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Reducing Inequality in Consumer Transactions: The Significance of Aggravated Vulnerabilities

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Introduction

Whether consumer law should address inequality has been approached from various perspectives in Latin America and Europe.[1] A central factor to consider in the effort to elucidate the place for inequality concerns in consumer transactions is the underlying concept of the consumer embraced in each jurisdiction. In Europe, EU consumer law has historically emphasized *consumer empowerment,* and the European Court of Justice has predominantly elaborated its jurisprudence around the interpretive benchmark of the *average consumer*, that is, one who is presumed "reasonably well informed, observant and circumspect." Conversely, consumer protection laws in Latin America start by emphasizing *consumer protection* and, by consequence, the courts have generally embraced the interpretive benchmark of the *vulnerable consumer*, that is, the party in the transaction who occupies, however relatively, a markedly vulnerable position in the regulatory structure of the marketplace.[2]

The European emphasis on *empowerment* and the *average consumer* benchmark is informed by an underlying assumption that consumers are sovereign: they are rational actors who adequately process information and make informed decisions on their own. Following this particular assumption of rationality, EU consumer law has mainly taken the form of disclosure obligations and the recognition of consumers' correlative rights in order to make the information necessary for autonomous choices available to them. Put in the simplest form, the professional supplier is taken as the *informant* and the consumer as the *informed sovereign*. This means that,

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[1] Note that most consumer protection laws in Latin America are influenced by a mix of approaches taken in other Latin American jurisdictions, European legal systems (mainly France and Spain) and, to a limited extent, United States jurisprudence (mainly involving class action lawsuits and punitive damages).

[2] Two clarifications are in order: First, by referring to "consumer protection laws in Latin America" I do not mean to undermine the diversity and distinctiveness of each national jurisdiction. Quite the contrary: my aim is to offer a reconstruction of the broader shared rationale on consumer law during the time when (in the 1980s and 90s) most countries in the region enacted national consumer protection laws. This shared understanding does not directly contradict the many singularities that distinguish national consumer protection laws. Moreover, my focus on one particular jurisdiction, that of Argentina, for concrete, localized and in-depth analysis reflects my respect for the distinctiveness of consumer protection laws' designs in Latin America. Second, bringing to light all the national differences in the design of consumer law regulation in Latin American jurisdictions or in Member States in Europe lies beyond the scope of this project. From time to time I resort to specific comparisons within Latin American jurisdictions or EU Member States in order to illuminate the line of argument of this paper, however such references are not intended as exhaustive or comprehensive. For an example (in the context of corporate law) of a comprehensive scholarly approach to address meaningfully these (and other) questions, see M. Pargendler, 'The Grip of Nationalism on Corporate Law' (2020) 95 *Indiana Law Journal* 533-90.

on one side, the focus is on whether the supplier discloses the information owed and, on the other, on whether the consumer has sufficient access to that information–an approach often characterized as "empowerment through information." Under this framework, information and empowerment are usually preferred to substantive regulation which, in principle, reflects reduced concern for vulnerable consumers. Indeed, cognitive vulnerabilities of consumers (the particular circumstances that impair decision-making) are primarily treated as exceptions (or deviations) from the default assumption of rational autonomy.

Contrarily, the Latin American emphasis on *protection* and the *vulnerable consumer* benchmark is informed by an underlying conception of the consumer as an imperfectly rational actor (one of "bounded rationality") whose structural relation to the provider and marketplace situates her in a position of relative vulnerability. The point of departure is precisely such structural vulnerability: all consumers are *potentially* vulnerable. Under this framework, consumers' vulnerabilities are the *norm* rather than the *exception*. This approach acknowledges the inherent complexity of market dynamics and consumer behavior, and the way in which professional suppliers and consumers relate to each other within that complex context. Part of the complexity derives from the dual objectives of the professional suppliers. Professional suppliers balance their obligation to inform potential customers against their primary objective of marketing their products or services to attract as many actual customers as possible. In other words, the professional supplier seeks to persuade the consumer that her product offers more advantages and benefits than her competitors, and to that end she invests resources and effort in gaining an understanding of her consumers' behavior that surpasses that of the consumers themselves. The persuasive angle of suppliers' exploitative behavior signals, on one hand, the insufficiency of the empowerment-through-information approach; and, on the other hand, the need to display more sensitivity to particular circumstances that impair consumers' decision-making. The underlying principle is that consumer protection statutes should not limit themselves to remedying market imbalances because they can also provide a means for fostering substantive equality in consumer transactions, which becomes manifest where there is more substantive regulation coupled with more room for courts to intervene.

In this chapter, I demonstrate significant consequences of this distinctive emphasis: the more consumer law moves towards *empowerment* and embraces the *average consumer* default, the less sensitive it becomes to the vulnerabilities that impair consumer decision-making, which hinders this model's capacity to address substantive inequality in consumer transactions. The different starting points, consumer vulnerability as an *exception* in Europe *versus* consumer vulnerability as a *norm* in Latin America, are crucial in the determination of when a court may justifiably intervene in a contractual relationship in order to protect vulnerable consumers from detrimental agreements. Following an examination of the European experience, the article takes a closer look at consumer protection law in Argentina, where the courts embrace the task of using consumer law to reduce inequality. In particular, it focuses on the significant, recently introduced category of the hyper-vulnerable consumers–that is, consumers who find themselves in a situation of aggravated vulnerability due to age, gender, physical or mental state or social, economic, ethnic and/or cultural circumstances, any of which may cause special difficulty for the full exercise of their rights as consumers (Res. 139/2020). The choice of the Argentine case is motivated by the country's paradigmatic shift from a formal and abstract principle of equality to a substantive and

situated conception that was introduced by Civil Code reform of 2015. The referred shift is also operative in the recently proposed Project of Reform of the Consumer Protection Law, which opens a path for novel regulation sensitive to inequality in consumer relations,[3] and was given momentum by the urgent need for responses from government, civil society, and social associations to the structural inequality that has become glaringly evident in the aftermath of the COVID-19 crisis.

Against this background, the traditional view that Latin American legal systems often represent outdated or failed transplants from Global North models becomes unsatisfactory. As this introduction suggests, the legal structures for consumer protection in Latin America differ from the approaches to consumer law which are currently considered "orthodoxy" in EU consumer law.[4] This deviation itself suggests that a more helpful or meaningful framework to address the development of "heterodox" legal approaches to consumer law in Latin America is greatly needed.[5] In this context, the legal heterodoxy framework introduced by Mariana Pargendler and Kevin Davis offers a promising alternative.[6] The close attention the legal heterodoxy framework devotes to the local circumstances (social, economic and political) in developing countries makes it better equipped to unpack the variety of public policy objectives pursued within a range of different worldviews, each with its own order of values embraced. The conjugation of policy objective and local values yields the distinctive responses of consumer law in different jurisdictions to the problems common to all of them.

Moreover, by inviting scholars to tease out the underlying reasoning behind the divergent approaches to consumer law in developing jurisdictions, this methodology offers a unique opportunity not only to overcome the traditional unidirectional perspective of inquiry and learning (i.e., focusing on the degree to which Latin American institutions *converge* with their European counterparts), but also, and perhaps most importantly, it opens up an avenue for identifying "reverse convergence" (i.e., areas where Europe *converges* with Latin America). This broader perspective is particularly apt in the current rise of the global digital economy. The rapid development of Artificial Intelligence (and other new technologies), whose algorithms have direct impact on consumers' rights to safety, privacy, and non-discrimination, is exacerbating the salience of the structural character of consumer vulnerability in the marketplace.

1 Consumer Law and Inequality in Europe and Latin America

1.1 Between Empowerment and Protection Paradigms: A Matter of Emphasis

Whether consumer law should be concerned with inequality is a multi-faceted question that depends to a certain extent on the particular vision and understanding of the aims of consumer law in play, as well as the base conception of the consumer in a given legal system. Europe and Latin

[3] For an example of how the reform tackles consumer inequality, see M. G. Martínez Alles, 'Regulating Gender Stereotypes in Advertising: When Persuasion Reinforces Inequality' (2019) 5 *Latin American Legal Studies* 287-312.
[4] "Orthodoxy" refers to legal doctrines designed by developed countries.
[5] "Heterodoxy" refers to legal doctrines that deviate from those designed by developed countries.
[6] K. Davis and M. Pargendler, 'Legal Heterodoxy in the Global South: Adapting Private Laws to Local Contexts', Introduction in this volume.

America have approached the relationship between consumer law and inequality from various, distinct perspectives, which reflect different views on both the goals of consumer law and the role of the consumer in the marketplace.

In the European context, where the underlying objective was putting in place a set of rules for the creation and maintenance of a single, durable regional market, consumer protection law was predominantly understood from the outset in terms of its usefulness for market optimization, a one-sided, exclusive goal aiming for internal market integration.[7] This unidimensional stance implied that *economic interests* and *social interests* are somehow fully separable.[8] The thinking behind the approach considered that EU consumer protection law should only concern the economic interests of the parties to any transaction, which are compatible with a market economy. Non-transactional interests, such as equality, social cohesion, or distributive concerns, which could conflict with market integration, were secondary.[9]

According to this stance, protecting consumers against their vulnerabilities that result from particular circumstances puts a limit on (liberal notions of) freedom of contract and party autonomy,[10] which could hinder rather than enhance market integration.[11] The underlying liberal position is that the right to free choice constitutes the core element of the individual rights of citizens to participate in cross-border transactions in accordance with European Community law—the notion that the internal market should maximize the capacities of both businesses and consumers to do business with each other across borders.

Following this logic, the main rationale behind consumer protection law became the empowerment of consumers to take sufficiently informed autonomous decisions on their own by focusing on the right to information and relying on information duties to facilitate consumer choices and autonomy.[12] This paradigm of empowerment-through-information embraced by the

[7] G. Davis, 'The Consumer, the Citizen, and the Human Being', in D. Leczykiewitz and S. Weatherill (eds.), *The Images of the Consumer in EU Law* (Oxford: Hart Publishing, 2016), pp. 325-38; M. Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political?' (2015) 21 *European Law Journal* 572-98. Moreover, see G. G. Howells, C. Twigg-Flesner, and T. Wilhelmsson (eds.), *Rethinking EU Consumer Law: Markets and the Law* (Oxfordshire: Taylor & Francis, 2018) (the underlying position of this book is that European consumer law and policy risked over-emphasizing the internal market goal to the detriment of protections for the vulnerable).

[8] Davis, 'The Consumer, the Citizen, and the Human Being', 326, note 7 above (criticizing the dominant view as factually wrong, distinctively un-European, and "potentially dangerous for the achievement of European societies, which are notable precisely for their commitment to the integration of the social and the economic.").

[9] T. Wilhelmsson, *Social Contract Law and European Integration* (Aldershot: Dartmouth, 1995).

