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E-Commerce in the Digital Age: Evaluating the European Union’s Legal Arsenal for Consumer Protection

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{وَتَوَكَّلْ عَلَى ٱللَّهِ ۚ وَكَفَىٰ بِٱللَّهِ وَكِيلًا}

{And put your trust in Allah, for Allah is sufficient as a Trustee of Affairs}

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Abstract (English)

This thesis examines the effectiveness of the European Union’s legal arsenal on consumer protection in e-commerce. While the digital age and improvements in the digital market has transformed the manner in which consumers interact with sellers for the better through greater efficiency, it also introduced complex challenges which increase the vulnerability of consumers. The European Union enacted legislation to counteract the negative effects of e-commerce on consumers, which will be examined in detail. This thesis critically assesses the legislation put forward through a doctrinal analysis with a critical, holistic perspective of key consumer protection concerns such as unfair contract terms and misleading practices. The thesis will reveal that although the legislation provides consumers with comprehensive rights, supplemented by the case law of the European Court of Justice, there are weaknesses present such as legal fragmentation and ambiguity. This thesis contributes a holistic legal evaluation of the interconnectedness of the legislation and proposes a reform of the ‘average consumer’ standard as well as recommendations for improvement of the European Union’s legal arsenal.

Abstract (Deutsch)

In dieser Arbeit wird die Wirksamkeit des rechtlichen Arsenals der Europäischen Union zum Verbraucherschutz im elektronischen Handel untersucht. Das digitale Zeitalter und die Verbesserungen auf dem digitalen Markt haben zwar die Art und Weise, wie Verbraucher mit Verkäufern interagieren, durch größere Effizienz zum Besseren verändert, aber auch komplexe Herausforderungen mit sich gebracht, die die Anfälligkeit der Verbraucher erhöhen. Die Europäische Union hat Rechtsvorschriften erlassen, um den negativen Auswirkungen des elektronischen Geschäftsverkehrs auf die Verbraucher entgegenzuwirken, die im Einzelnen untersucht werden sollen. In dieser Arbeit werden die vorgeschlagenen Rechtsvorschriften durch eine dogmatische Analyse mit einer kritischen, ganzheitlichen Perspektive der wichtigsten Verbraucherschutzbelange wie missbräuchliche Vertragsklauseln und irreführende Praktiken kritisch bewertet. Die Arbeit wird zeigen, dass die Rechtsvorschriften den Verbrauchern zwar umfassende Rechte einräumen, die durch die Rechtsprechung des Europäischen Gerichtshofs ergänzt werden, dass sie aber auch Schwachstellen wie Rechtszersplitterung und Mehrdeutigkeit aufweisen. Diese Arbeit trägt zu einer ganzheitlichen rechtlichen Bewertung der Verflechtung der Rechtsvorschriften bei und enthält Vorschläge für eine Reform der Norm des „Durchschnittsverbrauchers“ sowie Empfehlungen zur Verbesserung des rechtlichen Arsenals der Europäischen Union.

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Chapter 1 – Introduction

1.1 Introduction

The introduction of electronic commerce (hereafter: e-commerce) to consumers originated in the digital age but witnessed a global rise as a result of the COVID-19 pandemic.[1] Online retailers enabled consumers to purchase the same goods and services as they do in person from the comfort of their homes. This drastically changed the manner by which consumers interact with retailers. Instead of face-to-face communication between a store owner or retailer and consumer, consumers interact with online platforms or artificial intelligence software to purchase goods and services. The shift from human relationships between retailers and consumers to digital relationships between computer software and consumers raises concerns over the protection of consumers during e-commerce transactions.[2]

Consumers may purchase products or services in different ways. They may contact an online retailer or service provider to ask for the cost of purchasing a good or service, initiating the business-consumer relationship through the first interaction. Another manner of purchasing a good or service is through consumers browsing a retailer or service provider’s online, and metaphorically adding a product or service into their ‘basket’. At that point in time, a relationship is formed between the consumer and the online retailer or service provider. In these said e-commerce transactions, there is minimal contact between the two parties. Furthermore, consumers pay for the price of the good or service through an online payment provider, which requires certain guarantees to be made to consumers to ensure a secure transaction.

There are several concerns about the protection of consumers and what their rights entail when purchasing goods or services from e-commerce platforms. For example, due to the rise of e-commerce, some retailers have online marketplaces, but no physical store where consumers can visit to look at products before buying them. This may lead to misleading practices by the false advertisements of goods or services, or terms and conditions crafted in legal jargon, making them difficult to understand for consumers with no legal background. Other consumer protection issues arise from complexities of the online environment of the retailer, which may entrap low income consumers or minors to engage in transactions without

[1] Cameron Guthrie, Samuel Fosso-Wamba and Jean Brice Arnaud, ‘Online Consumer Resilience during a Pandemic: An Exploratory Study of e-Commerce Behavior before, during and after a COVID-19 Lockdown’ (2021) 61 Journal of Retailing and Consumer Services 1, 1.
[2] Emanuel de Bellis and Gita Venkataramani Johar, ‘Autonomous Shopping Systems: Identifying and Overcoming Barriers to Consumer Adoption’ (2020) 96 Journal of Retailing 74.

the necessary background knowledge to support their decision. Due to the risks posed by e-commerce, consumers are enshrined with rights to protect them when engaging with online retailers. This led to developing the research question titled ‘To what extent does the current EU legal framework on e-commerce effectively safeguard consumer rights in the digital marketplace?”. This thesis aims to examine the effectiveness of the current European Union legal framework in safeguarding consumer rights in the digital marketplace. Key consumer protection topics will be broken down, discussed, and analyzed alongside the relevant EU legislation to determine if consumer protection laws in the EU effectively protect consumers.

