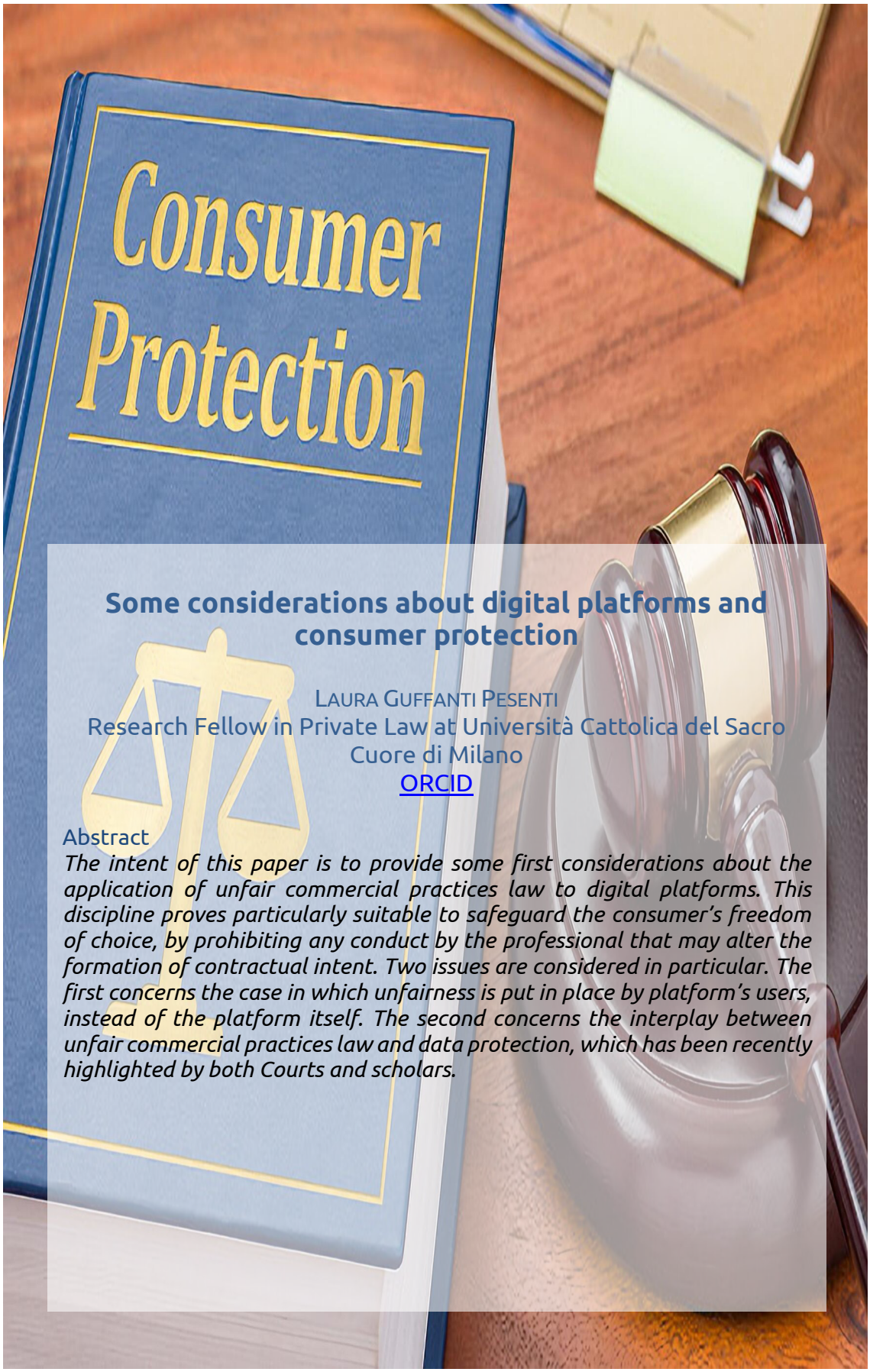
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Some considerations about digital platforms and consumer protection

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Abstract

The intent of this paper is to provide some first considerations about the application of unfair commercial practices law to digital platforms. This discipline proves particularly suitable to safeguard the consumer's freedom of choice, by prohibiting any conduct by the professional that may alter the formation of contractual intent. Two issues are considered in particular. The first concerns the case in which unfairness is put in place by platform's users, instead of the platform itself. The second concerns the interplay between unfair commercial practices law and data protection, which has been recently highlighted by both Courts and scholars.

