PERSPECTIVES OF CONSUMER LAW IN THE EUROPEAN DIGITAL SINGLE MARKET

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Abstract

The creation of the European Union brought to life the internal market and, at its center, lie the four fundamental freedoms. All the mechanisms that can be found at the core of the EU have helped abolish the barriers enacted against trading in order to consolidate the common market in which we can thrive. Together with the spectacular growth of the EU within the last decades, the legislation in the field of Consumer Protection has also gradually evolved, until reaching its current, performant state. Nevertheless, over the last few years, our world has been shaken due to crisis such as the one brought on by the pandemic. This also affected the consumers, as more of us shifted towards buying goods and services online. Unfortunately, although the level of innovation that businesses have shown is unprecedented, the threats that mount against the consumers' best interests, such as big data, are bigger than ever. And this is just the tip of the iceberg. In the years to come, with the development of smart contracts, blockchain, cryptocurrencies, AI and even the Metaverse, the legal framework will need to evolve faster than ever to keep up with the changes of our ever-digitalizing world. In this paper, I will analyze briefly the evolution of European laws governing Consumer Protection, focusing on the areas which have been mostly regulated, how the EU has tried to fight against unfair commercial practices, while also turning to more recent acts such as the Digital Services Act in order to better understand how they are attempting to make the digital market a safe place for consumers. Finally, I will focus on the changes that need to be implemented, while also offering some perspectives for the future and some legislative solutions that I believe would be necessary at EU level.

Key-words: consumer protection, digital single market, consumer remedies, case law, digital content, Digital Services Act.

1. Introduction to European Consumer Law

Ever since the early beginnings of our society, trading was crucial for survival. To trade came naturally to our ancestors, being a skill deeply embedded into human nature. As a consequence, they built institutions focused on facilitating such actions, which then evolved with the passage of time.

Looking back in history, before the European Union was even a budding idea, the general theory of obligations was laying down the groundwork for the development of civil law, contract law, and, of course, consumer law. In the Roman Empire, the jurisconsults and the emperor Justinian compiled a monumental work entitled "*Corpus Juris Civilis"* which is considered to be the root of law as we currently know it. This can be noted by analyzing the significant influence it has had on continental European law systems and civil law jurisdictions such as our country.

We cannot talk about consumer law without mentioning contract law. They are too deeply entwined to be treated as different topics. The development of a functioning legal framework around contract law was a laborious process across history. Besides the contributions brought forth by the Romans, we can note the *Magna Carta Libertatum* which contained provisions ensuring safe passage for merchants. In the Industrial Revolution, production and the exchange of goods and services expanded greatly in proportions and, the legal systems responded in kind. Thus, at a continental level, the work of the jurisconsults was adapted to the more modern times, and the Napoleonic Code was elaborated.

With the creation of the European Union, the internal market was born. At its core lie the four freedoms: free movement of goods, the free movement of persons, the free movement of capital, and the freedom of establishment and to provide services. In order to ensure that the internal market operates at capacity, at a European Union level, regulations and directives were adopted in the field of contract law. All of these worked together in order to remove barriers that plagued trade over the years. Of course, a European contract law doesn't exist, but the legislation enacted in key fields, such as consumer protection displays the coordinated efforts in ensuring that key issues are addressed in the same manner across the Member States.

The main principles safeguarding the European Union's competence to adopt legislation are the principle of conferral, the principle of subsidiarity, and the principle of proportionality. According to article 5 (2) of the Treaty on European Union (TEU), the EU boasts only with the competencies explicitly conferred to it by the Member States. In the Treaty of Lisbon, this principle was pushed a degree further and a clear delimitation of competencies, which was missing so far, was included. (Barnard & Peers, 2014)

The principle of subsidiarity is outlined in article 5 (3) TEU and it refers to the fact that the EU can enact legislation in a specific domain only if the Member States cannot do it efficiently. Finally, based on the provisions of Article 5 (4) TEU, the principle of proportionality means

that all measures undertaken by the EU have to be proportional with the goals that wish to be achieved. All of these principles have, at heart, the purpose of ensuring that the most appropriate laws are put into place for the benefit of the European citizens.

We can note three main categories of competencies that showcase the division between the EU and the State Members. These are: exclusive competencies (the EU alone can legislate), shared competencies (both EU and State Members can legislate), and supporting competencies (EU only supports, and complements the binding acts enacted by the State Members).

Consumer protection falls under the umbrella of shared competencies, according to Article 4 (2)(f) TFEU, which implies that the EU should act in accordance with the principles of subsidiarity and proportionality outlined previously. In the continuation of this paper, the legislation enacted in this field will be analyzed, together with its implications and the challenges brought forth by our ever-changing and evolving world.

The main purpose of the analysis that will be conducted in this thesis is to garner a better understanding of the Consumer Protection legislation within the EU and also to determine whether the changes that have been initiated by the European Commission, in the last years and good enough tools to ensure a suitable level of consumer protection. That stands as the basic question this dissertation will attempt to answer, while also shedding light on the efficiency of these changes in light of the pandemic and the raging storm caused by the technological developments.

In order to answer these questions, we will, as methodology, turn to researching the legal doctrine in this field, analyzing EU law, both past and present and the current proposals being developed. Therefore, the core of the materials analyzed will be made up of the EU treaties, regulations, directives, decisions and, of course, the jurisprudence of the European Court of Justice. Moreover, research articles and expert studies will also be used to analyze the impact of the pandemic and the drive for digitalization in the last few years on consumer behavior. The second research methodology I will undertake in my paper will be a comparative approach across the current legislation in the EU Member States, how the Consumer Protection Directives have been transposed into national law systems and the level of harmonization. This will help determine whether the current law proposals are built on a steady foundation that can support them in the long run and help protect the consumers all across the European Union.

The topic of consumer protection is very relevant in our current, turbulent landscape. It undoubtedly affects each and every one of us, probably in our daily lives. Thus, constant

analysis such as this one, needs to be undertaken in order to find the weaknesses in our current legislation and to determine how it can be improved upon. I believe that only through constant work can a performant Consumer Law continue to exist and work towards our benfit.

1.1 Historical evolution of provisions regarding Consumer Protection in the EU and the notion of consumer

The European Union boasts with a rich history and a series of measures enacted in order to help build and consolidate the common market as we know it today. Together with the development of the EU, the legislation protecting consumers evolved gradually and this section will explore this complex process.

The Treaty of Rome, signed in 1957, established the European Economic Community and included some of the first provisions, albeit indirect, in the area of consumer protection. This showcased that Member States understood, even then, the need of ensuring consumers benefit from protection within the common market. These measures, as inscribed in Article 39 and Article 40 related mostly to issues concerning agriculture and competition law. More importantly, with the Treaty of Rome, the countries that signed it, consented to develop a common market, with the four crucial freedoms and also with a set of common policies governing certain areas across all Member States, with the purpose of reaching integration within the economic area. (Horspool & Humphreys, 2006).

An important step in the development of legislation in the domain of Consumer Protection was undertaken with the Brussels Convention on Jurisdiction and Enforcement of Judgements. This Convention, in Article 13, offered a definition for a "*consumer*", stating that it is a person who has entered a contract for a purpose that is outside of his profession or trade. Across time, we will see that numerous international acts have proposed formal definitions for consumers, such as the Rome Convention on the Law Applicable to Contractual Obligations, from 1980 or the series of Directives enacted in this field.

Concrete actions were undertaken starting from the 1970s to elaborate legislation meant to protect the consumers. One of them is the resolution adopted by the Council of Ministers in 1975, which outlined a preliminary program destined to ensure consumer protection. Furthermore, this included the general principles and the objectives of a future consumer policy. With this, the Council of Ministers displayed their acknowledgment of the evolution of the world and the need for rules that would protect consumers — crucial actors in the economy

— from any abuses by traders or those offering services. Moreover, in the program, five consumer rights were included: the right to protection of health and safety, the right of redress, the right to protection of economic interests, the right to be heard, and the right to information and education.

The jurisprudence of the European Court of Justice contributed to the European Union's budding consumer protection policy. This was owed to the abundant case laws governing the free movement of goods, one of the four fundamental freedoms outlined previously in this paper. In the *Cassis de Dijon (Case 120/78)* ruling, the ECJ analyzed the German law which restricted the marketing of weak alcoholic drinks invoking the protection of consumer health and the protection of consumers from unfair practices. In its ruling, the ECJ stated that these practices were infringements on the free movement of goods and an unlawful suppression of the consumers' choices conducted by the State.

In addition to this, the judgment served as a pilot, being applied in other similar cases which involved national laws impeding the free movement of goods and narrowing the choices available to consumers. Such a limitation can only be imposed due to powerful reasons, which include public health or the defense of consumers.

The case-law of the European Court of Justice prompted the Council of Ministers to adopt a new resolution, in 1981. This resolution stood to reaffirm the rights and the principles which were outlined in the program from 1975. Also, it placed emphasis on the need for the participation of consumers in the process of decision making, putting forth the idea that agreements between interest groups could lead to the fulfillment of consumer protection goals.

With the Single European Act in 1986, the Community moved towards achieving an internal market by 1992, which, according to Article 14, is an area with no internal frontiers and where the free movement of persons, capital, services, and goods are in place. In regards to the development of policy regarding consumer protection, this act was the first primary legislation document that employed the use of the term "*consumer*" and, going a step further, stood as the foundation allowing the Community to adopt legislation concerning the consumers.

To ensure a comprehensive analysis of the historical evolution of consumer protection policy, one needs to also mention the Three-Year Action Plan of Consumer Policy in the European Economic Community. This was adopted in 1990 and its main purposes were to

contribute to the state of the labeling of products and to improve the security of the consumers regarding credits and package tours.

The Maastricht Treaty reshaped the internal market and put in place provisions regarding the field of consumer policy. Following this Treaty, consumer protection began to be the main justification for measures taken at EU level. This outlined the pressing need for a high-level, Union consumer protection policy that would safeguard the well-being of consumers across the Member States. (Stuyck, 2000)

Another important milestone, although not legally binding of itself, is the inclusion in the EU Charter of Fundamental Rights (2000) of Consumer Protection in Article 38. European Courts have referenced this Charter in numerous situations, as did the Advocates-General. This statement can be supported by the Opinion of the Advocate General offered in the case *Z. v Parliament (Case C-270/99).*

This brief historical presentation of the emergence of consumer protection legislation at EU level cannot stand complete without mentioning the myriad of regulations and directives that were adopted in this field. Together, they have helped shaped the current provisions into a solid framework that ensures a proper level of protection granted to the consumers. These Directives can be divided into two types: the ones that deal with certain marketing or selling methods and the ones that focus on a specific type of contract. Throughout the years, it can be noted that many of the Directives adopted in the first category contain exclusions from their scope which were not consistent across the board. (Kötz, 2017)

A minimum harmonization approach was followed with the early-adopted Directives. What this implies is that the Member States are allowed to introduce provisions in their national laws which can go beyond the minimum standards introduced by the Directives. However, with time, a transition has occurred and we can observe the shift that was conducted — from a minimum harmonization approach to a maximum harmonization.

Among the first directives that were adopted in the domain of consumer protection were the *Doorstep Selling Directive (85/577/EEC)* and the *Distance Selling Directive (97/7/EC).* The first of these two introduced rules regarding contracts born between consumers and traders or anyone who is acting on behalf of the traders, as long as the contract was concluded away from the premises of the business. The second directive regarded contracts concluded at a distance between consumers and suppliers of goods and services. This was seen as a very progressive step at the time of its adoption, because although it did not explicitly state that it

aimed to regulate e-commerce, that was, in fact, its main area of application when technology started its development. One progressive provision included in this directive was the right of the consumer to withdraw from the contract, within seven working days, without needing to provide a reason and without suffering any penalties. This new addition to the consumer rights was entitled the cooling-off period and, although it was affected by a series of exceptions, for instance in the case of financial services, this represented a significant step forward in terms of protecting consumers engaging in e-commerce.

