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RESEARCH

Fragmenting Consumer Law Through Data Protection and Digital Market Regulations: The DMA, the DSA, the GDPR, and EU Consumer Law

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Abstract
The paper assesses the impact of EU digital legislation on general consumer law. To that end, it addresses the Digital Markets Act and the Digital Services Act in their interaction with the General Data Protection Regulation, as the legal instruments of economic characteristics that seem to confront consumer law more straightforwardly. The main claim that the paper makes is that they fragment consumer law by altering its bases and affecting its principal horizontal provisions, namely, the Unfair Commercial Practices Directive (UCPD, 2005) and the Unfair Contract Terms Directive (UCTD, 1993). The transformation arises from the assumption, by the digital regulations, of the competition concern for market structure and business size while ignoring the nuances among the users of digital services. The societal aims of the EU's digital policy are also relevant, particularly those concerning personal data. Overall, the digital laws frame a regulation of private relationships that does not pivot on consumption while affecting consumers. Consumer law could be gradually giving way to EU digital private law.

Keywords EU digital legislation · Market regulation · Consumer law · Fragmentation of EU consumer law · EU digital regulations · Platform regulation and EU private law

Introduction

Market regulation intertwines with economic, political, and social assumptions on the roles of states, businesses, and consumers. In a theoretical scenario, one might expect a coherent legal response to the regulation of the market's supply and demand sides and the state's intervention in the economy (Averitt & Lande, 1997). For example, a libertarian stance would likely result in no state intervention, an absence of competition and consumer laws (that address market failure, which libertarians reject), and the utmost respect for freedom of contract between private actors. However, such mirror-image legal responses to market

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regulation rarely occur because several factors determine heterogeny in the emergence and application of law. The lack of systemic coordination is even more evident under EU law that, *a fortiori*, does not have the characteristics of a legal system (Micklitz, 2018a, p. 192).

The regulation of the EU internal market has experienced several phases since the Treaty of Rome in 1957. The initial decades were dominated by the four market freedoms and competition law (Micklitz, 2018a, p. 166). The European Court of Justice (the ECJ, the CJEU or the Court) then assumed an active role in the European integration process (Micklitz, 2018a, p. 167; Unberath and Johnston 2007, p. 1239). The Court's decisions in *Dassonville* (1974) and *Cassis de Dijon* (1979) were relevant in assessing the validity of national measures "having an equivalent effect to import restrictions" (current Art 34 TFEU). Those measures were accepted if necessary to "satisfy mandatory requirements," in particular and among others, "the defence of the consumer" (ECJ, 1979, para 7). From then on, the ECJ shaped the internal market through negative harmonization when interpreting the four freedoms.

The Commission's response to *Cassis de Dijon* was to pursue market integration with positive harmonization (European Commission, 1979). In the aftermath of *Cassis de Dijon*, it stated that: "The Commission's work of harmonization will henceforth have to be directed mainly at national laws having an impact on the functioning of the common market where barriers to trade to be removed arise from national provisions which are admissible under the criteria set by the Court" (European Commission, 1979). Consumer protection stood among those admissible criteria under *Cassis de Dijon*. Furthermore, it is claimed that consumer protection was the most important objective of the *Cassis* caveat to free movement (Unberath and Johnston, 2007, p. 1240). Therefore, it was a natural target for positive harmonization measures.

Already in 1975, the Commission developed the first EC consumer policy (Council Resolution 1975), which was followed by the second consumer programme (Council Resolution 1981). The initial consumer directives stemmed from those programmes. The Single European Act (1986) granted the EEC competence over consumer legislation. It flourished as a result. The harmonization of consumer law proceeded under Article 100a of the EEC Treaty (current Art 114 TFEU), on the establishment and functioning of the internal market. Consumer law developed as market law (Micklitz, 2018a, p. 176). Its extent and relevance led to a decline in negative harmonization by the ECJ's interpretation of the four freedoms (Stuyck, 2013, p. 390).

Consumer law, as a partial regulation of the demand side of the market, coexisted with competition law (and the four freedoms), on the supply side. Articles 101 and 102 TFEU (formerly Arts 85 and 86 of the EEC Treaty) prohibit certain agreements between undertakings and control the abuse of a dominant position. Unlike consumer law, competition is grounded in EU primary law, rather than secondary legislation. This could be one reason (though not the only one) for their historical conceptual misarrangements. However, the aim of consumer welfare is present in both areas and connects them, whether directly or indirectly, even when the concept of who the consumer is differs, as competition law includes businesses alongside those acting for non-commercial purposes (Crémer et al., 2019, p. 41).

The evolutions of competition and consumer laws have not run in parallel. Both of them have experienced cycles of diverse economic assumptions on market regulation, which included ordoliberal and neoliberal views. A major consequence of those economic assumptions for competition law was focusing on market structure and competitors (ordoliberals) or on consumer welfare alone (neoliberals) (Warlouzet, 2023). For consumer law, an ordoliberal period recognized the need to grant consumer protection and acknowledged

consumer interests that were not strictly economic, such as health and safety (Council Resolution 1975); the neoliberal period influenced the concept of the consumer as a rational and confident agent (European Commission, 2007). However, competition's interest (or lack of) in market structure and size of businesses did not impact consumer law, which constantly treated businesses alike, subject to equal rules.

Therefore, even though competition and consumer laws have experienced shared economic assumptions, they differ in the consequences of those assumptions and in the time when each legal field embraced them—consumer law recurrently running behind. Outside digital markets, consumer and competition laws have coexisted in relatively watertight compartments.[1]

The relationship between the economic assumptions of competition and consumer laws should be taken with due care. First, because economic theories do not transition directly to legal norms. Second, following the institutional design of the EU, several actors have intervened, which could (and did) have conflicting interpretations, notoriously, the Commission, the EU legislator, and the ECJ. Even the same institution has shown divergent interpretations of the same concept, as is the case for the Court and the "average consumer" when it was the subject matter of primary as opposed to secondary law (Unberath and Johnston, 2007). As EU law is a pluralistic legal order, the intervention of national administrations and courts further complicates the picture. Third, general market governance with consumer and competition law was supplemented with sectoral regulations. EU regulation of finance,[2] energy,[3] transport,[4] and telecommunications[5] are particularly relevant and have had fragmentation effects on market governance.

The EU's digital framework alters the relative isolation of consumer and competition laws. That framework includes the Digital Services Act (DSA, 2022a), the Digital Markets Act (DMA, 2022b), the Data Governance Act (2022c), the Data Act (2023), and the Artificial Intelligence Act (2024) while relying heavily on the General Data Protection Regulation (GDPR, 2016). The rise of big tech companies and the failure of competition law to deal with them was a relevant justification for the new digital legal norms. They were also meant to tackle the common risks that digital technologies pose to society as a result of their extensive reach and use (European Commission, 2020a).

The new digital laws assume the vision that the Commission had at the time of drafting and enacting them, whereby market structure and the protection of competitors were perceived as a goal of antitrust, which included non-economic interests. They also drag, to a considerable extent, competition law's historical understanding of consumers as the participants in the demand side of the market, without further legal implications that could derive from the commercial or non-commercial purpose (consumers *stricto* sensu) for which they act.

However, rather than relying on traditional primary competition law (and "without prejudice" to it), the digital markets framework becomes secondary, internal market law. Article 114 TFEU justifies most of the digital laws. In its new garment of digital markets regulation, *competition* norms enter into direct legal contact with *consumers* (again,

[1] See Albors-Llorens, 2014, for some connections.

[2] Under the MiFID Regime, Directive 2014/65/EU (2014) and implementing legislation.

[3] Notoriously, under Directive 2019/944 (2019d).

[4] Air carriage is a good example of fragmentation under Regulation 261/04 (2004).

[5] See Directive 2018/1972 (European Electronic Communications Code, 2018) and, for a historical reference, Directive 2002/22 (Universal Services Directive, 2002).

"without prejudice" to consumer law stricto sensu). The italicized words (competition and consumers, not competition law and consumer law) are meant to highlight that the regulation of digital markets reunites under the same legal umbrella businesses offering digital services and consumers using them, in a broad sense, including businesses and individuals who act in a non-commercial capacity (consumers in the traditional sense).

The lack of nuance in the users of the technologies is the norm in the new digital laws, as is the existence of graduations among the providers of digital services. What matters is the risk that digital technologies bring about for the market and society, not the commercial or non-commercial purpose of their use. For both the market and society, the larger the provider, the worse for market structure (Recitals 3 and 4 DMA) and the greater the societal concerns (Recitals 75 ss. DSA). This is strikingly different from the basic assumptions of consumer law, which distinguishes among users around the purpose of their activity and does not make qualifications between businesses, with equal rules for all.

The interdependence of the economic, social, and political orders is noticeable in the digital laws. Market regulation would prevent societal risks. In a (digital) world in which the biggest power is held by a few global corporations and not the Westphalian state, private ordering assumes the functions of public law to protect fundamental rights, democratic processes, and public health (Recitals 81–83 DSA). For those purposes, the logic of abuse of power gains ground (Recital 4 DMA) over the (still present) transparency requirements aiming for an informed choice.

The transformation is impactful for the basis of consumer law. The EU has designed a legal framework for the digital environment with innovative roles for participants. As Micklitz notes, the addressee of regulation is the citizen, and that "[s]omehow emphatically, one might argue that the EU is about to establish a genuine new economic order, one that no longer distinguishes between various addressees but concerns 'the economic operator' and 'the affected'" (Micklitz, 2024, p. 73). A new *ius civilis digitalis* seems underway. The quest is to determine whether and how the new regime will cohabitate with the existing ones, especially competition and consumer laws.

This paper focuses on the latter. It aims to assess the impact of EU digital legislation on general consumer law. To that end, it will address the Digital Markets Act and the Digital Services Act in their interaction with the General Data Protection Regulation, as the legal instruments of economic characteristics (see Micklitz, 2024, pp. 74–75) that seem to confront consumer law more straightforwardly. The main claim that the paper makes is that they fragment consumer law by altering its bases and affecting its principal horizontal provisions, namely, the Unfair Commercial Practices Directive (UCPD, 2005) and the Unfair Contract Terms Directive (UCTD, 1993). The transformation arises from the assumption, by the digital regulations, of the competition concern for market structure and business size while ignoring the nuances among the users of digital services. The societal aims of the EU's digital policy are also relevant, particularly those concerning personal data.

The paper begins by looking at the transformations of competition law before the digital package was enacted, when the existing competition goals were transferred to it (The Goals of Competition Law—A Transformation). It follows with an examination of the parallel evolution of consumer law as market regulation in relative isolation from competition prior to the digital package (Constant Binarism in Consumer Law). Next, the paper presents the impact of the digital laws on general consumer law (Digital Laws as Internal Market Legislation: Transforming Key Assumptions in Consumer Law). The analysis then delves into unfair practices law (The Fragmentation of Unfair Practices Law) and the transformation of the control of unfair terms (Fragmenting and Deconstructing the Control of Unfair Terms), before concluding (Conclusion).

