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## 7. Consumer protection in the metaverse

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### 1. INTRODUCTION

The goal of consumer protection has never represented a uniformly shared concept at a global level. Historically, consumer protection measures have varied with regard to their desired outcomes and purposes, ranging from social and redistributive objectives to ensuring access to markets to foster them. Regardless of the aims, resulting in legislative measures of diverse extent and content, one aspect was common among consumer laws: that consumption deserved protection.

This assumption is currently under siege. Increasingly, consumption is perceived in a negative light. The most direct confrontation comes from the need for environmental protection, which serves as a basis for restricting established consumer rights. Among these are the right to withdraw from a contract (and return the good) and the right to substitute a defective asset, both of which would be detrimental to the environment.<sup>1</sup> It is claimed that we are currently living in a post-consumerist society, whose participants want to consume less and differently and seek to incorporate collective interests or ethical consumption.<sup>2</sup> And, even if consumers may not subscribe to these values, the law would in any case restrict certain consumer choices in view of those societal interests. Consumption thus develops into a manifestation of citizenship with the peculiarity that, probably for the first time, it comes at the expense of consumer rights.<sup>3</sup>

In the digital environment, consumption also intertwines with citizenship. Tech companies can gather unprecedentedly large datasets that allow granular knowledge of a person, including their health (for example, via an IoT app), sexual preferences and political choices, to name but a few. Such data can be used to nudge and exploit consumers. Furthermore, digitalisation can infringe and restrict fundamental rights – for example, by cancelling participation in the digital arena and so restricting freedom of expression. The metaverse would magnify the interrelation between consumption and citizenship due to the profound effects of immersive realities on persons – a characteristic of Web 3.0 that is not exclusive to the metaverse.

The above-mentioned challenges to citizenship follow an act of consumption: purchasing goods or requesting services. Therefore, as in the offline world, consumption in the digital

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<sup>1</sup> Communication from the Commission to the European Parliament and the Council of 13 November 2020, ‘New Consumer Agenda. Strengthening Consumer Resilience for a Sustainable Recovery’, COM(2020) 696 final, 3.1; E. Terryn and E. van Gool, ‘The Role of European Consumer Regulation in Shaping the Environmental Impact of E-Commerce’ (2021) 3 *EuCML* 89, 94–100.

<sup>2</sup> M. Grochowski, ‘Consumer Law for a Post-Consumer Society’ (2023) 1 *EuCML* 1.

<sup>3</sup> For a reflection on the impact of environmental protection for consumer law, see HW Micklitz, ‘Squaring the Circle? Reconciling Consumer Law and the Circular Economy’ (2019) 6 *EuCML* 229.

environment is now regarded with caution due to its societal impact. The metaverse is likely to augment that perception.

Unlike in the mid–late twentieth century, when consumer laws started to develop and form their core concepts, consumption is currently not overtly welcomed. Its societal effects are increasingly being addressed through mandates where it is considered to pose an environmental challenge. Instead, the problematics of fundamental rights are largely overcome in legislation with the consent of the affected citizen.<sup>4</sup> Hence, the law pursues two opposite routes (mandates and consent) to achieve the same outcome of incorporating societal interests into the regulation of consumption. However, it is not always clear how consumer law interacts with data protection, market regulation and the protection of fundamental rights – all pillars of digital markets. A notorious lack of coordination exists between those areas. Importantly, key concepts such as those of the protected person and consent vary across areas.

Focusing on EU law, this chapter claims that, unless consumer law is preserved, it will be inroaded by concepts enshrined in data protection and digital markets law. Although this may be a consequence of the societal impact of consumption in the digital world, it could effectively lead to lower levels of consumer protection. This chapter first presents consumer law as status-based, and sets out what it derives therefrom (Section 2). Next, the chapter explores consumer protection in the digital environment, to assess whether or how consumer law might be undergoing a process of deconstruction (Section 3). The following two sections explore specific instruments in EU law seeking to address fairness in the metaverse (Section 4) and how consumer protection could be improved in that context (Section 5). The author’s conclusions are provided in Section 6.

## 2. CONSUMER LAW AS STATUS-BASED

### 2.1 Notion of Consumer

EU consumer law has historically relied on objective concepts to define both consumers and businesses.<sup>5</sup> The consumer is defined in a negative manner – a natural person not classified as a business – as opposed to the professional party, defined by the aims of its activity. Common definitions in B2C legislative instruments show this binarism. A focus on consumer legislation that applies horizontally, regardless of the specific context and the objective definition of the parties, is present in the Unfair Contract Terms Directive (UCTD),<sup>6</sup> the Unfair Commercial

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<sup>4</sup> Art 6(1)(a) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1; Art 14(4) of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1.

<sup>5</sup> E. Terryn, ‘Consumers, By Definition, Include Us All ... But Not for Every Transaction’ (2016) 2 ERPL 271, 273–4.

<sup>6</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29.

Practices Directive (UCPD)<sup>7</sup> and the Consumer Rights Directive (CRD).<sup>8</sup> They all adopt a binary approach to determine the participants in a B2C relationship.

Under the UCTD, a seller or supplier is ‘any natural or legal person who is acting for purposes relating to his trade, business or profession’.<sup>9</sup> A consumer, in turn, is ‘any natural person who is acting for purposes which are outside his trade, business or profession’.<sup>10</sup> In the UCPD and in the CRD, a trader is ‘any natural or legal person who is acting for purposes relating to his trade, business, craft or profession’,<sup>11</sup> while a consumer is someone who acts ‘for purposes which are outside his trade, business, craft or profession’.<sup>12</sup>

The same objective and binary classification of the parties to a B2C relationship is found in sectorial legislation, for example, in the Consumer Sales Directive (CSD)<sup>13</sup> and in the Digital Content Directive (DCD).<sup>14</sup> Under the CSD and the DCD, a consumer is such when ‘acting for purposes which are outside that person's trade, business, craft or profession’,<sup>15</sup> as opposed to the seller (CSD) or the trader (DCD) who act ‘for purposes relating to that person’s trade, business, craft or profession’.<sup>16</sup>

Even though EU law lacks the characteristics of a legal *system*,<sup>17</sup> which renders a harmonised interpretation of legal instruments complicated, the Court of Justice of the European Union (CJEU) in the *Kamenova* case decided that the concept of trader under the UCPD and the CRD should be interpreted uniformly.<sup>18</sup> A similar conclusion was reached for the UCTD

<sup>7</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22 (UCPD).

<sup>8</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64.

<sup>9</sup> Art 2(c) UCTD.

<sup>10</sup> Art 2(b) UCTD. Italics added.

<sup>11</sup> Art 2(b) UCPD and art 2(2) CRD.

<sup>12</sup> Art 2(a) UCPD and art 2(1) CRD. Italics added.

<sup>13</sup> Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L136/28. On the CSD, see F. de Elizalde, ‘Sale of Goods’ in *Oxford Encyclopedia of EU Law* (Oxford University Press 2022). See also J. Morais Carvalho, ‘Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771’ (2019) 5 EuCML 194.

<sup>14</sup> Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1. On the DCD, see C Riefa, ‘Digital Content Contracts’ in *Oxford Encyclopedia of EU Law* (Oxford University Press 2022), and Morais Carvalho (n 13).

<sup>15</sup> Art 2(2) CSD and art 2(6) DCD.

<sup>16</sup> Art 2(3) CSD and art 2(5) DCD.

<sup>17</sup> H.W. Micklitz, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (Cambridge University Press 2018) 192.