1.2 Methodology

This thesis adopts the doctrinal legal research methodology with an analytical perspective of the relevant legal frameworks for e-commerce in the European Union. The aim of the research is to fill in the ever growing gap in consumer protection as a result of constantly growing e-commerce practices such as dark patterns and digital content which threaten the rights of consumers. Both primary and secondary sources will be utilized, with the former being legislation in the field of consumer protection and the relevant case law, and the latter being academic discussion and literature. The use of primary sources will allow an accurate formation of the legal framework of consumer protection to act as a basis for the research, while the secondary sources will facilitate in creating a holistic view of the issue of consumer protection. This research seeks to address the strengths and weaknesses of the relevant legislation on consumer protection and to propose reforms for the consumer protection system.

The aim of the thesis will be met by firstly addressing the core of e-commerce transactions, online consumer contracts, by a discussion of how they are created, and the most common form of a consumer contract. Standard form contracts will be assessed to highlight the risks they pose to consumers, stemming from various asymmetries. A ‘consumer’ will be defined in order to delineate the scope of consumer protection rights and will carry on into a discussion of dual purpose contracts where a purchaser may not be considered a consumer under EU law. Penultimately, multiple asymmetries present in consumer contracts will be analyzed, shining light on the need to protect consumers in e-commerce. The chapter will conclude with a discussion of the binding nature and validity of electronic contracts through digital signatures.

The third chapter will delve into specific key consumer protection topics which will be identified through the previous chapter's discussion on online consumer contracts. Relevant legal frameworks on e-commerce and digital services will be discussed in relation to key consumer protection issues. The legal frameworks which will be picked apart and discussed are amongst many, the Consumer Rights Directive,[3] the E-Commerce Directive, [4] the Unfair Commercial Practices Directive,[5] Unfair Contract Terms Directive, [6] and the Digital Content Directive.[7] The chapter will begin with the topic of information requirements, outlining their importance for consumers and the legal obligations placed on sellers to conform to them, as well as the factors stopping their implementation from being fully effective. Then, misleading practices and the effects on consumers in e-commerce will be discussed alongside an evaluation of the legislation protecting consumers from those practices. The chapter will then continue on to unfair contract terms which come as a result of standard form contracts, as well as an evaluation of the objectivity of the 'unfairness test' in protecting consumers from those terms. Additionally, the issue of defective products and the remedies provided to consumers under the Sale of Goods Directive will be explored to evaluate the effectiveness of the legislation in upholding those rights for consumers. The requirements and legislation governing digital goods and services will be considered to further contribute to the evaluation of the protection of consumers. Following from that, the core consumer right of withdrawal and its ability to be exercised by consumers will be explored as it is one of the most essential rights for consumers in online transactions. Penultimately, vulnerable consumers and the common issues they face will be discussed while assessing the effectiveness of the legislation protecting their rights in online transactions with sellers to complete the holistic perspective of this thesis. Finally, academic recommendations for the improvement of the consumer

[3] Parliament and Council Directive 2011/83/EU 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 L304/64 ('Consumer Rights Directive').
[4] Parliament and Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1 ('E-Commerce Directive').
[5] Parliament and Council Directive 2005/29/EC 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] OJ L149/22 amended by Parliament and Council Directive 2019/2161 of 27 November 2019 [2019] OJ L318/7 ('Unfair Commercial Practices Directive').
[6] Parliament and Council Directive (EU) 2019/2161 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 L328/7 ('Unfair Contract Terms Directive').
[7] Parliament and Council Directive (EU) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1 ('Digital Content Directive').

protection framework will be put forward in the fourth chapter, stemming from the examination of the European Union's legal framework. This aims to stimulate discussion on the betterment of the protection of consumers to further encourage e-commerce by ensuring consumer protection through every step of the transaction.

Chapter 2 - Online Consumer Contracts

2.1 Overview

This chapter aims to set the basis for the discussion of consumer protection in electronic commerce in the European Union through analyzing various aspects of consumer contracts in the sphere of e-commerce from beginning to end. Firstly, the elements necessary to form an online consumer contract will be examined as no product or service can be purchased through e-commerce without a contract between the consumer and online retailer or seller. Every formation of an ordinary contract must include an offer and acceptance, a rule stemming from contract law.[8] Then, the legal effects on and responsibilities of consumers and businesses stemming from sales contracts will be explored, namely the obligations of businesses to provide the product or service agreed upon, the financial obligation of consumers. Secondly, the most common form of e-commerce consumer contracts, standard form contracts, will be delved into to explore the simplification of e-commerce contracts as a result of the information age. Thirdly, the definition of a consumer, and how this definition was reached through European Union jurisprudence will be discussed to set a strong basis to further the discussion on the protection of consumer rights in e-commerce. Following that, transactions of dual purpose purchases will be discussed to delineate situations where a buyer may be considered a consumer and consequently afforded protection under European Union consumer law. Fifthly, this chapter will discuss the power asymmetries between online businesses and consumers which requires the need for more robust consumer protection mechanisms. Finally, this chapter will tie off with the intersection of consumer protection and digital signatures in e-commerce contracts.