The Goals of Competition Law—A Transformation

Competition and consumer law aim at fairness in the internal market (Siciliani et al., 2019, p. 7; Vestager, 2022b; against, Radic, 2023). Competition law focuses mostly on supply while consumer law principally regulates demand, where the transaction is made for non-commercial purposes. Intuitively, the rules that shape competition and consumption should share an economic, social, and political perspective on the market.

However, in the EU, they are distinct disciplines lacking in coordination, in line with EU law's "silo" way of operating (Micklitz et al., 2014). As a result, competition and consumer law have co-existed in relative non-communication. They did not even emerge at the same time. While competition law was foreseen in the Treaty of Rome (especially, Arts 85 and 86), the EU did not assume competence over consumer law until the Single European Act (1986) (Micklitz, 2018a, p. 174).

The competition law provisions in the treaties have remained mostly unchanged since the Treaty of Rome (Warlouzet, 2023, p. 38). Primary EU law prohibits certain agreements that affect competition in the internal market, allowing some exceptions (Art 101 TFEU). It also bans any abuse of a dominant position (Art 102 TFEU). However, the stability of the norms has not resulted in uniformity in their application. Competition law does not exist in a vacuum (Whish & Bailey, 2012, p. 20) and has not remained alien to the political and economic changes in the EU.

The goals of competition law have shifted since its first recognition in the Treaty of Rome. Warlouzet organizes the evolution into four stages: (i) the early years of the European Economic Community (EEC), (ii) 1962–2003, (iii) 2003–2014, and (iv) 2014–to date (Warlouzet, 2023).

In the first stage, the then-recently enacted competition norms resulted from negotiations that led to a syncretic result, which would have lacked a clear policy orientation (Cseres, 2022, p. 5; Warlouzet, 2023, p. 38). Some scholars suggest, instead, that an ordoliberal approach to competition was present in the EEC since its inception in 1957 (Drexl, 2011, p. 439; Gerber, 1994, p. 72). The inclusion of competition provisions in the Treaty of Rome could have responded to the ordoliberal stance on the need for an economic constitution (Drexl, 2011, p. 439).

In any case, the ordoliberal flavour became evident in 1962 with the adoption of Regulation 17/62, implementing Articles 85 and 86 of the EEC Treaty (Council Regulation 1962; Cseres, 2022, pp. 18–19). Ideas rarely transition purely to facts. The same can be said for ordoliberalism and competition law. However, key milestones in the EEC competition policy starting in 1962 can be traced back to ordoliberal ideas. The first was the recognition of an autonomous competition policy (Warlouzet, 2023, p. 41), with strong enforcement powers held by the European Commission (Cseres, 2022, p. 8). Competition policy did not depend on other EEC policies, such as industry or environment, even though exceptions were admitted in practice (Whish & Bailey, 2012, p. 157). Second was the concern for market structure and competitors as a goal of competition law (Siciliani et al., 2019, p. 56). This responded to the ordoliberal view about the interdependence of orders (*Interdependez der Ordnungen*): economic, social, and political. The economic order influences the social and the political components of societies. Economic concentration by private companies was seen as pervasive as state intervention in the economy. Monopolies and cartelisation played a role in the years leading to and during the Nazi regime. Preventing them was vital to ensure political freedom (Drexl, 2011, pp. 430–431; Warlouzet, 2023, p. 40). Therefore, the goals of competition law were (at least indirectly) not merely economic. By focusing

on market structure to prevent concentration with an eye on small and medium enterprises (SMEs), competition law would have spillover effects on society.

The wind started to change in the 1980s. Several factors would have led to this. A certain Americanisation of Europe reinvigorated the prestige of the American understanding of the aims of competition law (Warlouzet, 2023, p. 44). Under the influences of the Second Chicago School, US antitrust law focused at that time on economic efficiency as the sole goal. An increased neoliberal approach to the internal market (Micklitz, 2018a, pp. 181–186), successive Irish and British commissioners in charge of the European competition authority during the Thatcher period (Commissioners Peter Sutherland and Leon Brittan), and prevailing views in the competition community were persuasive in the transformation of the goals that European competition law should have (Warlouzet, 2023, pp. 44–45).

Departing from an ordoliberal understanding, EC and then EU competition law began to focus solely on "consumer welfare" (Albors-Llorens, 2014, p. 166). An effects-based, measurable economic approach replaced the previous aims of competition law (Siciliani et al. 2019, p. 56). Thereafter, antitrust law was aimed at protecting competition rather than competitors, in the understanding that "protecting competitors from their more efficient rivals is harmful to social and consumer welfare" (Whish & Bailey, 2012, p. 22). Under this approach, the key question for an antitrust investigation should be whether a business practice leads to consumers paying higher prices (Whish & Bailey, 2012, pp. 21–22). Other goals remained alien to competition law.

This shift materialized with Regulation 1/2003 (Council Regulation 2003), for Articles 81 and 82 of the Treaty (currently, Arts 101 and 102 TFEU), and Regulation 139/2004 for merger control (Council Regulation 2004; Cseres, 2022, pp. 9–11; Warlouzet, p. 45). Regulation 1/2003 (Council Regulation 2003) decentralized the enforcement of competition law, granting more relevant participation to Member States while ensuring cooperation between them and the Commission. Regulation 139/2004 (Council Regulation 2004) distributed merger control between the Commission and Member States upon quantitative criteria. Looking at the enlargement of the EU to Eastern Europe, Cseres considers that the move from an ordoliberal to a neoliberal understanding of the goals of competition law responded, among others, to a certain distrust for the national enforcers following decentralization (Cseres, 2022, p. 11). Sticking to an economic approach would prevent national competition authorities from implementing their national competition interests within the EU governance framework (Cseres, 2022, p. 11).

Decentralization was accompanied by Commission guidance. Several documents made the "more economic approach" to competition law evident. A good example is the Guidance on the Commission's enforcement priorities in applying Article 82 EC Treaty (European Commission, 2009). Its Recital 5 stated that: "[t]he Commission, therefore, will direct its enforcement to ensure that markets function properly and *that consumers benefit from the efficiency and productivity which result from effective competition* between undertakings." Recital 6 consistently stated: "the Commission is mindful that *what really matters is protecting an effective competitive process and not simply protecting competitors*. This may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market."[6]

[6] Italics added.

Neelie Kroes, the Commissioner for Competition (2004–2009), expressed the prevalence of the "consumer welfare" approach to competition law during a speech at the renowned Fordham Conference on International Antitrust Law and Policy in 2005. "My own philosophy on this is fairly simple. First, *it is competition, and not competitors*, that is to be protected. Second, ultimately the aim is to avoid consumer harm. I like aggressive competition – including by dominant companies – and I don't care if it may hurt competitors – as long as it ultimately benefits consumers" (Kroes, 2005, p. 3).

The wind started to blow from a different direction with the appointment of Margrethe Vestager as Commissioner for Competition in the Juncker presidency (2014–2019), which was renewed under President von der Leyen's first term (2019–2024; Warlouzet, 2023, pp. 45–46). During the latter period, Vestager cumulated her position in the competition authority with an Executive Vice Presidency of the Commission for a Europe Fit for the Digital Age. Therefore, was influential in both antitrust and the regulation of digital markets.

As with previous shifts, the economic and political context affected the goals of competition law. This time, the push came from the dominant role of certain big tech companies (known as GAFAM). They drew the attention of the Commission and resulted in significant fines (Witt, 2023, p. 629). The political discourse and subsequent legal interpretation focused on the harm that big tech companies pose to the economy and society.

After years of an economistic approach to antitrust, the Commission recovered a central idea of its ordoliberal past: that competition law could have goals that exceed consumer welfare. A "principle-based approach" replaced the "more economic" stance to antitrust. In a later speech, Vestager explained that a multi-purpose competition law had allowed the Commission to provide an early response to the challenges that large digital players brought along (Vestager, 2022a, b).

The Commission reinstalled market structure as an aim of competition law (Warlouzet, 2023, p. 46), with a concern for the protection of SMEs. Contrary to the previous decade, competition law was again (as in the 1962–2003 period) a matter not only of competition but of competitors. The preoccupation about the impact of market concentration on democracy and fundamental rights, notoriously in the digital sphere, resembled ordoliberal concerns for the interdependence of the economic and political orders. However, history does not repeat itself. The Commission started to embrace non-competition criteria such as the protection of privacy and the environment (Vestager, 2022a, b; Warlouzet, 2023, p. 46), which could be seen as more interventionist than what the ordoliberals would have accepted.

Two examples showcase the shift in the goals of competition law: a speech by Commissioner Vestager (Vestager, 2014) and the amendment of the Guidance on the Commission's enforcement priorities in applying Article 82 EC Treaty (European Commission, 2023). They will serve to compare and contrast, respectively, with the speech by Commissioner Kroes (Kroes, 2005) and the original Commission Guidance (European Commission, 2009), which were previously quoted.

In an evaluation hearing of the Committee on Economic and Monetary Affairs of the European Parliament, Vestager gave her views on the goals of competition law. She highlighted the importance of SMEs in competition law and seemed to reject the autonomy of antitrust law while referring to non-competition criteria. Vestager then stated that: "Companies succeed when they compete on merit, but in important markets like energy and the digital sector, particular alertness is needed to ensure that dominant players will respect the rules. *It is all the more important to allow innovation from small and medium-sized companies to flourish*." (…) "*I do not see the competition portfolio as a lonely portfolio*; on

the contrary." (…) "Regulation shapes market reality." (…) "*To me this is not only about firms and customers; it is about citizens*. It is a people thing. It is about us." Commissioner Vestager insisted on this approach to competition law some years later (Vestager, 2022a, b).

In 2023, the Guidance on the Commission's enforcement priorities in applying Article 82 EC Treaty was amended (European Commission, 2023). According to Recitals 5 and 6 of the original communication (European Commission, 2009), what mattered was economic efficiency and protecting competition, not competitors—the consumer welfare goal. Instead, Recital 1 of the amendment affirms that Articles 101 and 102 TFEU (core in competition law) "can moreover contribute to achieving objectives that go beyond consumer welfare, such as plurality in a democratic society."

The transformation of the goals of competition law reflects a change in the perceptions of the role that law should have in market governance, which was extrapolated to the regulation of digital markets. Before getting there, it is important to explain the evolution of the demand side of the market, in which consumer law stands out.