[10] C. Kirchner, 'Justifying Limits to Party Autonomy in the Internal Market-Mainly Consumer Protection', in S. Grundmann, W. Kerber, and S. Weatherill (eds.), *Party Autonomy and the Role of Information in the Internal Market* (Berlin: de Gruyter, 2001), pp. 173-96.

[11] V. Mak, 'The Consumer in European Regulatory Private Law', in D. Leczykiewicz and S. Weatherill (eds.), *The Images of the Consumer in EU Law* (Oxford: Hart Publishing, 2016), p. 381-400, p. 382 ("The image of the weak consumer, however, does not sit well with the general framework for economic regulation of private law relationships in the EU […]; nor does it fit with the general principle of party autonomy that underlies most national private laws.").

[12] European Commission, A European Consumer Agenda—Boosting Confidence and Growth, COM/2012/0225 (2012), p. 225 final: "Empowering consumers means providing a robust framework of principles and tools that enable them to drive a smart, sustainable and inclusive economy. Empowered consumers who can rely on robust framework

EU is based on the conceptualization of the consumer "as a rational actor who—like other private actors—makes autonomous decisions and for whom the law normally only offers a facilitative back-up, rather than protection."[13] The emphasis in the EU Directives on the mandatory disclosure of information and rights of withdrawal (a short cooling-off period following the transaction to allow consumers to re-evaluate and change their decision without penalty), which are designed for reasonably well-informed and circumspect consumers, clearly reflects this agenda of empowerment.[14]

Alongside the empowerment narrative is the rhetoric that *maximum harmonization* is needed in order to promote the internal market, with its corollary that *minimum harmonization* should be dismissed because it might harm the unity of the internal market by inhibiting the establishment of a level playing field for trade.[15] Whether accurate or not, this assertion implies that the success of the empowerment-through-information paradigm ultimately requires a ceiling on consumer rights for the sake of maximum harmonization. Achieving maximum harmonization, for its part, ultimately means that consumer protection must be determined by the EU, and that level of protection cannot be raised by national law (i.e. stricter national rules of consumer protection are disallowed).[16] This limits national choice and flexibility in that the centralization does not allow sufficient space for national initiatives to protect groups of vulnerable consumers

ensuring their safety, information, education, rights, means of redress and enforcement, can actively participate in the market and make it work for them by exercising their power of choice and by having their rights properly enforced."

[13] Mak, 'The Consumer in European Regulatory Private Law', p. 382, note 11 above. Questioning the empowerment-through-information approach in the EU, see H-W. Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return to Social Elements in the Civil Law: A Bittersweet Polemic' (2012) 35 *Journal of Consumer Policy* 283-96. Questioning the assumption that the consumer is able to use the disclosed information in order to bargain more effectively and secure the benefits of a transparent and competitive market, see G. Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 *Journal of law and Society* 349-70. For research showing that consumers suffer from information overload and that highlight their limited information-processing capabilities, see B. Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practice Directive* (New York: Springer, 2015); H. Schebesta and K. Purnhagen, 'Island or Ocean: Empirical Evidence on the Average Consumer Concept in the UCPD' (2020) 28 *European Review of Private Law* 293-310.

[14] Note that EU consumer law is mostly composed of disclosure rules that aim to provide consumers with all sorts of information not only during the pre-contractual stage but also once a contract has been concluded. Moreover, it is important to point out that The Consumer Rights Directive implements standardization of the information requirement across the EU. See e.g. Articles 5-6 of the Council Directive 2011/83/EU of October 25, 2011 on consumer rights, OJ 2011 No. L304, November 22, 2011 (CRD); Articles 4-6, 10-11 of the Council Directive 2008/48/EC of April 23, 2008 on credit agreements for consumers, OJ 2008 No. L133, May 22, 2008; Article 5 of the Council Directive 2001/95/EC of December 3, 2001 on general product safety, OJ 2002 No. L11, January 15, 2002 (GPSD).

[15] For a critical assessment of this assertion, see G. Howells, 'Europe's (Lack of) Vision on Consumer Protection', in D Leczykiewicz and S Weatherill (eds.) *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Oxford: Hart Publishing, 2016), pp. 431-46, p. 442 (arguing that the benefits of maximum harmonization have been overstated, since there is no convincing empirical evidence on the extent to which such uniformity increases cross-border trade).

[16] See, for instance, Case C-358/01, *Commission v. Spain* [2003] ECR I-13145 (where national measures related to labelling of products were deemed overly protective and struck down because they created unjustifiable barriers to trade in the Internal Market).

whose particular needs cannot be satisfactorily addressed by rules adopted at the EU level.[17] Moreover, *maximum harmonization* also means that if the maximum EU level of protection is lower than existing national standards, then the central EU determination causes a reduction in protection in those member states.[18]

Whether EU consumer law should leave room for member states to choose how they enhance protection of particular groups of vulnerable consumers is a contested issue subject to (ongoing) debate,[19] one that I do not engage in this piece.[20] My aim is distinct: I wish to show that, the more EU consumer law emphasizes *empowerment* and embraces *maximum harmonization*, the less sensitive it is to vulnerabilities that impair consumer decision-making, which hinders the empowerment-through-information model's capacity to address inequality in consumer transactions. To clarify, I am not implying that EU consumer policy solely involves empowerment.[21] It also recognizes the need for protection, and some concern for vulnerabilities is evident in the recognition that certain groups of consumers warrant enhanced protection.[22] For example, the Unfair Commercial Practice Directive (Directive 2005/29/EC) conveys (limited)

[17] S. Weatherill, 'Empowerment Is Not the Only Fruit', in D. Leczykiewicz and S. Weatherill (eds.), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Oxford: Hart Publishing, 2016), pp. 203-21, p. 221 (arguing that "maximum harmonization should be regarded as the exception and minimum harmonization as the norm in order to preserve space for national initiatives that reflect the sheer diversity of consumer experience and preference across the regulatory terrain of the EU's internal market."). For an analysis of the divergence in rationalities of EU and national private law, see R. Michaels, 'Of Islands and the Ocean: The Two Rationales of European Private Law', in R. Brownsword et al. (eds.), *The Foundations of European Private Law* (Oxford: Hart Publishing, 2011), pp. 139-58. For an analysis of the effect of nationalism on the design of corporate laws, see Pargendler, 'The Grip of Nationalism on Corporate Law', note 1 above.

[18] An example of enhanced protection at the member state level is found in Spain's recent introduction of the general category of the "vulnerable consumer". According to Article 3, Law Nº 4/2022, vulnerable consumers are "those individuals who, individually or collectively, for their characteristics, needs or personal, economic, educational or social circumstances, are, even when only territorial, sectorial or temporarily, in a special situation of subordination, helplessness or lack of protection that prevents them from exercising their rights as consumers under conditions of equality." This reform of the Spanish Consumer Protection Law mainly responded to the devastation caused by the pandemic on the basis of the constitutional mandate to grant protection to consumers (Art. 51.1, Spanish Constitution).

[19] For objections to excessive harmonization in European contract law, see T. Wilhelmsson, 'Private Law in the EU: Harmonised or Fragmented Europeanisation?' (2002) *European Review of Private Law* 77-94, 84. Similarly, see N. Reich, 'A European Contract Law or an EU Contract Law Regulation for Consumers?' (2005) 28 *Journal of Consumer Policy* 383-407. For an analysis on the impact of maximum harmonization in contract law, see F. De Elizalde, 'Standarisation of Agreement in EU Law. An Adieu to the Contracting Parties?', in T. Tridimas and M. Durovic (eds.), *New Directions in European Private Law* (Oxford: Hart Publishing, 2021), pp. 29-59 (arguing that EU law is transforming core elements in contract formation by following a standardization approach—which, for instance, relies on legal standards such as the "average consumer" that ignores the individual characteristics of the contracting parties).

[20] For thoughts on this debate, see, for instance, H.W Micklitz, 'The Full Harmonization Dream' (2022) 11 *Journal of European Consumer and Market Law* 117-21; S. Weatherill, 'The Fundamental Question of Minimum or Maximum Harmonisation', in S. Garben and I. Govaere (eds.), *The Internal Market 2.0* (Oxford: Hart Publishing, 2020), pp. 261-84; N. Reich, 'From Minimal to Full to 'Half Harmonisation', in J. Devenney and M. Kenny (eds.), *European Consumer Protection Theory and Practice* (Cambridge: Cambridge University Press 2012), pp. 3-5.

[21] See Weatherill, 'Empowerment Is Not the Only Fruit', pp. 203-04, note 17 above (arguing that "[c]onsumer law needs to be about more than empowerment."; and that "[a] vision based exclusively on empowerment is too narrow.").

[22] See Howells, 'Europe's (Lack of) Vision on Consumer Protection', p. 434, note 15 above (arguing that there are many instances when the Commission and the Court of Justice have in fact shown sensitivity to consumer concerns).

concern for the vulnerable consumer by incorporating measures of consumer protection targeting specific disadvantaged groups ("mental or physical infirmity, age or credulity").[23] Other references to vulnerable consumers are made in the Consumer Rights Directive (Directive 2011/83/EU) and the General Product Safety Directive (Directive 2001/95/EC). The reference in the Consumer Rights Directive stipulates that traders should take into account the specific needs of "consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity" when providing consumers with pre-contractual information.[24] The General Product Safety Directive (Directive 2001/95/EC), for its part, mandates that categories of consumers "particularly vulnerable to the risks posed by the products under consideration, in particular children and the elderly" be taken into account when assessing product safety.[25] Together however, the original choice to (over)emphasize *empowerment* and the pervasiveness of the narrative on the advantages of *maximum harmonization* for the internal market have powerfully influenced the overly restrictive consideration of consumer vulnerabilities in EU law, which, as I will demonstrate in the following section, are considered secondary (or subsidiary) protective interests.[26]

The situation is quite different in Latin America. There, the *protective* aim of consumer law has been emphasized over the empowerment one since the very beginning.[27] The prevailing underlying rationale at the time when most consumer protection laws were enacted in the region (the 1980s and 90s) prioritized the need for specific regulation from the state to properly address the contractual asymmetry of power between suppliers and consumers in the marketplace. This stance reveals the shortfall, at least in the realm of consumer law, of the classic assumption of formal equality between the contracting parties on the basis of which most nineteenth century Civil Codes were constructed. Consequently, consumer law has mainly been understood as a tool to counteract structural power imbalances between suppliers and consumers in the marketplace, with the aim of strengthening consumers' substantive rights. This stance is perhaps partially explained and, to some extent, reinforced by the constitutional status of consumer rights in most jurisdictions

[23] Article 5(3) of the Council Directive 2005/29/EC of May 11, 2005 on unfair business-to-consumer commercial practices in the internal market, OJ 2005 No L149, June 11, 2005 (UCPD) provides: "Commercial practices which are likely to material distort the economic behavior 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. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally."

[24] Article 34, CRD.

[25] Article 8, GPSD.

