Rescuing transparency in the digital economy: in search of a common notion in EU consumer and data protection law

Jablonowska, A.A.; Tagiuri, G.

Yearbook of European Law, 2023, **42**, 347–387
https://doi.org/10.1093/yel/yead005
Advance access publication 27 September 2023
Article

OXFORD

Rescuing transparency in the digital economy: in search of a common notion in EU consumer and data protection law

Agnieszka Jabłonowska*, Giacomo Tagiuri†

ABSTRACT

Transparency remains a contested concept in European Union (EU) law and policy. All the main instruments of EU consumer and data protection law require that consumers be given access to and understand certain information about their relationships with traders. Improved transparency is also proposed as a response to a variety of problems associated with digital markets, including those experienced by consumers and data subjects. At the same time, transparency is increasingly challenged as ineffective and potentially even counterproductive from doctrinal and critical scholarship alike. First, transparency is seen as inherently unable to transform the economic reality on the ground and to address the power imbalances between consumers and traders. Secondly, it is argued that acts of representation involved in transparency suffer from complexity and are prone to exploitation by the actors who engage in it. This, in turn, casts doubt on the ability of transparency to steer the behaviour of businesses and transform markets to the benefit of consumers and society. This article builds upon prior critiques of transparency and connects them with a doctrinal analysis of EU consumer and data protection law and in particular the Unfair Contract Terms Directive, the Unfair Commercial Practices Directive, and the General Data Protection Regulation. Seven different notions of transparency are identified: (i) Transparency as access to the medium over time; (ii) Transparency as presentation of information that facilitates understanding; (iii) Transparency as formulations that facilitate understanding; (iv) Transparency as non-ambiguity and logical intelligibility; (v) Transparency as the absence of deception and confusion; (vi) Transparency as completeness and specificity; and (vii) Transparency as non-arbitrariness. The article submits that the acts of representation involved in transparency are already recognized in the three legal regimes and attempts are made to leverage the mediated nature of transparency to consumers' advantage. Crucially, existing efforts to regulate mediation and improve its quality can, nowadays, be reinforced with the help of algorithmic systems geared toward supporting consumers. Moreover, some of the deployments of transparency identified—most notably transparency as non-arbitrariness—push its outer conceptual boundaries in ways that bring transparency very close to fairness. The article ultimately questions a vision of transparency as a necessarily softer-touch protective frame, which cannot alter business

* Agnieszka Jabłonowska, Institute of Private Law, Leiden University, Leiden, The Netherlands. Email: a.a.jablonowska@law.leidenuniv.nl
† Giacomo Tagiuri, Department of European and International Law, University of Amsterdam, Amsterdam, The Netherlands

conduct. The conceptual richness of transparency offers opportunities for its deployment in more disruptive ways.

I. INTRODUCTION

In debates on the governance of the digital economy, transparency experiences a revival as the favoured rhetorical and policy frame to assist weaker parties in complex economic transactions supported by algorithmic systems.[1] Improving consumers' ability to see, know, and understand the economic relationships that populate their lives is offered as an instrument to fix or alleviate a variety of problems associated with digital markets. Indeed, as documented by scholarship in law and the social sciences, the understanding that we, as consumers, have of the digital services we use is severely constrained.[2] This constrained understanding is in turn recognized to harm consumers and society in various ways, mainly by posing challenges to autonomy, privacy, welfare, and even democracy.[3]

Aiming for more transparency in digital consumer markets appears to make sense for a plurality of both practical and normative reasons. First, many of the problems that emerge in digital markets can be conceptualized as problems of opacity and complexity. Secondly, European Union (EU) law and policy have ample experience in the use of transparency requirements in pre-digital settings, eg, through the requirements included in the Unfair Contract Terms Directive (UCTD)[4] and the Unfair Commercial Practices Directive (UCPD).[5] Thirdly, transparency, as a market-friendly protection frame, which aims to regulate markets by safeguarding or perfecting the autonomy of individual consumer decision making, is arguably a frame around which it is easy to build political consensus. In this context, it appears only natural that transparency keeps featuring prominently in recent EU initiatives concerned with the unruly development of digital markets from the General Data Protection Regulation (GDPR)[6] to the proposed Artificial Intelligence Act (AIA)[7] as well as other recently approved legislation.[8]

[1] Tal Z Zarsky, 'Transparent Predictions' (2013) University of Illinois Law Review 4 1503; Frank Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information* (Harvard University Press 2015) 216; Marc Rotenberg, 'Artificial Intelligence and the Right to Algorithmic Transparency' in Marcello Ienca and others (eds), *The Cambridge Handbook of Information Technology, Life Sciences and Human Rights* (CUP 2022) 153; Alexander J Wulf and Ognyan Seizov, 'Artificial Intelligence and Transparency: A Blueprint for Improving the Regulation of AI Applications in the EU' (2020) 31 European Business Law Review 4, 611.

[2] Pasquale ibid 59; José Van Dijck, *The Culture of Connectivity: A Critical History of Social Media* (OUP 2013) 47; Tarleton Gillespie. *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions that Shape Social Media* (Yale University Press 2018) 198.

[3] Shoshana Zuboff, 'Big Other: Surveillance Capitalism and the Prospects of an Information Civilization' (2015) 30 Journal of Information Technology 75; Cathy O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (Penguin Random House 2017); Julie E. Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (OUP 2021).

[4] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29.

[5] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') [2005] OJ L 149/22.

[6] Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [2016] OJ L 119/1.

[7] '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.

[8] See especially 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 (Digital Markets Act) [2022] OJ L 265/1; 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 (Digital Services Act) [2022] OJ L 277/1. Both acts contain obligations that can be conceptualised as transparency requirements. For an analysis of transparency in these acts, see eg, Philipp Hacker, Johann Cordes and Janina Rochon, 'Regulating Gatekeeper AI and Data: Transparency, Access, and Fairness under the DMA, the GDPR, and Beyond' <https://ssrn.com/abstract=4316944> Accessed 19 September 2023;

The persisting salience and intuitive attractiveness of transparency are, however, in sharp contrast with a growing body of scholarship, which from different disciplines and sensitivities fundamentally questions transparency as a worthwhile direction in economic law and policy. Behavioural insights have been undermining, now for decades, the assumption of the so-called information paradigm for which consumers who know more will act upon the information they have in socially beneficial ways.[9] More fundamentally, critically oriented scholars point at the intensity of consumer vulnerability and the power asymmetries which emerge in the digital economy to conclude that transparency is not just insufficient, but potentially even harmful.[10] These observations are in line with broader critiques of transparency in law and other disciplines which show that while transparency promises neutral and direct transmission, it is unavoidably mediated and relies on disclosures by the actors who control the content, form and context of what is released.[11] Excessive reliance on transparency may thus increase rather than correct power asymmetries, including those which intensify in the digital economy.

Spurred by the observation of this tension in current debates on transparency, in this article, we discuss the extent to which transparency can be rescued as a frame for assisting consumers in the digital economy. We take transparency to capture at a minimum a desirable enhancement of consumers' understanding of the economic relations they engage in. Our aim is to unpack what enhancing consumers' understanding means and assess the extent of transparency's progressive potential given specific features of digital markets. To do so, we build upon the critiques of transparency mentioned above and connect them with a doctrinal analysis of transparency in EU consumer and data protection law.

The analysis adopts a bottom-up approach: we start from existing EU laws, decisions by the Court of Justice (CJEU) as well as national courts and regulatory authorities over the past two decades or so. Our focus is predominantly on the three main horizontal pillars of EU consumer (data) protection: the UCTD, the UCPD, and the GDPR. More observations are also spurred by the deployment of transparency requirements in specific sectoral regulations, such as most recently the proposed AIA. This inquiry allows us to distinguish seven notions of transparency emerging in the law: (i) Transparency as access to the medium over time; (ii) Transparency as presentation of information that facilitates understanding; (iii) Transparency as formulations that facilitate understanding; (iv) Transparency as non-ambiguity and logical intelligibility; (v) Transparency as absence of deception and confusion; (vi) Transparency as completeness and specificity; and (vii) Transparency as non-arbitrariness. As we present each of these notions, we discuss whether and to what extent they appear in the different legal acts, distinguish the problems they are deployed to fix, and try to assess the progressive potential of each notion. As we emphasize, the notions are not mutually exclusive but often build upon each other.

The findings of our doctrinal investigation allow us to contribute nuance to the debates on transparency as sketched out above. In particular, while building upon the critiques of

Paddy Leersen, 'An End to Shadow Banning? Transparency Rights in the Digital Services Act between Content Moderation and Curation' (2023) 48 Computer Law & Security Review 105790.

[9] For an overview of the behavioural insights questioning the information paradigm, see George Loewenstein, Cass R Sunstein and Russell Golman, 'Disclosure: Psychology Changes Everything' (2014) 6 Annual Review of Economics 391. For a more sociologically oriented critique of the so-called behavioural turn *cf* Sabine Frerichs 'What Is the "Social" in Behavioural Economics? The Behavioural Underpinnings of Governance by Nudges' in Hans Micklitz, Anne-Lise Sibony and Fabrizio Esposito (eds), *Research Methods is Consumer Law: A Handbook* (Edward Elgar 2018) 399–440. See also Hans-W. Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic' (2012) 35 Journal of Consumer Policy 283.

[10] See, most recently, Natali Helberger and others, 'Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability' (2022) 45 Journal of Consumer Policy 175.

[11] Rachel Adams, *Transparency: New Trajectories in Law* (Routledge 2021) 27, 54, 63. See also, Ida Koivisto, 'The Anatomy of Transparency: The Concept and its Multifarious Implications' EUI Working Paper MWP 2016/09.

transparency, our analysis also brings us to challenge some of these critiques' grimmer conclusions. As we find, the mediated nature of transparency does not fundamentally undermine its ability to assist consumers. On the contrary, the said mediated nature is already recognized in the application of the legal acts we investigate and we describe several attempts to leverage this feature of transparency to the advantage of consumers. We also identify potential in the fact that existing efforts to regulate mediation can be reinforced with the help of algorithmic systems geared towards supporting consumers, for example by reviewing large documents for compliance with transparency requirements.[12] Moreover, some of the deployments of transparency we observe push its outer conceptual boundaries in ways that bring transparency very close to fairness, understood as a protection frame that more explicitly aims to correct and transform economic relationships. Hence, our findings ultimately question a vision of transparency as an unavoidably softer-touch protective frame, which cannot alter business conduct. All in all, the analysis confirms that transparency can offer a meaningful frame for assisting consumers in the digital economy. To the extent that it is needed, rescuing transparency is thus a worthwhile project to which this article aims to contribute.

The novelty of our contribution lies not only in connecting critical studies on transparency with insights from consumer and (data) protection law but also in bridging fields of EU law that are typically considered in separation, despite the growing recognition of their close connection.[13] While many studies have explored transparency in either EU consumer law (and the various subfields thereof),[14] or data protection law,[15] the present article considers the two areas together. We find indications that different acts of consumer and data protection law can conceptually enrich one another and observe that various actors involved in the formulation and enforcement of EU law are ready to embrace such mutual enrichment. From this perspective, our approach aims to open up new spaces to apply the notions of transparency developed under one regime in another regime, so as to soften path-dependencies in enforcement which may be constraining the progressive potential of transparency.

The structure of the article is as follows. Section II describes the tensions around transparency as they emerge in contemporary debates in consumer law and policy and makes the case for a more fine-grained exploration of how transparency can assist consumers in the digital economy. Section III lays the ground for the analysis of transparency in the law of unfair terms, unfair commercial practices and data protection by describing the key features of

[12] On the idea of supporting consumers through technologies, see generally, Michal S Gal and Niva Elkin-Koren, 'Algorithmic Consumers' (2016) 30 Harvard Journal of Law & Technology 309; Marco Lippi and others, 'The Force Awakens: Artificial Intelligence for Consumer Law' (2020) 67 Journal of Artificial Intelligence Research 169; Nathalie de Marcellis-Warin and others, 'Artificial Intelligence and Consumer Manipulations: From Consumer's Counter Algorithms to Firm's Self-regulation Tools' (2022) 2 AI and Ethics 259. Examples, including Claudette, PriBot, and PriX, are discussed further in this article.

[13] See especially, Frederik Zuiderveen Borgesius, Natali Helberger and Agustin Reyna, 'The Perfect Match? A Closer Look at the Relationship between EU Consumer Law and Data Protection Law' (2017) 54 Common Market Law Review 1427; Inge Graef and Sean Van Berlo, 'Towards Smarter Regulation in the Areas of Competition, Data Protection and Consumer Law: Why Greater Power Should Come with Greater Responsibility' (2021) 12 European Journal of Risk Regulation 674.

[14] See eg, Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 Journal of Law and Society 349, 356; Johanna Waelkens, 'Article 5 Unfair Terms Directive 93/13/EEC: Transparency and Interpretation in Consumer Contracts' in Ilse Samoy and Marco BM Loos (eds), *Information and Notification Duties* (Intersentia 2015) 47; Joasia Luzak and Mia Junuzović, 'Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts' (2019) 8 Journal of European Consumer and Market Law 97; Ognyan Seizov, Alexander J Wulf and Joasia Luzak, 'The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU' (2019) 42 Journal of Consumer Policy 149; Rolf H Weber, 'From Disclosure to Transparency in Consumer Law' in Klaus Mathis and Avishalom Tor (eds), *Consumer Law and Economics* (Springer 2021) 79.

[15] See eg, Merle Temme, 'Algorithms and Transparency in View of the New General Data Protection Regulation' (2017) 3 European Data Protection Law Review 473; Christopher Kuner and others (eds), *The EU General Data Protection Regulation (GDPR): A Commentary* (OUP 2020); Laurens Naudts, Pierre Dewitte and Jef Ausloos, 'Meaningful Transparency Through Data Rights: A Multidimensional Analysis' in Eleni Kosta, Ronald Leenes and Irene Kamara (eds) *Research Handbook on EU Data Protection Law* (Edward Elgar 2022) 530.

transparency in each one of the three legal regimes. It also draws attention to one trend that brings the three regimes together, namely the recognition that transparency is not an unmediated process and that acts of representation involved in transparency can become the target of specific rules. Section IV presents the seven notions of transparency that we have identified in the case law and administrative decisional practice on these three regimes. Section V concludes by discussing how a concept of transparency that is both critically informed and doctrinally robust can not only affect the process of communication but also bear upon the underlying market practice and through that strengthen consumer (data) protection in the digital age.

II. THE TENSIONS AROUND TRANSPARENCY

In contemporary debates around transparency as a conceptual frame for assisting weaker parties, a certain tension can be sensed. On the one hand, transparency is proposed as the natural solution for many of the challenges that consumers face in the digital economy. As the said challenges are often rooted in problems of opacity and complexity, transparency discourses understandably drive policy formulation. On the other hand, transparency is looked at with growing scepticism by both critical scholars and more doctrinal ones. The present section explores this tension in current debates around transparency. It first examines some of the reasons that make transparency an attractive policy frame, and then the main streams of criticism directed at transparency.

A. Why more transparency seems desirable in digital consumer markets

The digital economy has significantly changed the conditions of consumers' participation in markets and society.[16] The ways in which consumers are confronted with offers, make their choices, or express consent to a contract, amongst other things, are radically transformed. New types of commercial actors, business models, products, and services characterized by the centrality of data and data-enabled algorithms certainly deliver value to consumers, but also entail risks.[17] In the following, we discuss two processes through which the digital economy accelerates and which contribute to increased complexity and opacity in consumer markets: (i) servitization, or the growth of services and (ii) the growth of algorithmic decision making. We briefly describe both of these processes and explain how they are relevant to our discussion of transparency.

First, in digital markets, we consume less goods and more services. Digital technologies make it possible to provide a range of services that are novel in character: social media, messaging apps, content-creation and sharing platforms. Furthermore, digital technologies support the purchase and provision of many traditional (pre-digital) services as well—eg, banking, insurance, utility provision, travel, just to name a few. As a result, the amount of services we purchase, or subscribe to, has dramatically increased, which is sometimes referred to as a process of servitization.[18]

[16] Michele Willson, 'Algorithms (and the) Everyday' (2017) 20 Information, Communication & Society 137.

[17] See eg, Ryan Calo, 'Digital Market Manipulation' (2013) 82 George Washington Law Review 995; Eliza Mik, 'The Erosion of Autonomy in Online Consumer Transactions' (2016) 8 Law, Innovation and Technology 1; Karen Yeung ''Hypernudge': Big Data as a Mode of Regulation by Design' (2017) 20 Information, Communication & Society 118; Maurice E Stucke and Ariel Ezrachi, 'How Digital Assistants Can Harm our Economy, Privacy, and Democracy' (2017) 32 Berkeley Technology Law Journal 1239; Quentin André and others, 'Consumer Choice and Autonomy in the Age of Artificial Intelligence and Big Data' (2018) 5 Customer Needs and Solutions 28; Dirk Helbing, 'Societal, Economic, Ethical and Legal Challenges of the Digital Revolution: From Big Data to Deep Learning, Artificial Intelligence, and Manipulative Technologies' in Dirk Helbing (ed), *Towards Digital Enlightenment* (Springer 2019) 47; Claude Castelluccia and Daniel Le Métayer, 'Understanding Algorithmic Decision-making: Opportunities and Challenges' (2019) Study requested by the Panel for the Future of Science and Technology, European Parliamentary Research Service.

