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Editorial

The Sustainability of Consumer and Market Law: Green Claims, Greenwashing and the Right to Repair

Consumer and Market Law are at a turning point.[1]

Improving the legislative framework for supporting more sustainable production, consumption and trade is needed for contributing to reach the Sustainable Development Goals[2] to encourage companies, especially large companies with a cross-border dimension, to integrate sustainability information into their reporting cycle and to adopt sustainable practices in their supply chain. Further action in this area shall have a positive impact on global value chains involving production processes in third countries. This already led to relevant innovations at Member States' level, e. g. in France[3] and Germany[4].

At the same time, the EU aims to incentivize third country companies to contribute to the green transition, in particular the businesses trading within the EU internal market. Additionally, sustainable development chapters of the EU bilateral and region-to-region trade agreements can create opportunities for cooperation in line with the overall EU objectives to increase the sustainability dimension of its trade policy. This shall constitute a step forward to strengthening the so-called "Brussels effect"[5], setting a higher threshold for all market players dealing with the EU Market. Back in March 2022 the European Commission proposed a set of provisions aimed at updating Union consumer law to ensure that consumers are protected and to empower them to contribute actively to the green transition.[6]

1 H-M Schally, 'The Impact on Private Law of the Product Policy Initiatives under the European Green Deal', in A De Franceschi and R Schulze (eds), *Harmonizing Digital Contract Law* (Nomos – Hart 2023) 728 ff.; B Keirsbilck and E Terryn (eds), *Consumer Protection in a Circular Economy* (Intersentia 2019); H-W Micklitz, 'Squaring the Circle? Reconciling Consumer Law and the Circular Economy' (2019) EuCML 229 ff.

2 And in particular SGD 12.6: "Encourage companies, especially large and transnational companies, to adopt sustainable practices and to integrate sustainability information into their reporting cycle". See. e. g. W Huck, Sustainable Development Goals (Beck – Hart – Nomos 2022) 455, 459, 472 ff.

3 E.g. in France: LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre. See e. g. E Savourey and S Brabant, 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption' (2021) Business and Human Rights Journal 144 ff.

4 The Supply Chain Due Diligence Act (*Lieferkettensorgfaltspflichtengesetz*) was passed by the German Bundestag on 11 June 2021. From 1 January 2023, the law is applicable to companies based in Germany and companies with a branch pursuant to § 13 d HGB with at least 3,000 employees in Germany. From 1 January 2024, companies with at least 1,000 employees in Germany are covered. See e. g. H Fleischer and P Mankowski, *Lieferkettensorgfaltsprlichtgesetz* (Beck 2023).

5 A Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP 2020).

6 European Commission, 30 March 2022, 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. See E Terryn, 'The New Consumer Agenda: A Further Step Toward Sustainable Consumption' (2021) EuCML 2021 1 ff.

On the same path, on 22 March 2023 the European Commission published two new instruments: the Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims ("Green Claims Directive", hereinafter: GCD)[7]; and the Proposal for a Directive of the European Parliament and of the Council on common rules promoting the repair of goods (hereinafter: RGD).[8]

As stressed by the EU Commission, the March 2023 proposals aim to provide more specific rules and to complement the proposed changes to the Unfair Commercial Practices Directive. Both Proposals aim at tackling a common set of problems by implementing different elements of the same preferred policy package identified in the Impact Assessment published together with the initiative on empowering consumers for the green transition.[9]

The need to tackle false environmental claims by ensuring that buyers receive reliable, comparable and verifiable information to enable them to make more sustainable decisions and to reduce the risk of "greenwashing" was already a priority in the European Green Deal,[10] and, later on, in the New Circular Economy Action Plan,[11] in the New Consumer Agenda,[12] as well as in the recently adopted Green Deal Industrial Plan.[13] The European Parliament[14] and the Council[15] have shown strong support for the Commission's aim in this regard. For this reason, it is foreseeable that the Proposals published in March 2023 will receive strong support and benefit of a fast track. First of all, from a systematic point of view, these Proposals shall be better coordinated with the existing and forthcoming rules on production, and in particular with the Proposed Eco Design Regulation (hereinafter: EDR)[16] and its provisions on the Digital Product Passport (Art. 8 ff.).

Focusing on the Green Claims Directive (hereinafter GCD) Proposal, the initiative builds on the lessons learned on the implementation of the UCPD and the need for specific rules on the substantiation of explicit green claims, on communication and verification. It also benefits of the lessons on the proliferation of ecolabelling schemes, the development of the EU Ecolabel, EMAS, and of the environmental footprint methods.

As regards the substantiation of comparative explicit environmental claims, Art. 4 GCD excludes from its scope of application "traders that are microenterprises within the meaning of [Art. 2, para 3[17] of the] Commission Recommendation 2003/361/EC[18] unless they request the verification with the aim of receiving the certificate of conformity in accordance with Article 10". This exclusion is reproduced also in Art. 5, para 7 GCD as regards the communication of explicit environmental claims. Such choice may prove to be problematic as it can fundamentally neutralize the impact of the Directive in the sector of microenterprises. Even if one is aware of the circumstance that microenterprises should not face excessive financial burdens, a solution to this could be to include such entitities into the scope of application of Art. 12 GCD: this rule provides, *inter alia*, that Member States shall

7 European Commission, 22 March 2023 COM(2023) 166 final 2023/0085 (COD).
8 European Commission, 22 March 2023, 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 2023/0083 (COD) 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.
9 SWD(2022) 85 final.
10 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee of the Regions, The European Green Deal, COM(2019)640.
11 COM(2020)98 final, 11 March 2020.
12 COM(2020)696 final, 13 November 2020.
13 COM(2023)62final, 1 February 2023.
14 In December 2020, in its conclusions on making the recovery circular and green, the Council noted its appreciation of the Commission's intention to ensure the substantiation of environmental claims on the basis of environmental impacts along products' life cycles: see Council Conclusions, 14167/20.
15 In its resolution on the New Circular Economy Action Plan, the European Parliament strongly supported the Commission's intention to make proposals to regulate the use of environmental claims through the establishment of solid and harmonised calculation methods covering the full value chain: see European Parliament resolution of 10 February 2021 on the New Circular Economy Action Plan (2020/2077(INI)).
16 European Commission, 30 March 2022, Proposal for a Regulation of the European Parliament and of the Council establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC, COM(2022) 142 final 2022/0095 (COD).
17 "…a microenterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million".
18 Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

take appropriate measures to help small and medium sized enterprises, including, without prejudice to applicable state aid rules, financial support, access to finance, specialized management and staff training and organizational and technical assistance.

As regards the substantiation and communication of environmental claims and environmental labels, an introduction of a harmonized graphic format, ideally contained in an Annex – as e. g. provided by Art. 4 RGD – would be desirable, e. g. introducing a "European Green Claims Information Form". This also considering the quite vague requirements contained in several provisions of the GCD, which may lead to a relevant degree of uncertainty for businesses and enforcers. Also in this regard, a better coordination of both GCD and RGD with the proposed EDR is desirable. Focusing on products, according to the EDR the digital product passport should be an important tool for making information available to actors along the entire value chain and its availability should significantly enhance end-to-end traceability of a product throughout its value chain. Among other things, as stressed in Recital 26 EDR, the digital product passport should support consumers make informed choices by improving their access to product information relevant to them, allow economic operators other value chain actors such as repairers or recyclers to access relevant information, and enable competent national authorities to perform their duties. To this end, this tool should not replace but complement non-digital forms of transmitting information, such as information in the product manual or on a label. It should be therefore possible for the digital product passport to be used for information on other sustainability aspects applicable to the relevant product group pursuant to other Union legislation. Given the function of such tool, it would be reasonable to explicitly provide in Art. 5 and 8 GCD that the information on the product or the trader that is the subject of the explicit environmental claim and on the substantiation shall be made available together with the claim in the digital product passport itself. This should be the case also with regard to Art. 4 and 6 RGD. Such solution should make easier and faster the verification, review and update of environmental claims provided by Art. 9 GCD.

Also the provision regarding penalties has space for improvement. By reproducing the formulation of Art. 13, para. 1 UCPD, Art. 17, para. 1 GCD provides that the penalties shall be effective, proportionate and dissuasive, while paras 2 and 3 aim to give more substantiation to the aforementioned criteria, but in the end replicate some fundamental criticisms concerning the effectiveness of current European consumer and market law.[19] Already under the UCPD the fact that the European legislator did not provide clear harmonized penalties for the case of breach of the prohibition of unfair commercial practices opened the door to a fragmentation of the national solutions resulting from the implementation: that fragmentation has been impairing consistency and the realization of an efficient EU-wide strategy against unfair practices.[20] Secondly, but not less importantly, effectiveness and dissuasiveness can be actually achieved mainly through proportionality of penalties. In order to better substantiate the concept of proportionality, the penalty shall be linked to the annual turnover of the trader being sanctioned for an unfair commercial practice. Rather than fixing an amount of money as the highest possible penalty, a link to annual turnover would allow the trader's size, market power and – above all – market impact to be taken into account. This would avoid both "over"- and "undersanctioning".

A useful step in this direction can be found in Art. 2, par. 3 of Directive 2019/2161/EU, which amended Art. 13 UCPD, where it provides that Member States shall ensure that when penalties are to be imposed in accordance with Article 21 of Regulation 2017/2394/EU, they include the possibility either to impose fines through administrative procedures or to initiate legal proceedings for the imposition of fines, or both, the maximum amount of such fines being at least 4 % of the trader's annual turnover in the Member State or Member States concerned. In order to enhance the effectivity of existing and proposed rules, the abovementioned provision should be ideally extended beyond the

19 See e. g. A De Franceschi, 'Planned obsolescence challenging the effectiveness of consumer law and the achievement of a sustainable economy' (2018) EuCML 217 ff.
20 Cf. the reports on the implementation of the UCPD in the EU Member States published in issues 5/2015, 6/2015 and 2/2016 of this Journal.

scope of application of Article 21 of Regulation 2017/2394/EU, thereby including all unfair commercial practices and infringement of national provisions adopted pursuant to the proposed GCD and not only the cases in which there is a reasonable suspicion that a widespread infringement or widespread infringement with a Union dimension is taking place. The same thoughts could serve also for improving the formulation of Art. 8 RGD.

Especially in the digital and in the green sector, consumer and market law is subject to rapid obsolescence. With particular regard to the practices of the major players in the global market, it seems that private law remedies and enforcement are not effective enough for influencing traders to solve the above-mentioned issue.[21] Therefore, a consistent and effective EU-harmonized set of proportionate penalties would be needed. From a consumer's perspective, additional rights may be of little use if enforcement is going to be difficult and/or slow. The proposed amendments might be a better and more effective solution. This would encourage fair trading behaviour, thereby enhancing the effectiveness of consumer rights and protecting the interests of the competitors. Also the proposal to prioritize the right to repair shall be welcomed, but it needs to be better coordinated with the proposed EU Regulation on eco-design. From a systematic perspective, a more holistic approach and a better synergy between the legislative proposals regarding the production, advertising and commercialization stages is desirable, in order to avoid overlapping and enhance consistency of the European legislation.

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21 See e. g. R Podszun, Ch Busch and F Henning-Bodewig, 'Behördliche Durchsetung des Verbraucherrechts?' [2018] available at <https://www.bmwi.de/Redaktion/DE/Publikationen/Studien/behoerdliche-durchsetzung-des-verbraucherrechts.pdf?__blob=publicationFile&v=10>; cf. A Mundt, 'Verbraucherschutz braucht eine stärkere behördliche Komponente' (2018) 9 Wettbewerb in Recht und Praxis..

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Articles

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The Emergence of Energy Citizenship in the EU

I. Introduction

Over the last 15 years, the term 'energy citizenship' has found its way into different disciplines.[1] In the wake of a profound transformation of energy systems worldwide, energy citizenship is also emerging as a concept detected in law, as we aim to demonstrate in this paper using the EU as an example. The origin of the concept of energy citizenship can be traced back to psychology:

Energy citizenship as a psychological concept points at a double role of the individual with regard to the energy supply: According to psychologist Patrick Devine-Wright, who first coined the term,[2] energy citizenship is about a public that is an 'active rather than [a] passive stakeholder […] in energy system evolution'. According to Devine-Wright, the public´s 'potential for action is [moreover] framed by notions of equitable rights and responsibilities across society for dealing with the consequences of energy consumption, notably climate change.'[3] These ideas are also reflected in the interdisciplinary definition of energy citizenship which we developed in an earlier publication together with Hamann and others.[4] According to this definition, 'energy citizenship is people´s rights to and responsibilities for a just and sustainable energy transition.'[5]

In legal literature, the concept of energy citizenship is mentioned mostly in connection with 'energy democracy.' Energy citizens are defined as 'all individuals or legal persons involved in the production, distribution and sale of energy, without discrimination as to nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or effective centre of its activities.'[6] Whereas legal and other literature has developed a concept of energy democracy,[7] energy citizenship has not yet been analysed as a normative legal concept. Unlike prior publications,[8] we will not connect energy citizenship primarily with energy democracy but will develop energy citizenship as part of an innovative understanding of EU citizenship.

After explaining our research questions as well as our methodology[9] (II), we explain why EU citizenship is an innovative form of citizenship (III). We argue that due to its multilayered and multi-functional nature, the EU concept of citizenship can harbour energy citizenship (IV). Building upon this, we examine EU law for its emerging concept of energy citizenship (V). We then connect energy citizenship with energy democracy (VI.) Finally, we prove an outlook on the implications energy citizenship might have (VII).

II. The Research Questions and Methodology

In this paper, we argue that energy citizenship as a legal concept can be inferred from EU law and we sketch some consequences from it. We argue that – although not explicitly mentioned in EU primary law – EU law allows for the inference of energy citizenship. At the centre of a legal notion of energy citizenship stands the relationship of the individual and of the collective (or individual interests versus the interests of the society) in the energy transition. Since the concept of democracy also addresses this relationship,[10] energy citizenship will be also connected to energy democracy.

Our main research questions are:

1) Does the EU legal system support a concept with an active individual with (enforceable) energy-related rights, and eventually even duties? Is the energy transition a mere policy goal, with the EU and MS' governments responsible for its implementation without any citizen's rights or duties?

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1 See, e. g., M Ryghaug and others, 'Creating Energy Citizenship through Material Participation' (2018) 48 Social Studies of Science 283; B Lennon et al., 'Citizen or consumer? Reconsidering energy citizenship' (2020) 22 Journal of Environmental Policy & Planning 184.

2 P Devine-Wright, 'Energy Citizenship: Psychological Aspects of Evolution in Sustainable Energy Technologies' in Joseph Murphy (ed), *Governing Technology for Sustainability* (1st edn, Earthscan 2006) 71.

3 ibid 71.

4 K Hamann et al., 'An interdisciplinary understanding of energy citizenship: Integrating psychological, legal, and economic perspectives on a citizen-centered sustainable energy transition' (2023) 97 Energy Research & Social Science 102959, p 1-9, and K Hamann et al., *D2.1 Interdisciplinary understanding of energy citizenship* (EC2 14 February 2022) <https://ec2project.eu/sites/site0261/media/downloads/d2.1_interdisciplinary_understanding_of_energy_citizenship_2022_02_24_final-version.pdf> accessed 8 July 2022.

5 Hamann et al., (n 4) 2.

6 D S Olawuyi, 'From Energy Consumers to Energy Citizens. Legal Dimensions of Energy Citizenship' in R Fleming, K Huhta and L Reins (eds), *Sustainable Energy Democracy and the Law* (Brill | Nijhoff 2021) 101 (104).

7 R Fleming, K Huhta and L Reins (eds), *Sustainable Energy Democracy and the Law* (Brill | Nijhoff 2021); D Fairchild and A Weinrub, *Energy Democracy. Advancing Equity in Clean Energy Solutions* (Island Press 2017); B van Veelen and D van der Horst, 'What is energy democracy? Connecting social science energy research and political theory' (2018) 46 Energy Research & Social Science 19; K Szulecki, 'Conceptualizing energy democracy' (2017) 1 Environmental Politics 21; S Droubi, R J Heffron and D McCauley, 'A critical review of energy democracy: A failure to deliver justice?' (2022) 102444 Energy Research & Social Science; M J Burke and J C Stephens, 'Energy democracy: Goals and policy instruments for sociotechnical transitions' (2017) 33 Energy Research & Social Science 35.

8 Olawuyi (n 6).

9 M Pechstein and C Drechsler, '§ 7. Die Auslegung und Fortbildung des Primärrechts' in Karl Riesenhuber (ed), *Europäische Methodenlehre* (3rd edn, De Gruyter 2015) para 11.

10 Hamann et al, *D2.1 Interdisciplinary understanding of energy citizenship* (n 4) 14.

2) What is the relationship of energy citizenship to other existing concepts of citizenship, in particular to nationality, political citizenship and EU citizenship? Is it accessible to non-EU-nationals and why (not)?

3) Why is the concept proposed here new or innovative?

4) Which consequences would follow from it?

We start by arguing that energy citizenship can connect to EU citizenship: We look at the development of EU citizenship with its focus on the union citizen rights under Art. 20 et seq. TFEU and on the market-related fundamental freedoms. This allows us to perceive it as multi-layered and open for further developments, such as energy citizenship. We work with a doctrinal approach, considering the text of the treaties as well as selected case law and literature.[11]

An analysis of EU law shows that energy citizenship is not explicitly enshrined in EU law. Hence, two different methods can be applied to demonstrate its existence as EU legal concept: either deduction as a method that 'begins with premises, which, if true, must lead to a true conclusion';[12] or induction as a method which draws 'inferences from specific observable phenomena to general rules'.[13] Both are recognized within EU legal scholarship[14] and regularly applied by the CJEU.[15]

Inferring energy citizenship deductively would require a suitable general principle or rule in EU law. In lack of such, we will apply induction to examine the emerging EU energy citizenship. Generally, inference by induction can be divided into three steps: First, one needs an idea on the aim of the induction. In the present case this is the definition of energy citizenship laid down above. Second, one must determine the legal system one wants to analyse, here EU law. Third, the actual induction takes place: It must be examined if those norms of EU law (primary as well as secondary law) linked to the general idea taken together[16] allow inferring energy citizenship.[17]

Since teleological arguments play an important role in the interpretation of EU law,[18] they also feed into the analysis. For primary law, the general aims and the cross-sectoral objectives of the treaties[19] are considered; for secondary law, the recitals of the directives.[20] Moreover, we include international obligations (especially the Aarhus Convention[21]) as well as political documents, such as communications of the Commission, in our analysis. Whereas international obligations are binding the EU, political documents reveal the political intentions of EU (secondary) law. They support or mitigate the result of the analysis. Therefore, our analysis does not only rest on EU primary and secondary law but also on international obligations and political documents.

III. The Multi-Layered and Multi-Functional Character of EU Citizenship

In this section, we describe the innovative character of EU citizenship. The focus lies on explaining the multi-layered and multi-functional nature of EU citizenship. Perceiving EU citizenship as multi-layered allows to include new developments, such as energy citizenship (but eventually also environmental citizenship, etc). This allows for upholding the classical notion of citizenship (as in giving political rights and duties to individuals). A multi-layered EU citizenship furthermore explains why energy citizenship is not necessarily (but can be) linked to political citizenship. Despite its novelty, the concept of multi-layered citizenship can rest on existing forms of citizenship.

1. Dual or Multiple Citizenships and Multilevel Citizenship

In the context of the EU, Art 20 para 1 Treaty on the Functioning of the European Union (TFEU) lays down that '[c]itizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.' Citizens of EU member states are therefore not only citizens of their own state, but moreover EU citizens. Apart from federal or multi-level systems, there is a trend towards states accepting dual or multiple citizenship.[22] This shows that multiple, parallel, or overlapping forms of citizenship are common, at least for many Member States of the EU.

Undoubtedly, there can be more than one kind of citizenship in a certain state.[23] In federal states, for example, the concept of 'Landesbürgerschaft' ('regional citizenship'[24]) or 'subnational citizenship'[25] as forms of multilevel citizenship can exist.[26] In Austria, e. g., residents of a region (and sometimes even ex-residents), who have Austrian citizenship are also regional citizens.[27]

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11 For the doctrinal approach cf Aulis Aarnio, *Essays on the Doctrinal Study of Law* (Springer 2011).

12 W T Worster, 'The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches' (2014) 2 Georgetown Journal of International Law 445.

13 ibid 445.

14 For deduction see T Koopmans, 'The Birth of European Law at the CrossRoads of Legal Traditions' (1991) 39 The American Journal of Comparative Law 493; for both methods see J Neuner, '§ 12 Rechtsfortbildungen' in K Riesenhuber (ed), *Europäische Methodenlehre* (4th edn, De Gruyter 2021) 371.

15 For the inductive method, see, e. g. Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECLI:EU:C:2009:465, paras 35, 37; for the deductive method as method applied by the ECJ see V Perju, 'Reason and Authority in the European Court of Justice' (2009) 49 Virginia Journal of International Law 307.

16 For the steps of inference by induction see F Reimer, *Verfassungsprinzipien. Ein Normtyp im Grundgesetz* (Duncker & Humblot 2001) 412-413.

17 For the induction as method of law see ibid 407-408; see also F Reimer, *Juristische Methodenlehre* (Nomos 2001) 598-599.

18 Pechstein and Drechsler (n 9) para 40-41.

19 ibid para 28-29.

20 ibid para 32.

21 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark on 25 June 1998, 2161 UNTS 447.

22 Spiro, 'Multiple Citizenship', in A Shachar et al (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) 631-634; cf the contributions in D Kalekin-Fishman and P Pitkänen (eds), *Multiple Citizenship as a Challenge to European Nation-States* (Brill 2006).

23 On 'multilevel citizenship' cf W Maas, 'Multilevel Citizenship' in Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017); cf D Stjepanović and S Tierney, 'The Right to Vote: Constitutive Referendums and Regional Citizenship' (2019) 18 Ethnopolitics 3 264, 268-271.

24 E.g. Art 6 para 2 Austrian Federal Constitution Act; on regional citizenship in general, cf E Hepburn, '"Citizens of the region": Party conceptions of regional citizenship and immigrant integration' (2010) 50 European Journal of Political Research 504, 504-505.

25 cf D Kochenov, 'Regional Citizenships and EU law: The Case of the Åland Islands and New Caledonia' (2010) 35 European Law Review 307, 308.

26 Multilevel citizenship in federal states is not a new concept; for the US see Justice Kennedy in its concurring opinion in *US Term Limits v Thornton*, 514 US 779, 838 [1995] who pointed at the configuration of the US constitution as providing citizens with 'two political capacities, one state and one federal, each protected from incursion by the other'

27 W Hacksteiner and Ch Ranacher, 'Wahlrechtliche Homogenität und Landesbürgerschaft' in Anna Gamper (ed), *Entwicklungen des Wahlrechts am europäischen Fallbeispiel* (Springer 2010) 442-443.

2. The Characteristics and Development of EU Citizenship

Art 20 TFEU is the central norm of EU citizenship[28]. It mentions certain rights of EU citizens, such as the right to move freely and the right to vote. According to the CJEU, EU citizenship is 'the fundamental status of nationals of the Member States'.[29] Although EU citizenship cannot be deployed in detail here, we would like to sketch some features and developments which are central to the multi-layered structure of EU citizenship: These are the transnational nature of EU citizenship, its integrative force reaching even to the levels of social participation and family status, and the overcoming of the sole focus of fundamental freedom rights of individuals on the (internal) market. Additionally, the individual has a special standing within the EU legal system.

EU citizenship is transnational and reduces the significance of nationality within the EU.[30] It has its main scope of application in cross-border cases in which nationals of one Member State reside on the territory of another. Francesca Strumia states that the CJEU – 'aggressively deployed […] the principle of non-discrimination on the basis of nationality: it has found that European citizens residing in a Member State other than the one of nationality are entitled to equal treatment with nationals for purposes of a number of entitlements and benefits'.[31] This applies, in particular, to all types of social benefits granted by Member States to their citizens: They have to be extended to all citizens of other Member States residing on the territory of the first.[32] The name and family status rightfully acquired in one Member State, have to be recognised by all other Member States, regardless of any national private international law rules pointing to the opposite direction.[33] On the level of civil and commercial rights, the principle of free circulation of judgements of other Member States applies. This implies their recognition and enforcement based on EU regulations (Art 81 TFEU). This recognition requires mutual trust and responsibility between the Member States.[34]

Furthermore, the evolution of EU citizenship has its peculiarities. Historically,[35] EU citizenship evolved out of 'market citizenship'[36] based on the four fundamental freedoms of the TFEU (former ECT). Yet, the concept of 'market citizenship' is nowadays discarded. Art 20 TFEU provides for a Union citizenship in the form of rights and freedoms which are – unlike the four fundamental freedoms of Internal Market law – not dependent on the exercise of any cross-border economic activity by the respective citizen.[37] This applies to the freedom to move as well as to the (political) right to vote on the local level in other Member States and for the EP, and the petition right.[38] The EU citizen's free movement right of Art 20 TFEU is subject to some outer limits which are intended to ensure the financing of the welfare systems of the Member States: The right of residence in a foreign Member State for more than three months depends on having sufficient financial resources or being employed (Art 7 para 1 lit a and b Directive 2004/38/EC).

Finally, although the EU was not directly founded by its citizens but rather indirectly via their national parliaments and governments, citizens themselves do have a status today in the EU legal and political system.[39] But the strength of EU citizenship does not only lie in citizenship itself. The fact that individuals can rely upon EU law before their national courts (due to the direct effect of EU law) made individuals strong allies of the EU in promoting integration through EU law. This also means that the individual has a direct relationship to the EU and does not need its own Member State to act as an intermediary.[40]

3. The Multiple Layers of EU Citizenship

These different strains of the development of EU law allow us to see EU citizenship as a multi-layered and multi-functional citizenship. Although new in the EU-context, multi-layered citizenship is not a novelty. It can be read, for example, into Thomas Humphrey Marshall's speech (held in 1949) on citizenship and social class.[41] In his speech, Marshall (albeit without using the term 'multi-layered citizenship') mapped out three elements, a civil, a political and a social element of citizenship[42] in order to outline the development of citizenship in England. Marshall´s civil and political element harbour both, a republican[43] idea of citizenship as well as a liberal idea of citizenship:[44] The 'liberal perspective' focuses

28 See also Art 9 TEU, which lays down that '[e]very national of a member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.' For an overview on the jurisprudence on EU citizenship cf G-R de Groot and N Chun Luk, 'Twenty Years of CJEU Jurisprudence on Citizenship' (2014) 15 German Law Journal 821.

29 Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECLI:EU:C:2001:458, para 31.

30 According to A von Bogdandy and others, 'Ein Rettungsschirm für europäische Grundrechte' (2012) 72 ZaöRV 45, 62-63; EU citizenship nowadays is even more than a transnational concept, because it also protects EU citizens against violations of a member state that make EU citizenship ineffective.

31 F Strumia, 'Supranational Citizenship' in A Shachar et al (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) 675.

32 B Lurger and M Melcher, *Europäisches Privat- und Wirtschaftsrecht* (Verlag Österreich 2020) 77-78 (with further references); cf Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECLI:EU:C:1998:217; *Grzelczyk* (n 35); Case C-224/98 *Marie-Nathalie D'Hoop v Office national de l'emploi* [2002] ECLI:EU:C:2002:432; Case C-140/12 *Pensionsversicherungsanstalt v Peter Brey* [2013] ECLI:EU:C:2013:565; Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014] ECLI:EU:C:2014:2358; Case C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others* [2015] ECLI:EU:C:2015:597.

33 ibid 70-71 (with further references); Case C-148/02 *Carlos Garcia Avello v Belgian* State [2003] ECLI:EU:C:2003:539; Case C-353/06, *Stefan Grunkin and Dorothee Regina Paul* [2008] ECLI:EU:C:2008:559; Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [2018] ECLI:EU:C:2018:385.

34 Strumia (n 31) 678.

35 For the roots of EU citizenship see von Bogdandy et al (n 30) 59-60.

36 For the term 'market citizen' ('Marktbürger'), see, e. g., C Calliess, *Zur Demokratie in Europa: Unionsbürgerschaft und europäische Öffentlichkeit* (Mohr Siebeck 2014) 47-51; F Schorkopf, *Der europäische Weg: Grundlagen der Europäischen Union* (Mohr Siebeck 2010) 65; S Besson and A Utzinger, 'Toward European Citizenship' (2008) 39 Journal of Social Philosophy 185, 200; cf I Bartle, 'Political Participation and Market Citizenship in a Global Economy: The European Union in Comparative Perspective' (2006) 29 International Journal of Public Administration 415; D Kochenov, 'The Oxymoron of "Market Citizenship" and the Future of the Union' in F Amtenbrink et al (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (Cambridge University Press 2019); N Nic Shuibhne, 'The resilience of EU market citizenship' (2010) 47 Common Market Law Review 1597; D Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' (2005) The Modern Law Review 233. For the connection between 'market citizenship' and 'European citizenship' cf M Steinfeld, *Fissures in EU Citizenship* (Cambridge University Press 2022) 39 and 269 ff.

37 Lurger and Melcher (n 32) 65; 68.

38 cf L Pavlidis, *Akzente der Unionsbürgerschaft* (Verlag Österreich 2019) 177 ff; generally Shuibhne (n 36).

39 Schorkopf (n 36) 65-66.

40 ibid 66 ff.

41 TH Marshall and T Bottomore, *Citizenship and Social Class* (Pluto Press 1987) 49 (in note 1).

42 ibid 17.

43 For the republican dimension see D Kostakopoulou, *The Future Governance of Citizenship* (Cambridge University Press 2008) 19 ff.

44 I Honohan, 'Liberal and Republican Conceptions of Citizenship' in A Shachar et al (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) 83.

on the rights of an individual arising from citizenship.[45] The republican aspect of citizenship points at the common good or common interest (common goals) linked to citizenship, citizens and public and private institutions are bound to.[46] As we will show the liberal and the republican element are reflected in energy citizenship.

In England, Marshall explains that political rights were preceded by civil rights,[47] followed by the emergence of social rights.[48] It is important to note that the edges of these three elements (or layers) of citizenship are not straight cut, but sometimes overlap. Similarly, Shachar points out that citizenship is a 'multidimensional concept and institution', which is open to different interpretations and dimensions.[49]

EU citizenship is also open to a multi-dimensional or multi-layered citizenship. Both the special role of the individual and the development from market citizenship to EU citizenship show that EU citizenship involves the participation of citizens in a common cause beyond Member States' interests. This common cause consists of several EU policy goals: the realization of an area of freedom, security and justice (including the fundamental rights of the ECHR, the free circulation of judgements, the recognition principle for names, and family relations), the Internal Market goals (including the four fundamental freedoms) – each of which belong to Art 3 (2) to (4) TEU or Art 3 and 4 TFEU. The development of EU citizenship shows – because EU citizenship is no longer a market citizenship connected to the exercise of one of the fundamental freedoms – it can be characterised as multi-layered. These layers lead to multi-functional citizenship in the EU,[50] which means that citizenship can serve political, economic or, as we argue, ecological goals.

The concept of multi-layered citizenship is especially promising regarding energy citizenship in EU law. Firstly, it allows us to perceive energy citizenship as part of EU citizenship, without restricting energy citizenship to 'classic' citizens. This means that the energy layer of citizenship can – provided the law foresees it – be extend to people who are not EU citizens.

Secondly, multi-layered citizenship allows us to identify different functions for each layer of citizenship. The political layer of citizenship might harbour political rights and duties and human rights and can be described as the *liberal* part of citizenship. Other layers of citizenship, such as the integration layer, the market layer and the energy layer, can address important community concerns (like EU integration, fairness and functioning of an Internal Market without borders, the energy transition to renewable sources). It thus fulfils a *republican* or community-goal-oriented function. Certain layers overlap, in particular the integration layer overlaps with almost all other layers at least in part. The right of free movement of EU citizens is not linked to economic activity but is at the same time part of the market layer.

Against this background we take Síofra O´Leary's definition of citizenship (in the context of the EU) as 'a juridical condition which describes membership of and participation in a defined community [… carrying] with it a number of rights and duties which are, in themselves, the expression of the political and legal link between the [… community[51]] and the individual'[52] as our point of departure for the following analysis of energy citizenship. According to Chiara Raucea, for the EU this is reflected in the decisions of the CJEU which 'conceives of European citizenship rights not simply as a bundle of scattered interests, but as a web of interrelated rights'.[53]

Within the EU framework we identify 'market citizenship' as the result of individual rights and duties linked to the economic, common good goal of the EU Internal Market, or, as we argue, 'energy citizenship' as a result of particular rights and duties linked to the environmental common good goal of energy transition. The rights and duties of energy citizens – as shaped by the new energy market directives – transform traditionally passive 'energy consumers' and 'energy customers' to 'active customers'[54], 'renewables self-consumers'[55], and participants of an 'energy community'[56]. Following Marshall's political, i. e. liberal, dimension of citizenship as well as its historically developed bundle of political rights, we identify the political or liberal layer as the core layer of citizenship while others (for instance economic or energy) add to it.

For the development of our legal concept of energy citizenship, we chose neither to include nor exclude energy citizenship from classical citizenship, i. e. membership to a certain *political* community. Energy-related rights and duties foreseen in the respective legal system form the basis for energy citizenship. The question arises how certain rights and duties qualify as forming a layer of citizenship. Referring to the republican tradition of citizenship, we argue that in order to assume energy citizenship in the respective legal system, we need to be able to identify a commitment to energy transition and to sustainability linked with those rights and duties (as community goals).

IV. Adding the 'Energy' Layer to EU Citizenship

We develop the legal concept of energy citizenship in three steps: we first sum up our abstract idea of energy citizenship (step 1), we then analyse EU law and identify norms (step 2) from which we finally induce energy citizenship (step 3).

1. Step 1 – The Abstract Idea: EU Energy Citizenship is an Additional Layer and its Personal Scope of Application

In case of the EU, the political citizenship has already two layers: the union citizenship and the citizenship of a certain Member State. Under EU law, energy rights (and duties) mainly build on political EU citizenship, but also extend to the larger collective of energy customers residing in an EU

45 ibid 91.
46 ibid 88.
47 Marshall and Bottomore (n 41) 17.
48 ibid 17. Marshall mentions amongst others the 'right to real income which is not proportionate to the market' (ibid 28), housing (ibid 35), and education (ibid 36 ff).
49 A Shachar, 'Citizenship' in M Rosenfeld and A Sajó, *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 1003.
50 L Pavlidis (n 38) 177 ff, who explicitly uses the term 'multifunktional' (multi-functional).
51 O´Leary uses the word 'state'. As we have pointed to literature arguing that citizenship is not limited to States, we prefer to use the neutral term 'community'.
52 S O'Leary, *The evolving concept of Community citizenship: from the free movement of persons to Union citizenship* (Kluwer Law International 1996) 13.
53 Ch Raucea, 'European Citizenship and the Right to Reside: ' No One on the Outside has a Right to be Inside?'' (2016) 22 European Law Journal 470, 489.
54 Art 15 of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast) [2019] OJ L158/125 (IMED).
55 Art 21 of Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast) [2018] OJ L328/82 (RED).
56 Renewable energy communities according to Art 22 RED, and citizen energy communities according to Art 16 IMED.

Member State, even if they do not have the nationality of a Member State. This gives rise to two groups of natural persons being 'energy citizens' under EU law: those who are EU citizens and, thus, entitled to participate in political decision-making and those who are not. In case of corporations, their place of incorporation or centre of administration in the EU is decisive. The reason for this broader personal scope of energy citizenship as compared to the union citizenship under Art. 20 et seq. TFEU is the personal scope of the underlying EU legal regime, which gives rise to energy citizenship (see infra steps 2 and 3.) The political goals, responsibilities, and citizens' entitlements with respect to energy transition in the EU include all people habitually residing in the EU. The concept of excluding non-EU-nationals is foreign to this body of law. Looking at these legal rules from a citizenship perspective (steps 2 and 3), there is no valid reason for advocating such exclusion from an energy citizenship concept. This broader personal scope including union citizens and non-union citizens with their habitual residence (or place of incorporation/centre of administration) in the EU is also congruent with the ideas underlying the definitions of energy citizenship by Devine-Wright,[57] the psychologist-inventor of the term 'energy citizenship', and the interdisciplinary definition of energy citizenship coined by Hamann and others.[58]

2. Step 2 – Identifying EU Norms which Might Form Energy Citizenship

Energy citizenship results from various norms of EU law. As explained above (II), we apply the inductive method because no principle pertaining to energy citizenship seems to exist under EU law. The basis for induction is not only norms which expressly refer to 'energy citizenship', but, generally, those linked to the fields of energy or environmental protection in their relation to individuals. Deriving energy citizenship through induction results in a web of different norms, which taken together allow energy citizenship to emerge.

a) Primary Law

EU primary law mentions 'energy' various times. Art 194 para 1 TFEU stipulates the following:

The Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks.

