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Citation

Mak, V. (2023). How can consumer interests be protected when consumer identities are increasingly diffuse? In H. -W. Micklitz & C. Twigg-Flesner (Eds.), *The transformation of Consumer Law and Policy in Europe* (pp. 43-63). Oxford: Hart Publishing. doi:10.5040/9781509963058.ch-003

Version: Publisher's Version

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

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How Can Consumer Interests be Protected When Consumer Identities are Increasingly Diffuse?

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I. Introduction

Consumer laws emerged in the United States (US) and Europe in the 1960s and 1970s in response to an upscaling of production and the perceived weakness of consumers in negotiating and assessing the quality of goods and services offered.¹ Regulation took the form of specific rules on contractual rights and tort liability, applicable to ‘business-to-consumer relationships’ (B2C 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.² The one-size-fits-all model of consumer law no longer seems appropriate. In modern consumer markets, consumers have simultaneously become more vulnerable and more active, in particular under the influence of the rapid emergence of digital consumer markets and platformisation. I will expand upon these developments below. In terms of setting the scene for questions of transformation, it can be helpful, by way of example, to think of young people who have discovered that buying and re-selling limited edition shoes or vintage clothes can be quite a lucrative side-activity for individuals who are otherwise not active as traders.³ Should they be subject to contract

*The research agenda presented in this chapter will be the subject of a Vici project (2022–27), funded by the Netherlands Organisation for Scientific Research (NWO).

¹I Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Hart Publishing, 2012) 41 ff.

²V 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).

³For examples, see the online platforms Kickzswap and Vinted.

and tort rules applicable to consumer-to-consumer (C2C) relations, or do they constitute a new category of ‘prosumers’?⁴

Digitalisation is but one influence on consumer markets. The same consumer who is buying or selling things on online platforms is called upon to make choices that contribute to sustainable consumption. In this respect, consumer identities are expanded to include not only their economic role as market actors but also their position as consumer-citizens with a responsibility to adjust their choices and behaviour in the light of societal objectives and values.⁵

By retaining one consumer image in regulation, which considers the consumer as a weaker party in relation to businesses and aids her by providing information, European consumer law has become unable to keep up with the demands that digitalisation, platformisation and sustainability place on consumer markets. This contribution will consider in what respects a transformation of the consumer image can lead to better-fitting regulation and policies. That is not to say that the old consumer image and the information paradigm in European consumer law should be abolished. Instead, the question is what alternatives can be identified, and whether they can be implemented into EU law and national private laws in such a way that consumer law becomes able to address the needs of modern markets. That question has come to the fore in other research too, for example in behavioural studies that have shown that consumers often do not read information or are hindered from properly understanding it due to cognitive limitations.⁶ Also, advances in the capabilities of data-driven technologies have given rise to studies on the personalisation of consumer law.⁷ Still, no viable alternative has emerged that can replace the information-based approach in consumer law. Existing solutions often take the form of amendments to the information paradigm, whilst acknowledging that a larger overhaul of consumer law may be needed.⁸ However, such a reform would require

⁴The term ‘prosumer’ was coined by Alvin Toffler in 1980. See A Toffler, *The Third Wave* (Bantam Books, 1980) 280. Economic scholarship has in recent years put forward that the consumer concept should be revised, partly to take into account household production and other aspects of prosumer behaviour. See M-B Piorkowsky, ‘Alfred Marshalls Konsumenten sind Prosumenten’ in M-B Piorkowsky and K Kollmann (eds), *Vergessene und verkannte Vordenker für eine Kritische Konsumtheorie* (Springer, 2019) 21; M-B Piorkowsky, ‘Ansätze für ein neues Haushaltverständnis in der ökonomischen Grund- und Allgemeinbildung’ in C Müller et al (eds), *Bildung zur Sozialen Marktwirtschaft* (De Gruyter, 2014) 254, 264–66.

⁵cp 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.

⁶P Hacker, *Verhaltensökonomik und Normativität. Die Grenzen des Informationsmodells im Privatrecht und seine Alternativen* (Mohr Siebeck, 2017); F Gómez Pomar and M Artigot Golobardes, ‘Rational Choice and Behavioural Approaches to Consumer Issues’ in H-W Micklitz, A-L Sibony and F Esposito (eds), *Research Methods in Consumer Law: A Handbook* (Edward Elgar, 2018) 119; JA Luzak, ‘Who Calls the Tune? Stocktaking of Behavioural Consumer Protection in Europe’ in H-W Micklitz, A-L Sibony and F Esposito (eds), *Research Methods in Consumer Law: A Handbook* (Edward Elgar, 2018) 239; K Purnhagen, ‘More Reality in the CJEU’s Interpretation of the Average Consumer Benchmark – Also More Behavioural Science in Unfair Commercial Practices?’ (2017) 8 *European Journal of Risk Regulation* 437.

⁷O Ben-Shahar and A Porat, *Personalized Law. Different Rules for Different People* (Oxford University Press, 2021); C Busch and A De Franceschi (eds), *Algorithmic Regulation and Personalized Law* (Bloomsbury Publishing, 2020).

⁸For a recent analysis of the information paradigm, see M Narciso, ‘Reviewing the Information Paradigm. The Role of Online Reviews in the Regulation of Information in EU Consumer Law’ (PhD dissertation, Maastricht University, 2022).

a more thorough examination and would need to be designed and evaluated carefully. This contribution aims to provide a starting point for the reform that is being sought.

The structure of this contribution is as follows. Section II will elaborate on the changes in consumer markets that have triggered a desire for transformation of the consumer image. These triggers, relating to digitalisation and sustainability, are universal in the sense that they affect market places around the world. Arguably, however, the transformation of consumer law can start with a European-focused approach, as regulation in this region is in some ways more advanced than other regions in its dealing with digital markets and sustainability. Section III will elaborate on this point. Section IV then turns to three specific images of the consumer that can be used as ideal types for a further examination of the ways in which a new consumer image can be constructed. These are ideal types and, as will be seen, some overlap between them is unavoidable. They nevertheless provide a starting point for a systematic unpacking of the consumer image in the light of digitalisation, platformisation and sustainability. Section V veers back to the overarching perspective and asks how the insights from the studies of the three ideal types can inform a new perspective on the consumer image in European consumer law. It posits that a transformation of the consumer image will have to take account of the historical development of consumer images in EU law, as well as regulatory techniques that help find the right balance between over- and under-protection of certain consumer groups. On an institutional level, the ways in which lawmakers at different levels of regulation – including EU law, national laws and private regulation – can integrate new perspectives on consumer law and policy require attention. Section VI concludes by briefly summarising what the main challenges are and how they will be addressed. The outlook for the future is optimistic: European consumer law has matured from a one-size-fits-all model focused on B2C relations to a legal framework that encapsulates the values of EU law and that can be a building block for a new architecture for consumer law in digital markets and in relation to sustainability. The time is now right for engaging in a thorough examination of existing rules of consumer law, including those laid down in national contract and tort laws. The aim will be to design rules that are tailored to the new vulnerabilities and opportunities arising for consumers in digital markets, and to unlock the capacities of consumers to contribute to more sustainable consumption.