[18] The phrase servitization (or sometimes servicification) captures a trend whereby goods are provided as services (eg, a car is provided through a leasing contract rather than a sale) or services are added to the provision of goods (eg, maintenance

For consumers, services are generally more complex to understand than products, because of their longer term nature, the reliance on performance by other persons, and the pervasive use of technologically advanced solutions in their provision. Moreover, the digital economy blurs the boundaries between goods and services. Some of the items that consumers used to buy in a physical form, as a product, are now only digital and intangible: think of the so-called content industries (music, books, movies, games, etc.), which are now not so much purchased on a physical support but enjoyed as streams of data on a subscription basis. In this context, growing opacity surrounds what we actually do when we shop for digital products: the very nature of what we buy and of the rights we acquire—ownership of a good or temporary use rights?—are contentious and uncertain.[19]

Finally, many of the digital products we consume are difficult to evaluate through the parameters of price and quality. They are not what economists refer to as search goods, but instead belong to the categories of experience or credence goods (ie, respectively goods whose quality is unknown to consumers until use or whose utility is hard to evaluate even after use).[20] In the digital economy, consumers are often able to assess the quality or their enjoyment of relevant services only after use, or by using external services, such as rankings or crowdsourced review systems.[21] This development points at a context where assessing the value of a product becomes increasingly complex. As we go on describing, pervasive personalization aggravates these challenges.

A second development that accentuates the uncertainty in digital markets is the pervasive use of algorithms in the provision of consumer goods and services.[22] In this context, data are central both as an object of market transactions, and as input to decisional processes that lead to the transactions, often resulting in forms of personalization through consumer profiling.[23] Consumer data, acquired via growingly sophisticated commercial surveillance techniques, determine the type of advertisement, offers, and prices that consumers are confronted with in online markets. More fundamentally, consumer data also shape the actual services we get as consumers; for example, the functionalities available or the content of social media platform feeds. These features of service vary from user to user and so do the decisional processes that affect consumers rights, such as in relation to content removal or suspension.

Algorithmic decision making enables the personalization of many elements of the service. Personalization is documented to proceed through the use of inferred data, meaning data extracted from users without their direct input, mostly from monitoring their previous uses of the platform and confronting it with data of other consumers.[24] Moreover, seemingly

services are provided together with a particular product). Janja Hojnik, 'The Servitization of Industry: EU Law Implications and Challenges' (2016) 53 Common Market Law Review 1575. But the term is also used in a less technical sense to illustrate the growth in the size of services over goods in the digital economy.

[19] See generally, Aaron Perzanowski and Jason Schultz, *The End of Ownership: Personal Property in the Digital Economy* (MIT Press 2016); Michael A Heller and James Salzman, *Mine!: How the Hidden Rules of Ownership Control Our Lives* (Doubleday Books 2021).

[20] Phillip Nelson, 'Information and Consumer Behavior' (1970) 78 Journal of Political Economy 311; Michael R Darby and Edi Karn, 'Free Competition and the Optimal Amount of Fraud' (1973) 16 The Journal of Law and Economics 67.

[21] From a different perspective, Klein has suggested that the Web can among others decrease search costs of certain product attributes, thereby transforming experience goods into search goods. See, Lisa R Klein, 'Evaluating the Potential of Interactive Media Through a New Lens: Search versus Experience Goods' (1998) 41 Journal of Business Research 195. However, more recent research failed to confirm a significant shift of this kind. See, Makoto Nakayama, Norma Sutcliffe and Yun Wan, 'Has the Web Transformed Experience Goods into Search Goods?' (2010) 20 Electronic Markets 251.

[22] See eg, Calo (n 17) 82; Zuboff (n 3) 75; Cohen (n 3) 80.

[23] Mireille Hildebrandt, 'Defining Profiling: A New Type of Knowledge?' in Mireille Hildebrandt and Serge Gutwirth (eds), *Profiling the European Citizen: Cross-Disciplinary Perspectives* (Springer 2008), 17; Tal Zarsky, 'The Trouble with Algorithmic Decisions: An Analytic Road Map to Examine Efficiency and Fairness in Automated and Opaque Decision Making' (2016) 41 Science, Technology & Human Values 118.

[24] See eg, Johann Laux, Sandra Wachter and Brent Mittelstadt, 'Neutralizing Online Behavioural Advertising: Algorithmic Targeting with Market Power as an Unfair Commercial Practice' (2021) 58 Common Market Law Review, 719, 720; Giovanni Sartor and Francesca Lagioia, 'Regulating Targeted and Behavioural Advertising in Digital Services: How to Ensure Users' Informed Consent' (2021), Study requested by the European Parliament's Committee on Legal Affairs, 38.

small and indiscernible adjustments to data-driven services can trigger outcomes desired by the traders, unbeknownst to the parties they affect. For example, recent whistleblower accounts suggest that contentious content may be promoted in the news feeds since it has been shown to increase users' engagement with the platform.[25] In such a context, when using the same digital service, regulated by the same standard terms and algorithms, consumers may have highly divergent experiences and may not even be able to perceive relevant changes in their own use of services. There is hardly a standard product that can be known or made visible before the conclusion of the contract.

The developments set out above point to a more radical form of opacity than previously experienced in mass consumer markets: consumers face uncertainty in relation to key features of the contractual relationship, which are very hard if not impossible to predict in the pre-contractual phase, given that they are the outcome of algorithmic decisions. Furthermore, consumers face uncertainty in relation to the type of input, meaning the type of data the algorithm relies on, and the rules that lead to the decision. With regards to these types of problems, a growing body of scholarship has been detailing the role of transparency as a tool to make the decisions of artificial intelligence (AI) systems more explainable and understandable.[26] New sources of opacity have thus triggered a counter-movement of which transparency forms a prominent part.

B. What makes transparency attractive to law and policymakers

In light of the previous observations, transparency emerges as an almost natural response to various forms of closure and complexity in markets and society, including the growing opacity and complexity of digital markets. This intuitive appeal is strengthened by features of transparency that make it particularly attractive to law and policymakers and thus a pervasive frame of protection across market regulatory regimes. To understand what makes transparency attractive, it is useful to briefly trace its development in EU law and policy.

The most prominent way in which EU consumer and data protection law engages with transparency is through the so-called information paradigm. The latter stresses the role of information rules, such as disclosure duties, in market regulation. As observed in the literature, the information paradigm aligns with many different political theories, which pursue different ultimate goals, like autonomy, efficiency or fairness.[27] It is taken to steer the behaviour of companies or public authorities in socially desirable directions, foster participation in decisional processes, and exert competitive pressure.[28] Information rules thus emerge as attractive across the political spectrum and a plausible instrument for reconciling different objectives considered desirable in consumer markets.[29]

Indeed, over the past decades, the information paradigm has grown ever more established in EU law and policy, mainly through the expansion of explicit disclosure duties. Extensive horizontal lists of mandatory information to be communicated to consumers are currently

[25] Kiran Stacey, 'Facebook Chose to Maximise Engagement at Users' Expense, Whistleblower Says' <www.ft.com/content/41b657c8-d716-436b-a06d-19859f0f6ce4> Accessed 19 September 2023.

[26] Philipp Hacker and Jan-Hendrik Passoth, 'Varieties of AI Explanations Under the Law. From the GDPR to the AIA, and Beyond' in Andreas Holzinger and others (eds), *xxAI - Beyond Explainable AI: International Workshop, Held in Conjunction with ICML 2020*, 18 July 2020, Vienna, Austria, Revised and Extended Papers (Springer 2022) 343.

[27] Thomas Wilhelmsson and Christian Twigg-Flesner, 'Pre-contractual Information Duties in the Acquis Communautaire' (2006) 2 European Review of Contract Law 441, 449; Christoph Busch, 'The Future of Pre-contractual Information Duties: From Behavioural Insights to Big Data' in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar 2016) 222–23. For the normative appeal of several political theories in EU private law, see, Martijn W Hesselink, *Justifying Contract in Europe: Political Philosophies of European Private Law* (OUP 2021).

[28] Frederick Schauer, 'Transparency in Three Dimensions' (2011) University of Illinois Law Review 1339, 1346. On the 'governance by transparency' see especially, Archon Fung, Mary Graham and David Weil, *Full Disclosure: The Perils and Promise of Transparency* (CUP 2007) 5–6.

[29] Seizov, Wulf and Luzak (n 14) 151.

found, eg, in Directive 2011/83/EU on consumer rights[30] as well as other consumer law directives. As we discuss further in this article, a corresponding trend can also be observed in the data protection realm.

The information paradigm in EU law appears particularly well aligned with the idea of consumer empowerment,[31] and the vision of rational consumers as active economic agents.[32] Disclosure requirements, unlike more intrusive forms of regulation, are expected to correct undesirable market outcomes while preserving free choice and thus safeguarding and potentially even enhancing the autonomy of consumers.[33] Well-informed consumers are not only capable of more autonomous choices, but they can also more adequately perform their role as arbiters of market outcomes, and thus ensure the market runs smoothly. Disclosure obligations, it has been theorized, may even encourage competition in relation to the friendliness of consumer terms[34]—all without explicitly regulating the content of the bargain.

In sum, transparency possesses conceptual flexibility and appeal across a broad political spectrum.[35] As we see in the next section, these features are also among the reasons why transparency is looked at with scepticism by some of its critics. For our purposes, however, it is important to observe that the said attractiveness creates space for transparency to be deployed where other types of (more intrusive) intervention seem politically hard to pursue.

C. Three directions of transparency critiques

So far, we have shown how the increasing opacity and complexity of digital consumer markets trigger calls for enhanced transparency. This is consistent with previous findings indicating that the intensity of debates about transparency increases in contexts with higher degrees of institutional closure, meaning where the holders of powers are particularly impermeable to public oversight.[36] As seen, transparency is also an attractive instrument because political compromise around it is generally easier to find. These promises of transparency have a timeless appeal, so much so that transparency remains a lasting point of reference in scholarship and policy.[37]

Over time, however, transparency has also attracted growing criticism from several viewpoints. In the following, we discuss three distinct, yet interrelated, streams of critique: (i) the behavioural findings pointing to limits of consumers' perception; (ii) transparency's false promise of unmediated access to reality and its susceptibility to abuse, and (iii) the inability of transparency to tackle structural asymmetries in the digital economy.

The first stream is in line with the so-called behavioural turn in the social sciences and questions the usefulness of transparency starting from the bounded rationality of

[30] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L 304/64.

[31] Stephen Weatherill, 'Empowerment is Not the only Fruit' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016) 203.

[32] Christian Twigg-Flesner, Reiner Schulze and Jonathon Watson, 'Protecting Rational Choice: Information and the Right of Withdrawal' in Geraint Howells, Iain Ramsay and Thomas Wilhelmsson (eds), *Handbook of Research on International Consumer Law* (Edward Elgar 2018) 111, 112–14.

[33] Loewenstein, Sunstein and Golman (n 9) 392.

[34] Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate 2007) 56.

[35] On this see also, Christopher Hood, 'Transparency in Historical Perspective' in Christopher Hood and David Heald (eds), *Transparency? The Key to Better Governance* (OUP 2006) 2–23 (observing that transparency is so widely agreed upon that it takes on features of orthodoxy).

[36] H Patrick Glenn, 'Transparency and Closure' in Padideh Ala'i and Robert G Vaughn (eds), *Research Handbook on Transparency* (Edward Elgar 2014) 16–18.

[37] See eg, Hood and Heald (n 35); Emmanuel Alloa and Dieter Thomä (eds) *Transparency, Society and Subjectivity: Critical Perspectives* (Palgrave Macmillan 2018); Stefan Berger and others (eds), *Cultures of Transparency: Between Promise and Peril* (Routledge 2021).

consumers.[38] This scholarship has pointed out that consumers' attention is a scarce resource and that over-information may lead not only to confusion, but also to consumers disregarding the information as not serious or reliable.[39] Such problems may be further exacerbated by our overconfidence when acting as consumers, which leads us to overestimate the level of control we have over the course of initiated events.[40] Within this line of scholarship, behavioural fixes have been proposed to overcome the above limitations through design of disclosure duties that may overcome consumers' bounded rationality.[41] But the behavioural critique of transparency has been very influential in consumer law scholarship[42] and may inform much of today's pessimism around the concept: transparency, mainly in the form of information duties, does not work, because behavioural biases prevent consumers from accessing, understanding or acting upon the information they receive.[43]

The second noteworthy direction of the critique derives from critical scholarship in law and other humanities which questions the meaning and the underlying assumptions of transparency at a more fundamental level. In particular, two themes stand out in this line of research. First, it is noted that transparency discourses rely on a metaphor of visibility, in particular the metaphor of seeing with one's own eyes, and connect it to knowing and understanding.[44] This metaphor, scholars have observed, is misleading, because it suggests that there is a fixed and stable reality waiting to be made visible through neutral medium. As this scholarship instead points out, the dichotomy between the medium of representation and the object to be represented is unstable, and as a consequence representation and even direct perception are hardly ever neutral.[45] As others clarify, there are always acts of representation and interpretation involved in any act of seeing.[46] Koivisto describes this as a paradox, whereby transparency is both opposed to mediation and dependent on it.[47]

Second, the critical scholarship suggests that transparency may solidify rather than dismantle existing power structures. Adams, for example, clarifies that transparency as the metaphor of 'making something visible' is associated with the Enlightenment and through this historical linkage came to be perceived as a 'neutral and unquestionable value'.[48] In reality, Adams notes, transparency is necessarily embedded in power relations and is typically 'enacted by the same author of the information-object, who has, in addition, the power to control the form of disclosure, the information disclosed and, arguably, the way in which that information is received'.[49] If this dimension is neglected, transparency may give the false idea that the relevant power holders can be seen, checked, and made accountable.[50]

[38] See, in particular, Richard Thaler and Cass R Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Penguin 2009); Daniel Kahneman, *Thinking, Fast and Slow* (MacMillan 2011).

[39] Weber (n 14), 79.

[40] ibid. For detailed analysis, see Kahneman (n 38) 199.

[41] See eg, Loewenstein, Sunstein and Golman (n 9) 391.

[42] Howells (n 14) 356–62; Wilhelmsson and Twigg-Flesner (n 27) 452–55; Anne-Lise Sibony and Geneviève Helleringer, 'EU Consumer Protection and Behavioural Sciences: Revolution or Reform?' in Alberto Alemanno and Anne-Lise Sibony (eds), *Nudge and the Law: A European Perspective* (Hart Publishing 2015) 209; Fabrizio Esposito, 'Conceptual Foundations for a European Consumer Law and Behavioural Sciences Scholarship' in Hans-W Micklitz, Anne-Lise Sibony and Fabrizio Esposito (eds), *Research Methods in Consumer Law* (Edward Elgar Publishing, 2018) 38.

[43] See Omri Ben-Shahar and Carl Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press 2014); Florencia Marotta-Wurgler, 'Does Contract Disclosure Matter?' (2012) 168 Journal of Institutional and Theoretical Economics 94.

[44] Koivisto (n 11) 3; Stefan Larsson and Fredrik Heintz, 'Transparency in Artificial Intelligence' (2020) 9 Internet Policy Review 1, 5.

[45] Jack M Balkin, 'How Mass Media Simulate Political Transparency' (1999) 3 Cultural Values 393. As noted by Balkin, 'the very metaphor of transparency suggests a medium through which we view things'.

[46] Adams (n 11) 27.

[47] Koivisto (n 11) 22.

[48] Adams (n 11) 19–22, 26–28.

[49] ibid 25.

[50] ibid 62–63.

The third direction of transparency critiques is similarly concerned with power asymmetries but relates more directly to the digital economy. This stream of scholarship emphasizes how asymmetries in digital markets are qualitatively different from the ones generally affecting consumer markets. As observed by Helberger and others, in digital markets power imbalances manifest not only because of the very large size of the seller, or dependency of the buyer from it, but also as a product of the structural inability of consumers to deploy their agency to shape the outcome of economic interactions.[51] This inability is rooted not only in the difficulty to access or understand information concerning rights and duties, but in the very design of platforms that rely on ever more intrusive forms of data extraction to deliver services with addictive qualities that may harm consumers.[52] These observations spur both a new emphasis on, and a rethinking of, the notion of consumer vulnerability. In the digital economy, vulnerability ceases to qualify only specific groups of consumers (eg, defined by age or mental ability, but also possibly education or socio-economic status), as it typically does in consumer law, and becomes a state afflicting all consumers vis-à-vis digital companies. Accordingly, a new concept of 'digital vulnerability' is advocated by scholars to capture the transformation of consumption in data-driven markets: digital vulnerability is not only relational, but it is also architectural 'because the digital choice architectures we navigate daily are designed to infer or even create vulnerabilities'.[53]

The intensity of the consumer vulnerabilities and power asymmetries, which emerge in the digital economy bring scholars to question the ability of transparency to assist consumers. While seemingly problems of complexity and opacity, the new challenges consumers face in digital markets are so intense that they may require novel protection frames.[54] As a recent study concludes, since 'the consumer is structurally and universally unable to "understand" the digital architecture, information in whatever form cannot remedy the existing asymmetry'.[55] It is argued instead that this structural consumer vulnerability calls for a more fundamental re-design of market interactions. An important area of scepticism around transparency, which is shared at least by the second and third streams of critique, relates indeed to transparency's inability to transform reality on the ground. Transparency is seen as inherently unable to do so directly, due to its focus on the process of communication and not on the communicated. Furthermore, it is submitted that the acts of representation involved in transparency can themselves suffer from complexity and be prone to exploitation by the actors who are to be made visible. This, in turn, casts doubt on the ability of transparency to steer the behaviour of businesses, as well as its capacity to realize other goals it may have, such as fostering autonomy and participation.

