

# Information, Transparency and Fairness for Consumers in the Digital Environment

Emilia Mišćenić\*

## *A. Introduction: consumer legislation in the digital age – fit for purpose?*

Technological developments and increasing digitalization have brought multiple challenges to EU consumer law. We are faced with new and digital technologies that are changing the environment in which the average consumer is acting on the market and in everyday transactions. The question is: are these changes for better or worse? At this point, the Commission is questioning digital fairness between businesses and consumers in online transactions and the adequacy of EU consumer law to answer the challenges of digitalization.<sup>1</sup>

At the same time, this chapter addresses critically the position of the consumer in the EU digital market. An average consumer, ‘who is reasonably well informed and reasonably observant and circumspect’, becomes weak and vulnerable when stepping into the digital market.<sup>2</sup> The reasons for this are manifold, as will be described in the chapter. While some of the reasons causing ‘digital vulnerability’ can be attributed to the consumer as a person, a variety of reasons for this arise from the digital environment as well as risks related to the developing digital market and digital technologies.<sup>3</sup>

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1 European Commission, Digital Fairness - Fitness Check on EU consumer law, available at <[https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law_en)>.

2 Mišćenić, E, ‘Legal Risks in Development of EU Consumer Protection Law’ in Misćenic and Raccah (eds), *Legal Risks in EU Law: Interdisciplinary Studies on Legal Risk Management and Better Regulation in Europe* (Switzerland: Springer International Publishing, 2016) 135.

3 Helberger, N, Lynskey, O, Micklitz, H-W, Rott, P, Sax, M and Strychar, J, *EU Consumer Protection 2.0, Structural asymmetries in digital consumer markets*, BEUC (2021).

In line with these recent developments, this chapter addresses the position of consumers on the digital market and focuses on the relation among information, transparency, and fairness in the digital environment. This chapter also addresses the gap that exists not only between ‘digital fairness and transparency’, but also between legal regulation and the digital reality. Despite the existing legal framework, businesses are only purportedly complying with legal rules. More often than not, they are circumventing or ignoring the requirements of EU consumer law related to mandatory information duties and transparency. This has been proven so far by diverse empirical research and studies, as well as CJEU case law on violations by businesses of information duties and transparency. Cases such as *Tiketa*, *Meta Platforms Ireland*, *Victorinox*, *Fuhrmann-2*, and many others,<sup>4</sup> demonstrate how speedy development of digital technologies is affecting businesses-to-consumer (B2C) relationships and contributing to ‘digital asymmetry’ between businesses and consumers. What cases such as these also point to is the need for change and adjustment of the current legal rules on mandatory information duties and transparency, as will be discussed in the chapter.

In the digital environment, where our choices are not run by rational and informed decisions but manipulated by design and various digital techniques and unfair commercial practices, such as dark patterns and profiling, all of us tend to transform from an average to a vulnerable consumer. Not only do we not know or understand that we have been manipulated by unfair digital techniques, we also do not possess the knowledge and the expertise needed to understand the highly complex mechanisms running the algorithms or the programming language of distributed ledger technologies.<sup>5</sup> Once we step into the digital market, which is shaped by its own features and particularities and bears risks that we are not familiar with, we simply have no other choice but to click and accept in order to get a product or service. As consumers, we are ticking different boxes, accepting cookies, privacy policies, standard terms and conditions (T&C), mostly

4 CJEU, Case C-536/20, 24.02.2022, *Tiketa*, ECLI:EU:C:2022:112; case C-319/20, 22.04.2022, *Meta Platforms Ireland*, ECLI:EU:C:2022:322; case C-179/21, 05.05.2022, *Victorinox* ECLI:EU:C:2022:353; case C-249/21, 07.04.2022, *Fuhrmann-2*, ECLI:EU:C:2022:269.

5 Paterson, M, ‘Misleading AI: Regulatory Strategies for Algorithmic Transparency in Technologies Augmenting Consumer Decision- Making’ (2023) *Loyola Consumer Law Review* 558 (558 *et seq*). See also Galli, F, *Algorithmic Marketing and EU law on Unfair Commercial Practices* (Springer, 2022) 181.

without reading them or without getting important information prior to concluding a contract on a durable medium.

It is precisely at this point where the reality differs from legal regulation and its requirements. As will be demonstrated, traders' T&C usually incorporate pre-contractual information as required under EU consumer directives or at least some of the required information. According to Commission sweep actions, two out of three web shop sites were not properly informing consumers of their right to withdraw from the contract within 14 days, as well as of other rights in cases of non-conformity, nor were they informing consumers about the possibility of online dispute resolution.<sup>6</sup> Depending upon the web design, traders' T&C are available online via hyperlink and are often changed unilaterally by the trader without a valid reason or without informing the consumer.<sup>7</sup> The consumer is not in a position to negotiate the T&C, and even if they get them, they do not understand them. This undermines substantive transparency requirements as interpreted by CJEU case law, according to which the contract should set out transparently the specific functioning of the agreed arrangement and consumers must be able to evaluate the economic consequences which ensue from it.<sup>8</sup>

The digital techniques and practices described create an environment in which digital fairness is replaced by increasing unfairness caused by non-transparency in online B2C transactions.

### *B. What is going on in the EU legislative arena?*

Currently we are faced with extra-production and over-production of various legal acts affecting the EU digital single market. Speedy development of online marketplaces and digitalization, as well as a significant increase

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6 European Commission EU-wide screening ('sweep'), Online shopping: Commission and Consumer Protection authorities urge traders to bring information policy in line with EU law, 31.01.2020, available at <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_156](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_156)>.

7 Loos, M and Luzak, J, *Update the Unfair Contract Terms directive for digital services*, European Parliament, PE 676.006 –February 2021.

8 On the extensive CJEU case law see Commission Notice, Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts [2019] OJ C323/04.

in online transactions,<sup>9</sup> has resulted in over-extensive adoption of EU legal acts addressing various issues, in particular information duties and transparency requirements. The General Data Protection Regulation (GDPR),<sup>10</sup> the Digital Services Act (DSA),<sup>11</sup> the Digital Markets Act (DMA),<sup>12</sup> the P2B Regulation (EU) 2019/1150,<sup>13</sup> as well as numerous consumer law directives regulating different sectors or particular legal institutions are all relevant for the status and role of actors on the digital market, foremost for their rights and obligations in B2C online transactions.

In an online transaction, B2C relationships can, for instance, be covered by:

- the Consumer Rights Directive (CRD) regulating distance contracts, pre-contractual information duties, and withdrawal periods,<sup>14</sup>
- the Unfair Contract Terms Directive (UCTD) regulating the fairness of the content of contract provisions,<sup>15</sup>

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9 Eurostat, E-commerce statistics for individuals, Last update: February 2023, available at <[https://ec.europa.eu/eurostat/statistics-explained/index.php?title=E-commerce\\_statistics\\_for\\_individuals](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=E-commerce_statistics_for_individuals)>.

10 Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.

11 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) OJ L 277/1.

12 Regulation (EU) 2022/2925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265/1.

13 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11 July 2019, 57–79.

14 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L 304/64.

15 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95.

- the Unfair Commercial Practices Directive (UCPD) addressing a variety of traders' manipulative practices, such as dark patterns or other misleading and aggressive commercial practices,<sup>16</sup>
- the Omnibus Directive improving regulation and protection in online transactions by addressing some more recent developments and actors on the market, such as influencers or sponsored advertising,<sup>17</sup>
- the Twin Directives regulating possible lack of conformity of goods or digital content or digital services,<sup>18</sup>
- the Product Liability Directive regulating producers' liability for defective products,<sup>19</sup>
- the E-Commerce Directive addressing the information duties and responsibilities of information society providers,<sup>20</sup>
- the Electronic Communications Code regulating specific technical requirements related to electronic communications services and networks,<sup>21</sup> as well as the rights and duties of operators and their end-users, including consumers, and

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16 Directive 2005/29/EC of the European Parliament and Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149.

17 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, 18.12.2019.

18 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ L 136, 22.5.2019; 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, 22.5.2019.

19 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 210/29.

20 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178/1.

21 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), OJ L 321/ 36.

- the Payment Services Directive 2 regulating customer authentication and faster and more secure electronic payments,<sup>22</sup>
- etc.

In addition, current initiatives and proposals for amendments to some of these legal acts are afoot, either because these are outdated or because they need further improvement and adjustment to the goals of sustainable development.<sup>23</sup>

This development is highly relevant for the topic of transparency and digital fairness and for all actors on the digital market, both businesses and consumers. Businesses in all their forms – sellers, suppliers, operators, online platforms and search engines, payment services providers and many others – all have to comply with different requirements and obligations regulated by all or some of these acts and pay high compliance costs. Even so, they cannot be really sure that compliance has been fulfilled properly and in accordance with all existing EU legal rules.

Consumers and other customers, on the other hand, can barely grasp and understand their rights and obligations arising under all these rules, let alone find them on the interface of a certain web-page. The information duties prescribed by diverse legal acts have lost their real purpose in practice – in particular in the digital environment, which significantly affects transparency requirements.

