Investigating Digital Vulnerability with Theories of Harms: A Methodological Proposal with Three Illustrations

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A. Overview

If one asks ChatGPT-3.5 to "write 300 words on the word 'vulnerability'. Discussing in particular its etymology and its relation with the word 'harm'", ChatGPT-3.5 answers as follows:

"The word 'vulnerability' is a powerful and multifaceted term that encompasses the essence of human existence. Its etymology traces back to the Latin word 'vulnerabilis', derived from 'vulnerare', meaning 'to wound' or 'to injure'. This linguistic lineage highlights the core concept behind vulnerability – a susceptibility to harm or injury. The term has evolved over centuries, but its fundamental meaning remains rooted in the idea of being exposed to potential harm.

Vulnerability is a concept deeply intertwined with the word "harm". It signifies a state of fragility or weakness that makes individuals or entities more susceptible to experiencing harm, whether physical, emotional, or psychological. The relationship between vulnerability and harm is intricate and vital for understanding human experiences and relationships.

In the realm of psychology and emotional well-being, vulnerability is often associated with opening oneself up to the possibility of emotional harm. It is the act of allowing one's true self to be seen, which can lead to profound connections with others but also exposes one to the risk of rejection or hurt. This concept is at the core of Brené Brown's work on vulnerability, where she posits that embracing vulnerability is essential for building genuine connections and resilience.

In the context of social justice and equity, recognizing and addressing vulnerability is crucial. Vulnerable populations, such as marginalized communities or individuals facing economic hardship, are more susceptible to harm in various forms, including discrimination, injustice, and unequal access to resources. Acknowledging vulnerability in these contexts is essential for advocating for fairness and equal opportunities.

In essence, vulnerability is an intrinsic aspect of the human condition, deeply intertwined with the concept of harm. It reminds us that, in our pursuit of personal growth, connection, and justice, we must acknowledge and address the vulnerabilities within ourselves and in others. By doing so, we can foster empathy, compassion, and resilience, ultimately striving for a more inclusive and understanding world".[1]

This short text is accurate. Moreover, it provides two relevant insights. The first is that the digital environment is undeniably a source of opportunity. At the same time, it is also a source of concern. The second is that the idea of vulnerability is intrinsically connected with the idea of harm. Accordingly, this chapter will provide an overview of an approach to consumer law and policy called 'theories of harm'.

More precisely, the approach will be presented in general terms. Next, the uses of this approach will be discussed and exemplified. Finally, the chapter will investigate three applications of the theory that are particularly relevant for future research concerning digital environments: hidden gems and hidden traps in digital marketing; hyper-engaging practices; personalized prices and personalized terms more generally.

B. What is a theory of harm, and why the study of vulnerability needs one

The idea of theories of harm is mainstream in the practice of competition law.[2] In the context of consumer law, instead, its relevance is becoming to be recognized.[3] Being a recent idea, it has yet to receive the attention

1 https://chat.openai.com/share/769019ff-1810-481b-9c69-9ea4c760a7b4, last access: 30 October 2023.

2 For a nuanced discussion, see Jan Broulík, 'Relevant Generality of Antitrust Economics: Competitive Effects as Adjudicative and Legislative Facts' (2023) 19 Journal of Competition Law & Economics 444. For examples of theories of harm related to digital markets, see Jan Kraemer and Daniel Schnurr, 'Big Data and Digital Markets Contestability: Theory of Harm and Data Access Remedies' (2023) 18 Journal of Competition Law & Economics255; Massimo Motta, 'Self-Preferencing and Foreclosure in Digital Markets: Theories of Harm for Abuse Cases' (2023) 90 International Journal of Industrial Organization 102974; Avdasheva Svetlana and Korneeva Dina, 'Theories of Harm for Multi-Sided Platforms: Challenges for Competition Policy and BRICS Answers'; OECD 'Theories of Harm for Digital Mergers', https://www.oecd.org/competition/theories-of-harm-for-digital-mergers.htm, accessed 29 October 2023.

3 Seminal, in this regard, is the monograph by Harriet Gamper, Paolo Siciliani and Christine Riefa, *Consumer Theories of Harm: An Economic Approach to Consumer Law Enforcement and Policy Making* (Hart Publishing 2019).

it deserves.[4] At the same time, it sheds light on several aspects of EU consumer law.

While in competition law theories of harm are mainstream, like many sectorial mainstream ideas, they have not received extensive theoretical analysis. Arguably, a theory of harm is composed of three main layers:

i) the general doctrine of consumer harm – what is consumer harm?
ii) ways in which consumers are harmed – how does consumer harm happen?
iii) the case-specific scenarios of harm – how are consumers harmed in such and such context

In a first approximation, the three layers can be described as follows. The general doctrine of harm defines when consumer harm occurs, serving as the normative foundation of harm theory within a legal context. It outlines the types of harm, like high prices or limited choices, that laws seek to address, reflecting their protective goals. It establishes the standard for evaluating firms' conduct. The second layer of the theory of harm addresses the question of what causes harm, focusing on causation explanations. This layer reflects the prevailing knowledge and enforcement practices in a jurisdiction at a specific time. Empirical research plays a crucial role in shaping this layer, but it is also influenced by dominant institutional beliefs. In fact, the second layer of the theory of harm reflects the prevailing understanding and influences the current enforcement practices in a specific jurisdiction. While empirical research greatly informs this layer, it is also shaped by the prevalent institutional beliefs of the legal system in question.

This section articulates these elements and then discusses the main uses of this theoretical approach, namely both coherence-seeking and proposal of effectiveness-oriented interpretations of existing provisions as well as well as the proposal of new norms, rules, and principles.

4 For discussions, see Jules Stuyck, 'Book Review: Consumer Theories of Harm, An Economic Approach to Consumer Law Enforcement and Policy Making Paolo Siciliani, Christine Riefa and Harriet Gamper, Hart, Oxford, 2019', (2020) 9 Journal of European Consumer and Market Law 222; Fabrizio Esposito, 'Towards a General Theory of Harm for Consumer Law' (2021) 44 Journal of Consumer Policy 329. For an analysis along these lines, see also recently, Przemysław Pałka, 'Harmed While Anonymous: Beyond the Personal/Non-Personal Distinction in Data Governance' (2023) 2023 Technology and Regulation 22.

I. The elements of a theory of consumer harm and where to find them

1. What is harm?

The first layer, known as the general doctrine of harm, addresses the fundamental question of when consumer harm occurs. This aspect serves as the normative foundation of the theory of harm and establishes what constitutes legally relevant consumer harm in a certain legal context.[5] It provides a broad and theoretical explanation of the types of harm that the law aims to prevent or mitigate, such as high prices or restricted choices. This articulation of the general doctrine of harm refers to and can be inferred by looking at the protective objectives of the law. In essence, creating a general doctrine of harm involves specifying the normative standard against which firms' behavior is evaluated.

In civil law contexts, this first layer is deeply intertwined with a legal system's law of obligations, which determines what is a protected interest. It is then complemented by part of the law of contractual and tort liability specifying limitations to the recoverable damage. Finally, consumer law and sectorial legislation contribute to this activity. For example, the Air Passenger Rights Regulation grants a statutory right to compensation (Art 7) for the "serious trouble and inconvenience"[6] which can be increased under national law (Art 12).

An important issue of the theory of consumer harm approach is that, in its current development, the approach dismisses the idea that economic analysis of consumer transactions should solely prioritize maximizing overall or societal welfare, disregarding distribution between consumers and traders. Instead, it advocates for a consumer welfare standard.[7] There are compelling economic and legal justifications for favoring a consumer welfare standard in the analysis of market law. Therefore, the theory of harm approach should not raise concerns among consumer lawyers but should be embraced as an opportunity for enhanced interdisciplinary cooperation.

The concept of consumer sovereignty provides a sophisticated justification to the use of economic theory in the analysis of consumer-related

5 The expression 'legal context' is purposefully malleable. It can refer generically to EU consumer law, but also specifically to a first-instance court decision or to a specific piece of legislation (eg, the Italian Consumer Code). For a general discussion of the notion of legal context, see Uwe Kischel, *Comparative Law* (OUP 2019).

6 Recital 2.

7 Siciliani *et al*, n 3 above, 9.

issues that is, nevertheless, fitting with legal doctrine (contrary to most economic analyses of consumer law).[8] In a nutshell, consumer sovereignty is an equality norm that is supported by indirect reciprocity. The idea is that in a market economy, everyone is sovereign when acting as a consumer and subject of the consumers on the market where they act as producers. For example, a plumber is the subject of the recipients of their services, and the same plumber is then entitled to be sovereign at the supermarket, at the dentist's, etc. This idea has an impressive and mistreated history in economics; also, it fits well with the explicit structure of EU consumer policy, but also with the way in which EU consumer and antitrust law are interpreted and applied.