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Keywords: Unfair commercial practices; Digital platform; Consumer protection.

Summary: Introduction. - 1. Unfair commercial practices discipline. - 2. Some cases of unfairness put in place by digital platforms (or by its users). - 3. The interplay between unfair commercial practices and data protection. - Conclusion.

Introduction.

The intent of this paper is to provide some considerations about the application of the repressive discipline of unfair commercial practices to digital platforms[2] in order to protect consumers.

Digital platforms represent tools that feature "two different sides"[3].

On the one hand, they facilitate relations between users, offering them a virtual location for the exchange of goods and services and thus increasing the volume of trade [4]. On the other hand, they operate in a field that inevitably makes the relationship between users and the platform asymmetrical.[5] It is no longer that information asymmetry that has historically characterized the relationship between professionals and consumers. But it is a so-called digital asymmetry[6], which sees the platform as a strong subject, and its users (whether professionals or consumers) as weak subjects.

The position of strength that characterizes the platform with respect to its users makes it possible for the platform to behave with misconduct towards them. On the one hand, with respect to consumers, the platform is able to affect their self-determination by altering their choices on the market. On the other hand, with regards to professional users, the platform can adopt opaque criteria for the presentation of offers to the public, for example by privileging some of them over others, through the so-called 'positioning'[7]operations.

The relationships between platforms and commercial users (in turn

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[1] This paper reproduces, with some additions, the reflections formulated for the Workshop *Legal design for transparency in consumer contracts operating in online and offline environments,* Suor Orsola Benincasa University, Naples, 28 October 2021.

[2] Most recently on this subject A Quarta, G Smorto, *Diritto privato dei mercati digitali* (Le Monnier 2020); see also A Palmieri, *Profili giuridici delle piattaforme digitali* (Giappichelli 2019); G Resta, 'Digital platforms and the law: contested issue', Medialaws, https://www.medialaws.eu [2018], 232.

[3] Regulation (EU) 2019/1150, recital 1.

[4]S Casabona, 'L'affaire Expedia deciso dalla cassazione francese. Occasione di riflessione su giurisdizione e diritto applicabile nelle controversie con le piattaforme di intermediazione mobiliare', Dir. comm. int. (2021), 665.

[5] N Helberger, O Lynskey, H-W Micklitz, P Rott Marijn Sax, J Strycharz, *EU Consumer Protection 2.0, Structural asymmetries in digital consumer markets. A joint report from research conducted under the EUCP2.0 project,* 2021, ibid., 51 (https://www.beuc.eu/publications/eu-consumer-protection-20-structural-asymmetries-digital-consumer-markets-0).

[6] See N Helberger, O Lynskey, H-W Micklitz, P Rott, M. Sax, J. Strycharz, *EU Consumer Protection 2.0, Structural asymmetries in digital consumer markets*, 2021, ibid. 51: «*digital asymmetry* will and may never be reduced to information asymmetry. Digital asymmetry is a structural phenomenon that affects all consumers and that cannot be overcome by providing ever more information. As the consumer is structurally and universally unable to 'understand' the digital architecture, information in whatever form cannot remedy the existing asymmetry».

[7] G Grisi, 'Le magnifiche sorti progressive del turismo 5.0' (2020), Europa dir. priv., 482.

'professionals') have been dealt with, also under this last aspect, by the recent Regulation (EU) 1150/2019 which introduced stringent information duties and transparency obligations for platforms, and forms of protection for commercial users based on the principle of effectiveness.

On the contrary, for consumer protection there is no specific discipline, also because there are many profiles of unfairness abstractly attributable to the digital platform and they can vary, according to the different shape of the relationship between the platform itself and consumers.

The digital platform, in fact, can itself be a seller of products and services to the consumer. But the platform can also act only as an intermediary, limiting its service to putting professionals and consumers in contact with each other. Moreover, the relationship can be even more complex: because the platform could carry out intermediation activities, and at the same time offer goods and services to consumers[8].

