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Editorial

EU Consumer Law: a Few Prognoses for 2025

2025 opens a new chapter in the trajectory of European consumer law. With a new Parliament and European Commission—and thus a fresh mandate to regulate consumer issues—the next few years may present interesting and significant challenges. Undoubtedly, issues of digital fairness will be at the forefront of the EU's consumer agenda in the near future.[1] Additionally, EU consumer law has faced a number of challenges and questions that often stem from issues originating in previous years. In the first issue of the EuCML in 2025, we would like to highlight several such issues that are likely to be on the policy, academic, and judicial agendas over the coming year. This Editors' pick is, of course, far from exhaustive, but we hope it will provide valuable guidance through more detailed (and sometimes less obvious) matters in EU consumer law.

Embracing New Consumer Imaginaries: 'Business as a Consumer' and 'Post-Consumer Consumption'

One of the most fundamental questions that consumer law will soon face is the need for a substantial redefinition of whom it aims to protect and against what threats.

In the contemporary EU law, the conventional clear-cut division between consumers and professionals is increasingly blurred. This distinction was crucial from the perspective of political ramifications, as it relatively clearly defined who should be protected and against what types of threats. However, the EU *acquis* demonstrates a growing trend to extend protection to entities that are entrepreneurs but are in a weaker position relative to other entrepreneurs with whom they engage. In this way, the weaker business party becomes increasingly recognized as a distinctive category of EU law. To simplify, the weaker professional (which is usually an SME) can be considered a 'new consumer,' whose protection will undoubtedly increasingly inherit elements already known from consumer law while also developing new solutions over time.

This gradual shift began in EU law at least during the development of new regulations concerning supply chains in the food sector[2] and platform-to-business relations.[3] At this stage, EU law main-

1 See also E Mišćenić, P Tereszkiewicz, 'Towards a New Digital Fairness Act!' (2024) 13(6) EuCML 229.
2 Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, OJ L 111, 25.4.2019, p. 59–72.
3 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.7.2019, p. 57–79.

tained a separation between the concepts of business and consumer, merely transferring elements of the consumer regulatory toolbox into the business-to-business domain.[4] A more significant change came with the horizontal regulation of the digital market. In GDPR,[5] and subsequently in DSA[6] and DMA,[7] EU law moved away[8] from a strict distinction between consumers and business parties, introducing more homogeneous notions, such as "data subject" and "recipient of the service". These concepts use a different criterion for classifying entities, which crosses the traditional consumer/professional divide.[9] In this context, the key consideration is the form of engagement in the market (e. g., through a platform), rather than the consumer or business purpose of that engagement. This leads to the gradual emergence of two bodies of law in EU regulation: consumer law and a regulatory framework of a cross-sectoral nature that uniformly encompasses both selected consumers and selected firms.

In light of these changes, can the classical notion of consumer retain its significance? One of the key challenges is to relatively clearly define what the protection of individuals in the market is truly intended to serve and what interests it should focus on. Although EU consumer law has never focused solely on protecting purely economic (material) interests, the significance of non-economic aspirations and values in consumption schemes has recently become particularly evident. Firstly, modern consumer law faces the growing commodification of goods and spheres of human activity, such as building interpersonal relationships or emotions.[10] This issue is particularly evident in the social media sector, where the business model is based on providing the infrastructure for communication and building social relationships. Secondly, many contemporary consumers pay increasing attention not only to the consumption value of goods and services, but also to the values that these goods represent. Consequently, consumption is becoming increasingly subject to ethical and political choices. In this case, the choice of certain goods simultaneously serves as a declaration of the consumer's alignment with specific values.[11] This issue is particularly noticeable regarding consumer attitudes toward sustainable consumption and 'fair trade' goods. However, this problem has much more fundamental implications for the entirety of consumer law and requires reconsideration of how consumer law should respond to this category of interests (and harms associated with them).

Shedding New Light on Enforcing Transparency

European consumer protection framework has a few years to it and has even undergone a few cosmetic procedures to freshen up. Is it any wonder though that consumers continue to under-appreciate and underuse it if the water they have been led to remains murky. Some of the recent CJEU's case law puts enforcing transparency of consumer information and of contractual provisions in a new light.