<sup>18</sup> Case C-105/17 *Komisia za zashtita na potrebitelite v Evelina Kamenova* ECLI:EU:C:2018:808, paras 27–29.

and the CRD, in respect of the notion of consumer.<sup>19</sup> This is consistent with the similarity of the definitions under those directives, and also with the fact that they are based on the same treaty provision, art 114 of the Treaty on the Functioning of the European Union (TFEU),<sup>20</sup> ex art 95 of the Treaty establishing the European Community (TEC),<sup>21</sup> which justifies the EU legislative intervention that aims at the functioning of the (EU) internal market.

The matter has not reached the CJEU yet, but it would not be surprising if the uniform interpretation of the parties to a B2C relationship extends to cover the CSD and the DCD, as their enactment was also based on the said treaty provision (arts 95 TEC or 114 TFEU). Moreover, the CJEU has already confirmed the objectivity of the notion of the consumer against the backdrop of knowledge and expertise. In *Costea*,<sup>22</sup> *Schrems*<sup>23</sup> and *Petruchová*,<sup>24</sup> the CJEU dismissed the claim that a knowledgeable person should not be considered a consumer. The claimant in *Costea* was a commercial lawyer who challenged the validity of a credit agreement into which he had entered for personal use. The CJEU determined that even an experienced person is a consumer when they act for non-professional purposes.

The purpose of the contract marks the side on which the person falls: business or consumer. Therefore, the notions of business and consumer are functional,<sup>25</sup> as they depend on the precise contract. A person can act as a consumer for certain transactions while being considered a business for others. But if the purpose is not professional, the person will be treated as a consumer even if they are an expert in the field.

## 2.2 Consequences of a Status-Based Law

The objective definition on which EU law has decided with regard to the parties in a B2C relationship (business and consumer) has manifold consequences. It creates a status-based or position-based law which determines a framework of protection that disregards the specific characteristics of the actual parties.<sup>26</sup> If the aim of the transaction does not imply professional or business purposes for one party, they would be considered a consumer and protected

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<sup>19</sup> Case C-570/21 *I.S. and K.S. v YYY S.A.* ECLI:EU:C:2023:456, paras 42-43.

<sup>20</sup> OJ C202/1.

<sup>21</sup> OJ C325/33.

<sup>22</sup> Case C-110/14 *Horațiu Ovidiu Costea v SC Volksbank România SA* ECLI:EU:C:2015:538, para 21.

<sup>23</sup> Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited* ECLI:EU:C:2018:37, para 39. It was solved under Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1 (Brussels I Regulation).

<sup>24</sup> Case C-2018/18 *Jana Petruchová v FIBO Group Holdings Limited* ECLI:EU:C:2019:825, para 55. It was solved under Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1 (Brussels I Regulation recast).

<sup>25</sup> N. Reich, HW Micklitz, P. Rott and K. Tonner, *European Consumer Law* (Intersentia 2014); Terry (n 5) 280≠1.

<sup>26</sup> M. Hesselink, 'Contract Theory and EU Contract Law' (2015) Amsterdam Legal Studies Research Paper No. 2015-39, 1, 9, papers.ssrn.com/sol3/papers.cfm?abstract\_id=2674508, 11; F. Cafaggi, 'From a Status to a Transaction Based Approach? Institutional Design in European Contract Law' (2013) 1 CMLR 311, 312.

accordingly. EU consumer law protects all members of the ‘class’ alike – an option ensuring maximum welfarism, that is, one that is not targeted.<sup>27</sup>

The status-based approach differs from the party-based assumption in classical (national) private law. The difference is much more profound than the character of the rules made mandatory in EU law and mostly non-mandatory in national private law (with limitations). The divergence stems from mismatching principles, whereby national law enhances freedom of contract and EU law aims at regulating the market, is the so-called European regulatory private law in Micklitz’s expression,<sup>28</sup> a task that is not necessarily, or at least not only, guided by freedom of contract.<sup>29</sup>

### 2.2.1 Standardisation of agreement<sup>30</sup>

The status-based approach to B2C relationships not only determines the applicable legal framework but also affects consent, a key concept in private law that was historically connected to the actual parties. On this, EU and national laws differ. In national law, consent, in its bilateral form of agreement, pivots around the actual parties. This remains true across jurisdictions, which differ in how an agreement is formed and interpreted. In a nutshell, certain jurisdictions adopt an objective approach to agreement (notoriously common law countries), whereby reliance on an offer determines the formation of a contract,<sup>31</sup> which is interpreted according to the criterion of a reasonable person.<sup>32</sup> Other jurisdictions opt for a subjective approach to both the formation of contracts and their interpretation (in particular, civil law countries). What matters to them is the actual meeting of the parties’ minds (*consensus ad idem*), although there is a recognition of objective criteria, in view of legal certainty.<sup>33</sup>

Despite such nuances, the parties remain central to the agreement. This characteristic is also present in the assessment of the validity of contracts that, under national law, can be directly affected by defects of consent. An action for rescission fails if the consent of one (or both) parties, depending on the legal system, was not vitiated. For example, when a party did not actually rely on the incorrect information that the other one gave.<sup>34</sup> In addition, the characteristics of the party that suffered from the defect of consent are part of the equation and can determine the failure of an action for rescission of the contract. On this point, English law, for instance, considers the known characteristics of the actual representee in an action for misrepresentation (eventually leading to dismissing the action),<sup>35</sup> while French law requires

<sup>27</sup> C. Willet, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate 2007) 377–8.

<sup>28</sup> H.W. Micklitz, Y. Svetiev and G. Comparato, ‘European Regulatory Private Law – The Paradigms Tested’ (2014) EUI Law Working Papers 2014/04, [cadmus.eui.eu/handle/1814/31137](https://cadmus.eui.eu/handle/1814/31137).

<sup>29</sup> Micklitz (n 17) 22.

<sup>30</sup> See F. de Elizalde, ‘Standardisation of Agreement in EU Law: An Adieu to the Contracting Parties?’ in M. Durovic and T. Tridimas (eds), *New Directions in European Private Law* (Hart 2021) 29–59.

<sup>31</sup> M. Chen-Wishart, ‘Formation of Contract’ in H. Beale (ed), *Chitty on Contracts* (Sweet & Maxwell 2015) 193–4.

<sup>32</sup> G. Treitel and E. Peel, *The Law of Contract* (Sweet & Maxwell 2011) 241.

<sup>33</sup> See art 1188 French Civil Code and § 157 BGB.

<sup>34</sup> Treitel and Peel (n 32) 361.

<sup>35</sup> *ibid.*

that a mistake is inexcusable to the one who suffered as a result of it,<sup>36</sup> thus taking into consideration their own diligence.

However, under EU consumer law, the actual parties are irrelevant as regards consent, following the status-based approach and the objective definitions of business and consumer. The focus is put on the aims of the contract (whether for professional purposes or not) and on the understanding of the average consumer, not the *actual* one. Therefore, agreement and consent transform into transparency. Under the UCPD, commercial actions or omissions are misleading if they are likely to deceive the *average consumer* and cause them (average consumer) to take a transactional decision that they would not have taken otherwise (arts 6(1) and 7(1) UCPD). In the same vein, an aggressive commercial practice requires a significant impairment of the average consumer's freedom of choice and to lead them to take a transactional decision that they would not have taken otherwise (art 8 UCPD). In a definition that runs across EU legislation, recital 18 UCPD explains that the average consumer is someone 'who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors'.