2.2 Formation of Online Consumer Contracts

Online consumer contracts are the core of e-commerce. It is the starting point of the interaction between a business and consumer and allows two types of relationships to be formed between the consumer and seller: a contractual relationship where a legally binding

[8] Devi Prabha A, 'A Brief Study on Offer and Acceptance' (2022) 10 International Journal of Innovative Research in Computer Science & Technology 6.

agreement is formed between the consumer and seller with obligations that must be fulfilled by both parties, and a transactional relationship where a good or service is exchanged in return for financial payment.

An online consumer contract can be classified as a “distance contract” as it is entered into by the seller/business and consumer where both parties are not physically present with each other.[9] While there is a stark difference between an online consumer contract and a physical one, the elements required for an online contract to be formed derive from the requirements of a contract in a physical marketplace. Firstly, an offer must be made by either the consumer or the business (seller). This can be established by the consumer placing an item from an online marketplace into their online ‘cart’, or by the business providing the consumer with a quote for services offered. A vital aspect of identifying an offer is the presence of an intention to be legally bound to the consumer contract by either party. The offer should ideally come with conditions on acceptance such as financial payment and delivery of the product or service. One aspect of the offer which can cause disputes between consumers and businesses is the legal capacity of the consumer. The latter must have the legal capacity to enter into and conclude a contract, meaning that the consumer should be above legal age ,mentally competent, and sufficiently informed.[10] Secondly, the offer made by either party must be accepted; if the consumer made the offer, it must be accepted by the business and vice versa.[11] Thirdly, both parties must consider the offer and its acceptance in the sense of the consumer paying the cost of the good or service and the business accepting it. Finally, both parties must be aware that after the payment has been made and received, they are both in a legally binding contract subject to the laws of the European Union.

The legally binding effect of the online consumer contract comes into effect when the contract is concluded. The legislation applicable to e-commerce in the European Union such as the Consumer Rights Directive or the E-commerce Directive does not explicitly state when an online consumer contract is concluded. However, Article 11(1) of the E-commerce Directive places an obligation on online retailers to send confirmation to consumers when they have purchased a service through an online platform, but the Directive does not specify the purchase of a product.[12] This Article can be interpreted to mean that the contract is

[9] Consumer Rights Directive, art 2(7).
[10] Andrea J Boyack, ‘The Shape of Consumer Contracts’ (2023) 101 Denver Law Review 1, 7.
[11] Ekaterina Pannebakker, ‘Offer and Acceptance and the Dynamics of Negotiations: Arguments for Contract Theory from Negotiation Studies’ (2013) 6 Erasmus Law Review 131, 133.
[12] E-Commerce Directive, art 11(1).

concluded once the order confirmation is received by the consumer. On the other hand, there is another approach to determining when an online consumer contract is concluded. Consumers have obligations under contracts, that being a financial obligation to pay for the cost of the product or service they wish to obtain. Once an offer is made either by the seller by providing an invoice for a product or service, or by the consumer where they add products into their online 'basket', and this offer is accepted by either party, a payment must be made by the consumer. This can be interpreted to mean that at the point in time where the consumer fulfills their financial obligation under the contract, the contract is concluded. This is supported by the preparation and delivery of a product starting after the payment is concluded. A consumer contract can also be concluded by the product or service provider at the moment which they fulfill their obligations under the contract to provide the consumer with a product or service.

It is imperative to determine when a consumer contract is concluded as there are certain consumer protection rights that consumers can depend on only after the conclusion of the contract. The most relevant to this point of debate is the right of withdrawal. This grants consumers the right to withdraw from a contract for 14 days after the conclusion of a consumer contract. For products, the 14 day period begins when they acquire physical possession of the product while for services, the withdrawal time period begins when the contract is concluded.[13] While the Consumer Rights Directive provides strict provisions for the withdrawal period, it does not explicitly state when a contract is concluded, which may give rise to disputes between businesses and consumers. More importantly, it has the potential to threaten consumer protection as there are doubts as to when a consumer can exercise their right of withdrawal after purchasing a good concluded by a sales contract. As the burden of proof rests on the consumer when exercising the right of withdrawal, there should be clarification on the issue of conclusion of sales contracts to effectively protect consumers. Online retailers or sellers traditionally set their own terms and conditions for consumers using their services or buying their products, which means that there are differences between the point of conclusion of a contract of each retailer. Consumers may be able to rely on the wide interpretation of the right of withdrawal laid down in the Consumer Rights Directive for both sales and services contracts. A generalization can be made for products and services where it can be interpreted that the consumer contract is concluded when consumers acquire physical possession of the product or the fulfillment of services as at

[13] Consumer Rights Directive, art 9.

that point, the consumer fulfilled their financial obligation under the contract and the retailer fulfilled their obligations by providing the product or service ordered by the consumer. There is a clear gap in the Consumer Rights Directive on the point of conclusion of consumer contracts which if not filled in through jurisprudence and academic discussion may threaten consumer protection.

