

# *Protecting vulnerable consumers in the digital single market*

Article

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# Protecting vulnerable consumers in the digital single market

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## Abstract

The article argues that in a digital environment there is a need for a paradigm shift which includes reversing the expectations placed on consumers by EU law to be the arbiter of markets, to behave as ‘average’ consumers with additional protection granted for those deemed ‘vulnerable’. This is because we ought to expect vulnerability to be the norm rather than the exception. The information paradigm prevalent in EU consumer law also needs to be altered to solve the systemic vulnerability problems rife in digital markets. It should no longer be about consumers defending themselves (using rather imperfect instruments in the process), but about businesses behaving fairly and skilled enforcers ensuring obligations are fulfilled. Fairness in digital markets should be by design and not something that is offered to consumer simply as a remedy after the damage has already occurred.

## Keywords

Vulnerable consumers; EU consumer law; fairness; unfair commercial practices; dark patterns; Digital Services Act; Digital Market Act; General Product Safety Regulation; Artificial Intelligence Act; Consumer Credits Directive.

## Introduction

The Digital single market was a priority recognised in 2015 by the European Commission in the Digital Single Market strategy for Europe<sup>1</sup> to consider the fact that the global economy was rapidly becoming digital. The Commission President’s Agenda for Europe for 2019-2024 continues this line to create a Europe fit for the digital age.<sup>2</sup> The Covid 19 pandemic accelerated this phenomenon, living any hope or desire for an unconnected life

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<sup>1</sup> COM (2015) 192 final.

<sup>2</sup> Ursula von der Leyen, A Union that thrives for more, My agenda for Europe: Political guidelines for the next European Commission 2019-2024 (2019), <https://op.europa.eu/en/publication-detail/-/publication/43a17056-cbf1-11e9-9c4e-01aa75ed71a1>. With this comes a programme of reforms.

behind. Indeed, since 2020 shopping habits shifted irremediably online.<sup>3</sup> The Commission proposed a path to the Digital Decade, to achieve the digital transformation of our society and economy by 2030.<sup>4</sup>

But in the race to make all things digital, what has become of consumers and their protection? The Digital Decade is focussed on investment in skills, public services, infrastructures and businesses. Some digital infrastructure targets will undoubtedly assist consumers as 100% of households ought to have gigabit network coverage and 100% of populated areas should gain 5G coverage by 2030. However, in the interim, disparities and unequal access to the Internet is likely to remain. Consumers are not ‘directly and specifically’ part<sup>5</sup> of this ambitious Digital Decade agenda, and yet are likely to require navigating this newfound digital frontier as retail moves further towards the digital and private lives and economic lives become even more intertwined.

If technology is supposed to empower people, what happens to those who cannot access it, for economic or personal reasons?<sup>6</sup> What about the consumers who get charged extra for goods and services purchased online or for their utilities? What about those who buy unsafe products online?<sup>7</sup> How do they get compensated? How can harm be prevented? What checks and balances are in place to avoid consumers purchasing goods they may not need but are constantly presented to them during internet searches or while browsing social media? What happens to those who are unfairly targeted by scammer or profiled by AI? The Digital Decade seeks to transform the way businesses work by pushing the use of AI from its current 25% to 75% and the use of big data from 14% to 75% also.<sup>8</sup> With such investments made in the technologies needed for big data and AI it is unlikely businesses would not plan to use this intelligence gathered on their customers and supply chains to lucrative ends. It is apparent that a world that becomes increasingly digital but fails to directly account for its end users’ needs,

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<sup>3</sup> Eurostats, Online shopping ever more popular in 2020 (2020), <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20210217-1>

<sup>4</sup> State of the Union 2021, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_4630](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4630)

<sup>5</sup> In the 2030 Digital Compass: the European way for the Digital Decade, COM (2021) 118 final, the word consumer only features 3 times.

<sup>6</sup> Digital exclusion remains problematic despite initiatives to bridge the gap. See for eg: Medici, Digital Inclusion, reducing digital exclusion, <https://medici-project.eu/digital-inclusion/>

<sup>7</sup> See European Economic and Social Committee (EESC), Opinion on the Product safety Directive Revision, <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/product-safety-directive-revision> and the European Commission’s legislative programme, [https://ec.europa.eu/info/business-economy-euro/product-safety-and-requirements/product-safety/consumer-product-safety\\_en](https://ec.europa.eu/info/business-economy-euro/product-safety-and-requirements/product-safety/consumer-product-safety_en)

<sup>8</sup> European Commission, A path to the Digital Decade: common governance and coordinated investment for the EU’s digital transformation by 2030 (15 September 2021).

namely the citizen and/or consumer, would run the risk of unleashing an environment unfit for purpose.

The European Commission has been busy rolling out a consumer protection modernisation agenda, creating multiple legal initiatives to align consumer needs to the digitalisation drive. This includes the Digital Market and Digital Services Act<sup>9</sup>, the revision of the consumer credit directive<sup>10</sup>, a proposal for a General Product Safety Regulation<sup>11</sup> and will shortly add a revision of product liability rules. Discussions are also underway regarding e-privacy<sup>12</sup> and the way Artificial Intelligence can be controlled with a proposal for a Regulation laying down harmonised rules on artificial intelligence (the Artificial Intelligence Act).<sup>13</sup>

Addressing the needs of specific groups of consumers (which includes some aspects of vulnerability) is one of the key objectives of the new consumer agenda.<sup>14</sup> For example, the new consumer agenda specifically highlights the need of over-indebted consumers, children and minors and consumers with disabilities. But this consumer focussed agenda is somewhat hampered by the use of old paradigms that were already struggling to protect consumers in the brick-and-mortar world and the fact that it is far too narrow to address vulnerability. As a result, and while I welcome increased awareness of vulnerable consumers in the EU and any punctual intervention that may improve the plight of particular groups, this article calls for a more fundamental sets of reform to protect vulnerable consumers in the digital single market.

The article starts with defining the vulnerable consumer in EU consumer law and highlighting why protection is not yet adequate. To protect consumers in a digital environment effectively, I advocate a necessary paradigm shift.<sup>15</sup> This shift includes reversing the expectations placed on consumers by EU law to be the arbiter of markets, to behave as ‘average’ consumers with additional protection granted for those deemed ‘vulnerable’. This is

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<sup>9</sup> <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>

<sup>10</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2021:347:FIN>

<sup>11</sup> [https://ec.europa.eu/info/business-economy-euro/product-safety-and-requirements/product-safety/consumer-product-safety\\_en](https://ec.europa.eu/info/business-economy-euro/product-safety-and-requirements/product-safety/consumer-product-safety_en)

<sup>12</sup> <https://digital-strategy.ec.europa.eu/en/policies/eprivacy-regulation>

<sup>13</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0206>

<sup>14</sup> European Commission, Communication from the Commission, *New Consumer Agenda, Strengthening consumer resilience for sustainable recovery* COM (2020) 696 final.

<sup>15</sup> This article builds on previous work presented at UNCTAD, notably Christine Riefa, The protection of vulnerable consumers in the digital age, [https://unctad.org/system/files/non-official-document/ccpb\\_RPP\\_2020\\_05\\_Present\\_Christina\\_Riefa.pdf](https://unctad.org/system/files/non-official-document/ccpb_RPP_2020_05_Present_Christina_Riefa.pdf) and Christine Riefa, Protecting consumers’ data in the digital world: advocating fairness by design [https://unctad.org/system/files/non-official-document/ccpb\\_Speaking\\_Notes\\_Riefa\\_digital\\_data\\_protection\\_en.pdf](https://unctad.org/system/files/non-official-document/ccpb_Speaking_Notes_Riefa_digital_data_protection_en.pdf).

because in a digital environment all consumers are in fact vulnerable and thus, we ought to expect vulnerability to be the norm rather than the exception. In addition, the information paradigm prevalent in EU consumer law needs to be altered because it cannot solve the systemic vulnerability problems rife in digital markets (and consumer markets more generally). What is therefore required is changing the mindset to move away from the expectation that consumers should be defending themselves against unfair practices and market imperfections and require businesses to behave fairly as a matter of course. The expectation should be about fairness by design.<sup>16</sup> The article concludes with discussing what a duty to trade fairly to protect vulnerable consumers in the digital single market could look like.

## 1. Defining the vulnerable consumer in EU consumer law

The concept of ‘vulnerability’ can be broadly understood. It is a concept that cuts across disciplines.<sup>17</sup> We find traces of protection of vulnerability in many branches of the law. For example, data protection law gives enhanced protection to special categories of data<sup>18</sup> and human rights law has developed adaptations notably through the jurisprudence of the European Court of Human Rights.<sup>19</sup> In all settings, vulnerability is a difficult concept to grapple with from a legal perspective because it is somewhat elastic. Vulnerability has fuzzy edges and can also be transient.<sup>20</sup> It depends on the situation the person finds him or herself in.<sup>21</sup>

### 1.1. Conceptualization anchored in personal characteristics

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<sup>16</sup> Paolo Siciliani, Christine Riefa, Harriet Gamper, *Consumer Theories of Harm, An economic approach to consumer law enforcement and policy making* (Oxford: Hart 2019).

<sup>17</sup> ‘Vulnerability across Disciplines’, Conference (7-8 October 2021), Newcastle Law School (UK), organised by Dr Timothy Dodsworth and Prof. Christine Riefa, funding from Society of Legal Scholars, <https://www.ncl.ac.uk/law/events/vulnerability-across-disciplines/>.

<sup>18</sup> Art 9 GDPR.

<sup>19</sup> Corina Heri, *Responsive Human Rights, Vulnerability, Ill-treatment and the ECtHR* (Oxford: Hart 2021).

<sup>20</sup> Francesca Ippolito, Sara Inglesias Sánchez, *Protecting Vulnerable Groups; The European Human Rights Framework* (Oxford: Hart 2015) identifies vulnerability as a dynamic concept. For eg, a consumer may be vulnerable as he or she searches for a fertility treatment, but vulnerability may have passed or be less acute once a baby is on the way. See *Siciliani, Riefa, Gamper* (n 16) 173, case study on fertility add-ons.