2. What causes harm?

The second layer relates to the question: 'What causes harm?' This component of the theory of harm relates to causation. It is made up of the set of accepted explanations for how harm happens. In competition law, this layer has been developed on the basis of economic analysis.[9] It comprises

8 Fabrizio Esposito, *Law and Economics United in Diversity* (Edward Elgar 2022) deals with the core theoretical and doctrinal foundations of the idea in EU antitrust and consumer law. This monograph is complemented by analyses that reinforce the account either by looking at sectorial legislation or engaging with specific theoretical perspectives. Fabrizio Esposito and Stefan Grundmann, 'Investor-Consumer or Overall Welfare: Searching for the Paradigm of Recent Reforms in Financial Services Contracts' (2017) *EUI Law Department Research Paper Series*, 2017/5; Fabrizio Esposito and Lucila de Almeida, 'A Shocking Truth for Law and Economics: The Internal Market For Electricity Explained With Consumer Welfare', in Klaus Mathis and Bruce Huber (eds), *Energy Law and Economics in Europe* (Springer 2018); Fabrizio Esposito and Lucila de Almeida, 'In Search of a Grand Theory of European Private Law: Social Justice, Access Justice, Societal Justice and Energy Markets', in Kai Purnhagen, Lucila de Almeida, Marta Gamito and Mateja Durovic (eds), *Transformation of Economic Law: In Honour of Hans-W Micklitz* (Hart Publishing 2019); Fabrizio Esposito and Giovanni Tuzet, 'Economic Consequence for Lawyers: Beyond the Jurisprudential Preface' (2020) 9 *Journal of Argumentation in Context* 368; Fabrizio Esposito, 'The Consumer Welfare Standard, Consumer Sovereignty, and Reciprocity: An Evolutionary Foundation for the Positive Economic Approach to Law that Actually Works', in Klaus Mathis and Avishalom Tor, *The Law and Economics of Justice* (Springer 2024); Fabrizio Esposito and Gianmaria Pessina, 'The Consumer Welfare Standard as an Endogenous Market Institution to Solve the Monopoly Prisoner's Dilemma', on file with the author.

9 See the literature referred to in footnote 2 for examples and discussions.

a typology of causal mechanisms that link certain market practices to consumer harm in certain contexts.

It should be noted that this second layer of the theory of harm expresses the received wisdom and characterizes the state of the art of enforcement in any given jurisdiction at any given point in time. This layer benefits immensely from empirical research but is also heavily influenced by the dominant institutional beliefs in a given legal context. At the same time, one should not forget that inappropriate legislative measures might well be part of the causes of harm.

The 'behavioural turn' which took place in the early 21st century illustrates all these points.[10] First, it was possible to challenge a received view about how consumers really behave, which was too optimistic. As part of that process, information-giving as a governance tool was heavily criticized. However, the critique led to a conscious focus on nudge in the US to offer a regulatory tool palatable to conservatives.[11] In the EU, instead, these studies lead to clear prohibitions (such as the one of pre-ticked boxes) and to proposals aimed at interpreting existing prohibitions in more incisive ways.[12]

Against this background, the theory of harm approach focuses predominantly on the limits of the market mechanism (the invisible hand) to deliver benefits to consumers. So far, the approach has not been developed in the direction of considerations about when certain legal measures are more or less likely to be desirable.

More precisely, the theory of harm approach distinguishes between two main types of traders and consumers: fair and unfair traders; sophisticated and naïve consumers. Traders are fair if they compete on the merits by offering the best possible deals to consumers; instead, they are unfair if they try to make a profit by exploiting "the well-known structural asymmetries

10 See, generally, Alberto Alemanno and Anne-Lise Sibony (eds), *Nudge and the Law: A European Perspective* (Hart Publishing 2015). See also Fabrizio Esposito, 'A Dismal Reality: Behavioural Analysis and Consumer Policy' (2017) 40 Journal of Consumer Policy 193 and Fabrizio Esposito, 'Conceptual Foundations for a European Consumer Law and Behavioural Sciences Scholarship', in Hans-Wolfgang Micklitz, Anne-Lise Sibony, Fabrizio Esposito (eds), Research Methods in Consumer Law (Edward Elgar 2018).

11 Richard H Thaler and Cass R Sunstein, 'Libertarian Paternalism' (2003) 93 The American Economic Review 175.

12 See, especially, Anne-Lise Sibony, 'Can EU Consumer Law Benefit from Behavioural Insights? An Analysis of the Unfair Practices Directive' (2014) 22 European Review of Private Law 901.

existing between consumers and traders".[13] Importantly, opting to compete based on merit is driven not primarily by altruism but by a profit-maximizing assessment.[14] As noted above, the approach is primarily focused on the motivation provided by the market mechanism, namely the invisible hand turning traders' self-interest into a means to foster consumers' interest.

At the same time, consumers can be divided into two groups that, for present purposes, can be named sophisticated and naïve consumers. This is a theoretical distinction that may or may not match that found in the UCPD of average and vulnerable consumers.[15] The distinction is functionally made on the basis of consumers' ability to identify a threat (cause of harm or vulnerability) in a certain choice architecture. By definition, sophisticated consumers can spot it, but naïve ones often cannot. More precisely, contractual attributes can be divided into three categories: search, experience and credence attributes. The idea is that ascertaining the true quality of these attributes is increasingly difficult. Naïve consumers often will not even check the quality of search attributes.

3. Scenarios of harm

Building on the content of the previous two layers, the theory of harm approach advocates examining specific market interactions using a framework of analytical constructs called 'scenarios of harm'. A scenario of harm consists of assumptions regarding the strategic interactions between traders and consumers, considering the varying levels of transparency associated with different transactions. Notably, scenarios of harm in their current formulation predominantly focus on the transaction as a homogenous entity.[16] However, as illustrated later in this chapter, the same framework can be used to analyze specific transactional attributes and, in particular, contract terms.

13 Fabrizio Esposito and Mateusz Grochowski, 'The Consumer Benchmark, Vulnerability, and the Contract Terms Transparency: A Plea for Reconsideration' (2022) 18 European Review of Contract Law 1, 22.

14 Siciliani *et al*, n 3 above, 110 *et seq*.

15 Siciliani *et al*, n 3 above, 109 *et seq*. On this point, see, however, Esposito 2020, n 8, above.

16 See, for a more detailed analysis, Fabrizio Esposito and Anne-Lise Sibony, 'In Search of the Theory of Harm in EU Consumer Law: Lessons from the Consumer Fitness Check' in Klaus Mathis and Avishalom Tor (eds), *Consumer Law and Economics* (Springer International Publishing 2021), 255-259.

The arguably better account of the theory of harm approach, which is slightly different from the original one, includes four scenarios of harm: the benchmark, the lemon, *divide et impera*, the bottom. These scenarios are ordered from the less to the most concerning, especially from the perspective of the most vulnerable consumers.

Pragmatic reasons suggest refraining from elaborating on these four scenarios of harm for the moment. In fact, said information is not necessary to illustrate how the theory of harm approach can be used. At the same time, that information is best offered just before explaining how the scenarios shed light on issue pertaining to digital transactions, harm and vulnerability.

II. What a theory of harm can be used for

To discuss this topic, it is useful to briefly mention the experience of EU competition law, where the use of theories of harm increased as part of the more economic approach to law. In EU competition law, adopting a more economic approach has significantly benefited practice. It clarified that harming consumers is intrinsically problematic while harming competitors is only instrumentally so. It allowed enforcers to single out harmful conduct that would have been difficult to identify otherwise. In some occasions, it simplified the analysis of scenarios of harm for competition authorities by allowing courts to accept presumptions.[17]

As noted above, consumer law has not reached a stage of elaboration similar to competition law when it comes to conceptualizing harm or adopting a typology of conducts and market circumstances that lead to harm. For this reason, the first two layers of the theory need to be investigated further.[18] At the same time, the second part of this chapter illustrates that the scenarios of harm are sufficiently reliable to be applied in a variety of contexts.

17 Anne-Lise Sibony, 'Data and Arguments: Empirical Research in Consumer Law', in Hans-Wolfgang Micklitz, Anne-Lise Sibony, Fabrizio Esposito (eds), *Research Methods in Consumer Law* (Edward Elgar 2018)

18 Esposito and Sibony, n 16 above.

It has been persuasively argued that EU consumer law is directionless, necessitating a fundamental reconsideration.[19] This lack of clarity is especially problematic when determining how the law should adapt to digital markets. One primary challenge is the varying viewpoints of Member States, in particular concerning private law matters. Sometimes, ambiguities or non-specifics are intentionally adopted to achieve a directive consensus.