[26] On this point, see Howells, 'Europe's (Lack of) Vision on Consumer Protection', p. 434, note 15 above ("In other words, I do not think the EU lacks a soul to its consumer policy, but its emphasis on the internal market and maximum harmonization has risked making people forget the core values and rights it has guaranteed EU citizens."). For a critical view, see Howells, Twigg-Flesner, and Wilhelmsson (eds.), *Rethinking EU Consumer Law. Markets and the Law*, p. 7, note 7 above (arguing that "consumers should be recognized as a class who are structurally poorly positioned to protect themselves in the marketplace.").

[27] On the importance of starting points and narratives, see e.g. Weatherill, 'Empowerment Is Not the Only Fruit', pp. 203-204, note 17 above ("It may seem a small shift to prefer to address 'consumer law' over 'consumer protection law', but it is a shift that carries with it an enormous risk that the protective instinct that underpins the development of the law, driven by the appreciation that in some circumstances the market will harm the consumer, or at least some consumers, will be diluted or even lost.").

in the region.[28] Constitutional status complicates the simplicity of the widely professed solid line walling economic and social rights from the underlying logic of private law institutions, such as contracts, torts, and property law. Ultimately, constitutionalizing consumer rights means that the constitution can be invoked to reshape the legal relationship between consumers and suppliers in the marketplace.[29]

Following this line of thinking, the underlying idea was that consumer protection encompasses much more than empowerment because its concern is achieving adequate levels of substantive protection for all consumers, whether empowered or not. The underlying conception of the consumer thus departs markedly from the "reasonably well-informed and circumspect" rational actor that is assumed by the empowerment-through-information model. Instead, under the *protection* paradigm, the dominant depiction of the consumer is that of a *structurally vulnerable consumer*, that is, one who occupies a relatively although decidedly vulnerable position in the market structure, which calls for a higher degree of protection than other transactional contexts involving private parties who negotiate on more equal footing.[30]

Under this distinctive structural narrative, the empowerment-through-information strategy (i.e., seeking to enable consumers to exercise their freedom of choice) appears, at least *a priori*, ill-suited for effective protection of consumers deemed, in principle, vulnerable to market power dynamics that (more often than not) impair their ability to inform themselves adequately or make free, autonomous choices. Consequently consumer protection statutes in many Latin American jurisdictions originally contained, in addition to the classic information duties and disclosure rules (which align well with the empowerment approach), more robust substantive protections, such as a consumer's right to compensation and stringent remedies (e.g., the broader availability of pain and suffering awards and increasing recourse to punitive damages awards),[31] a right to dignity and equitable treatment, a regime of strict liability, and the availability of class action mechanisms, free access to justice and protective principles (e.g., "*in dubio pro-consumer"*), all of which better serve the aim of shielding consumers from structural vulnerability. Again, the claim is not that consumer law in Latin America exclusively involves substantive protection and heightened

[28] Most modern Latin American Constitutions, such as those of Argentina (1994), Brazil (1988), Colombia (1991) and Peru (1993), enshrine consumer rights as fundamental rights. The Chilean Constitution (1980) is an important exception, although the Constitutional Court of Chile has recognized the importance and protective nature of rules for consumer protection. For a discussion on the inclusion of new rights in the new constitutions in Latin America, see R. Gargarella, 'Inequality and the Constitution: From Equality to Social Rights', in P. Dann, M. Riegner and M. Bönnemann (eds.), *The Global South and Comparative Constitutional Law* (Oxford: Oxford University Press, 2020), pp. 235-49.

[29] For research showing how courts in Brazil and Colombia have recently embraced using traditional contract law to address inequality, see K. E. Davis and M. Pargendler, 'Contract Law and Inequality' (2022) 107 *Iowa Law Review* 1485-1541.

[30] For instance, the structural vulnerability of consumers in the marketplace is explicitly recognized in the consumer law of Brazil (Article 4 [I], Law 8078/1990) (hereinafter "Brazilian Consumer Protection Code").

[31] Note that punitive damages are available in the consumer protection laws of Argentina and Chile, notes 113-118 below.

concern for vulnerable consumers, for empowerment is certainly an objective too.[32] The point is that the original emphasis on *protection* has facilitated the model's capacity to address *inequality* in consumer transactions, by displaying much more sensitivity towards consumer vulnerabilities not only from legislators but also, and importantly, from courts —which I explore through reference to the particular case of Argentina in Section 2.

Examining the distinctive European and Latin American visions of consumer law reveals how the pervasive foundational narratives pit the aims of consumer law as dichotomous (empowerment *or* protection), leading to starkly contrasting default conceptions of the consumer in Europe and Latin America ("reasonably well-informed, observant and circumspect" *versus* "structurally vulnerable"). These different default assumptions then affect ensuing decisions on when, where and how consumer vulnerability in the marketplace should be addressed. The problem with this dichotomous narrative is that consumer *protection* and consumer *empowerment* are not necessarily at odds. On the contrary, they may very well complement each other. Another problematic aspect of the empowerment *or* protection framework is that it diverts attention from the more relevant question (and challenge), which is the appropriate relative weight of each in the design of any given legal system's consumer law, not to mention the particular circumstances and contexts that might justify modifying that balance. In other words, the empowerment v. protection characterization overlooks the importance of recognizing and mapping out the interconnectedness and interaction between the two objectives, a relationship that is socially and culturally dependent—which will become clearer when I explore their interplay in the Argentinian context in Section 2.

However, the institutional choice on whether to emphasize *empowerment* or *protection* over the other has been assumed necessary from the outset in both Europe and in Latin America, perhaps without awareness of the extent of the practical ramifications that would actually transpire. In what follows, I explore one such ramification. In particular, I show how the initial emphasis on empowerment in Europe led the EU to embrace the "average consumer" as its interpretive benchmark, depicting consumer vulnerabilities as exceptions that occasionally require a higher degree of protection if properly justified; whereas the original Latin American emphasis on protection has led those jurisdictions to embrace the "vulnerable consumer" as their interpretive benchmark, positing structural vulnerability as the norm allowing greater room for the provision of enhanced protection in cases of "aggravated vulnerability," which intensifies structural vulnerability.

1.2 The Significance of the Benchmark Adopted

[32] Consumer protection statutes in Latin America also establish and regulate duties of information. For instance, the Argentinean Consumer Protection Law provides as follows: "Art. 4: Information. The supplier is obliged to provide to the consumer, in a certain, clear and detailed manner, all the information related to the essential characteristics of the goods and services that it provides, and the conditions of its commercialization. The information must always be free for the consumer and provided with the necessary clarity that allows its understanding." Art. 4, Law No 24.240 (text according to Law No 26.361, B.O. 7/4/2008).

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The European narrative emphasizing consumer empowerment-through-information assumes a particular understanding of the consumer that responds to the initial, overarching concern with providing the information needed by consumers to make well-informed decisions.[33] This implies that stringent consumer protection, meaning protection that goes beyond duties of information (e.g., mandatory substantive law, such as the control of standard contract terms) is only justified "when the information content cannot be shaped in such a way that a reasonably observant, circumspect consumer could digest it at a reasonable price or with reasonable effort."[34] This profile for the typical consumer in Europe was in fact established by the European Court of Justice (ECJ) itself, which described her as: "reasonably well-informed and reasonably observant and circumspect."[35] The ECJ then developed, through reference to this profile in its case law, the interpretive benchmark of the "average consumer" as the default standard in legal doctrine for judging "unfairness", for example, when assessing whether a contractual clause, in legal terms, is sufficiently clear.[36] Following this logic, the aim of consumer law is empowering the average, "reasonably well informed and reasonably observant and circumspect" consumer to exercise her choices, and to establish under which justifiable circumstances a heightened degree of protection may be *exceptionally* required.

Likewise, the Unfair Commercial Practice Directive (UCPD) has also adopted the "average consumer" benchmark as the standard to assess whether a specific practice (outside the forbidden) is unfair (e.g., whether it has misled or caused consumers to engage in a transaction that they would not have taken otherwise) and, as a consequence, whether consumers should be protected against

[33] For a critical view of this constructed image, see Davis, 'The Consumer, the Citizen, and the Human Being', pp. 326-27, note 7 above ("the Court does not look at Europeans as they are, but as a certain vision of the law would like them to be.").

[34] S. Grundmann, 'Targeted Consumer Protection', in D. Leczykiewicz and S. Weatherill (eds.) *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Oxford: Hart Publishing, 2016), pp. 223-44, p. 238.

[35] The ECJ formulated its standard definition of the concept in its 1998 judgment *Gut Springenheide*: case C–210/96, *Gut Springenheide GmbH v Oberkreisdirektor des Kreises Steinfurt* [1998] ECR I–4657. For further case law on the average consumer: case C–303/97, *Verbraucherschutzverein eV v Sektkellerei G. C. Kessler GmbH und Co*. [1999] ECR I–513; case C–220/98, *Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH* [2000] ECR I–117; case C–465/98, *Verein gegen Unwesen in Handel und Gewerbe Kölv Adolf Darbo AG*. [2000] ECR I–2297; case C–3/99, *Cidrerie Ruwet SA v Cidre Stassen SA and HP Bulmer Ltd.* [2000] ECR I-8749, and many others. See also Recital 18, UCPD.

[36] Mak, 'The Consumer in European Regulatory Private Law', p. 383, note 11 above (referring to "the average consumer of EU law as a benchmark but also as a means by which to mediate between EU law and national laws."). Similarly, see S. Weatherill, 'Who is the 'Average Consumer'?', in S. Weatherill and U. Bernits (eds.), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29 – New Rules and New Techniques* (Oxford: Hart Publishing, 2007), pp. 115-38, p. 135 (stating that the average consumer standard "is an attempt to navigate a course between the rich diversity of actual consumer behavior and the need for an operational regulatory benchmark."). For a critique of the normative model of the average consumer in credit and mortgage law, see I. Domurath, 'The Case of Vulnerability as the Normative Standard in European Consumer Credit and Mortgage Law-An Inquiry into the Paradigms of Consumer Law' (2013) 2 *Journal of European Consumer and Market Law* 124-37, 133, 135.

it.[37] For example, in Sony,[38] the ECJ examined whether the economic behavior of the "average consumer" with regard to the product would be materially distorted by the commercial sale of a computer equipped with pre-installed software that affords no option for the consumer to purchase the same model of computer without the pre-installed software. Namely, would it significantly undermine the average consumer's ability to make an informed decision and lead to a transactional decision that the consumer would not have taken otherwise? In dealing with this question, the ECJ emphasized that the consumer had been duly informed prior to the purchase that the computer model in question did not come without pre-installed software. On the basis of that information in particular, the understanding was that the consumer was able to decide whether to accept the terms previously drawn up by the seller and was therefore, in principle, free to choose another model of computer, or another brand, of similar technical specifications that was sold without pre-installed software or came with different pre-installed software. In light of these considerations, the ECJ concluded that the commercial practice at issue did not in itself constitute an unfair commercial practice within the meaning of Article 5(2) of the UCPD. As is evident in the ECJ's approach, the consumer is treated in the abstract and the preponderant focus is on the quality (correctness) of the information provided.