Moreover, and as expected, these legal acts contain many flaws that often overlap or need further clarification and interpretation of different vague and general legal terms. For instance, it is still unclear when and if certain intermediaries, such as online platforms under the DSA, are included in the definition of ‘trader’ under the CRD or ‘seller’ under the

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22 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, OJ L 337/35.

23 Eg, Proposal for a Directive of the European Parliament and of the Council on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394, Directives (EU) 2019/771 and (EU) 2020/1828, COM(2023) 155 final; Proposal for a Directive of the European Parliament and of the Council on liability for defective products, COM/2022/495 final; Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive), COM/2022/496 final; Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information, COM/2022/143 final.

Twin Directives, or when they are liable.<sup>24</sup> Of course, one can rely on the interpretation in CJEU cases, such as *Kamenova*, *Whatelet*, *Eventim*, *Tiketa*, or European Commission interpretation guidelines.<sup>25</sup> However, businesses and consumers acting on the digital market are usually unaware of CJEU rulings and cannot be expected to wait for dispute resolution or guidelines to get the right answer on how to act on the market.

Another example is the discussion on how to categorize the role of influencers on the market. Many influencers advertise various third-party products and services in exchange for certain benefits and their services are widely used by traders.<sup>26</sup> The legal solution is to be found in several EU legal acts, such as the E-Commerce Directive imposing duties on information society services providers, and the UCPD as amended by the Omnibus Directive. The latter amendments helped in clarifying the role of influencers on the digital market, by requiring that a third party operating on the market and offering products must state if they are a trader or not.<sup>27</sup> Prohibition of fake reviews and introduction of provisions on paid sponsorships will also increase transparency in relation to influencers, who are now obliged to state if a promotion was paid for.<sup>28</sup>

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- 24 See Cauffman, C, 'New EU rules on business-to-consumer and platform-to-business relationships' *Maastricht Journal of European and Comparative Law*, XX(X) (2019) (1) 8 and Carvalho, JM, Arga e Lima, F and Farinha, M, Introduction to the Digital Services Act, Content Moderation and Consumer Protection, *Revista De Direito E Tecnologia* 3 (2021) 1 (71) 99. Under Directive (EU) 2019/771, Rec 23: 'Member States should remain free to extend the application of this Directive to platform providers that do not fulfil the requirements for being considered a seller under this Directive'.
- 25 Legal scholarship is divided about the CJEU interpretations and does not answer clearly whether conclusions from case C-149/15, *Whatelet*, ECLI:EU:C:2016:840 can by analogy be applied to online platforms as traders. In *Tiketa*, the CJEU held 'that intermediary and the principal trader may both be classified as "traders" for the purposes of that provision, without there being any need to establish the existence of a twofold provision of services' (para 54). In *Eventim*, the CJEU confirmed that an online booking platform is covered by the concept of 'trader' within the meaning of Art 2(2) CRD.
- 26 European Parliament Study, Michaelsen, F, Collini, L, Jacob, C, Goanta, C, et al, *The impact of influencers on advertising and consumer protection in the Single Market* (2022); Riefa, C and Clausen, L, 'Towards fairness in digital influencers' marketing practices' *Journal of European Consumer and Market Law* 8 (2019) 2 (64) 64.
- 27 Đurović, M, 'Adaptation of Consumer Law to the Digital Age: EU Directive 2019/2161 on Modernisation and Better Enforcement of Consumer Law' (2020) 68(2) *Belgrade Law Review* 62–79.
- 28 Arts 6 and 7 UCPD. According to the Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning

Another example is dark patterns that are prohibited by Article 25 DSA, but at the same time are not covered and excluded from the UCPD. According to Article 25(2) DSA the prohibition in paragraph 1 on manipulative online interface design affecting a free and informed decision by service recipients will not apply to practices covered by the UCPD or GDPR. There is no clear explanation why a certain unfair commercial practice, in particular one directly affecting B2C relationships, could not be prohibited by both legal acts.

All of this creates a high degree of legal uncertainty for market players, who have to adjust to speedy development of the digital market and who have to know precisely their rights and duties, let alone their position and the role on the market. However, new and upcoming legislation seems to complicate things even further by adding more requirements and offering less by way of guidance and practical solutions. The increase of legal fragmentation is putting legal certainty and transparency at risk.

This is not a novelty *per se*, in particular in EU consumer law, where academics warn that an uncoordinated and unsystematic regulatory approach is of much more harm than use to all the addressees of such excessive legal regulation. Over the years, we have witnessed many attempts to improve the legal framework of EU consumer law in the form of different agendas and initiatives. In the New Consumer Agenda 2020, the Commission questioned whether further and additional legislation is needed to ensure an equal level of consumer protection in online and offline B2C transactions.<sup>29</sup> Two years later, the Commission launched an initiative on ‘Digital fairness – Fitness check on EU consumer law’ aimed to assess whether existing pieces of legislation are ensuring a high level of protection in the digital environment. The Fitness Check is focused on the legal adequacy of the three main EU consumer directives – namely the UCTD, the UCPD, and the CRD – in terms of the current demands of the digital environment. The questionnaire that forms part of public consultation launched on 28

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unfair business-to-consumer commercial practices in the internal market, *OJ C 526/1*, 2.2., *influencers* ‘could qualify as traders if they engage in such practices on a frequent basis, regardless of the size of their audience. Alternatively, in case the persons do not qualify as traders, they could nevertheless be considered to act ‘on behalf of’ the trader whose products are promoted by the practice and therefore fall within the scope of the Directive.’

29 Communication from the Commission to the European Parliament and the Council New Consumer Agenda – Strengthening consumer resilience for sustainable recovery, COM(2020) 696 final.



November 2022 reveals that the aim of the initiative goes beyond assessing the three directives but also the state of play on the EU digital market since the last check in 2018.<sup>30</sup>

Particular questions deal with vitally important issues, such as the coherence of EU consumer law with other sector-specific laws, for example data protection, new rules applicable to online platforms, artificial intelligence, and so on. EU consumer law refers only partially to application of other areas of law, while these areas insufficiently address consumer protection. For instance, the GDPR refers to the UCTD in its Recital 42 concerning a subject's consent to data processing in preformulated declarations.<sup>31</sup> There seems to be more coherence with the DSA, which is 'without prejudice to Union law on consumer protection' (Recital 10 DSA). However, similarly as with the DMA, certain unfair commercial practices are insufficiently addressed, which in turn opens the door to potentially harmful and unfair commercial practices in the digital environment.

This means that the bond between EU consumer law and other areas of law needs to be strengthened. Other questions tackle vital consumer issues, such as dark patterns and manipulative designs, consent to online contracts, and availability of traders' T&C, conclusions, prolongations and cancellations of digital subscription contracts, as well as the role of influencers on the digital market.

For instance, question no. 1 addresses 'digital practices that unfairly influence consumer decision-making', while question no 2. asks about consent to T&C and making their content easily understandable to a consumer. Questions related to termination and cancellation of digital subscription contracts discuss proposals on informing and reminding consumers. The question about free trial subscription asks about sharing sensitive information about consumer payment details with traders.

The questionnaire also investigates whether the concept of an 'average' or 'vulnerable' consumer needs further benchmarks or criteria in order to adapt to the digital environment. Regardless of the question asked in the Fitness Check public consultations, there is a clear horizontal thread that brings them all together. This relates to information and transparency. This

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30 European Commission, A New Deal for Consumers: Commission strengthens EU consumer rights and enforcement available at <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_18\\_3041](https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3041)>.

31 According to Rec 42 GDPR preamble the pre-formulated declaration of consent '... should be provided in an intelligible and easily accessible form, using clear and plain language and it should not contain unfair terms' in accordance with the UCTD.

chapter therefore aims to clarify the position of consumers in relation to businesses on the digital market and to examine how they are affected by information and transparency requirements.

### *C. From an average to a vulnerable consumer in the digital environment*

Are we all vulnerable in the digital environment and, if so, why? In order to offer a plausible answer, we need to start from the beginning and draw a clear distinction between the basic concepts, namely the definition and the image or concept of the consumer. The definition of the consumer differs from one directive to another, but it usually contains two cumulative criteria defining the consumer as a natural person who is acting on the market outside of their business or professional purposes. For instance, Article 2(2) of Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods (SGD) defines the consumer as ‘any natural person who, in relation to contracts covered by this Directive, is acting for purposes which are outside that person’s trade, business, craft or profession’.

Many CJEU judgements interpret the notion of consumer in different EU consumer directives and in relation to different circumstances, including both of the two criteria, and related notions, such as dual purpose contracts, for example *Gruber*, *Costea*, *Schrems*, *Di Pinto*, *Faber*, *Šiba* and many others.<sup>32</sup> However, these will not be discussed within the context of this article. What is to be discussed here is the concept, also known as the image, of the consumer existing behind these definitions that arise under various EU consumer directives. It is precisely the image that is decisive for a better understanding of the position of the consumer as a person acting on the market and their relationship towards businesses, that is, traders.