The above, therefore, are situations in which the relationship between platform and consumer is configured differently: and this diversity is reflected on contractual regulations, or more broadly on the relationship between them, leading the doctrine to investigate its nature and legal protection[9], between general private law and special disciplines.[10]

Even before the contract law and related protections, however, the system seems to face the weakness of the consumer with regards to the platforms through the discipline of unfair commercial practices referred to in Articles. 18 et seq. of the Consumer Code, which seems to have become a sort of stronghold of consumer protection.

The latter (which is applied before and regardless of whether or not a relationship has been established between the platform and the consumer) has had significant application in this area, thanks also to its character of general horizontal discipline, valid for the most diverse areas and the most diverse ways in which platforms can behave with unfairness versus consumers.

1. Unfair commercial practices discipline.

Before focusing on the application of this discipline to digital platforms, it is worth recalling that it originates from Directive 2005/29/EC, which aimed to contribute to the proper functioning of the internal market and at the same time to achieve a high level of consumer protection[11].

Essential elements in a general sense – referred to in Article 20 of the Consumer Code – are professional diligence (the practice must be "contrary to the requirements of professional diligence") and the ability of the practice to distort the economic behavior of the average consumer, causing the consumer

[8] See MW Monterossi, 'La tutela dell'utente commerciale nei mercati digitali' (2021), Contratto e Impresa, 925.
[9] C Camardi, 'Contratti digitali e mercati delle piattaforme. Un promemoria per il civilista' (2021), Jus civile.
[10] The distinction is coined by C Castronovo, 'Diritto privato generale e diritti secondi. Responsabilità civile e impresa bancaria' (1981), Jus, 158. [more recently, C Castronovo, '*Diritto privato generale e diritti secondi. La ripresa di un tema,* in A. Plaia (ed.), *Diritto Civile e diritti speciali. Il problema dell'autonomia delle normative di settore*' (Giuffrè 2008), 5.
[11] Cfr. art. 1 dir. 2005/29/EC

to make a commercial decision that would not be make otherwise. In addition to the general case[12] there are two more limited cases, although they are also characterized by a certain generality: misleading commercial practices and aggressive commercial practices, provided for in Articles 21-22 and 24-25 of the Consumer Code, respectively. In the end, the discipline contemplates two blacklists of unfair practices (misleading, art. 23 cod. cons.; aggressive art. 26 cod. cons.), at the occurrence of which, without the need for further verification, the conduct of the professional will be the object of repression.[13]

In brief, the repressive regulation of unfair commercial practices aims to safeguard the consumer's freedom of choice by prohibiting any conduct by the trader that may affect this choice, altering the formation of contractual intent.

This freedom of choice, however, is not protected by Directive 2005/29/EC – as far as individual relations are concerned – through the remedial technique that has characterized the consumer rights in the most significant episodes.[14] The consumer's freedom of choice is instead protected at a general market level, as a fundamental component for the proper functioning of the competition [15] which features the consumer's freedom of choice as a fundamental component.

The sense indicated is supported by the fact that Directive 2005/29/EC (and with it the Consumer Code) does not appear – as many have underlined – as a discipline relative to the *act* but rather to the *activity* of the professional[16]. The field of application of the same is not the contract, but the commercial practice; the criterion on which the misconduct is measured is not the individual consumer[17] but the average consumer [18] (on average informed and reasonably prudent: meaning an abstract model of consumer); the formulation of the case is not in terms of the obligation but in terms of what is prohibited[19]; the commercial practice is unfair not only if it is actually false, but also if it is likely to distort the economic behavior of the average consumer. [20] And again, repression of prohibited conduct is made through 'effective, proportionate and dissuasive' *sanctions*.[21]

The interest pursued through the suppression of unfair commercial practices is, therefore, an interest of general nature and not individual: common to competitor consumers and to the entire market. Coherently, as far as our legal system is concerned, the Italian 'Autorità Garante della Concorrenza e del Mercato' is responsible for the application of this discipline, as it is invested with the power to sanction those whose conduct is considered to be what is