Thus, the Distance Selling Directive was a crucial, pioneering legal instrument in protecting consumers who engaged in e-commerce, ensuring they have at their disposal needed information and a period to withdraw from the contract. Both of these directives were abrogated by the *Directive on Consumer Rights (2011/83/EU)* with a minimum harmonization approach and which is still applicable today.

One of the fields which did not fall under the umbrella of the provisions included in the Distance Selling Directive was the one of contracts concluded at a distance for financial services. In this specific domain, the EU adopted the *Distance Marketing of Financial Services (2002/65/EC).* To this day, it is still applicable.

Another directive enacted in the field of consumer protection is the *Consumer Sales Directive (1999/44/EC).* This had its foundation in a proposal submitted by the European Commission in 1996, with a minimum harmonization approach, but with a significant impact. Its provisions are applicable to all consumer transactions, regardless of the manner in which they are concluded. The purpose of passing this Directive was to help harmonize all the different national laws and to offer strong consumer protection.

In accordance with the Consumer Sales Directive, the consumer has the right to have the goods brought into a state of conformity without charge through repair or replacement. This is subject to proportionality, meaning that the remedy needs to be proportionate and not impose, on the seller, costs that when compared with an alternative remedy are unreasonable. If the lack of conformity is significant, the consumer also has the right to rescind the contract.

The most important act enacted by the EU in the field of consumer protection was the *Consumer Rights Directive (2011/83/EU)* which replaced both the Doorstep Selling Directive and the Distance Selling Directive. This was a maximum harmonization directive that regulated both online and offline transactions. Moreover, this put forth not only a standard set of pre-

contractual information obligations but also a set of rules regarding the consumer's right to withdraw from the contract. (Dumitru & Tomescu, 2020)

In our country, the mandatory transposition into national legislation was conducted through Government Emergency Ordinance no. 34/2014. The fact that in Romania it had to be implemented through an Emergency Ordinance, rather than a law *stricto sensu*, showcases that Romania was slow, this time and not only, in fulfilling its obligation of transposing EU Directives. For the Consumer Rights Directive, the timeframe in which it had to be transposed ended on the 13th of December 2013, and the Emergency Ordinance was adopted immediately after the Commission started the infringement procedure against our country on the 14th of January 2014. The penalties that the European Commission was filing for were of 1.8 million euros and an extra 650 euros/day for any additional delay, based on the Communication of the European Commission.

This Directive applies to Business-to-Consumer contracts, regardless of the method of settlement, which could be face-to-face, online, etc. Still, this legal act didn't escape criticism, due to the fact that it couldn't be applied to all types of contracts (Weatherhill, 2012). This referred to its lack of applicability for contracts concluded, for instance, for financial services or package holidays, which are governed by other directives.

Tying in with the previous definition outlined before for the notion of "*consumer*", we can note that through this Directive, the definition was narrowed in comparison with the one from 1968. Thus, according to the Consumer Rights Directive, a consumer is a *natural* person, acting for purposes outside of his business, trade, profession, or craft. We can observe that the EU legislation in regards to consumer protection is now targeted at safeguarding individual rights, but not those of companies or other *legal* persons. The case-law of the ECJ went a step further though by addressing the situation in which a natural person concludes a contract for products that could be used either for personal or professional purposes. Thus, in the *Johann Gruber v. BayWas AG (C-464/01)*, the ECJ deemed that if such a contract is concluded for purposes that partly fall under the umbrella of the person's trade and partly outside, with the condition for the trade purpose to be limited in regards to the overall context of the supply, then that natural person could also be considered a consumer. Therefore, they would benefit from the legislation built around the topic of consumer protection.

This Directive brought forth important contributions to the field of consumer protection such as the standardized pre-contractual information obligation, along with rules regarding the

right of withdrawal that will apply to distance contracts and off-premises contracts. The first type of contract refers to a contract between a consumer and a trader without both of them being physically present in the same place, while the latter is a contract where both trader and consumer are present in the same place, with the mention that this place is not the premise from which the trader conducts their business. Another extremely important provision here is the right to *termination at will* which grants the consumers the right to cancel the contract within 30 days if no other agreement was made upon concluding the contract. Furthermore, the trader has the corresponding obligation of reimbursing the integral amount.

Digitalization constantly shaped and reshaped the world we live in. Contract law and consumer protection law could not evade this process either. Therefore, the legislation enacted in the last decades reflects this transition towards a digitalized world. One example from the Directive previously analyzed is the rules designed to address the specificity of digital content such as the fact that a consumer cannot withdraw from a contract for digital content after using it (downloading the software) unless the download occurred without consent from the consumer.

A more in-depth analysis of the EU directives recently adopted reveals further adaptation to the ever-evolving world and the manner in which it creates new requirements in terms of consumer protection. As a consequence, the *Package Travel Directive (90/314/EEC)* was replaced through a different act dealing with a specific type of contract, the *Package Travel and Linked Travel Arrangements (2015/2302/EU)*. Through this new directive, the protection granted to those traveling was increased, by taking into account the recent developments in terms of tourism. Therefore, the term "*package*" refers to a combination of a minimum of two types of travel services acquired for the same trip or holiday, while "*linked*" adds the need for these different travel services to be concluded as separate contracts, with separate service provides.

The rights that this directive grants to consumers are very comprehensive, painting a picture of utmost safety for those intending to purchase travel services. From those, we will mention the right to pre-contractual information, the right to price reduction in the event of cost reduction, the right to assistance, and, crucial for most of us, the right to withdraw from the contract before the beginning of the package.

One final Directive which completes my presentation of the consumer law *acquis* within the EU is the *Directive on Unfair Commercial Practices* (2005/29/EC). This was a huge

milestone in protecting the consumers because it entirely prohibited unfair practices in consumer transactions, going as far as providing, in Annex 1, a list of 30 unfair practices that cannot be accepted in regards to transactions concluded with consumers. This directive was the source for a generous jurisprudence of the ECJ, which will be analyzed in another section of this paper due to its great effect in its mission of defending consumers.

All of these legal instruments briefly presented in this section help showcase how consumer protection grew to become an important area of EU policy. With all of these developments, the EU was able to anticipate and properly respond to the technological revolution, becoming one of the leaders in terms of consumer protection policies. This can be further proved by the new strategic framework on EU consumer policy adopted by the Commission in November 2020.

The *New Consumer Agenda* is very complex and tackles current issues, including those brought on by the COVID-19 pandemic. Briefly, the goals outlined here include addressing the new challenges and opportunities that arose from the pandemic and also from the digital and green transitions. Moreover, it aims at protecting the vulnerable consumers in the aftermath of the economic crisis spurred on by the system shock owed to the pandemic and also, to ensure international cooperation in safeguarding consumer rights within a globalized world.

1.2 Main instruments in place to ensure consumer protection. Most important areas in which consumer protection legislation is in place.

As outlined previously, an effective consumer policy lies at the foundation of the proper functioning of the EU single market and, by proxy, of the entire economy. Thus, it becomes imperative that they are granted protection. This has been a monumental task for which a series of instruments were employed. The most important ones were presented in the section above and are represented by the EU legislation constantly adopted in this field. Within the last couple of years, as the world was suffering through the pandemic, a swift response was prepared in order to protect consumers from emerging challenges. All of these will be expanded on further in this paper. Besides the legislation in the field of consumer protection, we cannot ignore the EU institutions that are systematically monitoring conditions for consumers in areas such as knowledge and trust through the consumer conditions scoreboard.

Of course, we must mention the mechanisms in place for the enforcement of consumer protection. Without them, all of this would be simply smoke and mirrors and the legislation could be ignored according to the interests at work. Thus, responsible for the enforcing of

consumer law are the national authorities. In Romania, this is represented by the National Authority for Consumer Protection, which was organized and functions in accordance with *Government Decision no. 700* from the 11th of July 2012 and all of its amendments brought on by a series of subsequent Government Decisions. In accordance with *EU Regulation 2017/2394* on cooperation between national authorities responsible for the enforcement of consumer protection laws, these national authorities can collaborate in order to dissuade breaches of consumer protection, while also being able to conduct coordinated investigations.

In addition to this, we can also note other instruments adopted at a sectoral level that aim to better the framework governing the protection of consumers. The first one that I will briefly present is represented by consumer groups. Therefore, we have the *European Consumer Consultative Group (ECCG),* the main forum for consultation of the Commission with both national and European consumer organizations. The ECCG was set up through *Commission Decision 2009/705/EC* and it can advise the Commission on issues that regard consumer interests in the EU.

The impact of such efforts would be significantly reduced if the instruments to empower consumers were not put in place. Thus, the EU has constantly worked on areas such as consumer information or consumer education. One of the projects undertaken to this end is *Dolceta* which was an interactive online tool that taught consumers about their basic rights, product safety, and also financial literacy. Taking into account that Romania is one of the countries, at EU level, with the smallest percentage of financially literate persons, the importance of such an endeavor becomes clear. Finally, the European Union has also established a network of European Consumer Centers aimed at offering information and advice on cross-border shopping.

Through the course of time and as the EU consumer policy evolved, a series of key areas distinguished themselves. One of them and, arguably, the most important one up until recently is the area of **product safety**. In accordance with the requirements contained in EU law, all products destined for consumers need to meet requirements regarding traceability, measures to avoid safety risks, and information to consumers. Safety is a responsibility that befalls the producers and the **CE marking** certifies that products are compliant with the applicable safety norms. Two directives, *Directive 2001/95/EC* and *Directive 1999/34/EC* safeguard this particular key area of consumer protection.

Although we sometimes take it for granted, the area regarding **food safety and labeling** has been a source of numerous scandals throughout the years. Thus, it has enacted a wide range of regulations aimed at making the labeling of food reliable and implementing strict hygiene standards in the internal market. Among these we will mention *Regulation 1924/2006* on nutrition and health claims made on foods; *Regulation 834/2007* on organic production and labeling of organic products and *Regulation 1830/2003* regarding the traceability and labeling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms.

A hot topic at the moment, with mounting prices all across the world and the governments vying to ease the burden befalling the consumers is the **energy area.** A series of directives have been adopted in this domain, among which we can find *Directive 2009/72/EC* concerning common rules for the internal market in electricity, *Directive 2009/73/EC* concerning common rules for the internal market in natural gas, but also *Directive 2010/30/EU* on the indication by labeling and standard product information of the consumption of energy and other resources by energy-related products and *Directive 2012/27/EU* on energy efficiency.

The trend has been to push for growth in sustainable energy sources and we have to mention *The Clean energy for all Europeans* package adopted in 2019, which is meant to drive the transition towards clean energy. Moreover, in light of Russia's aggression towards Ukraine, the Commission has recently drafted a plan to make Europe independent from Russian fossil fuels before 2030. Undeniably this is a difficult endeavor and consumer protection measures should be at the forefront of this undertaking. Already we have noticed a significant increase in prices for both electricity and gas and, although measures have been taken at EU and Member State level such as the *Energy Prices Toolbox* which has helped mitigate the impact of high prices for vulnerable consumers, these are not long-term solutions. I believe further concrete actions should be taken to ensure the burden on those vulnerable doesn't become unbearable.

Protecting customers in the **financial services** is another laborious task at EU level, made even harder because a significant proportion of the customers don't understand complex financial products or are tempted to take out too big of a loan based on uneducated choices. Furthermore, some financial service providers have used unfair practices such as misleading descriptions of financial products and this has spurred the adoption of strict rules aimed at protecting consumers. As an example, we can mention *Directive 2007/64/EC* on payment

services in the internal market, *Directive 2005/29/EC* concerning unfair business-to-consumer commercial practices in the internal market, and *Regulation 1286/2014* on key information documents for packaged retail and insurance-based investment products.

