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Online platforms: new vulnerabilities to be addressed in the European legal framework. Platform to consumer relations.

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Abstract

The essay analyses the relationship between online platforms and consumers in the light of European consumer law. The complex digital environment shaped by platforms is characterised by a lack of transparency about the role and status of the parties active in the online marketplace, as well as by the use by online platforms of practices aimed at conditioning consumers' behaviour and limiting or completely excluding their self-determination, giving rise to new forms of vulnerability. In such a context, the regulation of unfair commercial practices can play a central role, provided that some interpretative uncertainties are overcome.

Keywords: online platforms - B2C contracts - unfair commercial practices - online advertising; differential pricing - vulnerable consumer.

Summary: Introduction. – 1. Rules on online marketplaces set forth by the modernization directive. – 2. Unfair commercial practices in platform to consumer relations. – 2.1. Practices amounting to forms of covert advertising: the uncertain boundary between information and advertising. – 2.2. Practices related to online ranking of goods and services. Personalized ranking. 2.3. Practices amounting to differential treatment in platform to consumers relations: price differentiation – 2.4. Personalization of advertising and targeting techniques in platform to consumer relations. – 3. Role played by UCPD rules in tackling the new forms of vulnerabilities arising in the context of platform to consumer dealings.

Introduction.

The European Commission, in its 2016 Communication on Online Platforms and the Digital Single Market - Opportunities and Challenges for Europe ('Platform Communication') highlighted the challenges that online platforms pose to consumer law[1] and called for the promotion of greater transparency when traders deal with consumers using such platforms, in particular with regard to goods/services' rankings and data collection. More recently, in view of these challenges, the Proposal for a Regulation on a Single Market For Digital Services (15.12.2020 COM(2020) 825 final; hereinafter DSA Proposal) recognized the need to amend and update first of all Directive 2000/31/EC[2] (hereinafter the E-Commerce Directive), but also other consumer law provisions applicable to online

[1] C. Busch, H. Schulte-Nölke, A. Wiewiórowska-Domagalska, F. Zoll, *The Rise of the Platform Economy: A New Challenge for EU Consumer Law?* (2016) 1 *EuCML*, 3.

[2] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1.

transactions between traders and consumers.

1. Rules on online marketplaces set forth by the modernization directive

A step in the direction suggested by the European institutions is represented by directive 2019/2161/UE (hereinafter "modernization directive"[3]) that has been adopted in order to (at least partially) adapt the provisions contained in the Unfair Commercial Practices Directive[4] (hereinafter "UCPD") and Consumers Rights Directive[5] (hereinafter "CRD") to the developments occurred in the digital economy, with the aim of strengthening consumers' rights when the latter engage in online transactions[6].

According to the modernization directive, online marketplaces consist of "a service using a software, including a website, part of a website or an application, operated by or on behalf of a trader which *allows* consumers to conclude distance contracts with other traders or consumers". This broad definition stresses the fact that online marketplaces fulfill an intermediation role bringing together and facilitating transactions between consumers and suppliers of goods and services; and that characteristic entails the presence of contractual relations that involve multiple parties playing different roles and having various legal status. The same definition takes into account that digital platforms are home to the active consumer (or prosumer[7]), so called because he or she has an active role in promoting products and services and enters into contracts with other consumers[8].

Given the complexity of the environment where digital platforms operate, it may not always be clear to the consumer who the parties to the supply contract are and what legal status the supplier of goods or services may have[9]. This opacity creates uncertainty about the

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[3] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules.

[4] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22.

[5] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance [2011] OJ L304/64, as amended by Directive 2015/2302/EU of the European Parliament and of the Council of 25 November 2015.

[6] The modernization directive has amended Directive 2005/29/CE, by adding a definition (article 2(lett. *n)* of "'online marketplace'. A similar definition has been included in the CRD (see Art. 2, 1 no. 16 and 18).

[7] M. Maugeri, *Elementi di criticità nell'equiparazione, da parte dell'AEEGSI, dei "prosumer" ai "consumatori" e ai "clienti finali"* (2015) *Nuova giur. civ. comm.*, 406. See also F. Trubiani, *I soggetti del commercio elettronico: limiti delle attuali definizioni legislative e prospettive future* (2020) 2, *Nuovo dir. civ.*,..

[8] D. Di Sabato, *Progredire tornando all'antico: gli scambi della sharing economy*, in *Sharing economy. Profili giuridici* (eds.) D. Di Sabato, A. Lepore (ESI 2018), 5.