III. THE RECOGNITION OF THE MEDIATED NATURE OF TRANSPARENCY IN THE LAW ON UNFAIR TERMS, UNFAIR COMMERCIAL PRACTICES, AND DATA PROTECTION

As illustrated in the previous section, transparency presents an appealing solution for many problems in the digital economy and an attractive conceptual frame for law and policymakers. But its utility is growingly contested. Transparency is an illusion, many claim. It does not work, others observe. Can transparency be rescued as a conceptual frame to assist

[51] Natali Helberger and others, 'EU Consumer Protection 2.0.: Structural Asymmetries in Digital Consumer Markets' A joint report from research conducted under the EUCP2.0 project (2021).

[52] See also, Calo (n 17) 82; Mik (n 17) 1; Yeung (n 17) 118; Zuboff (n 3) 75; Cohen (n 3) 80.

[53] Helberger and others (n 51) 19. See also: Helberger and others (n 10) 175.

[54] *Cf* Stefan Larsson, 'Algorithmic Governance and the Need for Consumer Empowerment in Data-driven Markets' (2018) 7 Internet Policy Review 1.

[55] Helberger and others (n 51) 118.

consumers in the digital economy? To answer this question, the remaining part of this article looks, in more detail, into how EU law enables consumers and data subjects to know and understand the nature of the legal relationships to which they are or may become part. As a first step, we briefly introduce the legal provisions that our doctrinal analysis focuses on—the UCTD, the UCPD, and GDPR. We draw attention to one trend which brings the three regimes together, namely the fact that EU consumer and data protection law is not oblivious to the mediated nature of transparency, but rather seeks to increasingly regulate it. Regulation of mediation can target both formal (eg, presentation, visualization, style) and substantive (mostly content) features[56] of various transparency devices—standard terms, advertising, and privacy policies—as well as regulation of how consumers are given access to the said devices. Our analysis also touches upon the interaction of transparency with other protection frames, namely fairness, especially within our description of the UCTD where this interaction is particularly prominent.

A. Transparency in the Unfair Contract Terms Directive

One of the key tenets of consumer protection in the digital age is Directive 93/13/EEC on unfair terms in consumer contracts. While they are not a new phenomenon, pre-formulated contracts, drafted unilaterally by one party, are especially pervasive in digital markets. The goal of the Directive is to remedy the asymmetry of information and bargaining power between traders and consumers arising in such contracts.[57] The core instrument for achieving its goal is Article 3(1) UCTD, which sets out a minimum standard for judicial review of the fairness of non-individually negotiated terms. Such a review is carried out, first and foremost, in relation to the content of contractual clauses and asks whether a non-individually negotiated contract term is contrary to the requirement of good faith and causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

While fairness review is the UCTD's most prominent instrument of consumer protection, the Directive also aims to fix the imbalance between traders and consumers through a transparency requirement: Article 5 UCTD states that where all or certain terms are offered to the consumer in writing, such terms should always 'be drafted in plain, intelligible language'. Moreover, Article 4(2) UCTD extends the transparency requirement to elements of the contract whose fairness is typically not scrutinized. Pursuant to that provision, a determination of unfairness should not extend to the main subject matter of the contract nor depend on a judgment of adequacy or correspondence between the price paid and the goods or services exchanged, but only insofar as the latter are expressed in 'plain and intelligible language'. This means that transparency review extends to the price and object of the contract, which are instead in principle excluded from fairness review.

The Court has repeatedly stressed that the requirements of Article 5 and 4(2) UCTD have the same scope,[58] and cannot 'be reduced' to the formal and grammatical intelligibility of the contract terms, but extend to both form and content.[59] Existing case law reveals, moreover, that transparency and fairness in the UCTD are often working together, become relevant at different stages of the legal relationship, and may overlap. For example, concerns around transparency may factor into the finding of unfairness, with the consequent remedies that the law assigns to said finding, including potentially the voidness of the term.[60]

[56] Luzak and Junuzović (n 14) 99; Waelkens (n 14) 61.
[57] Judgment of the Court of 15 March 2012, C-453/10, Pereničová and Perenič, ECLI:EU:C:2012:144, para 27.
[58] ibid para 69. See also, judgment of the Court of 3 September 2020, C-84/19, Profi Credit Polska, ECLI:EU:C:2020:631, para 74 and the case law cited.
[59] Judgment of the Court of 30 April 2014, C-26/13, Kásler and Káslerné Rábai, ECLI:EU:C:2014:282, para 71.
[60] See eg, judgment of the Court of 26 April 2012, C-472/10, Invitel, ECLI:EU:C:2012:242, para 28 ('[I]n the assessment of the 'unfair' nature of a term, within the meaning of Article 3 of the Directive, the possibility for the consumer to foresee, on

B. Transparency in the Unfair Commercial Practices Directive

Another vital act of the EU consumer *acquis*, often seen as a key safety net for consumer protection in the digital economy, is Directive 2005/29/EC on unfair commercial practices. The UCPD is applicable to broadly defined 'commercial practices', which include a broad range of acts, omissions, communications, and courses of conduct or representation, engaged in before, during or after a commercial transaction, provided these are directly connected with the promotion, sale or supply of products.[61] Many of these acts, and most obviously advertising, can be seen as transparency devices that mediate between the business and the consumer, as do the standard terms.

Unlike the UCTD, the UCPD does not expressly distinguish between (un)fairness and transparency. Its focus remains on countering 'unfair commercial practices', which include violations of the professional diligence requirement with the potential of distorting consumers' behaviour. The UCPD further sets out several more specific types of unfair commercial practices, namely misleading practices (respectively actions in Article 6 and omissions in Article 7) and aggressive practices (Articles 8 and 9). The role of transparency with respect to these two different types of unfair commercial practices is different.

Transparency plays a larger role in relation to misleading practices, which are focused heavily on consumer information problems.[62] Article 6(1) UCPD contains a prohibition of commercial practices which contain false information or in any way, including through overall presentation, deceive, or are likely to deceive the average consumer, in relation, eg, to the main characteristics of the product or the extent of the trader's commitments. Moreover, under Article 7(1) UCPD, a commercial practice is regarded as misleading if it omits 'material information'[63] that the average consumer needs, according to the context, to take an informed transactional decision. The same is also true, among others, if the trader hides or provides such material information in an unclear, unintelligible, ambiguous or untimely manner (Article 7(2)). In all the above cases, an additional condition applies, pertaining to the practice being at least likely to cause the consumer to take a transactional decision that he or she would not have taken otherwise.

The problems of consumers affected by misleading actions and omissions can broadly be described as transparency problems. In both cases, the consumer is not able to know or fully understand the nature of legal relationships to which they are or may become part.[64] Like in the case of the UCTD, a distinction can be drawn between formal and substantive transparency, whereby the former relates, among others, to information being provided in an unintelligible or untimely manner, while the latter pertains, eg, to the comprehensiveness and accuracy of the material information. The importance of transparency with respect to other

the basis of clear, intelligible criteria, the amendments [of] to the fees connected to the service to be provided is of fundamental importance'); judgment of the Court of 28 July 2016, C-191/15, Verein für Konsumenteninformation, ECLI:EU:C:2016:612, para 68 ('[T]he unfairness of such a term may result from a formulation that does not comply with the requirement of being drafted in plain and intelligible language set out in Article 5 of Directive 93/13'). See also in the scholarship Edoardo Ferrante, 'Contractual Disclosure and Remedies under the Unfair Contract Terms Directive' in A Janssen and G Howells (eds), *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Routledge 2005) 115. For this debate in the Italian context see, Guido Alpa and Vincenzo Mariconda, *Codice dei Contratti Commentato* (Wolters Kluwer 2020) 2978; Pierluigi Giammaria 'Art 1469-quater, 1°, 2° e 3° comma' in Guido Alpa and Salvatore Patti (eds), *Clausole vessatorie nei contratti del consumatore* (Giuffrè 2013) 1023; Elena Poddighe, *I Contratti con i Consumatori. Vol. 1: La Disciplina delle Pratiche Vessatorie* (Giuffrè 2000) 137.

[61] arts 2(d) and 3(1) UCPD.

[62] *Cf* Mateja Durovic, *European Law on Unfair Commercial Practices and Contract Law* (Bloomsbury Publishing 2016) 110.

[63] Durovic describes the notion of material information as 'a standard which understands what information is necessary for consumers to make an informed choice'. ibid 118. Note that in the national languages, the concept material is often translated as relevant (eg, Italian) or important (eg, Polish).

[64] Judgment of the Court of 18 July 2013, C-265/12, Citroën Belux, ECLI:EU:C:2013:498, para 39 ('[A] combined offer of which one component is a financial service is more likely to be lacking in transparency as regards the conditions, the price and the exact content of that service. Accordingly, such an offer may well mislead consumers as to the true content and actual characteristics of the combination offered').

types of unfair commercial practices, such as aggressive practices, appears to be less obvious, but existing case law suggests that transparency can also play a part in the finding of unfairness under Articles 8 or 5(2) UCPD.[65] A thicker, overarching notion of transparency may therefore be of relevance to all manifestations of the UCPD fairness test.

C. Transparency in the General Data Protection Regulation

To complete the picture of the key acts protecting consumers in the digital economy, attention must be drawn to the GDPR. With the rise of the digital economy, in which the personal data of consumers are extensively monetized, consumer law and data protection law have been drawn closer together.[66] Arguably, important commonalities can also be identified within particular components of the two domains. Indeed, the GDPR expressly embraces core concepts from the EU consumer *acquis*, such as transparency and fairness.

More specifically, when defining the principles relating to the processing of personal data, Article 5(1)(a) GDPR stipulates that personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject. Unlike in the previously applicable Data Protection Directive,[67] from which transparency could only be indirectly construed, in the GDPR transparency is one of the general principles governing the processing of personal data and the Regulation devotes much space to this aspect of data processing. The GDPR defines items of information to be communicated to the data subject at the time of obtaining personal information from them (Article 13)[68] as well as modalities of such communication, among others conciseness, clear and plain language as well as a reference to *transparency* without further specification (Article 12(1)). While we find the mention of transparency in Article 12(1) rather vague, we interpret it as capturing something narrower than the principle of transparency referred to in Article 5(1)(a) GDPR. In addition, Article 14 defines information to be provided where personal data have not been obtained from the data subject. Finally, aspects of information provision can also be found as part of data subjects' *ex post* rights, most notably the right of access (Article 15). The principle of transparency encompasses all the above-mentioned substantive and formal elements, and possibly more.[69]

It is worthy of note that the GDPR does not explicitly require traders to communicate information to the data subjects in the form of privacy policies. It is true that explicit expressions of the transparency principle, such as the obligations under Articles 12–14, may render the publication of privacy policies a practical necessity. Still, other transparency devices, such as visualization, video or other media, or even experimentation, through allowing consumers to experience the differences of changed privacy choices, can also come into the picture when applying the principle.

In debates about transparency in EU data protection law, particular attention has also been devoted to Article 22(1) GDPR, which equips data subjects with the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning them or similarly significantly affects them. The right is not absolute, but subject to exceptions set out in the next paragraph. For some of the exceptions additional safeguards apply, which include at a minimum the rights of the data subjects to obtain human intervention on the part of the controller, to express their point of view, and to

[65] Judgment of the Court of 13 September 2018, C-54/17, Wind Tre, ECLI:EU:C:2018:710, para 48.

[66] Zuiderveen Borgesius, Helberger and Reyna (n 13) 1427.

[67] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.

[68] A similar provision applies to personal data obtained from other sources, see, art 14 GDPR.

[69] See also, European Data Protection Board, Binding decision 1/2021 on the dispute arisen on the draft decision of the Irish Supervisory Authority regarding WhatsApp Ireland under art 65(1)(a) GDPR, adopted on 28 July 2021, para 191. ('[I]t is important to differentiate between obligations stemming from the principle of transparency and the principle itself.')

contest the decision (Article 22(3) GDPR). Moreover, recital 71 additionally refers to the right to obtain an 'explanation' of the decision reached after such assessment. Whether or not a right to explanation exists under the GDPR, and what would be its consequences for the design of algorithmic systems, has been the subject of intense scholarly discussion, which goes beyond the scope of this article.[70] We will nonetheless refer to academic research about explanations to the extent that it can enrich our study of the more specific notions of transparency.

Transparency in the GDPR is closely linked to lawfulness and fairness, a connection which becomes especially clear when the different legal bases in which the processing of personal data can be grounded are analysed.[71] As indicated in recital 42 GDPR, if the processing is based on data subject's consent and the latter is pre-formulated, an assessment under national norms implementing the UCTD may become relevant.[72] Moreover, fairness checks and balances are also present in other legal bases available to the data controller, referred to in Article 6(1)(b)–(f) GDPR, eg, through the criterion of necessity.[73] Arguably, the principle of transparency could also factor into those assessments as well as play a role in making them more visible.

D. Mediated transparency and digital markets

The discussion above reveals that transparency plays a prominent role in the three EU acts that arguably contribute the most to the protection of consumers in the digital economy: the UCTD, the UCPD, and the GDPR. As already apparent from the cursory discussion above, each regime takes increasing care of the regulation of disclosure modalities. Indeed, the notion of transparency in consumer law scholarship is typically equated with the comprehensibility of information and therefore, even at first sight, can be distinguished from disclosure as such.[74]

Recognition of the mediated nature of transparency is also visible in the new wave of digital legislation, albeit not equally by all institutions. A prominent case in point is the proposed AIA, which aims to lay down a uniform legal framework for the development, marketing and use of AI in the EU. While the original version tabled by the Commission had little in terms of regulation of disclosure modalities,[75] amendments proposed by the European Parliament

[70] *Cf* Bryce Goodman and Seth Flaxman, 'European Union Regulations on Algorithmic Decision-making and a "Right to Explanation"' (2017) 38 AI Magazine 50; Sandra Wachter, Brent Mittelstadt and Luciano Floridi, 'Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation' (2017) 7 International Data Privacy Law 76; Andrew Selbst and Julia Powles, 'Meaningful Information and the Right to Explanation (2017) 7 International Data Privacy Law 233; Gianclaudio Malgieri and Giovanni Comandé, 'Why a Right to Legibility of Automated Decision-making Exists in the General Data Protection Regulation' (2017) 7 International Data Privacy Law 243; Maja Brkan, 'Do Algorithms Rule the World? Algorithmic Decision-making and Data Protection in the Framework of the GDPR and Beyond' (2019) 27 International Journal of Law and Information Technology 91, 103; Apostolos Vorras and Lilian Mitrou, 'Unboxing the Black Box of Artificial Intelligence: Algorithmic Transparency and/or a Right to Functional Explainability' in Tatiana-Eleni Synodinou and others (eds), *EU Internet Law in the Digital Single Market* (Springer 2021) 251.

[71] On the interactions between transparency and fairness in the GDPR, see, Damian Clifford and Jef Ausloos 'Data Protection and the Role of Fairness' (2018) 37 Yearbook of European Law, 130, 154.

[72] See also, Christiane Wendehorst and Friedrich Graf von Westphalen, 'Das Verhältnis zwischen Datenschutz-Grundverordnung und AGB-Recht' (2016) 69 Neue Juristische Wochenschrift 3745, 3748.

[73] Clifford and Ausloos (n 71) 169.

[74] Luzak and Junuzović (n 14) 97; Weber (n 14) 73.

[75] The Commission proposal only focuses on regulating modalities of disclosure in art 13, which, however, remains of limited relevance to consumers. First, the provision is aimed at high-risk systems and very few systems applied in consumer markets are qualified as such. Moreover, as it does not require the providers or users of AI systems to provide transparency to the person affected, such as consumers. In contrast, art 52 of the proposal, which does deal with information for consumers, does not engage with modalities of communication. *Cf* Martin Ebers and others, 'The European Commission's proposal for an Artificial Intelligence Act - A Critical Assessment by Members of the Robotics and AI Law Society (RAILS)' (2021) 4 J—Multidisciplinary Scientific Journal 589, 596; Michael Veale and Frederik Zuiderveen Borgesius, 'Demystifying the Draft EU Artificial Intelligence Act - Analysing the Good, the Bad, and the Unclear Elements of the Proposed Approach' (2021) 22 Computer Law Review International 97, 107.

go deeper into specifying both the form and substance of consumer-facing disclosure.[76] For example, the amendments to Article 52(1) of the AIA refer to the provision of information on the operation of an AI system 'in a timely, clear and intelligible manner'. Even more detailed requirements are proposed for the users of specific systems, such as manipulated text or video (eg, deepfakes), which clarify that 'disclosure shall mean labelling the content in a way that informs that the content is inauthentic and that is clearly visible for the recipient of that content' (Article 52(3)). Moreover, Article 28b(4) of the AIA in the version proposed by the European Parliament extends the obligations of Article 52(1) to the providers of generative AI systems (such as ChatGPT), which are frequently used by consumers. It is likely that at least some of these amendments will inform the final version of the AIA.