In this context, a more explicit expression of EU consumer law's protective intentions is beneficial. Firstly, it is not always apparent that the law's ultimate purpose is to protect consumers. A debate has emerged where some believe that the goal of market building has overshadowed the protection of vulnerable consumers. The Commission has actively sought to harmonize national consumer legislations to reduce business hurdles stemming from regulatory differences. As a result, EU consumer law seems more catered to empowered consumers who drive competition and market integration, sidelining the vulnerable population's needs.[20] Despite the advantages market integration offers (like increased choice and competitive pricing), some scholars argue it does not equate to genuine protection for the most vulnerable. In this regard, the proliferation of EU full harmonization directives and regulations is seen as particularly problematic, as it greatly limits Member States' power to intervene independently.[21] In terms of the theory of harm approach, this essentially means that the EU legislator assumes that the market is best understood as an instance of the scenarios of harm called benchmark and lemon, more than the more concerning *divide et impera* and bottom. In fact, the key difference between these two groups of scenarios of harm is the extent to which vulnerable consumers can benefit from the herd protection offered by the interaction between more autonomous consumers and traders.[22]

The second reason for more explicit articulation relates to regional and temporal variations. Different legal systems prioritize different consumer

19 Geraint Howells, Christian Twigg-Flesner and Thomas Wilhelmsson, *Rethinking EU Consumer Law* (Routledge 2018).

20 Note that this view is different from the so-called instrumentalization critique, which holds that (private) law used to pursue ends which do not belong to it. Recently, Laura Burgers, Marija Bartl, and Chantal Mak, 'Introduction. The Evolving Concept of Private Law in Europe', Amsterdam Centre for Transformative private law Working Paper No. 2022-07. For an attempt to dispel this critique regarding the concept of allocative efficiency, see Fabrizio Esposito, 'What Can the Consumer Welfare Hypothesis Do for You? At Least Three Things…' (16 June 2023) *EU Law Live*.

21 Howells et alii, n 19 above.

22 See below, section 5.

benefits. One system might prioritize lower prices, even if it compromises other standards. In contrast, another might emphasize consumer rights like extended guarantees, potentially leading to higher prices and limited choices. These normative choices should be explicitly stated, aiding in comparisons between the EU's consumer law and those of other jurisdictions and enabling the assessment of its evolution and relevant criticisms.

Additionally, there is a practical need for well-defined theories of harmin EU consumer law. As penalties for consumer protection breaches could escalate to 4% of global turnover,[23] there will likely be more scrutiny of the reasoning behind infringement decisions. As the economic implications intensify, more litigation is expected, requiring clear guidance for both enforcement agencies and courts.

1. Reverse-engineering and coherence

Reverse-engineering legal reasoning involves inferring the objectives by examining how legal norms are justified, thereby gaining a deeper comprehension of them.

The purpose of reverse-engineering legal reasoning is an initial step in enhancing the legal system's design to enhance its effectiveness in achieving its intended objectives. In line with the social engineering paradigm, the focus during the reengineering phase is not on providing a normative assessment of policy objectives but rather on offering improved tools to attain given objectives. Naturally, after undergoing reverse engineering, the legal system may subsequently attract normative critiques aimed at altering its pursued policy goals, as discussed below. For the moment, the focus is on making explicit the relationship between the law's goals and the institutional design selected to achieve them.[24] This enhanced clarity can be used to perform one of the most traditional and ambitious doctrinal activities, namely investigating the coherence of the legal system. For example, one

23 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules OJ L 328/7, Articles 1 and 3, introducting this penalty in the UCTD and UCPD, respectively.

24 For a clear and insightful analysis, see, Frans Leeuw and Hans Schmeets, *Empirical Legal Research: A Guidance Book for Lawyers, Legislators and Regulators* (Edward Elgar 2017).

may find that in a certain context, the institutional design assumes that the interest of less and more sophisticated consumers are aligned, but in a very similar one, the assumption is that their interests are misaligned. This incoherence is problematic and may lead to three outcomes: challenging the assumption that the two contexts are similar; arguing in favour of the former institutional design for both contexts; arguing in favour of the latter institutional design for both contexts.

To undertake the reverse engineering of legal reasoning, two essential components are required. First, there is a need for competing economic hypotheses to generate alternative explanations for the substance of legal reasoning. Second, a methodology for analyzing legal reasoning is necessary to determine which economic hypothesis aligns better with it.

In the process of reverse engineering legal reasoning, it is crucial to possess at least two competing hypotheses to assess their explanatory capacity. Additionally, these hypotheses can relate to either normative or empirical variables; for instance, the normative variable may involve the choice of a welfare standard, while the empirical one may concern the level of transaction costs.

The objective is to identify distinctions in the arguments constructed around one concept versus another. In the present context, the different theories of harm constitute the different hypotheses to be tested by looking at the reasoning justifying and applying certain concepts as legal concepts. As noted above, the theories assume that the normative goal is that of fostering the consumers' interests as much as possible.

Consider the controversy over dual-quality products that surfaced in Europe around 2017. This issue was so pressing that President Juncker addressed it in his State of the Union speech that year. Reacting to the discontent of numerous Eastern European leaders and European Parliament members, he emphasized that all consumers within the Union should be treated equally. He condemned the disparity where some European regions receive lower-quality food products than others, even when the branding and packaging are identical. The underlying concern, mainly shared by Central and Eastern European governments, is that Western European traders could potentially deceive their Central-Eastern European consumers by selling them inferior products.

The Modernisation Directive clarified that selling these dual-quality goods constitutes an unfair commercial practice. By definition, a product is considered dual quality if it has a "significantly different composition or characteristics" than another product but is marketed as the same.

The scenario of harm best associated with dual-quality goods sees Central-Eastern European consumers as targets of deceit. Western brands, perceived as premium, might reduce the quality of their products for this market. Local businesses would naturally resist such practices, while Western consumers could potentially benefit from indirect subsidization. Dual-quality products share traits of both lemon and *divide et impera* scenarios.[25] This is not surprising, in that Central-Eastern European traders face the problem typical of a lemon scenario, namely successfully showing the (higher) quality of their offers. At the same time, some Western traders are relying on geographical separations to implement the *divide et impera* strategy. By imposing a single-quality standard, the EU legislator managed to support Central-Eastern traders address the lemon problem and disincentivize the problematic *divide et impera* strategy relied upon by some Western traders.

The fact that the real-world issue straddles different archetypal harm scenarios should not discredit the framework. These scenarios are archetypes, not exhaustive categories. In particular, the real world is complex; so it might well be that different scenarios of harm coexist in the same market, as dual-quality goods illustrate. The significance of this framework is its ability to analytically (rather than emotionally) pinpoint the problematic aspects of dual-quality goods practices. A comprehensive understanding can then guide enforcement priorities and determine when a product truly exhibits dual quality.

To give another example, consider the transparency of core terms in consumer contracts. The CJEU currently reviews them only from the perspective of the average consumer.[26] If the interests of average and vulnerable consumers are aligned, then we are probably in the benchmark scenario, and this approach is justified. Yet, if we are in the *dividi et impera* scenario, vulnerable consumers are left to their own devices. When this is the case, a more robust, demanding, intrusive notion of transparency is justifiable because it is instrumental in protecting vulnerable consumers against unfair terms. This thicker notion of transparency requires that contract terms are transparent also for the vulnerable consumer. According to this thicker no-

25 Using the version of the framework we had in 2020, Anne-Lise Sibony and I concluded that the scenario was best understood as between the bottom and *divide et impera*. Probably, we underplayed the role of Central-Eastern traders back then.

26 The first case where this happened is Judgment of 30 April 2014, *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*, C-26/13, ECLI:EU:C:2014:282, p. 74.

tion of transparency, Article 4(2) shields from the unfairness test only core terms that are transparent also for the vulnerable consumer. Conversely, Article 5 requires terms that are transparent also for the vulnerable consumer.

The thicker notion of transparency is beneficial to vulnerable consumers for the following reasons. Let us consider first the case where the complex offer is worse than the simple one – the hidden trap. The vulnerable consumer is likely to choose the complex offer. If this happens, under our proposed interpretation of Article 4(2), the core terms of the complex offer will not satisfy the transparency requirement. Consequently, these terms will have to be reviewed for their substantive fairness. Article 5 contributes to the overall deterrence of the UCTD by exposing the trader to additional legal sanctions.[27]

It is in the second case – the hidden gem – that Article 5 plays a pivotal role. In this case, the complex offer is better than the simple one. The vulnerable consumer is likely to opt for the simple offer, even if less advantageous. Against this background, a thicker notion of transparency in Article 4(2) will not do much to help the vulnerable consumer. In fact, by assumption, the simple offer will also be transparent according to the thicker notion of transparency. Consequently, vulnerable consumers are prone to choose simpler and less advantageous offers, to their detriment. To benefit the vulnerable consumer, the UCTD should motivate traders to increase the transparency also of the complex offer. When both offers become transparent, the vulnerable consumer should join the average one in preferring the complex offer. However, Article 4(2) cannot be used for this purpose. The reason is simply that the complex offer has not been accepted by the consumer: the consumer has chosen the simple offer. Accordingly, only the terms of the simple offer can be reviewed pursuant to Article 4(2).