As noted above, over the years, CJEU case law and several EU consumer directives, have developed different consumer concepts.<sup>33</sup> It is therefore not surprising that the Fitness Check is questioning whether further bench-

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32 CJEU Case C-464/01, *Gruber*, ECLI:EU:C:2005:32; case C-110/14, *Costea*, 03.09.2015, ECLI:EU:C:2015:538; case C-311/18, *Facebook Ireland and Schrems*, ECLI:EU:C:2019:1145 case C-361/89, *Di Pinto*, 14.03.1991, ECLI:EU:C:1991:118; case C-497/13, *Faber*, 04.06.2015, ECLI:EU:C:2015:357; case C-537/13, *Šiba*, 15.01. 2015, ECLI:EU:C:2015:14.

33 Leczykiewicz, D and Weatherill, S, *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* Oxford Legal Studies Research Paper No. 9/2016 (Hart Publishing, Oxford 2016)); Stuyck, J, *Consumer Concepts in EU Second-*

marks and criteria are needed to draw a clear distinction between the 'average' and the 'vulnerable' consumer.

Both of these concepts are reflected in CJEU case law and referred to in EU consumer legal acts. When interpreting the UCPD provisions in *Gut Springerheide*, the CJEU developed the concept of an average consumer, 'who is reasonably well informed and reasonably observant and circumspect'.<sup>34</sup> This concept evolved over the years and now represents a benchmark for consumer protection in interpretation of various EU consumer directives (the CRD, the UCTD as listed above). So, despite being initially recognised as a concept bound to unfair commercial practices,<sup>35</sup> today it represents a benchmark used in interpretation in cases related to unfair contractual terms, consumer credit, sales contracts, and so on. The role of the average consumer is nevertheless prone to changes and, depending upon the circumstances of the case, the position of a particular consumer can easily transform into a weak consumer, who is 'in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge'.<sup>36</sup>

The consumer can also be ignorant and unaware of their rights,<sup>37</sup> or vulnerable for a variety of reasons.<sup>38</sup> For instance, vulnerability is recognised under the UCPD and the CRD because of consumers' 'mental, physical or psychological infirmity, age or credulity'.<sup>39</sup> Unlike a definition itself, the concept of the consumer changes, in particular in situations in which special personal and factual circumstances affect the position and consequently the behaviour of the consumer towards traders.<sup>40</sup> For this

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ary Law' in Klinck and Riesenhuber (eds), *Verbraucherleitbilder: Interdisziplinäre und europäische Perspektiven* (de Gruyter, 2015) 120.

34 CJEU Case C-210/96 *Gut Springerheide* ECLI:EU:C:1998:369, para 31.

35 Duivenvoorde, BB, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer 2015) 159.

36 CJEU joined cases C-240/98 to C-244/98, *Océano Grupo and Salvat Editores*, ECLI:EU:C:2000:346, para 25.

37 CJEU Case C-32/12, *Duarte Hueros*, EU:C:2013:637, para 38.

38 CJEU Case C-382/87, *Buet and Others v Ministère public*, 16.05.1989, ECLI:EU:C:1989:198, para 13; case C-149/15, *Wathelet*, 09.11. 2016, ECLI:EU:C:2016:840, para 39. See European Commission, Consumer vulnerability across key markets in the European Union, Final Report, 2016, available at <[https://commission.europa.eu/system/files/2018-04/consumers-approved-report\\_en.pdf](https://commission.europa.eu/system/files/2018-04/consumers-approved-report_en.pdf)>.

39 Rec 34 CRD; Art 5(3) UCPD and Rec 18.

40 Purnhagen, K, 'More Reality in the CJEU's Interpretation of the Average Consumer Benchmark – Also More Behavioural Science in Unfair Commercial Practices?' *European Journal of Risk Regulation* 8 (2017) (437) 439; Purnhagen, K and Schebesta,

reason, behavioural studies play an important role in understanding the concept of a consumer.<sup>41</sup>

What we often witness in practice is a transformation from an average to a weak or rather vulnerable consumer depending upon the circumstances of the case. For this purpose, it would be useful to determine when and under what circumstances an average consumer becomes a vulnerable one, in particular in the digital environment. Does every average consumer become vulnerable when stepping into the digital world or engaging in an online transaction? Both parties to B2C relationships and other market players would certainly benefit from some additional benchmarks and clarification of these questions.

Many different aspects of vulnerabilities are recognized in EU consumer law, such as physical, intellectual, and economic vulnerability. The question is: how do these affect the position of the consumer on the market? Is someone vulnerable prior to stepping into the digital market? Or do they become so because of the risks and demands of the market?

The concept of vulnerability is particularly recognized in the context of financial services, such as consumer and mortgage credit agreements and other services.<sup>42</sup> As emphasised in the Payment Account Directive, EU legislation ‘must effectively take into account the needs of more vulnerable consumers’.<sup>43</sup> Here, the consumer often crosses the line of being average and becomes vulnerable, not only because of their financial needs and personal situation, but also because of the high risks associated with the highly complex functioning mechanisms of financial, banking, or payment services and products. In these transactions the consumer becomes more vulnerable and deserves enhanced protection.

This suggests that a clearer distinction is needed between vulnerability in general and so-called ‘digital vulnerability’. In general, vulnerability is to be looked at from two main angles, one related to the specific needs

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H, ‘Island or Ocean: Empirical Evidence on the Average Consumer Concept in the UCPD’ (2020) 28 (2) *European Review of Private Law* 293–310.

41 Incardona, R and Poncibò, C, ‘The average consumer, the unfair commercial practices directive, and the cognitive revolution’ *J Consum Policy* 30 (2007) 21.

42 Reich, N, ‘Vulnerable Consumers in EU Law, in Leczykiewicz, D and Weatherill, S, *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (n 33) (141).

43 Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic feature, *OJ L* 257/214.

of a person acting on the market, and another related to the specifics of the market and its products. As emphasised by Waddington, vulnerability can be linked to both endogenous (factors inherent to the individual) and exogenous (external) factors.<sup>44</sup> In the context of the digital environment, Recital 34 CRD requires that in providing clear and comprehensible information before the consumer is bound by a distance contract:

the trader should take into account the specific needs of consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee.

Article 5(3) UCPD applies similar criteria when determining particularly vulnerable specific groups, such as elderly people or children. Article 5 ODR Regulation requires that:

the ODR platform is accessible and usable by all, including vulnerable users (“design for all”), as far as possible.<sup>45</sup>

The concept of vulnerability is important to online traders and other businesses, who need to take into account the specific needs of consumers when informing them about their rights and obligations and other important aspects of an online transaction.

When it comes to the digital market, we all tend to transform from an average to a vulnerable consumer, because we lack the capacity to understand the complex language of IT technology, algorithms, programming language, and distributed ledgers technologies. The products and services offered on the digital market – and the market itself – are less transparent due to use of the highly complex technological, mathematical and algorithmic mechanisms on which they are based. As rightly pointed at by Weber, the consumer does not understand ‘the programming language and the techniques of the distributed ledgers having Java similarities or being Python or

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44 Waddington, L, ‘Exploring vulnerability in EU Law: An analysis of ‘vulnerability’ in EU criminal law and consumer protection law’ (2020) 45(6) *European Law Review*, 779–801, 782.

45 Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) OJ L 165, 18.6.2013, 1–12.

Solidity’, nor are smart contracts or blockchain technology expressed in an ‘understandable language’.<sup>46</sup>

At all stages, from advertising, precontractual informing, contract conclusion as well as in the post-contractual stage, consumers are at risk because of either their personal position or of the specifics of the digital market and its products and services. This makes the structural imbalance of power between businesses and consumers much worse in the digital environment and leads to digital asymmetry, where our choices are not run by rational and informed decisions, but quite often manipulated by algorithms and other digital techniques, such as dark patterns, profiling, manipulative design, and so on.<sup>47</sup>

All in all, one can conclude that in the digital environment there is still a place for all of the above-mentioned concepts, including the average consumer acting in ordinary B2C online transactions. However, due to use of different manipulative designs and unfair digital techniques, as well as the risks inherent to the digital market, vulnerability is more likely to occur in the digital environment. According to the BEUC report from 2021:

...digital vulnerability describes a universal state of defencelessness and susceptibility to (the exploitation of) power imbalances that are the result of increasing automation of commerce, datafied consumer-seller relations and the very architecture of digital marketplaces.<sup>48</sup>

Under the New Consumer Agenda 2020:

the vulnerability of consumers can be driven by social circumstances or because of particular characteristics of individual consumers or groups of consumers, such as their age, gender, health, digital literacy, numeracy or financial situation.

In short, it would be useful to develop additional benchmarks, as has already been done by some Member States, such as Spain, where the legis-

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46 Weber, R, ‘The Disclosure Dream – Towards a New Transparency Concept in EU Consumer Law’ (2023) (12) 2 *Journal of European Consumer and Market Law (Eu-CML)* (67) 69.

47 Costa, E and Halpern, D, ‘The behavioural science of online harm and manipulation, and what to do about it’, Discussion paper, Behavioural Insights team (2019).

