

PART II

Conceptualizing Digital Vulnerability Beyond Consumer Law

Digital Vulnerability in a Post-Consumer Society. Subverting Paradigms?

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A. Why digital vulnerability?

The concept of digital vulnerability¹ has recently been playing pivotal role in the EU discourse on consumer protection in the digital economy. Its emergence and rapid popularity arose primarily from shortcomings of the existing conceptual framework of consumer law, which made it difficult to incorporate a new group of problems instigated by the online market. This was due, first of all, to a highly formalized distinction between consumers and other market actors in EU law up to now. Secondly, in its classical design, EU consumer law was based on the average consumer benchmark,² and only to a small extent supplemented with the vulnerable consumer concept.³ Both notions are intended to serve as standardized rubrics for application of those elements of the consumer law framework that require evaluation of behavioral determinants of consumer market conduct (such as awareness, knowledge and cognitive skills). This system has, however,

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1 The concept of consumer vulnerability in this chapter builds on the seminal study by N. Helberger, *et al.*, 'Surveillance, consent and the vulnerable consumer. Regaining citizen agency in the information economy', in: Helberger *et al.*, *EU Consumer Protection 2.0. Structural asymmetries in digital consumer markets* (BEUC: Brussels 2021); see also below section D.I. On further elaborations of this concept see e.g. Helberger *et al.*, 'Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability' (2021) 45 *Journal of Consumer Policy* 175; Micklitz *et al.*, 'Towards Digital Fairness' (2024) 13 *Journal of European Consumer and Market Law* 24.

2 On consumer law's overly broad reliance on the average consumer concept, see Esposito / Grochowski, *The Consumer Benchmark, Vulnerability, and the Contract Terms Transparency: A Plea for Reconsideration*, 18 *European Review of Contract Law* 1 (2022).

3 See also Leczykiewicz / Weatherill, *The Images of Consumer in EU Law*, in: Leczykiewicz / Weatherill (eds.) *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law*, Hart Publishing 2016, 7–11.

proven too stiff to acknowledge new sources of consumer harm brought about by the online economy.

The digital vulnerability idea emerged primarily to overcome the limitations of this system and to make consumer law more sensitive to new types of threats faced by consumers in the online realm.⁴ Above all, it seeks to provide a coherent framework for new dimensions of consumer weakness⁵ resulting from the growth of the data- and algorithm-based economy. Constructed with this idea in mind, digital vulnerability was embedded in the classical imaginary of the consumer as a market actor who pursues intrinsically economic goals. In this sense, digital vulnerability shares its conceptual roots with the other areas of EU consumer law. It was built on the implicit assumption that consumers' goals and interests can be expressed in terms of the value of goods they seek to accrue on the market. Consequently, consumer law's entire system, including open-ended standards (such as good faith) and evaluation benchmarks (such as the average consumer model), have been calibrated for consumers as market actors who pursue economic goals in classical terms.

Over time this picture was partly altered by acknowledging that consumer interest and consumer harm may include also non-economic values such as satisfaction and other emotions.⁶ Nonetheless, EU consumer law has never developed a systematic framework for including non-economic interests and non-economic harm. The expansion of the digital economy made this deficit particularly vivid and troublesome. Although the existing structures of EU consumer law have not proven defenseless in this regard, the lack of an underlying conceptual framework turned this exercise into a game of hide-and-seek. The early attempts to grapple with non-economic consumer interests resorted primarily to general tools such as the UCTD (Unfair Contract Terms Directive)⁷ coupled with fundamental rights (espe-

4 For further discussion on the conceptual genealogy of digital vulnerability, see Grochowski, Digital vulnerability – intellectual origins, in Grundmann / Sirena (eds.) European Contract Law and Future Challenges Intersentia 2024 (forthcoming).

5 On various ways of understanding vulnerability in the digital consumer economy, see also OECD, *Consumer Vulnerability in the Digital Age*, OECD Digital Economy Papers, No. 355, June 2023, 12–14 and Galli, Algorithmic marketing and EU law on unfair commercial practices, Springer 2022, 188–192.

6 See e.g. E. Illouz, *Emotions as Commodities. Capitalism, Consumption and Authenticity*, Routledge 2017.

7 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29–34.

cially freedom of speech)⁸ as a benchmark for understanding the essence of consumer detriment. The recourse to fundamental right was, however, not supported with any deeper concept of consumer weakness in the non-economic realm. The enactment of the DSA (Digital Services Act)⁹ further amplified this problem, posing a threat of splitting consumer protection online into two worlds that cannot communicate with each other.

These shortcomings call for a more in-depth consideration of the place and role of non-economic interests within the consumer weakness/vulnerability agenda.¹⁰ The chapter takes up this query and delves into the question of how consumer law can accommodate the new consumption modalities in the digital economy.¹¹ The analysis proceeds in four steps. It sets out with an outline of the consumer concept up to now, paying special attention to the interplay between economic and non-economic consumer interests (section B). The argument proceeds towards new consumption paradigms in the online economy, explaining the challenge they pose for consumer interest and consumer harm (section C.I.). Against this background, the chapter also takes a critical look at the bottom-up strategies employed in response to the broader and more diverse array of consumer interests (section C.II.). Further, the analysis identifies the main traits of the digital vulnerability idea, explaining to what extent it overthrows the classical conceptualization of a consumer as a market participant (section D.I.). With this in mind, the chapter formulates an outline of the ‘post-consumer digital vulnerability’ concept (section D.II.) and proposes ways to integrate it with the general digital vulnerability framework into a coherent framework (section D.III.). The text concludes with a few remarks about the possible future trajectory for ‘post-consumer digital vulnerability’, taking into account the parallel system of protection emerging in EU regulation of online platforms (section E).

8 See section C.II.

9 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC, OJ L 277, 27.10.2022, p. 1–102.

10 On the role of various forms of consumer vulnerability within the conceptual agenda of consumer law, Grochowski, *Digital Vulnerability: Hopes and Disillusions* (unpublished manuscript, on file with author).

11 The chapter develops selected thoughts outlined in my earlier editorial: Grochowski, *Consumer Law for a Post-Consumer Society*, 12 *Journal of European Consumer and Market Law* 1 (2023).

