

<sup>43</sup> V Bhargava and M Velasquez, 'Ethics of the Attention Economy: The Problem of Social Media Addiction' (2021) 31(3) *Business Ethics Quarterly* 321.

Virtual reality (i.e. that reality altered by digital means) creates a sense of security in the user such that it engenders legitimate trust, but at the same time, it induces in the user false ideas about security, privacy and trust. The erosion of such trust can damage the relationship between users and traders/intermediaries, weakening their self-determination and also affecting their own decisions and conduct.

Digital consumption undermines this interaction of trust between human beings.

In particular, the relationship with digital platforms makes the consumer psychologically vulnerable.

Thus, in a context in which the dissemination of digital tools has become more complex, 'new' vulnerability hypotheses have arisen witnessing the reconsideration of socio-economic factors.

Then, the evolution and the critical analysis of the concept of consumer fragility/vulnerability posed in the digital economy become crucial to understand.

The central question, which raised several issues, is based on the admissibility of the concept of the vulnerable digital consumer, as well as the greater or special protections to be afforded to them.

On this point, some scholars appear to be divided: while on the one hand, it is believed that the creation of new forms of vulnerability, which require an adequate regulation by the legislator, should be admitted<sup>44</sup>, on the other hand, it is argued that in the face of digital literacy, the consumer appears more aware and, for this reason, not in need of a different/increased degree of protection<sup>45</sup>.

"In this regard, solutions to the previous questions may be found in the UCTD and also in the UCPD<sup>46</sup>. The universality of these two acts makes them a useful tool for incorporating new categories of interests into consumer law and extending their protection. Less straightforward, however, is the relationship between consumer protection and the new EU acts that directly concern new forms of individual market participation and the new interests that are pursued in this way"<sup>47</sup>. This is because EU law is still at the experimental stage, juggling intuitions and piecemeal solutions.

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<sup>44</sup> F Pellicanò and R Petti, 'La vulnerabilità del consumatore nei settori delle comunicazioni elettroniche e dell'audiovisivo' (2022) *Consumerism 2022 - Quindicesimo rapporto annuale - Il consumatore vulnerabile tra innovazione e diritti fondamentali*, Università degli Studi Roma Tre 75 <<https://www.consumersforum.it/ricerche.html>> accessed 25 October 2024.

<sup>45</sup> See AL Sibony and G Helleringer, 'European Consumer Protection through the Behavioral Lens' (2017) 23 (3) *Columbia Journal of European Law* 607.

<sup>46</sup> M Grochowski 'Consumer Law for a Post-Consumer Society' (2023) 12(1) *Journal of European Consumer and Market Law (EuCML)* 1, 3.

<sup>47</sup> *ibid.* "This is particularly true of the Digital Services Act (DSA) and the Digital Markets Act (DMA), which largely address the relationship between an individual and a professional (a platform), which in many instances is a classical business-to-consumer liaison. Paradoxically, however, both acts partly deny their consumer nature. Many references to consumers are made in a 'negative' manner to indicate that certain issues they address do not interfere with consumer rules".



It has been ascertained how between users and web operators there exists a level of asymmetry determined by a disparity of technical knowledge and information that might affect the correct formation of the will, even contractual, of the user. In fact, the considerable difference between the knowledge of the contracting parties may, at the time of the conclusion of an online contract, generate erroneous expectations or unlawful reliance on the service provider to the point of vitiating the moment of formation of the will. Relevant, therefore, is the issue of transparency.

The imbalance of power between consumers and data-powered traders who control digital environments creates a foundation for unfair practices - and the consumer can do very little to prevent it. In the coming years, with the proliferation of AI systems and biometric technologies, the position of the consumer can only be expected to become ever weaker in the face of automated systems perfected for making money on human weaknesses and vulnerabilities.

Under conditions of digital asymmetry, the consumer is particularly susceptible to practices which exploit the differences in power to the detriment of the consumer. This resulting universal state of vulnerability, referred to here as digital vulnerability, applies to virtually all consumers who participate in the data economy and undermines their autonomy of choice.

In addition, the proliferation of AI systems (i.e. the use of AI systems to infer consumers' emotions) and biometric technologies may be expected to strengthen asymmetries between traders and consumers and as a tool to exploit vulnerabilities.

## 2.1 The Vulnerability of the Digital Consumer

New technologies, given their global dimension and the difficulty of finding timely regulation of the numerous legal issues related to their use, would leave the consumer increasingly vulnerable and without effective protection<sup>48</sup>. This raises a number of questions, most notably one concerning consumer law itself: Could it currently be considered equally effective? Or is it in need of innovation?<sup>49</sup>

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<sup>48</sup> Durovic and Poon (n 36) 181, 188.

<sup>49</sup> Also on this point G Magri, S Martinelli and S Thobani, *Manuale di diritto privato delle nuove tecnologie* (Giappichelli 2022) 3.

The idea of the ‘average consumer’<sup>50</sup> has now definitely entered in crisis<sup>51</sup>. That’s because, the evolution of new technologies and the rapidity of their development in the digital ecosystem lead one to question the degree of care, diligence, prudence and information demanded of the average consumer.

Thus, this crisis in which the digital consumer finds himself is nothing more than the outcome of a series of issues that have arisen in recent years (attributable to technological evolution), which has rendered the traditional disciplines, introduced to date for consumer protection, incompatible or difficult to reconcile with the digital consumer relationship<sup>52</sup>.

What makes the digital consumer even more vulnerable than the traditional one? One of the main obstacles for web users susceptible to automated decision-making processes is that of transparency: being able to make the logic of the algorithms used by the platform clear. In this respect, a properly informed user has greater freedom of choice in the digital marketplace.

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<sup>50</sup> See S Sandulli, ‘Vulnerabilità e consumatore al tempo della pandemia’ in P Corrias (ed), *I soggetti vulnerabili nella disciplina comune e nei mercati regolamentati* (ESI 2022) 178 “For some time, doctrine and jurisprudence have formulated numerous theories on vulnerable subjectivity. On this point we refer to the studies by S Dodds, C Mackenzie and W Rogers, who refer to three different forms of vulnerability: inherent, situational and pathogenic. This distinction, on the one hand, calls into question the notion of the average consumer as a parameter of reference, on the other hand, in addition to human conditions and merely external factors, generates a different situation of vulnerability (the authors, in this regard, emphasise the polysemy of the term)”. On this topic see also S Ranchordas, ‘Vulnerable Consumers and Vulnerable Citizens - What Can Consumer Law Teach Other Fields of Law?’ (2021) 10(6) *Journal of European Consumer and Market Law* (EuCML) 225; A Furia and S Zullo, ‘Introduzione’ in Id. (ed), *La vulnerabilità come metodo: percorsi di ricerca tra pensiero politico, diritto ed etica* (Carocci 2020) 9.

<sup>51</sup> On the topic of the ‘average consumer’ see Case C-465-98, *Verein gegen Unwesen in Handel und Gewerbe Köln eV v Adolf Darbo AG* EU:C:2000:184 [2000]. See also Case C-210/96 *Gut Springenheide* EU:C:1998 [1998]; Case c99/01 *Gottfried Linhart e Hans Biffl* [2002] ECR I-9375, paras 31-32; Case C-44/01 *Pippig* [2003] ECR I-03095, para 55; Case C-218/01 *Henkel KGaA* [2004] ECR. I-1725, paras 47, 52, 53 Case C-381/05 *De Landtsheer Emmanuel SA c. Comite’ Interprofessionel du Vin de Champagne, Veuve Clicquot Ponsardin SA* [2007] ECR I-3115, para 23; Case C-210/96 *Gut Springenheide* EU:C:1998:369 [1998]. See again Ouyang (n 13), “This legislative development followed the long-standing ECJ case law on misleading commercial practices, which postulates that average consumers are not easily misled. [...] For the first time, in the case *Gut Springenheide*, the Court of Luxemburg defined the consumer as a reasonably well-informed person, observant, and circumspect. This implies that the ‘informed consumer’ can autonomously distinguish the characteristics of products and understand the message and content of advertising, with an ‘average’ ability that need to be ascertained, case by case, about the situation and the peculiarities of the case. In recent times, the ECJ argued that the formula of the ‘reasonably well informed and reasonably observant and circumspect consumer’, established in *Gut Springenheide* needed to be updated. The notion of consumer is a reference threshold for the current analysis as it represents a centrepiece of European consumer protection law”. See also D Szilágyi, ‘Empowering consumers: Towards a broader interpretation of the vulnerable consumer concept in the European Union’ (2022) 63(3) *Hungarian Journal of Legal Studies* 279, 293; G Straetmans and J Vereecken, ‘Towards a New Balance Between Private and Public Enforcement in EU Consumer Law’ (2024) 32(1) *European Review of Private Law* 41, 80.

<sup>52</sup> On this issue, refer, among many others, to: S Lanni, ‘Pregiudizi algoritmici e vulnerabilità’ (2021) suppl 3 *Rivista trimestrale di diritto dell’economia* 72; A Jablonowska and others, ‘Consumer Law and Artificial Intelligence. Challenges to the EU Consumer Law and Policy Stemming from Business’ Use of Artificial Intelligence: Final Report of the ARTSY Project’ (2018) European University Institute (EUI) Working Papers 11, who went much further by explicitly arguing that “Consumer protection law turned into consumer law without protection”.





In this sense, the new and changing online activities have slowly led to an evolution of the notion of consumer - that is far removed from the conventional one - and laid the foundations for a new declination of the value of consumer awareness.

In fact, the consumer appears to be a figure with a polymorphous nature and an intrinsically evolutionary vocation (with respect to which the monolithic nature of the notion would contrast with the variety of spheres, specifically the digital markets in which this subject operates).

Economic factors (market fragmentation), legal factors (regulatory polycentrism) and intellectual factors (the greater degree of maturity in thinking about this issue) are pushing beyond the uniform category of the average consumer.