2.3 Standard Form Contracts

E-commerce consumer contracts are not typically drafted individually, instead, standardized contracts with standardized terms are used that apply to every consumer purchasing a product or service from an online retailer or marketplace. This is known as a standard form contract. Standard form contracts create an asymmetrical power balance between the consumer and seller as the latter sets the terms of the contract and there is no room for negotiation on the consumer's behalf.[14] The seller is the dominant party in the seller-consumer relationship. This leaves the consumer with two options; (a) agree to the contract terms set by the seller and purchase the good or service, or (b) disagree with the terms set and cancel the consumer transaction. Article 3 of the Unfair Contract Terms Directive can act as an instrument to determine if a consumer contract is unfair to the weaker party of the business-consumer relationship; that being the consumer. Although the Unfair Contract Terms Directive was drafted in the late 90s before the rise of e-commerce which can be witnessed in the present day, the substance of Article 3 can be extended to contract terms in online consumer contracts. Where a standard form contract's terms are drawn up before the formation of the relationship between the business and consumer, and the consumer has no capacity to influence the substance of the contract, it is regarded as a contract which has not been "individually negotiated".[15]

Standard form e-commerce contracts have evolved to be implemented through two types of modern agreements. The first is a "clickwrap contract" which prompts consumers using the website of the online retailer to accept the terms and conditions of the website through an 'I agree' button.[16] This omits the necessity of a consumer's electronic signature and only requires the click of a mouse. As a result of the rise of e-commerce, some retailers have implemented a "browsewrap contract". This type of agreement has made the process of

[14] Simon Blount, 'Unconscionability in Online Business to Consumer Contracts' (2021) 2 ANU Journal of Law and Technology 5, 7.
[15] Unfair Contract Terms Directive, art 3.
[16] Adam Gatt, 'Electronic Commerce — Click-Wrap Agreements' (2002) 18 Computer Law & Security Review 404, 405.

concluding an e-commerce contract between a retailer and consumer even simpler. When accessing the website of a seller, consumers are notified that by browsing the website, they automatically agree to the terms and conditions set.[17] This erased the step of physically accepting terms and conditions, and when the consumer reaches the stage of purchasing a product or service, the terms and conditions do not have to be accepted again. In both agreements, the act of accepting the terms and conditions of the online retailer or marketplace acts as the consumer's electronic signature and consent to enter into a legally binding agreement.

What draws standard form contracts into the scope of the research question of this paper is the fact that the contracts give rise to an asymmetric power play. The retailer is the party who constructed the contract and holds the bargaining power in the business-consumer relationship. Since the contracts are prepared prior to the transaction, the contract terms are not personalized nor are they negotiable. The non-negotiable element of the contracts causes a further power imbalance between the business and consumer as the consumer has no say in the terms of the contract when buying goods. Businesses take the consumer as a whole, so they do not consider one specific consumer but all of their potential consumers. In every transaction, the business holds an advantage over consumers as it is the party most knowledgeable about all of the details of the product as well as the specific policies the business has such as returns, refunds, or specifics regarding defective products or services which do not meet the consumer's expectations. Consumers tend to agree to terms and conditions they are unaware of due to multiple factors. Firstly, the extremely long terms and conditions displayed to consumers are time consuming to read through. Secondly, ordinary consumers with no legal or retail experience do not have detailed knowledge about unfair contract terms or e.g. the right of withdrawal, as contracts are drafted in a legal language known as "legalese", which is difficult for a person with no legal knowledge to decipher.[18] Thirdly, online retailers selling products or services of a similar make typically have similar standard form contracts as they are widely used. This leaves the consumer with limited, and sometimes no choice but to accept the standard form contract if they need the product or service.

[17] Drew Block, 'CAVEAT SURFER: Recent Developments in the Law Surrounding Browse-Wrap Agreements, and the Future of Consumer Interaction with Websites' (2002) 14 Loyola Consumer Law Review 227, 228.
[18] Eric Martínez, Francis Mollica and Edward Gibson, 'Poor Writing, Not Specialized Concepts, Drives Processing Difficulty in Legal Language' (2022) 224 Cognition 1, 1.

Ascertaining the exact stage at which an offer is accepted by a consumer is challenging in standard form contracts as a result of the purely automated contract formation process. In browsewrap and clickwrap contracts detailed above, offers can be considered to be accepted by consumers in multiple forms. It can be accepted by agreeing to the terms set on the retailer's platform, completing an online payment, or receiving an automated order confirmation. It is clear that there is no universally agreed on stage where an offer in e-commerce is accepted by a consumer. Regardless of the unclear point of acceptance of an offer, a consumer must still be protected when purchasing a product or service. Consumer protection is essential to maintain the stability of the internal market, specifically cross border e-commerce across the European Union.

The above discussion established the reasons consumers are viewed as the weaker party in e-commerce transactions. For this reason, an analysis into the European legal framework on consumer protection is necessary, and the relevant legislation will be dealt with in Chapter three.

2.4 Definition of Consumer

To examine the effectiveness of current consumer protection laws in the European Union, the definition of a 'consumer' must be dissected. A 'consumer' is defined in the E-commerce Directive, Unfair Commercial Practices Directive, and the Consumer Rights Directive as a "natural person who" when buying a product or service through a digital platform or marketplace "is acting for purposes which are outside his trade, business, craft or profession".[19] The definition is clear-cut and delineates that the consumer in the business-to-consumer relationship must be someone who obtains the good or service for personal reasons which do not fall within the scope of their professional work life. It explains who a consumer is in a technical manner i.e. "acting for purposes … outside his trade…" and a personal manner i.e. "natural person".[20] The definition of a 'consumer' is uniform in European Union Directives and share the same fundamental elements of "a natural person" "acting … outside his trade…".[21] This uniformity seeks to clearly define the scope of consumer protection rules and who they are applicable to.

