The average consumer standard - an assessment of the challenges of e-commerce

Diana-Raluca Fofiu

1Faculty of Law, West University of Timişoara, Romania

Abstract. With the signing of the Treaty of Rome and the regulation of the single market, the European Union must continue its efforts to modernise and update the legislation governing the free trade area. It is not enough for the single market to exist, but it must be functional, competitive, and at the same time, secure and balanced, in order to support sustainable economic and social development. In this respect, greater attention must be paid to the digital internal market, which operates using new and complex instruments that can deepen the existing imbalance between the trader and the consumer. In the context of this digital asymmetry, the portrait of the average consumer needs to be analysed in relation to these new tools, as this standard generates new legislative directions and influences the way consumer protection policies are applied.

1 Introduction

The consumer protection legislation acts as an intermediary between suppliers of goods and services and those who want to purchase them for personal use – the consumers. However, this intermediary appears to be manifestly biased, in order to protect the economic and social interests of the buyers. Nevertheless, the road to legislation that protects a vulnerable category of people must be paved with the utmost caution. The business-to-consumer (B2C) relationship must remain an effective one. At the same time, it must not constitute an unreasonable burden on traders, but rather compensate for the intrinsic disadvantages affecting consumers, that might prevent them from having certain social and economic needs met.

The aspiration of some European countries to create a single market to achieve economic and social progress was realized in 1957 with the signing of the Treaty of Rome, which established common policies in key areas such as trade. Since then, important steps have been taken to achieve an efficient single market that serves the interests of the Member States, and efforts have been made to remove all barriers to the free movement of goods, services, capital, and people. Once the preliminary step of regulating the common market has been completed, the next steps involve constant efforts to modernize and update this common commercial area. It is therefore not enough for the single market to exist; it must be functional and highly

* Corresponding author: diana.fofiu97@e-uvt.ro

© The Authors, published by EDP Sciences. This is an open access article distributed under the terms of the Creative Commons Attribution License 4.0 (https://creativecommons.org/licenses/by/4.0/).
competitive to support sustainable economic and social development. A market cannot perform if the parties to the legal relationships that arise within it do not have confidence in this newly created system, so it is necessary to create a secure and accessible European trading area, to identify the potential vulnerabilities and to provide guarantees. The first section of the article aims to identify the trends governing the digital environment and the new commercial practices whose fairness and trustworthiness is in question. Once the picture of the digital internal market is sketched, it is essential to have a good understanding of the digital consumer’s portrait as a beneficiary of this market. Thus, the second section examines the dynamics of the notion of consumer and the applicable standards, around which the whole consumer law policy is built. Finally, within the second section there will also be identified the elements that should be considered when assessment of the consumers’ standards is made, especially in the digital world.

2 An overview of the digital internal market

The architecture of the digital environment is changing the relationship between the consumer and the trader. Traditionally, in ‘classic’ business-to-consumer relationships, the consumer finds himself in a disadvantaged position, inferior in terms of knowledge and bargaining position, in relation to the purchased good or service. Given the complexity of the tools used in the digital environment (such as innovative payment methods or commercial marketing tools), but also the peculiarities of a distance contract (lack of physical interaction with both the goods and the supplier of the goods), it is reasonable to assume that the imbalance is deepening in the digital environment. To confirm this assumption, it is necessary to analyse the complexity of the existing tools and products in the digital internal market and to examine the profile of the digital consumer, to see whether the existing digital environment generates an asymmetry strong enough to represent the basis of the current and future legislation. All the tools, communications and behaviour of the trader in the digital environment, aimed at providing or promoting goods or services, represent commercial practices under Directive 2005/29 on Unfair Commercial Practices (UCPD), and are subject to legislative censorship when they are ‘produced’ in a way that may influence the economic behaviour of the average consumer. Thus, current European legislation seeks to prevent traders from taking advantage of their economically superior position and greater volume of information in order to sell their products. At the other end of the scale, an absolute presumption of inferiority is established in the case of the consumer, which operates independently of the actual knowledge that the person concerned may have or the information that he or she has [1].

The law is based on the idea of fairness, which must exist not only during the contractual relationship between the parties but also before and after it, just as in the case of the obligation of good faith during the pre-contractual negotiation stage. As will be shown in the next section, fairness is usually assessed by reference to a fictional standard, that of the average consumer. However, given the architecture of the digital environment, it is essential to also consider that it subtly but significantly influences consumer reactions and can even create digital vulnerabilities. Thus, consumers can be considered digitally vulnerable when they are susceptible to commercial exploitation, which is achieved by new technologies and commercial marketing tools [2] such as algorithmic profiling, automated decisions, or behavioural analytics based on which strategic predictions are made. The problem with this terminology lies in the fact that the UCPD and Directive 2011/83/EU on Consumer Protection (CPD) use the notion of vulnerability to designate a category of people who are disadvantaged due to their intrinsic characteristics (such as age or the existence of a physical or mental disability), thus excluding external aspects (the systemic configuration of the
digital environment and the way technology shapes the relationship between consumers and traders).