Unlike national law, the UCPD does not pivot on the actual parties but rather on the average consumer, which is a legal standard.<sup>37</sup> Consistently with the objective definition of consumer, which is determined by the purpose of the contract, the concept of agreement in EU law disregards the individual consumer to grant a status-based protection that is marked by the average member of the class. A similar conclusion can be deduced from the UCTD. This directive controls unfair terms in standard form contracts (literally, terms not individually negotiated).<sup>38</sup> To this end, it contains a grey list of unfair terms. A general clause enables the assessment of the unfairness of a term when, contrary to the requirement of good faith, it causes a significant imbalance in the rights and obligations of the parties under the contract, to the detriment of the consumer (art 3(1) UCTD). An unfair term is not binding on the consumer if the contract can continue in existence. If not, the contract itself would be non-binding (art 6(1) UCTD).

The directive controls the substantive fairness of terms but, in principle, it seems that procedural fairness, including agreement and the consequences for a lack of transparency, was not harmonised and thus remained a matter of national law.<sup>39</sup> However, the CJEU advanced the interpretation of the UCTD by providing a clear definition of the requirement that the terms should be drafted in 'plain intelligible language', enshrined in arts 4(2) and 5 UCTD. In the *Kásler* case, the CJEU decided that a term would comply with that requirement if an average consumer were able to understand its legal and economic implications – the transparency test.<sup>40</sup> *Kásler* addressed the main terms of a contract (art 4(2) UCTD). In *Matei*, the CJEU clarified that transparency carried the same meaning throughout the UCTD, reaching ancillary terms.<sup>41</sup> Therefore, not understanding a term would result in unfairness and, eventually, in the term

<sup>36</sup> Art 1132 French Civil Code. See also arts 4:103 PECL and II.7:201 DCFR.

<sup>37</sup> Recital 18 UCPD.

<sup>38</sup> Art 3(1) UCTD.

<sup>39</sup> Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, COM(2000) 248 final 18.

<sup>40</sup> Case C-26/13 *Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt* ECLI:EU:C:2014:282, paras 71-75.

<sup>41</sup> Case C-143/13 *Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA* ECLI:EU:C:2015:127, para 73.

(and even the contract) not binding the consumer.<sup>42</sup> This harsh consequence is reached when an *average consumer* does not fully understand its implications – which could not necessarily be the case for an *actual* consumer.

Overall, EU law assumes a maximum welfarist approach that determines protection based on status, in relation to the purpose of a B2C relationship. Unlike national private laws, individual characteristics of an actual consumer are irrelevant to that protection. This was shown in the two main horizontal legal instruments of EU consumer law (the UCPD and the UCTD)<sup>43</sup> and especially in relation to agreement, which is a salient element on which EU law diverges from national laws.

### 2.2.2 The impact of status on the enforcement of EU consumer law

The regulatory character of EU private law implies that its enforcement is dual: public and private. EU law determines the rights while Member States enjoy procedural autonomy to decide the remedies granted to consumers, with the limitations arising from the principles of equivalence, effectiveness, proportionality and dissuasiveness.<sup>44</sup>

Notwithstanding, the boundaries of procedural autonomy are not clearly defined as they experience pressure from EU legislation and the CJEU. In fact, sector directives, such as the DCD and the CSD, enact EU remedies for consumers, including repair, substitution and termination.<sup>45</sup> In horizontal legislation, the UCPD was amended to recognize private remedies, including compensation, price reduction and termination.<sup>46</sup> The UCTD was reformed to provide a harmonised framework for public sanctions.<sup>47</sup> In turn, interpretation by the CJEU

<sup>42</sup> The link between a lack of transparency and the unfairness assessment was defined later, starting in Case C-421/14 *Banco Primus SA v Jesús Gutiérrez García* ECLI:EU:C:2017:60, para 64.

<sup>43</sup> In other pieces of EU secondary legislation, the status-based approach is certain in respect of the level of protection. It is less evident when it comes to agreement as the CJEU has not given clear guidance yet, except probably for Directive 2002/65/EC [2002] OJ L271/16, as decided in Case C-143/18 *Antonio Romano and Lidia Romano v DSL Bank – a branch of DB Privat- und Firmenkundenbank AG, formerly DSL Bank – ein Geschäftsbereich der Deutsche Postbank* ECLI:EU:C:2019:701, paras 54–55.

<sup>44</sup> N. Reich, ‘The Principle of Effectiveness and EU Private Law’ in U. Bernitz, X. Groussot and F. Schulyok (eds), *General Principles of EU Law and European Private Law* (Wolters Kluwer 2013) 301; F. Cafaggi and P. Iamiceli, ‘The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions’ (2017) 3 ERPL 575.

<sup>45</sup> Arts 14(1) DCD and 13(1) CSD.

<sup>46</sup> Art 11a UCPD, as amended by the Omnibus Directive: Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L328/7. On these remedies, see F. de Elizalde, ‘La Directiva 2019/2161, de Modernización del Derecho de Consumo, por la que se conceden remedios individuales contra las prácticas comerciales desleales. ¿Un paso más hacia la estandarización del derecho privado de la Unión Europea?’ (2021) 4 *Revista de Derecho Civil* 47.

<sup>47</sup> Art 8 UCTD, as reformed by the Omnibus Directive.

has shaped those remedies, notoriously under the CSD<sup>48</sup> and the UCTD.<sup>49</sup> The interventions of EU legislation and the CJEU on remedies limit the procedural autonomy of Member States.

The status-based approach of EU law to B2C relationships, including the objective definitions of business and consumer and the average consumer as a legal standard, is relevant to the public and private enforcement of consumer rights. This is noticeable in horizontal legislation, yet not restricted to it.

Under the UCTD, the declaration of unfairness is subject solely to the substantive assessment of a term; it disregards the actual contracting parties. The consumer can challenge the validity of a term even if they are a knowledgeable and experienced person.<sup>50</sup> When the unfairness arises from a lack of transparency of a term, the standard to determine it is the average consumer, again, not the actual one. Therefore, the individual consumer is irrelevant to the unfairness assessment under the UCTD.

In the UCPD, the average consumer should be the one affected by misleading actions, misleading omissions or aggressive commercial practices, in a way that is likely to or actually leads the average consumer to take a transactional decision that he would not have otherwise taken. The actual consumer is not considered, and it is uncertain how this should affect the private remedies that the UCPD now recognizes.<sup>51</sup>

The standardization that stems from the status-based approach of EU law enhances the enforcement of consumer rights. It allows injunctive relief with orders to cease and desist in the use of unfair terms and unfair commercial practices.<sup>52</sup> As the assessment of unfairness, in both cases, does not depend on the individual consumer, it is possible to grant such orders against the users of unfair terms and against those that incur unfair practices.<sup>53</sup> In the same vein, a declaration of unfairness, even if decided in an individual case, affects all contracts that contain the tainted term and all applications of the unfair commercial practice (with procedural differences as to pendency and *res judicata*).

This is true for instances of misinformation and undue influence during the formation of contracts. As previously observed,<sup>54</sup> in national private law, the characteristics of the aggrieved party determine the success of an action for rescission following a defect of consent, which would normally encompass those situations. Misinformation could lead to a misrepresentation in English law or to an action in mistake or fraud in French and German law, for example. In that scenario, the personal characteristics of the parties determine the fate of the

<sup>48</sup> de Elizalde (n 13).