[12] Cfr. art. 18 cod. cons.
[13] Cfr. art. 23 e 26 cod. cons.
[14] These are essentially the well-known figures of the nullity to protect and the right of cancellation.
[15] A. Barba, *Capacità del consumatore e funzionamento del mercato. Valutazione e divieto delle pratiche commerciali* (Giappichelli 2021), 11.
[16] Among the first to highlight it L Rossi Carleo, 'Consumatore, consumatore medio, investitore e cliente: frazionamento e sintesi nella disciplina delle pratiche commerciali scorrette' (2010), Europa dir. priv., 704.
[17] That acts solely for the satisfaction of personal interests and needs, as noted A Nicolussi, 'I consumatori negli anni Settanta del diritto privato. Una retrospettiva problematica' (2009), Europa dir. priv.
[18] Recital 18 and art. 1 dir. 2005/29/CE; art. 18 cod. cons.
[19] Both the directive and the consumer code, that follows the directive's text, are expressed in the terms that 'unfair commercial practices are prohibited'.
[20] Art. 5 dir. 2005/29/EC; art. 18 code. cons.
[21] Art. 13 dir. 2005/29/EC, transposed into the more extensive art. 27 cod. cons.

prohibited by the directive.[22]

What can be deduced from these brief considerations is that the objective of protection is the consumer's freedom of choice; and also that this objective of protection is considered within the general market dimension and not in the particular terms of the contract.[23]

This at least until the adoption of Directive 2019/2161/EU, which introduced a new Article 11-bis in Directive 2005/29/EC: under this new provision, legal systems have to adopt private remedies for unfair commercial practices.[24] This means going from the original dimension of Directive 2005/29/EC, which focuses solely on the repression of the misconduct of the trader, to a dimension that now focuses on protecting also the individual consumer, who may have been the victim of an unfair commercial practice.

Pursuant to the new Article 11-bis in fact: "1. Consumers harmed by unfair commercial practices, shall have access to proportionate and effective remedies, including compensation for damage suffered by the consumer and, where relevant, a price reduction or the termination of the contract. Member States may determine the conditions for the application and effects of those remedies. Member States may take into account, where appropriate, the gravity and nature of the unfair commercial practice, the damage suffered by the consumer and other relevant circumstances".[25] The directive has not yet been transposed in the Italian legal system. But it is evident that its transposition can have an impact also with regards to the individual defense of the consumer versus unfair commercial practices put in place by a digital platform.

2. Some examples of unfairness put in place by digital platforms (or by its users).

The areas of intersection between this discipline and the phenomenon of digital platforms are now taken into consideration.

What must first be noted in this regard is: on the one hand, the fact that there are numerous forms and ways of unfairness that a digital platform can have towards the consumer; on the other, how the range of formulas that

[22] As independent authorities in general, it is responsible for the protection of widespread interests. On widespread interests, and on the need to protect them, in the first instance, not by jurisdiction, but with an independent administrative subject see G. Berti, 'Interessi senza struttura (i c.d. interessi diffusi)', *Studi in onore di A. Amorth*, I, (Giuffrè 1982), 67.

[23] As proof that these are separate plans, and that the Directive is originally dedicated only to the wider market plan, there's the clarification according to which the rules introduced by the Directive do not affect the application of contract law (see Article 3 of 2005/29/EC).

[24] The desire to overcome this approach is also evident from one of the recitals (No. 13) of the Proposal COM (2018)185 final, although not reproduced in the final version of Directive 2019/2161/EU. It states that 'while that Directive was originally designed mainly to regulate the market conduct of traders based on public enforcement, experience from more than ten years of application demonstrate the shortcomings of the lack of a clear framework setting out rights to individual remedies'.

[25]The desire to overcome this approach is also evident from one of the recitals (No. 13) of the Proposal COM (2018)185 final, although not reproduced in the final version of Directive 2019/2161/EU. It states that 'while Directive 2005/29/EC was originally designed primarily to regulate the market behavior of traders on the basis of enforcement measures at a public level, experience from more than ten years of application highlights the limitations posed by the lack of a clear framework establishing the rights to individual remedies'.

characterize the repressive discipline of unfair commercial practices (first of all, the general clause referred to in art. 20 cod. cons.) has made it possible to easily bring within its scope the most varied types of behavior used by the platforms.