Technological innovation and data represent the central elements of the evolutionary process that characterises the new digital ecosystem, contributing to the creation of a renewed socio-economic scenario, in which several actors operate: companies, consumers, and providers of digital services and products<sup>53</sup>. This has undoubtedly contributed to the emergence of a category of consumer, tending to be different from the traditional one, who, if, on the one hand, would seem to be endowed with an increased awareness of the exercise of his or her freedom of choice, on the other hand, could be made more vulnerable by the digitised ecosystem in which he or she operates<sup>54</sup>. The peculiarities deriving from digital make them particular consumers.

In fact, it is specified that all consumers at some point may become vulnerable due to external factors or their interaction with the market or due to the difficulties they face in accessing and understanding relevant consumer information.

In view of these considerations, it must be examined whether there is a concrete distinction between traditional (offline) and digital (online) consumers, what exactly makes a digital consumer (even) more vulnerable than the first one?

In this regard, one of the factors affecting the greater or lesser vulnerability of digital consumers may be linked to their educational process and digital literacy<sup>55</sup>. In addition,

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<sup>53</sup> See S Agarwal, 'Consumer Protection in the Digital World' (2022) 3(2) *Jus Corpus Law Journal* 616; J Jakhar, 'Consumer Protection (E-Commerce Rules), 2020: Revolution for Consumer Protection in Digital Space' (2022) 5 *International Journal of Law Management & Humanities* 1919; A Fletcher and others, 'Consumer Protection for Online Markets and Large Digital Platforms' (2023) 40(3) *Yale Journal on Regulation* 875.

<sup>54</sup> L Gatt and IA Caggiano, 'Consumers and Digital Environments as a Structural Vulnerability Relationship' (2022) 2 *EJPLT* 8.

<sup>55</sup> In addition to being context-dependent, the phenomenon of vulnerability is inevitably linked to the socio-demographic characteristics and background of the consumer (to be understood not only as the individual's level of education and the technological skills acquired over time or the result of one's temperament and aptitude, but also as the level of knowledge of products and services that are the object of the consumer's attention). A 2016 European Commission study, entitled 'Understanding Consumer Vulnerability in the EU's Key Market', identifies the conditions and characteristics that can make consumers vulnerable. For a more in-depth analysis of the related study <[https://commission.europa.eu/publications/understanding-consumer-vulnerability-eus-key-markets\\_en](https://commission.europa.eu/publications/understanding-consumer-vulnerability-eus-key-markets_en)> accessed 25 October 2024.

there are issues related to digital consumption, such as accessing digital products or services online.

A fair and non-discriminatory approach to digital transformation should address the needs of user-consumers, who are often less accustomed to digital tools or less comfortable with them.

This leads to a concept of the consumer placed in a situational perspective, understood as objective, functional and dynamic. For this reason, even vulnerability itself must not be assessed in the abstract, but rather according to the specific situation in which the consumer finds himself, so as to extend protection not only to the average consumer but to all<sup>56</sup>.

Therefore, this category of consumers obliges, in certain respects, to question the criteria of correct qualification as well as to rethink the traditional regulatory tools.

On this point, it is necessary to refer to the study carried out by Martha Fineman<sup>57</sup>, who explored the concept by stating that the expression vulnerability should be understood as a universal and shared condition of human beings, an inevitable consequence of 'human embodiment' (within which the category of vulnerable consumers would also fall).

However, according to this approach, fragility, which at the societal level is constant and universal, at the individual level is characterised as particular and unique.

According to this new paradigm of human vulnerability, fragility is understood as a positive condition in order to realise equality of opportunity and access<sup>58</sup> which must commit institutions to remove the conditions that prevent them from addressing the challenges related to individual fragility. Consumer vulnerability, therefore, would not be the exception, but the rule<sup>59</sup>.

Think also of the categories of children, older adults<sup>60</sup>, the sick or the disabled, who are often the subject of 'paternalistic' discrimination based on an alleged lack of ability.

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<sup>56</sup> Durovic and Poon (n 36).

<sup>57</sup> M Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 (1) Yale Journal of Law & Feminism 9. Fineman conceptualises vulnerability as a universal and ever-present experience that can be exposed at any time by our individual circumstances. The framing of the notion of vulnerability is necessary because by clearly identifying why consumers may qualify as vulnerable, and the factors that lead to that vulnerability, it is possible to construct an environment that respects consumer choice, while ensuring the appropriate protection of the vulnerable.

<sup>58</sup> M Fineman, 'Beyond Identities: The Limits of an Antidiscrimination Approach to Equality' (2012) 92(6) Boston University Law Review 1716.

<sup>59</sup> A Cole, 'All of Us Are Vulnerable, But Some Are More Vulnerable than Others: The Political Ambiguity of Vulnerable Studies, an Ambivalent Critique' (2016) 17(2) Critical Horizons 260; C Riefa and S Sainnier, 'Economic Theory and Consumer Vulnerability: Exploring an Uneasy Relationship' in Id. (eds), *Vulnerable Consumers and the Law. Consumer Protection and Access to Justice* (Routledge 2021) 17.

<sup>60</sup> On the topic of the older consumer see CM Cascione, *Il lato grigio del diritto. Invecchiamento della popolazione e tutela degli anziani in prospettiva comparatistica* (Giappichelli 2022) 207. A Fusaro, 'Persona vulnerabile e forme di condizionamento del volere', in P Corrias (ed), *I soggetti vulnerabili nella disciplina e nei mercati regolamentati* (ESI 2022) 59; H Berg and KT Liljedal, 'Elderly Consumers in Marketing Research: A Systematic Literature Review and Directions for Future Research' (2022) 46(5) International Journal of Consumer Studies 1640. See also L Berg, 'Consumer



These kinds of differences have led to hierarchical subordination and social exclusion of the person who possesses them, as being part of a ‘weak category’<sup>61</sup>.

It is emphasised that the concept in question cannot be relegated to rigid, pre-set canons, since there is a plurality of factors that, considered individually, affect the individual’s economic choices in completely different ways.

What differs is that in the consumer-market relationship, vulnerability is more easily identifiable and to some extent governable through regulation that is attentive to the specificity of each group.

What is more, such a hypothesis entails the emergence of excessive discretion on the part of the judge in emphasising the vulnerabilities of the individual due to the difficulty of anchoring the judgement in objective data.

Once the different sources and states of digital vulnerability have been identified<sup>62</sup>, one should ask what legal effects flow from the assessment of a situation of vulnerability.

In particular, the criterion of inclusiveness is relevant.

We must, then, start from the relationship with the consumer and reconsider the role of vulnerability, so that their digital fragility is respected.

The concatenation between exogenous factors, dependent on the external environment and endogenous factors<sup>63</sup>, linked to the intrinsic characteristics of the individual, determine the optimal conditions for the manifestation of vulnerability phenomena.

Thus, more generically, consumer vulnerability is posited as a state of powerlessness generated by an inability to control a situation or condition that, in a specific market context, causes the consumer harm or a disadvantageous situation such as to interfere with his or her purchasing and consumption behaviour.

In light of these issues, it may be considered that consumer vulnerability is a dynamic concept, since are the people and contexts that generated it, and that it is identified in the potential of the subject to be harmed.

Although numerous contributions have been made to give an account of the complexity of the phenomenon, to date there is still no unanimous consensus on what constitutes a

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Vulnerability: are Older People More Vulnerable as Consumers than Others?’ (2015) 39(4) *International Journal of Consumer Studies* 284.

<sup>61</sup> Cf G De Cristofaro, ‘Legislazione italiana e contratti dei consumatori del 2022: l’anno della svolta. Verso un diritto “pubblico” dei (contratti dei) consumatori?’ (2022) 45(1) *Le nuove leggi civili commentate* 38.

<sup>62</sup> See F Luna, ‘Identifying and Evaluating Layers of Vulnerability - A Way Forward’ (2019) 19(2) *Developing World Bioethics* 86.

<sup>63</sup> See S Chatratha, GS Batra and Y Chabac, ‘Handling Consumer Vulnerability in E-Commerce Product Images Using Machine Learning’ (2022) 8 *Heliyon* 2, which states that vulnerability can also be influenced by personal factors/circumstances that include (among many) even temporary health problems (physical or mental), emotional trauma or abandonment, physical impairment, weak language skills, dependency difficulties.

state of vulnerability and what its effects are on consumers<sup>64</sup>, as the legislation dealing with it is still disorganized and fragmented<sup>65</sup>.

## 2.2 Is There A Digital Consumer Vulnerability?

The notion of vulnerability<sup>66</sup> suffers from indeterminacy, due precisely to its legal, economic and sociological origin<sup>67</sup>, such that it is highly versatile in its application in the most diverse contexts<sup>68</sup>.

The extension of protection in terms of vulnerability is therefore undeniable, with regard to web users only, when referring to a specific group of consumers<sup>69</sup>.

With regard to the legal situations of vulnerability, there is a growing trend towards a concept that serves as a heuristic device<sup>70</sup> as well as a qualitative and/or quantitative indicator in the identification of situations potentially detrimental to dignity, in order to identify corrective and implementing solutions, oriented towards the promotion of the principles of equality and autonomy of the person, not only of protection and safeguard.