<sup>49</sup> C. Leskinen and F. de Elizalde, 'The Control of Terms that Define the Essential Obligations of the Parties under the Unfair Contract Terms Directive: Gutiérrez Naranjo' [2018] *Common Market L. Rev.* 1595, 1610; H.W. Micklitz and N. Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' [2014] *CMLR* 771, 794#6.

<sup>50</sup> Case C-110/14 *Costea* (n 22).

<sup>51</sup> de Elizalde (n 46), 73–9. M. Loos, 'The Modernization of European Consumer Law (Continued): More Meat on the Bone After All' (2020) 2 *ERPL* 407, 410–11.

<sup>52</sup> Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] *OJ* L409/1.

<sup>53</sup> Joined Cases C-381/14 and 385/14 *Jorge Sales Sinués and Youssouf Drame Ba v Caixabank SA and Catalunya Caixa SA (Catalunya Banc S.A.)* ECLI:EU:C:2016:252, para 43.

<sup>54</sup> See above Section 2.2.1.

action. Therefore, actions for rescission due to defects of consent are, in principle, unsuitable for collective redress. They depend heavily on individual circumstances, which impedes the concurrence of common facts that would allow a representative action.

Under EU law the consumer is objectively defined, and the same protection is granted to all of those affected, for example, by the misinformation, disregarding individual knowledge and expertise. The incorrect information could be an unfair commercial practice that will be assessed according to the criterion of the average consumer (art 6(1) UCPD). It could also affect the comprehensibility of a term, whereas the average consumer would be unable to foresee its legal and economic consequences, resulting in unfairness (arts 4(2) and 5 UCTD).<sup>55</sup> In any event, as the infringement depends on the legal standard of the average consumer and not the actual one, it is suitable for a representative action. On occasion this could result in overprotection of a knowledgeable party, hence maximum welfarism, which could be justified in view of the constitutional demand for a high level of protection of consumer rights.<sup>56</sup>

Therefore, the standardization that results from the status-based EU private law enhances individual and collective redress. The objective definition of consumer and the use of the average consumer as a legal standard lead to higher protection than that granted under national law in many comparable circumstances, especially when knowledge, expertise, and information are involved. Instead, in other situations, such as that arising from a defective product, the differences are less significant.

### 3. CONSUMERS IN THE DIGITAL AGE

#### 3.1 Vulnerability in EU Law

As seen in the previous section, the objective definition of the consumer, coupled with the average consumer standard, is the rule in EU law. However, on occasion, there is an explicit recognition of the vulnerable consumer, as an exception to protect people that meet pre-defined criteria. In the field of consumer law, recognition of vulnerable consumers is scarce. The UCPD is the most salient assumption of that concept,<sup>57</sup> under its art 5(3):

Commercial practices which are likely to materially distort the economic behaviour only 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, shall be assessed from the perspective of the average member of that group.

Art 5(3) UCPD tackles physical and mental vulnerability but not economic vulnerability.<sup>58</sup> Moreover, for vulnerability to be considered, a commercial practice must be able to distort the

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<sup>55</sup> Case C-26/13 *Kásler*, paras 74–75.

<sup>56</sup> Art 169 TFEU.

<sup>57</sup> Beyond the UCPD, recital 34 CRD deals with vulnerability in the context of the provision of information, with a similar definition to that of art 5(3) UCPD.

<sup>58</sup> On the types of vulnerability, see N Reich, ‘Vulnerable Consumers in EU Law’ in D. Leczykiewicz and S. Weatherill, *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart 2016) 141.

behavior of a ‘clearly identifiable group’. Hence, individual vulnerability will be disregarded unless shared by a group. Therefore, the concept of vulnerability that the UCPD adopts as an exception to the average consumer standard also follows a status-based logic. This is so because the vulnerable consumer must meet the characteristics of a group and the unfairness of a commercial practice shall consider the average member of that group.

The UCPD has two sub-statuses: the average and the vulnerable consumer. Both are alien to the individual characteristics of the actual consumer. On this issue, the European Commission supported the drafting of current art 5(3) UCPD, precisely on the basis that individual circumstances were ignored. In the Commission’s view, assessing each individual’s circumstances ‘would be unworkable’.<sup>59</sup> The focus on internal vulnerabilities has been criticised as stigmatising.<sup>60</sup> In the most extreme reaction to group vulnerability, some note that it is inherent to the human condition to be vulnerable and, hence, vulnerability should be the rule and not the exception.<sup>61</sup> From another angle, the restriction to inherent vulnerabilities, as the UCPD does (mental and physical infirmity, and age), has been challenged for not considering external constraints, including personal and socio-economic. Additionally, the UCPD’s option for informational vulnerabilities would leave market pressure and exploitation unaddressed.<sup>62</sup>

A policy document from the European Commission issued in 2016 presented a new concept of the vulnerable consumer. It was more comprehensive, and went beyond the limits of a group definition to consider individual circumstances. According to this document, the vulnerable consumer is:

A consumer who, as a result of socio-demographic characteristics, behavioural characteristics, personal situation, or market environment is at higher risk of experiencing negative outcomes in the market; has limited ability to maximise their well-being; has difficulty in obtaining or assimilating information; is less able to buy, choose or access suitable products; or is more susceptible to certain marketing practices.<sup>63</sup>

However, this new concept of consumer vulnerability has not taken root in EU hard law, which continues to be based on the inherent vulnerabilities of a clearly defined group, with a focus on information misappreciation.

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<sup>59</sup> Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the common position of the Council on the adoption of a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending Regulation [Consumer Protection Co-operation] and directives 84/450/EEC, 97/7/EC, 98/27/EC and 2002/65/EC (the Unfair Commercial Practices Directive) COM(2004) 753 final.

<sup>60</sup> G. Malgieri and J. Niklas, ‘Vulnerable Data Subjects’ [2020] *Computer Law & Security Rev.* 1, 3.

<sup>61</sup> M. Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1131407](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1131407) 10–11.

<sup>62</sup> N. Helberger et al, ‘EU Consumer Protection 2.0. Structural Asymmetries in Digital Consumer Markets’ (2021) BEUC 12–13, and 16.

<sup>63</sup> London Economics, ‘Consumer vulnerability across key markets in the European Union’, [https://commission.europa.eu/system/files/2018-04/consumers-approved-report\\_en.pdf](https://commission.europa.eu/system/files/2018-04/consumers-approved-report_en.pdf).

### 3.2 Vulnerability in the Metaverse

With the metaverse/s under construction, it seems that, in any event, the immersive reality would augment the pervasive effects that have already been observed in Web 2.0. This is particularly worrisome considering the reach that the metaverse could have, especially, with younger generations. On this point, Generation Z tends to interact with peers more via video games (65 per cent) than at school (64 per cent) or work (51 per cent).<sup>64</sup> Video games include immersive reality environments such as Roblox and Fortnite. These figures of preferred interaction serve as an indicator of potential usage of other Web 3.0 environments such as the metaverse – and highlight the impact that it could have on the overall population.

Helberger et al. address vulnerability in digital consumer markets to conclude that art 5(3) UCPD is unfit for purpose.<sup>65</sup> To reach this conclusion, they explore all the dimensions of vulnerability, including inherent and situational (external) vulnerability, and dispositional (potential) and occurrent (actual) vulnerability. They also present the risks of architectural and relational vulnerability, which I would like to explore here in the context of the metaverse.