Although Art. 194 para 1 TFEU does not address citizens directly, two features are worth looking into. The EU's energy policy is not only taking into consideration 'the establishment and functioning of the internal market', but also the 'need to preserve and improve the environment', and it is taken 'in a spirit of solidarity between Member States'. Therefore, the aims of the EU's energy policy are in the functioning of the market (a), but also in the promotion of energy efficiency, energy saving, and the development of new and renewable forms of energy (c). Although energy efficiency, energy saving, and the development of new and renewable forms of energy serve market purposes, they clearly oblige EU policy to consider environmental aims as well. This reflects the special nature of energy: sufficient energy supply is the prerequisite for the functioning of all other markets and that of all of human existence.[59] Literature also suggests that the market, environmental protection, and solidarity can be seen as hierarchical, but likewise of the same value.[60] Therefore, although Art. 194 para 1 TFEU does not directly address citizens or people, its wording expresses the high significance of energy supply for markets, for the environment and for individuals as basis of a decent life in our society.

With regard to energy citizens, the consideration of the environment is of interest, since the protection of the environment is a common interest of all citizens, as the environment is a 'res publica' of citizens. The significance of environmental concerns is underpinned by Art. 37 Fundamental Rights Charter of the EU (and, in similar wording, Art. 11 TFEU). The former stipulates that '[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'. Although Art. 37 CFR is not a right, but rather a principle, its inclusion in the Fundamental Rights Charter expresses the high significance of environmental concerns for citizens. Art. 37 CFR, together with Art 11 TFEU, can be seen as a bridge between the regulatory energy policy in Art. 194 and citizens.

Solidarity is invoked by Art. 194 TFEU and Art. 122 TFEU, which lays down a procedure for 'measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy'. The CJEU recently relied on the principle of energy solidarity between the Member States and the EU.[61] Whereas Art. 122 TFEU and Art. 194 para 1 TFEU address solidarity between Member States, as shown below, the latest communication of the European Commission in that field has already extended the notion of energy solidarity to include solidarity between citizens and the Member States.[62]

Art. 170 TFEU (which foresees setting up so-called trans-European networks) stipulates that (amongst other objectives) trans-European networks shall 'enable citizens of the Union, economic operators and regional and local communities to derive full benefit from the setting-up of an area without internal frontiers, [and that for that sake] the Union shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures.' In that regard, EU law declares the full benefit of citizens, an aim to be considered when setting up a trans-European network.

b) Secondary Law

Further evidence for the development of an energy citizenship in EU law can be derived from secondary law, especially from the Renewable Energy Directive 2018/2001/EU (RED)[63] and the Directive on Common Rules for the Internal Market for Electricity 2019/944/EU (IMED)[64]. The RED points to the important role of the citizen in the energy transition: They are supposed 'to take ownership of the energy transition,

57 See above n 2.
58 See above n 4.
59 cf T Favaro, *Regolare la transizione energetica: Stato, mercato, innovazione* (Wolters Kluwer 2020) 2 ff (with further references). It is important to notice that Art 194 TFEU allows member states to choose the forms of energy they want to use, see Kaisa Huhta, 'The scope of state sovereignty under Article 194(2) TFEU and the evolution of EU competences in the energy sector' (2021) 70 International and Comparative Law Quarterly 991–1010.
60 Ch Calliess, 'Art. 194 AEUV' in Ch Calliess and M Ruffert, *EUV/AEUV* (C. H. Beck 2016) sec 4.
61 Case C-848/19 P, *Federal Republic of Germany v European Commission* [2021] ECLI:EU:C:2021:598 margin no 37-44.
62 Commission, 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality' COM (2021) 550 final, 4.
63 See above n 55.
64 See above n 54.

benefit from new technologies to reduce their bills, and participate actively in the market' (recital 76). Along with this and further references to citizens in the recitals of the directive (e. g., recital 51, 66, 70), Art. 21 and Art. 22 of the directive construct citizens as 'renewables self-consumers' or as part of an 'energy community'. Similarly, the IMED cites a Commission communication (recital 4) describing the 'Energy Union with citizens at its core, where citizens take ownership of the energy transition, benefit from new technologies to reduce their bills and participate actively in the market, and where vulnerable consumers are protected.' Again, recital 4 as well as other recitals (43, 44, 45, 46, 47) of the directive emphasise the active role of citizens. The development of an energy citizenship is supported especially by Art. 15 ('active customers') and Art. 16 ('citizen energy communities') of the directive. It is particularly remarkable that the 'energy communities' established by the IMED are expressly called 'citizen' energy community. This underlines the importance of energy customers (and producers) acting as 'citizens', not only as mere market participants.

In Art. 10 ff the IMED lays down a huge number of private rights of final customers. Most of these are contractual rights vis-à-vis the energy supplier ranging from information rights, rights to certain bills and billing information, the right to a smart meter, to the right to switch the supplier or the right to participate in a citizen energy community. In addition, the IMED points to a social dimension of the energy transition, when it lays down rules on vulnerable customers (Art. 28) and energy poverty (Art. 29). The provision that 'each Member State shall define the concept of vulnerable customers which may refer to energy poverty and, inter alia, to the prohibition of disconnection of electricity to such customers in critical times' (Art. 28 para 1 of the directive) recalls the prohibition on expulsion of nationals.[65] The idea of Art. 28 IMED is similar: instead of a prohibition on being deprived of residency in the state where one is a national, Art. 28 para 1 prohibits depriving certain customers of electricity in critical times. Both expulsion from a country and deprivation of electricity are exclusionary acts, and in both cases, exclusion is prohibited. This points to the idea described above that energy supply, as well as telecommunication, water supply, public transport, and a bank account, are the basis of a decent living in our society. Exercising energy citizenship by producing one's own energy (energy self-consumption) or by taking part in an energy community is not only environmentally desirable, but is also understood as a way of reducing energy costs for consumers, a concern most important for vulnerable consumers. Accordingly, energy supply, a decent living, and environmental protection are connected.

The rights of energy customers and vulnerable consumers laid down in Art. 10-28 IMED are constitutive of the legal position of an energy citizen which is a position of public law, linking the energy consumer or customer to the collective goal of sustainable energy supply on the EU energy market. What is remarkable and what distinguishes energy citizenship from classical citizenship of a nation state is that these rights belong to (regulatory)[66] *private law* and are shaping the contractual relations between energy (self-)consumers and suppliers on the market. Other layers of EU citizenship, like the market or integration component or the freedom rights and free circulation rights also contain a more or less close link to private law. Thus, EU citizenship seems to be composed of rights and duties of citizens stemming from public *and* private law.[67] The energy citizenship layer reveals to have particularly strong roots in private rights and entitlements of citizens in the energy market.

c) EU Policy Papers and Communications of the European Commission

EU policy papers also reflect the growing awareness of the significance of active energy citizens. In its communication 'A clean planet for all', the Commission seemed to have – at least partly – an active citizen in mind. According to the communication, '[t]he future energy system will integrate electricity, gas, heating/cooling and mobility systems and markets, with smart networks placing citizens at the centre'.[68] Throughout the communication, citizens are referred to as active participants in the energy transition.[69]

The new role of citizens is described as follows: '[…] citizens must be at the core of the transition. The Commission is thus committed to delivering a new deal for energy consumers helping them to save money and energy through better information; giving consumers a wider choice of action as regards their participation in energy markets; and, maintaining the highest level of consumer protection'.[70] While the Commission quote states that 'citizens' shall be at the core of the transition, the following analysis rather refers to 'consumers', e. g. in arguing that 'consumer choice' has to change, 'consumer awareness' shall be increased, and that civil society is important to promote a 'lifestyle change'.[71]

One recent European Commission communication – the new EU strategy on adaption to climate change – also mentions the key role of empowering 'individual citizens, who will play a key role in the success of the adaptation strategy'.[72] Similarly, the Commission's July 2021 communication "'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality" emphasises the role of 'citizens' in climate transition. It explains that the Green Deal is built on a solidarity principle between citizens and states:

Reaching climate neutrality will require a shared sense of purpose, collective efforts and a recognition of different starting points and challenges. Many citizens, especially younger people, are ready to change their consumption and mobility patterns when empowered by relevant information in order to limit their carbon footprint and to live in a greener, healthier environment. However, this package also addresses the concerns of those whose employment or income are affected by the transition.[73]

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65 See the Petruhhin case, where Advocat General Bot stated that 'the principle that a State does not extradite its own nationals is a traditional principle of extradition law', Case C-182/15 *Aleksei Petruhhin v Latvijas Republikas Ģenerālprokuratūra* [2016] ECLI:EU:C:2016:330, Opinion of Advocate General Bot, para 51.

66 On the concept of European regulatory private law see in detail H-W Micklitz, 'Europäisches Regulierungsprivatrecht: Plädoyer für ein neues Denken' (2012) 6 Zeitschrift für Gemeinschaftsprivatrecht 254; cf the contributions in F Cafaggi and H Muir Watt (eds), *The Regulatory Function of European Private Law* (Edward Elgar 2009).

67 This might support the thesis that the distinction between private and public law is not as relevant as previously thought, for a discussion on the topic cf Ch D Stone, 'Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter' (1982) 130 University of Pennsylvania Law Review, 1441-1509.

68 Commission, 'A Clean Planet for all' COM (2018) 773 final, 6.

69 ibid 15, 22, 24.

70 Commission, 'In-depth analysis in support of the Commission Communication COM (2018) 773', 27.

71 ibid 45.

72 Commission, 'Forging a climate-resilient Europe – the new EU Strategy on Adaptation to Climate Change' COM (2021) 82 final, 4.

73 Commission (n 62) 4.

A new Social Climate Fund will provide payments for individuals at risk from energy poverty.[74] Generally, the Fit for 55 document evokes climate change as a common challenge, when it mentions that '[t]he European Union is built on the premise of developing common policies to achieve our common interests'. It invokes solidarity between its Member States and between its citizens to achieve these goals and enjoy its benefits, with everybody acting in line with their own capacities and competences, and respecting different national specificities and starting points in reaching the end goal. The Fit for 55 package is designed in this spirit: efforts are shared between Member States in the most cost-effective way, acknowledging their differences, and supporting those most in need, to ensure that the transition reaches everybody in a beneficial way.[75]

Lastly, the European Green Deal must be mentioned. It states the goal 'to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use'.[76] Moreover '[c]itizens are and should remain a driving force of the transition'.[77] The Green Deal also explicitly mentions energy communities: the Climate Pact 'will continue to work to empower regional and local communities, including energy communities'.[78]

d) International Obligations: Aarhus Convention

Although focusing on environmental actions of states, the Aarhus convention is worth discussing as well, since the EU is a signatory to the convention.[79] The EU has transposed the Aarhus Convention with two directives[80] as well as a regulation[81]. Regarding its content, the convention provides for certain rights of participation and access to justice in environmental matters. Although the Aarhus Convention and the expansion of energy supply from renewable sources might not always go hand in hand[82] -[83] – the Aarhus convention generally works towards more participation of individuals and organised civil society. This supports a stronger position of the individual in the energy transition, at least to the extent it is linked to environmental matters. In strengthening the position of the individual, the Aarhus Convention can therefore also support the concept of energy citizenship.

3. Step 3 – Induction of Energy Citizenship

With regard to the concept of energy citizenship, the norms and statements quoted above can be viewed as building the basis for the concept. We have shown that the EU does not only have the power to regulate in the field of energy policy, but also places citizens at its centre when it comes to the future of energy markets: It views them as 'active customers', as 'renewables self-consumers' or as participants of an 'energy community'. As participants of energy communities the new role of the individual as energy citizen is particularly pronounced. This is illustrated in the individual which not only produces energy and provides energy services. As participant of an energy communities which aim at 'provid[ing] environmental, economic or social community benefits to its members […] or to the local areas where [… they] operate[…] rather than to generate financial profits' the new role of the individual gets evident (Art. 2 para 11 IMED; Art. 2 para 16 REDII). Both aspects of citizenship the liberal one and the republican one manifest therefore in energy communities. The liberal aspect (participation) consists in the right to participate in a renewable energy community according to Art. 22 para 1 RED II as well as the right to participate in a citizen energy community according to Art. 16 para 1 IMED. The republican aspect consists of the environmental, economic, or social community benefit to the other members and/or to the local area.

It is clear that EU secondary law creates a considerable number of energy-related rights of citizens, most of which are part of private law: such as the rights to information, to transparent bills, a smart meter, to switch supplier, or to set up an energy community. However, it is not equally evident that EU law also imposes energy related duties on the individual. The reverse side of the numerous private law rights which help consumers save both energy and money as well as contribute to and benefit from an increase of energy from renewable sources are not outright legal duties – such as saving energy, switching supplier or establishing an energy community. Even though they could be considered moral ones.[84] A general source of legal duties can be identified by the fact how the EU law shaping and regulating the energy transition has to be respected by all citizens, even though some of these rules might affect citizens only indirectly. On the whole, we can identify a great number of expressed energy-related rights *and* a number of less evident, partly indirect duties for individuals in EU law.[85]

Moreover, we have shown that the EU is manifesting its commitment to energy transition and sustainability through various acts. The energy-related rights and duties mentioned can be seen as an expression of the attempt to implement the energy transition, and at the same time show that the energy transition is a common concern that can only be achieved with the active participation of individuals. Energy citizenship, therefore, consists of both rights and duties in the field of energy on the one hand (liberal element of citizenship), and a commitment to a sustainable energy transition (which can be seen as a common good to achieve) on the other hand[86] (republican element of citizenship).

The EU energy citizenship layer cuts across several fields of law. This crosscutting character is not unlike the free move-

74 ibid 4.
75 ibid 13.
76 Commission, 'The European Green Deal' COM (2019) 640 final, 2.
77 ibid 2.
78 ibid 22.
79 See, in general, P Oliver 'Access to Information and to Justice in EU Environmental Law: The Aarhus Convention' (2013) 36 Fordham International Law Journal 1423.
80 Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information [2003] OJ L41/26, and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment [2003] OJ L156/17.
81 Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L264/13.
82 For the connection between environmental law and energy law, see M Peeters and T Schomerus, 'Modifying our Society With Law' (2014) 4 Climate Law 131. They predict more legal conflicts in the future (ibid 139); for instance, building a new windpark might be promising with regard to clean energy, but might also raise environmental concerns
83 .
84 Cf A Toffler, The Third Wave (Pan Macmillan 1981) 403, who points at the development of a 'prosumer ethic', in which money loses some of its prestige and other capabilities such as 'self-reliance, the ability to adapt and survive under difficult conditions, and the ability to do things with one´s own hands' gain in importance.
85 Such a duty could be seen in the fact that citizens have a duty to tolerate the installation of a smart meter (instead of a conventional meter), see Art 19 ff IMED. It is interesting to note that related to EU citizenship Niamh Nic Shuibhne identified a trend of ascending duties of the individual in 2015 already, see N Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 889.
86 In literature the energy transition has already been seen as 'collective obligation' which strengthens its republican content, see A Monti and B Martinez Romera, 'Fifty shades of binding: Appraising the enforcement toolkit for the EU's 2030 renewable energy targets' (2020) 29 RECIEL 224.

ment right of classical EU citizenship (Art. 21 TFEU) which leaves its impact on public law (permission to reside), social law (extension of welfare state rights) and private law (recognition of family status, names) as well.[87] Both layers, energy citizenship and free movement citizenship, have an important connection to markets and market law while at the same time transcending this market relation in their citizenship dimension: Art. 21 TFEU does not require an economic activity of the entitled union citizen, only a cross-border aspect of her case. Energy citizenship includes energy poverty protection, the universal service principle, and an active involvement of the citizen in an important common interest goal for the whole society. This extends beyond markets: energy transition and climate change mitigation.

In concrete terms, the energy citizenship layer encompasses private (contract law) rights of energy citizens vis-à-vis energy providers, as well as socially protective law (dealing with vulnerable consumers and the basic character of energy supply for a decent living), and the regulatory framework of an EU energy market in transition, the latter being part of public law. It moreover includes incentives, direct and indirect duties of citizens, which are supposed to lead to individual commitment to an active participation in an overarching common goal which can be seen in the sustainability of energy supply in the EU and the mitigation of climate change.

V. Energy Citizenship and Energy Democracy

The concept of energy citizenship as a layer of EU citizenship includes the idea of citizens' active and rights-based participation in the energy transition and, therefore, can be seen as strengthening 'energy democracy'. The concept of 'energy democracy' is defined as 'a framework to consider the possibilities of energy transformation democratizing a society, or democratization of a society bringing energy transition'[88], Fleming, Huhta and Reins emphasize the decentralization of the energy system.[89] Welton identifies three strands of definitions of energy democracy, emphasizing different aspects: consumer choice, local control and access to process.[90]

What is common to these definitions is their focus on citizens being able to participate in the energy transition. Similarly, Wahlund and Palm summarize that definitions of energy democracy "often present […] direct forms of citizen participation such as collective prosumerism, community ownership, and cooperatives as key steps to democratising energy systems".[91]

When energy democracy is considered an objective[92] of (EU) law aiming at participation of citizens in the energy transition, energy citizenship can strengthen energy democracy, because according to the concept of energy citizenship laid down above, energy citizenship consists of rights to participate in and (weak) duties to support the energy transition. Granting rights to individual energy citizens goes beyond concepts focusing on the actual activity of individuals because it creates an institutional background for active citizens. Energy citizenship as a layer of EU citizenship, therefore, strengthens the concept of rights of citizens in the energy transition, and in doing so, reinforces 'energy democracy'.

VI. Conclusion and Outlook

Question 1: Does the EU legal system support an active individual with energy-related rights, and eventually even duties, or is the energy transition a mere policy goal with the EU and MS' governments responsible for its implementation? Against the backdrop of the existential problems resulting from climate change, the EU legislator has realized that individual citizens – taking over responsibility and control of their energy production and consumption – must stand at the core of a successful energy transition (decentral carbon free energy supply). Our analysis of EU law resulted in our conviction that EU law is ripe for a legal concept of 'energy citizenship'. We, therefore, elaborated 'energy citizenship' as a legal concept in the context of EU law.

Question 2: What is the relationship of energy citizenship to other existing concepts of citizenship, in particular to nationality, political citizenship and EU citizenship? Is it accessible to non-EU-nationals and why (not)? We argue that energy citizenship is part of a multi-layered concept of EU citizenship. It provides individuals with energy rights and duties, independent of their nationality. It is situated at the crossroads between public and private law. EU energy citizenship builds on EU citizenship (as laid down in Art. 20 et seq. TFEU) including its personal scope of nationality of an EU Member State. However, due to the specific goals of the area of law and life concerned (energy provision and transition), the personal scope of energy citizenship additionally extends to non-EU-nationals residing in the EU.

Question 3: Why is the concept proposed here new or innovative? Unlike prior scholarship, we address energy citizenship not from a non-legal perspective or an energy democracy perspective, but try to reveal its basis in EU law. We develop our concept in close reference to union citizenship under Art. 20 et seq. TFEU and construe EU citizenship in an innovative way, i. e. as a 'specific multi-layered concept', which is open to extension on two sides: Building on the nationality of Member States union-citizenship is, eventually, open to citizens of new Member States. Building on important union policies, like non-discrimination, free cross-border movement of citizens, it is open to new important policies, which the EU develops over time, like energy transition and climate change mitigation. New policy related layers of EU citizenship have the active participation and entitlement of union citizens at their cores and require a certain standard of high relevance for the whole of the EU, in the case of energy citizenship, there is even high global relevance.

Question 4: Which consequences may follow from it? We are aware of the fact that our study is merely doctrinal. Therefore, we do not claim the ability to make any statements on the real-life effects of our proposed concept. We, however, dare to make some speculations about possible future consequences in the following:

Reference to the legal concept of EU energy citizenship in EU and national documents might increase awareness in the population for the highly relevant policy goal of energy transition and climate change mitigation. The greater the awareness of citizens and governments, the stronger their motivation to take up their relevant part in the energy transition will be. The

87 For recent developments cf Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions under Article 25 TFEU On progress towards effective Eu citizenship 2016-2020' COM (2020) 731 final, 8 ff (public law), 16 (private law), 17 (social law).

88 H Sasaki, Challenging the Transition of Civilization: Theory and Practice of "Energy Democracy", in Asuka/Jin (eds), *Energy Transition and Energy Democracy in East Asia* (2022) 1 (5).

89 Fleming, Huhta and Reins, 'What is Sustainable Energy Democracy in Law?' in Fleming, Huhta and Reins (n 6) 3.

90 S Welton, 'Grasping for Energy Democracy' (2018) 116 MICH. L. REV. 581, 585.

91 Wahlund and Palm, 'The role of energy democracy and energy citizenship for participatory energy transitions: A comprehensive review' (2022) 87 Energy Research & Social Science 102482 1, 10248 3.

92 Fleming, Huhta and Reins (n 89) 3.

concept of energy citizenship is easy to grasp and might be the right transmission belt for empowering citizens and local communities making active use of their energy-related rights. Apart from its empowering potential, energy citizenship also addresses state powers and authorities. Once recognized as a legal concept, it could bind courts and administrative authorities, e. g., when interpreting norms or in cases, where different interests must be balanced. Moreover, energy citizenship could also remind lawmakers of their responsibility to take into account the energy transition in their acts. Even though being unable to measure its effects, we speculate that the concept of energy citizenship could make the EU regulatory regime for the energy transition more effective – in the application of EU law as well as in the every-day life of EU citizens. ■

Dario Hug*

Sustainability, Circular Economy and Consumer Law in Switzerland

I. Introduction

Switzerland, the EU and its Members States have all recognized the 17 United Nations Sustainable Goals. Goal 12 is to ensure sustainable consumption and production patterns.[1] The pursuit of this objective offers new opportunities for analysis and development in contract law, consumer law and in the field of unfair commercial practices.[2] However, although some changes are underway[3], these areas often remain viewed through the traditional lens of protecting the economic interests of consumers[4] as a weaker party[5], without usually taking environmental considerations into account.[6] In light of the ongoing climate crisis[7], the need (i) to concretely protect the environment (ii) to put in place environmentally sustainable consumption patterns as well as (iii) to adopt a more circular economy[8] are pressing. To reach these goals, observers note that solutions can no longer be confined to national consumer laws but international cooperation in this area is needed.[9] As a country located in the centre of Europe, the European Green Deal (December 2019)[10], the New Circular Economy Action Plan (March 2020)[11] and further developments based on these initiatives are also of great practical importance for Switzerland.

This paper assesses Swiss consumer law from the perspective of environmental sustainability and the circular economy. The objective is to present the general state of the law in this respect, considering important achievements and ongoing developments at the European level. To this end, we first present the Swiss legal framework of consumer protection and consumer contracts, as well as sustainable development and circular economy (II). We then conduct a "sustainability check" of Swiss consumer law (III), before concluding (IV).

II. Swiss Legal Framework

1. Preliminary Remarks

How does Swiss consumer law compare to that of the EU and its Member States?

Unlike some EU Member States such as e. g. France, Austria or Italy, Switzerland has neither a Consumer law Code nor a general Consumer Protection Act in the strict sense. Switzerland's approach can in this respect be defined as being "hybrid" with separate and often heterogeneous instruments in both civil codification and special laws (see section II.2).[12] Consumer protection is also usually less pronounced, as the legislator not infrequently relies on the principle of individual responsibility, including that of consumers. As a result, case law at federal level on the application of the statutory rule against the use of unfair terms in B2C contracts remains scattered compared to the numerous ECJ preliminary rulings in relation to the Unfair Contract Terms Directive. On a procedural level, there is also still some reluctance to grant consumers collective rights of action, which consequently tends to limit the collective enforcement of their rights (see section II.2.2).

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1 Bundesamt für Raumentwicklung, 'Die Schweiz auf dem Weg zur Agenda 2030 für nachhaltige Entwicklung' (*DETEC Press Release*, 18 December 2018) <https://www.uvek.admin.ch/uvek/de/home/uvek/medien/medienmitteilungen.msg-id-73462.html> accessed 31 January 2023. See also Sebastian Heselhaus, *Rechtsvergleich bestehender rechtlicher Massnahmen in der Europäischen Union und ausgewählten Staaten sowie der Schweiz zur Förderung der Kreislaufwirtschaft im Konsumbereich* (Gutachten Bundesamt für Umwelt, 2020) 17.

2 For further details, A Halfmeier, 'Nachhaltiges Privatrecht' (2016) 216 Archiv für die civilistische Praxis 717, 749-762.

3 In relation to the 2018 New Deal for Consumers, M Grochowski, 'European Consumer Law after the New Deal: A Tryptich' (2020) 39 Yearbook of European Law (OUP 2020) 387, 393.

4 V Mak and E Terryn, 'Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment Through Consumer Law' (2020) 43 Journal of Consumer Policy 227, 234. See also B Keirsbilck and S Rousseau, 'The Marketing Stage: Fostering Sustainable Consumption Choices' in B Keirsbilck and E Terryn (eds), *Consumer Protection in a Circular Economy* (Intersentia 2019) 93, 99.

5 Halfmeier (n 2) 750.

6 For notable exceptions, L Krämer, 'On the Interrelation Between Consumer and Environmental Policies in the European Community' (1993) 16 Journal of Consumer Policy 455; C Kye, 'Environmental Law and the Consumer in the European Union' (1995) 7 Journal of Environmental Law 31; K Tonner, 'Consumer protection and environmental protection: Contradictions and suggested steps towards integration' (2000) 23 Journal of Consumer Policy 63.

7 Intergovernmental Panel on Climate Change (IPCC), 'Climate Change 2022: Synthesis Report' (Assessment Report 6, 2022) <https://www.ipcc.ch/report/sixth-assessment-report-cycle/> and IPCC, 'Climate Change 2021: The Physical Science Basis' (Assessment Report 6, 2021) <https://www.ipcc.ch/report/sixth-assessment-report-working-group-i/> both accessed 31 January 2023.

8 Grochowski (n 3) 392 and 393.

9 Halfmeier (n 2) 748; M Durovic and F Lech, 'International and Transnational Consumer Law on Sustainable Consumption', in A Do Amaral Junior, L de Almeida and L Klein Vieira (eds), *Sustainable Consumption – The Right to a Healthy Environnement* (Springer 2020) 13; H-W Micklitz, 'Squaring the Circle? Reconciling Consumer Law and the Circular Economy' in B Keirsbilck and E Terryn (eds), *Consumer Protection in a Circular Economy* (Intersentia 2019) 323, 335.

10 European Commission (EC), 'The European Green Deal' COM(2019) 640 final.

11 EC, 'Circular Economy Action Plan – For a cleaner and more competitive Europe' COM(2020) 98 final.

12 For a detailed presentation of Swiss consumer law, H Heiss and L D Loacker (eds), *Grundfragen des Konsumentenrechts* (Schulthess 2020). On the systematic approach of Swiss consumer law, D Hug, *La formation du contrat de consommation: Entre régime général et approche sectorielle – analyse et perspectives en droit suisse* (Helbing Lichtenhahn 2020) para 2141 ff.

Nevertheless, due to close cultural, economic[13] and geographic ties between Switzerland, the EU and its Member States, as well as with the internal market, Swiss law continues to be strongly influenced by EU law.[14] The "Europeanisation" of Swiss consumer law essentially dates back to the early 1990 s although – or precisely because – the sovereign refused to join the EEA agreement at that time.[15] This dynamic and still ongoing process is taking place either in the form of so-called autonomous adaptation ("*autonomer Nachvollzug*", "*adaptation autonome*") or in the form of a general alignment with EU law.[16] From a national perspective, Swiss consumer law must – very simply put – be adopted and maintained as close as possible to EU consumer law on which it is based (this also applies in principle to its interpretation by the internal courts).[17]

2. Consumer Protection and Consumer Contracts

Art. 97 of the Swiss Federal Constitution of 1999 (hereafter: Cst.) represents the constitutional basis of consumer protection in Switzerland. Its origin goes back to the approval by the people and the cantons of an express consumer protection provision in the previous Federal Constitution of 1874. Art. 97 Cst. reads as follows:

1. The Confederation shall take measures to protect consumers. 2 It shall legislate on the legal remedies available to consumer organisations. These organisations shall have the same rights under the federal legislation on unfair competition as professional and trade associations. 3 The Cantons shall provide a conciliation procedure or a simple and rapid court procedure for claims of up to a certain sum. The Federal Council determines this sum.

a) Substantive Law: A Hybrid Approach

From the mid-1980 s onwards[18], there was legislative work to implement the constitutional mandate for consumer protection through the Federal Act on Information for Consumers[19] (hereafter: ConsumIA) and in the Swiss Federal Code of Obligations[20] (hereafter: CO; art. 6 a [sending of unsolicited items, 1991[21]] and 40 a ff CO [door-to-door sale, 1991]).

From the 1990 s on, consumer protection was gradually further adapted and expanded in the CO, often – but not exclusively – pursuant to the above-mentioned (see section II.1) phenomenon of the "Europeanisation" of Swiss law. The provisions on door-to-door sales were the first adapted (1994). A few years later (2000), a specific consumer protection was adopted in the context of the marriage or partnership brokerage mandate including a right of withdrawal (art. 406 a ff CO). More recently (2013), the limitation period for the buyers' warranty claim was extended from one to two years (art. 210 para 1 CO). Furthermore, nullity of the clause reducing the prescriptive period in B2C contracts in case of a breach of warranty was also regulated (art. 210 para 4 CO; see also section III.2.2.b). Three years later (2016), a right to withdraw from a contract concluded "*by telephone or by a comparable means of simultaneous verbal communication*" was introduced, and the withdrawal period for door-to-door sales contracts (as well as consumer credit contracts) extended from 7 to 14 days. Even more recently (2020), nullity of the waiver of prescription defence made by the addressee of general terms and conditions was introduced (art. 141 para 1[bis] CO).

Pursuant to the Swiss legislator's hybrid approach of consumer law, the abovementioned developments in general private law were paralleled by the adoption of special laws (Product Liability Law [1994], Consumer Credit Law [1994 and 2003][22], Package Travel Law [1994][23] and Product Security Law [2010][24 25]), as well as through amendments of the pre-existing Federal Act against Unfair Competition[26] (hereafter: UCA, which initially entered into force in 1945, the current version dating, however, from 1988; see art. 3 UCA [unfair and misleading commercial practices] and art. 8 UCA [control of unfair terms[27]]). Finally, a right to withdraw from insurance contracts within 14 days was also very recently (2022) adopted (art. 2 a and 2 b Insurance Contract Law[28]).

b) Procedural Law: An Individualistic Approach

In the event of a civil dispute, (some) procedural protection is offered to the consumer by the Swiss Code of Civil Procedure[29] (hereafter: SCCP). This protection manifests itself in the form of a right to a *forum* at the consumer's domicile (art. 32 SCCP [jurisdiction for domestic disputes concerning consumer contracts]; see also arts. 114 and 120 Federal Act on Private International Law[30] for the jurisdiction and law

13 In 2021, Switzerland's merchandise trade volume with the EU represented 57.70 % of the total volume of Swiss merchandise trade (exportations CH-EU for 130.26 billion Swiss francs, importations EU-CH for 135.81 billion swiss francs), <https://www.eda.admin.ch/dam/europa/fr/documents/faq/schweiz-eu-in-zahlen_fr.pdf> accessed 31 January 2023.

14 A Morin, 'L'influence du droit européen sur le droit privé suisse de la consommation' in O Lauren and P-F Vulliemin (eds), *Le droit de la consommation dans son contexte économique* (CEDIDAC 2009) 17.

15 Swiss Federal Sheet 1993 I 757 (following the rejection of the European Economic Area which froze Switzerland's EU application). For further details, E Kohler, *Le rôle du droit de l'Union européenne dans l'interprétation du droit suisse* (Stämpfli 2015).

16 P Pichonnaz, 'art. 97' in V Martenet and J Dubey (eds), *Commentaire romand de la Constitution fédérale* (Helbing Lichtenhahn 2021) para 21.

17 DFT 145 III 409, C. 5.2. (Leading Decisions of the Federal Supreme Court; German: BGE; French: ATF; Italian: DTF); DFT (BGE/ATF/DTF) 139 III 217, C. 2.1.3. and DFT (BGE/ATF/DTF) 129 III 335, C. 6. See also P Jung, 'Das Argument der Europakompatibilität im schweizerischen Privatrecht' (2010) ZSR 513 and T Probst, 'La jurisprudence de la Cour de justice des Communautés européennes: un nouveau défi pour la pratique juridique en droit privé Suisse' (2004) RJN 2004 13, 18, 25 and 36 f.

18 For an overview of consumer protection in Swiss federal law before 1981 (dating back as far as the 1905 Food Act, Classified Compilation [hereafter: CC] 817.0), Swiss Federal Sheet 1986 II 360.

19 Federal Act of 5 October 1990 on Information for Consumers (CC 944.0; "*Bundesgesetz über die Information der Konsumentinnen und Konsumenten*", "*Loi fédérale sur l'information des consommatrices et des consommateurs*").

20 Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code, Part Five: The Code of Obligations (CC 220: "*Obligationenrecht*", "*Code des obligations*").

21 These dates refer to the year of entry into force.

22 Federal Act of 23 March 2001 on Consumer Credit (CC 221.214.1; "*Bundesgesetz über den Konsumkredit*", "*Loi fédérale sur le crédit à la consommation*").

23 Federal Act of 18 June 1993 on Package Travel (CC 944.3; "*Bundesgesetz über Pauschalreisen*", "*Loi fédérale sur les voyages à forfait*").

24 Federal Act of 12 June 2009 on Product Safety (CC 930.11; "*Bundesgesetz über die Produktesicherheit*", "*Loi fédérale sur la sécurité des produits*").

25 Federal Act of 18 June 1993 on Product Liability (CC 221.112.944; "*Bundesgesetz über die Produktehaftpflicht*", "*Loi fédérale sur la responsabilité du fait des produits*").

26 Federal Act of 19 December 1986 against Unfair Competition (CC 241; "*Bundesgesetz gegen den unlauteren Wettbewerb*", "*Loi fédérale contre la concurrence déloyale*"). As opposed to Directive 2005/29/EU the scope of application is in principle not limited to B2C contracts (see however ftn 27).

27 See D Frei and P Jung, 'Revised Control of Unfair Terms in Swiss Law – Consumer Protection by Competition Law?' (2015) 5 EuCML 165. Contrary to the general conception of UCA (see ftn 26 footnote), this provision currently limited to B2C contracts.

28 Federal Act of 2 April 1908 on the Insurance Contract (CC 221.229.1; "*Bundesgesetz über den Versicherungsvertrag*", "*Loi fédérale sur le contrat d'assurance*").

29 Federal Code of Civil Procedure of 19 December 2008 (CC 272; "*Zivilprozessordnung*", "*Code de procédure civile*").

30 Federal Act of 18 December 1987 on Private International Law (CC 291; "*Bundesgesetz über das Internationale Privatrecht*", "*Loi fédérale sur le droit international privé*").

applicable to consumer contracts under private international law[31]). The condition for the consumer to benefit from this forum is that the contract concerns "ordinary consumption" ("*Leistung des üblichen Verbrauchs*" "*prestation de consommation courante*"), which is a Swiss specificity. One of its important practical functions is to limit consumer protection to situations where a particular need for social protection is identified.[32] In addition, a summary procedure can apply in so-called clear cases (art. 257 SCCP) as well as a simplified procedure if the value in dispute does not exceed CHF 30'000 (art. 243 SCCP). If the amount does not exceed CHF 2'000, the conciliation authority may decide on the merits, if the plaintiff so requests (art. 212 SCCP).

However, the approach to dispute resolution remains individualistic: there is no real and effective mechanism of collective redress for consumers in civil proceedings.[33] In the context of the Dieselgate, for example, a judgment of the Swiss Federal Supreme Court 4A_43/2020 of 16 July 2020 denied the Foundation for Consumer protection ("*Stiftung for Konsumentenschutz*"[34]) the capacity to sue VW and the general car importer in Switzerland. The foundation's civil action had been filed in connection with the compensation claim ("*Schadenersatz*") on behalf of 6'000 buyers who had assigned their right to compensation to the foundation. The main argument of the Supreme Court was that the claim for compensation was not covered by the foundation's statutes, which had to be interpreted strictly (and therefore even if the stated purpose was to safeguard the interests of consumers).[35] After difficulties in introducing a regulation on collective redress in 2020[36], the Federal Council nevertheless presented new proposals on 10 December 2021 to strengthen the protection of consumer's collective interests, the concrete outcome of which is still to be determined.[37] Indeed, on 24 June 2022, the Legal Affairs Committee of the National Council has decided to postpone its decision on the Federal Council's proposals and has instructed the relevant Department to carry out further investigations. It is not expected that the Legal Affairs Committee will resume its examination of the propositions before the second quarter of 2023.[38]

3. Sustainable Development and Circular Economy

In the 1999 Constitution, the principles of sustainable development and conservation of resources were expressly elevated to the status of goals of the Confederation.[39] Art. 2 paras 2 and 4 Cst. read as follows:

[…] *2 It [the Swiss Confederation] shall promote the common welfare, sustainable development, internal cohesion, and cultural diversity of the country.* […] *4 It is committed to the long-term preservation of natural resources and to a just and peaceful international order.*

a) Absence of Specific Provision on Circular Economy

In addition to art. 2 Cst., there are further constitutional references to "sustainable development" in the areas of Environment and Spatial Planning (art. 73 Cst.[40]), Energy policy (art. 89 Cst.[41]), Agriculture (art. 104 Cst.) and Food security (art. 104 a Cst.). These are guiding principles, which must be translated into law.[42] Sustainability is, for example, mentioned in the Federal Act on the Protection of the Environment (hereafter: EPA; see art. 1, 29 a, 29 f and 32 a EPA). This (public) law is nevertheless considered a central framework act for environmental protection that encompasses the protection of natural resources.[43] Art. 30 EPA also states that "*waste must be recovered where possible*" and art. 30 a litt. a EPA mentions that "*the Federal Council may prohibit placing products intended for once-only, short-term use on the market if the benefits of such use do not justify the harm to the environment that they cause*".