At this point under consideration, therefore, we can witness the tendency to expand the discipline referred to in Articles 18 et seq. of the Consumer Code, thanks to the flexible nature of the rules included in this discipline.

Starting from the most linear assumptions, what first of all is considered as being unfair is the behavior of digital platforms regarding their own intermediation services. This hypothesis easily falls within the scope of Articles 18 et seq. of the Consumer Code.

The platform, in fact, which is a professional subject, could adopt a behavior contrary to professional diligence[26], and likely to distort the economic behavior of the average consumer that it reaches, or to whom it is directed [27].

A recent example, brought to the attention of the Authority of Competition and Market, concerned a well-known digital platform which operates an "online intermediary hosting service", which allows users to "exchange and/or sell and/or buy products, use an integrated payment system, communicate by sending private messages or using the *forum*" (PS12003).

The misconduct, in this case, consisted in the fact that the platform described itself as a free platform for its users, while the intermediation service was free only for sellers, and not for buyers[28].

From this point of view, the message was, therefore, misleading, according to the Authority [29]: because it was capable of "engaging the consumer" who then has to pay commission for purchases on the platform initially proposed as being free. [30]

The platform's responsibility for misleading commercial practices related to its conditions of use (once again in terms of the gratuitousness of the service) was also identified in another recent proceeding (PS11726), relating to a *crowdfunding* platform[31].

The Professional in question was a platform qualified by the Authority as 'one of the world's largest fundraising platforms', and the disputed practice concerned fundraising for hospitals in those areas most affected by the Coronavirus.

In this case too, the platform was charged with the fact that the website

[26] In the sense referred to in art. 18, co. 1 lett. h cod. cons.

[27] In the broad sense referred to in art. 18, co. 1, lett. e cod. cons.

[28] See the final act of procedure PS12003: "the legislator has provided that the consumer, according to the paradigm identified in the rules of the Consumer Code aimed at protecting the freedom of choice of the same, must simultaneously have – from the initial contact – all the information useful to make decisions of a commercial nature, in particular where the professional intends to promote a service highlighting the costs of the same and emphasizing the gratuitousness and the absence of commissions. In this regard, any possibility for consumers to find on the trader's website information on how the Platform operates and on the related costs that are then sustained by the buyer is completely irrelevant".

[29]The conduct is qualified as a deceptive commercial practice, for violation of Articles. 20, 21 and 22 cod. cons. The measure is injunction, requiring the suspension of advertising messages misleading consumers in terms of the gratuitousness of the service.

[30]The Authority (with prov. 29788 of 2021) consequently provides that – pursuant to Article 27, paragraph 3, of the Consumer Code and Article 8, paragraph 1, of the Regulation – the Company temporarily suspends all activities aimed at the dissemination of misleading and omissive advertising messages and information relating to the gratuitousness or absence of commissions (or similar expressions) for consumers regarding the purchase and sales transactions carried out on the platform.

[31] See the relevant sanctioning measure, decided at the meeting of 1 December 2020.

indicated no additional costs, while at the time of payment, the consumer was diversely forced to pay an amount to finance the platform itself.

According to the Authority, this constituted a misleading representation of reality, regarding the gratuitousness of the services offered, and an aggressive method that conditions the choice of the amount of commission foreseen for each donation.[32]

In both these cases there seems to be no doubt about the abstract configuration of an unfair commercial practice on the platform. Because these were practices carried out by the platform itself, and capable of distorting consumer behavior.

Different from those mentioned above is the case in which the platform doesn't put in place, directly, any unfair conduct versus the consumer, but instead the responsibility lies with the professionals who use the platform to sell their products to consumers.

Here the problem immediately appears more complex. In fact, it becomes a matter of understanding whether the platform can be said to be responsible for the unfair commercial practice carried out by other subjects operating on it, in a sort of unprecedented vicarious responsibility.

The discipline of unfair commercial practices, indeed, does not seem to be formulated in terms that include this hypothesis. And the system excludes the responsibility of the hosting provider for any irregularities committed by its users,[33] foreseeing, moreover, no obligation on the hosting provider's part to monitor the contents it 'hosts'.[34]

Nevertheless, in some recent cases, proceedings have begun to assert the responsibility of digital platforms for unfair commercial practices, even when these practices concerned conduct carried out by subjects operating on the platform.