Constant Binarism in Consumer Law

The Parties to a Consumer Relationship

The Treaty of Rome did not enshrine an express EC Community competence on consumer protection. Consumers were only mentioned in relation to agricultural policy and competition (European Commission, 1977, pp. 6–7). One of the objectives of the common agricultural policy was to ensure that supplies reached consumers at reasonable prices (Art 39 (1)(e) TEC). As regards competition, Article 85(3) TEC permitted certain agreements between undertakings if, among other things, they allowed consumers a fair share of the resulting benefit. Article 86(b) TEC framed a situation of abuse of a dominant position when it limited production, markets, or technical development to the prejudice of consumers.

The first EEC consumer programme (Council Resolution, 1975) rationalized the need for a common consumer policy in Article 2 TEC, whereby the EEC had the task of "an accelerated raising of the standard of living." The Commission derived from this mission the requirement to protect "the health, safety and economic interests of consumers" (Council Resolution 1975). In the absence of express Community competence, the first directives were grounded in Article 100 TEC (currently, Art 114 TFEU), on the establishment and functioning of the internal market. This constitutional justification for enacting secondary consumer law (market-oriented) survived several treaty reforms and has remained central.

Until the EEC was granted competence over consumer protection with the Single European Act (1986), the European economic constitution largely rested on the four market freedoms and competition (Micklitz, 2018a, p. 166). That could point to a certain connection between the goals of competition and the incipient consumer policy, at least until 1986. It must be remembered that the aims of competition law were read with an ordoliberal lens at that time. A theoretical thread between competition and consumer law can be found. The requirement to protect consumers against businesses was historically part of an ordoliberal understanding of an economic constitution (Drexl, 2011, pp. 434–435). Consumer protection complemented competition law as a way of addressing market failures.

In particular, the first EEC consumer programme was conceived in response to the "abuses and frustrations" in the market since the balance between businesses and consumers had become weighted in favour of the former (Council Resolution 1975, § 6). The programme is marked by the language of power imbalance and the need to protect consumers from abuses (Council Resolution 1975, §§ 8, 9, 19; Ouyang, 2024). The aims of consumer policy were not restricted to economic interests. Those were one out of five aims that started with consumer health and safety (Council Resolution 1975, § 14). The programme contained a definition of a consumer that could reach a societal dimension: "The consumer is no longer seen merely as purchaser and user of goods and services for personal, family or group purposes but also as a person concerned with the various facets of society which may affect him either directly or indirectly as a consumer" (Council Resolution 1975, § 3). Therefore, the first EEC consumer programme contained ordoliberal traces and was aligned with how the goals of competition law were then perceived.

However, unlike the aims of competition law at the time, market structure had no impact on the incipient consumer policy nor on the regulation of consumer protection that followed. Power imbalance was assumed to exist between consumers and businesses in general, without any nuances in the latter's obligations based on their size. Subsequent case law of the ECJ recognized the existence of power and information imbalances in a business-to-consumer relationship (*Océano Grupo* [2000] para 25, and recurrently after it). However, those imbalances were stable and treated identically for all businesses.

The uniform consideration of a transaction's business and consumer sides has remained a hallmark of EU consumer law, which assumes a "contractual position logic" (de Elizalde, 2021, pp. 38–41). Consumer protection depends on the purpose of a contract, whether commercial/professional or private. Consumer law is functional (Terryn, 2016, p. 280). The same person could be treated as a consumer or a business in different transactions, depending on whether she pursues private or commercial aims in each contract, respectively.

The Doorstep Selling Directive (Council Directive 1985) was the first to provide a European legally binding definition of a consumer. In it, the consumer meant "a natural person who (…) is acting for purposes (…) outside his trade or profession." The trader was "a natural or legal person who (…) acts in his commercial or professional capacity" (Art 2, Council Directive 1985). Since then, consumer law has maintained a functional approach to the parties of a consumer relationship, with slight terminological variations on the purposes that categorize a business: "trade, business, or profession" (as in Arts 2b and 2c UCTD, and Arts 1a and 1c CSD 2019b) or, more recently, "trade, business, craft or profession" (as in Arts 2a and 2b UCPD 2005, Arts 2(1) and (2) CRD 2011, and Arts 2(5) and 2(6) DCD 2019c). In all circumstances, the consumer is defined in opposition to the business, as one who is not a business.

The harmonized concept of consumers and businesses across legal instruments justifies that the ECJ decided that the concept of "trader" under the Unfair Commercial Practices Directive (2005) and the Consumer Rights Directive (2011) should be interpreted uniformly (*Kamenova* [2018], paras 27–29). The Court additionally reasoned that as both instruments are based on Article 114 TFEU, they pursue the same objectives of contributing to the functioning of the internal market and achieving a high level of consumer protection. Hence, the definition of trader in the respective instruments should be interpreted in the same way (*Kamenova* [2018], para 28). Both arguments by the ECJ, the similarity of the definitions and Article 114 TFEU as a shared legal basis (that is extended in consumer legislation), lead naturally to extrapolating the uniform notion of a trader to other legislative instruments beyond the Unfair Commercial Practices Directive and the Consumer Rights Directive. Moreover, as the consumer is defined negatively, as one who is not a

trader, a uniform interpretation of a consumer across legal instruments follows. The Court reached that conclusion for the meaning of a consumer under the Unfair Contract Terms Directive and the Consumer Rights Directive (*YYY, S.A.* [2023], paras 42–44).

The definitions of consumers and businesses are not only functional but also objective (Terryn, 2016, pp. 273–74). The purpose of a transaction defines consumer protection disregarding the personal characteristics of the parties. Businesses hold obligations with consumers without any consideration of their size or expertise. Consumers who act for non-commercial purposes are protected even if they are knowledgeable and experts in the field (Adicae [2024], para 49; *Costea* [2015], para 21; *Petruchová* [2019], para 55; Schrems [2018], para 39).

The Average Consumer as an Instrument to Reinforce Binarism

A characteristic of consumer policy that began with the first EEC consumer programme was the need to remedy the informational imbalance between businesses and consumers. The idea was that increased choice would allow a better quality of life (Micklitz, 2018a, p. 172). The first EEC consumer programme mandated legislation to prevent unintentional choices, following misleading advertising or labelling (Council Resolution 1975, § 19). In an ultimately key instruction, the Commission prioritized formulating general principles on information that "should apply in the preparation of all specific directives and other rules relating to consumer protection" (Council Resolution 1975, § 35). Information would allow consumers to "make a rational choice between competing products and services" (Council Resolution 1975, § 34). The cornerstones for the information paradigm of EU consumer law as a regulatory tool and the approach to the consumer as "*homo economicus*" were set. Information requirements rocketed in legislation. Ultimately, the consumer evolved into a rational *and* confident actor, with the transformation of the economic assumptions underpinning EU policies after the Lisbon agenda (Micklitz, 2018a, pp. 181–186). According to the Commission, "Confident, informed and empowered consumers are the motor of economic change as their choices drive innovation and efficiency" (European Commission, 2007). The story is well-known.

The rational consumer should be able to understand the information that the law requests businesses to provide. "The information paradigm underlines transparency as the main method of consumer protection" (Siciliani et al., 2019, p. 19). Transparency entails understanding. The average consumer was gradually chosen as the benchmark to determine the comprehensibility of information. The average consumer is deemed rational, reasonably well-informed, observant, and circumspect. Such a definition first appeared in case law (Durovic, 2016, p. 30; *Gut Springenheide* [1998], para 31). It was replicated in the Unfair Commercial Practices Directive (Recital 18) and therein used to determine the fairness of business-to-consumer practices (Art 5(2) UCPD), including those affecting consumers' intent (Arts 6 and 7 UCPD), as well as their freedom of choice and conduct (Art 8 UCPD).

The ECJ extended the average consumer to legal instruments that lacked the same standard. For the Unfair Contract Terms Directive, it first did so in *Kásler* to interpret the transparency requirements under Articles 4(2) and 5 UCTD (*Kásler* [2014], para 74). The Court also resorted to the average consumer to interpret the Consumer Rights Directive. In particular, to determine the understanding of what constituted a "business premise" under Article 2(9) CRD (*Verbraucherzentrale Berlin* [2018], para 73) and the information that should be displayed under Article 8(4) CRD (*Walbusch* [2019], para 47). Therefore, the

average consumer has become a cross-legislative standard to assess the transparency of information.

The existence of a standard to determine the intention (through comprehended information or transparency) and freedom of consumer choice is coherent with the objective definitions of a business and a consumer.[7] Under EU consumer law, the parties to a consumer transaction are determined by purpose only, ignoring business size as well as consumer knowledge and expertise. Rights and obligations are group-based; they are equal for all consumers and businesses in similar circumstances. Individuality does not matter. If a consumer is anyone who acts for non-commercial purposes, without considering individual characteristics, then it seems logical that a (generalized) standard is used to determine the transparency (and fairness) of business practices and the validity of consumer choice. The average consumer has been the chosen standard. The Court has deemed the average consumer a "legal fiction," a "single abstract entity" that allows a unitary assessment of transparency (*Adicae* [2024], para 52).

The consequential need for a standard is a different issue from establishing how demanding it should be. The recognition of a standard does not close the door to behavioural criticisms that affect the current definition of the average consumer as a rational agent; these criticisms are manifold in the literature.[8]

The average consumer is not the only standard in consumer law, as the law recognizes certain instances of vulnerability. Article 5(3) UCPD grants higher levels of protection to "clearly identifiable *groups* of consumers"[9] who are particularly vulnerable due to age, mental or physical infirmity or credulity. The same categories are mentioned in Recital 34 CRD. Despite differing from the average consumer, the vulnerable consumer under the Unfair Commercial Practices Directive is also a group-based standard. Other instances of vulnerability are present in the regulations of services (including energy and telecommunications) but focus on economic weakness instead.[10] They also use clusters to determine a higher level of protection than the "normal customer."

Digital Laws as Internal Market Legislation: Transforming Key Assumptions in Consumer Law

The Goals of the Digital Regulations: Taming the Giants and General Consumer Law

The digital revolution brought with it new EU policies and legislative action with profound consequences for the regulation of the internal market. The digital transformation caught the attention of the Juncker presidency (2014–2019) as an opportunity to boost economic growth (European Commission 2015; Juncker 2014). Since 2015, the Commission began to shape "a digital single market," with the understanding that digital technologies are not a specific sector "but the foundation of all modern innovative economic systems" (European Commission, 2015). The initial response of the Commission aimed at amending existing legislation and adopting particular measures, including those related to ICT infrastructure

[7] See above, 3.1.

[8] For an updated account, see Ouyang, 2024.

[9] Italics added.

[10] See Directive 2019/944 (2019d), for energy, and Directive 2018/1972 (European Electronic Communications Code, 2018) for telecommunications.

(European Commission, 2015). The General Data Protection Regulation was enacted during this period, as a cross-sectoral legal instrument, not restricted to the digital world but encompassing it.