However, Switzerland has to date no specific constitutional provision for the implementation of a circular economy. In 2016, Swiss citizens rejected by 63.6 % the Green Party's initiative "For a sustainable and resource-efficient economy", which aimed to create an explicit constitutional basis for an economy that does not make excessive demands on natural resources and promotes the closure of material life cycles.[44] Still, art. 74 Cst. recognizes the broad competence of the Confederation in environmental protection. In combination with art. 2 and art. 73 Cst., this provision can thus be seen as an anchor for the circular economy (mainly also in connection with waste law).[45]

b) Endorsement of the Circular Economy

In line with the usual, rather non-interventionist approach of the Swiss legislator, the Federal Council has until recently indicated that it relied primarily on the responsibility of

31 Switzerland is a depository State of the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (see art. 15 of the Convention for jurisdiction over consumer contracts).

32 Federal Supreme Court Decision 4A_432/2007 from 8 February 2008, C. 4.3.2. (sale of a luxury car).

33 For more details and nuances, D Hug, 'Le consommateur en procédure civile suisse', RJN 2018 15, 34 ff. See also, Pichonnaz (n 16) paras 28 ff.

34 This foundation is a private law foundation pursuant to art. 80-89 c of the Swiss Civil Code. Especially, art. 3 of its statutes provides that its purpose is "*to safeguard the interests of the consumers*". See Federal Supreme Court Decision 4A_43/2020 from 16 July 2020, C. A.a and 3.

35 Federal Supreme Court Decision 4A_43/2020 from 16 July 2020, C. 3.2.5.: "*Der Vorinstanz ist insgesamt keine Verletzung von Bundesrecht vorzuwerfen, wenn sie gestützt auf die Auslegung der Zweckumschreibung in Art. 3 der Stiftungsurkunde erwog, die Einreichung einer Klage zur gerichtlichen Durchsetzung von Tausenden von Schadenersatzforderungen einzelner Konsumenten aus ausservertraglicher Haftung sei vom konkreten Stiftungszweck nicht umfasst. Sie ging zudem zutreffend davon aus, dass es sich beim fraglichen Vorgehen, mit dem sich die Beschwerdeführerin als Inkassovehikel gerichtlich für eine Vielzahl abgetretener ausservertraglicher Schadenersatzforderungen betätigt, auch nicht um eine vorbereitende oder unterstützende Nebenhandlung handelt, die der Zweck mit sich bringen kann*".

36 Swiss Federal Council, 'Zivilprozessordnung: Zugang zum Gericht soll leichter werden' (*Press release*, 26 February 2020) <https://www.admin.ch/gov/fr/accueil/documentation/communiques/communiques-conseil-federal.msg-id-78231.html> accessed 31 January 2023.

37 Swiss Federal Council, 'Bundesrat verabschiedet Vorlage zum kollektiven Rechtsschutz' (*Press release*, 10 December 2021 <https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-86344.html> accessed 31 January 2023.

38 Sekretariat der Kommissionen für Rechtsfragen, 'Kollektiver Rechtsschutz: zu viele offene Fragen zum heutigen Zeitpunkt' (*Press release*, 24 June 2022) <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20210082> accessed 31 January 2023.

39 A Papaux and V Martenet, 'art. 2' in V Martenet and J Dubey (eds), *Commentaire romand de la Constitution fédérale* (Helbing Lichtenhahn 2021) para 4.

40 While art. 2 para 2 Cst. embodies a three-dimensional sustainability conception – social, economic, and environmental – art. 73 Cst. refers to purely ecological sustainability. Both refer, however, to an intergenerational perspective, R Mahaim 'art. 73' in V Martenet and J Dubey (eds), *Commentaire romand de la Constitution fédérale* (Helbing Lichtenhahn 2021) para 26.

41 This provision contains an explicit mandate for the efficiency of resources in the field of energy, Heselhaus (n 1) 23.

42 M Malzacher, 'Prémices de l'engagement fédéral en matière d'économie verte' in L Heckendorn Urscheler and K Topaz Druckman (eds), *Les difficultés économiques en droit*, (Schulthess Editions romandes 2015) 127, 130. For a detailed analysis of the justiciability of sustainable development, Mahaim (n 40) para 20 ff.

43 A Griffel and H Rausch, 'art. 1' in Vereinigung für Umweltrecht (ed), *Kommentar zum Umweltschutzgesetz* (2nd edn, Schulthess Verlag 2011) para 6 ff. See also Heselhaus (n 1) 24.

44 <https://www.uvek.admin.ch/uvek/fr/home/detec/votations/initiative-populaire-economie-verte.html> accessed 31 January 2023.

45 Heselhaus (n 1) 22 ff.

companies to contribute to the preservation of resources by applying appropriate business models.[46] Important private initiatives such as Circular Economy Switzerland, Go for Impact, the resources trialogue, ECOS and öbu (an association for sustainable management) can be mentioned here.[47] In recent years, different initiatives and policy interventions have been carried out to achieve through "hard law" the implementation of a more circular economy (e. g. better availability of spare parts, improvement and identification of product repairability, development of the circular economy, incentives that can support business models based on circular use).[48] However, the motions for a better availability of spare parts and improvement and identification of product repairability were closed on 17 December 2021 because the Swiss National Council did not complete their review within two years. The other initiatives are still ongoing.

On 16 February 2022, the Federal Council also expressly stated that it wanted to promote the circular economy. A central element here is to extend the lifespan of products to preserve natural resources. Repairing, reusing and sharing products can be seen as promising approaches in this regard.[49] Moreover, the federal Government declared "*its aim to transition to a resource-saving, sustainable economy which fulfils its responsibilities along the entire value chain" and that "It is a challenge it intends to tackle in partnership with the private sector*".[50] In addition, it has noted that traditional environmental protection measures are now insufficient to ensure the well-being of current and future generations.[51] These measures will thus have to be complemented by "*policies designed to preserve these resources and use them efficiently*" and "*such policies must look at the entire resource life cycle and promote what is known as the circular economy*".[52] The use of secondary materials is also seen as a way to increase Switzerland's resilience by mitigating the risk of cross-border supply interruptions or sudden price fluctuations.[53]

These intentions are likely to have an impact on the way contract and consumer law is perceived from the perspective of environmental sustainability and the circular economy. This leads us a "sustainability check" of current Swiss consumer Law (III).

III. "Sustainability Check" of Swiss Consumer Law

1. Preliminary Remarks

What do we mean by "sustainability check" of Swiss consumer law? What is the benchmark in this respect?

Since the 1980 s waste treatment and recycling have developed in a significant way in Switzerland. However, the country (still) consumes a large amount of raw materials and ranks among the top OECD countries in terms of urban waste.[54] Each year, Switzerland generates from 80 to 90 million tons of waste and the trend continues to grow.[55] According to a study by the NGO Oceancare, each Swiss citizen produces an average of 95 kg of plastic waste per year.[56] Moreover, according to the Global E-Waste Statistics Partnership, the country ranks third in the world's largest producers of e-waste per capita, with no less than 23.4 kilos per person in 2019, with an E-waste collection rate of 63 % for 2017.[57] On a global scale, these values seem strongly correlated to the GDP per capita of a given country: the more money an individual has, the more he or she regularly buys new products. In this respect, Switzerland should undoubtedly do more to prevent, or at least significantly reduce the amount of waste generated, especially also e-waste.[58] Based on the current EPA, a federal ban on single-use plastics would constitute a first and welcomed step. This would standardise this ban at the Swiss level and symbolically point out the importance of gradually moving away from the throwaway society. Moreover, obviously from Switzerland's perspective too, encouraging repair rather than replacement would reduce the high global demand for raw materials and moderate the human and environmental externalities created by their extraction.[59]

Various regulatory strategies, previously identified and systematized from the specific perspective of combating premature product obsolescence (see also section III.2.3), can be mentioned here: resisting through durability, postponing through maintenance and upgrades, reversing through direct reuse, repair, refurbishment and remanufacturing, as well as reducing the environmental impact of products through recycling.[60] Through a "sustainability check", this article sheds

46 Interpellation 20.4555, Marionna Schlatter, Fehlanreize zum Ersatz von funktionstüchtigen Handys (closed on 13 March 2021).

47 <https://circular-economy-switzerland.ch/?lang=fr> ; <https://www.go-for-impact.ch/fr/> ; <http://www.ressourcentrialog.ch/> ; <https://ecos.ch/> ; <https://www.oebu.ch/> all accessed 31 January 2023.

48 Motion 19.4595, Müller-Altermatt, Kreislaufwirtschaft: Bessere Verfügbarkeit von Ersatzteilen für Produkte (closed on 17 December 2021); Motion 19.4597, Birrer-Heimo, Kreislaufwirtschaft. Verbesserung und Kennzeichnung der Reparaturfreundlichkeit von Produkten (closed on 19 February 2020); Parliamentary Initiative 20.433, Committee on the Environment, Regional Planning and Energy CN, Développer l'économie circulaire en Suisse; Postulate 20.3062, Bourgeois, Prévention et valorisation des déchets à renforcer; Postulate 20.3090, Munz, Mehr Recycling statt Deponien von Baumaterialien; Postulate 22.3064, Wettstein, Kreislaufwirtschaft konkret. Schaffung von Anreizen für nutzenbasierte zirkuläre Geschäftsmodelle. See also Heselhaus (n 1) 24 ff.

49 Postulate 21.4589, Roduit, Le droit à la réparation comme accélérateur d'emplois de proximité et pour préserver nos ressources.

50 Swiss Confederation, Switzerland implements the 2030 Agenda for Sustainable Development (Switzerland's Country Report, 2018) 18 <https://www.are.admin.ch/are/en/home/media/publications/sustainable-development/die-umsetzung-der-agenda-2030-fur-nachhaltige-entwicklung-durch-.html> accessed 31 January 2023.

51 Swiss Confederation, Switzerland implements the 2030 Agenda for Sustainable Development (Baseline assessment of Switzerland serving as a basis for the Country Report, 2018) 37, <https://www.are.admin.ch/are/en/home/media/publications/sustainable-development/die-umsetzung-der-agenda-2030-fur-nachhaltige-entwicklung-durch-.html> accessed 31 January 2023.

52 Swiss Confederation (n 51) 37.

53 See the opinion of the Swiss Federal Council of 16 February 2022 in the context of the Postulate 21.4589, Roduit, Le droit à la réparation comme accélérateur d'emplois de proximité et pour préserver nos ressources.

54 In 2016, the recycling rate for urban waste was only 53 %, Swiss Confederation (n 50) 18 f. See also <https://circular-economy-switzerland.ch/politique/?lang=fr> accessed 31 January 2023.

55 Swiss Confederation (n 51) 67. Municipal solid waste is the second largest waste category in Switzerland (in 2020, 6.1 million tonnes of waste) after waste generated by construction activity (57 million tonnes). The quantity of waste per capita rose from 659 kg in 2000 to 700 kg in 2020, which makes Switzerland one of the highest waste producers in Europe, see Federal Office for the Environment, 'Raw materials, waste and the circular economy: In brief' <https://www.bafu.admin.ch/bafu/en/home/topics/waste/in-brief.html> accessed 31 January 2023.

56 <https://www.oceancare.org/wp-content/uploads/2023/01/Factsheet-OceanCare_Plastik-in-der-Schweiz_2023.pdf> accessed 31 January 2023. Moreover, although the waste disposal functions quite well, around 14'000 tonnes of plastic are still being released into the environment in Switzerland, see Federal Office for the Environment (n 55).

57 https://globalewaste.org/statistics/country/switzerland/2019/ accessed 31 January 2023. At present, 70 % of Switzerland's total waste volume is recycled, see Federal Office for the Environment (n 55).

58 Interpellation 20.4618, Friedl, Fast Weltmeister im Anfall von Elektroschrott (closed on 19 March 2021).

59 A Perzanowski, 'Consumer Perceptions of the Right to Repair' (2021) 96 Indiana Law Journal 361, 364 mentioning cobalt extraction in the Democratic Republic of Congo about 20 % of which is extracted by hand by people, including children as young as 6 years old, in often disastrous conditions.

60 A Michel, 'Premature Obsolescence: In Search of an Improved Legal Framework', thesis, KU Leuven and UCL Louvain, 2022, 75 ff.

some light on the extent to which Swiss law applies – or fails to apply – some of these important considerations through consumer law.[61] Where appropriate, we will mention related political developments. Ultimately, the aim is to present how environmental sustainability as one of the three pillars of "sustainability"[62] is currently implemented. To do so, this article looks at sales law (2), information requirements and beyond (3), as well as the right of withdrawal (4).

2. Sales law

a) A Neutral Approach

The sales contract is governed by art. 184 ff. CO.[63] These provisions do not make a fundamental distinction between B2C sales and other sales[64], which can be seen as an important feature of the conception of Swiss sales law ("one size fits all model"[65]). This situation may be perceived negatively. However, it offers an opportunity for EU lawyers to assess sales law differently from a comparative perspective. For example, with the exception of art. 210 para 4 CO (for further details see section III.2.2.b), it saves the legal interpreter from some practical difficulties that may arise in distinguishing between the private and professional use of the good when determining the applicable rules. In contrast to EU sales law, however, environmental sustainability and circular economy considerations are essentially absent from Swiss sales law, which offers limited consumer protection in any event.[66]

b) Elements

ba) Remedies

In claims for breach of legal warranty, the buyer may sue either to rescind the contract of sale (*actio redhibitoria*) or to have the sale price reduced (*actio minutoria*) by way of compensation for the decrease in the object's value (art. 205 para 1 CO). However, rescission is excluded where it is not justified by the circumstances (art. 205 para 2 CO) and price reduction is excluded when the loss of value due to the defect is equal to or greater than the selling price (art. 205 para 3 CO).[67] For example, in a recent decision of the Geneva court of first instance rendered in the context of Dieselgate, the Swiss importer of a car was condemned to return the sale price to the buyer (CHF 36'800), after deduction of an indemnity for the use of the car (CHF 24'338.40), on the condition that the buyer return the vehicle (art. 208 CO). The buyers' lawsuit followed the rescission of the contract by the buyer on the ground that the vehicle still had a serious defect after the disputed software was updated.[68] It is also interesting to note here that the alternative remedy of price reduction can be a sustainable remedy "*if a good lacking conformity still offers some functionality, if the consumer continues to use this good and if he refrains from any substitute consumption (like purchasing the same type of good again)*".[69] In this regard, leaving aside possible procedural obstacles, some "sustainability potential" is already present in Swiss sales law.

That said, there is no legal right to repair for the buyer in Switzerland.[70] When it is designed as a primary legal remedy, a right to repair is recognised to promote environmental sustainability and the circular economy.[71] In a system of mass distribution, the sales contract has thus a significant potential to regulate the production, development, and consumption of durable goods, including digital goods and circular economy.[72] From a Swiss perspective, it should be borne in mind that a right to repair is often contractually provided for[73] in contracts of sale, making the case for enshrining current practice into law.

bb) Limitation Period

An action for breach of warranty of quality and fitness prescribes two years after delivery of the moveable good to the buyer, even if the buyer does not discover the defects until later, unless the seller has assumed liability under warranty for a longer period (art. 210 para 1 CO). Before 1 January 2013, this period was only one year. To strengthen consumer protection, this period was then extended to two years.[74] There are, however, no longer lasting or product-specific legal guarantee periods.[75]

Despite the "one size fits all model", art. 210 para 4 CO nevertheless envisages B2C sales specifically, albeit in the limited context of the nullity of the reduction of the default two-year[76] limitation period for an action in case of a defect. An extension of the warranty period is possible, however, within the ten-year limitation period of art. 127 CO.[77] The law therefore offers the parties the possibility of arranging limitation periods that are longer than the statutory two-year period (art. 210 para 1 CO). However, and this may rightly

61 For an in-depth analysis from the perspective of the sale of goods, Y M Atamer, 'Nachhaltigkeit und die Rolle des Kaufrechts: Eine rechtsvergleichende Übersicht zu den Regulierungsmöglichkeiten' (2022) 141 ZSR 285.

62 On the "*Drei-Säulen-Konzept*", A Hellgardt and V Jouannaud, 'Nachhaltigkeitsziele und Privatrecht' (2022) 222 Archiv für civilistische Praxis 164, 167-170. See also Halfmeier (n 2) 721-725 and Mahaim (n 40) para 15.

63 For a comparison of EU Sales law and Swiss law, Y M Atamer and S Hermidas, 'Die neue EU-Richtlinie zum Verbrauchsgüterkauf Regelung, Neuerung und mögliche Ausstrahlung auf das schweizerische Kaufrecht' (2020) 1 Aktuelle Juristische Praxis 48.

64 S Marchand, *Droit de la consommation – Le droit suisse à l'épreuve du droit européen* (Schulthess Editions romandes 2012) 187.

65 Atamer (n 61) 311.

66 For an in-depth analysis on the need for reform of Swiss sales law, Y M Atamer and M Eggen, 'Reformbedürftigkeit des schweizerischen Kaufrechts – eine Übersicht' (2017) 153 ZBJV 731.

67 S Venturi and M-N Zen-Ruffinen, 'art. 205' in L Thévenoz and F Werro (eds), *Commentaire romand du Code des obligations* (Helbing Lichtenhahn 2021) para 1.

68 Judgment JTPI/13464/2021 of the 19th chamber of the court of first instance of the Republic and Canton of Geneva of 21 October 2021, available here: <https://avocats-route.ch/wp-content/uploads/2021/12/jugement-tribunal-genve-contre-amag.pdf> accessed 31 January 2023.

69 E Van Gool, Anaïs Michel, B Keirsbilck and E Terryn, *Public consultation as regards the Sustainable consumption of goods – promoting repair and reuse initiative*, submitted to the EC on 4th April 2022, 5 f. The position paper is available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4211301> accessed 31 January 2023.

70 DFT (BGE/ATF/DTF) 95 II 119, C. 6.: "[…] *la garanzia dei difetti non conferisce all'acquirente un diritto alla riparazione dei vizi, quest'ultimo non potendo optare che tra l'azione redibitoria e l'azione estimatoria*". However, a right to repair is provided for the contract for work and services in the case of minor defects or only slight deviations from the contractual terms (art. 368 para 2 CO).

71 E Terryn, 'A Right to Repair? Towards Sustainable Remedies in Consumer Law' in B Keirsbilck and E Terryn (eds), *Consumer Protection in a Circular Economy* (Intersentia 2019) 127, 128 f. See also K Van Acker, 'Technology for Circular Economy: A New Paradigm for the Way We Use Resources' in B Keirsbilck and E Terryn (eds), *Consumer Protection in a Circular Economy* (Intersentia 2019) 21, 25.

72 K Kryla-Cudna, `Sales Contracts and the Circular Economy´ (2020) 28 ERPL 1207.

73 Marchand (n 64) 200; Venturi/Zen-Ruffinen (n 67) para 28.

74 Swiss Federal Sheet 2011 2699 and Swiss Federal Sheet 2011 3655.

75 On the impact of longer legal guarantee periods on the durability of the goods from the perspective of EU Sales law, E Van Gool and A Michel, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis' (2021) 4 EuCML 136, 141.

76 Respectively less than one year in the case of a B2C sale of second-hand goods (art. 210 para 4 lit. a CO).

77 S Venturi and M-N Zen-Ruffinen, 'art. 197' in L Thévenoz and F Werro (eds), *Commentaire romand du Code des obligations* (Helbing Lichtenhahn 2021) para 8.

be surprising, the remedies of the consumer can still be excluded altogether within the limits of art. 199 CO (fraudulent concealment of the defect by the seller) and art. 8 UCA (unfair terms).[78] This can be seen as an important negative point for consumer[79] and environmental protection. Indeed, the very existence of a legal remedy in case of a defect most likely leads to a longer lifespan of the product because this usually incentivises the liable party to ensure that the product lasts at least for the duration of the limitation period.[80]

bc) Notification of the Defect and Burden of Proof

Swiss sales law is generally criticized for its complexity and formalism.[81] The buyer must for example inspect the purchased object "as soon as feasible" and notify the default immediately without delay usually seven days. However, the time frame is shorter if the defect is such that there is a risk that waiting may lead to greater damage (see art. 201 para 1 CO).[82] Should the buyer fail to do so, the purchased object is deemed accepted, except in the case of defects that would not be revealed by a usual inspection (art. 201 para 2 CO). Where such defects come to light subsequently ("hidden defect"), the seller must also be notified immediately, otherwise the object is deemed to have been accepted even in connection with those hidden defects (art. 201 para 3 CO).

In Swiss law, there is no presumption concerning a lack of conformity which becomes apparent within one year from the time the goods were delivered (as per art. 11 para 1 Directive 2019/771). Therefore, no specific reversal of the burden of proof applies in favour of the consumer, who essentially bears the full burden of proving the defect if the goods have been accepted.[83] A reversal of the burden of proof during a certain period after the purchase as is the case in EU law could contribute to combating premature obsolescence (see also section III.2.3), as it is then assumed that the goods are functional at least during the relevant period.[84]

c) Premature Obsolescence

ca) General Aspects

As this is still the case in many other countries – with the notable exception of France, it seems[85] – Swiss law does not contain a specific provision on premature obsolescence either.[86] The traditional contractual remedies (i. a. defects of consent, guarantees) and those based on the UCA are, however, rather ineffective in tackling this phenomenon.[87] In particular, art. 3 para 1 litt. b[88] and art. 3 para 1 litt. i[89] UCA do not seem to be able to combat it effectively. For example, a cantonal court has ruled that the fact that the seller subsequently and publicly acknowledged a problem with the batteries of certain models of telephones did not necessarily imply that consumers had been misled.[90]

As mentioned (see section III.2.2.a), there is also no legal right to repair for the consumer – and more generally the buyer – in case of defect of the purchased good. Therefore, the right to repair is also not considered a primary remedy either.[91] However, commercial practice and the general terms and conditions of sellers often provide for a contractual right to repair (see also section III.2.2.a); it remains voluntary though. Furthermore, there is no specific legal obligation to update goods with digital elements or in the context of the supply of digital content and digital services[92] which could, however, help curb technological obsolescence.[93] Moreover, although theoretically possible for customers and consumer associations (see art. 10 UCA), collective redress is (very) limited in general and especially in cases of premature obsolescence.[94]

cb) Political Perspectives

Various political initiatives have been tabled to evaluate a possible reform of sales law and to address the issue of premature obsolescence in Switzerland. In September 2021, the Federal Council was mandated to present a report outlining the legislative and regulatory changes needed to allow for the legal sanctioning of intentional or fraudulent shortening of a product's lifespan.[95] In December 2021, a Swiss parliamentary representative called for the introduction of a legal right to repair for consumers.[96] Another parliamentary initiative aimed to reverse the burden of proof in the case of a

78 For further details, Y M Atamer and J Küng, 'Haftungsbegrenzung bei kaufvertraglicher Sachgewährleistung, Wie viel Freiheit braucht es?' (2021) 9 AJP 1093.

79 Critical, E A Kramer, 'Korrespondenz zum neuen Art. 210 Abs. 4 OR', recht 2013 52 and Marchand (n 64) 203 f. See also J Kren Kostkiewicz, 'art. 210' in J Kren Kostkiewicz and S Wolf (eds), *OR Kommentar Schweizerisches Obligationenrecht* (Orell Füssli Verlag AG 2016), para 11; P Pichonnaz, 'Les nouveaux délais de prescription de l'action en garantie (CO 371 et CO 210)' (2013) 109 SJZ 69, 75; P Tercier, L Bieri and B Carron, *Les contrats spéciaux* (Schulthess Verlag 2016) para 747.

80 On legal warranties as a quality incentive for the seller, H-B Schäfer and C Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (6th edn, Springer Gabler 2021) 578-579 with further references.

81 For further details, Y M Atamer and M Eggen, 'Reformbedürftigkeit des schweizerischen Kaufrechts – eine Übersicht' (2017) 153 ZBJV 731, 763-765. See also E A Kramer, 'Die konsumentenrechtliche Defizite des schweizerischen Kaufrechts vor dem Hintergrund der europäischen Rechtsentwicklung' (1998) JKR, 205 and Marchand (n 64) 193 ff.

82 Federal Supreme Court Decision 4A_53/2012 from 31 July 2012, C. 6.2.

83 Heselhaus (n 1) 91 f.; H Honsell, 'art. 197' in C Widmer Lüchinger and D Oser (eds), *Basler Kommentar, Obligationenrecht I* (Helbing Lichtenhahn 2020) para 12.

84 Van Gool and Michel (n 75) 142.

85 Art. L 441-2 Code de la consommation indeed provides for a definition of premature obsolescence. See Thierry Bourgoignie, 'Sustainable Consumption and Obsolescence of Consumer Products' in A Do Amaral Junior, L de Almeida and L Klein Vieira (eds), *Sustainable Consumption – The Right to a Healthy Environnement* (Springer 2020) 28, 30 f.

86 See Federal Supreme Court Decision 6B_437/2019 from 8 August 2019, C. B.

87 For further details, A F Rusch, 'Geplante Obsoleszenz' (2012) 6 recht, 176; G Geissbühler, 'L'obsolescence programmée : main invisible versus défaut invisible' in Olivier Hari (ed), *Protection de certains groupements de personnes ou de parties faibles versus libéralisme économique : quo vadis ?* (Schulthess Verlag 2016) 133; B Mathez, 'Le consommateur face à l'obsolescence programmée en droit suisse: analyse sous l'angle contractuel et sous l'angle des pratiques commerciales déloyales', Master's thesis, University of Neuchâtel, 2021 (<https://bib.rero.ch/global/documents/2121774> accessed 31 January 2023).

88 According to this provision, the person who makes false or misleading statements about himself, his company, his business name, his goods, his works, his services, his prices, his stocks, his sales methods, or his business or who, by such statements, gives third parties an advantage over their competitors acts unfairly.

89 According to this provision, the person who deceives customers by misrepresenting the quality, quantity, usability, or usefulness of goods, works or services or by concealing the dangers they present acts unfairly.

90 See Federal Supreme Court Decision 6B_437/2019 from 8 August 2019, C. B. in reference to the preliminary cantonal judgment.

91 Advocating in this direction on EU Level, Van Gool, Michel, Keirsbilck and Terryn (n 69).

92 Atamer and Hermidas (n 63) 65 f.

93 On the sustainability potential of updates under EU Sales law, Van Gool and Michel (n 75) 139 f.

94 Federal Supreme Court Decision 6B_437/2019 from 8 August 2019, C. 1.3 denying the right to appeal to the association NoObs who filed a criminal complaint against Apple before the public ministry of the canton of Geneva in the so-called "Batterygate", <https://www.tdg.ch/suisse/obsolescence-iphones-jugee/story/29510997> accessed 31 January 2023.

95 Postulate 21.4224, Brenzikofer, Rechtliche Konsequenzen bei absichtlicher Verkürzung der Lebensdauer von Produkten (adopted). See also Motion 20.4025, Hurni, Non à l'obsolescence programmée ! Garantir une durée de vie d'au minimum cinq ans pour les objets électroniques (closed on 8 June 2022).

96 Postulate 21.4589, Roduit, Le droit à la réparation comme accélérateur d'emplois de proximité et pour préserver nos ressources.

defect[97] while another sought to extend the guarantee period from the current two years (art. 210 para 1 CO) to five years.[98] The concrete legislative outcome remains to be seen but they could prove positive for both consumer protection and environmental sustainability.

In addition, federal offices are carrying out an overall analysis of the modernization of warranty law.[99] In this respect, a cost-benefit analysis of various measures is being prepared, including a time-limited reversal of the burden of proof for the buyer and an extension of the warranty period.[100] These measures could help to combat the phenomenon of premature obsolescence, although it should be borne in mind that this is a complex issue that requires a multi-layered legal approach (e. g. ecodesign, contract law and fight against unfair competition).[101]

3. Information Requirements and beyond

a) A Measured Use of Information Obligations

As a principle, apart from good faith (art. 2 Swiss Civil Code) and specific information obligations under sectoral consumer legislation[102], there is no pre-contractual "material" information obligation in Swiss contract law, especially for B2C contracts.[103] Consequently, there is also no specific legal provision on sustainability information[104], in particular the degree of repairability of a good.[105]

More generally, the Swiss legislator is rather reluctant to adopt legal information obligations, preferring to leave the voluntary initiative to the private sector. The abovementioned ConsumIA is not considered to be particularly suitable for setting mandatory information requirements.[106] Indeed, implementation of objective information to consumers through regulations on declarations relating to goods and services is primarily the responsibility of businesses and consumer organisations. The Federal Council has only a subsidiary role to regulate the declaration procedure by ordinance[107] if no private agreement has been reached within a reasonable time or if such an agreement is not satisfactorily complied with (art. 3 and 4 ConsumIA).[108] From the point of view of achieving environmental sustainability in consumer law, this legal situation eventually implies also taking into consideration complementary legal rules, such as ecodesign rules.[109]

b) Towards an Incremental Importance of Ecodesign Rules?

Observers note that relying and focusing only on information will often not be sufficient to achieve environmental sustainability[110], as the main impact of a product occurs at the design stage. In other words, the product *itself* must be sustainable.[111] The limitation and emphasis on information obligations can thus be seen as a classic "act on the cause rather than on the effects" consideration, which is not fully addressed by mere information on sustainability (however well adapted[112]). The information must therefore often be complemented by ecodesign rules, which the EU also intends to address, by extending the scope of these requirements to the widest possible range of products.[113] Furthermore, as a reminder of the need to (re)unite consumer law and environmental law, information requirements alone do not guarantee a minimal consumer protection level, even if they steer consumers to more sustainable goods and services.[114]

Especially from the perspective of sales law, the existence of ecodesign rules raises the question of the relationship between these standards and the provisions on the seller's liability for a defect. In other words, how do ecodesign requirements (if any) affect the conformity of a given good from a contractual and environmental sustainability perspective? In contrast to EU law, Swiss law does not explicitly provide for the criterion of "durability" as an objective requirement.[115] Moreover, the concept of "non-conformity" has primarily a subjective meaning, in the sense that what matters first is the

97 Motion 19.4598, Masshardt, Kreislaufwirtschaft: Einführung einer Beweislastumkehr auch in der Schweiz (rejected by the Swiss National Council on 22 September 2020).
98 Motion 19.4594, Streiff-Feller, Kreislaufwirtschaft. Längere Gerätelebensdauer durch längere Garantiefristen (accepted by the Swiss National Council on 30 September 2021).
99 With access to the documents of the study commissioned in this context by the Federal Office of Justice, the Federal Office for the Environment and the State Secretariat for Economic Affairs, <https://www.seco.admin.ch/seco/fr/home/Publikationen_Dienstleistungen/Publikationen_und_Formulare/Regulierung/regulierungsfolgenabschaetzung/vertiefte-rfa/modernisierung_des_gewaehrleistungsrechts_2022.html> accessed 31 January 2023.
100 <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20204025> accessed 31 January 2023.
101 For an in-depth analysis, Michel (n 60).
102 E.g. art. 4 Travel Package Law or art. 9 ff. Consumer Credit Law.
103 With further, although more nuanced references, Hug (n 12) para 867. Admittedly, in the context of e-commerce, art. 3 litt. s UCA imposes the clear indication of the identity and contact information of the seller. However, this is not strictly speaking a "material" information.
104 For an in-depth analysis of the impact of ethical production processes as an informational characteristic for conformity of the purchased good, see Y M. Atamer and P Gerber, 'Ethische Produktionsprozesse als Merkmal der Mangelfreiheit der Kaufsache' (2022) 11 Aktuelle Juristische Praxis 1159, 1162 ff.
105 See Motion 19.4597, Birrer-Heimo, Kreislaufwirtschaft. Verbesserung und Kennzeichnung der Reparaturfreundlichkeit von Produkten (closed on 19 February 2020).
106 In relation to a motion asking for clearer information on the durability and replacement of light bulbs, the Federal Council indicated that ConsumIA primarily focused on agreements between the business and consumer organisations concerned rather than the adoption of mandatory information requirements. See Motion 19.4434, Michaud Gigon, Pour une information claire lors d'achats de produits non réparables (closed on 17 December 2021).
107 There are currently two federal ordinances regulating the declaration procedures based on art. 4 and 11 of the ConsumIA. The first concerns the declaration for timber and timber products with a duty to declare to the consumer the timber species and the place of origin of the timber (Ordinance on The Declaration for Timber and Timber Products of 4 June 2020 [CC 944.021]). The second, concerns the declaration of furs and fur products (Ordinance on the Declaration for Fur and Fur Products of 7 December 2012 [CC 944.022]).
108 Heselhaus (n 1) 12 and 120.
109 To date, Switzerland has largely adopted the European Commission's implementing regulations for the Ecodesign Directive by means of autonomous adaptation through art. 44 of the Federal Act of 30 September 2016 on Energy (CC 730.0; "*Energiegesetz*", "*Loi sur l'énergie*") and an implementing ordinance. See, however also with proposals to better integrate life cycle and repairability aspects into the law, Heselhaus (n 1) 107 ff. Currently, a legislative proposal is underway to allow the Federal Council to incorporate requirements relating to product design (e. g. repairability, lifetime and information) into the EPA.
110 Keirsbilck and Rousseau (n 4) 98 and 103; Mak and Terryn (n 4) 233 ff. See also M Schaub, 'How to Make the Best of Mandatory Information Requirements in Consumer Law' (2017) 25 ERPL 25. A 2014 Consumer market study on environmental claims for non-food products shows that 61 % of consumers state that they find it difficult to find out which products are truly environmentally friendly and 44 % say they do not trust environmental claims. See further, E Terryn, 'Lutter contre l'écoblanchiment est nécessaire mais ne suffit pas pour atteindre une consommation responsable' (2022) 1 RJE 2022 73, 77 f.
111 Terryn (n 71) 2.
112 For a Dutch initiative allowing e. g. the consumers to calculate Co2 emissions linked to a delivery, <https://bewustbezorgd.org/> accessed 31 January 2023. See further, C Montalvo, D Peck and E Rietveld, *A Longer Lifetime for Products: Benefits for Consumers and Companies* (Study commissioned by the IMCO Committee, 2016) 83 f. <https://www.europarl.europa.eu/RegData/etudes/STUD/2016/579000/IPOL_STU(2016)579000_EN.pdf> accessed 31 January 2023. This study mentions the use of smartphone technology to communicate environmental information in an obvious (i.e difficult to miss) and explicit (i.e easy to understand) way.
113 See from 30th March 2022 : EC, 'On making sustainable products the norm' COM(2022) 140 Final <https://ec.europa.eu/environment/system/files/2022-03/COM_2022_140_1_EN_ACT_part1_v8.pdf> accessed 31 January 2023.
114 Mak and Terryn (n 4) 240.
115 Art. 7 para 1 lit. d Directive 2019/771.

conformity of the good delivered with the good agreed upon by the parties.[116] However, it does not seem inconceivable that, via the criterion of the expected quality ("*vorausgesetzte Eigenschaft*", "*qualité attendue*") of the good[117], durability or repairability considerations based on relevant ecodesign rules, could gradually flow into the assessment of its defectiveness. Indeed, linking ecodesign e. g. durability standards to individually, product-specific, determined limitation periods (Finland and the Netherlands have such flexible periods) should allow the latter to evolve and adapt more quickly, also from the perspective of the expected quality of a given consumer product.[118]

Such a "heteronomous" influence is potentially not without impact on substantive private law, insofar as the seller's liability for the guarantee against defects would then eventually be objectified, even "imposed" by public law standards (at least in the hypothesis of the absence of a voluntary agreement on ecodesign on the producer's side).[119] Under Swiss law, a defect can, however, also affect the legal quality of the good, this being the case if the good does not correspond to the legal requirements or does not allow the buyer to take full advantage of it (e. g. if it does not comply with administrative requirements).[120] In this respect, the aforementioned judgment of the court of first instance of Geneva in connection with Dieselgate (see section III.2.2.a), ruled that the vehicle returned to the buyer after updating the incriminating software was still defective. This was the case because the car did not comply with the antipollution EU5 standard. Therefore, it was unfit for use. The court ruled that this justified the rescission of the contract of sale, with the deduction of a customary indemnity.[121]

c) Green Claims and Fight Against Greenwashing

ca) General Aspects

Under Swiss law, given a certain reluctance to impose legal information obligations to contractual parties, as seen above (see section III.3.1), there are also no specific provisions or effective procedural enforcement against greenwashing in consumer law and the UCA.[122] However, the UCA contains statutory provisions that oversee voluntary commercial disclosures to ensure that they are "correct", i. e. that they do not mislead consumers[123] Depending on the circumstances, they may be relevant to environmental claims in B2C, and even B2B relationships. Indeed, with the exception of art. 8 LCD on unfair terms, the scope of application of the UCA is not limited to B2C contracts. This can be seen as a further materialisation of a "one size fits all model" (for sales law, see section III.2).