Besides the "average consumer" benchmark, the UCPD includes two other categories of consumers: the "targeted (average) consumer;" and the "vulnerable (average) consumer."[39] The "targeted consumer" refers to situations where a commercial practice is specifically aimed at a particular group of consumers, such as children.[40] The "vulnerable consumer" is meant to capture situations where "certain characteristics such as age, physical or mental infirmity or credulity make consumers particularly susceptible to a commercial practice or to the underlying product."[41] However, the Directive further establishes that those commercial practices "shall be assessed from the perspective of the *average member* of that group."[42] The fact that the reference point is the "average member" of the protected group means that, whether or not actual members of the "targeted" or the "vulnerable" group are misled by a certain practice, if the "assumed average member" would not be misled, there are no grounds for enhanced protection.

This theoretical construct, which contradicts the centrality of relational, situational and highly contextual factors in the very definition of vulnerability, makes effective protection of vulnerable consumers difficult to ensure.[43] What it actually does is reconfirm the original, underlying intent of EU consumer law to facilitate market integration where consumers'

[37] The UCPD is the only legal instrument that systematically employs the concept of the "average consumer", namely in Article 5 (contrary to provider's due diligence), Article 6 (misleading actions), Article 7 (misleading omissions), and Article 8 (aggressive practices).
[38] Case C-310/15, *Vincent Deroo-Blanquart v. Sony Europe Limited* ECLI:EU:C: 2016:633 [2016].
[39] For an analysis of the average, targeted and vulnerable consumer of the UCPC, see Howells, Twigg-Flesner and Wilhelmsson, *Rethinking EU Consumer Law. Markets and the Law*, pp. 66-73, note 7 above.
[40] Article 5(3), UCPD.
[41] Ibid.
[42] Ibid (my emphasis).
[43] For relational notions of consumer vulnerability, see N. Helberger et al., 'Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability' (2022) 45 *Journal of Consumer Policy* 175-200.

vulnerabilities are seen as a destabilizing departure from informed autonomy rather than relevant interests that warrant heightened protection (i.e., vulnerabilities as interests of secondary consideration). Most importantly, these two categories end up consolidating and reinforcing the default standard of the "average consumer." First, consumer vulnerability is conceived as an exceptional deviation from the norm of the "average consumer" whose protection must be justified by additional substantive reasons beyond personal status as consumers.[44] Second, the "average" benchmark is embedded as a subsidiary consideration in the exceptional categories themselves, in that vulnerabilities are assessed in reference to the "average member" of the group. Moreover, it is not entirely clear what these category-based classifications are meant to address.[45] For instance, the exclusive focus on personal attributes (age, physical or mental infirmity or credulity) is questionable. They are narrow and flat attributes that fail to recognize that vulnerabilities are dynamic, not static: a person or group of persons may experience different kinds of vulnerabilities at different times. The manifestation of vulnerability depends on the particular circumstances (or contextual setting) in which consumers find themselves (situational vulnerability). For example, age does not in itself imply vulnerability. In many situations, an educated, resourceful elderly woman in Argentina can overcome hurdles of digital financial transactions that an illiterate poor elderly woman in the same country might not. Additionally, the categorical approach invites further criticism from those who argue that person-based categorizations not only stigmatize (or stereotype) groups of consumers, but also that they, perhaps most importantly, prevent us from identifying those from among the vulnerable category who are worse off than others (e.g., the illiterate and poor elderly woman when attempting to make a digital financial transaction).[46] Moreover, if these categories are meant to mitigate structural inequality in consumer transactions, they seem to present problematic shortfalls. For example, they do not capture other social, economic, ethnic and/or cultural circumstances, which may very well impair consumers' decision-making and call for some sort of enhanced protection.[47] Admittedly, vulnerability is extremely complex and multi-layered.[48] However, reflecting it solely in terms of person-focused attributes, as EU consumer law does in a categorical, selective and fragmented way, makes it even more difficult (if not impossible) to grasp.

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[44] On this point, see Grundmann, 'Targeted Consumer Protection', note 34 above.

[45] There is also some discussion on whether the list is exhaustive or not, see e.g. Howells, Twigg-Flesner, and Wilhelmsson, *Rethinking EU Consumer Law. Markets and the Law*, note 7 above; B. Duivenvoorde, 'The Protection of Vulnerable Consumers Under the Unfair Commercial Practices Directive' (2013) 2 *Journal of European Consumer and Market Law* 69-79.

[46] T. Wilhelmsson, 'The Informed Consumer vs the Vulnerable Consumer in European Unfair Commercial Practices Law—A Comment', in G.G Howells et al. (eds.), *Yearbook of Consumer Law 2007* (Hampshire: Ashgate Publishing, 2007), pp. 211-28, pp. 212-13. Moreover, see F. Luna, 'Identifying and Evaluating Layers of Vulnerability—A Way Forward' (2019) 19 *Developing World Bioethics* 86-95, 87.

[47] Weatherill, 'Who is the 'Average Consumer'?', p. 136, note 36 above. Similarly, Mak, 'The Consumer in European Regulatory Private Law', p. 386, note 11 above (pointing out that these categories of consumers are not easy to apply in practice and may be under-inclusive).

[48] P. Cartwright, 'Understanding and Protecting Vulnerable Financial Consumers' (2005) 38 *Journal of Consumer Policy* 119-38 (who developed a different taxonomy of vulnerability which seeks to account for said complexity by focusing on the particular circumstances creating vulnerabilities). For a layered understanding of vulnerability, see F. Luna, 'Elucidating the Concept of Vulnerability. Layers Not Labels' (2009) 2 *International Journal of Feminist Approaches to Bioethics* 121-39.

The point is that using the benchmark of the average consumer reduces the space for consumer vulnerability to an exceptional departure from the norm.[49] The influence of this framework has been widely commented in the scholarly work in Europe on the vulnerable consumer: most scholars depart from acknowledging and recognizing the average consumer as the unquestionable default and argue for *flexibilization* or *expansion* of that very notion in order to more accurately capture consumer vulnerabilities.[50] The few European scholars who have of late begun fundamentally questioning the average consumer default itself have thus far focused on the specific context of digital markets—persuasively arguing that "structural vulnerability" be taken as the *norm* in the digital economy and calling for higher levels of consumer protection and a reassessment of the information paradigm dominant in the EU.[51]

Conversely, in Latin America, the dominant narrative of consumer protection has paved the way for the original notion of the consumer as one who occupies a relatively yet markedly vulnerable position in the market structure. Consumer law's aim has thus concentrated on establishing when and under which circumstances consumers require protection, and when and under which circumstances an enhanced degree of protection is warranted or even required. The underlying rationale is that all consumers are potentially vulnerable (whether empowered or not) due to structural features that are characteristic of the market contextual dynamics: asymmetry of knowledge and systemic power imbalances between suppliers and consumers. The idea is that recognizing consumer vulnerability means acknowledging that consumers, for the mere fact of being consumers, might be exploited by suppliers under certain circumstances. Hence, the most relevant factor is the *possibility* of exploitation in the marketplace.

Following this logic, the idea of an "average consumer" presumed "reasonably well informed, observant and circumspect" who is therefore considered sufficiently protected by the disclosure of crucial information did not take root in Latin America. Instead, in addition to the asymmetrical advantages in terms of bargaining power and information that suppliers enjoy, another dimension of the unequal supplier-consumer relationship has been recognized: the

[49] For the opposite approach, see M. Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law and Feminism* 1-23 (arguing for a default universal understanding of vulnerability as "the ever-present possibility of harm, injury, and misfortune" that is a consequence of human embodiment).

[50] See, for example, F. Esposito and M. Grochowski, 'The Consumer Benchmark, Vulnerability, and the Contract Terms Transparency: A Plea for Reconsideration' (2022) 18 *European Review of Contract Law* 1-31.

[51] See, for instance, Helberger et al., 'Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability', 182, note 43 above (arguing that "vulnerability is not a state of exception, reserved for particular groups of consumers, but a universal condition [which] is particularly true of digital markets"). On this topic, it is important to point out to the European Commission's new definition of the vulnerable consumer, which signals towards a more universal conception of vulnerability: "This new definition distinguishes five dimensions of consumer vulnerability. A vulnerable consumer could be defined as: A consumer, who, as a result of socio-demographic characteristics, behavioral characteristics, personal situation, or market environment: is at higher risk of experiencing negative outcomes in the market; has limited ability to maximize his/her 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."). Cf. European Commission, Understanding Consumer Vulnerability in the EU's Key Markets, Factsheet (2016).

imbalance caused by consumers' cognitive vulnerabilities.[52] The empirical evidence convincingly shows that people usually, when making decisions, do not behave as a *homo economicus* or a perfectly rational agent would.[53] On the contrary, as imperfectly rational agents, their behavior deviates from what rational choice theory predicts. Individual rationality is bounded because cognitive abilities are finite. This acknowledgment admits instances when, in certain contexts, and maybe even in a great many if not most of them, individuals who resemble the "average consumer" behave according to the postulates historically assumed by the prevailing economic models.[54] It also means, however, that sometimes individuals deviate from those models' predictions and act using mental shortcuts and alternative cognitive processes whose connection to logical deduction or standards of rational decision-making is tenuous. The responsibility for this behavior lies with the heuristics of intuitive thinking and cognitive biases.[55] Psychologists and economists have identified a large catalogue of cognitive biases based on experiments and hypotheses, including availability, confirmation, and *status quo* biases, and the bandwagon effect, among others.[56]

For their part, suppliers invest considerable resources and effort (into, for example, highly sophisticated neuromarketing techniques)[57] in order to gauge the cognitive biases of consumers better than the consumers understand them themselves, which increases the marketplace asymmetry already noted.[58] In the process of informing and persuading consumers, cognitive biases are used as a tool like any other to promote products. Even if it can be accurately said that suppliers do have a genuine interest in providing reliable information about their products, it is equally fair to say they do so with the clear aim of attracting as many consumers as possible—the ultimate goal being increased sales, not necessarily fully informed consumers.[59] Furthermore, suppliers in competitive markets who are not willing to exploit the cognitive limitations of consumers are often quickly supplanted by those who are. Thus, according to Jon Hanson and

[52] C. Jolls, C. R. Sunstein, and R. Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 *Stanford Law Review* 1471-1550.
[53] Ibid.
[54] Ibid., 1477.
[55] The concept of heuristics and biases was originally proposed by A. Tversky and D. Kahneman, 'Judgment Under Uncertainty: Heuristic and Biases' (1974) 185 *Science* 1124-31. See also D. Kahneman, *Thinking, Fast and Slow* (London: Penguin, 2012); R. B. Korobkin and T. S. Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88 *California Law Review* 1051-1144; J. J. Rachlinski, 'The Psychological Foundations of Behavioral Law and Economics' (2011) 2011 *University of Illinois Law Review* 1675-696.
[56] Jolls et al, 'A Behavioral Approach to Law and Economics', note 52 above.
[57] Neuromarketing is the study of consumer behavior that makes use of neuroscientific techniques in order to obtain data on a person's consumption behavior and habits. For example, cameras, sensors, and wristbands are used to record expressions, changes in speech, and even the consumer's heart rate.
[58] See G. A. Akerlof and R. J. Shiller, *Phishing for Phools. The Economics of Manipulation and Deception* (New Jersey: Princeton University Press, 2015), pp. 52-54 (describing how advertisers use, through trial and error, persuasive techniques to secure and increase sales of their products).
[59] A. Kuenzler, *Restoring Consumer Sovereignty. How Markets Manipulate Us and What the Law Can Do About It* (Oxford: Oxford University Press, 2017), pp. xvii-xxi (describing how advertising from its beginnings served a dual purpose of informing and persuading).