It follows that it is necessary to look elsewhere to find a deterrence mechanism against the drafting of complex but advantageous offers marketed in tandem with simpler and less advantageous ones. Article 5 of the UCTD can be used to this end. Since this provision introduces a general obligation to draft transparent terms, it can also be used against complex but advantageous offers (within the meaning of these terms as used in the

27 Even after the adoption of the Modernization Directive, Member States enjoy wide discretion in establishing the legal consequences of violating Article 5. On the matter, see eg Vanessa Mak, *Legal Pluralism in European Contract Law* (OUP 2020) 157-159; Paolisa Nebbia, *Unfair Contract Terms in European Law* (Hart 2007).

previous section). It should be remembered that the CJEU's case law on sanctions in EU consumer law leaves ample room for national legal systems to design sanctions.[28]

Only pecuniary sanctions (damages and/or fines) would be easy to apply to the situation under scrutiny. In this situation, the trader is sanctioned for the lack of transparency of the terms of a contract that ultimately the vulnerable consumer has chosen not to enter into. Under the current scheme of the UCTD, it seems hard to apply remedies such as termination, rescission, nullity, or revision. All these remedies presuppose that the opaque term is part of the contract that is binding the consumer. However, in the situation under scrutiny, this is not the case.

2. Interpretation, integration and policy proposals

Theories of harm can be transformative in the legal system. In fact, one can use them to organize the ideas supporting the claim that a certain provision needs to be interpreted in a certain way or, more explicitly, to recommend a legislative reform. I provide three examples to illustrate this point: the right to transparent terms for vulnerable consumers; the right to know the impersonal price and how much the price was personalized; a positive duty of care towards consumers.

As anticipated, reverse-engineering is also useful for a more critical investigation of legal materials, as illustrated by the plea for reconsidering the view that the transparency standard of contract terms in the Unfair Contract Terms Directive should always be only that of the average consumer.[29]

As anticipated, sometimes a more robust interpretation of transparency requirements in the Unfair Contract Terms Directive is necessary to safeguard vulnerable consumers from unfair terms. The advocated "thicker" transparency ensures that contractual terms are clear even for such vulnerable consumers. Under this understanding, Article 4(2) of the UCTD would only protect core terms from an unfairness review if they are trans-

28 See, recently, Judgment of 10 June 2021, *Ultimo Portfolio Investment*, C-303/20, ECLI:EU:C:2021:479.

29 Esposito and Grochowski, n 12 above; Fabrizio Esposito, Leonor Gambôa Machado and Mateusz Grochowski, 'Será que o Direito Português confere melhor proteção aos consumidores vulneráveis que o Direito da União Europeia no contexto de cláusulas abusivas em contratos de consumo? Uma análise jurídica e económica' (2022) 6 Católica Law Review 83.

parent to the vulnerable consumer. Additionally, Article 5 would necessitate this higher degree of transparency.

The importance of this enhanced transparency is evident in two contexts, called the Hidden Gem and the Hidden Trap. In the Hidden Trap, a complex offer is less beneficial than a simpler one. Vulnerable consumers, not fully grasping the intricacies, might (even randomly) opt for the complex offer. Notably, it would be economically rational in competitive markets to make the simpler one more expensive, which shows that competition will not solve the problem.[30] Under the proposed transparency, the core terms of this complex offer will meet the transparency criteria and will be scrutinized for fairness. Article 5 further ensures trader accountability by introducing additional legal consequences.

In the Hidden Gem, the complex offer is more beneficial than the simple one. Despite its advantages, vulnerable consumers might go for the simpler offer due to its apparent clarity and possibly lower price.[31] The enhanced transparency in Article 4(2) has a limited impact here, as even with this stringent transparency measure, the simpler offer would still appear clear. Hence, vulnerable consumers might still choose the less beneficial offer. For the UCTD to truly benefit vulnerable consumers, it should encourage traders to make even complex offers transparent. However, since the consumer has chosen the simple offer, only its terms can be reviewed under Article 4(2).

This necessitates an alternative deterrent against offering complex yet beneficial terms alongside simpler, less beneficial ones. Article 5 can play this role. Given its emphasis on drafting transparent terms, it can address even complex but advantageous offers. The CJEU's case law provides flexibility in designing sanctions within the EU consumer law framework.

A core element of this analysis is showing that the *communis opinio* on how the UCTD protects consumers from unfair terms rests on the premise that core unfair terms is best understood as an instance of the benchmark scenario. However, the focus on the Hidden Traps and Gems allows us to show that, at least in those circumstances, the situation is best understood as a more alarming scenario, namely *divide et impera*. On these premises,

30 In legal scholarship, see Oren Bar-Gill, *Seduction by Contract : Law, Economics, and Psychology in Consumer Markets* (OUP 2012).

31 For the same reason, making the more complex offer cheaper than the simpler one in the Hidden Trap: competitive pressure.

a more intrusive (for traders) and protective (for consumers) interpretation of Article 4(2) and 5 UCTD are proposed.

Second, consider the provision introduced by the Modernization Directive stating that consumers have the right "where applicable, to know that the price was personalised on the basis of automated decision-making". This provision has been typically interpreted according to its plain meaning, thereby granting consumers the right to know that the price was personalized.[32]

Arguably, this right is not effective enough and stronger interventions are needed, starting with the right to know how much the price was personalized.[33] Why? For current purposes, it is sufficient to anticipate that exploitative price personalization is likely an instance of the *divide et impera* scenario, if not the bottom scenario. Against this background, the right to know that the price was personalized is ineffective. In fact, merely knowing that the price was personalized, without further information of the outcome or consequences of said personalization is not useful to the consumer. This is especially true for those (I suspect the overwhelming majority) who do not infer from the fact that the trader did not frame the personalization as an explicit discount that the trader is most probably offering a personalized (and exploitative) surcharge. These consumers need to know how much the price was personalized in comparison to the impersonal price. Note that a plausible interpretation of the GDPR leads to the conclusion that consumers at least have the right to be offered an impersonal price.[34] This is less than, but the logical precondition of, the right to know how much the price was personalized. Thanks to the GDPR, consumers can resist the processing of their data to personalized the price, thereby being offered an

32 See, IPSOS, London Economics, Deloitte, *Consumer Market Study on Online Market Segmentation through Personalised Pricing/Offers in the European Union* (2018); Alan Sears, "The Limits of Online Price Discrimination in Europe" (2020) 21 Science andTechnology Law Review 1; Sebastião Barros Valle, "The Omnibus Directive and Online Price Personalization: A Mere Duty toInform?" (2020) European Journal of Privacy Law & Technologies; Competition & Market Authority (CMA), Algorithms: How They Can Reduce Competition and Harm Consumers; Hans-Wolfgang Micklitz, Peter Rott, Natali Helberger, O Lynskey, Marijn Sax, Joanna Strycharz, *Structural Asymmetries in Digital Consumer Markets* (BEUC 2021); OECD, *Disclosure about Personalised Pricing on Consumers. Results from a Lab Experiment inIreland and Chile* (OECD 2021).

33 Fabrizio Esposito, "Making Personalised Prices Pro-Competitive and Pro-Consumers" (2020) 2/2020 *CeDIE Working Paper*.

34 Fabrizio Esposito, 'The GDPR Enshrines the Right to the Impersonal Price' (2022) 45 Computer Law & Security Review 105660.

impersonal price. The right to know how much the price was personalized means that the information about the impersonal price is given together with the one about the personalized price.

The seminal book *Consumer Theories of Harm* offers a wealth of examples of situations in which consumers are expectably suffering a suboptimal level of harm, in situations as diverse as retail energy markets, bank current and savings account, compensation and seating in the airline industry and fertility add-ons. On these grounds, the authors advance a convincing argument supporting the view that moving away from a negative duty not to trade unfairly and towards a positive duty to trade fairly is necessary.[35]

C. Four scenarios of consumer harm

I. A first approximation

It is possible to identify at least four archetypical scenarios of harm: the bottom, the lemon, *divide et impera*, and the benchmark. The bottom is the scenario where there are not enough average consumers to police the quality of traders' offers. Accordingly, traders do not compete on the merits and focus on exploiting consumers. The lemon is the scenario where traders struggle to compete on the merits because they face significant challenges in signalling the quality of their offers and thereby distinguishing themselves from profiteers. *Divide et impera* is the scenario where the interests of the average and vulnerable consumers could be aligned but have been artificially disconnected by the trader.