In concrete terms, art. 3 para 1 litt. b UCA and art. 3 para 1 litt. i UCA[124] could for instance be considered in the case of misleading environmental claims on the supply side (in relation to premature obsolescence, see section III.2.3).[125] From the point of view of legal application and the principle of *nullum crimen, nulla poena sine lege*[126], however, the challenge lies in relying on measurable criteria such as the lifetime of a product or hours of operation to assess the accuracy of commercial statements at the advertising and marketing stage.[127] Furthermore, how can the actual impact and overall externalities associated with the design, production and marketing of a given product be "correctly" assessed, especially when it is advertised and described as environmentally responsible or with a low environmental impact? Similarly, it has been argued that claims relating to repairability, and circularity of a product have yet to be legally substantiated and may not currently be considered as measurable claims under UCA.[128]

cb) Political Perspectives

As with premature obsolescence (see section III.2.3), there have been policy developments in recent years related to green claims and the fight against greenwashing. Their results are not always positive from a consumer and environmental protection point of view. For example, in a 2014 draft revision of the EPA, the Federal Council proposed to adopt an article 35 d EPA on environmental product information, which would have allowed it to enact provisions similar to international requirements to require manufacturers, importers and sellers of products whose manufacture, use or disposal significantly harms the environment to inform consumers of the environmental impact caused.[129] However, it was rejected by the Parliament.[130] More recently, the Federal Council was invited to make extensive use of the "Retained Environmental Value" (hereafter: REV) indicator to assess the environmental sustainability of circular economy and of individual products. The proposal was welcomed by the Swiss National Council. The Federal Council also shares the view expressed in it and has announced that it will deal with it in a forthcoming report. This REV would integrate the whole life cycle of products as well as the quality aspects of

116 D Akikol, *Sachmängelhaftung beim Warenkauf – Obligationenrecht und UN-Kaufrecht (CISG)* (Schulthess Verlag 2008) para 164, 174, 226 and 353; Ch Müller, *Contrats de droit suisse – Présentation systématique des contrats les plus importants en pratique* (Stämpfli 2021) para 304 f.; Venturi and Zen-Ruffinen (n 77) para 2 (they note a tendency towards a certain objectification in B2C relationships through the "expected qualities").

117 See Atamer and Gerber (n 104) 1162 ff and 1168.

118 Van Gool and Michel (n 75) 142.

119 On the role of public law provisions for the non-conformity of the sold good, Akikol (n 116) para 459 ff. On ecodesign and conformity requirements, see further H-W Micklitz, V Mehnert, L Specht-Riemenschneider, C Liedtke and P Kenning, *Recht auf Reparatur. Veröffentlichungen des Sachverständigenrats für Verbraucherfragen* (Sachverständigenrats für Verbraucherfragen, 2022), 42 and 46 ff.

120 Venturi and Zen-Ruffinen (n 77) para 5 with further reference to DFT (BGE/ATF/DTF) 95 II 119, C. 3 b.

121 Judgment JTPI/13464/2021 of the 19th chamber of the court of first instance of the Republic and Canton of Geneva of 21 October 2021, available here: <https://avocats-route.ch/wp-content/uploads/2021/12/jugement-tribunal-genve-contre-amag.pdf> accessed 31 January 2023.

122 For already mentioned exceptions, see ftn 107 on the declaration of timber and fur. Furthermore, art. 16 a of the Federal Act of 29 April 1998 on Agriculture (CC 910.1; "*Landwirtschaftsgesetz*", "*Loi sur l'agriculture*") regulates the indication of characteristics or production methods, including environmentally friendly production) and art. 18 of the Federal Act of 20 June 2014 on Foodstuffs and Utility Articles (CC 817.0; "*Lebensmittelgesetz*", "*Loi sur les denrées alimentaires*") provides protection against deception relating in particular to the country of production and the origin of the raw materials or components.

123 As highlighted by O Bar-Gill and O Ben-Shahar, 'Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law' (2013) 50 CMLR 109 one can distinguish between two methods to deliver information: (i) affirmative disclosures requiring to convey certain information and (ii) provisions that supervise voluntary disclosures for them to be "correct".

124 See ftn 88 and 89.

125 The scope of application of art. 3 para 1 litt. i UCA is broader and aiming to protect customers against misleading information and the concealing of information, Heselhaus (n 1) 117.

126 The violation of art. 3 UCA can indeed lead to a criminal conviction under art. 23 UCA with a maximum penalty of three years in prison.

127 For an independent testing programme on premature obsolescence of products funded by Horizon 2020 (started May 2019), <https://prompt-project.eu/project/> accessed 31 January 2023. One main objective of this project is to support the assessment of the longevity of consumer products when they are put on the market.

128 Heselhaus (n 1) 117 ff.

129 Swiss Federal Sheet 2014 1751, 1793

130 Object of the Federal Council 14.019, Pour une économie durable et fondée sur une gestion efficiente des ressources (économie verte). Initiative populaire et contre-projet indirect.

materials.[131] Another proposal from June 2020 aimed to introduce a unified reference system based on the "Product Environmental Footprint" (PEF).[132] While noting that environmental labelling of products "*seems a promising approach*", the Federal Council nevertheless proposed to reject the postulate. The main reason for this was, however, that it did not believe that an additional report would add any value given other related work in progress. This proposal was then eventually closed in June 2022 because the Swiss National Council did not complete its review within two years.

In any case, these and other initiatives[133] demonstrate that it is probably only a matter of time before more precise environmental benchmarks become available, which in turn could have an impact on the application of possible UCA provisions on green claims and the fight against greenwashing. That said, in June 2021, a parliamentary initiative entitled "Stop advertising greenwashing" proposed to amend art. 3 para 1 litt. i UCA to expressly extend the deception of the customer to the carbon footprint or neutrality of a product and to sanction the concealment of its dangers and climate impact.[134] On February 3rd, 2022, a narrow majority (13 to 8, with 2 abstentions) of the members of the Legal Affairs Committee of the National Council proposed to reject this parliamentary initiative[135] once again defeating – or at least postponing – any positive development and reinforcement of protection against green claims. One of the arguments put forward was that that such a ban would be difficult to enforce as determining whether a given product can be presented as climate-neutral or environmentally friendly would create a significant administrative burden. The current legal *status quo* therefore remains.

4. Right of Withdrawal

If the contract qualifies as a doorstep selling agreement, the consumer benefits from a right to withdraw from the contract (art. 40 a ff CO). This right is not systematically included in the provisions on the sales contract but in the context of the general "Obligations arising by Contract" (art. 1 to 40 f CO). Furthermore, if the contract qualifies as a consumer credit contract, the consumer has a right of withdrawal under this sectoral law (art. 16 Consumer Credit Law).

An important difference between EU consumer law and its Swiss counterpart is the absence, in the latter, of a (legal) right of withdrawal for domestic sales made in the context of e-commerce. The Swiss provisions on revocation in door-to-door sales and similar contracts (art. 40 a ff CO) only offer the consumer the possibility to revoke his offer to enter a contract or his acceptance of such an offer if the transaction was proposed by telephone or by a comparable means of simultaneous verbal communication (art. 40 b litt. d CO).[136]A legal situation which, through the traditional prism of consumer protection, illustrates a gap in protection may prove that Swiss law is more sustainable, or at least more flexible in addressing sustainability in this context.[137] Indeed, recent discussions in the EU[138] and some Member States[139] on the environmental adequacy of maintaining the right of withdrawal in e-commerce (taking into account environmental externalities such as failed deliveries, traffic congestion, possible excess packaging and waste from returns that are not reused or remanufactured)[140] would not be so immediately relevant for Switzerland. The same applies to the question of abolishing the mandatory nature of the right of withdrawal in e-commerce for such reasons, which is a non-issue under Swiss Law.

However, an associated issue that may be relevant from both the point of view of EU and Swiss law is whether to prohibit free returns offered by sellers on a contractual basis[141] for sustainability reasons.[142] The Federal Council has rejected the introduction of a minimum return fee and expects e-commerce companies to describe their products and sizes as well as possible to reduce returns due to incorrect sizes or incomplete infor-

131 Postulate 20.3727, Clivaz, Mesurer la durabilité environnementale de l'économie circulaire à l'aide de l'indicateur "Retained Environmental Value". For this indicator, M Haupt and S Hellweg, 'Measuring the environmental sustainability of a circular economy' (2019) 1-2 Environmental and Sustainability Indicators 1000005 1. As explained by the authors: "*The indicator extends the focus from end-of-life to the entire life cycle and includes substitution of primary materials. Furthermore, it allows for monitoring the transition towards a circular economy from an environmental and possibly economic and social perspective*".

132 Postulate 20.3834, Friedl, Klima- und Umwelttransparenz von Produkten verbessern mit einer Umweltproduktdeklaration (closed on 17 June 2022).

133 See further Interpellation 21.4641, Andrey, Mehr Zähne für die Finma zur Prävention und Bekämpfung von Greenwashing?; Postulate 19.4490, Michaud Gigon, Informer les clients sur la durabilité des investissements financiers proposés (closed on 22 September 2021); Motion 19.4434, Michaud Gigon, Pour une information claire lors d'achats de produits non réparables (closed on 17 December 2021).

134 Parliamentary Initiative 21.457, Pasquier-Eichenberger, Stop à l'écoblanchiment publicitaire (closed on 16 June 2022).

135 <https://www.parlament.ch/centers/kb/Documents/2021/Rapport_de_la_-commission_CAJ-N_21.457_2022-02-03.pdf> accessed 31 January 2023.

136 Interestingly, however, based on information provided by the shipping company DPD for 2021, Switzerland is the European champion for returning goods, with a return rate of 27.1 % (ahead of the Netherlands [24.5 %] and Belgium [19.0 %]). See Moritz Kaufmann,'Gekauft, probiert, zurückgeschickt' NZZ am Sonntag (Zurich, 27 March 2022).

137 See, however, BSS Volkswirtschaftliche Beratung, *Impact of the growing Mail Order on Traffic* (Schweizerische Vereinigung der Verkehrsingenieure und Verkehrsexperten, 2020) <https://www.bss-basel.ch/files/berichte/BSS_Auswirkungen_Versandhandel.pdf> accessed 31 January 2023. According to this study, the impact of mail order on traffic and kilometres travelled is rather small in relation to total traffic volume. Also, the ecological consequences of government measures in the retail sector are difficult to assess because of the substitution effects between stationary and online trade. The increase in goods transport mileage due to online shopping can indeed be accompanied by a decrease in private vehicle traffic (and other environmental impact of shopping in a "brick and mortar" context), as consumers visit shopping centres less often. See answer by the Federal Council to Motion 21.4208, Töngi, Unnötige Transporte vermindern mit weniger Retouren.

138 In a written answer of 7 May 2020 by Mr Reynders on behalf of the European Commission to the Parliamentary Question – E-000477/2020 (ASW), *E-commerce: right of withdrawal and cost-free return of goods*, the Commission stated that it "*intends to look into measures to address this environmental impact of excessive return of goods bought online*", <https://www.europarl.europa.eu/doceo/document/E-9-2020-000477-ASW_EN.html> accessed 31 January 2023.

139 In Belgium, see DOC 55 2335/001, Chambre des représentants de Belgique, 23 novembre 2021, Proposition de résolution relative à l'évolution vers un droit de rétractation durable et équilibré dans le cadre du commerce électronique, <https://www.dekamer.be/FLWB/PDF/55/2335/55K2335001.pdf> accessed 31 January 2023.

140 On this topic, E Terryn and E Van Gool, 'The Role of European Consumer Contract Law in Shaping the Environmental Impact of E-commerce' (2021) 3 EuCML 89, 94 ff. See also A Michel, 'Matelas et vêtements dans le même sac? (2020) 126 DCCR 34, 45. A study of the University Bamberg found that 238'000 tons (0.0262 %) of overall Co2 emissions in Germany resulted from returned packages. Concretely, this corresponds to 2'200 daily trips by car from Hamburg to Moscow, <http://www.retourenforschung.de/info-retourentacho2019-ausgewertet.html>; see further <https://www.europarl.europa.eu/doceo/document/E-9-2020-000477-ASW_EN.html> both accessed 31 January 2023.

141 Article 14 para 1 Directive 2011/83/EU permits the seller to offer free returns to the consumer.

142 Motion 21.4208, Töngi, Unnötige Transporte vermindern mit weniger Retouren. For a Swiss study arguing that "*returns must be reduced – for financial and ecological reasons*", P Spreer, T Pfrang, M Linzmajer, *Die Psychologie der Retoure: Wie Behavioral Design die Rücksendequote im E-Commerce senken kann* (elaboratum, 2021). A study of the University Bamberg also found that 238'000 tons (0.0262 %) of overall Co2 emissions in Germany resulted from returned packages. Concretely, this corresponds to 2'200 daily trips by car from Hamburg to Moscow, <http://www.retourenforschung.de/info-retourentacho2019-ausgewertet.html>. See further <https://www.europarl.europa.eu/doceo/document/E-9-2020-000477-ASW_EN.html> both accessed 31 January 2023. For another German study on the management of the return of goods, <http://www.retourenforschung.de/> accessed 31 January 2023.

mation.[143] Other measures could include the use of specific technologies such as virtual dressing rooms[144] to allow consumers to "try on" fashion items such as clothes[145] or explicitly stating that consumers must exercise their right in good faith.[146] Stimulating – for example trough nudging in a digital context – sustainable delivery and return options may also provide further improvements when considering the right of withdrawal from an environmental sustainability perspective.[147]

IV. Conclusion

In terms of environmental sustainability, circular economy and recycling, Swiss law has since the 1980 s focused mainly on waste management aspects. However, there is still much room for development from the perspective of consumer law despite some change being on the way in Switzerland as it is in other EU countries.

As seen above (see section III.2.3), an overall analysis of the modernization of warranty law is being conducted, which also includes aspects of premature obsolescence. This initiative has recently led to a comparative law and regulatory assessment on the modernization of warranty law (May 2022). However, the concrete legislative outcome for Swiss sales law (as well as for consumer protection in general) remains to be seen. In parallel, other studies related to the circular economy and with a possible effect on private law have also been undertaken, such as on a register to facilitate use-based business models in the field of land ownership (August 2022)[148] and on a register for moveable property in the field of circular economy (December 2022).[149]

From a European lawyer's point of view, some developments in Switzerland are worthy of notice. Although the right to repair is not legally provided for in Swiss sales law, the potential explicit adoption of such a right in the CO through a modernization of warranty law could immediately be extended to all contracts, i. e. not only B2C contracts. Because Swiss law essentially followed its own hybrid approach of consumer law in relation to general private law, Swiss law can usually be less stringent than EU consumer law can be. This may be an advantage in addressing some of the challenges of the climate crisis with greater legal coherence (i. e. without the need to focus on how or where to implement sector-specific consumer protection legislation in national law). Furthermore, it often avoids having to distinguish between the private or professional purpose of the good(s) acquired, which can pose unnecessary problems of delineation in practice from an environmental sustainability perspective. However, a "one size fits all" approach is unlikely to overcome the adoption of flexible, i. e. product-specific, guarantee periods if Switzerland wants to implement and promote sustainable consumption especially through sales law.

Conversely, the absence of a legal right of withdrawal in B2C e-commerce transactions in Switzerland implies that difficulties that may be encountered in the EU in trying to limit the availability of the right of withdrawal for ecological reasons (e. g. denying the right in certain situations to combat externalities such as pollution and waste accumulation originating from compulsive buyer behaviour and improper reuse of returned goods) can likely be bypassed. Swiss consumers will at least not have to experience a legal "step backwards" and an "undermining" of the substance and principle of such right (although prohibiting e. g. free return would presumably be perceived rather negatively by both businesses and consumers as an undue restriction of their private autonomy). In any event, it should also be borne in mind that the determination of the actual environmental impact of e-commerce – and hence also of a B2C right of withdrawal in such context – compared to traditional trade ultimately depends on multiple factors (e. g. transportation means used by "traditional" customers or energy-impact of stores).[150]

Furthermore, it remains interesting to keep an eye on the legal solutions that may be adopted by the Swiss Confederation, as the country already has a completely unified private law system in operation between different linguistic and cultural communities, which also covers consumer protection. As a non-EU Member State, Switzerland is not bound by the "maximum harmonization standard paradigm" that is in vogue in EU legislation.[151] The completion of the EU internal market is not, as such, an objective of Swiss consumer law. This situation may again allow for greater flexibility and hindsight on solutions taken by the EU and does not imply legal balancing acts to maintain national competence over (secondary) EU law on certain aspects covered, or not, by directives.

Nevertheless, the Swiss legislative process is not necessarily faster or more efficient and consistent in dealing with pressing issues in practice, and those involving environmental sustainability and consumer protection are no exceptions. In any event, Switzerland often sides with the adoption of EU solutions because of its particular geographical, economic and political position towards the EU. Legal developments regarding environmental sustainability, circular economy and consumer law are therefore likely to follow suit, at least to some extent. However, for the same reasons, it seems rather unlikely – though desirable with its unique position in Europe – that the country will pioneer the realisation of the circular economy and environmental sustainability through the adoption of legal rules at the level of consumer law.

Referring also to the latest EU developments, a current legislative proposal (draft act) in fact envisages anchoring important concepts relating to environmental sustainability and the circular economy in the EPA, particularly with regard to the lifespan and repairability of products.[152] The latter act is, however, a

143 Motion 21.4208, Töngi, Unnötige Transporte vermindern min weniger Retouren. Another option is to uniformize the size of the goods, e. g. by a label indicating the size in centimetres only as to avoid consumer confusion. See DOC 55 2335/001 (n 139) 11 f.

144 See <https://www.shavatar.me/> accessed 31 January 2023.

145 See DOC 55 2335/001 (n 139) 8. As mentioned in this proposition, fashion items are indeed the goods that are most returned by consumers.

146 DOC 55 2335/001 (n 139) 10 and 14 gives the example of a consumer ordering many clothes without having the intention of keeping them but one. On the abuse of right under Swiss law in the context of the right of withdrawal, Hug (n 12) para 1411.

147 Terryn and Van Gool (n 140) 89.

148 <https://www.seco.admin.ch/seco/de/home/Publikationen_Dienstleistungen/Publikationen_und_Formulare/Regulierung/regulierungsfolgenabschaetzung/vertiefte-rfa/registerloesung_nutzenbasierter_geschaeftsmodelle_grundeigentum.html> accessed 31 January 2023.

149 <https://www.seco.admin.ch/seco/de/home/Publikationen_Dienstleistungen/Publikationen_und_Formulare/Regulierung/regulierungsfolgenabschaetzung/vertiefte-rfa/registerloesung_mobilien_im_bereich_kreislaufwirtschaft2022.html > accessed 31 January 2023.

150 Terryn and Van Gool (n 140) 89 with further references in ftn 8, especially to J Edwards, A McKinnon and S Cullinane, 'Comparative analysis of the carbon footprints of conventional and online retailing' (2010) 40 International Journal of Physical Distribution & Logistics Management 103.

151 J Morais Carvalho, 'The Premature Obsolescence of the New Deal for Consumers' (2021) 3 EuCML 85, 86 calling the EU legislative process an "*elephant in the room*" in the context of maximum harmonization confronted to the need for the legislator to intervene quickly "*in many cases*" for an effective intervention.

152 For further information, <https://www.parlament.ch/fr/organe/commissions/commissions-thematiques/commissions-ceate/consultation-ceate-20-433> accessed 31 January 2023. For the preliminary draft: <https://www.parlament.ch/centers/documents/fr/vernehmlassung-20-433-urek-n-vorentwurf-f.pdf> accessed 31 January 2023.

public law text. At least at this stage, this choice seems to imply the maintenance in Switzerland of a certain "silo approach" in relation to general private law and consumer law on the one hand, and environmental protection on the other. However, especially sales law cannot (any longer) afford to act in a vacuum totally detached from external conditions, and these aspects also become increasingly interconnected (think here e. g. of the possible impact of ecodesign rules on the assessment of the "ordinary" life and repairability of a product from a sales law perspective, see section III.3.2). In turn, this promises to bring many fundamental and exciting questions for lawyers to discuss, that are also necessary for society to be addressed. ■

Comment & Analysis

Rolf H. Weber*

The Disclosure Dream – Towards a New Transparency Concept in EU Consumer Law

Information or disclosure requirements have become a major regulatory instrument in EU consumer law. But the mandated disclosure paradigm is confronted with many challenges in real life (information overload, overconfidence). Moreover, a new three-dimensional transparency concept must be developed encompassing (i) an optimization of information quality elements as well as (ii) consumer empowerment and responsibility principles.

I. Introduction

In August 2022, Micklitz[1] convincingly wrote: "It can no longer be taken for granted that fully harmonized consumer law provides for the best solution." Indeed, not only the Consumer Rights Directive 2011/83[2] and the "New Deal for Consumers" of 2018[3] but also the legislative instruments governing digital contract law (for example the Supply of Digital Content and Digital Services Directive 2019/770[4], the Sale of Goods Directive 2019/771[5] and the various new regulations in the context of online platforms[6]) envisage to achieve a high consumer protection level by implementing fully harmonized rules-based standards.

The main instrument of EU consumer law consists in information requirements that are designed to help consumers for making reasonable decisions. This approach was pursued over the last decade notwithstanding the fact that mandatory disclosure has been questioned in academic research.[7] This contribution attempts at developing an approach that implements a new transparency concept instead of detailed information requirements.

II. Concept of EU Consumer Law

1. General Foundation

Consumer law usually introduces mandatory rules, such as written form requirements for contract conclusion, pre-contractual and ongoing information obligations, termination rights, etc. This type of (paternalistic) rule-making is justified by the following arguments:[8]

- regularly the consumer is the weaker contract party than the supplier of goods and services (inequality and vulnerability problem);
- the structural information asymmetries between the market participants in principle jeopardize the efficient allocation of economic resources.[9]

An assessment of the second justification reason, namely the information asymmetry, is the main objective of this article. For the sake of completeness, other potential consumer law instruments being frequently introduced are (i) specific (limited) prohibitions in the form of behavioral bans, (ii) restrictions on general business terms (for example content-related restrictions and specific control/supervision measures) or (iii) burden of proof and liability rules that make enforcement of damage claims easier for consumers.[10]

As mentioned, a particularly important part of consumer law concerns the mandated disclosure of information. This requirement should counterweigh the assumed information asymmetries; at least in digital markets, however, the existence of asymmetries is not obvious and should at least be subject to further debate since online information is extensively available. In addition, even if mandated disclosure is not seen as a traditional paternalistic approach since the consumer does not become the beneficiary of specific beha-

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1 H-W Micklitz, 'The Full Harmonization Dream' (2022) EuCML 117, 119.

2 OJ 2011 L 304/64; information requirements encompass the main characteristics of the goods or services, the identity of the trader, the total price of the goods or services, the arrangements for payment, delivery and performance, the product guarantee, the duration of the contract, the functionality of digital goods.

3 COM(2018) 183 final.

4 OJ 2019 L 136/1.

5 OJ 2019 L 136/28.

6 Examples are the P2B Regulation 2019/1150, the Digital Markets Act, the Digital Services Act, etc.

7 See below chapter II.2; for an overview see R H Weber, 'From Disclosure to Transparency in Consumer Law' in K Mathis and A Tor (eds), *Consumer Law and Economics* (Springer 2021) 73 et seqq.

8 The CJEU case law regularly recognizes the intellectual and economic inferiority of consumers since Case C-89/91, Shearson Lehmann Hutton v. TVB, (1993) ECR I-139, para. 18.

9 Already more than 30 years ago, the problem of information asymmetry was addressed by G A Akerlof, 'The market for "lemons": quality uncertainty and the market mechanism' (1970) Quart. J. Econ. 488-500.

10 A detailed description of consumer protection instruments can be found in E Mišćenić, 'Legal Risks in Development of EU Consumer Protection Law' in E Mišćenić and A Raccah (eds), *Legal Risks in EU Law: Interdisciplinary Studies on Legal Risk Management and Better Regulation in Europe* (Springer 2016), 135, 149 et seqq. with many further references.

vioral requirements to be fulfilled, the respective provisions nevertheless lead to a detailed rule-making imposing far-reaching obligations on the supplier of goods or services.[11]

2. Detailed Information Requirements and Mandated Disclosure Paradigm

For almost 10 years already, the "mandated disclosure paradigm" has been challenged in academic writing, originally in relation to financial market regulations[12] but equally applicable in the consumer law context. Apart from the hidden costs caused by such kind of disclosure (for example detailed prospectus obligation in case of public offerings), academics (not at least in a Law & Economics perspective) argued that mandated disclosure would exacerbate inequality, impair consumers' decisions and deter lawmakers from adopting better regulations.[13]

In addition, the question arises whether consumers indeed read and understand the mandatorily provided information (problem of the information overload[14]). As expressed by the critical voices of Ben-Shahar and Schneider[15], sometimes the provided information whether individually aggregated or based on advice "will not adequately help the naïves in their dealings with the sophisticated." Therefore, a potential way to assist individuals in making better decisions is to direct choices through smart incentives without mandating certain outcome.[16]

As mentioned, the critical voices to the mandated disclosure paradigm stem from the assessment of "consumer protection" in financial markets by extensive and overly detailed information requirements. The new blockchain technologies aggravate the problems into a different direction: consumers are often not able to understand the IT "language" meaning that for example the disclosure of mathematical formulas constituting a smart contract do not lead to an informed addressee.

However, even if mandated disclosure is confronted with inherent weaknesses, transparency as a valuable principle in open markets should remain an important objective. But transparency or information disclosure must overcome the given challenges and be designed afresh.

III. Challenges for transparency principle

1. Notion of Transparency

According to the Oxford Dictionary transparency means "easily seen through and understood". Transparency encompasses characteristics such as clarity, accuracy, accountability, accessibility and truthfulness; on the one hand, transparency enables access to the information necessary for the evaluation of opportunities and costs of operation of a specific transaction, on the other hand, it is relevant in the discussions about governance.[17]

Transparency can also be seen as a key element of governance and is essential in rebuilding and maintaining trust in markets; confidence is based on economic evidence.[18] Furthermore, already more than 130 years ago, Supreme Court Justice Brandeis expressed the opinion that the duty to make information available to the public was a necessary companion to the right to privacy.[19] These characteristics must be considered in the design of the regulatory information or disclosure requirements.

2. Information Overload

The transparency principle is confronted with challenges, for example with the issue of information overload. Looking from a societal perspective, too detailed information requirements could have two negative effects:[20]

- The sheer volume and intensity of information leads to a confusion effect since the recipients (consumers) are not anymore able to cope with all information details and lose the necessary overview of the data.
- The permanent delivery of (similar) information causes a Kassandra effect; even if the consumers take note of the information, its contents is no longer seen as being serious and reliable.

The general wisdom that overconsumption of information can have negative effects or even be risky also applies with respect to detailed disclosure requirements. Thereby, several aspects should be considered:[21]

- Over-information consumes working and leisure time on the supplier and the consumer side.
- Attention is a scarce resource; a person cannot dispose of this resource in an unlimited way.
- Over-information increases the risk that messages or data being spread out are considered to be redundant.
- The utilization level of the (potential) informational supply is decreasing in case of data overload.[22]

Excessive information provision by consumer law causes an unsuitable attempt to realize an appropriate transparency concept. But the balancing of interests remains difficult: Incomplete disclosure leaves people ignorant, but complete disclosure creates crushing overload problems; as a consequence, a regulator should recognize that "less is more" even if it cannot be excluded that "less is not enough".[23]

3. Overconfidence

A second challenge for the transparency principle consists in the overconfidence problem. As real life shows, the understanding of the past does not necessarily lead to the ability to predict the future.[24] Psychological studies have led to the result, that a majority of people is of the opinion to be above average as far as capabilities are concerned although, of course, only half can be. Overconfidence is not always bad

11 Weber (n 7), 74.
12 The basic study stems from O Ben-Shahar and C E Schneider, 'More than you wanted to know: the failure of mandated disclosure' (Princeton Univ. Press 2014).
13 See also Weber (n 7), 75 and 77 with further references.
14 See below chapter III.2.
15 O Ben-Shahar and C E Schneider, 'The failure of mandated disclosure' (2011) 647, 748.
16 Mainly to this aspect R H Thaler and C R Sunstein, 'Nudge: improving decisions about health, wealth and happiness' (Yale Univ. Press 2008).
17 R H Weber, *Shaping Internet Governance: Regulatory Challenges* (Schulthess/Springer 2009) 121.
18 C Kaufmann and R H Weber, 'The Role of Transparency in Financial Regulation' (2010) JIEL 779, 780.
19 S D Warren and L D Brandeis, 'The Right to Privacy' (1890) Harv. L. Rev. 193; later dissenting opinion in Olmstead v. USA, 277 US 433, 471 (1929).
20 This sub-chapter is based on Weber (n 7), 79-80.
21 The following list is based on N Luhmann, 'Die Gesellschaft der Gesellschaft', (Suhrkamp 1997), Vol. 2, 1090, 1097, 1102 et seqq.
22 This effect is often called the Kassandra effect, i. e. the expressed words remain unheard; for further details see Weber (n 7), 80.
23 See Ben-Shahar and Schneider (n 15), 647.
24 See D Kahneman, 'Thinking fast and slow' (Farrar, Straus and Giroux 2011) 218.

but it has the tendency to overestimate the benefits due to overwhelming information; correspondingly, it underestimates the costs leading to the acceptance of too high risks.[25]

Overconfidence also tends to foster a misdirected judgment, since in such case humans have the illusion that they are in control of a planned project or their lives. Overconfidence refers not only to over-optimism but also to over-precision, e. g. misinterpretation of probabilities.[26] Consequently, a new transparency concept needs to overcome the described (negative) challenges.

IV. Towards an improved transparency concept

1. Basic Considerations

The provision of a better transparency environment and of adequate access to information but also the establishment of a possible direct participation of market participants in the policy-making is imperative in the consumer field.[27] Because improved transparency can contribute to the empowerment of consumers, the development of such a concept is needed.

A three-dimensional concept of transparency should be considered:[28] The first dimension refers to institutional aspects, i. e. procedures and decision-making; by providing legal certainty, transparency serves as an anchor for appropriate regulations. The second dimension of transparency constitutes the substantive backbone of consumer regulations. The third dimension is accountability of actors for rebuilding confidence in the market system.

The two main pillars of an improved transparency concept should enshrine an optimization of the information quality and a clearer positioning of consumer rights and obligations.

2. Optimization of Information Quality

Transparency should address the way how information is delivered in order to optimize the outcome of the information process. In principle, the source of the transparency problem is not grounded in the disclosure requirements but in the way how individuals filter information. Therefore, salience matters when certain information is essential for the individual or general welfare.[29]

The basic objectives of transparency require robust and general rules not necessarily more regulation. This principle is enshrined in article 12 para. 1 of the General Data Protection Regulation 2016/679 (GDPR);[30] information must be given "in a concise, transparent, intelligible and easily accessible form, using clear and plain language". "Intelligible" means understandable by an average consumer and "simple" requires avoiding "complex sentence and language structures".[31] Clear and comprehensive information must also be given about the used digital technology.[32]

Similarly to consumer (not personal data) protection, article 6 para. 1 of the Consumer Rights Directive 2011/83 also requires the making available of information in a "clear and comprehensible manner" but the subsequent list of not less than twenty concrete items jeopardizes the "clarity" principle.[33] The Omnibus Directive 2019/2161 has even introduced "additional specific information requirements for contracts concluded on online marketplaces".[34] Looking at these provisions, in the consumer protection context less emphasis is put on "intelligible" and "simple" than in the data protection context which does not appear to be convincing.[35]

Furthermore, a principles-based approach trying to implement harmonized minimum standardization is more adequate than a detailed rules-based approach. This experience has been made in financial market regulation;[36] in addition, such approach allows to include all relevant voices in the decision-making procedures (first dimension of transparency concept). A general framework also facilitates the attempt to concentrate on the quality of the consumer regulation (second dimension of transparency concept) instead of its quantity[37] since, particularly in a complex and more opaque technological environment,[38] "less is often better than more".

3. Consumer Empowerment and Responsibility

A future-oriented understanding of an appropriate transparency concept in EU consumer law must observe the following elements:[39]

- The information recipient should be defined as a holder of rights/obligations and an essential component for the perception of both informational disclosure and transparency. Such concept relies on the principle of "information choice" of the consumer which can overcome the problem of information overload since an average consumer, being reasonably well informed and observant, cannot truly understand all the listed complex information and recognize what is essential.[40]
- Publicly accessible and reliable information must be provided, i. e. substantive quality standards related to information are to be implemented, supported by an adequate legal framework which influences peoples' choices and furthers the informational understanding since a rational person would arguably organize his or her conduct in accordance with the law.
- The availability of and the compliance with disclosure procedures as well as the observance of the time element is paramount (third dimension of transparency concept), i. e. transparency implies a constant visibility of information.

Improved transparency needs to contribute to the empowerment of consumers (incl. digital literacy). This aspect even

25 See also Weber (n 7), 81 with further references.
26 Weber (n 7), 82.
27 Since the single consumers are not in a position to reasonably influence the development of protective regulations, consumer organizations should become more involved in the legislative processes.
28 See also Kaufmann and Weber (n 18), 781, and Weber (n 17), 122.
29 See C R Sunstein, 'Empirically informed regulation' (2011) Univ. Chicago Law Rev. 1349, 1353.
30 OJ 2016 L 119/1.
31 Article 29 Working Party Guidelines on transparency, 2017/18, 7 and 9.
32 N Helberger, O Lynskey, H-W Micklitz, P Rott, M Sax and J Strycharz, 'EU Consumer Protection 2.0, Structural asymmetries in digital consumer markets' (Brussels, March 2021) 28.
33 See also the thorough description of the case law in E Mišćenić,' Protection of consumers in the EU digital single market: virtual or real one?', in A Viglianisi Ferraro, M Jagielska and M Selucká (eds), The influence of the European legislation on national legal systems in the field of consumer protection (Wolters Kluwer/CEDAM 2018) 219, 229 et seqq.
34 OJ 2019 L 328/7.
35 A closer link has now been established by the CJEU in the recent Meta Platforms Ireland case; see the convincing analysis of E Mišćenić, 'Case Note on Meta Platforms Ireland (28.4.2022 – C-319/20)' (2022) GPR 206 et seqq.
36 See J Black, M Hopper and C Band, 'Making a success of Principles-based regulation' (May 2017) Law and Financial Markets Review 191 et seqq.
37 Weber (n 7), 80.
38 Helberger et al. (n 32), 31.
39 Weber (n 7), 84.
40 See E Mišćenić, 'The Constant Change of EU Consumer Law: The Real Deal or Just an Illusion?' (2022) Anali Pravnog Fakulteta u Beogradu 679, 721/22, available at <https://ssrn.com/abstract=4279882> accessed 30 March 2023; see also Helberger et al. (n 32), 31 pointing to the fact that consumers often do not understand the technical architecture behind online information flows.

gains importance in the new technological environment of the distributed ledger infrastructures. In the "traditional" (including digital) world, the "meeting of minds" constituting the conclusion of a contract can be met by an exchange of communications of whatever nature (even if it is only a "click" on a button). This situation has changed with the arrival of smart contracts: usually, the parties of a smart contract do not fully understand the programming language and the techniques of the distributed ledgers having Java similarities or being Python or Solidity, an object-oriented syntax which is executed on the Ethereum Virtual Machine. Smart contracts are not expressed in an "understandable language" of common sense; therefore, legal doctrine argues that persons who enter into a smart contract accept the binding force of the technical conditions even if they do not really understand all the details of the technology.[41] Reference can also be made to the concept of a matching system for intent declarations in the sense of the term "parties' conduct" as used in some legal instruments, for example in article 2.1.1. of the Unidroit Principles of International Commercial Contracts (version of 2016).[42]

A specific problem concerns the General Business Conditions (GBC). If the provider of digitally referenced goods or services is using GBC being likely the case in practice, it is difficult to acknowledge how the customer could read the respective provisions as required by the Consumer Rights Directive and the Unfair Contract Terms Directive 93/13. Possibly, the practical importance of this challenge might not be very substantial since smart contracts are mainly used in the context of relatively straightforward transactions, based on highly standardized transactions parameters, however, at least theoretically the EU consumer law principles are not complied with.[43]

Empowerment of consumers should be understood as a medal having two sides. For the last twenty years, EU consumer law mainly addressed the rights of consumers. Nevertheless, a rightsholder position principally goes along with responsibilities and obligations. Consumers should also be reasonably observant and circumspect in their behavior.[44] The concept of market citizenship includes the expectation that consumers behave responsibly and do not cause specific risks due to an obvious lack of understanding for certain technological or transactional issues. So far, the aspect of consumer responsibility has always been circumvented in legal discussions, however, this notion would be a worthwhile field of future academic research.