An example is represented by the PS11734 case. In this case the platform was charged with deceptive commercial practices relating to coronavirus protective medical devices. The deceptiveness of the practice concerned both the prospection of untruthful characteristics of the products sold on the platform, and the excessively high prices compared to those applied in the period before the pandemic[35].

However, in this case it wasn't the platform that behaved in the deceptive

[32]We read in the provision (nr. 77) that in the present case is missing clarity of information from initial contact with the consumer. This induces the Authority to recognize the presence of misleading information (related to the *claims* on gratuitousness, absence of costs and optional commissions in favor of the platform itself).

[33] See art. 16 d.lgs. 70/2003.

[34] See art. 17 d.lgs. 70/2003.

[35]The Authority notes (prov. 28445 of 2020) that commercial communications aimed at promoting the sale of the products subject to the procedure – in particular filtering masks and *test kits* for self-diagnosis – appeared suitable to generate in the consumer the erroneous belief that it was possible to avoid contracting Covid-19 by using masks and / or self-diagnose the presence of the *virus* through *test-kits* at home (not authorized). Such conduct was therefore considered contrary to professional diligence and capable of distorting the economic behavior of the average consumer, in relation to the product, leading them to make decisions of a commercial nature that would not have been made otherwise, on the basis of a misleading and ambiguous representation of reality, which – moreover – exploited the existing health emergency situation and was likely to endanger the health and safety of the consumers. In addition, the conduct consisting in the application of significant price increases during the pandemic crisis for some products that are difficult to find due to the rapid spread of the *virus,* seemed to unduly exploit the situation of serious epidemic crisis and the consequent vulnerability of consumers.

manner, but rather the operators using it. And, therefore, these charges of unfair practice could have been made to them[36].

However, the decision released by the Authority states, the responsibility of (the platform) "as owner of the marketplace platform and responsible for the sales made on the platform"; the platform "is ... required, also in accordance with the standard of professional diligence referred to in Article 20 of the Consumer Code, to adopt measures to avoid speculation phenomena such as those detected, or to prevent the use of claims and statements aimed at misleading consumers, as to the purchase of products presented or commonly indicated as useful for limiting the circulation of the coronavirus".

With regards to these statements, one may wonder whether this type of application goes beyond what is permitted by the discipline of unfair commercial practices [see Article 18.b and (d)]. And even more so, if it does not contradict the regime of irresponsibility contained in the discipline of electronic commerce, in particular Arts. 16 and 17 d.lgs. 70/2003. Pursuant to art. 16, as it is well known, 'where an information society service is provided, that consists of the storage of information provided by a recipient of the service, the service provider is not liable for the information stored at the request of the recipient of the service'; and under Article 17, as is well known, 'in providing the services referred to in Articles 14, 15 and 16, the provider shall not be subject to a general obligation of monitoring the information they transmit or store, nor to a general obligation of actively searching for or circumstances indicating the presence of unlawful activities'.

Precisely in this regard, in a recent judgment before the Council of State (C.d.S. 18 May 2021, n. 3851), it was noted that the two disciplines must be coordinated, "in the sense that it is possible to sanction [as unfair commercial practices] behavior that violates the rules of professional correctness, but it is not allowed that through enforcing the discipline on unfair practices, the hosting provider services is forced to provide services not provided for by the regulations on electronic commerce and by the specific contract".[37]

These events lead us to reflect and question the adequacy of the discipline currently in force. Both in terms of the repression of unfair commercial practices, with regards to which it would be necessary to establish with certainty whether they also occur in terms of a vicarious responsibility of the platform for its operators; but also – on a broader level – with regards to the discipline of digital platform liability, in view of the increasing strength these platforms have had in recent times.[38] In this last regard, if the regime of

[36] The procedure, as stated in the prov. 28445 of 2020, concerns certain conduct carried out by the companies as part of the sale of products related to the propagation of the SARS-CoV-2 Virus *(Coronavirus,* Covid-19), carried out *by third-party sellers on the Companies' platform* (emphasis added).

