Special Issue: Should Data Drive Private Law

Technology and Regulation

Fostering Consumer Protection In The Granular Market:

The Role Of Rules On Consent, Misrepresentation And Fraud In Regulating Personalized Practices

Antonio Davola*

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a.davola@uva.nl

Companies increasingly employ data-driven technologies for the allocation and display of offers and advertising based on detailed consumer monitoring. Consumers may fail to recognize the manipulation of their choices if they are unaware of the exploitation of their habits, mental models, and biases to influence their behaviour. Companies may make use of consumers' cognitive limitations and individual frailties to their disadvantage. Against this backdrop, private law rules could provide meaningful normative guidance in regulating personalized commercial practices.

The article examines the role and characteristics of provisions regulating defective consent and misrepresentation to evaluate whether these rules could incorporate emerging findings on personalized practices and operate as viable instruments for the modernization of consumer protection.

1. Personalized practices in the digital environment

It is commonly understood that, in recent years, online commerce has experienced a profound technological revolution, gradually shifting towards the intensive use of automated data-driven technologies for the allocation and display of offers and advertising for consumers. The ceaseless introduction of tracking and targeting technologies that leverage consumer data in order to personalize the marketing experience has been a defining feature of the impressive growth of online markets.[1] The ability to scrutinize the interests, motivations and needs of consumers through profiling algorithms is at the very core of new modes of creating and supplying products and services in a digital environment.[2]

These innovations provide companies with new ways to gain market advantage. By connecting and cross-examining data obtained from consumers through different sources –e.g. the use of information and communications technologies (ICT), technologies for the internet of things (IoT), and even merely monitoring online activity – companies can intensely scrutinize their (actual and potential) customers and even manage to induce their emotions through affective computing analysis, in order to provide highly personalized offers.[3] This process goes under the general name of 'customerization' and combines both operational and interactional flexibility to tailor not only the product offered, but every aspect of the consumption experience. Online customerization affects both product components (namely their attributes and benefits) and their presentation, choice, and delivery, which in turn impacts the general interaction between the communicator (the seller) and the communicant (i.e. the consumer).[4]

Tailored and targeted commercial techniques constitute a heterogeneous phenomenon and can be based on a vast set of theoretical and methodological underpinnings. Well-known strategies incorporate ex multis semantics and data mining stemming from artificial intelligence,[5] auction theory, and social network and neuroscientific analyses.[6] In addition, they rely on self-tuning algorithms, intent data and immersive multimedia[7] to reach different degrees of personaliza-

1 Alan Schwartz, 'Legal Implications of Imperfect Information in Consumer Markets' (2004) 151(1) *Journal of Institutional and Theoretical Economics* 31, 38.

2 See Irina Domurath, 'Technological Totalitarianism: Data, Consumer Profiling, and the Law' in Lucila de Almeida, Marta Cantero Gamito, Mateja Durovic and Kai Purnhagen (eds.) *The Transformation of Economic Law: Essays in Honour of Hans-W. Micklitz* (Hart 2019), 66: 'Profiling is a term from information science that refers to the construction and application of user profiles through computerised data analysis, increasingly involving the processing of large quantities of aggregated data. During the profiling process, data is analysed and evaluated with the help of algorithms or heuristics, and the constructed profiles are applied as a basis for a decision-making'.

3 Rafael Calvo, Sidney D'Mello, Jonathan Gratch and Arvid Kappas (eds.), *The Oxford Handbook of Affective Computing*, (OUP 2014); see also Lee Jonathan Steen and Robert Morris Kim, 'Affective Computing: Invasive Technology and Legal Considerations to Protect Consumers' (2010) XI(1) *Issues in Information Systems*.

4 *Ex multis* Soontae An, Hannah Kang and Hyun Seung Jin, 'Self-Regulation for Online Behavioral Advertising (OBA): Analysis of OBA Notices' (2018) 24 *Journal of Promotion Management* 270-291.

5 Bernhard Anrig, Will Browne and Mark Gasson, 'The Role of Algorithms in Profiling' in Mireille Hildebrandt and Serge Gutwirth (eds.) *Profiling the European Citizen – Cross-Disciplinary Perspectives* (Dordrecht 2018).

6 Fabiana Di Porto and Mariateresa Maggiolino, 'Algorithmic Information Disclosure by Regulators and Competition Authorities' (2019) *Global Jurist*.

7 Natali Helberger, 'Profiling and targeting consumers in the Internet of

* Antonio Davolo Ph.D. (Sant'Anna School), LL.M. (YLS), is a Postdoctoral Fellow (Luiss), Marie Curie Research Fellow, University of Amsterdam, Fair Personalization Project.

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tion. Such methods have been categorized by scholars under different names, referring inter alia to online behavioural advertising (or OBA),[8] psychological targeting,[9] personalized commercial practices,[10] and micro-targeting.[11]

Amongst legal scholars, growing debate has subsequently arisen on whether and how these techniques should be regulated under the European framework, in reference to different bodies of law – e.g. data protection and consumer law - depending on the specific risk considered.[12] Yet little attention has been devoted to investigating the role that private law can play as a resource in protecting individuals against the threats that highly personalized practices may introduce. In contrast, this article argues that the sector-specific regulations frequently evoked as a means to respond to the personalization of product offers and advertising present shortcomings in term of dealing with the systemic effects of this phenomenon, and that private law rules can constitute an effective resource to enhance consumer protection. In particular, the argument is made that rules on defective consent can provide a valid resource to monitor, scrutinize and correct possible adverse effects arising from personalized techniques.

It should be noted that targeted commercial practices, and customerization more generally, are supposed to introduce significant benefits for all participants in the market ecosystem. From a theoretical perspective, the ability to accurately profile customers improves the market's capacity to match buyers and sellers, therefore lowering both search and transaction costs for products and services.[13] In addition, gathering data from consumers and using consumers as 'informative agents' supports the provision of free online content for the public, in accordance with the paradigm of data as counter-performance.[14] On the whole, it is therefore conventionally acknowledged that a virtuous employment of targeting processes is likely to stimulate economic growth and welfare in the digital sector.[15]

At the same time, the uncontrolled use of consumer data to elaborate predictive and explicit profiles,[16] i.e. used to develop targeted strategies, is likely to lead to manipulations in both quantitative and qualitative terms. On the one hand, this might be the result of a company taking advantage of the asymmetric information that emerges from the elaboration of data gathered for customer classification and profiling – and thereby favouring its resulting traditional market failures; on the other hand, deep knowledge of consumer characteristics might make it possible to influence their choices and exploit their cognitive limits and biases,[17] causing 'behavioural market failures'.[18] In such cases, consumers exposed to tailored commercial offers could end up being unable to recognize the artificial modulation of their set of choices and, possibly, the means available to oppose it, because they are unaware of the way products, offers, and advertisements use their habits, mental models, and heuristics to influence their behaviour.

The result of these and related trends is that, via personalized practices, firms are not only capable of taking advantage of their general understanding of consumers' cognitive limitations but are also able to reveal, and even trigger, the frailties of consumers at an individual level, thus granularizing their business approach depending on the counterpart's characteristics.[19] At the same time, profiles can be used to offer products to specific target groups (or individuals) only, thereby excluding other consumers from access and purchase – or subjecting them to different conditions.[20]

Due to the inner ambiguity of its uses, the growth of profiling as a standard mode of business operation[21] has been viewed with suspicion by scholars and regulators in light of the development of the Digital Services Act package,[22] with some parties calling for the introduction of stringent regulations (that could ultimately favour less intrusive forms of advertising that do not require extensive tracking of user interaction with content)[23] and even promoting a ban on such practices.[24] Currently, though, no explicit option in favor of general

Things – A new challenge for consumer law' in Reiner Schulze and Dirk Staudenmayer (eds.) *Digital Revolution: Challenges for Contract Law in Practice* (Nomos 2016), 135-161.

8 Frederik Zuiderveen Borgesius, 'Online behavioral advertising: a literature review and a research agenda' (2017) 46 *J Advert* 383-376; Sandra Wachter, 'Affinity profiling and discrimination by association in online behavioural advertising' (2020) 35(2) *Berkeley Tech Law J;* Steven C. Bennet, 'Regulating online behavioral advertising' (2010) 44 *J Marshall Rev* 899.

9 Sandra C. Matz et al., 'Psychological targeting as an effective approach to digital mass persuasion' (2017) 114 *Proc Natl Acad Sci* 12714-12719.

10 Przemysław Pałka, Agnieszka Jabłonowska, Hans-W. Micklitz and Giovanni Sartor, 'Before machines consume the consumers. High-Level Takeaways from the ARTSY Project' (2018) *EUI Working Papers*, LAW 2018/12 2.

11 Martin Ebers, 'Beeinflussung und Manipulation von Kunden durch „Behavioral Microtargeting'' (2018) *MMR* 7.

12 See *infra* Section 3.

13 Alisa Frik, Amelia Haviland, Alessandro Acquisti, 'The Impact of Ad-Blockers on Product Search and Purchase Behavior: A Lab Experiment' (2020) *USENIX Security Symposium* 163-179.