48 BEUC 2021 (n 3) 5.

lator introduced further criteria to determine the category of vulnerable consumers.<sup>49</sup>

#### *D. Information duties in EU consumer legislation and CJEU case law*

##### **I. Information duties**

The structural imbalance of power in B2C relationships is worsening in the digital environment, in particular in relation to the bargaining power that consumers are usually left without, the level of knowledge related to AI and digital technologies, and information asymmetry between the parties. In the digital environment, one talks about different aspects of vulnerability, such as digital illiteracy or lack of awareness about digital risks. However, while literacy and awareness are highly recommended and needed, empirical studies confirm that even literate and aware consumers make wrong choices. This usually occurs not because of digital illiteracy, but simply because they are manipulated by unfair digital techniques.

Consumer choices are affected by online behaviour tracking, by use of personal data for business purposes, by manipulative designs, as well as by other sorts of dark patterns.<sup>50</sup> And behind every manipulation lurks misuse of information. Although digital asymmetry cannot be cured by the right to 'right' information, it is most likely that the situation can be improved by greater transparency and more effective regulation of mandatory information obligations.<sup>51</sup>

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49 Response of the European Law Institute, European Commission's Public Consultation on Digital Fairness – Fitness Check on EU Consumer Law (2023) 34: 'According to Art. 3.2 of the General Consumer Protection Law... vulnerable consumers with regard to specific consumer relations are those natural persons who, individually or collectively, due to their characteristics, needs or personal, economic, educational or social circumstances, are in a special situation of subordination, defencelessness or lack of protection that prevents them from exercising their rights as consumers under equal conditions, even if this is territorial, sectoral or temporary'. For other measures in non-EU countries see OECD, 'Consumer Vulnerability in the Digital Age' (2023) 355 *OECD Digital Economy Papers* 34.

50 Bongard-Blanchy, K, Rossi, A, Rivas, S, Doublet, S, Koenig, V, Lenzini, G, 'I am Definitely Manipulated, Even When I am Aware of it. It's Ridiculous! - Dark Patterns from the End-User Perspective', DIS '21: Designing Interactive Systems Conference 2021, 763–776.

51 Segger-Piening, S, 'No Need to Read: 'Self-Enforcing' Pre-Contractual Consumer Information in European and German Law' in Mathis and Avishalom *Consumer Law*

So, where do we stand today with regard to legal regulation of information duties? In order to answer this question, several aspects need to be addressed, where the first concerns current legal regulation on disclosure and mandatory information obligations, as well as the question how it affects an average or vulnerable consumer.

Despite extensive criticism from legal scholarship and elsewhere, EU consumer law still insists upon provision by businesses of extensive mandatory information to consumers in order to cure information asymmetry and obtain a balance in B2C relationships. This paternalistic approach to legal regulation is the residue of outdated views according to which an average consumer, who is reasonably well informed, as well as reasonably observant and circumspect will be empowered by the information and therefore come to an informed and reasonable choice and decision.<sup>52</sup> For instance, the CRD prescribes more than twenty pieces of information to be provided both at the pre-contractual stage and once the contract has been concluded.<sup>53</sup> More than nineteen pieces of pre-contractual information are to be provided on the Standard European Consumer Credit Information (SECCI) form in consumer credit, together with the option of providing additional information to consumers by creditors.<sup>54</sup> The Mortgage Credit Directive (MCD) requires extensive information to be included in advertising (Article 11), general information (Article 13(1)(a)-(n)), pre-contractual personalized information (Article 14(1)) to be provided in the European Standardised Information Sheet (ESIS), and further information on intermediaries and representatives (Article 15).<sup>55</sup> The forthcoming Consumer Credit Directive (CCD 2) follows this pattern and regulates advertising (Article 8), general information (Article 9), pre-contractual personalized information on the basis of SECCI (Article 10), as well as information for

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*and Economics, Economic Analysis of Law in European Legal Scholarship* (Springer 2021) 89–117.

- 52 Pichonnaz, P, 'Information Duties' in Micklitz and Twigg-Flesner (eds), *The Transformation of Consumer Law and Policy in Europe* (Oxford, Hart 2023) and literature quoted therein.

- 53 Art 5(a) to (h) and Art 6 (a) to (t) CRD.

- 54 Directive 2008/48/EC of the European Parliament and Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133/66, Art 5.

- 55 Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, OJ L 60/34.



specific types of credit on the basis of ECCI (Article 11). Use of the proposed one-page Standard European Consumer Credit Overview (SECCO) was heavily discussed during the legislative procedure.<sup>56</sup>

The content of mandatory information to be provided by businesses – that is, traders – to consumers is most likely to overlap in certain fields of legal regulation with respect to the digital environment as well. For instance, the E-Commerce Directive sets requirements for information society services providers regarding online information, online advertising, online shopping, and online contracts. It requires provision of clear, comprehensive, and unambiguous minimal information prior to placing an order, and for the T&C to be available in a way that allows storage and reproduction for recipients (Article 10(3)).

The information requirements for different market players, such as online platforms, search engines, and intermediary service providers are regulated by other pieces of legislation, such as the DSA or the P2B Regulation. In addition to the E-Commerce Directive, the CRD and other acts, mandatory information is to be provided to consumers under the ADR/ODR rules,<sup>57</sup> the Twin Directives, and the Omnibus Directive requiring ‘additional specific information requirements for contracts concluded on online marketplaces’ (Article 6(a)). Particularly interesting and at the same time contradictory is the way in which provision of mandatory information is regulated. EU consumer directives regularly require that an endless sea of information is provided to the consumer by the trader ‘in good time before’ or ‘before the consumer is bound’, and in a ‘clear and comprehensible manner’ (Article 5(1) CRD; Article 6a Omnibus Directive).

So, how can an average consumer, who becomes weak or vulnerable in the digital market, comprehend more than twenty pieces of information about a certain product or service? How can the trader provide the consumer with such an amount of information in a ‘clear and comprehensible manner’, as required under these and many other EU consumer directives?

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56 Proposal for a Directive of the European Parliament and of the Council on consumer credits, COM/2021/347 final.

57 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ L 165/63; Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), OJ L 165.

What we are witnessing here is a direct conflict between regulation of information duties and transparency, where over-extensive and ineffective regulation of mandatory information obligations works to the detriment of both businesses and consumers involved in online transactions.

What we are also witnessing is the gap between current legal regulation and digital market reality. The detrimental effects are not only reflected in the decision-making process and behaviour of consumers, who are rather confused than enlightened by the amount of information.<sup>58</sup> These are echoed in digital and online market practices. There is a huge difference between what is required under EU consumer directives and the digital reality, where the consumer is ticking the 'yes' or 'accept' boxes on use of cookies, privacy policy, personal data, T&C, and so on. Information is usually available online on the trader's web-site and, depending upon the web-design, it is most likely that the legally required pre-contractual information, or at least some of it, will be merged with other contractual conditions in the T&C hyperlink.

In most online transactions, pre-contractual and contractual information – meaning contractual conditions – are not even provided to consumers on a durable medium. As confirmed by different studies, Commission sweeps, and case law, traders and other online businesses, such as online platforms and intermediaries, have found their own way to purportedly comply with legally required mandatory information duties.<sup>59</sup>

## II. CJEU case law

Violation of information duties and transparency requirements online is continuously addressed by CJEU case law. Cases arising from different consumer law fields confirm the existing gap between legal regulation and its enforcement in practice. When interpreting the former Distance Selling Directive in *Content Services*, the CJEU took a stand against clicking consent to a hyperlink containing pre-contractual information in the

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58 Critically on the information overload and referring to the extensive literature, Pichonnaz (n 52).

59 Mišćenić, E, 'Protection of Consumers on the EU Digital Single Market: Virtual or Real One?' in Viglianisi Ferraro, A, Jagielska M and Selucka, M (eds), *The Influence of the European Legislation on National Legal Systems in the Field of Consumer Protection* (Cedam, 2018) 219–246.

T&C, which were only available online on the trader's website. The CJEU explained that:

a website such as that in question in the main proceedings, the information on which is accessible to consumers via a link provided by the seller, cannot be regarded as a “durable medium”.<sup>60</sup>

The Court further emphasized that:

...a business practice consisting of making the information referred to in that provision accessible to the consumer only via a hyperlink on a website of the undertaking concerned does not meet the requirements of that provision.<sup>61</sup>

Ten years later, in *Tiketa*, the CJEU came to a different conclusion. The Court acknowledged the development of digital technologies and market and accepted clicking on the T&C hyperlink as a way of informing consumers. It stated that the CRD:

must be interpreted as not precluding the information referred to in Article 6(1) from being provided to the consumer, prior to the conclusion of the contract, only in the general terms and conditions for the provision of services on the intermediary's website, which that consumer actively accepts by ticking the box provided for that purpose, provided that that information is brought to the consumer's attention in a clear and comprehensible manner.<sup>62</sup>

Nonetheless, the CJEU required that information duties are fulfilled and provided to a consumer on a durable medium and concluded that:

such a means of providing information cannot act as a substitute for providing the consumer with the confirmation of the contract on a durable medium, within the meaning of Article 8(7) of that directive, since this does not prevent that information from forming an integral part of the distance or off-premises contract.<sup>63</sup>

Besides addressing information duties and transparency requirements in the digital environment and in online B2C transactions, the CJEU con-

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60 CJEU case C-49/11, *Content Services*, 05.07.2012, ECLI:EU:C:2012:419, para 50.

61 *ibid*, para 52.