The first von der Leyen presidency (2019–2024) pushed the digital single market forward. It included it within one of the six Commission's priorities, "A Europe fit for the digital age" (von der Leyen, 2019). It created an executive vice presidency of the Commission for a Europe Fit for the Digital Age, with Margrethe Vestager at its helm, which she combined with her (re-elected) job as competition commissioner. The Commission's communication "Shaping Europe's Digital Future" (European Commission, 2020) triggered the proposals of the Digital Services Act (European Commission, 2020c) and the Digital Markets Act (European Commission, 2020d). It also announced actions leading to a Data Governance Act and a Data Act (ultimately both resulting in legislation) and a White Paper on AI. The parallel communication "A European Strategy for Data" (European Commission, 2020b) gave a more precise roadmap for such actions when related to data, aiming at the EU as a leader in a data-driven society.

The Commission's communication "Shaping Europe's Digital Future" (European Commission, 2020) triggered a change in the normative isolation that competition and consumer laws had in the offline world. In the provision of digital services, they became related under a common legal framework largely based on Article 114 TFEU, on the establishment and functioning of the internal market. All the new legislative instruments are grounded in Article 114 TFEU (the AI Act [2024] is additionally justified in Art 16 TFEU). For general competition, this treaty justification is innovative (Warlouzet, 2023, p. 47). Moreover, it implies departing from an ex-post assessment of agreements and conducts to ex-ante mandated obligations (de Streel, 2024, p. 7; Podszun, 2023). Instead, Article 114 TFEU has been the most common base for consumer law.

It is uncertain whether the EU "digital laws" conceive digital services as an economic "sector" or rather a phenomenon that runs across sectors. The DMA uses the singular form "sector" (Arts 1(1) and 2(4) DMA), but the DSA opts for the plural (Cauffman & Goanta, 2021, p. 760; Recital 127 DSA). The reality is that the companies targeted by regulation operate in diverse activities that could be classified as sectors (Podszun, 2023, p. 7), including tourism (Booking), retail (Amazon, Temu, Ali Express), and media and communication (YouTube, X), to mention just a few. This makes the regulation of digital markets an innovative experiment that cannot easily be directed to previous (parcelled) experiences of sector regulation, such as energy, telecommunications, or finance. Notwithstanding this, they have in common that they fragment general consumer and competition laws by creating special legal regimes, with special rules and standards. The extent of fragmentation for consumer law is more significant than ever under the new digital framework, as will be explained.

On this note, the digital laws assume the goals that competition had when they were proposed and enacted.[11] The Commission had departed from the "consumer welfare" approach, which focused on economic efficiency as the sole aim. Starting approximately in 2014, it recuperated market structure as a goal of competition law (Warlouzet, 2023, p. 46), with a concern for the protection of SMEs. It also began to embrace non-competition criteria such as privacy. The shift occurred against the backdrop of the challenge that big tech companies posed to antitrust in the digital environment.

[11] See above, "The Goals of Competition Law—A Transformation.".

However, competition law alone was considered unfit to address that challenge. The new digital laws were a reaction to the ineffectiveness of competition law in dealing with big tech (European Commission, 2020; Podszun, 2023; Witt, 2023). Lengthy (Bernaerts, 2023, p. 54; Witt, 2023, p. 629) and costly (Bernaerts, 2023, p. 54; Podszun, 2023, p. 3) competition enforcement proceedings justified the move to ex-ante regulation. An extended concern for the broader societal impact of digital technologies, and big tech in particular, was equally influential (European Commission, 2020; Recital 75 DSA).

The transformation of the legal approach (from antitrust to market regulation) did not leave behind the goals that competition law had at the time. Notoriously, it maintained its preoccupation with market structure and the embracement of non-competition aims. The Commission justified the need for new digital laws in the following terms: "[b]ased on the single market logic, additional rules may be needed to ensure contestability, fairness and innovation and the possibility of market entry, as well as public interests that go beyond competition or economic considerations' (…) [to] be prepared to act to forcefully defend our democracies" (European Commission, 2020, pp. 5–6).[12]

The bigness of tech companies was conceived as an aggravated threat to the market and society (European Commission, 2020) which justified enhanced obligations on them (Chiarella, 2023, p. 35). In all cases, bigness refers to the number of users of digital services, and sometimes also to the turnover and market value of companies (as in Art 3(2)(a) DMA). The Digital Services Act states that "[v]ery large online platforms and very large online search engines may cause societal risks, different in scope and impact from those caused by smaller platforms" (Recital 76 DSA). The Digital Markets Act addresses the "serious imbalances in bargaining power" that big players (the market gatekeepers) can provoke, leading to unfair practices and conditions (Recital 4 DMA).

The result was an asymmetric regulation of digital markets (Bernaerts, 2023, p. 56; Podszun, 2023, p. 9). The size of the business actor determines the application of all (as for gatekeepers in the DMA) or some of the new digital rules (as for very large online platforms and very large online search engines under the DSA). Unlike competition law, there is no room to justify the pro-competitive effects of prohibited conducts (Bergqvist & Faustinelli, 2022, p. 2; Recital 23 DMA7). Moreover, the digital laws encompass societal interests, notoriously fundamental rights, democratic processes, and public health (see Recitals 79–83 DSA).

The asymmetric regulation of digital markets is impactful on business-to-consumer relations. It abandons the binary business/consumer roles that determine the application of consumer protection based on the commercial/non-commercial purposes of the parties (Micklitz, 2024, p. 72). It creates differences in the traders' obligations and the corresponding consumer rights, which now depend on business size. In their interaction with the General Data Protection Regulation, which is omnipresent in the digital legal framework, the digital laws could affect consumer law's horizontal instruments, especially the Unfair Commercial Practices Directive and the Unfair Contract Terms Directive. They both rely on the binarism of consumer law, which the digital laws put at stake.

The following sections aim to expound on those problems to determine the extent of the fragmentation of consumer law by the digital and data protection regulations. The assessment will be restricted to the three legal instruments that are closest to the economic

[12] Between brackets added.

interests of consumers and that have the most significant interaction with consumer law: the Digital Markets Act, the Digital Services Act, and the General Data Protection Regulation.

The Digital Markets Act and the Digital Services Act harmonize internal market rules, as consumer law has historically done (Art 114 TFEU). The Digital Markets Act aims at "contestable and fair markets in the digital sector (…) to the benefit of business users and end users" (Art 1(1) DMA). While it mostly addresses businesses, some rules empower end users (Podszun, 2023, p. 2) who could be consumers. The Digital Services Act aims to contribute to the proper functioning of the internal market by setting rules for a safe and trusted online environment in which fundamental rights, including the principle of consumer protection, are respected (Art 1(1) DSA). The users of the intermediary services that the Digital Services Act targets could be consumers. Thirdly, even though the General Data Protection Regulation is not grounded in market regulation as it relies on Article 16 TFEU (the right to data protection), it incorporates the internal market freedoms through the free flow of data (Art 1(3) GDPR). The digital laws reinforce the economic aspects of data, including personal data, which are influential to digital markets (Finck, 2024). Again, the data subject could be a consumer.

Deconstructing Consumer Law Through the Obliged and Protected Parties

The Digital Markets Act, the Digital Services Act, and the General Data Protection Regulation deconstruct consumer law by redefining those obliged and protected under such legal regimes. Consumer law assumes a binary classification of consumers and traders based on the commercial/non-commercial purposes of a conduct or a transaction, which triggers equal rules for all businesses.[13] Instead, the digital laws (the DMA and the DSA) fragment the actors in the supply side of the market and consequently break up businesses' obligations. Following the legislator's concern for market structure, some big undertakings are under more demanding obligations, while small and medium enterprises are, on occasion, exempted. The asymmetric regulation has developed new definitions that categorize the obliged parties. They coexist with the GDPR, the application of which is alien to the commercial purpose of transactions.

Different concepts from that of the "consumer" determine those protected by regulation and granted rights. New addressees of regulation have flourished that overlap with the consumer, thus deconstructing the binarism of consumer law. In the *ius civilis digitalis* that could be underway (time is needed to determine the radicality of the change), the consumer is marginalized in favour of the citizen (Micklitz, 2024, p. 73), a trend that is also present in the GDPR.

Starting the assessment with the Digital Markets Act, it tackles gatekeepers and sets obligations for them alone. Gatekeepers are undertakings enjoying a durable position in the provision of core platform services that are impactful on the internal market and represent an important gateway for business users to reach end users (Arts 2(1) and 3(1) DMA). The law assumes that those requirements are reunited when: (a) for the impact on the internal market, a business meets a certain turnover (7.5 billion euros) or market capitalization (75 billion euros) and provides the same core platform service in at least three Member States; (b) to determine that it is an important gateway, that the platform service has 45 million monthly active end users and 10,000 business users; (c) the requirement of holding

[13] See above, "The Parties to a Consumer Relationship.".

a durable position in the market is presumed when the number of users in point (b) is present in the last three financial years (Art 3(2) DMA).

To date, the Commission has designated seven gatekeepers (Alphabet, Amazon, Apple, Booking, Bytedance, Meta, and Microsoft), providing twenty-four core platform services: social networks (TikTok, Facebook, Instagram, and LinkedIn), interpersonal communication (Whatsapp and Messenger), intermediation (Google Maps, Google Play, Google Shopping, Amazon Workplace, App Store, Booking.com, and Meta Marketplace), video sharing (YouTube), advertising (Google, Amazon, Meta), browsing (Chrome and Safari), search (Google Search), and operating systems (Google Android, iOS, iPadOS, and Windows PC OS) (European Commission, 2024a).

The addressees of the core platform services are classified as "end users" and "business users." The latter are natural or legal persons "acting in a commercial or professional capacity using core platform services for the purpose of or in the course of providing goods or services to end users" (Art 2(21) DMA). The end user is a natural or legal person who is not a business user (Art 2(20) DMA). Therefore, consumers interacting with gatekeepers fall under the category of end users, as they intervene in a non-commercial capacity.

The Digital Markets Act does not define consumers. It signals business users and end users as the beneficiaries of regulation (Art 1(1) DMA). However, the (undefined) consumer appears concerning auditing obligations (Art 15(1) DMA) and, more importantly, when including the DMA (Arts 42 and 52 DMA) in the list of EU legislation that can serve as a basis for collective actions under the Representative Actions Directive (2020). Therefore, under the DMA, natural persons acting for non-commercial purposes are targeted as end users and, more seldomly, as consumers.