The lack of transparency persists in many standard terms and conditions, which consumers are not allowed to individually negotiate with traders and service providers. The CJEU recently approved

4 Another example of this approach is Article 13 of Data Act that directly introduces unfairness test into busiess-to-business contracts.
5 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4.5. 2016, p. 1–88.
6 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC, OJ L 277, 27.10.2022, p. 1–102.
7 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, OJ L 265, 12.10.2022, p. 1–66.
8 This is, however, not the first time that EU consumer law has adopted a broader conceptual category than the traditionally understood term 'consumer.' For earlier instances, see the concepts of 'air passenger' and 'traveller' introduced in air travel and package travel legislation – Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, OJ L 326, 11.12.2015, p. 1–33; Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, OJ L 46, 17.2. 2004, p. 1–8.
9 See, e. g., I. Domurath & H.-W. Micklitz, 'EU Digital Private Law: Tattering or New Beginning?' (2024) 20(4) ERCL 263, 301–304.
10 M Grochowski, 'Digital Vulnerability in a Post-Consumer Society. Subverting Paradigms?' in C. Crea, A. De Franceschi, *The New Shapes of Digital Vulnerability in European Private Law* (Nomos 2024) with further references.
11 S Dadush, 'Identity Harm' (2018) 89(3) University of Colorado Law Review 863.

of a new judicial approach to combating the lack of transparency in standard terms and conditions, by accepting that national courts could review transparency in collective proceedings.[12] This is possible if various traders and service providers from the same economic sector, who are involved in collective proceedings, use the same or similar terms, even if consumers concluded contracts with them over a long period of time.[13] The large number of traders or service providers involved in such collective proceedings may complicate the case, but this does not change the national court's obligation to review transparency of similar standard terms.[14] The transparency review in collective proceedings is facilitated by the use of the average consumer benchmark, which prevents national courts from accounting for individual consumer characteristics, such as age, occupation, income level or degree of awareness of mortgage regulations.[15] The CJEU makes an interesting reference to the possible changes in the "level of information and attention" of the average consumer. This could occur if contracts under consideration span a long time and mortgage regulations have been widely discussed during this time, to the extent that the average consumer's perception of them would have shifted.[16] For national courts to rely on such a changed awareness, they need to have objective and well-documented evidence thereof. They cannot simply assume it from the time that has passed since, e.g., the information about unfairness of floor clauses, has been made public.[17]

The second shift relates to the exponential growth of digitalisation, which forced policymakers to reconsider the importance of online information's transparency, emphasised also in the data protection framework.[18] Specifically, in another summer judgment, the CJEU confirmed an option to seek recourse through a representative action for an infringement of an obligation to transparently inform data subjects about the purpose of data processing, legal basis for this process, and intended recipients of the data.[19] This follows from the CJEU recognising that transparent provision of this information is necessary for data subjects to give a valid consent for data processing. As such, without it, their rights are infringed "as a result of the processing", which activates protection in the form of a representative action from Article 80(2) GDPR.[20] This opens a new route for data subjects, often consumers, to seek recourse for the lack of transparency – via a representative body.

Overall, these two recent judgments highlight the growing importance of collective proceedings and representative actions in enforcing consumer rights, and the willingness of courts to accommodate the use of consumer protection measures, such as transparency, in them.

Greening Consumer Law

One of the main challenges for consumer law at a regulatory level over recent years has been the convergence between consumption and sustainability.[21] The field of the sale of consumer goods is one where this link has been discussed the most.[22] In 2020, the Directive (EU) 2019/771[23] had not yet been transposed by the Member States and the European Commission was already announcing the need to amend it in the New Consumer Agenda.[24]

12 Case C-450/22 *Caixabank and Others* [2024] EU:C:2024:577 para 46.
13 Ibid, paras 38 and 44.
14 Ibid, para 43.
15 Ibid, para 53.
16 Ibid, paras 54-55.
17 See also C Leone, 'One size fits all? Average consumer in collective proceedings, CJEU in C-450/22' (26 July 2024, *Recent Developments in European Consumer Law blog*) <https://recent-ecl.blogspot.com/2024/07/one-size-fits-all-in-collective.html>.
18 Articles 5 and 12 of the Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data OJ [2016] L-119/1 (General Data Protection Regulation, GDPR).
19 Case C-757/22 *Meta Platforms Ireland* EU:C:2024:598, paras 54 and 62.
20 Ibid, para 61.
21 H.-W. Micklitz, 'Squaring the Circle? Reconciling Consumer Law and the Circular Economy' (2019) 8(6) EuCML 229.
22 M. M. Oliveira da Silva and J. Morais Carvalho, 'The (Un)Sustainability of the Sale of Goods in Directive (EU) 2019/771', in M. Santos Silva *et al.* (eds.), *Routledge Handbook of Private Law and Sustainability* (Routledge 2024) 123; F. Zoll *et al.*, 'Various Approaches to 'Greening' Consumer Sales Law', in M. Santos Silva *et al.* (eds.), *Routledge Handbook of Private Law and Sustainability* (Routledge 2024) 103; E. Terryn, 'A Right to Repair? Towards Sustainable Remedies in Consumer Law' (2019) 27 *European Review of Public Law*, 851.
23 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC.
24 J. Morais Carvalho, 'The Premature Obsolescence of the New Deal for Consumers' (2021) 10 EuCML 85, 87.