[9] A. Quarta, *Il diritto dei consumatori ai tempi della* peer economy. *Prestatori di servizi e* prosumers, (2017) 2 *Europa e Diritto Privato*, 667. G. Smorto, *La tutela del contraente debole nella* platform economy (2018) *Giornale dir. lav. relaz. industriali*, 423.

legal framework applicable to the supply contract[10]. Therefore, when buying from an online marketplace, consumers need to be clearly informed about: i) the identity of the goods/services provider; ii) whether the online platform provider bears some of the duties arising from the supply contract; iii) whether they are buying goods or services from a trader or from a non-trader.

In this respect, CRD, as amended by the modernization directive, currently includes a new provision (art. 6 bis) that prescribes a series of transparency duties upon the providers of online marketplaces regarding, first of all, the legal status of the third party offering goods or services to consumers through the online marketplace and, secondly, whether the online marketplace acts as a mere intermediary between the parties to the supply contract.

Notably, under this provision, before a consumer is bound by a distance contract on an online marketplace, the provider of the online marketplace shall: *i)* inform consumers whether the third party offering goods, services or digital content is a trader or a non-trader, based on a declaration made by the same third party; *ii)* in case the third party is a non-trader, provide a short statement that consumer law does not apply to the contract concluded. The rationale of this provision resides in ensuring that consumers do not rely on the fact that their counterparty is a trader[11]. In light of the above, the modernization directive has added also a new art. 7, f), to the UCPD, according to which it is material the information "whether the third party offering the products on the online market place is a trader or not, on the basis of the declaration of that third party to the provider of the online marketplace ". Not providing this information amounts to an unfair practice and can be sanctioned as such.

Moreover, under the modernization directive, it is mandatory to disclose how the obligations related to the supply contract are shared between the third party offering the goods, services or digital content and the provider of the online marketplace. Consequently, the role of mere intermediary between the supplier of the goods or services and the consumer may be invoked by an online platform only if that role is made apparent by clear and comprehensible communication to consumers[12] (not entrusted to standard forms or the like). This principle, set out in various provisions of consumer law, is at the basis of previous case law according to which a trader acting (offline) as an intermediary on behalf of a private individual qualifies as seller for the purposes of Article 1(2)(c) of Directive 1999/44/EC[13],

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[10] C. Twigg-Flesner, *Disruptive Technology – Disrupted Law? How the Digital Revolution affects (Contract) Law,* A. De Franceschi (ed.), *European Contract Law and the Digital Single Market*, 2016, 34-6.

[11] According to *European Commission, Staff Working Document on Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices*, SWD(2016)163 final, "under the professional diligence and transparency requirements laid down by Articles 5(2), 2(h), 6 and 7 UCPD, any e- commerce platform, insofar as it can be considered a "trader", should take appropriate measures enabling, amongst others, its users to clearly understand who their contracting party is – and the fact that they will only benefit from protection under EU consumer and marketing laws in their relations with those suppliers who are traders".

[12] See Recital n. 27 of the modernization directive: (for example, it could indicate that a third-party trader is solely responsible for ensuring consumer rights, or describe its own specific responsibilities where that provider assumes responsibility for certain aspects of the contract, for example, delivery or the exercise of the right of withdrawal).

[13] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12.

where the former has failed to duly inform the consumer of its role of mere intermediary[14].

In the same vein, building upon other existing case law[15], the modernization directive states that the information given by the provider of an online marketplace is without prejudice to any responsibility that the latter and the third-party trader have in relation to the supply contract under other Union or national law. This means that the determination of the duties incumbent on the online marketplace provider as a result of the supply contract is a matter of interpretation that must be assessed on a case-by-case basis.

2. Unfair commercial practices in platform to consumer relations

Online marketplace providers often resort to forms of commercial practices, which are able to influence consumers' preferences and needs and oftentimes to compromise their self-determination and freedom to choose goods and services[16]. Such practices are made possible by the deployment of digital technologies and involve the collection[17], use and transfer of consumer data to third parties and therefore affect both consumer law and data protection law[18].

2.1. Practices amounting to forms of covert advertising: the uncertain boundary between information and advertising.

Among the practices that can threaten consumer autonomy are forms of covert advertising, which frequently occur on online platforms. These practices are made possible by the fact that - in the context of online interactions between traders and consumers - the boundaries between genuine information (or recommendation) and advertising have become blurred. Digital platforms tend to take advantage of this opacity.