B. Open-edged economic imaginary

The conceptual roots of the modern consumer law framework date back to the turn of 1960s and 1970s, when a mounting mass consumption society drew policymaking attention to the protection of rights of non-professionals on the market. While in the US the idea of consumer protection was rooted in the idea of consumers who were state citizens and who, therefore, should be protected against harmful market practices,¹² the European approach developed rather as a spillover of the ordoliberal ideal, adopted as the cornerstone of the political economy in the post-war Western Europe.¹³ The emerging consumer protection in Europe was based on the imaginary of a consumer market and consumer law typical for that era. It focused attention on individuals buying products and services to satisfy everyday personal needs, from purchasing a car to getting a candy in a store. The goods consumer sought on the market were seen through the prism of exchanging goods and services of measurable economic value for money.¹⁴

Expectedly, the accents in consumer protection were placed primarily on supporting autonomous and informed market choices and ensuring the proper quality of goods and services.¹⁵ The core of consumer protection law that formed in this way encompassed typical situation where consumer decision-making might be hampered by the contractual circumstances (off-premises and distance contracts), product safety, and unfair terms; later it was supplemented by rules on sale agreements and on other more specific types of consumer contracts (such as timeshares and credit).¹⁶ All these acts rested on the implicit premise that consumer protection meant a protection of economic interests understood along conventional lines – i.e. as a value that can be expressed in monetary terms (or at least that is directly relatable

12 Herrine, What Is Consumer Protection For?, 34 *Loyola Consumer Law Review*, 240 (2022).

13 Krämer, The Origins of Consumer Law and Policy at EU Level, in Micklitz (ed.), *The Making of Consumer Law and Policy in Europe*, Hart Publishing 2021, 13–19.

14 See also Olsen, Consumer Imaginaries, Political Visions and the Ordering of Modern Society in Micklitz (ed.), *The Making of Consumer Law and Policy in Europe*, Hart Publishing 2021, 278–284.

15 See also, more generally, Freedman, A Short History of Consumer Policy in the EU in Leczykiewicz / Weatherill (eds.) *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law*, Hart Publishing 2016, 452–458.

16 Tonner, From the Kennedy Message to Full Harmonising Consumer Law Directives: A Retrospect, in Purnhagen / Rott, *Varieties of European Economic Law and Regulation. Liber Amicorum for Hans Micklitz*, Springer 2014, 701–704.

to a monetary measure). This imaginary has been intrinsic to European consumer law ever since. It directly informed, for instance, the structure of the unfairness test in the UCTD, where the benchmark of ‘consumer detriment’¹⁷ has been tacitly understood as economic harm,¹⁸ i.e. the unfavourable quality(value)/price ratio. Such an understanding of interest and harm is ubiquitous in EU consumer law and forms the backbone of its agenda.¹⁹ The same logic applied to the average and vulnerable consumer models used to benchmark basic consumer features (such as knowledge, awareness and gullibility).²⁰ Although these notions do not build on any clear assumptions as to transaction type – and they could apply across all market sectors – they have been implicitly shaped as models of human behaviour in the market settings where consumers exchange conventional commodities in the sense described above.²¹

Over time this structure of consumer law was gradually becoming more porous and capable of accommodating market situations and interests that did not necessarily fit into the picture of classically framed consumption. The instances of non-economic interests transcending into the main body of consumer law were, however, rather an exception, and they have never been put into a coherent conceptual framework (notwithstanding the question whether the deep heterogeneity of these cases makes such framework at all feasible). However, it is worth looking at the most remarkable

17 Article 3(1) UCTD.

18 See e.g. Rott, *Unfair Contract Terms*, in Twigg-Flesner (ed.), *Research Handbook on EU Consumer and Contract Law*, Edward Elgar 2016, 299–301. It must, however, be noted that a segment of scholarship argues for a more situation- and sector-specific approach towards consumer detriment in the meaning of the UCTD – see Micklitz, *Unfair Terms in Consumer Contracts*, in Reich *et al.*, *European Consumer Law*, Intersentia 2014, 148–149, with further references. If extended beyond the economic context, this idea could possibly serve as a point of reference for freedom of speech and other post-consumer commodities discussed below.

19 Siciliani *et al.*, *Consumer Theories of Harm. An Economic Approach to Consumer Law Enforcement and Policy Making*, Hart Publishing 2019, 109–136; Esposito / Sibony, *In search of the theory of harm in EU consumer law: lessons from the consumer fitness check*, in Mathis / Tor (eds.) *Consumer law and economics*, Springer 2021.

20 Article 5(3) of the 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, 11.6.2005, p. 22–39.

21 See e.g. Esposito / Grochowski *supra* (fn. 2), at 6–15.

or conceptually challenging examples of such situations, as they mark a gradual shift from the traditional consumer world to the new territory that will be further²² described as “post-consumer”.

The earliest instance of a non-monetary perspective in consumer law (and perhaps the one most rooted in consumer law theory and practice) has been responsibility for substandard package travel services. Conceptualized for the first time in the ECJ *Leitner* judgment,²³ it became widely known as responsibility for a ‘ruined holiday’, eventually making its way into EU legislation.²⁴ The doctrine builds on the premise that the consumer interests embedded in a package travel service are by their nature hybrid and embrace not only purely economic values, but also emotions and experiences that a consumer sought to attain by purchasing a particular service. Consequently, consumers can obtain not only monetary compensation for the direct loss of economic value (e.g. when the purchased resort stay is cancelled), but also for the frustrated prospects for the positive feelings associated with this service (relatively: for the negative feelings triggered by particular unpleasantness).²⁵ Along similar lines, consumers can also be compensated for emotional discomfort caused by interruptions of air travel. Under the air passengers’ rights regulation,²⁶ the core compensation in the event of the cancellation or delay of a flight consists of a lump sum payment, irrespective of the ticket price and other direct economic parameters.²⁷

22 See section C.II.

23 Judgment of 12 March 2002, C-168/00, *Simone Leitner v TUI Deutschland GmbH & Co. KG*, ECLI:EU:C:2002:163.

24 Article 13 of the Package Travel Directive - Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, OJ L 326, 11.12.2015, p. 1–33.

25 On the essence of non-economic harm in tourist services, see e.g. Havu, *Damages Liability for Non-material Harm in EU Case Law*, 44 *European Law Review* 492 (2019).

26 Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, OJ L 46, 17.2.2004, p. 1–8.

27 On immaterial harm against the backdrop of the 261/2004 Regulation, see also Karsten, *Passengers, consumers, and travellers: The rise of passenger rights in EC transport law and its repercussions for Community consumer law and policy*, 30 *Journal of Consumer Policy* 117, 132–133 (2007).