14 The notion of 'informative agents' was developed by Luciano Floridi, *The Fourth Revolution: How the Infosphere is Reshaping Human Reality* (OUP 2014), 77. See also, for an analysis of data as counter-performance, Sebastian Lohsse, Reiner Schulze and Dirk Staudenmayer (eds.) *Data As Counter-Performance - Contract Law 2.0?* (Hart 2020).

15 Bart Custers, 'Data Dilemmas in the Information Society: Introduction and Overview', in Bart Custers, Toon Calders, Tal Zarsky and Bart Schermer (eds.), *Discrimination and Privacy in the Information Society: Data Mining and Profiling in Large Databases* (Springer 2013), 14.

16 See Article 29 Data Protection Working Party, 'Opinion 2/2010 on online behavioural advertising' (2010) 00909/10/EN WP 171 5 http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2010/wp171_en.pdf.

17 Ryan Calo, 'Digital Market Manipulation' (2013) 82 *George Wash Law Rev* 995.

18 Oren Bar-Gill, *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets* (OUP 2012) 2-4; Cass R. Sunstein, 'The Storrs Lectures: Behavioral Economics and Paternalism (2013) 122 *The Yale Law Journal* 1834.

19 Hans W. Micklitz, 'De- or Re-typification through Big Data Analytics? The Case of Consumer Law' in Christoph Busch and Alberto De Franceschi (eds.) *Algorithmic Regulation and Personalized Law. A Handbook* (Hart 2020); also, Rossella Incadorna and Cristina Poncibò 'The average consumer, the unfair commercial practice directive, and the cognitive revolution' (2007) 30 *J of Cons Policy* 1 21-38.

20 Wachter (n 8), 5.

21 Meike Kamp, Barbara Körffer and Martin Meints, 'Profiling of Customers and Consumers - Customer Loyalty Programmes and Scoring Practices', in Mireille Hildebrandt and Serge Gutwirth (eds.) *Profiling the European Citizen* (n. 8) 201.

22 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 (DSA) and 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 (DMA), https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN.

23 See EU Parliament Committee on the Internal Market and Consumer Protection, 'Report with recommendations to the Commission on the Digital Services Act: Improving the functioning of the Single Market' 2020/2018(INL) (2020) https://www.europarl.europa.eu/doceo/document/A-9-2020-0181_EN.html.

24 EU Parliament Committee on Legal Affairs, 'Report with recommendations to the Commission on a Digital Services Act: adapting commercial and civil law rules for commercial entities operating online' 2020/2019(INL) (2020) https://www.europarl.europa.eu/doceo/document/A-9-2020-0177_EN.html: the committee 'invites the Commission to assess options for regulating targeted advertising, including a phase-out leading to a prohibition'.

prohibition is present in the proposal, and targeted advertising is addressed only by means of transparency duties. In particular, online platforms that display advertising are required to make a repository publicly available (through application programming interfaces) that contains information on the aggregate numbers for groups of recipients to whom a personalised advertisement is specifically targeted.[25] The proposal is expected to undergo further modifications and a margin of improvement is definitely present. However, the option of introducing a veto on targeted advertising appears neither feasible nor advisable if we consider – along with the risk of their potential misuse – the abovementioned counterbalancing benefits of these technologies in terms of consumer empowerment and the promotion of prosumerism.[26]

A critical approach to the regulation of targeted practices shall, as a consequence, start from the risks that these techniques pose for consumers. Given this background, the paper investigates the role and characteristics of private law rules regulating consent and misrepresentation as resources to incorporate emerging findings on personalized practices, and evaluates their role as viable instruments for the modernization of consumer protection.

Accordingly, the article first provides an overview of the risks arising from targeted practices, examining them using the common conceptual framework of discrimination (Section 2). By distinguishing different discriminatory harms arising from these techniques, it is possible to highlight the limits of the different regulations that legal scholars have investigated as prospective tools for the phenomenon. Particular attention is devoted to exposing the shortcomings of rules on data protection, competition law, and consumer protection when addressing personalized practices, especially where the problem of reduced consumer self-determination is considered (Section 3).

Following on these considerations, the role of European private law and its interaction with consumer protection is then investigated. This paper argues that provisions on defective consent might constitute a viable regulatory solution, providing a tool to enhance consumer protection and promote substantive social justice in personalized interactions (Section 4). Building on the model rules from the Principles of European Contract Law and in the Draft Common Frame of Reference, the article highlights the view that, conceptually, Member States' rules on defective consent share conceptual ground with the main existing regulatory solutions usually considered when attempting to tackle the risks around tailored commercial practices. In addition, these rules overcome the current limits faced by each of them and therefore can providing a potentially more effective resource for dealing with the phenomenon.

Lastly, the paper offers some considerations regarding further advisable developments in the European framework (Section 5). In particular, a major obstacle is found in the persisting tensions between national and EU principles of contract law. The need for further harmonisation of European principles of contract law is identified as a desirable means to reach a common understanding of social justice in Europe as well as a way to attenuate, integrate and correct adverse and discriminatory effects arising from targeted practices.

25 See DSA Article 30 'Additional online advertising transparency'.

26 See *inter alia* Christian Thorun and Jane Diels, 'Consumer Protection Technologies: An Investigation into the Potentials of New Digital Technologies for Consumer Policy' (2020) 43 *J of Cons Policy* 178; Veronica Marotta, Kaifu Zhang and Alessandro Acquisti, 'The Welfare Impact of Targeted Advertising' (2017) https://ssrn.com/abstract=2951322 or http://dx.doi.org/10.2139/ssrn.2951322.

2. Targeted practices, discrimination and self-determination

Targeted practices raise a plurality of legal challenges, undermining different rights to which individuals are entitled in the digital environment. In the recent literature addressing this topic, risks have often been grouped under the general umbrella notion of 'discrimination.'[27] In this context – and in contrast with its sector-specific meaning in non-discrimination law[28] – the term discrimination is employed according to its descriptive definition, building on its etymologic roots[29] and without implying a structural relationship with protected factors.[30] In spite of using a unitary concept, however, discriminatory effects can be expressed in (at least) three different forms, and these have been unevenly examined in scholarly debate.

A first – and extensively investigated – form of discrimination arising from targeted commercial practices involves the possible exploitation of consumers' cognitive biases[31] and heuristics to exercise undue influence[32] and trigger desired behaviours in the transaction process.[33] In these cases, profiling is implemented to take advantage

27 *Ex multis* Angelisa Plane, Elissa Redmiles, Michelle Mazurek and Michael Carl Tschantz, 'Exploring User Perceptions of Discrimination in Online Targeted Advertising' (2017) *Proceedings of the 26th USENIX Security Symposium*; Wachter (n 8); Nizan Geslevich Packin and Yafit Lev Aretz, 'Social Credit And The Right To Be Unnetworked' (2016) 2 *Columbia Business Law Review*; Solon Barocas and Andrew Selbst 'Big data's disparate impact (2016) 104 *California Law Rev* 671; Pauline Kim, Data-driven discrimination at work (2016) 58 *Wm & Mary L Rev*, 857; Joshua Kroll, Solon Barocas, Edward Feltenm, Joel R Reidenberg, David Robinson and Harlan Yu, 'Accountable algorithms' (2016) 165 *U Pa L Rev* 633; Frank Pasquale and Danielle Citron 'Promoting Innovation While Preventing Discrimination: Policy Goals for the Scored Society' (2014) 89 *Washington Law Review* 1413; John Wihbey, 'The possibilities of digital discrimination: Research on e-commerce, algorithms and big data' (2015) *Journalist Resource* https://journalistsresource.org/studies/society/internet/possibilities-online-racial-discrimination-research-airbnb.

28 Defining cases in which a decision occurs on the sole basis of the parties' protected factors, such as sex, race, ethnic origin, disabilities, religion or belief, age and sexual orientation; see Sandra Wachter, Brent Mittelstadt and Chris Russel, 'Why Fairness Cannot Be Automated: Bridging the Gap Between EU Non-Discrimination Law and AI', *Computer Law & Security Review* 41 (2020) 105567 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3547922. In this sense, unlawful discrimination can also emerge as the result of personalization processes exploiting protected factors – e.g. gender-based distinctions. See Martin Ebers, 'Regulating AI and Robotics: Ethical and Legal Challenges' in Martin Ebers and Susana Navas (eds.) *Algorithms and the Law* (CUP 2020) 76.

29 The notion comes from the Latin term *discrimen* (distinction) and from the verb *discernere* (distinguish).

30 See Andrew Altman, 'Discrimination' (2020) *Stanford Encyclopedia of Philosophy*.

31 Ariel Ezrachi and Maurice E. Stucke 'The rise of behavioural discrimination' (2016) 37(12) *European Competition Law Review* 485-492; John Hanson and Douglas Kysar, 'Taking Behavioralism Seriously: Some Evidence of Market Manipulation' (1999) 112 *Harvard Law Review*, 1447.

32 *Ex multis* Martha Chamallas, 'The Disappearing Consumer, Cognitive Bias and Tort Law' (2014) 6(1) *Roger Williams University Law Review* 34; Thomas Gilovich, Dale Griffin and Daniel Kahneman, *Heuristics and biases: The psychology of intuitive judgment*, (CUP 2002); Christine Jolls and Cass Sunstein, 'Debiasing Through Law' (2006) 35 *Journal of Legal Studies*; Govind Persad, 'When, and How, Should Cognitive Bias Matter to Law?' (2014) 32 *Minnesota Journal of Law and Inequality* 103.