In 2024, for the sake of more sustainable consumption, the Directive (EU) 2024/1799[25] on common rules promoting the repair of goods was approved. This is a step towards greening consumer law, but it appears to be clearly insufficient. The effectiveness of the approved legislation is very much in doubt. Focussing on the amendments to Directive (EU) 2019/771, the analysis reveals problems at three levels: (i) the practical effectiveness of repairability as a conformity criterion; (ii) the extension of the liability period in case of repair; (iii) the replacement of the good during repair being subject to the discretion of the trader.

The repairability is included among the conformity criteria. The question, however, is what this means in practice. As with the conformity criterion of durability, which was included in the original version of the Directive,[26] repairability is not effective in a system that is based on liability or limitation periods that are shorter than the one implied by the duty to make goods repairable. If, after three years, it is concluded that the goods are not repairable (or durable), the situation is no longer covered by the Directive and the consumer will not be entitled to a replacement (a price reduction or the termination of the contract). If the lack of conformity becomes apparent within the liability or limitation period, the reference to repairability is also pointless, since there will always be, by definition, another independent lack of conformity. In order for the provision to have a useful effect, it could be considered that the repairability requirement applies to situations in which there is no lack of conformity (for instance, because the problem with the good is the result of misuse by the consumer) and the liability period has not yet elapsed. In this case, the lack of conformity would result from the non-repairability, and the consumer could ask for a replacement (a price reduction or the termination of the contract) even though the problem with the good was their responsibility. This is a way of ensuring that the reference to repairability among the conformity requirements is not just symbolic.

The 12-month extension of the liability period in the event of a repair is an interesting measure to make the consumer sales legal regime greener. It is also to be welcomed that Member States are allowed to provide for an extension for a longer period or for more than one extension if there is more than one repair. However, three problems can be identified. Firstly, it is not very clear whether the extension applies to any repair, even a very simple one from a technical point of view (for instance, when conformity is restored by handing over the second key to the car, which was missing). Secondly, no mention is made of extending the liability period in the case of replacement; if the extension is even longer, as it is now in several Member States, the solution still fails to incentivise repair. Thirdly, it may be of little use to extend the liability period without simultaneously extending the period in which the consumer does not have to prove that the lack of conformity already existed at the time of delivery. Solving these three issues is crucial if the provision is to be applied effectively.

Even more problematic seems to be the rule that provides that the trader can, if they wish, loan a good to the consumer while the non-conforming good is being repaired. Such a provision is, from the start, inappropriate in consumer relations, since it places all the power on the side of the trader, who is the party that, as a rule, decides what to do. Besides, the rule states the obvious, that goes without saying: the trader can loan a good to the consumer if they want to. What Recital 42 says, and should not say, is that loaning the good to the consumer in case of significant inconvenience resulting from the repair is a possibility for the trader. In this case, it is a duty. If they fail to do so, the repair does not fulfil the requirements of the Directive. The possibility of replacement through the delivery of a refurbished good if there is an agreement with the consumer also adds nothing and merely leads to confusion. Already at present, if there is an agreement between the consumer and the trader, the conformity can be remedied this way.

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25 Directive (EU) 2024/1799 of the European Parliament and of the Council of 13 June 2024 on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394 and Directives (EU) 2019/771 and (EU) 2020/1828.

26 According to E. Van Gool and A. Michel, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption' (2021) 10 EuCML 136, 138, durability also encompasses repairability.

Editorial

EuCML begins the year 2025 with changes to the Editorial Board. Prof. Dr. Vanessa Mak, after many years of dedicated service as Editor, is moving to the Advisory Board. We sincerely thank her for her long and successful cooperation! As of this issue, two outstanding scholars in consumer law join EuCML as Editors: Prof. Dr. Emilia Mišćenić and Prof. Dr. Evelyne Terryn. We are also pleased to welcome onboard Dr. Tom Bouwman and Dominik Dworniczak, who will work with us as Assistant Editors.

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