The architecture of the digital environment is based on the study of affective and cognitive judgments, anticipating the behaviour of Internet users to influence and direct them towards commercial decisions that satisfy the trader. Accordingly, the Commission confirms that the notion of vulnerability should be revised to also include external factors such as the specificities of the digital environment. In general, a person can be said to be vulnerable when he or she is unable to collect and assimilate information, understand the characteristics of certain products and the effects of certain marketing techniques and is therefore particularly vulnerable to making decisions that are economically disadvantageous and do not contribute positively to the person's quality of life [3]. We are therefore talking about a variable, situational concept, where people can be vulnerable in relation to one product or situation, and ‘non-vulnerable’ in relation to others. However, external factors do play a role in establishing the standard of the average consumer, as it will be shown in the next section.

The architecture of the choice in the digital environment raises issues of fairness in particular because of the three basic characteristics by which it operates [2]:

1. It is based on data, namely the fingerprints left by consumers online (user X is interested in buying a pair of shoes and has spent a lot of time looking at a particular retailer's website for a particular pair Y);
2. It is dynamic in the sense that it adjusts and reconfigures itself according to the information collected, trying to anticipate future behaviour in order to influence it in a certain direction (when using the search engine again to look for shoes, user X will see as first search results the website of the retailer selling pair Y);
3. It is personalized (user X may receive a personalized price offer, given his interest in pair Y).

These features reinforce the idea that the legislator's attention should (also) focus on the vulnerabilities generated by commercial marketing practices in the digital environment. The complexity and subtlety of some practices can leave the average digital consumer as exposed as a child in a ‘normal’, non-digital environment. Children are vulnerable precisely because they fail to understand the role and consequences of an advertisement and are more likely to react to emotional stimuli and make irrational decisions based on superficial and induced needs. Precisely the same effects can be produced by some of the tools used in e-commerce and the standard provided for in current legislation and developed by the case-law may no longer correspond to digital realities. In any case, the intrinsic traits of a given individual also dictate their ability to manage some external elements, in particular to identify and not fall into the trap of certain unfair practices. If we hit two people with the same intensity, one may bruise and feel pain (‘vulnerable consumer’) and the other may not feel pain and does not bruise (‘average consumer’). In the context of digitization, this should not mean that the hit is illegal only as far as the ‘bruised’ consumer is concerned, but it should be universally labelled as illegal.

In the current legislation, a commercial practice is either presumed to be absolutely unfair (those listed in Annex 1 of the UCPD) or its unfairness must be established by an authority or by a judge, by assessing the degree of influence on the economic behaviour of a consumer prototype. In the latter case, as will be shown in more detail in the next section, a practice may be considered unfair in relation to a vulnerable consumer (such as a child), but fair in relation to the average consumer (a reasonably attentive and circumspect adult), the decisive factor being the standard reference which has been used. A digital consumer could therefore be saved from an unfair practice in two situations:

- if it is on the list of practices considered unfair in any circumstances, namely Annex 1 of the UCPD. Currently, the list also includes certain practices that are prevalent in the digital environment (e.g., the prohibition of false reviews or the absence of mechanisms
to control the veracity of such reviews, or the obligation to mention that the ranking of the results of an online search is based on paid advertising). However, to keep pace with the new digital reality, this list should be completed. For example, it could include the application of differentiated pricing based on profiling, in particular where differentiation is done to the disadvantage of the consumer because an urgent need or particular interest in the product or service has been identified. In this case, it is the European legislator who must intervene, as the directive's completion will also have the effect of harmonizing all the laws of the Member States.

- if the assessor considers it likely to influence consumers' economic behaviour. In this case, since the effects of the judge's decision are limited to the borders of the Member State concerned, there is a risk of non-uniform practices at European Union (EU) level. Given the cross-border nature of businesses conducted in the digital environment, heterogeneity in this case would mean that a practice is considered fair in one State and unfair in another, which would be an obstacle to intra-community trade.

Such heterogeneity has been in the past the subject of references to the European Court of Justice for preliminary rulings: in the Clinique case, Germany held that the name Clinique used in relation to cosmetic products was misleading, as it could give consumers the impression that the products were having medicinal effects. This led the company to market its products under a different name in Germany, thereby incurring additional costs, which the court considered to constitute a barrier to the free movement of goods. Naturally, the court first examined whether the restriction was proportionate and justified by a legitimate interest, namely the protection of consumers against misleading practices which may harm their health or economic well-being. Thus, it took into account the fact that the average consumer could have realized that the product did not have medicinal properties because, firstly, that was not stated on the product and, secondly, they were available in cosmetic shops and not in pharmacies [4]. This case is an example of the risk that the UE takes when it leaves it to the courts to determine the legality of a practice instead of determining it itself by means of an European legislative act. Of course, for practical reasons, it is impossible to list all unfair practices in advance, and in this case the solution is, on the one hand, to regulate at European level the practices that are frequent in the market and which have a considerable impact on consumers, and, on the other hand, to give the judge the clearest possible criteria for assessing the impact of the other practices. In this second hypothesis, the criteria should be drawn up bearing in mind both the characteristics of the digital environment and the impact on the market in general. Applying the average consumer standard is a good solution in two respects. Firstly, it prevents over-protection, ensuring a balance between the interests of consumers and traders. Secondly, it allows the market to self-correct in relation to those practices which may harm consumers who are below the average of due diligence and circumspection required by law, in the sense that they will not buy a second time from a trader who has misled them with deceptive practices, therefore the bad reputation will drive that trader out of the market [5]. However, this standard, without clear criteria for its application, runs the risk of assessing desirable rather than actual behaviour. From a legal and economic point of view, in assessing the fairness of practices, consumer detriment should be assessed in terms of how consumers actually are and act, not how they could or should act [6].