[19] E-commerce Directive, art 2(e); Unfair Commercial Practices Directive, art 2(a); Consumer Rights Directive, art 2(1).
[20] ibid.
[21] ibid.

The next question that should be asked is why and how the Union legislators came to the definition of a consumer. Before the implementation of the Directives above into the domestic system of Member States of the European Union, there was a fragmented definition of ‘consumer’ in various Member States. As a result of this, consumer protection law needed to be made uniform in the Union through Directives which require implementation into the Member States’ domestic systems. The current definition of a consumer in European Law, specifically the requirement of a consumer being a natural person stems from the *Idealservice* case regarding the Directive on unfair terms in consumer contracts.[22] There, the European Court of Justice ruled that a ‘consumer’ includes only “natural persons”. [23] A consumer does not include those engaging in business transactions or persons with legal capacity as they are more knowledgeable on legal matters and hold sufficient financial funds to seek legal advice on the contracts they enter into, even if it is merely an e-commerce contract stemming from a purchasing agreement.[24] The term ‘consumer’ should be interpreted and understood narrowly to protect consumers who are in genuine need of protection. Genuine need can be distinguished by the characteristic of a consumer being the weaker party in transactions between them and businesses. Extending consumer protection rights to legal persons who are not in need of protection risks diluting the effectiveness of the right. Hence, an interpretation of a ‘consumer’ from a narrow lens protects the individual characteristics and essence of both business-to-business and business-to-consumer transactions. This is necessary as the core of consumer protection law is to protect the weaker party in transactions. Allowing businesses or legal persons into the realm of consumer protection, even if they are acting in the capacity of a consumer in the sense of purchasing a product or service, would threaten the legal certainty of consumer protection laws.

2.5 Dual Purpose Contracts

Jurisprudence of the European Court of Justice confirmed the definition of a ‘consumer’ through case law such as the *Idealservice* case. It has already been established that a consumer is a natural person who purchases a good or service for a reason not related to their professional life. However, some situations arise where a product is bought by an individual

[22] Joined Cases C-541/99 and C-542/99 *Cape Snc and Idealservice Srl and between Idealservice MN RE Sas and OMAI Srl* [2001] ECR I-9057, para 13.
[23] ibid.
[24] Bastian Schüller, ‘The Definition of Consumers in EU Consumer Law’, *European Consumer Protection: Theory and Practice* (Cambridge University Press 2012), 125 <https://www.cambridge.org/core/books/european-consumer-protection/definition-of-consumers-in-eu-consumer-law/795A60A15121A56EE0C5E5F0A5D05BA7> accessed 10 January 2025.

with a more liberal profession e.g. an individual who is a personal chef, and the product is used for both personal and professional reasons. This is known as a "dual purpose contract" and in order for the buyer to be protected by consumer law, the degree of professional use must be ascertained.[25]

The Consumer Rights Directive puts forward a test to determine whether a person buying a product or service is considered to be acting in a personal or professional capacity when concluding a sales contract. It lays down the concept that an individual is considered to be acting in the capacity of a consumer in a dual purpose contract when the professional use of the product or service is extremely limited in comparison to the personal use and in light of the general purpose of the contract.[26] Returning to the example above, if a personal chef buys a knife set, and uses the knives both during his shifts and at his home when cooking for himself but the chef primarily personally cooks for himself using the knives 90% of the time, the transaction can be covered by consumer law. There are three elements which must be considered when making this determination in a dual purpose contract, that being the "nature and purpose" of the contract, as well as the "objective circumstances" surrounding the transaction.[27] This means that each dual purpose contract is examined individually and does not ride on the bandwagon of previous contracts which may have been similar. On the other hand, the Court of Justice took a starkly different approach to the determination of the main purpose of a dual purpose contract in the *Gruber* case. There, the Court put forward the notion that even if an individual is acting in the context of private and professional use that is outside his trade or profession, and no matter how predominant the personal use is, the individual will not be considered a consumer. As soon as the individual uses a product or service for purposes which are within his trade, craft, or profession his rights under European consumer protection law cease to exist.[28] This perfectly aligns with the aim of consumer law to protect private consumers, which comes as a result of recognizing that consumers are the weaker party in transactions. The Consumer Rights Directive put an end to the discussion by stating that in dual purpose contracts, where the personal use of the product is "so limited", for the purpose of protection under the Directive, the individual "should … be considered a

[25] Zhen Chen, 'The Classification of Dual-Purpose Contracts in European Private International Law' (2023) 31 European Review of Private Law 909, 915.
[26] Consumer Rights Directive, recital 17.
[27] Case C-774/19 *A.B. and B.B. v Personal Exchange International Limited* [2020] EU:C:2020:1015, para [39], [92].
[28] Chen (n 25), 912.

consumer".[29] Hence, where an individual uses a product or service for purposes which are within his trade or profession, he holds the necessary knowledge to make an informed decision on the product or service. The individual is no longer considered the weaker party in the business-consumer relationship when purchasing a product or service within his field as it puts the individual on equal footing to the retailer in terms of being informed and knowledgeable.