The legislative developments observed in the context of the AI Act show a potential cross-fertilization between the EU digital legislation, on the one hand, and EU consumer (data) protection law, on the other. Notable similarities and spaces for mutual learning are also visible in other areas of debate. A good example is the notion of explainability, frequently used in AI governance to describe the capacity of black box models to be explained to users.[77] The recognition of mediated transparency lies at the very heart of those debates, which brings them close to the idea of transparency in EU consumer and data protection law. Indeed, the metaphor of direct visibility is no longer as prominent if the focus becomes shifted from 'disclosing' to 'explaining'. As Cabitza and others observe, 'an explanation has a *structural* aspect (which makes something plain) and a *relational* aspect (for which what has been made plain is also clear to somebody, and is understood by them)'.[78] However, the parallels between transparency in consumer and data protection law and explanations in AI also have limitations. While the focus of explanations is typically on causes (eg, why the system reaches a certain decision),[79] discussions about transparency in consumer (data) protection law address a broader range of questions, most prominently linked to the rights and duties of consumers.

In addition to the above, recent research has shown that digital technologies can not only exacerbate the imbalance between business and consumers but also make it easier for consumers to extract relevant information from large texts. To illustrate, Harkous and others developed an automated framework for privacy policy analysis (Polisis) and complemented it with a question–answering system (PriBot), capable of responding to queries about the content of long documents.[80] More recently, Brunotte and others presented a web extension providing easier access and visual explanations of information contained in privacy policies.[81] Finally, with respect to consumer contracts, a system for the automated detection of unfair terms was developed as part of the Claudette project.[82] Similar applications are currently being tested by other groups of researchers.[83]

[76] See, 'Amendments Adopted by the European Parliament on 14 June 2023 on the Proposal for a Regulation of the European Parliament and of the Council on Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts' <www.europarl.europa.eu/doceo/document/TA-9-2023-0236_EN.html> Accessed 19 September 2023.

[77] Adrien Bibal and others, 'Legal Requirements on Explainability in Machine Learning' (2021) 29 Artificial Intelligence and Law 149.

[78] Feberico Cabitza and others, 'Quod Erat Demonstrandum? Towards a Typology of the Concept of Explanation for the Design of Explainable AI' (2023) 213 Expert Systems with Applications 118888, 5.

[79] Tim Miller, 'Explanation in Artificial Intelligence: Insights from the Social Sciences' (2019) 267 Artificial Intelligence 1, 6; Brent Mittelstadt, Chris Russell and Sandra Wachter, 'Explaining Explanations in AI' (Proceedings of the Conference on Fairness, Accountability, and Transparency, Atlanta, 2019) 279.

[80] Hamza Harkous and others, 'Polisis: Automated Analysis and Presentation of Privacy Policies Using Deep Learning' (27th USENIX Security Symposium, Baltimore, 2018) 531.

[81] Wasja Brunotte and others, 'What About My Privacy? Helping Users Understand Online Privacy Policies' (Proceedings of the International Conference on Software and System Processes and International Conference on Global Software Engineering, 2022) 56.

[82] Marco Lippi and others, 'CLAUDETTE: An Automated Detector of Potentially Unfair Clauses in Online Terms of Service' (2019) 27 Artificial Intelligence and Law 117.

[83] Daniel Braun and Florian Matthes, 'NLP for Consumer Protection: Battling Illegal Clauses in German Terms and Conditions in Online Shopping' (Proceedings of the 1st Workshop on NLP for Positive Impact, Bangkok, 2021) 93.

The discussion so far illustrates that the mediated character of transparency can be and is mobilized by lawmakers and courts. Moreover, existing efforts to regulate mediation can, nowadays, be reinforced with the help of algorithmic systems geared towards supporting consumers. In the following, we explore these efforts in more detail and ask if there are any meanings of transparency that even reach beyond mediation.

IV. SEVEN NOTIONS OF TRANSPARENCY IN EU CONSUMER AND DATA PROTECTION LAW

While the previous sections discussed transparency at a general level, the remaining part of this article explores the specific manifestations that emerge from the UCTD, the UCPD, and the GDPR. Through a bottom-up doctrinal analysis of the three acts we have drawn up a non-exhaustive list of seven meanings (or notions) of transparency, which are not mutually exclusive and often build upon each other: (i) Transparency as access to the medium over time; (ii) Transparency as presentation of information that facilitates understanding; (iii) Transparency as formulations that facilitate understanding; (iv) Transparency as non-ambiguity and logical intelligibility; (v) Transparency as the absence of deception and confusion; (vi) Transparency as completeness and specificity; and (vii) Transparency as non-arbitrariness. Our list is not constrained by the legal categorizations in each studied regime and also looks for transparency requirements in provisions that do not talk explicitly of transparency. We intend our descriptions of the various meanings of transparency to be both more granular and more concrete (with an eye to operationalization) than most legal categorizations in the three regimes.

As we present the seven meanings, we discuss how each of them is embedded in the law, provide examples of the types of problems they are deployed to fix, with a particular focus on problems consumers experience in digital markets, and draw attention to the role that consumer-oriented technologies can play in the operationalization of each meaning. We also frame at least some of the meanings within broader interdisciplinary debates, mostly drawing from linguistics and psychology, about how to best achieve consumers' understanding through textual disclosures. More broadly, we seek to assess the potential of the meanings to transform digital consumer markets in a direction that is beneficial to consumers and society and discuss if there are signs of more radical visions of transparency emerging within each meaning, eg, notions that push transparency very close to fairness.

A. Transparency as access to the medium over time

Our first manifestation of transparency can be characterized as aimed at fixing problems of access to the medium (or the transparency device). This is the most basic dimension of mediated transparency and is often a prerequisite for its other forms to assume relevance. Indeed, if transparency is being realized by means of communicating information through a document, it is vital that the consumer can become acquainted with that document.

(i) Consumer law

The importance of transparency as access to the medium is explicitly recognized in the preamble of the UCTD. In particular, recital 20 notes that the consumer should 'actually be given an opportunity to examine all the terms'. A similar language can also be found in the Commission's Guidance on the interpretation and application of the UCTD,[84] which highlights the consumer's 'real opportunity of becoming acquainted with a contract term before

[84] European Commission, Guidance on the interpretation and application of Council Directive 93/13/EEC [2019] OJ C 323/4.

the conclusion of the contract'.[85] What is meant by such a real opportunity remains unspecified, although the Commission hints that it is not exhausted by the mere availability of the terms, including any annexes or other referenced documents.[86] A possible additional layer can arguably consist in the ease of accessing the terms. The latter is mentioned among others in the recommendations for a better presentation of information to consumers,[87] a unilateral self-regulatory commitment of several European business organizations, facilitated by the European Commission. The document refers, eg, to the placing of contract terms in a prominent place on a website and avoiding acronyms, such as 'AGB', 'T&C', 'CGV', which may not enjoy broad understanding.[88] It is worth noting, however, that the recommendations have not been endorsed by consumer protection organizations, which considered their added value to be limited.[89]

Indeed, both the Commission's guidance and the recommendations of the business organizations present a rather narrow vision of how access to the documents is to be provided, and as such miss several aspects of what this notion of transparency may entail. In particular, although the self-regulatory document refers to the consumer's ability 'to store and to print' the terms, it remains for the consumer to execute these actions in due time. This may be due, among others, to a narrow vision of transparency as limited to the pre-contractual stage, a vision arguably tailored to the protection needs entailed by sales of goods but hardly tenable in an economy dominated by long-term services. Admittedly, this approach draws some support from the case law of the Court of Justice, which puts emphasis on the importance of transparency before contract conclusion.[90] However, the Court is also mindful of the use that consumers can make of transparently communicated terms at later stages of the legal relationship, such as when a problem occurs.[91] Accordingly, one can argue that the ease of access to the terms should also extend to the ability to consult them at a later stage. Such a position finds support in Directive 2011/83/EU on consumer rights, which requires traders to provide consumers with the confirmation of a distance contract on a durable medium.[92] A related question pertains to any subsequent amendments of the terms, and the answer to it, in our view, should not be different.

The temporal dimension of transparency as access to the medium is not the only one that requires elaboration. The same is true for the circumstances of gaining such access. As mentioned before, considerations of ease begin to gain recognition: think of the recommendation to place a conspicuous link prominently on the trader's website.[93] Similar indications can also be found in the UCPD, albeit primarily in the context of misleading practices, which we discuss with more attention below: difficulty in accessing information can contribute to deception. Moreover, circumstances that can affect consumer's access to the medium are not limited to the placement of information about the medium. As the Court explicitly acknowledged, transparency under the UCTD is to be determined in the light of 'all the relevant facts' submitted for assessment, 'including the promotional material and information

[85] ibid 25.
[86] ibid.
[87] 'Recommendations for a Better Presentation of Information to Consumers' <https://ec.europa.eu/info/sites/default/files/sr_information_presentation.pdf> Accessed 19 September 2023.
[88] ibid 6.
[89] Thom van Mierlo, 'First Experiences with European Consumer Self-Regulation Dialogue: Twice Successful' (2021) 8 Journal of European Consumer and Market Law 33, 34.
[90] Judgment of the Court of 21 March 2013, C-92/11, RWE Vertrieb, ECLI:EU:C:2013:180, para 44.
[91] Candida Leone, 'Transparency Revisited – On the Role of Information in the Recent Case-law of the CJEU' (2014) 10 European Review of Contract Law 312, 322.
[92] art 8(7) of Directive 2011/83/EU.
[93] Recommendations (n 87) 6.

provided (. . .) in the negotiation of (. . .) agreement'.[94] The analysis triggered by the transparency requirement is thus contextual and goes beyond the form and content of a document. In this regard, the connection between the rules on unfair terms and on unfair commercial practices becomes especially prominent, whereby the presence of unfair commercial practices can be taken into account in the assessing of fairness undertaken under the UCTD.[95] All practices that affect the consumer's access to the relevant medium, in this case standard terms, can thus be relevant to the analysis of transparency. Aside from obscure layouts, one could think of practices that border on aggressiveness, such as when a consumer is being rushed to sign the contract or is otherwise discouraged from becoming familiar with it.[96] A cross-cutting perspective on transparency should bring connections of this kind into light, opening up potentially novel pathways to enforcement.

A more complex issue concerns the *public* availability of the various versions of the terms applicable over time. Public availability would require access to the terms by actors who are not parties to the contract, which in turn would frame the UCTD as aimed at more than the individualistic correction of terms in the bilateral contractual relations, and point at a more collective dimension of consumer protection in the unfair terms regime. While this may sound like a very broad interpretation to some, the UCTD and EU consumer law, more generally, already do have such a collective dimension as illustrated for example by certain features of the enforcement framework which assign an explicit role to collective bodies representing consumer interests.[97] This dimension could arguably support extending transparency as access to the medium to third parties if that could serve a more effective protection of collective consumers interests. Notably, in the digital age, the actions taken by third parties engaged in the protection of consumers (eg, consumer organizations) could themselves become data-driven. A prominent example is the previously mentioned Claudette project, in which standard terms are used for training an AI system, which can later be used to detect unfairness in consumer contracts.[98] This example also illustrates that the individual and collective dimensions of consumer protection can become intertwined in practice. After all, it may be due to the actions taken in the collective interest that individual consumers can be encouraged to go back to the documents, which they may not have read, or understood, in full, and to act accordingly.

(ii) Data protection law

A role for transparency as access to the medium also emerges in the domain of data protection, and this role appears especially meaningful in the digital age. Here, the medium (or transparency device) to be accessed is not, or not primarily, the standard contract, but typically the privacy policy.

Articles 13 and 14 of GDPR refer to 'providing' information to the data subjects, which, together with Article 12, entails a requirement to ensure, insofar as possible, that the data subject 'receives' the information.[99] The mere possibility of access is therefore not sufficient,

[94] See eg, judgment of the Court of 20 September 2017, C-186/16, Andriciuc and Others, ECLI:EU:C:2017:703, para. 46; judgment C-84/19, Profi Credit Polska, para 74.

[95] Judgment C-453/10, Pereničová and Perenič, operative part.

[96] *Cf* judgment of the Court of 12 June 2019, C-628/17, Orange Polska, ECLI:EU:C:2019:480.

[97] See eg, art 7(2) UCTD that requires Member States to ensure that organizations protecting consumer interests may take action before courts or administrative bodies in cases relating to 'terms drawn up for general use' and obtain remedies 'to prevent the continued use of such terms'. See also, judgment of the Court of 28 April 2022, C-319/20, Meta Platforms Ireland, ECLI:EU:C:2022:322, operative part, confirming the competence of Member States to allow consumer organisations to bring legal proceedings under GDPR in the absence of a specific mandate conferred by data subjects.

[98] See eg, Hans-W Micklitz, Przemysław Pałka and Yannis Panagis, 'The Empire Strikes Back: Digital Control of Unfair Terms of Online Services' (2017) 40 Journal of Consumer Policy 367; Marco Lippi and others (n 12) 169; Francesca Lagioia and others, 'AI in Search of Unfairness in Consumer Contracts: The Terms of Service Landscape' (2022) 45 Journal of Consumer Policy 481.

[99] See eg, decision of the Data Protection Commission made pursuant to s 111 of the Data Protection Act, 2018 and arts 60 and 65 of the General Data Protection Regulation of 20 August 2021 (DPC Inquiry Reference: IN-18-12-2) para 200.

but an active role of the controller (largely overlapping with the trader for our purposes) is envisioned. This mainly equates to reducing problems of difficulty to access. As the Irish Data Protection Commission (DPC) expressly stated: 'The user should not have to work hard to access the prescribed information.'[100]

Like in the case of standard terms, it is important to stress the temporal dimension of access to information under the GDPR. While information about data processing can certainly be significant prior to signing up for a data-driven service, it is at least as relevant at later stages of the legal relationship. Indeed, both the CJEU and the data protection authorities stress that the mandated information should allow data subjects, among others, to exercise their *ex post* rights, such as the right to object (to certain uses of their data).[101] The same is also true for other important consumer decisions not related to the exercise of direct legal rights, such as the decision to continue using the service and if so, in what way.[102] In order to exercise such choices consciously, the data subjects need to be capable of accessing the medium over time. For complex systems that constantly adapt this can be challenging of course; yet, even then, a case can be made for developing 'ways of describing system responsibility at different time periods and with different rhythms'.[103]

Importantly, unlike in standard terms, the moment at which the processing of personal data begins, and thus the privacy policy becomes relevant to the data subjects, may not be easy to identify, especially since not all processing requires the data subject's consent. Indeed, as evidenced by Article 14 GDPR, in contexts where personal data have not been obtained from the data subject (such as when the data subject is listed in the contacts of another person), transparency may face additional challenges but remains highly relevant. The provision mandates a series of information duties also for this scenario, albeit with a longer list of exceptions compared to when personal data originates from the data subject. In particular, pursuant to Article 14(5)(b) GDPR, the disclosure duty does not apply if the provision of the mandated information 'proves impossible or would involve a disproportionate effort'. The provision, nonetheless, goes on to say that the controller is, in such cases, required to take appropriate measures to protect the data subject's rights and freedoms and legitimate interests, including making the information publicly available.

The extent to which data subjects are to be given access to information (and modalities thereof) in the context of processing personal data, which has not been obtained from them has been elaborated by the data protection authorities. First, their decisions have clarified in what circumstances the exception of Article 14(5)(b) GDPR applies at all. For example, in a case concerning a repository of data about the economic activity of natural persons, the Polish data protection authority found that the failure to establish personal contact with the data subjects, whose telephone numbers and physical addresses were available to the controller, constituted an infringement of Article 14 GDPR.[104] Merely publishing a notice on the controller's website was not a sufficient alternative. In these cases, access to the medium is better construed as an active duty to reach out to the data subject. Secondly, authorities have made it clear that, when the exception of Article 14(5)(b) GDPR does apply and the information is communicated via public notice, the said notice must be easy to access for the data subjects. For example, the decision of the Irish Data Protection Commission concerning WhatsApp stressed that in providing information to non-users by way of a public notice,

[100] ibid para 337.
[101] See eg, judgment of the Court of 1 October 2015, C-201/14, Bara and Others, ECLI:EU:C:2015:638, para 33; European Data Protection Board (n 69) paras 55, 212.
[102] European Data Protection Board (n 69) para 197.
[103] Mike Ananny and Kate Crawford, 'Seeing Without Knowing: Limitations of the Transparency Ideal and its Application to Algorithmic Accountability' 2018 20 New Media & Society 973, 985.
[104] Decision of the President of the Office of Data Protection in Poland of 15 March 2019 (ZSPR.421.3.2018).

careful consideration should be given to the location and placement of the notice 'so as to ensure that it is discovered and accessed by as wide an audience of non-users as possible'.[105] Moreover, information concerning non-users should be presented separately to the user-facing transparency information so that, the authority emphasized, it is 'as easy as possible for non-users to discover and access the information that relates specifically to them'.[106]

Finally, it is important to stress that transparency as access to the medium in the context of personal data goes beyond privacy policies. A related, yet conceptually distinct domain concerns the consent forms typically used by controllers when the processing of personal data is based on the data subject's consent. In this area, the circumstances in which consumers gain access to the medium (eg, time and interface features) are increasingly well-studied, most notably under the banner of dark patterns. The latter term captures various forms of deceptive interfaces, which induce consumers to agree to something disadvantageous to them, in our case the processing of their data, as in the case of forms with pre-selected consumer consent.[107] We subscribe to an assessment of dark patterns as highly concerning and view them as principally incompatible with both the GDPR and the UCPD.[108] Interestingly, also in debates on dark patterns, the temporal dimension of transparency receives growing attention. For example, the recent guidelines of the European Data Protection Board (EDPB) emphasize that users should be able to adjust their data protection settings during the entire life cycle of their social media account without being exposed to dark patterns.[109] Among best practices, the availability of a 'data protection directory' is mentioned, that is of an easily accessible page from where all data protection-related actions and information are accessible.[110]

As seen above, ensuring transparency as access to the medium may require active engagement of the trader/controller, including by personally reaching out to the consumers/data subjects and otherwise making sure that the relevant information can be found and consulted with ease. In that sense, the present notion of transparency overlaps with further manifestations, concerned with the presentation and formulation of relevant disclosures, which we address below.