This chapter therefore proposes a fundamental reassessment of the consumer image. It is triggered by the observation that the consumer concept that has been central to European consumer law since its inception – of the consumer as a weaker party vis-à-vis a business, who through information can be placed in a more equal position – is no longer fitting. The influences of digitalisation and sustainability on consumer markets, as described above, require a reassessment of vulnerabilities of, as well as new opportunities for, consumers. That reassessment could well result in new conceptions of ‘the consumer’ in regulation and policy making. In other words, a ‘transformation of the consumer’. The outcomes however, are to be determined. The next sections will make a start.

II. Triggers for Transformation of the Consumer Image

The need for transformation of the consumer image is triggered by three developments in consumer markets: digitalisation; platformisation; and the pursuit of sustainability. These three topics are central themes of the European Commission's consumer agenda 2020–25 and also influence consumer policies at the national level of EU Member States, as well as globally.

Digitalisation in consumer markets denotes the emergence of markets for digital goods and services, such as e-books, apps, music, videos and streaming services.⁹ Consumers in these 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, but they are also vulnerable to exploitation, as they are subjected to sophisticated and opaque techniques seeking to manipulate their purchasing decisions.¹⁰ In this context, the existing information-orientated approach of consumer laws may no longer suffice.¹¹

Platformisation concerns the rise of online platforms, such as Amazon and Airbnb, which facilitate the sale of goods and services between traders and consumers. On these platforms, products are offered by professional as well as non-professional traders. This means that consumers, that is 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 concepts of 'consumer' and 'producer').¹² 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 proposal for a Digital Services Act (DSA).¹³ That also demands a reappraisal of prosumer responsibilities.¹⁴

⁹ Specific regulation was introduced in 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 (Digital Content Directive) [2019] OJ L136/1.

¹⁰ eg. algorithmic manipulation through targeted advertising; cp 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.

¹¹ For a more detailed analysis see section IV.A.

¹² cf Toffler (n 4).

¹³ 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. For commentaries, see C Cauffman and C Goanta, 'A New Order: The Digital Services Act and Consumer Protection' (2021) 12 *European Journal of Risk Regulation* 758; C Busch and V Mak, 'Putting the Digital Services Act in Context' (2021) 10 *Journal of European Consumer and Market Law* 109. 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. On that proposal, see 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.

¹⁴ For a more detailed analysis see section IV.B.

The pursuit of sustainability is a third trigger for a re-conceptualisation of the consumer concept. 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).¹⁵ 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-orientated approach adopted in B2C 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 so far highlighted focus on market-driven vulnerabilities of consumers,¹⁶ 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.¹⁷ 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 trends form the starting point of a deconstruction of the consumer concept, revealing divergences from the one-size-fits-all model of existing consumer laws. The challenge is to reconstruct consumer laws along the lines of a contextual approach to consumer protection, meaning that consumer concepts in regulation are tailored to the identities and behaviour of consumers in markets changed by digitalisation, platformisation and sustainability goals. I will elaborate on the way in which these questions can be approached in section IV of this chapter.

III. Focus on Europe

The challenge of how to regulate consumer markets in our day and age is of course a question that affects legislators and policy makers globally. There is a case to be made, however, for taking Europe as a starting point.

Europe can be a focal point for the transformation of consumer law due to the EU’s unique position in the regulation of consumer markets. The EU stands apart from other large consumer markets by its openness to global competitors (in contrast to China, which gives preference to local businesses) and the willingness to regulate for the sake

¹⁵ UN Sustainable Development Goals, see UN, ‘Do you know all 17 SDGs?’ at sdgs.un.org/goals (accessed 26 October 2022).

¹⁶ cp European Commission, ‘Understanding Consumer Vulnerability in the EU’s Key Markets’ (January 2016) at ec.europa.eu/info/publications/understanding-consumer-vulnerability-eus-key-markets_en (accessed 26 October 2022). See also P Siciliani, C Riefa and H Gamper, *Consumer Theories of Harm* (Hart Publishing, 2019).

¹⁷ cf Consolidated Version of the Treaty on European Union [2008] OJ C115/13, Arts 2 and 3. See also Mak and Terryn (n 5).

of fair competition, responsible use of data and consumer protection (in contrast to the more reluctant stance of the US to regulation). It is in many cases a frontrunner, as exemplified by the 2016 General Data Protection Regulation (GDPR),¹⁸ the 2020 proposal for the DSA, and a highly developed set of consumer legislation and case law. However, the EU is not in the lead on every topic, and note will be taken of regulatory solutions adopted earlier in other legal systems. In relation to sustainability, for example, a large number of US States have already adopted rules on reparability of products.¹⁹

The framework of EU law also provides a solid basis for developing a contextualised approach to consumer concepts. Due to the shared competence of the EU legislator and the legislators of the EU Member States, European consumer law is made up of a mixture of EU and national laws. An implication of this is that a balance always needs to be struck between harmonisation and the maintenance of diversity. The challenge that European consumer law is faced with, nonetheless, is a much greater degree of contextualisation than currently exists. Recent years have seen EU consumer laws converge towards a concept of the ‘average consumer’ as someone who is ‘reasonably well-informed, and reasonably observant and circumspect’.²⁰ An exception to this highly capable consumer is made for those who are vulnerable due to ‘mental or physical disability, age or credulity’.²¹ Also in some cases national laws maintain general rules of contract or tort that protect consumers, depending on the circumstances of each case. The rise of digital and platform markets, and the call for sustainable consumption, demands a new contextualisation. Greater account will have to be taken of structural factors that give rise to new vulnerabilities, and of situational factors that characterise different forms and degrees of consumer vulnerability.²²

The reassessment of the consumer image and consequent adaptations of existing rules and policies will affect a number of EU instruments. In the EU, consumer protection rules applicable to the digital market are laid down primarily in directives that are generally applicable to consumer contracts and/or relations, such as the Unfair Contract Terms Directive (UCTD),²³ the Consumer Rights Directive (CRD),²⁴ and the UCPD. Some rules are derived from the Digital Content Directive and the GDPR. Further, for

¹⁸ 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 (General Data Protection Regulation) [2016] OJ L119/1.

