



Universiteit
Leiden
The Netherlands

A Primavera for European consumer law: re-birth of the consumer image in the light of digitalisation and sustainability

Mak, V.

Citation

Mak, V. (2022). A Primavera for European consumer law: re-birth of the consumer image in the light of digitalisation and sustainability. *Journal Of European Consumer And Market Law*, 11(3), 77-80. Retrieved from <https://hdl.handle.net/1887/3513511>

Version: Publisher's Version

License: [Leiden University Non-exclusive license](#)

Downloaded from: <https://hdl.handle.net/1887/3513511>

Note: To cite this publication please use the final published version (if applicable).

Journal of European Consumer and Market Law

EuCML 3/2022 · Volume 11

13 June 2022 · Pages 77–116

Board of Editors: Prof. Dr. Christoph Busch, University of Osnabrück – Prof. Dr. Alberto de Franceschi, Università degli Studi di Ferrara – Dr. Mateja Durovic, King's College London – Prof. Dr. Catalina Goanta, Utrecht University – Dr. Mateusz Grochowski, Max Planck Institute for Private Law, Hamburg – Prof. Dr. Joasia Luzak, University of Exeter – Prof. Dr. Vanessa Mak, Leiden University – Prof. Dr. Jorge Morais Carvalho, Universidade Nova de Lisboa – Dr. Kristin Nemeth, University of Innsbruck – Prof. Dr. Rupprecht Podszun, Heinrich Heine University Düsseldorf – Prof. Dr. Sofia Ranchordas, University of Groningen – Prof. Dr. Christine Riefa, University of Reading

EMail: editors@eucml.eu

Editorial

***A Primavera* for European Consumer Law: Re-birth of the Consumer Image in the Light of Digitalisation and Sustainability**

As the world is opening up again after two years of lockdowns and other restrictions imposed to control the Covid-19 pandemic, we are witnessing other transformations also. In the field of European consumer and market law the legislative process leading to the adoption of the Digital Services Act (DSA) is coming to a close.¹ In a marathon trilogue lasting sixteen hours, the European legislature tackled the final points on which agreement needed to be reached. Reports of ‘white smoke’ coming out with the agreement of a final text emerged at the end of April, although the agreed text has still to be distributed at the time of writing this editorial. The adoption of the DSA is a long-anticipated event on the calendar of European consumer law. Together with the Digital Markets Act (DMA) it constitutes the first global effort to reign in the power of BigTech through regulation. Despite the shortcomings observed by commentators and practitioners,² this package of legislation can be seen as a big step towards protecting the interests of consumers, small and medium-sized enterprises and other users of digital services in the EU. It can provide the basis for further legislative or regulatory actions in the future. The review of product safety and product liability regulation is already underway and will need to dovetail with the DSA when it comes to liability of online platforms.³ Other areas in which regulation has until now been of a minimalist nature – such as information rights for consumers and the regulation of unfair commercial practices – will have to be revisited and potentially revised in the light of evolving technologies.⁴

There are other transformations in European consumer law too that demand attention. Recent publications and academic events have focused on a ‘recalibration’ or reassessment of consumer law,⁵

1 European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM(2020) 825 final. The DSA Proposal was published together with a proposal for a Digital Markets Act (DMA); European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final.

2 For earlier commentaries in this journal see C Busch and V Mak, ‘Putting the Digital Services Act in Context’ (2021) 10 Journal of European Consumer and Market Law 109; R Podszun, P Bongartz and S Langenstein, ‘The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers’ (2021) 10 Journal of European Consumer and Market Law 60; R Podszun, ‘The Digital Markets Act: What’s in it for Consumers?’ (2022) 11 Journal of European Consumer and Market Law 1. See also CANMY Cauffman and C Goanta, ‘A New Order: The Digital Services Act and Consumer Protection’ [2021] European Journal of Risk Regulation 7.

3 C Busch, ‘Rethinking Product Liability Rules for Online Marketplaces: A Comparative Perspective’, European Legal Studies Institute Osnabrück, Research Paper Series No. 21-01, available at <dx.doi.org/10.2139/ssrn.3897602>.