33 Giovanni Sartor, 'New aspects and challenges in consumer protection. Digital services and artificial intelligence' (2020) EU Policy Department for Economic, Scientific and Quality of Life Policies studies https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648790/IPOL_STU(2020)648790_EN.pdf; see also Agnieszka Jabłonowska, Maciej Kuziemski, Anna Maria Nowak, Hans-Wolfgang Micklitz, Przemyslaw Palka and Giovanni Sartor, 'Consumer law and artificial intelligence: challenges to the EU consumer law and policy stemming from the business' use of artificial intelligence: final report of the ARTSY project (2018) *Working Pa-*

of cognitive limitations characterizing a target group[34] in order to stimulate them to purchase products or services they would otherwise not be willing to acquire (or, at least, that they would shop for under different conditions)[35] or to diversify prices for products and services according to individuals' willingness to pay.[36] Although perfect price discrimination is often thought to be welfare-enhancing by making it possible to achieve efficient outcomes in the distribution of resources, third-degree price discrimination – i.e. charging different segments of the market different prices for the same product, directly linking prices to consumers' willingness and ability to pay – based on exogenous identifying features is also likely to lower consumer welfare by favouring companies' extraction of information rents.[37] In addition, these risks are further exacerbated in concentrated markets such as that of the IoT, with GAFAM[38] operating as oligopolists across industries.[39]

A second established narrative investigates targeted commercial practices as a potential threat to privacy and data protection rules. From this perspective, attention has been devoted to investigating the potential use of sensitive data encompassing protected factors to provide personalized services (both directly and indirectly, or by association),[40] with major consequences in terms of disparate impact.[41] Profiling has been under intense scrutiny by privacy advocates, as well as being normatively addressed by the General Data Protection Regulation (GDPR).[42] Moreover, various proposals have been formulated by scholars in order to regulate this activity[43] and ensure that consumers are able to protect their privacy in the automated processing of their data by digital platforms.[44] With regard to the potential discriminatory effects of profiling, Art. 22 GDPR shall be read in conjunction with the general prohibition regarding special categories of personal data in Art. 9 GDPR, which regulates the processing of personal data items that reveal protected factors and mandates human supervision, provided the exempting conditions set out in the provision do not apply.

Lastly, a third strand of research exists. Namely, personalized commercial practices can be analysed as techniques that affect a consumer's freedom of choice by artificially modulating the sets of products offered on the market; consequently, they can operate as tools for the indirect reduction of consumer autonomy. It has been empirically observed that personalization affects clickthrough rates, and exposure to tailored offers increases user propensity to conduct both active and passive searches on advertiser webpages. Nonetheless, while the impact of these techniques on acquisition rates has been measured by looking at metrics such as purchase probabilities, sales, and online searches,[45] little attention has been devoted to the analysis of the manner in which personalized and behavioural practices undermine self-determination in business-to-consumer transactions.[46]

With personalized practices, consumers exposed to them only see a minor (individually created) subset within the whole assortment of products of the same kind that are present on the market; in addition,

per, EUI LAW, 2018/11 https://cadmus.eui.eu/handle/1814/57484; Christopher Burr and Nello Cristianini, 'Can machines read our mind?' (2019) 29 *Minds and machines* 461-494. It should be noted that critiques of behavioral manipulation are generally value-neutral, meaning that subliminal influence is considered harmful, even when it is meant to achieve legitimate ends: see Cass Sunstein and Lucia Reisch, 'A Bill of Rights for Nudging' (2019) 8(3) *Journal of European Consumer and Market Law* 95.

34 Raffaele Caterina, 'Psicologia della decisione e tutela del consumatore' (2012) 1 *Analisi Giuridica dell'Economia* 2-18; 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), 209-234; Hans-Wolfgang Micklitz, Lucia Reisch and Korlenia Hagen, 'An Introduction to the Special Issue on 'Behavioural Economics, Consumer Policy, and Consumer Law' (2011) 34 *Journal of Consumer Policy* 271.

35 For a general overview, see Sophie Bienenstock, 'Consumer Bias', in Alain Marciano and Giovanni Battista Ramello (eds.) *Encyclopedia of Law and Economics* (Springer 2018).

36 *Ex multis* Inge Graef, 'Algorithms and fairness: what role for competition law in targeting price discrimination towards end consumers?' (2018) 24(3) *Columbia Journal of European Law* 541-559; Ariel Ezrachi and Maurice Stucke, *Virtual Competition. The Promise and Perils of the Algorithm-Driven Economy* (HUP 2016); Mariateresa Maggiolino, 'Personalized prices in European competition law' (2017) *Bocconi Legal Studies Research Paper* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2984840.17; Antonio Davola, Technological innovation in creditworthiness assessment (2019) 10 Open Review of Management, Banking and Finance. This phenomenon is often given the name 'behavioral exploitation' as well. See Peter Rott, 'A Consumer Perspective on Algorithms', in Lucila de Almeida, Marta Cantero Gamito, Mateja Durovic and Kai Purnhagen (eds.) *The Transformation of Economic Law: Essays in Honour of Hans-W. Micklitz* (Hart 2019), 43-64, 46; Salil Mehra, 'Algorithmic Competition, Collusion, and Price Discrimination' in Woodrow Barfield (ed.), *The Cambridge Handbook of the Law of Algorithms* (CUP 2020), 199-208.

37 *Ex multis* see Gerrit de Geest, *Rents: How Marketing Causes Inequality* (Beccaria 2018) *passim*.

38 GAFAM stands for Google, Apple, Facebook, Amazon, and Microsoft.

39 See Nicolas Petit, *Big tech and the digital economy: The Moligopoly scenario* (OUP 2020).

40 Domurath (n 2), 86; Catalina-Adriana Ivanus, 'Discrimination by Association in European Law' (2013) 2 *Persp Bus LJ* 117.

41 Frederik Zuiderveen Borgesius, 'Personal data processing for behavioural targeting: which legal basis?' (2015) 5 *Int Data Priv Law* 163-176; Chris Hoofnagle, Ashkan Soltani, Nathan Good, Dietrich James Wambach and Mika D Ayenson, 'Behavioral Advertising: The Offer You Cannot Refuse' (2012) 6 *Harvard Law & Policy Review* 273; Maja Brkan, 'Do Algorithms Rule the World? Algorithmic Decision-Making in the Framework of the GDPR and Beyond' (2019) 27(2) *International Journal of Law and Information Technology* 91–121; Barocas and Selbst (n 27); Natalia Criado and Jose M. Such, 'Digital Discrimination', in Karen Yeung and Martin Lodge (eds.), *Algorithmic Regulation* (OUP 2019), 87.

42 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 [2016] OJ L 119 (GDPR). In particular, see art. 22.

43 See e.g. Christoph Busch and Alberto De Franceschi 'Granular Legal Norms: Big Data and the Personalization of Private Law' in Vanessa Mak, Eric Tjong Thin Tai and Anna Berlee (eds.) *Research Handbook on Data Science and Law* (Elgar 2018); Margot E. Kaminski and Gianclaudio Malgieri, 'Algorithmic impact assessments under the GDPR: producing multi-layered explanations' (2020) *International Data Privacy Law*; Mireille Hildebrandt, 'Profiling and the Rule of Law' (2009) 1 *Identity Inf Soc* 64.

44 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) *International Data Privacy Law*; 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*; Gianclaudio Malgieri and Giovanni Comandé, 'Why a Right to Legibility of Automated Decision-Making Exists in the General Data Protection Regulation' (2017) 7(3) *International Data Privacy Law*; Margot E. Kaminski, 'The Right to Explanation, Explained' (2019) 34(1) *Berkeley Technology Law Journal*, 15; Andrew Selbst and Julia Powles, 'Meaningful Information and the Right to Explanation' (2017) 7(4) *International Data Privacy Law* 233-242; Alessandro Mantelero, ' From Group Privacy to Collective Privacy: Towards a New Dimension of Privacy and Data Protection in the Big Data Era (2017) *Group Privacy* 139-158.

45 Veronica Marotta, Vibhanshu Abhishek and Alessandro Acquisti, 'Online Tracking and Publishers Revenues: An Empirical Analysis' (2019) https://www.semanticscholar.org/paper/Online-Tracking-and-Publishers-Revenues%3A-An-Marotta/bee63f4551c7b6a5a1f07357734a81eab2fec919.

46 See Arlen Moller, Richard Ryan and Edward Deci, 'Self-Determination Theory and Public Policy: Improving the Quality of Consumer Decisions without using Coercion' (2006) 25(1) *Journal of Public Policy & Marketing* 104-116; also Fabrizio Esposito, 'Conceptual foundations for a European Consumer Law and Behavioural Sciences Scholarship' in Hans-W. Micklitz, Anne-Lise Sibony, Fabrizio Esposito (eds.) *Research Handbook in Consumer Law* (Elgar 2018).

they attribute to that set a specific saliency. Hence consumers are deprived of general understanding regarding the state of the market and the behaviour of their peers, which is pivotal for them to develop purchase preferences consciously and autonomously.[47] Furthermore, this effect is exacerbated by the frequent inability of consumers to recognize the factitious nature of what they find online or understand the way profiling algorithms can craft what is offered to them. Frequently, this form of discrimination has been investigated as a form of manipulation, or nudge,[48] and therefore it could be argued prima facie that it actually constitutes an expression of the first form described above. Yet there is a profound difference. Whereas manipulation involves an active (or sometimes malicious) intent to direct consumers towards a certain product or service, the reduction of individual perception of the true state of the market emerges as an inherent consequence of profiling. In this sense, the threat to autonomy also differs from the (previously examined) exploitation of consumer bias, operating as an exogenous effect of pervasive market segmentation rather than as an effect of individual heuristics.