Moving to the Digital Services Act, it is an internal market instrument that regulates intermediary services in the information society. The parties obliged under this regulation are presented in a blurry manner. In the definitions section (Art 3 DSA), the DSA focuses on the intermediary services that it targets: mere conduit, caching, and hosting (Art 3 (g) DSA), with specific definitions for online platforms and online search engines (Art 3 (i) and (j) DSA). It can be implied that the obliged are those providing such intermediary services. The operatory rules of the DSA state so and references to the "providers" of intermediary services are the norm throughout the text.[14]

Just like the DMA, the DSA assumes market structure as a goal of regulation and considers the impact of bigness over fundamental rights, democratic processes, and public health (Recitals 79–83 DSA). On that basis, it widens the obligations of the providers of "very large online platforms" (VLOPs) and "very large online search engines" (VLOSEs), especially in the management of systemic risks (Chapter III, Sect. 5 DSA, 2022).

To be designated either of them, the Digital Services Act requires an average number of 45 million monthly active recipients of the intermediary service (Art 33(1) DSA). To date, the Commission has designated twenty-three VLOPs (AliExpress, Amazon Store, App store, Pornhub, Booking, Google Play, Google Maps, Google Shopping, YouTube, Shein, LinkedIn, Facebook, Instagram, Pinterest, Snapchat, Stripchat, TikTok, Temu, X, XVideos, XNXX, Wikipedia, and Zalando) and two VLOSEs (Bing and Google Search) (European Commission, 2024b). Under the same vision of market regulation, the DSA narrows certain obligations for small-and-medium enterprises (as in Art 19(1) DSA) while remitting the definition of SMEs to the Commission Recommendation of 6 May 2013 (European Commission, 2003).

[14] See, for example, Articles 11 DSA ss.

Overall, on the supply side of the market, the Digital Services Act opts for alternative notions to that of "trader," which is uniform in consumer law. The DSA contains a definition of trader mimicking that of consumer law and marked by the commercial purpose of an activity (Art 3(f) DSA). However, except for one rule (on the responsibility of platforms conveying the impression that they act as sellers of products or suppliers of services, Art 6(3) DSA), the category of traders is only used to determine some of the obligations of the providers of online platforms (Chapter III, Sect. 4 DSA). Hence, they are not the target of regulation as businesses are organized according to different categories, based on the intermediary service provided.

The addressees of the intermediary services under the DSA are the "recipients of the service" (Art 3(b) DSA), who are defined as "any natural or legal person who uses an intermediary service, in particular for the purposes of seeking information or making it accessible." Recipients of the service encompass business users, consumers, and other users (Recital 2 DSA), with the subcategories of the "active recipient" of an online platform (Art 3(p) DSA) or an online search engine (Art 3(q) DSA). As with traders, the DSA assumes consumer law's definition of "consumer" (Art 3(c) DSA). However, except for one rule (Art 6(3) DSA), it is only a tool to determine some of the obligations of the providers of online platforms (Chapter III, Sect. 4 DSA).

The third instrument under consideration is the General Data Protection Regulation, which is not a piece of internal market regulation, even though it harmonizes rules relating to the free movement of personal data (Art 1(1) GDPR). Data protection interacts with consumer law (Helberger et al. 2017), competition law (Lynskey and Costa-Cabral 2017), and the digital laws (Finck, 2024; Koolen, 2023). However, unlike the latter, in principle it applies uniformly, disregarding the size of those targeted by regulation.

Under the GDPR, the key functions that trigger obligations are the controller, the processor, and the recipient of data. The "controller" can be anyone who determines the purposes and means of the processing of personal data (Art 4(7) GDPR). The "processor" processes data on behalf of the controller (Art 4(8) GDPR). The recipient is anyone to whom personal data are disclosed (Art 4(9) GDPR). The beneficiary of the GDPR is the "data subject," an identified or identifiable natural person (Art 4(1) GDPR). A reference to the "consumer" is absent. However, Recital 42 GDPR mentions the Unfair Contract Terms Directive in relation to pre-formulated declarations of consent. Overall, as the commercial purpose of data treatment is irrelevant, it is unsurprising that the GDPR ignores the concepts of business/trader and consumer.

The interaction of the DMA and DSA with the GDPR has fragmentation effects on consumer law. It partitions businesses' obligations based on size and enlarges the beneficiaries of those obligations to reach non-consumers. The alteration of consumer law's binarism as to the protected and obliged has domino effects over its main rules and standards.

The following sections outline the impact of the DMA, the DSA, and the GDPR on general consumer law. The focus will be on the two main horizontal instruments of consumer law: the Unfair Commercial Practices Directive and the Unfair Contract Terms Directive.

The Fragmentation of Unfair Practices Law

Unfair Practices in the Digital Markets Act

The Digital Markets Act lays down harmonized rules for contestable and fair markets where gatekeepers are present to the benefit of business users and end users (Art 1(1)

DMA). Therefore, it aims to tackle the lack of contestability and unfairness of digital markets. Contestability relates to "the ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services." On unfairness, Recital 33 DMA mentions that it "should relate to an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage." End users (including consumers) seem absent from the definitions of contestability and unfairness.

However, their role as beneficiaries of the regulation (Art 1(1) DMA) is not indirect. The DMA considers that market contestability and fairness are put at risk by the special technical and economic characteristics of core platform services in combination with "unfair practices" (Recital 2 DMA). The DMA lacks a definition of those unfair practices. They are addressed in the recitals (see Recitals 2, 4, 31, 35, and 42 DMA) where it is mentioned that the imbalance in the bargaining power of gatekeepers could result in "unfair practices" for business users and *end users* (Recital 4 DMA).[15] Moreover, the obligations that the DMA introduces correspond to those practices that have a particularly "negative direct impact" on business users and *end users* (Recital 31, DMA).[16]

Therefore, the gatekeepers and end users become related by unfair practices that the former could address to the latter. These are to be found in Chapter III, under the heading "Practices of gatekeepers that limit contestability or are unfair." As "unfair practices" are those that affect contestability and fairness (Recital 2 DMA), it is implied that they are listed in Chapter III.

A salient feature of the DMA is that only significant market actors, the gatekeepers, are subject to its obligations. The fact that they exclusively bind gatekeepers serves to fragment consumer law's perspective of businesses, whereby those acting in the same sector of the economy are subject to equal rules. Under the DMA, providers of core platform services that meet certain thresholds are under more stringent regulations.

Consequently, when listed in the DMA, the same practice by different businesses would have to follow alternative paths to be declared unfair. If (black)listed in the DMA, it would be unfair when conducted by a gatekeeper. For other cases and businesses, consumers would have to take the longer route of proving that it affects the conduct or choice of an average consumer under the Unfair Commercial Practices Directive (Arts 5–9 UCPD) unless the practice is also blacklisted in the UCPD (Annex I of the UCPD).

It is also the characteristic of the DMA that it enlarges the beneficiaries of regulation when compared to consumer law. The DMA is concerned about the impact that unfair practices of gatekeepers have on the "fairness of the commercial relationship between undertakings providing such [core platform] services and their *business users* and *end users*."[17] In fact, many of the prohibited practices address business users and end users indistinctively (see Arts 5(6), 5(7), 5(8), 12(5)(a), 13(6), and 24 DMA). So, protection under the DMA is granted to those acting for commercial and non-commercial purposes. Consumers (*stricto* sensu) are treated, to a large extent, *pari passu* to businesses.

[15] Italics added.

[16] Italics added.

[17] Between brackets and italics added.

The DMA as Lex Specialis for Unfair Practices?

The fragmentation of both sides of a consumer relationship calls into question the compatibility of the Digital Markets Act with the Unfair Commercial Practices Directive. Some scholars in competition law have considered that the DMA should be deemed the *lex specialis* of other EU instruments (Bania, 2023; Botta & Borges, 2023). In respect of unfair practices, Bania considers that the UCPD does not apply to those practices that the DMA regulates (Bania, 2023, p. 127).

The UCPD tackles unfair business-to-consumer commercial practices before, during, and after a commercial transaction (Art 3(1) UCPD). They are defined in broad terms as "any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers (Art 2(d) UCPD; *UPC Magyarorsáz*, para 34). The CJEU confirmed the broad scope *ratione materiae* of the UCPD by deciding that it establishes a general prohibition on unfair commercial practices that distort consumers" economic behaviour (*Trento Sviluppo*, 2013, para 32).

The definition of end users under the Digital Markets Act superimposes, for natural persons, that of consumers. In both cases, they are defined by the non-commercial nature for which they act. So, an unfair practice by a gatekeeper acting in the course of its business that affects end users could be considered an unfair business-to-consumer commercial practice, in the sense of Art 2(d) UCPD. By way of example, the subversion of autonomy, decision-making, or free choice of end users via the structure, design, function, or manner of operation of a user interface (Art 13(6) DMA). Apart from being (black)listed in the DMA, it could result in an aggressive business-to-consumer commercial practice (Art 8 UCPD). The question is how the DMA and the UCPD should coexist.

In support of the application of the UCPD to unfair practices that are listed in the DMA, it can be argued that, even though the DMA targets businesses principally, it also benefits end users (Art 1(1) DMA), which could include consumers. On this, the CJEU has included within the material scope of the UCPD national rules that had other aims (including competition) than consumer protection (*Mediaprint*, 2010, paras 21–22; Plus, 2010, paras 38–39; see Keirsbilck, 2011, p. 250). This argument could be extended to cover the DMA.

However, the DMA innovates with respect to the cited case law of the Court in *Plus* and *Mediaprint*. The legal norms that define unfair practices are both EU law instruments (not EU v national laws), the DMA and the UCPD, for which non-identical outcomes are foreseen (*Wind Tre*, 2018, para 59). For example, the DMA does not regulate individual remedies, unlike the UCPD (Art 11a UCPD), following its reform by the Omnibus Directive (2019a).

The UCPD serves as a safety net for consumer protection (European Commission, 2021, 1.2.1.) "where there is no specific sectoral legislation at Community level" (*Mezina*, 2020, para 59; Recital 10 UCPD). More precisely, Article 3(4) UCPD foresees that "[i]n the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects." It is due to this provision that Bania understands that the UCPD does not apply to practices covered in the DMA (Bania, 2023, p. 127).

For the UCPD not to apply, with the DMA serving as *lex specialis*, three requirements must be met (Art 3(4) UCPD; European Commission, 2021, 1.2): (a) that the

other norm is an EU law instrument, (b) that it regulates specific aspects of unfair commercial practices, and (c) that there is a conflict between both provisions. The Court considered that such a conflict exists when norms other than the UCPD: "which regulate specific aspects of unfair business practices, impose on undertakings, in such a way as to leave them no margin for discretion, obligations which are incompatible with those laid down in Directive 2005/29" (*Wind Tre*, 2018, para 61) "showing a divergence that cannot be overcome by a unifying formula" (*Wind Tre*, 2018, para 60). The DMA would meet all three requirements.