Douglas Kysar, manipulation becomes an inescapable requirement for staying power in competitive markets.[60]

Consumer transactions are shaped by the interaction between market dynamics and consumer psychology.[61] Understanding the behavioral dynamics of the relevant actors in the marketplace further illuminates the structural dimension of consumer vulnerability. At the same time, it makes evident both the insufficiency of duties of information and rights of withdrawals as exclusive legal protective measures and the need for mechanisms to provide enhanced, substantive protection in especially impairing circumstances. Importantly, this approach acknowledges both the dynamism of consumers' vulnerabilities and the relational advantage of suppliers who are able to identify personal biases and characteristics of which consumers themselves are often unaware and the suppliers can exploit.

Regarding the former, the dynamism of consumer vulnerability means that consumer susceptibility to manipulation are not static characteristics of a person (age, education, etc.) but are rather often products of the market dynamics designed to exploit cognitive biases and heuristics. While this implies that consumers are not inherently and irremediably vulnerable, the more important implication is that vulnerabilities are mainly relational, situational and highly contextual. They are dependent on the particular circumstances' consumers are in when engaging in consumer transactions, which can exacerbate those vulnerabilities to the consumers' detriment (e.g., an elderly consumer may be vulnerable to certain commercial practices involving digital expertise that evoke familial duties, but not to ones that exploit a desire for fame, recognition or romance).

As for the latter, the relational advantage of suppliers in the modern marketplace, the information on potential consumers' biases and vulnerabilities has multiplied by many orders of magnitude. Before the advent of the digital economy, for example, empirical evidence already showed that female consumers were often more vulnerable to (predatory) price personalization in car purchasing,[62] but the landscape thirty years after that research was conducted is almost unrecognizable. It is important to recall that we are not only talking about the information that consumers freely and publicly share on social media.[63] From the information on spending habits tracked by credit card companies to the internet browsing information shared by internet providers, suppliers' ability to identify and target personal circumstances and individual characteristics that

[60] J. D. Hanson and D. A. Kysar, 'Taking Behavioralism Seriously: Some Evidence of Market Manipulation' (1999) 112 *Harvard Law Review* 1420-1572 (focusing on the cigarette industry as a paradigmatic example of market manipulation strategies).

[61] On this point, see O. Bar-Gill, 'Consumer Transactions', in E. Zamir and D. Eichman (eds.), *The Oxford Handbook of Behavioral Economics and the Law* (Oxford: Oxford University Press, 2014), p. 466.

[62] For empirical research demonstrating that retail car dealerships systematically offered substantially better prices on identical cars to white man than they did to blacks and women, see I. Ayres and P. Siegelman, 'Race and Gender Discrimination in Bargaining for a New Car' (1995) 85 *The American Economic Review* 304-21.

[63] On reclaiming privacy in digital markets, see A. Kuenzler, 'On (Some Aspects of) Social Privacy in the Social Media Space' (2022) 12 *International Data Privacy Law* 63-73.

make a consumer potentially more prone than others to enter into detrimental consumer transactions has grown exponentially.[64]

This is the background against which the point of departure for consumer protection statutes in Latin America, that of "structural vulnerability", becomes especially pertinent. Consumer protection statutes were envisioned as a key tool to counterbalance systemic power imbalances between suppliers and consumers with the aim to protect consumers' ability to fully exercise their substantive rights. Under this logic, improving standards for the disclosure of information and market transparency, however important and desirable, appear insufficient to compensate fully for consumers' structural disadvantages because informative measures hardly seem capable of empowering consumers to make wholly autonomous decisions.[65] Unlike EU consumer law, Latin American countries embraced from the start more substantive measures (e.g., rules of strict liability, broader availability of pain and suffering awards, recourse to punitive damages, among others) and protective principles (e.g., *in dubio pro consumer*)[66] that go beyond the mere duty to provide information and further developed these measures through the case law in individual cases involving consumer transaction disputes—which I explore further in the Argentinean context discussed in Section 2.

Moreover, the protective narrative of the "structurally vulnerable consumer" underlying the norm has made it possible for courts to play a dynamic and active role in interpreting whether and when to protect individual consumers from abusive or unfair commercial practices in the particular cases before them.[67] The courts do this by appealing to, among other legal resources, the underlying protective principles already mentioned that transversally inform consumer protection law.[68] For instance, the practice of personalized pricing, which would normally be allowed under the 'average consumer' benchmark as long as the provider complies with the requisite disclosure requirements (i.e., that it disclose in advance that the price has been personalized), might be found questionable under the 'vulnerable consumer' benchmark together with the contextual sensitivity to the particular circumstances of the case usually involved in the operation of the *in dubio pro-consumer* principle. This is because one particular circumstance of personalized prices is that they

[64] For a general account of such practices, see S. Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (New York: PublicAffairs, 2019).

[65] See N. Reich, 'Vulnerable Consumers in EU Law' in D. Leczykiewicz and S. Weatherill (eds.), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Oxford: Hart Publishing, 2016), pp. 139-58.

[66] I did not find an explicit reference to the principle of "*in dubio pro consumer*" in the UCPD Directive or a concrete application of that principle in the CJEU consumer protection case law. However, absence at the European level does not mean that protective principles are absent from the national laws of the Member States.

[67] Note that others have argued that the presumption of vulnerability of all consumers is a consequence of the *pro-consumer* principle on which consumer law is built, see P. V. López Díaz, 'The Hyper Vulnerable Consumer as a Weak Party in Chilean law: A Taxonomy and Scope of the Applicable Legal Protection' (2022) 10 *Latin American Legal Studies* 340-415, 342 footnote 5.

[68] Protective principles are similarly expressed in different jurisdictions in Latin America, such as: (i) "in case of doubt about the interpretation of the principles established by this law, the one most favorable to the consumer will prevail"; or (ii) "the interpretation of the contract will be made in the most favorable sense for the consumer. When there are doubts about the scope of its obligation, the one that is less burdensome will be followed." Arts. 3 and 37, Law No 24.240 (text according to Law No 26.361, B.O. 7/4/2008)

are often the product of sophisticated profiling and manipulation, which make evident the shortcomings of an exclusive focus on the information disclosed and demand a meaningful assessment of the structural and situated factors potentially impairing consumers' decision-making in those specific contexts.

Furthermore, the protective narrative has facilitated the acknowledgement in some jurisdictions of what are called "aggravated vulnerabilities," which are individual characteristics (e.g., age, gender, disability) or personal circumstances (e.g., residency in rural or impoverished areas, limited access to technology or education, unemployment, poverty) that on their own or in the aggregate heighten the "structural vulnerability" affecting all consumers as such in that they exacerbate particular consumers' odds to enter into detrimental economic transactions. Following this thinking, the debate in Latin America has recently progressed to assessing the desirability of adding the normative category of "hyper-vulnerable consumer" (which responds to "aggravated vulnerabilities") to the standard for the "vulnerable consumer" (which responds to "structural vulnerabilities") in order to reduce inequality in consumer transactions when certain exacerbating circumstances impairing individual consumers' decision-making are manifest—a debate I explore further in the Argentinean context discussed in Section 2.[69]

The impact of the default image of the consumer initially selected is doubtless significant in terms of consumer law's capacity to address inequality. As just described, the European "average consumer" benchmark hinders the model's capacity to meaningfully address inequality in consumer transactions. In contrast, the Latin American benchmark of the "vulnerable consumer" opens a path for substantive consumer protection laws that demonstrate more sensitivity to inequality concerns in consumer relations by recognizing room for courts to address inequality in the particular cases before them. Examining the divergence between the Latin American and European narratives on the role of consumer law and the default image of the consumer reveals a vital element in understanding the different attitudes towards the more fundamental question of whether consumer law *should* address inequality in those jurisdictions. The relevance of my claim is reinforced by the relative futility of simply looking at the wording of consumer protection provisions here and there without a broader understanding of the emphasis in each case. It is the underlying narratives embraced in those jurisdictions that ultimately give content to and inform the default interpretive benchmarks ("average" or "vulnerable") used by judges (and other relevant actors) in enforcing consumer protection laws. These benchmarks play an important role in assessing the different levels of protection ultimately granted to consumers. This suggests that the

[69] S. S. Barocelli, 'Consumidores Hipervulnerables. Hacia Una Acentuación del Principio Protectorio' (2018) 57 *La Ley* 1-5. For a recent discussion in the context of consumer protection law in Chile, see López Díaz, 'The Hyper Vulnerable Consumer as a Weak Party in Chilean law: A Taxonomy and Scope of the Applicable Legal Protection', note 67 above. Regarding the concern at regulating the hyper-vulnerable consumer category in Latin America, see, for instance, Article 39 of the Brazilian Consumer Protection Code prohibiting professional suppliers from "taking advantage of the weakness or ignorance of the consumer, considering his/her age, health, knowledge or social condition, to convince him/her to acquire his/her products or services"; and article IV, paragraph 4 of the Consumer Protection of Peru and article 15 of the general law of the rights of users and consumers, where they refer to "pregnant women, children and adolescents, the elderly, people with disabilities" and also incorporate to this hyper-vulnerable category "consumers in rural areas or in extreme poverty."

practical relevance of the specific concept of the consumer embraced in the different jurisdictions plays an important normative role.