<sup>21</sup> eg Jean Pascal Chazal, *Vulnérabilité et droit de la consommation*, Colloque sur la vulnérabilité et le droit (Mars 2000) Université P. Mendès-France, Grenoble II, France, <https://hal-sciencespo.archives-ouvertes.fr/hal-01053489/document> accessed 4 November 2021; Suraj Commuri and Ahmet Ekici, *An enlargement of the notion of vulnerability* 28 2 *Journal of Macromarketing* 183 (2008); European Commission, *Consumer Vulnerability across key markets in the European Union* (final report) (Brussels: 2016) [https://ec.europa.eu/info/sites/info/files/consumers-approved-report\\_en.pdf](https://ec.europa.eu/info/sites/info/files/consumers-approved-report_en.pdf), analyses situational drivers.

EU consumer law already accounts for vulnerable consumers.<sup>22</sup> It does so primarily through two different sets of provisions (horizontal and vertical).

In the energy sector, for example, the legislator introduced provisions to protect ‘vulnerable customers’ in Directive 2009/72/EC concerning common rules for the internal market in electricity.<sup>23</sup> It was left for Member States to define who vulnerable customers may be and put in place adequate protection.

The concept of the ‘vulnerable’ consumer is also enshrined in the Unfair Commercial Practices Directive 2005/29/EC (UCPD). It is understood by reference to the average consumer, a hypothetical consumer who is “reasonably well informed, reasonably observant and circumspect” as defined in *Gut Springenheide*<sup>24</sup> and endorsed in subsequent CJEU decisions.<sup>25</sup> The vulnerable consumer by contrast is a person that the legislation recognises as needing additional assistance. The focus is primarily on the personal attributes, and the cognitive capacities of consumers.<sup>26</sup> Vulnerable consumers are protected when they form part of a ‘clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee’.<sup>27</sup> There are hurdles to clear to obtain protection: a cause of action; being part of a group that is clearly identifiable; a group that is *particularly* vulnerable; a trader that can reasonably foresee the harm the practice could cause. Recital 19 suggests that the conceptualization of who is deemed vulnerable may be

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<sup>22</sup> United Nations Guidelines on the Protection of Consumers (2016) Guideline 5b, protection of vulnerable and disadvantaged consumers as legitimate consumer needs; Robin Simpson, ‘A universal perspective on vulnerability, international definitions and targets’ in Christine Riefa, Séverine Saintier (eds.), *Vulnerable Consumers and the Law: Consumer Protection and Access to Justice* 31-50 (Abingdon: Routledge 2021).

<sup>23</sup> Article 7. For more on the energy market, Naomi Creutzfeldt, Chris Gill, Marine Cornelis, Rachel McPherson, *Access to justice for vulnerable and energy-poor consumers, Just Energy?* (Oxford: Hart 2021).

<sup>24</sup> Case C-210/96 *Gut Springenheide GmbH, Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt-Amt für Lebensmittelüberwachung and Another* [1998] ECR I-4657, para. 31.

<sup>25</sup> This definition was followed eg in Case C-220/98 *Estée Lauder* [2000] ECR I-117, paras 27 and 30; Case C-99/02 *Linhart and Biffl* [2002] ECR I-9375, para 32; Case C-465/98 *Adolf Darbo* [2000] ECR I-02297; Case C-239/02 *Douwe Egberts* [2004] ECR I-07007. Note some slight differences in approach concerning comparative advertising. See notably, Case C-44/01 *Pippig Augenoptik* [2003] ECR I-03095, para 82; See discussion in Philippe de Jong, *Comparative advertising in Europe* in Jeremy Phillips (ed.), *Trade Marks at the Limit* (Cheltenham: Edward Elgar 2006); Case C-356/04 *Lidl Belgium* [2006] ECR I-08501.

<sup>26</sup> For a critique of this approach, Eleni Kaprou, ‘The legal definition of ‘vulnerable’ consumers in the UCPD, Benefits and limitations of a focus on personal attributes’ in Riefa, Saintier *Vulnerable Consumers and the Law* (n 22) 51-67.

<sup>27</sup> Art 5(3).

broader as the types of vulnerabilities could be interpreted as only indicative.<sup>28</sup> However, to date, few courts have extended the scope of this notion past the list contained in the UCPD.<sup>29</sup>

As a result, the low-income consumer is not normally considered vulnerable in the context of the UCPD. Payment problems or poverty are public law issues and find responses under welfare law<sup>30</sup> not consumer law. Yet, it is well documented that consumers from disadvantaged background are consistently charged more for goods and services and pay a poverty penalty.<sup>31</sup> In the EU, for example, low-income consumers are regularly put on more expensive energy tariffs due to limited payment methods available to them or because they do not have access to mainstream financial services. They often have to pay for more expensive credit.<sup>32</sup> Access to housing, clean water or food, are also normally dealt with outside the scope of consumer law and within the human rights or welfare spheres. They are not per se billed as consumer rights despite featuring in international text.<sup>33</sup> Conversely however, disabled consumers, although needing specific assistance in some aspects of their life, have tended to be considered from the perspective of social care and not as active participants of the mainstream private market holding equal rights to those of non-disabled individuals.<sup>34</sup>

## 1.2. Moving beyond personal characteristics

The scholarship on consumer vulnerability has clearly moved beyond strict personal characteristics (age, gender, locality, education and language) to account for an ever-growing range of socio-economic factors, as well as looking at how external elements may create, influence or reinforce vulnerabilities.<sup>35</sup> Much of the credit for this shift goes to the work of

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<sup>28</sup> Recital 19 states: ‘Where certain characteristics *such as* age, physical or mental infirmity or credulity (...)’ See also European Commission guidance also confirming that it can cover a wide range of situations (European Commission, *Commission Staff Working Document, Guidance on the Implementation of the Directive 2005/29/EC on Unfair Commercial Practices* (2016, SWD/2016/0163 final) para 2.1.6.).

<sup>29</sup> One notable exception: Hungarian Competition Authority Decision Vj-5/2011/73, 10 November 2011 who considered that consumers that were banned by a credit institution due to a poor ability to pay were particularly susceptible to a specific offer that omitted material information, cited in *European Commission Guidance 2016* (n 28).

<sup>30</sup> Peter Rott, *The low-income consumer in European Private Law* in Peter Rott and Kai Purnhagen, *Varieties of European and Economic Law and Regulation* 675 (New York: Springer 2014).

<sup>31</sup> David Caplovitz, *The Poor pay more* (New York: Free Press 1967). For a more recent account, Edmund Mierzwinski, *Colston E. Warne Lecture: Consumer Protection 2.0 – protecting consumers in the 21<sup>st</sup> Century* 44 *Journal of Consumer Affairs* 581 (2010); See also the work of Fair by Design: Ending the poverty premium in the UK, <https://fairbydesign.com/> accessed 15 December 2021.

<sup>32</sup> *Consumer vulnerability across key markets* (n 21) 319.

<sup>33</sup> United Nations Guidelines (n 23).

<sup>34</sup> Ieva Eskytė, *Disabled People’s Vulnerability in the European Single Market: The Case of Consumer Information* 42 *JCP* 521 (2019).

<sup>35</sup> Christine Riefa, Séverine Saintier, In search of (access to) justice for vulnerable consumers’, in Riefa, Saintier *Vulnerable Consumers and the Law* (n 22) 7. For a complementary overview of the scholarship, see BEUC (Natali



David Caplovitz for highlighting the plight of low-income consumers in the 1960s<sup>36</sup> and more recently to Martha Fineman for developing a vulnerability theory that has served as an anchor for work in various disciplines and notably in consumer law. Martha Fineman conceptualises vulnerability as a universal, ever-present experience, which may be exposed at any given moment by our individual circumstances or embeddedness, (i.e. our relationship with the institutions and others around us).<sup>37</sup> It therefore never really leaves us. Vulnerability theory also demonstrates the need for a more responsive State.<sup>38</sup> The theory differs from existing models of protection, whereby protection normally rests on rules curtailing discrimination against certain groups. Fineman's theory also posits that institutions should be designed to provide support to individuals to overcome their vulnerability, but often fail to do so, mostly because institutions tend to work in silos. Fineman's approach concentrates on the structure of society and adopts a more substantive vision of equality.<sup>39</sup> The theory is useful in a consumerist context because it removes the need to categorise individuals and, in the case of consumers, it saves from stigmatizing vulnerable consumers, who are too often perceived as those 'who cannot, or can no longer, cope with the requirements of modern consumer society'.<sup>40</sup> Recognition of vulnerability has often been negatively associated with 'inferiority'.<sup>41</sup> Vulnerability theory allows us to think of the law as being focused on maximising resilience even if it may be hard to achieve. The law should assist vulnerable consumers, not hinder them. And it should do so in all areas of their lives, not just their energy consumption or interactions with dodgy dealers.

The law needs to fully represent the causes of vulnerability and adapt assistance and remedies. The late Norbert Reich identified three types of vulnerability for consumers: physical disability, intellectual disability, and economic disability.<sup>42</sup> Cartwright developed a taxonomy in the context of the financial services industry which looks at factors such as information,

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Helberger, Orla Lynskey, Hans-W Micklitz, Peter Rott, Marijn Sax, Joanna Strycharz), *EU Consumer Protection 2.0, Structured Asymmetries in digital consumer markets* 5-27 (BEUC 2021).

<sup>36</sup> Caplovitz (n 31). See also, Alan Andreasen, *The Disadvantaged Consumer* (New York: Free Press 1975).

<sup>37</sup> Martha Fineman, *Vulnerability and Inevitable Inequality* 4(3) *Oslo Law Review*, 133-149 (2017).

<sup>38</sup> Martha A Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition* 20(1) *Yale Journal of Law and Feminism* 1 (2008).