Finally, an extremely complex area, which has suffered tremendous changes over the course of time is the **Digital market**. So big are the current evolutions shaping the society that ensuring the protection of consumers in the digital single market has grown into a priority for European legislators. The pandemic has represented a strong push that directed consumers more towards e-commerce. Thus, a myriad of regulations and directives have been adopted that cover e-commerce, but this field is still ripe and, surely, many more pieces of legislation will be adopted in the further years. As it is, this key domain will be further explored in the continuation of this paper, especially as it bears a direct effect on all of our lives and our futures.

1.3 The Directive on Unfair Commercial Practices — analysis and implications using the Case Law of the ECJ.

The Unfair Commercial Practices Directive (Directive 2005/29/EC) was enacted in order to ensure the full harmonization of national laws regarding unfair commercial practices. As a consequence, it covers areas such as misleading advertising, marketing strategies, and even post-sale practices, with the purpose of increasing the protection offered to consumers and facilitating the functioning of the internal market. One noteworthy exclusion from the scope of this directive are any matters that concern intellectual property. Nevertheless, this directive was an extremely important milestone in the European Union's efforts to prevent traders from exhibiting unfair practices towards consumers.

As it usually is the case with such pioneering legislation, this directive also spurred debates during its adoption process. The main topic of discussion was the issue of which consumer benchmark is the appropriate one to be chosen. This stemmed from the difference in which national courts of the Member States addressed this topic. Therefore, some set this benchmark at the level of a more critical consumer, thus placing emphasis on consumer responsibility, while others set it at the level of a more naïve consumer, meaning more emphasis on the trader's responsibility. (Duivenvoorde, 2015) This particular topic was also addressed by the ECJ, in 1998, way before this Directive was adopted, in the *Gut Springenheide (Case C-210/96)* by saying that this benchmark should be set at the level of an *average* consumer, who is reasonably informed and observant. Resonating with the Case Law of the ECJ, the directive adopted this

same approach, together with two other alternative benchmarks that aim to grant an added level of protection to the most vulnerable consumers (target group benchmark and vulnerable group benchmark).

According to the final form of this directive, Article 5 introduces a general clause that safeguards against unfair commercial practices (contrary to the requirements of professional diligence, materially distorting the economic behavior of the consumers). Moreover, Articles 8 and 9 clearly prohibit not only misleading actions but also misleading omissions, while the first annex includes a *black list* of twenty-three misleading practices and another eight aggressive ones which are regarded as unfair regardless of the circumstances such as pyramid schemes, use of the claim 'free', direct appeals to children or products which cannot legally be sold.

Because the interpretation of this Directive and the manner in which the Member States applied it gave way to some problems, the European Commission, in 2009, first published the *EC Guidance* which aims to offer guidelines in regards to these specific issues. This has been regularly updated, in order to ensure that it keeps up with the requirements of our society. However, this is not a formal legal document, it cannot give rise to rights and obligations to subjects of the law, therefore, rulings of the European Court of Justice are needed to solve issues regarding the interpretation of this Directive.

Consequently, the Unfair Commercial Practices Directive and the interpretation of its benchmarks became the root of a myriad of cases under the ECJ, which will be analyzed in the continuation of this section. One case that should be mentioned in regards to the average consumer benchmark is the *Adolf Darbo case (C-465/98).* This case served to give a more in-depth interpretation to the characteristics of informed and observant consumers.

In this particular situation, Adolf Darbo was an Austrian manufacturer of Jam who sold its products in Germany under the name '*d'Arbo Naturrein'* which was considered a problem in the vision of a German consumer organization, because the noun *Naturrein* means naturally pure and the jam had as ingredients an addictive substance (pectin) and residues of lead and pesticides due to soil pollution. The decision of the ECJ when asked to advise on this matter by the national court was that consumers were not misled because pectin was listed among the ingredients on the product's label. Therefore, according to the ECJ's vision of the average consumer benchmark, reading the labels of food products should be undertaken before making a purchase. Regarding pollution, the ECJ further argued that based on common sense,

consumers would know that fruits that grew outside are exposed to a certain level of soil pollution.

Another important instance of the Unfair Commercial Practices Directive needing to be interpreted by the Case Law of the ECJ was in 2015 as a result of a request for a preliminary ruling asked for by the Paris Court of Appeal in *Case C-562/15* (Smith & Chance, 2017) The preliminary request was needed due to a dispute between Carrefour and ITM Alimentaire International (ITM), both operators of supermarkets and hypermarkets in France. After an advertising campaign in which Carrefour showed that its prices were consistently lower than ITM's prices, ITM complained that Carrefour was comparing its hypermarket prices to ITM's supermarket prices and that the store format affected the price of goods, making for a distorted comparison.

The ECJ made a note of its own case law, stating that comparative advertising should not be used anti-competitively or in a way that affects consumer interests. It used the Unfair Commercial Practices Directive and stated that an omission was considered misleading when it omitted material information according to the needs of an average consumer making a purchase decision. It also stated that prices typically vary based on shop format, which could lead to asymmetrical comparison. Such information should have been provided to the consumers in the promotional materials, otherwise, it counts as material information hidden. This is a real-life, quite recent ruling that proves the importance of the Unfair Commercial Practices Directive in protecting consumers from omissions and asymmetrical comparisons that could bring them prejudice.

Based on the Court's ruling in the *Abcur* case (*Joined Cases C-544/13 and C-545/13)*, the ECJ also made it clear that this Directive can be applied together with other sector-specific pieces of EU legislation, in a complementary manner. This was justified by the fact that the general requirements put forth in this Directive can work together like pieces of the same puzzle with more specific requirements included in other EU legal instruments. Following this, it makes sense to reach the conclusion that there is quite an interplay between the Unfair Commercial Practices Directive and other EU laws such as the Consumer Rights Directive, the Services Directive, or the e-Commerce Directive which were presented previously.

As mentioned before, the EC Guidance was, in fact, regularly adopted. In a truly comprehensive analysis, one cannot ignore the 2016 guidance document issued by the Commission. Thus, in this guidance, in light of a plethora of rulings by national courts, the

Commission aimed to clarify notions such as '*commercial practice', 'average consumers',* and *'vulnerable consumers',* while also offering examples of misleading actions, omissions and aggressive practices such as copy-cat packaging. Because legal instruments need to evolve with the course of time, to respond to the needs of their subjects, the EC Guidance also touched upon issues that appeared years after the adoption of this Directive way back in 2005.

One such issue was *greenwashing* which relates to claims by companies, which convey misleading information about products, stating they are sustainable, when, truthfully, that is not the case. It is clear that even nowadays companies are employing such tactics and that firm legislation should be enacted in order to discourage them. Other issues that emerged within the online sector, this time, were the *paid placements* to consumers and also, countless instances of traders posing as consumers and writing misleading online reviews of their products and services.

Furthermore, the protection of consumers in an exponentially more digitalized world was definitely one of the Commission's concerns when elaborating this guidance. This statement becomes abundantly clear after analyzing their outlined position on practices such as *hidden marketing* on social media platforms, which could target children and teenagers (avid users of social media, while also belonging to the group of vulnerable consumers) and push for the *user's informed consent* in regards to their preferences being tracked and collected by traders through means such as cookies. The EC Guidance made it clear that practices such as customer profiling could be a violation of the Unfair Commercial Practices Directive if used with the endgame of exerting undue influence.

In light of the radical changes awakened at the societal level by the pandemic, the European Commission published a new Guidance in regards to the Unfair Commercial Practices Directive. Through this, the Commission went a step further, as compared with its 2016 Guidance in regards to the application of this Directive to specific fields such as sustainability, but also the digital sector. Therefore, in this Guidance, it tackled issues such as the commercial practices of online platforms, the transparency of search results, influencer marketing, data-driven practices and dark patterns, and consumer lock-in. One last, highly recent development regarding this Directive is the adoption of the *Modernization Directive (Directive 2019/2161)* of the European Parliament and of the Council, which is a part of the *New Deal* for consumers and introduces changes to the Unfair Commercial Practices Directive such as rules on the marketing of dual quality products and rules on the private enforcement of the previous

Directive. (Duivenvoorde, 2019) The Modernization Directive is meant to be transposed and adopted by the Member States, together with all measures needed to comply with it by the 28th of May 2022. This shows the EU's constant concern for improving the protection granted to consumers, but, I believe, it is too early to tell with certainty what these changes will bring, in practice, to consumer protection. Furthermore, this process might suffer delays, especially when taking into account the current tumultuous state of the world and with a military conflict raging on in Europe.

While this was only an introduction into the challenges posed by the digital world to the complex issue of consumer protection, the subsequent sections of this paper will linger more on the topic in the attempt of painting a comprehensive picture of its current state and the moves that will need to be undertaken in the future at European Union level, especially due to the changes brought on in consumer behavior by COVID-19, which will be tackled further on.

1.4. Impact of the COVID-19 pandemic on consumer behavior

The COVID-19 pandemic shocked the entire world to the core. It brought on changes that cannot be undone. However, the fight for progress has to continue and the people, including the citizens of the European Union, need to be quick in adapting. One way to push through the unknown and come out triumphant is through clear policies. Before enacting them though, one needs to fully comprehend the severity of the impact the pandemic has had on all facets of our lives — including consumer behavior and, indirectly, the requirements of the consumer protection legislation.

According to data released by the European Commission, about 71% of consumers shopped online in 2020. Moreover, according to Eurostat, online purchases done by internet users increased by over 20% in 2021 as compared with 2011. The largest share of online shoppers was comprised of those aged between 25-54 years old. When thinking about the typical internet user, those numbers could seem reasonable, however, we have to note that this increase is present, to a certain extent, in all age groups. Thus, even among the category of people with the ages of 55-74, online shopping increased with approximately 15% in the last decade.

All of the previous numbers stand confirmed when looking at the evolution of e-GDP (the share of GDP that comes from e-commerce). According to a report compiled by Ecommerce Europe, the share of e-GDP from the total European GDP has grown from 3.11% in 2017 to 4.6% in 2021. Cumulatively, these paint the picture of a world in which online shopping has

become the norm. In my opinion, this would have happened nevertheless within the next years, but the pandemic has considerably sped up the process.

Yet, one thing that we cannot deny is that, with the growth in e-commerce, the threats faced by consumers have also expanded in number. Rogue traders, online fraud, and goods plagued by non-conformity issues. All of these have become common occurrences in our post-COVID-19 landscape. Based on research conducted by Arkose Labs, in the first quarter of 2020, 26.5% of all online transactions were scam attempts.

The Commission's response to these issues was swift and we can note that it tackled them together with the Consumer Protection Cooperation network. Moreover, it has vowed to continue to analyze the long-term impacts of COVID-19 on consumption patterns and use it as the foundation for further future policies. We can note this by looking at the New Consumer Agenda briefly presented previously. One of its five key pillars is the *digital transformation*. Through this, the Commission will attempt to address the problems that I've outlined here and much more. It wants to help protect consumers from online commercial practices that impede them from making informed choices such as hidden advertising and dark patterns. Furthermore, it was to place the consumers at the forefront of the discussion regarding the digital economy and the shifts Artificial Intelligence and financial services digitalization will bring to the world.

The Digital Single Market has been a priority for the Commission ever since 2015, this strategy's goal being to render virtual borders obsolete and to enable consumers to access cross-border online content easier. Undoubtedly, when considering everything that I have presented, the pandemic has served as an enormous driver for digital transformation within the EU. I would go even further, labeling it as a potential catalyst, lighting up the fire that was needed in order to achieve further digital single market integration. If that were to come to pass, I harbor no doubt that our society would be better prepared to deal with systemic shocks than it was in the present. However, many challenges remain in the face of the Digital Single Market, and the framework required to ensure an effective consumer protection is quite tricky and needs work. In the continuation of this paper, I will try to paint a vivid picture of it all, while also offering some perspectives for the future of European consumer protection.

2. Protecting the consumers — a laborious task made even more complex by digital transformations

The digital transformations that are happening as we speak in our society have provided consumers with a myriad of opportunities, putting at their disposal innovative new products or allowing them to shop from across borders with a touch of their screen. At the same time, however, it has brought to light the uglier side of technology and exposed them to risks that had been unfathomable a decade ago.