V. Outlook

In a nutshell, forward-looking lawmakers should recognize that "less is more" and that "quality is more important than quantity". Instead of detailed regulations, transparency should build the foundation for offering a clear and comprehensive set of information that is understandable and self-explaining and empowers the consumers to take reflected decisions.[45] Transparency does not mean that an overwhelming disclosure is made but that the available information is appropriate and tailor-made. Legislators should strive at implementing an optimum, not a maximum of information.

Consequently, regulators in general EU consumer law, equally as in the financial market field, should strive at introducing principles-based (not rules-based) guidelines and provisions in order to protect consumers' interests. Principles-based guidelines are usually not designed in a highly detailed manner but as general behavioral rules allowing to adapt the specific informational requirements to the given needs in a specific market, being essential for providing legal certainty and for maintaining trust. The concrete obligations must promote (or request) the disclosure of relevant information on certain business *activities in relation to consumers*.

In a nutshell, with the aim of adequately shaping the transparency policies, appropriate objectives and principles that are understandable by all stakeholders must be developed; thereby, the implementation of sound corporate governance concepts in public institutions and private enterprises will be strengthened.[46] In rephrasing the convincing sentence of Micklitz quoted at the opening of this article[47] it appears to be justified to say: "It can no longer be taken for granted that mandated disclosure with detailed information requirements in consumer law provides for the best solution." Moreover, EU consumer law should strive for another regulatory path that leads towards increased consumer empowerment enshrining rights and responsibilities. ■

41 R H Weber, Smart Contracts and What the Blockchain Has Got to Do With It, in M M DeStefano and G Dobrauz-Saldapenna (eds), New Suits, Appetite for the Legal Disruption in the Legal World, (Stämpfli 2019) 355, 364/65.

42 Unidroit, Principles of International Commercial Contracts (2016), Art. 2.1.1., Commentary 3, available at <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/> accessed 30 March 2023.

43 See also Weber (n 41), 365.

44 See also the respective remark of Mišćenić (n 40), 721.

45 Weber (n 7), 85.

46 Weber (n 7), 85.

47 See above n 1.

Rita Simon*

Manipulated Software as a Minor Lack of Conformity?

Case Note on *Porsche Inter Auto and Volkswagen* (C-145/20)

I. Into VW Cases

The Dieselgate scandal is permanently enriching our national and European case law. This mass harm[1] is extensive, testing the effectiveness of the enforceability of consumer sales law, but it also deeply questions the adequacy of the European vehicle type approval framework and the market surveillance performed based on it. Due to the fact that Diesel cars have significant presence in our urban areas, exhausting unlimited NO_x from the engine to the ambient air has a clearly negative impact on the environment and on our health. The scandal identified policy approaches, which attempted to achieve cleaner air for Europe[2] solely through technological improvements created by the vehicle industry, as dissatisfactory. Shortcomings in the existing collective redress mechanisms for consumers became apparent. It also became clearer that consumers in countries with more developed administrative enforcement have easier access to various forms of redress[3] than those in countries where only civil law enforcement is available. The contractual issues of Diesel-cases overwhelmed national courts, alternative dispute resolution (ADR) bodies and cross border dispute resolution bodies with cases concerning remedies for non-conformity, limitation period, court jurisdiction, and assignment of claims.

At the level of European law, the Dieselgate saga resulted in many interesting preliminary rulings. The first wave of the CJEU cases mainly concentrated on the admissibility of the vehicle's "switch-software systems", which improved the performance of the emission control system of vehicles solely during the EC type-approval procedures; but switched them off during normal use on the road. The French ruling[4] from 2018 clarified several technical definitions of the type approval of motor vehicles, such as 'element of design' and `emission control system´; concluding that such "switch-software-systems" are prohibited defeat devices. The CJEU ruling[5] from 2019 on questions referred from Austria answered crucial questions on the jurisdiction of national courts in matters relating to tort concerning the Brussels I Regulation,[6] stating that even if the damage resulting in a tortious act (of contracting) took place in another Member State, the court where the damage actually occurred has jurisdiction. Although these judgments definitely facilitated individual legal actions, the scandal was not settled.

This summer, the CJEU published the second wave of judgments, based on the preliminary ruling references from the Austrian Supreme Court, the Eisenstadt Regional Court and the Klagenfurt Regional Court, challenging the permissibility of the follow-on software replacing the inadmissible "switch software". Two of these follow in the wake of the earlier French ruling on defeat devices on diesel engines,[7] interpreting Regulation (EC) No 715/2007 on type approval.[8] Both applied the same legal reasoning concerning the replaced so-called "temperature window" software, which allowed the exhaust gas regulation was fully effective only when the external temperature was between 15 and 33 C.[9] Case C-128/20[10] considered that this follow-on software should also have been classified as a defeat device, and that it may only be allowed if it is strictly needed to avoid immediate risks of accident or damage to the engine.[11] The Luxembourg court verdict was also that the software concerned does not fulfil these conditions. The second judgment, C-134/20,[12] practically repeated these findings, adding that, when assessing the admissibility of such a device, it is irrelevant whether it was installed at the vehicle's production stage of or only during its repair.[13] Although both judgments help somewhat bridge the gap between sector-specific legislation on vehicles and the Sale of Consumer Goods Directive,[14] a closer linkage was not created.

This intertwining between the contractual liability of car dealers and sector-specific legislation on vehicle manufacturing was achieved by the third case. Judgment C-145/20[15] answers essential legal questions regarding the sales guarantee, especially on the conformity of goods, which will be the focus of this comment. After a short summary of the C-145/20 case and the applicable Austrian law (para. II), this article will answer whether the consumer can reasonably expect that an approved vehicle filters harmful emissions from its engine; and whether fitting a prohibited defeat system should be seen as a minor lack of conformity, as understood by the Directive on Sale of Consumer Goods[16] (afterwards SCG), if the purchaser acquired the vehicle even though he was aware of the presence of such a device (para. III) Furthermore, it will claim that the judicature cannot replace the omitted market surveillance, and predicts a third wave of claims brought by NGOs against vehicle manufacturers and market authorities for causing environmental harm (para. IV).

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1 E Karner, 'Massenschäden und Verbraucherschutz' in M Schmidt-Kessel and Ch Strünck and M Kramme (eds), *Im Namen der Verbraucher? Kollektive Rechtsdurchsetzung in Europa* (Schriften zu Verbraucherrecht und Verbraucherwissenschaften 2015) 170.
2 Directive 2008/50/EC of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] *OJ L152/1*.
3 S Augenhofer, 'Reform des Verbraucherrechts durch den New Deal – ein Schritt zu einer effektiven Rechtsdurchsetzung?' (2019) Europäische Zeitschrift für Wirtschaftsrecht 12.
4 Case C-693/18 *CLCV and Others* [2020] ECLI:EU:C:2020:1040.
5 Depending where the damage has occured, Case C-343/19 *Verein für Konsumenteninformation* [2020] ECLI:EU:C:2020:534.
6 Point 2 of Article 7 of Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] *OJ L351/1*.
7 Case C-693/18 *CLCV and Others* (n 5).
8 Regulation (EC) No 715/2007 of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information [2007] OJ L171/1.
9 Case C-145/20 *Porsche Inter Auto and Volkswagen* (n 15), para 34.
10 Case C-128/20 *GSMB Invest* [2022] ECLI:EU:C:2022:570.
11 Case C-128/20 *GSMB Invest* (n 11), para 70.
12 Case C-134/20 *Volkswagen* [2022] ECLI:EU:C:2022:571.
13 Case C-134/20 *Volkswagen* (n 12), para 88.
14 Within the meaning of Article 3(2) Directive of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] *OJ L171/12*.
15 Case C-145/20 *Porsche Inter Auto and Volkswagen* [2022] ECLI:EU:C:2022:572.
16 Directive (EU) 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods [2019] *OJ L136/28*, and OGH (Austrian Supreme Court) 10Ob44/19 x, 17/3/2020, (2020).

II. Factual Background and the Austrian Law

An Austrian consumer (DS) purchased a Volkswagen motor vehicle with a Euro 5 generation EA 189 type diesel engine from an independent authorised Volkswagen dealer in 2013. This vehicle contained the manipulated switch-software, which operated the exhaust gas recirculation (EGR) system only in the laboratory.[17] The German Federal Office for Motor Vehicles (Kraftfahrt Bundesamt, afterward: KBA) ordered Volkswagen to withdraw this switch system in 2015[18] to re-establish conformity of the vehicle with Regulation No 715/2007. VW fulfilled this order with a software update, the suitability of which was confirmed by the KBA in 2016,[19] and the existing EC vehicle type-approval was not withdrawn or revoked.

In February 2017, DS had carried out a software update on the vehicle. Although the new software no longer included a "switch-system" depending on the condition of the use (in the laboratory/on the road), the exhaust gas regulation was fully effective only when the external temperature was between 15 and 33 C ("temperature window").[20] After learning about the updated switch-system, DS brought an action before the Landesgericht Linz (Regional Court, Linz, Austria) claiming a lack of conformity with the contract according to § 932 Sec. 1. of the AGBG (Austrian Civil Code), seeking compensation, invoking a guarantee for the lack of conformity, and the annulment of the contract with the dealer, and compensation against the manufacturer. Both the Regional Court Linz and Higher Regional Linz dismissed the action due to the lack of defectiveness, based on the fact that the type approval was not revoked by the KBA. Both courts stated, that "(…) the technique of reducing the exhaust gas recirculation at outside temperatures below 15 and above 33 degrees Celsius was permissible according to Art 5 para 2 of Regulation (EC) 715/2007, because it was necessary to protect the engine from damage."[21] DS brought an appeal to the Austrian Supreme Court on the grounds that the conformity of the vehicle was not remedied by the software update. He claimed that there was a risk that the vehicle would decrease in value and be damaged as a result of the software update.[22]

From a civil law perspective, the current legal debate challenged the interpretation of conformity rules and warranty based on the SCG and on its rules of implementation according to the Allgemeines Bürgerliches Gesetzbuch[23] (afterwards AGBG). Nevertheless, the lower regional courts rejected the argument of the defectiveness of the vehicle, because the plaintiff should not expect a withdrawal of the vehicle-type approval by the authorities as a result of the software update, which remedied the original defect.[24] The Supreme Court, examined the existence of a defect in the vehicle purchased by the plaintiff at the time of the transfer. Furthermore, the court examined the possible occurrence of damage to the plaintiff caused by the second defendant.

According to the applicable law, introduced by the Amending Law on the Warranty Law[25] in 2002, a defect in performance within the meaning of § 922 ABGB exists if the performance falls qualitatively or quantitatively short of the usually assumed or warranted characteristics. These usual assumed characteristics of a passenger car, according to the Austrian case law are those availing of the official permits required for the use on the road.[26] The Supreme Court assumed that the vehicle purchased by the plaintiff was *defective* within the meaning of § 922 ABGB because the impermissible defeat device was not disclosed to the authority responsible for granting the EC type approval, which resulted in a lack of legal validity of the type approval granted. In its view, the average consumer who is reasonably well-informed and reasonably observant and circumspect[27] expects, when purchasing a motor vehicle, that it is in compliance with the normative requirements. Therefore, the commitment to the legal order in this respect must be seen as part of the reasonable expectations of the consumer.

In the case of a repairable defect, the buyer has a remedy for bringing the good into conformity pursuant to § 932 para. 1 ABGB. The court therefore examined whether the inadmissible defeat device continued to exist after the "software update" was carried out. The court underlined that an attempt to improve the situation by installing the "software update" would not be successful simply because the KBA had not revoked or withdrawn the EC type approval granted. Rather, in its view, it should be assessed whether the purchased vehicle still has a defeat device that is inadmissible pursuant to Art 5 (2) of Regulation (EC) 715/2007.[28] Despite the statements of the defendants, that exemptions from Article 5 (2) (a) of Regulation (EC) No 715/2007 are allowed, the court claimed that those exemptions need to be interpreted narrowly.[29]

Concerning the available remedies in the case of the lack of conformity, § 932 para. 4 Sentence 1 ABGB, implementing Article 3(6) of the SCG, allows Wandlung (rescission of the contract) only if the defect is not minor. The minor lack of conformity gained two dimensions in this case. First, it was to assess whether the use of a defeat devices, which is prohibited under Article 5(2) of 715/2007 Regulation, may be classified as a minor lack of conformity; and second, whether the fact that the buyer (Übernehmer/acquirer) would have concluded the contract even with the knowledge of the defect, would qualify it as a minor defect.[30] According to Austrian case law, when examining whether a minor defect within the meaning of § 932 para. 4 ABGB exists, an objective weighing of the interests of the contracting parties must be carried out with regard to the specific contract and the circumstances of the individual case. This means that subjective circumstances should also be taken into consideration. Furthermore, the Austrian literature on § 932 para. 4 sentence 1 ABGB, also held an opinion that it should been assessed as a minor defect when the buyer (Übernehmer/acquirer) would have concluded the contract with the knowledge of the defect, even if under different conditions[31]. Because the plaintiff stated in the lower procedures that he would have purchased the contested vehicle, even if he had been aware of the existence and operation of that device, the definition of a minor lack of conformity gained special attention.

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17 OGH 10Ob44/19 x (n 17) A. Sachverhalt.
18 KBA (Kraftfahrt Bundesamt) Decision 15/10/2015, see < https://www.kba.de/DE/Presse/Archiv/Abgasthematik/vw_inhalt.html> accessed 1 January 2023
19 KBA Letter 20/12/2016.
20 Case C-145/20 *Porsche Inter Auto and Volkswagen* (n 15), para 34.
21 OGH 10Ob44/19 x (n 17).
22 OGH 10Ob44/19 x (n 17) .
23 § 1811 ABGB (Allgemeines bürgerliches Gesetzbuch).
24 OGH 10Ob44/19 x (n 17) C. Bisheriges Verfahren.
25 2001 GewRÄG (Gewährleistungsrechts-Änderungsgesetz).
26 OGH (Austrian Supreme Court) 2 Ob 34/11 f, 29/3/2011 (2011).
27 Case C-44/01 *Pippig Augenoptik* [2003] ECLI:EU:C:2003:205 para 55; Case C-562/15 *Carrefour. Hypermarchés* [2017] ECLI:EU:C:2017:95 para 31.
28 OGH 10Ob44/19 x (n 17), zur Frage 2. 5.2.
29 OGH 10Ob44/19 x (n 17), zur Frage 2. 6.6.
30 OGH 10Ob44/19 x (n 17), zur Frage 3.
31 B Zöchling-Jud, '§ 932' in A Kletečka and M Schauer (eds), *ABGB-ON1.02* (Manz 2015).

The Supreme Court contested that these issues were not *acte clair,* and referred three questions to the CJEU.[32] The first concerned the assessment of the conformity of the motor vehicle with the contract; the second the permissibility of such a defeat device; and the third the qualification of the lack of conformity. Taking in account, that the first and the third question had not been dealt with in earlier case law, I will focus on these here.

III. Lack of Conformity in the CJEU Judgment

1. Reasonable Expectations of an Average Consumer

Although the legal principles on warranty clarified by the SCG clearly apply to these issues, the national interpretation of the implementing acts was very diverse. National courts hesitated to affirm that a complex product such as a car can be seen as defective due to its prohibited defeat device software, when the vehicle type was granted EC type approval based on the Regulation (EC) No 715/2007. As such, the concept of conformity according to Article 2(2)(d) of the SCG required clarification from the CJEU, mainly concerning the quality and performance of goods that the average consumer can reasonably expect.

The Luxembourg court mirrored in great extent the opinion of AG Rantos[33] and decided: "When acquiring a vehicle model of a type that has been approved and is, therefore, accompanied by a certificate of conformity, a consumer can reasonably expect that Regulation No 715/2007 and, in particular, Article 5 thereof, has been complied with in respect of that vehicle, even in the absence of specific contractual clauses."[34] Accordingly, a vehicle which does not comply with the requirements of the mentioned Regulation does not show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, within the meaning of Article 2(2)(d) of SCG. Regardless of the existence of the EC type-approval, the unlawful use of thermal windows has strict contractual consequences[35]. With this decision the CJEU assessed that a motor vehicle with illegal software, which has a negative impact on the environment, especially ambient air, and indirectly also on human health, gives rise to a claim of non-conformity within the meaning of Art. 2 of SCG. However, various national laws may have allowed for such claims to be brought in across the EU[36], but this CJEU judgment links for the first time the requirements of sector-specific regulation with the contractual law guarantee due to the lack of conformity on the European level and eliminates the legal obstacles to bringing civil law claims against products with seemingly valid certification.

Interestingly, in his opinion AG Rantos makes a connection to the new Directive (EU) 2019/771 on Sale of Goods,[37] which repealed the former SCG[38], differentiating between objective and subjective requirements for conformity. The AG noted that, in addition to complying with any subjective requirement for conformity, goods must be fit for the purposes for which goods of the same type would normally be used, taking into account their compliance with any existing Union and national law.[39] The CJEU did not comments on the new Directive and on the subjective/objective criteria for conformity. However, it took over the remaining parts of the AG´s opinion, underlining, that compliance with EU and national requirements should be seen as legitimately expected objective criteria for conformity.

2. Evaluation of the Lack of Conformity

The SCG has attracted great attention among national legislators, but also with the judicature of the Member States;[40] however, the requirement of a minor lack of conformity had not been directly explored by the CJEU until now.[41] The closest issue, case C-32/12[42] dealt only with enabling consumers to apply for guarantee remedies, but a clear differentiation between defects of a minor or an essential nature was not issued. In her opinion, AG Kokott only summarised national courts' practices concerning a minor lack of conformity.[43] In the case C-145/20 the Luxembourg court makes a relevant note on this issue. The CJEU's evaluation is clear: A vehicle with the mentioned prohibited defeat device cannot be regarded as having a minor lack of conformity within the meaning of Article 3(6) of Directive 1999/44. This qualification follows the opinion of AG Rantos[44] and refers to the sector-specific rules in Art. 5 Regulation (EC) No 715/2007. This interlinking of the lack of environmental requirements and compliance with conformity guarantees is one of the main improvements achieved by the CJEU.[45]

Concerning the remedies available to the consumer in the case of a lack of conformity, Art. 3 SCG delivers primary and secondary remedies; however, the annulment of the contract is not possible for minor defects. The question of how far the lack of conformity could be deemed, based on the consumer awareness of the defectiveness within the meaning of Art. 2 (3) of SCG, the CJEU overturns the prevailing opinion in the Austrian literature, stating: "that the fact that, after having purchased a good, a consumer admits that he or she would have purchased that good even if he or she had been aware of such a lack of conformity is not relevant for the purposes of determining whether a lack of conformity must be classified as 'minor'."[46] AG Rantos goes even further, noting that the assessment of the consumer's awareness of the lack of conformity should be objective in nature. The yardstick of the expected consumer awareness is very high; according to AG Rantos, a full knowledge of the facts is required for it not to be deemed a lack of conformity. Based on the information paradigm[47] the seller is obliged to inform the consumer of the lack of conformity in the contracting period,[48] to enable them

32 OGH 10Ob44/19 x (n 17) zur Frage 3.7.2.
33 Case C-145/20 *Porsche Inter Auto and Volkswagen* (n 15), Opinion of AG Rantos, para 145.
34 Case C-145/20 *Porsche Inter Auto and Volkswagen* (n 15), para 54.
35 See also A Janssen, 'The Dieselgate Saga: the Next Round' (2022) Journal of European Consumer and Market Law 169.
36 E.g. Whirlpool (UK) Ltd and Magnet Ltd v Gloucestershire County Council (1995) 159 JP 123 – Ss 10 and 39 CPA.
37 Directive (EU) 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods [2019] *OJ L136/28*.
38 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L 171/12.
39 Case C-145/20 *Porsche Inter Auto and Volkswagen* (n 15), Opinion of AG Rantos, para 148.
40 N Reich H-W Micklitz P Rott and K Tonner, *European Consumer Law* (Intersentia 2014) 169.
41 E.g. Case C-65/09 *Gebr. Weber and Putz* [2011] ECLI:EU:C:2011:396. does not clarify this issue.
42 Case C-32/12 *Duarte Hueros* [2013] ECLI:EU:C:2013:637.
43 Case C-32/12 *Duarte Hueros* [2013] (n 40), Opinion of AG Kokott, para 57.
44 Case C-145/20 *Porsche Inter Auto and Volkswagen* (n 15), Opinion of AG Rantos, paras161-162.
45 M-E Arbour, 'The Volkswagen Scandal at the CJEU: Defeat Devices between the Conformity Guarantee and Environment Law' (2022) European Journal of Risk Regulation 7.
46 Case C-145/20 *Porsche Inter Auto and Volkswagen* (n 15), para 86.
47 Reich, Micklitz, Rott and Tonner (n 41) 22.
48 Case C-145/20 *Porsche Inter Auto and Volkswagen* (n 15), Opinion of AG Rantos, para 157.

to make an informed decision. This creates a relatively high hurdle on the objectivity, in practice transferring the burden of proof onto the seller. From this respect, the CJEU decision contradicts the opinion of the Austrian literature mentioned, which assessed a lack of conformity as a minor defect when the buyer expresses, that they would have concluded the contract with the knowledge of the defect, even if under different conditions;[49] and opens the door for the annulment of the contract.

IV. Comments Beyond Contract Law

Vehicles do not fit in the category of usual or so-called search goods, concerning the economical classification of goods due to their information content.[50] Following this clustering, cars belong to the category of complex post or experience goods, where the consumer will be convinced of the quality of the goods after trying it, for example, we will see in a while after consuming the dinner whether the restaurant cooked it properly. Similarly, the functionality of a vehicle's Anti-lock Braking System will only be clear after an accident. The same is valid for a vehicle's exhaust gas recirculation system. Its quality can only be checked in regular roadworthiness tests[51] or with remote emission sensing on the road.[52] Lacking personal skills on technical auditability, consumers can only rely on the quality of vehicle components based on the granted licences or technical controls. Flawless performance of duties by authorities, testing facilities and market surveillance involved in the EC type-approval is crucial for the effectiveness of consumer protection, otherwise the fundamental principle of a high level of consumer protection in the meaning of Art. 38 of the Charter on the Fundamental Right of EU[53] in conjunction with Art. 169 TFEU,[54] cannot be achieved. Sufficient monitoring by these institutions will be fundamental in the future, bearing in mind the increasing application of even more complex AI technologies.[55]

Concerning the role of market surveillance and civil justice, two remarks should be added. First, this never-ending Dieselgate scandal shows the associated ineffectiveness of not only the current type approval and testing system, but also of the market surveillance. Regarding the permissibility of the software update, which contained the disputed temperature window, the question should be posed: Why did the German market authority omit, for the second time, to investigate the emission regulating software when it was already clear that the earlier constructed component, the "switch-software," was an impermissible defeat system?[56] Strong oversight and a ban of the new software would undoubtedly be in line with Art. 5 and 10. of Regulation (EC) No 715/2007. Second, the limited but not irrelevant role of the civil courts in the fight against unfair business practices should be underlined. In the absence of sufficient market surveillance, civil justice becomes an ex-post market police force.[57] Besides this, earlier similar lessons (e. g. the foreign currency credit crisis following the drastic strengthening exchange rate of the Swiss Franc after 2010) showed that civil courts alone cannot ensure that the market functions properly. Similarly, as reviewing unfair contract terms in mortgage agreements can only slowly and inefficiently force financial institutions to responsible lending activities, confirming the existence of a lack of conformity in sale contracts can hardly eliminate manufacturers' unfair business practices towards creating manipulated emission control systems. Civil law can only play an *ultima ratio* role in ex-post control of the businesses' market activity. It covers only certain aspects of B2C disputes concerning sales agreements; besides that, it cannot protect consumers against businesses' systemic rogue behaviour concerning complex and very technical products, such as vehicles. Private law sanctions for omitted environmental performance are pointillistic and weak measures. Activating the promised effective, proportionate and dissuasive penalties, established by the national law of Member States should mainly be achieved by market surveillance[58]. Due to the existing allocation of competences, this target should be ensured by active market surveillance. Market authorities need to ensure effective enforcement of Regulation (EC) No 715/2007, and also of the Unfair Commercial Practices Directive.[59] The tight cooperation between different market authorities has been one of the main aims of the European Consumer Protection Cooperation Network since 2006, but its realisation must not be an empty promise, but a real fact.[60]

Even so, the Dieselgate saga is much more wide-reaching. On a micro level, this trilogy is a greenwashing case,[61] where consumers believed they were purchasing an environmentally friendly vehicle, but the green promise was not fulfilled; on the macro level, the quality of ambient air and consumer´s health is at stake. From this perspective, the private law sanctions for false green performance claims are insignificant compared with the environmental damage that this type of vehicle caused and causes on our roads. Although Regulation (EC) No 715/2007 mentions the importance of environmental protection and the need to reduce NOx emissions from diesel vehicles in order to improve air quality,[62] which aims are repeated in several other Directives, and implemented by all Member States,[63] their achievement is impeded by the car industry. Balancing environmental interests with the economic interests of manufacturers is an uneasy task, but finally this case-trilogy solves a major part of the underlying problem, that manufacturers must create and apply technical devices

49 B Zöchling-Jud, '§ 932' in A Kletečka and M Schauer (eds), *ABGB-ON1.02* (Manz 2015).
50 Nelson differentiates between tree type of consumer goods: search, post or experience good, and credence goods, such as financial services. See P Nelson, 'Information and Consumer Behaviour' [1970] Journal of Political Economy 311.
51 Directive 2014/45/EU of 3 April 2014 on periodic roadworthiness tests for motor vehicles and their trailers [2014] OJ L127/51.
52 See e. g. CARES <https://cares-project.eu/prague-remote-emission-sensing-campaign-completed/> accessed 12 December 2022.
53 Charter of Fundamental Rights of the European Union [2012] OJ C326/391.
54 Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/1.
55 See Proposal for a Directive on adapting non contractual civil liability rules to artificial intelligence <https://commission.europa.eu/system/files/2022-09/1_1_197605_prop_dir_ai_en.pdf> accessed 6 January 2023 and Proposal for a Directive of the European Parliament and of the Council on liability for defective products < https://single-market-economy.ec.europa.eu/system/files/2022-09/COM_2022_495_1_EN_ACT_-part1_v6.pdf > accessed 6 January 2023.
56 KBA Letter 20/12/2016.
57 M Józon, 'Unfair contract terms law in Europe in times of crisis: Substantive justice lost in the paradise of proceduralisation of contract fairness' (2017) Journal of European Consumer and Market Law 159.
58 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 [2019] *OJ L 328/7*.
59 Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive') [2005] *OJ L149/22*.
60 The new Regulation aims a closer cooperation; see Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws [2017] *OJ L345/1*.
61 Benjamin J Richardson, *The Art of Environmental Law: Governing with Aesthetics* (Hart Publishing 2019) 182.
62 Recitals 1 and 4 to 6 Regulation OJ 2007 L171/1 (n 9).
63 *OJ 2008 L 152/1 (n 3)*.

capable of ensuring that vehicles comply with the emission limits.[64]

Since the beginning of the Dieselgate scandal, 55 dangerous products in the category of motor vehicle, which have a negative impact on the environment have been flagged. Among the alerted brands are Mercedes Benz, Toyota, Jaguar, and Renault, but also products such as AdBlue.[65] This long list of environmentally unfriendly manufacturers will have several waves of future claims trailing behind them. Too many gaps are still unsettled. Cities struggling with high levels of air pollution due to massive vehicle traffic volumes could claim that manufacturers make it impossible for them to comply with their Air Quality Plans due to excess exhaust emissions. Further, NGOs could claim against the market authority because of their failure to monitor pollution levels or car manufacturers against greenwashing the performance of the emission control system of vehicles.

The tort law liability of manufacturers of vehicles equipped with unlawful defeat devices reached a new dimension trough the current CJEU decision case C-100/21[66] from 21. March 2023. The court followed the opinion of AG Rantos´s on the seeks to break through § 826 of the German BGB to ensure compensation for individual purchasers in broad sence. It stated in essence, that the repealed Framework Directive[67] and the Regulation No 715/2007[68] on type approval must be interpreted as protecting the specific interests of the individual purchaser of a motor vehicle vis-à-vis the manufacturer of that vehicle, , in addition to protect the public interests.[69] Nevertheless, the CJEU delegated the detail of compensation for damages caused to the purchaser into Member States´ competence; it clarified, that national courts should protect the rights guaranteed by the legal order of the Union in a such way, which does not result in unjust enrichment of the persons concerned.[70] It seems that the principle of effectiveness of European law[71] is capable of fighting against established national rules, such as § 826 BGB, if they render the exercise of the buyer´s right to compensation derived from sector-specific secondary law, such as Directive 2007/46, impossible or excessively difficult in practice. Due to this cutting-edge decision not only car manufacturers will experience a new wave of damage claims, but national legislators should also rethink and review the national remedies. The supremacy of European law will also influence such legal fields, which the European legislator could not reach with direct regulation.

V. Conclusion

The Dieselgate scandal is a perfect test case. It is continually proving the adequacy of the European vehicle type approval framework and the enforceability of individual and collective consumer rights. Due to the malfunction of the market surveillance on emission control system of vehicles, civil justice became an ex-post market police force, where mislead car owners sought for efficient remedies. However, private law sanctions for omitted environmental performance seem to be pointillistic and weak measures; civil law can only play an *ultima ratio* role in ex-post control of the businesses' market activity.

From the private law point of view, Dieselgate cases are complex issues, which require a combined consideration of the contractual liability of car dealers and sector-specific legislation on vehicle manufacturing. This summer the CJEU assessed the second wave of non *acte clair* questions, to unify divers national interpretations. The judgment in case C-145/20 answers essential legal questions regarding guarantees, especially on the conformity of goods and the reasonable expectations of the consumer. With this decision the CJEU assessed that compliance with EU and national requirements should be seen as legitimately expected objective criteria for conformity, therefore, a motor vehicle with illegal software, gives rise to a claim for non-conformity within the meaning of Art. 2 (2)(d) of the SCG. Further, a vehicle with the mentioned prohibited defeat device cannot be regarded as having a minor lack of conformity within the meaning of Article 3 (6) of Directive 1999/44. The Luxembourg judgment connects for the first time the requirements of sector-specific regulation with the contractual law guarantee due to a lack of conformity and eliminates the legal obstacles to bringing civil law claims against products with seemingly valid certification. It opens the door for the annulment of the contract, overturning the prevailing opinion in the Austrian literature, which assessed a lack of conformity as a minor defect when the buyer expresses, that they would have concluded the contract even with the knowledge of the defect. However, confirming the existence of a lack of conformity in purchase contracts can hardly eliminate manufacturers' unfair business practices towards creating manipulated emission control systems. Therefore flawless performance of testing facilities and market surveillance is crucial to ensure effective consumer protection of such complex experience goods. ■

64 Case C-128/20 *GSMB Invest* (n 11), para 65.
65 RAPEX < https://ec.europa.eu/safety-gate-alerts/screen/search?resetSearch=true > accessed 12 December 2022.
66 Case C-100/21 *Mercedes-Benz Group (Daimler)* [2023] ECLI:EU:C:2023:229
67 Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (OJ L 263, 9.10.2007
68 Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (OJ L 171, 29.6.2007, p
69 Case C-100/21 *Mercedes-Benz Group (Daimler)* [2023] ECLI:EU:C:2023:229 para 85
70 ibid para 94
71 Case C-100/21 *Mercedes-Benz Group*, Opinion of AG Rantos, para 57.

Eleni Kaprou*

Aggressive commercial practices 2.0: Is the UCPD fit for the digital age?

I. Introduction

The Unfair Commercial Practices Directive (hereafter UCPD) is one of the most important directives in EU consumer law, covering all transactions between businesses and consumers in the EU.[1] The UCPD is accompanied by a Guidance document published by the European Commission (Commission). While the Guidance document is not binding, it is a useful and important point of reference for the interpretation of the UCPD, summing up case law of the Court of Justice of the EU (CJEU), as well as national case law and enforcement cases. Notably, it sets the tone for what the Commission considers important and what the practical issues are that have arisen regarding the application of the provisions of the UCPD. On the 17th of December 2021, the Commission adopted the third Guidance document for the application and interpretation of the UCPD[2] (new UCPD guidance), replacing the previous one adopted in 2016.[3]

The new UCPD guidance focuses on the application of the UCPD in specific fields, and the digital sector is prominent amongst them.[4] In particular, it tackles novel issues, such as dark patterns and gaming practices to address how the UCPD can be applied in these circumstances.[5] This approach is in line with the Commission's priority area of ensuring Europe's fitness for the digital age.[6] In order to achieve that goal, the Commission has proposed new legislation, such as the Digital Services Act (DSA), which was adopted in October 2022.[7] It has been argued that the potential overlap between the DSA and the UCPD may *de facto* mean that the UCPD will be less relevant in the digital environment for the sake of increased legal certainty.[8] While that is a visible danger, it would be a loss for EU consumer law to place what has proven to be a lasting legal instrument in the side lines. Therefore, it is important to assess and utilise the current legal framework's capacity for meeting digital challenges and the new UCPD guidance has a key role to play in showcasing the ability of the UCPD to respond to current challenges.

This contribution focuses on aggressive commercial practices as a unique aspect of the UCPD, which introduced them for the first time on an EU level. The aggressive practices provisions have been on the side lines of the UCPD for a long time and have received very little academic comment so far, with some notable exceptions.[9] The lack of attention can be partially attributed to a difficulty in defining aggressive practices and in understanding their nature and scope. The previous version of the UCPD Guidance, published in 2016, devotes little space to aggressive practices, especially in comparison to misleading practices, thus revealing the inconspicuous role aggressive practices play in the UCPD.[10]

However, the new UCPD guidance is offering a renewed approach to regulation of aggressive practices. Instead of limiting the scope of application of the provisions to more traditional practices, such as door-to-door selling, the UCPD provisions on aggressive practices are starting to be viewed as a tool for regulating hi-tech aggressive practices which aim to pressure and emotionally manipulate consumers. The way that the UCPD will respond to the changing and ever-more important role of the provisions on aggressive commercial practices in regulating the digital environment is in many ways a yardstick for assessing the relevance and adaptability of the UCPD in the digital age, which is the objective of this contribution.

This contribution will examine the meaning of aggressive practices, as defined in the UCPD (Part 2), as well as the relationship of aggressive practices and consumer vulnerability (Part 3). Part 4 examines the CJEU case law on aggressive practices, which is currently limited to three cases. Part 5 discusses the main applications of aggressive practices in the digital environment as set out by the new UCPD Guidance, namely, dark patterns, barriers to switching and direct exhortations to children. Part 6 concludes with thoughts on the future of the UCPD and suggestions for reform.

II. Aggressive Commercial Practices

The UCPD is structured along three levels of regulation: a general clause in Article 5, two small general clauses for misleading and aggressive practices in Articles 6-9, and a list of practices always to be considered unfair in Annex I. Aggressive practices are featured in two parts of the Directive, in Articles 8-9 UCPD and in Annex I, under the 'aggressive commercial practices' heading.[11]

Article 8 UCPD sets out the conditions that need to be satisfied for a practice to be considered aggressive:

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1 Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L-149/22.

2 European Commission, Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2021] OJ C 526/1.

3 European Commission, 'Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses' [2016] SWD/2016/0163 final.

4 New UCPD Guidance, 4.2.

5 New UCPD Guidance, 99, 103.

6 European Commission, 'Communication: Shaping Europe's digital future' (February 2020) <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en> (Accessed 30 December 2022).

7 Council 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), [2022] OJ L277/22.

8 M Narciso, 'The Unfair Commercial Practices Directive – Fit for Digital Challenges?' (2022) 10 EuCML 147, 153.

9 For works on aggressive practices see G Howells, 'Aggressive Commercial Practices' in G Howells, H-W Micklitz and T Wilhelmsson (eds), *European Fair Trading Law: The Unfair Commercial Practices Directive* (Ashgate Publishing Group 2006); P Cartwright, 'Under Pressure: Regulating Aggressive Commercial Practices in the UK' (2011) 1 Lloyd's Maritime and Commercial Law Quarterly 123; P Carballo-Calero, 'Aggressive Commercial Practices in the Case Law of the EU Member States' (2016) 5 EuCML 255; B Keirsbilck, *The New European Law on Unfair Commercial Practices and Competition Law* (Hart Publishing 2011), chapter 10.

10 European Commission, Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices: A comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses, [2016] SWD(2016) 163 final, 3.5.

11 See UCPD, Articles 8-9; Annex I UCPD.

A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.

In other words, aggressive practices require the use of harassment, coercion or undue influence to the extent that it impairs the average consumer's freedom of choice. It seems that there is no need to pinpoint whether the practice employs harassment, coercion, or undue influence. The elements of Articles 8-9 should be considered in combination with each other, and it is the overall impact of the practice that should be evaluated.[12]

Article 9 UCPD contains a list of factors to be considered for determining whether a practice uses harassment, coercion or undue influence. The factors listed are the following:

(*a) its timing, location, nature or persistence;*

(b) the use of threatening or abusive language or behaviour;

(c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product;

(d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader;

(e) any threat to take any action that cannot legally be taken.