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[14] European Court of Justice, Judgment of the Court (Fifth Chamber) of 9 November 2016, *Sabrina Wathelet v Garage Bietheres & Fils SPRL* (Case C-149/15).

[15] See CGUE *Uber Spain* (C-434/15), 20th December 2016; *Uber France* (C-320/16), 10th April 2018; *AirBnB Ireland* (C-390/18), 19th December 2019. A. De Franceschi, *Uber Spain and the identity crisis of online platforms*, (2018) *Journal of European Consumer and Market Law*, 1.

[16] Wolfie Christl, *Corporate Surveillance in Everyday Life: How Companies Collect, Combine, Analyze, Trade, and Use Personal Data on Billions* (2017); P. Nguyen, L. Solomon, *Consumer data and the digital economy: Emerging issues in data collection, use and sharing* (2018) 1-62, 11, available at https://apo.org.au/sites/default/files/resource-files/2018-07/apo-nid241516.pdf. Online platforms tend to make use of consumers' data in order to influence their economic self-determination. See in this respect E. Mik, *The erosion of autonomy in online consumer transactions*, (2016) 8(1), *Law, Innovation and Technology*, 1-38.

[17] A. Jablonowska, M. Kuziemski, A.M. Novak, H.W. Micklitz, P. Palka, G. Sartor, *Consumer Law and Artificial Intelligence. Challenges to the EU Consumer Law and Policy Stemming from Business' Use of Artificial Intelligence* (Final report of the ARTSY project), (2018) *EUI Working Papers*, 35: "Data gathering and knowledge generation might be the most fundamental "use" of AI by business… It was the availability of big data – the "dataquake" – that enabled high-paced development and mass deployment of AI in the first place; data not necessarily actively collected, but also generated as a side product of consumer use of online platforms and services".

[18] These practices are mostly made possible by the ability of platforms to analyze and relate huge amounts of data, as well as the use of Artificial Intelligence systems. See on these aspects N. Helberger, B.F. Zuiderveen, A. Reyna, *The Perfect Match? A Closer Look at the Relationship between EU Consumer Law and Data Protection Law* (2017) 54 *Common Market Law Review*, 1427 and G. Sartor, *New aspects and challenges in consumer protection. Digital services and artificial intelligence*, April 2020, 24, available at *https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648790/IPOL_STU(2020)648790_EN.pdf*

One example of these kinds of practices is the endorsement[19], recurring on social media platforms, of goods and services by the so-called influencers, who present themselves as mere disinterested users, but in fact recommend products/services on behalf of a supplier; this form of communication (being part of an entertainment content created by users of the digital platform) has a pronounced persuasive effect on the recipients of this form of communication (especially on minors[20]), that can be difficult to neutralise[21].

The circumstance, therefore, of not clearly stating that it is a communication with a commercial intent makes the practice unfair under the UCPD's provisions, according to which any form of commercial communication must be clearly identifiable as such by the recipients of the communication[22]. In this regard, however, an important question is identifying the party that should reasonably be expected to perform these duties (between the supplier and the influencer) and whether the platforms have to meet also any transparency obligations. Those issues have been the subject matter of Market Authorities' decisions[23].

A similar practice in terms of persuasiveness and opacity is represented by the review/rating of goods or services offered to consumers within an online marketplace by other consumers that claim to have experienced them. This type of review is enabled by the provider of the online marketplace that makes available to its users and manages a system of reputational feedback[24]. This practice has the merit of allowing consumers to easily obtain information from sources other than the companies themselves that provide the reviewed products/services. However, it can be used in a way that distorts the economic behavior of consumers and in light of this, first of all, businesses are required by the modernization directive to ensure that such practices are transparent and truthful[25]; moreover, Annex 1 to

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[19] Commercial users of these platforms incorporate product advertising into their entertainment content and give the impression that the content is not advertising in the first place. See S. C. Boerman, N.Helberger, G. van Noort, C. J. Hoofnagle, *Sponsored Blog Content: What Do the Regulations Say: And What Do Bloggers Say* (2018) 9(2) Journal of Intellectual Property, Information Technology and Electronic Commerce Law, 146 ; C. Riefa, L. Clausen, *Towards fairness in Digital Influencers' Marketing Practices* (2019) 8 Journal of European Consumer and Market Law, 64.

[20] Younger users are often unable to distinguish independent recommendations from product placement. See I. GARACI, *La "capacità digitale" del minore nella società dell'informazione*, (2019) *Nuovo dir. civ*., 59, 79.