In conclusion, oftentimes – and regardless of the specific kind of discrimination addressed – tailored techniques have been investigated from the common procedural standpoint of explainability. This perspective is focused on how to empower consumers and enable them to inspect and contrast incorrect decisions caused by software arbitrariness in conducting the profiling process, or by errors present in the dataset (this aspect is often traced back to debate regarding the black-box problem)[49] when algorithms are used by private subjects and, especially, public administration.[50] Although a procedural perspective proves to be pivotal in ensuring the effectiveness of protection, an understanding of substantive risks related to the formation of the parties' free will when personalized practices are implemented, in a proactive perspective, is equally (or even more) relevant.

3. A primer on attempts to regulate algorithmic discrimination

As a corollary of the extensive investigation of the potential discriminatory effects embedded in targeting strategies, European experts attempted to identify de iure condito regulatory responses that might prove effective in enhancing consumer protection in the digital environment. In particular, attention was devoted to the role of data protection, antitrust rules, and consumer law. None of these solutions, however, seems conclusive or robust enough to encompass the multifaceted risks that personalized commercial practices entail. Specifically, extensive research has been carried out regarding the capability of the General Data Protection Regulation (GDPR) to provide effective regulation of the data management and processing methods implemented in profiling algorithms.

Privacy and data protection scholars have called for a functional interpretation of GDPR-related user rights (e.g. rights related to individual automated decision-making, explanation, and the right to access) as a tool to disentangle the computerized process and equip data subjects with the concrete ability to infer information regarding the use of their data and its impact on the commercial offerings directed at them. Yet, as was previously mentioned, this perspective focuses primarily on the governance of data processing and acquisition. This approach proves to be inherently incomplete, since important values other than consumer privacy are present and significant.[51] Indeed, even though data protection rules properly regulate the acquisition and processing of users' personal information by data controllers and processors – and, in this sense, operate as an enabling factor for consumer protection[52] – they nevertheless provide only marginal protection for other individual rights and freedoms such as personal autonomy and self-determination. This happens, first and foremost, because the scope of data protection law is limited to personal data and, therefore, personalized practices are not bound to GDPR rules as long as users' data can be anonymized or is non-personal. In addition, the GDPR tackles information asymmetries and privacy risks by empowering consumers regarding which, how, and for what purpose data is acquired and processed; it does not, however, address the systemic effects that profiling likely introduces in terms of individual self-determination and the ability to develop purchase preferences. Protecting the structural state of the market is, indeed, beyond the regulation's scope. Lastly – and acknowledging the fact significant efforts have been made to introduce privacy-by-design solutions to

47 In addition, it has been observed that impairing consumers' sense of autonomy when making choices affects their well-being, diminishing their perception of being in control of their choices. See Quentin André, Ziv Carmon, Klaus Wertenbroch, Alia Crum, Douglas Frank, William Goldstein, Joel Huber, Leaf van Boven, Bernd Weber and Haiyang Yang, 'Consumer Choice and Autonomy in the Age of Artificial Intelligence and Big Data' (2018) 5 *Cust Need and Solut* 28–37.

48 Calo (n 17); Karen Yeung, ''Hypernudge': Big data as a mode of regulation by design' (2018) 20 *Communication and Society* 118-136.

49 Frank Pasquale, The *Black Box Society: The Secret Algorithms That Control Money and Information* (HUP 2015); Sandra Wachter, Brent Mittelstadt and Chris Russel, 'Counterfactual Explanations Without Opening the Black Box: Automated Decisions and the GDPR' (2018) 31(2) *Harvard Journal of Law & Technology*; Matthias Leese, 'The New Profiling: Algorithms, Black Boxes, and the Failure of Anti-Discriminatory Safeguards in the European Union' (2014) 45 *Security Dialogue* 5. On explainability in general, see *inter alia* Frank Pasquale, 'Toward a Fourth Law of Robotics: Preserving Attribution, Responsibility, and Explainability in an Algorithmic Society' (2017) 78(5) *Ohio State Law Journal* 1243-1255; Jack Balkin 'The Three Laws of Robotics in the Age of Big Data' (2017) ibidem 1217-1241; Bryce Goodman and Seth Flaxman, 'European Union regulations on algorithmic decision making and a 'right to explanation'' (2017) 38(3) *AI Magazine* 76–99; Andrew Selbst and Julia Powles, 'Meaningful information and the right to explanation', (2017) 7(4) *International Data Privacy Law* 233–242.

50 As regards the latter aspect, Member State courts are increasingly developing principles that could enhance transparency when using automated systems in executing administrative activities. See e.g. in Italy Consiglio di Stato, judgment of 8 April 2019, n. 2270; Michael W Monterossi, 'Algorithmic Decisions and Transparency: Designing Remedies in View of the Principle of Accountability' (2019) 5(2) *Italian Law Journal* 711-730. More generally, see Hans Micklitz and Przemyslaw Palka, 'Algorithms in the Service of the Civil Society' (2019) 8(1) *Journal of European Consumer and Market Law* 2.

51 See Jabłonowska et al. (n 33). It is not by chance that, in recent years, data protection scholars have begun to reconcile different rights involved in profiling for commercial purposes under the common framework of the right to information self-determination (see, critically, Bert-Jaap Koops, 'The Trouble with European Data Protection Law' (2014) 4(4) *International Data Privacy Law*, 250-261), expanding the basis provided by Art. 8 of the EU Charter of Fundamental Rights and advocating in favour of a wider role for data protection law in informing consumer rights. For a further exploration of the scope and meaning of Art. 8, Case C-40/17 Fashion ID GmBH & Co KG v Verbraucherzentrale NRW eV. [2019] ECLI:EU:C:2019:629. See also Heiko Richter, 'The Power Paradigm in Private Law. Towards a Holistic Regulation of Personal Data', in Mor Bakhoum, Beatriz Conde Gallego, Mark-Oliver Mackenrodt, GintarėSurblytėNamavičienė(eds.), *Personal Data in Competition, Consumer Protection and Intellectual Property Law* (Springer 2018) 565; Helena Ursic, 'The Failure of Control Rights in the Big Data Era: Does a Holistic Approach Offer a Solution?' (2018) *ibidem*, 55.

52 Manon Oostveen and Kristina Irion, 'The Golden Age of Personal Data: How to Regulate an Enabling Fundamental Right?' in Mor Bakhoum, Beatriz Conde Gallego, Mark-Oliver Mackenrodt, Gintar SurblytėNamavičienė (eds.) *Personal Data in Competition, Consumer Protection and Intellectual Property Law* (Springer 2018), 8.

make algorithms more responsible[53] – provisions in the GDPR are still heavily reliant on disclosure duties as the main strategy to empower consumers and ensure conscious consent. This occurs both in cases where personal data is collected directly from data subjects and when it is obtained through third parties.[54] Yet, a vast number of empirical studies have warned against the actual efficacy of this tool and have raised doubts regarding the likelihood it could improve decision-making, since consumers systematically tend not to read privacy policies or tend to misunderstand them.[55]

Related to the assumption that the heart of the problem lies in the characteristics of data-driven network architecture, there is also growing interest in competition law as a tool to tackle the distortions caused by personalized practices, in order to promote the establishment of fundamental rights in the European framework. This tendency has developed steadily, along with increasing efforts by public powers to regulate big data companies' ever-expanding exercise of power in digital markets, both in the European Union and abroad. It has been further fostered by recent decisions such as the one involving the German Bundeskartellamt and Facebook between 2019 and 2020.[56] Acknowledging the fact that the conduct of digital platforms is not yet subject to comprehensive and enforceable regulation, competition agencies seem to be increasingly willing to step in and use their enforcement powers to combat new forms of consumer harm[57] and to contrast big tech companies' causal-structural and modal power.[58]

This approach raises concerns as well. One concern is the ability of competition law to adapt its notions as they have been traditionally interpreted (e.g. relevant market, causality, and even harm)[59] to the specifics of the data market has been disputed. Another concern is that the true adequacy of antitrust public enforcement remedies – considering both fines and orders – in directly promoting consumer protection is questionable (and, it could be said, falls beyond the inherent scope of competition law). This is especially the case in light of the open-ended nature displayed by the remedies that have been issued in the abovementioned judgements.[60]

As far as consumer protection law is considered, it should not surprise anyone that the vast majority of scholars have explored the topic of personalized commercial practices by referring to the regulation provided by the Unfair Commercial Practices Directive (hereafter UCPD),[61] especially in light of the innovations proposed in the New Deal for Consumers[62] and the amendments subsequently introduced by the so-called Modernization Directive[63] in the UCPD and in the Directive on Consumer Rights.[64]

Without a doubt, rules prohibiting unfair and, in particular, misleading commercial practices[65] are attractive prima facie solutions in reducing the risks inherent in tailored strategies. Under the UCPD, a commercial practice is qualified as unfair when it is likely to materially distort the economic behaviour of the average consumer through techniques that impair their ability to make informed decisions, causing them to make transactional choices they would not have taken otherwise. In addition, a practice is specifically qualified as misleading if it is likely to deceive the personalized consumer. It is, therefore, not surprising that consumer law scholars have argued in favour of applying these provisions to protect consumers against potential discriminations caused by personalized strategies.[66]

53 Lilian Edwards and Michael Veale, 'Slave to the Algorithm? Why a 'Right to an Explanation' is probably not the remedy you are looking for' (2017) 16 Duke Law & Technology Review; as for contributions analysing the privacy by design principle in general, see Ira Rubinstein 'Regulating Privacy By Design' (2012) 26 *Berkeley Technology Law Journal* 1409.