[37] C.d.S. 18 May 2021, n. 3851 (3.6). This does not imply, however, according to the Council of State, the immunity of the platform. What should be verified on a case-by-case basis is whether there is any involvement of the same in commercial practice: since, in the event that the latter exists, the responsibility of the platform for the misconduct can also be asserted, even if this misconduct is carried out by another subject operating on it. On the liability of the *hosting provider* in the most recent jurisprudence of the Supreme Court see R Bocchini, 'The multi-subjective civil liability, subsequent and possible of the ISP' (2019), Giur. it.

[38] On this topic see the extensive study *Liability of online platforms* written by A Bertolini, F Episcopo, N-A Cherciu
(https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656318/EPRS_STU(2021)656318_EN.pdf) that has the following objectives "(i) provides a classification of existing platforms; (ii) identifies and assesses

exclusion of liability referred to in Legislative Decree 70/2003 proposed the objective of promoting online commerce, today the priority seems to be the protection of the subjects who use the platforms, due to their irreparable weakness towards the platform itself.[39]

3. The interplay between unfair commercial practices and data protection.

But the repressive discipline of unfair commercial practices has been applied to digital platforms also with reference to another area, different from those previously mentioned, and with respect to which discussion took place as to whether the discipline referred to in Articles 18 et seq. of the Consumer Code was the most appropriate for the protection of the weak subject against the platform.

This is the case decided by the Autorità Garante della Concorrenza e del Mercato with provision PS11112, with which a well-known social network platform was sanctioned, once again for misleading commercial practices. The measure was ultimately confirmed by the Council of State decision nr. 2631 of 29 March 2021.

The case is well known[40]. The conduct contested to the platform by the Authority lies in having collected and used users' data for commercial purposes without immediacy, clarity and completeness"; moreover, the platform has been accused of having forced customers "to allow ... the collection and use, for commercial purposes, of data concerning them ... in an unknowing and automatic way".

And that's not all. The deceptiveness of the practice also lies in the fact that the creation of an account on the platform was presented to the user as free [41] "so as to induce the user to make a decision of commercial nature that the user would not have made otherwise".[42]

The issues faced lead us straight to that progressive extension – which has already been partly noted – of the scope of the discipline of unfair commercial practices, even beyond its original limits.

The central theme in the case, in fact, recalls data protection and privacy, rather than the protection of the consumer's economic choice. And in fact, before the administrative court, it was objected the "non-commerciality of personal data and therefore the non-imputability of their processing ... to consumer law", and also that "... the non-patrimoniality of the personal data

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the relevant legal framework at the European level, discussing the policy issues that deserve consideration; and (iii) provides a set of policy options, addressing such concerns and discussing the available alternative approaches to tackle them".

[39] For some consideration in Digital Services Act, Proposal for Regulation COM (2020)825, 15 December 2020.

[40] The issue is further analyzed by C. Irti, *Consent "negotiated" and circulation of personal data* (Giappichelli 2021), 173, 177.

[41] The authority states that the group's business model is based precisely on the collection and exploitation of user data for remunerative purposes, thus configuring such data as a counter-provision of the service offered by the social network, as they have commercial value. In particular, the revenues from online advertising, based on the profiling of users starting from their data, constitute the entire turnover of ... and 98% of the turnover of ... " (prov. n. 27432, n. 18).

[42] Thus the final measure of the procedure PS11112 (nr. 7), referred to in the text.

makes it impossible to apply consumeristic … discipline".

However, the aforementioned decision rejected this exception, confirming the correctness of the Authority's work, and in particular stating that in the present case what is relevant is "the exploitation of personal data made available by the interested party in favor of a third party who will use it for commercial purpose" (C.d.S. 2631/2021, No. 9).

It follows that personal data is given such economic value [43], that the consumer's decision with regards to his data becomes a commercial decision. It further follows that the exchange between an intermediation service, and the consent given for data processing, results in a relationship for consideration and not free of charge. In fact, it attributes a resource to the platform from which it can profit, for example using techniques aimed at profiling users for commercial purposes.

User profiling is governed by articles 21, 22[44], 23 of EU Regulation 679/2016 and consists of (art. 4) "any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyze or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behavior, location or movements".