Legislators, the EU in particular, have worked tirelessly in order to create a framework that responded properly to these changes. Regulations and Directives were enacted to this end, with significant results, *The General Data Protection Regulation* (GDPR) being perhaps one of the most famous ones. The Digital Single Market was elaborated at the EU level, together with the Digital Services Act package, both of which will be explored in the following section.

They all addressed significant issues such as big data or information asymmetry, but, unfortunately, shocks such as the COVID-19 pandemic proved to us just how big these threats are and how much they can impact regular consumers, exposed to risks while engaging in e-commerce. These issues will be further expanded on in the continuation of this paper, outlining the current state of the legislation, and the plans that have been drawn up at EU level while also offering some suggestions for future improvement.

2.1 The Digital Single Market and its implications on consumer protection

The Digital Single Market was conceived, at EU level, as an essential part of the Single Market. Before proceeding with the analysis of its process of creation, I find it important to define the Digital Single Market in order to better understand its implications regarding consumer protection. In short, the Digital Single Market is an ecosystem in which both citizens and businesses can assess online services under fair conditions for both personal data protection and competition, regardless of their nationality or residence (European Commission, 2015). Through this strategy, the online sales across borders will significantly increase, because the consumers will also feel safer to engage in such activities. At the present time, one of them, if not the biggest barrier, in the face of widespread online selling across borders lies in the innate fear that consumers have ingrained in their minds. Of course, it is just, especially due to the fact that in the last years the number of scams has exponentially gone up, as shown in the previous chapter. However, with the legislation that is being adopted across the EU, which will be presented in this chapter, the consumers' trust will gradually increase, resulting in undeniable economic benefits for the EU.

As mentioned before, the importance of legislating the digital developments of our world is not a new concern of the European Union. No, in truth, the focus on supporting electronic and online services can be gleaned by analyzing the '*eEurope 2002 Action Plan'* and also the '*eEurope 2005 Action Plan'*. Through these two instruments, the European Commission demonstrated that it had fully acknowledged the budding digitalization of our world. Upon a more detailed glance, in these plans, the Commission aimed towards strengthening the digital infrastructure in Europe and bettering the digital skills possessed by potential users. With this as a starting point, joint efforts between the Commission and the Member States led to the creation of the foundation for the '*eServices'* later on (Schmidt & Krimmer, 2022).

Further steps were taken towards initializing the Digital Single Market when the *'i2010 eGovernment Action Plan'* of 2005 defined a series of objectives which included providing effective and efficient eGovernment services to EU citizens, providing all public procurement online, and also providing secure online authenticated access to platforms, emphasizing the need for security in the digital world.

The *Malmo Declaration* (2009), together with the *2010 Digital Agenda* paved the way towards furthering the evolution of digitalization within the European Union. Both of these documents established clear plans towards developing the digital single market, acknowledged the need to create trust and security and contained provisions aimed at enhancing the access to high-speed internet, while also increasing the level of digital literacy among the population. All of these efforts showed signs of fruition when *Regulation (EU) 910/2014* of the European Commission and of the Council on electronic identification and trust services for electronic transactions in the internal market was adopted. This Regulation replaced the *Electronic Signature Directive (Directive 1999/93/EC)* and set up the framework for using foreign digital identities for citizens and businesses in cross-border eGovernment services (Krimmer & Webster, 2021).

In the following years, it is undeniable that the Internet and all things digital took off, taking the world by storm. All that had been building up, reached its climax and the people grew more and more dependent on the digital world. Thus, the efforts of the European Commission intensified and it proposed a strategy on the Digital Single Market in order to react to the Digital Revolution taking place. As such, the Juncker Commission presented an astounding 30 legislative proposals that belonged to the 2014-2019 strategy on the Digital Single Market. Jean Claude Juncker himself publicly stated that the EU must take advantage of more

opportunities provided by digital services, as they know no borders (European Commission, 2014).

In the 2014-2019 Digital Single Market Strategy, we can note the existence of common rules for online sales, the revision of both the *Payment Services Directive*, but also of the consumer protection rules, the removal of geo-blocking for streaming services, and the enaction of a brand-new Regulation on the free flow of non-personal data. On the grounds of this Digital Single Market lied three pillars: *Access* (constant improvement towards providing access to consumers and businesses to digital transactions, non-digital goods, services, software or intellectual property in the EU); *Environment* (the constant adaptation and creation of conditions and an even playing field for digital networks) and *Economy and Society* (the development of the proper environment for supporting the growth of the digital economy and consumer wellbeing). Based on the European Commission Communication from 2015, we can observe the development of a roadmap in this regard, containing 16 key actions including a modern European copyright law or partnerships with the industry of cybersecurity.

Another important step was the Large-Scale Pilot TOOP from 2017-2020 which implemented the *'Once-Only Principle'* (OOP). What this principle aims to accomplish is to ensure that end-users (regardless of whether businesses or citizens) will not need to provide any information more than once. This principle can be accomplished through two different methods: either a country implements it and shares copies of the information with other government entities or through the creation of a data exchange layer where information is entered and stored only once, eliminating any duplicate copies. There is a larger discussion here, especially in light of data protection and the need to comply with GDPR, but this will be expanded upon in another section of this paper. What is important to mention here, in regards to the Digital Single Market is that the EU Member States have showcased their commitment to implementing this principle and that, according to Article 14 of the *Single Digital Gateway Regulation*, there are 21 services that should be provided on a cross-border basis within this Digital Single Market, all by the end of 2023.

During Jean-Claude Juncker's presidency of the Commission, the Digital Single Market was the second priority overall and, we can notice that, as the mandate changed, this fact stayed the same. These concerns are also echoed among citizens. This becomes obvious when looking at the results of a special Eurobarometer survey conducted in September and October of 2021. According to this particular survey, 81% of the respondents believed that digital tools and the

Internet will play highly important roles in their lives, bringing at least an equal number of advantages and disadvantages.

However, over half of the citizens surveyed (56%) expressed their concerns about the rising in cybercrime and also about the potential of their personal data being abused. Looking at recent history and scandals that have plagued our society, these are obviously valid concerns that should be addressed and this paper will attempt to do so in a future section. One final statistic that I find important is the outstanding number of EU citizens (82%) that would believe it useful for the EU to define a common vision in regards to digital rights and principles. This is certainly a pressing need that the EU has already started tackling and should continue to do so in the future.

Without a speck of doubt, the Digital Single Market is one of the most ambitious and prominent projects undertaken at EU level in the last couple of years. If done right, it could bring about great opportunities for the consumers located in the European Union, since it removes barriers and helps create opportunities for trading and innovation, making everyday life easier and helping to boost their confidence in cross-border e-commerce. This could be an important point of difference, seeing as, according to Eurostat, in 2020, approximately 88% of individuals made an online purchase from national sellers, while only 40% of the same individuals purchased from sellers located outside their country of origin. However, rarely are things entirely black or white. An area of grey will always exist and the continuation of this section aims to explore the ramifications of the Digital Single Market's development on the European consumers and the protection granted to them by the European Union.

One of the most important measures taken as a result of the push for the Digital Single Market and with a direct effect on consumer protection is the replacement of the Consumer Sales Directive with the *Online Sales Directive (Directive 2019/771/EU).* This directive applies to digital services or content that is offered together with the goods being sold. For better understanding, I will offer some examples which would include smartphones or even wearables such as smartwatches. Through this, the existing level of consumer protection was maintained or even increased, but not only when it comes to online sales, but also to other distance sales of goods.

A change that is introduced through this Directive is that the protection granted to consumers is extended, as they are given the right to withhold the payment of any remaining parts of the price until the seller brings the goods into conformity according to the contract

concluded. It also allows consumers to terminate the contract in case of a minor breach in the instance when repair and replacement failed or cannot be undertaken. Moreover, a two-year legal period in which the seller is liable for lack of conformity is introduced, while, at the same time, the presumption of non-conformity is extended to an extra two years. Finally, we have to note that there is a reversal in terms of the burden of proof, which entails the fact that the consumer simply has to indicate that the good is defective (Manko, 2015). Regarding the guarantees stipulated in terms of e-commerce of physical goods, we cannot skip over the fact that a guarantee period of two years was stipulated and that this, based on the Commission's official statements, could lead to the commercialization of better, more durable goods. (Havu, 2017)

Another important measure directly affecting consumers within the European Union is the *Digital Content Directive* (2019/770/EU). This is a revolutionary piece of legislation as it contains rules for contracts and transactions for consumers which also include digital services and digital content. This was an enormous move as the sector that profited off digital content was growing at an extremely fast rate. With this directive, the EU tried to protect consumers in their contracts with traders that endeavor in supplying both digital services and digital content. As an example, this directive can be applied in the case of computer programs, audio or video files, games, e-books, or software-as-a-service. What is more, this directive also applies to contracts in which the consumer offers up to the trader their personal data except when this data is only processed in order to provide the digital content or service. Pursuing this line of thought, it becomes obvious that this includes social media platforms such as Facebook or Instagram which have given rise to serious challenges in regards to protecting consumer information. Big Data has graced newspaper headlines for a reason and a further entire section of this paper will be focused on tackling it.

Further on, I will attempt to succinctly present the *Digital Content Directive*, in order for us to better understand the direction in which the EU is heading in terms of consumer protection in the Digital Single Market. Thus, this directive encompasses four objectives which are: being fitting and appropriate for its aims, treating cases of lack of conformity, providing legal guarantees, and, finally, including provisions regarding updates — important for our day-to-day activities.

Different from the Online Sales Directive, with this new piece of EU legislation, in instances where there is a lack of conformity in terms of the digital content provided, the

consumer has the right to terminate the contract immediately, to have it brought into a state of conformity within a reasonable period of time or to ask for annulment and subsequent reimbursement. The non-conformity claim can be brought by the consumers without any specified time limits. In addition to this, the directive also addresses the period of guarantee. As such, in the case of streaming services, like the case of Netflix, it must extend throughout the entire contract, while in other cases, it cannot be lower than 2 years. Going a step further, the directive also addresses the question of updates or modifications. These, in the case of continuous supply, should be free of charge or, if not, the customer should be granted the option to keep the initial version without additional costs.

Even at first glance, it is clear that important steps are being taken in order to ensure the protection of customers within the Digital Single Market. This can also be supported by the choice of opting for full harmonization in terms of several key aspects like conformity or remedies (Havu, 2017). The final directive outlined in this section — the Digital Content Directive — opened up the long path for further regulation in this area. Of course, there are also limits to its reach and we cannot help but point out that this directive lacks provisions in some key areas, especially for modern consumers. These areas include the transactions that operate using private data or backlogs of historical activities. Nowadays, this is a highly important area that cannot be ignored. Data is a new, powerful form of currency and consumers are the ones offering it up for usage. In some cases, this is done unconsciously. Due to the colossal importance of this subject, it shall have a further part which will expand on it.

In Romania, the Digital Content Directive has been transposed successfully into our national law, through the *Emergency Ordinance no.141/2021*. Moreover, there has been a need for some national legal provisions which ensured that the directive was successfully transposed and was able to produce its intended results, which entered into force on the 9th of January 2022. Through this, the national laws also included punitive measures which are meant to lead to the compliance of the obligations brought forth by this Directive.

The Digital Single Market could imply even more for consumers when venturing into a more in-depth analysis of the proposed measures. Thus, in the Digital Single Market papers, there have also been mentions of other barriers than can affect the consumer's ability to engage in online shopping across borders (Commission, 2015). This can refer, for example, to unjustified geo-blocking or similar manners of discrimination due to the nationality or residence — a highly unfair practice from the perspective of the consumer who has his choice

of available goods reduced unjustly. This has already been addressed in 2018 through *Regulation (EU) 2018/302* of the European Parliament and of the Council. This Regulation encompasses, under its scope, goods sold without physical delivery, services supplied electronically, or even services that are provided in a specific physical location. Furthermore, after this has entered into force, the traders cannot block consumers' access to their websites or even reroute them to a different version of it. In addition to this, consumers cannot be mandated by traders to pay with credit or debit cards that have been issued by one country or the other. It has to be mentioned that there are also some exclusions from this Regulation, most of which fall under the scope of other sector-specific legislation like transport services or retail financial services.