One hopes, therefore, for the construction of a common law for vulnerable persons (minors, older persons, digital consumers) that approaches the instruments of protection

<sup>64</sup> See again M Durovic and J Poon (n 36). See EU Digital Markets Act (DMA) itself, Regulation (EU) of the European Parliament and of the Council of 14 September 2022 on fair and contestable markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Regulation) (Text with EEA relevance) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R1925>> accessed 25 October 2024, proposed by the Commission in December 2020 and approved by the European Parliament and the Council in March 2022, in which no mention is made of vulnerable consumers. On this topic, see also Press Release, 'Digital Markets Act: Rules for Digital Gatekeepers to Ensure Open Markets Enter Into Force' (2022) European Commission <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_6423](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6423)> accessed 25 October 2024, as well as 'The Digital Markets Act: Ensuring Fair and Open Digital Markets (2022)', <[https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en)> accessed 25 October 2024. The same goes for the Digital Services Market (DSA), proposed in December 2020 and 25 March 2022 by the European Commission to improve the rules governing digital services in the EU <<https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>> accessed 25 October 2024, in which the identification of vulnerable consumers is only hinted at and, where it is hinted at, the conceptualisation of vulnerability is still severely limited, with groups of consumers influenced by factors such as gender, race, ethnic origin, religion, belief, disability, age or sexual orientation as factors that make specific groups or persons vulnerable or disadvantaged in the use of online services.

<sup>65</sup> E Bettelli, 'Dal concetto di debolezza alla nozione di vulnerabilità' in P Corrias (ed), *I soggetti vulnerabili nella disciplina comune e nei mercati regolamentati* (ESI 2022) 37.

<sup>66</sup> FD Busnelli, 'La dimensione della fragilità lungo il percorso della vita umana' in Id. (ed), *Persona e famiglia. Scritti di Francesco D Busnelli* (Pacini 2017) 239, in whose opinion the condition of vulnerability requires recovering, as a necessary premise, the fundamental principle of human dignity.

<sup>67</sup> See also Fusaro (n 60) 56.

<sup>68</sup> A De Giuli, 'Sul concetto di 'vulnerabilità' secondo la Corte di Giustizia UE' (2020) 10 *Diritto penale e uomo* (DPU) 1.

<sup>69</sup> G Berti De Marinis, 'La vulnerabilità nei mercati regolamentati' in P Corrias (ed), *I soggetti vulnerabili nella disciplina comune e nei mercati regolamentati* (ESI 2022) 89.

<sup>70</sup> M Fineman, 'Il soggetto vulnerabile e lo Stato responsabile', in MG Bernardini and others(eds), *Vulnerabilità etica, politica, diritto* (IF Press 2018) 166, Trad. it. by B Casalini and L Re, (article first published as 'The Vulnerable Subject and the Responsive State' 2010 (60) *Emory Law Journal* 151, 275).



in a more ductile manner<sup>71</sup>, as distinct from the merely patrimonial law that today pervades the various negotiation situations of simple informational weakness or disparity of bargaining power.

This context calls for a rethinking of the protection tools.

Some authors<sup>72</sup> have dwelt on the idea of an effective differentiation between vulnerable and non-vulnerable consumers, assuming that consumers can adopt very different attitudes depending on the circumstances in which they find themselves, so the group of vulnerable consumers cannot be considered a homogeneous group, but diversified according to assumptions and circumstances.

They found that if all consumers were considered vulnerable, the relevance of the concept of vulnerability and its operation would be lost<sup>73</sup>.

Despite the fact that this concept is more realistic and fluid, the standardisation of the notion of vulnerable consumer, whether on the one hand leads to greater malleability, on the other hand produces greater vagueness and legal uncertainty.

Therefore, it is possible to choose to give rights to a vulnerable group of consumers, adjusting the rules on a case-by-case basis, and without making any discrimination.

However, as has already been ascertained, various subjective aspects interfere in the consumer relationship and exacerbate the vulnerability of the contracting party; these are the personal conditions of certain consumers or social groups, which increase inequalities and determine a greater fragility, due to age, socio-economic conditions, cultural and psychological factors, which constitute the so-called 'aggravated vulnerability' or 'hypervulnerability' of the consumer (for example, the consumer's weakness and ignorance may be included in the context of hypervulnerability). These categories of subjects, therefore, require special protection, on pain of violation of the principle of equality.

This phenomenon, together with the traditional assumption of vulnerability, intensifies the fragility of the consumer, justifying greater protection for the hyper-vulnerable.

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<sup>71</sup> Battelli (n 65) 58.

<sup>72</sup> See S Fernandes Garcia and J Morais Carvalho, 'Vulnerabilidad y Consumo: ¿Tiene Sentido Distinguir entre Consumidores Vulnerables y no Vulnerables?' in E Soto Isler and D Jarufe Contreras (eds), *Vulnerabilidad y Capacidad - Estudios sobre Vulnerabilidad y Capacidad jurídica en el Derecho Comùn y de Consumo* (Rubicón 2022) 43, in which it is pointed out that "Portugal will follow a similar path in the near future. The measure, little applied so far, is based on the establishment of a set of criteria and rights corresponding to the vulnerable consumer status, which seems to aim at the approval of a cross-cutting legislative instrument".

<sup>73</sup> This explains why the concept of hypervulnerability has been created in some countries. The concept can be used to distinguish consumers precisely to overcome the idea that everyone is vulnerable. If everyone is vulnerable, we must distinguish between consumers who are more vulnerable than others and the concept of hypervulnerability.

See also F Barletta and M Maurilio Casas, 'A Proteção dos Vulneráveis e o Direito Civil: Um Mandamento Constitucional? Breves Reflexões' (2022) 31(141) *Revista de Direito do Consumidor (RDC)* 227; M De Souza Ciochetti and D De Souza Freitas, 'As Pessoas em Situação de Pobreza nas Relações de Consumo: a Hipervulnerabilidade e os Direitos Humanos' (2022) 31(141) *Revista de Direito do Consumidor (RDC)* 180, 188; D Mendes Thame Denny and others, 'COVID-19 Magnifies the Vulnerabilities: The Brazilian Case' (2021) 21(3) *International Journal of Discrimination and the Law* 279.

Indeed, applying the same treatment to all consumers, without assessing the subjective characteristics of certain purchasers or groups, would represent a new inequality.

In the digital society, the creation of new legal transactions in electronic commerce and the abuse of the use of personal data of web users by ISPs and third parties leads to the risk of increased vulnerability, hence the notion of hypervulnerability.

Thus, many concerns arise about the effectiveness of the regulatory instruments for consumer protection.

In such cases, governments must take care not only of the vulnerable, but especially of the hypervulnerable, as these are the ones who, as part of a minority that is often discriminated against or ignored, suffer the most prejudice. Protecting the hypervulnerable benefits the entire community, respecting the principle of social inclusion.

The subjective aspects of hypervulnerability must be balanced and evaluated in favour of the most fragile consumers in order to ensure the restoration of material equality and respect for the dignity of the individual in contractual relations. Therefore, the hypervulnerable deserve special attention, aimed at finding a means to pursue individual equality.

The concept should only be used in cases where the consumer is in a particularly vulnerable condition.

Thus, the distinction between vulnerable and non-vulnerable consumers may make sense, but at the same time, such a distinction implies going beyond the scope limited to consumer law alone to consider the individual as a citizen.

There is a need to look at digital vulnerability in the widest possible context by examining the impact that new technologies have on consumers. Therefore, in the digital context, in which all individuals may be potentially vulnerable, the understanding of who is a vulnerable consumer needs to be updated as soon as possible.

The way forward, therefore, would be to do the backward reasoning, i.e. to embrace the concept of vulnerability as the norm rather than the exception. This would allow the current consumer protection framework to be recalibrated (without necessarily having to wait for an actual reform, which, as is often the case, would be delayed) to assist consumers where they are unable to do so themselves<sup>74</sup>.

### **2.3 Platform Economy Contracts and Consumers**

In order to prevent consumers and businesses from being unfairly discriminated against when accessing content or purchasing goods and services online within the EU, one of the objectives of the DSM Strategy is to outline an appropriate regulatory framework for e-commerce.

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<sup>74</sup> See in this respect the final considerations by C Riefa, 'Protecting Vulnerable Consumers in the Digital Single Market' (2022) 33(4) European Business Law Review 633.





Among the various regulatory initiatives, it is also worth to mention Regulation 1150/2019<sup>75</sup> ('P2B'), which "originates precisely from the need to answer to the issue relating to the protection of commercial users who offer their goods and services through online platforms, mainly intended as 'online intermediary service providers' and search engines. In particular, many studies conducted in recent years have revealed a number of abusive practices in the relationship between digital intermediaries and users that have shed light on the shortcomings of the system and the need to strengthen the position of the latter<sup>76</sup>".

Continuing the analysis on cross-border e-commerce<sup>77</sup>, one of the reasons that has made consumers and smaller businesses skeptical is that the rules applicable to transactions can be complex, unclear and possibly differ from one member State to another. The duty to adapt to different national regulations on consumer protection and contracts has always discouraged businesses from engaging in cross-border trade, preventing consumers from taking advantage of the cheapest offers and the full range of online offerings<sup>78</sup>.

Further criticism is raised with regard to platform economy contracts<sup>79</sup>. Compared to traditional standard contracts drafted by the trader and submitted to the consumer, the terms and conditions of the contract are drafted by the platform and signed by its users and, unless otherwise specified, the same clauses apply to suppliers and users, both being qualified indiscriminately as users of the services provided by the platform. While it is true that the terms and conditions of contract practised by platforms would attribute rights and establish duties symmetrically for providers and users, it is also true that, by controlling the entire negotiation process, platforms exercise considerable power over their users, which is reflected in the terms and conditions of contract relating to the relationship between users and the platform, containing many of those provisions that highlight a condition of asymmetry between the contracting parties<sup>80</sup>.

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<sup>75</sup> Cf Among these, Regulation 1150/2019 should also be mentioned and, in this regard, see G Maggiore and L Lo Presti, *La responsabilità del marketing digitale, difendere il consumatore vulnerabile* (Giappichelli 2022) 2, 4; G Versaci, 'Le tutele a favore del consumatore digitale nella "Direttiva Omnibus"' (2021) 3 *Persona e Mercato* 583.

<sup>76</sup> *ibid.*

<sup>77</sup> See Fact Sheets on the European Union (n 20).