B. Transparency as the presentation of information that facilitates understanding

Another recurring dimension of transparency concerns the presentation of information in a way that facilitates understanding. As signalled earlier, growing attention devoted to this aspect of transparency has been reflected in the expansion of explicit provisions on disclosure modalities. Following the guidance from the Commission, which is largely based on the CJEU case law, the requirement to provide information in 'plain intelligible language' in Article 5 UCTD encompasses, among others, intelligibility at a formal level, eg, visual presentation of the terms, including font size, the order and organization of clauses, etc.[111] Such visual elements are also very prominent in the case law on the UCPD, albeit primarily in the

[105] Decision of the Data Protection Commission of 20 August 2021 (DPC Inquiry Reference: IN-18-12-2) para 167.
[106] ibid.
[107] European Data Protection Board, Guidelines 3/2022 on Dark patterns in social media platform interfaces: How to recognise and avoid them, adopted on 14 March 2022. See also, Forbrukerrådet, 'Deceived by Design: How Tech Companies Use Dark Patterns to Discourage Us from Exercising Our Rights to Privacy' <https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf> Accessed 19 September 2023; Jamie Luguri and Lior Jacob Strahilevitz, 'Shining a Light on Dark Patterns' (2021) 13 Journal of Legal Analysis 43.
[108] European Data Protection Board (n 107). European Commission, Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2021] OJ C 526/1, 101. See also, MR Leiser, 'Dark Patterns: The Case for Regulatory Pluralism between the European Union's Consumer and Data Protection Regimes' in Eleni Kosta, Ronald Leenes and Irene Kamara (eds), *Research Handbook on EU Data Protection Law* (Edward Elgar 2022) 240.
[109] European Data Protection Board (n 107) 39.
[110] ibid 45.
[111] European Commission (n 84) 25–26.

context of misleading practices, which are more thoroughly addressed in Section IV.E.[112] In its UCTD guidance, the Commission has further stressed that important stipulations should be given adequate prominence and that terms should be 'contained in a contract or context where they can reasonably be expected, including in conjunction with other related contract terms'.[113] For example, 'contract terms whose impact can only be understood when reading them jointly, should not be presented in such a way that their joint impact is obscured, e.g. through placing them in different parts of the contract'.[114]

The elements highlighted by the Commission find support in the work of linguists and psychologists. For our purposes, the framework developed by Langer, Schulz von Thun, and Tausch is especially useful as it relates directly to communication via text, which is the transparency device most frequently used in consumer markets. The authors consider comprehensibility (*Verständlichkeit*) to consist of the following four dimensions: (i) simplicity (*Einfachheit*); (ii) structure—order (*Gliederung—Ordnung*); (iii) shortness—conciseness (*Kürze—Prägnanz*); (iv) stimulating additional components (*anregende Zusätze*).[115] All the four dimensions are arguably important aspects of mediation which law can regulate. With regard to transparency as a presentation that facilitates understanding, the dimension of structure/order appears especially relevant. Following Langer and others, attention should be paid both to the internal order of the text (whether there are logical connections between sentences and the information is communicated in a sensible sequence) and its external structure (whether, eg, parts that belong together are grouped together and more important information is distinguished from less important, such as by way of highlighting or summaries).[116]

Similar insights can also inform the interpretation of Article 5(1)(a) GDPR and its further specifications, including those related to disclosure modalities. Most notably, Article 7(2) GDPR stipulates that if the consent of the data subject is given in the context of a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is clearly distinguishable from the other matters. Article 7(2) GDPR thus confirms the idea that a distinction should be made between more and less salient matters, with the former being given more prominence. Situations when the consumer/data subject is giving up some of his or her rights provide a good example for the salient matters.

The previously mentioned guidelines on dark patterns extensively engage with transparency as a presentation of information that facilitates understanding, highlighting the importance of structural and visual aspects of communication (font, background, placement) during the life-cycle of a social media account.[117] In its decision concerning Whatsapp, the Irish Data Protection Commission undertook a similar exercise with respect to the provider's privacy disclosures. For example, the authority raised doubts about the compatibility with GDPR of a separate 'Legal Basis Notice', which was not conspicuously linked to the more comprehensive 'Privacy Policy'.[118] The DPC further took issue with both overlaps and discrepancies between various portions of text dealing with same or similar issues in different locations, which could result in new elements being overlooked by the data subject.[119] Moreover, the lack of any reference to the right to withdraw consent in a section dedicated to exercising data subjects rights were subjected

[112] See eg, judgment of the Court of 26 October 2016, C-611/14, Canal Digital Danmark, ECLI:EU:C:2016:800, para 64.
[113] European Commission (n 84) 25.
[114] ibid.
[115] Inghard Langer, Friedemann Schulz von Thun and Reinhard Tausch, *Sich verständlich ausdrücken* (4th edn, Reinhardt 1990) 15–23.
[116] ibid 18.
[117] European Data Protection Board (n 107) 12.
[118] Decision of the Data Protection Commission of 20.08.2021 (DPC Inquiry Reference: IN-18-12-2) paras 196, 202.
[119] ibid paras 336, 355.

to criticism, since this was seemingly where data subjects were most likely to go search for information about their rights, and not in the other sections where that information was available.[120] Likewise, inconspicuous placement of the details about the data shared with Facebook was reproved.[121] Identifying issues of this kind could arguably be facilitated by AI-powered tools, such as PriX, Polisis, or Claudette.

Another aspect of transparency understood as presentation that facilitates understanding relates to timing. While not emerging explicitly from the UCTD and the GDPR, it does find recognition in the UCPD. In particular, Article 7(2) of the latter Directive states that a misleading omission encompasses situations when a trader provides material information 'in an untimely manner' and where this causes or is likely to cause the average consumer to take a transactional decision that he or she would not have taken otherwise. Here, once again, the distinction between more and less salient information becomes important along with the idea that certain information may be more relevant at a certain time than at another. For example, data subjects may be interested to know that their location data is being processed when that happens, and not just have a general idea that such processing can take place in the future.

A further aspect stressed by linguists and psychologists, when discussing different dimensions of transparency, is that the audience of communication matters.[122] As we saw in the previous section, transparency may require making (sections of) documents addressed at different audiences (e.g. users and non-users) clearly distinguishable from each other. This arguably is something that algorithmic systems could easily help spot. Moreover, target audiences should be taken into account when considering other formal and substantive aspects of the terms. While the general point of reference for EU consumer protection is the notion of the average consumer, who is reasonably well-informed and reasonably observant and circumspect,[123] its application in the context of transparency has not been uncontested.[124] For our purposes, it suffices to note that the law allows and even may require to adjust the reference point when particular audiences are targeted by the trader/controller. This approach is visible in the UCPD, which refers in Article 5(2)(b) to the 'average member of the group' when a commercial practice is directed to a particular group of consumers. The CJEU has also transferred this idea to the field of consumer contracts, recognizing that a different minimum size of the typeface may be appropriate for different groups of consumers targeted by a communication.[125] Also, the GDPR hints at the importance of the target audience and, in particular, points to the need of giving additional consideration 'to any information addressed specifically to a child'.[126] Finally, certain national courts, in particular the French courts in the context of application of national legislation on unfair terms, have produced a series of decisions exploring the question whether transparency should be judged in subjective or objective terms. As reconstructed in the scholarship, this case law shows that the judge should not decide whether a clause is not transparent in objective terms but whether that clause lacks clarity from the perspective of the consumer in the specific circumstances in which the consumer finds him or herself.[127] Such differentiations could arguably

[120] ibid paras 491.
[121] ibid para 552.
[122] Langer and others (n 115) 33.
[123] See eg, judgment of the Court of 20 September 2018, C-51/17, OTP Bank and OTP Faktoring, ECLI:EU:C:2018:750, para 27; recital 18 UCPD.
[124] See, most recently, Fabrizio Esposito and Mateusz Grochowski, 'The Consumer Benchmark, Vulnerability, and the Contract Terms Transparency: A Plea for Reconsideration' (2022) 18 European Review of Contract Law 1.
[125] *Cf* judgment of the Court of 23 January 2019, C-430/17, Walbusch Walter Busch, ECLI:EU:C:2019:47, para 39.
[126] art 12(1) GDPR.
[127] Waelkens (n 14) 55, quoting the French decision by Court of Appeal of Pau, 9 February 2004, No 02/001705. As the judge stated in that decision: 'il ne s'agit donc pas de savoir si la clause est en soi claire ou si son interprétation est nécessaire,

complicate the automation of transparency assessment; yet, ultimately they do seek to enhance protection of consumers and remind that it is primarily the responsibility of traders to draft their terms transparently.

Finally, while most of the existing discussion focuses on textual descriptions, the latter are arguably only one possible way of communicating relevant information to consumers. Other non-textual devices, like visualization, may be more effective in communicating information to consumers, especially in the digital economy.[128] Indeed, Article 12(7) GDPR explicitly stipulates that information may be provided to data subjects in combination with standardized icons. Similarly, the previously mentioned PriX project, aimed at helping users understand privacy policies, combines the extraction of relevant information with icons that additionally promote comprehension.[129] Departing even further from the standard textual form, conversational approaches, such as the one applied by PriBot, can also be imagined.[130] Indeed, an optimistic uptake of conversational AI, such as ChatGPT, suggests that interactive question–answering systems can be capable of effectively conveying knowledge to consumers.[131]

Overall, transparency as a presentation that facilitates understanding has many different facets. One of them is the provision of salient information in a prominent and timely manner—something that traders/controllers may not always be willing to do, considering that salient information will typically encompass disadvantages and burdens for the consumer/data subject. While AI systems can be used to bring such information to consumers' attention, it is the trader or controller who bears responsibility for that in the first place. Of course, the latter can also be assisted by AI when drafting complex documents.

The dimension of transparency discussed here is especially geared towards the problem of difficulty to understand, although one can also envisage situations in which particularly poor presentation makes the understanding close to impossible. Clearly, drawing a line between the presentation of a message and the formulation of its content is not always straightforward. We discuss this second aspect in the following section.

C. Transparency as formulations that facilitate understanding

This meaning of transparency is closely linked to the above, but concerns not so much the visual presentation of information within the document, as the syntax and semantics of each sentence or term. This meaning shares with the previous one the aim of facilitating understanding but seeks to achieve this aim by focusing on the understanding of each sentence in the contract or other transparency device, not the visual dimension of documents. In our classification, the deployments of transparency described here do not target formulations that are impossible to understand: either because they are ambiguous (can have more than one meaning) or logically unintelligible (eg, incomplete or grammatically incorrect sentences), on which see Section IV.D. Hence, transparency is deployed here to fix those problems of mediation that make understanding harder.

Existing case law is less explicit about pursuing this meaning of transparency compared to other notions dealing with the substance of the terms. In its decisions under the UCTD, the Court typically focuses on the ability of the consumer to understand the consequences of what they agree to (what we discuss especially in Section IV.F),[132] and often stresses that

mais si pour le consommateur ou le non professionnel, la lecture de la clause laissait place à une interprétation qui rend son erreur éventuelle de compréhension excusable et non fautive'.

[128] Consider, eg, the Google Maps Timeline as a way of visualising data collected about previous locations of maps users.

[129] Brunotte and others (n 81) 58

[130] Harkous and others (n 80) 539.

[131] See also, Miller (n 79) 32.

[132] Judgment of the Court of 23 April 2015, C-96/14, Van Hove, ECLI:EU:C:2015:262.

transparency cannot 'be reduced' merely to grammatical correctness (what we discuss under Section IV.D). In contrast, it does not explicitly state that each individual term must be easy to understand and that terminology and syntax should support this end. However, in its guidance document, the Commission reinterprets these findings of the Court, by deriving what we interpret as a facilitative role for Articles 5 and 4(2) UCTD. Indeed, the guidelines affirm that transparency aims at 'the comprehensibility of the individual terms, in light of the clarity of their wording and the specificity of the terminology used, as well as, where relevant, in conjunction with other contract terms'.[133] Repeated statements by the Court that transparency requirements must be interpreted broadly also support our point that transparency encompasses formulations that facilitate understanding.[134] Other sectoral regulations of the consumer *acquis*, especially in the field of financial services, as well as data protection law, are more explicit about this.[135]

We recognize that there are difficulties entailed in the statement that comprehension must be easy, for example, because it seems difficult to establish how easy comprehension must be. To operationalize the meaning of transparency as formulations that facilitate understanding, insights from linguistics and psychology can, however, again be helpful. Within the framework by Langer and others, simplicity, shortness/conciseness and stimulating additional components are the categories that seem more visibly implicated by this notion of transparency.[136] Further insights can also be drawn from more recent research on explanations in AI. In his influential article, Miller reviews relevant studies on explanation in the field of philosophy, cognitive psychology and social psychology and connects them to the research on explainable AI. As Miller concludes, explanations are fundamentally social and, therefore, the transfer of knowledge they aim at can be understood as relying on interaction or conversation.[137] If this is true also for the types of communication that contracts and privacy policies aim at, we can apply some of the rules that linguists identify as producing effective communication in interactive (conversation) settings to those transparency devices. The best known such rules are likely to be Grice's maxims[138] of quality, quantity, relation (relevance), and manner (clarity).[139]

Grice's maxim of manner appears here particularly relevant. It refers, among others, to avoiding obscurity of expression as well as being brief (ie, avoiding unnecessary prolixity). This aligns with simplicity in Langer's framework, which in turn concerns the choice of words and sentence construction, and encompasses among others: short, simple sentences, use of familiar words, explanation of technical words, concreteness, and illustrative language.[140] Interestingly for our purposes, emphasis is here placed on the explanation of technical words and not on their avoidance. This awareness is confirmed by suggestions from legal scholars working on national laws implementing the UCTD. As Italian scholarship notes, for example, while all avoidance of technical language seems unrealistic, overly

[133] European Commission (n 84) 25.
[134] See eg, judgment C-186/16, Andriciuc and Others, para 44 and the case law cited.
[135] See eg, art 13 of Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 [2014] OJ L 60/34, which requires 'clear and comprehensible general information' about the credit agreement, which other provisions specify as 'easily legible' (art 11(5), 'clearly legible' (Annex II, pt B) and 'easy comprehensible [sic!]' (Annex II, pt B). As regards data protection law, see eg, Article 29 Working Party, Guidelines on transparency under Regulation 2016/679 adopted on 29 November 2017, as last revised and adopted on 11 April 2018, 7 ('[C]ontrollers should present the information/ communication efficiently and succinctly in order to avoid information fatigue.').
[136] Langer and others (n 115) 15.
[137] Miller (n 79) 3.
[138] ibid 29.
[139] HP Grice, 'Logic and Conversation' in Peter Cole and Jerry L Morgan (eds), *Syntax and Semantics. Speech Acts. Vol. 3.* (Brill 1975) 41.
[140] Miller (n 79) 16.

technical language, such as jargon, may violate the transparency requirement, and specifically the meaning of transparency here considered.[141] Similarly, German scholars suggest that standard terms in B2C relations should avoid overly technical and ambiguous terms as far as possible and instead use clear (everyday) language, contain explanations of legal terms used and preferably be formulated in short sentences.[142] Finally, in the context of Polish law, the importance of a glossary of terms has been underscored.[143]

Another maxim worth highlighting is the maxim of quantity. It implies that one's contribution should be made as informative as is required and no more informative than is required. The maxim is also closely linked with relation, which provides that only information related to the conversation (ie, relevant information) should be communicated. Similarly, shortness/conciseness for Langer et al. concerns the question whether the length of the text remains in a reasonable relation to the information goal.[144] The scholarship does not prescribe shortness without further qualifications. On the contrary, it emphasizes the need to find a balance between conciseness and explanation: overly short texts are also not understandable, with the optimum falling somewhere in the middle.[145] Shortness, moreover, should not be achieved by using vague or general expressions, where a higher degree of specificity is required in line with the dimension of transparency discussed in Section IV.F.

Awareness of the role of shortness is quite prominent in financial regulation, as evidenced by the diffusion of requirements to publish key information documents in that sector.[146] This aspect of transparency practice has also received growing attention in the field of consumer and data protection law, especially in the digital economy. Most notably, Article 12(1) GDPR explicitly refers to the provision of information 'in a concise manner'. Furthermore, the Article 29 Working Party (now the EDPB) has promoted the format of layered privacy statements, which 'enable a data subject to navigate to the particular section of the [statement] rather than having to scroll through large amounts of text searching for particular issues'.[147] With regard to standard contract terms, the German Advisory Council for Consumer Affairs advocates to make it mandatory for traders to create one-pagers of maximum 500 words summarizing terms of service and privacy policies of digital services,[148] while other scholars endorse the mandating of similar one-pagers for AI systems.[149] We take these proposals to advocate for deployments of transparency to facilitate understanding mainly by leveraging the shortness of formulations.