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

²⁰ See inter alia Case C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung* ECLI:EU:C:1998:369, [1998] ECR I-4657; Case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt* ECLI:EU:C:2014:282; Case C-51/17 *OTP Bank and OTP Faktoring v Teréz Ilyés and Emil Kiss* ECLI:EU:C:2018:750; MBM Loos, ‘Transparency Under the UCTD: Could You Please Explain what these Terms are Supposed to Mean?: Case note to CJEU, C-51/17 *OTP Bank and OTP Faktoring*’ (2020) 9 *Journal of European Consumer and Market Law* 25.

²¹ 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 (Unfair Commercial Practices Directive) [2005] OJ L149/22 (UCPD), Art 5(3).

²² See section V.

²³ Council Directive 1993/13 of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29.

²⁴ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] OJ L304/64.

sustainability, the policing of information based on the CRD and the UCPD is complemented by specific rules on consumer rights following, for example, from the Consumer Sales Directive (CSD).²⁵ The analysis of the UCPD, the UCTD and the CRD is central to the reconstruction of the consumer image. These three Directives have a core position in the regulation of fairness and transparency in EU consumer law.²⁶ The question is whether they achieve enough.

IV. Re-imagining the Consumer

The deconstruction and reconstruction of a consumer image in European consumer law is in some ways daunting, as so much of consumer law and policy has been built around this one notion of the consumer as a weaker party in relation to businesses. Any adjustment of the prevailing consumer image will have repercussions in the rules that apply to B2C relations as well as adjoining rules of private law, for example the rules that apply to C2C relations. Adjustments to the consumer image will also affect the ways in which law is used as an instrument to steer consumer behaviour. The benchmark that is chosen is important. Is it the 'average consumer' who is reasonably informed, and reasonably observant and circumspect, and who has until now been the primary point of reference for EU consumer law and policy? Or is there room for a shift towards a more encompassing perspective, taking account of the consumer who is vulnerable due to socio-demographic characteristics, behavioural characteristics, personal situation or market environment?²⁷

The bigger questions cannot be answered without considering smaller, more focused areas of research. In order to get a firmer grasp on the topic, a number of case studies can highlight which changes are affecting consumer markets. In this respect, the three trends previously identified – digitalisation, platformisation and the pursuit of sustainability – give direction as to what should be the leading questions in this enquiry. I will examine here how each of these trends may be developed further into a research agenda that is able to support a reconstruction of the consumer image in European consumer law.

A. The Digital Consumer

The consumer of goods and services in the digital market is dealing with suppliers who know many things about her preferences and may exploit that knowledge. Sales platforms such as Amazon, Bol.com, or Rakuten France gather information on consumer preferences and use that information to optimise the way in which products are

²⁵ 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 [2019] OJ L136/28.

²⁶ cf Siciliani, Riefa and Gamper (n 16); J Luzak and M Junuzovic, 'Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts' (2019) 8 *Journal of European Consumer and Market Law* 97.

²⁷ cf European Commission (n 16) 383.

marketed on their websites. Social media platforms like Facebook similarly gather data on user preference and use this information for a range of purposes, including targeted advertising, where ads appear on a user's timeline based on her 'likes' and clicks on the website.²⁸

Businesses therefore use data-driven technologies to learn how consumers behave and to influence their purchasing decisions. They often do this without the consumers' knowledge or understanding.²⁹ 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.³⁰

In terms of reassessment of the consumer image, this observation leads to a first hypothesis, namely: digital asymmetry requires a re-conceptualisation of consumer vulnerability in digital markets, combined with tailored rules for protection of digital consumers. One angle allowing a further examination of the topic can be a study on the use of profiling by businesses, focusing on the creation of personalised 'persuasion profiles'. Persuasion profiles may be defined as 'collections of estimates of the expected effects of different influence principles for a specific individual. Hence, an individual's persuasion profile indicates which influence principles are expected to be most effective.'³¹

Notably, profiling is only one aspect of the ways in which businesses use technology to manipulate consumer behaviour in digital markets. It is often accompanied by the use of user interface design choices that coerce, steer or deceive users into making unintended and potentially harmful decisions ('dark patterns'),³² or personalised pricing, differentiating prices and marketing conditions depending on a user's personal characteristics.³³ Profiling can be taken as a starting point for examination of the consumer image in digital markets, since it constitutes the core aspect of digital asymmetry; the point where businesses gain their structurally stronger market position

²⁸ Consumer law and data protection coincide here, although a balance still has to be found with regard to free speech, content moderation and protection against misleading advertising. See, eg, C Goanta and S Mulders, "Move Fast and Break Things": Unfair Commercial Practices and Consent on Social Media' (2019) 8 *Journal of European Consumer and Market Law* 136.

²⁹ eg by running A/B experiments on websites.

³⁰ N Helberger et al, *EU Consumer Protection 2.0. Structural Asymmetries in Digital Consumer Markets* (BEUC Report, March 2021) at beuc.eu/publications/beuc-x-2021-018_eu_consumer_protection.0_0.pdf (accessed 26 October 2022); A Jablonowska et al, 'Consumer Law and Artificial Intelligence. Challenges to the EU Consumer Law and Policy Stemming from the Business' Use of Artificial Intelligence' (2018) EUI Working Paper LAW 2018/11 at cadmus.eui.eu/handle/1814/57484 (accessed 26 October 2022); S Zuboff, *The Age of Surveillance Capitalism* (PublicAffairs, 2019).

³¹ M Kaptein et al, 'Personalizing Persuasive Technologies: Explicit and Implicit Personalization Using Persuasion Profiles' (2015) 77 *International Journal of Human-Computer Studies* 38, 39–40; Helberger et al (n 30) 6. See also J Chester, 'Cookie Wars: How New Data Profiling and Targeting Techniques Threaten Citizens and Consumers in the "Big Data" Era' in S Gutwirth et al (eds), *European Data Protection: In Good Health?* (Springer, 2012) 53.

³² SS Chivukula et al, 'Nothing Comes Before Profit: Asshole Design in the Wild' in *Proceedings of the 2019 CHI Conference on Human Factors in Computing Systems Extended Abstracts (CHI'19 Extended Abstracts)*, 4–9 May 2019, Glasgow (ACM, 2019) 1.

³³ M Bourreau and A De Streel, 'The Regulation of Personalised Pricing in the Digital Era' (25 September 2020) Note for the OECD, DAF/COMP/WD(2018)150 at [one.oecd.org/document/DAF/COMP/WD\(2018\)150/en/pdf](http://one.oecd.org/document/DAF/COMP/WD(2018)150/en/pdf) (accessed 25 October 2022).

vis-à-vis consumers. The results from such a study can then be related to mechanisms that increase digital asymmetry, such as dark patterns and personalised pricing.