Non-economic perspectives have been growing in consumer law also in other ways, beyond the direct economic rationale. Most importantly, EU law has recognized that consumers may be interested not merely in obtaining certain services and goods, but also in subscribing to certain ethical or political values. The agenda that consumers most frequently want to adhere to and advance through their market choices pertains to the ethics of manufacturing certain goods (embedded especially in various manifestations of the ‘fair trade’ movement) or consuming them (regarding especially the environmental impact of certain commodities or the ways of using them).²⁸ Consumer law has become incrementally more sensitized to these issues. In selected cases the interests of consumers have already been protected when the commodity they purchased did not represent non-economic values declared for it. The most vivid instance so far has been ‘Dieselgate’, where consumers received redress²⁹ for untrue statements concerning the CO₂ emissions of diesel engines. The gist of this determination rested on the clear premise that consumer interests (in this case: the right to obtain a good that conforms with its declared specifics) also encompasses values that relate to the consumer’s social or political perspectives. In other words, the higher emission rates did not in any way affect the functionality of a vehicle – and, hence, they did not shift the quality/price ratio for consumers. However, deceptive representations about the engines collided with consumer expectations about the impact the purchase and use of a car may have on the environment.

In terms of result, consumers who made the purchase with the hope of making a contribution to sustainability were in fact supporting the opposite outcome. The accents in this case were placed, hence, on the non-economic

28 Particularly telling in this regard has been the citizen-consumer notion that encapsulated the ideal of a market actor who takes responsibility for collective goods and values and follows them through her everyday market choices – see e.g. Porter, *The Consumer Citizen*, OUP 2020, 14–21; Davies, *The European Consumer Citizen in Law and Policy*, Palgrave Macmillan 2011; Barra *et al.*, *Citizens, consumers and sustainability: (Re)Framing environmental practice in an age of climate change*, 21 *Global Environmental Change* 1224 (2011).

29 For the EU legal domain, this right was eventually identified by the CJEU in two judgments: of 14 July 2022, C-145/20, *DS v. Porsche Inter Auto and Volkswagen* (ECLI:EU:C:2022:572) and of 8 November 2022, C-873/19, *Deutsche Umwelthilfe eV v. Bundesrepublik Deutschland* (ECLI:EU:C:2022:857). On the importance of these cases for the development of consumer law, see also, for instance, Bertelli, *The Dieselgate Returns at the CJEU: Lack of Conformity, EU Consumers’ Rights and Responsibility*, 31 *European Review of Private Law* 1221 (2023).

spheres of consumer motivation and consumer interest, rather than on the purely monetary ones.³⁰ The essence of consumer detriment in these situations should, hence, be understood as an undermining of one's conscience and attitudes rather than economic interests.³¹ As opposed to the classical framework shared by competition and consumer law, where consumer harm is understood in terms of economic loss,³² the instances discussed above draw attention towards harm to one's feelings and values – or in other terms, to 'identity harm'.³³ Following similar patterns, consumer law is deemed capable of protecting consumers also in other cases of false state-

30 Grochowski, *European Consumer Law after the New Deal: A Tryptich*, 39 *Yearbook of European Law* 387, 410–411 (2020).

31 In more particular instances, consumers may also be protected in terms of other values they want to pursue on the market. This pertains, for instance, to requirements concerning indications regarding the geographic origins of product. Such requirements protect not only the general consumer interest concerning awareness of the exact geographic pedigree of a good, but they may also have a further ramification: by providing consumers with clear information about the geographical origin of a product, they may indirectly protect consumers who do not want to purchase products of particular origin for ethical reasons. See, for instance, CJEU judgment of 12 November 2019, C-363/18, *Organisation juive européenne and Vignoble Psagot Ltd v Ministre de l'Économie et des Finances* (ECLI:EU:C:2019:954). As the Court observed in this case (para 53), 'the fact that a foodstuff comes from a settlement established in breach of the rules of international humanitarian law may be the subject of ethical assessments capable of influencing consumers' purchasing decisions, particularly since some of those rules constitute fundamental rules of international law.' Critical of this decision (including the CJEU's understanding of 'ethical considerations'), Kanevskaya, *Misinterpreting Mislabelling: The Psagot Ruling* (2019) 4 *European Papers* 763.

32 P. Siciliani *et al.*, *supra* (fn. 19), at 2–15.

33 The notion was advanced by Dadush, who defines 'identity harm' as 'the anguish experienced by a consumer who learns that her efforts to consume in line with her personal values have been undermined by a business's exaggerated or false promises about its wares.' The author's analysis of identity harm focuses on sustainability as a consumer value: 'identity harm arises when a consumer learns that a purchase made her unwittingly complicit in hurting another human being or the planet.' (Dadush, *Identity Harm*, 89 *University of Colorado Law Review* 863, 865 (2018)). Without a doubt, however, this conceptual framework can be extended mostly in its entirety to other instances where consumers are manipulated into market activity that contradicts other values they seek to vindicate with their purchase on the market.

ments about the way a good was produced (false 'fair trade' declarations³⁴) and its impact on the environment ('greenwashing'³⁵).

In all these instances, EU consumer law proved to be capable of embracing a broad spectrum of consumer interests, exceeding the directly economic considerations. In other terms, the framework consumer protection acknowledged in various ways the compound and heterogenous nature of consumption as a social and market phenomenon. At the same time, however, all the instances discussed above situate themselves on the margins of consumer law. They have been deemed to be rather exceptional anomalies in the consumer protection agenda rather than a part of its mainstream. Moreover, they remained separated from one another and have never led to a coherent agenda of non-economic interest and harm in consumer law. Over time, this situation has become increasingly ill-suited to grasp new phenomena emerging in the consumer market.

C. Beyond the economic framework

I. Digital post-consumption and consumer harm

The lack of a clearer understanding of the extent to which non-economic values (or to be more precise: values that cannot be expressed in monetary terms³⁶) should be integrated into the array of consumer protection became particularly vivid over the past years, with exponential growth in the digital consumer economy. Specifically, the latter developed a broad range of services that cater only for emotions and social experiences, without providing individuals with 'consumable' goods in the classical sense. These services involve the acquisition of new experiences and emotions, the building of social links, and establishing channels to express one's views and attitudes.³⁷ None of these forms of market participation is without parallel in the earlier consumer economy (here it is sufficient to mention tourist

34 See e.g. Czarnecki *et al.*, Greenwashing and Self-Declared Seafood Ecolabels, 28 *Tulane Environmental Law Journal* 37 (2014).

35 See e.g. Spedicato, Deceptively Green: How the EU's Unfair Commercial Practices Directive Can Support Trademark Law in Combating Corporate Greenwashing, in Thouvenin *et al.* (eds.), *Kreation Innovation Märkte – Creation Innovation Markets*. Festschrift Retro M. Hilty, Springer: Berlin 2024.

36 See section B.

37 Grochowski, Consumer Law for a Post-Consumer Society, 12 *Journal of European Consumer and Market Law* 1 (2023).

services that to a great extent involved catering for emotions, experiences and social interactions). However, the current economy amplified these patterns to an unprecedented extent and surrounded them with complex structures of commodification and value extraction.