Article 9 is a highly useful tool for pinpointing when a practice is aggressive, setting out commonly occurring, practical factors which can be useful for enforcement authorities and courts. However, Article 9 UCPD is not a stand-alone article and must always be seen in conjunction with Article 8 UCPD. A more efficient way to establish whether a practice is aggressive would be to first look at the factors listed in Article 9 UCPD. Should the practice entail one or more of them it can be concluded that the practice uses harassment, coercion, or undue influence without it being necessary to determine which of these applies. Following that, one would need to check whether the practice satisfies the other conditions of Article 8 UCPD. When a practice does not fit with the factors of Article 9 UCPD, it still needs to be examined according to the criteria of Article 8 UCPD.

The aggressive practices provisions have been criticised as being vague and unclear. A common example of aggressive practices are ones that use physical force, or the threat of the use of physical force, such as '*creating the impression that the consumer cannot leave the premises until a contract is formed*'.[13] However, what is more relevant in today's market and especially in the digital environment, which is the focus of this paper, are aggressive practices that employ psychological pressure.

Psychological pressure may arise in a variety of contexts from the use of abusive language to time pressure for making a purchase and threatening to take legal action. Notably, the CJEU has recognised the element of psychological pressure in aggressive practices in its judgment in case C-428/11 *Purely Creative*. In this judgment the Court stated that the practice where the trader creates the false impression that the consumer has already won or will win a prize when the consumer must incur a cost to claim the prize takes advantage of the psychological effect caused by the announcement of the prize that induces consumers to make irrational decisions.[14] Further, point 28 of Annex I UCPD forbids direct exhortations to children, as they would place pressure on their parents, in the so-called '*pester power*' effect.[15] While advertising may generally employ emotion to e. g. convince consumers to buy a product, there is a point where the practice will be characterised as aggressive.

Another commonly occurring category would be that of placing barriers to the consumer exercising their freedom of choice in relation to the product.[16] Such practices are more likely to fall under coercion or undue influence rather than harassment. The prevalence of barriers in aggressive practices is noticeable also in the blacklist where points 27 and 29 Annex I UCPD on insurance companies and inertia selling refer to barriers. Psychological pressure may be more difficult to establish, as it is more subjective and might depend on how the behaviour and overall stance of the trader will be interpreted by the average consumer. In contrast to that, the existence of barriers to switching or terminating a contract may be easier to establish, as reference can be made e. g. to the terms and conditions of the trader, to their website or exchanged communications which can help in showing the existence of barriers. Barriers are more likely to occur post-contractually, yet they may occur also in the pre-contractual stage and may include charges to the consumer, like inertia selling.[17]

Another example would be the practice of pre-ticked boxes for additional services, which is regulated by Directive 2011/83/EU on consumer rights (Consumer Rights Directive).[18] The Consumer Rights Directive requires express consent to be provided for additional payments and the use of default options for obtaining that consent is not allowed.[19] The CJEU has clarified in its case law that price supplements which are neither compulsory nor necessary should be communicated in a clear, transparent and unambiguous way at the start of the booking process for the service and should be in an opt-in basis.[20] This practice can have an aggressive element as it centres around the trader using their power to impair the consumer's freedom of choice. It is not about offering false information but rather about making it cumbersome for the consumer to opt out of the default option.

The timing is right for the UCPD provisions on aggressive practices to be recognised as an effective instrument for regulating novel practices that take advantage of the power imbalance between trader and consumer, which is especially

12 G Howells, 'Aggressive Commercial Practices' in G Howells, H-W Micklitz and T Wilhelmsson (eds), *European Fair Trading Law: The Unfair Commercial Practices Directive* (Ashgate Publishing Group 2006) 173.
13 UCPD, Annex I, point 24.
14 C-428/11 *Purely Creative and others v Office of Fair Trading* (2012) ECLI:EU:C:2012:651, para 38.
15 For more on direct exhortations to children see below para 5.3.
16 For more on barriers to switching see below para 5.2.
17 UCPD, Annex I, point 29.
18 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, Article 22.
19 Ibid.
20 Case C-112/11 *ebookers.com Deutschland GmbH v Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband eVpara* [2012] ECLI:EU:C:2012:487, para 14.

relevant in the digital environment. That is not to say that the provisions cannot be improved upon but that the core of the provisions is easily applicable in the digital environment.

III. Aggressive Practices and Consumer Vulnerability

Inequality of power between the parties is at the centre of aggressive practices and the reasoning for regulating them. In the context of consumer law, the consumer is in general considered in a weaker position vis-à-vis the trader, but the more specific concept of the vulnerable consumer is designed to protect those in need of a heightened level of protection.

The UCPD alludes to the relationship between consumer vulnerability and aggressive practices but the narrow concept of vulnerability in the Directive does not allow for it to be considered adequately. Article 5(3) UCPD enumerates as exemplary a limited amount of the criteria of vulnerability, such as age, infirmity and credulity.[21] The emphasis on protection of children as vulnerable consumers can be seen in point 28 of Annex I UCPD which prohibits direct exhortation to children to buy advertised products or persuade their parents to buy them for them.[22] Children are considered to be vulnerable according to the Directive that lists age as one of the characteristics of a particularly vulnerable consumer.[23] In the digital environment, young consumers, teenagers in particular, may be disadvantaged by peer-pressure, the lack of consumer experiences and the lack of self-confidence among others.[24]

The new UCPD Guidance emphasises the impact of unfair practices in the digital environment on young consumers but the same is not true for elderly consumers. This could reflect the practice of the Member States where most examples in the Guidance come from which do not seem to have focused on elderly consumers. Alternatively, this omission may stem from elderly consumers not using digital services to the same extent. A Norwegian study on elderly consumers rejects the notion that the group is *de facto* vulnerable to argue that elderly consumers fare better than younger consumers in most vulnerability drivers, such as the lack of time and calculating skills.[25]

The existing criteria for vulnerability in the UCPD do not suffice anymore, as new dimensions of vulnerability have arisen in the digital environment. It is worth considering which consumers might be most impacted by design features which tend to be influenced by the mostly white and male engineers and reflect their biases.[26] This could mean that consumers with different ethnicities or genders may find themselves in a digital environment not built for them and not taking their needs into account. The negative impact of automated decision on poor and working class communities has been well documented in the US.[27] The UCPD should, in this light, expand the vulnerability criteria to also include e. g. ethnicity or gender that might be relevant both in the digital and physical market. The new Digital Services Act takes on a more holistic approach to vulnerability by banning advertisements based on profiling of special categories of personal data, such as ethnicity, religious and political beliefs.[28] It is not unlikely that the UCPD might follow an approach like that of the DSA to take a greater variety of consumer characteristics into account when assessing the fairness of practices.

The link between aggressive practices and vulnerability can also be seen in Article 9 UCPD, where one of the factors for determining whether a practice has used harassment, coercion or undue influence is:[29]

'The exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product.'

A circumstance of this type could be a temporary life event such as bereavement which may make consumer more susceptible to being exploited by traders.[30] The term '*specific misfortune or circumstance*' may have been used with bereavement or illness in mind, yet has the potential to be interpreted more broadly to include e. g. relationship breakdown or unemployment.

In the digital context, big data is being harvested to target individual consumers and nudge them towards a specific decision using personalised techniques, in a phenomenon Yeung has defined as hyper-nudging.[31] This requires a combination of the trader being aware of the life circumstances and emotional states of the consumer as well as being able to take advantage of this information to target consumers in a sophisticated manner, not easy for consumers to spot.

In a 2021 BEUC study on structural asymmetries in digital markets, the argument was made that the digital environment is different to the physical one in the sense that the choice architecture is constantly optimized to search and take advantage of consumer vulnerabilities.[32] This results to all consumers being in a vulnerable position in the digital environment.[33] Does this mean that a radical change of the UCPD and in particular, its concept of consumer vulnerability is required for its application to be relevant and useful in the digital environment? Or perhaps that there should be a division between legal instruments that apply in the digital environment only and those that apply only in the physical? There are some of the questions that EU consumer law is grappling with now, and which will determine the future of the UCPD.

The above 2021 BEUC study suggests that the UCPD should be revised to include an updated concept of digital vulnerability (or the authors' preferred more neutral term of digital asymmetries) to be anchored in the articles 5, 8 and 9 UCPD.[34] A reform of the concept of consumer vulnerability in the UCPD is long overdue and perhaps the relevance of digital vulnerability will be the catalyst for that change to happen.[35]

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21 Article 5(3) UCPD.
22 For more on point 28 Annex I as applied in the digital environment, see below para. 4.3.
23 See UCPD, Article 5(3).
24 W Batat 'Understanding the Dimensions of Young Consumer Vulnerability in the Web 2.0 Society' [2010] Child and Teen Consumption CTC, Norrköping Sweden, 250.
25 L Berg, 'Consumer vulnerability: Are older people more vulnerable as consumers than others?', (2015) 39(4) IJCS 284, 290.
26 A Waldman, 'Designing without privacy' (2018) 55 Hous. L. Rev. 659.
27 V Eubanks, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor* (St Martin's Press 2018), 11.P.
28 Regulation (EU) 2022/2065, Article 26(3).
29 UCPD, art.9(c).
30 I Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (2nd edn, Hart Publishing 2007) 174.
31 K Yeung, 'Hypernudge': Big Data as a mode of regulation by design' (2017) 20(1) Information, communication and society 118-136.
32 N Helberger, O Lynskey, H-W Micklitz et al, 'EU Consumer Protection 2.0: Structural Asymmetries in Digital Consumer Markets' (BEUC 2021), available online at https://www.beuc.eu/brochure/eu-consumer-protection-20-structural-asymmetries-digital-consumer-markets-0 (Accessed 30 December 2022), para 43.
33 Ibid para 58.
34 Ibid para 150.
35 For more on the need for reform of the vulnerable consumer in the UCPD see E Kaprou, 'The legal definition of 'vulnerable' consumers in the UCPD: Benefits and limitations of a focus on personal attributes' in C Riefa, S Saintier (eds), *Vulnerable Consumers and the Law* (Routledge 2021) 65.

In the meantime, legal provisions such as article 9 UCPD have a wording flexible enough to remain relevant for protecting consumers against aggressive practices in the digital environment. That being said, a potential reform would improve the level of consumer protection.

IV. First Step Forward: Case Law

It took more than a decade since the introduction of the UCPD for the first case on aggressive practices to be decided by the CJEU. Now, there is a small body of case law on the issue which finally helps shed light on the meaning of the provisions on aggressive practices. The slowly growing body of case law serves to highlight that the importance of regulating aggressive practices is being noticed in practice, as indicated also by the weight placed on the provisions by the new UCPD Guidance. This section reviews the case law on aggressive practices and how it informs our understanding of the provisions.

The first CJEU case with aggressive practices as its focus was *Wind Tre*. It was decided in 2018, thirteen years after the UCPD entered into force.[36] *Wind Tre* featured inertia selling, which is one of the blacklisted practices, by a telecommunications company in Italy.[37] Wind Tre was selling SIM cards with pre-installed and pre-activated services, namely internet and voicemail without first sufficiently informing consumers of the pre-installation and the cost of using these services.[38] The Court decided that this was an aggressive practice as consumers were not given the option to opt out of these services and would be required to deactivate them post-purchase in order not to be charged.[39] *Wind Tre* showed that aggressive practices go beyond the use of physical force and provided an expansive view of what qualifies as an aggressive practice.

One year later in the 2019 *Orange Polska* case, featuring again a telecommunications company, the CJEU discussed the practice of the consumer having to sign a contract in the presence of the courier delivering a hard copy of the contract.[40] This time the practice in question was found not to be aggressive as the consumers had had the chance to review the terms of the contract online before signing the hard copy in the presence of the courier. However, the Court pointed out that such a practice could be aggressive if the trader or the courier engaged in conduct that could be classified as undue influence, such as contractual penalties or less favourable conditions should the consumer refuse to sign immediately.[41] The Court explained undue influence in the context of aggressive practices as going beyond the consumer not having previous access to the contractual terms to conduct that would make the consumer uncomfortable and confuse his thinking in relation to the transactional decision at hand.[42] In *Orange Polska*, the Court went a step beyond *Wind Tre* to define undue influence and highlight the nature of aggressive practices not being about misinformation but instead about applying pressure to the consumer.

Both cases featured telecommunications companies which offer long-term contracts, thus making the imbalance of power between the parties more likely. However, up to that point there has not been a case focusing on the digital environment. This changed with the 2021 *StWL Städtische Werke Lauf a. d. Pegnitz* case on inbox advertising.[43]

Eprimo is an electricity company which employed the advertising company Interactive Media to place advertising messages in the inbox of users of the free email service T-Online. The issue was that the advertising messages were presented in a manner that made them indistinguishable from the rest of the emails apart from the date being replaced by the word '*Anzeige*' (advertisement), no sender, and the text appearing against a grey background.[44]

In relation to aggressive practices, the question referred was whether the advertising messages in question breached point 26 Annex I UCPD featuring a professional '*making persistent and unwanted solicitations by telephone, fax, email or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation*'.[45]

The decision also discussed technical aspects of the practice to establish whether the message was addressed directly and individually to a consumer. The court found that as the message appeared directly within the inbox of the private, password-protected email of the user concerned, within a private space protected by a password where they expect to receive only messages addressed to them individually the advertising message in question was in fact direct marketing.[46] The fact that the recipient of the message was not specifically targeted but chosen randomly or the fact that the email server processes advertising messages differently e. g. in terms of storage was not important and the messages qualified as '*solicitation*'.[47]

Users received messages on three occasions in December and January 2017 which was found sufficient to satisfy the '*persistent*' requirement. This shows that the Court did not treat the persistence requirement as a particularly high threshold, say one that would require multiple messages a day or multiple messages over a short period of time, such as a week. For the requirement of '*unwanted*' communications satisfying it centred around whether the users had provided their consent to be contacted prior to the sending of the messages. It was established by the referring court that no prior consent was obtained from the users, and they opposed to the messages after receiving them.[48] Therefore, the Court decided that the practice in question did breach point 26 of Annex I UCPD.

The *StWL Städtische Werke Lauf a. d. Pegnitz* case grapples more with the technical aspect and shows a more sophisticated understanding of how technology and in this case inbox advertising operates. Overall, the existing case law provides a much-needed blueprint for interpreting the aggressive practices provisions, albeit with a focus on blacklisted practices. It has shown that aggressive practices can have a wider scope than perhaps previously envisioned and certainly played a role in the approach of the Commission in the new UCPD guidance. However, it remains a challenging task for case law to move with the speed required to catch up with

36 Joined Cases C-54/17 and C-55/17, *Autorità Garante della Concorrenza e del Mercato v Wind Tre*, ECLI:EU:C:2018:710.
37 Inertia selling is defined in point 29 Annex I UCPD as 'demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer except where the product is a substitute supplied in conformity with Article 7(3) of Directive 97/7/EC'.
38 C-54/17, C-55/17 para 56.
39 C-54/17, C-55/17 para 52.
40 C-628/17, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Orange Polska S. A.*, ECLI:EU:C:2019:480.
41 C-628/17, para 48.
42 C-628/17, para 47.
43 C-102/20, *StWL Städtische Werke Lauf a. d. Pegnitz GmbH v Eprimo GmbH*, ECLI:EU:C:2021:954.
44 C-102/20, para 21.
45 UCPD, Annex I, point 26.
46 C-102/20, para 51.
47 C-102/20, para 50, 71.
48 C-102/20, para 74,75.

technological developments. In general, the UCPD lacks CJEU case law on digital challenges, making it more difficult to envision its application in these novel sectors.[49]

This is where a soft law instrument such as the UCPD Guidance can play a valuable role in casting a wider net to describe and explain aggressive practices in the digital environment.

V. The New UCPD Guidance

The current version of the UCPD Guidance was published in December 2021. It updates and expands the previous 2016 version.[50] It aims at facilitating the application of the UCPD, as well as increasing awareness of the UCPD among all relevant stakeholders.[51] The new UCPD Guidance looks into the application of the UCPD in different fields, namely sustainability, digital sector, travel and financial services.[52] A lot of space is devoted to the digital sector, a testament to both its importance and the complicated challenges it presents for unfair practices.

This contribution focuses on three categories of aggressive practices most relevant for the digital sector: dark patterns, barriers to switching and direct exhortations to children. These three categories are the ones highlighted in the section of the new UCPD Guidance on the digital sector as relevant for aggressive practices.[53] Dark patterns and barriers to switching are also highlighted in the call for evidence for the ongoing Fitness Check of EU consumer law on digital fairness, which will review the fitness for purpose of horizontal consumer law directives, including the UCPD, in the digital environment.[54] Furthermore, the Digital Services Act regulates dark patterns, prohibiting online platforms from employing them to influence the decision making of the users.[55] In addition to that, the Digital Markets Act prohibits gatekeepers from placing barriers to switching between different platform services for end-users.[56] Direct exhortations to children, while a more narrow category of practice which is specific to the UCPD, relate to consumer vulnerability in the digital environment, with children being considered particularly vulnerable online due to their lower online marketing literacy and developmental stage.[57]

These three issues are topical and important not only for the UCPD but for EU consumer law more broadly and as such have been chosen as the focal points for the analysis of this contribution.

1. Dark Patterns

The new UCPD Guidance makes an extensive reference to dark patterns and how they may constitute an aggressive commercial practice, making this one of the most innovative aspects of the new UCPD Guidance. They are defined in the new UCPD Guidance as *'a type of malicious nudging, generally incorporated into digital design interfaces.*'[58] The Guidance also states that dark patterns utilise behavioural biases and differentiates between different types of dark patterns stating that they may be personalised or applied to all users in the same manner.[59] As the UCPD was introduced in 2005, before the emergence of dark patterns the term is not defined in the articles, nor was such a definition introduced in the recent amendments to the UCPD made by the Modernisation Directive.[60]

a) Defining Dark Patterns

There is no generally accepted definition of dark patterns in the literature. The term 'dark patterns' was first used in 2010 by user experience specialist Harry Brignull who also set up the website darkpatterns.org. The website has since been renamed as deceptive.design in an effort to transition to a more inclusive term. However, dark patterns continue to be a popular and widely-used term. Brignull identified different types of dark patterns used to deceive consumers, such as trick question, confirm-shaming, privacy-zuckering and hidden costs to name a few.[61] Bösch, Erb, Kargl et al define a dark pattern as one that '*tricks users into performing unintended and unwanted actions, based on a misleading interface design*'.[62] Waldman, while not offering a stricto sensu definition of dark patterns, paints a vivid picture of their function as being that of a design which '*manipulates users into keeping the data flowing*'.[63] He likens dark patterns to a magic trick of misdirection where '*technology hijacks the way we perceive our choices and replaces them with new ones*'.[64] Mathur, Agar, Friedman et al define dark patterns as '*user interface design choices that benefit an online service by coercing, steering, or deceiving users into making decisions that, if fully informed and capable of selecting alternatives, they might not make*'.[65] In their recent paper Mathur, Mayer and Ksirshagar argue that so far the literature on dark patterns has adequately described dark patterns currently in use that may be problematic but at this stage there is a lack of a normative foundation.[66] Identifying a normative aspect can be useful in identifying dark patterns and understanding why and how to regulate them.

Dark patterns have also been defined in different policy publications, all published in 2022, a reflection of their increasing relevance for policy makers. The OECD offers a

49 M Narciso, 'The Unfair Commercial Practices Directive – Fit for Digital Challenges?', [2022] 4 EuCML 147, 148.
50 Ibid note 2.
51 New UCPD Guidance, 5.
52 New UCPD Guidance, s. 4.
53 New UCPD Guidance, 99, 106
54 European Commission, 'Call for Evidence for the Fitness Check of EU consumer law on digital fairness', [2022] Ref. Ares(2022)3718170, available online at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law_en (Accessed 30 December 2022).
55 Council Regulation (EU) 2022/2065, rec 67.
56 Council Regulation (EU) 2022/1925 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), [2022] OJ L 265/12.10.2022, Article 6(6).
57 A Kennedy, K Jones, J Williams, 'Children as Vulnerable Consumers in Online Environments', (2019) 53(4) JCA 1478, 1494.
58 New UCPD Guidance, 101.
59 Ibid.
60 For the amendments introduced to the UCPD, see Directive 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, [2019] OJ L 328, 18.12.2019, p. 7–28, Article 3.
61 For a more thorough list of the most common dark patterns along with a short explanation please see https://www.deceptive.design/types (Accessed 30 December 2022).
62 C Boesch, B Erb, F Kargl et al, 'Tales from the dark side: Privacy dark strategies and privacy dark patterns', [2016] 4 Proceedings on Privacy Enhancing Technologies 237, 239.
63 A Waldman, 'Cognitive biases, dark patterns, and the 'privacy paradox'' (2020) 31 Current Opinion in Psychology 105, 107.
64 Ibid.
65 A Mathur, G Acar, M Friedman et al, 'Dark patterns at scale: Findings from a crawl of 11K shopping websites', [2019] 3 Proceedings of the ACM on Human-Computer Interaction article 81, 81:2.
66 A Mathur, J Mayer, M Kshirsagar, 'What Makes a Dark Pattern… Dark?: Design Attributes, Normative Considerations, and Measurement Methods' [2021] In CHI Conference on Human Factors in Computing Systems (CHI '21), May 8–13, 2021, Yokohama, Japan, available online at https://dl.acm.org/doi/abs/10.1145/3411764.3445610 (Accessed 30 December 2022), 2.

definition of dark patterns as '*business practices employing elements of digital choice architecture, in particular in online user interfaces, that subvert or impair consumer autonomy, decision-making or choice. They often deceive, coerce or manipulate consumers and are likely to cause direct or indirect consumer detriment in various ways, though it may be difficult or impossible to measure such detriment in many instances.*'[67]

The OECD report in its literature review also points out, like Mathur et al, that earlier works on dark patterns merely identified different categories of dark patterns.[68] This is the approach taken by BEUC in its report on dark patterns as it does not offer a singular definition. Instead, it sets out some common types of dark patterns, namely those that:[69] *'(1) Make certain decisions more prominent or easier to make; (2) Create a false feeling of urgency/scarcity and a 'fear of missing out'; (3) Shame consumers (e.g., "confirm-shaming"); (4) Obstruct or confusing consumers); (5) Blind consumers (e.g., sneaking items into the basket)'*.The US Federal Trade Commission also follows the same approach as BEUC, choosing to focus on examples of how dark patterns are employed in practice.[70]

These policy reports are more concerned with improving the practical understanding of dark patterns, whereas definitions are informed by academic literature. However, it seems that in the future it might become necessary to develop and include a definition of dark patterns in legal texts to enhance clarity. Still, it is important to point out that the existing definitions of dark patterns as examined in this section bear a resemblance to the-more general-definitions for misleading and aggressive practices in the UCPD. In particular, the concept of '*deceiving users into making decisions that they would otherwise not make*', (Mathur, Agar, Friedman et al) is strikingly similar to that of a '*commercial practice causing the average consumer to take a transactional decision he would not have taken otherwise*'.[71] Likewise, the mention of misleading (Bösch, Erb, Kargl et al) or misdirecting users (Waldman) points to dark patterns as misleading practices and that of coercing users (Mathur, Agar, Friedman et al) suggesting aggressive practices. This means that even though a precise definition of dark patterns would be highly useful for policymakers and should be considered in a revision of the directive, it is possible to apply the general definitions of unfair practices to them in an adequate manner to protect consumers today.

b) Dark Patterns Examples in the New UCPD Guidance

It seems that the UCPD is well-equipped to tackle dark patterns even though it was conceived well before the employment of dark patterns. The new UCPD Guidance sets out some hypothetical examples of dark patterns that may amount to aggressive practices focusing on vulnerabilities of consumers and how traders may exploit them for their profit. Is it useful to examine them here to gain a better understanding of how the Commission envisions the UCPD can apply to dark patterns.

A common example featured in the Guidance is that of '*a trader being aware of a consumer's purchase history with respect to games of chance and random content in a video game and then targeting the consumer with personalised commercial communications that feature similar elements, with the aim of exploiting their higher likelihood of engaging with such products.*'[72] This is an example of the widely used technique of online behavioural advertising (OBA), meaning that companies collect data that allows them to target consumers and offer personalized content.[73] OBA is a growing field that is considered the future of advertising though it also creates privacy concerns.[74]

Another of the examples used is that of a teenager who is in a vulnerable mood due to events in their personal life, something the trader is able to identify and use to target the teenager with emotion-based advertisements at a specific time.[75] There is evidence that big tech companies, such as Facebook are able to identify the emotional state of teenagers and offer advertisements tailored to that, causing concern among scholars and experts.[76] Teenagers are singled out in the UCPD as vulnerable due to their age, however, any consumer, including adults would be likely to fall prey to such a practice. As seen also above, the new UCPD Guidance is bound to the limited concept of vulnerability as set out in the UCPD, making it seem out of step with the needs of the digital environment.[77] In particular, it seems to shy away from recognizing that the digital environment is built in a way that targets and tries to manipulate all consumers, thus placing them in a vulnerable position vis-à-vis the trader.[78]

The Guidance recognizes that dark patterns and OBA are a particular risk to vulnerable consumers in another example about a consumer '*who has been banned by a credit institution due to the inability to pay and the trader used that information to target them with specific offers, exploiting their financial situation*'. In this case, none of the vulnerability criteria of the UCPD apply, yet, it does fit in with the factors for aggressive practices and in particular, '*the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product*'.[79]

Less affluent consumers being targeted by sub-prime lenders is a common occurrence also offline. What is perhaps more central here is whether the information was obtained in a legal manner. Dark patterns are often associated with privacy concerns in the literature, especially how they can exploit cognitive biases to get consumers to divulge personal information online.[80] The new UCPD Guidance is drawing atten-

67 OECD, 'Dark Commercial Patterns', OECD Digital Economy Papers No 336 (OECD Publishing 2022) available online at https://doi.org/10.1787/44f5e846-en (Accessed 30 December 2022), 8.
68 Ibid 9.
69 BEUC, 'Dark patterns and the EU consumer law acquis: Recommendations for better enforcement and reform' (2022), available online at https://www.beuc.eu/position-papers/dark-patterns-and-eu-consumer-law-acquis (Accessed 30 December 2022).
70 Federal Trade Commission, 'Bringing dark patterns to light', (Staff Report September 2022), available online at https://www.ftc.gov/system/files/ftc_gov/pdf/P214800 %20Dark%20Patterns%20Report% 209.14.2022 %20-%20FINAL.pdf (Accessed 30 December 2022).
71 See Article 6(8) UCPD.
72 New UCPD Guidance, 100.
73 S Boerman, S Kruikemeier, F Zuiderveen Borgesius, 'Online Behavioral Advertising: A Literature Review and Research Agenda' (2017) 46(3) Journal of Advertising 363,364.
74 Ibid 374.
75 New UCPD Guidance, 100.
76 D Susser, B Roessler, H Nissenbaum, 'Online Manipulation: Hidden Influences in a Digital World', (2019) 4 Georgetown Law Technology Review 1, 6.
77 See above Part 3.
78 N Helberger, O Lynskey, H-W Micklitz et al, 'EU Consumer Protection 2.0: Structural Asymmetries in Digital Consumer Markets' (BEUC 2021), available online at https://www.beuc.eu/brochure/eu-consumer-protection-20-structural-asymmetries-digital-consumer-markets-0 (Accessed 30 December 2022), para 58.
79 UCPD, Article 9(d).
80 See for example, A Waldman, 'Cognitive biases, dark patterns, and the 'privacy paradox'' (2020) 31 Current Opinions in Psychology 105.

tion to the harm they can cause to consumers beyond privacy in relation to their transactional decisions. However, it is not so easy to create a clear-cut distinction between privacy dark patterns and market manipulation dark patterns. As in the financial services example, often the issue lies not only in how the information was used to manipulate the consumer but also how was it obtained by the trader.

Dark patterns are gathering attention from regulators not only on an EU level and in several Member States, such as France and Hungary but also in the US, where the State of California enacted legislation on dark patterns in 2020.[81] The inclusion of dark patterns in the new UCPD Guidance, as well as their role in recent legislation such as the DSA points to the EU paying close attention to technological developments and wishing to be a leader in that area.

The UCPD seems to be a useful tool for tackling dark patterns, but the new Guidance may not be the end of this process, as the UCPD may require further amendments to keep up with dark patterns. This is what has been suggested by BEUC in a recent policy paper to add dark patterns such as confirm-shaming to the blacklist of practices.[82] Striking the right balance between flexibility and legal certainty is the big bet for the future of the UCPD. The new fitness check on EU consumer law focusing on digital fairness which is currently underway and covers also the UCPD points to a revision of the UCPD in the near future being more likely than previously thought.[83] If that is the case, then the inclusion of dark patterns in the UCPD would be a priority.

2. Barriers to Switching

Barriers to switching providers are a classic example of aggressive practices, found also in Article 9 UCPD.[84] Some of the most prominent examples come from the energy sector.[85] Common barriers to switching may include a long-winded, complex process to switch and often, applicable fees for switching.[86]

Obstacles to switching lead to sub-par economic efficiency, as consumers cannot make use of the best offers from other competitors in the market, unless they are able to easily switch providers. The new UCPD Guidance goes beyond standard barriers to switching to cover barriers to switching in the digital environment.

a) Confirshaming

Confirshaming is one of the dark patterns mentioned in the previous section. It is examined here separately as it better suited to be characterised as a barrier to switching according to Article 9(d) UCPD as a sub-category of aggressive practices. Confirshaming, has been described by Grey et al as an obstruction dark pattern, meaning that it presents '*a major barrier to a particular task that the user may want to accomplish*'.[87] More specifically, the practice requires that while the company facilitates the consumer doing what they want, e. g. signing up for a service, it obstructs them from doing what is undesirable for the company, such as not receiving their commercial communications or cancelling the service all together.[88] The barriers in question could be reminding you of the benefits you will lose, offering different options than the one you want (e. g. fewer messages rather than unsubscribing from all messages) or could be using trick questions, designed to confuse consumers and make it difficult for them to choose their preferred option.[89]

The new UCPD Guidance defines confirshaming as a technique '*whereby the consumer is prompted, without reasoned justification, to reconsider their choice through emotional messages several times*'.[90] This definition sets out three elements for confirshaming: 1) its emotional nature and the effect it has on the consumer and 2) the frequency of the messages and, 3) the consequence of the consumer taking a transactional decision they would not have taken otherwise.

The emotional aspect of confirshaming, like the name implies, is trying to steer the consumer into making a particular choice using shame, e. g. by starting the sentence with 'no, thanks'.[91] According to the new UCPD Guidance, companies that use '*visual interference; to the same effect, meaning the image prompting the consumer to continue with the service may be more prominent (e. g. colourful, larger font), may be engaging in an aggressive practice*'.[92] The frequency of the messages is also an important aspect as repeated messages are likely to be an aggressive practice. For example, as set out in the new UCPD Guidance, the consumer may be asked several times to choose 'yes' and 'no' with messages such as '*would you like to be kept informed about similar offers? Would you like to subscribe to the newsletter? Can we use your details to personalise our offer?*'.[93] In this example repetition is combined with a trick question as, halfway through the click sequence, the buttons 'yes' and 'no' are reversed intentionally. The consumer has clicked 'no' several times, but now clicks 'yes' and accidentally subscribed to a newsletter.[94] The Guidance also offers a best practice to avoid barriers to switching or terminating which is that unsubscribing from a service should be as easy as subscribing to the service.[95]

A representative real-life example of confirshaming is that of unsubscribing from Amazon Prime services. Consumers are frequently nudged when using Amazon to subscribe to Amazon Prime, an easy process taking only a couple of clicks. However, if a consumer wishes to cancel the service they are faced with a more complex procedure, requiring them to log into their Amazon account, navigate a complicate menu, be reminded several times of the benefits they will be losing and

81 BEUC, ''Dark Patterns and the EU Consumer Law Acquis: Recommendations for better enforcement and reform' (7.2.2022), available online at https://www.beuc.eu/position-papers/dark-patterns-and-eu-consumer-law-acquis (Accessed 30 December 2022); TITLE 1.81.5. California Consumer Privacy Act of 2018.
82 Ibid, 13.
83 For more information see https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law_en (Accessed 30 December 2022).
84 See above Part 2.
85 See for example, Council of European Energy Regulators, 'CEER Report on commercial barriers to supplier switching in EU retail energy markets' [2016], Ref: C15-CEM-80-04, available online at https://www.ceer.eu/documents/104400/-/-/bd226e4b-5542-f12c-c21e-4d5a078c765d (Accessed 30 December 2022).
86 See for example, BEUC, 'Stalling the switch: 5 barriers when consumers change energy suppliers', (September 2017), available online at https://www.beuc.eu/publications/stalling-switch-5-barriers-when-consumers-change-energy-suppliers (Accessed 30 December 2022).
87 C Gray, Y Kou, B Battles et al, 'The Dark (Patterns) of UX Design' [2018] Proceedings of the 2018 CHI Conference on Human Factors in Computing Systems, Paper 534. https://dl.acm.org/doi/10.1145/3173574.3174108 (Accessed 30 December 2022), 5.
88 J Luguri, L Strahilevitz, 'Shining a light on dark patterns' (2021) 13 JLA 43, 49.
89 Ibid.
90 New UCPD Guidance, 102.
91 A Mathur, G Acar, M Friedman et al, 'Dark patterns at scale: Findings from a crawl of 11K shopping websites', [2019] 3 Proceedings of the ACM on Human-Computer Interaction article 81, 81:6.
92 New UCPD Guidance, 102.
93 New UCPD Guidance, 101.
94 New UCPD Guidance, 101.
95 New UCPD Guidance, 102.

offered confusing options for cancellation.[96] Following a complaint filed by BEUC, the Norwegian Consumer Council and the Transatlantic Consumer Dialogue, the Commission along with national consumer authorities launched an action again Amazon about its cancellation practices, resulting in Amazon changing its Prime web interface, labelling the cancel button more clearly and shortening the explanatory text.[97]

As subscription services are increasingly popular, practices like confirshaming are prevalent and likely to cause significant consumer detriment. While confirshaming is caught by articles 8-9 UCPD, steps such as including a definition in the text of the UCPD, or including the practice in the blacklist, as suggested by BEUC would increase legal certainty.[98]

b) Lock-in Practices

A second important sub-category of barriers to switching are lock-in practices. Lock-in may mean consumers' choices are limited by a lack of interoperability and exacerbated by a lack of competition which makes it difficult for consumers to change between systems. One example would be choosing between an Apple or Android mobile phone. Consumers are encouraged to stick to one system and changing may mean a loss of income, loss of time and loss of data.[99]

One such aggressive practice was the subject in the *Wind Tre* case seen above, where the practice of selling mobile phones with pre-installed software was found to breach the blacklist of the UCPD as inertia selling.[100] This does not mean companies are prevented from selling hardware with pre-installed software, so long as they provide sufficient and accurate information prior to the purchase, both in relation to the existence of pre-installed software and any applicable costs.[101] *Wind Tre* can be contrasted with the earlier *Sony* case, where the Court stated that selling a computer with pre-installed software does not constitute an unfair practice unless there are additional circumstances at play.[102] It is peculiar that the new UCPD Guidance chose the *Sony* case as an example of a lock-in practice, as opposed to the newer *Wind Tre* case, especially since they have divergent outcomes. This creates the impression that lock-in practices are not so easily caught by the UCPD, while that is not the case.

The new UCPD Guidance seems to suggest that along with other applicable legislation, such as the GDPR and the Digital Content Directive, there is an adequate framework in place to mitigate the potential negative outcomes of lock-in practices for consumers. To the extent that lock-in practices influence consumer decisions not only about software but also hardware, this could mean they are prevented from switching to a more sustainable company. However, this should not reduce the potential of the aggressive practices provisions to catch practices that may deter consumers from changing providers or operating systems.