54 See Arts. 13 and 14 GDPR.

55 See *inter alia* Ian Ayres and Alan Schwartz, 'The No-Reading Problem in Consumer Contract Law' (2015) 66 *Stanford Law Review* 545; Omri Ben-Shahar, 'The Myth of the 'Opportunity to Read' in Contract Law' (2009) 1 European Review of Contract Law; Oren Bar-Gill and Franco Ferrari, 'Informing Consumers about Themselves' (2010) 3 *Erasmus Law Review*, 93.

56 Bundeskartellamt, decision no B6-22/16 of 6 February 2019, Facebook Inc., Menlo Parc, U.S.A., Facebook Ireland Ltd., Dubin, Ireland, Facebook Deutschland GmbH/Verbraucherzentrale Bundesverband e. V., Berlin.; OLG Düsseldorf, Order of 9 January 2015, Az. VI Kart 1/14 (V) - (HRS) juris; Bundesgerichtshof; decision no KVR 69/19 of 23 June 2020. See also the recent request for a preliminary ruling against this decision, submitted to the European Court of Justice by the Bundeskartellamt on 5 March 2021.

57 See Anne C. Witt, 'Excessive Data Collection as Anticompetitive Conduct – The German Facebook Case' (2019) 8 Jean Monnet Working Paper https://jeanmonnetprogram.org/paper/excessive-data-collection-as-anticompetitive-conduct-the-german-facebook-case; Marco Botta and Klaus Wiedermann, 'The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey' (2019) 64 *Antitrust Bulletin* 428-446; Justus Haucap, 'Data Protection and Antitrust: New Types of Abuse Cases? An Economist's View in Light of the German Facebook Decision' (2019) *CPI Antitrust Chronicles* https://www.competitionpolicyinternational.com/data-protection-and-antitrust-new-types-of-abuse-cases-an-economists-view-in-light-of-the-german-facebook-decision; Giuseppe Colangelo and Mariateresa Maggiolino, 'Data Protection in Attention Markets: Protecting Privacy through Competition?' (2017) 8 *Journal of European Competition Law & Practice*.

58 Maureen Ohlhausen and Alexander Okuliar, 'Competition, Consumer Protection, and the Right [Approach] to Privacy' (2015) 80 *Antitrust Law Journal* 121.

59 See Petit (n 39); Inge Graef, 'Market Definition and Market Power in Data: The case of Online Platforms' (2015) 38 *World Competition: Law and Economics Review* 4; Simonetta Vezzoso 'Competition Policy in a world of Big Data' in X Olleros and M Zhegu (eds.) *Research Handbook on Digital Transformations* (Cheltenham 2016).

60 Inge Graef 'Blurring Boundaries of Consumer Welfare: How to Create Synergies Between Competition, Consumer and Data Protection Law in Digital Markets' in Mor Bakhoum, Beatriz Conde Gallego, Mark-Oliver Mackenrodt, GintarėSurblytėNamavičien̊ (eds.), *Personal Data in Competition, Consumer Protection and Intellectual Property Law* (Springer 2018), 122; Roberto Pardolesi, Roger Van Den Bergh and Fransiska Weber, 'Facebook e i portenti del 'Konditionenmissbrauch'' (2020) 3 *Mercato, concorrenza, regole*.

61 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 [2005] O JEC L 149/22 (UCPD). Regarding the role of the UCPD in tackling personalized practices, see *ex multis* Philipp Hacker, 'Personalized Law and the Behavioral Sciences' in Christoph Busch and Alberto De Franceschi (eds.) *Algorithmic Regulation and Personalized Law. A Handbook* (Hart 2021), 252.

62 Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee. A new deal for consumers Brussels [2018] COM 183 final.

63 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L 328/7 (Modernisation Directive).

64 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, 64–88 (hereafter CRD).

65 See Arts. 5 and 6 UCPD.

66 *Ex multis* Alexandre Streel and Florian Jacques, 'Personalised pricing and EU law' (2019), 30th European Conference of the International Telecommunications Society (ITS):'Towards a Connected and Automated Society', Helsinki, Finland, 16th-19th June, 2019 https://www.econstor.eu/

In spite of the doubtless appeal of regulating tailored practices through the UCPD, this option presents significant limitations as well. First and foremost, personalized strategies are difficult to reconcile with the main categories employed in the UCPD, as they blur the boundaries between (lawful) promotion of products through mere persuasion and (unlawful) manipulation in the assessment of the practice, given the intricacy of defining concepts such as 'unfairness' and 'misleading' in prescriptive terms[67] and the difficulty of reconciling a technique which is inherently based on personalization with normatively determined (and contested) standards such as the concept of 'average consumer'.[68] This is also in consideration of the fact that – even when specific vulnerable groups are present[69] – the UCPD always requires a commercial practice to be defined as deceitful with respect to its targeted group's average member, which must be taken as the benchmark.[70] Such a standard is inherently problematic if we wish to reconcile it with the heterogeneity of behavioral biases present in a population (which are difficult to relate to specific target groups)[71] and with the inherent structure of personalized practices. The aim is to progressively overcome a 'clustered' approach to consumer groups and individualize interaction.[72]

The fact that current regulatory interventions to address microtargeting have focused solely on the aspect of price discrimination and price sensitivity[73] seems to further confirm the difficulties that consumer law is facing in dealing with this phenomenon. In addition, the choice of regulating this topic via mandatory information for consumers regarding the existence of personalized prices 'so that they can take into account the potential risks in their purchasing decision' seems to overlook the previously mentioned debate on the shortcomings of disclosure duties in B2C relationships[74] and the fact that transactional decisions by average consumers are determined not only by prices, but more generally by purchasing conditions as a whole.[75]

Furthermore, as was underscored before, problems are not limited to the payment of different prices for the same product amongst profiled consumers. Rather, they extend to risks related to creating a fictional perception regarding the actual presence of different products on the market and making it impossible to observe the behavior of peers, which is regarded as a significant part of the learning process in consumption.[76]

Lastly, a major – and extensively explored[77] - problem in addressing personalized practices via the UCPD is related to private enforcement. In the Directive, no indication is present regarding the appropriate remedy that should be issued after the violation of its provisions. This is an intentional choice, as emerges from Recital 9 of the Directive, which states that the norms in the UCPD operate 'without prejudice to individual actions brought by those who have been harmed by an unfair commercial practice, [...] and without prejudice to Community and national rules on contract law'. Accordingly, Member State governments (and, potentially, courts in individual cases) are required to set rules to foster the Directive's implementation.

Regarding this aspect, which has often been pinpointed as critical in terms of consumer protection,[78] steps forward are currently being taken. The Modernization Directive encourages private enforcement for consumers who are victims of unfair commercial practices by requiring Member States to make proportionate and effective remedies available to them, with specific reference to rights to damages and (if relevant) the unilateral termination of the contract.[79] Yet the actual choice regarding the appropriate remedy and the conditions for its adjudication are still remitted to Member States' national laws,

bitstream/10419/205221/1/de-Streel-Jacques.pdf; Federico Galli 'Online Behavioural Advertising and Unfair Manipulation Between the GDPR and the UCPD' in Martin Ebers and Marta Cantero Gamito (eds.) *Algorithmic Governance and Governance of Algorithms. Legal and Ethical Challenges* (Springer 2020), 110-132.

67 Chris Willet, 'Fairness and Consumer Decision Making under the Unfair Commercial Practices Directive' (2010) 33 *Journal of Consumer Policy* 247-273; Mateja Djurovic, *European Law on Unfair Commercial Practices and Contract Law* (Hart 2016).

68 See *ex multis* Hans-W. Micklitz, 'Unfair commercial practices and misleading advertising' in Norbert Reich, Hans-W. Micklitz, Peter Rott and Klaus Tonner (eds.) *European consumer law* (Intersentia 2014) 67-123; Stephen Weatherill 'Who is the 'Average Consumer?' (2009) in Stephen Weatherill and Ulf Bernitz (eds.), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29. New Rules and New Techniques* (Hart 2007) 119; Vanessa Mak 'Standards of Protection: In Search of the 'Average Consumer' of EU Law in the Proposal for a Consumer Rights Directive' (2010) 4 Tisco Working Paper Series on Banking, Finance and Services, 1-16; Cees Van Dam, 'The Average Consumer – a pluriform phenomenon' (2009) 3 *Tijdschrift voor Europees en economisch recht*, 11; Bram Duivenvoorde, *The consumer benchmarks in the Unfair Commercial Practices Directive* (Springer 2015).