There is no lingering doubt that digitalization has entirely altered the manner in which business is conducted, and with such new legislation in terms of consumer protection in the EU, an appropriate legal framework will be established. On the other side, another problem remains, but this time in the digital world, which consumers probably face quite often. This is related to the harmonization of legislation only at the EU level, which has been the focus, in the last few years, in light of all that has been presented here. Thus, the laws governing transactions, in the following years, should go in the direction of a more global harmonization (Gorton, 2017). Clearly, online shopping by customers located in the EU isn't isolated to the European Union. There is the USA, Asia and, the even more glaringly obvious candidate, since its exit from EU — The UK. A more global policy could help and it would solidify the trust that consumers have when ordering online.

Of course, as with any progress, there are also downsides, including in terms of consumer wellbeing within the EU. Therefore, for complying with these new regulations, changes may need to be made by companies in the manner in which they are conducting business. Of course, the bigger companies will not be that affected, as they will be able to manage the extra costs and mitigate the risks that they are exposed to. However, for SMEs, which make up the vast majority of the companies operating within the world economy, adapting may prove to be more challenging. We have noticed such difficulties also when GDPR was first introduced. Such issues might reduce the SME's growth, some could even need to push back some product releases in order to accommodate with the legislation being enacted. Looking at this from the consumer standpoint, this might affect them, because they might reduce the number of choices available on the market. However, such difficulties would be only in the short-term, and, I dare say, the benefits far outweigh the costs if we think about the future — a future in which

consumers benefit from a wide level of protection in the Digital Single Market, all the while helping the economy develop by allowing SMEs to penetrate new markets using the power of the Internet.

2.2. The Digital Services Act and the quest for a fair digital market for consumers

Nowadays, the digital economy has become a crucial facet of the development of the economy and, implicitly, of our future. I don't think I am alone in saying that I cannot fathom a world in which technological developments will not continue to be the driving force behind business innovation and the well-being of consumers. We have come too far to back down from seeing this progress all the way to the end of the line. More so than ever before after the COVID-19 pandemic which has entirely shifted the paradigm and accelerated the digitalization process more than we ever thought possible a couple of years ago.

Unfortunately, beneath this progress also lie in hiding a series of threats to the general well-being of consumers and their fundamental rights as human beings. Technology is a double-edged sword, with an incredible potential for good, but also with a hidden, darker side. What matters is who is wielding it and to what purpose. So far, we have seen that the presumption that good will triumph cannot be our sole protection. Human rights are way too important to rely on the good faith of companies, businesses, or politicians. Self-interest has a way of creeping in, festering, and corrupting the good.

Countless examples can be offered to support my statement. I will only venture to mention those unrelated to consumers briefly, lingering on the business side of the paradigm between digitalization and consumer rights, seeing as this is the focus of this paper. However, human rights, in general, are way too important, inscribed in our country's Constitution and also numerous important international instruments such as the Universal Declaration of Human Rights, for us to simply gloss over them and not mention them at all.

Fake news, propaganda, deep fakes, election tampering, abuse of personal data — all of them shake the very core of the pillars upon which our democratic society is built. During the pandemic, these issues have only gained more traction. Thus, according to a study conducted by Ofcom in the UK, nearly half of the country's population (46%) declared that they had been exposed to fake news and nearly all found it hard to discern between fake news and accurate representations of facts (Ofcom, 2020). Furthermore, technological interference in the political ecosystem seems to have become the norm in our current times. The famous scandal of

Cambridge Analytica and its influence over Brexit, one of the most important and disruptive events that occurred at EU level in the last decade, is a clear reflection of the depth of the problem we are facing. Unfortunately, those social media platforms that we find almost impossible to relinquish, have been used to disrupt democracies or, in some cases, even jeopardize people's lives.

The best example I can think of is Myanmar, where, when a person buys a phone, the first thing installed on it was Facebook. The social media platform has grown to become nearly synonymous with having access to the Internet and, the dark side of it all is that the platform was used to disseminate hatred, divide the population and nudge them towards violence in the offline environment. The tragic consequence was the Rohingya Muslim population massacre and the forceful displacement by the Myanmar army of over 700,000 Rohingya Muslims. According to Facebook's own press release from 2018, it closed over 150 accounts of members of the Myanmar army, but the damage had already been done. As most IT giants do, Facebook also publicly apologized for violating human rights and promised that in the future it would try to be a force of positive change. However, practice has shown that, in most cases, these kinds of promises are empty shells and profit takes precedence.

The European Commission did not remain idle to such violations and the lack of protection that was awarded to users of digital services within the European Union. *The Digital Services Act* package is comprised of *The Digital Services Act* and *The Digital Markets Act*, with its main purpose being to help foster a safe digital space that will protect the fundamental rights of its users. These proposals were put forth by the European Commission in December 2020, probably also spurred on by the severe impact of the pandemic on the digital market. An incredibly recent development in this field was the fact that a political agreement was reached on these two acts. Thus, on the 25th of March 2022, the agreement was concluded concerning the Digital Markets Act, and on the 23rd of April 2022 on the Digital Services Act.

These were necessary not only due to the rampant evolution of digitalization but also because of the difference in the manner through which Member States regulated such activities. This became a significant issue because the operations of these platforms were inherently cross-border in nature and different provisions could hinder their activities. This could, in the medium to long-term hinder the functioning of the Digital Single Market as a whole.

Though not yet entered into force, these two acts depict significant progress in the area of addressing issues created by these gatekeepers that are dominant platforms and will aim to

protect fundamental rights, but also to help lay the foundation of a level playing field that will support competitiveness and innovation. What is more, this also aims at helping SMEs and start-ups scale up and access customers across the single market. As a consequence, we can denote that these two acts have at their forefront both consumer welfare, but also protecting and helping grow SMEs.

The proposed *Digital Services Act* amends *Directive 2000/31/EC* of the European Parliament and the Council in terms of aspects regarding e-commerce and information services. Through these amendments, the scope is extended, making it possible to be applied to substantially more services, including online marketplaces or platforms of collaborative economy (Van Eecke & Gallego Capdevila, 2021) that have shaped up to become an integral part of our lives such as Uber, Kickstarter or Airbnb. In the continuation of this section, we will analyze the most important provisions that have been added to EU legislation through these instruments.

First of all, the term '*gatekeeper'* which has also been mentioned within this paper. Based on Article 2(1) of the Digital Markets Act, this word defines those providers of core platform services that are designated pursuant to Article 3 of the Digital Markets Act. In addition to this, we can also find clearly specified, a definition of those so-called '*core platform services',* in Article 2(2), and they are online social networking services, video-sharing platform services, online search engines, and online intermediation services. All of these are worthy of the term '*gatekeeper'* if it has a significant impact on the internal market, if it enjoys an entrenched position throughout its operations or if they will benefit from such a position in the near future, or if it operates a core platform service that is a gateway through which business users will reach their end-users.

A quantitative approach will be used in order to identify these gatekeepers, according to Article 3(2) of the Digital Markets Act which contains the thresholds that will need to be reached in order for us to be in the presence of such a gatekeeper. This includes, for instance, social networks that can boast with a market cap of over 75 billion euros or with a turnover that exceeds 7.5 billion euros per annum. In addition to this, these companies also need to be providers of social media, messenger apps or browsers that gather over 45 million end users located in the European Union per month, together with 10,000 business users within a year. For all of those who meet these criteria, obligations are listed in Article 5 of the Digital Markets Act, and in Article 6 we have a series of rules of conduct. However, we have to point out that

these rules must be adapted to all individual cases, as no case is identical and the Commission has reserved its discretion to operate in this department.

Furthermore, we also have to mention the obligation to inform the Commission about mergers. This is included in Article 12 (1) of the Digital Markets Act and clearly states that the Commission must be made aware by the parties that are partaking in this merger before it will be conducted. Although the Commission cannot interfere with the merger, this will allow it to obtain a full picture of the ever-evolving digital market.

Finally, in case of non-compliance, legal consequences have also been established by the Digital Markets Act in Articles 16(1) and 25-27. Based on these Articles, the European Commission has the prerogative to impose fines of up to 10% of the total turnover of that certain gatekeeper. Important to mention, that in Article 26(3) the principle of proportionality is outlined in regards to the fines which are applied.

Of course, there is also room for improvement, as there always is when enacting new legislation in an area that is susceptible to constant change. One thing would be making the notification procedure mandatory and the gatekeepers should show their intentions of complying with their obligations. Another idea would be introducing certain clauses that would permit obsolete commitments to expire. (Monti, 2021)

After we have analyzed the Digital Markets Act, I believe it is important to turn our eye to the *Digital Services Act*, which is an integral part of the European Commission's efforts to make the digital space a place that respects the most important values of our society (human rights, democracy, freedom, and rule of law), on which the EU has been built. This act followed a plethora of consultations undertaken between the Commission and a varied set of stakeholders among which we can find academia, public authorities, digital service providers, and the citizens. All of these important actors reached a consensus on the need for upgrading the rules currently governing digital services, but they also believed that some key principles of the e-Commerce Directive, which was presented previously in this paper, should be included in the Digital Services Act because they are still compliant with the current state of affairs. In the *Explanatory Memorandum* to the DSA proposal, there was an agreement in terms of the fact that the obligations concerning removing certain content should only be applicable to illegal content. This makes sense when we think about the freedom of speech as one of the fundamental freedoms that citizens have. Regarding what this illegal content refers to, in a

nutshell, this refers to all information which, by itself or through reference to a certain activity does not comply with the EU law or with the law of a Member State.

The results of all these consultations took shape in the form of three resolutions adopted by the Parliament on the planned Digital Services Act. They made a push not only for transparency but also for accountability when it comes to digital services providers, taking a hard stance on the negative effect of personalized advertising, reflecting their concern for the users of these platforms. Practically, they pounced on the impact that user tracking and big data have, which will be elaborated further on in this paper.

Going more in depth, we have to observe that there is a horizontal framework that is applicable to all intermediary services. Thus, the Digital Services Act includes rules regarding asymmetrical due diligence obligations for a safer and fairer online medium, the conditional liability exemption that is awarded to the providers of intermediary services, and the implementation of this Regulation, including cooperation between authorities that are competent in this matter, which are united in a body that is called the *European Board for Digital Services*, as stated in Article 47 of the Digital Services Act.

In terms of scope, the Digital Services Act applies to all intermediaries who offer their services to users who have been established in the EU or who reside the in EU. According to Article 11 of the Digital Services Act, similarly to GDPR, those intermediaries who aren't based in the EU must appoint a legal representative in the EU.

When it comes to liability of the providers of intermediary services, in the Digital Services proposal we observe the key principles that are outlined in the e-Commerce Directive are maintained. The concern of the EU for consumers shines through in Article 5(3) of the Digital Services Act when it comes to online marketplaces that are intermediating between traders and consumers. Thus, such a marketplace can be held liable, under the provisions of consumer law, if it causes an average consumer to believe that the object which is being transacted will be provided by the platform or by a user which is under the authority of said marketplace. The European Consumer Organization welcomed this proposal, but they also brought to light that it doesn't create positive secondary liability for the intermediaries. Consequently, it was addressed directly to the legislators, calling for an amendment to this article in order to establish a joint, severable liability for these digital services providers in cases such as non-compliance with due diligence obligations, non-performance of the contract, damages, or guarantees.