Finally, in the benchmark scenario, the interests of the average and vulnerable consumers are aligned. The average consumers are offering a form of herd protection to the vulnerable consumers. In other words, average consumers operate on the market by choosing traders competing on the merits. By doing so, they help these traders to succeed on the market by sidelining the profiteers. In this context, the vulnerable consumers benefit from the exercise of their power of choice by the average consumers.

The book *Consumer Theories of Harm* introduced another scenario called 'the subsidy'.[36] In this scenario, sophisticated consumers benefit from

35 Siciliani et alii, n 3, above, 179-208.
36 Siciliani et alii, n 3, above.

a consumer right or power, but that very same right or power is useless for the less sophisticated consumer (typically because it is too complex to exercise). The scenario does not seem well-designed for the following reason. Even if a consumer does not exercise the right to withdraw, the same consumer could benefit from other consumers putting pressure on the trader by exercising that right (and leaving also a negative review). Generalizing, the fact that some consumers do not exercise a right does not mean they are merely subsidizing other consumers as long as the interests of the two groups are aligned and the exercise of the right by one group is also beneficial to the other group.[37] The central concern seems whether the trader successfully eliminates the herd protection naïve consumers enjoy because of sophisticated consumers' behaviour. Hence, it appears appropriate to substitute the subsidy scenario with *divide et impera*.

II. The scenarios in more detail

1. The benchmark

In the benchmark scenario, fair and unfair firms struggle to distinguish between sophisticated and naïve consumers.[38] Accordingly, sophisticated consumers offer a degree of protection to the naïve ones. This protection is stronger, the higher the number of sophisticated consumers, and the more homogeneous the interests of the two groups are. The scenario covers situations of price obfuscation and evaluation inflation, in which the unfair firm tries to downgrade search attributes into latent credence attributes, thereby reducing competitive pressure on them. In these cases, the unfair firm attempts to obscure search attributes, turning them into less visible features, thus diminishing the competitive pressure they face.

37 See, more extensively on this, Fabrizio Esposito, Antonio Davola, Mateusz Grochowski, '
Price Personalization vs. Contract Terms Personalization', in Fabrizio Esposito and Mateusz Grochowski (eds), *Cambridge Handbook of Algorithmic Price Personalization and the Law* (CUP forthcoming).

38 Siciliani et alii, n 3, above, 126.

Note that this scenario is called the benchmark because it represents the best non-ideal set of circumstances:[39] the appropriate legal intervention will empower sophisticated consumers to exercise enough pressure on traders so that fair trading behaviour will become common, to the benefit also of naïve consumers whose interests, as noted, are aligned with the sophisticated consumers.

2. The lemon

In the lemon scenario, named after Akerlof's market for lemons model,[40] fair traders struggle to effectively signal their offers' quality to consumers, distinguishing them from the unfair traders' offers. This is thus an unstable scenario. When fair traders fail to solve this quality-signaling problem, both fair and sophisticated consumers exit the market, which then collapses in the bottom scenario.

Good durability and competence of a service provider are typical examples of this issue. The law intervenes with mandatory and voluntary durability warranties and guarantees[41] and minimum quality standards, such as the bar exam.

3. *Divide et impera*

In the *divide et impera* scenario, the interests of sophisticated and naïve consumers are artificially misaligned. 'Artificially' here stresses that, but for some trader's conduct, the interests of sophisticated and naïve consumers would be aligned. Note that the conduct does not necessarily be one that explicitly segregates consumers into different groups. Self-selection mechanisms allowing consumers to separate themselves actively are sufficient.

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39 On the distinction between ideal and non-ideal theories in relation to market allocations, see Joseph Heath, *Morality, Competition, and the Firm: The Market Failures Approach to Business Ethics* (OUP 2014).

40 George Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84 The Quarterly Journal of Economics 488. On which, see Stefan Grundmann, 'Knowledge and Information', in Stefan Grundmann, Hans-Wolfgang Micklitz & Moritz Renner (eds), *New Private Law Theory: A Pluralist Approach* (CUP 2021), 241-246.

41 See, for example, Artt. 5-9 and Art. 17, Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC OJ L 136/28.

4. The bottom

The bottom is the worst possible scenario. In this scenario, traders' offers are "worthless or of little value".[42] This scenario is populated only by unfair firms who exploit naïve consumers and their vulnerabilities. In other words, there is no fair firm operating in this market, and sophisticated consumers know this and stay away. Pyramid and Ponzi schemes and fake lottery prices are good examples of this. Glamorous Ponzi schemes like the one orchestrated by Bernie Madoff (20 billion USD) remind us that also normally sophisticated consumers can 'hit the bottom'.

5. On the relationship between the scenarios

Let us elaborate on the relationship between these scenarios. The benchmark scenario is the most favourable one for all consumers, while the bottom is the least favorable for the vulnerable consumers. The lemon scenario is volatile: if traders (or the legal framework) effectively address the signaling issue, consumers' situation improves to the benchmark scenario; if not, it deteriorates to the bottom scenario.

Divide et impera is, in a way, the most dangerous scenario, especially in the digital environment. Two features of the digital economy make it particularly relevant. First, the ability to create granular distinctions is useful to create offers that will have different degrees of appeal for sophisticated and naïve consumers, thereby misaligning their interests. At the same time, digital offering space is way more abundant than shelves in aisles, so granular offerings become also more common.

Ultimately, the key question is whether empowering sophisticated consumers (in particular, via information disclosure and the right to withdraw) will be enough to foster all consumers' interest in the market, or not. When that is not the case, more intrusive forms of intervention are required.[43] In the benchmark, this seems within reach. So is in the lemon scenario if the quality signal problem is solved. Note that solving the quality problem may require mandatory protective interventions such as minimum standards to expel scammers from the market. The extensive systems of market surveil-

42 Siciliani et alii, n 3, above, 112.

43 Esposito 2017, n 10, above and Fabrizio Esposito, *Law and Economics United in Diversity: Towards a Synthesis for the 21st Century* (Edward Elgar 2022), 175-180.

lance[44] in place to ensure that goods, but also food, drugs, etc, are safe show how extensive the EU protective net is—and by implication, how unfair it is to keep lamenting that the information paradigm dominates the EU governance of consumer transactions.

On these grounds, it is now possible to discuss three concerning situations that can be illuminated by the theories of harm approach.

D. Divide et impera *in digital marketplaces*

The first example is the fact that in online marketplaces, space is more abundant than shelves in the physical world. It follows that traders can make way more offers for similar products while introducing a significant degree of variation in the offers.[45]

I. Shopping between hidden traps and hidden gems as the new normal?

Traders frequently provide two versions of a product or service: a straightforward version and a more intricate one. While the sophisticated consumer grasps both, the naive consumer only understands the simple version. Such dual offerings are common, with examples including basic and premium internet plans. As per Articles 4(2) and 5 UCTD, traders are legally secure as long as both offers are deemed clear for the average consumer. However, this overlooks the vulnerable consumers who cannot discern the intricate offer's nuances, leaving them susceptible to exploitation.

To delve deeper, consider two contrasting scenarios. In one, the straightforward version is superior, while the intricate version has a concealed disadvantage ("Hidden Trap"). In the other scenario, the intricate offer is better, concealing a benefit ("Hidden Gem").

Considering the Hidden Trap scenario, the complex offer might involve unexpected costs, like a deductible for accidents. While some research has explored why consumers fall for these traps, the protective role of the sophisticated consumer towards the naïve has not attracted much attention. In such a context, the average consumer recognizes the simpler offer's better value and opts for it. But this choice does not deter traders from presenting

44 See, generally, Pieter Van Cleynenbreugel, *Market Supervision in the European Union: Integrated Administration in Constitutional Context* (Brill 2014).

45 See, more extensively, Esposito and Grochowski, n 13, above.

both versions. The vulnerable consumer, unable to identify the trap in the complex offer and likely enticed by a lower price, may be drawn to it. Under current interpretations of Articles 4(2) and 5 UCTD, this is lawful, even if it exploits vulnerable consumers.

In the Hidden Gem scenario, the complex offer might bundle a product with an additional beneficial service at a competitive price, such as car rentals with insurance. Is this any better for the vulnerable consumer? It isn't. Like the prior situation, average consumers discern the complex offer's superiority, finding the gem. In contrast, vulnerable consumers may see the straightforward, less beneficial offer as better, missing out on the concealed advantage. Again, the prevalent interpretation of Articles 4(2) and 5 UCTD does not afford ample protection to consumers.

In both contexts, whether facing a hidden trap or hidden gem, naïve consumers remain susceptible to harm. Sophisticated consumers' choices do not discourage traders from maintaining both offers, leaving the naïve ones at a consistent disadvantage.