2 Consumer Law and Inequality in Argentina

2.1 Structural Vulnerability as Default: An Explanation

The initial rationale of consumer protection law in Argentina was to provide legal tools to counterbalance the factual asymmetry of information and negotiating power between consumers and suppliers in the marketplace, which is characteristic of consumer transactions.[70] The underlying wisdom behind the enactment of the Argentinian Consumer Protection Law (1993) was the aspiration to devise a normative microsystem which had as its primary objective creating legal tools to comprehensively and effectively account for the challenges faced by consumers in the marketplace. After all, the unequal bargaining positions between the parties in consumer contracts were already well known, inequality which in many instances throws into question the affirmation of a pillar of classic contract law, true consent. In many ways, the emergence of consumer protection law represented a fracture in the classic general theory of contract law, which has traditionally assumed contractual parties to be on equal footing. Instead, consumer protection law in Argentina acknowledged the power imbalance between the contracting parties from the very beginning with its recognition that consumers as such occupy a relatively although markedly vulnerable position in the market structure that calls for differentiated treatment and stringent substantive protection.[71]

This protective aim was substantively reinforced a year later by the reform of the Argentinian Constitution (1994), which expressly introduced consumers rights (such as protection of consumers' health, safety, and economic interests; right to access to adequate and truthful information; freedom of choice; and conditions of equal and dignified treatment) as constitutional rights,[72] and incorporated into Argentine law several International Treaties with constitutional status, many of which include (directly or indirectly) consumer protection measures.[73] Furthermore, this trend, which understands consumers as the subject of protection in as much as they are consumers, was first reinforced by the Supreme Court of Justice[74] and later confirmed by the paradigmatic shift from *formal* and *abstract* equality to a *substantive* and *situated* notion of the same that was transversally instituted by the recently reformed Argentinean Civil Code (2015). The 2015 reform introduced specific rules and principles directly aimed at protecting consumers'

[70] The first Argentinean Consumer Protection Law was sanctioned in 1993 (Law 24.240). It was then substantially reformed in 2008 (Law 26.361) and in 2015 (Civil Code Reform).
[71] See S. S. Barocelli, 'Hacia la Construcción de la Categoría de Consumidor Hipervulnerables' in S. S. Barocelli (ed.), *Consumidores Vulnerables* (Buenos Aires: El Derecho, 2018), pp. 9-32, p. 11.
[72] Article 42 of the Argentine Constitution (justified by consumers' structural vulnerability in the marketplace).
[73] Article 75, Inc. 22 of the Argentine Constitution.
[74] CSJN, Fallos: 339:1077, Cons. 17º. Prevención, Asesoramiento y Defensa del Consumidor c/ Bank Boston N.A. (declaring that Art. 42 CN establishes the special protection that the Constitution recognizes to consumers due to their structural vulnerability in the marketplace).

structural position of vulnerability in the marketplace within the general norms of contracts.[75] Moreover, the current *Project of Reform of the Argentinean Consumer Protection Law* explicitly introduces the "structural vulnerability of the consumer" as a fundamental principle of consumer law.[76]

Apart from the underlying protective rationale fundamentally inspired by the recognition of consumers' structural vulnerability in the marketplace as the norm, consumer law in Argentina is further informed by, among other principles, the normative principle of "*in dubio pro consumer*"—which prescribes that courts, 'when in doubt', interpret the rules contained in the consumer statute 'in favor of the consumer'.[77] Importantly, the "*in dubio pro consumer*" principle is explicitly recognized as such in both the Consumer Protection Law [78] and the recently reformed Civil Code.[79] This normative principle, in conjunction with the consumers' structural vulnerability standard, is being used by relevant legal actors, particularly judges, as a flexible interpretive tool (e.g., to fill in gaps or solve conflicts of rights in case of doubt) to justify measures deemed necessary to protect individual consumers in the cases brought before them, a tool that allows more sensitivity to context-specific forms of vulnerability.[80] For instance, the "*in dubio pro consumer*" principle has been applied to interpret normative conflicts within consumer law;[81] compliance with the duty to inform;[82] and deceptive, abusive or discriminatory advertising, among many others cases. Judges have also resorted to it to assess relevant aspects of the particular relationship between the parties in order to uncover abusive clauses or fraudulent business practices.[83]

[75] See S. S. Barocelli, 'Principios y Ámbito de Aplicación del Derecho del Consumidor en el Nuevo Código Civil y Comercial' (2015) 5 *Revista de Derecho Comercial del Consumidor y de la Empresa* 64.
[76] Article 5, Anteproyecto de Ley de Defensa del Consumidor, 6/12/2018.
[77] Article 3 of the Consumer Protection Law (Law 24.240).
[78] Ibid.
[79] Article 1095 of the Civil Code: "Interpretation of the consumer contract. The contract is interpreted in the most favorable sense for the consumer. When there are doubts about the scope of their obligation, the one that is less onerous is adopted."
[80] For instance, CNACAF (Cámara Nacional de Apelación en lo Contencioso Administrativo) has adopted the *in dubio pro consumer* principle, interpreting that "the protection of the weakest party in the consumer relation is based on a 'presumption of legitimate ignorance.'" CNACAF, Sala II, Ombú Automotores S.A. c/Secretaría de Comercio e Inversiones—Disp. DNCI Nº 220/97, 23.921/1998, 4/03/1999.
[81] For instance, in case of conflict regarding the applicable law (e.g., the Civil Code or the Consumer Protection Law), the provision that is most favorable to the consumer will prevail.
[82] See, for instance, SCJ Mendoza, "Bloise de Tucci, Cristina c. Supermercado Makro S.A.", 2/7/2002, LLGran Cuyo, 2002-726 (where the advanced age of the plaintiff was taken into special consideration in order to determine that the information on the automatic doors (the "entrance" and "exit" signs) installed by the supermarket was not sufficient to protect her safety or that of the rest of the consumers).
[83] For example, the advanced age of the consumer was considered when his car was stolen in a supermarket (CNCom., Sala C, 18/3/2016, "Luzuriaga, Julián Enrique c. COTO C.I.C.S.A.", La Ley Online Argentina); on the occasion of the execution of a promissory note against a retired woman (CCC de Córdoba de 5º Nominación, 9/5/2019, "Comercial Salsipuedes S.A. c/ Casanova, Miriam Nelly"); and in order to determine the interest rate and payment capacity of an elderly woman (CNCom, Sala C, 27/5/2019, "Fello, Elena Yolanda c/ Banco Piano S.A."). Similarly, smokers were protected "as a particularly vulnerable group, insofar as—for many of them—the habit of smoking has become an addiction." (CNCiv., Sala C, 09/09/2019, "Q., M. A. c. Nobleza Piccardo S.A. y otros s/ Daños y perjuicios", La Ley Online: AR/JUR/27633/2019), among many others. Similarly, special protection was also recognized to minors (CNCiv., Sala L, 6/13/2007, "Osorio, Marcela B. c, Alto Palermo S.A.", La Ley, Buenos Aires, 1/17/2008; CNCiv.,

Importantly, most of these cases show some sensitivity to individual consumers who find themselves in a particularly vulnerable situation vis-à-vis suppliers.[84]

Accordingly, besides looking at the wording of protective legislative measures (for instance, duty of information, rights of withdrawal, abusive clauses, free access to justice, and so on), observing the intervention and behavior of the courts in interpreting and enforcing consumer protection law is extremely important, since courts and judges play a relevant role in reducing inequality in consumer transactions by adjudicating case-by-case situations, and whether effective access to justice is ultimately granted to consumers ultimately lies in their hands. Certainly, this has not always been the scenario. In Argentina, the actual implementation and enforcement of the Consumer Protection Law only gradually began to gain traction around a decade after it was sanctioned. A cultural change had to be wrought because consumers were not sufficiently aware of their rights while, for their part, lawyers and civil law judges also unfamiliar with the new statutory regulation initially resisted its implementation. The major shift in the enforcement of consumer protection laws in Argentina occurred much later, in 2008, when, among other reforms, free access to justice, class action mechanisms and punitive damages[85] were introduced in Argentina's Consumer Protection Law.[86] These substantive reforms, coupled with the implementation of more expeditious procedures, were key factors behind the expansion of consumer litigation in Argentina.[87]

2.2 The Significance of Aggravated Vulnerabilities

It seems clear at this point that the assumption of the consumer as a rational actor who processes information adequately in order to meet her individual preferences is altogether unsatisfactory. At the same time, an understanding of the consumer as someone who suffers from cognitive biases that make her completely vulnerable and subject to constant manipulation by suppliers is not fully satisfying either. The structural fact that all consumers are potentially vulnerable does not mean that actual vulnerabilities will always materialize for everyone in every

Sala H, 6/2/2014, "G.R., J.H. y otros," La Ley Online: AR/JUR/44769/2014); and to consumers with disabilities (CSJN, 8/28/2007, "C.P. de N., C.M.A. y otros v. Centro de Educación Médica e Investigaciones Médicas", La Ley Online: 70039319: in this case the prepaid medical entity was ordered to cover the expenses required in a lawsuit in favor of the disabled minor).

[84] For the leading Argentinian case in terms of dignified and equitable treatment in which punitive damages were imposed because the commercial premises of a telephone company lacked an access ramp, thus forcing the physically impaired plaintiff to be attended to on the sidewalk, see SCBA, 06/11/2012, "Machinandiarena Hernández, Nicolás c. Telefónica de Argentina SA s/ reclamo de actos de particulares." For another example in which punitive damages were imposed, see G.I.T. v. Swiss Medical S.A. (C. Nac. Com. Sala B, 2016), where a health insurance company deliberately delayed the payment of the urgent treatment required by the insured patient under the insurance policy coverage openly jeopardizing his health and physical integrity.

[85] For a detailed analysis of punitive damages in Argentina, see M. G. Martínez Alles, '¿Para Qué Sirven los Daños Punitivos? Modelos de Sanción Privada, Sanción Social y Disuasión Óptima' (2012) 14 *Revista de Responsabilidad Civil y Seguros* 55-100.

[86] Note that in Europe, the lack of a strict, harmonized approach to sanctions for infringements of substantive consumer protection rules has been repeatedly brought up as a weakness in its enforcement of consumer law.

[87] D. A. Chamatropulos, *Estatuto del Consumidor* (Buenos Aires: La Ley, 2019).

transaction. Furthermore, even when actual vulnerabilities do often materialize in certain circumstances, it does not follow that all consumers will be rendered *equally* vulnerable, since vulnerabilities have differentiated impact on different persons in different situations—not everyone will experience the same type or the same degree (or level) of vulnerability.[88] Structural vulnerability thus suggests a rather simplistic answer to a more complicated problem: consumers are not uniform; diversity and heterogeneity better characterize consumers as a group—for they do not share the same abilities, characteristics, social circumstances, economic position, etc. In such a context, a richer understanding of the act of consumption and what it involves is needed, one that takes into account the social and cultural context within which consumer preferences are channeled, for a more accurate appreciation of consumer vulnerability, whose forms are distinctive for different individuals in different settings, and, as such, relational, situational and highly contextual (i.e., we need to envision the "socially situated consumer").[89]

This more holistic and contextual understanding of the consumer necessarily leads to a logic that forecloses understanding consumer protection law as an eminently informative tool disconnected from the particularities of the social and cultural context of consumption. Within the broader universe of the structurally vulnerable consumer there are individual consumers who on account of internal factors (e.g., age, gender, disability) and/or external circumstances (e.g., poverty, residency in rural or disadvantaged areas, limited access to technology or education, unemployment) find themselves in particularly disadvantageous situations of subordination, defenselessness, or lack of protection which, temporarily or permanently, prevent them from fully exercising their rights as consumers in equal conditions.[90] These consumers are known as "hyper-vulnerable consumers" (or "especially vulnerable consumers").[91] This means that beyond the shared cognitive vulnerabilities potentially affecting all consumers, there are additional contingent factors—both internal (i.e., characteristics pertaining to oneself) and external (i.e., pertaining to the circumstances surrounding the transaction)—that might exacerbate consumers' relatively structural vulnerable position vis-à-vis suppliers, further impairing their decision-making.