[21] R. Baldwin, *From Regulation to Behavior Change: Giving Nudge the Third Degree*, (2014) 77(6) *Modern Law Review*, 831.

[22] See Article 7(2) and point No. 22 of Annex I UCPD against hidden marketing. A similar requirement stems from Article 6(a) of the e-Commerce Directive.

[23] See the Italian Autorità Garante della Concorrenza e del Mercato (AGCM), Order no. 27787 of the 22.5.2019 https://www.agcm.it/dotcmsCustom/tc/2024/6/getDominoAttach?urlStr=192.168.14.10:8080/C12560D000291394/ 0/E6B624BBD0F6A573C12584150049D1EE/$File/p27787.pdf).

[24] C. Busch et al., *The ELI Model Rules on Online Platforms*, in *European Consumer and Market Law*, 9, 2, 2020, 61 ss.; C. Busch, *Crowdsourcing Consumer Confidence: How to Regulate Online Rating and Review Systems in the Collaborative Economy*, (ed.) A. De Franceschi, *European Contract Law and the Digital Single Market*, (2016) Cambridge, 223; G. Smorto, *Reputazione, fiducia e mercati* (2016) 1 *Europa e diritto privato*, 199; A. Thierer, *How the Internet, the Sharing Economy, and Reputational Feedback Mechanisms Solve the "Lemons Problem"* (2016) 70 *University of Miami Law Review*, 830.

[25] J. Malbon, *Taking Fake Online Consumer Reviews Seriously*, (2013) 36 *Journal of Consumer Policy*, 139. See also Competition and Markets Authority (UK), *Online reviews and endorsements – Report on the CMA's call for information*,

Dir. 2005/29/EC has been amended so as to include among the list of unfair commercial practices also those consisting in "Sending, or instructing another legal or natural person to send, false consumer reviews or false appreciations or providing false information about consumer reviews or appreciations on social media, in order to promote products" (Art. 23 ter), as well as in "Indicating that reviews of a product are sent by consumers who have actually used or purchased the product without taking reasonable and proportionate measures to verify that the reviews come from such consumers" (Art. 23 bis) [26].

2.2. Practices related to online ranking of goods and services. Personalized ranking.

Practices related to the classification of the results of online searches for goods and services conducted by consumers in digital marketplaces are also expressly regulated by the modernization directive. Indeed, it is well known that higher ranking or any prominent placement of commercial offers within online search results has an important impact on consumers' choices. There are a range of factors which might influence the order in which search results are presented and each online platform has its own algorithm which determines the order of presentation.

In light of that, in order to promote transparency, the modernization directive clarifies that, although it is permissible for a business user to pay an online market, whether directly or indirectly, to "influence rankings", nevertheless, this fact must be disclosed, along with the effect of such payment on the ranking. Consequently a new item has been added to Annex I of Directive 2005/29/EC, to make it clear that practices where a trader provides information to a consumer in the form of search results in response to the consumer's online search query, without disclosing paid advertising or payment made specifically for achieving higher ranking of products within the search results, are unfair and sanctioned as such. This is a transparency requirement designed primarily to protect the freedom of choice of the consumer who may be unaware that the results of the online search are influenced by third parties or the economic interests of the online marketplace provider. Such a transparency requirement applies also to comparison tools[27].

At the same time, it is expressly mandated that platforms set out the "main parameters determining ranking"[28], as well as the relative importance between the various parameters, and provide this information in a clear and comprehensible manner, not being sufficient to this end a mere "reference in the standard Terms or Conditions"(Recital 19). In this respect, the EU Commission had already clarified that consumers, unless are informed otherwise, have the expectation that search results are included and ranked based only on relevance to their search queries and not based on other criteria (p. 133).

The new rules implicitly recognize that, besides the issue of influence exerted on behalf

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CMA41 (June 2015) and ISO 20488:2018, *Online consumer reviews – Principles and requirements for their collection, moderation and publication*.

[26] See Recitals no. 47 and 49.

[27] The UCPD requires all traders to clearly distinguish a natural search result from advertising. This also applies to operators of comparison tools. The relevant provisions in this respect are Article 6(1)(c) and (f) and Article 7(2) UCPD. See in this respect the 'Key principles for comparison tools', http://ec.europa.eu/consumers/consumer_rights/unfair-trade/comparison-tools.