4 Note that artificial intelligence (AI) is also subject to regulatory discussions at the EU level. See European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts’, COM/2021/206 final.

5 CMDS Pavillon, ‘Herijking van consumentencontractenrecht: duurzaamheid als nieuw ijkpunt?’ in CMDS Pavillon and WH van Boom, *Privaatrechtelijke bescherming herijkt. Preadviezen voor de Vereniging voor Burgerlijk Recht* (Uitgeverij Paris 2021) 14.

personalization of consumer law,⁶ and indeed the overall theme of the ‘transformation of consumer law’.⁷ The wish for a renewal of European consumer law seems to be hanging in the air, like spring time, or with reference to Botticelli’s famous painting of the birth of Venus, a *primavera*.

If this spring time indeed is the start of an age of transformation in European consumer law, a crucial question that we need to ask is whether we also need to recalibrate the image of the consumer. Consumer laws emerged in the US and Europe in the 1960s and 1970s in response to an upscaling of production and the perceived weakness of consumers to negotiate and to assess the quality of goods and services offered.⁸ Regulation took the form of specific rules on contractual rights and tort liability, applicable to ‘business-to-consumer relationships’ in which the consumer was broadly defined as a natural person not acting in the course of a business or profession. In substance, regulation focused on information rights for consumers, which should help them assess the quality of goods and services offered. While that framework served consumer protection goals well, the complexities of modern consumer markets may demand greater differentiation between types of consumers, instead of a one-size-fits-all model.⁹

At least three manifestations of the consumer give rise to a recalibration of European consumer law. The first is the digital consumer, that is, the consumer of digital goods and services, such as ebooks, apps, music, videos and streaming services.¹⁰ Consumers in digital markets are not only weaker in relation to businesses due to a lack of bargaining power or a lack of information on the quality of products, as they are in markets for physical goods.¹¹ They are also vulnerable to exploitation as they are subjected to sophisticated and opaque techniques seeking to manipulate their purchasing decisions.¹² Businesses use data-driven technologies to learn how consumers behave and to influence their purchasing decisions. They often do this without the consumer’s knowledge or understanding.¹³ Such practices create a ‘digital asymmetry’, a term denoting the structural imbalance between tech-providers and consumers, due to consumers’ structural and universal inability to fully understand the digital architecture.¹⁴ In this context, the existing information-oriented approach of consumer laws may no longer suffice.

Second, the ‘prosumer’ in platform markets will need to be considered. On online platforms, such as Amazon, products are offered by professional as well as non-professional traders. This means that consumers, i. e. natural persons not acting in the course of a business or profession, can move to the supply side of the market and become so-called ‘prosumers’ (conflating the concept of ‘consumer’ and ‘producer’).¹⁵ While peer-to-peer sales are not a new phenomenon and are regulated by the general rules of contract and tort law, platformisation upsets the balance that existing laws have struck between the interests of traders, buyers and third parties. Online platform operators are seldom held liable for harm suffered by consumers buying from prosumers (or other traders) through a platform. Yet, platform operators can have a meaningful role in safeguarding the quality of goods and services offered on their platform. Legislators are grappling with the question how to regulate platform responsibilities, as seen for example in the EU’s DSA proposal. That demands also a reappraisal of prosumer liability.

6 O Ben-Shahar and A Porat, *Personalized Law. Different Rules for Different People* (OUP 2021).

7 Conference organized by Christian Twigg-Flesner and Hans Micklitz at the University of Warwick on 21-22 April 2022.

8 I Ramsay, *Consumer Law and Policy. Text and Materials on Regulating Consumer Markets* (Hart Publishing 2012) 41 ff.

9 V Mak, *Legal Pluralism in European Contract Law* (Oxford University Press 2020) 119 ff; H-W Micklitz, *Brauchen Konsumenten und Unternehmen eine neue Architektur des Verbraucherrechts? Gutachten A zum 69. Deutschen Juristentag* (CH Beck 2012).

10 Specific regulation was introduced in the Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1 (Digital Content Directive).

11 For a comparison, see Daniëlle Op Heij, ‘The Digital Content Contract in a B2C Legal Relationship from a European Consumer Protection Perspective’ (2022) EuCML 53.