<sup>78</sup> Cf A Kuczerawy, 'To Monitor or Not to Monitor? The Uncertain Future of Article 15 of the E-Commerce Directive' (*Ku Leuven*, 10 July 2019) <<https://balkin.blogspot.com/2019/05/to-monitor-or-not-to-monitor-uncertain.html>> accessed 25 October 2024; K Osei Bonsu, 'An Economic Analysis of Consumer Right Protection in E-Commerce: Testing Efficiency Using the Principles of Contract Law' (2019) 15(1) *International Journal of Progressive Sciences and Technologies* 186. See L Bozzi, 'Le proposte di direttiva sui contratti di vendita online e sulla fornitura di contenuti digitali e la disciplina delle obbligazioni restitutorie - un tentativo (riuscito?) di bilanciamento dei contrapposti interessi' (2018) 116(4) *Rivista del Diritto Commerciale e del diritto generale delle obbligazioni* 603; VV Cuocci, 'Contratti online e mercato unico digitale: l'approccio (minimalista) del legislatore europeo in tema di clausole abusive' in A Addante (ed), *Tutela del consumatore nei contratti telematici e nuove frontiere del diritto europeo della vendita* (Cedam 2017) 73.

<sup>79</sup> F Möslin, 'Digitized Terms: The Regulation of Standard Contract Terms in the Digital Age' (2023) 19(4) *European Review of Contract Law* 300.

<sup>80</sup> See Fact Sheets on the European Union (n 20).

The main issues concerned contractual clauses reserving to platforms the right to unilaterally modify the contract, which is almost always accompanied by a presumption of acceptance of the users resulting from the continuous use of the platform<sup>81</sup>.

The analysis conducted so far leads to one consideration: while platforms help to make the relationship between providers and users more balanced with regard to the provision of services, the same cannot be said with regard to the legal relationship that the platform has with its users, as many clauses used by online platforms strongly prejudice individual users<sup>82</sup>.

Indeed, the prejudices stemming from digitisation undermine the digital platform-consumer interaction, making the latter particularly vulnerable<sup>83</sup>.

In such a context, in which the spread of digital tools is becoming increasingly complex, 'new' vulnerability hypotheses have arisen, thus witnessing the reconsideration of socio-economic factors, which are once again relevant<sup>84</sup>.

It becomes crucial to understand the evolution and critical analysis of the concept of consumer fragility/vulnerability in the digital economy, and the impact of the platform economy on the digital consumer (which may make it even more vulnerable).

In this respect, one consideration could be made with regard to consumer protection issues often arise from the informal production of services and insufficient transparency with regard to liability rules and resolution or redress mechanisms if problems occur in the platform economy<sup>85</sup>, which creates benefits but also risks.

European consumers have been exposed to new ranges of illegal goods, activities and content, while new online businesses struggle to enter a market dominated by large platforms. Connecting many businesses with many consumers through their services and their access to large amounts of data gives big platforms leverage to control and set standards for important areas of the digital economy. The EU wants to regain the initiative to shape those areas at the European level and set standards for the rest of the world<sup>86</sup>.

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<sup>81</sup> P Hausemer and others 'Exploratory Study of consumer issues in peer-to-peer platform markets' (2017) Brussels: European Commission <[https://eprints.soton.ac.uk/411699/1/FinalreportMay2017pdf\\_2\\_.pdf](https://eprints.soton.ac.uk/411699/1/FinalreportMay2017pdf_2_.pdf)> accessed 25 October 2024.

<sup>82</sup> *ibid.*

<sup>83</sup> Cf RP Kanungo and others, 'Digital Consumption and Socio-Normative Vulnerability' (2022) 182 *Technological Forecasting and Social Change* 2.

<sup>84</sup> Others include those that can be traced back to a social cause or economic condition inherent to the poor; immigrants, refugees, workers.

<sup>85</sup> Eurofound, European Foundation for the Improvement of Living and Working Conditions <<https://www.eurofound.europa.eu/en/platform-economy-consumer-protection>> accessed 25 October 2024. See also, JP Vazquez Sampere, 'Why Platforms Disruption Is So Bigger Than Product Disruption' (2016) 4 *Harvard Business Review* <<https://hbr.org/2016/04/why-platform-disruption-is-so-much-bigger-than-product-disruption>> accessed 25 October 2024.

<sup>86</sup> EU legislation needs to catch-up with online developments and that is why the EU worked on a new legislative framework called the Digital Services Act (DSA) and the Digital Markets Act (DMA), which aim to set guidelines for the new online landscape, including online platforms, to ensure a better, safer digital environment for users and companies throughout the EU.



Indeed, the growing emergence of the platform economy is having a distorting effect on both the established economic models and the related regulatory system<sup>87</sup> and on the issues related to digital platforms<sup>88</sup>. Resorting to a broad conceptualisation, one can consider that the existing regulatory systems do not seem fully capable of providing adequate legal solutions to the numerous problems related to the platform economy, its nature and function.

In this sense, the question is: Which regulatory measures should be applied to strike a harmonious balance between promoting healthy innovation and ensuring a safe digital transactional environment for all classes of users contracting with platform operators?

It is now clear that in the platform economy contracts are often concluded in a condition of total asymmetry of bargaining power to the advantage of platforms; what is not clear, however, is whether, and to what extent, solutions capable of counteracting these inequalities are actually emerging. Although, in some cases, the protection of the weaker contracting party in the platform economy may be guaranteed through recourse to traditional protections, in other hypotheses it may not be possible to disregard the implementation of a regulatory intervention - to be added to the ordinary remedies of common rights - that guarantees the balance between private autonomy and contractual equity.

In such a framework, it is essential to interpret the general terms and conditions prepared by platforms through technological tools, taking into account the operating systems and structure of sites, apps and algorithms.

### 3 Standard Contracts and Platforms: Benefits and Detriments from the Digital World

The objective envisaged by the European legislator, through its recent numerous regulatory initiatives, has been to adapt the European Single Market to the Digital Age, thus making it imperative to frame the regulation of contracts in the broader context of digitisation-related phenomena, including contracts for the provision of digital content and services<sup>89</sup>.

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<sup>87</sup> See C Bush and others, 'The Rise of the Platform Economy: A New Challenge for EU Consumer Law?' (2021) 5 Journal of European Consumer and Market Law 3.

<sup>88</sup> European Commission 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Online Platforms and the Digital Single Market - Opportunities and Challenges for Europe' (2012) <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52012DC0673>> accessed 25 October 2024; M Colangelo and V Zeno-Zencovich, 'Online Platforms, Competition Rules and Consumer Protection in the Travel Industry' (2016) 5 Journal of European Consumer and Market Law 75.

<sup>89</sup> G Guerra, 'Il contenuto digitale nel contratto di vendita di beni e servizi. Note a margine della nuova disciplina di armonizzazione (massima) europea' [2020] Giustiziacivile.com 1-10.

“Within the context of the Strategy for a Digital Single Market, the European Commission introduced new rules that harmonise collective enforcement of consumer protection laws to better safeguard consumers’ interest put forward the Digital Services Act package”<sup>90</sup>.

We have seen how digital transformation has also led to a change in standard contract terms. In effect, with the emergence of online platforms, supported by algorithmic data analysis and self-enforcing technologies, platform terms and conditions have become increasingly common. Since these clauses deviate strongly from traditional standard terms for many reasons, several authors<sup>91</sup> have, after careful examination, questioned whether the current regime of unfair contract terms is still appropriate for the evolving category of the digital consumer-user.

The emergence of online platforms, supported by algorithmic data analysis and self-enforcing technologies, is increasingly replacing traditional standard terms with platform terms. Generally speaking, the emergence of the platform economy modifies the regulatory framework within which transactions occur.

Hence, “it is necessary to amend the UCTD to, on the one hand, improve consumer protection online against unfair contract terms of DSPs and, on the other hand, to provide more legal certainty to DSPs as to what terms and conditions are considered fair”<sup>92</sup>.

Perhaps, the regulatory instruments developed for the standard terms of bilateral agreements (transparency requirements, review of fairness and restrictions on contracts) seem inadequate to meet the new challenges of digital transformation. In order to strike the right balance between protecting private autonomy and avoiding significant imbalances, a new regulatory strategy is needed. Therefore, the regulatory objective should be to ensure the impartiality of platforms by focusing on the structural conditions of their regulation<sup>93</sup>.

The European legislator adopted the same regulatory approach in the broader context of digital legislation: the P2B Regulation refers to transparency in its title and makes it one of its main regulatory objectives<sup>94</sup>. In particular, Article 3 requires online intermediary service providers to ensure transparency in various aspects. However, it is considered that the regulatory instrument of transparency is not sufficient to preserve private autonomy

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<sup>90</sup> See literature described (n 15).

<sup>91</sup> On this subject, see C Poncibò, ‘The UCTD 30 Years Later: Identifying and Blacklisting Unfair Terms in Digital Markets’ (2023) 19 (4) *European Review of Contract Law* 321, 345; DT Apostolos, ‘The Court and the Sleeping Beauty 2.0: Filling the Contractual Gap, or Making Valid Consumer Contracts to the Detriment of the Non-consumer?’ (2023) 19(4) *European Review of Contract Law*; M Ginestri, ‘Equality or Superiority of the Weak Party? Consumer Protection and the Issues at Stake’ (2023) 19(4) *European Review of Contract Law* 375; P Hacker ‘Manipulation by algorithms. Exploring the triangle of unfair commercial practice, data protection, and privacy law’ (2021) 29 *European Law Journal* 142.

<sup>92</sup> MBM Loos and J Luzak, ‘Update the Unfair Contract Terms directive for digital services’ (2021) *European Parliament - Policy Department for Citizens’ Rights and Constitutional Affairs Directorate-General for Internal Policies* 17-22.

<sup>93</sup> MBM Loos, ‘Crystal Clear? The Transparency Requirement in Unfair Terms Legislation’ (2023) 19(4) *European Review of Contract Law* 281.