This approach to vulnerability as a complex phenomenon requiring an exercise of internal and external contextualization fits well with "layered" concepts of vulnerability.[92] For instance, Florencia Luna has argued that vulnerability should be understood "dynamically and relationally" since we do not face "a solid and unique vulnerability" but rather "different vulnerabilities, different layers operating."[93] Moreover, she points out that "some of these layers may overlap:

[88] On this point, see R. P. Hill and E. Sharma, 'Consumer Vulnerability' (2020) 30 *Journal of Consumer Psychology* 551-70. Similarly, Luna, 'Identifying and Evaluating Layers of Vulnerability—A Way Forward', 87 note 46 above.
[89] On the notion of the consumer as a socially and culturally situated actor, see A. Kuenzler, *Restoring Consumer Sovereignty*, pp. 156-87, note 59 above.
[90] For a skeptical view on increasingly individualized consumer law in the EU, see G.G. Howells, 'Protecting Consumer Protection Values in the Fourth Industrial Revolution' (2020) 43 *Journal of Consumer Policy* 145-75, 167. On personalized law more broadly, see O. Ben-Shahar and A. Porat, *Personalized Law. Different Rules for Different People* (Oxford: Oxford University Press, 2021).
[91] See S. S. Barocelli (ed.), *La Problemática de los Consumidores Hipervulnerables en el Derecho del Consumo Argentino* (Buenos Aires: Universidad de Buenos Aires, 2020).
[92] Luna, 'Elucidating the Concept of Vulnerability. Layers Not Labels', note 48 above.
[93] Id., 128.

some of them may be related to problems with informed consent, others to social circumstances." According to Luna, "the layered way of viewing vulnerability allows it to target differences or variations within the group and to consider different kinds of safeguards or empowerment tools targeting these different features."[94]

Admitting gradations of vulnerability that affect consumers differently, allows us, in turn, to recognize the situational diversity of different social and cultural settings and to acknowledge the need for special and differentiated protections from the state. Treating everyone as equals when significant substantive cognitive and contextual differences exist can lead to unsatisfactory results and breakdowns in protection. Where different levels of inequality operate, the state should intervene in differentiated manners to protect consumers, according to the situated diversity at hand. Where the vulnerability is aggravated with respect to the standard, the law can account for this difference by providing more or less accentuated protection depending on the case—the intensity of the legal protection of vulnerable individuals should be proportional to the quantity and nature of the various layers of vulnerability in play. Ultimately, the underlying principle holds that all consumers are potentially vulnerable, but at distinct levels and in different contexts.

Regulating aggravated vulnerabilities has supporters and detractors. The critics argue that special rules stigmatize groups of individuals by identifying them as subsets of society who deserve exemptions based on a set of predetermined personal characteristics (e.g., age, gender, disabilities).[95] Others argue that such regulation goes against the very ideal of equality before the law, the ideal that requires courts to turn a blind eye to differences of, for instance, social status.[96]

Conversely, those who support normative recognition for special subsets believe positive discrimination is required in order to restore equality in consumer transactions—especially in societal contexts where pervasive conditions of socioeconomic inequality are patent. The underlying idea is that *highlighting* disadvantages by explicitly regulating them and providing differentiated treatment represents an important step forward in addressing inequality in consumer transactions by directing the attention of relevant actors, such as judges, lawyers and the state, to internal and external factors that impair consumers' decision-making and would not otherwise be weighted, factored in or even perhaps considered relevant under the broader (more elusive)

[94] Luna, 'Identifying and Evaluating Layers of Vulnerability—A Way Forward', 89, note 46 above.

[95] See, for instance, A. Cole, 'All of us Are Vulnerable, but Some Are More Vulnerable than Others: The Political Ambiguity of Vulnerability Studies, An Ambivalent Critique' (2016) 17 *Critical Horizons* 260-77; G. Malgieri and J. Niklas, 'Vulnerable Data Subjects' (2020) 37 *Computer Law and Security Review* 1-16; M. Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4 *Oslo Law Review* 133-49 (arguing that the concept of vulnerabilities is incorrectly used as "disadvantages" or "discrimination" since it ignores the inherently unequal relationship between consumers and providers).

[96] For a criticism of this conventional view in the context of civil litigation, see M. Shapiro, 'The Indignities of Civil Litigation' (2020) 100 *Boston University Law Review* 501-79, 511 ("The conventional view in political and legal theory has long been that the ideal of equality before the law requires judicial blindness to differences of social status […]. But it may well be that, in conditions of socioeconomic inequality, attending to, and even highlighting, differences of social status can promote legal equality, by helping level the playing field between socially weaker and more powerful parties.").

framework of structural vulnerability.[97] Moreover, the focus on identifying and understanding disadvantages would not only help to expose and raise awareness of undesirable commercial practices that would otherwise go unnoticed but also, and most importantly, to devise mechanisms to counteract them, mitigate their impact on hyper-vulnerable consumers and ultimately restore equality in consumer transactions.

While regulation for aggravated vulnerabilities acknowledges these aspects and builds upon them, the broader framework of the structurally vulnerable consumer does not on its own assure that certain inequalities will be directly tackled and addressed by the relevant actors. Ultimately, the salience and significance of consumers' inequalities must be taken up by the legislator to obtain the consideration they deserved from judges, lawyers, and the State. Giving the framework statutory backing would help to level the playing field between socially vulnerable and more powerful parties in the specific context of certain consumer transactions.

More than discriminating or stigmatizing certain groups of consumers, identifying layers of vulnerability (e.g., poverty, illiteracy, gender, age, etc.) that impair individual consumer decision-making, directs our focus and attention to the existing institutional arrangements and the more fundamental question of how law and policy might more fairly balance vulnerabilities in the consumer-provider relationship. No meaningful answer to this question can be found without devoting attention to context and complexity and any meaningful answer will require responsive institutions and state architecture that acknowledge vulnerability—a responsive state with the capacity to take substantive action.[98]

2.3 The Normative Category of the Hyper-Vulnerable Consumer

The COVID-19 crisis not only made more salient the already deep inequalities in Argentine society but exacerbated many of them—the exceptionally long periods of lock-downs and social distancing measures increased the proliferation of online and digital tools to engage in economic transactions which created a "digital gap" for those with restricted access to internet and technology or little knowledge of how to use them, restricted access to basic health care and education, increased the levels of unemployment and poverty, among other examples of the societal impact of the pandemic response.[99] The urgent need to reduce structural inequality from

[97] Similarly, see F. R. Cooper, 'Always Already Suspect: Revising Vulnerability Theory' (2015) 93 *The North Carolina Law Review* 1339-79; Cole, 'All of us Are Vulnerable, but Some Are More Vulnerable than Others: The Political Ambiguity of Vulnerability Studies, An Ambivalent Critique. Critical Horizons', 267, note 95 above (stressing the importance of acknowledging the differences within consumers (i.e., identifying the needs of specific groups and individuals) to tackle system inequalities).

[98] On this point, see M. Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory Law* 251-76. Similarly, see L. Peroni and A. Timmers, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 *International Journal of Constitutional Law* 1056-85 (showing how the acknowledgment of vulnerability status for particular groups in the case law of the European Court of Human Rights has led the court to find special positive obligations on the part of the state).

[99] See R. A. Vazquez Ferreyra, 'La Pandemia y Los Nuevos Vulnerables' 92 *La Ley* 1-7.

the government, civil society and social associations became more pressing than ever.[100] If anything, it became evident that ignoring the vulnerabilities impairing consumers' decision-making would result in perpetuating and worsening inequality. In this context, the category of the hyper-vulnerable consumer, which had previously been discussed in scholarly circles,[101] acknowledged in the case-law[102] and explicitly introduced in reform draft proposals of the Consumer Protection Law,[103] was at last officially introduced in the Argentine legal system (Resolution SCI 139/2020).[104] The new category was formally introduced as a response to the constitutional mandate (Art. 75 Inc. 23) to promote positive action measures to guarantee consumers full enjoyment of their rights in conditions of actual equality of opportunity and treatment according to the National Constitution (Art. 42 CN; Art. 1094 CC) and other International Human Rights Treaties with constitutional status in Argentina (Art. 75 Inc. 22 CN; Arts. 1 y 2 CC).

The regulation establishes that hyper-vulnerable consumers are those who, in addition to their structural vulnerability as consumers, find themselves in other aggravated situations of vulnerability due to their age, gender, physical or mental state, or due to social, economic, ethnic and/or cultural circumstances that cause special obstacles to the full exercise of their rights as consumers.[105] The category is dynamic, flexible and relational in that it must be assessed in each particular situation. Furthermore, the regulation establishes a non-exhaustive list of situations that might be considered criteria of hypervulnerability: claims that involve the rights or interests of (i) children and adolescents; (ii) members of the LGBT+ collective; (iii) persons of over 70 years of age; (iv) persons possessing a certified disability; (v) individuals without permanent resident immigration status; (vi) those who belong to native communities; (vii) those who reside in rural areas; (viii) those who reside in impoverished neighborhoods (according to Law 27.453); and (ix) situations of socioeconomic vulnerability. Situations of socioeconomic vulnerability include being a retiree, pensioner or a worker in a dependency relationship whose gross income is less than or equal to twice the official minimum wage known as the Minimum Vital and Mobile Salaries in Argentina; belonging to certain categories of tax contributors; being a beneficiary of pregnancy or child social allowances; and being included in the special social security scheme for domestic service employees (Law 26.844), among others.[106]

One of the concrete practical implications of being considered within the new normative category is facilitating access to justice, broadly understood, for hyper-vulnerable consumers. The

[100] See E. N. Mendieta and C. D. Kalafatich, 'El Reconocimiento de los Consumidores y las Consumidoras Hipervulnerables en el Ordenamiento Jurídico Argentino' (2020) 288 *El Derecho* 1-6.
[101] See generally S. S. Barocelli, 'Los Consumidores Hipervulnerables como Colectivos de Especial Protección por el Derecho del Consumidor', in G. A. Stiglitz and F. Alvarez Larrondo (eds.), *Derecho del Consumidor* (Buenos Aires: Hammurabi, 2003), p. 165.
[102] For examples, see notes 82-84 above.
[103] See generally C. A. Hernández et al., 'Antecedentes y Estado Actual del Proyecto de Código de Defensa del Consumidor' (2020) 39 *La Ley*.
[104] Resolution Nº 139/2020 of the Secretary of Internal Commerce.
[105] Article 1, Resolution Nº 139/2020.
[106] Article 2, Resolution Nº 139/2020.