<sup>39</sup> Fineman, *The Vulnerable Subject* (n 38). Note that Fineman's theory has evolved pointing that vulnerability may not be something that can be overcome, see Martha Fineman, *Universality, Vulnerability and Collective Responsibility* 16(1) *The Ethics Forum* (2021).

<sup>40</sup> Norbert Reich, *Vulnerable consumers in EU law* in Dorota Leczykiewicz, Stephen Weatherill, *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* 149 (Oxford: Hart 2016).

<sup>41</sup> Chazal (n 21).

<sup>42</sup> Reich (n 40) 141.

pressure, supply redress and impact vulnerabilities that taken together help identify where a consumer may find themselves vulnerable.<sup>43</sup> Cartwright's view is that, while difficult, the exercise of defining vulnerability is necessary because 'by identifying clearly both why consumers are vulnerable and how the factors that lead to such vulnerability can be addressed, it is possible to construct an environment which respects consumer choice while ensuring that the most vulnerable are protected appropriately'.<sup>44</sup> Siciliani, Riefa and Gamper also reflected on the way vulnerable consumers suffer economic harm and how to mount effective early responses to protect vulnerable consumers and/ or consumers in vulnerable purchasing positions (that are otherwise average consumers) highlighting that 'disengaged' consumers are also vulnerable.<sup>45</sup>

The need for a broader conceptualization of consumer vulnerability is also echoed in the work of the European Commission. The report on *Consumer Vulnerability across Key Markets in the European Union* proposed the adoption of a more exhaustive definition of vulnerable consumers. The report highlights that socio-demographic characteristics, behavioural characteristics, personal situation, or market environment can all have an effect. The report also acknowledges that because of a combination of these factors, *consumers*:

- are at higher risk of experiencing negative outcomes in the market;
- have limited ability to maximise their well-being;
- have difficulty in obtaining or assimilating information;
- are less able to buy, choose or access suitable products;
- or are more susceptible to certain marketing practices.<sup>46</sup>

### **1.3. A broader understanding of vulnerability not yet sufficiently embedded into rule making fit for the digital age**

This shift in understanding resulted in a broader conceptualisation of vulnerable consumers, notably in Directive (EU) 2019/944 on common rules for the internal market for electricity.<sup>47</sup> Article 28 requires Member States to put in place adequate safeguards to protect vulnerable customers. While it leaves it to Member States to define the concept, the Directive clearly states

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<sup>43</sup> Peter Cartwright, *Understanding and Protecting Vulnerable Financial Consumers* 38(2) Journal of Consumer Policy 119-138 (2015).

<sup>44</sup> Cartwright (n 43) 119-138.

<sup>45</sup> Siciliani, Riefa, Gamper (n 16) 40.

<sup>46</sup> *Consumer Vulnerability across Key Markets* (n 21) 169.

<sup>47</sup> Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU.

that it can include a reference to energy poverty and the prohibition of disconnection of electricity in critical times, income levels, the share of energy expenditure of disposable income, the energy efficiency of homes, critical dependence on electrical equipment for health reasons, age or other criteria. The concept is also linked to social security and poverty via the application of Article 28(2) which requires Member States to take ‘appropriate measures, such as providing benefits by means of their social security systems to ensure the necessary supply to vulnerable customers, or providing support for energy efficiency improvements, to address energy poverty where identified pursuant to point (d) of Article 3(3) of Regulation (EU) 2018/1999, including in the broader context of poverty (...)’.<sup>48</sup>

However, despite this perceptible shift, very little has changed concerning the UCPD and the application of general consumer law. In the 2018 reforms, the Directive on Better Enforcement and Modernisation of Consumer Protection Rules which amended the UCPD did not make any important changes (despite recommendations by the fitness check).<sup>49</sup> As a result, the updated guidelines on the UCPD are limited to making the case for broadening the understanding of vulnerability by reaffirming that the list of characteristics in Recital 19 is non-exhaustive and highlighting that the UCPD defines vulnerable consumers as consumers who are ‘particularly vulnerable to the practice or the underlying product’ and thus are more susceptible to certain market practices. Other legislation such as the Consumer Rights Directive is also limited to one mention in Recital 34 of consumers who are particularly vulnerable because of their mental, physical, or psychological infirmity, age or credulity. The Regulation on Online Dispute Resolution does require in Art 5 that the ODR platform be accessible and usable for all, including vulnerable users, but does not define them.

Fast forward, little is taken on board by the new consumer agenda and in moving towards a digital society. The Communication from the Commission notes that it is generally assumed that consumers are the weaker party in a transaction and requires protection for their health, safety and economic interests. It also points to the fact that certain groups can be particularly vulnerable, with causes in social circumstances, or because of particular characteristics of consumers or groups of consumers (age, gender, health, digital literacy, numeracy or financial situation, lack of accessibility), all potentially exacerbated by the

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<sup>48</sup> Note that the notion of poverty was already included in Directive 2009/72/EC (Art 3(7) and (8)), but the new version of the Directive broadens the criteria that may be taken into account.

<sup>49</sup> European Parliament, *Briefing: Vulnerable Consumers 4* (European Parliament, 2021).

pandemic.<sup>50</sup> Nevertheless, apart from more targeted measures in credit, acknowledging children and people with disability, the new legislation being discussed only makes modest changes to protect vulnerable consumers.

The proposal for a Directive on Consumer Credits<sup>51</sup> only mentions vulnerable consumers twice in the explanatory referendum. It also limits its intervention to debt advice, information and some improvements to the rules concerning creditworthiness<sup>52</sup> although the enlargement of its scope to loans previously excluded and forbearance measures should prove useful to assist more vulnerable consumers.<sup>53</sup>

The Digital Market Act (DMA) is billed to benefit consumers as it seeks to promote competition across digital markets keeping the large online platforms in check, and imposes obligations to promote free-choice through portability for example, but does not mention vulnerable consumers.<sup>54</sup> The Digital Services Act (DSA) is focussed on consumer protection in as much as it is seeking to ensure trust in the digital economy with a detailed section on online marketplaces<sup>55</sup> and rules deemed complementary to the consumer protection acquis (notably Directive (EU) 2019/2161 which establishes specific rules to increase transparency as to certain features offered by certain information society services).<sup>56</sup> However, the DSA barely mentions vulnerable consumers. And where it does, the conceptualisation of vulnerability is still severely limited. The DSA is concerned with gender, race or ethnic origins, religion or belief, disability, age or sexual orientation as factors rendering specific groups or persons vulnerable or disadvantaged in their use of online services.<sup>57</sup> They also include minors and children.<sup>58</sup> The vision of vulnerability is therefore still very much anchored in personal factors.

Product safety rules through the proposal for a General Product Safety Regulation have been amended to take into account the use of platforms as sales channels for unsafe goods.<sup>59</sup> However, vulnerable consumers are also not adequately represented with only 3 mentions in

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<sup>50</sup> *New Consumer Agenda* (n 14) 16.

<sup>51</sup> COM (2021) 347 final.

<sup>52</sup> See in particular, Art 8 to 12 on information, Article 13 on personalised offers, Art 18 on obligation to assess creditworthiness, Article 34 on financial education and 36 on debt advisory services.

<sup>53</sup> Article 2 CCD which brings within scope loans below €200 and leasing agreements with an option to purchase, overdraft facilities, free interest rate credit or short-term credit, etc. The Directive will also apply to crowdfunding credit services. Article 35 on arrears and forbearance measures before enforcement may assist but it allows member states to decide on additional charges that creditors could impose in the event of default (Art 35(5)).

<sup>54</sup> Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act) Com (2020) 842 final.

<sup>55</sup> Proposal for a Regulation on a Single Market for Digital Services (Digital Services Act and amending Directive 2000/31/EC COM (2020) 825 final, Explanatory memorandum, 2.

<sup>56</sup> *DSA Explanatory memorandum* (n 55) 5.

<sup>57</sup> *DSA Explanatory memorandum* (n 55) 13.

<sup>58</sup> Recital 34 DSA; Recital 68 DSA.

<sup>59</sup> Notably Art 20 GPSR.

the text and a focus remaining on personal characteristics.<sup>60</sup> Article 7 on aspects for assessing the safety of products, lists at para (e), the categories of consumers at risk when using the product, in particular vulnerable consumers such as children, older people and persons with disabilities.

Similarly, the AI Act focusses primarily on personal attributes. The Proposal for an Act prohibits some artificial intelligence practices that have a ‘significant potential to manipulate persons through subliminal techniques beyond their consciousness or exploit vulnerabilities of specific vulnerable groups such as children or persons with disabilities in order to materially distort their behaviour in a manner that is likely to cause them or another person psychological or physical harm. Other manipulative or exploitative practices affecting adults that might be facilitated by AI systems could be covered by the existing data protection, consumer protection and digital service legislation that guarantee that natural persons are properly informed and have free choice not to be subject to profiling or other practices that might affect their behaviour.’<sup>61</sup> Article 5(1)(b) prohibits:

*the placing on the market, putting into service or use of an AI system that exploits any of the vulnerabilities of a specific group of persons due to their age, physical or mental disability, in order to materially distort the behaviour of a person pertaining to that group in a manner that causes or is likely to cause that person or another person physical or psychological harm;*

Economic harm seems thus excluded from the scope of protection, leaving the use of AI fair game in the exploitation of consumers and their manipulation and harm in primarily economic contexts.<sup>62</sup> The definition of high-risk AI<sup>63</sup> in article 7 however, which enables the Commission to adopt delegated acts, does account for vulnerability in a slightly broader way. Article 7(2)(f) does take into account the extent to which potentially harmed or adversely impacted persons are in a vulnerable position in relation to the user of an AI system, in particular due to an imbalance of power, knowledge, economic or social circumstances, or age. This is by far the

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<sup>60</sup> Recital 5 GPSR; Recital 55 GPSR.

<sup>61</sup> AI Act Proposal explanatory memorandum, 12-13.

<sup>62</sup> The proposal however given its broad remit does acknowledge vulnerability in other areas, notably vis-a-vis public authorities and in migration contexts.