<sup>94</sup> P2B Regulation (EU 1150/2019) Art 1(1).



in the face of digitised standard terms. Although transparency regulations may help to overcome information asymmetries and promote informed choices, they prove ineffective when restrictions on private autonomy have other causes.

That's why specific prohibitions should be introduced into the UCTD to address some of the most common transgressions.

On the other hand, other scholars have pointed out that the discipline laid down by the UCTD is sufficient and can also be extended to the online world, at most being supplemented<sup>95</sup>.

The emergence of online platforms, supported by algorithmic data analysis and automated technologies, is increasingly replacing traditional standard terms with platform terms. In this respect, there is a need to assess the adequacy of the existing regime of unfair contractual terms to digitised terms or whether a new regulatory approach is needed. The regulatory tools developed for standard terms in bilateral agreements, relating to transparency requirements, fairness review and restriction on contracting, do not longer seem adequate to meet the challenges of digital transformation.

Through these legislative initiatives, the EU's main aim would be to adopt appropriate measures aimed at the establishment or functioning of the internal market, while contributing to the achievement of a high level of consumer protection, and to ensure the right balance between this achievement and the promotion of the competitiveness of enterprises (especially SMEs)<sup>96</sup>.

Starting from these premises, therefore, the aim will be to investigate the actuality of the inequality of bargaining power in the digital market economy, in order to demonstrate how the risk arising from this imbalance has not diminished (on the contrary) and how the numerous European regulatory initiatives appear ambiguous, lacking and still totally insufficient to guarantee appropriate protection for the vulnerable digital consumer.

### 3.1 Unfair Terms Regulation and Vulnerable Subjects

As is well known, the numerous regulatory initiatives envisaged by the European legislator in recent years highlight a further issue: the need to protect the vulnerable position of users in the digital market and operating in e-transactions. This has had a particular impact on the necessary reframe of certain regulations, first of all the UCTD<sup>97</sup>, leading interpreters to wonder whether the UCTD itself may be sufficient for the protection of this 'new' category of subjects or whether the adoption of *ad hoc* measures as well as a constant updating of the list of unfair contract terms (especially the updating

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<sup>95</sup> See B Hajek, 'Online Platform Service Providers on Platform 9¾: A Call for an Update of the Unfair Contract Terms Directive' (2020) 28(5) *European Review of Private Law* 1143, 1174.

<sup>96</sup> Cf Recital 1, Dir. (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects of contracts for the supply of digital content and digital services (22 May 2019) OJEU L 136/1.

<sup>97</sup> C Gardiner, *Unfair Contract Terms in the Digital Age. The Challenge of Protecting European Consumers in the Online Marketplace* (Edward Elgar 2022).

of blacklists) is essential. Indeed, the UCTD needs updating to address the challenges posed by digital services. “This concerns in particular the fundamental research question of identifying new unfair terms of DSPs so that they can be included in a new blacklist”<sup>98</sup>. The scope is to guarantee the evolution of consumer law, in the digital age, and promoting a fair and transparent environment for consumers in an ever-changing digital landscape<sup>99</sup>.

In this sense, the work will examine whether general terms in contracts of digital service providers, in the event of a significant imbalance between the rights and obligations of the parties aimed at harming consumers, can be brought within the scope of the UCTD, whose framework was mainly developed for the offline world<sup>100</sup>.

Indeed, numerous new marketing practices are based on the use of sophisticated technologies that also allow for large-scale processing of data that may include personal consumer data.

The evolution of algorithmic practices will be evaluated based on specific normative thresholds set by EU consumer law. As we know, consumer law does not offer the sole or optimal normative framework for assessing the development of algorithmic business practices. Crucially, to effectively analyse the impact of digitisation on legal relationships, it is essential to clearly define and articulate these different perspectives<sup>101</sup>.

Thus, in this context, it is also crucial to assess the online transparency of digital service providers’ clauses and the penalties to which they might be subject in the event of violation of the current consumer protection framework<sup>102</sup>.

Overall, the digitisation of standard terms poses challenges to the existing regulatory model of the Unfair Contracts Terms Directive - recently amended by the *Omnibus Directive* - in several aspects. Although the UCTD was never genuinely reformed in the over thirty years since it entered into force, it needs updating to address the challenges posed by digital services.

Whereas platform terms are not considered part of “contracts concluded between a seller or supplier and a consumer” (Art 1 par 1 UCTD), but are provided by a third party, and personalised terms may not be “drafted in advance” (Art 3 par 2 UCTD), technological self-enforcement threatens to create significant imbalances (Art 3 par 1 UCTD).

In order to preserve the architecture of choice for private contracts, it is necessary to consider a new legal strategy. This is because, the measures once developed for standard

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<sup>98</sup> These updates are necessary for the development of the study on the ‘Fitness Check of EU Consumer Law’ concerning the evolution of consumer law in the digital sphere.

<sup>99</sup> See G Hiwatashi Dos Santos, ‘A “New Deal for Consumers”? The European Regulatory Framework for Online Search Queries and Rankings under the Omnibus Directive (Directive (EU) 2019/2161)’ (2020) 2 *Anuário do NOVA Consumer Lab* 66.

<sup>100</sup> Loos and Luzak (n 92).

<sup>101</sup> Ouyang (n 13).

<sup>102</sup> Recommendations are made to improve the effectiveness of this framework through: the introduction of a black list and a grey list of unfair terms, the strengthening of existing sanctions and the introduction of new obligations for digital service providers.





terms in bilateral agreements - transparency requirements, fairness review, and restrictions on contracting around - seem inadequate to meet the new challenges of digital transformation.

Perhaps, in this context, the current European framework regarding unfair contract terms may not effectively protect when they enter into contracts with DSPs. This is because, although the digital sphere has brought about many benefits, it has also placed consumers in a more vulnerable position.

On this point, the digital revolution, which has overwhelmed the European market, has led the legislator to draw up new regulations aimed at implementing and innovating the DSM - with particular reference to the field of European online contract law, trying also to protect the 'weak' party of digital contracts: the consumer-user (taking into account, for instance, the DCD concerning contracts for the supply of digital content and services, and the SGD concerning contracts for the sale of goods)<sup>103</sup>.

This is in response to the boundless economic potential of the Internet for commerce, which enables the aggregation and globalisation of markets.

The use of digital platforms in contracting, governed at European level by the P2B Regulation, requires a reevaluation of traditional civil law profiles. The evolution of telematic contracts and the protection of digital consumers call for a fresh approach that goes beyond established legal frameworks.

For this reason, the legal models should be technologically neutral - allowing for flexibility and adaptation to evolving business models and technological advancements in the platform economy - and should also balance the interests of platform operators, users, and regulators, promoting fair and transparent contractual practices.

In light of these considerations, online platforms are one of the main technological drivers providing alternative regulatory infrastructures based on their standard terms and conditions.

In this sense, the research analyses different types of digital-specific unfair terms used by DSPs: the ones concerning digital services and contents, automation and personalisation, and finally, the ones concerning consumers' data rights. It would be

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<sup>103</sup> Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects of contracts for the supply of digital content and digital services L 136/1 <<https://eur-lex.europa.eu/legal-content/IT/ALL/?uri=CELEX:32019L0770>> accessed 25 October 2024; Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects of contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC <<https://eur-lex.europa.eu/legal-content/IT/ALL/?uri=CELEX:32019L0771>> accessed 25 October 2024.

Turning to the analysis of the transposition of Directive (EU) 2019/770, on contracts for the supply of digital content and services, and Directive (EU) 2019/771, on contracts for the sale of goods, the European delegation law does not provide for any particular criteria regarding the transposition of the relevant regulatory provisions into Italian law. The Directives, complementing each other, are qualified as 'Twin Directives'; however, despite their common peculiarities, they also present clear differences. See I Fernández Chaçòn, 'Some Considerations on the Material Scope of the New Digital Content Directive: Too Much Work Out for a Common European Framework' (2021) 3 *European Review of Private Law* 517.

necessary to examine the regulatory options, aimed at defining the vulnerability of users and, particularly, the possibility of establishing a new blacklist of digital-specific unfair terms and integrated them with some guidelines for fairness assessment under the UCTD.

The need to change the directive emerged only in the past year, through the *Omnibus Directive* (also known as Modernisation Directive - MD). This change is limited to increasing the effectiveness of the UCTD sanctions and facilitating the enforcement of unfairness in the Member States. The specific aim is “to propose measures increasing the effectiveness of the UCTD framework in the provision of digital services. To that effect, the study presents an overview of commonly encountered terms used by digital service providers and evaluates whether they may cause a significant imbalance, contrary to good faith, in the parties’ rights and obligations to the detriment of consumers. Where this is indeed the case, such terms could be considered unfair”<sup>104</sup>.

“In effect, the aforementioned digital landscape has unique features that were not present in traditional face-to-face transactions. In particular, consumers interact with a wide range of digital service providers and online platforms, and these interactions are governed by terms and conditions which lay out the contractual obligations and rights of both consumers and service providers and should be designed to protect the interests of all parties. These terms and conditions often disadvantage consumers, putting them in a more vulnerable condition caused by the digital asymmetry”<sup>105</sup>.

This is fundamental for the evaluation of the need for amending this directive in order to improve, on the one hand, the protection of online consumers against unfair contractual terms of digital service providers and, on the other hand, to give more legal certainty to digital service providers concerning terms and conditions that are considered unfair<sup>106</sup>.

In this regard, the purpose of this work is to deal with the question of contract supplementation and the revision of unfair contractual terms, enlightening the main problems the digitisation has encountered.

### 3.2 Types of Digital-Specific Unfair Terms

The current European framework against unfair contract terms may not be an effective regulatory tool for consumer protection, especially when consumers conclude contracts with DSPs. As member States offer more consumer protection than the UCTD, DSPs may be faced with a different assessment of unfairness in the different member States, resulting in unequal conditions for digital service providers.