3. Direct Exhortations to Children

The new UCPD Guidance also examines blacklisted practices in the digital market and especially direct exhortations to children in advertisements. Point 28 of Annex I of the UCPD bans direct exhortations to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.[103] The practice is banned as a recognition of the 'pester power' of children that can convince parents to buy products they otherwise would not have. It also recognises that children may be more impressionable, hence belonging to one of the categories of vulnerable consumers in the UCPD.[104]

The new UCPD Guidance showcases several examples from the practice of the Member States on direct exhortations to children on the digital environment. In online games aimed at children, messages inviting them to 'buy more' and 'upgrade now' were found to breach the UCPD blacklist.[105] Similarly, online advertising messages for a game suggesting to children to send premium rate SMS messages to interact with one of the characters of the game was also found to be an aggressive practice.[106] Gaming practices are not only aimed at children, but also at adults. Some of the gaming practices that are particularly relevant for aggressive practices are those that make use of the timing to put pressure on the consumer e. g., offering a in-game micro transaction at a critical point in the game.[107] Gaming apps are often geared towards getting users to build an ongoing and long-term relationship with the game, meaning that they stay engaged for longer and keep returning to the game.[108] It is this ongoing relationship and the continuous collection of user data that makes users more susceptible to microtransactions.[109]

Even though blacklisted practices are meant to enhance legal certainty, there are some difficulties associated with proving that there has been a direct exhortation to children. Establishing that the practice targets children may not be as easy as it seems, especially for products such as videogames which may also be aimed at the general population. The new UCPD Guidance suggests a range of criteria for assessing whether a practice targets children such as the design of the marketing, the medium used to send the marketing, the type of language used, the presence of topics or characters that may appeal to children, the presence of age-restrictions, providing direct links to making purchases etc.[110]

Another issue to consider is what qualifies as a direct exhortation in the digital environment. Is the display of a link a direct exhortation? In a Finnish case, an AR application where at the end of a story a link appeared, and a virtual avatar encouraged the user to click on the link to win tickets

96 For a detailed account of the practice see, Forbrukerradet, 'You can log out, but you can never leave' (Forbrukerradet 2021), available online at https://fil.forbrukerradet.no/wp-content/uploads/2021/01/2021-01-14-you-can-log-out-but-you-can-never-leave-final.pdf (Accessed 30 December 2022).
97 European Commission, 'Consumer protection: Amazon Prime changes its cancellation practices to comply with EU consumer rules' (Press release 1 July 2022), available online at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4186 (Accessed 30 December 2022).
98 BEUC, ''Dark Patterns and the EU Consumer Law Acquis: Recommendations for better enforcement and reform' (7.2.2022), available online at https://www.beuc.eu/position-papers/dark-patterns-and-eu-consumer-law-acquis (Accessed 30 December 2022), 13.
99 New UCPD Guidance, 106.
100 See s.4.
101 C-54/17, C-55/17 *Wind Tre*, para 49,50.
102 C-310/15, *Vincent Deroo-Blanquart v Sony Europe Limited*, ECLI:EU:C:2016:633, para 53.
103 Annex I UCPD, point 28.
104 UCPD, Article 5(3).
105 MD 2012:14, Norwegian Market Court, 6 December 2012, Stardoll, as cited in new UCPD Guidance 70.
106 Hungarian Competition Authority, 26 May 2021, VJ/3/2020, Global AWA Pty Ltd et al, as cited in new UCPD Guidance 70.
107 New UCPD Guidance, 104.
108 N Helberger, O Lynskey, H-W Micklitz et al, 'EU Consumer Protection 2.0: Structural Asymmetries in Digital Consumer Markets' (BEUC 2021), available online at https://www.beuc.eu/brochure/eu-consumer-protection-20-structural-asymmetries-digital-consumer-markets-0 (Accessed 30 December 2022), para 53.
109 Ibid.
110 New UCPD Guidance 70.

for a concert was found to be a direct exhortation.[111] The practice was considered to be aimed at children as it was advertised in a comic book. Similarly, a German court also found the display of a link to a store for an online game using the phrase with the sentence *'seize the good opportunity and give your armour and weapons that certain 'something''* to be a direct exhortation.[112] The German Court argued that the practice was a direct exhortation to children as the advertisement used language typical for targeting children. In that case, this meant, among other factors, using English language terms used by teenagers as well as the use of the second person.[113] However, a link displayed alongside an indirect message, such as '*If you also want a copy for yourself, you can also order it for your console using the links below*' was outside the scope of point 18 of Annex I UCPD.[114]

If that is the case, it would be easy for traders to avoid getting caught by this blacklisted practice. It seems that the Member States are understandably keen to protect children as consumers but it is worth considering whether an indirect invitation has that much less significant effect than a direct invitation. This is another example where the phrasing used in the UCPD could be updated to better reflect the commercial practices in the digital environment.

Businesses are savvy in targeting children in the digital environment and catching all relevant practices will often require going beyond the blacklist to also employ Articles 8 and 9. This is demonstrated by the complaint against the social media platform TikTok filed by the European Consumer Organisation BEUC, which claimed that TikTok may be allowing companies to target young audiences, which form a significant part of its audience. TikTok was deemed to have used hidden advertising practices such as hashtag challenges or branded 2D/3D content that can be embedded in users' videos, which practices may be particularly relevant for targeting children.[115] That complaint initiated a dialogue between TikTok and the national consumer protection authorities (CPC) network over the compatibility of its practices with EU consumer protection rules. As a result of this dialogue, which was concluded in June 2022, TikTok committed to greater transparency, including the option for users to report advertisements targeted at children and undisclosed branded content.[116] While these commitments are welcome, they go to show that there is still a long way to go to effectively protect children in the digital environment.

In fact, Tiktok continues to be at the centre of controversy regarding how its policies breach privacy rights of children. In particular, a collective action has been brought on this issue in the Dutch courts by three representative organisations.[117] The Dutch data protection authority has also fined TikTok EUR 750,000 for breaching the privacy of young children.[118] Similarly, the Irish Data Protection Commission has launched inquiries on the compatibility of TikTok's policies with the GDPR.[119] These privacy cases may point to the fact that privacy law is considered more appropriate for the protection of children compared to the UCPD whose powers are limited in that regard.

VI. Conclusion

This contribution focused on the role the UCPD provisions on aggressive commercial practices can play in tackling practices in the digital environment. In particular, it looked at how the new UCPD Guidance envisions an expansive view on the previously side lined provisions on aggressive commercial practices.

The aggressive practices provisions, especially when focusing on psychological pressure, are in general well equipped to tackle digital practices and that the flexible approach adopted by the UCPD allows it to remain a useful tool in the digital environment. The UCPD Guidance showcases the role the provisions can play especially for dark patterns, barriers to switching and direct exhortations to children providing a blueprint for how to apply the in the digital market. This blueprint is much needed given that the limited CJEU case law on aggressive practices is not able to keep up with technological developments.

That being said there are some changes that would help enhance legal clarity and ensure that the UCPD remains relevant for the digital environment. As suggested in this contribution, a change in the definition of the vulnerable consumer in the UCPD to be more in step with the digital market and a more holistic view of vulnerability would be an essential step to enhancing the directive. Furthermore, drawing attention to dark patterns, the most concerning digital practices, with providing a definition and perhaps even banning certain prevalent practices such as confirshaming would make a big difference towards tackling such techniques. Finally, if the UCPD is to effectively protect children in the digital market, revisiting the banned practice of direct exhortations to children is key.

EU consumer law is at crossroads and the digital environment is a key priority that will determine how the regulatory landscape will evolve. The future of the UCPD will be decided in relation to its relevance to the digital environment. Either it will adapt and continue to effectively protect consumers or it will become obsolete, able to tackle only more traditional practices. The UCPD was built to be futureproof and has the elements there to make it effective against digital practices, and aggressive practices, provided it makes the necessary amendments. ■

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111 Finnish Consumer Ombudsman, decision KKV/54/14.08.01.05/2019, as cited in new UCPD Guidance 71.

112 German Federal Court, 17 July 2013 – I ZR, 34/12, Runes of Magic, as cited in new UCPD Guidance 71.

113 Ibid.

114 Austrian Supreme Court of Justice, 9 July 2013, 4 Ob 95/13 v, Disney Universe as cited in new UCPD Guidance 71.

115 BEUC, 'Tiktok without filters- a consumer law analysis of TikTok's policies and practices' (February 2021), available online at https://www.beuc.eu/reports/tik-tok-without-filters-consumer-law-analysis-tiktoks-policies-and-practices-report (Accessed 30 December 2022).

116 European Commission, 'EU Consumer protection: TikTok commits to align with EU rules to better protect consumers', (Press Release Brussels, 21 June 2022), available online at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3823 (Accessed 30 December 2022).

117 E Silva de Freitas, X Kramer, 'First strike in a Dutch TikTok class action on privacy violation: court accepts international jurisdiction', (Conflictoflaws.net, 13 December 2022), available online at https://conflictoflaws.net/2022/first-strike-in-a-dutch-tiktok-class-action-on-privacy-violation-court-accepts-international-jurisdiction-2/ (Accessed 30 December 2022).

118 Autoriteit Persoonsgegevens, 'TikTok fined for violating children's privacy', (Press release July 2021), available online at https://www.autoriteitpersoonsgegevens.nl/en/news/tiktok-fined-violating-children's-privacy (Accessed 30 December 2022).

119 Data Protection Commission, 'DPC launches two inquiries into TikTok concerning compliance with GDPR requirements relating to the processing of childrens' personal data and transfers of data to China' (Press release September 2021), available online at https://www.dataprotection.ie/en/news-media/latest-news/dpc-launches-two-inquiries-tiktok-concerning-compliance-gdpr-requirements-relating-processing (Accessed 30 December 2022).

Country Reports

Federica Casarosa*

Administrative Enforcement of Consumer Law in Italy

The Impact of Consumer and Market Authority Decisions on Digital Platforms

The challenges emerging from the enforcement of consumer law rules in the digital market are well-known. Although the recent interventions of the European legislator have addressed the potential problems emerging from the consumer contracts negotiated online, it is important to look at the case law of courts in order to evaluate if and how the national implementation of EU law is complied with.

The Italian case law provides for an interesting example: digital platforms are only in few cases involved in judicial civil proceedings as regards the application of consumer provisions. Instead, several are the cases where administrative courts address the enforcement of consumer law rules when dealing with digital platforms. In fact, according to the Italian Consumer Code, the Market and Consumer Authority (AGCM) is in charge of verifying the compliance with the provisions dedicated to unfair market practices and unfair contract terms. The decisions of the authority are then subject to judicial review before administrative courts. The analysis of the cases shows the impact that these decisions may have on the conduct of digital platforms. A clear example is the Facebook case, where the addressing the AGCM sanctioned the social network for the lack of transparency in the information provided to consumers as regards the commercial use of their data. However, other cases emerge, such as the decision regarding the coordinated sales of flights and hotels by an online platform, where the Council of State interprets the distinction between passive and active hosting providers. The contribution will present the most relevant cases showing the how the regulatory authority has started to play a crucial role in enforcing the European rules on digital platforms.

I. Introduction

Our life is now extremely dependent on information and communication technologies, and the Covid-19 pandemics has only fast-forwarded the shift of many activities from in person to online context. Without any kind of prejudice against this development, we need to make sure that the activities, the goods and services, as well as the interactions in the online environment respect the principles and the laws that apply in the offline world.[1] This has been the objective that has characterized the choices of EU legislator as regards the creation of a Digital single market since 2015.[2]

In this context, the main players are obviously the digital platforms, which have been involved in a dramatic change affecting their structure and business models throughout the almost three decades since the beginning of Internet. As a matter of fact, the legal definition that are currently available still struggle to acknowledge and incorporate the evolution that affected these increasingly powerful actors. The recent adoption of the so-called Digital Services Act[3] have tried to update the first and long-lasting definition that was provided by Article 2(a) of the e-Commerce Directive.[4] The latter, adopted in 2000, referred to information society service providers (ISSP) defining them as "*any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*". The definition was extremely wide and stressed the economic exchange that characterize the interaction between the provider and the recipient of the service. The DSA starts from the same definition but distinguished, among the hosting providers, the 'online platform' which, pursuant Article 2(i), refers to those providers that, at the request of a recipient of the service, stores and disseminates information to the public, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service. This latest intervention has the advantage to clearly spell out the obligations also for those type of platforms that provide only a communication activity such as in the case of social networks.[5] As we will see in the following analysis, although the commercial exchange seems to be excluded from these types of platforms, the fact that services in communication platforms are exchanged with personal data of the users led the judicial authorities to treat them in the same manner as the digital platforms that provide commercial services.

One underlying element that characterize the relationship between digital platforms and their users is the unavoidable asymmetry that favors the former at the expense of the latter. Digital platforms are able to exploit the data that they gather from the myriad of interactions that they 'host' with users, extracting patterns from any type of behaviour. This knowledge enables them to influence, for instance, the preferences

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1 D Op Heij, 'The Digital Content Contract in a B2C Legal Relationship from a European Consumer Protection Perspective Recommendations for the Pre-Contractual and (Post-)Contractual Phase', (2022) 11 EuCML, 53; Ch Busch, H Schulte-Nölke, A Wiewiórowska-Domagalska, F Zoll, 'The Rise of the Platform Economy: A New Challenge for EU Consumer Law?', (2016) 5 EuCML, 3.

2 See 'What is the digital single market about?', <https://ec.europa.eu/eurostat/cache/infographs/ict/bloc-4.html> accessed 28 March 2023

3 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) (2022) OJ L 277/1.

4 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 (2001) OJ L 178/1.

5 Another definition is provided by 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 (2019) OJ L 186/1,which specifically address the online intermediation services as information society services that allow business users to offer goods or services to consumers, irrespective of where those transactions are ultimately concluded and are provided to business users on the basis of contractual relationships between the provider of those services and business users which offer goods or services to consumers.

and purchasing habits of consumers; or the way in which commercial users present their offers.[6]

This is clearly not the asymmetry that has historically characterised the consumer relationship, which is based on the different degree of information that characterises the consumer, making him a weaker contractor vis-à-vis the professional. In the case of platforms, it is rather a matter of a more general digital asymmetry, in which the platform has a 'technological supremacy' over all the types of users including both professionals or consumers.[7]

This does not mean that the traditional system of power relations between professionals and consumers who may meet on the digital platform to sell and purchase goods and services has been superseded: because the professional seller, or service provider, is still a 'stronger' subject with respect to the 'weaker' party, namely the consumer who enters into the contract. The rules protecting the consumer, as well as those governing electronic commerce therefore remain in force, even where the contract is concluded not directly on the trader's website, but through the intermediary of the platform.

II. The Application of Unfair Commercial Practices Directive to Digital Platforms

The legislation that steps in when looking at the interaction between digital platforms and consumers is the Unfair Commercial Practices Directive (UCPD),[8] which is one of the main pillars of EU law aimed at safeguarding the consumer's freedom of choice, through the prohibition of those commercial conducts that that could affect it by direct or indirect manipulation.

It must be acknowledged that consumers' freedom of choice, however, is not addressed by UCPD in the context of the individual relationship, but rather as market regulation.[9] As a matter of fact, the prohibition of unfair commercial practices is aimed not only at protecting consumers but also competitors, and the market in general.

This approach is evident also from a set of elements that characterize the directive, namely:

• the focus on professional's activity, which is not just limited to the contractual relationship but rather to the wider commercial practices;[10]

• the criterion on which unfairness is measured is not the individual consumer but the average consumer (reasonably well-informed and reasonably circumspect);[11]

• the commercial practice is unfair not only if it is actually false, but also only if it is capable of distorting the economic behaviour of the average consumer.

In the Italian legal system, the directive has been implemented in the Consumer Code, with the enforcement allocated both to civil courts and to the national market authority, namely the *Autorità Garante per la concorrenza e il Mercato* (Consumer and Market authority – AGCM).[12] In this latter case, pursuant to the articles included in the Consumer Code in order to implement the UCPD, the AGCM has the power to stop the unfair conduct and to eliminate its effects, as well as the power to sanction the traders engaging in prohibited practices even when they do not have an immediate impact on contractual relationships.[13]

Although the UCPD was not originally drafted considering the application in the digital market, it is clear that the interactions between digital platforms and consumers fall into the scope of application of the directive and the implementing legislation at national level.[14] In case, the digital platform falls into the category of trader as defined by Article 18(1)(b) of the Consumer Code,[15] as "*any natural or legal person who […] is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader*".

As a trader, the digital platform should comply with specific requirements set in the directive, in particular the standard of professional diligence defined by Article 18(1)(h) as the "*average degree of specific skill and care that consumers reasonably expect from a professional towards them with respect to the general principles of fairness and good faith in the professional's field of activity*". If this standard is not complied with by the trader,[16] and the conduct can have the effect of distorting the economic behaviour of the consumer,

6 S Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, (PublicAffairs 2019); A Jabłonowska, 'Consumer Protection in the Age of Data-Driven Behaviour Modification BEUC's Academic Report and the New Regulatory Developments', (2022) 11 EuCML, 67; M Grochowski, A Jabłonowska, F Lagioia & G Sartor, 'Algorithmic Price Discrimination and Consumer Protection :A Digital Arms Race?' (2022) 1 Technology and Regulation, 36.

7 See H Micklitz, N Helberger et al., 'EU Consumer Protection 2.0: Structural asymmetries in consumer markets', (2021) <https://www.beuc.eu/publications/beuc-x-2021-018_eu_consumer_protection.0_0.pdf> accessed 28 March 2023; and H Micklitz, N Helberger et al., 'The Regulatory Gap: Consumer Protection in the Digital Economy, (2021) <https://www.beuc.eu/publications/beuc-x-2021-116_the_regulatory_-gap-consumer_protection_in_the_digital_economy.pdf> accessed 28 March 2023.

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

9 S Cacucci, *Pratiche commerciali scorrette e disciplina dell#attività negoziale*, (Cacucci 2012); A Barba, *Capacità del consumatore e funzionamento del mercato* (Giappichelli 2021); A Beckers, 'The regulation of market communication and market behaviour: Corporate social responsibility and the Directives on Unfair Commercial Practices and Unfair Contract Terms', (2017) 54 *CMLR*, 475; S Weaterhill and U Bernitz, *The Regulation of Unfair Commercial Practices under EC Directive 2005/29 – New rules and new techniques* (Hart 2007).

10 See P Iamiceli, 'Unfair practices in business-to-business and business-to-business contracts: A private enforcement perspective', (2017) Revista da Faculdade de Direito da UFMG, 335 – 388; M Durovic, 'The Subtle Europeanization of Contract Law: The Case of Directive 2005/29/EC on Unfair Commercial Practices' (2015) 23 ERPL, 715.

11 See the recent preliminary ruling of the Italian Council of state on the definition of average consumer: Council of State, 10 October 2022, no. 8650.

12 See the policy choices adopted by the other EU Member States in Commission, 'First Report on the application of Directive 2005/29/EC ('Unfair Commercial Practices Directive')', COM(2013) 139 final.

13 See Legislative Decree 2 August 2007, no. 146. G De Cristofaro, *Pratiche commerciali scorrette e codice del consumo*, (Giappichelli 2008); G De Cristofaro, 'Le pratiche commerciali scorrette nei rapporti tra professionisti e consumatori: il d. lgs. 146 del 2 agosto 2007, attuativo della direttiva 2005/29/CE', in (2007) Studium iuris, 1188; M Libertini, 'Le prime pronunce dei giudici amministrativi in materia di pratiche commerciali scorrette', in (2009) Giur. comm., 886 ss.

14 This was also confirmed by the Guidelines on the application of the Directive both in 2016 and more recently in 2021. See Commission Staff Working Document, 'Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices – Accompanying the Commission Communication A comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses', SWD/2016/0163 final; and Commission Notice, 'Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internalmarket', 2021/C 526/01.

15 Note that the provision included in the Consumer Code follows exactly the definition included in Article 2(b) UCPD.

16 Obviously, the conduct can also be qualified as a misleading or an aggressive practice that may fall into the black or grey list defined by the unfair commercial practice directive.

then the digital platform can be held liable for the unfair commercial practice.

It is interesting to see that, in Italy, the conducts of digital platforms were only in few cases the object of judicial proceedings before civil courts as regards the application of consumer provisions. Instead, several are the cases where administrative courts addressed the enforcement of consumer law rules when dealing with digital platforms. In fact, according to the Italian Consumer Code, the AGCM oversees the compliance with the provisions dedicated to unfair market practices and unfair contract terms, and such are then subject to judicial review before administrative courts. When looking at the cases decided by the AGCM and eventually by administrative courts, interesting trends emerge showing how the interpretation of the provisions of the UCPD may impact on the conduct of digital platforms.

III. The Decisions of the AGCM

1. Platform Adopting Unfair Commercial Practices.

The decisions addressing the cases in which the digital platform was deemed to have engaged in in a conduct that could be qualified as unfair are interesting as they show the application of the UCPD in the relationship between the consumer and platform.

The first example that comes from the caselaw decided by the AGCM is the one involving a well-known digital platform providing the forum for C2C exchanges. The platform was subject to two different proceedings that followed one year apart addressing two different commercial practices which were in both cases deemed as unfair.[17]

The Lithuanian service provider, called *Vinted*, presented its platform as a hosting service "*where it is possible to sell and buy clothing and household goods*" without costs for the users, as the platform claim in its advertisements that there will be added fee for the exchange concluded. However, the Italian regulatory authority in its investigations finds out that the consumers were misled by the commercial claim as in reality the service provided by the platform was in fact free of charge only for those who sold their goods on it: not for those who wished to buy goods. The latter found only at the end of the contractual process that they were expected to pay also a commission fee. In the first proceeding of the AGCM, the commercial practice was clearly qualified as misleading, taking into account the fact that the consumer did not receive "*from the first contact – all the information useful to take the decision of a commercial nature*". The AGCM, moreover, highlights that it is irrelevant that the consumer would have found out the information on other pages of the platform's website. As a result of the decision of the AGCM, the commercial claim of the platform was modified and it currently does not include any reference to the gratuitousness of service for users.

The second proceeding, instead, focused on another commercial practice adopted regarding the criteria used by the platform to define the so-called "buyer protection fee". This additional cost allocated on the buyer is calculated by the platform and ranges between 3 % and 8 % of the cost of the goods purchased. Again, the AGCM deemed the commercial practice misleading as the platform was not able to provide any information to the buyer as regards the criteria upon which such additional fee is calculated.[18]

Another case decided recently by the AGCM focused on a different type of platform, namely the so-called crowdfunding platforms. Such platforms are based on the management and promotion of fundraising campaigns created by third parties. The decision focused on the platform GoFundMe which claimed that provide its hosting service in a "fast free and secure" manner. Similarly to the previous case, whenever a consumer was about to execute the online payment order, he/she would find out that the final cost included also a mandatory commission fee defined by the platform. The result of the proceeding before the AGCM was to qualify the conduct as misleading: "*the challenged conduct appeared to be contrary to professional diligence and likely to induce the average consumer to make commercial decisions that he or she would not otherwise have made, on the basis of a misleading representation of reality about the gratuitousness of the services offered and an aggressive manner that conditions the choice of the amount of commission expected on each donation*".[19] Although some commentator suggested that the unfair commercial practices legislation should have been applied to the case, as fundraising should fall outside the scope of application,[20] still the service provided by the platform was qualified by the AGCM as a commercial practice that did involve an economic behaviour of the consumer.

Basing on similar assumptions, the AGCM also sanctioned a well-known social networking platform for unfair commercial practice.[21] As already highlighted by the academic literature,[22] this decision was the first at national level to recognize that the exchange occurring on the social networking platform was not 'free', rather it was based on the ability for the platform to receive as counter-performance the ability to access and exploit the personal data of the registered users. The AGCM deemed the conduct as a misleading practice, as the platform did not inform sufficiently and thoroughly the consumer about the personal data processed for the purpose of personalizing the service and for the purpose of personalized advertising: the platform required the consumers at the moment of the registration to accept the terms and conditions, the latter included also a privacy policy that allowed the platform to access and freely process the personal data of the consumers without specifying the purpose. The data pro-

17 AGCM, 20 July 2021, no. 29788; and AGCM, 25 October, no. 30355.

18 E Simionato, 'Vinted: sanzione dell'AGCM da 1,5 milioni per pratiche commerciali scorrette', 2 December 2022, <https://www.iusinitinere.it/vinted-sanzione-dellagcm-da-15-milioni-per-pratiche-commerciali-scorrette-43612> accessed 3 February 2023.

19 See AGCM, 27 March 2020, no. 28204. Note that the authority acknowledge that the platform may have also exploited the emotional condition of the consumer, in particular when fundraising was linked to the Covid-19 pandemic or for other health emergencies.

20 See A Renda, *Donation-based crowdfunding, raccolte fondi oblative e donazioni "di scopo"*, (Giuffré 2021) 559. The author affirmed that fundraising is a different service that does not qualified as an economic behaviour of the consumer to satisfy a personal need, rather as a behaviour governed by a spirit of generosity. Accordingly lacking the commercial nature of the exchange should not be subject to the legislation on unfair commercial practice.

21 AGCM, 29 November 2018, no. 27432. See that social networking platform failed to comply with the order requiring to remove the unfair practice and, after a second investigation, the decisions was appealed before the Tribunale Amministrativo Regionale Roma-Lazio, 10 January 2020, No. 261 and later on by Consiglio di Stato, 29 March 2021, No. 2631.

22 C Irti, *Consenso "negoziato" e circolazione dei dati personali*, (Giappichelli 2021), 173; G Cassano, 'Si può fare commercio di dati personali?', (2021) Diritto dell'Internet; S Franca, 'L'intreccio fra disciplina delle pratiche commerciali scorrette e normativa in tema di protezione dei dati personali: il caso Facebook approda al Consiglio di Stato', (2021) Rivista della regolazione dei mercati, 365; A Di Cerbo, 'Il corrispettivo dei servizi digitali: i dati personali' (2021) 2 EJPLT, <www.ejplt.tatodpr.eu> accessed 3 February 2023; A De Franceschi, 'Italian Consumer Law after the Transposition of Directives (EU) 2019/770 and 2019/771', (2022) 11 EuCML, 72.

cessing, according to the data protection legislation, if informed and adequately consented by the consumer would have been lawful.[23] However, being the consumers not adequately informed would impact on the consumer choices of registering. Interestingly, the arguments of the AGCM considered the economic value of personal data and recognized that they can be subject to the unfair commercial practices legislation, being such data the object of the transaction that involved the platform and the user.[24]

In all these cases, the analysis of the ACGM focused on the conduct of the digital platform as regards the services provided by the latter to consumer, if such conducts were deemed as unfair the AGCM was able to sanction the digital platform.

2. Unfair Commercial Practices Carried Out on the Digital Platform

The other set of decisions of the AGCM address the cases where digital platforms were only the context in which the unfair commercial practice was taking place, as the misleading or aggressive conducts were performed by third parties, i. e. traders, selling goods or services on the platform.

Several cases involved the sale of Covid-19 test kit cases and other para-sanitary products (such as filter masks) on intermediary platforms. In most of the cases, the AGCM affirmed that the commercial claims appeared likely to mislead the recipients into believing that it was possible to avoid Covid-19 infection using the masks and/or self-diagnose the presence of the virus by means of (unauthorized) home-testing kits. Such conduct was therefore contrary to professional diligence and liable to distort to an appreciable extent the economic conduct of the average consumer, in relation to the product, inducing him to take commercial decisions that he would not otherwise have taken.[25] Additionally, the authority acknowledged that the traders were also able to increase significantly the price of certain products, exploiting the vulnerability of the consumers during the health crisis.

It is important to acknowledge that the AGCM did not attribute the unfair commercial conduct to the platform itself, however, it affirmed that the digital platform should still be obliged to meet the standard of professional diligence, pursuant to Article 20 of the Consumer Code, monitoring and eventually preventing unfair practices, and in one case the authority sanctioned the digital platform for such lack of control over the third parties conduct.

Such a decision on the liability of platforms for unfair business practices carried out by its users, however, implies a monitoring role played by the digital platform over its users, and this qualification could clash with the provisions the e-commerce Directive, which is still in force. The directive, and its implementing provisions at national level,[26] deny that the platform – qualified as a hosting provider – has a general obligation to monitor the content transmitted or stored, nor has it a general obligation to actively seek fact or circumstance indicating the presence of illegal activities. The compatibility between the unfair commercial practice and the exemption of liability for hosting providers was addressed in detail by the decision of the Council of State, n. 3851/2021, addressing the appeal against a decision of the AGCM.[27] The supreme administrative Court based its reasoning on the assumption that there isn't any incompatibility between the position of a trader, according to the definition provided by the legislation on unfair commercial practices, and the position of a hosting provider, according to the definition provided by the legislation on electronic commerce. The court then affirmed that the two legislation must be coordinated, allowing the AGCM to sanction the conduct that violates the professional standards, without implying that the application of unfair commercial standards provisions would require additional obligations on hosting provider not defined by the electronic commerce legislation. According to the Court, there should be a case-by-case analysis of the involvement of the digital platform in the commercial practice, and in the affirmative case, such element would allow to hold the platform liable for the lack of control over the misconduct of the third party.

According to the interpretation of the Council of State, there seems to be a shift from the regime of general exemption of liability, provided by the e-commerce Directive, in the direction of strengthening the responsibility of the platforms vis-à-vis the need to protect consumers and, in more general terms, weaker parties.[28]

The shift acknowledged in the Italian case law is also supported by the recent European legislative developments: the abovementioned Digital Services Act.[29] Although keeping the same structure and liability regime for the digital platforms provided in the previous e-Commerce directive, Article 6(3) DSA includes a specific exception to the scope of application of the liability regime for hosting providers, affirming that it does not apply "*with respect to the liability under consumer protection law of online platforms that allow consumers to conclude distance contracts with traders, where such an online platform presents the specific item of information or otherwise enables the specific transaction at issue in a way that would lead an average consumer to believe that the information, or the product or service that is the object of the transaction, is provided either by the online platform itself or by a recipient of the service who is acting under its authority or control.*" This provision, though circumvoluted, seems to imply that whenever the consumer believes (or is led to believe) that the goods or services are provided by the platform or its auxiliaries, the platforms liability is not excluded. It will be up to platform to demonstrate that it does not have any 'authority or control' over the other traders. ■

23 See in particular Consiglio di Stato, 29 March 2021, No. 2631, para. 23.

24 See more generally in S Lohsse, R Schulze and D Staudenmayer (eds.), 'Data as Counter-Performance – Contract Law 2.0?' (Hart – Nomos 2020); A De Franceschi, 'La circolazione dei dati personali tra privacy e contratto' (ESI 2021).

25 AGCM, February 2020, PS11705; AGCM, March 2020, PS11716-PS11717; AGCM, 17 March 2020, no. 28173; AGCM, 27 March 2020, no. 28207; AGCM, April 2020, PS11734; AGCM, April 2020, PS11732; AGCM, April 2020, PS11722.

26 See Article 16, E-commerce Directive.

27 Council of State, 18 May 2021, no. 3851.

28 L Guffanti Pesenti, 'Note in tema di piattaforme digitali e pratiche commerciali scorrette', (2021) Jus-online.

29 Note that the academic literature already advocated on the need to define "*some sort of 'secondary liability' of the platform provider*". See C Busch et al. (n 1) 8.

David Markworth*

Coding a Collective Consumer Redress Vehicle in Germany

How Debt Collection Services Became Consumer Allies and what that Means for Directive 2020/1828

The article shows how a new way of enforcing consumer claims by using debt collection services has evolved on the German legal services market. It discusses the implications of this development for EU Directive 2020/1828 on representative actions for the protection of the collective interests of consumers and the future of consumer law enforcement regulation as a mean for improving the access to justice. The article argues that the Directive – in light of the market solution – offers European consumers 'too little, too late'. At the same time though, it is not (yet) possible to determine whether the German experience indicates that strengthening market forces is really the best regulatory technique to boost consumer access to justice. The article therefore suggests that regulators should gather more empirical evidence before further experimenting with consumer redress.

I. Introduction

When we think about the people who provide consumer access to justice, the picture of dust-sprinkled attorneys offering mostly basic legal advice for a set fee still dominates our imagination. However, a market-based revolution is currently shaking up the European legal services markets, a sector that has traditionally been known for being anything but innovation-prone. Large-scale entrepreneurial lawyering, a term originally referring to the US way of investing in legal services with the aim of obtaining a profit,[1] has found its way to the EU. In numerous European countries, a new type of player takes a fresh look on (consumer) claims enforcement. The Netherlands perhaps have acted as a role-model for other European states. Here, (US) law firms began to set up or became involved in claim vehicles aiming at establishing a mass litigation market earlier than elsewhere.[2] But similar events are taking place in France. *Azar-Baud* and *Biard* report the "emergence of a myriad of new Legaltech actors attracted by an emerging mass litigation market in France."[3] Similar reports come from other EU member states.[4] As this article will show, Germany is no exception. When looking at the pan-European development more closely, two observations can be made: Firstly, it must be noted that the novel actors in the different member states faced and are still facing very different obstacles in their struggle for market-entry. This is due to the legal services market – and the civil justice system as a whole – still being shaped by local traditions with relatively scarce European intervention. The second observation is that these individual obstacles shape the actors' legal appearance, meaning the legal form they are structured in. Thereby, the challenges that had to be overcome in Germany were perhaps even a little greater than elsewhere, since a highly regulated legal services market met with scepticism towards 'American-style' mass litigation or recognizing enforcement as a business model, a very self-confident legal community, and courts that were scared of being overwhelmed with new tasks. This might explain why the new market participants in Germany adopted a particularly peculiar shape: they are using debt collection services as a vehicle. This meant taking on great legal risks, but, in the end, they have managed to 'code' a successful new business model for collective consumer redress through debt collection services that in 2022 has managed to gain legitimacy by the German Federal Court.

The article's first aim is to explain this 'coding' process to a wider European audience in its part II. Furthermore, the recent developments in Germany are put into perspective by comparing the market-led initiative with Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers. The Directive is the EU's answer to the increased 'risk of a large number of consumers being harmed by the same unlawful practice' (recital one) and explicitly aims at improving consumers' access to justice (Article 1) through better claims enforcement. There is also a strong temporal link between the rise of debt collection service claims enforcement and the introduction of the Directive since it is applicable from June 25th 2023 onwards and needed to be implemented on member state-level by December 25th 2022.[5] The bottom-up tactic of using debt collection services as the consumer law enforcement vehicle of choice is therefore directly competing with an EU top-down approach. Considering this, the ultimate measure of the success of the new business model from a regulatory perspective will be whether or not it has pre-empted the EU efforts. Insofar, the article argues that the Directive – in light of the recent market developments – offers German (and other European) consumers 'too little, too late'. To examine this in more detail, part III. highlights three lessons that the market developments must teach future regulators. At the same time though, as the article's part IV. argues, it is not (yet) possible to determine whether the German experience indicates that strengthening market forces is really the best regulatory technique to boost consumer access to justice. Regulators should therefore gather more empirical evidence before further experimenting with consumer redress.

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1 X Kramer and I Tillema, 'The Funding of Collective Redress by Entrepreneurial Parties: The EU and Dutch Context' (2020) 2 Revista Ítalo-Española de Derecho Procesal 165, 167.

2 See I Tzankova and X Kramer, 'From Injunction and Settlement to Action: Collective Redress and Funding in the Netherlands', in A Uzelac and S Voet (eds), *Class Actions in Europe* (Springer 2021) 97; Kramer and Tillema (n 2) 171.

3 M Azar-Baud and A Biard, 'The Dawn of Collective Redress 3.0 in France?' in A Uzelac and S Voet (eds), *Class Actions in Europe* (Springer 2021) 73.

4 See A Biard and X Kramer, 'The EU directive on representative actions for consumers: a milestone or another missed opportunity?' (2019) ZEuP 249, 255.

5 At the time of writing, only a draft for the German act to transform the Directive into national law (Verbandsklagenrichtlinienumsetzungsgesetz – VRUG) existed. See Bundesministerium der Justiz, 'Entwurf eines Gesetzes zur Umsetzung der Richtlinie (EU) 2020/1828 über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher und zur Aufhebung der Richtlinie 2009/22/EG' (16 February 2023) <https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_VRUG.pdf;jsessionid=72DF776F4E09B7186A7A30CBE84B5A19.2_cid334?__blob=publicationFile&v=2> accessed 29 March 2023.

II. 'Coding' a consumer redress vehicle

Katharina Pistor, in her 2019 book 'The Code of Capital', describes how attorneys, mainly in common law countries, use existing laws to 'code' new assets that are then protected by legal rights.[6] She writes that the "true masters of the code" use their legal know-how "to craft new capital and in this process often make new law from existing legal material."[7] One might wonder whether in civil law jurisdictions like Germany there is even room for the type of legal inventions that are described in the book, given their thicket of rules that –presumably – leaves no space for 'coding' activities. The heavily regulated legal services market might thereby seem especially resistant against clever innovation. In Germany, the legal services sector is structured mainly by the Federal Code for Lawyers (*Bundesrechtsanwaltsordnung, BRAO*), the Act on Out-of-Court Legal Services (*Rechtsdienstleistungsgesetz, RDG*) and the Code of Civil Procedure (*Zivilprozessordnung, ZPO*). In the past, this sector – as it is the case in many other European countries – featured a (quasi) monopolist setting with the sale of legal services being restricted by law to lawyers and a small number of other players. The Act on Out-of-Court Legal Services stipulates that the provision of (out-of-court) legal services is only permissible to the extent provided for under the RDG or other laws (Article three), which means, that legal services are forbidden as long as they are not explicitly permitted. This is supposed to guarantee a high quality of legal services and – as a result – consumer protection.[8] Additionally, lawyers are subject to tight licensing requirements and under bar supervision.[9] At first glance, innovation in the German legal services sector against this background only seems possible by way of changes within the existing, traditional set-up or via regulatory alterations 'top-down'. A market-based evolvement of a new business model by 'coding' is neither intended nor envisioned. Nonetheless, by relying on debt collection services (DCS) a way was found to do just that. Debt collectors (alongside pension consultants and advisers on foreign law) under German law are one of the very few professions that are allowed to sell limited legal services apart from lawyers.[10] Traditionally, though, they had limited their actions on providing financial services eg for private lenders battling non-performing loans or businesses with many outstanding sales claims. Additionally, the traditional debt collection services are – like elsewhere in Europe –, under scrutiny for acting abusively, harming both consumers and the economy by threatening consumers' physical, psychological, and economic well-being.[11] In other words, commercial debt collection is often blamed for deteriorating the access to justice or regarded as being an 'anti-consumer' practice. The new industry participants have turned this image around by reinventing debt collection services as consumer allies. The next paragraphs show how this is the result of inventiveness and risk-taking but also of circumventing restrictions that were originally introduced to protect the legal system. They give an overview of how the new business model works (1), how it has gained legal recognition (2) and why it relies on using debt collection services as a vehicle (3).