<sup>63</sup> This includes situations where: (a) the AI systems are intended to be used in any of the areas listed in points 1 to 8 of Annex III; and (b) the AI systems pose a risk of harm to the health and safety, or a risk of adverse impact on fundamental rights, that is, in respect of its severity and probability of occurrence, equivalent to or greater than the risk of harm or of adverse impact posed by the high-risk AI systems already referred to in Annex III.

largest conception of vulnerability, but it can only be considered where there is a high risk to health and safety or fundamental rights, thereby drastically curtailing its use.

## **2. Paradigm shifts required to protect vulnerable consumers in the digital single market**

The search for fairness for vulnerable consumers in digital markets requires questioning the status quo and established foundations of EU consumer law. The Commission's Communication on a New Consumer Agenda limits itself to updating the UCPD and the Consumer Rights Directive guidance to ensure consumers benefited from comparable level of protection of protection and fairness online as they enjoy offline.<sup>64</sup> This stance appears short-sighted as it presupposes that those offline markets work optimally for consumers, which is far from the case. 'For many years, it has been thought that fairness would be achieved by relying on information as a remedy and expecting the average consumer to ensure that businesses are kept in check. (...) but the law struggles to avoid harm being caused to consumers and it struggles to repair the harm after the event.'<sup>65</sup> This is true of any consumer markets, but especially digital consumer markets. As the EU seeks to move towards a digital Europe, making the protection of consumers in the digital single market a reality will require several seismic shifts in the concepts and methods used to protect consumers to date. It will need to go much further than the new consumer agenda lets on.

### **2.1. Consumer vulnerability in digital markets: Vulnerability as the norm rather than the exception**

Digital markets are a breeding ground for vulnerability. All consumers are affected. As a result, this reality clashes with the long-established cult of the average consumer. The average consumer crystallises 'the expected behaviour of consumers.'<sup>66</sup> This has 'important consequences for the level of protection offered to consumers and for the degree to which intervention in the market is possible.'<sup>67</sup> The concept imported into EU consumer law was originally designed to articulate a free movement of goods doctrine<sup>68</sup> to foster the internal

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<sup>64</sup> *New Consumer Agenda* (n 14) 10.

<sup>65</sup> *Siciliani, Riefa, Gamper* (n 16) 1.

<sup>66</sup> Bram B Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive 229* (Cham: Springer International Publishing 2015).

<sup>67</sup> *Duivenvoorde* (n 66).

<sup>68</sup> See Case C-120/78 *Rewe-Zentral* [1979] ECR I-00649; Case C-362/88 *GB-INNO-BM* [1990] ECR I-00667, para 12; Case C-470/93 *Mars GmbH* [1995] ECR I-01923.

market. It protects a consumer that resembles the ‘homo economicus’ posited under the neo-classical rational-choice theory<sup>69</sup> and is focussed on consumer self-reliance.<sup>70</sup> It is largely accepted that this standard is not reflective of who a real consumer is because it places high expectations on consumers who are presumed to be ‘capable of forming an opinion of the products advertised without [their] economic and health interests being harmed’ (so long as the information disclosed is available and not misleading).<sup>71</sup> In a digital environment, even this ideal average consumer would struggle to behave as expected.

The technology itself is a driving factor for vulnerability, notably the use of artificial intelligence and other associated technologies. Helberger et al. note that sources of vulnerability can be found not only in occurrent vulnerabilities (those that do exist and have materialised already) but also in dispositional vulnerabilities (those that are latent and have not yet materialised) and that both deserve equal protection in the digital world.<sup>72</sup> For example, data collection may not harm consumers immediately and at every collection points. But the collection of large amounts and amalgamation of data into a profile would and could render consumers ‘dispositionally’ vulnerable.<sup>73</sup> Protection therefore needs to think of future use rather than only actual uses of data to protect consumers and guard against abuse. Vulnerability also comes from the fact that, in digital markets consumers often disengage. They let the algorithm guide them without a fight. They do not attempt to disable privacy notices or shop around for a better deal even in the knowledge that prices may be personalized. They do not read the terms and conditions<sup>74</sup> that enable the operator to harvest data and use it to their advantage, and so on and so forth. On this point, Siciliani, Riefa and Gamper have highlighted how ‘disengaged’ consumers find themselves in vulnerable purchasing situations, not because of particular cognitive failings or socio-demographic characteristics, but because the ‘structure’ of the consumer markets on which they evolve leads to apathy through obfuscation.<sup>75</sup> In those

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<sup>69</sup> See eg, Willem H van Boom, A Garde and O Akseli, *Introduction*, in Willem H van Boom, Amandine Garde and Orkun Akseli (eds.), *The European Unfair Commercial Practices Directive – Impact, Enforcement Strategies and National Legal Systems* (London: Routledge, 2016).

<sup>70</sup> Chris Willett, *Fairness and Consumer Decision Making under the Unfair Commercial Practices Directive* 33 *Journal of Consumer Policy* 247 (2010).

<sup>71</sup> Opinion of Advocate General, G. Geelhoed, in Case C-239/02 *Douwe Egberts* [2004] ECR I-07007, para 54.

<sup>72</sup> BEUC (N Helberger, O Lynskey, H-W Micklitz, P Rott, M Sax, J Strycharz), *EU Consumer Protection 2.0, Structured Asymetries in digital consumer markets* (BEUC 2021) 17, para 38.

<sup>73</sup> Note that despite identifying vulnerability, the authors shift towards using a different terminology. They explain: ‘Speaking of digital vulnerability, even if it makes sense in light of extensive research in behavioural and communication science, would misguide lawyers, in whatever function they are operating’. See *Helberger et al.* (n 72) 49, para 113.

<sup>74</sup> Yet this is an area that the DSA imposes further information requirements, eg Art 12 and 29 DSA.

<sup>75</sup> *Siciliani, Riefa, Gamper* (n 16) 40.

cases, it is in fact rational for consumers to disengage and not shop around, leading to detriment. By and large, consumers are the victims of online manipulation, the use of information technology to covertly influence another person's decision-making, by targeting and exploiting their decision-making vulnerabilities.<sup>76</sup> The disengagement is the result of the operation of a market that is bent on treating consumers unfairly<sup>77</sup> and thus creates a vulnerability as well as disruptions in the marketplace itself. Consumers only do the most rational thing they can – not waste time by shopping around or reading privacy notices or terms and conditions.

We therefore need to also consider the role of 'structures' into the vulnerability profile of consumers. According to Helberger et al.:

*In the digital society, vulnerability is architectural because the digital choice architectures we navigate daily are designed to infer or even create vulnerabilities. The vulnerabilities – be they dispositional or occurrent – that consumers can experience are not an unfortunate by-product of digital consumer markets; vulnerabilities are the product of digital consumer markets.*<sup>78</sup>

While there is a recognition that vulnerability is more varied than first catered for by consumer law, structural causes in the creation or in the compounding of vulnerability is less clearly documented. Helberger et al. note that with digital practices commercial messages are only one part in a larger, systemic approach to influencing consumer behaviour. The message is the system.<sup>79</sup> Evaluating commercial practices can therefore not be limited to the evaluation of the practice itself but requires exploring the systemic set-up and the way technology shapes the relationship between consumer and advertiser.<sup>80</sup>

The more recent discourse reflects, as Fineman's work does, a growing acknowledgement that external elements create, influence or reinforce vulnerabilities, a phenomenon that I identify as 'systemic vulnerability'<sup>81</sup>, i.e. vulnerability created by the system, vulnerability of the individual that stems from the way a system is devised in other

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<sup>76</sup> Daniel Susser, Beate Roessler, Helen Nissenbaum, Technology, Autonomy and Manipulation 8 (2019) 2  
*Internet Policy Review* DOI: 10.14763/2019.2.1410,  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3420747](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420747)

<sup>77</sup> Siciliani, Riefa, Gamper (n 16) 40.

<sup>78</sup> See for example, Helberger et al. (n 72) 19, para 44.

<sup>79</sup> Helberger et al. (n 72) 15, para 30.

<sup>80</sup> Helberger et al. (n 72) 15, para 30.

<sup>81</sup> Systemic vulnerability in this sense does not mean that the system itself is weak, although arguably if a system is unable to service the individuals that needs it, there is clear weakness in its design. Helberger et al. talk of structural asymmetries.



words, its architecture. The scholarship identifies ‘choice architecture’<sup>82</sup> as particularly problematic in a digital context.<sup>83</sup> Data collection can now happen around the clock, feeding algorithms learning preferences and adjusting suggestion in real time. This leads to increased personalisation, which, while potentially useful, can also lead to exploitative use. Perversely, the very structure of the relationship the consumer has with a trader can influence the level of influence the trader can have on the consumers’ behaviour. This creates a feedback loop, where the more the trader knows on the consumer, the more it is able to frame choices and exploit consumers’ vulnerabilities.<sup>84</sup> In turn, this fosters a race to the bottom: even fair traders need to engage in framing tactics and data collection and processing at scale in order to compete.

However, systemic vulnerability in the digital marketplace is not solely linked to the architecture of this market. Consumer vulnerabilities is also very much the result of systems that fail to assist consumers. Systemic vulnerability comes from laws and regulations that are badly designed or inefficient. This includes for example, outdated rules of competition or poor data protection, or overreliance on information (see below) all of which are well documented. Riefa and Saintier also noted that lack of access to justice for vulnerable consumers is a systemic failure.<sup>85</sup> This will of course mean improving routes to redress via access to dispute resolution, but it also means focussing on dispute avoidance<sup>86</sup> through regulation and public enforcement.<sup>87</sup> EU law has a tendency to place consumers in the uneasy position that rights are granted, but redress often needs to be initiated by consumers. There is heavy reliance on private enforcement and redress only after the harm has been experienced (ex-post). Where access to justice is failing, the otherwise average consumer, may be the victim of a systemic vulnerability which will come to add to his or her already vulnerable state in the digital sphere. Riefa and Saintier noted that the consequence of a bad consumer transaction can indeed be also the creator of vulnerability itself. The washing machine that stops working and can only be replaced by obtaining high interest credit in order to fund not only a replacement, but also, the cost of a

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<sup>82</sup> Richard Thaler, Cass Sustein, *Nudge, Improving Decisions about Health, Wealth and Happiness* (place: Penguin, 2009).