Finally, the UCPD allows for heterogeneous assessments as it considers that the standard of the average consumer cannot be set correctly without taking into account social, cultural and linguistic factors. Therefore, a linguistic aspect may categorize a commercial practice as fair in one State and misleading in another, as was the case in the Graffione case. In this case, given that 'cotonelle' means cotton in Italian, the Court held that a mark named Cotonelle could mislead Italian consumers into believing that goods marketed under that mark were made of that material [7]. In the absence of such an association between the name and the material, there would have been no case of deceptive practice. Since the Graffione judgment dates
from 1996, a similar interpretation today would raise two problems. On the one hand, it contradicts the objective enshrined in the consumer protection directives, which is to create a uniform system of protection at EU level and to remove barriers to cross-border trade. On the other hand, it challenges certain characteristics of the average consumer, who is presumed to study product labels (including the list of ingredients) before making a purchase [5]. In the digital context, it seems disproportionate to oblige a trader to market products under different names in order to prevent confusion, given that online shops may target consumers in different Member States.

The digital internal market is very crowded. On the positive side, this ensures the high degree of competitiveness that the Union wants. From 2017 to 2021, global e-commerce sales have almost doubled (from $2.382 billion to $4.938 billion in 4 years [8]) and the trend remains ascendent. The downside is that in the battle for consumers’ attention, the techniques being used cause consumers to act against their will and are built into the very design of the platforms (the so-called dark patterns). Examples of such practices are the placement of banners that do not offer the option to refuse the usage of online identifiers, such as cookies, or platforms that make it difficult for consumers to make decisions that are contrary to the interests of the trader (for example, in order to delete a user account on the Amazon platform, the procedure is not intuitive at all, with the person having to go to 'Help' → 'More help' → 'Contact us' → 'Something else' → 'Login and security' → 'Close my account', and then send a message to the platform asking to deactivate the account). Another example of a dark pattern is the use of font colours or sizes to direct the consumer to the merchant's desired decision, relying on the fact that the user does not have time to read every message on the website, but rather navigates intuitively and reflexively. In this respect, the concept of clickbait has emerged, which encompasses all content on the internet designed to attract attention and encourage internet users to click on a particular link.

Platforms have become particularly creative in this regard, with examples of banner ads that have integrated a design element representing a speck of dust to generate a click when the person actually intended to wipe their phone or tablet screen. One last example of cleverly designed marketing communications are ads placed in the inbox of email service users, which mimic an email very well. This example raises discussions around protection of individuals against unsolicited communications, as advertising materials stored on users' terminals have a special regime, regulated by Directive 2002/58/EC on privacy and electronic communications (ePrivacy Directive). According to this Directive, direct marketing consisting of placing advertising materials in people's inboxes can only be carried out with their prior consent, the rationale being that unsolicited advertising material appearing on users' terminals is an intrusion into their privacy. In practice, marketers capture this consent in many forms, such as by offering free products or a discount on the first order in exchange for subscribing to the company's newsletter. Although the conditions for placing advertising material by email seem clear, they made the subject of a preliminary referral to the Court of Justice of the European Union (CJEU) in late 2021. Thus, in case C-673/17 StWL v. ePrimo GmbH, the Court examined to what extent a communication for marketing purposes made through email complies with the requirements of the Directive. In fact, users of an email service received in their inbox advertisements relating to the supply of electricity by the company ePrimo. These materials were not visually distinguishable from other e-mails but were inserted among them and marked as ‘advertisements’. Therefore, although the ad had the form of an email, it was not in fact clear to the referring court whether such a message fell within the concept of electronic mail, since the applicant argued that such advertisements may constitute unsolicited communications for which the express consent of the person concerned is required. The CJEU indeed held that the use of banner advertisements in such a manner is exactly the type of intrusion that the European legislature intended to prevent through the ePrivacy Directive. Therefore, the consent of the holder of the e-mail address
was required for the display of this advertisement and no other legal basis was allowed. However, the e-mail service was a free service, financially supported by advertisers and users had the possibility to pay for an ad-free e-mail service. In this case, it can be argued that the user was informed in advance of the marketing practices used and consented to them when deciding to use the free e-mail service. This once again reinforces the theory that personal data has become a mean of payment for various goods or services. Consequently, the CJEU has ruled that although consent must exist, it is for the referring court to verify that this condition is met [9], and under the relevant legislation, the burden of proof of consent lies with the issuer of the advertising material, namely the trader.

