

# Editorial Introduction: Consumers in the Digital Single Market

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This Special Issue on consumers in the Digital Single Market originates from the establishment of the Jean Monnet Centre of Excellence ‘Consumers and SMEs in the Digital Single Market (Digi-ConSME)’ within the Department of Sociology and Economic Law of the *Alma Mater Studiorum University of Bologna* (Italy). Digi-ConSME is co-funded by the Erasmus+ programme of the European Union. Its ambitious goal is to establish itself as a voice in the debate and serve as a catalyst for international research on the area of EU studies relating to the opportunities, challenges and risks of digitalisation for consumers and Small and Medium Enterprises (SMEs).

Why the angle of consumers and SMEs within the many issue brought by digitalisation?

Consumers and SMEs are at the centre of the European project. They are the engine of the EU economy. The digital revolution and technologies are transforming the economy and social relations across the world, posing unprecedented policy and regulatory challenges, and undermining existing legal frameworks and principles. The technological curve has gone up steeply with the development of disruptive artificial intelligence, data lakes and databases, distribution ledgers, algorithms and other intelligent systems that make use of big data as their essential fuel. Likewise, business models have changed accordingly, with the raise of digital platforms and boost of e-commerce.

The Covid-19 pandemic has demonstrated the increase of pace of the digital economic model. In just a year, it has shown the importance of digital products and service for individuals, alongside the acceleration of the pre-existing emerging economic model. Digital technologies have become essential for working, learning, entertaining, socialising, shopping and accessing all sort of services. At the same time, the sudden outburst of the pandemic has exposed the vulnerabilities of the digital space, including its dependencies on large global providers.

The digital technologies and models place public policy and law making at a crossroad.

Digitalisation presents opportunities and risks for the European economy and market. Consumers and SMEs are particularly involved and affected. Fundamental rights

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and other economic rights are involved. Examples are data protection, consumer protection, ownership and property, contracts and competition, and so on.

Within the process of digitalisation, the EU Digital Single Market attempts to remove regulatory barriers and move from national markets to a single EU market. Innovation and the Digital Single Market are pivotal to the process of European integration. The Digital Single Market becomes the strategy of the EU to ensure access to, and full participation in, online activities for individuals and businesses under conditions of fair competition, consumer and data protection, and the removal of all market barriers. According to the European Commission, it “could contribute €415 billion to the European economy, boosting jobs, growth, competition, investment and innovation. It can expand markets, offering better and more cost-effective services, transform public services and create new jobs. It can create opportunities for new start-ups and allow companies to grow and innovate in a market of over 500 million people”.<sup>1</sup>

Thus, the achievement of a EU Digital Single Market is a policy high on the agenda of the European Commission, especially under the Recovery Plan and the rebuilding of Europe for future generations. Regulation plays a pivotal role in the shaping of a EU single market fit for a sustainable digital economy, ensuring an optimal economic and social balance. Also, a properly regulated market offers an unprecedented opportunity for a competitive model in the world economy.

At the same time, the digital revolution poses unprecedented policy and regulatory challenges, and undermines existing legal frameworks and principles.

Within this framework, how are consumers and SMEs affected? What are the challenges and risks ahead? What regulatory environment should provide for a right balance between economic exploitation, social justice and the protection of established rights? How should the law of innovation look like and what is the role of the EU?

How it is decided what the rules are is one of the most important challenges facing policymakers today.

New technologies present new challenges, opportunities and risks for the market and its actors. Disruptive technologies call for action, review and reflection – particularly from the point of view of the existing regulations. Innovation and protection from risks (economic, social and individual) demand an appropriate balance. In recent times, a number of new EU Directives, legislative proposals or policy strategies have attempted to deal with some of the new challenges presented in the digital age. Yet it can reasonably be questioned whether EU law deals with the issues of new and emerging technologies adequately.

A rich body of law is currently being developed in response to the digital age.