First, it is evidently an EU instrument that regulates the internal market as the UCPD does, both being based in Article 114 TFEU. Second, the DMA regulates specific aspects of unfair practices that can be deemed "commercial." Gatekeepers under the DMA act in a business capacity, with a commercial purpose (Recital 2 DMA, excluding those that do not have such a purpose). Thus, unfair practices can impact the fairness of a commercial relationship (Recital 2 DMA). Third, a conflict between the DMA and the UCPD can be inferred. Take the given example of subversion, by a gatekeeper, of the autonomy, decision-making, or free choice of end users via the structure, design, function, or manner of operation of a user interface. It is a (black)listed practice that becomes directly unlawful under Article 13(6) DMA. It does not need to meet the requirements of Article 8 UCPD to be declared unfair, whereby the practice must significantly impair (or have the potential to impair) the average consumer's freedom of choice or conduct, causing him to take a transactional decision that he would not have taken otherwise. On this aspect, the DMA and the UCPD can be considered incompatible.

Bania's reading of Article 3(4) UCPD is that the resulting *lex specialis* character of the DMA would imply leaving the UCPD entirely aside. In her view, that would deprive consumers of individual redress (Art 11a UCPD) for unfair practices under the DMA, which does not foresee such a remedy (Bania, 2023, pp. 127–28).

That conclusion looks excessive. Article 3(4) UCPD indeed gives preference to other EU law instruments that regulate specific aspects of unfair practices, such as the DMA. The UCPD serves as a safety net for consumer protection, with a subsidiary application to more specific rules. However, the prevalence of the other EU legal instruments is restricted to "those specific aspects" (Art 3(4) UCPD) where the conflict arises. In this case, the clash affects the definition of an unfair practice for designated gatekeepers. The DMA is the *lex specialis* for that (see *Citroën*, 2016, para 45).

However, the UCPD continues to apply where no conflict arises. That is precisely what a safety net is for. Moreover, the DMA applies "without prejudice" to the UCPD (Recital 12 DMA). So, the provisions of the UCPD that are not affected by the DMA can be relied upon (see *Wind Tre*, 2018, para 67). Therefore, consumers could resort to individual redress (Art 11a UCPD) in response to unfair practices under the DMA.

Circumscribing the Fragmentation of Unfair Commercial Practices Law

The fragmentation of unfair commercial practices law by the Digital Markets Act has two consequences, one more straightforward than the other. On the one hand, as was analysed,[18] it partitions the binarism of consumer law on the business side. For gatekeepers, it (black) lists certain unfair practices that are always unlawful, while traders who are not designated

[18] See "Unfair Practices in the Digital Markets Act.".

gatekeepers, embarking on the same practice, receive more lenient treatment. Their practice will have to be assessed under the requirements of the UCPD if they address consumers (Arts 5–9 UCPD).[19] The DMA also affects the demand side of the market, as many unfair practices under it treat end users and business users alike (see Arts 5(6), 5(7), 5(8), 12(5)(a), 13(6), and 24 DMA), thus expanding the scope of those protected under EU law.

The second consequence of fragmenting unfair practices is less evident and will depend on how the UCPD is interpreted in view of the DMA and the other digital laws. The goals of market regulation that the digital laws assume (their focus on market structure in particular), which result in divergent obligations for big tech companies, could impact the assessment of unfair commercial practices under the UCPD, beyond those regulated under the DMA. A change is foreseeable for aggressive commercial practices (Arts 8 and 9 UCPD), following a resurgence of the power imbalance rhetoric (Recital 4 DMA and Recital 76 DSA).

Consumer protection has been constantly justified with regard to the weak position of consumers towards businesses as regards both their bargaining power and level of knowledge (starting in *Océano Grupo* [2000], para 25, and reaching the more recent *Caixabank* [2024], para 28; in unfair commercial practices, *Orange Polska* [2019], para 33). This points to two different sources of imbalance: an affected freedom due to an abuse of power and an undesired intention caused by a misunderstanding. Choice and conduct can be affected by either of them, as national contract laws have historically acknowledged under different vices of consent: mistake and fraud for misunderstandings (including misrepresentation in the common law), duress and undue influence (in some countries including usury) for lack of freedom (de Elizalde, 2021, pp. 34–35).

However, the relationship between freedom and information has special features in EU consumer law. First, the existence of a power imbalance between businesses and consumers is even. The law assumes that all business-to-consumer relationships are under the same power imbalance. Consumer rules protect consumers against unfair business practices by any trader. A big tech company and a local retailer are treated equally. Therefore, the assessment of a lack of freedom depends on the factual circumstances (Arts 6(2), 7(1), and 8(1) UCPD; *Orange Polska* [2019], para 30) rather than who the trader is. Second, the information paradigm of EU consumer law advanced the control of understanding (transparency) over freedom in business-to-consumer relationships (Helberger et al. 2021, pp. 67–69).

Both characteristics are present in the Unfair Commercial Practices Directive regime. On the first note (the binarism of consumer law), it protects consumers against unfair commercial practices by any business (Art 3(1) UCPD).

On the second aspect (the advancement of transparency over freedom), it has been impactful in legislation and case law. Articles 6 and 7 UCPD, on misleading actions and omissions, address unfair practices that affect understanding, while Articles 8 and 9 UCPD, on aggressive commercial practices, deal with those that undermine freedom. A practice is aggressive under Article 8 UCPD if it "significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise."

[19] The treatment would not be more lenient for practices also blacklisted in the UCPD (Annex I).

Despite dealing with different phenomena, the connection of freedom with information is present already in the text of the Unfair Commercial Practices Directive. In fact, the only form of aggressive practice that the UCPD defines is undue influence, which means exploiting a position of power "in a way which significantly limits the consumer's ability to make an *informed* decision" (Art 2(j) UCPD).[20] In *Orange Polska* (2019), the CJEU interpreted that article and, referring to the general provision on aggressive commercial practices (Art 8 UCPD), it considered that the consumer should be able to make a free choice, which supposes that the *information* provided by the trader is clear and adequate (*Orange Polska* [2019] para 34—see also, para 47-). The advancement of transparency over aggressive commercial practices has been deemed, correctly, an unacceptable intermingling (Helberger et al. 2021, p. 69).

The market assumptions of the digital laws (including the DMA and the DSA) can transform the two peculiar features noted above. Consumer law's starting point, whereby all business-to-consumer relations are under the same power imbalance and that information enhances free choice, trembles in this respect.

The conduct of gatekeepers leads to "serious imbalances in bargaining power" (Recital 4 DMA, not just "imbalances" as in consumer law), as they have "considerable economic power," beyond that of SMEs (Recital 24 DMA). Very large online platforms and very large online search engines pose societal risks that are different in scope and impact from those caused by smaller platforms (Recital 76 DSA). The digital regulations are internal market law grounded in Article 114 TFEU that fragment the business side of a relationship based on the "bigness" and "impact" of undertakings.

That fragmentation could be mirrored in the assessment of unfair practices under the UCPD, especially for aggressive commercial practices. The legal recognition of disparities in the bargaining power of businesses should result in a different treatment of those designated as gatekeepers, very large online platforms and very large online search engines. Their capacity to harass, coerce, and exert undue influence over consumers (Art 8 UCPD) is larger. As the assessment of unfair practices must consider the circumstances of their occurrence (Arts 6(2), 7(1), and 8 UCPD), the size of the business could now become an important factor.

Additionally, the resurgence of the power imbalance rhetoric should release the control of free choice from the arms of Morpheus (transparency). "Serious imbalances in bargaining power" (Recital 4 DMA) cannot be remedied by information. The control of aggressive commercial practices, with a focus on designated imbalances, is called to rise. However, this would result in the further fragmentation of consumer law, with varying standards among businesses for similar practices.

The special treatment of the imbalance of the consumer with the "big" business would be considered even if the average consumer standard is retained. The transformation can coexist with the average consumer, as the assessment of unfair practices must consider the factual context (Arts 6(2), 7(1), and 8(2) UCPD), which should include that the practice is done by a gatekeeper, a very large online platform or a very large online search engine. In those circumstances, the average consumer would be in a weaker and less free position towards the business.

It is true that the definition of the average consumer, which is strongly marked by information, could be particularly unfit in a context, like the digital, of architectural and

[20] Italics added.

relational imbalances (Helberger et al. 2021). However, courts have already managed to work around this in the offline environment, lowering the sophistication that can be expected from the average consumer (Howells & Straetmans, 2017; Micklitz, 2024, p. 79). The same can occur in order to accommodate that notion following the asymmetric regulation that stems from the digital laws. In any event, retaining a standard is relevant for collective actions and an abstract control of the UCPD, to ensure that the requirement of commonality is met and not lost in the peculiarities of a more individualized test (de Elizalde, 2024a, pp. 110–111).

Fragmenting and Deconstructing the Control of Unfair Terms

The Control Under the Unfair Contract Terms Directive: Stable Power and Knowledge Imbalances

One of the main instruments of consumer law is the Unfair Contract Terms Directive. It controls terms that have not been individually negotiated in business-to-consumer contracts (Art 3(1) UCTD). The UCTD is the EU private law instrument that the CJEU has visited most, currently reaching almost two hundred judgments. It has been influential in dealing with unfair terms, especially in banking and financial contracts (Wiewiórowska-Domagalska et al. 2024).

Under the UCTD, contractual terms can be deemed unfair if they are grey-listed in the Annex of the directive, which some Member States have turned into blacklists following the minimum harmonization approach of the UCTD (Art 8 UCTD; Civic Consulting, 2017). Subsidiarily, ancillary terms can also be controlled when they reunite the characteristics of the general criteria set out in Article 3(1) UCTD: contrary to good faith, the term causes a significant imbalance in the rights and obligations of the parties, to the detriment of the consumer. An unfair term is not binding on the consumer (Art 6(1) UCTD; de Elizalde, 2024b).

The control of terms under the UCTD does not reach the definition of the main subject matter of the contract (Art 4(2) UCTD), namely, the essential obligations under the contract, those that characterize it (*Kásler* [2014], para 49; Sørensen, 2024, p. 390). Additionally, it does not encompass terms that determine the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other (Art 4(2) UCTD). The exemption must be strictly interpreted (*Kásler* [2014], para 42) and can be disregarded in national law following the minimum harmonization approach of the UCTD (Art 8 UCTD).

However, the essential terms under a contract can be controlled if they are not drafted in "plain intelligible language" (Art 4(2) UCTD), which is the requirement of transparency, additionally set forth in Article 5 UCTD, for all terms (ancillary and main). The CJEU advanced the interpretation of that directive by defining transparency and considering that it has the same substantive meaning throughout the UCTD (starting in *Matei* [2015], para 73). Transparency relates to the ability of an average consumer to understand the consequences of a term (starting in *Kásler* [2014], para 74).