II. The naïve consumers' right to transparent contract terms

What can be done for the naïve consumers? The assumption that sophisticated consumers will adequately protect the naïve ones is at the core of the rationale behind the *communis opinio*. The same idea is also at the core of the benchmark scenario. Accordingly, the benchmark scenario can be used to describe in more detail the rationale behind the *communis opinio*.

Using the conceptual apparatus developed by the theory of harm approach, our claims can be reformulated as follows. The *communis opinio* is wrong in considering that average consumers will protect the interests of the vulnerable ones regarding core terms; in other words, the *communis opinio* is wrong in considering core contract terms as an instance of the benchmark scenario. In some situations, at least, traders can use self-selection mechanisms based on opacity to 'divide and conquer' consumers. When this happens, naïve consumers find themselves in the bottom scenario, not in the benchmark one. This means that consumers are living in the *divide et impera* scenario. Let us see why.

As currently understood, Articles 4(2) and 5 of the Unfair Contract Terms Directive presuppose that core contractual terms fall within the last scenario – the benchmark. In other words, Articles 4(2) and 5 are based

on the assumption that naïve consumers are adequately protected by the behavior of the sophisticated consumer in relation to core terms.

This conclusion follows directly from the idea that it is sufficient to review the transparency of core terms from the sophisticated consumer's perspective. The reasoning is as follows: traders who want to attract sophisticated consumers have to offer transparent and attractive terms. Thus, also naïve consumers benefit from the traders' fear of losing business opportunities with sophisticated consumers. Indeed, the mainstream economic analysis of consumer law supports this view, especially in relation to core terms.[46] This analytical framework has been used to analyze the distinction between core and ancillary terms in UCTD.[47]

A partial solution requires that core terms must also be transparent from the perspective of naïve consumers. When this is not the case, then it will be possible for the judge to analyze the substantive fairness of the price-quality ratio, taking into consideration the existence of the hidden gem and hidden trap. In an individual transaction, the presence of the hidden trap will have more straightforward consequences since the naïve consumer has selected the contract with such terms. More problematic is the situation of the hidden gem, since the consumer, in this case, has opted to enter into the simple contract. At least, even in such cases, one can complain that the trader violated Article 5 UCTD in hiding the gem. Admittedly, however, the benefit for the consumer will be limited. This is not surprising, considering that this situation has failed to receive any attention until recently.

E. Hyper-engaging practices pulling us to the bottom

Content-sharing platforms are one of the most significant socio-economic developments in digital environments. Why do they work so well? Because they hook users by design, which makes them a problematic commercial

46 Broad survey in Esposito 2017, n 10, above. Recently, Ann-Sophie Vandenberghe, 'The Law on Unfair Terms in Standard Form Contracts in Europe', in Klaus Mathis and AvishalomTor (eds), *Consumer Law and Economics* (Springer 2020), 126-127 and Esposito and Grochowski, n 13, above.

47 Matteo Dellacasa, 'Judicial Review of "Core Terms" in Consumer Contracts: Defining the Limits' (2015) 11 *European Review of Contract Law* 152; Fernando Gómez Pomar, 'Characterizing Economic and Legal Approaches to the Regulation of Market Interactions', in Peter Cserne and Fabrizio Esposito (eds), *Economics in Legal Reasoning* (Palgrave 2020) 63.

practice. They do it because they are the clearest example of hyper-engaging practices (H-EPs).[48]

I. Hyper-engaging practices: capturing and retaining user attention

Hyper-engaging practices are tactics used online, especially by content-sharing platforms, to capture and retain user attention. These strategies focus on exploiting human attentional limitations and reinforcing certain behaviours to make using a service a habitl. H-EPs tap into the limited attentional resources of humans. Common manifestations include infinite scrolling, autoplay, push notifications, emojis, disappearing stories, follower counts, and more. By targeting human attention, they often compromise rational decision-making.

H-EPs have two main components. The first is the use of adaptive algorithms to personalize content for users. Algorithms analyze past interactions and adjust future content, providing a sense of reward. The second is the use of behavioural reinforcement techniques, which match closely the Dopamine System. Dopamine, a hormone, plays a key role in habit formation. In fact, the activation of the dopaminergic system encourages the repetition of actions that previously led to rewards. The dopamine cycle, comprising stages of wanting, seeking, anticipating, triggering, and rewarding, is essential to understanding repeated engagement with online platforms.

The so-called Hook Model well illustrates the above.[49] The Hook Model is a major blueprint for creating habit-forming products: it includes triggers, actions, variable rewards, and investments. This model closely mimics the dopamine cycle, leading to habitual use of platforms. Content-sharing platforms like YouTube, Facebook, and TikTok clearly resemble the Hook Model. Features like likes, shares, comments, etc., serve as variable rewards, while the scarcity of certain content (like stories) and features like infinite scrolling keep users engaged.

Hyper-engaging practices raise concerns generally in terms of manipulation, but for some users, the problem can degenerate into addiction. H-EPs are manipulative by nature: they can direct user behaviour without the

48 Fabrizio Esposito and Thaís Maciel Cathoud Ferreira, 'Addictive Design as an Unfair Commercial Practice: The Case of Hyper-Engaging Dark Patterns' (2024) *European Journal of Risk Regulation* 1.

49 Nir Eyal, *Hooked: How to Build Habit-Forming Products* (Portfolio 2014).

user's awareness, compromising autonomous decision-making. This occurs as platforms exploit cognitive biases in users, pushing them to spend more time online. Did it ever happen to you to open one of these platforms 'to give a quick look' and then 30+ minutes had passed? That is the first problem I am referring to.

Some users are not so lucky, and for them, the habit degenerates into internet addiction, which results in negative physical, mental, and social effects. The continuous dopamine cycles make offline life less gratifying.

Hyper-engaging practices are a form of nudge. In fact, a 'nudge' alters behavior through certain aspects of choice architecture that are not relevant from a rational choice perspective.[50] When big data analytics play into nudges, they become 'hypernudges'.[51] Hence, H-EPs can be defined as a type of hypernudge, where the digital interface influences users to spend more time online. H-EPs are also dark patterns. Dark patterns are practices that distort or prevent users from making informed choices.[52] H-EPs can be seen as a subset of dark patterns due to their manipulative nature and impact on behaviour. Unsurprisingly, dark patterns often overlap with hypernudges as they both affect user behaviour using big data.

The scenario of harm that most closely resembles the use of hyper-engaging practices is the lemon, but with a clear negative trend toward the bottom. In fact, consumers are at the mercy of unscrupulous traders who design their service to make it, in essence, addictive. Moreover, it is difficult to predetermine which consumers will be prey of hyper-engaging practices.

At the same time, content-sharing platforms can be useful and meaningful to people's lives in many ways. This is true even if one focuses more specifically on social media.[53] Accordingly, one should not ignore that content-sharing platforms can and potentially could be very valuable to their users. Accordingly, it seems that these services are facing the quality problem characteristic of the lemon scenario so regulatory intervention could be pretty effective in orienting competitive pressure towards truly value-creating service innovation.

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50 See, for a discussion, Esposito 2018, n 10, above.

51 Karen Yeung, '"Hypernudge": Big Data as a Mode of Regulation by Design' (2017) 20 Information, Communication & Society 118.

52 Broad survey in Jamie Luguri and Lior Strahilevitz, 'Shining a Light on Dark Patterns' (2021) 13 *Journal of Legal Analysis* 43.

53 See, however, Jaron Lanier, *Ten Arguments For Deleting Your Social Media Accounts Right Now* (Henry Holt and Co. 2018).

II. Hyper-engaging practices plausibly violate the Unfair Commercial Practices Directive

Already the Unfair Commercial Practices Directive (UCPD)[54] can be used to help traders in industries where H-EPs are and could be used pervasively to combat said practice. In fact, the UCPD aims to safeguard consumers from, among others, manipulative commercial practices that might distort their decision-making processes. Hyper-engaging practices are indeed likely to infringe upon the UCPD.

As seen, H-EPs are characterized by their ability to engage users by exploiting cognitive vulnerabilities and enticing users to make decisions that serve the platform's financial interests. The power of these practices lies in their subtlety; in fact, they often operate in an organic way, with users perceiving their engagement decisions as a product of free will.

For a practice to be deemed unfair under the UCPD, it must, first of all, satisfy the 'transactional decision test': the practice should cause the average consumer to make a transactional decision that they would not have taken otherwise. The Court of Justice of the European Union (CJEU) has interpreted this concept broadly, suggesting it encompasses not just purchasing decisions, but any decisions related to them.[55] Hence, any strategy designed to capture consumer attention falls within the UCPD's purview. Given H-EPs' manipulation of user behaviour for financial gain, they potentially breach this test. This is confirmed by the fact that the use of H-EPs is advised in popular marketing literature.[56]

Admittedly, in the digital environment, it is challenging to demonstrate the precise impact of H-EPs on user behaviour empirically. However, evidence from the literature and other studies on online manipulation

54 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council OJ L 149/22.