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<sup>1</sup> European Commission, *A Europe Fit for the Digital Age*, available at <[https://ec.europa.eu/commission/priorities/digital-single-market\\_en](https://ec.europa.eu/commission/priorities/digital-single-market_en)>; European Parliament, *Digital Transformation. BRIEFING EU policies – Delivering for Citizens*, available at <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/633171/EPRS\\_BRI\(2019\)633171\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/633171/EPRS_BRI(2019)633171_EN.pdf)>.

Even before the Covid19 pandemic, EU law affecting the digital and technological sphere was becoming an important area of EU law, with a growing number of Directives and Regulations (e.g. the General Data Protection Regulation,<sup>2</sup> the Payment Services Directive 2,<sup>3</sup> the Law Enforcement Directive,<sup>4</sup> the Open Data Directive,<sup>5</sup> the Regulation on the free flow of non-personal data<sup>6</sup> – just to name a few), as well as early decisions of the Court of Justice of the EU (e.g. the *Uber case*<sup>7</sup>).

These days a number of legislative acts are under discussion or in the legislative pipeline. The recent proposals under the Digital Services Act package (Digital Services Act<sup>8</sup> and Digital Markets Act<sup>9</sup>), as well as the prospective creation of a European data Space<sup>10</sup> promise deep changes for the regulation of the digital environment. Likewise, the Data Governance Act,<sup>11</sup> the Artificial Intelligence Act,<sup>12</sup> the proposed

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<sup>2</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1–88.

<sup>3</sup> Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, OJ L 337, 23.12.2015, p. 35–127.

<sup>4</sup> Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, p. 89–131.

<sup>5</sup> Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information, OJ L 172, 26.6.2019, p. 56–83.

<sup>6</sup> Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union, OJ L 303, 28.11.2018, p. 59–68.

<sup>7</sup> Judgment of the Court (Grand Chamber) of 20 December 2017, (Case C-434/15) *Asociación Profesional Elite Taxi v Uber Systems Spain SL*, ECLI:EU:C:2017:981.

<sup>8</sup> Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final.

<sup>9</sup> Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), COM/2020/842 final.

<sup>10</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “Towards a common European data space”, COM/2018/232 final; Commission Staff Working Document, Guidance on sharing private sector data in the European data economy Accompanying the document Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and the Committee of the Regions “Towards a common European data space”, SWD(2018) 125 final.

<sup>11</sup> Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act), COM/2020/767 final.

<sup>12</sup> 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.

e-Privacy Regulation,<sup>13</sup> the European Health Data Space,<sup>14</sup> the EU Smart Cities Marketplace<sup>15</sup> are seen as essential to pursue digital policies that empower people and businesses to seize a human centred, sustainable and more prosperous digital future for Europeans.<sup>16</sup>

This bulk of present and future regulatory acts start building a comprehensive EU legislative framework, placing the EU at the forefront of the regulation of the digital sphere with the ambition to become a world leader vis-à-vis other jurisdictions.<sup>17</sup>

Despite the copious regulatory efforts, the definition of the legal environment is far from being over. The Consumer Summit 2022 on the next steps in the implementation of the New Consumer Agenda continues to focus on the challenges for consumer protection posed by the green and digital transitions, and the online enforcement of consumer rights.<sup>18</sup>

Indeed, the digital economy is transforming, or even disrupting, traditional economic and social relationships, as well as the ensuing traditional legal principles, concepts, and framework enshrined in established EU Law. The interaction between these instances challenges European integration at many levels, where information technology, big data and artificial intelligence have disruptive or transformative effects on many aspects of the economic and social life of consumers, consumer rights, and fundamental rights of the person. Legal principles and protections are constantly tested. For example, new technologies, platforms, and business models already challenge the recently passed GDPR or established consumer protection legislation. This begs for a redefinition of rights, wrongs or the suitability of existing juridical principles and frameworks. Similarly, digital networked technologies open up new possibilities to access services and markets, which can only be achieved if the system of rights adapts to the technological change. Likewise, new business models brought by digitalisation, the shared economy, and the dominance of monopolistic technological giants and platform challenge SMEs. Issues of competition outside and inside the platforms, creativity, innovation and proprietary rights depart from traditional schemes and test the economic life of SMEs or dictate changes. In turn,

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<sup>13</sup> Proposal for a Regulation of the European Parliament and of the Council Concerning the Respect for Private Life and the Protection of Personal Data in Electronic Communications and Repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), COM/2017/010 final.