Commodities that give consumers access to experiences and feelings without involving a direct purchase are one of the components of the post-consumerist universe. The latter term took on a broad array of understandings in social and economic academic literature,³⁸ all of which, however, emphasize one crucial trait: in the post-consumer reality, individuals treat markets as a sphere for pursuing one's positive emotions,³⁹ social links⁴⁰ and personal growth⁴¹ rather than as a realm simply for the acquisition of goods.⁴² The digital economy to a great extent functions around these spheres of consumer motivation, responding to individuals and reflecting 'a growing interest in experiences, emotions and services, a revival of repairing, and the spread of leasing initiatives and sharing networks enabled by the internet'.⁴³

This market strategy became the backbone of the social media sector.⁴⁴ Platforms crafted an utterly new set of consumer services, placing them-

38 For a review of existing theoretical accounts, see Cohen, *Collective dissonance and the transition to post-consumerism*, 52 *Futures* 42 (2013).

39 Pine / Gilmore, *The experience economy*, Harvard Business Review Press 2011, 3–7.

40 Becher / Dadush, *Relationship as Product: Transacting in the Age of Loneliness*, 2021 *University of Illinois Law Review* 1547 (2021).

41 Hayden / Wilson, *Beyond-GDP indicators: changing the economic narrative for a post-consumer society?* in Vergragt *et al.* (eds.), *Social Change and the Coming of Post-consumer Society. Theoretical Advances and Policy Implications*, Routledge 2017; Szejnwald Brown / Vergragt, *From consumerism to wellbeing: toward a cultural transition?*, 132 *Journal of Cleaner Production* 1 (2015); Cohen, *The Decline and Fall of Consumer Society? Implications for Theories of Modernization*, 2015 *Global Modernization Review: New Discoveries and Theories Revisited* 33 (2015).

42 Some expressions of non-material consumer interest mentioned in the previous section, such as the fair-trade and pro-environmental agenda, can clearly be labelled as post-consumerist in the currently discussed terms. On post-consumerism as a label for mobilization around collectivist market values and socially-sensitive attitudes towards consumption, see e.g. Schor, *The new sharing economy: enacting the eco-habitus*, in Vergragt *et al.* (eds.), *Social Change and the Coming of Post-consumer Society. Theoretical Advances and Policy Implications*, Routledge 2017; Soper, *Other Pleasures: The Attractions of Post-consumerism*, 2009 *Social Register* 115 (2009).

43 Trentmann, *Empire of Things. How We Became a World of Consumers, from the Fifteenth Century to the Twenty-First*, Harper Collins 2016, 682.

44 From the institutional perspective of EU law there can be no doubt that platform users qualify as consumers as long as they enter platforms for non-professional pur-

selves in the role of intermediaries in building and maintaining social relations. In so doing, the platforms gave rise to a new set of consumer interests, which could hardly be accommodated by the classical economic framework. Admittedly, contracts between users and social media platforms are not gratuitous and involve a certain degree of exchange, with personal data and consumer attention as the price for social services.⁴⁵

Obviously, the new types of consumable assets and consumer values associated with them are not risk-free for consumers. The power structures that underly the digital consumer economy replicate in many regards dominance/weakness schemes from the brick-and-mortar market. Platforms create isolated social and market domains that are heavily self-regulated with limited impact of state governance. This market power of platforms manifests itself most vividly in shaping freedom of speech,⁴⁶ as well as in reconciling conflicts between free expression, privacy and other fundamental rights.⁴⁷ In all these regards platforms may misuse or abuse their power over users, harming their emotions and inter-personal liaisons, as well as frustrating expectations about the degree to which their personality and ‘identity’⁴⁸ is protected by a platform.

From this vantage point, platforms can be considered as providers of a particular modality of consumer services – namely the ‘speech infrastructures’⁴⁹ that allow platform users to follow their individual aspirations and

poses – see e.g. CJEU judgment of 25 January 2018, C-498/16, *Maximilian Schrems v Facebook Ireland Limited* (ECLI:EU:C:2018:37). The German case law mentioned in fn. 63–65 further confirms this unanimous viewpoint.

45 Langhanke / Schmidt-Kessel, Consumer Data as Consideration, 4 *Journal of European Consumer and Market Law* 218 (2015).

46 See e.g. Klonick, The New Governors: The People, Rules, and Processes Governing Online Speech, 131 *Harvard Law Review* 1598 (2018).

47 On a general conceptual framework of platforms as suppliers of proportionality in the fundamental rights domain, Łakomiec, Public law and co-regulation. Influence of human rights discourse on internet platforms’ standard of privacy protection, in Casarosa / Grochowski (eds.) *Enforcing Private Regulation in the Platform Economy*, Mohr Siebeck 2024 (forthcoming).

48 See section D.II.

49 The notion of ‘infrastructure’ is used here beyond its context in market regulation and public policy – see e.g. Zuckerman, The Case for Digital Public Infrastructure, Knight First Amendment Institute 2020; Hallinan, Civilizing infrastructure, 35 *Cultural Studies*, 707 (2021). In the discussion that follows, it is used as a synonym for a cluster of technological and private regulatory instruments set up by a platform to enable a particular sphere of user activity and to govern it.

values through social interactions.⁵⁰ From one side, growth of this market sector can be seen as a tenet of overwhelming commodification of private and social phenomena,⁵¹ from privacy,⁵² to attention,⁵³ to social relations⁵⁴ and emotions ('emodities').⁵⁵ From the other side, however, commodification should be seen as a two-sided phenomenon. It does not only involve extracting economic value of objects that have so far not been considered as belonging to the market realm;⁵⁶ it also concerns establishing a new type of a good or service that can be acquired by other market actors, such as consumers. In other words, in most instances commodification is inseparably intertwined with questions regarding the quality of goods and services emerging on the market.

In this way, commodification entails an immediate challenge for the legal framework of the market: How should we conceptualize the proper standard for the new market assets and how should we protect these who are 'passive' actors of commodification process, i.e. consumers and other market subjects? The social media sector has made this question particularly vivid in a few regards. One of them relates to privacy and extracting consumer data as a commodity.⁵⁷ Another is the psychological safety of services provided to consumers by social media platforms.⁵⁸ The third one – particularly relevant for 'post-consumer consumer law' – is the coherence between the quality of social media services, users' expectations and the objective quality standards.