69 See Art. 5.3 UCPD.

70 See Art. 5.2 UCPD. Also, Bram Duivenvoorde, 'The Protection of Vulnerable Consumers under the Unfair Commercial Practices Directive' (2013) 2(2) *Journal of European Consumer and Market Law* 69-79.

71 Hacker (n 61), 258.

72 As a consequence of this consideration, a vast debate has arisen in recent years regarding the advisability to promote the creation of personalized standards, using big data analytics and artificial intelligence to tailor each provision to individual needs and characteristics. See Christoph Busch and Alberto De Franceschi, 'Personalization and Granularity of Legal Norms in the Data Economy: A Transatlantic Debate' in Christoph Busch and Alberto De Franceschi (eds.) *Algorithmic Regulation and Personalized Law. A Handbook* (Hart 2021), 3; Tony Casey and Anthony Niblett, 'Self-driving Laws' (2016) 66(4) *University of Toronto Law Journal* 426; Id., 'Framework for the New Personalization of Law' (2019) 86(2) *University of Chicago Law Review* 333-358. This approach is seen to be promising in specific areas of law, such as the drafting of disclosures, see for instance Joasia Luzak, 'Tailor-made Consumer Protection: Personalization's Impact on the Granularity of Consumer Information' in Marcelo Corrales Compagnucci, Helena Haapio, Margaret Hagan and Michael Doherty, *Legal Design: Integrating Business, Design and Legal Thinking with Technology* (Edward Elgar 2021). However, a general claim for legal personalization is generally acknowledged to be a questionable strategy, see Christoph Grigoleit and Philip Maximilian Bender, 'The Law between Generality and Particularity. Chances and Limits of Personalized Law' in Christoph Busch and Alberto De Franceschi (eds.) *Algorithmic Regulation and Personalized Law. A Handbook* (Hart 2021) 132; Marietta Auer, 'Granular Norms and the Concept of Law: A Critique' *ibidem* 137.

73 Art. 4 of the Modernization Directive. See also Willem van Boom, Jean-Pierre I. van der Rest, Kees van den Bos & Mark Dechesne, 'Consumers Beware: Online Personalized Pricing in Action! How the Framing of a Mandated Discriminatory Pricing Disclosure Influences Intention to Purchase' (2020) 33 *Soc Just Res* 331–351.

74 See *supra* n 54.

75 Sebastião Barros Vale 'The Omnibus directive and online price personalization: a mere duty to inform?' (2020) 2 *European Journal of Privacy Law & Technologies*.

76 See Aihui Chen, Yaobin Lu and Bing Wang, 'Customers' purchase decision-making process in social commerce: A social learning perspective' (2017) 37(6) *International Journal of Information Management* 627-638; Enrico Moretti, 'Social Learning and Peer Effects in Consumption: Evidence from Movie Sales' (2011) 78(1) *The Review of Economic Studies* 356-393; Markus M. Mobius and Tanya S. Rosenblat, 'Social Learning in Economics' (2014) *Annual Review of Economics* 6 827-847.

77 Hugh Collins, 'Harmonisation by Example: European Laws against Unfair Commercial Practices' (2010) 73(1) *The Modern Law Review* 89-118; Tihamer Toth (ed.), *Unfair Commercial Practices: The Long Road to Harmonized Law Enforcement* (Pázmány 2014).

78 Franziska Weber, 'Abusing Loopholes in the Legal System – Efficiency Considerations of Differentiated Law Enforcement Approaches in Misleading Advertising' (2012) 5(4) *Erasmus Law Review*, 289; Willem van Boom, 'Experiencing Unfair Commercial Practices: An Introduction' (2012) *ibidem* 234.

79 See Recital 16 of the preamble of the Modernization Directive.

and this has significant consequences in terms of the effectiveness of enforcement (especially considering the inner trans-nationality of the digital market). Indeed, normative fragmentation exacerbates the abovementioned problems related to regulating the procedural dimension of anti-discriminatory enforcement. It creates uncertainty for consumers, deterring claims and ultimately curbing access to justice.

4. The 'porous' nature of European private law and the potential of rules on consent

Various solutions could be explored in order to address the shortcomings of the rules concerning tailored commercial practices and, at the same time, exploit the opportunities offered by these developments to produce a better framework for consumers. Regarding this aspect, it is important to stress that some notions and tools in private law can be 'porous'[80] enough to allow for an oriented interpretation that can be functional to regulating personalized strategies. These tools can offer a sufficient margin of appreciation to incorporate emerging findings and be viable instruments in the modernization of consumer protection. As a matter of fact, profiling affects contractual relationships and market exchanges alike. Hence, the interaction between private law and consumer rules is plausible in order to protect the interests of individuals throughout the market experience.[81] In addition, discrimination through tailored offers is a reduction of self-determination that has an impact on consumers' capacity to genuinely develop their free will in contracts, which is an aspect consistently addressed by private law rules.

At the same time, it is common knowledge that the possibility of applying private law rules to the field of consumer protection is not undisputed amongst legal scholars, and that interpretations of the relationship between the two areas vary significantly amongst the legal regimes of the Member States, on the basis of different grounds. Examples include the allegedly different needs and goals pursued by the two bodies of regulation or the diverse conceptual approaches to consumer vulnerabilities they entail.[82]

It is beyond the scope of this work to investigate the general relationship between consumer and private law. Still, it is reasonable to defend the view that – despite their substantial differences and considering the role of European private law – it is not necessarily the case that contract law and consumer protection have to be dedicated to pursuing completely different goals. The two sets of regulations are meant to promote free and frequent exchanges by protecting both parties' genuine consent in order to, ultimately, make the most of the rationality of operators and to respect the fundamentals of a market economy. Furthermore, as far as the concomitant value dimension of contracts is concerned, they both pursue egalitarian goals, in the sense that they seek to balance disparities amongst unequal parties that might otherwise produce an unfair result for vulnerable persons, and to harmonize the autonomy of the parties along the lines of policies of social and distributive justice.[83]

In light of this teleological symmetry, it is reasonable to believe it is possible to apply general remedies (from broader branches of regulation such as private and contract law) to consumer law, as integrative resources. This perspective is, furthermore, consistent with the hierarchical relationship between lex generalis and lex specialis[84] – just as it is between European private law (considered an autonomous field, separate from that of Member States) and consumer law. Accordingly, it is legitimate for contract law to operate as an ancillary resource when provisions developed within consumer law do not yield effective answers to commercial strategies based on technological strategies that consumer law does not (yet) adequately address, as is the case in the field of personalized advertising.

Amongst private law rules, in particular, provisions on defective consent might be a viable regulatory solution[85] and a tool to promote social justice in personalized interactions, by contributing to a broader framework for the assessment and regulation of targeted services pursuant to substantive fairness in contractual relationships. From a general perspective, to evaluate whether a contract should be avoided, rules on defective consent are designed to take into consideration different situations affecting the formation of a party's genuine assent to the conclusion of a contract. According to the structure depicted in the main set of rules for international and European contexts, an initial hypothesis (mistake) occurs every time a party shows an incorrect understanding of the content of a contract as a result of an erroneous analysis of the agreement and its provisions, based on her own belief. Moreover, a different hypothesis (misrepresentation) occurs if the counterparty – even acting in good faith – made or caused this mistake, or knew or ought to have known of the mistake, and willfully left the mistaken party in error, and the counterparty knew that the mistaken party, had they known the truth, would not have entered into the contract or would have done so only on fundamentally different terms. Lastly, a third hypothesis (fraud) arises in situations in which the provision of consent is determined by an intentional false statement of facts by the counterparty, meant to deceive the contractor.

This general structure is not unambiguous amongst jurisdictions, with doctrines heterogeneously construing the three concepts.[86]

80 Genevieve Helleringer and Anne-Lise Sibony 'European Consumer Protection Through The Behavioral Lens' (2017) 23(3) *Columbia Journal Of European Law*.

81 See Domurath (n 2) 88.

82 Carmelita Camardi, 'Pratiche commerciali scorrette e invalidità' (2010) 6 *Obbl contr* 408.

83 See Chantal Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (Kluwer 2008), 50.

84 With specific regard to the relationship between EU private law and consumer protection law, see Vanessa Mak, 'The Consumer in European Regulatory Private Law', in Dorota Leczykiewicz and Stephen Weatherill (eds.), *The Image of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart 2016), 381-400. See also Dorota Leczykiewicz and Stephen Weatherill (eds.), *The Involvement of EU Law in Private Law Relationships* (Hart 2013); Hans-W. Micklitz, 'Unfair commercial practices and European private law', in Christian Twigg-Flesner (ed.), *The Cambridge Companion to European Union Private Law* (CUP 2010), 229-242.

85 Fabrizio Cafaggi and Horatia Muir Watt, *The Regulatory Function of European Private Law* (Elgar 2009); Hans-W. Micklitz, 'The Visible Hand of European Regulatory Private Law – The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation' (2009) 28 Yearbook of European Law 3-59; Hans-W. Micklitz, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (CUP 2018).