[28] It is not mandated to make public the algorithm that determines the ranking, in view of the need for reconciling the transparency about the way rankings work with protection of trade secrets and intellectual property.

of third parties, the way algorithms that determine the rankings of goods/services are designed may otherwise affect consumer autonomy, but also the principle of equal treatment. This occurs when digital platforms use recommender systems[29] (i.e., algorithms that provide suggestions about what a user might be interested in) to tailor the results of an online search to each individual (so-called differential ranking). As a consequence, the content (commercial and non-commercial) made available to each consumer is differentiated in light of a number of parameters, including the use of profiling and personalization techniques (see paragraph 2.4.). This practice is widely used in e-commerce and more generally in business-to-consumer transactions in online marketplaces.

The opacity of the criteria used to arrange the results of the online search prevents the user from understanding the logic recommender systems apply and means that the user can be easily manipulated in his or her purchasing choices[30].

2.3. Practices amounting to differential treatment in platform to consumers relations: price differentiation.

Commercial practices involving differential treatment and/or economic discrimination against consumers[31] are a common feature of online markets, which parallel the forms of differentiation that occur in the context of the relations between digital platforms and their business users.

Practices of such a nature include the so-called price differentiation[32], whereby digital marketplace operators are able to offer the same goods and services on a large scale at different prices to each consumer[33].

The practice of price differentiation[34], when based on the inferred (in the online context

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[29] Rules on recommender systems are included in the new DSA Proposal: Article 2 (o) of the Proposal defines a recommender system as a "fully or partially automated system used by an online platform to suggest in its online interface specific information to recipients of the service, including as a result of a search initiated by the recipient or otherwise determining the relative order or prominence of information displayed".

[30] See D.Paraschakis, Algorithmic and ethical aspects of recommender systems in e-commerce ((2018)) Malmö: http://muep.mau.se/bitstream/ handle/2043/24268/2043_24268%20Paraschakis.pdf?sequence=3&isAllowed=y.

[31] H. Schulte-Nölke, F. Zoll, *Discrimination of the Consumers in the Digital Market*, *Study of the European Parliament*, 2013, 47, http://www.europarl.europa.eu/meetdocs/2014_2019/documents/imco/dv/discrim_consumers_/discrim_consumers_en.pdf.

[32] See OECD, *Personalised Pricing in the Digital Era.* Background Note by the Secretariat, 28 November 2018, available at https://one.oecd.org/document/DAF/COMP(2018)13/en/pdf. See *Consumer market study on online market segmentation through personalised pricing/offers in the European Union* conducted for DG Just by Ipsos, London Economics and Deloitte, June 2018, available at https://ec.europa.eu/info/publications/consumer-market-study-online-market-segmentation-through- personalised-pricing-offers-european-union_en. With regard to differentiated practices occurring in platforms to businesses relations, see the Reports of the *Observatory for the Online Platform Economy* [C(2018), 2393 final], available https://ec.europa.eu/digital-single-market/en/news/commission-expert-group-publishes-progress-reports-online platform- economy.

[33] A. Lindsay, E. McCarthy, *Do we need to prevent pricing algorithms cooking up markets?* (2017) 32(12) *European Competition Law Review*, 533.

[34] O. Bar-Gill, Algorithmic Price Discrimination: When Demand Is a Function of Both Preferences and (Mis)Perceptions (May 29, 2018) 86, University of Chicago Law Review, The Harvard John M. Olin Discussion

as well as in the offline environment) propensity of the consumer to pay, is not per se unlawful in the light of consumer law[35]; it may, however, be illegitimate in some cases, depending on the techniques employed and the ways in which knowledge of the maximum price consumers are willing to pay for a given good or service is acquired and/or exploited by digital platforms. According to some scholars, online marketplaces that apply a differential price must inform consumers in compliance with a principle of transparency[36]. The modernization directive[37] has expressly set forth a duty to provide "where applicable, information that the price has been personalized on the basis of an automated decision-making process"[38], adding that such a duty of transparency is "without prejudice to Regulation (EU) 2016/679, which provides, inter alia, for the right of the individual not to be subjected to automated individual decision-making, including profiling" (see Recital no. 45). Thus, the provision implicitly recognizes not only that businesses are currently able to gain exact knowledge of the individual consumer's maximum propensity to pay for a given good or service[39], but also that the accumulation of data, a necessary prerequisite for

Paper Series, No. 05/2018, Harvard Public Law Working Paper No. 18-32, available at SSRN: https://ssrn.com/abstract=3184533

[35] See European Commission, Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, SWD(2016) 163 final, 134. In this regard, the so-called Services Directive (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market) includes a general prohibition on price discrimination only when it is based on the consumer's nationality and place of residence.