50 See also Cohen, *The Biopolitical Public Domain: the Legal Construction of the Surveillance Economy*, 31 *Philosophy and Technology* 213 (2017); Allmer, *Critical Theory and Social Media. Between Emancipation and Commodification*, Routledge 2015; Sion, *Social Media-based Self-Expression: Narcissistic Performance, Public Adoration, and the Commodification of Reified Persona*, 11 *Contemporary Readings in Law and Social Justice* 70 (2019).

51 Lobel, *The Law of the Platform*, 101 *Minnesota Law Review* 87, 90 (2016).

52 Schwartz, *Property, Privacy, and Personal Data*, 117 *Harvard Law Review* 2055, 2062 (2004).

53 Wu, *Blind Spot: The Attention Economy and the Law*, 82 *Antitrust Law Journal* 771 (2019).

54 Illouz, *supra* (fn. 6), at 5–8.

55 Bengt Alauf / Illouz, *Emotions in Consumer Studies*, in Wherry / Woodward (eds.) *The Oxford Handbook of Consumption*, OUP 2019, 239.

56 Hermann, *The Critique of Commodification. Contours of a Post-capitalist Society*, OUP 2021, 20–39.

57 Kapczynski, *The Law of Informational Capitalism*, 129 *Yale Law Journal* 1460, 1498–1499 (2020).

58 See e.g. Bietti, *The Data-Attention Imperative*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4729500

II. Deficits of the legal framework

Unsurprisingly, when confronted with the social media speech infrastructures, consumer law turned out to be ill-equipped to grasp the peculiarities of the consumer interests and consumer harm involved. Relying heavily on the classical (monetary) conceptualization of the consumer market,⁵⁹ the conventional legal framework proved mostly defenseless towards new modes of online consumption. The problem is visible already at the linguistic level. The conventional notions of a ‘good’ and ‘service’ can hardly be applied to non-economic commodities – such as freedom of expression or autonomy in establishing social relations – without a conceptual shift in their understanding. This dilemma can be easily traced to the language used in the existing policy and judicial accounts of the social media sector. While grappling with the interrelationship between the social media business model and consumer protection, one German court described the commodity in question as “Facebook services” rendered under the platform-user contract’.⁶⁰ This notion was needed to conceptualize the platform/user relationship in the language of consumer law and to infuse it with a new notion of consumer harm. Similar conceptual tensions are typical for other commodities that cannot be directly defined within the classical economic framework of consumer law.

Attempts to address non-economic consumer interests resorted primarily to general tools such as the UCTD, which was invoked by courts as a benchmark in reviewing whether the particular clause in the platform’s terms of service was unfair.⁶¹ The economic components used in defining consumer interests and consumer harm were being replaced in this regard by fundamental rights.⁶² In the social media sector, this concerned primarily shaping freedom of speech through content moderation⁶³ or through

59 See section B.

60 Landgericht Munich, judgment of 11 August 2018, 11 O 3129/18.

61 Lutz, Plattformregulierung durch AGB-Kontrolle?, *Verfassungsblog*, 30 July 2021, <https://verfassungsblog.de/facebook-agb-kontrolle/>

62 Grochowski, From Contract Law to Online Speech Governance, *Verfassungsblog*, 18 May 2023, <https://verfassungsblog.de/contract-speech>.

63 See judgments of the German Supreme Court (*Bundesgerichtshof* – BGH) of 29 July 2021, III ZR 179/20 and III ZR 192/20 that questioned Facebook’s speech moderation policy (suspension of users’ account with reference to platform’s Community Standards) as excessively limiting freedom of speech; see also Sprenger, Enforcing Put Backs in German and European Law, 72 *GRUR International* 933 (2023).

other acts of internal governance as done by a platform (such as the obligation imposed on users to present themselves online in a particular way⁶⁴). In a more specific instance, the same logic was applied to review Facebook terms of service that denied the heirs of a deceased user access to her account.⁶⁵

Fundamental rights served in these cases as a benchmark for determining whether the consumer service poses no harm to platform users – or, to put it in consumer law terms, whether it causes no consumer harm. The essence of this harm was defined, however, in specific terms as detriment to the sphere of a consumer's personal liberty, identity and freedom to express one's self. This conceptualization of harm was placed entirely beyond the area of economic considerations. Instead of identifying the particular market commodity or economic interests infringed by a platform, attention was primarily focused on the question whether – and to what extent – consumers were deprived of values protected as fundamental rights. Undeniably, this approach provides a convenient point of reference for handling consumer law disputes in the post-consumer realm. Reference to fundamental rights allowed courts to overcome other problematic issues related directly to defining consumers and their interest in the online economy. At the same time, however, the attempts in question have been too isolated to ground a satisfactory framework for the new types of consumer interests addressed in the platform economy.

D. Post-consumer vulnerability

I. Digital vulnerability: the overall origins

In the ways described earlier, the proliferation of post-consumer models raises a question regarding the effective protection of platform users in

64 See judgments of BGH of 27 January 2022 III ZR 3/21 and III ZR 4/21; see also Stadler / Franz, Keine Klarnamenpflicht bei Facebook, 75 *Neue Juristische Wochenschrift* 1282 (2022).

65 See judgment of BGH of 12 July 2018, III ZR 183/17; see also Wüsthof, Germany's Supreme Court Rules in Favour of Digital Inheritance, 7 *Journal of European Consumer and Market Law* 205 (2018). In this particular instance, the Court referred to the right of inheritance protected under Article 14(1) of the German Constitution (*Grundgesetz*).

the digital economy. As it was already said,⁶⁶ the existing notion of digital vulnerability builds on the premise that consumers involved in the online economy are exposed to specific risks stemming from this market environment. As opposed to the classical notion of consumer vulnerability (in its most developed form as embedded in UCPD), consumers are not digitally vulnerable due to intrinsic personal features distinguishing them from the other members of the group (such as age and health). The essence of vulnerability in question rests on the premise that architectural and relational⁶⁷ features of the digital market make consumers particularly prone to certain types of harm. In these terms, all humans carry certain degree of vulnerability,⁶⁸ which can be activated when they place themselves in the digital market environment.⁶⁹ As the authors of the study observe, 'digital vulnerability ... results from power imbalances between consumers and sellers: consumer vulnerabilities can be identified and/or created because consumers interact with sellers within digital environments that can learn about them and be adapted accordingly. Given the data-driven nature of contemporary digital commercial practices, every consumer is dispositionally vulnerable to being profiled and targeted exploitatively.'⁷⁰

In a nutshell, the concept of digital vulnerability is structured around two main building blocks: it relates either to the contracting process or to consumer data. In the first regard, consumers may be vulnerable especially due to their higher susceptibility to online manipulation (widely known under the catchphrase of 'dark patterns') and to new types of harm arising from new types of consumer products and services (including, for instance, digital market assistants⁷¹ and other types of software merchandised as consumer commodities). In terms of data, consumer harm can result from infringements of privacy as such, as well as from the way their data is subsequently handled – especially by subjecting consumers to algorithmic decision-making (such as personalized advertising and price personaliza-

66 See section A.

67 For further discussion on the relational and architectural components in defining consumer vulnerability, see Helberger *et al.*, Surveillance, *supra* (fn. 1), at 18–23.