86 For example, according to § 119 of the German *Bürgerliches Gesetzbuch* (BGB), mistakes need not to be known by the counterparty – with this element constituting the essential divide between mistakes and deceit *ex* § 122(1) BGB – and, therefore, it might entitle them to receive reliance damages from the party avoiding the contract. Differently, in the Italian legal system, a party's mistakes must be recognizable by the counterparty in order to justify the avoidance of the contract; see Art. 1431 of the Italian Civil Code (*Codice Civile*). The distinction between misrepresentation and mistake has been subject to prominent debate in common law jurisdictions as well: the 1967 Misrepresentation Act distinguishes between fraudulent, negligent, and innocent actionable misrepresentation as basis for recission, whereas the doctrine of mistake (which can be common, mutual, and unilateral) developed mostly through case law (*ex multis Bell*

Moreover, a neat distinction between mistake, misrepresentation and fraud is not always present in regulations.[87] Still, in spite of different names and some discrepancies in their configurations, rules on defective consent are present – and follow similar structures – in the vast majority of Member States, having their conceptual common core in the Roman tradition;[88] all European systems acknowledge the view that an expression of will might arise from a (self- or hetero-determined) misrepresentation of the characteristics of the agreement.[89] As a further confirmation, rules on defective consent are present both in the Principles of European Contract Law (PECL) regulating the means to avoid a contract due to a mistake[90] or fraud generated by the counterparty,[91] and in the Draft Common Frame of Reference (DCFR) within provisions related to fraud and good faith in fair dealing.[92]

Considering these aspects, academics have already suggested applying these rules as supplementary resources to tackle other shortcomings in the regulation of commercial practices that were investigated in previous years, such as the exploitation of consumers' cognitive biases.[93] Building on this experience, the application of rules on defective consent to tailored commercial techniques could foster an enhancement of the level of consumer protection in the digital environment and overcome the various critical aspects of the above-mentioned regulations.

First of all, and similar to the GDPR, rules on defective consent arise from the common ground of protecting consumers' information self-determination, while they also exhibit a wider and more flexible scope. On the one hand, they are suitable for regulating not only the acquisition and processing of data that is functional to personalized advertising and profiling, but also the entire B2C interaction. On the other hand, they are disentangled from the inner weaknesses of information duties as a means of generating genuine consent. In addition to shortcomings related to the no-reading problem, mandated disclosures are, as a matter of fact, circumscribed in many aspects. Namely, they must be identified ex ante and they usually grant victims the right to ask for compensation only, without affecting the validity of the contract concluded. Lastly, information duties are inherently fragmentary, meaning that the same information can be framed from different perspectives. For example, mandated notice regarding the performance of profiling strategies (and even personalized pricing) can be represented as a process conducted in a client's best interest, in order to find the most suitable product, while the consequent reduction of choice is not mentioned.

Against this backdrop, rules on defective consent provide an ex-post tool for judicial scrutiny, as they devote specific attention to the interpretation of the parties' behaviour – and implemented strategies – throughout the whole bargaining process, including the pre-negotiation phase. In this way, the assessment of unlawfulness conducted in accordance with the rules on misrepresentation and fraud can consider the entirety of elements that contributed to the formation of the contract. Thus, when a party's conduct artificially affects the understanding that the counterparty has regarding the characteristics or the functioning of a product or a service (e.g. by extremely narrowing the selection of products offered, so as to induce a state of almost complete 'blindness' in the consumer regarding the state of the market), these rules can provide solid ground for the elimination of the harmful effects of the contract.

Significant advantages are also present when interaction with regulation on unfair commercial practices is considered. Once again, both set of rules start from a common conceptual ground, namely the unfair modification of one party's will. Yet provisions on defective consent do not require the consumer to take (virtually or in practice) a transactional decision that they would not have taken otherwise, as this is explicitly mentioned as an essential element in both the wordings of Art. 6 (on misleading actions) and Art. 7 (on misleading omissions) of the UCPD.

On the contrary, rules on defective consent do not require a strict causal link between the use of a discriminatory strategy and the decision to conclude a contract,[94] as they are able to regulate both essential and non-essential mistakes and fraud, as long as these lead to a modification of the agreement's conditions.[95] In addition, these rules are not bound to the rather problematic average consumer benchmark either, which allows courts to perform ex personae scrutiny of each case at stake; consequently, provisions regulating defective consent do not lead to a conclusive statement regarding the tailored practice in se, but rather to the performance of individually segmented evaluations, which are both consistent with the inner characteristics of profiling practices (i.e. their granularization and diversification amongst consumers) and functional to balancing the potentials and shortcomings that these strategies possess.

A reconsideration of the role played by consent rules in the regulation of microtargeting against relying on unfair commercial practices regulation alone is also advisable, when considering, that the latter mainly focuses on the collective protection of consumers at a macroeconomic level.[96] Yet, the sophistication of commercial relationships in the digital environment and the granularization of B2C interaction make it difficult, for a court (or a supervisory authority) to express

v Lever Bros Ltd [1932] AC 161 and *Great Peace Shipping Ltd v Tsavliris Salvage International*) Ltd [2003] QB 679) to identify the requirements for rescission or rectification of the concluded contract. See also Patrick Atiyah and Francis Bennion, 'Mistake in the Construction of Contracts' (1961) 24 Modern Law Review 421; Catharine MacMillian, *Mistakes in Contract Law* (Bloomsbury 2012); John Cartwright, *Misrepresentation, Mistake and Non-disclosure* (Sweet & Maxwell 2012).

87 As it will be observed shortly - the PECL does not rigidly distinguish between mistake and misrepresentation, encompassing them both under Art. 4:103.

88 See Martin Jose Schermaier, 'Mistake, misrepresentation and precontractual duties to inform: the civil law tradition' in Ruth Sefton-Green (ed.), *Mistake, Fraud and Duties to Inform in European Contract Law* (CUP 2005), 39-64.

89 John Cartwright, 'Defects in Consent Contract Law', in Arthur Hartkamp, Martijn Hesselink, Ewoud Hondius, Chantal Mak and Edgar du Perron (eds) *Towards a European Contract Code* (Kluwer 2011), 537.

90 Art. 4:103 PECL.

91 Art. 4:107 PECL.

92 Respectively Art. II.-7:205(1) and Art. II.-7:205(3) DCFR.

93 See Francesco Paolo Zatti, 'Fraud and Misleading Commercial Practices: Modernising the Law of Defects in Consent' (2016) 12(4) European Review of Contract Law 307-334; Jan Trzaskowski, 'Behavioural Economics, Neuroscience, and the Unfair Commercial Practices Directive' (2011) 34(3) Journal of Consumer Policy 377-392; Eleni Tzoulia, 'Imprints of behavioural research in EU consumer protection legislation: the 'average consumer test' in the Unfair Commercial Practices Directive' (2017) *Tijdschrift voor Consumentenrecht en handelspraktijken* 258.

94 See Marco Loos, 'The modernization of European Consumer Law (continued): More meat on the bone after all' (2019) *Amsterdam Law School Legal Studies Research Paper No 2019-32* 3.

95 See e.g. Art. 4:103(1)(b) PECL.

96 Thomas Wilhelmsson, 'Scope of the Directive', in Geraint Howells, Hans-W. Micklitz and Thomas Wilhelmsson (eds.), *European Fair Trading Law. The Unfair Commercial Practices Directive* (Aldershot 2006), 51; Anna Genovese, 'Ruolo dei divieti di pratiche commerciali scorrette e dei divieti antitrust nella protezione (diretta e indiretta della libertà di scelta) del consumatore' (2008) Annali italiani del diritto d'autore della cultura e dello spettacolo 297, 302.

an evaluation on a commercial practice (per se) on a general level, as the UCPD requires. On the contrary, judicial scrutiny conducted through the lens of defective consent can operate as a second-degree evaluation to enrich and correct the outcome of the first-level interpretation under consumer law and allow for a re-assessment based on the specific characteristics of the tailored interaction considered.

This way, rules on defective consent can contribute to broadening the scope of market regulation around justice and substantive efficiency goals, without precluding – when advisable – the direct application of the UCPD. The interaction between both regulatory matters can ameliorate the market process by promoting unhindered decisions, with consumer law working on a broad scale and contract law in the individual case.

While it cannot be claimed that the application of defective consent rules radically erases all incentives for companies to engage in discrimination – these provisions being primarily targeted at enhancing autonomous (consumer) choices – they would nevertheless introduce an additional granularized dimension of scrutiny, which is absent in the UCPD approach, and this might prove to be desirable in reacting to practices that are differentiated on an individual basis. As regards the general provision on unfair commercial practices,[97] private law rules on consent will likely provide more flexibility since they do not require the behaviour to be contrary to the requirements of professional diligence, since it is difficult to break this condition down into specific obligations and standards (whether in terms of implementation or of auditing) when automated processes are considered.[98] Lastly, and underscoring a significant difference from the UCPD, provisions on defective consent provide a certain remedy – avoidance of the contract – as a consequence of violations, which is suitable for protecting consumers and, at the same time, exercising proper deterrence for professionals (especially when coupled with the awarding of compensation for damages for culpa in contrahendo).