[36] Cfr. P. Hacker, *Personalizing EU Private Law: From Disclosures to Nudges and Mandates*, in *European Review of Private Law*, (2017) 25(3), 651, nonché A. Porat, L. J. Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data,* in Michigan Law Review, (2014) 112(8), 1417. See in this respect, EC (2018), *Consumer market study on online market segmentation through personalised pricing/offers in the European Union*, European Commission, https://ec.europa.eu/info/sites/info/files/aid_development_cooperation_fundamental_rights/aid_and_development_by_topic/documents/synthesis_report_online_personalisation_study_final_0.pdf. according to which consumers have a more positive reaction to online personalisation when they are aware that data collection and personalisation is taking place, and also when they can opt out of such practices.

[37] Art. 4 of the modernization directive has inserted into art. 6, par. 1, CRD a letter *e bis).*

[38] See Recital no. 45: "Traders may personalise the price of their offers for specific consumers or specific categories of consumer based on automated decision-making and profiling of consumer behaviour allowing traders to assess the consumer's purchasing power. Consumers should therefore be clearly informed when the price presented to them is personalised on the basis of automated decision-making, so that they can take into account the potential risks in their purchasing decision. Consequently, a specific information requirement should be added to Directive 2011/83/EU to inform the consumer when the price is personalised, on the basis of automated decision-making…". Requiring businesses to disclose personalised pricing practices represents an effective remedy according to the Organisation for Economic Co-operation and Development's Study on Personalised Pricing in the Digital Era (DAF/COMP(2018)13, 20 November 2018, 35 ss.), as long as mandated disclosure procedures are simple, clear and relevant, as opposed to lengthy and complex disclosures that are unlikely to be read by consumers.

[39] "European Data Protection Supervisor. (2015). Opinion No. 7/2015. Meeting the challenges of big data: A call for transparency, user control, data protection by design and accountability. Available at: https://edps.europa.eu/data-protection/our-work/publications/opinions/meeting-challenges- big-data_en.

acquiring such knowledge, may take place in violation of the provisions on data protection[40].

2.4.Personalization of advertising and targeting techniques in platform to consumer relations.

Differential pricing is only a manifestation of a broader phenomenon that occurs in online marketplaces, which is not explicitly addressed by existing rules, the so-called personalization[41], i.e. the use of technology to optimize advertising campaigns' efficacy to the highest possible degree. Personalization is the combined effect of multiple technologies, which reinforce each other (such as tracking tools and IoTs' sensors[42], psychographic techniques, which enable psychological attitudes to be inferred from behaviour, image and voice recognition technologies that allow businesses to capture emotional response to advertising and to exploit such knowledge, etc.). Therefore, it has become possible to gain exact knowledge not only about consumer preferences and characteristics, as inferred (on the basis of profiling), but also about (mis)perceptions and vulnerabilities (due to psychological and physiological states) of individuals, as *observed* in real time[43].

Businesses and organizations that use these technologies understand consumers' decision-making better than consumers themselves and, therefore, are able to *coerce* consumers into commercial decisions they would not have taken otherwise. This is made possible by resorting to powerful tools (referred to in the literature as "hypernudges"[44]), consisting in algorithms programmed to self-learn how to exploit vulnerabilities[45].

It is clear that, in such cases, we are faced with practices of manipulation of the consumer who operates in digital markets[46], with the aim of exploiting and even creating new forms of

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[40] European Data Protection Board, *Guidelines 8/2020 on the targeting of social media users. Version 1.0*, 2 September 2020, available at *https://edpb.europa.eu/our-work-tools/public-consultatio ns-art-704/2020/guidelines-082020-targeting-social-media-users_it*.

[41] Q. André, Z. Carmon, K. Wertenbroch et alii, *Consumer Choice and Autonomy in the Age of Artificial Intelligence*, (2018) 5 *Customer Needs and Solutions*, 8.

[42] See also see Scott R. Peppet, Regulating the Internet of Things: First Steps Toward Managing Discrimination, Privacy, Security, and Consent, Texas Law Review, (2014), 95 ss., 117 e 119: "The first Internet of Things problem is the widespread sensor deployment: Internet of Things data will allow us to sort consumers more precisely than ever before". According to the author, the widespread use of third wave technologies (such as the IoT technologies) has made available a greater amount of intimate and personalised data, creating additional personalised targeting opportunities.