62 *Tiketa* (n 4), para 54.

63 *ibid* para 54.

firmed and accepted the transformation of the role of pre-contractual information, which in practice actually became post-contractual information.

In other cases, such as *EIS*, the CJEU was dealing with violation of the CRD provisions on information duties and their relation and meaning towards an ‘average consumer’.<sup>64</sup> Departing from the concept of an average consumer, the CJEU concluded that:

in a situation in which a trader’s telephone appears on his or her website in such a way as to suggest, to an average consumer, that is to say a reasonably well-informed and reasonably observant and circumspect consumer, that that trader uses that telephone number for the purposes of his or her contacts with consumers, that telephone number must be considered to be “available” within the meaning of that provision.<sup>65</sup>

In *Fuhrmann-2*, dealing with the so-called payment button and the information required under Article 8(2) CRD in cases of online obligatory payments, the CJEU considered that the transparency of information displayed on the button is to be assessed by the national court by taking into account the expectations and understanding of an average consumer. According to the CJEU:

the referring court will in particular have to verify whether the term ‘booking’ is, in the German language, both in everyday language and *in the mind of the average consumer* who is reasonably well informed and reasonably observant and circumspect, necessarily and systematically associated with the creation of an obligation to pay.<sup>66</sup>

Only the words appearing on the ordering button or similar function should be taken into account when determining whether the formulation ‘complete booking’ or similar words correspond to the words ‘order with obligation to pay’, within the meaning of the CRD provision.<sup>67</sup>

In *Victorinox*, the CJEU was dealing with an online purchase in which the trader omitted to provide information on the existence and the conditions of a manufacturer’s commercial guarantee, contrary to the CRD provision on pre-contractual information in distance contracts (Article 6(1) (m) CRD). Here, the CJEU evaluated the trader’s duty to provide this information by relying on the legitimate interest of an average consumer

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64 CJEU case C-266/19, *EIS*, 14.05.2020, ECLI:EU:C:2020:384.

65 *ibid*, para 41.

66 *Fuhrmann-2* (n 4), para 33.

67 *ibid*, para 35.

in obtaining that information for the purposes of concluding a contract. According to the CJEU:

the information requirement imposed on the trader by that provision does not arise from the mere fact that that guarantee exists, but only where the consumer has a legitimate interest in obtaining information concerning that guarantee in order to decide whether to enter into a contractual relationship with the trader.<sup>68</sup>

Then the Court went further by determining when this legitimate interest exists, ‘inter alia, where the trader makes the manufacturer’s commercial guarantee a central or decisive element of its offer’.<sup>69</sup> However, in order to determine if the information is central and decisive, or in other words essential information, the CJEU emphasized that:

account must be taken of the content and general layout of the offer with regard to the goods concerned, the importance of referring to the manufacturer’s commercial guarantee for sales or advertising purposes, the space occupied by that reference in the offer, the likelihood of mistake or confusion which that reference *might trigger in the mind of the average consumer* – who is reasonably well informed and reasonably observant and circumspect with respect to the different rights which he or she may exercise under a guarantee or to the real identity of the guarantor – whether or not there might be explanations relating to other guarantees covering the goods, and any other element capable of establishing an objective need to protect the consumer.<sup>70</sup>

In short, CJEU case law is clearly acknowledging development of the digital environment and takes into account the possible digital risks created by misrepresentation or manipulative design and the manner in which these affect the behaviour and the decision-making process of an average consumer.

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68 *Victorinox* (n 4), para 53.

69 *ibid*, para 53.

70 *ibid*, para 53.

*E. The relation between information and transparency in the digital environment*

As rightly emphasized by the CJEU in *Radlinger and Radlingerová*, the

information, before and at the time of concluding a contract, on the terms of the contract and the consequences of concluding it is of *fundamental importance for a consumer*.<sup>71</sup>

But the information should be provided in a transparent and effective manner in order to achieve the goals of EU consumer directives. Ineffective regulation of information duties results in circumvention of legally required information duties and transparency requirements in practice. In the digital environment, usually there is no provision of relevant information in a 'clear and comprehensible manner' and in 'good time before' the consumer is bound by the contract. Carefully designed websites contain catchy information about products and services, while the essential information related to the content, duration, termination, withdrawal or even the exact price, form part of businesses' T&C hyperlink. Those consumers who do click and read, find it difficult to understand and to identify the information that is essential for contract conclusion. Consequently, the current legal regulation of information duties and transparency requirements presents a sort of *l'art pour l'art* that is being ignored or redesigned by online businesses. Moreover, it is not suitable for the digital age, where information is used in a completely different manner than in the offline environment. As stated by Weber, 'transparency or information disclosure must overcome the given challenges and be designed afresh'.<sup>72</sup>

From the very beginning of EU consumer law, information duties were used in consumer directives as a main tool for achieving transparency.<sup>73</sup> According to Riesenhuber and Möslin, 'transparency plays a central role in the capacity of functioning of the market economy' and is often viewed as a synonym for information duties of all kinds.<sup>74</sup> However, in the context

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71 CJEU case C-377/14, *Radlinger and Radlingerová*, 21.04. 2016, ECLI:EU:C:2016:283, para 64.

72 Weber (n 46) 69.

73 Howells, G, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 *Journal of Law and Society* 349; Đurović, M, *European Law on Unfair Commercial Practices and Contract Law* (Oxford, Hart Publishing, 2016) 192.

74 Riesenhuber, K and Möslin, F, 'Transparenz' in Basedow, J, Hopt, KJ and Zimmermann, R, (eds), *Handwörterbuch des europäischen Privatrechts* (Tübingen, 2009)

of the digital environment, we should ask what is the quality of information, and is excessive information-giving helping or making consumers even weaker and more vulnerable in the digital market? The current legally-required over-excessive information requirements are working to the detriment of both parties, creating high compliance costs for businesses and not providing real protection to consumers.

However, it is not just about 'quantity' but also about the 'quality' of information. Quality is *inter alia* concerned with the manner in which information-giving should be done in online B2C transactions, and which can significantly contribute to achieving transparency. As emphasised by AG Ruiz-Jarabo Colomer, 'transparency is concerned with the quality of being clear, obvious and understandable without doubt or ambiguity'.<sup>75</sup> As a more general concept, transparency aims to achieve legal certainty through clarity, precision and understandability.<sup>76</sup> And it is precisely the 'quality', including the 'quantity', of information that is currently being questioned in the Fitness Check related to fairness and transparency in the digital environment.<sup>77</sup>

In the context of EU consumer law, many legal acts call for transparency in one way or another, such as the UCTD, the UCPD, the CCD, the MCD, the PSD2, the CRD, the CSD, the DCD, the Omnibus Directive, and more. A variety of legal acts require provision of plain, intelligible, comprehensible, clear and understandable information to consumers. Some of these legal acts introduce further requirements, such as the duty to clarify and explain essential information to consumers. For instance, Article 16 MCD imposes a duty on creditors and intermediaries to provide adequate explanations of pre-contractual information and of essential characteristics of products, as well as of specific effects which might be detrimental to consumers.<sup>78</sup> The DCD provides an explanation in Recital 59 of its preamble, according to which in cases where 'the trader informed the consumer *in a clear and comprehensible manner* before the conclusion of the contract'

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1485. Transparency is an important principle in various areas of law (such as public procurement, subsidies, the right to access information) and it contributes to the rule of law and democracy as determined in Arts 6 and 11 TEU.

75 Opinion of Advocate General Ruiz-Jarabo Colomer in case C-110/03, *Belgium v. Commission*, ECLI:EU:C:2004:815, para 44.

76 CJEU case C-417/99, *Commission v. Spain*, 13.09.2001, ECLI:EU:C:2001:445, para 40.

77 Fitness Check (n 1).

78 Mišćenić, E, 'Mortgage Credit Directive (MCD): Are Consumers Finally Getting the Protection They Deserve?' in Slakoper, Z (ed), *Liber Amicorum in Honorem Vilim Gorenc* (Rijeka 2014) 23.

the consumer's digital environment is not compatible with the technical requirements, the burden of proof for lack of conformity should be on the consumer.

Transparency forms part of conditions related to modification of digital content and services in Article 19 DCD, where 'the consumer is informed *in a clear and comprehensible manner* of the modification' (lit. c) and 'the consumer is *informed reasonably in advance*' (lit. d). Article 17(2) in relation to Article 3(5) CSD on commercial guarantees regulates that 'the commercial guarantee statement shall be expressed *in plain, intelligible language*'.<sup>79</sup> Many other examples demand transparency in relation to different regulatory aspects and require provision of clear and comprehensive information to consumers.