<sup>14</sup> European Commission, European Health Data Space, available at <[https://ec.europa.eu/health/ehealth/dataspace\\_en](https://ec.europa.eu/health/ehealth/dataspace_en)>.

<sup>15</sup> European Commission, Smart Cities, available at <[https://ec.europa.eu/info/eu-regional-and-urban-development/topics/cities-and-urban-development/city-initiatives/smart-cities\\_en](https://ec.europa.eu/info/eu-regional-and-urban-development/topics/cities-and-urban-development/city-initiatives/smart-cities_en)>.

<sup>16</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “2030 Digital Compass: the European way for the Digital Decade”, COM(2021) 118 final.

<sup>17</sup> See also B. van der Sloot, *Editorial* 3 European Data Protection Law Review 351 (2021).

<sup>18</sup> Consumer Summit 2022 held on 10 February 2022 under the the French Presidency in cooperation with the European Commission. The event marks the close partnership, formed between the Commission and the Member States, and all EU-level and National stakeholders, to make the New Consumer Agenda deliver on the ground.

the issues confronting SMEs question or force a rethinking of the consumer interest and protection.

Through an examination of current and relevant strategies, proposals, enacted legislation and case law vis-à-vis emerging business models powered by new technologies, legal scholarship seeks to understand the role of policy-makers and regulation to shape a sustainable EU market economy.

This Special Issue focuses on consumers. It is a contribution to the debate, which is bound to last for years, with the awareness that in the race between technology and regulation the latter risks to be doomed to obsolescence as soon as it comes into force. A Special Issue focusing on SMEs will follow elsewhere.

A leitmotif of the contributions concerns the inadequacy of the information paradigm that informs consumer law and policy.

Arno Lodder and Jorge Carvalho tackle the issue of online contracts, which in principle should be concluded by informed consumers. The European Union has long required an abundance of information requirements by online services. Touching upon the existing information requirements, the findings on the intersection of behavioural studies and consumer law, the authors primarily focus on new information requirements against the background of an online platform offering space for businesses providing services to consumers. They discuss critically the new information requirements of the Omnibus Directive 2019/2161. They also analyse the amendments to the Directive 2000/31/EC on e-commerce as proposed late 2020 in the Digital Services Act. The target of the investigation concerns the type of information that should be communicated, how this information should be communicated, and when it should be communicated. The authors end up being dubious about the value of all this information. Like the other authors of this Special Issue, they question the need for, and interest of, consumers for information.

At the same time, other authors identify consumer vulnerability in the digital sphere as a main policy and legislative gap alongside the ‘information problem’.

Christine Riefa argues that in the digital environment there is a need for a paradigm shift reversing the expectations placed on consumers by EU law to be the arbiter of markets and behave as ‘average’ consumers. By contrast, additional protection should be granted for those who are deemed ‘vulnerable’. In fact, in the digital space it is reasonable to expect vulnerability to be the norm rather than the exception. The information paradigm prevalent in EU consumer law needs to be altered to solve the systemic vulnerability problems rife in digital markets. It should no longer be about consumers defending themselves using imperfect instruments in the process, but about businesses behaving fairly and skilled enforcers ensuring that obligations are fulfilled. The author concludes that in the end fairness in digital markets should be by design and not something that is offered to consumer as a remedy after the damage has already occurred.

In a similar vein, Maddalena Rabitti and Maria Cecilia Paglietti focus on consumer vulnerability in the financial services sector empowered by digitalisation. The authors conceptualize the figure of the ‘digital-financial payment consumer’, which combines two separate sources of vulnerability: digital vulnerability and financial vulnerability.