The idea of stimulating additions, highlighted by Langer and others, captures formulations that trigger active involvement mainly through a desire to read or listen.[150] This includes the use of examples and/or a personal touch. However, like with conciseness, it is not easy to

[141] Giovanni De Cristofaro and Alessio Zaccaria, *Commentario Breve al Diritto dei Consumatori* (Cedam 2010) 370.
[142] Friedrich Graf von Westphalen, 'AGB-Recht im ersten Halbjahr 2018' [2018] NJW 2240.
[143] Joanna Luzak, 'Doprecyzowanie Zasady Transparentności w Polskim Prawie Konsumenckim' [2020] Studia Prawa Prywatnego 42, 49.
[144] Langer and others (n 115) 18.
[145] ibid 27.
[146] See eg, Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) [2014] OJ L 352/1. See also, Marika Salo, Helena Haapio and Stefania Passera, 'Putting Financial Regulation to Work: Using Simplification and Visualization for Consumer-Friendly Information' in Erich Schweighofer and others (eds), *Networks. Proceedings of the 19th International Legal Informatics Symposium IRIS 2016* (Österreichische Computer Gesellschaft OCG 2016) 399. For an empirical study see, Andreas Oehler, Andreas Höfer and Stefan Wendt, 'Do Key Investor Information Documents Enhance Retail Investors' Understanding of Financial Products? Empirical Evidence' (2014) 22 Journal of Financial Regulation and Compliance 115.
[147] art 29 Working Party (n 135) 7.
[148] Advisory Council for Consumer Affairs at the German Federal Ministry for Justice and Consumer Protection, 'Digital Sovereignty' <www.svr-verbraucherfragen.de/wp-content/uploads/English-Version.pdf> 20–21, Accessed 6 August 2022.
[149] Alexander J Wulf and Ognyan Seizov, 'Artificial Intelligence and Transparency: A Blueprint for Improving the Regulation of AI Applications in the EU' (2020) 31 European Business Law Review 611.
[150] Langer and others (n 115) 22.

find an optimal level of stimulating additions. For instance, if the text is not well-structured then stimulating additions can further contribute to confusion.[151] Furthermore, as we discuss in Section IV.E, the use of a personal touch, such as typical in marketing and advertising, may create problems in contracts or privacy policies insofar as it can lead consumers into error about, in particular, their legal rights.

One more issue that deserves consideration in the context of formulations that facilitate understanding is the situation where terms of service or privacy policies are drafted in a language different from the consumers' own language. Our choice of including these situations within this meaning of transparency is rooted in the fact that lack of understanding here derives from difficulty, and not impossibility to understand. Along similar lines, the Commission guidance document on the UCTD makes clear that consumers need to be 'sufficiently familiar with the language in which the terms are drafted'.[152] National laws transposing the UCTD, as well as their implementation practice, provide more details on the extent to which this aspect of transparency may be deployed.[153] More recently, the issue was also taken up by the EU lawmaker, who introduced a requirement for very large online platforms and very large online search engines to publish their terms and conditions in the official languages of all the Member States in which they offer their services.[154] Such a requirement may not only be helpful for the users of those services but can also facilitate the development of consumer-oriented systems with multilingual features.[155]

D. Transparency as non-ambiguity and logical intelligibility

Unlike the two preceding notions, this meaning of transparency aims at fixing problems which do not merely make it more difficult for consumers to understand relevant information, but which actually preclude the very possibility of doing so. In particular, this dimension captures two types of problems that transparency is deployed to fix: situations in which more than one meaning can be attributed to a sentence—the sentence is ambiguous; and situations in which a sentence is logically unintelligible, which would typically be rooted in a material drafting mistake (such as rooted in a grammatical error or the omission of certain necessary words) or a translation error. Thus understood, transparency means that sentences in standard terms or privacy policies are logically intelligible and are susceptible to only one interpretation. Transparency is here deployed to fix problems about the very possibility to understand which are rooted in the medium, and more specifically in the syntactic or semantic features of one term.

In judicial practice, the meaning of transparency as lack of ambiguity is very well-established. It may even be the best-established meaning in national case law and the corresponding scholarship, especially as regards standard terms. This may be because judges can easily draw consequences from finding this type of non-transparency, most notably by applying to consumer contracts the rule of interpretation *contra proferentem*, a rule that is well known to the civil law systems of several Member States also before any formal development of consumer law.[156] The rule assumes that the party who inserted or uttered an ambiguous

[151] ibid 27–28.
[152] ibid.
[153] Marco BM Loos, 'Double Dutch: On the Role of the Transparency Requirement with Regard to the Language in which Standard Contract Terms for B2C-contracts Must be Drafted' (2017) 6 Journal of European Consumer and Market Law 54, 57.
[154] art 14(6) of 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 (Digital Services Act) [2022] OJ L 277/1.
[155] For an example, see Kasper Drazewski and others, 'A Corpus for Multilingual Analysis of Online Terms of Service' (Proceedings of the Natural Legal Language Processing Workshop 2021, Punta Cana, 2021) 1.
[156] See eg, art 1370, Regio decreto 16 marzo 1942, n. 262 (Italian Civil Code).

clause will try to unduly benefit from it and therefore it prescribes that the ambiguous clause be interpreted against the interests of the utterer.

In the literature concerning the UCTD and its national implementations, a distinction has been made between the two situations of ambiguity and logical unintelligibility which we bundle together here. This distinction could potentially be relevant to the consequences of non-transparency. The scholarship tends to agree that in cases in which more than one meaning can be attributed to a term, the interpretation more favourable to the consumer should prevail. This is in line with a textual reading of Article 5 UCTD, which explicitly links transparency to the rule of interpretation *contra proferentem*. In contrast, some have noted that radically 'incomprehensible terms' are unlikely to be the main target of the UCTD as they cannot be solved through the rule of interpretation, but instead can be addressed by national civil laws (eg, a contract with an indeterminate object would be null and void).[157] Regardless of these nuances, from a conceptual point of view it makes sense to subsume both problems under the notion of transparency here discussed as both problems make comprehension impossible without external intervention.

Despite the scholarly attention devoted to transparency as non-ambiguity and logical intelligibility, cases concerned with it do not seem to reach the CJEU very often.[158] This may be explained by the fact that, as mentioned, solutions for these types of problems are well established in national private law and thus national judges may be familiar with this deployment of transparency requirements. In the UCPD, the present notion of transparency emerges primarily in the context of misleading practices, which we discuss mostly under Section IV.E.[159] In the GDPR ambiguity is not explicitly mentioned; yet, it can certainly be an issue affecting privacy disclosures. Moreover, since pre-formulated declarations of consent can also be assessed under the UCTD,[160] it would seem possible to apply the *contra proferentem* reading also to this context. As regards logically unintelligible sentences, these seem to be infrequent problems and furthermore an easy target for state-of-the-art natural language processing systems.

E. Transparency as the absence of deception and confusion

This meaning of transparency targets forms of mediation that generate in the consumer a false representation of the underlying economic reality, as well as his or her rights and duties, typically but not necessarily with some form of intent by the trader to generate this false representation.[161] The problem of being misled is rooted in either omissions or specific formulations in the medium (the transparency device) that make it more difficult to access information about the economic relationship, but it also may end up making it impossible to understand or know the consequences or underlying reality of the relationship.

(i) Consumer law

To reconstruct what being misled actually means it is helpful to start from the UCPD, where the notion plays an important role. To recall, the Directive establishes a prohibition of commercial practices that are unfair by being contrary to the requirements of professional diligence and likely to materially distort the economic behaviour of the average consumer. One type of such practices are indeed misleading practices (Articles 6 and 7). A trader engages in a misleading action, as defined in Article 6, not only when its practices 'contain false

[157] Ferrante (n 60) 120 (by reference to art 1341, comma 1, Italian Civil Code).
[158] Consider, eg, a merely passing reference in the judgment of the Court of 23 April 2015, C-96/14, Van Hove, ECLI:EU:C:2015:262, para 42.
[159] art 7(2) UCPD.
[160] Recital 42 GDPR.
[161] For the UCPD, see eg, European Commission (n 108) 23 and 101. *Cf* judgment of the Court of 19 September 2013, C-435/11, CHS Tour Services, ECLI:EU:C:2013:574, operative part.

information' and are 'therefore untruthful', but also when they 'deceive' or are 'likely to deceive the average consumer even if the information is factually correct' in relation to some important elements of the contract including price, main product characteristics, or the trader's commitments, and insofar as the action 'causes or is likely to cause [the reference consumer] to take a transactional decision that he [or she] would not have taken otherwise'. An important specification for our purposes is that the consumer may be misled even by way of the 'overall presentation' of the information (Article 6), which suggests that one may be led into error not only by the substantive content of the information provided but also by formal elements, such as the organization of the text in a document. The broad scope of misleading practices is particularly interesting when observed in the light of the trend towards using marketing jargon in documents, such as terms of service and privacy policies (eg, 'We value your privacy' or 'We process data to improve experience').[162] We go back to this point and the relationship between UCTD and UCPD.

Article 7(1) UCPD provides that also omissions can be misleading insofar as they relate to 'material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby cause [or are] likely to cause the average consumer to take a transactional decision that he [or she] would not have taken otherwise'. Also in Article 7 the letter of the Directive acknowledges the boundedness of mediation, as the omissions need to be assessed by taking into account 'the limitations of the communication medium'. As further clarified in Article 7(2) UCPD, a trader can engage in a misleading omission also by hiding or providing material information in an unclear, unintelligible, ambiguous, or untimely manner or by failing to identify the commercial intent of the commercial practice. Recent amendments to the UCPD further stress the importance of presentation in the finding of material omissions. In particular, a new provision about product rankings specifies that information considered material in this context should be made available 'in a specific section of the online interface that is directly and easily accessible from the page where the query results are presented'.[163] This, once again, connects the analysed dimension of transparency with notions described in the preceding sections, mainly transparency as access and as presentation that facilitates understanding.

The two provisions concerning actions and omissions have a similar structure. In order to mislead, a practice needs to induce a distorted representation or omit information about some important element of the contract, the so-called material information, and additionally such omission or distortion needs to be likely to have an impact on the consumer's transactional decision, the latter being understood broadly.[164] What constitutes material information depends on whether we are dealing with actions or omissions. Indeed, the Directive provides two separate lists of information deemed material, one for misleading actions (Article 6(1)) and one for misleading omissions although limited to the context of invitations to purchase (Article 7(4)) and the two lists do not fully overlap.[165] For other misleading omissions, judicial leeway in defining material information is generally greater. However, as signalled above, following recent amendments to the UCPD, the notion of material information was also clarified and tailored to some omissions specific to the digital economy, such as failing to name parameters of product rankings.[166]

[162] *Cf* Jan Trzaskowski, *Your Privacy Is Important to Us! – Restoring Human Dignity in Data-Driven Marketing* (Ex Tuto Publishing 2021) 201.
[163] art 7(4a) UCPD as amended.
[164] European Commission (n 108) 31–32 ('There is a wide spectrum of transactional decisions a consumer may take in relation to a product or a service other than the decision whether to purchase'. Examples include decisions to 'click through a website' or 'continue using the service by browsing or scrolling.')
[165] See also: European Commission (n 108) 54 and the case law cited; Durovic (n 62) 122.
[166] art 7(4a) UCPD as amended.

To illustrate the difference between material information under Articles 6 and 7 UCPD consider the example of consumer rights. While the provision on misleading actions explicitly lists consumer rights among the type of information the consumer cannot be actively misled about, for misleading omissions Article 7(4)(e) UCPD merely refers to the right to withdraw. However, as mentioned, beyond the context of invitations to purchase the courts enjoy a broader margin of discretion when defining material information in misleading omissions. Finally, attention should be drawn to the connection established in Article 7(5) UCPD between misleading omissions and the violation of information requirements imposed on traders, which may include information about consumer rights.[167] Depending on the circumstances, also other consumer rights may therefore fall under the notion of 'material information' that cannot be omitted.

All in all, the notion of material information in the UCPD appears to be quite flexible and can extend to information about a number of consumer rights, such as the right to have digital services supplied in line with the legal standard of conformity.[168] Whether or not an action or omission involving such material information constitutes an unfair commercial practice depends on a case-by-case assessment in light of all criteria of Articles 6 and 7 UCPD. After all, the UCPD contains a two-tier test, which additionally enquires about the likely impact of the misleading action or omission on consumer's transactional decisions. An exception to the case-by-case assessment applies only for the practices listed in the Directive's annex, the so-called blacklist, which are unfair in all circumstances. The blacklist confirms our observations concerning the importance attached to avoiding confusion about the rights enjoyed under the law. Specifically, point 10 classifies "presenting rights given to consumers in law as a distinctive feature of the trader's offer" as a blacklisted practice. Accordingly, the traders should neither omit information about relevant rights nor misrepresent them as something they provide at their own discretion.

Transparency as the absence of deception and confusion is also visible in the EU law on unfair terms. First, certain deployments of formal transparency as described above can also be conceptualized as aimed at ensuring that the consumer is not being misled. For example, in the context of the presentation of the terms, we have emphasized the importance of drafting terms in a logical way so that, eg, important stipulations are not hidden amongst other provisions or detached from their relevant context. Secondly, the language of being misled penetrates the CJEU case law on transparency under the UCTD, especially in the context of consumer rights. Specifically, the Court develops what may seem as its own version of forms of communication that mislead, by reference to the notions of 'confusion' and 'leading into error'.

In *Profi Credit Polska*, the Court found that the transparency requirement of the UCTD can be infringed when the formulation of contract terms can 'give rise to confusion' on the part of the consumer as to his or her obligations and the economic consequences of those terms.[169] In this regard, *Profi Credit Polska* is in line with the earlier judgment in *Verein für Konsumenteninformation (VKI)*. *VKI* concerned a pre-formulated choice of law clause that did not explicitly inform the consumers that they could continue to rely on the mandatory provisions of the law of the country where they habitually resided.[170] The Court found that the clause could be deemed unfair on the ground of transparency insofar as it 'leads the consumer into error by giving him [or her] the impression that only the law of [the supplier's]

[167] See eg, art 5(1)(e) of Directive 2011/83/EU.
[168] 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 L 136/1.
[169] Judgment C-84/19, Profi Credit Polska, para 86.
[170] Judgment C-191/15, Verein für Konsumenteninformation, para 61.

Member State applies to the contract, without informing him [or her] that under Article 6(2) of Regulation No 593/2008 [the consumer] also enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that term'.[171]

In *VKI*, the CJEU appears to have intervened in the transparency of clauses that misrepresent the legal rights enjoyed by the consumer as a consequence not only of the contract but also of legal regulation. A similar approach can be observed in the *Invitel* case, where the Court had already found that whereby the amendments of fees for landline phone services were regulated by mandatory legislative provisions or by provisions that endowed the consumer with a right to withdraw, the seller was required to inform the consumer about those provisions.[172] The *Invitel* and *VKI* decisions, however, do not support a general duty of the traders to inform the consumers about all of their legal rights. This was clarified in the more recent case *Ottília Lovasné Tóth* where the Court was asked to decide whether the transparency requirement of Article 5 UCTD requires the seller to provide 'additional information relating to a term which is drafted clearly, but the legal effects of which may be determined only by interpreting provisions of national law in respect of which there is no consistent case-law'.[173] In this case, depending on different interpretations by local courts the term at issue may or may not have resulted in a reversal of the burden of proof for executing credit by the lender. The Court found that 'it does not follow from [*Invitel* and *VKI*] that the seller or supplier is also required to inform the consumer, before a contract is concluded, of the general procedural provisions of domestic law of its own State of residence, such as those relating to the allocation of the burden of proof, or the relevant case-law'.[174]

The distinction that the Court seems to introduce in *Ottília* may be a fine one to police or implement, but it is one that is worth exploring. The Court suggests that transparency may require traders to communicate information at least about those mandatory rights of consumers without knowledge of which it would be impossible for consumers to foresee the economic consequences of (or exercise certain rights in) the relationship (such as at issue in *Invitel* and *VKI*). The Court, however, is not required to also provide information that is purely facilitative of consumers' claims, for example, information about local procedural rules such as at stake in *Ottília*. In this way, the Court may be introducing something akin to a material information test in the UCTD. Given the above, we may conclude that, as consumer law currently stands, the absence of deception or confusion in relation to consumer rights is focused on information that is essential to a basic understanding of the contractual relationship but does not extend to information that facilitates the advancement of consumers rights.

(ii) Data protection law

Our analysis shows an overall congruency of the approach of the law and courts to the interpretation of misleading actions and omissions under the UCPD and certain meanings of transparency under the UCTD, especially as they relate to the provision of information about consumer rights. Arguably, the same can also be said for the operation of the transparency principle in the GDPR. Indeed, both judgments of the CJEU and decisions of the data protection authorities seem to recognize that transparency requires avoiding the leading of data subjects into error.