However, in order to achieve transparency in B2C online transactions and make information understandable to the average or vulnerable consumer, the information has to be '*available to consumers*' in the first place. Once it has been provided or given by the trader or received by the consumer, one can discuss the clarity and comprehensibility of the information. Most of the legal acts mentioned explicitly require availability of information that contributes to transparency. For instance, Article 6 E-Commerce Directive asks for the conditions of promotional offers, competitions and games to be '*easily accessible and be presented clearly and unambiguously*'. It also demands clearly identifiable unsolicited commercial communities 'in order to improve transparency'.<sup>80</sup> Under formal requirements for distance B2C contracts, Article 8 CRD requires availability of information and prescribes that 'the trader shall give the information provided for in Article 6(1) or *make that information available* to the consumer in a way appropriate to the means of distance communication used in plain and intelligible language'. The information is legible, 'in so far as that information is provided on a durable medium' (Article 8 CRD). Article 6.a introduced by the Omnibus Directive requires general information on the main parameters determining ranking to be made available in a specific section of the online interface that is directly and easily accessible from the page where the offers are presented (lit a).<sup>81</sup> Amendments introduced to Annex I UCPD related to sponsored online content and higher ranking

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79 De Franceschi, A and Schulze, R (eds), *Harmonizing Digital Contract Law – The Impact of the EU Directives 2019/770 and 2019/771* (CH Beck, Hart, Nomos, 2023).

80 E-Commerce Directive, Rec 30.

81 Art 6a CRD.



of products within the search results require that the provider inform consumers of that fact in a concise, easily accessible, and intelligible form and ‘to ensure adequate transparency towards the consumers’.<sup>82</sup>

Similar requirements regarding transparency arise under legal acts regulating the operations of online traders and intermediaries, such as online platforms and search engines.<sup>83</sup> For instance, Article 5 P2B Regulation requires from online search engines to set out the main parameters determining ranking and provide ‘an easily and publicly available description, drafted in plain and intelligible language’. The recently adopted DSA sets a number of conditions to very large online platforms (17 VLOPs) and search engines (2VLOSEs) that reach at least 45 million monthly active users.<sup>84</sup> These designated companies will have to comply with different sets of requirements contributing to transparency in the digital environment, in particular by monitoring and preventing illegal content and disinformation. However, despite the legal rules according to which information should be made available to consumers in plain and intelligible language and prior to contract conclusion, the digital reality is different, as indeed is seen in CJEU case law. Research studies, such as the 2022 European Commission ‘Behavioural study on unfair commercial practices in the digital environment’, confirm widespread violation of presented rules and extensive use of unfair commercial practices in the digital environment.<sup>85</sup>

Most common examples of use of unfair digital techniques and manipulative design affecting transparency belong to so-called subscription traps related to free trials and digital subscription contracts that consumers can easily conclude, but not terminate.<sup>86</sup> One could argue that in B2C online

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82 Omnibus Directive, Rec 21.

83 Lodder, AR and Carvalho, JM, ‘Online Platforms: Towards an Information Tsunami with New Requirements on Moderation, Ranking, and Traceability’ 4 (2022) 33 *European Business Law Review*, 537–556.

84 European Commission, Digital Services Act: Commission designates first set of Very Large Online Platforms and Search Engines, Brussels, 25 April 2023.

85 European Commission, Directorate-General for Justice and Consumers, Lupiáñez-Villanueva, F, Boluda, A, Bogliacino, F, et al, *Behavioural study on unfair commercial practices in the digital environment – Dark patterns and manipulative personalisation: final report*, Publications Office of the European Union, 2022, available at <<https://data.europa.eu/doi/10.2838/859030>>.

86 RAND Europe, ‘Examining misleading online free trials and subscription traps experienced by European consumers’, 2018, available at <<https://www.rand.org/randeurope/research/projects/misleading-free-trials.html>>; Forbrukerradet, ‘You Can Log Out, But You Can Never Leave’ (2021) available at <<https://fil.forbrukerradet.no/wp>

transactions the consumer has a right to withdraw from a contract within the prolonged duration period as a sanction for the trader not providing information. As accentuated by Howells, 'the right of withdrawal is best viewed as an extension of the modern policy of protecting consumers by informing them'.<sup>87</sup>

However, the consumer who is unaware of the right to withdraw from a contract within the so-called cooling-off period of 14 days, plus 12 months in the case of omission of information on the right of withdrawal (Articles 9-10 CRD), will most likely not use a right that they were not informed about. Pichonnaz addresses the right of withdrawal as a self-enforcement remedy that has both its benefits and its downsides.<sup>88</sup> As interpreted in *Messner*, *Heinrich Heine* and other CJEU cases related to online transactions, the right of withdrawal as guaranteed by EU consumer directives 'is to be more than formal'.<sup>89</sup>

Moreover, consumers need protection from omission of other relevant and sometimes essential information. Misleading omissions are covered by the UCPD, according to which:

*a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information ... and ... this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.*<sup>90</sup>

In this respect, the UCPD plays an important role in preserving transparency and protecting consumers from misuse and manipulation of information. As confirmed in *Canal Digital Danmark*, where omission of material information on the total price of the subscription resulted 'in a significant asymmetry of information that is likely to confuse consumers'.<sup>91</sup> Without entering the details of the UCPD, one needs to acknowledge the

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-content/uploads/2021/01/2021-01-14-you-can-log-out-but-you-can-never-leave-final.pdf>.

87 Howells, G, 'The Right of Withdrawal in European Consumer Law, in Schülte-Nolke, H and Schulze, R (eds), *Europäisches Vertragsrecht im Gemeinschaftsrecht*, (Köln 2002) 229.

88 Pichonnaz (n 52).

89 CJEU case C-489/07, *Messner*, 03.09.2009, ECLI:EU:C:2009:502, para 19; CJEU case C-511/08, *Heinrich Heine*, 15.04. 2010., ECLI:EU:C:2010:189, para 54.

90 Art 7(2) UCPD.

91 CJEU case C-611/14, *Canal Digital Danmark*, 26.10.2016, ECLI:EU:C:2016:800, para 41.

role that this important EU consumer directive is playing in guaranteeing the ‘quality’ of information towards an average or vulnerable consumer acting on the digital market.<sup>92</sup> By defining and prohibiting misleading and aggressive commercial practices, including digital ones, and by specifying these practices in the black list from Annex I as commercial practices which are considered unfair in all circumstances, the UCPD creates a strong bond between information, transparency and fairness in the digital environment.

#### *F. The relation between transparency and fairness in the digital environment*

In the digital environment and when entering online B2C transactions, the consumer is usually not provided with pre-contractual information separately from the T&C hyperlink. The pre-contractual and contractual terms are merged in the T&C box that consumers tend to accept without reading. Once the contract is concluded, the consumer receives a confirmation link from which they can download the contractual conditions or even the contract. These practices are in direct conflict with the legal requirements on mandatory information on the basis of which the consumer should be able to decide whether they wish to enter the contract.<sup>93</sup> Once the consumer was provided with the link to the pre-contractual information ‘after’ contract conclusion, as well as with the contractual conditions, they are usually not able to affect the contract content. Often, they do not understand the T&C that are supposed to be drafted in plain and intelligible language.<sup>94</sup> This is not to mention cases, such as the German *WhatsApp* case,<sup>95</sup> in which the T&C are drafted in English or another language that is not the consumer’s mother tongue.<sup>96</sup> Lack of transparency affects consumer choices and leaves them without an actual choice, therefore bringing fairness into question.

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92 See the other chapters in this volume.

93 CJEU case C-377/14, *Radlinger and Radlingerová*, 21.04.2016, ECLI:EU:C:2016:283, para 64.

94 European Commission, Luzak, J, Loos, M, Elsen M, et al, *Study on consumers’ attitudes towards Terms and Conditions (T&Cs) – Final report*, Publications Office (2020) 4.

95 Urteil des Kammergericht Berlin, case Az. 5 U 156/14, 08.04.2016, available at <[http://www.vzbv.de/sites/default/files/whatsapp\\_kg\\_berlin\\_urteil.pdf](http://www.vzbv.de/sites/default/files/whatsapp_kg_berlin_urteil.pdf)>.

96 Loos, M, ‘Double Dutch: On the role of the transparency requirement with regard to the language in which standard contract terms for B2C-contracts must be drafted’ (2017) 2 *Journal of European Consumer and Market Law* (EuCML) 54. Differently, Schmitz, B and Pavillon C, ‘Measuring Transparency in Consumer Contracts:

In a digital environment where choices are guided by manipulative designs and other unfair digital practices, where essential information is not available in good time before concluding the contract, and where consumers can enter the contract but not leave – we can hardly talk about transparency and fairness.

The relation between fairness and transparency has been extensively addressed by CJEU case law. For instance, in cases related to the use of unfair commercial practices and unfair terms in different consumer contracts – and in particular in consumer credit agreements – unfairness is often caused by non-transparency.<sup>97</sup> The average or even financially vulnerable consumer is often victim to unfair commercial practices, which according to the CJEU must be taken into account when assessing the unfairness of contractual terms. As stated in *Pohotovost'*, failure to mention essential information may be a decisive factor in assessment by a national court whether a contractual term is transparent and fair.<sup>98</sup> In *Pereničová and Perenič*, related to indication of incorrect and misleading information, the CJEU found that:

a finding that such a commercial practice is unfair is one element among others on which the competent court may... base its assessment of the unfairness of the contractual terms.<sup>99</sup>

This has been recognized in the Commission Guidance on the implementation and application of the UCPD from 2016 and 2021, according to which ‘*erroneous information provided in the contract terms is ‘misleading’*’ within the meaning of the UCPD if it causes, or is likely to cause, the average consumer to take a transactional decision that he would not have taken

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The Usefulness of Readability Formulas Empirically Assessed’ (2020) 5 *Journal of European Consumer and Market Law* 191.