2.6 Asymmetries in Consumer Contracts

In transactions between businesses and consumers, the consumer is the weaker party. This comes as a result of information asymmetry and bargaining power asymmetry. The former is where the business has more knowledge of the product or service, its specificities, pricing strategies, and contract terms. The information asymmetry automatically leaves the consumer at a disadvantage no matter e.g. how many questions they ask a sales associate about the product or research the product before buying. To understand this more it can be put into practical terms. When buying e.g. a blender, the seller (business) has detailed knowledge about the strength of the blender, number of blades, durability, functions, and safety instructions. The consumer, on the other hand, may have done some research and learned basic information about the functions of the blender, but is not educated enough to know the specifics. The retailer or seller has a duty upon him/her to inform the consumer of every detail of the product including its origin and advertising methods in order to make an informed decision.[30] Information asymmetries may threaten a consumer's right to be informed under consumer protection law. Consumer protection rules exist to remedy the power imbalance in the relationship between businesses and consumers by allowing consumers to seek compensation for the businesses' wrongdoing. For example, the Product Liability Directive came into force to remedy consumers who have bought a defective product e.g. a blender that was wired incorrectly and starts a fire in the consumer's home.

In addition to information asymmetry, there is also a bargaining power asymmetry between businesses and consumers. Businesses hold superior bargaining power in physical marketplaces, but this power is amplified in e-commerce where standard contract terms are set. The consumer has no negotiating power to give input on the contract terms, or to negotiate the price of a product or service, contributing to the asymmetry between consumers and businesses. Consumers may either accept the terms set and become legally bound in the

[29] Consumer Rights Directive, recital 17.
[30] ibid, art 6.

contract or reject the businesses' terms and not become a party to the contract. The lack of bargaining power for consumers places them at a disadvantage when entering into contracts with online businesses as they are entering the contract on a 'take it or leave it' basis. When thinking of the notion of a consumer in regard to consumer protection, it must be thought of in terms of a reasonable, average consumer. An average consumer, or an average individual, does not have sufficient legal knowledge or background to fully understand the contract they are entering into, which further increases the asymmetrical gap between consumers and online businesses. This substantiates the need for e-commerce Regulations and Directives to include provisions which effectively address the gap between consumers and businesses in e-commerce.

In terms of market power, although there is still asymmetry present between the business and consumer, the consumer is empowered in the sense that they have the ability to choose to stop purchasing a product if they do not feel informed about its specificities or pricing. Consumers have the freedom to purchase any product or service they consciously choose. However, this market power is not unlimited, it is limited to the number of comparably similar products or services available for consumers to choose between. Regardless of consumers' market power, they must be protected when purchasing any product or service.

2.7 Digital Signatures

The rapid development of e-commerce led to a change in the habits of consumers, allowing them to buy any product or service available on the internet with a few quick taps on a screen. Transactions of higher values where consumers purchase e.g. luxury items or valuable antique pieces from online auctions require extra verifications. Online retailers utilize digital signatures (or electronic signatures) as a tool to verify the identity of consumers and to bestow confidence in consumers.[31] There are several ways by which the development of digital signatures in e-commerce transactions intersect with consumer protection. Additional verifications using electronic signatures allow consumers to protect their economic interests and benefit from a secure exercise of the freedom of movement of goods and services, as well as building trust in e-commerce, a necessity for its success.[32] This can be credited to the fact

[31] Stephen Mason, 'The Signature', *Electronic Signatures in Law* (University of London Press 2016), 1 <https://www.jstor.org/stable/j.ctv5137w8.7> accessed 8 January 2025.

[32] UNCITRAL 'Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods' (2009), 35 <https://digitallibrary.un.org/record/657519?ln=en&v=pdf> accessed 5 February 2025.

that digital signatures provide a high level of security to ensure that consumers are not making high cost transactions with a fraudulent online retailer.[33]

Digital signatures in the European Union are governed by the European Union's Parliament and Council Regulation on "electronic identification and trust services for electronic transactions", also known as the eIDAS Regulation.[34] One of the Regulation's goals is to build individuals' trust in online transactions when acting as consumers in e-commerce. The Regulation lays down a framework on electronic signatures and makes an effort to harmonize digital signatures for its acceptance on an EU wide basis. Electronic signatures are separated into three categories: (basic) electronic signatures, advanced electronic signatures, and qualified electronic signatures. The first category is most commonly used in e-commerce and involves methods such as that in clickwrap contracts where the consumer virtually clicking an 'I accept' button, or typing out their name constitutes their electronic signature and will to be bound into a contract with the online retailer.[35] Consumers can use their electronic signature as proof of entering into an electronic contract, resulting in both the consumer and retailer having obligations to fulfill. This provides consumers with legal certainty and assurance that once they have been released from their financial obligations, they are legally entitled to their product or service. Additionally, this form of digital signature complies with the right to be informed enshrined in the Consumer Rights Directive as online retailers or service providers must provide consumers with the product or services' properties as well as other identifying information of the seller or service provider.[36] This form of electronic signature perfectly encapsulates the intention of the legislators of the eIDAS Regulation to increase "the effectiveness of …. private online services".[37] Prior to consumers providing an electronic signature, they are asked to agree to terms, conditions, and policies set by the online retailer. A limitation of electronic signatures arises where theoretically, online retailers expect consumers to thoroughly read the terms and conditions set but realistically, it is widely known that consumers tend to skim past them due to their extreme lengths and complexities.[38] This may lead to the acceptance of terms and conditions which consumers are

[33] John Velentzas and others, 'Digital and Advanced Electronic Signature: The Security Function, Especially in Electronic Commerce' (2022) 139 SHS Web of Conferences 1, 1.
[34] Parliament and Council Regulation (EU) 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [2014] OJ L257/73 ('eIDAS Regulation').
[35] Gatt (n 16), 407.
[36] Consumer Rights Directive, art 6.
[37] eIDAS Regulation, recital 2.
[38] Yannis Bakos, Florencia Marotta-Wurgler and David R Trossen, 'Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts' (2014) 43 The Journal of Legal Studies 1, 32.

not aware of, allowing consumers to willingly forfeit their right to be informed. The e-commerce contracts concluded may be declared invalid by Courts of the European Union if they contain unfair terms which were hidden from the consumer, or terms that were misleading and filled with legal jargon, intentionally done to confuse the consumer. The discussion on unfair contract terms will be further explored in the following chapter.