68 Dodsworth *et al.*, Editorial: Digital Vulnerability, 46 *Journal of Consumer Policy* 413 (2023).

69 On these two ways of defining consumer vulnerability, see also Riefa, Protecting Vulnerable Consumers in the Digital Single Market, 33 *European Business Law Review* 607, 610–614 (2022).

70 Helberger *et al.*, Surveillance, *supra* (fn. 1), at 25.

71 Van Loo, Digital Market Perfection, 117 *Michigan Law Review* 815 (2019).

tion). The core structure of digital vulnerability can, hence, be envisaged as follows:⁷²

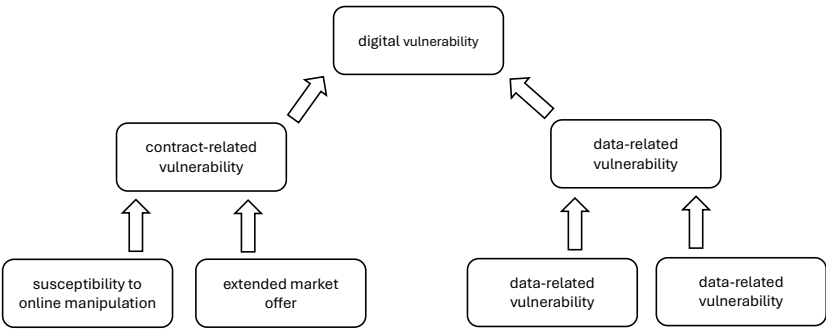


Fig. 1 – Digital vulnerability

Digital vulnerability, as with the entire conceptual structure of consumer law, rests heavily on the classical economic framing of market interests and harm. Although to some extent non-economic values (such as privacy⁷³) are part and parcel of digital vulnerability, this is primarily spillover from the fact that those values have been already vastly commodified. In this way, digital vulnerability captures a relevant characteristic of the problems faced by consumers in the most typical parts of the online economy that involve purchasing goods and services in a traditional form.

II. The architecture of post-consumer vulnerability

The framework of digital vulnerability does not directly acknowledge that consumers’ market aspirations do not always involve classical modes of consumption. In other terms, the concept of vulnerability can be reconsidered from the perspective of the post-consumer digital economy, including especially various amenities of the social media sector. Keeping in mind the earlier conclusions about the nature of consumer interests involved

72 This conceptual scheme of digital vulnerability is discussed in more detail in: Grochowski, *supra* (fn. 4).
73 Helberger *et al.*, *Surveillance*, *supra* (fn. 1), at 23–24; see also, generally, Malgieri, *Vulnerability and Data Protection Law*, OUP 2023.

in non-economic modes of consumption,⁷⁴ there is no doubt that by entering into contracts with online platforms and other providers of social experiences and emotions, consumers may expect a certain quality of such services. In most cases, the benchmark for evaluating this quality cannot be expressed in purely economic terms and requires other rubrics. Typically, the standard in question is formed at the intersection of general social practice and specific requirements of the online world.

Consumers may expect that the way certain services are delivered to them will correspond with the overall shape of this social interaction to the extent that it aligns with specificity of the online sphere. In this way, for instance, not all the statements admissible within the circle of family or friends are lawful in the specific context of the speech forum created by an online platform. With this in mind, the conceptual structure of the post-consumer side of digital vulnerability can be described with reference to two main parameters.

The first of them relates to the consumer's personal sphere and encompasses two main types of threats: the safety of information communicated to users and the risk that users will not be able to produce and share information. These notions describe two sides of consumer participation in non-economic online services.

On the passive end, consumers are exposed to information of various forms and content (such as a newsfeed on social media). They may, hence, reasonably expect that this information will respect certain minimal standards of directness and truthfulness. Understood in this way, information safety as a consumer standard prohibits, for instance, exposure to fake news (being both false as to content and deceptive as to its origins⁷⁵) and to graphic content that may injure the feelings of unsuspecting users.⁷⁶ Certainly, not every meddling with information as done by a platform should

74 See the previous section.

75 Mathiesen, Fake News and the Limits of Freedom of Speech, in Fox / Saunders (eds.), *Media Ethics, Free Speech, and the Requirements of Democracy*, Routledge 2018.

76 Interestingly, the 2023 OECD report on digital consumer vulnerability counts fake news amongst instances of consumer vulnerability triggered by online transactions. It is not fully clear whether the authors of the report understood fake news merely from the transaction-related perspective (i.e. as deceptive statements intended to lure consumers into purchasing certain products) or whether they think of it also as a consumer issue per se. At any rate, however, certain fake news may also directly impact consumer purchasing behavior (which was the case, for instance, for untrue statements about Covid-19 treatment); OECD, *supra* (fn. 5), at 15–16.

be deemed a manifestation of consumer vulnerability.⁷⁷ For instance, curating the newsfeed with use of algorithms does not always lead to consumers being deprived of their informational autonomy or exploit their vulnerability. This may happen, however, if user data is misappropriated to produce individual user profiles, to apply dark patterns⁷⁸ or to commit other abuses of a platform's power in the process of personalization.⁷⁹

On the active side, consumers seeking non-economic values on the digital market are usually interested in enjoying autonomy in expressing their views, abilities (e.g. sharing art created by themselves) and personality. The main component of this liberty encompasses freedom of speech, understood as both a fundamental right and as a benchmark for the quality of consumer services (see also below). Additionally, consumers may also expect that expression fora available to them online will provide not merely formal but also substantive self-expression autonomy – i.e. that they will be free of hate and other forms of violence that could otherwise deter users from expressing themselves in the way they intend to.⁸⁰ This domain of post-consumer digital vulnerability relates to the quality of services provided to consumers online. Taking social media platforms as an example, it is easy to illustrate this form of consumer susceptibility by comparing 'speech infrastructures' in the sense discussed above with the classical framework of compliance for consumer goods purchased in a sales agreement. When creating an account on a social media platform, consumers have a right to receive a service that will respect standards expressed both directly in the contract and inferred from social practice and reasonable consumer expectations.