Through profiling it is therefore possible to customize the offers addressed to the users of the platforms. But this does not actually mean greater attention given to the person, as the term might suggest. This was highlighted by a recent study [45] that focused on this phenomenon just mentioned, affirming the relevance and usefulness of the discipline of unfair practices in this specific area[46], especially thanks to the general clause included in art. 5 Dir. 2005/29/EC

[43]See S Tommasi, *The 'New deal' for Consumers. Towards More Effective Protection?* (2020) ERPL, 328. The author brings back the expression according to which "personal data constitute the new currency in the network (A Palmieri - R Pardolesi, *Clausole "unfair" e abuso da sfruttamento*, Mercato Concorrenza Regole, 2018, 14). Camardi, Contratti digitali, 886, also dwells on the phenomenon of exchange between goods (and services) and personal data.

[44] On which see the considerations of N. Helberger, O Lynskey, H-W Micklitz, P Rott, M Sax, J Strycharz, *EU Consumer Protection 2.0, Structural asymmetries in digital consumer markets. A joint report from research conducted under the EUCP2.0 project,* 2021, part. II, 136 s.

[45] See N Helberger, O Lynskey, H-W Micklitz, P Rott, M Sax, J Strycharz, *EU Consumer Protection 2.0, Structural asymmetries in digital consumer markets. A joint report from research conducted under the EUCP2.0 project,* 2021, part. II, 103: "the individual is replaced by their digitalized alter ego, which is a commodified digitalised person. Personalisation through AI would then abolish individualisation rather than realizing individualisation. Thus, personalisation is a misnomer: it insinuates the idea that personalisation may lead to individualisation, whereas it puts an end to individualisation and substitutes the individual through their alter ego. That is why the alter ego breaks down the distinction between individualisation and standardization".

[46] Again N Helberger, O Lynskey, H-W Micklitz, P Rott, Marijn Sax, J Strycharz, *EU Consumer Protection 2.0, Structural asymmetries in digital consumer markets. A joint report from research conducted under the EUCP2.0 project,* 2021, part. II, 95 states that "The relevant legal rules deal neither with personalisation nor with digital vulnerability. Digital vulnerability and personalisation have to be squeezed into data protection (GDPR), unfair commercial practices (UCPD), and unfair contract terms (UCTD) legislation». In the study (part II) an interesting analysis is carried out on the type of unfair practice to which personalisation could give rise, between aggressive practices and deceptive omissions, and also focuses on the relevance of the general clause of opposition to professional diligence as a rule of closure of the entire subject. Among the concluding observations of the analysis relating to personalization there is the one for which, in addition to the privacy protection discipline offered by the GDPR «the only further tools to exercise at least some sort of control over personalised commercial practices are to be found in Directive 2005/29/EC on commercial practices".

(transposed in Art. 20 Cod. cons.).

Conclusions.

In conclusion, the reason for the expansive tendency that has come to light in these pages, lies in the fact that, on the one hand, the discipline of unfair commercial practices is based on a rule of general application, and as such, is capable of expanding to include new examples of unfairness; on the other hand, the regulation of unfair commercial practices allows a broader protection of the consumer class: because it is aimed at affecting the professional's *activity* and not the single *act* (or single relationship); and because it is entrusted to an administrative authority that operates regardless of the apathy typical of the weakest subjects on the market.[47]

In the case of data, however, the problem seems more difficult to solve when the issue goes from general market protection to individual protection. In this area, the remedies recently put in place by the Union (dir. 2019/2161/UE may not be equally effective.

The termination of the contract, for example, is a result that the consumer will hardly hope for, in particular when it comes to services aimed at socialization (the so-called social networks). It is easy to guess, in fact, that the consumer has been able to keep active the network of relations established thanks to the platform, something that would have not been possible if the consumer opted for the termination of the contract.

Moreover, even if the consumer decides to terminate the contract with the platform, reimbursement could prove to be a problem. Think, for example of the case in which consideration is represented by the transferring of consumer's personal data to the platform, with good chances that the same data has already been transferred to third parties and used for profiling purposes.

[47] For this reason C Granelli, Unfair commercial practices: the protections, *Il Contratto*, *Enc. dir.* (2021), 838 hopes that "the legislator will take the opportunity of transposition ... to outline a composite *set* of *simple, rapid, effective, inexpensive and low-risk* remedies for the consumer in order to protect the consumer who has fallen victim to unfair commercial practice".