The second category of digital signatures is advanced signature and its main advantage is the security it provides.[39] It can be used in, for example, high cost consumer transactions such as purchasing luxury items or one-of-a-kind antique items. Article 26 of the eIDAS Regulation lays down three requirements for advanced electronic signatures to be valid. The signature must be constructed using "electronic signature creation data" and must be associated with the signee in a unique manner which identifies the signee.[40] Furthermore, it must not allow persons to challenge or deny the authenticity of the electronic signature due to the high level of encryption around the signature.[41] This provides a high level of security to consumers when conducting online transactions and allows them to build trust with online retailers. The advanced category of digital signatures provides consumers with legal standing in cases of disputes with online retailers or middlemen to transactions. Article 169 of the Treaty on the Functioning of the European Union lays down the concept of consumer protection through the protection of the "safety and economic interests of consumers", which electronic signatures aim to do.[42] Electronic signatures act as a means of concrete legal certainty due to the non-repudiable nature of the signature. Neither the consumer nor the seller may object to the authenticity or validity of the signature, such as transactions where a one-time password is sent to consumers to confirm a transaction, instilling confidence in both parties. Furthermore, completing or filling in a digital signature immediately places both the consumer and the business into a legally binding contract requiring the consumer to fulfill their financial obligation of paying for the price of the product or service obtained, as well as the business' obligation to fulfill the consumer's order. However, this is only possible where the digital signature meets the validity requirements set by the eIDAS Regulation and general law of contracts discussed above, that being a valid offer, acceptance, payment, and the legal capacity of the consumer.

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[39] Sarah Wood Braley, 'Why Electronic Signatures Can Increase Electronic Transactions and the Need for Laws Governing Electronic Signatures' (2001) 7 Law and Business Review of the Americas 417, 429.
[40] eIDAS Regulation, art 26.
[41] Patrick van EECKE, 'The Legal Aspects of Digital Signatures', *Cyberidentities* (University of Ottawa Press 1999), 58 <https://www.jstor.org/stable/j.ctt1cn6rfb.8> accessed 8 January 2025.
[42] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/49, art 169 ('TFEU').

2.8 Chapter Conclusion

This chapter analyzed the multifaceted nature of online consumer contracts by highlighting its stages of formation and the associated challenges. The core elements of a legally binding contract, that being an offer, acceptance, payment and will to be bound into a contract were examined. In the analysis, it became evident that there exists ambiguity regarding the moment at which a contract is considered to be concluded. A contract may be considered to have been concluded where the product is delivered or service is performed, where the consumer's financial obligation is concluded, or even when the consumer receives an order confirmation. The point of the conclusion of an online consumer contract comes with significant implications on issues such as the right of withdrawal, stressing a need for a delineation of this issue.

The discussion on standard form contracts emphasized the asymmetries present in e-commerce. Although the rise of browse wrap and clickwrap agreements made the process of contract formation more efficient, it also created an imbalance of bargaining power between consumers and sellers/businesses. Standard form contract terms are prewritten, do not vary between different consumers, non-negotiable, and formulated in 'legalese'. Where contract terms are unfair to consumers, the consumer may either (1) accept the terms and conditions set, or (2) choose not to participate in the contract. This does not offer consumers any flexibility. The bargaining asymmetry coupled with the information asymmetry in e-commerce creates an environment which may not always protect the rights of consumers.

Furthermore, it was imperative to understand the definition of a 'consumer' to determine whether consumer protection measures in the European Union legal framework are targeted correctly. The uniform definition in the consumer protection legislation includes natural persons who act as consumers for purposes outside of their trade. A uniform definition with a strict interpretation is necessary for consumer protection, especially for cases of dual purpose contracts. The definition reached emphasized the European Union's commitment in protecting consumers who are considered vulnerable in the business-consumer relationship.

Additionally, the chapter explored the application and integration of digital signatures in online consumer contracts and framed it as a dual sided tool which both simplifies the conclusion of contracts and opens up consumers to vulnerability. While digital signatures provide added security to consumer contracts, they also bring forward issues of informed consent in contracts as a seller's terms and conditions are typically long and drafted in a complex manner. This may lead to a consumer unknowingly forfeiting their right to be informed.

Hence, although the European Union has established a detailed legal framework through its Directives, namely the Consumer Rights Directive, the E-Commerce Directive, the Unfair Contract Terms Directive, and the Unfair Commercial Practices Directive, gaps in consumer protection still remain. Ambiguities in the conclusion of consumer contracts, asymmetries exacerbated by standard form contracts, a minimized understanding of informed consent and the right to be informed, and challenges of digital signatures lead to the preliminary conclusion that while the legal framework in place protects consumers rights, it does not do so comprehensively enough. Clarity on the gaps left by legislation is necessary to enhance consumer protection and provide legal certainty to both sellers and consumers.