Through the Digital Services Act, the EU has also taken a stand against the illegal activities which have proliferated, on the Internet, in the past couple of years. Thus, in Article 21, there is stipulated a duty for such online platforms to inform law enforcement authorities should they become aware of information that gives rise to suspicions of crimes that involve a threat to the safety of persons that have taken place, are taking place or are likely to take place.

In an effort to extend the protection that is offered to customers who are engaging in trade on such marketplaces, Article 22 also contains a requirement that platforms acquire enough information on the traders operating through them to identify them, including a certificate of their compliance with relevant EU rules. A reasonable effort must be undertaken by platforms to ensure that the information they obtain is reliable or, in case it is not, to suspend that particular trader.

It is clear that consumer welfare is at the forefront of the Commission's concerns when enacting the Digital Services Act. A fairer market through ensuring that no player has the power of distorting competition will, without a doubt, improve the consumer's well-being. After all, these are the ones who are using these digital services and they are the ones susceptible to having their fundamental rights be infringed upon, as we have seen in the previous examples. The European Court of Justice also emphasized this specific fact in the *Kokurrensverket v TeliaSonera Sverige* decision. Here, the Court ruled that competition has to be impeded from being distorted to the detriment of the public interest and consumers. Through this, the ECJ considered that the entire well-being of the EU would be ensured.

This Digital Services Act aims at shifting the way in which consumer protection is enforced throughout the Member States of the European Union. Thus, the platforms that have so far remained impassive will need to take action against the illegal acts and the transgressions against consumers that are occurring, some of which they are enabling or even intermediating. This will be effective because if not, they will be held liable according to these acts, as we have presented previously. Basically, from the moment a complaint is filed to the platform, they must take action if they do not want to adhere to the consequences.

This extra layer of consumer protection has not yet been published in the Official Journal of the EU and it has to enter into force. The Digital Services Act will start being applied within 15 months or from the 1st of January 2024, whichever will come first. For the very large platforms or search engines (VLOPs), which fit the criteria presented above, this will apply even sooner, which means approximately 4 months after it has been designated.

2.3 Big data and information economy—challenges of consumer protection in the European Digital Single Market

We are all currently assisting to the enormous growth of the information economy. In essence, this refers to an economy where the focus is heavily placed on the information industry. In a few words, information has become a capital good. Like two sides of the same coin, data has become one of the most transacted and precious currencies nowadays. For companies that are operating in the digital economy, data is a goldmine that waits to be exploited.

According to official EU estimates, the value of the personal data of European Union citizens reached nearly 1 trillion euros annually in 2020. The Eurobarometer from 2019, after the adoption of GDPR, revealed that 62% of us, European citizens, feel that we don't have full control over the personal data shared online. This reveals, in my opinion, that big data continues to represent one of the greatest current challenges of our digital economy. In this section, I will endeavor to analyze it, together with its implications, both positive and negative for consumers.

As I have presented in my previous sections, platforms have become an integral part of our daily lives. What most of us do not understand or perhaps choose to ignore is the fact that the services provided by these platforms are not free of charge. No, in fact, we pay for them with our data. An example to help illustrate this is the one of Google. We all use it as a search engine, probably on a daily basis. Still, this service is not entirely free of charge, because we pay for it through the personal data that is collected and through the ads we look at. Advertisers are paying Google to distribute their ads to the proper audience. (Weber, 2014)

Companies have been quick to employ business models that are heavily reliant on personal data as a key input, all of which have one endgame in sight: gathering it in order to provide it to advertisers who will, consequently, use it to target potential consumers with behavioral advertising(Stucke & Ezrachi, 2016).

Of course, before we delve into a more in-depth analysis of big data and its ramifications in the consumer protection field, we should first define a few key concepts. One of them is '*data',* which tends to be quite vague and has a different meaning for all of us. Thus, we will turn to one of the most important pieces of legislation in the field of data protection, GDPR, which defines it quite adeptly. According to Article 4 of GDPR, personal data includes any information that relates to identified or identifiable natural persons. In the category of identifier

features, we can include the name, the location, identification number, factors tightly connected with genetic, cultural, social, physiological, physical identity, or any other online identifiers. The last category could also include information partaking to items such as IP addresses.

One key aspect that has to be mentioned in this analysis is that the right to protection of personal rights is among one of the fundamental rights. Consequently, it can be found in the Charter of Fundamental Rights of the EU, in Article 8. According to this article, data has to be processed fairly, after obtaining the consent of the person or with some other legitimate law basis. Furthermore, every single one of us enjoys the right of accessing the data collected about us and the right to have it rectified in accordance with reality. This right is strongly connected with that guaranteeing respect for private and family life. What is more, the latter is also found in the Constitution of our country. Going one step further, the right to have our personal data protected is also stipulated in TFEU, in Article 16.

Besides this, we cannot ignore the significant contribution brought to the field of not only consumer data protection but also personal data in general by the ECJ. Thus, in its Judgement from the 13th of May 2014, in the case of *Google Spain and Google (C-131/12),* the Court established the right to be forgotten. Following this ruling, it became clear that data subjects, based on the rights included in Articles 7 and 8 from the Charter — which have been outlined above — can request that their information be excluded from that available to the general public. The ECJ stated that these rights override the interest of the general public to find information in a search on that specific data subject, together with the economic interest of the operator of the search engine making that information available to the public. As is perhaps natural, the Court did offer an exception, where this doesn't apply: that case in which making that information available can be justified through the interest of the general public to access this information.

The other important term is '*big data',* which has been the subject of numerous definitions throughout the last few years. For this paper, we will look at the one offered by the European Data Protection Supervisor, which defines it as copious amounts of different types of data that are produced at a very high speed, from more sources, that require powerful processors and algorithms to be analyzed. A Gartner report was more specific, focusing on 3 different aspects when talking about Big Data: the *volume* (huge amounts of data), the *variety* (wide range of sources and types), and the *velocity* (the speed at which it will be processed).

Taking into account all that I have presented above, we can state that big data amplifies the information asymmetry that already existed in the market between consumers and firms. (Wagman & Zhe Jin, 2021) To explain, consumers are swarmed with information and constantly look for manners in which to better focus on that which genuinely interests them, while companies strive to collect, use store, or exchange information pertaining to the consumers. To this end, businesses have also taken up using artificial intelligence, but what can be troubling are their practices. More often than not, the consumer interest is not at the forefront of their concerns, taking a backseat to profitability.

On top of this, we are facing concerns in terms of data ownership rights, data security, accessibility, data disclosure, transparency, and ease of data de-anonymization. All of these have led to a blurring in the lines between consumer protection and antitrust regulation. That is owed to the fact that all of these unfair practices can harm consumers, but also alter the dynamics of the market, granting excessive power to certain big players, those so-called dominant platforms that we have discussed previously.

We can take into account the case of Google, so that we can better understand just how complex the landscape is in terms of consumer protection and antitrust legislation, in the era of big data. In this particular case, Google was including its own mapping, shopping, and review services at the top of its search results, thus influencing what results consumers obtained following their search. In the EU, Google received a fine of 2.4 billion euros in 2014, justified by arguing that it abused of its dominance as a search engine, in regards to its competitors. However, to illustrate just how differently the world views such issues, in the US, the FTC closed this case, by claiming that this practice was performed with the goal of improving the quality of their results. Now, whichever approach we think is just, one thing that we cannot ignore is that Google's practice was directly influencing both the market powerplays and the consumers. That was because such a vertically-integrated platform yielding results to consumers can lead to an increase in welfare for some specific consumers, but it can also undoubtedly harm those that wish for a wide range of choices.

Data, as is the case with technology in general, is a double-edged sword. It has radically improved our lives, making affordable innovative services that we could only dream of a decade ago. The pandemic has shown us its multiple benefits. For instance, in the field of telemedicine, we can access top-quality medical services, store our medical files within an app and get the best care possible, even from a distance. Furthermore, through data, the quality of

the services we can access on numerous platforms can be optimized and make for a customized experience for all of us. All of our online searches are optimized, based on our individual tastes and we can get targeted and personalized ads. In the end, the number of ads we see is the same, but at the very least, as customers, we receive suggestions for products that we would actually be interested in. Through big data, we can also increase the productivity of economic actors through better business intelligence and companies can use the data gathered for better research projects. It is without doubt that these can significantly improve our lives, perhaps in more ways than we can begin to comprehend now.

However, despite the benefits I have succinctly outlined above, data comes at great costs for us, from different points of view, either as persons or as customers. The most important challenge when it comes to big data's impact on consumers regards data protection. We, as consumers in good faith, provide our personal information, which can then be shared widely across the world. Going into more detail, there have been instances where this sort of actions have led to profiling or even discrimination. Of course, GDPR has managed to award more control to the consumers over the information that they are offering. Furthermore, GDPR gives consumers the right to request that companies delete their data.

Looking at the way in which GDPR spurred effects, we have to say that the fines imposed on companies in breach of its terms were significant. The largest one to date is the one issued by Luxembourg's National Commission for Data Protection against Amazon in 2021, due to cookie consent problems. It amounted to 746 million euros. Close behind, but not nearly as colossal in amount is the fine awarded to WhatsApp in 2021 because the company hadn't properly explained all of its data processing practices. This one was of 255 million euros.

Analyzing the case of our country, we have to mention that according to Eurostat data, Romania is ranked as third in the European Union in terms of sanctions applied by national data protection authorities. In total, we applied 68 fines, with a total of 721.000 euros. Another important statistic is showcasing the total amount of the fines applied at EU level. In 2021 it exploded, growing by 521% and reaching 1 billion euros.

This shows that data protection authorities are doing their part, sanctioning violations in terms of GDPR. Yet, that can sometimes not be enough. For the most part, significant data abuses were conducted by large platforms, not the regular SMEs. Taking Amazon, for instance, they were fined a staggering 746 million euros. Still, their revenues in the same year amounted to over 51 billion euros. Well, in this case, practice has shown that large platforms prefer to

apologize, pay the fines and stick to the law-breaking attitude if it would entail high profits at the expense of consumers.

We have to take into account another issue in the aftermath of GDPR in the EU and this can be called the '*privacy paradox'.* This is represented by the phenomenon in which, although users claim to care about data protection, they do not act in accordance with these statements. Instead, they disclose their personal data freely or agree to online privacy policies without reading them beforehand. In order to support this statement, we can look at a survey conducted by the European Commission in 2015. According to its results, 31% of users partially read the terms and conditions on websites, 49% do not read them at all and only 18% fully read privacy policies.

More often than not, the root of such behavior is not laziness, as some companies might claim, but their lack of ability, seeing as most of those terms and conditions are so complicated that few users would actually be able to understand them. Moreover, in the case of some websites, in particular some social networks, users might be facing the choice between agreeing to terms in their entirety or ceasing to use that website's services. (Botta & Wiedemann, 2019)

Also, consumers tend to be biased, as behavioral studies conducted by Kahneman have revealed. This means that they do not always act rationally or in their best interest. In order to improve the effectiveness of current consumer protection regulations, the legislator should also keep that in mind. One such policy might be represented by prohibiting commercial practices that result in triggering such behavioral biases in consumers. According to research in the field, most injuries caused to consumers are due to poor use of otherwise entirely safe products. (Staelin, 1978) Taking these behavioral insights into consideration, my suggestion would be that new rules regarding safety warnings be issued, that would cater to and mitigate consumer behaviors as much as possible.

Another issue demonstrating that big data and its dangers to consumers have yet to be solved is reflected in a report published by advocacy group *Access Now in 2020*. According to its findings, national data authorities are underfunded and understaffed, which threatens their ability to enforce GDPR. Large firms, like the gigantic platforms responsible for most abuses, can profit from this, using their significant economic resources to try and circumvent the provisions found in GDPR.

In such a situation, that was significantly favorable to companies and in a volatile world environment where consumer data was less safe by the day in the pandemic, the jurisprudence

of the ECJ provided a solution that can serve as a lighthouse in the future of consumer protection.