On architectural vulnerability, Helberger et al. argue that ‘digital marketplaces are characterized by structural power imbalances and choice architectures that are explicitly designed for exploiting individual differences and biases’.<sup>66</sup> Moreover, as the collection of data is continuous, the increasing use of a service leads to a more detailed knowledge of a person’s traits that, in turn, could perfect the exploitation strategy. In this sense, vulnerability is relational.<sup>67</sup> Against this backdrop, everyone is potentially vulnerable.

It is still uncertain whether the metaverse will evolve as Web 2.0 had done, under the dominance of big technological actors, or, instead, as a decentralised model, which would atomise data control. In any event, the metaverse would lead to an unprecedented amount of data that would be exchanged.<sup>68</sup> Moreover, virtual reality aims at a truly immersive experience that, potentially, could engage an individual’s five senses.<sup>69</sup> An experience like this would diffuse the boundaries between the virtual and the real world.<sup>70</sup> If data can be put to profitable use by corporations (as it seems will be the case) architectural vulnerability could reach hitherto unseen levels.

In such a scenario, the concept of the vulnerable consumer in art 5(3) UCPD does not fully grasp the nuances of the metaverse. A consumer can become vulnerable as a result of its design and uses, by the cognitive confusion between real and virtual, and by the pressure that comes from the immersive experience. A concept of vulnerability that sticks to predefined, inherent

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<sup>64</sup> E. Briggs, ‘Gen Z Is Extremely Online,’ Morning Consult (12 December 2022), <https://morningconsult.com/2022/12/12/gen-z-social-media-usage>.

<sup>65</sup> Helberger et al (n 62) 24.

<sup>66</sup> *ibid* 26.

<sup>67</sup> *ibid* 20.

<sup>68</sup> L. Anidjar, N. Geslevich Packin and A. Panezi, ‘The Matrix of Privacy: Data Infrastructure in the AI-Powered Metaverse’ (2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4363208](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4363208) 8.

<sup>69</sup> N.J. Patel, ‘Reality or Fiction? Sexual Harassment in VR, The Proteus Effect and the Phenomenology of Darth Vader – and Other Stories’ Medium (21 December 2021), <https://medium.com/kabuni/fiction-vs-non-fiction-98aa0098f3b0>.

<sup>70</sup> *ibid*.

conditions such as mental and physical infirmity and age (art 5(3) UCPD), is unsuitable to the overall digital world,<sup>71</sup> and even more so to the metaverse. Furthermore, the concept of the average consumer, as someone who is reasonably well-informed, reasonably observant and circumspect,<sup>72</sup> is overly inclined to information shortcomings and is also unfit to tackle the architectural settings of the metaverse.<sup>73</sup>

Based on these premises, the legal standard for protection could shift to that of a vulnerable consumer.<sup>74</sup> This would depart from the notion of vulnerability that is based on group characteristics (as art 5(3) UCPD does) to assume common features of vulnerability in the digital environment, such as architectural and relational. However, if EU consumer law is to remain status-based, the aspects of vulnerability that are more individualised should remain alien to the new concept, such as situational vulnerability as a result of personal circumstances, for example, the loss of a close relative. Facts leading to individual vulnerability could be considered as an added layer of protection to the new (vulnerability) standard.

### 3.3 Deconstructing Status-Based Law

In digital markets, it is especially difficult to disassociate consumer law from data protection legislation, even though EU law treats them as separate areas.<sup>75</sup> Consumer law is aimed at fostering the demand for goods and services in the internal market by safeguarding consumer rights (arts 114 and 169 TFEU). Data law deals with the protection of data as a fundamental right,<sup>76</sup> without neglecting the free flow of data as a market objective.<sup>77</sup> However, data protection and consumer law are intertwined in daily life. Data is treated for the provision of consumer goods and services. Data serves the purposes of profiling consumers, personalising prices<sup>78</sup> and tailoring advertising.<sup>79</sup> Data is used as a counter-performance of services, as in social media apps, and even EU legislation, notoriously the DCD, recognizes data as an alternative to price.<sup>80</sup>

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<sup>71</sup> Helberger et al (n 62) 24.

<sup>72</sup> Recital 18 UCPD.

<sup>73</sup> Helberger et al (n 62) 24.

<sup>74</sup> Helberger et al (n 62) 25.

<sup>75</sup> Grochowski (n 2) 2.

<sup>76</sup> Art 1(1) GDPR.

<sup>77</sup> Art 1(3) GDPR. The previous Data Protection Directive was based on art 100 A TEC, the predecessor of art 114 TFEU, hence, clearly grounded on the freedoms of the internal market. Full reference of the Data Protection Directive is Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

<sup>78</sup> Accepted in art 6(1)(e) CRD.

<sup>79</sup> See N. Helberger, F. Zuiderveen Borgesius and A. Reyna, 'The Perfect Match? A Closer Look at the Relationship between EU Consumer Law and Data Protection Law' (2017) CMLR 1427, 1430-31.

<sup>80</sup> Art 3(1) DCD.

It is claimed that the expansion of data treatment impacts our role as citizens. Profiling gives data collectors insight into the personality of users<sup>81</sup> that could both forecast and tailor political opinions,<sup>82</sup> determine access to public services<sup>83</sup> and increase the risks as we go online.

The metaverse will entail a significant challenge to the person and, consequently, to the citizen. Experiments carried out some years ago detected a direct link between avatars (our digital self-representations in immersive realities) and natural persons.<sup>84</sup> It demonstrated that avatars determine the behavior of users – a phenomenon that has been labelled the Proteus effect.<sup>85</sup> If avatars determine conduct, the powers of big players in the metaverse will exceed traditional private relationships. Some even explain big tech interest in virtual reality as a quest to gain ‘a dominant share of biopower to achieve biosupremacy, monopolistic power over human behavior’.<sup>86</sup> If this is so, the challenge to citizenship is immense.

Consumer practices and citizenship become interrelated in the digital market and could well merge in the metaverse. The thread between them is data. Therefore, the approach to data protection, as a fundamental right (Art 1(2) GDPR and Art 8 of the EU Charter of Fundamental Rights),<sup>87</sup> seems appropriate, as in the digital economy it is central to citizenship.

However, while enshrining the fundamental right to data protection, the EU could indirectly be undermining the status-based approach of consumer law and, hence, hindering consumer protection. Importantly, as the challenge to citizenship arises from private relationships and B2C practices, leaving consumer law tenets aside could lead to unsuccessful outcomes for citizens’ rights. Data protection law and, more broadly, the regulation of digital markets, hit the waterline of status-based consumer law when they introduce a new notion of the protected person. As previously discussed,<sup>88</sup> consumer law assumes an objective definition of the consumer (a natural person who acts for purposes beyond their trade, business or profession) and the standard of the average consumer. Both disregard individual characteristics, including knowledge and expertise.

Data protection law and digital markets regulation in the EU shift to alternative concepts such as the data subject,<sup>89</sup> recipient of the service<sup>90</sup> and user.<sup>91</sup> The data subject is ‘an identi-

<sup>81</sup> M. Kosinski, D. Stillwell and T. Graepel, ‘Private Traits and Attributes Are Predictable from Digital Records of Human Behavior’ (2013) 110 *Proceedings of the National Academy of Sciences* 15.

<sup>82</sup> See the Cambridge Analytica scandal: [www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html](http://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html).

<sup>83</sup> Helberger et al (n 62), 26–7.

<sup>84</sup> N. Yee and J. Bailenson, ‘The Proteus Effect: The Effect of Transformed Self-Representation on Behavior’ (2007) 33 *Human Communication Research* 271.