12 For example algorithmic manipulation through targeted advertising; compare G Wagner and H Eidenmüller, ‘Down by Algorithms? Siphoning Rents, Exploiting Biases, and Shaping Preferences: Regulating The Dark Side of Personalized Transactions’ (2019) 86 The University of Chicago Law Review 581.

13 E.g. by running A/B experiments on websites.

14 N Helberger, O Lynskey, H-W Micklitz, P Rott, M Sax and J Strycharz, *EU Consumer Protection 2.0. Structural Asymmetries in Digital Consumer Markets* (BEUC Report, March 2021), available at <beuc.eu/publications/beuc-x-2021-018_eu_consumer_protection.0_0.pdf>; A Jablonowska, M Kuziemski, AM Nowak, H-W Micklitz, P Palka and G Sartor, ‘Consumer Law and Artificial Intelligence. Challenges to the EU Consumer Law and Policy Stemming from the Business’ Use of Artificial Intelligence’, final report of the ARTSY project, EUI Working Paper LAW 2018/11, available at <cadmus.eui.eu/handle/1814/57484>; S Zuboff, *The Age of Surveillance Capitalism* (PublicAffairs 2019).

15 Cf A Toffler, *The Third Wave* (Bantam Books 1980) 280.

Third, the consumer image in European consumer law will need reassessment in light of the increased demand for consumers to be part of the societal project for achieving more sustainable consumption. The main question in this context is what role can be expected of consumers besides governments and the private sector in pursuing sustainable consumption. Sustainable consumption has become an important societal goal and is part of the UN Sustainable Development Goals (goal number 12).¹⁶ Consumers themselves are part of the strategy adopted by governments and policy makers to achieve more sustainable approaches to consumption. For consumer law, this demands a re-evaluation of the consumer protection-oriented approach adopted in business-to-consumer relationships. Should consumers not share the responsibility to make sustainable choices, as consumer-citizens, and how can that be achieved? This aspect of the transformation of ‘the consumer’ stands apart from digital markets. However, it provides a vital step in the construction of a consumer concept that takes account of the complexities of modern consumer markets. Whereas the other questions highlighted above focus on market-driven vulnerabilities of consumers,¹⁷ the issue of consumer-citizenship in relation to sustainable consumption highlights the role of consumer law beyond market regulation, in the pursuit of societal goals. Consumer markets are increasingly influenced by such goals.¹⁸ Furthermore, this perspective highlights that consumer concepts should not only be adjusted to weaknesses following from growing asymmetries in digital consumer markets, but should also take account of responsibilities that rest on consumers as citizens.

These three consumer images, relating to digitalisation, platformisation and sustainability, are vital to the development of European consumer law in the coming years. These three topics are central themes of the European Commission’s consumer agenda 2020-2025 and also influence consumer policies at the national level of EU member states. Globally, also, legislators and policy makers are exploring the ways in which consumer law can contribute to the regulation of digital markets and to sustainable consumption. The US, for example, has already taken steps towards the introduction of a ‘right to repair’, which should result in a longer lifespan for consumer goods and hence less waste of resources.¹⁹

The challenge has been carved out, with the approach to be developed further in the coming years.²⁰ One notion that will be up for reassessment in the light of the foregoing is the ‘average consumer’ of EU law. Much debated and challenged, in particular from the behavioural sciences perspective, the idea of this consumer image providing a cornerstone for European consumer law is reaching its limits. We have seen this in the Swiss currency mortgages saga playing out in Central and Eastern European member states, which led to a number of references to the European Court of Justice. The test of which information a ‘reasonably informed, and reasonably observant and circumspect’ average consumer should have understood has been used as a basis for assessment. Its application by national courts has however not always led to protection of consumers, as some national courts held that the average consumer would have understood the risk associated with a foreign currency clause in a mortgage agreement.²¹ We saw a more promising approach in the *Aziz*-case, concerning unfair terms in mortgage agreements, in which the Court effectively protected consumers in Spain from home eviction through its interpretation of the Unfair Contract Terms Directive.²² That case made clear that the protection of consumers through European consumer law can go beyond the protection of economic interests. The adoption of the EU’s Digital Single Market Agenda and the EU Green Deal can perhaps be seen as the start of a new phase.²³

16 UN Sustainable Development Goals, see <sdgs.un.org/goals>.

17 Compare European Commission, ‘Understanding Consumer Vulnerability in the EU’s Key Markets’ (January 2016), <ec.europa.eu/info/publications/understanding-consumer-vulnerability-eus-key-markets_en>. See also P Siciliani, C Riefa and H Gamper, *Consumer Theories of Harm* (Hart Publishing 2019).