The above examples of dark patterns represent subtle practices, and their categorization as unfair requires a rather difficult assessment, given that the second situation above is involved, when the assessor must analyse abstract aspects, i.e., the reaction of an imagined character to a practice with a psychological substrate that is not necessarily manifestly illegal. At the opposite end of the spectrum are those practices whose illegality is obvious. The sneak into basket technique involves inserting unwanted products into a shopper's basket. If he does not want them, he must remove them himself. The term ‘products’ also includes additional services, such as inserting travel insurances automatically when the consumer wants to buy airplane tickets. This practice is also common in relation to placing online identifiers in users’ browsers for various purposes such as marketing. In Case Planet49, the court held that a consent cannot be considered valid if it has been given following the placement of a box expressing consent to the placement of cookies, if this box is pre-ticked, so that in case of disagreement, the user should untick it. The situation is also the same as regards the active conduct that the consumer must have if he does not want to purchase the products added by default to the basket. The Court emphasized that remaining passive cannot be an expression of valid consent, since in order to meet the requirements of clarity, specificity and lack of ambiguity, it must be the product of ‘a clear affirmative action’ [10].

Regulation 2022/2065 on digital services (DSR) confirms the concern of the Union's legislative bodies about these manipulative design practices. The Regulation was published in the Official Journal of the European Union on 27.10.2022, with most of its provisions to apply from 17.02.2024. This legislation defines dark patterns as practices that ‘distort or significantly impair, either intentionally or through their effects, the ability of recipients of the service to make informed and autonomous choices or decisions’, prohibiting platforms from containing such elements. Unfair commercial practices, on the other hand, include any act, omission, course of conduct, representation or commercial communication made by a trader, and which is directly connected with the promotion, sale, or supply of a product to consumers which, being contrary to professional diligence, is likely to materially distort the economic behaviour of the average consumer. It thus follows that sometimes dark patterns, if they originate from a trader and possess the related characteristics, may constitute unfair commercial practices, and may be invalidated under the UCPD. Such manipulative designs may also fall under the General Data Protection Regulation (GDPR), as in the case of Planet49 mentioned above. Moreover, the European Data Protection Board (EDPB) published a guide on dark patterns in social media platform interfaces in which, in addition to identifying and classifying a multitude of dark patterns, it also indicated how exactly the GDPR is incident in such cases. Thus, ‘the principles of accountability, transparency and the obligation of data protection by design stated in Article 25 of the GDPR are also relevant regarding design framework and dark patterns could infringe those provisions’ [11]. For all other situations where the practice does not fall under any of the above-mentioned laws, the DSR becomes applicable, and Member States must establish and apply sanctions to platforms containing elements of manipulative design.

Every action taken online generates data and its processing is done to ensure the functionality of the platforms but also to personalize the content displayed to users. In both
cases, certain data files are stored in the browser (e.g., cookie identifiers, which assign each visitor a unique string of numbers and characters). In the first case, these identifiers help e-commerce platforms to recognize a specific user to provide useful functions, such as remembering login credentials or products added to the shopping cart. Accordingly, only the platform that placed the identifiers in someone’s browser after obtaining their consent may use the information stored in them (first party cookies). In the second case, however, the use of identifiers for the purpose of providing personalized advertising material is the starting point for a discussion with legal relevance, both from the perspective of consumer and personal data protection. Thus, in addition to the identifiers described above, e-commerce platforms may also place identifiers such as cookies from third party platforms, like Google (third-party cookies), which will retain information about the user's behaviour on the site. Specifically, an e-commerce platform selling books stores a Google cookie in the user's browser, which stores data confirming that the user is interested in a particular book. When the user accesses Google, he will be recognized as ‘that user interested in books’ and will consequently fill in the empty advertising space on the platform with an ad for products which shall interest readers. This process is known as profiling, which is defined in the GDPR as ‘any form of automatic processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects relating to that person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements’. Figure 1 illustrates the phenomenon in 3 general steps:

![Diagram of profiling phenomenon](image)

**Fig. 1.** Illustration of profiling phenomenon.

Profiling involves combining information collected through cookie identifiers (individual user preferences) with individual characteristics of each person, such as date of birth, age, place of residence, the latter being information that is personal data within the meaning of the GDPR. Thus, each user ends up with a digital *alter ego*, which is seen by marketers as a valuable product**, and the more accurately this *alter ego* reflects the real consumer, the more likely is that the marketer's advertising will be successful. From a consumer protection perspective, this phenomenon is relevant firstly because it can generate the development of unfair practices that can influence the consumer's economic behaviour in directions that can affect him financially and secondly because it can give rise to discrimination, in particular when age or material circumstances lead to differential pricing for the same goods or services.