These two components are crucial for our understanding of consumer vulnerability in the post-consumer context. As has been stated above, the essence of vulnerability rests in exposing sensitive areas of a consumer's self

77 Besides this, social media users can also be vulnerable in a personal and not relational sense – e.g. due to their age or financial standing. This source of vulnerability, however, is rarely considered in separation from vulnerability that stems from forming a market or social relation in the online environment (see also Galli *supra* (fn. 5), at 194, 196).

78 See e.g. the practice of amplifying the user's extreme emotions in construing a newsfeed as acknowledged by Facebook – Goel, 'Facebook Tinkers With Users' Emotions in News Feed Experiment, Stirring Outcry', New York Times, 29 June 2014.

79 Ezepeleta / Zurutuza / Gómez Hidalgo, A study of the personalization of spam content using Facebook public information, 25 Logic Journal of the IGPL 30 (2017).

80 See e.g. Amilo, Speech Regulation by Algorithm, 30 Wm. & Mary Bill Rts. J. 245 (2021-2022).

to digital architecture and governance structures supplied by a non-state third party. In this way, consumers make themselves vulnerable to the manner in which platforms exercise their private governing power.⁸¹ Referring one more time to the social media example, users seeking social relations and self-expression online subject themselves to content moderation, account suspension and other forms of platform governance that can harm their private sphere and personal interests. The similar susceptibility to arbitrary exercises of power by online platforms is also typical for the other digital economy domains that cater for user emotions and social experience (such as dating apps, discussion fora and online gaming platforms).

Further, the quality question usually involves strong consumer expectations regarding the safety of relationships built online, the security of data and protection from other users' deception and violence. These expectations are in themselves a source of consumer vulnerability. By entrusting their emotions and social liaisons to an online service provider, consumers put themselves in a precarious position, making important parts of their personal sphere dependent on a commercial market actor. Thus, the pivot of the system is users' reliance on the proper quality of speech infrastructure supplied to them. This trust relation overlaps with the personal consumer values discussed earlier as the first pillar of post-consumer digital vulnerability. Indeed, expectations as to informational safety and autonomy can be seen as a common denominator for the personality- and quality-related components of this concept.⁸² This general framework applies to the fullest extent to social media platforms. It can, however, also incorporate the other types of digital services that centre around user experiences, emotions and social links. The sources of post-consumer digital vulnerability can be structured in the following way:

81 Tsesis, Dignity and Speech: The Regulation of Hate Speech in a Democracy, 44 Wake Forest Law Review 497 (2009).

82 See e.g. Custers / van der Hof / Schermer, Privacy Expectations of Social Media Users: The Role of Informed Consent in Privacy Policies, 6 Policy & Internet 268 (2014).

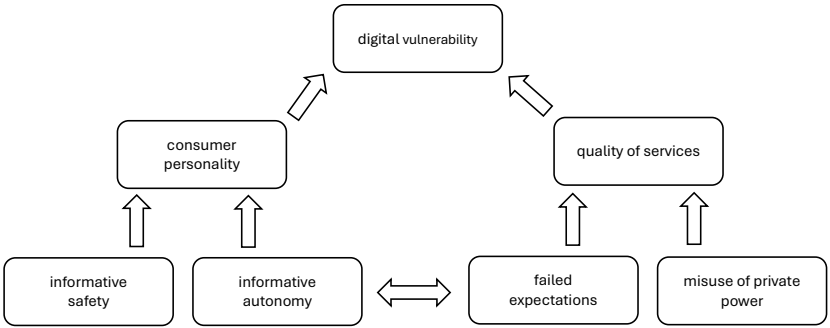


Fig. 2 – Digital vulnerability: the case of post-consumptive services

III. Digital vulnerability: towards a comprehensive concept

Post-consumer digital vulnerability responds to the need for a conceptual framework for consumer interests and consumer harm that goes beyond the conventional framework of consumer law. It aims to supplement the general concept of digital vulnerability – as a relational (situational) and architectural⁸³ consumer feature – with another dimension, typical for the consumption patterns increasingly prominent on the market. Thus, the concepts of general consumer vulnerability and of the post-consumer are complementary and can create a thorough conceptual understanding of the essence and peculiar sources of consumer weakness in the online realm.

The various origins and instances of the post-consumer vulnerability discussed in the previous section share three common features: (a) they incorporate non-economic consumer interests⁸⁴ addressed by online platforms; (b) they stem from the technical organization of consumer services combined with the power relationships on the market; (c) they are situation-based and do not relate to distinctive personal features such as age or wealth. It is easy to notice that the two modes of consumer digital vulnerability discussed in this section share the same conceptual grid. They

83 On the relational and architectural concept of digital vulnerability, see fn. 67.
84 Undeniably, the fact that the interests in question are of non-economic nature does not preclude contracts concluded with social media platforms and other service providers from being reciprocal. In most instances, such reciprocity is based on an exchange of consumer data for various infrastructures supplied by platforms (see also fn. 45).

both rest on the assumption that certain types of market activity expose individuals to a higher degree of risk, by amplifying existing market weaknesses or by triggering new ones. In this sense, every consumer – solely by being a human – bears in herself digital vulnerability that can be activated under the particular market conditions. Thus, both types of digital vulnerability are situation-based (relational) and dependent on the technological and private regulatory design of the particular consumer service. For this reason, the two senses of vulnerability shares many of their origins, such as the widespread use of algorithms in governing platform-user relationships, the severe imbalance of bargaining power, and the issue of protecting consumers' private sphere.

The difference between these two modes of vulnerability rests on differences in subject-matter – or, to put it differently, in the various consumption patterns that underpin them. The post-consumer realm pertains to activities that the classical legal imaginary would allocate to the sphere of personality or fundamental rights, rather than to market issues per se. With the ongoing commodification of these spheres in the digital market, problems expressed so far in the language of social autonomy, freedom of speech and analogous notions have to be reconceptualized as parts of a market regulation framework. To put it in different terms, the essence of 'post-consumer' digital vulnerability rests in the nature of the values involved. First, by seeking experiences, social interactions and emotions, consumers expose inherently sensitive parts of themselves to service providers. This includes, for instance, information about their personal life, health and other intimate details that are usually kept private or revealed only to one's close circles of family and friends. Second, the commodities catered for in the post-consumer domain are also sensitive in themselves, as they address the intimate, oftentimes fundamental, personal and social needs of human beings. For the reasons discussed in the previous section, the technological design of social infrastructures sifts the power/weakness relationship in the post-consumer realm and exposes consumers to even higher levels of potential harm. Consequently, similar to the modern concept of digital vulnerability, its post-consumer version can also be perceived as both relational and architectural. However, both the market/social situation and the technological design employed to govern users' interactions is located elsewhere.