1. How it works

As the Federal Court's eighth senate has explained in detail in its 2019 'Lexfox' ruling,[12] the new legal service usually requires (consumer) claimants irrevocably assigning their claims to a specialized platform – the DCS – for the purpose of enforcement (so-called assignment model). This platform then bundles the claims and attempts to enforce them in its own name, out of court or – if this does not lead to success – in court, whereby it bears the corresponding costs. In the latter case, the platform acts as plaintiff in regard to its claims-pool and hires lawyers. In the event of the enforcement being successful, the platform receives a share in its proceeds. For the claimants, this is supposed to be risk-free, since if the platform's efforts fail, they do not incur any costs, even when a lawyer was hired or court fees must be paid.[13] When acting in court, DCS claim enforcement vehicles make regular use of third-party litigation funding (TPF), a practice that has its origins in Australia[14]. *Tzankova* and *Kramer* define TPF arrangements as "funding facilities that a third party unrelated to the litigation provides on a 'non-recourse basis' to cover all or part of the litigation costs, in exchange for a success fee related to the outcome of the litigation. The non-recourse nature of the funding facility indicates that, unlike a bank loan, it only needs to be 'repaid' if the action is successful and unlike with a bank loan, the 'debtor' is not required to provide a guarantee for the funding".[15] Here, in other words, it is not (only) the platform or an attorney but an investor (the third party) that is the beneficiary of parts of the proceeds of a funded claim.[16] As a result, DCS mass claim enforcement involves multilateral relationships: between the claimants, the debt collection service, its lawyers, and the financing third party. DCS are now in use in various areas of (broader) consumer law. They enforce claims for train or flight delays, fight for severance packages or collect insolvency-related claims. In practice, the ways, in which debt collection services enforce consumer law may differ greatly, though. In particular, not all new businesses specialize on consumer law enforcement. DCS for example also play a central part in the enforcement of competition law claims for damages arising from the so-called truck cartel in Germany, an area where they were until recently facing heavy resistance from lower courts.[17]

2. Gaining legal recognition

The central building stone when 'coding' legally, as *Pistor* explains, is the act of gaining legal recognition.[18] Once a legal innovation has achieved to be protected by the law, it becomes a stable source of wealth because only then it is able to fend off challenges by competitors or regulatory intervention. Events, in which the wheel of history is turned back, and a legitimized 'code' is once again delegitimized, are – as *Pistor* shows – rare.[19] Equally, *Sandefur* and *Clarke* see legitimacy as a prerequisite for achieving sustainability. They define legitimacy as the "shared belief that something is correct,

6 K Pistor, *The Code of Capital* (PUP 2019) 19 f., 46.
7 Pistor (n 7) 160.
8 See Article one of the Act on Out-of-Court Legal Services.
9 See the Federal Court for Lawyer's parts two and three.
10 See Article two and ten of the Act on Out-of-Court Legal Services.
11 See German Bundestag Official Record (Bundestags-Drucksache) 19/20348 of 24 June 2020, p. 1; for an in-depth analysis of debt collection practices in Europe see C-G Stănescu (ed), *Regulation of Debt Collection in Europe* (Routledge 2022).
12 German Federal Court, 27 November 2019, VIII ZR 285/18.
13 German Federal Court, 27 November 2019, VIII ZR 285/18 [148 ff., 157 ff.].
14 Kramer and Tillema (n 2) 168.
15 Tzankova and Kramer (n 3) 111.
16 Kramer and Tillema (n 2) 168.
17 See Landgericht Stuttgart, 28 April 2022, 30 O 17/18; Landgericht München I, 7. February 2020, 37 O 18934/17 (both truck cartel); Landgericht Stuttgart, 20 January 2022, 30 O 176/19 (Rundholz cartel).
18 Pistor (n 7) 20.
19 Pistor (n 7) 19 f.

acceptable, and worthy of recognition as such". It involves stakeholders accepting and employing a new method[20] or the wide acknowledgement that providers have "the authority to do the specific work that they do."[21] All of this must be especially true for new business ideas in a regulated market. The ultimate goal for DCS claims enforcement therefore had to be legitimacy. They accomplished this goal in form of three milestone rulings by the German Federal Court with the last one stemming from 2022:

On 27 November 2019, the Federal Court's eighth senate addressed the new business model for the first time.[22] 'Lexfox', a debt collection service and the plaintiff in the underlying case, offered – initially free of charge – an online 'rent-calculator'. It allowed tenants to determine whether their rent is too high in relation to the local comparative index. If the rent exceeded the permissible amount, the tenant, due to a local regulatory 'brake' mechanism, was able (among other things) to claim repayment of overpaid sums from the proprietor. The plaintiff offered the enforcement of these claims. According to its general terms and conditions, in the event of success of its efforts, the plaintiff should receive a share in the achieved repayment, amounting to one third of the saved annual rent. Otherwise, the tenant should not incur any costs. The Federal Court ruled that the legislator had intended to allow debt collection services, even though they are not lawyers, the judicial enforcement of all sorts of monetary claims. Thereby, it should make no difference that Lexfox, before being able to actually enforce the claim, had to fulfil a number of conditions (eg check the legal validity of the claim and advise the customers accordingly as well as reprimand the landlord for asking for excessive rent).[23]

The second major ruling's plaintiff asserted airline customers' claims for damages ('Airdeal' by the Federal Court's second senate[24]). The customers had booked and paid for flights, but these flights were no longer operated because of their airline's insolvency. Now, they argued that the defendant had not filed the airline's insolvency petition in due time. The plaintiff here was to receive 35 % of the net proceeds of a successful enforcement. It was to conduct legal and factual investigations and examine whether and which claims the passengers were entitled to against third parties and, if there were sufficient prospects of success, assert them out of court or in court. The plaintiff then was supposed to decide at its own discretion against whom, to what extent and in what manner it would take necessary enforcement steps in and out of court. It was also entitled, but not obliged, to conclude settlements, to waive claims against individual opponents and to assign claims to opponents in return for compensation. The second senate ruled that Airdeal's business model is allowed irrespective of it being centred on enforcing 'disputed' claims, meaning claims where there is only a small or no chance that the debtor will settle out-of-court (pay voluntarily) and therefore it seems highly unlikely that a litigation can be avoided. Furthermore, the court decided that debt collection services are even authorized to offer (informal) collective action lawsuits (so-called '*Sammelklage-Inkasso*'). Their business model may, in other words, predominantly or exclusively focus on enforcing claims in court (= in-court legal services) with a contingency fee arrangement.[25]

In its 2022 'Financialright' ruling, the Federal Court's senate VIa finally cleared up most of the remaining doubts regarding the legality of DCS consumer claims enforcement. The Federal Court clarified that even bundling large numbers of claims is legal and that there is no upper limit to the number of claims being brought to court (Financialright had bundled around 2,000 claims).[26] Furthermore, the Federal Court explicitly pointed out that the new business model's legality is not challenged by its for-profit character. It is supposed to be irrelevant that the collection and filing of claims is meant to generate revenue since earning money with lawsuits is not inherently objectionable.[27] Finally, the Federal Court in 2022 ruled that debt collection services may enforce claims that are subject to foreign law, meaning that the business model may also encompass cross-border litigation for the claims of European consumers against German companies. In the underlying case, the plaintiff in the context of the Volkswagen 'Diesel scandal' even acted for a person who had bought a defective car in Switzerland.[28]

3. Using debt collection services as a vehicle

Up to this point, it has been left open why the claims enforcement in the Federal Court's cases has not been offered by law firms and why the new business model relies on using debt collection services as a vehicle instead. The fact that it was not the traditional market participants who expanded their service range must seem even more surprising given the fact that claims enforcement generally, but especially for consumers, seems like an appealing investment class. For once, consumers, as Directive (EU) 2020/1828 points out in its recital one, are often harmed in large numbers by the same unlawful practice. Therefore, a legal service can rely on scaling effects by bundling a high number of claims that on their own are of low value (eg 24.76 EUR in the 'wenigermiete.de' case). Additionally, EU and member state consumer law is – in large parts – applicable mandatorily. Thus, unlike with 'soft law', diverging agreements between the parties are rare. As a result, once the legal due diligence has been completed regarding one potential claim – meaning the question of whether the claim is valid and enforceable has been answered – little imponderability remains in respect to a whole set of claims, a factor on which a large-scale enforcement attempt's success crucially relies upon. The area of consumer law is also especially 'law thick', which means that there are fewer 'hard cases' (*Dworkin*[29]) in which it is unclear what the applicable law's solution to a legal problem is. Finally, consumers often have legal protection insurance. Relying on this insurance provides enforcement providers with a risk-free way of establishing case precedents. Once a service provider knows the outcome of thousands of similar cases it is able to precisely tailor its offer, whereas high stakes litigation, in comparison, is much harder to calculate. Furthermore, the cost risk of trying to enforce a claim in Germany can be estimated by looking at the Lawyers' Remuneration Act (RVG). Since an investor will only share in the enforcement proceeds in the best case, it is possible to build a portfolio of cases in which the best-case outcome is higher than the cost risk assumed, although it must be considered additionally that if a settlement is reached, this best-case scenario does not come into play. In consideration of all of

20 R Sandefur and T Clarke, 'Designing the Competition: A Future of Roles Beyond Lawyers? The Case of the USA' (2016) 67 Hastings Law Journal 1467, 1472.
21 Sandefur and Clarke (n 21) 1481.
22 German Federal Court, 27 November 2019, VIII ZR 285/18.
23 German Federal Court, 27 November 2019, VIII ZR 285/18 [148 ff., 157 ff.].
24 German Federal Court, 13 July 2021, II ZR 84/20.
25 German Federal Court, 13 July 2021, II ZR 84/20 [16 ff.]; see also German Federal Court, 13 June 2022, VIa ZR 418/21 [11, 1].
26 German Federal Court, 13 June 2022, VIa ZR 418/21 [14].
27 German Federal Court, 13 June 2022, VIa ZR 418/21 [18].
28 German Federal Court, 13 June 2022, VIa ZR 418/21 [21 ff., 27 ff.].
29 R Dworkin, *Taking Rights Seriously* (Bloomsbury 2013) 105 ff.

this, financing legal service models from a risk management point of view is even potentially attractive for institutional investors, since it offers a unique way of diversifying an investment portfolio: the risk associated with litigation generally does not correlate with any other investment activities on the market.[30]

In reality though, investing in claims enforcement with the aim of obtaining a profit faces a number of regulatory hurdles that prevent it from being organized like any ordinary business. In fact, the main reason, debt collection services were being used as enforcement vehicles in Germany was to successfully circumvent these hurdles. The new actors are taking advantage of the fact that debt collection services have more regulatory leeway than lawyers. Only recently, changes have been introduced that gradually level the regulatory playing field of lawyers and debt collection services with lawyers now enjoying more freedom and DCS being controlled more heavily,[31] but the general picture still holds. For once, debt collection services may freely attract 'outside' equity capital whereas being a shareholder in a law firm is restricted to active practitioners.[32] This regulatory leeway gave the new actors the chance to make the great upfront investments that were required to establish themselves in the legal services market. As *Sandefur*, *Clarke* and *Teufel* point out, "the adoption of new types of legal services by the public must overcome the barrier of consumers recognizing that they might benefit from such services at all".[33] Customers must not only discover a service but also find out what the new service is and what it can do to help them with the concrete problem they are confronted with.[34] New providers therefore firstly must invest in ways of attracting customers through (online) marketing. Secondly, they have to invest in the initial assessment of claims and enforcement strategies (the book-building process) as well as in establishing the operating tools for handling large numbers of claims (software, call centres and legally trained staff). Since all this accumulates sunk costs, acquiring 'outside' equity capital in ways that go beyond those allowed to law firms becomes an essential asset. DCS claims enforcement providers are also circumventing law firm restrictions regarding legal finance. To this day – as it is the case in a number of EU member states[35] –, it is (largely) not permissible for German lawyers to enter into agreements on the basis of which remuneration depends on the outcome of a case, the lawyer's success (contingency fee or no-win-no-fee arrangements) or where the lawyer's fee is a part of the amount recovered (quota litis).[36] Likewise, lawyers are not allowed to circumvent the German Code of Civil Procedure's loser-pays rules by assuming their clients' risk of losing in court by way of undertaking to bear the court fees, administrative fees or costs of other parties.[37]

III. Gaining insights from the market developments

The fact that the market-made DCS model circumvents the traditional regulatory set-up of the enforcement market begs the question of how successful a regulatory top-down attempt at improving claims enforcement that leaves this set-up untouched will be. As it happens, a strong temporal link here exists: The rise of DCS claims enforcement coincides with the introduction of Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers, an EU level take on enhancing the means for the enforcement of Union law. The deciding factor for comparing regulation with market solution is that the Directive explicitly aims at improving the access to justice (Article 1). The EU has identified a "lack of effective means for the enforcement of Union law protecting customers" (recital two). The Directive therefore seeks to "address the challenges relating to the enforcement of consumer law": to improve "the deterrence of unlawful practices and to reduce consumer detriment in an increasingly globalised and digitalised marketplace", the EU finds it "necessary to strengthen procedural mechanisms for the protection of the collective interests of consumers" (recital five). The Directive claims to ensure at least one 'effective and efficient' procedural mechanism for representative actions on the member state level (recital seven) with the consumers entitled to benefit from these actions "in the form of remedies, such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid" (recital thirty-seven). Apart from its aim, comparing the Directive with DCS claims enforcement is further justified by the fact that the Directive's approach forms a stark contrast to the market-led tactic we see in Germany, as far as it addresses the problem of mass consumer harm by unlawful business practices top-down. *Biard* and *Kramer* even deem the Directive's approach "paternalistic".[38] What distinguishes the EU's from the market's method is that the member states shall (only) ensure that representative actions as provided for by the Directive can be brought by so-called 'qualified entities' (QEs) (see recital nine, article four).The EU's goal is to provide QEs with a tool for both injunctive and redress measures against traders that infringe provisions of Union law. In contrast, the actors behind the new consumer claim enforcement DCS identified a gap in consumer redress and then 'coded' their business model in a way that enabled them to provide it.

When comparing the regulatory approach with DCS claim enforcement, one may conclude that the Directive offers German consumers 'too little too late' or has even been rendered superfluous and might also only to a limited extent positively affect consumers in other member states. Even though in theory the Directive might offer a good approach at improving the access to justice, the new tool that member states establish in its wake might lie idle. Consequently, businesses violating consumer rights might face less new exposure to claims enforcement than the EU hopes for. In particular, three insights may be gained from the German market developments: (1) that a more holistic approach for strengthening non-traditional consumer law enforcement may be needed, (2) that a lack of consumer redress tools may not be the 'real' cause for the gaps in consumer law enforcement, and (3) that the Directive may not offer enough incentives to considerably strengthen enforcement.

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30 See Tzankova and Kramer (n 3) 112.
31 See the Act to Promote Consumer-oriented Offers in the Legal Services Market (*Gesetz zur Förderung verbrauchergerechter Angebote im Rechtsdienstleistungsmarkt*) of 10 August 2021 (latest amendment to the RDG, in force: 1 October 2021), Federal Law Gazette I 2021, 3415.
32 See BT-Drucks. 19/27670, 131. To secure the prohibition of 'outside' equity participation, the transfer of shares in a law firm requires partner approval (Article 59 i II BRAO). Additionally, shares may not be held for the account of a third party and third parties are not allowed to participate in the firm's dividends (Article 59 i III BRAO).
33 R Sandefur, T Clarke and J Teufel, 'Seconds to Impact?: Regulatory Reform, New Kinds of Legal Services, and Increased Access to Justice' (2021) 84 Law and Contemporary Problems 69, 76.
34 Sandefur and Clarke and Teufel (n 34) 76.
35 See Kramer and Tillema (n 2) 171.
36 See Article 49 b II 1 BRAO with exceptions in Article 4 a RVG.
37 See Article 49 b II 2 BRAO.
38 Biard and Kramer (n 5) 256.

1. Non-traditional consumer law enforcement faces unexpected resistance

The developments on the German market show that attempts at improving consumer access to justice by strengthening non-traditional law enforcement methods face a (strong) opposition. Among the opponents are groups that one might not have considered as the 'usual suspects'.

One would expect the opposition to be led by big companies fearing that their unlawful practices might, in the future, not continue to go unpunished. *Biard* and *Kramer* for example note "fierce criticisms among EU business communities using the spectre of the American class action to slow down policy discussions and reforms" on the EU level.[39] The German example though shows that, since forging a new enforcement tool automatically interferes with the traditional set-up of the legal services market, the resistance is broader than that. In Germany, the traditional legal community was among the opponents against DCS enforcement providers since its members (rightfully?[40]) worried about losing parts of their traditional business to the new players. At the same time, some lower German courts, despite the very clear rulings by the Federal Court, have until recently continued to challenge the legitimacy of parts of the new business model.[41] One of the reasons for this continuing dispute is that the DCS enforcement initiative clashed with an unprepared court system that was not properly prepared to handle the new case load resulting from the changes. Thus, the developments in Germany showcase how dependent new enforcement mechanisms are on the court system and the legal infrastructure of a country. The positive effects of a new enforcement initiative are significantly over-shadowed if it causes turmoil in this regard. Both the potential conflicts between a new enforcement mechanism and the traditional legal service providers and the civil justice system are, although certainly not unknown on the EU level, not addressed by Directive 2020/1828. On the one hand, in line with the principle of procedural autonomy, the Directive does not contain provisions on every aspect of proceedings in representative actions (recital twelve). It is even left to the discretion of the member states whether they design the procedural mechanism for representative actions required by the Directive as part of an existing or as part of a new procedural mechanism (recital eleven). The interplay between the Directive and the member states' legal service markets, on the other hand, is not even mentioned in the regulation. This indicates that it will be up to the member states to improve consumer claims enforcement in a more holistic way. Each member state must evaluate individually in which direction its legal services market and justice system are supposed to evolve in light of changed enforcement practices. Here, providing a controlled and monitored experimental regulatory space that relaxes rules about non-lawyer profit from legal services might be preferable to the German 'shock therapy' through which law practices that were traditionally deemed unauthorized suddenly became valid by way of a court order. One important aspect requiring consideration is that the new enforcement models might help to advance a greater absence of attorneys in civil cases. As *Sorabji* has noted, this push-back might be beneficial in some instances, since attorneys only really shape the outcome of a dispute if a civil process is adversarial and formal or the procedural/substantive law is complex.[42] Insofar as claims enforcement is more accessible, less formal and technical, there might be less need for direct contact between clients and lawyers. It is unclear though, if better consumer law enforcement must really come at the price of 'The End of Lawyers' (*Richard Susskind*[43]). We might just need to redefine their role. Even *Sorabji* points out that "lawyers are an essential means through which open justice is achieved. The presence of independent legal scrutiny of the litigation process while it is taking place is a strong prophylactic against the prospect of the arbitrary application of procedural law and substantive law by court administrators and the judiciary."[44] Additionally, he further writes, the absence of lawyers from large parts of the civil justice system, combined with reductions in opportunities for lawyers to gain legal skills, experience and the judgment that stems from that, would pose a problem concerning the ability to hold the justice system to account as well as operate it effectively in the future.[45]

A similarly careful transformative process must be designed for the national court system. While digitalizing court proceedings seems like an obvious solution to courts being overwhelmed by additional caseload, it seems evenly important to further strengthen ADR and ombudsperson mechanisms. Finally, the way in which litigation funding may be provided might need an update. The German consumer DCS example shows that investors are increasingly willing to regard litigation as an investment class and there might be untapped potential of leveraging this willingness to further consumer interests. When legal finance is made easier, appropriate safeguards are necessary to point out the financial implications and risks associated with it to non-commercial clients by way of easily accessible information.[46]

2. Legal services market is innovation-ready

The second takeaway from the German experience is that a lack of accessible consumer redress tools might not necessarily be consumer law enforcement's 'real' problem. Instead, the legal services market, when given the chance, seems capable of innovating on its own. This claim is supported by the observation that in Germany it is mostly lawyers that are nibbling away at their own old market. The founder of 'Flightright' – a company, registered as a debt collection service, enforcing consumer rights to reimbursement and compensation in the event of flight delays and cancellations stemming from the EU's 2004 passenger rights regulation[47] –is for example qualified as a lawyer, as is the founder of 'Conny', Germany's self-proclaimed leading online-platform for legal services regarding tenant, labour, and telecommunication law (also a registered debt collection service). Considering this – proven – potential for innovation, reducing the barriers that new entrants to the legal services market face may be a more effective way to make sure that consumer interests are safeguarded than introducing new regulation. One way to do this is to relax the rules about who can profit from the sale of legal services,

39 Biard and Kramer (n 5) 250.
40 See M Kilian, 'Legal Tech – wo findet der Wettbewerb statt?' (2021) Anwaltsblatt 676–677.
41 See eg Oberlandesgericht Schleswig, 22 January 2022, 7 U 130/21.
42 J Sorabji, 'Justice without Lawyers' in X Kramer and A Biard and J Hovenaars and E Themeli (eds), *New Pathways to Civil Justice in Europe* (Springer 2011) 221–242 (230, 232).
43 R Susskind, *The End of Lawyers* (OUP 2010).
44 J Sorabji (n 43) 239.
45 J Sorabji (n 43) 239.
46 See for DBA arrangements: M Ahmed and X Kramer, 'Global Developments and Challenges in Costs and Funding of Civil Justice' (2021) ELR 181, 184.
47 Regulation (EC) No 261/2004.

but – as was mentioned in (1) – the new market forces must be well-canalized to prevent an implosion of the legal service market.

3. Top-down approach might not be taken up

The German experience thirdly suggests that the Directive's top-down approach may not be an effective means for strengthening the enforcement of Union law protecting consumers because, in comparison to a market approach, it creates an additional hurdle. A key difference between the market approach and the Directive is, that the new consumer DCS explicitly tailored their product in a way that they thought would attract customers and then got this tailor-made solution approved by the courts. In turn, the Directive only presents a new consumer redress tool. The Directive's success therefore crucially relies on the formation of a functioning new services market with suppliers and customers. The new tool can only work effectively if it is adopted. Otherwise, the whole regulation will lack impact. The Directive on the supply side depends on providers figuring out how to create and deliver the enforcement mechanisms that the Directive permits. On the demand side consumers need to start using models that are based upon it. As *Sandefur*, *Clarke* and *Teufel* highlight, "[j]ust because services exist does not mean people will use them." To exemplify this, they point towards legal wills that are relatively affordable, well-established and easy-to-use instruments to greatly simplify the necessary transition process after a person's death and yet, most people make no use of it.[48] Enforcement tools that are based on the Directive thereby face the additional problem that modifying them is only possible in the regulatory realms.

In this context it is finally problematic that the Directive limits the incentives to make use of the new consumer enforcement tools that are introduced. One driving factor of the German market-based solution for the lack in consumer law enforcement was, as has been pointed out, that entrepreneurs discovered a new business model. They explored a new way to offer legal services at a (high) profit margin. In contrast, a key element of Directive (EU) 2020/1828 is that only so-called "qualified entities" (QEs) may act on behalf of consumers. One specific criterion these QEs must comply with is that they operate on a non-profit basis. QEs should have a "non-profit-making character" (recital twenty-five). The EU hopes that local consumer associations will step in and protect the consumers' interests through representative action: "Consumer organisations in particular should play an active role in ensuring that relevant provisions of Union law are complied with. They should all be considered well placed to apply for the status of qualified entity in accordance with national law" (recital twenty-four). But it is unclear whether these non-profit organisations are even properly incentivized to assume their designated new role, since providing legal services has always predominantly been a for-profit endeavour. Considering the low possible rewards, the risks these organisations will face might be too high, because the Directive establishes a default loser-pays rule: "In representative actions for redress measures, the unsuccessful party should pay the costs of the proceedings incurred by the successful party, in accordance with the conditions and exceptions provided for in national law" (recital thirty-eight, see also article twelve). Only in "exceptional circumstances" is it possible to order individual consumers concerned by a representative action for redress measures to pay the costs of the proceedings that were incurred as a result of those individual consumers' intentional or negligent conduct (recital thirty-eight). Regulators are of course free to structure a legal service in this manner. As the German Federal Court has pointed out in its 2022 ruling, they can freely decide whether it should be inappropriate to use a new legal service in an entrepreneurial way.[49] Nevertheless, *Biard* and *Kramer* point out that the use of collective redress mechanisms has in the past been drastically limited by the fact "that associations often do not have the necessary human and/or material resources to start such lengthy and burdensome procedures".[50] The Directive leaves it at the discretion of member states to "take measures aiming to ensure that the costs of the proceedings related to representative actions do not prevent qualified entities from effectively exercising their right to seek the measures" referred to in the Directive (Article 20). As a possible measure, the Directive explicitly points out "public funding, including structural support for qualified entities, limitation of applicable court or administrative fees, or access to legal aid" (Article 20). In its recital twenty-four the Directive even considers that "public bodies" could play an active role in ensuring that relevant provisions of Union law are complied with by bringing representative actions. This proposed solution to the funding problem might open up the enforcement process to regulatory capture, though, especially, since it implies an authority mix-up: public bodies would be laying down the enforcement rules as well as function as the enforcement agency. Considering this, it remains unclear whether the dangers of conflicts of interests would actually be greater than if it was allowed to use the new legal tools an entrepreneurial way.

QEs' funding problems could partly be circumvented by making widespread use of third-party funding (II. 1)). The Directive however also interferes with the way in which new legal service providers may access it when acting in court. In general, the Directive allows group actions to be funded by third parties, such as litigation funds, but its use is limited. Outside funding, the Directive states, must not divert the action "away from the protection of the collective interests of consumers" (Article 10). The member states must ensure that the QE's decisions are not unduly influenced by the funder or that the action is not funded by a competitor of the defendant. The Directive further provides that the courts will be required to assess compliance with these limitations and will be able to take appropriate measures, if necessary.[51] The EU sees this as a safeguard to prevent conflicts of interest between funders and claimants. The goal is "to avoid abusive litigation that would unjustifiably hinder the ability of businesses to operate in the internal market" (recital ten). It remains to be seen, to which extent these limitations will prevent the use of TPF within the Directive's scope, thereby constraining the Directive's overall application. Interestingly, the German Federal Court did not share the Directive's expressed scepticism towards TPF. The court in 2022 ruled that a conflict of interests of the plaintiff (the DCS), the TPF and the claimants in light of the contractual structures cannot be established,[52] since in principle the interests of all parties involved are jointly focused on assuring the enforcement of all claims in full or up to the highest possible amount.[53] The court acknowledges that some claimants, due to their claim being bundled up with others that had lower enforcement

48 Sandefur and Clarke and Teufel (n 34) 75.
49 German Federal Court, 13 June 2022, VIa ZR 418/21 [18].
50 Biard and Kramer (n 5) 254.
51 See Ahmed and Kramer (n 47) 185.
52 German Federal Court, 13 June 2022, VIa ZR 418/21 [54 ff.].
53 German Federal Court, 13 June 2022, VIa ZR 418/21 [51].

prospects, risk receiving a lower share than would have been in reach of individual action when a DCS concludes a litigation settlement. This risk, however, is supposed to be offset by the considerable advantages that DCS claims enforcement has over solo enforcement attempts (fee degression and capping, distribution of the litigation cost risk, strengthening of the negotiating position).[54] The court specifically saw no structural conflict of interests if the litigation financier has only theoretical or insignificant means to influence the claim enforcement. Without such influence, the court found no difference to constellations in which the DCS undertakes the litigation financing itself and uses its own funds or an external loan for this purpose.[55] *Cordina* comes to a similar conclusion.[56] This implies that its provisions on TPF might limit the Directive's usage without a proper cause. All of this makes it seem far from certain that the EU approach will work in practice.

IV. Does the market solution improve the access to justice?

Considering the shortcomings of the EU's current regulatory approach, the question remains if market approaches like the one using debt collection services as enforcement vehicles are capable of rendering further regulatory attempts superfluous. Thereby, the ultimate measure of the success of a new business model must be whether or not it actually improves access to justice for consumers. If the term is understood in this broad sense, the question if consumer DCS have improved the access to justice must be answered affirmatively since the new business model helps to bridge the EU consumer law expectation gap (1). An actual improvement of the access to justice must incorporate more, though. *Ahmed* and *Kramer* define a legal system that provides 'access to justice' as a system that is "equally accessible to all" and leads to "results that are individually and socially just".[57] Hence, the concept of access to justice encompasses much more than a litigant's right to have "his day in court".[58] With the data available it is not possible to assess to which extent market-made solutions are actually expanding the access to justice in this narrower sense (2).

1. Closing the expectation gap

In the context of this article, speaking of an EU consumer law expectation gap is supposed to point towards a mismatch between justiciable events and enforcement. The number of justiciable events for EU consumers has, due to European legislation – complemented by national implementation acts –, steadily increased over the years. *Sandefur* and *Teufel* define justiciable events as everyday life "events or circumstances that have civil legal aspects, raise civil legal issues, and have consequences for people that are shaped by the civil law".[59] If a justiciable event requires the application of legal expertise (eg by a lawyer) in order to be handled properly, *Sandefur* and *Teufel* speak of a legal need.[60] A distinct feature of these justiciable events is that their volume "can increase as everyday life becomes more 'law thick,' with more kinds of activity becoming actionable under the law".[61] "When law seeks to order more activities of daily life, the frequency of justiciable events increases because more of the routine activity of life becomes justiciable."[62] This is the role that European law has played in regard to consumers, most notably by way of Directives like (EU) 2019/771 on certain aspects concerning contracts for the sale of goods. In other words: European consumers are experiencing an age of extended justiciability. At the same time, as Directive 2020/1828 points out, consumer law enforcement has not expanded equally: there is a "lack of effective means for the enforcement of Union law protecting customers" (recital two). This mismatch creates an expectation gap: If consumers are offered more ways in which they may act upon being harmed, they at the same time can expect that ways are provided on which this action may take place. The new DCS help to close this gap by safeguarding that more justiciable events become 'cases' which means that they, in the words of *Sandefur* and *Teufel*, receive "some kind of legal intervention".[63]

2. Missing data

Apart from the theoretical claim that using DCS closes the enforcement gap in EU consumer law it seems impossible to definitively answer the question whether the German experience indicates that strengthening market forces is the best regulatory technique to improve the access to justice, since the empirical evidence necessary to decide this answer is yet missing. An increased access to justice would be a function of both sides of the market. It is not enough if on the demand side consumers are interested in and able to use the new services. Additionally, on the supply side, the new services must also be effective, sustainable and provide their services in fair and accurate ways. In this regard, the DCS enforcement providers' profit aim must arouse scepticism. The fact that they look at claim enforcement from an entrepreneurial point of view guarantees that they offer an efficient enforcement mechanism. At the same time, it implies that they do not explicitly aim at fuelling the access to justice. From the access to justice point of view, the involvement of entrepreneurial parties in collective redress has, as *Kramer* and *Tillema* have pointed out, potential benefits as well as drawbacks: "First, it can fuel access to justice by providing adequate funding, but it could also create or sustain a claim culture. Second, it can improve price and quality competition and thus benefit collective redress litigants or, on the contrary, create a race to the bottom as is sometimes feared. Third, it can increase the quality of claims and equality of arms as funders can serve to filter out unmeritorious claims, but it could also lead to adverse selection and abusive behaviour by (potential) litigants. And fourth, the involvement of entrepreneurial third-party funders could contribute to aligning interest of the parties involved, but on the other hand it may also trigger a conflict of interests."[64] When it comes to the new consumer DCS, it is hard to evaluate these (de)merits. They, for example, tend to specialise and focus on the funding of a certain type of claims. As a result, typically only a low number of providers are offering one specific legal service, which raises the concern that these providers can demand a disproportionate share (eg 20-30 % success fees in the case of 'Flightright') of a litigation's proceeds. Furthermore, they are accused of acting in their own economic interest, rather than

54 German Federal Court, 13 June 2022, VIa ZR 418/21 [51]; German Federal Court, 13 July 2021, II ZR 84/20 [51].
55 German Federal Court, 13 June 2022, VIa ZR 418/21 [57, 58].
56 A Cordina, 'Is It All That Fishy? A Critical Review of the Concerns Surrounding Third Party Litigation Funding in Europe' (2021) ELR 270–280.
57 Ahmed and Kramer (n 47) 182.
58 Ahmed and Kramer (n 47) 182.
59 R Sandefur and J Teufel, 'Assessing America's Access to Civil Justice Crisis' (2021) 1 U. C. Irvine L. Rev. 753, 757.
60 Sandefur and Teufel (n 60) 759.
61 Sandefur and Teufel (n 60) 757.
62 Sandefur and Teufel (n 60) 758.
63 Sandefur and Teufel (n 60) 761.
64 Kramer and Tillema (n 2) 180.

that of the claimants by being overly-selective in accepting claims. The DCS platforms are certainly innovators in the legal services market but that does not imply that they are also legal risk takers. It remains to be seen to which extent the platforms will take on risky and speculative cases. When it comes to Dutch TPF, *Tzankova* and *Kramer* have pointed out that they are "typically not legal pioneers" and prefer to avoid "cases that are based on novel liability theories".[65] If the German DCS platforms choose a similar path, their impact on access to justice would be significantly lower. Finally, the DCS platforms provide legal services not only for consumers but also (especially in cartel cases) for large multinational corporate clients, that could have also (even though at greater troubles) relied on the traditional legal services market. DCS claim enforcement in other words is not restricted to 'David vs Goliath' types of disputes and might gradually shift away from consumer claims to more profitable business claims or to being only a platform that directs you to a partner lawyer in the future.

The problem in the end though is that there is little reliable data on how big the unrealized market for legal services in Germany was at any given moment in time. Only a regular series of surveys would allow regulators to compare the public experience with justice problems before and after the new consumer DCS entered the market. Though, even the Federal Court in its 2022 ruling could only state that the high caseload that civil courts are facing in the wake of DCS bundling claims in large numbers indicates that presumably consumer rational disinterest has been overcome and the access to justice has been facilitated without being able to point towards any data that would support this claim.[66] There are several reasons for this lack of data. For once, acquiring data on unmet legal needs is hard in general and evaluating the quality of new consumer assistance is even harder. Additionally though, regulators are also not focusing on this aspect at the moment. Directive 2020/1828 for example aims at contributing to fairer competition and creating a level playing field for traders operating in the internal market (recital seven[67]). Furthermore, it focuses on facilitating and reducing the price of cross-border litigations.[68] Both these goals do not necessarily encompass the creation of the most effective consumer redress mechanisms from an access to justice point of view. This shows the need for a more access-to-justice-focused and evidence-based future regulation of consumer claim enforcement that is based on a proper assessment if, for the sake of consumers, we should turn to new regulation or the market.[69]

V. Conclusion

The evolvement of a new consumer claims enforcement tool using debt collection services as a vehicle shows that Directive (EU) 2020/1828's top-down approach is not an effective way to improve access to justice. Instead, it offers consumers too little, too late.

1. Private enforcement of consumer law faces strong opposition, partly in unexpected forms. It is not only big companies that oppose more efficient forms of consumer law enforcement, but new enforcement tools must also overcome the traditional legal community's fear of losing business. Furthermore, the legal system must adjust to new enforcement tendencies. To make sure that legal service providers develop the necessary strength to thrive despite this two-fold opposition, strong incentives must be put in place. Otherwise, the EU's push for strengthening consumer law enforcement will be in vain. In light of the German experience it is doubtful whether the Directive will lead to the establishment of successful enforcement initiatives even though it prohibits them from becoming a viable business model.

2. Once, entrepreneurs manage to circumvent other stakeholders' resistance, the market itself is capable of innovating consumer law enforcement. Therefore, from a regulatory perspective, rather than introducing a new enforcement tool 'top down', it might be more effective to adapt a big picture perspective and explore whether there are legitimate reasons for this resistance or if it must be broken through paving the way for new entrants into the legal services market.

3. Finally, the described trend shows that we are lacking the necessary data to determine which technique improves the access to justice better: introducing new enforcement mechanisms or strengthening market forces. If access to justice is to be the overarching regulatory goal, regulators must therefore first gather more empirical evidence on what methods work. ■

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65 Tzankova and Kramer (n 3) 112.
66 See German Federal Court, 13 June 2022, VIa ZR 418/21 [37].
67 See also recitals two and six.
68 See European Commission, 'Access to justice' <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/civil-justice/access-justice_en> accessed 29 March 2023.
69 For a similar conclusion see C Hodges, 'Evaluating Collective Redress: Models, Evidence, Outcomes and Policy', in A Uzelac and S Voet (eds), *Class Actions in Europe* (Springer 2021) 38 f.