The concept of digital asymmetry provides a hook for the development of a consumer image tailored to the digital market. The trade-off that needs to be made is whether such a consumer image can do better than the existing framework of European consumer law. How does digital asymmetry differ from existing concepts of consumer weakness and vulnerability in European consumer law? And if European consumer law is to protect consumers from exploitation due to digital asymmetry, which rules in current regulation offer protection and what amendments are needed? The initial steps have been taken through a reassessment of the UCPD in the light of digital asymmetry.³⁴ It could be that regulation needs to go further. One key characteristic of digital asymmetry is that business models in digital markets have become so opaque that traders themselves cannot provide information on how exactly the digital architecture is constructed, and what that entails for the way in which consumer data are gathered, processed and shared with third parties. Even if they were able to provide information on the workings of the digital architecture, the degree of complexity could well be so great that even the reasonably well-informed average consumer of EU law would have difficulty understanding it. In that light, European consumer law can at least provide a basis for reassessing the balance of fairness between tech companies and their users.³⁵

B. The Prosumer

The consumer in platform markets has other characteristics, or so it seems at first glance. In online platform markets consumers have become active on the supply side, for example selling t-shirts or toys from their bedrooms through online platforms like marktplaats.nl or Amazon.com. This type of consumer has already been referred to as a consumer turned ‘prosumer’.³⁶ Further distinctions could potentially be made within this concept. For example, one might distinguish between consumers who produce the goods they sell (eg through 3D printing) and consumers who only buy goods and sell them on. In terms of presenting the research problem, however, it suffices for now to realise that the position of prosumers on online platforms is subject to several risks.

Depending on whether the prosumer qualifies as a professional trader,³⁷ prosumer-consumer contracts are governed by consumer law or by general contract law. Neither regime seems to be quite fitting for prosumers in the platform economy. A number of problems have already been identified in the literature on online platforms, most recently in the debate following the publication of the DSA proposal.

³⁴ Helberger et al (n 30) 46 ff.

³⁵ cf C Goanta, ‘European Consumer Law: The Hero of Our Times’ (2021) 10 *Journal of European Consumer and Market Law* 177.

³⁶ See section I. For an examination in the legal domain, see also I Brown and CT Marsden, *Regulating Code: Good Governance and Better Regulation in the Information Age* (MIT Press, 2013) 183 ff.

³⁷ For guidance, see Case C-105/17 *Evelina Kamenova v Okrajzha prokuratura – Varna* ECLI:EU:C:2018:808 (*Kamenova*) para 38.

First, prosumers may be exposed to liability towards consumer-buyers contracting with them, for example if goods are defective and cause harm to the consumer or if information concerning the product characteristics is misleading. Under existing regulation, the prosumer will often be solely liable. Platform operators cannot be held liable, in most cases, because they are not party to the contract between prosumer and consumer-buyer and therefore not responsible for unsatisfactory performance. Product liability under the EU's Product Liability Directive cannot be directed to platforms if they are not the producer, importer or distributor of the goods.³⁸ Further, most platforms benefit from the 'host exemption' of the E-commerce Directive,³⁹ holding that hosts are not liable for illegal information posted by users unless they were alerted to it and failed to remove it. In consequence, prosumers, whether professional traders or not, will often bear the burden of liability. As the weaker party in relation to the platform, plus the one less sizeable and less likely to provide an adequate remedy to the consumer, one may wonder whether this outcome is justifiable.⁴⁰

Second, platform operators often bind external traders to strict performance targets through contractual standard terms. Non-compliance leads to warnings and eventually denial of access to the platform. Regulation (EU) 2019/1150 on fairness in platform-to-business relationships goes some way towards protecting small traders.⁴¹ However, this Regulation applies only to professional traders on online platforms, not to non-professional prosumers.

In terms of reassessment of the consumer image, these observations lead to a second hypothesis, namely: the regulation of private law relationships in the platform economy requires the introduction of a 'prosumer' category and rules tailored to it. Should this idea be followed through, the consequence may be that rules will be designed that in certain circumstances hold platform operators jointly and severally liable for harm caused by prosumers to consumers. What will need to be examined is in what circumstances this should be the case, taking account of existing legal frameworks for third-party liability in contract and tort.

In order to redesign the legal framework, it will be helpful to have a better picture of what characterises prosumers. Do we need to see them as a separate category, or can we place them within existing categories of 'traders' and 'consumers' in European consumer law? This question is unresolved, in part because the characteristics of

³⁸ Council Directive 1985/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210/29. This Directive is under review and a proposal for a new Directive on Liability for defective products was presented by the European Commission at the end of September 2022 (COM (2022) 495 final). Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety [2001] OJ L11/4 was also reviewed, and the new General Product Safety Regulation (proposed in 2021 (COM (2021) 346 final)) was adopted by the Council on 25 April 2023.

³⁹ 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 ('Directive on electronic commerce') [2000] OJ L178/1.

⁴⁰ C Busch, 'Rethinking Product Liability Rules for Online Marketplaces: A Comparative Perspective' (2021) European Legal Studies Institute Osnabrück, Research Paper Series No 21-01 at dx.doi.org/10.2139/ssrn.3897602 (accessed 25 October 2022).

⁴¹ 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 [2019] OJ L186/57.

'trader' and 'consumer' concepts in EU law and the national laws of the Member States are not uniformly established. The Court of Justice of the European Union (CJEU) provided some guidance in the *Kamenova* case, concerning the definition of the 'trader' in the Unfair Commercial Practices Directive.⁴² The list of characteristics provided by the Court sets out when a natural person selling products through an online platform should be considered a trader. It takes into account, inter alia, whether the sale takes place in an organised manner, whether the seller has specific expertise with regard to the products offered, whether the seller has a legal status allowing her to engage in commercial activities (eg registration with a chamber of commerce), whether the seller is subject to value-added tax, and whether the seller regularly purchases new or secondhand goods in order to resell them.⁴³ This list is not exhaustive, however, and Member States may maintain their own assessment criteria alongside the guidance given by the CJEU.

The development of a legal framework that befits 'prosumers' in the platform market is therefore still in its infancy. For its further development, it could be helpful to identify in what respects prosumers require protection as a weaker party and in what respects they are more self-reliant compared to other consumers. To this end, findings from behavioural studies on consumer decision making in online market places and studies on active (versus passive) consumers may provide a starting point for further analysis. Research has shown that consumer behaviour is influenced by biases and heuristics, which means that the information-based approach, which is prevalent in existing consumer law, is often not effective in steering consumers towards rational, informed choices.⁴⁴ Further, differences have been seen in the ways in which active consumers and passive consumers operate in consumer markets. This ranges from the ways in which they process information⁴⁵ to the personality traits and market conditions that trigger consumers to complain and hold businesses accountable for unfair practices⁴⁶ or to behave in a sustainable manner.⁴⁷ Prosumers are likely to have more characteristics of active than of passive consumers. If this is confirmed, it is still a question whether prosumers' behaviour and cognitive limitations in decision-making processes differ from those of other consumers. Therefore, further research, for example in the form of an empirical study of prosumers on online platforms, may be warranted.