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<sup>104</sup> The EU Parliament published a preliminary list of updated unfair or potentially unfair clauses that can be found in the terms and conditions of contracts concluded between consumers and Digital Service Providers (DSPs) see on <[https://www.europarl.europa.eu/RegData/etudes/STUD/2021/676006/IPOL\\_STU\(2021\)676006\(SUM01\)\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/676006/IPOL_STU(2021)676006(SUM01)_EN.pdf)> accessed 25 October 2024.

<sup>105</sup> Gardiner (n 97).

<sup>106</sup> See Fact Sheets on the European Union (n 20).



It has been noted that in recent years, new unfair contract terms have emerged in specific sectors, leading to the need to innovate the discipline. Nevertheless, identifying digital-specific unfair terms used by DSPs in consumer contracts poses new challenges trying also to understand if the UCTD differs in the digital world.

Firstly, digital services and digital content: the analysis of “common terms in contracts of digital service providers, indicating when they could significantly distort the balance between the parties’ rights and obligations to the detriment of consumers and should, therefore, fall within the scope of the Unfair Contract Terms Directive”<sup>107</sup>.

In particular, digital services could only be provided in the online environment by DSPs and not provided offline. At times, consumers may not be certain whether they have acquired a digital content or a digital service and, therefore, what protection they are entitled to. The MD recognises this ambiguity, as the supply of digital content could also be a series of individual acts of supply or even continuous supply throughout a period of time, which characteristics are normally associated with the provision of digital services (Recital 30 MD). A recommendation that could be made for the revision of the UCTD, in this respect, is a recognition of unfairness of such terms and conditions of DSPs, which do not transparently or correctly identify the nature of the contract, as well as statutory rights and obligations of parties following from it.

This is just one example of a situation, where a standard term of a contract for the provision of digital services could implicitly undermine consumer protection and discourage or even stop consumers from claiming their rights<sup>108</sup>.

Numerous other clauses, however, can be taken into account and, therefore, brought under the UCTD, including: Contract terms which oblige the consumer to conclude an additional digital content contract or another contract pertaining to hardware with a third party; Contract terms preventing consumers from exercising rights under copyright law; Contract terms misrepresenting a service as acquisition of content, using tacit consent and ‘browsewrap’ contracts or misrepresenting the service as free where the trader monetises their personal data, time or attention; Contract terms forcing the consumer to waive ownership of content they share on the service (videos they produce, photos uploaded on social media, etc.); Contract terms giving the trader the right to unilaterally delete a consumer’s user account (this can have a huge impact on consumers, for many their online accounts are an important part not only of their social but also their professional activity)<sup>109</sup>.

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<sup>107</sup> See again Gardiner (n 97).

<sup>108</sup> BEUC, ‘EU Consumer Protection 2.0 - Protecting fairness and consumer choice in a digital economy’ (2022) 3-9 <[https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-015\\_protecting\\_fairness\\_and\\_consumer\\_choice\\_in\\_a\\_digital\\_economy.pdf](https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-015_protecting_fairness_and_consumer_choice_in_a_digital_economy.pdf)> accessed 25 October 2024.

<sup>109</sup> N Helberger and others, ‘Towards Digital Fairness’ (2024) 13(1) *Journal of European Consumer and Market Law* (EuCML) 24-30; N Helberger and others, ‘Digital Fairness for Consumers’ (BEUC 2024) 262.

However, at the moment these terms are just indicative of unfairness and are included in a non-exhaustive and exhaustive list.

The other hypothesis involving the possible identification of new abusive clauses concerning Contract Terms derived from automated systems as the digital landscape expanded, so did the complexity and opacity of the processes underpinning digital services. Many DSPs began leveraging sophisticated algorithms, and AI systems, to make decisions that directly affected users.

While these automated systems often brought about efficiency and personalisation, they also introduced challenges, notably in transparency and equity. Users were often unaware of how decisions were made on their behalf and with what implications. This lack of transparency made it difficult for consumers to make informed decisions and left them vulnerable to potential biases and unfair practices embedded within these algorithms.

The whole issue related to automated systems only serves to highlight the inadequacy of consumer protection instruments, due to the numerous gaps and significant flaws in legislation (e.g. the most recent AI legislation)<sup>110</sup>.

Finally, some unfair terms may involve intricate technological aspects, such as data collection, processing, and sharing practices. It is essential to discuss about the peculiarities of the assessment of online transparency of terms of digital service providers and sanctions they could face if they breach the current consumer protection framework and their personal data. For that reason, recommendations have been proposed in order to improve the effectiveness of this framework by: introducing a black and grey list of unfair terms, strengthening current sanctions, and introducing new obligations for digital service providers. If DSPs do not comply with such obligations, they could find themselves in breach of the GDPR<sup>111</sup>. This may either provide consumers with additional remedies<sup>112</sup>.

To strengthen legal certainty in the relationship between DSPs and consumers, it could be recommended to extend the principle of transparency from the UCTD to apply to DSPs providing information as to which of their online disclosures are part of their terms and conditions.

Practices based on data exploitation can render consumers entirely powerless in situations where insights from their data allow the trader to exploit their vulnerabilities and pressure points against them. In effect, at the level of contractual clauses, consumers purchasing goods and services can be put in a situation of particular disadvantage where the ‘fine print’ in the contract terms requires them to enter into yet another contract to use their newly purchased device (e.g. connected devices proving to be useless without a

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<sup>110</sup> S Pant, ‘EU Rules on AI Lack Punch to Sufficiently Protect Consumers’ (2023) Press Release 1.

<sup>111</sup> F Zuiderveen Borgesius, N Helberger and A Reyna, ‘The Perfect Match? A Closer Look at the Relationship between Eu Consumer Law and Data Protection Law’ (2017) 54 Common Market Law Review 1451.

<sup>112</sup> For example, an option to withhold performance, not allow DSPs to rely on their liability exclusion or limitation clauses or allow courts to terminate the contract if this is more advantageous to the consumer than merely leaving the term contradicting the GDPR out of consideration.



contract with a service provider), or when they are prohibited from using the device in ways which are allowed by law<sup>113</sup>.

As a result, certain clarifications are necessary to improve the online consumer protection against unfair contract terms of DSPs and to provide more legal certainty to DSPs as to what terms and conditions are considered fair.

In this sense, even the possibility to deliver special guidelines was outlined, but that said, given the emergence of new unfair contractual terms, additional guidance for DSPs is needed for defining how compliant terms and conditions in digital business should look like (e.g. in relation to consent to the collection and use of personal data in line with GDPR, or to changes to terms and conditions, or to copyright and ownership of consumer-generated content); and how they would best be presented online (digital design).

However, a problem is that guidance is not legally binding. Consequently, only some market participants actually look at the guidance and are familiar with the detailed examples and supporting case law provided<sup>114</sup>.

In conclusion, since digital contracts adopt and adapt traditional clauses to suit online interactions, it is crucial to differentiate between known unfair terms that are repackaged for the digital context and the new one specifically tailored to digital markets. As a matter of fact, while these terms may not be entirely novel, their implementation and impact in the digital realm can differ from what happens in traditional settings.

Distinguishing reiterations of known terms and original ones is crucial for effectively addressing the root causes of consumer harm.

Hence, to promote gap-filling regulations, an additional regulatory mechanism is needed to encourage the emergence of balanced conditions. Rather than sanctioning conflicting regulators, such a regulatory instrument should favour those regulators that appear to be particularly reliable. Such an approach would benefit from the fact that platforms are, in principle, particularly well-positioned to design rules that mimic the market, as they have access to data on market participants' preferences that are not usually available to regulators.

### **3.3 The 'Omnibus' Directive: Towards (and Beyond) the Modernisation of Consumer Protection in the Digital Society**

These years of technological changes have not only identified a regulation that catches up with the changes, but have also provoked a shift in the relationship between regulation and interpretation of the abovementioned legal framework. This has made the current system more complex and, at the same time, has led to the ineffectiveness of traditional regulation and protection techniques, making it necessary, finally, "to adopt new logics

<sup>113</sup> See R Montinaro, 'Online Platforms: New Vulnerabilities to be Addressed in the European Legal Framework. Platform to Business User Relations' (2020) 2 European Journal of Privacy Law & Technologies 38.

<sup>114</sup> Durovic and Poon (n 36).

to recompose a system (that despite the implementation of a European discipline of maximum harmonisation is still persistent) that is jagged<sup>115</sup>. Among the most significant changes affecting this process we can list: the pluralism of sources that undermines Consumer law (not only at the national level), which is naturally destined to continuous revisions necessary to adapt it to the new European legislation; the globalisation of the economy and competition between systems; the crisis of the ‘average’ consumer, whereby the provisions merely indicate the protected interest and the purpose of protection, leaving the interpreter with the task of filling in the gaps; finally, the sectoral and vertical legislation, which is sometimes too analytical (sterile or repetitive).

The main and direct consequence of these changes is the shift from the traditional unity of the system to its current unevenness, characterised by a plurality of sectoral disciplines (sometimes overlapping, sometimes intersecting) and general rules.

The further (negative) effect of the changes brought about by the technological revolution was the direct (and partial) obsolescence of pre-existing provisions.

This has been recognised following the advent of the aforementioned ‘New Deal for Consumers<sup>116</sup>’ and, above all, the ‘Omnibus’ Directive (MD), although on the whole the rules appear inadequate and become quickly obsolete.

On closer inspection, the modernisation of consumer protection rules has been driven by increasing societal demands. Several gaps in national consumer laws have been identified due to breaches in the transposition of previous directives and new digital tools. Furthermore, another important aim of this Directive is to strengthen the transparency and information requirements already well established in other legislation<sup>117</sup>.

What appears ineliminable, notwithstanding the additions and subtractions due to the continuous impact of legislative evolution, is the presence of general principles and rules of a cross-sectoral nature that are suitable for guaranteeing a statute of general consumer rights and protections, which can then find their declination in special rules.