[43] C. Burr, N. Cristianini, *Can machines read our minds?* (2019) 29 *Minds and Machines*, 61–494.

[44] K. Yeung, *'Hypernudge': Big Data as a mode of regulation by design* (2017) 20(1) *Information, Communication & Society*, 118

[45] G. Sartor, *Consumer Law and Artificial Intelligence. Challenges to the EU Consumer Law and Policy Stemming from Business' Use of Artificial Intelligence* (n.17) 28: "personalised advertising involves the massive collection of personal data, which is used in the interests of advertisers and intermediaries, possibly against the interests of data subjects. Such data provide indeed new opportunities for influence and control, they can be used to delivers deceitful, or aggressive messages, or generally messages that bypass rationality by appealing to weaknesses and emotions". See J.D. Cohen, *Between Truth and Power. The Legal Constructions of Informational Capitalism* (2019) Oxford University Press.

[46] K. Manwaring, *Emerging Information Technologies: Challenges for Consumers* (April 25, 2017) Oxford University Commonwealth Law Journal (2017) Vol. 17 (2) available at SSRN: https://ssrn.com/abstract=2958514.

vulnerability[47]. Digital consumer manipulation, as this phenomenon is called by the relevant literature, can erode consumer autonomy, limit choice and competition, violate privacy and even compromise personal dignity (when it is successful in persuading consumers to conduct transaction that they would not otherwise have concluded). In the end, the influence of such practices on consumers' decisions might result in overspending, purchasing unrequired goods, financial risks, etc.[48]. It is, therefore, pivotal to determine the "legally permissible levels of transactional exploitation"[49] and find the adequate legal measures of protection.

3.Role played by UCPD rules in tackling the new forms of vulnerabilities arising in the context of platform to consumer dealings.

Consumer law and most notably the legislation on unfair commercial practices can play a role in ensuring that platforms do not cross the thin line between recourse to legitimate forms of persuasion and the exercise of undue influence or even coercion over consumers.

And in fact, under the rules on misleading commercial practices, it is sufficient that the practice (action or omission) employed by the trader induces or is likely to induce the average consumer to take a decision of a commercial nature that the latter would not otherwise have taken. The trader is required to provide clear and transparent information on all elements that, depending on the circumstances, may be decisive for the consumer's informed consent. Interpreters therefore infer from this provision an open number of duties of information, not limited to those provided for by specific provisions. To this end, consumers need to know whether the trader collects their personal data and for what purposes, as well as whether data is collected that is not necessary for the provision of the service and whether, conversely, such data is used for commercial purposes[50] (and/or is passed on to third parties). Accordingly, it is incumbent on the trader to inform if it engages in tracking, profiling and related practices, such as personalized pricing and consumer targeting[51].

With regard to behavioural targeting and personalization techniques, the UCPD provisions against aggressive marketing practices can help to safeguard the consumers' autonomy, provided that some difficulties of interpretation are overcame: i) firstly, regarding the criteria for distinguishing lawful/fair practices from unlawful/unfair ones in a digital environment, especially with respect to the peculiarities of AI applications; ii) secondly, with regard to the way of conceptualising the vulnerability of the consumer.

In this respect, proper interpretation of the paradigm of vulnerable consumer is desirable, considering that according to the Charter of Fundamental Rights of the European Union,

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[47] European Data Protection Supervisor, *Opinion 3/2018, EDPS Opinion on online manipulation and personal data* (19 March 2018) 22.

[48] G. Sartor, *New aspects and challenges in consumer protection. Digital services and artificial intelligence* (n. 18) 14.

[49] See E. Mik, *The erosion of autonomy in online consumer transactions* (n. 16).

[50] See the Italian Consumer and Market Authority decision fining Facebook Inc. e Facebook Ireland Ltd. for not clearly disclosing the commercial purpose behind the collection and processing of consumers' personal data (https://agcm.it/dotcmsdoc/allegati-news/IP330_chiusura.pdf).

[51] According to the European Commission, the functionality also refers to whether personalization happens (see *Commission, DG Justice Guidance Document concerning Directive 2011/83/EU on consumer rights* (2014), 67: "As appropriate to the product, the following information should be given: . . . Any conditions for using the product not directly linked to interoperability, such as: a. tracking and/or personalization", available at <ec.europa.eu/justice/consumer-marketing/files/ crd_guidance_en.pdf>.).