To highlight the scale and subtlety of these practices, it is also important to recognize that they have consequences which go beyond commercial interests. As the information that reaches an individual is filtered and adapted to match and constantly reconfirm their preferences [12], there is also recognition at the level of the EU of the effects that targeted political propaganda can have on people, with the aim of providing each user the information that is most likely to convince them, with the consequence that citizens can no longer rely on a common set of facts, but rather a harmful polarization is created [13]. While it may seem that such arguments are too extreme, it is the courts themselves that have confirmed the impact of algorithms on major political events, such as the Brexit.
As far as the protection of personal data is concerned, it represents the currency paid for certain facilities offered on the internet. Thus, ‘free’ services involve advertisements or even direct collection of personal data (e.g., offering digital products or services in exchange for an e-mail address and agreement to provide marketing materials). The interchangeability of price and personal data in the context of the provision of digital services has been recognized by Directive 2019/2161 (the Omnibus Directive), stating that the CPD rules should also apply under the same conditions when the price for certain digital services consists of personal data. However, particular attention should also be paid to the actors involved in the online marketing activity to establish who bears responsibility for the processing of consumer data. The trader usually outsources this activity to an advertising agency, which will take care of the dissemination of advertisements through the processes described in the lines above. In this context, who is a controller and who is a processor, within the meaning of the GDPR? Intuitively, given that the advertising agency is processing data at the request of a company that wants to promote its products or services, one might think that the agency is the processor, with the responsibility falling on the ‘shoulders’ of the company that determines that customer data will be used for advertising purposes. This reasoning is correct, up to a point. The margin of discretion that an advertising agency has can push it into the realm of controllers, since although the final purpose of the processing is determined by the company, the modalities of processing, the categories of data, and the places where the advertisements will be displayed, are determined by the agency. Even if the entity acts in a similar capacity as a processor, it will no longer be considered a mere processor in the terminology of the GDPR if it has a significant degree of influence over the processing arrangements [14]. When the agency and the company share the purpose and means of the processing, as is often the case for profiling advertisements, they are joint controllers and are responsible for compliance with data protection provisions.

The technological progress that has shaped e-commerce has not been ignored by the Union's legislative bodies. In 2019, the CPD, the UCPD, Directive 93/13/EC on unfair terms in consumer contracts and Directive 98/6/EC on price indication were amended and supplemented by the Omnibus Directive, with these changes due to take effect in all Member States from May 2022, but the updating of the legislation does not stop there. The ePrivacy Directive is also in the process of being transformed, with a draft regulation still on the table of the European Parliament to better protect electronic communications. In addition, once the DSR becomes enforceable, several commercial practices which are harmful to consumers will become illegal, such as targeted advertising based on sensitive data and that related to minors. Despite the subtlety that characterizes the architecture of the digital environment and irrespective of all the rights that have progressively been granted to consumers over time, the mechanism available to authorities and judges to invalidate commercial practices (including digital ones) involves the application of the fictitious average consumer standard. It is therefore necessary to establish who falls within the notion of consumer and what criteria shall be applied for identifying the average consumer in the digital context presented in this section.

3 The creation of a digital consumer standard

E-commerce, by its particularities, defies the definition of the consumer under European law. An essential element that places individuals under the umbrella of consumer law is the purpose of the purchase of the good or service. Thus, to enjoy the privileges granted by the laws that operate with this notion, a person must act for purposes which are outside his trade, business, craft or profession. Naturally, for practical reasons, this purpose is verified in a superficial way. Thus, the purchase of a product or service as a natural person is absolutely presumed to be for personal purposes. Conversely, if the same natural person makes
purchases through the company they manage, the purpose condition will no longer be met. By way of example, if a laptop is purchased by a teacher to prepare lessons for the students, the purchase falls within the scope of consumer protection law, even though it is to be used for professional purposes. On the other hand, the same purchase made by a teacher organised as a legal person (such as an authorised natural person) does not benefit from the protection of this legislation.

Since this situation may ultimately place a natural person at a disadvantage, it is natural to wonder whether there are situations in which a legal person could be a consumer. Although the definition of consumer in all the European directives is limited to natural persons, this does not rule out the possibility of granting a certain form of organisation the protection conferred by consumer law. Two perspectives must therefore be considered:

### 3.1 The perspective of equality of persons before the law

This equality seems to be breached by the different legal regime applicable to the two teachers in the above example. In this respect, a company has lodged an exception of unconstitutionality with the Constitutional Court of Romania (CCR), arguing that the exclusion of legal persons from the umbrella of consumer protection constitutes discrimination and violates constitutional principles. Overlooking the procedural irregularities of this referral, the CCR justifies the rejection of the exception with two main arguments. On the one hand, the differentiated treatment does not concern comparable situations, since ‘professionals who conclude contracts within their field of activity are not in the same situation of vulnerability as persons who do not normally conclude such commercial contracts, so that they cannot invoke the discriminatory nature of the provisions of Article 2 of Law 193/2000 (n.n. Law on unfair terms in contracts concluded between professionals and consumers, which transposes the UCPD)’ [15]. On the other hand, a legal person can only rely on the principle of equality when the legal regime applicable to it affects a group of citizens, thereby creating inequality between them. Such a situation arises in Case C-329/19 Condominio di Milano via Meda v. Eurothermo SpA, discussed in the next subsection.

Consequently, from the point of view of the equality, the two professors are not in comparable situations, since organisation in the form of a legal person gives rise to an absolute presumption of possession of additional knowledge of a possible commercial relationship and of the power to negotiate the contract giving rise to that relationship. Thus, from a legal point of view, the teacher-natural person and the teacher-legal person are two different entities, who ‘judge’ differently and to whom different standards apply. In the first case, the legislator’s expectations are average, all lack of knowledge and bargaining power being supplemented by law. In the second case, the expectations are high(er), as legal persons are *ex officio* ‘smart’ from an economic point of view. In conclusion, at least as far as European consumer protection law is concerned, as a rule, the corporate veil is not lifted so that the natural person behind a company can be identified with it.