It is precisely by looking more closely at the transposition disciplines of the two UCTD and UCPD, that we can already see the non-univocal nature of the notion of consumer<sup>118</sup>.

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<sup>115</sup> Cappello (n 37).

<sup>116</sup> Cf S Perugini, ‘La normativa comunitaria’ in G Cassano, M Dona and R Torino (eds), *Il diritto dei consumatori* (Giuffrè 2021) 42.

<sup>117</sup> Gardiner (n 97).

<sup>118</sup> See in this regard G De Cristofaro, ‘Rimedi privatistici “individuali” dei consumatori e pratiche commerciali scorrette: l’art. 11-bis Dir. 2005/29/UE e la perdurante (e aggravata) frammentazione dei diritti nazionali dei paesi Ue’ (2022) 2 *Jus Civile* 269; M Maugeri, ‘Invalidità del contratto stipulato a seguito di pratica commerciale sleale?’ (2022) 2 *Jus Civile* 319, 320; L Guffanti Pesenti, ‘Pratiche commerciale scorrette e rimedi nuovi. La difficile trasposizione dell’art 3, co. 1, n. 5), Dir. 2019/2161/UE’ (2021) 4 *Europa e diritto privato* 635; C Camardi, ‘Contratti digitali e mercati delle piattaforme. Un promemoria per il civilista’ (2021) 4 *Jus Civile* 885, in which it is found that “The very recent Directive 2019/2161, on the modernisation of consumer rights has intervened inter alia to amend those already introduced on unfair terms, unfair commercial practices, price indications, by reinforcing the information obligations also incumbent on platforms, especially with reference to whether or not the operator offering goods and services through it is a





The first, which essentially looks at the contract and its content, focusing on the clauses intended to make it up, refers to a notion that we could call ‘concrete’ of consumer, useful to delimit the scope of application of the rules.

The second, which essentially considers the activity and not the act, refers to an abstract figure of the consumer, which the legislator seems to use to indicate the objectives pursued through legislative action (by shifting the focus from the act to the activity, the figure of the consumer expands and emerges from the rigidity that usually characterises it).

It follows from this that there is no single legal concept of the consumer and this also generates critical issues in terms of consumer protection<sup>119</sup>.

There is thus an apparent need not to limit the broad topic of the protection of subjects who, although differently identified and defined, are still bound by the same need for protection (despite criticisms have been raised on this point<sup>120</sup>). In such a context,

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professional (a circumstance that the consumer purchaser must be aware of in order to determine the rules applicable to the contract, consumer law or common law)”; Finally, for an overall assessment of the new Directive, see F Cafaggi, ‘Rimedi e sanzioni nella tutela del consumatore: l’attuazione del New Deal’ (2020) 2 *Questione Giustizia* 4. For a more general perspective on consumer law see, instead, G De Cristofaro, ‘40 anni di diritto europeo dei contratti dei consumatori: linee evolutive e prospettive future’ (2019) 2 *I Contratti* 177; S Pagliantini, *Il diritto privato europeo in trasformazione - Dalla direttiva 771/2019/EU alla direttiva 633/2019/EU e dintorni* (Giappichelli 2020) 2.

<sup>119</sup> On this issue, a comparison should be made with the findings of P Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (3rd edn, ESI 2020) 510, where it is expressly stated that “consumer protection is not always achieved through the protection of consumption: sometimes the subject is protected as a citizen, sometimes as a person the quality of consumer is only an aspect of the person, a partial aspect of a complex reality, where individuals cannot be distinguished exclusively between producers and consumers, since they are first and foremost men”. A similar thesis is supported by A Barba, *Consumo e sviluppo della persona* (Giappichelli 2017) 294, who, on this very point, expressly declares that “the transformation of the social and economic category of consumer into a legal category that is characterised by the structural relationship between consumption, weakness and protection, is included and absorbed in the situational connotation of protection: the weakness of the consumer in fact only comes to the fore in the situations typified by the legislator. The natural person is protected not by reason of the state of inferiority with respect to the producer or distributor of goods or services that he chooses to - or is induced to - consume, but by reason of the diminished or compromised power of negotiating self-determination that is determined in particular relational market situations. The situational connotation is derived precisely from the need for normative typification, i.e. a selective strategy of the deservingness of protection of the relational situations that make up the internal market; if the need for protection were immanent to the person, who, moreover, can only live by consuming, typification would not be necessary”. P Stanzione (ed), *La tutela del consumatore tra liberismo e solidarismo* (ESI 1999) 307. “Therefore, it is useful to separate the rules defending the consumer as a market protagonist, from the provisions guaranteeing the person and/or the citizen [...] In reality, the status of person and citizen have an absolute value; on the contrary, the consumer is a condition linked to the concrete circumstances and to the actual modalities of contracting. Different is the consumer in the financial market, where there are special guarantees and to which some persons cannot even gain access. [...] The consumer is not a status, but a contractual position to be identified and ascertained from time to time; the subject is now a consumer, now a producer or entrepreneur in a condition of economic or technological dependence”.

<sup>120</sup> On this issue, however, see F Denozza, ‘Fallimenti del mercato: i limiti della giustizia mercantile e la vuota nozione di “parte debole”’ (2013) 1 *Orizzonti del diritto commerciale* 3. According to the authors’ view, the consumer is not always weak, but weakness derives from the compromised ability to self-determine in consumption, thus, it is not a pre-existed status, but only exists when the ability to self-determine is compromised, in which case, it would seem, one could speak of a weak consumer.

reference should be made to the ‘fractionated’ consumer<sup>121</sup>, increasingly mentioned because of the activities with which he or she is connected.

This is because the generic concept of consumer usually refers to the person who participates in one or more of the phases of the consumption cycle (which can be considered, at least in general terms, the persuasion phase, the purchase phase and the fruition phase).

This concept, however, does not specify which behaviour distinguishes the consumer. This has long led to the subject being regulated on the assumption that consumer behaviour is the result of a choice made by a rational agent.

More recently, on the other hand, the theory based on cognitive psychology and behavioural economics<sup>122</sup> has been widely affirmed, according to which the image of the consumer as ‘*homo oeconomicus*’ “does not automatically provide a causal explanation for consumer behaviour, nor is it a tool for predicting such behaviour, but is a regulatory ideal that is only efficient if it is actually followed by the recipients, otherwise consumer behaviour is irrational”<sup>123</sup>. The cognitive bias<sup>124</sup> becomes the new critical issue, on which the legislator tends to focus its attention.

Nevertheless, a common and unambiguous notion of a digital vulnerable consumer has not been proposed, as it is a particularly broad and ever-changing concept.

Concretely, the digital consumer has been more generically qualified as the consumer who concludes contracts by digital means and/or who purchases (or accesses) goods, services or content of a digital nature<sup>125</sup>. This consumer may be qualified as that subject placed in a condition of vulnerability with respect to the most dominant platforms, amplified and conditioned by external factors created by the modern digital ecosystem.

Indeed, while there is no agreement on a single definition of vulnerable consumers, the concept of consumer vulnerability that emerges from the academic literature, including sociology, marketing and law is wider than the one defined in the UCPD.

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<sup>121</sup> Please see F Bassan, M Rabitti and L Rossi Carleo, ‘Consumerism 2019 - Dodicesimo rapporto annuale - Dal codice del consumo al Digital Service Act. Quella dal consumatore al cittadino digitale è vera evoluzione?’ (2022), *Il consumatore vulnerabile tra innovazione e diritti fondamentali* 8 <https://www.consumersforum.it/ricerche.html> accessed 25 October 2024.

<sup>122</sup> Cf L Herzog, P Kellmeyer and V Wild, ‘Introduction to the Special Issue Digital Behavioral Technology, Vulnerability and Justice: Towards an Integrated Approach’ (2022) 80(1) *Review of Social Economy* 807; P Kellmeyer, ‘Digital Vulnerability: A New Challenge in the Age of Superconvergent Technologies’ (2019) 12(1/2) *Bioethica Forum* 60.

<sup>123</sup> Bassan, Rabitti and Rossi Carleo (n 121).

<sup>124</sup> *ibid.*

<sup>125</sup> See, N Helberger and others, ‘EU Consumer Protection 2.0. Structural Asymmetries in Digital Consumer Markets’ (BEUC 2021) 1 <[https://www.beuc.eu/publications/beuc-x-2021\\_018\\_eu\\_consumer\\_protection.0\\_0.pdf](https://www.beuc.eu/publications/beuc-x-2021_018_eu_consumer_protection.0_0.pdf)> accessed 25 October 2024 i quali pongono il seguente interrogativo: “what protection can the concept of consumer vulnerability offer the digital consumer, is the distinction between the average and the digital consumer still fit for the digital age, and if not, do we need a new understanding of ‘digital vulnerability’ and what would its elements be?”. Tuttavia, tali interrogativi non presentano una risposta univoca. See also European Parliament, ‘Vulnerable Consumers’ (2021) 2, <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690619/EPRS\\_BRI\(2021\)690619\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690619/EPRS_BRI(2021)690619_EN.pdf)> accessed 25 October 2024.



Obviously, even this perspective is not self-sufficient, but it contributes to weakening the systematic value of the traditional notion of the consumer<sup>126</sup> as a natural person acting for purposes unrelated to the professional activity carried out and leads, rather, to distinguishing the activity of the offline consumer from the online consumer<sup>127</sup> (to whom, moreover, a central and dynamic role should be recognised).

In this respect, the communication on the New Deal turned the spotlight on the digital consumer (the consumer-user who buys goods and services on online marketplaces).

This is seen as a more evolved consumer who, faced with the way digital platforms operate, may find himself disarmed and lacking clear and sufficient tools to protect his position in the same way as in traditional markets.

Despite the fact that the ‘*Omnibus*’ Directive aims to amend the UCTD, it is pointed out that “the changes made to the directive did not specifically concern consumers accessing goods and services of a digital nature, nor those accessing goods and services of a physical nature by digital means (for this reason, there is no shortage of calls for a more significant update of the UCTD that takes into account the peculiarities of the digital economy)”<sup>128</sup>.