55 See Judgment of 19 December 2013, *Trento Sviluppo srl, Centrale Adriatica Soc. Coop. Arl v Autorità Garante della Concorrenza e del Mercato*, C-281/12, ECLI:EU:C:2013:859.

56 Eyal, n 49, above; Richard Shotton, *The Choice Factory: 25 Behavioural Biases that Influence What We Buy* (Harrington House 2018); A K Pradeep, *The Buying Brain: Secrets for Selling to the Subconscious Mind* (Wiley 2021).

corroborates the claim that H-EPs exploit cognitive vulnerabilities.[57] This manipulation often leads to heightened user engagement, causing decisions which might not have been made in the absence of these manipulative cues.

While H-EPs might seem to be misleading, they are best understood as aggressive commercial practices. Misleading practices revolve around withholding or distorting information. H-EPs, however, are immune to information provision. Their potency is not in the concealment of information but in the very architecture of their design. They represent a more profound threat to consumers, surpassing mere misleading tactics.

Articles 8 and 9 UCPD prohibit aggressive commercial practices. These are practices that employ, among others, undue influence, which impairs consumers' freedom of choice, leading them to decisions they would not ordinarily make. Given H-EPs' manipulative nature, they fit well within this description.

In fact, the UCPD defines undue influence as a situation where a trader exploits a position of power over a consumer, pressuring them and limiting their ability to make informed decisions. Notably, the CJEU has shown flexibility in interpreting undue influence, considering not just explicit but also implicit, more subtle forms of pressure.[58]

H-EPs are successful due to their ability to guide user decisions stealthily. By design, they direct attention and influence user choices, often below conscious awareness. In the broader framework of the UCPD, and particularly given the mandate to be future-proof, these manipulative practices should be interpreted as exerting undue influence. This view is bolstered by

57 See, for example, World Health Organization, *Public Health Implications of Excessive Use of the Internet, Computers, Smartphones and Similar Electronic Devices: Meeting Report, Main Meeting Hall, Foundation for Promotion of Cancer Research, National Cancer Research Centre, Tokyo, Japan, 27-29 August 2014* (World Health Organization 2015) <https://apps.who.int/iris/handle/10665/184264> accessed 5 June 2023; Patti Valkenburg, Adrien Meier and Ine Beyens, 'Social Media Use and Its Impact on Adolescent Mental Health: An Umbrella Review of the Evidence' (2022) 44 Current Opinion in Psychology 58.

58 Judgment of 18 October 2012, *Purely Creative Ltd and Others v Office of Fair Trading*, C-428/11, ECLI:EU:C:2012:651; Judgment of 13 September 2018, *Autorità Garante della Concorrenza e del Mercato v Wind Tre SpA and Vodafone Italia SpA*, C-54/17, ECLI:EU:C:2018:710; Judgment of 12 June 2019, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Orange Polska*, C-628/17, ECLI:EU:C:2019:480.

the UCPD Guidelines and other legal literature that links undue influence with manipulative tactics.[59]

In case the above claim is rejected, H-EPs shall be analyzed through the lenses of Article 5 UCPD, the general prohibition designed to target unfair commercial practices not covered by other UCPD provisions. Pursuant to this general prohibition, a practice is deemed unfair if it goes against professional diligence and can notably alter the average consumer's economic behaviour. Despite the prevalence of H-EPs, they are often manipulative, violating the principles of good faith and fair dealing. In particular, employing H-EPs that compromise users' autonomy is in breach of professional diligence. The UCPD's Article 5(2) implements the transactional decision test, which relates to H-EPs' influence on consumer behaviour. Even if H-EPs are not labelled aggressive, they should be classified as unfair practices under Article 5(2) UCPD, given their propensity to steer consumer behaviour.

In summary, the UCPD can prohibit H-EPs. Even if these tactics were not foreseen when the directive was enacted, UCPD's provisions can be construed to ban H-EPs, categorizing their deployment as an unfair practice.

F. Divide et impera *by way of price personalization*

Price personalization has been receiving a significant among of attention by academic policy-makers and stakeholders in the recent years. Indeed, it is a topic of great complexity from normative, institutional, descriptive, and methodological perspectives (especially from an interdisciplinary viewpoint).[60]

This complexity is well-illustrated by the change of position by BEUC, the European Consumer Organization, on the matter. During the legislative process leading to the Modernization Directive, BEUC claimed consumers needed 'blunt' transparency about the fact that a price is personalized;[61]

59 Commission Notice – Guidance on the Interpretation and Application of Directive 2005/29/EC of the European Parliament and of the Council Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market [2021] OJ C526/1, 100-104.

60 See, broad survey in Esposito and Grochowski forthcoming, n 37, above.

61 BEUC, *Proposal for a Better Enforcement and Modernisation of EU Consumer Protection Rules – "Omnibus Directive". The BEUC View* (BEUC 2018).

the European Parliament amended the directive's text to that effect. In the summer of 2023, BEUC proposed to ban price personalization.[62]

This U-turn is problematic in two respects. The first is methodological. Not much justification was provided a few years ago, while the more recent analysis fails to engage with the relevant literature. The second is that there are substantive reasons that while the 'blunt' transparency position is not enough, the 'blunt' prohibition errs in the opposite direction.

The theory of harm approach helps to articulate these points.

I. The economic preconditions of exploitative price personalization

Price personalization is not necessarily detrimental to consumers.[63] In fact, price personalization can be understood as a way to foster 'spatial competition'. It is a fact that offers can be of different quality. This difference can be 'vertical', for example, between budget and premium versions of a good or service; or they can be 'horizontal', so that different people will prefer different offers. Food, beverages and clothing are sectors were both distinctions coexist: Coca vs Pepsi (horizontal); Ferrari vs Twingo (vertical); pizza vs sushi (horizontal); Rolex vs Casio (vertical); etc.

The point is that, as discussed below, price personalization can be exploitative of consumers; but it can also benefit them. First, it can increase access. If a consumer is willing to pay below market price but above cost, it will be profitable to the trader to offer a personalized discount to that person. Second, it can stimulate competition, especially between horizontally-differentiated offers. The intuition is that a discount could motivate a loyal consumer of product A to try out product B. Of course, algorithmic price personalization also poses threats to the competitive process.[64] But the point is that this is complex business practice with lights and darks and should be analyzed and governed with nuance.

62 BEUC, *Each Consumer a Separate Market? - BEUC Position Paper on Personalised Pricing* (BEUC 2023).

63 See, generally, Office for Fair Trading (OFT), *The Economics of Online Personalised Pricing* (OFT 2013); OECD, *Personalized Pricing inthe Digital Era* (OECD 2018); Esposito 2020, n 33, above; Esposito and Grochowski forthcoming, n 37, above.

64 See, Christopher Leslie, "Predatory Pricing Algorithms" (2023) 98 *New York University Law Review* 49 and Thomas Cheng and Julian Nowag, "Algorithmic Predation and Exclusion" (2023) 25(1) *University of Pennsylvania Journal of Business Law* 41.

Let us focus on the use of price personalization to extract rents from consumers. There is widespread agreement among economists that traders can use algorithmic decision-making to increase prices to specific (groups of) consumers under the following conditions: profiling capacity; some degree of bargaining power; obstacles to arbitrage.[65]

The first requirement is that traders have an increased ability to understand how much consumers are willing to pay for a product or service.[66] The second is some degree of bargaining power.[67] This bargaining power can originate in the market structure and the lack of competitive pressure, or more situational elements. Within the elusive notion of situational bargaining power,[68] obfuscation practices have received particular attention.[69] An obfuscation practice hides behind a veil of complexity (linguistic or otherwise) the risks the consumer is exposed to; obfuscation limits the decisional ability of the consumer. For example, a credit agreement where the interest rate is calculated in national currency, but the credit is issued and then reimbursed in a foreign currency with the implication of the exchange rate applied by the lender makes the consumer pay the lender twice: first by paying the interest rate; second by paying the mark-up on the exchange rate applied by the lender.[70]

65 OECD, n 63, above and OFT, n 63, above.

66 See, generally, Katsov, Ilya, *Introduction to Algorithmic Marketing: Artificial Intelligence for Marketing Operations* (Sunnyvale 2017).

67 See OECD, n 63, above and OFT, n 63, above. See also Juan-José Ganuza and Gerard Llobet, 'Personalized Prices in the Digital Economy', in Juan-José Gauza and Gerard Lobert (eds), *Economic Analysis of the Digital Revolution* (FUNCAS 2018).