### 3.2 The perspective of ensuring a high level of consumer protection through homogeneous legal regimes

This level is itself an aim of the Union, declared and assumed by the Treaty on the Functioning of the European Union (TFEU). As the Constitutional Court of Romania pointed out in the above-mentioned decision, not granting a legal person the status of consumer may, in some cases, deprive of rights natural persons who are acting for personal and not professional purposes and who compose that entity. This would result in discrimination
between consumers simply because some of them have associated themselves in some legal forms/structures.

This situation was the subject of a preliminary reference to the CJEU, as the Italian courts wished to clarify whether a legal entity similar to an association of owners (in Italian law, condominio) can be qualified as a consumer. That association, the condominio, concluded through its administrator a contract for the supply of energy with a company, which contained unfair terms whose usage in consumer contracts is prohibited by Directive 93/13/EEC on unfair terms in consumer contracts (UCTD). However, for such terms to be invalidated by the court, a consumer must be a party to that contract. Although the final beneficiary of these clauses is still a natural person (a tenant of a common property) the party to the commercial relationship does not fulfil the condition of being a natural person and therefore, according to the European directives, cannot be regarded as a consumer. However, Member States have the power to change this as both the CPD and the UCTD allow them to extend the application of the rules contained in these legal acts to other legal entities. In Condominio di Milano via Meda v. Eurothermo SpA, the CJEU recognises this power even to the courts, which have the power to interpret the transposing laws extensively and to create a practice that offers more protection than that in the Directives [16]. The reasoning of this decision is also valid in relation to the CPD, meaning that a transposition law or even the practice set by the courts can recognise an entity such as condominio the right to withdraw from a distance contract for instance, or the right to be provided with a certain set of information. This broad interpretation does not enter into conflict with Article 4 CPD, which provides that Member States may not introduce into their national law 'provisions diverging from those laid down in the Directive, including more or less stringent provisions, to ensure a different level of consumer protection’. The scope of the CPD is limited to natural persons, therefore the regime applicable to other entities remains to be determined by the Member States, which may decide to assign them the same regime as the one set by the Directive itself, without this amounting to a change in the provisions applicable to natural persons. However, if a Member State chooses not to confer the protection of the Directive to entities like the Italian condominio, the issue of discrimination discussed in the previous sub-section becomes relevant. In these situations, since such entities are groups of natural persons not acting for professional purposes, it is questionable whether it is appropriate to assimilate them with a typical legal person, which is presumed to have advanced knowledge and bargaining power and presumed to be on an equal footing with its contractual partner.

Once the categories of persons who may be consumers have been established, the next important point concerns the standards with which the legislator operates and which the judge is called upon to apply when dealing with consumer protection claims. Thus, in C-210/96 Gut Springenheide, the CJEU validated the profile of the average consumer: a sufficiently attentive, informed, and circumspect person [17] without advanced knowledge of the product he is buying. By reference to this standard, the courts were to conclude whether a particular commercial practice was misleading. As a decision of the CJEU was unable to ensure uniform application of this standard across the Member States, the standard was codified, but not in the form proposed by the Court. The European Economic and Social Committee, an advisory body of the Union, the European Parliament and the Council of the European Union, as legislative bodies, have argued that this standard does not offer sufficient protection, in particular in relation to vulnerable groups of persons, such as children or persons with certain disabilities [5]. The current law on unfair commercial practices therefore provides that the standard set by the Court must be applied taking into account 'social, cultural and linguistic factors’, the yardstick being the average member of the group to which a particular practice is directed. In conclusion, in order to assess the fairness (and therefore the legality) of a commercial practice, the assessor will have to go through two steps:
3.2.1. The identification of the target group of the practice

This step is essential as the standard to be applied depends on it, but it is not easy, especially as neither the legislation nor the case law provides much guidance. Thus, the UCPD provides in Art. 5(2)(b) that a practice is unfair if it ‘materially distorts or is likely to materially distort the economic behaviour with regard to a product of the average consumer whom it reaches or to whom it is addressed or of the average member of a group where a commercial practice is directed at a particular group of consumers’.

The court must therefore first ascertain whether the product or service has features which suggest that it is not addressed to everyone, but to a specific category of consumers. Thus, an advertisement for robes specific to the legal professions may be addressed to a particular group, namely certain legal professionals, such as judges and lawyers. Thus, to be able to impact the assessment of the fairness of a practice, the group must meet three conditions: it must be ‘sufficiently identifiable, limited in scope and homogeneous’ [18], otherwise the judge must look at the general benchmark. The geographical criterion, although it delimits a group which shares a set of common characteristics (cultural, social, or linguistic), it does not meet the condition of having a limited scope but even so, it influences the portrayal of the average consumer and can work in parallel with a specific group. Thus, if the specific group under consideration is pregnant women, and pregnant women in a particular State are the average consumer and can work in parallel with a specific group. Thus, if the specific group consisting of persons who have in common only the fact that they are digital consumers does not meet the condition of having a limited scope but even so, it influences the portrayal of the average consumer who is a national of that State. Secondly, Art. 5(3) UCPD provides for a specific kind of group, namely that of persons who are particularly vulnerable because of intrinsic characteristics such as age or infirmity. In order to ensure that the protection of vulnerable categories of persons does not turn into unreasonable obligations for traders, the Directive lays down the condition of foreseeability of the negative impact on vulnerable persons. In addition, as explained in the previous section, vulnerability is situational: a person with a physical disability may be particularly vulnerable in relation to one product (such as medicines or treatments for that disability) and not vulnerable at all in relation to other products (such as food or clothing). Therefore, the intrinsic characteristic of the group member must be relevant to the practice whose fairness is being assessed, otherwise the standard may be the general one.