The UCTD addresses power and knowledge imbalances in a business-to-consumer contract (starting in *Océano Grupo* [2000], para 25, and reaching the more recent *Caixabank* [2024], para 28; Wiewiórowska-Domagalska, 2024). Targeting power imbalance is more

evident in ancillary terms, which can be revised even if understood and consented to. The UCTD opts for a substantive control of ancillary terms to re-establish equality in the rights and obligations of businesses and consumers (*Banco Español* [2012], para 40). Instead, the aim of re-establishing knowledge imbalance runs across the UCTD, reaching ancillary and main terms, with the requirement of transparency (Arts 4(2) and 5 UCTD). Businesses must provide the pre-contractual information that consumers need (*Invitel* [2012], para 29). An insufficiently informed choice affects the validity of terms and, if the contract cannot continue in existence without the term, the subsistence of the contract as such (Art 6(1) UCTD).

In line with other pieces of consumer law, the UCTD assumes that power and knowledge imbalances are constant in all business-to-consumer contracts. The control of unfair terms applies equally to every business that uses terms that have not been individually negotiated (Art 1(1) UCTD). It protects every consumer, disregarding their actual knowledge or expertise (*Adicae* [2024], para 49; Costea [2015], para 21). Protection is determined by contracting with a business for non-commercial purposes (Arts 2(b) and (c) UCTD).

Consent and the Validity of Contracts: The UCTD, the GDPR, and the Digital Laws

Contract Formation in National and EU Laws: Formal Isolation and Actual Relationship

The EU lacks competence in the formation of contracts, which largely remains within the realm of national law. EU private law applies without prejudice to national rules on that matter (see Art 3(2) UCPD and Art 3(10) DCD, for example). However, the CJEU assumed that a contract is formed by consent, following an offer and acceptance (*Rudolf Gabriel* [2002], para 48). Similarly, Article 8(6) of the Consumer Rights Directive states that when a contract is to be concluded by telephone, "Member States may provide that the trader has to confirm the offer to the consumer who is bound only once he has signed the offer or has sent his written consent"—so that the signature or written consent entails acceptance.

While leaving consent largely unaddressed, EU legislation has heavily regulated the pre-contractual stage, with information requirements and the control of unfair commercial practices, along with the post-contractual phase, by granting remedies (Micklitz, 2018b, p. 73). Consequently, even though the waters are formally parted, EU law affects national contract law. The regulation of pre-contractual obligations impacts contract formation (; de Elizalde, 2021, pp. 47–48; Durovic, 2015, pp. 716, 743; Whittaker, 2007, pp. 140–141,152). By way of example, misleading actions (Art 6 UCPD), including communicating wrong or deceptive information, as well as misleading omissions of material information (Art 7 UCPD) are typical situations of defects of consent in national law (mistake, misrepresentation), whereas the aggressive commercial practices of coercion and undue influence (Arts 8 and 9 UCPD) are also common instances of defects of consent (duress, undue influence). The reform of the UCPD (Omnibus Directive, 2019a) enhanced that relationship by granting remedies for unfair commercial practices including contractual, such as damages, price reduction, and termination (Art 11b UCPD).

The influence of EU law over national contract laws is stronger under the Unfair Contract Terms Directive. The UCTD harmonizes the substantive control of terms. Additionally, the CJEU's interpretation of transparency, which reaches main and ancillary terms (Arts 4(2) and 5 UCTD), directly affects contract formation. A term would not be binding on the consumer (Art 6(1) UCTD) if, lacking transparency, it is deemed unfair under the

general clause of Art 3(1) UCTD: when, against good faith, it causes a significant imbalance in the rights and obligations of the parties, to the detriment of the consumer (*D.V. v M.A.* [2023], para 47).

Therefore, informational issues in the formation of contracts (leading to a lack of transparency) will affect the validity of terms or, if the contract cannot continue in existence without the term, the whole contract (Art 6(1) UCTD). This consequence is harmonized at an EU level, thus pushing national procedural autonomy backwards.[21] For unduly informed choices in standard form contracts, the transparency control assumes the function that national contract law reserves for defects of consent, including mistake, fraud, and misrepresentation. Consequently, even though consent remains a matter of national law, its validity is overseen by the UCTD when affecting the transparency of terms. A lack of understanding of a term by an average consumer would result in its invalidity, or that of the whole contract if it cannot continue in existence (Art 6(1) UCTD).

Harmonizing Consent, Fragmenting the UCTD: The GDPR and the Digital Laws' Approach to Market Structure

The regulation of consent and the Unfair Contract Terms Directive become closer concerning data. More than in brick-and-mortar transactions, contracts in digital markets rely on data processing. The treatment of personal data is especially relevant for consumers. For businesses, data have an important economic value, even though it is difficult to estimate (Hacker, 2019, pp. 5–7). Data are treated for the provision of consumer goods and services. They serve the purpose of profiling consumers, personalizing prices, and tailoring advertising (Helberger et al. 2021, pp. 1430–1431). Data are used as counter-performance in the context of "free" services, as for many social network online platforms. This function has been recognized in the Digital Content Directive (Art 3(1) DCD).

Prior to the enactment of the new digital and data framework (with the DMA, the DSA, the Data Governance Act, the Data Act, and the AI Act), Helberger et al. had noted that "[i]n data-driven consumer markets the distinction between consumer law and data protection law is far from clear-cut" (Helberger et al. 2021, p. 1428). The consumer and the data subject could be the same natural person, whose data are treated under a consumer transaction. In the interaction of those legal instruments, the UCTD was considered to complement the GDPR (Hacker, 2019, pp. 13–18; Helberger et al., 2021, pp. 1449–1453). The UCTD can justify the control of unfair terms related to data treatment, even if the data subject had validly consented to them.

Data protection law and the UCTD also relate concerning consent, albeit in a different manner. The UCTD did not harmonize the requirements for the incorporation of standard terms into the contract, which remained a matter of national law. A comparative look into national laws shows that for a term not individually negotiated to become part of the contract, it should be accessible and agreed upon by the parties (Beale et al., 2019, pp. 813–819). Therefore, the unfairness assessment under the UCTD presupposes that consumers have consented to the terms. However, despite consent being a national matter, the CJEU's interpretation of the UCTD advanced over it. As was explained in the previous section, the CJEU pushed national procedural autonomy backward by controlling informational misunderstandings with transparency (Arts 4(2) and 5 UCTD). Non-transparent

[21] For a full account of Article 6(1) UCTD, see de Elizalde, 2024b.

terms affect consent and result in them not being binding on the consumer if deemed unfair (Art 6(1) UCTD). Data protection law takes things a step forward towards the harmonization of consent. On that aspect, rather than assuming a complementary function, the UCTD could be displaced.

Unlike consumer law, the GDPR (fully) harmonized consent, as a valid justification for personal data processing (Art 6(1)(a) GDPR). Therefore, data-related terms are subject to the validity of consent under the GDPR, which precedes the unfairness control of the UCTD. Consent to data treatment impacts ancillary and main terms when it justifies data processing. Consumer law has further delegated the validity of data treatment (whether through consent or other) to the GDPR, in the context of the provision of digital content and digital services (Art 3(8) DCD). It is through consent that the goals underpinning the digital laws fragment the UCTD.

Under Article 4(11) GDPR, "[t]he 'consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her." The conditions for consent are further specified in Article 7 GDPR, with transparency standing out (Art 7(2) GDPR; Kosta, 2020, p. 350) as a key principle in data processing (Art 5(1)(a) GDPR).

Consent is aimed at ensuring autonomy and choice (Bygrave & Tosoni, 2020, p. 176; Custers et al., 2022, pp. 2–3 and 10; Schmidt-Kessel, 2020, p. 135). It expresses the right to informational self-determination (Bygrave & Tosoni, 2020, p. 176). It serves the purposes of the internal market (Art 1(3) GDPR), which is reinforced by the new digital laws that, in a "paradigm shift" (Finck, 2024, pp. 49–53), stimulate data processing and incentivize data sharing (Finck, 2024, pp. 49–53). The enhanced economic function of data brings data law and consumer law closer. Their approach should consider the goals of the new digital legal architecture.

The interpretation of consent under the GDPR could assume a new direction with the digital laws. Their preoccupation with market structure puts the requirement of free consent at the centre, following the resurgence of the power imbalance narrative. If some companies can create "serious imbalances in bargaining power" (gatekeepers, Recital 4 DMA) or pose societal risks that are different in scope and impact from those caused by smaller players (very large online platforms and very large online search engines, Recital 76 DSA), the data subject dealing with them is put in a less free position.

According to Recital 43 GDPR, "[i]n order to ensure that consent is freely given, consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller (…)." Consent is not freely given when the data subject is in a position of weakness vis-à-vis the controller (Bygrave & Tosoni, 2020, p. 182; Kosta, 2020, p. 353). There is a lack of freedom if the data subject is unable to refuse or withdraw consent without detriment (Recital 42 GDPR). Detriment can arise if data subjects cannot use a service that has a prominent role in their daily lives, that is decisive for their social interaction, or that gives them access to professional or employment-oriented platforms (European Data Protection Board, 2024, §§ 87–89). The names of the big tech companies providing those services come easily to mind.

In *Meta*, the CJEU had to analyse the validity of consent given by the user of an online social network, in particular the condition that it must be freely given, where the operator of the social network holds a dominant position in the market (*Meta* [2023], para 140). The Court acknowledged consent as a justification for data processing in those circumstances. However, the fact that the operator held a dominant position in the market (Art 102 TFEU)

was considered an important factor in determining whether consent had been freely given (*Meta* [2023], para 154). Bundling data and processing beyond what was necessary for the performance of the contract indicated a lack of freedom (*Meta* [2023], paras 150–151). The CJEU stated that users should be given the opportunity to access the service without such data processing operations, "if necessary for an appropriate fee" (*Meta* [2023], para 150).

Meta's reaction to the judgment was to offer a "pay or consent" model whereby users (consumers) could opt to pay a monthly or yearly fee to have access to an "ad-free" version of the service, as an alternative to the "free" version but with personalized advertising. At that time, the DMA had already come into force. Article 5(2) DMA allows gatekeepers to combine and cross-use data if the end-user has given consent according to the GDPR. In an ongoing investigation, the Commission considers that Meta's "pay or consent" model breaches Article 5(2) DMA as it does not allow users "to opt for a service that uses less of their personal data but is otherwise equivalent to the 'personalised ads' based service" (European Commission, 2024c). Furthermore, the Commission understands that Meta's model "does not allow users to exercise their right to freely consent to the combination of their personal data" (European Commission, 2024c).