97 Golecki M and Tereszkievicz P (eds), *Protecting Financial Consumers in Europe: Comparative Perspectives and Policy Choices* (Leiden and Boston, 2023); de Elizalde, F, ‘Standardisation of Agreement in EU Law. An Adieu to the Contracting Parties?’ in Durovic M and Tridimas T (eds), *New Directions in European Private Law* (Oxford, Hart 2021) 29–59. Loos M, ‘Transparency Under the UCTD: Could You Please Explain what these Terms are Supposed to Mean?’ (2020) 9(1) *Journal of European Consumer and Market Law (EuCML)* 25–27.

98 CJEU case C-76/10, *Pohotovost'*, 21.11.2002, ECLI:EU:C:2010:685, para 82.

99 CJEU case C-453/10, *Pereničová and Perenič*, 15.03. 2012, ECLI:EU:C:2012:144, para 47.

otherwise.<sup>100</sup> By analogy, these conclusions can be applied to online B2C transactions and online contracts, where the UCPD and the UCTD play an important role in guaranteeing fairness and transparency in the digital environment.<sup>101</sup>

In *Verein für Konsumenteninformation* – dealing with online sales contracts concluded by Amazon EU with consumers resident in other Member States – the CJEU found that the unfairness of a pre-formulated contractual term in the general terms and conditions:

may result from a formulation that does not comply with *the requirement of being drafted in plain and intelligible language*

under the UCTD.<sup>102</sup> This requirement of the substantive transparency forms part of Articles 4 and 5 UCTD,<sup>103</sup> and is to be interpreted as having the same scope under both provisions.<sup>104</sup>

Settled CJEU case law has drawn a clear distinction between so-called formal and substantive transparency and concluded that the requirement of transparency of contractual terms laid down by the UCTD cannot be reduced ‘merely to their being formally and grammatically intelligible’.<sup>105</sup>

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100 Guidance (n 27); European Commission, Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, Brussels, 25.5.2016, SWD (2016)163 final, 21. See Orlando, S, ‘The Use of Unfair Contractual Terms as an Unfair Commercial Practice’ (2011) 7(1) *European Review of Contract Law* (ERCL) 25.

101 Gardiner, C, *Unfair Contract Terms in the Digital Age, The Challenge of Protecting European Consumers in the Online Marketplace*. (Edward Elgar, Cheltenham, 2022) 9.

102 CJEU case C-191/15, *Verein für Konsumenteninformation*, 28.07.2016, ECLI:EU:C:2016:612, para 68.

103 Under Art 5 UCTD contractual terms offered to consumers in writing ‘must always be drafted in plain, intelligible language’. Art 4(2) UCTD regulates exclusion from the unfairness test of terms on the main subject matter of the contract or the adequacy of the price and remuneration, ‘in so far as these terms are in plain intelligible language’. See Miscenic, E, ‘Uniform Interpretation of Article 4(2) of UCT Directive in the Context of Consumer Credit Agreements: Is it possible?’ (2018) 3 *Revue du droit de l’Union européenne* 127, 127–59.

104 CJEU case C-26/13, *Kásler and Káslerné Rábai*, 30.4.2014, ECLI:EU:C:2014:282, para 69.

105 *ibid*, para 71; CJEU case C-186/16 *Andriuc and Others* ECLI:EU:C:2017:703, para 59; CJEU case C-609/19 *BNP Paribas Personal Finance* ECLI:EU:C:2021:469, para 42 and many others. See Luzak, J, and Junuzović, M, ‘Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts’ (2019) 8 *Journal of European Consumer and Market Law* (EuCML) 97.

According to the interpretations in CJEU case law, the transparency requirement:

is to be understood as requiring not only that the relevant term should be grammatically intelligible to the consumer, but also that the contract should set out transparently the specific functioning of the mechanism ... and the relationship between that mechanism and that provided for by other contractual terms ..., so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it.<sup>106</sup>

In most cases the CJEU has applied the standard of the average consumer, but also of the weak consumer<sup>107</sup> by accentuating that the UCTD protection system:

is based on the idea that the consumer is in a position of weakness vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge

meaning that the requirement:

that the contractual terms are to be drafted in plain, intelligible language and, accordingly, that they be transparent, must be understood in a broad sense.<sup>108</sup>

Further contributing to transparency is the explanation under Recital 21 UCTD:

whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail.

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106 *Kásler and Káslerné Rábai*, (n 103) para 75; *Andriciuc and Others*, (n 104) para 45; *BNP Paribas Personal Finance*, (n 104) para 42; CJEU case C-92/11, *RWE Vertrieb*, ECLI:EU:C:2013:180, para 49; CJEU case C-96/14, *Van Hove* ECLI:EU:C:2015:262, para 51; CJEU case C-348/14, *Bucura*, ECLI:EU:C:2015:447, para 55; CJEU case C-119/17, *Lupean and Lupean* ECLI:EU:C:2018:103, para 32 and many others.

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

108 *BNP Paribas Personal Finance*, (n 104) para 42; *Andriciuc and Others*, (n 104) para 44; *Kásler and Káslerné Rábai*, (n 103) para 39.

The so-called grey list from the UCTD Annex contains a plethora of examples of potentially harmful and unfair contractual terms that we are seeing in so many traders' T&C available online – for instance, the terms:

- 'enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract' (j),

or

- 'enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided' (k).<sup>109</sup>

What we are witnessing on a daily basis is switching from unpaid and free trial services to paid services without notification, and changes of the essential elements of the contract such as the price and the content of digital subscription contracts or of a mobile phone subscription contract.<sup>110</sup> The author of this chapter received notification of an increase in the price of mobile phone services, 'because of the overall economic market situation' and without a possibility to terminate the contract. Similarly, like many other consumers, she experienced a unilateral change of the entire subscription contract, that is, replacement with a new one, without any prior or post notification and without her consent to the new contract. What is particularly disturbing about the use of these unfair contractual terms and practices are the providers' explanations, according to which unilateral changes without consumer consent are to be accepted, because this is how it is done in the digital environment.

So, this 'digital consumer', as termed by Mak, is exposed to risks that they are not even aware of, and where the extent of unfair practices is sometimes hard to grasp and deal with in practice.<sup>111</sup> The Fitness Check addresses a variety of issues concerning transparency and fairness – including the well-known problems related to digital subscription contracts – and discusses the idea of introducing reminders before automatic renewal, requiring

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109 Loos M and Luzak J (n 7); Commission Notice, Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts [2019] OJ C323/04, 24.

110 Busch C, 'Updating EU Consumer Law for the Digital Subscription Economy' (2022) *Journal of European Consumer and Market Law (EuCML)* 41.

111 Mak, V, 'How can consumer interests be protected when consumer identities are increasingly diffuse?' in Micklitz, H-W and Twigg-Flesner, C (eds), *The Transformation of Consumer Law and Policy in Europe* (Hart, Oxford 2023).

explicit consent for payment data, introducing a termination button, and so on.<sup>112</sup>

While the writing of this chapter was nearing completion, the Commission launched an additional targeted survey complementing the public consultation, which assesses the adequacy of EU consumer protection legislation in the digital environment and its interaction with EU digital legislation, such as the DSA, DMA, GDPR, AI Act, and more.<sup>113</sup> Other valuable projects actually use digital technologies to combat digital unfairness, one such example being CLAUDETTE.<sup>114</sup> This automated detector of potentially unfair clauses in online terms of service aims to help digital consumers to detect unfairness online and improves digital fairness and transparency.<sup>115</sup>

### *G. Closing remarks and proposals*

In line with the current Fitness Check initiative questioning the adequacy of EU consumer protection legislation in the digital environment, it can be stated that many serious and complex issues need to be dealt with. The question is, what can be done about it and how? Currently there are far too many legal acts containing many legal rules which are ignored by businesses and which *de facto* do not protect consumers in the digital environment. Pre-contractual information has lost its initial purpose and has become post-contractual information. The transparency and fairness of this information, together with other contractual terms and conditions, becomes highly questionable once traders purportedly comply with legal requirements in practice.

The combination with different unfair digital practices, such as tracking, profiling, use of manipulative designs and of other dark patterns, under-

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112 Response of the European Law Institute (n 47).

113 European Commission, Targeted consultation: Study to support the Fitness Check of EU consumer law on digital fairness and the report on the application of the Modernisation Directive (EU) 2019/2161, available at: <<https://s.chkmkt.com/?e=332289&c=136495868&h=E6E97C3663EC023&l=en>>.

114 CLAUDETTE – “automated CLAUse DETectEr” – is an interdisciplinary research project hosted at the Law Department of the European University Institute, led by professors Giovanni Sartor and Hans-W. Micklitz, in cooperation with engineers from the University of Bologna and University of Modena and Reggio Emilia, available at: <<http://claudette.eui.eu/about/index.html>>.