<sup>85</sup> *ibid.*

<sup>86</sup> See M. Marks, ‘Biosupremacy: Big Data, Antitrust, and Monopolistic Power over Human Behavior’ (2021) *U. California at Davis L. Rev.* 513.

<sup>87</sup> OJ C326/391.

<sup>88</sup> See above, Section 2.1.

<sup>89</sup> Art 4(1) GDPR.

<sup>90</sup> Recital 2 and art 14 DSA.

<sup>91</sup> Art 2(a) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L201/37.

fied or identifiable natural person'.<sup>92</sup> The recipient of the service is any natural or legal person that uses an intermediary service in the information society.<sup>93</sup> The user is defined as 'any natural person using a publicly available electronic communications service'.<sup>94</sup> In all cases, the focus is put on the individual person and not on a class. It now appears clearer that these relatively new concepts relating to the protected subject in digital environments aim to replace that of consumer. On this matter, the Digital Services Act (DSA)<sup>95</sup> disregards the peculiarities of the notion of consumer as it unambiguously states that '[b]usiness users, consumers and other users are [equally] considered to be "recipients of the service" for the purpose of this Regulation'.<sup>96</sup>

Against this claim, it is correct to acknowledge that market and data protection regulations exceed the scope of consumer law and, because of this, embrace more far-reaching concepts of the protected subject. In the same vein, there are plenty of references to and even provisions targeting consumers in digital markets regulation, especially in the DSA.<sup>97</sup> There is even one reference to the UCTD in the GDPR.<sup>98</sup> However, the objective definition of consumer, on which consumer law pivots, is discarded in favour of alternative notions that target the natural person. This could make sense from the logic of fundamental rights (the basis for data protection) and the perspective of self-determination.<sup>99</sup> Notwithstanding, this is done at the expense of key tenets of consumer law. Changing the notion of protected subject impacts the concept of the consumer and has a domino effect on consent and transparency. As discussed previously, consumer law disregards individual circumstances, including expertise.<sup>100</sup> Even a knowledgeable person is protected. For example, unlike national private law, an expert can challenge the validity of a term and even a contract when acting for purposes beyond their business or profession.<sup>101</sup> With respect to transparency and understanding, consumer law relies on the standard of the average consumer.<sup>102</sup>

Instead, data protection law emphasises the consent of the data subject,<sup>103</sup> the natural person, as the first of the listed means to legitimise data processing.<sup>104</sup> The definition of consent focuses on the individual data subject, disregarding class protection. According to art 4(11) GDPR, consent means 'any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her'. Alongside this

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<sup>92</sup> Art 4(1) GDPR.

<sup>93</sup> Arts 3(b) and 3(g) DSA.

<sup>94</sup> Art 2(a) Directive on privacy and electronic communications (n 91).

<sup>95</sup> See n 4.

<sup>96</sup> Recital 2 DSA. Between brackets added.

<sup>97</sup> See arts 6, 21 and 31–4 DSA.

<sup>98</sup> Recital 42 GDPR.

<sup>99</sup> See AF Westin, *Privacy and Freedom* (IG Publishing, 2015).

<sup>100</sup> See above, Section 2.1.

<sup>101</sup> Case C-110/14 Costea; Case C-498/16 Maximilian Schrems; C-2018/18 Petruchová.

<sup>102</sup> For the UCTD, Case C-26/13 Kásler, paras 74–75. For the UCPD, arts 6 and 7 UCPD.

<sup>103</sup> On consent and digital resignation see A. Kotsios, *Paying with Data: A Study on EU Consumer Law and the Protection of Personal Data* (Uppsala Universitet, 2002), 78; C. Riefa, 'Protecting Vulnerable in the Digital Market', <https://centaur.reading.ac.uk/109664> 20.

<sup>104</sup> Art 6(1)(a) GDPR.

definition of consent, the GDPR enshrines transparency requirements.<sup>105</sup> Although recital 42 GDPR makes a controversial reference to the UCTD,<sup>106</sup> transparency also departs from its meaning in consumer law.<sup>107</sup> The reference to determine a lack of transparency would not be the average consumer but, eventually, the ‘average member of the intended audience’. The Article 29 Data Protection Working Party gives the example of working professionals whose level of understanding would be higher than that of children.<sup>108</sup> This difference is something that consumer law would also take.<sup>109</sup> However, would those working professionals be all treated alike if acting for non-professional purposes (as consumer law would do)? Or, instead, would transparency be determined by their individual characteristics, which could lead to infinite sub-clusters of audiences?

The logic of the data subject and consent point to the latter answer. On this, the CJEU in *Orange Romania*<sup>110</sup> referred transparency to the data subject (the natural person). More precisely, the CJEU interpreted informed consent under the GDPR to conclude that it required the data controller to provide information ‘in an intelligible and easily accessible form, using clear and plain language, allowing the data subject to be aware’ of relevant facts concerning the treatment of data.<sup>111</sup> Furthermore, ‘[s]uch information must enable the data subject to be able to determine easily the consequences of any consent he or she might give and ensure that the consent given is well informed’.<sup>112</sup> Compare this with transparency under the UCTD, which uses the standard of the average consumer as a benchmark.<sup>113</sup>

Therefore, it seems that EU law is eroding consumer protection in digital markets by inroad-ing into the concept of the consumer and the standard of the average consumer.<sup>114</sup> When the metaverse will be fully functioning, consumer law could look markedly different to its current guise. In fact, the data protection and digital market regulation framework would hinder consumer law, especially if the relationship between them is one not of coexistence<sup>115</sup> but of the pre-eminence of the former. The DCD is a good example of this, as it gives prevalence

<sup>105</sup> Arts 5(1)(a) GDPR.

<sup>106</sup> Kotsios (n 103) 352–3.

<sup>107</sup> D. Clifford, I. Graef and P. Valcke, ‘Pre-Formulated Declarations of Data Subject Consent – Citizen-Consumer Empowerment and the Alignment of Data, Consumer and Competition Law Protections’ CiTiP Working Paper 33/2017, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3126706](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126706) 13–15.

<sup>108</sup> Art 29 Working Party, ‘Guidelines on transparency under Regulation 2016/679’ WP260 rev.01, 7, para 9.

<sup>109</sup> See, art 5(3) UCPD.

<sup>110</sup> Case C-61/19 *Orange Romania SA v Autoritatea Națională de Supraveghere a Prelucrării Datelor cu Caracter Personal (ANSPDCP)* ECLI:EU:C:2020:901.

<sup>111</sup> Case C-61/19 *Orange Romania*, para 40. Italics are my own.

<sup>112</sup> *ibid.*

<sup>113</sup> See above, Section 2.2.1. In 2023 the CJEU provided for the unbundling of consent but did not engage in the concept of it. See Case C-252/21 *Meta Platforms Inc., formerly Facebook Inc., Meta Platforms Ireland Ltd, formerly Facebook Ireland Ltd, Facebook Deutschland GmbH v Bundeskartellamt, interveners: Verbraucherzentrale Bundesverband eV* ECLI:EU:C:2023:537.

<sup>114</sup> The ‘business’ side of the relationship is also being affected as in arts 14(5) and (6) DSA, which aggravate responsibilities for those providers of intermediary services that are very large online platforms and very large online search engines, as defined in art 33(1) DSA.