Therefore, in the action for preliminary ruling triggered by the legal dispute between Meta Platforms Ireland and the Federation of German Consumer Organizations (*Case C-319/20)*, the ECJ decided that consumer protection associations have the right to file infringements of GDPR. They can bring a collective action, provided that such a capacity to sue is found in the national provisions of the Member State. One requirement is that the Member State in case legislates nationally the representation of data subjects by the national data protection authorities.

This milestone of a decision has huge implications regarding consumer protection in the future. If, before, companies could somehow circumvent GDPR by taking advantage of understaffed authorities, the consumer protection associations are a different subject matter. These can prove to be much better watchdogs for consumer protection and companies should be prepared for a larger string of civil proceedings brought against them in the near future.

We also have to accept that although GDPR was a gigantic leap forward in terms of data protection, it is not perfect. There are some shortcomings that should be addressed in the near future in order to make for a better overall landscape in terms of consumer protection in the EU. To begin with, I believe that, as was proven before, the national consumer protection agencies in all Member States need to be well funded and staffed. Moreover, they should endeavor to cooperate more closely in enacting policies, rules, and best practices that would ensure a high-notch protection for all consumers. Such coordinated actions could also help them counteract pan-EU infringements against consumer legislation.

Technology and developments such as big data and AI are more than simply challenges. No, in fact, they present an ocean of opportunity waiting to be tapped into. National authorities should also access them in order to better their operations. Complementary to this, private actors can be involved in the fight for consumer protection. We have already seen the ECJ give consumer protection organizations the right to pursue class-action suits, but that can be just the beginning. They can also install hotlines where consumers can be informed of their rights or file complaints. They can help put together a database with consumer legislation that is easily accessible and help run programs meant to educate consumers. Especially those from rural areas of countries such as Romania, where their ability to access such information is limited, like their resources.

Finally, even the most appropriate and coordinated measures will not suffice in the long run. Not with the speed at which the world is changing. Swift action will need to be undertaken constantly in order to keep the consumer legislation relevant to the needs of the subjects it aims to protect. Some of the most pressing future issues will be outlined in the next section of this paper, together with potential remedies for the future. Yet, this is only the beginning, and much further research needs to be conducted in these areas. The efforts might be significant, but the rewards are immeasurable. After all, each and every one of us takes up the role of a consumer daily and we deserve to have our rights guaranteed by strict legislation that discourages any misconduct.

3 Conclusion. Perspectives of European consumer protection

As we've explored and demonstrated throughout this paper, more often than not, the society evolves at lighting speed. Technology has proven this to us time and time again. In compliance with this tendency, the legal system is also constantly adapting — improving. New normative acts are being created and the existing ones are amended in order to ensure their relevance. Yet, there are instances in which laws cannot keep up with society. The legislator sometimes cannot anticipate the surprising path that technological developments will take.

Admittedly, the European Union has shown an incredible swiftness in responding to such changes. This is also the case of consumer protection legislation. Still, there are countless areas yet to be properly regulated, such as smart contracts, blockchain, AI or even the Metaverse. All of these are upon us, lingering in waiting. If cryptocurrency has taught us anything, is that technological developments can boom overnight. In these instances, it becomes crucial that a legal framework exist in the field. Legislative gaps are dangerous and make way for a proliferation of crime that is a danger to us all.

Thus, in this last section of my paper, I will endeavor to outline the future perspectives of European consumer protection. All of these technological developments will be considered, as I try to offer up some valid routes for the legislators to explore with the passage of time. These can be seen as starting points for some much-needed future research in this domain. Seeing as it directly impacts all of us, I do believe it should be at the forefront of numerous consultations, as opinions from both experts and the general public is the only way to lay down a strong foundation for proper legislation.

3.1 Consumer protection in the light of blockchain and smart contracts

One of the most striking examples of technology moving much faster than we could have ever anticipated is blockchain, which led us to the point when smart contracts have become part of our reality. Yet, at the same time, they are a disruptive innovation that poses a serious challenge to our laws and jurisprudence. For the purpose of this section, I believe the most appropriate way to start would be by defining the concept of '*smart contracts'* and what they actually entail.

It might come as a surprise to most, but the idea of smart contracts was initially introduced all the way back in 1994 by Nick Szabo (a scientist, specialized in cryptography and law). According to him, smart contracts can be defined as computerized transactions Protocols that fulfill the terms of the contract. Based on this definition, we can deduce that through smart contracts we may satisfy contractual terms (confidentiality, payment or even enforcement), reduce the need for intermediaries such as banks and minimize exceptions, either malicious or accidental. Through interpreting this, we can safely conclude that, originally, smart contracts didn't need to be based on blockchain technology. Business models of platforms like Netflix, that entail an automated successive contract formation and digital performance fits this original definition, with their structure prepared to respect a certain procedure if one party doesn't perform. (Borgogno, 2019)

Our world, sensing the issues brought forth by smart contracts, mainly the lack of human readability, has tried, once again to respond to it. Therefore, Ian Grigg has coined the term of a '*Ricardian contract'*. This type of contract ensures a link between a legally binding agreement between the parties and the protocol that incorporated it. These are readable by both humans and machines, making them admissible in court. As such, any disputes that arise from such a contract can be resolved in court. Still, not all smart contracts fall under the category of Ricardian contracts and, with the emergence of cryptocurrency and blockchain, smart contracts in general seem to also gain a lot of popularity.

Looking from a more legal standpoint, smart contracts represent computer codes that cannot be classified as a legal contract, but which execute predefined commands and which possess legal structures and properties. One of the main advantages of these contracts are represented by the simplification of the contracting process. However, as is usually the case, using such revolutionary techniques gives rise to new questions. The one that we will be

focusing on are related to how we can actually ensure the effective protection of consumer rights when adopting smart contracts.

Some of the most important challenges in light of smart contracts are linked with the bargaining power of consumers, consumer behavior and enforcing consumer rights. (Kasatkina, 2021)To begin with, we cannot ignore the fact that when employing smart contracts, the consumers will be left with no actual possibility to bargain. They will simply click on a button, agreeing to the terms. Well, in this case, can we actually speak about a contract? As we have presented above, there is no EU contract law, but we will turn to the Romanian Civil Code in order to elaborate on this issue.

According to Article 1166 of our Civil Code, a contract is an agreement of wills between two or more persons, with the intent to create, modify or extinguish a juridical relation. The same is echoed by most EU State Member Civil Codes, although in somewhat different words. We can clearly see the emphasis placed on the agreement between the parties, which is the source of the contractual rights and obligations. In stark contrast to this, when using smart contracts, one party (usually the company) will be deciding on the entire content of the contract, while the weaker party (the consumer) will only be able to accept the terms or decline them. In essence, consumers will be stripped of their ability to negotiate more favorable terms.

Under these circumstances, to me it becomes imperative that in the future we would need to figure out a manner in which consumers will be able to make their preferences known. Difficult task, but the saving grace for consumer protection could lie hidden in the form of blockchain or decentralized ledger technology. For a better understanding of these terms, we have to understand that the decentralized ledger systems, which are also at the core of cryptocurrencies, are quite adept at preventing information asymmetry. (Rab, 2020) That is owed to the fact that the user can access the full ledger, enforcing his trust in the technology.

Thus, when using such technology, consumers can access all the records of the goods they purchased (from manufacturing to delivery). Moreover, if the product doesn't comply with the agreed terms, the technology would be equipped to recognize it faster. It could possibly eliminate the need to go to consumer protection agencies or even to a court of law. Compensation would also reach consumers faster, directly through the account information they provided at the moment of concluding the contract. In addition to this, we can also note that some of the other problems such as privacy and confidentiality could see a solution through blockchain or decentralized ledger transactions. Because these technologies do not need the

identity of the person holding the asset, consumers will not need to disclose as much information. Sometimes, an address could suffice.

Yet, there are numerous downsides to smart contracts, when examining them from a legal point of view. Among them are ones regarding free consent and capacity. They are significantly harder to prove and even so, you cannot declare a contract void as they will self-execute and remain coded in blockchain forever. Moreover, the parties cannot terminate the contracts at will and neither can a court of law, as it will be executed automatically. Tying with one of the benefits I have outlined before for consumers (privacy), it also poses a disadvantage, when looking from the perspective of the Consumer Rights Directive and traders' requirements. When employing smart contracts on decentralized ledgers, through the use of keys, they won't have to disclose full identification details. In such cases, the consumer will not be clear on who to sue in case of non-performance.

However, the largest issue to day still remains and that is how we could integrate this into our current consumer protection legislation. This section aims to explore the current possibilities that I can envision for accomplishing such a task. First of all, the usage of blockchain and its private key system, would help solve the issue of proving the parties' consent. Another thing I would propose is to try to first ensure a wider adoption of Ricardian Contracts, instead of skipping directly to smart contracts in general. Pushing for the first type would ensure a period of transition, as the world grows more accustomed to smart contracts. At the same time, courts of law will be able to solve disputes right away, instead of waiting for legislators to enact laws and regulations.

We should also try to address the issue with the current impossibility to change the terms of smart contracts once they have been concluded. One potential alternative would be to include the possibility to accredited third parties (courts of laws, mediators, arbitrators) to amend the terms of the contract. Furthermore, there should be a series of predefined terms established for all contracts, based on their type, and in accordance with EU legislation. Judging what has been presented previously in this paper, it becomes obvious that this includes the consumer's right to withdraw from the contract within a specified period. The accredited third parties should also ensure the compliance with this, so that the consumers will enjoy a proper level of protection and not suffer any disadvantages from employing smart contracts.

We could try to code smart contracts so that they will automatically consider the most common breaches of contracts and have written code on how to deal with such instances.

Furthermore, we could try to include principles of law such as the good faith principle or some of those stipulated in UNIDROIT Principles of International Commercial Contracts, from 2016. One example of the latter is the one according to which, if the terms of a contract written by one party are unclear, we will prefer an interpretation against that party. The reason why we would be better off going by principles rather than by coding entire consumer protection laws, regulations, directives is that, as we have seen, these laws change too quickly and it would only create unnecessary confusion.

All in all, I believe smart contracts in general represent both a threat, but also a huge opportunity. We've already seen that consumers struggle with issues such as privacy, phishing, complicated terms or lengthy contracts. If done well, smart contracts powered through by blockchain technology can help consumers better protect their rights and limit the lack of fairness in terms of bargaining power. They could even work towards reducing the consumer inertia in acting upon enforcing their rights as the code would do it for them, while also prevent the trader to unilaterally alter any of the contractual terms. All of this will, without a speck of doubt, help empower consumers even more — clearly a direction in which the EU aims to go.

3.2 How will cryptocurrencies and Artificial Intelligence reshape the current legislation on consumer protection?

Cryptocurrencies and Artificial Intelligence (AI) have been at the forefront of all almost all discussions regarding digitalization within the last decade. Understandable, as they represent some of the biggest developments, their potential for disruption immense. This section of my paper will analyze them from the consumers' standpoint, trying to outline both the benefits and risks associated with their wide adoption, while providing some perspectives for the future. We will begin with cryptocurrencies, which have exploded in the last few years. Billionaires were created overnight, people started buying them more, edged on by public figures such as Elon Musk, while regulators scrambled to find a proper manner to legislate.

The dangers associated with cryptocurrencies are two-fold and they impact us as both persons and consumers. A spike in money-laundering and terrorist financing using crypto has edged on the EU in extending the scope of application of the *Anti-Money Laundering and Countering Terrorism Financing Directive* to cryptocurrency platforms all the way back in May 2018. Tightly associated with the pandemic, we can note the stringent increase in crypto scams. Concerns have been raised regarding advertising that preys on a consumer's

inexperience and even market manipulation. According to a study conducted by the FCA in UK, less than 1 in 10 potential buyers of crypto had engaged in reading the warnings of investing in such assets. Moreover, there have been numerous instances in which influential people have been impersonated by scammers in order to steal from consumers. Some countries outside the EU responded swiftly and drastically, as is the case of Singapore, which prohibited public advertising of crypto in its entirety or South Korea which has reduced through regulations the number of available crypto coins from 60 to 5.