On the basis of the characteristics of avoidance, when a contract is vitiated for defective consent as a result of a tailored practice, two alternatives are set for the victim: if the conduct of the professional affected on an aspect of the agreement, which is not necessary (in the eye of the counterparty) for the contract to properly operate, then she will be able to keep the contract in force and ask for compensation based on the professional's culpa in contrahendo.

On the contrary, if the outcome of the exploitation relates to an element that was deemed essential for the conclusion of the contract the party might ask the judge to render the whole contract null and void, then seek damages for its non-conclusion.

This framework of choices that the consumer has at her disposal ultimately shapes a remedy that is, at the same time, flexible and functionally respondent to her specific needs and interests.

Yet, the counterparty's behavior will always be punished - even if its amount will vary depending on the concrete choice of the consumer: when the contract remains in force, the quantum debeatur is quantified considering the worse conditions that the party suffered due to the unfair use of tailored practices;[99] if the contract is declared null as a whole, then the party is instead entitled to be compensated for the conclusion of an invalid agreement.

In summary, rules on defective consent share conceptual ground with the main existing regulatory solutions that were introduced to tackle risks arising from tailored commercial practices. In addition, they overcome some of the current limits that each of them presents and therefore provide a potentially more effective resource for dealing with the phenomenon. Nonetheless, tensions existing between national and European principles of contract law – like those between the different facets embodied in each Member State's rules on defective consent – further epitomize the incompleteness of the system.

Recurring to defective consent rules can raise some points of criticism: it might be argued, for example, that under contract law rules individual consumers would be devoid of enough incentives to pursue protection in court, considering the high risks involved in litigation, the rules regarding the burden of proof, and the fact that the potential benefits may not outweigh its cost.

While acknowledging that, in general, the lack of incentives to act in court constitutes a major concern of the private enforcement system overall – which is found in consumer law as well[100] - it cannot be prima facie excluded that the economic interests linked to the contract may nevertheless persuade the individual to enter in a proceeding. In addition, even being subject to a demanding burden of proof, prior judgments ordering an injunction or a penalty might be useful in alleviating the burden of proof regarding the existence of a fraud or an alteration of consent: in recent years, Member States' jurisdictions held that a public authority's decision might constitute a 'privileged evidence' with regards to a violation of private law rules.[101] Furthermore, this approach is consistent with regulatory initiatives which took place in other areas – such as competition law – regarding follow-on actions;[102] transposing this orientation on the case of defective consent might, therefore, offer a good basis to those individuals who are willing to pursue the avoidance of their contract as a private law remedy.

Lastly, it might be contended that contract law is based on freedom of contract, and therefore should not consider power imbalances. With regards to this aspect, it might be first observed that the understanding of contract law has undergone significant changes in recent years, which are leading to a crescent consensus on the idea of the Materialisierung of contract law, taking into account the different bargaining power between the contracting parties and the condition of asymmetric information.[103] According to this perspective, power imbalances would play a significant role in the analysis of defective consent rules as well. Secondly, in the case of tailored commercial practices, the reduction of individuals' autonomy does not (directly) stem from the

97 Art. 5 UCPD.

98 See Sandra Wachter et al (n 28). Some attempts are, nevertheless, present: Nicholas Diakopoulos 'Algorithmic Accountability: the investigation of Black Boxes' (2014) Tow Center for Digital Journalism https://academiccommons.columbia.edu/doi/10.7916/D8ZK5TW2; Dillon Reisman, Jason Schultz, Kate Crawford and Meredith Whittaker, 'Algorithmic Impact Assessments: a practical framework for public agency accountability' (2018) AiNow Institute https://ainowinstitute.org/aiareport2018.pdf; Ebers (n 28) 76.

99 In order to perform this operation, a valid proxy could be represented e.g. by offers made by the same operator to other clients.

100 Franziska Weber, *The Law and Economics of Enforcing European Consumer Law* (Aldershot 2014), 45–52.

101 See the Italian Cass civ, 13 February 2009, Nr 3640 (2010) Il Foro italiano 1901. See also Francesco Paolo Patti, 'Fraud and Misleading Commercial Practices: Modernising the Law of Defects in Consent' (2016) 4 *European Review of Contract Law* 318.

102 For an overview see Pier Luigi Parcu, Giorgio Monti and Marco Botta (eds.) *Private Enforcement of EU Competition Law. The Impact of the Damages Directive* (Cheltenham 2018).

103 Jürgen Basedow, 'Freedom of Contract in the European Union' (2008) 16 *European Review of Private Law* 905.

asymmetry of bargain power between her and the counterparty but, rather, from the consumers' inability to understand the determinants behind the offer presented to her.

5. Concluding remarks

The analysis conducted in this research has shown that rules on fraud and misrepresentation might offer a sufficient margin of appreciation to incorporate emerging findings on personalized practices, and to operate as viable instruments for the modernization of consumer protection in the absence of a form of dedicated regulation. Still, improvements are advisable in order for the system to be optimized. Despite the indications provided by the Principles on European Contract Law and the Draft Common Frame of Reference, and in light of the formal independence of Member States' private law and the (minor, but nevertheless still existing) differences amongst different national rules on defective consent, harmonization is undoubtedly desirable.

While it is beyond the scope of this article to argue extensively in favour of a normative unification of private law in the European framework, it is nevertheless worth observing that the attempt to formulate a uniform set of rules - within the broader conceptual lens of the 'constitutionalization' of private law[104] - has long been identified as a necessary step towards achieving social justice in private relations,[105] and that consumer law has played a pivotal role in stimulating this debate since its earliest days.[106] In addition, and in spite of the difficulties that this process has encountered in recent times, the role of private law as a transformative and conceptually unifying framework has been further stressed by the regulatory uncertainties presented by digital innovations, with a major focus on the transnational dimension of online platforms and commercial practices.[107]

In this context, private law is supposed to operate as the synthesis of the heterogenous experiences of Member States and supervisory authorities filtered through the lens of the fundamental principles that animate the whole European framework and that play a central role in determining the content of regulatory measures. Amongst these principles, the preservation of consumer consent and will (including their perception of the overall existence and characteristics of different products on the market) constitute a necessary condition for the genuine development of the digital environment.

In the absence of a (desirable) stringent harmonization of private law in the European framework, and in light of the (inevitable) shortcomings currently presented by existing regulations (in particular GDPR and UCPD) in addressing high-tech marketing strategies based on personalization, rules on defective consent could provide a valid ad interim solution to attenuate, integrate and correct the possible adverse and discriminatory effects of these techniques, while at the same time preserving the benefits they introduce to the market ecosystem.

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104 Hugh Collins 'The Constitutionalization of European Private Law as a Path to Social Justice?' in Hans-W. Micklitz (ed.) *The Many Concepts of Social Justice in European Private Law* (Edward Elgar 2011); See also Jan M. Smits, 'Convergence of Private Law in Europe: Towards a New Ius Commune?' in Esin Örücü and David Nelken (eds.) *Comparative Law: A Handbook* (Hart 2007), 219-240; Martijn W. Hesselink 'The New European Legal Culture' in Martijn W. Hesselink (ed.) *The New European Private Law: Essays On The Future Of Private Law In Europe* (Kluwer 2002), 11-75; Id, 'The General Principles of Civil Law: Their Nature, Roles and Legitimacy' in Dorota Leczykiewicz and Stephen Weatheril (eds.) *The Involvement of EU Law in Private Law Relationships* (Hart 2013), 131-180; Jan M. Smits, 'The Principles of European Contract Law and the Harmonization of Private Law in Europe', in Antoni Vaquer (ed.) *La Tercera Parte De Los Principios De Derecho Contractual Europeo* (Tirant 2005), 567-590.

105 Jürgen Basedow, ‹Codification of Private Law in the European Union: The Making of a Hybrid› (2001) 9(1) *European Review of Private Law* 35–49; Ruth Sefton-Green, 'Social justice and European identity in European contract law' (2006) 2 ERCL 275, 277; Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto' (2004) 10(6) European Law Journal 653-674; Chantal Mak, 'Europe-building through private law. Lessons from Constitutional Theory' (2012) 3 *European Review of Competition Law* 326-341; Giovanni Comandé, Gert Brüggemeier and Aurelia Colombi Ciacchi (eds.) *Fundamental Rights and Private Law in the European Union* (CUP) 2010.

106 Albertina Albors-Llorens, 'Consumer Law, Competition Law and the Europeanization of Private Law', in Fabrizio Cafaggi (ed.), *The Institutional Framework of European Private Law* (OUP 1993).

107 *Ex multis* Stefan Grundmann (ed.), *European Contract Law in the Digital Age* (Intersentia 2018); Marija Bartl, 'Socio-Economic Imaginaries and European Private Law' in Poul F. Kjaer (ed.) *The Law of Political Economy: Transformations in the Function of Law* (CUP 2020) 228-253; Hans-W. Micklitz, 'The Transformative Politics of European Private Law' *ibidem* 205-227; Natali Helberger, Lucie Guibault, Marco Loos, Chantal Mak, Lodewijk Pessers and Bart Van der Sloot, *Digital Consumers and the Law: Towards a Cohesive European Framework* (Kluwer 2012); Chantal Mak, 'Fundamental Rights and the European Regulation of iConsumer Contracts' (2008) *Journal of Consumer Policy*, 425-439.