18 Cf Art. 2 and 3 Treaty on European Union (TEU). See also V Mak and E Terryn, ‘Circular economy and Consumer Protection. The Consumer as a Citizen and the Limits of Empowerment through Consumer Law’ (2020) 43 *Journal of Consumer Policy* 227.

19 See E Terryn, ‘A Right to Repair? Towards Sustainable Remedies in Consumer Law’ (2019) 27 *European Review of Private Law* 851.

20 I will be leading a research team for the project ‘Transformation of the Consumer Image’ at Leiden University from 2022-2027, funded by a Vici grant from the Netherlands Organisation for Scientific Research (NWO).

21 Emilia Mišćenić, ‘Currency Clauses in CHF Credit Agreements: A “Small Wheel” in the Swiss Loans’ Mechanism’ (2020) 8 *EuCML* 226, 231.

22 CJEU C-415/11 *Aziz*, ECLI:EU:C:2013:16.

23 H-W Micklitz, ‘Squaring the Circle? Reconciling Consumer Law and the Circular Economy’ (2019) 8 *Journal of European Consumer and Market Law* 229.

Fundamentally, the reassessment of the consumer image in European consumer law will require a greater reckoning of who the consumer really is, instead of in all circumstances reverting to the fictional image of the ‘average consumer’. That requires a reassessment of notions of weakness and vulnerability. It has been recognised that, besides being subject to structural factors, consumer vulnerability is situational, ‘meaning that a consumer can be vulnerable in one situation but not in others, and that some consumers may be more vulnerable than others’.²⁴ Situational factors are sometimes integrated into consumer laws, e.g. in Art. 5(3) of the Unfair Commercial Practices Directive, which distinguishes consumers who are vulnerable due to age or mental or physical infirmity. Nevertheless, such rules are exceptions, and moreover they also are limited in their differentiation. Age, for example, is not always a distinguishing factor, as some children are more aware of marketing manipulation than others.²⁵ The common denominator in these contexts is consumer laws’ lack of attention for structural and situational factors. Although the European Commission has recognised such factors, alongside individual characteristics, as part of policy making in EU consumer law—referring to ‘[a] consumer, who, as a result of socio-demographic characteristics, behavioural characteristics, personal situation, or market environment’ is vulnerable—²⁶ the way in which they should be integrated into consumer law requires further developing.

The reassessment and potential re-birth of the consumer image, therefore, comes at a crucial time for European consumer law. It can be a fundamental step towards a modernised legal framework, fit for the age of digitalisation and sustainability. Finally, while this reassessment challenges the one-size-fits-all model that has been the basis of consumer laws since the mid-1960s, one should also not forget what gains have been made for consumer protection on that, now considered, rudimentary basis. The strength of that model, which sometimes overregulates, is that it offers categorical protection to all consumers. That strength can also be part of the development of new rules tailored to digital consumers and prosumers. It can also be weaved into our expectations with regard to the consumer-citizen in relation to sustainability, who may need to give up some consumer protection for the greater good, but not all. The existing framework of European consumer law therefore should be maintained before it is remodelled. It provides fertile ground for a new *primavera*.

Vanessa Mak*

²⁴ European Commission 2016 (n 17).

²⁵ S van der Hof et al., ‘The Child’s Right to Protection against Economic Exploitation in the Digital World’ (2020) 28 The International Journal of Children’s Rights 833.

²⁶ European Commission (n 17) 383.

* Professor of Civil Law, Leiden University; E-mail: v.mak@law.leidenuniv.nl.