<sup>83</sup> See for example, *Helberger et al.* (n 72) 18, para 40.

<sup>84</sup> *Helberger et al.* (n 72) 20, para 46 talk of relational vulnerability to describe this aspect.

<sup>85</sup> Christine Riefa, Séverine Saintier, *The way forward: For an inclusive access to justice to protect vulnerable consumers in Vulnerable Consumers and the Law* (n 23) 248. A view confirmed by *Creutzfeldt et al, Just Energy?* (n 23).

<sup>86</sup> Richard Susskind, *Online Courts and the Future of Justice* 65-70 (Oxford: OUP 2019). The concept of justice is composed of four elements: dispute resolution, dispute containment, dispute avoidance, legal health promotion.

<sup>87</sup> Riefa, Saintier, *The way forward* (n 85) 248. The current reforms notably DSA and DMA focus on public enforcement of the new rules.

small claim action, can be enough to create vulnerability where there was none. Yet, the EU consumer legislator rarely concerns itself with the affordability and coherence of the systems supporting the rights it has created.

Rather than regulating through making a distinction between systems or between groups of consumers and their ability (as is the case today), Helberger et al. propose to target digital asymmetries and adopt the concept of ‘digital vulnerability’ to describe a universal state of defencelessness and susceptibility to (the exploitation of) power imbalances that are the result of increasing automation of commerce, datified consumer-seller relations and the very architecture of digital marketplaces’.<sup>88</sup> In effect, to appropriately capture vulnerability in digital markets, we need to have an even broader focus. Real protection can only come from addressing the intersections of all of those systems and the attributes of consumers that render them particularly vulnerable. This includes ‘market-specific vulnerability’ (digital), which can affect any of us in certain contexts, alongside ‘vulnerability associated with personal characteristics’, which captures the idea that individuals with certain characteristics may face particularly severe, persistent problems across a range of markets<sup>89</sup> and ‘systemic vulnerability’, the interaction or lack thereof of all systems and vulnerability dimensions (access to justice, data protection, competition law, etc).

## **2.2. Digital markets: where the information paradigm should come to die**

The development of consumer law in the EU, along a neo-liberal economics rationale, meant that, as government intervention in the market should be minimised, the onus should be placed on the consumer to react to the information given in ways that would maximise efficiencies.<sup>90</sup> Despite well documented limitations<sup>91</sup> and much criticism<sup>92</sup>, information remains to date the primary vehicle for consumer protection in the EU. It was for example the choice made by the legislator in the Omnibus Directive 2019/2161<sup>93</sup> concerning personalised

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<sup>88</sup> Helberger et al. (n 72) 20.

<sup>89</sup> CMA, *Consumer Vulnerability: Challenges and Potential Solutions* (Feb 2019) 4-8.

<sup>90</sup> For an exploration of the influence of neo-classical economics on consumer law and vulnerability, see Christine Riefa, Harriet Gamper, ‘Economic theory and consumer vulnerability, exploring an uneasy relationship’ in *Vulnerable Consumers and the Law* (n 23) 17-30.

<sup>91</sup> Geraint Howells, The potential and limits of consumer empowerment by information (2005) *Journal of law and Society* 349, 351.

<sup>92</sup> See for eg, Siciliani, Riefa, Gamper (n 16) 18-24; Omri Ben Sahar, Carl E Schneider, *More than you wanted to know – the failure of mandated disclosure* (Princeton: Princeton University Press 2016).

<sup>93</sup> EU Directive 2019/2161 on better enforcement and modernization of Union consumer protection rules, Article 4(4)(a)(ii) and Recital 45.

pricing.<sup>94</sup> It is also the solution favoured to protect consumers in the new consumer agenda. The Communication from the Commission explains that the digital transformation offers new opportunities to provide more targeted and understandable information concerning sustainability for example. In the context of digital information, it claims that it could empower consumers to check the reliability of information, make comparisons between products<sup>95</sup>, thereby continuing to rely on consumers to be well informed. The DSA for example uses information to ensure transparency of online advertising and the AI Act mandates information that biometric of emotion recognition techniques may be used.<sup>96</sup>

To tackle digital vulnerability however, one must address the information paradigm that has reigned supreme in European Consumer Law and other fields over a number of decades. Armed with information, consumers are not always able to make good choices for themselves. In fact, reliance on information as a proxy for protection is a systemic vulnerability. Consumers are rarely starved of information. Instead, too much information tends to be given often at the command of the legislator. Consumers choose to ignore it because using it does not really lead to positive outcomes.<sup>97</sup> Reich flagged that ‘improved information and market transparency are of little help to vulnerable consumers when the goal is to enable them to lead self-determined lives. It is rather the targeted improvement of infrastructure, and intelligent, realistic schemes of providing advice, that enable consumers, including vulnerable consumers, to participate independently in economic and social life’.<sup>98</sup>

The list of information required to be disclosed by the Consumer Rights Directive, the Electronic Commerce Directive, the Consumer Rights Directive far outweigh what any human being is capable of processing.<sup>99</sup> Similarly the GDPR and the e-Privacy Directive also impose information obligations.<sup>100</sup> This leads to an overflow of information that creates an illusion of

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<sup>94</sup> amending Directive 2011/83/EU on Consumer Rights to add in Article 6(1)(ea) on information requirements for distance and off-premises contracts: “where applicable, that the price was personalized on the basis of automated decision-making”. see also F Esposito, Making personalised prices pro-competitive and pro-consumers *Cahiers du CeDIE* 2020/02 <<https://uclouvain.be/fr/instituts-recherche/juri/cedie/cahiers-du-cedie.html>> accessed 21 March 2021.

<sup>95</sup> *New Consumer Agenda* (n 14) 8.

<sup>96</sup> Art 24 and 30 DSA; Art 52(2) AI Act.

<sup>97</sup> For more on this issue, see *Siciliani, Riefa, Gamper* (n 16); see also Christine Riefa, Harriet Gamper, ‘Economic theory and consumer vulnerability: Exploring an uneasy relationship’ in *Vulnerable Consumers and the Law* (n 23)17-30.

<sup>98</sup> *Reich* (n 40) 150.

<sup>99</sup> George A Miller, *The Magical Number Seven, Plus or Minus Two: Some limits in our capacity for processing information* 63 *Psychological Review* 81(1956).

<sup>100</sup> For more on the implications of information in the context of the GDPR, see *Helberger et al.* (n 72) 29, from para 70.

improvement in the consumer's situation<sup>101</sup> but not a factual one. Consumers are not better off as a result of the information. In any event, the assimilation of information which was already a difficult task in the analogue world has become an almost impossible task in the digital age. Human ability to absorb and process information does not grow at the same pace as technological development.<sup>102</sup> In fact, many consumers do not read the information available.<sup>103</sup> Many also click accept to any privacy notices because it is a) not technically always possible to understand the actual ramification of accepting (lack of consent); b) far too time consuming to understand privacy notices for what can after all be fairly menial tasks (such as reading a newspaper article online) and c) objecting to the treatment may leave consumers without access to the product as no viable alternative can be found (lack of choice). In any event, when consumers do the tasks and look at the information, studies have showed that consumers who do shop around, end up being less satisfied with their choice than those who do nothing or little.<sup>104</sup>

Some solutions have been explored to improve the information provided to consumers. Legislators have busied themselves relying on behavioural economics to devise information that may be better understood and assimilated by a wider number of consumers. Indeed, the formulation of information can be difficult to understand and terms and conditions as well as privacy policies can be very long to read and digest. Working towards more understandable formats or the use of nudges may assist consumers if done for the right reasons. However, Helberger et al. highlight how *'framing is often used by websites in consent notices that establish the positive implications of consenting to data collection (access to various functionalities or improved experience), while such notices ignore or downplay the possible negative consequences'*.<sup>105</sup> The calibrating of information via the intervention of behavioural economics can create unwanted consequences. Vulnerable consumers may be stigmatised because even after the information is calibrated, some will still not be able to make a good choice.

Of course, at this juncture we could also envisage that technology is harnessed to provide consumers with tailored information. The use of Big data to create 'granular legal norms' has

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<sup>101</sup> Katarzyna Poludniak-Gierz, Personalisation of Information Duties Challenges for Big Data Approach 3 (2018) *European Review of Private Law* 298.

<sup>102</sup> Poludniak-Gierz (n 99) 298.

<sup>103</sup> See for eg, Jonathan Obar, Anne Oeldorf-Hirsh, *The biggest lie on the Internet: Ignoring the privacy policies and terms of service policies of social networking sites* Information, Communication & Society (2018).

<sup>104</sup> Citizens Advice, *Against the Clock: Why more time is not the answer for consumers* (November 2016).

<sup>105</sup> Helberger et al. (n 72) 36, para 84.

been explored as a response to imperfect information models.<sup>106</sup> However, to date many have concerns at letting big data take care of personalisation of information, not only because of encroachments on privacy and potential errors<sup>107</sup> in the way algorithms make their choices but also at the fact that enforcement mechanisms are poorly equipped to deal with personalised law<sup>108</sup> and are unlikely to be resolved without significant investments.

Besides, there is no guarantee that those alternatives can also assist with consumers' tendency to disregard information at the point it is offered because of over-optimism or because they are focussed on accessing the service and thus pay little attention to privacy notices or other disclosures.<sup>109</sup> Information may also be discounted because the consumer senses (often erroneously) that accepting is a necessity to access the website.<sup>110</sup> In any event, information can also have perverse effects as shown by Brandimarte, Acquisti and Loewenstein.<sup>111</sup> The authors demonstrated that control over the release and access to private information (even if personally identified) meant that individuals were more likely to divulge leaving them paradoxically more vulnerable.<sup>112</sup> Their paper concluded that technology designed to protect can end up exacerbating the risks faced. There are therefore perverse dangers in the disclosure of information that does not seem to have been factored into policy making.