At the time of writing this paper, the price of Bitcoin plummeted to its lowest point since 2020 and Coinbase plunged in value, losing more than 2 million of its active users. Such a meltdown illustrates clearly the risks associated with this type of unregulated assets, showing how one's gains can disappear in the blink of an eye. It is likely that crypto will rebound after these losses, but it might take years for them to soar to new highs. In the meantime, policies should be enacted to avoid the current state of the legislation void that we find ourselves in. It is my genuine belief that central to all of the EU's efforts to push legislation in this field should be the goal of protecting consumers from falling victims to fraud and abuse.

As it has been proven in this paper, the EU has not remained complacent to the countless issues arising from the widespread adoption of cryptocurrency. Yet, its attempts have not always been entirety successful. This is the case of the *New Consumer Sales Directive*, which does not clearly accept the payment which would be conducted in virtual currencies. A different approach has been taken in the *Digital Content Directive*, which is very clear in its acceptance of such a means of payment. (Janssen, 2021)

Still, legislation cannot be ironclad from its inception and what really matters is constantly improving upon it. We can see it in the EU constantly and so, in March 2022, the Economic and Monetary Affairs Committee, adopted its official position in regards to the new rules being proposed for crypto-assets. It aims to strengthen the current framework protecting the consumers by taking measures meant to combat market manipulation and aimed at supporting the integrity of the market. MEPs also support the idea that the issuing of these tokens should be supervised by authorities (European Securities and Markets Authority and The European Banking Authority), while imposing the obligation of businesses engaged in dealing with crypto to ensure better information is provided to consumers about the risks, charges and costs that their dealings will incur. Furthermore, the EU also aims to touch upon the environmental

threat posed by cryptocurrencies and the MEPs wished for future Commission law proposals to include crypto-mining in the EU taxonomy for sustainable activities by 2025.

All of these initiatives fall under the umbrella of a new *Digital Finance package* that is aimed at supporting the Member States' transition to digital systems, while ensuring citizens (consumers) are also properly protected. One thing that should be considered in this regulation package, I think, would be protecting consumers in case of bankruptcy of such cryptocurrency trading platforms. The need for this becomes even more clear when looking at how Coinbase has suffered within the last few days. The USA has taken the first steps, by backing up US residents with Coinbase USD wallets through the Federal Deposit Insurance Corporation up to a maximum of 250.000 dollars. My proposal for future legislation would be that the EU ensure this and more, guaranteeing cryptocurrency funds and wallets, for the best possible level of protection to the consumers.

It is my belief that cryptocurrencies have the potential to become safer investments and yield good returns. However, the current uncertainty on the market in regards to laws and regulations cannot be maintained for long. Otherwise, we risk the proliferation of a black market that could have serious impacts on all of us. Consumers need to be able to trust the crypto companies, they need to be able to be sure that they are protected, that the public system safeguards their investments. Unless some insurances are made for customers, those skeptical ones, like me, will not jump ship and start trading in cryptocurrencies.

The other facet of this digital transformation that is upon us is represented by Artificial Intelligence (AI). While a few years ago this seemed to only belong in the fictional world, nowadays AI has grown to become a part of our life. We use it in goods and services every single day, whether we talk about voice assistants, smart homes, banking or even the facial recognition software unlocking our phones. According to Eurostat, in the last decade, the increase in the number of published AI patent applications was of over 400% and more than 60 million new jobs could be created through AI and robotics in the world by the year of 2025.

Yet, as is the case with technology in general, with benefits come also costs and threats. When it comes to AI and consumer protection, that is also the case. Some of these issues have been explored in great depth in a previous section of this paper, as they concern Big Data analytics, consumer profiling, power and information asymmetry, as one of the EU's White Papers from 2020 stated. However, there are other risks associated with the usage of AI in products and services and this stems in the high degree of automation that seems to be a part

of the IoT. We can also consider the machine biases which can lead to the discrimination of consumers, or, in the case of chatbots, even the maximization of gains for the company instead of the consumers. If we stop and consider the retail industry, we can even go a step further and think of hazardous situations for children, when machines suffer from errors or when they mistakenly comply with a child's request.

Another issue that arises is the one related to the liability of the damages for activities that are related to AI. In order to better illustrate this abstract concept, we can think of the liability for autonomous cars, which has been at the forefront of legal debates for a few years already, with no uniform solution being outlined. In the FinTech sector several consumer protection challenges have also come to light, which include the greater use of algorithms, that has spurred on cyber-attacks. (Niziol, 2021) As it has been stipulated in the preamble for the *Cybersecurity Act*, the mounting number of cyberthreats calls for international collaboration and the development of a common global approach to address these issues.

Again, the EU has not remained passive to the changes brought on by AI, seeing as there are still some large gaps in the legislation in regards to what is actually being covered at the present moment. Briefly, I will try to highlight such issues within the EU framework I have previously presented. The Unfair Commercial Practices Directive has been analyzed in great depth. Yet, some of its pioneering definitions at the time, are falling short when it comes to AI-driven dark patterns and behavioral advertising. (Ebers, 2021) For instance, the definition of a '*vulnerable consumer'* becomes too narrow, as through big data pretty much anybody's vulnerabilities can be exploited, not only those affected by infirmity, credulity or minority.

Regarding pre-contractual information obligations, although they are stipulated by many directives, some which have been analyzed before, they are too generic to explain concretely how such disclosure should be conducted through the usage of AI systems. In terms of product liability, the *Product Liability Directive* has been under the scrutiny of the legislators recently. That is because it is unsure whether software products will fall under its scope. Moreso, it only applies to products, leaving outside of its scope companies that provide services such as data-analytics tools or machine-learning libraries. The lack of proper liability instruments has spurred the Commission to consider making amendments to respond to the societal changes. The non-conforming AI applications issue could also be raised and we have two possible options at EU level. We could either use *DCSD 2019/770* (which applies to additional digital content or services) or *SGD 2019/771* (which only applies to the good with digital elements, if

the digital services are integrated to the good and their malfunctioning prevents proper usage of the good).

The European Parliament established a special committee that adopted in the month of May 2022 a proposal for an EU Roadmap to AI. This is building upon the proposal put forth by the Commission on the 21st of April 2021, which aims to help Europe become one of the largest global hubs for developing trustworthy AI products. It touches upon safety, accountability, transparency, discrimination, bias, civil liability regimes for AI, guidelines for use of AI in military or education. Again, it is my belief that we should start off from the principles of law, while keeping in mind the fundamental human rights, rather than getting lost in the details. We have to focus on quickly finding solutions for the issues presented, so that we can develop good practices and ensure that technology reaches people in a just, fair manner.

To conclude this section, I believe it is important to state that AI applications and technology is not harmful on its own to consumers or persons in general. No, it is a tool that, in the hands of people, has the potential for either accomplishing great good or causing irreparable damage. For example, we have seen that AI can discriminate, impose unfair contract clauses to different categories of consumers, but the machines could also be trained to detect such unfair clauses and single them out. In this grey area rules, laws and regulations step in, so that they can ensure the good will outshine the bad and create a framework in which the protection granted to all of us is sufficient for us to enjoy the benefits that this Digital Revolution has brought upon us.

3.3 Consumer protection in the Metaverse

A concept that encompasses everything that has been discussed in this chapter so far is the Metaverse. I am sure we have all heard about it, but most of us probably struggle to understand such an abstract concept and its ramifications on our daily lives. Briefly, the metaverse stands for an immersive, 3D Internet in which the users will be able to interact with both environments generated by computers and each other. Today, the metaverse is present in online gaming, garnering enormous success. This can be proven by the 2019 *Fortnite World Cup* which managed to gather more than 2.3 million online viewers for its finale, besides the packed stadium watching it in person. Popular brands have been quick to ride the high of the metaverse and the users' thirst for content, like the case of the Gucci Garden on the Roblox platform, which, in May 2021 attracted over 20 million users, managing to sell bags at higher prices than

those paid for the physical goods. Considering that Facebook has rebranded itself as Meta and that it is planning to invest billions in the development of their very own metaverse platform, we can surely expect that other brands will jump the wagon and start investing in metaverse-compliant actions.

I agree that it sounds exciting, especially for our generation, who has grown with technology and is more than eager to experiment with it. Yet, it comes with enormous challenges, which encompass everything that has been already discussed in this chapter. Seeing as the metaverse is such a far-reaching concept, all of the threats associated with the proliferation of technology and digitalization are associated with it. Cybersecurity attacks are expected to keep rising as the consumer interest in the metaverse soars. We will be faced more and more often with not only data theft, but also identity theft, ransomware or disinformation campaigns. Deep fakes will gain more traction and they will impact a significant proportion of the most important aspects of our lives.

In a decentralized metaverse, there is no legal framework as of yet that will hold companies liable for their actions. No laws. No regulations. No virtual police. A space where everyone can do as they please. Therefore, there is nothing that can prevent parties (companies, state agencies, even private individuals) from accessing the personal data of consumers and afterwards using it to their own gains. Narrowing our scope only towards consumer protection, it is obvious things are quite blurry not only in regards to data protection. We can talk about liability or warranties for the products purchased. Scamming could emerge as one of the top activities conducted on the metaverse. With an economic crisis knocking on our door rapidly, people can be expected to resort to such alternatives much quicker and more often. Furthermore, with the surge in popularity of NFTs, scamming has never been easier. A recent example is the one represented by a group of investors that was scammed out of more than 1 million dollars when buying an NFT that belonged to the *"Big Daddy Ape Club"*.

Taking all of this into consideration, I find it imperative that governments and regulators worldwide fully cooperate in the development of a safer, inclusive metaverse. One possible solution would be for inter-state cooperation in the creation of service centers specialized in receiving complaints coming from users of the metaverse.

Of course, this brings us to the issue of designing policies that would ensure users their basic, fundamental rights when exploring the metaverse. I think this should be done through consultations with the big companies, such as Meta, that will be ruling over the metaverse.

Admittedly, they have not been very forthcoming in their previous collaborations with the authorities, but this is unchartered territory for them as well. Instead of trying to fight off fines, they could focus on developing a set of rules that would work towards everybody's best interest. A win-win situation from which consumers stand to greatly benefit.

In addition to this, I also think legislations should consult with cyber-security experts in their endeavor to develop a set of working laws to protect consumers in the metaverse. Only through such public-private endeavors will the laws be fully compliant with the new consumer needs that arise in this complex, virtual space. We need to try to think outside the box, instead of being limited by previous paradigms, seeing as this is a borderless space that presents limitless possibilities.

All in all, I think waiting too long to enact the necessary legal rules could prove to have a largely detrimental effect on consumer rights. It can end up even affecting the smooth functioning of the world markets. Still, a sweeping regulatory storm could end up smothering innovation and cutting the wings of these disruptive technological developments. The right approach would be, in my opinion, trying to adapt and build on the existing legal rules. We already have functional, performant contract and consumer law frameworks and an abundant ECJ jurisprudence in the EU. I wager that we have learned from the mistakes committed previously and that we will be able to impose a step-by-step legal reform, that will come organically and develop together with the metaverse. There is no need for it to be a competitive process, when it could be a collaboration.

It is clear that the future will look quite different from anything that we could anticipate now. The metaverse will be applied in more than just video games. I dare say that it will become an integral part of our life. In this case, we can build on contract and consumer law and reach a state where we have the optimal balance between private contracting, company-level innovation and government regulation. One thing that we cannot afford is losing our rights and civil liberties in the process. We've fought too hard for it to happen and, I dare say, in the EU, with the approach the legislators have had so far, that will probably never come to pass. Not when consumer rights and, in essence, human rights, are among the top concerns of the Commission when drafting up proposals. The EU has managed so far to withstand the test of regulating technology, in spite of the bumps that it ran into. It is my genuine belief that it will manage to succeed this time around too, becoming a hub for a humanely-focused technological development.

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