The Commission's approach to Article 5(2) DMA expands to gatekeepers the concerns that the CJEU had shown for free consent when given to a dominant undertaking under competition law (Art 102 TFEU). The significant power imbalance between the gatekeeper and the end user would lead to situations in which the latter's freedom is more restricted. In the case of Meta, that would result from putting end users in the binary alternative of data processing for behavioural advertising or potentially not accessing the service due to the financial burden of paying a fee. From the GDPR's perspective, that scenario would be detrimental to data subjects because it deprives them of a service that is decisive for their social interaction (European Data Protection Board, 2024, § 88). Consent should not be regarded as freely given if the data subject is unable to refuse without detriment (Recital 42 GDPR). In services not provided by dominant undertakings or gatekeepers such a detriment might not exist and consent could be considered freely given. The consequence would be fragmenting the assessment of consent.

Unlike consumer law's key tenets, the power imbalance under the GDPR is not constant or equal in every relationship. The digital laws reinforce that perspective whereby some "big" companies alter the power imbalance more significantly than others. That has an impact on free consent and the validity of the terms agreed upon.

In its opinion on the "pay or consent" model, the European Data Protection Board related the "bigness" of companies under the digital laws with freedom of consent under the GDPR (European Data Protection Board, 2024). The opinion focuses on the non-legally defined "large online platforms," a concept in which the EDPB includes "among others" very large online platforms under the DSA and gatekeepers under the DMA (European Data Protection Board, 2024, § 28). What matters to that opinion is if a platform attracts a large number of data subjects, its position in the market and if it undertakes data processing on a large scale (European Data Protection Board, 2024, §§ 25–27). As the opinion recognizes, the personal scope of "large online platforms" is more far-reaching than the big players targeted by the DMA and the DSA (European Data Protection Board, 2024, § 28). According to the European Data Protection Board, "large online platforms" have the potential to affect the data subject's freedom more intensively than other controllers (European Data Protection Board, 2024, §§ 96–113).

The divergent assessment of valid consent, with variations as regards freedom, impacts the UCTD. Consent for data-related terms remains a requirement for their incorporation into the contract. It precedes the unfairness control. If consent is affected by a lack

of freedom, the unfairness assessment would not even happen. Therefore, it is foreseeable that the validity of terms in digital contracts with big tech companies be increasingly challenged under the GDPR (and or the DMA) instead of resorting to the UCTD. In this field, Sleeping Beauty (following Micklitz's and Reich's representation of the UCTD prior to the 2007–8 financial crisis; Micklitz & Reich, 2014) might never wake up.

The extent of the impact of the digital and data protection regulations on the UCTD will ultimately depend on whether situations of significant power imbalance are restricted to designated gatekeepers under the DMA and designated very large online platforms and very large online search engines under the DSA, or alternatively, a broader view is taken, such as that of the European Data Protection Board. In both scenarios, the application of the UCTD becomes fragmented: for digital services, it would be different from other contracts, with differences also among the former.

Deconstructing the UCTD with the Digital Laws?

Beyond consent, the overall relationship of the Unfair Contract Terms Directive with specific controls for standard form contracts in the digital laws is not evident. As such, it is complicated to anticipate how the digital laws, especially the Digital Services Act and the Digital Markets Act, will impact the UCTD. The starting point is a recognition that the digital laws apply "without prejudice" to the UCTD (Recital 10 DSA; Recital 12 DMA). However, similar reservations have proven problematic in other contexts.

Starting with terminology, it lacks uniformity. The UCTD applies to terms "not individually negotiated" (Art 3(1) UCTD). The DSA opts for "terms and conditions" (Art 14(1) DSA), which are defined as "all clauses, irrespective of their name or form, which govern the contractual relationship between the provider of intermediary services and the recipients of the service" (Art 3(u) DSA). This broad definition could reach negotiated terms, differing from the scope of the UCTD (Micklitz, 2024, p. 75). The DMA refers to "terms and conditions" (Recital 64 DMA) and to "general conditions" (Art 6(13) DMA), but without defining them. The latter could mean non-negotiated terms, which are common when end users contract with gatekeepers.

The extent of content control in cases that could affect consumers varies. The DMA only contains a specific provision prohibiting disproportionate "general conditions" for terminating a core platform service (Art 6(13) DMA). Instead, Article 14 DSA could be far-reaching. Although its main target is content moderation,[22] its wording could lead to a broader scope. Under Article 14(1) DSA, providers of intermediary services shall inform, in their "terms and conditions," any restrictions they impose on the use of their service in respect of *information provided by the recipients*. Article 14(4) DSA mandates: "[p]roviders of intermediary services shall act in a diligent, objective and proportionate manner in applying and enforcing the restrictions referred to in paragraph 1, with due regard to the rights and legitimate interests of all parties involved, including the fundamental rights of the recipients of the service (…)."

The "information provided by the recipients" (Art 14(1) DSA) could have alternative meanings. It could refer to "information" in plain language, which would be relevant to content moderation (in this sense, Arts 15(1)(c) and 17 DSA). Additionally, it could have a legal meaning: that of personal data. If so, it would be important for content moderation,

[22] See Quintais et al. (2023).

but it would not be restricted to that. According to Article 4(1) GDPR, personal data "means any *information* relating to an identified or identifiable natural person."[23] If the latter were accepted as contained in Article 14 DSA, its scope of application would superimpose that of the UCTD. A common example that would fit Article 14 DSA would be that of "free" services (such as an online social network), whereby consumers (recipients of the service) provide personal data (information) in exchange for the service.

If "information" under Article 14 DSA were understood in the sense of the GDPR to embrace personal data, the regulation of "terms and conditions" under the DSA could deconstruct the control of terms not individually negotiated under the UCTD. Deconstruction is the chosen word as the DSA's control of "terms and conditions" diverges from the control of unfair terms in the UCTD. Under the DSA, providers of intermediary services should act in an "*objective and proportionate* manner in applying and enforcing" (Art 14(4) DSA) "any *restrictions* that they impose *in relation to the use of their service* in respect of information provided by the recipients of the service, in their terms and conditions" (Art 14(1) DSA).[24] This is all, "with due regard to the rights and legitimate interests of all parties involved" (Art 14(4) DSA). Focusing on the given example of "free services," common restrictions of users' rights relate to the use of data for behavioural advertising or tough conditions to terminate the service, to mention just a couple.

The UCTD and the DSA could clash in the assessment leading to an invalid term. The UCTD requires that the term goes against good faith and causes a significant imbalance in the rights and obligations of the parties, to the detriment of the consumer (Art 3(1) UCTD). The DSA accepts a proportional restriction (of rights?) in the terms and conditions, with due regard to the rights and legitimate interests of all parties involved (Arts 14(1) and 14(4) DSA). It can be assumed that a restriction that lacks objectivity and proportionality would lead to a non-binding term.

The requirement of proportionality in the application (and enforcement) of terms runs across the DSA (Art 14(4) DSA) and the DMA (Art 6(13) DMA). In the DSA, the proportionality test should consider the rights and legitimate interests of all the parties involved (Art 14(4) DSA). It is unclear how the proportionality test will develop and, importantly, whether it will match the evolution of Article 3(1) UCTD. Under the UCTD, proportionality is embedded in the requirement that, for a term to be deemed unfair, it should cause "a significant imbalance in the parties' rights and obligations arising under the contract" (Art 3(1) UCTD; Sørensen, 2024, pp. 416–417).

Additionally, it remains to be seen how the "objective" manner in applying and enforcing terms under the DSA (Art 14(4) DSA) will coexist with the requirement of good faith in the UCTD (Art 3(1) UCTD). According to the CJEU, good faith under Article 3(1) UCTD implies that the "seller or supplier dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiation" (*Aziz* [2013], para 69; *BNP Paribas* [2021], para 66).

Moreover, Article 14 DSA could potentially allow the control of the main terms of the contract as it is not expressly excluded. In the given example of "free" digital services, the exchange of data for a service and the principal characteristics of such a service would define the main terms of the contract. Their potential treatment under Article 14 DSA would differ from the one given by the UCTD. According to Article 4(2) UCTD, terms that define the main subject matter of the contract are exempted from control if transparent. The

[23] Italics added.

[24] In both cases, italics added.

CJEU has interpreted the concept of main terms under Article 4(2) UCTD to comprise the essential obligations that characterize it (*Kásler* [2014], para 49; Sørensen, 2024, p. 390). Following this definition, it is not relevant whether the consumer's performance consists of price or data.[25] In both cases, it would be an essential obligation under the contract. The law already acknowledges this in a similar context (Art 3(1) DCD). Therefore, Article 14 DSA could revolutionize the assessment of main contract terms concerning data by controlling them even if they are transparent (with maximum harmonization effects).

Lastly, in addition to its deconstructing effects, Article 14 DSA could have fragmentary consequences. The "objective and proportional" restriction of rights in terms and conditions could consider the power imbalance generated by very large online platforms and very large online search engines. Those cases could lead to a tighter control of "terms and conditions," if compared to other providers of intermediary services.

Conclusion

The regulation of digital markets, and the services provided, assumes market structure as a goal. The "bigness" of some tech companies is understood to cause larger competitive and societal harms. The legal response to such a challenge is an asymmetric regulation that imposes enhanced obligations on big tech companies towards users of digital services, whether businesses or others. In doing so, the digital laws adopt the market approach that competition law had at the time of their proposal and enactment, with a focus on competitors and embracing non-competition interests.

On the demand side of the market, the digital laws operate with different concepts to that of the consumer. To a large extent, rights are not related to the non-commercial nature for which a person acts. The consumer is replaced by the user of digital services, which could also be a business. The digital laws frame a regulation of private relationships that does not pivot on consumption. Consumer law is gradually giving way to digital private law.

The focus on market structure and the abandonment of the non-commercial purpose of a transaction as the determinant for protection fragments consumer law. Its application in digital services splits from others, with two main consequences.

First, while traditional consumer law imposes equal obligations on all businesses, the digital laws function in tiers, with enhanced obligations on big players (gatekeepers, very large online platforms, and very large online search engines). Additionally, the digital laws design specific controls of unfair practices and unfair terms, in a difficult interaction with consumer law. Some scholars have argued that the digital laws replace consumer law. This paper recognizes their role as *lex specialis* without reaching such an extreme consequence for unfair practices under the Digital Markets Act. Instead, the Digital Services Act could have deconstructive effects on the control of unfair terms, assuming that courts interpret it in connection with the General Data Protection Regulation.

Second, the resurgence of power imbalance as a justification for digital regulation leads to a fragmented interpretation of freedom, with stricter controls in situations where designated big companies intervene. That is impactful for the assessment of unfair commercial practices and of consent for data-related terms, which precedes the control of unfair terms.

[25] Against, Hacker (2019, pp. 16–17) who proposes a functional approach to the main terms of the contract concerning data to conclude that their control should not be exempted under Art 4(2) UCTD.

The digital laws are still recent and the conclusions of this paper are, to a large extent, anticipatory. The technicality of the new regulations, the encompassing scope of the services addressed, and their implied aim of providing an overarching framework for private relationships in the digital world ensure fruitful case law. It will refine the image of EU digital private law.

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