## 4 Final Remarks

The analysis outlined so far leads to some fundamental considerations.

- The first one is related to the defining aspects of the concept of vulnerability as well as the contextual proposition of the problems connected to the phenomenon.

At this point, it is possible to outline some reconstructive hypotheses considering the figure of the vulnerable digital consumer and the possibility of innovating the discipline and the protection tools for these users in case of unfair digitalised clauses.

It is essential, then, to start from an assumption: the contemporary world, in regulatory silence, requires that the protection of the most vulnerable individual be raised beyond

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<sup>126</sup> L Ammannati, ‘Il paradigma del consumatore nell’era digitale: consumatore digitale o digitalizzazione del consumatore?’ (2019) 1 *Rivista trimestrale di diritto dell’economia* 8, which specifies that with the new consumer provisions, the European Commission intended to strengthen digital consumer protection policies. Indeed, the new package of measures is largely tailored to the future challenges for consumer policy in a rapidly changing economic and technological environment. It is therefore considered that the DSM Strategy can be interpreted as the framework for EU actions to modernise consumer protection instruments and adapt them to the digital consumer.

<sup>127</sup> See R Petti, ‘La tutela del consumatore nel settore delle comunicazioni elettroniche’ *Consumerism 2019 - Dodicesimo rapporto annuale - Dal codice del consumo al Digital Service Act. Quella dal consumatore al cittadino digitale è vera evoluzione?* Università degli Studi Roma Tre (2019) 42 <[https://www.consumersforum.it/files/eventi/2019/CF\\_Consumerism-2019.pdf](https://www.consumersforum.it/files/eventi/2019/CF_Consumerism-2019.pdf)> accessed 25 October 2024; P Occhiuzzi, ‘Trasporti e vulnerabilità: i diritti dei consumatori alla prova dell’evoluzione digitale e della transizione sostenibile’ - *Consumerism 2022 - Quindicesimo Rapporto Annuale - Il consumatore vulnerabile tra innovazione e diritti fondamentali* (2022) Università degli Studi Roma Tre 29 <https://www.consumersforum.it/ricerche.html> accessed 25 October 2024.

<sup>128</sup> Loos and Luzak (n 92).

traditional assumptions; this is because not all individuals benefit equally from the changed technological and market environment.

The vulnerable digital consumer, therefore, is understood as that subject placed in a condition of vulnerability with respect to the most dominant platforms, which is exacerbated, moreover, by external factors created by the modern digital ecosystem.

For these reasons, the article has led to consider the vulnerable digital consumer as belonging to a dynamic social category, evolved in a particular context (the digital one), influenced by a combination of old and new factors and which is identified in those particularly vulnerable individuals who risk not having access to essential services, being exposed to forms of manipulation that violate fundamental rights and being discriminated.

This is a consumer endowed with a mainly situational vulnerability, which arises as a result of particular situations or contexts, occurring several elements capable of determining or aggravating such forms of vulnerability<sup>129</sup>. This condition of vulnerability, therefore, requires different protection, which ensures the function of the right to concretely protect the new needs of consumers<sup>130</sup>.

Given an answer to the first question, it is necessary to move on to the second question concerning the probable protections that the renewed value framework of domestic and supranational law could grant to the category thus delineated.

On this point, the concept of ‘consumer empowerment’ identified as that set of processes capable of increasing the level of information and knowledge, bargaining power as well as the ability to communicate with the economic operator<sup>131</sup> deserves special consideration.

However, legal protection is still segmented, as the institutions have not prepared a plan that favours uniformity of protections and their instruments.

It is interesting to note that in some jurisdictions it is possible to identify a remedy specifically applicable to the situation described.

In the Spanish legal system, in fact, one of the first to respond to the objectives set by the 2020-2025 Agenda<sup>132</sup>, a specific regulation on vulnerability has been introduced, which is extended to new categories, including the digital consumer.

The aim of the legislation, by strengthening consumer protection, is to promote and strengthen digital literacy, transparency, contracts, the right of withdrawal and the ability of users to access<sup>133</sup>. These issues are no longer related to the traditional categories of

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<sup>129</sup> Sandulli (n 51) 194.

<sup>130</sup> *ibid* 197.

<sup>131</sup> Occhiuzzi (n 127).

<sup>132</sup> Cf European Commission, ‘New Consumer Agenda - Strengthening consumer resilience for sustainable recovery’ (2020) <[https://commission.europa.eu/document/ac73e684-1e7f-4d36-a048-8f8a0b874448\\_en?prefLang=it](https://commission.europa.eu/document/ac73e684-1e7f-4d36-a048-8f8a0b874448_en?prefLang=it)> accessed 25 October 2024.

<sup>133</sup> MJ Marín López, ‘El Concepto de Consumidor Vulnerable en el Texto Refundido de la Ley General para la Defensa de los Consumidores y Usuarios’ (2021) 37 *Revista CESCO De Derecho De Consumo* 112; R Barceló Compte, ‘El Consumidor



the most vulnerable, but rather to those with limited financial means. In these hypotheses, the Authority is recognised as having the power to undertake a series of actions capable of offering these categories of consumers a system of guarantees, safeguards and protection, extending these instruments and its intervention also to the digital environment. Hence the urgency of incorporating the notion of vulnerable consumer into the Spanish legal system in the single text of Ley 4/2022<sup>134</sup>, so as to avoid loopholes in the previous legislation that would lead to an obvious lack of protection for this category of consumers. The law in question, going beyond the traditional allusion to the economic situation of consumers in determining their situation of vulnerability, not only identifies a notion of vulnerable consumer but also provides a series of remedies for the same.

Only the practical application of these provisions will be decisive in understanding their real impact in the different systems.

From the wording of the legislation, it is clear, therefore, how the Spanish legislature wished to introduce a supplementary discipline to the instruments of consumer protection that were vulnerable, especially with regard to information obligations.

The solution adopted by this framework assumes that concrete measures, may be identified in self-regulatory initiatives, in the form of codes of conduct, or in the use of standardised practices that enable institutions and organisations to identify specific groups of vulnerable people and to develop appropriate inclusive and protective practices.

It is necessary to ensure that markets, which are oriented and controlled by law, are seen as a resource and not as a possible threat to the protection of the vulnerable (digital consumer).

The hope, at this point, is that the intervention to define the vulnerable consumer-user and identify specific forms of protection will not remain isolated.

- The second consideration regards standardised contracts and the need for the identification of 'new' unfair terms.

The evaluation of the current context has allowed the reflection on the different issues that the digital, or rather, algorithmic society raises with regard to consumer-user protection; in effect, the regulatory framework described above is causing some mystification, particularly because of the risks of the legal uncertainty<sup>135</sup>.

As a natural consequence of this reasoning, in fact, on the one hand it was possible to examine the considerable European initiatives and the most recent proposals for a better

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Especialmente Vulnerable: de la Protección Class-Based a la Protección State-Based' (2022) 16 Actualidad Jurídica Iberoamericana 626.

<sup>134</sup> Cf Ley 4/2022, 25 febrero, BOE-A-2022-3198, in Boletín Oficial del Estado, Artículo primero: Modificación del texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias, aprobado por Real Decreto Legislativo 1/2007, de 16 de noviembre <[https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2022-3198](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2022-3198)> accessed 25 October 2024.

<sup>135</sup> Cf G Sartor, 'Algorithmic Price Discrimination and Consumer Protection - A Digital Arms Race?' [2022] Technology and Regulation 41.

and more efficient DSM; on the other hand, attention was also paid to the role of the consumer, today understood as a digital user placed in a vulnerable condition, as well as to the application and necessary integration of the discipline of unfair terms in the platform economy, due to the emergence of increasingly digitalised standard contractual terms. Indeed, online platforms provide regulatory infrastructures that can be combined with algorithmic data analysis and automated technologies, thus enabling regulatory learning processes that work faster and more effectively than traditional legal instruments such as default rules and bilateral standard terms. Future regulation of standard terms should take advantage of this superior knowledge without underestimating the risks of digitised terms. The current UCTD regulatory instruments (transparency requirements, fairness review and opt-out restrictions) are increasingly inadequate to deal with these new challenges of digitised terms because they are adapted to standard terms in bilateral agreements. Although these findings may also support the European Commission's current digital fitness check, they underline the fundamental need for legal reform. An architecture of choice for digital contracts requires a completely new regulatory strategy.

To strike the right balance between protecting private autonomy and avoiding significant imbalances, the regulatory objective should be to ensure the impartiality of platforms by focusing on the structural conditions of their regulation rather than trying to assess the substantive content of their terms.

Notably, the investigation of such terms in the digital world encounters specific challenges, requiring new methodologies and protection tools<sup>136</sup>, a fact that underlines the uniqueness of the digital environment compared to traditional contexts. On this point, it has been noted that simply changing the UCTD may not be sufficient, and that a different approach is needed. For this reason, two avenues were envisaged: on the one hand, the creation of a new, updated blacklist incorporating the clauses considered unfair for digital (which must be implemented repeatedly) and, on the other hand, the development of European Commission guidelines for assessing fairness in the context of the UCTD. These criteria could act in synergy to provide a robust and up-to-date regulatory framework to ensure fairer and more transparent contractual conditions for consumers in the digital environment<sup>137</sup> (online contractual imbalance would not be corrected simply by amending the directive on unfair terms in contracts, but also by strengthening the effectiveness of the framework of the UCTD through its simultaneous revision).

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<sup>136</sup> 'Introducing EnfTech: A technological approach to consumer law enforcement' (Geneva, UNCTAD 2022) <<https://unctad.org/meeting/introducingenftech-technological-approach-consumer-law-enforcement>> accessed 25 October 2024.

<sup>137</sup> Gardiner (n 97).