The outcomes of the suggested analyses can form the basis for assessing whether a new category of 'prosumers' should be introduced into EU consumer law and/or the laws of the Member States. By means of synthesis one might ask: (i) what liability

⁴² *Kamenova* (n 37). See also C Twigg-Flesner, 'Bad Hand? The "New Deal" for EU Consumers' (2018) 15 *Zeitschrift für das Privatrecht der Europäischen Union* 166.

⁴³ *Kamenova* (n 37) para 38.

⁴⁴ O Ben-Shahar and CE Schneider, *More Than You Wanted to Know. The Failure of Mandated Disclosure* (Princeton University Press, 2014).

⁴⁵ J Luzak, 'Online Disclosure Rules of the Consumer Rights Directive: Protecting Passive or Active Consumers?' (2015) 4 *Journal of European Consumer and Market Law* 79.

⁴⁶ YA Arbel and R Shapira, 'Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop It' (2020) 73 *Vanderbilt Law Review* 929.

⁴⁷ M Maciaszczyk and M Kocot, 'Behavior of Online Prosumers in Organic Product Market as Determinant of Sustainable Consumption' (2021) 13 *Sustainability* 1157.

rules for misleading information or dangerous products currently apply to prosumers in the EU, depending on professional or non-professional status; (ii) whether liability should be divided differently amongst platforms and prosumers; and (iii) whether the introduction of a 'prosumer' category would be required for achieving that aim. The usual challenge of combining behavioural studies and law applies here, namely that the translation of behavioural findings to legal rules always requires normative choices. A discursive approach, discussing how available alternatives fit within the doctrinal framework of existing laws and with policy objectives, can help identify what options for regulation are available and how they can contribute to achieving a balance between the interests of prosumers, platforms and consumers. At the same time, an analysis of the position of prosumers on online platforms can contribute to theory-building in private law. Seeing that contract and tort law are based on the autonomy of parties, an analysis of this kind contributes to determining (i) what degree of autonomy can be expected from prosumers; and (ii) when the autonomy of platform operators should be curtailed for the sake of prosumer protection.⁴⁸

The development of a prosumer image for platform regulation could also benefit from comparisons with other areas in which consumers have moved to the supply-side of the market. Most notable is the rise of the prosumer in energy markets, where consumers increasingly generate their own household electricity through solar panels. The position of these types of prosumers in regulation is still under development.⁴⁹ Interestingly, not only their legal position in the consumer energy market is subject to evaluation, but also their position as contributors to sustainability goals in society. In that respect, the prosumer concept coincides with the third notion of the consumer presented here, the consumer-citizen.

C. The Consumer-Citizen

The third aspect of a reassessment of the consumer image is triggered by a changing perspective on what society expects of consumers. The consumer concept historically developed as an instrument for the protection of individuals in markets, that is, in an economic context where they were regarded as weaker parties vis-à-vis businesses. In this day and age, that image is changing. Consumers are regarded as individuals who not only operate in a market, but who are also part of the pursuit of societal goals.

One of the most urgent societal goals involving consumer action is sustainability. The pursuit of sustainable consumption in the light of climate change is high on the

⁴⁸ Autonomy is defined as the capacity for self-development through free choice, noting that this freedom can be restricted if it curtails another party's autonomy. cp H Dagan, 'Autonomy, Pluralism and Contract Law Theory' (2013) 76 *Law and Contemporary Problems* 19.

⁴⁹ See, eg, A Butenko and K Cseres, 'The Regulatory Consumer: Prosumer-Driven Local Energy Production Initiatives' (2015) Amsterdam Centre for European Law and Governance Research Paper 3/2015 at www.uu.nl/sites/default/files/ucwosl-cve_20160311-the_regulatory_consumer_prosumer-driven_local_energy_production_initiatives-butenko-cseres.pdf (accessed 25 October 2022); K Cseres, 'Consumer Social Responsibility in Dutch Law. A Case Study on the Role of Consumers in the Energy Transition' (2019) 12 *Erasmus Law Review* 94; S Milciuvienė et al, 'The Role of Renewable Energy Prosumers in Implementing Energy Justice Theory' (2019) 11 *Sustainability* 5286.

national, European and global agenda.⁵⁰ Although measures focus on the supply side, consumers can play an active role in the pursuit of sustainability.⁵¹ However, rules of consumer law often clash with environmental protection goals.⁵² The European legislator has started a process of integration of consumer and environmental policies (fitting with Article 11 TEU),⁵³ but experiences in the drafting process of the new CSD suggest that while lip service is paid to sustainability (eg recital 32 of the Directive), it has not been integrated as a policy objective in the rules of the new CSD.⁵⁴

The reconstruction of a consumer image for European consumer law therefore also requires examination of the question of which consumer concept fits with the pursuit of sustainability goals through consumer law. An angle that may be useful here is that of the consumer citizen, meaning the consumer as an active participant in the pursuit of social policies.⁵⁵ Notably, the consumer in this context may also be conceptualised from the viewpoint of vulnerability, as climate change poses a threat to the vulnerable of the future, the ‘future generations’ acknowledged in climate litigation such as the *Urgenda* case.⁵⁶ While that vulnerability is acknowledged, the reassessment of the consumer image proposed here focuses on how regulation can engage today’s consumers in the pursuit of sustainability, and therefore a re-conceptualisation of the consumer as a consumer citizen.

This leads to a third hypothesis: consumers may have to give up some protection if that leads to more sustainable outcomes.⁵⁷ For example, if goods are defective and consumers have a choice of remedy for non-conformity, where they can choose either repair or replacement, they may have to opt for the more sustainable remedy.⁵⁸ One aspect of reassessing the consumer image in the light of sustainability, therefore, is that the hierarchy of remedies in consumer sales law requires a reboot. The challenge in that respect is to determine how consumer law can be tailored to the pursuit of sustainability whilst maintaining consumer protection. Preliminary studies suggest that the new CSD leaves room for EU Member States to regulate remedies for non-conforming goods in ways that promote sustainable use and recycling. Member States can maintain remedies

⁵⁰ Besides the EU Green Deal and the UN Sustainable Development Goals, see, eg, at the national level Netherlands, ‘Circular Economy 2050’ www.government.nl/topics/circular-economy/circular-dutch-economy-by-2050#:~:text=2050A%20waste%2Dfree%20economy,and%20raw%20materials%20are%20reused (accessed 25 October 2022).

⁵¹ J Karsten and LA Reisch, ‘Sustainability Policy and the Law’ (2008) 4 *German Policy Studies* 45. See also Mak and Terryn (n 5).