First, they analyse the need of applying the concept of ‘neutrality of regulation’ to avoid possible conflict of rules between interconnected ecosystems, such as digital payments, digital platforms and blockchain. Next, they explore digital-financial consumer vulnerability, describing the possible implications at the level of regulation and the consequences that this new kind of vulnerability brings at the level of political choices. The authors focus on the obligations of financial players and the conduct of a consumer who is part of a payment service contract, adopting both the point of view of public law and private law. The contribution concludes that, among the different sources of vulnerability, age appears to be the key issue when assessing the vulnerability of digital payment consumers. This vulnerability is specifically relevant to the providers’ disclosure obligations, product design and product governance. On the consumer side, the same behaviour should be assessed differently depending on the specific vulnerability of the consumer involved.

Consumer consent is another well-known critical matter in consumer protection. However, digitalisation exacerbates the weaknesses of this legal technique (oddly) designed to empower consumers. Federico Galli, Francesca Lagioia and Giovanni Sartor study the market of targeted advertising where multiple actors collect, exchange, and process personal data for the purpose of capturing users’ attention in the online environment. They identify considerable adverse effects on individuals and society, resulting from mass surveillance, the manipulation of choices and opinions, and the spread of addictive or fake messages. Their contribution critically discusses the regulation of consent in such a market. After reviewing EU laws and proposals, they consider the extent to which the requirement of informed consent may provide effective consumer protection and suggest future directions to ensure more effective consumer protection.

Discussions on consumer protection and digitalisation could not escape the pervasiveness of Big Data and Artificial Intelligence in the present development of economic systems and business models.

Maria Lillà Montagnani and Carolina Paulesu discuss how Big Data and Artificial Intelligence have changed the way in which credit scoring takes place and creditworthiness is evaluated in the retail financial sector. Consumers’ credit-scores now involve non-traditional data and is based on the predictions that lenders can make on the basis of those data. The authors show how the use of these data and artificial intelligence poses questions as to the level of protection granted to consumers in relation to the discriminatory effects that an ungoverned use of technologies can generate. The article addresses the suitability of the Proposal for a new Directive on Consumer Credit to protect consumers that enter into credit agreements where access to credit is determined by credit scoring systems based on artificial intelligence. It considers also other EU rules that can provide protection to consumers, such as antidiscrimination law the GDPR. The authors conclude that in a technologically complex scenario such as the one of credit scoring and artificial intelligence, consumers can only find protection if an ecosystem of rules is created, empowering consumers further and regulating the use of artificial intelligence on the business side of credit agreements.

Finally, Inge Graef and Bart van der Sloot also address issues brought by the increasing use of, and reliance on, big data. The authors advance that harms caused by data technologies can no longer be effectively addressed under the predominant regulatory paradigm of individual empowerment. Accordingly, even a sophisticated consumer cannot fully protect herself against collective harms triggered by others' privacy choices or by technologies creating competitive harm without processing personal data or targeting individuals. The authors suggest that while data protection and competition law can be applied more proactively to address such harms, difficulties are likely to remain. They submit that stronger regulatory interventions are required to target collective, and sometimes competitive, harms from technologies.

Overall, what clearly emerges from the criticalities identified by the authors of this Special Issue is the need to rethink the way consumer law has been framed so far.

In a market that is mainly supply-driven and governed by the supply-side, there are conduct of business risks. Aggressive business models may expand via the digital development. Innovation and competition are welcome, but digital technologies are complex and business models take new unconventional forms where data feed new scenarios and create new markets. This can result in an environment favourable for targeted individual marketing, exploitation of consumers' behavioural biases, mis-selling of product and services, economic and social sorting or discrimination. Freeriding wallows in legal uncertainty and may flourish.

The timely understanding by the legislator of the different technologies and business models is crucial to recognise how the market develops and the loopholes of the current legal framework. A rethinking of the consumer protection regime would be necessary to reconcile the needs of a new market and the protection of its users.