### 2.3. Consent is an outdated measure in digital markets

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<sup>106</sup> Christoph Busch, Alberto De Franceschi, Granula Legal Norms: Big Data and the Personalisation of Private Law, in Vanessa Mak, Eric Tjong Tjin Tai, Anna Berlee (eds.), *Research Handbook on Data Sciences and Law* (Cheltenham: Edward Elgar 2018).

<sup>107</sup> For eg, see *Poludniak-Gierz* (n 99) 306 discussing diet supplement sold to a pregnant woman omitting the dangers of the pills because it did not have data on this fact.

<sup>108</sup> Christoph Busch, Algorithmic Regulation and (Im)perfect Enforcement in the Personalised Economy, in Christoph Bush, Alberto De Franceschi (eds.), *Data Economy and Algorithmic Regulation: A Handbook on Personalised Law* (place: Beck Nomos Hart 2020).

<sup>109</sup> Frederik Zuiderveen Borgesius, *Behavioural Sciences and the Regulation of Privacy on the Internet* in Anne-Lise Sibony and Alberto Alemanno (eds.), *Nudge and the Law, A European Perspective* (Oxford and Portland: Hart 2015).

<sup>110</sup> Christine Utz, Martin Degeling, Sacha Fahl, Florian Schaub and Thorsten Holz, *(Un)informed consent: Studying GDPR consent notices in the field* Proceedings of the 2019 ACM SIGSAC Conference on Computer and Communication Security 973-990 (2019).

<sup>111</sup> Laura Brandimarte, Alessandro Acquisti and George Loewenstein, *Misplaced confidences: Privacy and the Control Paradox* 4 Social Psychological and Personality Science 3 (2013).

<sup>112</sup> Joanna Strycharz, Guda van Noort, Edith Smit, Natali Helberger, *Protective behavior against personalized ads: Motivation to turn personalization off* 13 Cyberpsychology: Journal of Psychosocial Research on Cyberspace 2 (2019), Article 1, <https://doi.org/10.5817/CP2019-2-1> concluding the paradox also applied in the context of the GDPR: 'our findings cast doubts on the role of transparency about data collection and processing. Informing consumers did not activate their threat or coping appraisal and did not predict their motivation to act. This is good news for marketers who commonly dread the transparency requirements: purely being informed does not make consumers negative by default.'

One of the techniques used in parallel with information is the requirement that the consumer must consent to the treatment of their data or to the contract they have entered. We use consent in law to validate transactions. But if consent was ever meaningful, it no longer is, in the digital era. Monitoring and tracking are not visible. Data is often collected without the knowledge of the individual and when this is the case, there will be no real basis upon which to consent.<sup>113</sup> The GDPR sought to require consumers to be informed and consent to the treatment of their data. As a result, many pop-up windows have now come to populate our lives. Many are simply closed without being read. Or, because of the nudge that highlights the ‘accept all’ rather than ‘reject’, consumers consent to data treatment that they are not able to understand. Information here again does not solve the problem. The GDPR has forced disclosure of data collection practices. It has however not changed much in the way consumers can be protected. Simply, it has displaced the cause for inaction, for ‘disengagement’ from one where the consumer was blind, to one where it can now be deemed responsible for his or her failure to protect their privacy and data. With regards to sensitive data, consent needs to be express thereby raising the threshold of what may be deemed acceptable and elucidating more awareness from consumers who consent, at least in theory.

But in digital markets, the relationship in which consumers engage in is so tilted in the trader’s favour that consent turns out to be meaningless.<sup>114</sup> There is evidence that framing and linguistic mechanisms used in privacy policies ‘*walk a precarious balance between aiming to inform consumers in order to fulfil the information provision, or convincing consumers to consent*’.<sup>115</sup> Dark patterns are also used to guide consumers towards choices that may not serve them well.<sup>116</sup> The Commission’s Communication on a New Consumer Agenda acknowledges practices that come to distort consent and states that commercial practices that disregard consumers’ right to make an informed choice, abuse their behavioural biases or distort their decision making process must be tackled.<sup>117</sup>

Much of the problem reside in the fact that the data is not simply collected and used for particularly well-defined purposes and compartmentalised for those uses. Instead, aggregation of data (which is often the more lucrative part of data collection) means that the data is mixed

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<sup>113</sup> Lawrence Lessig, *The law of the horse: what cyberlaw might teach* 113 Harvard Law Review 501, 505 (1999).

<sup>114</sup> Yet the extend of what constitutes consent is far removed from the interpretation given in Art 29 Working Party, *Opinion 2/2017 on data processing at work* (WP249), where consent to surveillance by employers can never constitute consent. See also, Case C-673/17 *Planet 49* ECLI:EU:C:2019:801 that ruled that pre-ticked boxes that need to be deselected do not constitute consent to the use of cookies.

<sup>115</sup> *Helberger et al.* (n 72) 36, para 84.

<sup>116</sup> *Utz, et al.* (n 110).

<sup>117</sup> *New Consumer Agenda* (n 14) 10.

with others to the point, that it is not always possible to understand and predict what will come of the data and how it will end up impacting consumers. This means that it is not possible to really consent to use of data in the future and yet it is that use that is most worrying. All the consumer can do is to consent to data being collected. For example, when signing up for a DNA profile, the consumer gives their DNA to a private entity that stores that information but may sell it to third parties. The use made of this data in the future is unclear and because of opacity in the market structure it is possible to imagine a consumer losing sight of who holds the data or of new uses made of their data.<sup>118</sup> It is therefore not really possible to enforce rights granted by the GDPR for a consumer even if technically it may be allowed to do so. Helberger et al confirm, that even having sufficient knowledge and understanding, the consumer cannot predict what will happen to their data and what possibilities it gives the processor post-consent.<sup>119</sup> Besides, consent which focusses on individual consent is outdated because data gathering often affects others who can be profiled thanks to shared observable characteristics<sup>120</sup> and, in any event, anonymised data is beyond the control of the individual.<sup>121</sup>

### **3. Fairness by design: the new approach to protecting vulnerable consumers in the digital single market?**

A different approach is necessary. It requires a stronger regulatory framework that focuses on positive and substantive obligations rather than rely on procedural fairness as a guide. It is about developing a more prescriptive standard of conduct which could include mandatory rules of substance, such as a minimum quality standards or fitness tests to prevent mis-selling of risky products or better, the introduction of a positive duty to trade fairly.<sup>122</sup> The new approach needs to acknowledge that consumer lives do not happen in a vacuum and look at digital vulnerability in the broader context. It is a holistic view that needs to permeate the way we think of regulation and protection. This means not only looking at the impact of technologies on consumers, but more widely the impact of other systems. To some extent the current wave of reform acknowledges this in as much as many initiatives are linked: DSA, DMA, General

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<sup>118</sup> For example on Ancestry.co.uk: *'By giving consent to participate in the Project, you agree that all information and Biological Samples that you share with us (as further described below) through your use of our websites, mobile applications, and products that exist now, or in the future (our "Services") can be collected and used for research consistent with the Purpose until the Project is completed or ends (which may be many years from now). Anyone who has activated an AncestryDNA test at any time can voluntarily participate in this Project.'*

See, <https://www.ancestry.co.uk/dna/lp/informedconsent-v4-en>

<sup>119</sup> Helberger et al. (n 72) 32, para 74.

<sup>120</sup> Helberger et al. (n 72) 32, para 76, citing Custers (2016).

<sup>121</sup> The GDPR does not offer protection if the data is anonymised.

<sup>122</sup> Siciliani, Riefa, Gamper (n 16) 24.

Product Safety Directive, Product Liability reform, AI, etc. But at this stage, the overlaps and connexions remain unclear, and the texts show little interests in the plight of the vulnerable consumers. There is also much ambiguity as to whether or not the new reform notably the DSA and DMA are truly part of the revision of the consumer acquis or should be understood to stand alone.

Regardless, our understanding of who a vulnerable consumer is needs urgently updating as we are all vulnerable and the systems in place can compound vulnerability. Addressing the causes and intersections is essential. When the machines can make inferences, can present advertising and frame product choices, can even calculate what a consumer finds an acceptable price (willingness to pay) or frame offers to nudge towards a purchase, consumers become powerless. Consumers cannot influence the way the market works especially where there is no meaningful alternative. Reflecting on vulnerability in digital markets, it is necessary to transform the way we see consumer law and its enforcement.<sup>123</sup> There is also a need to look at the role of AI in impacting consumer behaviour and step up the requirements. Economic harm needs to be recognised within a broader spectrum. Economic harm can lead to harm that goes far beyond. Embracing digital vulnerability as the norm, rather than the exception will enable our consumer protection laws to recalibrate to assist consumers where they are unable to assist themselves or where the efforts required would be disproportionate.

Advocating a different approach does not get rid of information altogether, for a certain modicum of details will always be necessary, but it stops relying as information as a proxy for protection. Helberger et al. confirm that digital asymmetry is a structural phenomenon that affects consumers and that cannot be overcome by providing even more information.<sup>124</sup> Information can no longer be the go-to solution. It is only part of a package of expectations placed on traders. Thus, I may be informed that the price will be personalised but could expect that it will only be so to my benefit as a consumer and not to maximise my willingness to pay to extract more rents. This is important because where information does not work, much is left to trust. Consumers that are scammed are often victim of ‘blind trust’ where the trustee has full control. In this situation the seller does not need to provide any objectively verifiable

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<sup>123</sup> Christine Riefa, *Coronavirus as a catalyst to transform consumer policy and enforcement* 43 *Journal of Consumer Policy* (2020) 451.