⁵² C Kye, ‘Environmental Law and the Consumer in the European Union’ (1995) 7 *Journal of Environmental Law* 31; Mak and Terryn (n 5); H-W Micklitz, ‘Squaring the Circle? Reconciling Consumer Law and the Circular Economy’ (2019) 8 *Journal of European Consumer and Market Law* 229.

⁵³ Treaty on European Union (TEU) [2012] OJ C326/13.

⁵⁴ See E Van Gool and A Michel, ‘The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis’ (2021) 10 *Journal of European Consumer and Market Law* 136.

⁵⁵ S McGregor, ‘Keynote: Consumer citizenship: A pathway to sustainable development’ (International Conference on Developing Consumer Citizenship, Hamar, Norway, April 2002); SA de Vries, H de Waele and M-P Granger (eds), *Civil Rights and EU Citizenship: Challenges at the Crossroads of the European, National and Private Spheres* (Edward Elgar, 2018).

⁵⁶ M Grochowski, ‘Does European Contract Law Need a New Concept of Vulnerability?’ (2021) 10 *Journal of European Consumer and Market Law* 133. See also Hoge Raad, ECLI:NL:HR:2019:2006 (*Urgenda*).

⁵⁷ cp A Halfmeier, ‘Abschied vom Konsumschutzrecht’ (2022) *Zeitschrift für Wirtschafts- und Verbraucherrecht* 3.

⁵⁸ cp Mak and Terryn (n 5).

for ‘hidden defects’ beyond the legal guarantee period, maintain favourable conditions for the consumer’s right to withhold payment until sellers have fulfilled their obligations, and determine when the legal guarantee period is suspended or interrupted.⁵⁹ However, the new CSD also contains a rule that makes the remedy of termination of contract and return of the price more readily available than before, thereby undermining the position of repair and replacement as primary remedies in the hierarchy (Article 13(4) CSD). Furthermore, the Directive could have done more to promote the sale of secondhand goods and the recycling of goods, backed up with consumer protection through quality control and information rights.⁶⁰

With regard to sustainable consumption, it is important to realise that consumer law cannot by itself do all the work. The rules of consumer law constitute only one part of the policy mix used by legislators to encourage sustainable consumption. For consumers to make the right choices, it is important to understand the psychology of sustainable consumerism and the ways in which it can be stimulated through information and marketing.⁶¹ Also, regulators and policy makers should ensure that the supply side of the market provides sustainable options for consumers.⁶²

V. Reconstructing the Consumer Image in EU Law

Bringing together the lines set out in section IV, the following step is to develop an overarching perspective on the contextual use of consumer concepts in law. That requires developing a normative perspective on the way in which the consumer should be conceptualised in the light of, using shorthand,⁶³ new *vulnerabilities* arising from digitalisation, new ways of *empowerment* for prosumers due to platformisation and new *responsibilities* as a consumer citizen in the pursuit of sustainable consumption. These three elements – vulnerability, empowerment and responsibility – have characterised European consumer law since its inception.⁶⁴ However, the changes in market structures in the digital economy, with an opaque architecture for data protection, product safety, and contractual rights and liability, require a re-balancing that goes beyond individual B2C relationships. Information rights cannot sufficiently address the structural asymmetry between tech-firms and consumers, nor can existing contract and tort laws address the structural imbalance between prosumers and platform operators.

⁵⁹ Van Gool and Michel (n 54) 143.

⁶⁰ *ibid* 147–48. cp also E Terryn and E Van Gool, ‘The Role of European Consumer Regulation in Shaping the Environmental Impact of E-Commerce’ (2021) 10 *Journal of European Consumer and Market Law* 89.

⁶¹ L Steg, ‘Environmental Psychology and Sustainable Consumption’ in L Reisch and J Thøgersen (eds), *Handbook of Research in Sustainable Consumption* (Edward Elgar, 2015) 70.

⁶² Mak and Terryn (n 5) 229–30.

⁶³ The picture is of course more complex, as the above analysis has shown. Moreover, the term ‘empowerment’ is often regarded as part of regulators’ rhetoric to support consumer regulation based on the notion of a rational consumer, which, as was also seen, is not in line with the findings from behavioural studies on consumers’ cognitive limitations.

⁶⁴ D Leczykiewicz and S Weatherill, ‘The Images of the Consumer in EU Law’ in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law. Legislation, Free Movement and Competition Law* (Hart Publishing, 2016) 1.

The position of the consumer citizen is likewise not structurally embedded in existing consumer and environmental regulation and policies, where the focus is still primarily on information and labelling.

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.'⁶⁵ Situational factors are sometimes integrated into consumer laws, for example in Article 5(3) UCPD, 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.⁶⁶

The common denominator in these contexts is consumer laws' lack of attention to 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 vulnerable⁶⁷ – the way in which they should be integrated into consumer law requires further development.

It is submitted that the architecture of a new approach to consumer concepts can be built on three connected foundational parts: (i) a study of 'consumer identities' in European private law, examining how they have been embedded in EU law's consumer concepts over time and how they might evolve in the future (section V.A); (ii) a study of regulatory theories that can support choices that lawmakers face between the use of categories and personalisation (section V.B); and (iii) a study of lawmaking processes in European consumer law, taking account of the legal pluralist constellation within which rules are made 'beyond the state' (section V.C).⁶⁸

A. Consumer Identities in European Private Law

How has the differentiation in consumer identities been embedded in consumer concepts in European consumer law, and what can we learn from this for future regulation? This question provides a building block alongside the three perspectives set out in section IV for the development of a new conception of 'the consumer' in European private law. It requires an examination of contract and tort as the main areas of harmonisation of EU consumer law.

Two strands of enquiry may be followed. First, a start may be made by examining the development of consumer identities in EU law since the inception of EU consumer

⁶⁵ European Commission, 'Understanding Consumer Vulnerability in the EU's Key Markets: Factsheet' (February 2016) 2 at ec.europa.eu/info/sites/default/files/consumer-vulnerability-factsheet_en.pdf (accessed 25 October 2022).

⁶⁶ 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.

⁶⁷ European Commission (n 16) 383.

⁶⁸ For a study of legal pluralism in European consumer markets, see V Mak, *Legal Pluralism in European Contract Law* (Oxford University Press, 2020).

law. The year 1975 may be taken as a starting point, as the first consumer programme at the European level was adopted then. The consumer concept at that time was influenced by national policies of social justice. It developed towards the ‘average consumer’ as a *homo economicus* as part of the EU’s internal market programme after the Single European Act 1985. In recent years it has adopted a differentiated stance in which social justice considerations have led to consumer protection beyond economic interests (eg, to manage the repercussions of the 2008 financial crisis on consumer mortgages).⁶⁹ 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.⁷⁰ A more comprehensive picture may be obtained by charting how consumer identities have been perceived in literature and policy documents on European consumer law, including EU internal market law, EU harmonised consumer law and selected national laws.