'Union policies shall ensure a high level of consumer protection' (Article 38). The need for a revision of this notion is much more apparent with respect to the consumer dealing with the complexity of the online environment[52].

With modern personalized marketing techniques, "firms can not only take advantage of a general understanding of cognitive limitations, but they can also uncover and even trigger consumer frailty at an individual level"[53]. Therefore, to protect consumers effectively, consideration should be given to the emergence of new forms of vulnerabilities, other than that those considered by the UCPD' rules (infirmity, age or credulity). Some scholars propose to adopt a more appropriate concept of vulnerability and to focus on the limited ability to deal with business practices; they also highlight the fact that the use of certain persuasive strategies, such as profile based targeting and behavioral targeting, is primarily aimed at turning the average consumer into a vulnerable consumer[54]. However, it is much discussed whether such an outcome can be achieved through proper interpretation of UCPD rules or rather these rules need updating. In this regard, the EU resolution on a strategy for strengthening the rights of vulnerable consumers suggests that the concept of vulnerable consumers should also include consumers in a situation of vulnerability, meaning consumers who are placed in a state of temporary powerlessness resulting from a gap between their individual state and characteristics on the one hand, and their external environment on the other hand[55].

Despite the persisting uncertainty, member States market authorities and EU Institutions interpret/apply UCPD rules in such a way as to take into account not only individual consumers interests but also a broader economic and societal perspective[56]. This tendency is consistent with the fact that practices such as the ones above described encroach upon

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[52] The average consumer, as the 'reasonably informed, observant and circumspect' consumer, is defined by Recital 18 of the UCPD. See B. Duivenvoorde, '*The protection of vulnerable consumers under the Unfair Commercial Practice Directive*' (2013) 2 *Journal of European Consumer and Market Law* 69-79, 73; J. Trzaskowski, *The Unfair Commercial Practices Directive and Vulnerable Consumers*, paper presented at the 14th Conference of the International Association of Consumer Law (2013), available at http://www.iaclsydney2013.com/

[53] R. Calo, *Digital market manipulation* (2014) 82, *George Washington Law Review*, 995, available at <ssrn.com/abstract=2309703>. The requirements for the average consumer in a digital environment must reflect in some way or other the greater technical and organisational complexity but also the changed nature of digital or digitally-enhanced products, and hence the diminished consumers' ability to deal with that complexity.

[54]E. Mik, *The erosion of autonomy in online consumer transactions*, (2016) 8(1), *Law, Innovation and Technology*, 1, 33, who claims that vulnerability may also be "dynamic state". See H. W.Micklitz, N. Reich, The Court and Sleeping Beauty: The revival of the Unfair Contract Terms Directive (UCTD), (2014) 51 *Common Market Law Review*, 771. See N. Helberger, B.F. Zuiderveen, A. Reyna, *The Perfect Match? A Closer Look at the Relationship between EU Consumer Law and Data Protection Law* (n.18), 1458, who observe that, in view of the possibility for traders to "target individuals", more legal attention should be paid to the individual characteristics and vulnerabilities.

[55] European Parliament resolution of 22 May 2012 on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI)). Prepared by the Committee on the Internal Market and Consumer Protection, p. 6. The Resolution recognises that all consumers are susceptible to becoming vulnerable consumers over the course of their lives due to external factors and their interactions with the market

[56] See I. Garaci, R. Montinaro, *Public and Private Law Enforcement in Italy of EU Consumer Legislation after Dieselgate*, (2019) 1 *Journal of European Consumer and Market Law Review*, 29. See, with regard to unfair practices related to the processing of personal data, Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato), decisions PS11112 – *Facebook-Condivisione dati con terzi*, 29 novembre 2018, n. 27432, and PS10601 – *Whatsapp-Trasferimento dati a Facebook*, 11 maggio 2017, n. 26597.

privacy, autonomy and even individual dignity.

Proper governance of online platforms is decisive when it comes to protecting fundamental rights, as recognised by the European Parliament in its resolution on the Digital Services Act and fundamental rights issues[57]. The motto coined by the EU Parliament is: "it is not a matter of ensuring innovations against fundamental rights but, on the contrary, of promoting innovation through a fundamental rights framework".

[57] See the European Parliament resolution on the Digital Services Act and fundamental rights issues (of 20 October 2020, 2020/2022(INI)): according to the EU Parliament the business model currently applied by digital platforms including targeting of individuals based on characteristics exposing physical or psychological vulnerabilities impacts substantially on human dignity and fundamental rights protection.