Relevant for the digital environment, however, is the following question: can digital consumers be considered as belonging to the specific group in the sense of Art. 5(2)(b) CPD or to the vulnerable group of consumers in Art. 5(3) CPD? In the first case, a group consisting of persons who have in common only the fact that they are digital consumers does not meet the criterion of homogeneity and limited scope, so the answer would be a negative one. In the second case, as the intrinsic characteristics listed in the UCPD are not exhaustively listed, the Court could establish the existence of other personal elements that make a group of consumers particularly vulnerable and consequently apply a lower standard. As in the first case, the group of vulnerable persons should be clearly identifiable, so that it is still not possible to speak of digital consumers as a group in its own right, but rather as a group of digital consumers sharing certain common features. Thus, people who have a chronic alcohol addiction which is known by algorithms that deliver personalised advertising could be considered as representing a group of vulnerable digital consumers and therefore, the standard will be set accordingly. It is important to note that applying the standard by reference to the target group does not always mean lowering the benchmark. In the case of the marketing dental cutters for instance, it is clear that the product is aimed at dental experts, so a reasonably informed and knowledgeable dental practitioner, and not an ordinary person, will be considered. Finally, even in the absence of a specific group, the external elements that characterise the digital environment should be considered in determining the behaviour of the average user, as explained in the next sub-section.
3.2.2 The identification of the average consumer’s reaction to the practice, analysing to what extent their economic behaviour could be changed

In deciding how the fictional average consumer would have behaved in each case, the court must take into account a variety of factors. As we have seen in cases Clinique and Graffione, an average consumer would be misled by a trademark called Cotonelle, since it would suggest to him that the products marketed were made from cotton, but not by a Clinique trademark, since he could reasonably identify from all the circumstances that the products in question were not medicinal products but cosmetics. Although the two cases appear to betray an inconsistency in the application of the average consumer standard, the conclusion to be drawn is that conjunctural factors are particularly relevant.

The legislation proposes general formulations in this respect, stating that in assessing the misleading or aggressive character, account should be taken of the facts, characteristics and circumstances of the particular case, the limitations of the medium used, and the fact that Article 114 TFEU establishes a high level of consumer protection. More specifically, the assessor must consider factors such as:

- the presumed expectations which a reasonable person might have of a product and its characteristics, [19]
- the complexity of the product or service, with the average consumer's level of expectation and attention varying according to the value of the good purchased,
- the categories of information that have been made available to the consumer, including information conveyed through advertising,
- the manner in which the information is provided, including the clarity of the language used,
- the general context of the purchase, such as the specifics of the shop from which a product is purchased,
- market conditions, such as political or economic phenomena (e.g. the influence of energy market liberalisation on electricity supply services),
- findings and studies in the field of behavioural economics,
- the impact on free trade and the movement of goods and services, in which case a proportionality test must be carried out,
- the architecture of the digital environment, including the algorithms that generate a particular practice,
- the social, cultural and linguistic characteristics of the state where a particular practice is implemented,
- consumer protection must not place an unreasonable burden on the trader, so a new proportionality test must be made.

The assessment of the practice in accordance with the above-mentioned factors must be made in abstracto, by taking into consideration the potential harmful effect of the action or omission under review. Accordingly, there is no need to have a person who was actually affected by a practice in order to apply the standard. In addition, the notion 'commercial decision' does not refer only to the decision regarding the purchase of a particular product, but it also includes whether or not the consumer is persuaded to enter a shop or spend more time on a website engaged in a booking process [20]. Therefore, from the perspective of the UCPD, there is no formal impediment for assessing the fairness of the dark pattern practice described in the previous section.

Case law has not provided specific guidance for the digital environment, nor has it (yet) created a portrait of the digital consumer. Given the list of factors to be taken into account when setting this standard, we can conclude that the particularities of the digital environment significantly influence the assessments made by judges. Thus, certain traits and behaviours established as belonging to the average consumer in the offline environment do not remain valid in the online environment. For example, generalizing CJEU’s findings in Clinique, the
average consumer can determine the category to which a product belongs and identify its general characteristics by reference to the general context of the purchase (such as the specifics of the shop) and additional information on the packaging, even if the product name or pictures on the label suggest otherwise. In the online environment, a marketplace may sell products from different categories and there is no physical access to the good to study its packaging or label. According to Concord, the average consumer perceives a brand as a whole (global appreciation) and does not proceed to analyse its various details, so there is a likelihood that he or she will not distinguish between two similar brands and thus confuse them [21]. This issue becomes more acute in the online environment, where the digital representation of the brand, the photos and the presentation of the product sometimes make it impossible to distinguish between an original product and an imitation. Splitting the price of a product into several elements and highlighting only one part of the price [22] in order to arouse the user's interest can very easily lead to consumers accessing the platform and researching the offer, which already influences the consumer's behaviour without having to materialise into a purchase. In the online environment, these practices are very common, therefore the insertion of false or unreasonable incomplete information in advertising banners should be considered unfair practice. In addition, taking into account the architecture of the digital environment, profiling techniques, differential pricing policies, dark pattern designs and other similar factors, we can conclude that the average consumer's standard is lower in the digital environment and, at the same time, the number of elements that the court must take into account when making its assessment is higher.