regulation obliges the state to provide specialized legal assistance and more general support when needed, and to identify ex-officio the complaints filed by hyper-vulnerable consumers to give them expedited treatment and provide additional support for conflict resolution.[107] This is not only important in cases where the consumers' losses are not significant, which reduces the incentive to pursue redress but, most importantly, in order to overcome the enforcement costs barriers and generalized apathy towards consumer rights on the part of consumers themselves. Furthermore, the regulation establishes two additional protective principles that must be observed in all procedures involving a hyper-vulnerable consumer: (i) accessible language: all communication must use clear, colloquial language, expressed in a plain, concise, understandable and appropriate manner to the conditions of hyper-vulnerable consumers; and (ii) a reinforced duty of collaboration: suppliers' conduct must be aimed at guaranteeing adequate treatment and an expedited solution of the conflict, and must demonstrate full collaboration to this end.[108] Apart from the reinforced duty of collaboration, the regulation does not contemplate any additional or stringent sanctions for suppliers who do not comply with the requirement of expedited and effective treatment of claims involving hyper-vulnerable consumers. However, the explicit recognition of a "reinforced duty of collaboration" might open a path in practice for stricter assessment of supplier behavior by judges in those cases.[109] For instance, judges might use their discretion to raise the monetary sanctions imposed in the particular case to account for the nature of those claims (i.e., higher amounts in cases of hypervulnerability).[110] Indeed, a new reform grants discretion to the authority to double economic sanctions in certain situations where hyper-vulnerable consumers are involved.[111] Another possibility might be recourse by courts to the imposition of other stringent remedies (e.g., punitive damages).[112] As a matter of fact, judicial

[107] Article 3, Resolution Nº 139/2020 establishes the following positive acts that the authority must perform: (i) provide guidance and support to hyper-vulnerable consumers in filing their claims; (ii) identify ex-officio the claims filed by hyper-vulnerable consumers to give them priority and provide additional support in solving the conflict; (iii) articulate the intervention of free legal services when necessary; (iv) promote the imposition of necessary preventive measures; (v) propose actions oriented to educate consumers and measures to eliminate access barriers; (vi) promote good practices in terms of supplier attentiveness, treatment and protection of hyper-vulnerable consumers.

[108] Art. 4, Resolution Nº 139/2020.

[109] See, for instance, CN Com., Sala E, Asociación Coordinadora de Usuarios, Consumidores y Contribuyentes c. Despegar.com.ar S.A., 26/08/2020, LL AR/JUR/34616/2020; C. Fed. Apel., Sala I, Bahía Blanca, Reimondi, José Antonio c. Banco Nación Argentina, 27/05/2021.

[110] Note that the Consumer Protection Law grants discretionary power to determine the graduation of sanctions (between established legal limits) in the particular case. Art. 49 LDC.

[111] Cf. Law 15.410/2022, Art 73 bis.

[112] For the first case invoking protections for a hyper-vulnerable consumer, see M. M. A. c. Banco Patagonia S.A. (2022). Mr. M, a retiree, received a confusing letter sent by his bank to his home address instructing him to provide details to confirm his identity and the validity of the operations he carried out peremptorily within 72 hours or the bank would close all the accounts and products that the bank held in his name. The bank's action caused the plaintiff deep discomfort, uncertainty and fear because he could not think of any reason for the company where he had done his banking for more than 50 years would summon him, a retiree, in such an intimidating and exaggerated manner. In deploying the hyper-vulnerable consumer protections, the court emphasized that Mr. M was a 72-year old retiree, the letter was confusing and unclear, the letter did not provide complete and detailed information about the request, the letter did not explain why the requested information was needed, and, when bank officials had a second opportunity to do so when the plaintiff sought them out at his local branch, they again failed to provide an explanation. Banco Patagonia was sentenced to pay compensation to the retiree for non-pecuniary damages ($30,000) and punitive damages ($50,000) for reprehensible behavior and violation of consumer dignity. For an analysis of using punitive

decisions where judges awarded higher punitive damages in cases involving hypervulnerability have already been handed down.[113] The availability of punitive damages in the realm of consumer relationships in Argentina is probably one of the most distinctive tools at the judiciary's disposal for consumer law enforcement.[114] Granted, the amounts of punitive awards are legally capped[115] and are in general relatively modest.[116] Nonetheless, punitive awards have played an important expressive[117] and indeed growing role in the increased enforcement of consumer law in Argentina, which is reinforced by the fact that they are fully awarded to individual consumers.[118]

All these measures combined under the normative force of the new category of hyper-vulnerable consumers could play an important role in altering the behavior by disincentivizing market actors from exploiting aggravated vulnerabilities in the first place, which might, hopefully, mitigate the inequality in contemporary consumer transactions. Certainly, for this regulation to be effective, efforts and resources must be allocated to devising the proper enforcement mechanisms

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damages to protect hyper-vulnerable consumers, see E. N. Mendieta, L. Colás and S. Sansone, 'Los Daños Punitivos como Mecanismo de Protección de los Consumidores Hipervulnerables', in S. S. Barocelli (ed.), *Consumidores Hipervulnerables* (Buenos Aires: El Derecho, 2018), pp. 261-94.

[113] See note 84 above. For an analysis of the case law along this line, see S. S. Barocelli, 'Incumplimiento del Trato Digno y Equitativo a Consumidores Hipervulnerables y Daños Punitivos: La Suprema Corte de Buenos Aires Confirma su Procedencia' (2013) 29 *Diario Judicial* 3.

[114] The Consumer Protection Law regulates punitive damages through two main norms. The general basic rule is expressed in Art. 52bis and Art. 8bis which identify specific types of abusive conducts susceptible to the imposition of punitive damages. Art. 52bis: "Punitive Damages. To the supplier that does not comply with its legal or contractual obligations with the consumer, at the request of the injured party, the judge may apply a civil fine in favor of the consumer, which will be graduated according to the seriousness of the conduct and other circumstances of the case, regardless of other compensation that corresponds to the consumer." Art. 8bis states that suppliers' behavior revealing undignified or inequitable treatment or that places consumers in embarrassing, humiliating or intimidating situations, may be subject to the imposition of punitive damages, without prejudice to the compensation that corresponds to the consumer. Arts. 8bis y 52bis, Law Nº 24.240 (text according to Law Nº 26.361, B.O. 7/4/2008).

[115] Note that the legal cap was recently reformed as follows: "The amount of the fine cannot be more than [2.100 basic baskets]" (Art. 119, Law Nº 27.701 B.O. 1/12/2022). This means that the limit of punitive damages as of 1 December 2022 is equivalent to USD 1.837.000.

[116] The average punitive award amounts to $200,000 Argentinean Pesos. Only recently have we seen higher amounts—$800,000 to $1,000,000—which remain far below the legal limit. For an analysis of problems related to the practical implementation of punitive awards, see M. G. Martínez Alles, 'La Dimensión Sancionadora del Derecho de Daños. Los Daños Punitivos', in D. M. Papayannis (ed.), *Manual de Responsabilidad Extracontractual* (Mexico City: Suprema Corte de Justicia de la Nación de Mexico, 2022), pp. 601-47.

[117] For the expressive dimension of punitive damages, see M. G. Martínez Alles, 'Moral Outrage and Betrayal Aversion: The Psychology of Punitive Damages' (2018) 11 *Journal of Tort Law* 245-303.

[118] Note 114 above. Punitive damages offer an interesting example of the diffusion of ideas within Latin America. In fact, Chile joined in this trend by introducing punitive damages in the framework of its Consumer Protection Law passed in 2018 (Art. 53 [c], Law Nº 21.081, 13/09/2018, although it should be noted that the law does not expressly refer to the institution as "punitive damages"). In Mexico, meanwhile, punitive damages were directly introduced by the Supreme Court of Justice in 2014 (Amparo Directo 30/2013, Primera Sala, Suprema Corte de Justicia de la Nación, 26/02/2014). For comparative insights on the distinctive path followed by those jurisdictions, see M. G. Martínez Alles, 'Punitive Damages in Argentina and Mexico: Rethinking the Scope of the Public Policy Exception', in L. Meurkens and C. Vanleenhove (eds.), *The Recognition and Enforcement of Punitive Damages Judgments Across the Globe: Insights from Various Continents* (The Hague: Eleven International Publishing, 2023), pp. 129-47. For a comparative analysis on the approach to punitive damages in Latin America and Europe, see M. G. Martínez Alles, 'Punitive Damages: Reorienting the Debate in Civil Law Systems' (2019) 10 *Journal of European Tort Law* 63-81.

and strengthening the state's capacity to adapt and respond to the challenges posed by the variety of situations involving hypervulnerability. The regulation is too recent for informed conclusions at this point; however, it holds promise as a complement to other government policies aiming at addressing inequality in Argentina.

3 Conclusion

The need to reduce societal inequality is not unique to the Global South, it is a pressing global problem that urgently demands attention. Europe and Latin America have much to learn from each other. The distinctive emphasis on either *empowerment* or *protection* adopted in those jurisdictions impacts the discussion on the relationship between consumer law and inequality: the more consumer law moves towards empowerment and embraces the average consumer standard, the less sensitive it is to the vulnerabilities that impair consumer decision-making, which hinders this model's capacity to address inequality in consumer transactions. The socially devastating aftermath of the COVID-19 pandemic coupled with the rapid acceleration of the digital economy, globally compel an approach to consumer law that recognizes the default conception of consumers as occupying a relatively although markedly vulnerable position in the market structure. In this sense, the Latin American emphasis on structural vulnerability seems better equipped to address inequality in consumer transactions than the European emphasis on the average consumer. A fresh start for EU consumer law might thus begin with recalibrating its focus on the proper balance between empowerment and protection such that the law not only considers in the equation the relevance of addressing consumer inequality, but also the deep interconnectedness of economic and social interests. Whether EU law will refocus the concept of consumer vulnerability is unclear. However, reliance on the current standards of the average consumer (the default) and the vulnerable consumer (the exception) is becoming increasingly difficult to sustain, especially in the context of the emerging global digital economy.[119] Aggravated vulnerabilities are exacerbated in the digital age because the use of algorithms and big data collection allows providers to obtain much more information than ever before about their consumers' behavior.[120] Acknowledging the combination of the structural and situational factors that impair consumer decision-making could be an important step towards overcoming the (over)emphasis on empowerment and the (over)reliance on the benchmark of the average consumer as default.

[119] Similarly, see V. Mak, 'A Primavera for European Consumer Law: Re-birth of the Consumer Image in the Light of Digitalisation and Sustainability' (2022) 11 *Journal of European Consumer and Market Law* 77-80.
[120] N. Bol et al., 'Vulnerability in a Tracked Society: Combining Tracking and Survey Data to Understand Who Gets Targeted With What Content' (2020) 22 *New Media & Society* 1996-2017.