For these reasons the quality of these services and their compliance with users' expectations relate to intrinsic features of human beings and

need to be conceptualized in terms other than the typical commodities encountered in the consumer economy. At the same time, however, since they are traded on the market and subjected to the overall economic logic, they must be embraced by a general formula of consumer interests and consumer harm. It is necessary not only for instrumental reasons (i.e. to ensure a consistent applications of tools such as the UCTD), but also for more political consistency across various parts of the EU digital law.⁸⁵ The concept of digital vulnerability put forward in this chapter attempts to identify the main types of consumer weakness in these sectors of the digital economy. Its concept is an organic ramification of the existing consumer law, and it builds on the already existing tendencies to incorporate interests and other types of market involvement that do not amount to conventional economically oriented consumption.

From this vantage point, post-consumer digital vulnerability aims not to directly subvert the concept of digital vulnerability, but rather to supplement the economic and social imaginary on which it was founded. EU consumer law is in acute need of a more integrative concept of weakness/vulnerability, which would take into account the divergence of commodities consumers seek on the market and which would reach beyond the classical set of value/price questions. The concept outlined in this paper allows an integration of these domains by setting parameters for understanding consumer interests that lie outside the classical core of consumer law. Hence, it is necessary to develop an integrative concept of consumer vulnerability that would encompass the broader heterogeneity of present-day consumption.

E. The way ahead: bridging consumer law and platform regulation

The thorough idea of consumer vulnerability is even more important from the perspective of recent developments in the regulation of online platforms in EU law. Current EU legislation tilts towards separating the protection of consumers and users of other services online. This pertains especially to the DSA but also to other acts, such as the recent Regulation on political

85 See also the next section.

advertising.⁸⁶ This split⁸⁷ is rather unnatural from the perspective of the matter involved, which encapsulates both protection of individual vis-à-vis a firm (i.e. a typical consumer law matter) and protection of members of society or the polity who engage themselves in interactions intermediated by online platforms.⁸⁸ Consequently, platform regulation overlaps not only with the subject-matter of consumer law⁸⁹ but also with several instruments designed primarily to protect consumers.⁹⁰

EU law does not seem to build many bridges across these instruments. In its current state, it leaves out several issues regarding the coordination of rights and enforcement schemes. These gaps may be filled by general consumer law instruments (such as the UCTD and UCPD). This requires, however, a coherent understanding of why consumer protection in the platform economy differs from more conventional settings, and an understanding of what the object of this protection should be. The examples from case law discussed earlier⁹¹ illustrate well the struggle between older forms of consumer protection (UCTD) and the need to conceptualize new forms of consumer harm that do not fit into the conventional imaginary of consumer law. The resort to fundamental rights as a benchmark in conceptualizing consumer interests and vulnerability, although convincing as an interim solution, clearly does not provide a satisfactory answer to

86 Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising, OJ L, 2024/900, 20.3.2024.

87 See, especially, recital 10 DSA, stating that “for reasons of clarity, this Regulation should be without prejudice to Union law on consumer protection, in particular Regulations (EU) 2017/2394 and (EU) 2019/1020 of the European Parliament and of the Council, Directives 2001/95/EC, 2005/29/EC, 2011/83/EU and 2013/11/EU of the European Parliament and of the Council, and Council Directive 93/13/EEC, and on the protection of personal data, in particular Regulation (EU) 2016/679 of the European Parliament and of the Council.”

88 The perception of user vulnerability in the DSA builds on a personal rather than a relational view (see recitals 62, 95 and 104, which mention minors as the illustrative instance of vulnerable recipients of online services).

89 See Busch / Mak, Putting the Digital Services Act into Context: Bridging the Gap between EU Consumer Law and Platform Regulation, 10 *Journal of European Consumer and Market Law* 109 (2021); Cauffman / Goanta, A New Order: The Digital Services Act and Consumer Protection, 12 *European Journal of Risk Regulation* 758 (2021).

90 See e.g. Article 14 DSA, which introduces substantive requirements for terms of service, and Articles 25–27 DSA on online transparency and counteracting manipulation.

91 See section C.II.

the structural question of protecting consumers who opt for non-economic consumption modes.

The broader concept of digital vulnerability allows for a remedying of this weakness, by accommodate new modes of consumer interest as a part of a coherent consumer law framework. It offers a better understanding of the extent to which certain platform services can be classified as consumer commodities that can be put under the same rubric as other commodities on the consumer market. In this way, it can create a common denominator for cross-references between platform and consumer rules, in particular for a reciprocal formulation of the values and concepts developed in these spheres.⁹²

Finally, the augmented formula of consumer vulnerability puts into broader context the use of fundamental rights, which play a crucial role within the DSA, and – as was earlier demonstrated – which gain prominence in the treatment of consumer law issues.⁹³ From this perspective, the recourse to fundamental rights can be seen in a twofold way. First, it serves an indicative function by clearly pointing out that certain spheres of platform/user relationships are particularly sensitive for the legal order – and, hence, that they may trigger especially high degrees of vulnerability. Thus, fundamental rights provide an overall mapping of issues that necessitate attention in setting and enforcing rules for the digital economy.

Second, at a more granular level, fundamental rights may indeed serve as quality benchmarks for online services. The speech-related case law discussed earlier marks some origins of this trend, and the vividly constitutional perspective of the DSA is likely to further amplify it. In having recourse to fundamental rights as a yardstick for consumer services, one caveat is needed. Undoubtedly, while fundamental rights (such as freedom of speech) may provide a point of reference in deciding whether a particular platform service respects basic user rights, they do not exhaust the entire spectrum of consumer vulnerability. Rather, it encompasses a broad range

92 Interestingly, the DSA also seems to implicitly subscribe to a more diversified concept of user interest and harm, one which combines economic and non-economic substrates. See, for instance, recital 69 of its preamble, which identifies the following problem with online advertising addressed to vulnerable users: ‘When recipients of the service are presented with advertisements based on targeting techniques optimised to match their interests and potentially appeal to their vulnerabilities, this can have particularly serious negative effects. In certain cases, manipulative techniques can negatively impact entire groups and amplify societal harms, for example by contributing to disinformation campaigns or by discriminating against certain groups.’

93 See the case law discussed above in section C.II.

of interests that cannot be reduced to purely constitutional dilemmas and a balancing of fundamental rights. The comprehensive concept of consumer vulnerability discussed in this chapter speaks in favour of adopting a different perspective, one where the interests of individuals participating in the digital economy are seen as falling along a continuum. It puts economic and non-economic values on the same footing and treats them as self-sufficient parameters of a properly functioning digital consumer economy.