The usefulness of the standard goes beyond helping authorities or courts to enforce consumer protection policies, it also has legislative relevance for the development of these policies themselves [23]. For example, if we were to consider a hypothetical statistic in which 8 out of 10 young people aged between 18 and 21 who have a credit card end up taking on excessive debt, thus engaging in financially irresponsible behaviours, the legislator could restrict access to such products up to a certain age, just as in the case of the sale of alcoholic beverages to minors, which is prohibited.

4 Conclusions

The EU is trying to update consumer protection legislation to make e-commerce and online navigations a safe option for all internet users, tendency proved by the Omnibus Directive, the draft of a Electronic Communications Regulation and the new regulations on digital services and markets. From 02 May 2023, Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act - DMA) became applicable and aims to better control the large platforms that support the digital infrastructure and the space where traders meet consumers, such as Google. For example, DMA states that any consumer profiling techniques these big platforms apply to their core platform services will be subject to independent audit and transparency obligations in relation to these techniques. This aims to allow the users to act in an informed way when engaging in certain economic behaviour.

However, there are currently two certainties. The first is that the digital sector is specifically designed to attract and hold the attention of the consumer, the digital alter ego is traded between different platforms to identify the consumer’s profile and to provide advertising material of interest. These techniques, practised within certain limits, based on legal grounds, and governed by principles such as transparency, have no harmful effects and enhance the digital consumer experience. However, for those situations where the digital architecture generates unfair commercial practices based on the vulnerabilities of internet users, remedies must be put in place. The second certainty is that in order to remove an unfair practice, the judge (and the legislator, when crafting certain policies) must determine the behaviour (the reaction) of the average consumer - a person who is ‘reasonably critical,
aware and knowledgeable in his or her behaviour in the marketplace’ [18]. Therefore, in order to be able to provide a protection at least as robust as in the offline environment, the assessor must also consider certain subtle characteristics of the digital environment, understand the algorithms behind the operation of certain platforms and must consider the collection and processing of socio-demographic and psychological characteristics of the users. For example, a gambling platform identifies the interest, weakness and/or history of a loyal player and displays an offer presented as exclusive to him/her and whose validity is limited to the next two hours. When assessing the aggressiveness of such a practice, consumer profiling should also be considered, as this impacts the standard used. Thus, the wording of Art. 5(3) UCPD regarding vulnerable subjects should not be restricted to intrinsic characteristics such as age, but all dimensions of this notion should be recognised.

From the perspective of equality of persons before the law, consideration could be given to extending the notion of consumer to those groups of natural persons who act jointly for a purpose which is not related to their professional, commercial, industrial or craft activity, such as a condominio. The fact that Member States have the power to make such an extension in their national law may lead to situations where an Italian co-owner is exempted from paying excessive penalties because the clause establishing them was unfair and has been invalidated, whereas a co-owner from another Member State will be obliged to pay those penalties because the contracting was done through the administrator of the association, so that the condition of being a natural person is not met and the consumer protection legislation cannot apply.

In order to ensure the greatest possible degree of harmonisation, EU legislation should supplement the annexes to the UCPD by including more unfair digital practices. In this way, the assessor will be relieved of having to identify the reaction of the average consumer, which can imply analysing subtle factors and can be done differently within the Member States. For other practices, the law should provide clear criteria to be applied by all judges in all Member States. Such approaches are not only to the benefit of the consumer, but also to the benefit of traders who should be subject to as few differences in standards as possible within the EU.

References
1. Court of Justice of the European Union, Advocate General’s Opinion, Case C-110/14, Horațiu Ovidiu Costea v. SC Volksbank România SA
2. N. Helberger, O. Lynskey, H. Micklitz et. al., EU Consumer Protection 2.0. Structural asymmetries in digital consumer markets, A joint report from research conducted under the EUCP2.0 project (2021)
9. Court of Justice of the European Union, Judgement of 25.11.2021, Case C-102/20 StWL v. eprimo GmbH
10. Court of Justice of the European Union, Judgement of 01.10.2019, Case C-673/17, Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband v. Planet49 GmbH
11. European Data Protection Board, Guidelines 03/2022 on Dark Patterns in Social Media Platform Interfaces: How to Recognise and Avoid them (2022)
15. Constitutional Court of Romania, Decision 360/2013 on the rejection of the exception of unconstitutionality of the provisions of Article 2 of Law 193/2000 on unfair terms in contracts concluded between traders and consumers
16. Court of Justice of the European Union, Judgement of 02.04.2020, Case C-329/19, Condominio di Milano via Meda v. Eurothermo SpA
21. Court of Justice of the European Union, Judgement of 23.10.2002, Case T-6/01, Matratzen Concord v OHIM — Hukla Germany
22. Court of Justice of the European Union, Judgement of 26.10.2016, Case C-611/14, Criminal proceedings against Canal Digital Danmark A/S