<sup>115</sup> This is the aim of Helberger, Zuiderveen Borgesius and Reyna (n 79), and Kotsios (n 103).

to data protection regulation.<sup>116</sup> In the event of a conflict on, for example, data provided as counter-performance for a digital service, the rules of the GDPR on consent will apply and not those of consumer law (recital 38 DCD). Beyond this context, it seems that, for now, the CJEU has resisted the temptation of terminating the coexistence of the different legal regimes.<sup>117</sup>

#### 4. ENSURING FAIRNESS IN THE METAVERSE'S MARKETS

The two main legal instruments in consumer law – the UCPD and the UCTD – aim at fairness in the market, the former by combating unfair commercial practices and the latter by controlling unfair terms. Fairness is also one of the requirements for data processing under the GDPR.<sup>118</sup> However, in principle, EU law operates with ‘silos’ that do not impose systemic coordination between statutes. An unfair commercial practice does not necessarily constitute an unfair term. They would require separate assessments, even though the declaration of a practice as unfair should be considered in the control of a standard term.<sup>119</sup> For example, giving wrong information about the price would entail a misleading action (art 6 UCPD) that should be taken into account to assess the fairness of the price (following non-transparency), as a main term of the contract (art 4(2) UCTD). Similarly, a data breach occurring in a consumer transaction does not directly result in a violation of consumer law.<sup>120</sup> However, some propose that it should be considered when assessing fairness in consumer protection, as the CJEU has established for the UCTD and the UCPD.<sup>121</sup> The CJEU has dealt with this, approving it, in a case against Meta.<sup>122</sup>

Against this background, this section focuses on the UCTD and the UCPD as the main horizontal instruments in consumer law to ensure fairness in the market, including the digital market. The UCPD covers commercial practices, broadly understood,<sup>123</sup> in contracts and outside of them. The UCTD deals with contractual terms that are not individually negotiated.<sup>124</sup> Combined, they represent an important safety net for consumers in the metaverse.

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<sup>116</sup> Art 3(8) DCD.

<sup>117</sup> Case C-319/20 *Meta Platforms Ireland Limited, formerly Facebook Ireland Limited v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.* ECLI:EU:C:2022:322, paras 65–66.

<sup>118</sup> Art 5(1)(a) GDPR.

<sup>119</sup> Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s.r.o.* ECLI:EU:C:2012:144, para 43-44; Case C-109/17 *Bankia SA v Juan Carlos Mari Merino and Others* ECLI:EU:C:2018:735, para 49. See B. Keirsbilck, ‘Interaction between Consumer Protection Rules on Unfair Contract Terms and Unfair Commercial Practices: Perenicova and Perenic’ [2013] CMLR 247.

<sup>120</sup> P. Hacker, ‘Regulating the Economic Impact of Data as Counter-Performance: From the Illegality Doctrine to the Unfair Contract Terms Directive’, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3391772](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3391772) 18.

<sup>121</sup> Helberger et al (n 62) 61.

<sup>122</sup> See above (n 117).

<sup>123</sup> Art 2(d) UCTD. See also Case C-281/12 *Trento Sviluppo srl and Centrale Adriatica Soc. coop. arl v Autorità Garante della Concorrenza e del Mercato* ECLI:EU:C:2013:859 para 32.

<sup>124</sup> Art 3(2) UCTD.

In respect of the control of unfair terms, EU law does not regulate the incorporation of standard terms into a contract, this aspect being left to the Member States. As far as incorporation is concerned, it requires that a consumer can access and has the possibility to read the standard terms before agreeing to them.<sup>125</sup> To comply with this obligation, it is an extended practice that traders include agreement boxes in online transactions. They grant the possibility of reading the terms of the contract, thus ensuring accessibility and readability. However, in brick-and-mortar transactions, those two requirements for incorporation of terms are complied with by simply exhibiting the contract in a visible place. In this last context, contracts seem even less frequently read than in online transactions. Nevertheless, terms are deemed validly incorporated into the contract.

The technologies employed in the metaverse could entail an opportunity to improve the incorporation of terms that are not individually negotiated and, in parallel, enhance transparency. The actual readership of entire contracts is unrealistic and inefficient. Moreover, the UCTD controls the substantive fairness of terms, even if agreed upon by the parties. Hence, accepting unfair terms does not hinder consumer rights, except for main terms if drafted in plain, intelligible language (art 4(2) UCTD). Therefore, the law should focus on real accessibility and comprehensibility of terms, especially the main ones. The metaverse seems an optimal environment in which to achieve this by profiting from the potential of immersive reality and the advances in AI. The consumer could be given meaningful, concise information that is relevant to their contract, in an interactive and sensorially attractive manner. The GDPR anticipated standardized icons to provide information (art 12(7) GDPR) and the new digital market framework demands very large online platforms and sizeable online search engines<sup>126</sup> to prepare machine-readable summaries of contract terms. It seems the right trend and the metaverse could be the perfect place to test it.

Alongside potential benefits for fairness in consumer markets coming from the implementation of the metaverse come increased challenges. The first one affects the consumer protection framework. If the metaverse evolves into a truly decentralised model in which, increasingly, consumers act as prosumers (hybrid of consumers and producers),<sup>127</sup> even more than they do in Web 2.0, then the boundaries of whom is a business and whom a consumer become blurred.<sup>128</sup> It will be increasingly complex to operate with a binary classification of parties in a legal relationship (the business and the consumer) that is objectively defined by the purpose of the transaction.

Even if the consumer protection framework applies, the effects on personality and citizenship that immersive reality enhances, exacerbate two particular problems that have already emerged in Web 2.0. One of these concerns the fundamental rights of the user of the metaverse. For now, freedom of expression has been at the centre of the debate. It has been addressed in the DSA, under the control of terms that restrict it,<sup>129</sup> in yet another unclear interaction with the UCTD. However, in the metaverse the intensity of personality and citizenship vulnerability will be greater, thus potentially affecting other fundamental rights.

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<sup>125</sup> H. Beale et al., *Cases, Materials and Text on Contract Law* (Hart 2019) 813–19.

<sup>126</sup> As defined in art 33(1) DSA.

<sup>127</sup> Anidjar, Geslevich and Panezi (n 68) 5.

<sup>128</sup> See Case C-498/16 *Schrems*.

<sup>129</sup> Art 14(4) DSA. See J.P. Quintais, N. Appelmann and R. Fathaigh, 'Using Terms and Conditions to apply Fundamental Rights to Content Moderation' (2023) *German Law Journal* 1.

In the same vein, the impact that digital self-representations (avatars) have on individuals<sup>130</sup> would pose new challenges arising from digital interoperability and digital inheritance. Loos and Luzak have surveyed standard terms of current players in Web 2.0, which normally deny survivors rights.<sup>131</sup> They propose to include those clauses in the grey list of unfair terms in the UCTD,<sup>132</sup> which seems a sensible response to this problem.

Beyond standard terms, the UCPD is called on to assume a central role in establishing market fairness in the metaverse. It tackles unfair commercial practices that not only profit from informational asymmetries but also those that by design could exploit vulnerabilities. These are not cured with information. The UCPD follows a hierarchical order of control. In the first instance, it blacklists certain practices. If not listed, they are assessed against the benchmark of misleading actions (art 6 UCPD), misleading omissions (art 7 UCPD) and aggressive commercial practices (arts 8 and 9 UCPD). An ultimate, subsidiary control comes from a general clause on professional diligence (art 5 UCPD).