<sup>124</sup> *Helberger et al.* (n 72) 51, para 118.



credentials to support quality claims.<sup>125</sup> Other consumers may be more ‘circumspect’ but trust rests on two essential components, namely: credibility of the firm and benevolence.<sup>126</sup> Consumers act on the basis that the trader’s intentions are beneficial to the buyer himself.<sup>127</sup> Benevolence is the intention to accept vulnerability based upon positive expectations of the intentions or behaviour of another.<sup>128</sup> The trustor is willing to be vulnerable due to the perception of an absence of opportunism.<sup>129</sup> As a result, in choice architecture it may be difficult to dispel the trust placed in the firm because the firm may be able to manipulate the perception of the consumer. In any event, information is unlikely to alter the consumers’ position. For example, brands that use digital influencers to advertise their products rely on the idea of proximity, the illusion of connection, friendship and trust that forms in a network of people who share similar interests.<sup>130</sup> As a result, consumers may place trust in a digital influencer they follow on social media. Simply being told that the influencer is paid to give out their message will not always be sufficient to provide consumers with the tools to make sound decisions, the same way that disclosing an interest rate when offering credit may not trigger consumers to do the right maths and walk away from the deal.

There are many ways to approach reforms. The current EU wave continues a piecemeal approach, tackling various aspects but not attacking vulnerability head on. We could envisage fiduciary duties, duties of care, the imposition of ‘safety’ style obligations or the use of the UCPD.

One could expect that proprietary websites, or sellers/ service providers on intermediary platforms take responsibility for their online activities and offer their ‘vulnerable consumers’ (defined broadly to also account for systemic vulnerabilities) a level of protection akin a fiduciary duty. A fiduciary duty requires that firms must not put personal interests above those of the client. It has a moral element. The fiduciary must avoid conflicts of interests, must not profit from the firm’s position without the client’s knowledge and consent.<sup>131</sup> This is normally

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<sup>125</sup> Siciliani, Riefa, Gamper (n 16) 113.

<sup>126</sup> Shankar Ganesan, *Determinant of Long-Term Orientation in Buyer-Seller Relationship* 58 *Journal of Marketing* 1 (1994).

<sup>127</sup> Ganesan (n 126).

<sup>128</sup> Denise M Rousseau, Sim B Sitkin, Ronald Burt, Colin Camerer, *Not so different after all: A Cross-discipline view of trust* 23 *Academy of Management Review* 393(1998).

<sup>129</sup> Roger C Mayer, James H Davis, David Schoorman, *Including versus excluding ability from definition of trust* 21 *Academy of Management Review* 339 (1996).

<sup>130</sup> Christine Riefa, Laura Clausen, *Towards fairness in digital influencer’s marketing practices* 8 *Journal of European Consumer and Market Law* 2 (2019).

<sup>131</sup> <https://www.fca.org.uk/publication/discussion/dp-18-05.pdf>

the standard applicable for the protection of investors. Closely related to fiduciary duties are duties of care which have been floated in the financial industry<sup>132</sup> and with regards to online non-economic harm.<sup>133</sup> A duty of care in the financial context, would be an obligation for banks and other financial institutions to act in their customers' best interests<sup>134</sup> to help prevent mis-selling and other poor behaviour directed at customers. A duty of care runs counter to the current model whereby firms put in place unfair practices and see if they can get away with them (possibly through consumer apathy or lack of enforcement or regulatory intervention). A duty of care can have a positive ex ante influence because it comes to rebalance the relationship between financial services providers and their customers and engenders long-term cultural change in the sector.<sup>135</sup> At EU level, the proposal for Consumer Credits Directive requires that creditworthiness is assessed in the interest of the consumer to prevent irresponsible lending practices and over-indebtedness (art 18(1) CCD). It also requires that providers act honestly, transparently and professionally to take account of the rights and interests of consumers (art 32 CCD). It will also fall on Member States to ensure that the remuneration structure of advisory services does not prejudice the ability of staff to act in the consumers' best interest and not contingent on sales targets (art 32 CCD). This does not quite constitute a duty of care although it comes nearer.<sup>136</sup> In the UK by contrast, the 2021 FCA consultation on a New Consumer Duty<sup>137</sup> cements a move towards higher expectations for the standard of care firms need to provide to consumers. This regime nevertheless continues with a duty set at different levels when consumers are vulnerable. Because consumers who are in vulnerable circumstances are at greater risk of harm, firms should take additional care to ensure vulnerable consumers achieve outcomes that are as good as those of other consumer, reflecting published guidance on the fair treatment of vulnerable consumers.<sup>138</sup> Regrettably, the conception of who a vulnerable consumer is limited in its remit. The guidance notes:

*'A vulnerable customer is someone who, due to their personal circumstances, is especially susceptible to harm - particularly when a firm is not acting with appropriate*

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<sup>132</sup> <https://www.fca.org.uk/publication/consultation/cp21-13.pdf> .

<sup>133</sup> Such as those dealt with in Art 26 DSA.

<sup>134</sup> [https://www.fs-cp.org.uk/sites/default/files/duty\\_of\\_care\\_briefing\\_-\\_jan\\_2017\\_2.pdf](https://www.fs-cp.org.uk/sites/default/files/duty_of_care_briefing_-_jan_2017_2.pdf)

<sup>135</sup> Duty of care in the UK exist, for example, in the law of negligence, contract law (via implied terms or an express duty to take reasonable care) or in some statute (eg sec 49, CRA 2015).

<sup>136</sup> Note also the Data Governance Act which regulates data sharing intermediaries, does require acting in the best interest of data subjects when facilitating the exercise of their rights (art 11(10)), Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act) COM (2020) 767 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0767>

<sup>137</sup> <https://www.fca.org.uk/publication/consultation/cp21-13.pdf>

<sup>138</sup> <https://www.fca.org.uk/publications/finalised-guidance/guidance-firms-fair-treatment-vulnerable-customers>

*levels of care. Our view of vulnerability is as a spectrum of risk. All customers are at risk of becoming vulnerable, but this risk is increased by having characteristics of vulnerability. These could be poor health, such as cognitive impairment, life events such as new caring responsibilities, low resilience to cope with financial or emotional shocks and low capability, such as poor literacy or numeracy skills.*<sup>139</sup>

This definition remains focussed on personal characteristics. It does not account for systemic vulnerabilities, arguably curtailing some of the impact the position of a duty of care may be able to have on the protection of consumers. A duty of care would be useful in financial services given the complexity of most products. It could be a powerful ally in other sectors including digital markets. A duty of care is indeed the type of tool that can be deployed to counter non-economic harms (including hate speech and disinformation) and the defence of fundamental rights under the DSA. However, a duty of care may not translate for more common consumer transactions. A duty of care admittedly may place a high bar and imposes burdens on traders that may not be proportionate. However, regarding practices such as scams, or where the persistence of practices and their unfairness becomes the norm and the way the market behaves, heavy-handed intervention could be justified. Inevitably, solutions will also require looking at the role of platforms in the way consumers may be exploited in the digital single market. To date the responses, while upgraded by comparison to the Electronic Commerce Directive, remain rather tame in the Digital Services Act.<sup>140</sup>

Another way to tackle the issue could be aligned to that adopted in the proposal for a General Product Safety Regulation. This new framework could place expectations on traders in the same way the EU product safety regimes places expectations on traders. Only safe products can be released on the market. The safety framework places more robust expectations on traders than the general consumer law does on other harm, notably economic. The difference of degree is intuitively understandable. However, the EESC's opinion notes that the definition of safety that only covers "health" and "physical integrity" no longer corresponds to the actual risks to which consumers may be exposed.<sup>141</sup> The proposal now account, in Article 7, for risks

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<sup>139</sup> <https://www.fca.org.uk/publication/finalised-guidance/fg21-1.pdf> para 2.5.

<sup>140</sup> In the UK the Parliamentary joint committee on the Online Safety Bill (equivalent to the DSA) has proposed to include paid for scams adverts to be included in the Bill which would carry an obligation for platforms to stop scams from appearing and to remove them promptly when they do.

<sup>141</sup> EESC, Product Safety Directive/ Revision INT/957-EESC-2021, para 3.3. Note Prof. Riefa was the expert to rapporteur Mordechaj Martin Salomon on this opinion.

such as security and cybersecurity. It also includes environmental risks.<sup>142</sup> While there are clearly many issues still lingering regarding the sale of dangerous products online and concerns about the efficacy of the proposal, the direction of travel is towards an expansion of the role of safety<sup>143</sup> as well as the means put at the disposal of enforcers. Safety style obligation could be used for all products, not just those who may cause physical harm to consumers. Social media applications that lower young girls' body image and make an impact on their mental health<sup>144</sup> are 'dangerous products'. High cost, short term credit could be billed as a dangerous product, and at least necessitate criminal sanctions.<sup>145</sup> Financial scams on social media that defraud people of their savings do not only cause economic harm. They have devastating effects on people's lives. They cause distress, emotional harm, and mental health issues, some of which may lead to physical harm. They too could be seen to be unsafe products. Therefore, we could imagine an obligation to only put on the market products that do not harm consumers physically, mentally and/or economically. However, instead of exploring a modification of the proposal on the table, the European commission has been discussing the extension of the voluntary Safety pledge commitment to new consumer law areas.<sup>146</sup> This however rests on the premise that safety pledges worked in the consumer safety area<sup>147</sup>, which is not entirely accurate. In addition, it gives the erroneous impression that consumer law is soft law and that compliance is at the choice of traders.

This is not the case and instead it is clear that more public enforcement is what is clearly needed to defend vulnerable consumers in the digital age. The expectation should no longer be for consumers to beware, but for businesses to behave. It should not be about private action being the guardian of effective markets for consumers, but about public enforcement or collective action where appropriate. Individual consumers especially if they can be deemed

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<sup>142</sup> Recital 11, proposal for General Product Safety Regulation.

<sup>143</sup> See also ESSC, Product Safety Directive/ Revision INT/957-ESSC-2021, paras 3.4 which states: 'it is obvious and unavoidable that any future regulatory framework must also safeguard consumers against threats to their safety from hackable connected goods, a lack of updates to software and harmful chemicals, and welcomes changes in this regard.'