Second, complementary to the first part, an analysis may be made of the way in which consumer identities have been translated into consumer concepts in EU consumer law and national consumer laws, focusing on contract and tort law. Such an analysis should include the development of consumer concepts in legislation, case law and literature on European consumer law, including EU internal market law, EU harmonised consumer law and national laws of the Member States.

B. Regulatory Choices: Between Categories and Personalisation

What we need, furthermore, is a theoretical framework that can provide guidance for regulatory choices between categorical and contextualised consumer protection. While the claim made at the outset of this chapter challenges the existing one-size-fits-all model of consumer law, it also recognises that something may be lost if that model is replaced by a contextual approach. The advantage of a categorical model is that the net of consumer protection is cast widely: every natural person not acting in the course of a business or profession benefits from it. Over-regulation is an accepted consequence of this approach. What do we lose if we let go of it?

Regulatory theories can provide a framework for developing a more structured view on the alternatives that could be considered besides the existing model of European consumer law. One such framework may be provided by the decision theory framework developed by Hacker for consumer law.⁷¹ That framework provides a tool for regulatory choices in circumstances of uncertainty, for example where the characteristics and behaviour of a group (such as consumers) differentiate considerably. It narrows the scope for normative regulatory choices by comparing what rules would be adopted if

⁶⁹ H-W Micklitz, *The Politics of Justice in European Private Law. Social Justice, Access Justice, Societal Justice* (Cambridge University Press, 2018) 316 ff.

⁷⁰ Micklitz (n 52); Helberger et al (n 30).

⁷¹ P Hacker, *Verhaltensökonomik und Normativität. Die Grenzen des Informationsmodells im Privatrecht und seine Alternativen* (Mohr Siebeck, 2017); P Hacker, ‘Regulating Under Uncertainty about Rationality: From Decision Theory to Machine Learning and Complexity Theory’ in S Grundmann and P Hacker (eds), *Theories of Choice. The Social Science and the Law of Decision Making* (Oxford University Press, 2021).

(i) most people act rationally, or (ii) most people act in boundedly rational ways. These two sides of the spectrum circumscribe the space within which normative choices can be made by regulators. The key normative choice lies in the criteria used to rank the different outcomes.⁷²

The normative criteria for ranking alternative regulatory options can be developed through a political philosophical analysis, building on scholarly work on the foundations of European private law. While European private law is based on liberal political ideologies, it may be argued that there is an overlapping consensus on the categorical protection of weaker parties.⁷³ That finding may be used as the basis for a discursive approach, through which arguments in support of and against the rules identified at step one may first be mapped and then weighed against each other. The theory may also be tested against the findings from studies on specific areas of consumer law (section IV) and on the development of consumer concepts in EU law (section V.A).

C. The Transformation of the Consumer: Reconstruction of EU Consumer Laws along Contextualised Lines

The lines of enquiry come together in the final question: should European consumer laws be reconstructed along contextualised lines and, if so, how? What limitations to this approach should be taken into account in the multi-level regulatory framework of the EU? The research question is normative in nature and asks an overarching and fundamental question for lawmaking in European consumer law: considering that consumer laws are created at the EU level, the national level and through other sources (eg private regulation, standardisation), is it desirable to replace the one-size-fits-all approach to consumers with a contextualised approach? An attempt at answering this question may be made by examining the consequences for lawmaking that a turn towards a contextualised consumer in European consumer law concept will have.

The theoretical grounding for such a reassessment is dependent on the perspective that one takes with regard to lawmaking in European private law. Lawmaking in European private law occurs at different levels of regulation, including the national, the European and the international level, as well as private lawmaking through contracting and standardisation. Earlier studies have examined how lawmakers at these different levels interact. In European consumer law, the following models have been identified: (i) top-down harmonisation; (ii) regulatory competition; and (iii) legal pluralism, meaning the co-existence of legal norms without a formal hierarchy, with variations in 'strong' and 'ordered' legal pluralism.⁷⁴

⁷²Hacker, 'Regulating Under Uncertainty about Rationality' (n 71); A Rapoport, *Decision Theory and Decision Behaviour*, 2nd edn (Palgrave Macmillan, 1998).

⁷³J Rawls, *Justice as Fairness. A Restatement* (Harvard University Press, 2001); MW Hesselink, *Justifying Contract in Europe: Political Philosophies of European Contract Law* (Oxford University Press, 2021); H Muir Watt, 'Conflicts of Law Unbounded: The Case for a Legal-Pluralist Revival' (2016) 7 *Transnational Legal Theory* 313; Mak (n 68) ch 3.

⁷⁴JM Smits, 'Plurality of Sources in European Private Law, or: How to Live with Legal Diversity?' in R Brownsword et al (eds), *The Foundations of European Private Law* (Hart Publishing, 2011) 323; MW Hesselink, 'How Many Systems of Private Law are there in Europe? On Plural Legal Sources, Multiple

The legal pluralist model has gained acceptance in recent years, a process coinciding with a slow-down in top-down harmonisation by the EU legislator.⁷⁵ The proposal for a DSA package in December 2020 does not seem to have changed this outlook. Although the proposed legislation may again give a boost to regulation at the EU level, in its current design it relies heavily on voluntary monitoring by platform operators.⁷⁶ Only very large online platforms ('gatekeepers', a presumed status for platforms having more than 45 million monthly active end users and more than 10,000 yearly active business users in the EU) are subject to stricter regulation, focusing on controlling the market power that they gain through data aggregation.⁷⁷

Taking this legal framework as a starting point, the introduction of a contextualised approach to consumer protection in European consumer laws will require analysis along several axes. First, the debate of 'who makes rules and at what level of regulation' will have to be re-visited.⁷⁸ Which lawmaking actors are active in developing European consumer laws? Besides the EU legislator and national legislators, the scope of the enquiry will also increasingly need to include private actors who develop their own rules of engagement. Important categories of private regulators in the digital market are tech-firms such as Facebook and Apple, which determine on what terms consumers can obtain their digital content and services; and online platforms such as Amazon and Airbnb, which bind users to their standard terms and conditions and codes of conduct. While they are obliged to comply with rules of EU and national consumer laws, they have a large amount of freedom in contract law to set their terms. Their position as private lawmakers is reinforced by the absence of effective oversight and enforcement mechanisms for these contractual terms.⁷⁹ This means that private actors will be considered not just as the subjects of EU and national consumer laws, but also as lawmaking actors that define which rules apply in consumer markets, which conforms to the legal pluralist perspectives mentioned above. Private actors can in this respect contribute to the development of consumer law in digital markets and platform markets, and they can be facilitators or innovators of sustainable consumption.