The European Consumer Organisation (BEUC) has advocated the inclusion of new practices on the UCPD blacklist, for example, ‘the use of psychographic profiles or similar approaches to exercise emotional or psychological pressure’.<sup>133</sup> Beyond the blacklist, the regulation of aggressive commercial practices (arts 8 and 9 UCPD) would be an important measure in order to protect freedom of consumer choice in an environment such as the metaverse, where it could be seriously affected following the potential cognitive exploitation of consumers.<sup>134</sup>

Finally, special laws on consumer protection, most notably the DCD but also the CSD, will continue to be important so as to ensure fairness in specific transactions in the metaverse. The DCD enshrines the obligation of traders to deliver digital content and digital services in conformity with the contract.<sup>135</sup> The same obligation, for movable goods, is required under the CSD.<sup>136</sup> A lack of conformity grants consumers the remedies of repair and replacement of the flawed asset and, if those remedies were impossible, disproportionate or have not been achieved, the consumer can seek termination of the contract.<sup>137</sup> The remedy of compensation is not harmonised at an EU level, though.

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<sup>130</sup> See above (n 84).

<sup>131</sup> M. Loos and J. Luzak for the European Parliament, ‘Update the Unfair Contract Terms Directive for digital services’ (2021), [www.europarl.europa.eu/RegData/etudes/STUD/2021/676006/IPOL\\_STU\(2021\)676006\\_EN](http://www.europarl.europa.eu/RegData/etudes/STUD/2021/676006/IPOL_STU(2021)676006_EN). 27.

<sup>132</sup> *ibid.*

<sup>133</sup> Helberger et al (n 62) 12.

<sup>134</sup> On the complexities of applying aggressive commercial practices, see Helberger et al (n 62) 64–71.

<sup>135</sup> Art 6 Dir 2019/770.

<sup>136</sup> Art 5 Dir 2019/771.

<sup>137</sup> Art 14(1) Dir 2019/770 and art 13(1) Dir 2019/771.

## 5. METAVERSE COULD ENHANCE THE ENFORCEMENT OF CONSUMER RIGHTS

Quite reasonably, consumer law has approached technology as a risk.<sup>138</sup> However, it can also entail an opportunity to enhance consumer protection.<sup>139</sup> On this point, the blockchain technology that underpins the metaverse could be a good infrastructure to improve the enforcement of consumer rights, at least, in some sectors.

Blockchain functions with a conditional (if/then) or binary (0/1) logic that determines the data that should be inputted to ensure that the process remains completely within the chain. If the process requires input from someone outside of the chain (so-called oracles), then it is carried out, at least partially, offline.<sup>140</sup> Resorting to oracles affects the technical efficiency of blockchain and its pretensions of ‘self-enforcement’.

In principle, as the application of law requires interpretation, it is difficult to encapsulate it in blockchain. Only if the law followed a conditional logic would it be possible to delegate its enforcement to the chain. There are some sectors that are better suited for this, especially if regulated with fixed, non-interpretible, requirements.

In consumer law, the best example that one could think of is that of passengers’ rights, under the EU Flight Compensation Regulation (FCR).<sup>141</sup> The FCR grants remedies to passengers including compensation, reimbursement of tickets, rerouting and assistance (hotel nights, meals).<sup>142</sup> The blockchain technology that underlies the metaverse would be especially appropriate to enhance compensation under the FCR as, to a large extent, it relies on conditional logic.

In fact, breach of contract under the FCR is binary, dependent on whether a given flight was cancelled or delayed, or whether the passenger was denied boarding.<sup>143</sup> Compensation in the FCR is established in fixed amounts (250, 400 or 600 euros), depending on flight length and time (in the event of delay),<sup>144</sup> irrespective of individual circumstances. Moreover, airlines can be exempted from liability only if they can prove extraordinary circumstances, which the CJEU has interpreted narrowly.<sup>145</sup>

<sup>138</sup> See New Consumer Agenda, above (n 1).

<sup>139</sup> H.W. Micklitz, P. Palka and Y. Pannagis, ‘The Empire Strikes Back: Digital Control of Unfair Terms of Online Services’ (2017) *J. Consumer Policy* 367; F. de Elizalde, ‘The Potential of EU Consumer Law for Automated Enforcement’ [2022] *REDC* 155.

<sup>140</sup> E. Mik, ‘Smart Contracts: Terminology, Technical Limitations and Real World Complexity’ [2017] *Journal of Law, Innovation and Technology* 269, 297–8.

<sup>141</sup> Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2004] *OJ L46/1* (FCR).

<sup>142</sup> Arts 9–11 FCR.

<sup>143</sup> Arts 4–6 FCR.

<sup>144</sup> Art 7 FCR; Joined Cases C-401/07 and C-432/07 *Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v Condor Flugdienst GmbH, and Stefan Böck and Cornelia Lepuschitz v Air France SA* ECLI:EU:C:2009:716, para 61.

<sup>145</sup> Case C-315/15 *Marcela Pešková and Jiří Peška v Travel Service a.s.* ECLI:EU:C:2017:342, para 22; Case C-257/14 *C. van der Lans v Koninklijke Luchtvaart Maatschappij NV*

Therefore, as the process of determining the breach and the compensation due therefrom remains conditional (with the said exception of extraordinary circumstances), enforcement of the FCR could be delegated to blockchain. The law could be reformed to require smart contracts for airline tickets that would trigger compensation following a delayed or cancelled flight. It could also be offered by airlines as a market signal. Hence, consumers purchasing tickets in the metaverse would be better protected, avoiding the loss of rights following rational apathy to pursue small-value claims.

## 6. CONCLUSION

EU consumer law has distinguished itself as status-based law, whereby protection is granted on an objective and functional basis. A consumer is a person who acts for purposes beyond her trade, business or profession. An assessment is made for each transaction. The consumer is protected irrespective of actual knowledge and expertise. It is the average consumer, not the actual one, that matters. The standardization of the protected party enhances consumer rights by expanding them to reach those who are more knowledgeable – an option for maximum welfarism. Moreover, it allows for collective actions in many instances that, were it not for the objective definition of consumers, would fail – for example, when it comes to understanding the meaning of terms. Standardization of agreements in EU law ensures a commonality of facts that enhances collective redress.

Consumer law evolved in a period when mass consumption was in vogue. Access to markets was a goal. However, times are changing. In the digital environment, consumers are perceived as vulnerable subjects whose privacy and fundamental rights are at stake by architectural design. Online consumption is treated with certain mistrust, due to its perceived societal impact. Moreover, consumer law's archetype is still, to a large extent, the circumspect consumer, not the vulnerable one, which does not seem appropriate for the online environment, let alone the metaverse. As consumer law has failed to adapt this core aspect, there is a temptation to find the solution in data protection and market regulations.

This chapter makes the claim that setting consumer law aside is not a panacea. Both data protection and digital market regulations focus on the actual person and pivot on individual consent. Therefore, if these latter approaches prevail, the benefits of status-based consumer law could be lost, while also endangering the collective enforcement of consumer rights. The metaverse could augment those risks. Relying on individual consent, as the new trend in EU digital laws does, would be even more detrimental to the consumer. In the context of immersive realities, its architectural vulnerability could make consent meaningless. Under the guise of protection, the consumer would be left unprotected. Notwithstanding, this chapter presents certain instances in which the blockchain technology underlying the metaverse could be harnessed to improve consumer enforcement. In this way, the work embarks on a broader discussion of law and technology, as well as that of legaltech.

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ECLI:EU:C:2015:618, paras 41 and 42; Case C-501/17 *Germanwings GmbH v Wolfgang Pauels*  
ECLI:EU:C:2019:288, para 26.