68 Michael Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press 1991).

69 Xavier Gabaix and David Laibson, 'Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets' (2006) 121(2) *The Quarterly Journal of Economics* 505; Oren Bar-Gill, 'Algorithmic Price Discrimination: When Demand Is a Function of Both Preferences and (Mis)Perceptions' (2019) 86 *University of Chicago Law Review* 217; William Allender, Jura Liaukonyte, Sherif Nasser, and Timothy J. Richards, 'Price Fairness and Strategic Obfuscation' (2020) *Marketing Science* <https://doi.org/10.1287/mksc.2020.1244> accessed on 18 October 2023.

70 This type of credit agreements has been the subject of multiple decisions by the Court of Justice; see, recently, Judgment of 18 November 2021, *A. S.A.*, C-212/20, ECLI:EU:C:2020:901. For a legal and economic analysis, see Jarosław Bełdowski and Wiktor Wojciechowski, 'The Poisonous Fruit of Foreign Currency Loans for Consumers in Selected Central European States: The Dilemma for Macroeconomic Policy', in Avishalom Tor and Klaus Mathis (eds), *Consumer Law and Economics* (Springer 2021).

Significant barriers to arbitrage mean it is hard or impossible to transfer the right to receive the performance on the secondary market. An example of a contractual obstacle is a non-transferable ticket. However, it is also sufficient that the costs of organizing this secondary market are so high that it is not profitable to arbitrage. Struggling to enter into contact with consumers who are or would be offered a higher price is the main practical obstacle to arbitrage. In digital environments, both obstacles can be quite significant.

In digital markets, it is quite easy to keep consumers unaware of each other; therefore, there is a real possibility that traders who do not commit to offering only personalized discounts will signal to consumers that they are offering a personalized discount when they do so. The same traders, however, will hardly signal that the personalization practice is disadvantageous to consumers. Under these circumstances, if possible, traders will opt to inform consumers only that the price has been personalized without giving further information. In other words, they will try to hide their exploitative practice behind a curtain of opacity or vagueness.

More precisely, the following outcomes can be identified:

- Outcome 1: the trader commits to offer and offers personalized discounts only
- Outcome 2: the trader may offer personalized discounts or surcharges and offers a personalized discount or the impersonal price
- Outcome 3: the trader may offer personalized discounts or surcharges and, in the end, offers a personalized surcharge

These three scenarios are defined based on traders' pricing strategies: whether they exclusively offer personalized discounts and whether they present consumers with personalized discounts or surcharges. A personalized discount is a tailored price lower than the impersonal price, while a surcharge is higher than the impersonal price. Traders may commit solely to personalized discounts as a strategy to appeal to consumers (Outcome 1). To ensure that consumers are receiving a discount, traders will disclose the impersonal price effectively. This is vital for transparency and maintaining trust. However, if traders do not commit exclusively to discounts, they may give some consumers a surcharge and others a discount (Outcomes 2 and 3).

For strategic reasons, traders might avoid specifying which type of personalized price a consumer is receiving, as revealing a discount to one

consumer might imply a surcharge for another. However, this will happen only if consumers being offered an 'opaque' personalized price can compare it with another consumer's personalized discount. If, instead, consumers even perceive an 'opaque' personalized price as advantageous to them,[71] traders will systematically make their discounts explicit (Outcome 2) and their surcharges opaque or implicit (Outcome 3).

Against this background, the mere right to know that the price is personalized is, quite likely, ineffective in helping consumers. If traders prefer to disclose neither discounts nor surcharges, knowing that the price was personalized may lead consumers to assume optimistically that it is a discount, even when it is not. If traders prefer to disclose discounts for self-interested reasons, consumers may still interpret an 'opaque' personalized price (Outcome 3) as a discount. The result will be clearly dissatisfactory for consumers.

In sum, independently of consumer behaviour, the mere right to know that the price was personalized is not helpful to consumers. This does not mean that an information disclosure should be discarded in general as an important piece of the puzzle necessary that must be solved to make price personalization pro-competitive and pro-consumers.

Exploitative price personalization is quite literally an example of *divide et impera*. The practice aims to identify and exploit consumers who are willing to pay more for the good or service. Thus, the practice specifically targets herd protection, which is characteristic of healthier market contexts.

At the same time, price is a very salient contractual attribute, especially if it is presented in a simple way. This means that even if traders try to separate consumers into smaller groups, if meaningful information is given them in a simple way, the market mechanism could come a long way in deterring exploitative price personalization.

71 There is limited empirical research on this matter. The limited evidence available suggests that consumers interpret opacity optimistically, thereby benefitting exploitative practices. See, Willem van Boom, Jean-Pierre van der Rest, Kees van den Bos, Mark Dechesne, 'Consumers Beware: OnlinePersonalized Pricing in Action! How the Framing of a Mandated Discriminatory Pricing Disclosure Influences Intention to Purchase' (2020) 33 Social Justice Research 331.

II. An information duty that would work?

The core of the information duty I advocate for is the comparison between the personalized price and the personalized one: the right to know of how much the price was personalized. More precisely, traders should disclose the personalized price and the impersonal one at the same time. The simplest way to do so would be to rely on market practices used to make discounts salient. Notably, the information duty would not prohibit personalized surcharges (price increases above the market price) but would force traders to make them salient. The assumption is that the trader would have to justify to the consumer why they should want to pay a higher-than-normal price.

Under EU law, this right to know the impersonal price can also be constructed by way of interpretation of the information duty introduced by the Modernisation Directive. In fact, the text of the directive reads as: "where applicable, [consumers have the right be informed] that the price was personalized on the basis of automated decision-making". Since, as noted above, this mere right to know that the price was personalized is of little (if any) use to consumers, the principles of transparency and effectiveness require more from this text.[72] An attractive norm would grant consumers the right to know how much the price was personalized on the basis of automated decision-making. Important systematic considerations can be extracted by a careful analysis of the General Data Protection Regulation.[73] In particular, a careful analysis of Articles 7 and 22 GDPR supports this view.[74]

Moreover, to consider how intrusive this proposal would be, one needs to consider that is arguably the case that the right to be offered an impersonal price is already granted by the GDPR.[75] In extreme synthesis, in Outcomes 2 and 3, traders try to take advantage of their bargaining power, so that the bundled consent to price personalization and to enter into the contract with the personalized price is plausibly presumed not to be freely given. Accordingly, traders are obliged to give consumers the option to enter into

72 Esposito 2020, n 33, above.

73 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC OJ L 119/1.

74 Esposito 2020, n 33, above.

75 Esposito 2022b, n 34, above.

the contract without consenting to the offering of a personalized price. A similar conclusion can be reached when the legal basis traders try to rely upon is legitimate interest: exploitative price personalization is not a legitimate interest, so consumers can effectively object. This means that the right to be offered the impersonal price exists.

Consequently, recognizing the existence of the right to know how much the price was personalized would simply require making explicit at the relevant moment in time an information consumers are entitled to know anyhow. This does not seem like an enormous interpretative leap, but it is possibly an effective way to protect consumers from many exploitative attempts on digital markets.

G. Conclusions

All consumers can be harmed, not only the 'vulnerable ones' within the meaning of the UCPD. Indeed, all consumers' economic interest, safety and health shall receive a high level of protection pursuant to Article 169 TFEU.

The scenarios of harm are a useful framework to identify the deeper issues behind an intuitively concerning market practice. Thus, the scenarios help assess to what extent and why the practice is problematic, thereby pointing in the direction of plausibly effective interventions.

Throughout the chapter, it was seen that the single most significant variable is to what extent the interests of sophisticated and naïve consumers are aligned. In other words, herd protection is at the core of consumer policy. In terms of legal interventions, this means it is often reasonable to rely on empowerment tools, first and foremost, information duties. Empowering sophisticated consumers in the benchmark and lemon scenarios can go a long way to make traders behave fairly.

At the same time, one needs to see when empowering is unlikely to work. This is especially the case in the scenarios of harm called *divide et impera* and bottom scenarios. in these scenarios, empowerment of sophisticated consumers is unlikely to help naïve consumers. Thus, more intrusive forms of intervention will be needed, to the benefit of all consumers, but especially the naïve ones.

The semi-final point to make is that the theory of harm approach implies that the legal system should react with particular resolution in those situations where traders are or at least have been actively operating to misalign the interest of sophisticated and naïve consumers.

The final point is that the extent to which sophisticated and naïve consumers' theoretical categories overlap with the legal ones of average and vulnerable consumers requires careful investigation. The correlation cannot be simply assumed. Some choice architectures could be so complex that reasonably informed attentive and circumspect consumers are best understood as naïve consumers; this essentially means that the market is best understood as an instance of the bottom scenario, thereby requiring strong legal intervention.