115 Micklitz, H-W, Palka, P and Panagis, Y, ‘The empire strikes back: digital control of unfair terms of online services’ (2017) 40(3) *Journal of consumer policy* 367–388.



mines the very aim of the consumer legislation presented in this chapter, that is, protection of average and vulnerable consumers as people. As stated in the 2019 declaration of the Council of Europe:

fine grained, sub-conscious, and personalized levels of algorithmic persuasion may have significant effects on the cognitive autonomy of individuals and their right to form opinions and take independent decisions.<sup>116</sup>

In the digital environment, where people's choices and decisions are affected by algorithms and other digital techniques, there is a strong need to redefine and adjust EU consumer protection legislation.

All these issues have been recognized in a great deal of legal writings, research and behavioural studies, as well as by different EU institutional initiatives. So far, there has been a plethora of proposals, which differ depending in terms of their research aims and consumer issues analysed. Many voices are calling for adjusting legal thinking on information disclosure and transparency to the demands of the digital environment.<sup>117</sup> For instance, to these belong proposals on the use of tailor-made and personalized information for individual consumers.<sup>118</sup> If used fairly, as discussed within this chapter, tailor-made information might present the right solution. However, if misused by businesses, personalized law might lead to even more complex issues related to privacy, non-transparency, and unfairness in the digital environment.<sup>119</sup>

In their 2018 research study on transparency and information duties, Seizov, Wulf and Luzak propose a variety of beneficial legal and digital solutions.<sup>120</sup> Among others, the authors suggest improving regulation of

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116 Council of Europe, Declaration by the Committee of Ministers on the Manipulative Capabilities of Algorithmic Processes, Decl(13/02/2019)1 as quoted by Koivisto, I, 'The Digital Rear Window: Epistemologies of Digital Transparency' (2021) 8(1) *Critical Analysis of Law* 78.

117 Mak, V, *Legal Pluralism in European Contract Law* (OUP, 2020) 144–46.

118 Luzak, J, 'Tailor-made Consumer Protection: Personalisation's Impact on the Granularity of Consumer Information' in Corrales Compagnucci, M, Haapio, H, Hagan, M and Doherty, M (eds), *Legal Design: Integrating Business, Design and Legal Thinking with Technology*, Edward Elgar, Cheltenham, 2021, 105–129.

119 Busch, C, 'Implementing Personalized Law: Personalized Disclosures in Consumer Law and Data Privacy Law', *The University of Chicago Law Review*, 2019, 309–331.

120 Seizov, O, Wulf, JJ and Luzak, J, 'The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU' (2019) 42 (1) *Journal of Consumer Policy*, 149–173.

information obligations by introducing guidelines that would specify how to achieve transparency in online contractual terms.<sup>121</sup> The authors also call for improvement of information design to the benefit of consumers by suggesting possible solutions in the online environment. The authors continued to build upon these proposals in an empirical study and paper on improving transparency and legal certainty in Europe, where they confirmed many of the – here presented – conclusions and offered different proposals.<sup>122</sup>

Similar views are shared by BEUC, which invokes introduction of ‘fairness by design’ as a horizontal principle.<sup>123</sup> In order to improve transparency towards consumers, Cámara Lapuente asserts that the outcome of the information process needs to be optimized and the focus should be put on ‘how’ information is delivered to consumers.<sup>124</sup> According to Grochowski and others, the decision making process and transparency might be improved by developing algorithmic transparency and explainability, which would make consumers understand the functioning of the algorithmic mechanism and of the various digital techniques.<sup>125</sup>

Like many other scholars, the author of this chapter believes that EU consumer legislation can be improved by optimizing the rules on information duties and transparency.<sup>126</sup> Better regulation of currently over-extensive information duties and of transparency requirements that are, as seen above,<sup>127</sup> formulated in a general and descriptive manner and without practical examples or concretisation, is strongly needed. Instead of overbur-

121 Ibid, 158.

122 Luzak, J., Wulf, A.J., Seizov, O. *et al.*, ‘ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe’ (2023) *Journal of Consumer Policy* 1-27.

123 BEUC framing response paper for the REFIT consultation, Towards European Digital Fairness, 20.02.2023, 5.

124 Cámara Lapuente, S, ‘Nuevos perfiles del consentimiento en la contratación digital en la Unión Europea: ¿navegar es contratar (servicios digitales “gratuitos”)?’ in Gómez Pomar, F and Fernández Chacón, I, (eds), *Estudios de Derecho contractual europeo: nuevos contratos, nuevas reglas* (Cizur Menor, 2022) 331–405, 339.

125 Grochowski, M, Jabłonowska, A, Lagioia, F, and Sartor, G ‘Algorithmic transparency and explainability for EU consumer protection: unwrapping the regulatory premises’ (2021) 8(1) *Critical Analysis of Law* 43–63.

126 Schaub, M, ‘How to Make the Best Mandatory Information Requirements in Consumer Law’ (2017) 25(1) *European Review of Private Law* 25; Oehler, A, and Wendt, S, ‘Good Consumer Information: the Information Paradigm at its (Dead) End?’ (2017) 40 *Journal of Consumer Policy* 179–191.

127 See heading E.

dening the parties to B2C transactions with an endless sea of complex information, better to embrace the ‘less is more’ approach. Legally, this could be accomplished by amending the current rules and by making them more user-friendly. EU consumer directives could be amended by introducing new and additional provisions which would distinguish between ‘essential’ and other information. These amendments should draw a clear distinction between essential and all other information to be provided at the pre-contractual and contractual stage, and regulate different formal requirements for both categories.

Provision of essential information to consumers on a durable medium should remain obligatory, while hyperlinking to the rest of pre-contractual information and conditions should be considered in the digital environment.<sup>128</sup> Although the CJEU has argued against hyperlinking in the past (*Content Services*), times and circumstances have changed in the digital environment as acknowledged in *Tiketa*.<sup>129</sup>

In addition, it would be useful to nudge passive consumers to read the essential information and terms displayed in pop-ups or drop-down windows.<sup>130</sup> The amended provisions should require businesses to provide ‘essential information’ on a durable medium when placing an order (for example, by e-mail), while information to be provided should be limited to the main subject matter and the price, and the parties’ main rights and obligations, such as the right to withdraw from or terminate the contract, or access to remedies and legal protection.<sup>131</sup>

The suggested solution could fit in with the Fitness Check proposals on the online disclosure of summarized T&C. Introducing ‘an easily understandable summary of the key T&C in an easily accessible manner’ could be an acceptable legal solution, under the condition that it contains ‘essential information’ related to the consumer contract and contractual parties. This information should be transparent so that the consumer, average or vulnerable, really understands the legal and economic consequences arising under that contract. This way, the above-presented CJEU case law on

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128 See proposals on the format of information given by Seizov, Wulf and Luzak (n 119) 166.

129 See heading D., II.

130 Scholes, A, *Behavioural Economics and the Autonomous Consumer* (2012) 14 *Cambridge Yearbook of European Legal Studies*, 297–324.

131 Mišćenić, E ‘The Constant Change of EU Consumer Law: The Real Deal or Just an Illusion?’ (2022) 70(3) *Belgrade Law Review* 679.

transparency requirements could actually enter the regulatory framework and improve fairness in B2C online transactions.<sup>132</sup>

The proposed adjustments could also contribute to lowering businesses' compliance costs, while balancing between the parties' rights and obligations, as well as the risks involved. Achieving greater transparency could help in better allocation of risks and with liability issues. In this sense, all stakeholders involved could benefit from guidelines which would demonstrate how compliance with the regulatory framework would look in practice.

For instance, the transparency requirements across EU consumer directives could be supplemented by practical examples or guidelines introduced in annexes. These could include practical suggestions on how to disclose information online, by offering examples of how to format information (such as the potential structure and content of the T&C, information about key consumer rights, such as the right of withdrawal). One could argue that similar attempts have been made in certain sector-specific areas, such as consumer credit, where different forms are used to tell consumers of their rights and obligations, as well as potential risks (such as SECCI and, ESIS).<sup>133</sup>

The latter are not comparable with proposals on concretising transparency and information requirements, because these reflect current regulation and overburden the parties with complex information that is not transparent to consumers. Introduction of practical guidelines might prove to be useful to those businesses and consumers who want to comply with the consumer legal framework and who know their rights and obligations, and has the potential to contribute to more responsible behaviour in the digital environment.

This is already happening in the context of enforcement, where EU competent authorities cooperate with some of the main online businesses, such as Google, WhatsApp, Tik Tok and others in order to improve transparency towards consumers and avoid sanctions.<sup>134</sup> To conclude, this chapter pro-

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132 See heading F.

133 Similar as the CRD withdrawal form, which is not used in a uniform manner and differs in traders' practices both by its content and visual appearances. See Commission notice Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights 2021/C 525/01.

134 European Commission, Social media and search engines, available at <<https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enf>

poses regulatory changes to the benefit of all parties involved in online B2C transactions. These changes should aim at adjusting information and transparency requirements to the digital environment. In the digital environment, more transparency can actually be achieved with less information that is 'essential' and transparent to consumers.

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orcement-consumer-protection/coordinated-actions/social-media-and-search-engines\_en>; European Commission, Consumer protection: Google commits to give consumers clearer and more accurate information to comply with EU rules, available at <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_367](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_367)>.