In *Orange Romania*, the Court considered pre-formulated clauses in mobile telecommunications contracts, pursuant to which the consumers confirmed that they had been informed of, and had consented to, the processing of their data for various purposes. The Court

[171] ibid para 71 and operative part.
[172] Judgment C-472/10, Invitel, para 29.
[173] Judgment of the Court of 19 September 2019, C-34/18, Lovasné Tóth, ECLI:EU:C:2019:764, para 42.
[174] ibid para 66.

scrutinized the clauses on several grounds, including in view of their capacity 'of misleading the data subject as to the possibility of concluding the contract notwithstanding a refusal to consent to the processing of [personal] data'.[175] Where such deception occurs, the informed nature of the consent, including one expressed by signature, must be questioned.

Similarly, in its recent decision involving WhatsApp, the EDPB stated, among others, that 'controllers should make sure to avoid any confusion' as to the legal basis applicable to the processing.[176] In particular, the EDPB continued, it is important to avoid a situation in which the data subjects 'erroneously get the impression that they are giving their consent in line with Article 6(1)(a) GDPR when signing a contract or accepting terms of service' while in fact the processing is based on Article 6(1)(b) GDPR, ie, contractual necessity. Notably, confusion on this matter directly bears upon the legal rights that data subjects can expect to enjoy. In particular, while consent to the processing of personal data can be withdrawn (Article 7(3) GDPR), the scope of available actions is different when the processing is supported by other legal bases.

The apparent convergence of the UCTD, the UCPD and the GDPR on misleading actions and omissions calls for a few observations concerning the relationship between the three acts. First, as evidenced by the above discussion, the UCPD is prone to overlap with other legal acts due to the very broad definition of commercial practice and explicit applicability to practices engaged in before, during and after a commercial transaction relating to a product.[177] Commercial practices can, for example, be expressed by clauses in terms of service or privacy policies.[178] Moreover, the open-ended nature of the fairness tests in both the UCTD and the UCPD is prone to be informed by findings from other areas of consumer and data protection law. To illustrate, in its recent UCPD guidelines the European Commission stated that 'existing decisions by data protection authorities concerning a trader's compliance or non-compliance with data protection rules should be taken into account when assessing the overall fairness of the practice under the UCPD'.[179] Finally, as regards the connection between the UCPD and the UCTD, the CJEU recognized the unfairness of a commercial practice as one of the elements on which the competent court may base its assessment of the unfairness of contractual terms under Article 4(1) UCTD.[180] Accordingly, while the notions of fairness in the two directives are independent from each other, they do share a common conceptual ground—both with one another and with the GDPR. This may be also due to the conceptual proximity between the notions of transparency in those legal acts, which has effects on the determination of fairness.

All in all, a meaning of transparency as the absence of deception and confusion is strongly grounded across the three regimes. As such, deployments of this meaning seem particularly apt to fix some of the problems that consumers face in the digital economy. As mentioned, many problems in data-driven markets do have their roots in insufficient or misleading information, even if the informational dimension is often not the only one. For example, consumer confusion does come into play with respect to at least some types of dark patterns, namely those that induce a distorted representation of the different options available to consumers (eg, due to the different prominence given to each of them).[181] Furthermore, considering the pervasiveness of consent forms, to which consumers continuously respond when

[175] Judgment of the Court of 11 November 2020, C-61/19, Orange Romania, ECLI:EU:C:2020:901, para 49.
[176] European Data Protection Board (n 69) para 214.
[177] arts 2(d) and 3(1) UCPD.
[178] See eg, judgment C-453/10, Pereničová and Perenič, para 41.
[179] European Commission (n 108) 99.
[180] Judgment C-453/10, Pereničová and Perenič, para 43–44.
[181] Arunesh Mathur and others, 'Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites' (2019) 3 Proceedings of the ACM on Human-Computer Interaction 1, 5.

accessing digital services, even the average consumer who is reasonably well informed and circumspect cannot be expected to analyse each and every one of them for possible signs of deception. Similarly, the expansion of marketing language into many domains of standard terms and privacy policies should be approached with suspicion, since documents of this kind typically contain information about consumer and data subject's legal rights as well as other material information about which consumers should not be led into error.

F. Transparency as completeness and specificity

This meaning of transparency focuses on the completeness and specificity of information provided to the consumer.[182] Completeness and specificity are both functional to the consumer's ability to foresee the consequences of a business-to-consumer relation. While we do not extensively engage with the distinction between formal and substantive transparency in this article,[183] it is worth remarking that this meaning of transparency would fall squarely within the realm of substantive transparency. Here, transparency is deployed to ensure that the consumer is provided with information that is necessary to anticipate (foresee) the consequences of a legal relationship. While this form of transparency operates mostly at the pre-contractual level it would seem to play a disciplining function also throughout the duration of the legal relationship.

Transparency as completeness and specificity is deployed to fix problems that affect the very possibility to understand because of lack of (sufficiently specific) information. Indeed, as we have pointed out, some instances of non-transparency are rooted in formulations that make understanding hard, but where understanding remains possible, while other problems prevent understanding. The latter include the problems of ambiguity and logical intelligibility (Section IV.D) as well as the present problem of insufficient information.[184] While deficits of understandability can be compensated by asking for expert advice, similar solutions are not possible if the text is not sufficiently informative. Hence, in case of a tension between facilitative notions and completeness and specificity, we may want to prioritize the latter.[185]

(i) Consumer law

In the UCPD the notion of material information that cannot be omitted, at the cost of making the practice misleading, can also be conceptualized in terms of completeness and specificity. Certain items of information are explicitly qualified as material in the Directive, and a tendency towards expanding the corresponding catalogues can be observed. In particular, following recent amendments to the UCPD, when providing consumers with the possibility to search for products on the basis of a query, general information on the main parameters determining the ranking of products presented to the consumer and the relative importance of those parameters, as opposed to other parameters, is regarded as material.[186]

In relation to the UCTD, by innovating with respect to the letter of the Directive that only mentions plainness and intelligibility, the CJEU acknowledged that also omissions of essential information may matter for a finding of intransparency of standard terms. Aside from the assessment of the terms being 'drafted' in plain, intelligible language, 'the failure to mention in the [...] agreement the information regarded as being essential with regard to the

[182] On completeness see also, Luzak (n 143) 53.
[183] For more details, see, Luzak and Junuzović (n 14) 97.
[184] For a similar distinction, see Jonathan H Choi, 'Measuring Clarity in Legal Text' (2022) <https://ssrn.com/abstract=4151849>
[185] *Cf* Christian Grüneberg, '§ 307' in Otto Palandt (ed), *Bürgerliches Gesetzbuch* (78th edn, C.H. Beck 2019) 449.
[186] art 7(4a) UCPD as amended.

nature of the goods or services which are the subject matter of that contract' may play an important role in the transparency assessment.[187] The reference to information considered 'essential' shows a parallel to the 'material' information, to which Article 7(1) UCPD refers.

In decisions on the UCTD, the CJEU captures the idea of transparency as completeness mostly through the language of the ability of the consumer to *foresee the economic consequences* of his or her consent. On this reading, essential information is the information required to foresee the consequences of entering into a given contractual relation, especially relating to both parties' performance. By corollary, the information needs to be specific enough to enable the consumer to foresee the consequences, that is why we add specificity next to completeness within this same meaning or deployment of transparency. The Court's insistence on the ability to foresee consequences is also what informs our choice to qualify this meaning of transparency as solving problems relating to the very possibility to understand. On this reading, a duty of specificity would seem to extend only to essential elements of the relationship, without knowledge of which, the consumer is not capable of foreseeing the consequences of that relationship. Specificity does not thus seem to be required of all contract terms, nor as a merely facilitatory feature of the terms. From this perspective, the present meaning of transparency and transparency as the absence of deception and confusion (as outlined in the discussion of the *Ottilia* judgment) would seem to have a similar scope of application. Other meanings of transparency, such as transparency as formulations that facilitate understanding, would kick in once the possibility of understanding is secured.

As seen above, the meaning of completeness in our understanding is not synonymous with that emerging from economic studies on incomplete contracting.[188] We recognize that there can be manifold possible contingencies regarding future events and that contracts cannot take full account of each and every one of them.[189] Even the very scope of rights and duties of both parties may not be immediately apparent, especially in longer-term contracts. A good example is credit contracts denominated in a foreign currency which involve an inherent uncertainty arising from variations in the exchange rates. Despite this inherent uncertainty, the notions of completeness and specificity maintain their relevance. In particular, as observed by the CJEU in *Andriciuc*, it is not enough to disclose to the borrowers who contemplate entering into a credit contract that they thereby expose themselves to a foreign exchange risk which may prove difficult to bear.[190] The trader is also required to 'set out the possible variations in the exchange rate and the risks inherent in taking out a loan in a foreign currency'.[191] Similarly, the judgment in *Ibercaja Banco* recognized that there are certain factors that cannot be specified with full precision at the time of contract conclusion, as they indeed depend on unforeseeable events. The Court stressed, nonetheless, that in those cases it is important to provide the consumers with past examples which would allow them to foresee their future situation.[192]

Overall, the meaning of transparency as completeness and specificity emerges quite well in cases related to variable exchange rates, in which it is deployed to ensure that consumers can foresee the obligations and risks to which they are exposed. Arguably, in the digital economy, a similar logic could apply to the indirect 'costs', which consumers incur when making use of

[187] See eg, judgment of the Court of 3 March 2020, C-125/18, Gómez del Moral Guasch, ECLI:EU:C:2020:138, para 52; judgment C-186/16, Andriciuc and Others, para 47.

[188] See eg, Oliver Hart and John Moore, 'Foundations of Incomplete Contracts' (1999) 66 The Review of Economic Studies 115; Benjamin Klein, 'The Role of Incomplete Contracts in Self-enforcing Relationships' in Eric Brousseau and Jean-Michel Glachant (eds), *The Economics of Contracts: Theories and Applications* (CUP 2002) 59.

[189] See also, judgment of the German Supreme Court (Bundesgerichtshof) of 7 February 2019 (III ZR 38/18), confirming that transparency does not require all eventualities to necessarily be described.

[190] Judgment C-186/16, Andriciuc and Others, para 50.

[191] ibid.

[192] Judgment of the Court of 9 July 2020, C-452/18, Ibercaja Banco, ECLI:EU:C:2020:536, para 52-53.

seemingly free services. Such costs may extend well beyond giving up personal information: as observed by Pałka, they include 'cognitive costs' related to emotional manipulation and mental health problems and 'behavioural costs'" related to behavioural manipulation, addiction, and wasted time.[193]

Moreover, the above observations apply to the ability to predict what the actual performance of the trader will be. Indeed, in *Profi Credit Polska*, the Court explained that while the seller or supplier is not obliged to specify the nature of each service provided in return for the costs imposed on the consumer, it is important that the nature of the services actually provided can be reasonably understood or inferred from the contract considered as a whole.[194] In the digital economy this issue assumes particular importance, as indeed key aspects of digital services are routinely withheld from consumers and only come into light following outside scrutiny or whistleblower accounts. Thus, Luzak and Loos argue, for example, that digital service providers should be required to 'disclose fully how the use of automated decision-making impacts the provision of digital services' and that failure to do so would entail that any terms that have been personalized through automated means could be considered unfair under the UCTD.[195] It is questionable, however, whether such a requirement could be effectively enforced and if so, if information alone could be deemed as a sufficient means of consumer protection. On a more radical reading, one could conclude that in the case of particularly opaque and complex data-driven practices transparency towards consumers can no longer be achieved through information provision. Instead, we may encounter situations where the trader is, on the one hand, required to disclose essential aspects of its services to the consumers, and, on the other hand, these essential aspects are incapable of being described in a transparent manner. If transparency is taken seriously, the requirement could in this case demand more substantive modifications to the services provided. We return to this point in Section IV.G.

(ii) Data protection law

As mentioned before, the idea of transparency as completeness and specificity under the UCTD remains closely connected to the ability of the consumer to foresee the consequences of entering a contract. Notably, a similar language can also be found in the judicial interpretation of EU data protection law. For example, in *Planet49*, a case concerned especially with the e-Privacy Directive,[196] the Court found that information provided to the data subject who is asked to consent to cookies must be 'clearly comprehensible and sufficiently detailed' so as to enable the user to comprehend the functioning of the cookies employed.[197] A similar wording can also be observed in the *Orange Romania* case. There the Court found that the requirement of informed consent in the GDPR requires the controller to provide the data subject 'with information relating to all the circumstances surrounding the data processing, in an intelligible and easily accessible form, using clear and plain language. [. . .] Such information must enable the data subject to be able to determine easily the consequences of any consent he or she might give and ensure that the consent given is well informed'.[198]

While in the *Planet49* case it remained for the Court to determine what constitutes sufficiently detailed information with respect to cookies, the GDPR defines extensive lists of

[193] Przemysław Palka, 'The World of Fifty (Interoperable) Facebooks' (2021) 51 Seton Hall Law Review 1193, 1216.
[194] Judgment C-84/19, Profi Credit Polska, para 75.
[195] Marco Loos and Joasia Luzak, 'Update the Unfair Contract Terms Directive for Digital Services' (2021) European Parliament, Study requested by the European Parliament's Committee on Legal Affairs, 30.
[196] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L 201/37.
[197] Judgment of the Court of 1 October 2019, C-673/17, Planet49, ECLI:EU:C:2019:801, para 74.
[198] Judgment of the Court of 11 November 2020, C-61/19, Orange Romania, ECLI:EU:C:2020:901, para 40.

information which should be communicated to the data subjects in different circumstances. This is most notably the case for Article 13 GDPR, applicable whenever personal data is collected from the data subject. Thus, in the context of projects such as Claudette or PriX, compliance of privacy policies with Article 13 requirements can essentially be scrutinized through a checklist approach, namely the AI system checks whether certain information is present in the document.[199] While this elaboration provides a vital point of reference as regards completeness, it remains to be established how specific the relevant disclosure should be.

To illustrate the problem of defining specificity, consider Article 13(1)(c) GDPR concerning information about the purposes of the processing for which personal data are intended, as well as the legal basis for the processing. In this context, the Irish data protection authority condemned the practice of listing all potential legal bases that may justify the processing of personal data of WhatsApp users. Instead, it was found, information about the actual situation should be provided while any subsequent changes should be reflected in updates to the policy.[200] Moreover, the DPC clarified that a data controller needs to provide specific types of information in such a way that the connection between them is clear.[201] In particular, it is necessary to specify (i) the purpose of each processing, (ii) for each specified category of personal data, as well as (iii) the legal basis which is relied upon for each processing. A general statement of the purposes of the data collection, which is often found in privacy policies, would not be enough; the privacy policy would need to clarify for which purpose each category of data are collected and which legal basis enables it to do so. Moreover, the authority recognizes that it may sometimes be difficult to specify the categories of personal data processed under each legal basis in advance. In those cases, however, the DPC insists on providing data subjects, at the very least, with 'some examples of the type of data that has been processed by reference to [that] legal basis in the past'.[202] Completeness and specificity in the GDPR thus seem to operate similarly as they do in the UCTD and again emerge as helpful qualifiers for the meanings of transparency emerging in the analysed legal acts.

G. Transparency as non-arbitrariness

Transparency as non-arbitrariness tackles situations in which the trader retains space to make arbitrary decisions affecting consumers. This category represents somewhat of a shift of focus compared to our previous discussion. So far, we have described meanings of transparency that aim at enhancing consumers' understanding of their economic relationships by regulating mediation, but in which transparency does not aim to transform, at least not explicitly, the object of mediation, namely the underlying economic relationship. In itself, the extent to which different meanings of transparency are able to regulate mediation disproves some of the grimmest visions of transparency emerging in the critical scholarship surveyed above, by showing how pitfalls inherent in the mediated nature of transparency can be leveraged to consumers' advantage. In this section, we embrace the insights from the critical scholarship about the mutual dependence of the communication and the communicated to show that in addition to regulating mediation, at least one dimension of transparency directly aims at transforming the nature of the underlying object. In the following, we examine this manifestation, that is transparency as lack of arbitrariness, and consider whether it could herald a more fundamental shift in the deployment of transparency as a frame of consumer

[199] Giuseppe Contissa and others, 'CLAUDETTE meets GDPR: Automating the Evaluation of Privacy Policies using Artificial Intelligence' <www.beuc.eu/sites/default/files/publications/beuc-x-2018-066_claudette_meets_gdpr_report.pdf> 17, Accessed 19 September 2023.

[200] Decision of the Data Protection Commission of 20.08.2021 (DPC Inquiry Reference: IN-18-12-2) paras 369, 377, and 379.

[201] ibid paras 301–02.

[202] ibid para 382.

(data) protection. A connection between transparency and arbitrariness has been observed in previous scholarship[203] but deserves further elaboration.