<sup>144</sup> See the reports concerning research kept secret into impact of Instagram on your girls, <https://www.theguardian.com/technology/2021/sep/14/facebook-aware-instagram-harmful-effect-teenage-girls-leak-reveals>

<sup>145</sup> eg David Jasinski, Nicholas Ryder, Regulating the consumer credit market, protecting vulnerable consumers, in *Vulnerable Consumers and the Law* (n 23) 85-101.

<sup>146</sup> Annual Digital Consumer Event 2021, <https://digitalconsumerevent.eu/home> (25 November 2021)

<sup>147</sup> For a critique of their effectiveness, see Christine Riefa, Consumer Protection and electronic commerce: Protection against unsafe products bought online (The Left, 2021) 93 [https://emmanuelmaurel.eu/wp-content/uploads/2021/04/Consumer\\_protection\\_and\\_electronic\\_commerce\\_Protectection\\_against.pdf](https://emmanuelmaurel.eu/wp-content/uploads/2021/04/Consumer_protection_and_electronic_commerce_Protectection_against.pdf)

vulnerable, or in a situation of systemic vulnerability, are not able on their own to influence the behaviours of firms.

In *Consumer Theories of Harm*, I put forward together with Siciliani and Gamper, the idea of a positive duty to trade fairly, inviting policy makers, legislators and enforcers to think of ‘fairness by design’. A greater and more forceful application of consumer law is warranted because consumer detriment is not only persistent but also gets worse as consumer distrust in markets takes hold.<sup>148</sup> A duty to trade fairly will seek to ensure that consumers are treated equally, in a way that is right or reasonable. This could take different forms depending on markets and practices. For example, it is possible to shape a duty to trade fairly by modernizing the unfair commercial practices directive and its national implementations or go further and explore some of the options detailed above such as a duty of care where it would be fair in particular segments of a market. For purely transactional e-commerce it seems reliance on the UCPD offers a good anchor point.

Helberger et al. have argued that regulatory attention should shift from defining vulnerability or sorting out particular users under the concept of vulnerability towards tackling the sources of vulnerability, which comprises digital asymmetry.<sup>149</sup> They posit that external-structural asymmetries may be considered as aggressive practices under Articles 8 and 9 of the UCPD. Despite a narrow understanding so far by the CJEU on what constitute aggressive practices and what falls within the scope of undue influence<sup>150</sup>, the authors argue that one could look at structural influence. If this fails, it is possible to deal with asymmetries under the general clause (article 5).<sup>151</sup> However, Art 5(3) of the UCPD which is focussed on commercial practices towards a particular group that is particularly vulnerable, is not fit to address the situation of the digital consumer.<sup>152</sup> Data exploitative practices would be considered to be prima facie aggressive or infringing professional diligence and thus it would be for the trader to establish that they have taken the necessary safeguard. In effect, Helberger et al. argue for a reversal of the burden of proof in the UCPD<sup>153</sup> which is possible as it is delegated to national law under Recital 21 of the UCPD to ‘require traders to produce evidence as to the accuracy of factual

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<sup>148</sup> Siciliani, Riefa, Gamper (n 16) 179.

<sup>149</sup> Helberger et al. (n 72) 47, para 105.

<sup>150</sup> See CJEU Case C-54/17 *Wind Tre* ECLI:EU:C:2018:710 and CJEU Case C-628/17 *Orange Polska* ECLI:EU:C:2019:480.

<sup>151</sup> Helberger et al. (n 72) 48, para 109.

<sup>152</sup> Helberger et al. (n 72) 24, para 57.

<sup>153</sup> Helberger et al. (n 72) 76-77, paras 185-189.

claims they have made’ and/ or the use of auditors. The authors also float the idea of co-design of regulation involving business, consumer organisations and enforcement authorities (and favouring the use of standards to demonstrate compliance) as well as extending the blacklist of the UCPD.<sup>154</sup>

According to Siciliani, Riefa and Gamper a reinterpretation of the concept of ‘professional diligence’ and a broader use of the general clause could indeed offer useful solutions:

“to achieve a higher standard of consumer protection, the normative standard of professional diligence should discourage opportunism but promote trustworthiness and, more prescriptively, assistance. Accordingly, it could be argued that the material distortion is due to the trader’s implicit refusal to assist both potential and current customers to avoid making mistakes. Therefore, there would be no need for a complex inquiry into the conduct of competing traders in order to establish the appropriate benchmark of professional diligence.”<sup>155</sup>

The general clause could therefore be used successfully with regard to failures to disclose a price (dis-)advantage, as is the case with price personalization. It could be used to combat covert data collections, damaging inferences by AI and so on and so forth. Fairness could be premised on a duty to assist in situations where information used to be king. It is possible to imagine the development of fairness checklists. For example, the ACM guidelines on the protection of online consumers (currently templated on the UCPD) explains that to prevent deception in online choice architecture, it would be necessary to give easy-to-understand, complete and correct information, and before the consumer makes a purchase. The information will have to be found easily, and the design will need to be logical and fair. Default settings would need to be favourable to consumers and take the needs of vulnerable consumers into account. The effects of choice architectures will need to be tested by firms. According to those rules, harm does not necessarily need to be experienced by consumers and there is also no need for intention of harm being caused.<sup>156</sup>

From an economic standpoint, when consumers’ vulnerability is rooted into some serious causes (going deeper than simple inattentiveness or over-optimism) firms should be under a duty to not only abstain from exploiting the ensuing naivety, but also to assist vulnerable

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<sup>154</sup> *Helberger et al.* (n 72) 79.

<sup>155</sup> *Siciliani, Riefa, Gamper* (n 16) 201.

<sup>156</sup> ACM, guidelines: protection of the online consumer boundaries of online persuasion (2020), <https://www.acm.nl/en/publications/guidelines-protection-online-consumer>.

consumers in not making a mistake.<sup>157</sup> This would necessarily work hand in hand with also acknowledging the role and ‘reality’ of consent in B2C relationships as well as the ‘real’ and boundedly rational consumer.<sup>158</sup> Fairness could be adopting a more prescriptive standard with a ban on surveillance advertising (as is currently being proposed under the DSA).

This type of intervention is important ex-ante rather than ex-post because consumers may be at greater risk of vulnerability due to market features (which is the case in digital markets), their own characteristics, and other systemic vulnerability. ‘Consumers at risk of vulnerability are overall less likely to be able to represent their own interests and are at greater risk of suffering detriment. The impact of any detriment suffered is also likely to be greater, justifying public intervention.’<sup>159</sup>

Requiring that traders are under a duty of fairness would match consumers’ expectations of trust. Gómez explains that if firms can, “in [a] cost-effective way, correct inadequate levels of information on the part of consumers, their practices should be deemed unfair if they do not engage in these educational or corrective actions. In cost–benefit terms, they are [the] cheapest providers of a social benefit”.<sup>160</sup>

What follows is to determine if such duty should require firms to proactively detect vulnerability? Or should they only act on information declared by consumers.<sup>161</sup> Should we envisage that the technology we advocate protecting against also needs to hold the solution? Can big data analytics be used to profile consumers in order to help them rather than exploit them? If we go down this route, what are the risks of mandating firms to collect this information? This is beyond the scope of this article but ought to no doubt occupy scholars and policy makers in years to come. It could in any event be perfectly feasible that in the same way we expect traders to assist we could expect them to collect information for good rather than exploitative purposes. It would also be necessary to reflect on how enforcers gather the information they require (although they should in theory find it easier than consumers). With strong and systematic public enforcement, fairness would become enshrined in consumer markets because the expectations placed on traders will raise the level of behaviour. It places a positive duty on traders to treat consumer fairly, rather than not to treat them unfairly as is currently the case under the UCPD. In this vein, it comes closer to a duty of care. This could

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<sup>157</sup> Siciliani, Riefa, Gamper (n 16) 106.

<sup>158</sup> Herbert Simon, *A behavioural model of rational choice* 69 *Quarterly Journal of Economics* 99 (1955).

<sup>159</sup> Siciliani, Riefa, Gamper (n 16) 107.

<sup>160</sup> Fernando Gómez, *The Directive on Unfair Commercial Practices: a Law and Economics Perspective* 2 *European Review of Contract Law* 4 (2006).

<sup>161</sup> In the UK, this is reminiscent of Sale of Goods Act 1979 section 14(3) and Consumer Rights Act 2015 section 10.

over time shape markets in such a way that fairness becomes the only acceptable way to compete.

## **Conclusion**

The online world seems to have almost taken over with little that can be done to protect consumers in effective and sustainable ways. Finding ourselves in this situation is however not a fatality, it is through choice. The choice the legislators make when adopting laws that see consumers as economic agents and do not make the link with the wider environment consumers finds themselves in. Choice the politicians make when they decide on budget for the public enforcement of consumer law and the funding of access to justice. For consumers, the choice of changing operator or claiming their right in court or through ADR is no longer real. In a dematerialised world, where unfair practices are hard to spot and even harder to evidence, consumers struggle to claim their right and obtain adequate redress and/or the cessation of harmful conduct. Consumers cannot influence the way the market works for lack of meaningful alternative. Reflecting on vulnerability in digital markets, it is necessary to transform the way we see consumer law and its enforcement, notably the role of public enforcement. We should come to think less of vulnerability as what happens to the ‘other consumers’ and think of vulnerability as an integral part of who we all are online. Some empathy in law making will go a long way in ensuring we design more ‘human’ systems of protection not just economic ones.<sup>162</sup> To protect vulnerable consumers we need to reverse expectations. It should no longer be about consumers defending themselves (using rather imperfect instruments in the process); but it should be about businesses behaving fairly and skilled enforcers to ensure obligations are fulfilled. Fairness in digital markets should be by design and not something that is offered to consumer simply as a remedy after the damage has already occurred. A modicum of harm prevention and market surveillance is essential. As the new consumer agenda reforms are underway, it is an important message that hopefully will reach EU legislators.

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<sup>162</sup> *Riefa* (n 123).