As an aside, the autonomy of tech-firms and online platforms as lawmaking actors in consumer markets may be viewed with scepticism, as many of these firms' practices push the boundaries of values that are central to the EU legal order. Transparency, fairness, and in particular the balance between free speech and information control are thorny issues on which platforms such as Facebook (or now: Meta) have been called out. With a focus on online marketplaces, the enquiry proposed here is primarily concerned with economic interests. It only tangentially engages with questions of free speech and the dissemination of information. In that light, it is relevant to note that the rules created

Identities and the Unity of Law' in L Niglia (ed), *Pluralism and European Private Law* (Hart Publishing, 2013) 199; R Michaels, 'Of Islands and the Ocean: The Two Rationalities of European Private Law' in R Brownsword et al (eds), *The Foundations of European Private Law* (Hart Publishing, 2011) 139; Micklitz (n 69).

⁷⁵ Micklitz (n 69) 35–38, 191; Mak (n 68) 109.

⁷⁶ Busch and Mak (n 13).

⁷⁷ European Commission, Digital Market Act proposal (n 13) Art 3.

⁷⁸ On multilevel governance in EU regulation, see L Hooghe and G Marks, *Multi-Level Governance and European Integration* (Rowman and Littlefield Publishers, 2001).

⁷⁹ Mak (n 68) ch 9.

by private regulators have proved not inherently to favour business interests over those of consumers. On online marketplaces that connect traders and consumers, such as Amazon, the pursuit of high levels of customer satisfaction effectively results in high levels of consumer protection. The trade-off is that third-party traders who offer their products through the platform are bound by strict terms and conditions.⁸⁰ Moreover, the regulatory power of online platforms is curbed by the interaction with other lawmakers. Even if the legislator is slow in taking action, alternative mechanisms exist that moderate autonomous lawmaking action. Standardisation is an important one, as well as the creation of model laws or optional instruments. Also, online dispute resolution (ODR) can function as a regulatory instrument that places checks and balances on the practices of online platforms.⁸¹

Besides the institutional framework, a reassessment of substantive rules will be required. If the consumer image is adapted to the needs of digital markets and sustainability, should European consumer laws be amended, introducing a contextualised approach? If so, which instruments should be amended and how? This question goes to the heart of the existing EU consumer *acquis* and touches upon rules laid down in the UCPD, CRD, CSD and UCTD. Amendments of these directives could already result in a better fit with the position of consumers in digital markets, and facilitate their role as consumer citizens in relation to sustainability. It could also be that additional regulation is desirable at the EU level and/or the national level.

On a fundamental level, the reassessment of substantive rules also requires an answer to the question whether EU consumer law applies horizontally to all transactions or whether it should differentiate. More specifically, should lawmakers at the EU level strive for a horizontal approach in the way that, for example, rules on unfair terms apply to all consumer contracts (UCTD), or should consumer laws differentiate between sectors (eg energy, telecommunication, digital services)? There is no easy answer to this question. Historically, some parts of EU consumer law have developed from an overarching horizontal approach. Instruments concerning transparency and fairness in contract law, such as the UCTD and the UCPD, apply to almost all consumer contracts. The UCPD even extends beyond that and applies to all B2C relationships, regardless of whether they are contractual or non-contractual in nature. At the same time, the piecemeal development of EU consumer law has also resulted in sector-specific regulation, for example in the energy market and the telecom market. The division of regulatory competences over various directorates within the European Commission may be partly to blame for the sometimes uncoordinated approach to consumer regulation at the EU level, as well as the failure to connect consumer law to related fields, such as labour law or environmental protection.⁸² Notably, legislators at the national level are subject to similar organisational constraints. The reassessment of consumer law proposed here, however, can provide a stepping stone towards a more holistic approach to consumer

⁸⁰ cf *ibid* ch 7.

⁸¹ For an analysis of the operation of these instruments in platform markets, see *ibid* 203 ff.

⁸² SA de Vries, 'General Reflections on the Exercise of Economic Rights by EU Citizens' in SA de Vries et al (eds), *EU Citizens' Economic Rights in Action. Re-thinking Legal and Factual Barriers in the Internal Market* (Edward Elgar, 2018) 2, 11.

law. Connections can be made to similar discussions in labour law, where the notion of the ‘worker’ has been subject to debate in recent years, in particular in the light of the rise of the gig economy.⁸³ Connections can also be made to other concepts that coincide with or are similar to the consumer image, such as the ‘author’ in copyright law or the ‘client’ in financial services regulation. Such an approach can lead to a broader reassessment of notions of vulnerability and responsibility in EU and national private laws.

VI. Conclusions and Outlook

An assessment or re-imaging of the consumer can be a starting point for a modernisation of consumer law in the light of digitalisation, platformisation and sustainability. Consumer law scholars have for a longer time been searching for alternatives to the one-size-fits-all model of consumer law that regards the consumer as a weaker party in relation to businesses but in reality pays little heed to vulnerabilities. Also, the information paradigm that permeates consumer law has been challenged and chafed at, though not displaced, by studies on behaviour, cognitive limitations and nudging. Still, there has been no significant move forward, and as a result the regulation of consumer markets has fallen behind. Regulators and policy makers around the world are debating the rise of tech-giants and the risks they pose to users, as well as the challenges of climate change and the need for sustainable consumption. Regulatory action is not forthcoming, however, or only at a very slow pace.

In this contribution, I have set out a research agenda focusing on three key aspects in which the regulation of consumer markets could be improved. They concern new vulnerabilities affecting digital consumers, new opportunities for ‘prosumers’ operating on the supply side of consumer markets through online platforms, and a call for consumers as citizens to contribute to sustainable consumption. Each of these contexts requires a reassessment of the consumer image and, subsequently, a reassessment of the existing rules applying to businesses, consumers and other actors in these markets. Arguably, other aspects than these three could have been selected for further study – but perhaps these can be explored in other projects. Questions of re-imaging could, for example, be applied to the ‘worker’ concept in labour law, the ‘author’ in copyright law or the ‘client’ in financial services law.

The three areas selected for a reassessment of the consumer image provide input for an overarching analysis of the consumer image in European consumer law. As suggested here, lines of enquiry can focus on the historical and future development of the consumer image in EU law; the spectrum along which regulatory choices can be made, ranging from categorised protection to personalised approaches; and the institutional context within which consumer regulation is embedded. Europe may be of particular interest for such an analysis. It provides a framework for regulation that, even if it gives space to private actors to set their own rules, curbs that power by maintaining

⁸³ J Prassl, *Humans As a Service* (Oxford University Press, 2018).

correcting mechanisms in regulation and alternatives such as standardisation. Those active in the European consumer market will moreover have to comply with the values of EU law as laid down in the Treaties.

The idea of 'transformation of the consumer image' provides a starting point for an overhaul of consumer law. By re-imaging, or re-imagining, the consumer we may make a start with designing rules that can answer the challenges of digitalisation, platformisation and sustainable consumption.