Like in the case of completeness and specificity, transparency as non-arbitrariness is closely linked to the idea developed under the UCTD that the consumer should be able to foresee, based on clear, intelligible information, the economic consequences deriving from the contract. In the influential *Kásler* case, in the context of a mortgage loan denominated in a foreign currency one of the disputed clauses concerned the mechanism for currency conversion which was made to depend on the bank's selling rate of exchange. In interpreting the transparency requirement of Article 4(2) UCTD, the CJEU instructed the national court to determine 'whether the contract sets out transparently the reason for and the particularities of the mechanism for converting the foreign currency and the relationship between that mechanism and the mechanism laid down by other terms relating to the advance of the loan, so that the consumer can foresee, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it'.[204] While the case certainly involved transparency as completeness and specificity, one can also see it as an emergent indication of transparency as non-arbitrariness—due to the fact that the clause related to the exchange rates applied by the bank itself, apparently without an upper limit.[205]

The emergence of a separate notion of transparency as non-arbitrariness finds support in subsequent decisions at both the EU and national levels. In the *Matei* case, the Court was asked, once again, to provide its reading of the UCTD in the context of a loan denominated in a foreign currency. The contract at issue included a clause pursuant to which the bank reserved the right to alter the rate of interest 'in the event of significant changes on the financial markets'.[206] Addressing the transparency requirement, the Court reiterated, in line with *Kásler*, that it is

> of fundamental importance, for the purpose of complying with the requirement of transparency, to determine whether the loan agreement sets out transparently the reasons for and the particularities of the mechanism for altering the interest rate and the relationship between that mechanism and the other terms relating to the lender's remuneration, so that the consumer can foresee, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it.[207]

Notably, in the *Matei* case, the Court expanded the scope of the UCTD provisions from which such conclusion derives to include, in particular, Articles 3 and 5 UCTD and paragraphs 1(j), 1(l), 2(b), and 2(d) of the annex, namely the general fairness test, the general transparency requirement, and items on the Directive's grey list concerning traders' unilateral determinations about performances to be made. This suggests that transparency and fairness are closely intertwined and that some of the problems recognized in the grey list can be seen as fundamental transparency problems, which at the same time can ground a finding of their unfairness. To illustrate, among the terms which may be regarded as unfair, paragraph 1(j) of the annex refers to terms which have the object or effect of 'enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract'. Arguably, the limited foreseeability of the functioning of this term, which is a

[203] Weber (n 14) 83.
[204] Judgment C-26/13, Kásler and Káslerné Rábai, para 73.
[205] ibid.
[206] Judgment of the Court of 26 February 2015, C-143/13, Matei, ECLI:EU:C:2015:127, para 26.
[207] ibid para 74.

transparency issue, is also what causes a significant imbalance in the parties rights and obligations, which is a fairness issue.

In *Matei*, the Court suggested that the criterion for unilateral change of contract terms relating to 'significant changes in the money market', despite being grammatically plain and intelligible, raises the question of foreseeability of the exchange rate increases for the consumer.[208] The same will arguably apply, *a fortiori*, to terms which enable traders to change the contract unilaterally at their full discretion as well as other clauses equipping traders with a significant margin of discretion following contract conclusion. Multiple provisions of this kind were found in standard terms of digital service providers investigated as part of the Claudette project, including clauses allowing services to be changed, or content to be removed, or accounts to be suspended, whenever the service provider decides so.[209] Another good example is provided by the clauses mentioned in paragraph 1(m) of the UCTD annex, namely those 'giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract'.

The suggestion that arbitrariness can be framed as a problem of transparency and that it may at the same time constitute a fairness problem finds further support in our analysis of national law. Under German law, for example, recognized violations of the transparency requirement include clauses granting traders a significant margin of discretion in unilaterally amending the terms, equipping traders with rights without specifying the conditions of their exercise, and obscuring the scope of liability of both parties.[210] In Poland, we similarly find cases relating to a unilateral determination of the applicable exchange rates,[211] or to the modifications of the terms for insufficiently specified 'important reasons'.[212]

Notably, under both German and Polish law it is recognized that a lack of transparency can also fulfil the conditions of unfairness and render the relevant clause unlawful.[213] In practice, the clause will not be analysed in isolation, and it may be difficult to single out those aspects of the assessment which relate to transparency alone. To illustrate, among potentially unfair terms, paragraph 1(l) of the UCTD annex refers to contractual conditions allowing a seller of goods or supplier of services to increase the price of goods without 'giving the consumer the corresponding right to cancel the contract'. The existence of additional rights of the consumer, such as the right of termination, may be an important consideration in establishing whether the lack of transparency is triggering unfairness in a given case. It is worthy of note, however, that according to the Polish consumer protection authority, the right to terminate the contract does not necessarily guarantee an adequate level of consumer protection against unilateral and arbitrary changes made by the traders during performance of the contract—both in respect of contracts for a fixed and for an indefinite period (respectively, eg, credit and bank account). This is most notably the case if 'the inconvenience associated with the termination of an existing agreement may effectively dissuade consumers from accepting new proposals for contractual terms'.[214] A similar argument could potentially be made in respect of certain online services.

[208] ibid para 76.
[209] Lagioia and others (n 98) 481.
[210] See eg, judgment of the German Supreme Court (Bundesgerichtshof) of 26 March 2019 (II ZR 413/18).
[211] Decision of the President of UOKiK of 29 December 2020 (DOZIK-19/2020), 16–17 and 20; decisions of the President of UOKiK of 22 September 2020 (DOZIK-14/2020 and DOZIK-14/2020), 20 and 21–23, respectively.
[212] Decisions of the President of UOKiK of 10 July 2020 and 23 October 2020 (RLU-1/2020 and RLU-2/2020), 29 and 33–34, respectively. See also, decision of the President of UOKiK of 30 December 2019 (RKT-13/2019), 17–18.
[213] § 307(1) second sentence of the German Civil Code; judgment of the Polish Supreme Court of 15 February 2013 (I CSK 313/12) 7.
[214] Decision of the President of UOKiK, RLU-2/2020, 42–43.

As seen above, when traders reserve themselves a right to act with a significant margin of discretion at a later stage of long-term relationships, foreseeability of those actions on the part of consumers is necessarily constrained. This finds support in the recent scholarship on explanations in AI which shows that explanations relating to the underlying causes of decisions are more effective than those relating merely to probabilities, namely, using statistical generalizations in order to explain why something happens.[215]

Unforeseeability resulting from arbitrariness is thus a transparency problem, with all the relevant consequences that each given legal regime ascribes to non-transparency. We submit that with respect to the rules on unfair terms, such lack of transparency may at the same time be a fairness issue. This draws support not only from national decision making, which admittedly can provide for a higher level of protection compared to the EU standard,[216] but also from CJEU case law itself.[217] The same should arguably hold true for EU data protection law, in which, as mentioned, the language of 'determining the consequences' of consent also appears. Moreover, as the GDPR preamble suggests, pre-formulated declarations of consent may need to comply also with the transparency and fairness tests of the UCTD.[218] Accordingly, the above findings on arbitrariness can also be extended to the GDPR, and especially to situations where the processing of personal data is grounded in consent. Under this reading, the clauses pursuant to which a data subject agrees to indefinite inferences being drawn from his or her personal data would fall short of the transparency requirement. Transparency could thus provide a normative basis for a data subject's right to 'reasonable inferences', which has been advocated in the scholarship.[219] Along similar lines, it could be argued that informed consent to certain highly complex processing operations cannot, in principle, be granted.[220]

In this section, we have presented and welcomed what is likely to be the most radical deployment of transparency which is emergent in the law. Hence, we find it necessary to briefly touch upon potential concerns over the interference of such a notion of transparency with the parties' private autonomy. To this end, it is worth remarking that EU law can allow, and in some instances does so, consumers to opt-out of the protection afforded to them. For example, according to an established reading of the UCTD, the consumers should remain free to reject the standard of protection which the unfair terms rules provide for them. Such an opt-out, however, must always be the result of a genuine choice, ie, an explicit and free refusal to benefit from the protection afforded by the law, which itself conforms with transparency requirements.[221] Thus, individual consumers can make an informed decision that—despite not having to—they want to agree to something they cannot fully understand and foresee. On that reading, however, it is the trader who should have the incentive to inform and convince the consumer—acting in full transparency, including not resorting to misleading practices—that this is the case.

V. CONCLUSIONS: TRANSPARENCY FOR THE DIGITAL AGE

This article has started with an ambivalent outlook on transparency. On the one hand, transparency plays a growing role in both scholarly and policy discourses about the digital

[215] Miller (n 79) 25.
[216] Judgment of the Court of 3 June 2010, C-484/08, Caja de Ahorros y Monte de Piedad de Madrid, ECLI:EU:C:2010:309, operative part.
[217] Judgment C-191/15, Verein für Konsumenteninformation, para 68.
[218] Recital 42 GDPR.
[219] Sandra Wachter and Brent Mittelstadt, 'A Right to Reasonable Inferences: Re-Thinking Data Protection Law in the Age of Big Data and AI' (2019) 2 Columbia Business Law Review 494.
[220] *Cf* Michael Veale and Frederik Zuiderveen Borgesius, 'Adtech and Real-time Bidding under European Data Protection Law' (2022) 23 German Law Journal 226, 247.
[221] Judgment of the Court of 3 October 2019, C-260/18, Dziubak, ECLI:EU:C:2019:819, paras 53–55 and the case law cited.

economy and finds operationalization in most EU legal instruments of consumer (data) protection law, both old and new. Given its attractiveness across political divides and its conceptual flexibility, transparency emerges as a promising solution to some of the most urgent consumer problems in the digital economy, from dark patterns to forms of personalization that harm consumers. On the other hand, the concept typically stays so vague and is deployed to fix such a wide range of problems, that it is hard to visualize how it can effectively discipline digital markets. As we have experienced first-hand in the context of the Claudette project, identifying meanings of transparency that are ready to assist consumers in the digital economy is not easy.

Adding to this, a rich body of critical scholarship observes how transparency is, at its best, an all too convenient policy frame to protect consumers—it demands minimal effort by companies (information duties)—and, at its worst, an illusion. As it promises unmediated 'seeing' of the economic realities behind the relationships populating our everyday digital lives, transparency delivers a false sense of control over the holders of power. Direct observation is impossible, and transparency can at best regulate the quality of mediation—not very much, the critical scholarship tends to suggest. Our gaze on this critical scholarship is also ambivalent. While this article has incorporated critical insights about the unavoidably mediated nature of transparency, and about the mutual dependence of representation and what is being represented, it also rejected claims about the uselessness of transparency as generating illusory expectations. Illusions, to be sure, may motivate and direct effort towards worthy goals.

Through an in-depth investigation of manifestations of transparency in the three key pillars of EU consumer (data) protection law—the UCTD, the UCPD, and the GDPR—we found that transparency encompasses a range of meanings that are at the same time both better defined and further-reaching than it may appear at first sight. As we have argued, the diversity of these meanings and the scope of the progressive ends towards which they are deployed disperse some of the most intense concerns in the critical scholarship. While we do not wish to suggest that transparency is a self-sufficient frame for protecting consumers in the digital economy, we maintain that the full extent of transparency's conceptual potential, as emerging in the law, must be considered before any swift dismissal.

As we observe, most deployments of transparency in EU law leverage its mediated nature and seek to regulate the mediation performed by various transparency devices—terms of service, privacy policies, but also other forms of commercial communication including advertising. Growing attention devoted by the law to the modalities of communication can be linked to its persistent reliance on the information paradigm, coupled with a growing awareness of the boundedness of consumer choice rooted in the behavioural turn and other sociological complications of how markets work. On this view, transparency is both reliant on the information paradigm, and coming to its rescue in a context in which the ability of information to assist consumers is severely questioned.

As we have evidenced, through deployments of transparency, EU consumer and data protection law regulates mediation in various ways and with different motives. We identify transparency as access to the medium to be the baseline meaning and show its many facets, including its temporal dimension (transparency along the life-cycle of a relationship, that is both *ex ante* and *ex post*). The following two notions of transparency we presented, relating respectively to the presentation and to formulations (in essence, form and substance), are facilitative. We also illustrated the similarities between the general notion of transparency and the specific concept of an explanation, which is now the subject of renewed attention with respect to AI. Since they both involve a knowledge transfer and rely on acts of representation, both, we suggest, can be guided by the rules that linguists and psychologists identify as producing effective communication. Indeed, our analysis reveals an alignment between the

interpretation of transparency requirements in EU law and the relevant academic findings in the social sciences.

The three further notions we identify—namely non-ambiguity and logical intelligibility, absence of deception and confusion, and completeness and specificity—aim primarily at removing impediments to the understanding of a B2C relationship on the part of the consumer. Transparency as non-ambiguity and logical intelligibility aims to fix two types of very basic problems, which are rooted in the quality of the text: situations in which more than one meaning can be attributed to a sentence and situations in which a sentence is logically unintelligible, eg, as a result of drafting mistakes. In turn, the focus of transparency as the absence of deception and confusion and as completeness and specificity remains on the essential elements of the relationship, such as the consumer rights and the performances owed by both parties. These last two categories have as much to do with the quality of the mediation as with the type of information actually provided, and the precision thereof.

The final meaning of transparency we describe—transparency as non-arbitrariness—stands out from the others and demonstrates that transparency can also go beyond the information paradigm. By reducing the ability of companies to reserve too much discretion for them in relation to certain choices (eg, contract termination or content removal), this notion of transparency affects not only the communication but also the reality that lies beneath. As this last meaning illustrates, transparency stretches well beyond the formalism of disclosure duties and may ground and contribute to fairness review: a clause may be unfair insofar as its intransparency is instrumental to maintaining a power imbalance in the contractual relationship. This notion of transparency is prone to add an important measure of discipline to digital consumer markets in the EU and may even contribute to undermining the structural power imbalances that affect the digital economy and which bring some scholarship to dismiss transparency as a helpful protection frame.

Transparency as non-arbitrariness is a good illustration of what critical insights about the mutual dependence of the communication and the communicated can teach us. Indeed, by asking a company to deliver certain information in a certain quality and form, transparency may require companies to specify policies or routines in ways that end up transforming the underlying reality. Allowing consumers to 'see' what drives certain choices by digital traders may require the latter to formalize processes that were not clear, not even to them, beforehand, which may in turn lay the preconditions for the redesign of these processes. A prominent example is provided by mandating disclosure of the main parameters determining product rankings, which could disincentivize the use of AI systems insofar as they cannot generate such information. On this view, transparency has some of the qualities of self-reflection, as it may bring business to making explicit and possibly revising their own conduct. While the law may not currently go this far, certain decisional processes that are inherently opaque and for which businesses cannot communicate, not even *ex post*, the parameters or rules on which they are based, could *prima facie* be disqualified as not sufficiently transparent.

We are aware, to be sure, that a gap remains between the conceptual richness of transparency we have described and its practical application to the benefit of consumers in digital markets. Plausibly implicated in explaining the gap is insufficient enforcement, which is also rooted in the persisting segmentation of the three regimes here studied. Algorithmic systems developed with consumer interests in mind could be the missing piece of the transparency puzzle.[222] Systems of this kind can process large amounts of text and extract meaningful information from it, signal potential non-compliance and promote better drafting. Through

[222] *Cf* Gal and Elkin-Koren (n 12) 309; Lippi and others (n 12) 169.

this, they can not only empower individual consumers at different stages of their relationships with businesses but also enable activism by third parties, such as watchdog organizations representing the collective interests of consumers and data subjects. The granularity of meanings of transparency we aimed to produce in this article may inform some of the design choices of such systems to reap the full potential of textual disclosures and thus provide the basis for more fruitful interactions between the collective and individual dimensions of consumer (data) protection law.

While our findings confirm that the regulation of mediation via textual disclosure is quite encompassing and far-reaching under the three regimes, we also recognize that text may not be the best or most effective mechanism to enable consumers to see the nature of their economic relations in the digital economy. Nothing, however, prevents transparency from also be delivered through incentivizing and regulating the quality of non-textual devices, for example, video-visualization, or testing of different services through demo-modes or configurable versions, which allow consumers to experience a service under different privacy choices or subscription models. While the UCTD has very much of a textual focus, the transparency requirements in the UCPD and GDPR are prone to be employed to regulate the mediation also of these non-textual transparency devices. Moreover, more recent regulatory developments, such as the rules allowing consumers to experience different settings in recommender systems,[223] could be conceptualized as efforts towards increasing transparency through experimentation. Further research could additionally explore whether the failure to provide such mechanisms for experimentation could ground the finding of intransparency of the main characteristics of data-driven services and the corresponding uses of personal data.

Finally, our findings have implications for the interaction between the main regimes of EU consumer (data) protection law. While transparency is operationalized in very different ways across the three acts studied, the seven meanings we isolate play a role across the three regimes in either more nascent or more well-established forms. Hence, we conclude that EU law possesses a rich body of meanings of transparency across its three main consumer (data) protection instruments. While some of them may be only just emerging in some regimes, the commonalities we emphasize show how meanings of transparency explicitly elaborated in one regime are prone to fruitfully be picked up and deployed in another regime. This goes in the direction of breaking down path dependencies in enforcement, which seems all the more needed given the growing overlap of contracts, privacy policies, and some of the practices that communicate and implement them in the digital economy. All in all, we maintain, conceptual contamination across the three regimes could augment the progressive potential of transparency.

The richness and variety of meanings of transparency we have described may not be known to many actors operating across the three regimes—activists, judges, lawyers, scholars, as well as computer scientists who try to automate the detection of harmful practices for consumers. With this article, we aim to offer a richer language and vision of transparency, as well as a readier-to-use toolkit, to ensure that transparency continues to assist consumers in the digital age.

FUNDING

The research leading to this publication was supported by the National Science Centre in Poland (G.A. UMO-2019/35/B/HS5/04444).

[223] art 29 of the Digital Services Act.