Chapter 3 - Key Consumer Protection Issues

3.1 Introduction

The rapidly evolving nature of e-commerce transformed the transactional and interactional nature between consumers and sellers, bringing to light new challenges and concerns. Key consumer protection issues can arise at any stage of the transaction, from the buyer's interest in the product or service and willingness to purchase it to receiving the product and inspecting it. The European Union developed a legal framework to protect consumers from issues arising from e-commerce. This chapter critically examines the legal framework's effectiveness in safeguarding consumer rights, in light of key consumer protection issues which pose intensified risks in the e-commerce environment.

The examination begins with information requirements and the duties upon sellers when conducting their business with consumers in e-commerce. It then continues on to misleading practices, specifically false advertisements and dark patterns regulated by the Unfair Commercial Practices Directive. Unfair contract terms in consumer contracts which may be prejudiced against the consumer due to standard form contracts are examined, alongside the protections offered by the Consumer Rights Directive and the Unfair Contract Terms Directive. The issue of defective products and the remedies offered to consumers is analyzed to determine whether they sufficiently protect consumers. Additionally, the right of withdrawal and its exercise by consumers is explored to contribute to the holistic perspective of consumer protection. Finally, the treatment of vulnerable consumers in e-commerce with a dual perspective of traditional vulnerability and digital vulnerability will be delved into. The aim of this chapter is to highlight both the strengths and weaknesses of the legislation in light of the issues outlined to assess whether the framework provides consumers with effective protection in e-commerce.

3.2 Information Requirements

It has been established in this paper and supported by literature that a consumer is the weaker party in the contractual relationship between consumers and businesses.[43] Consumer protection laws exist to offset information asymmetries and to bring a balance to the contractual relationship in e-commerce. One of the most effective ways by which businesses can offset information asymmetries to provide a safer e-commerce experience to the consumer is by following mandated information requirements. Information requirements are simply a requirement for businesses and sellers to provide their consumers with certain information to enable them to make an informed purchasing decision.

Information requirements are governed by both the Consumer Rights Directive and the E-Commerce Directive. The Consumer Rights Directive prescribes information requirements for businesses engaging in distance contracts through e-commerce while the E-Commerce Directive addresses information requirements for service providers. The Consumer Rights Directive mandates that explicit pieces of information must be disclosed to the consumer.[44] This aligns with the consumer's right to be informed as a buyer within the European Union under the TFEU.[45] Under the Consumer Rights Directive and E-Commerce Directive, consumers must be informed of (1) the features of the product or service they are purchasing (2) the seller's information such as his/her name, address, contact details (3) the cumulative price of the good or service including delivery costs and taxes (4) delivery details such as time and date of delivery (5) the right of withdrawal and the procedure the consumer must follow to avail him/herself of that right.[46] The information requirements must be met by the business prior to the conclusion of the consumer contract.[47] This means that this requirement comes in at the transactional stage of the business-consumer relationship rather than the contractual stage. The transactional stage of the relationship is where the consumer is

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[43] Jarmila Lazíková and Ľubica Rumanovská, 'The Notion of Consumer in the EU Law' (2016) 5 EU Agrarian Law 1; Anabela Susana de Sousa Gonçalves, 'The E-Commerce International Consumer Contract in the European Union' (2015) 9 Masaryk University Journal of Law and Technology 5.
[44] Consumer Rights Directive, art 6.
[45] TFEU, art 169.
[46] Consumer Rights Directive, art 6(1); E-Commerce Directive, art 5.
[47] ibid.

discussing potentially buying the product and accepting an offer from the business to buy the product. Referring back to the stages of contract formation in Chapter 2, when the consumer’s financial obligation to the business is fulfilled, this marks the conclusion of the consumer contract. Hence, important information about the product must be disclosed prior to the contractual stage of the business-consumer relationship.

Article 6 of the Consumer Rights Directive was formulated to establish the concept of information requirements both to businesses and consumers; by informing businesses of their disclosure requirements, and by allowing consumers to refer back to the Directive to ensure their rights are protected when engaging in e-commerce. Furthermore, the legislators of the Directive prescribe the requirements of information disclosure in a highly specific manner to ensure it is followed by businesses and sellers. Article 6 of the Consumer Rights Directive states that the information requirements should be provided to the consumer “in a clear and comprehensible manner”.[48] The specification of the way in which the information should be delivered is written in a way which does not leave room for the business or seller to deviate from. While the “clear and comprehensible manner” is not explained verbatim, it can be understood by a thorough reading of Articles 6(1)(a)-(t).[49] However, the Directive uses the term “shall” which is not as imperative as the word ‘must’ for example. It may be said that this lack of imperativeness combined with the full harmonization nature of the Consumer Rights Directive may allow businesses to deviate from the provision of information requirements as States may not implement more stringent measures for businesses to follow.[50] Furthermore, the information requirement in Article 6(1)(c) of the Consumer Rights Directive requires businesses to provide consumers with a communication method which allows the latter to contact the former “quickly and communicate with him efficiently”.[51] Article 5 of the E-Commerce Directive prescribes information requirements which service providers must provide consumers with, but the drafting language is different to the Consumer Rights Directive. It states that the service provider “shall render easily, directly and permanently accessible to the recipients” the information requirements.[52] Similarly to the Consumer Rights Directive, the use of the term ‘shall’ may give the connotation of the information requirements being a measure which is not mandatory for service providers to supply consumers with. This school of thought is supported by the minimum harmonization

[48] ibid.
[49] ibid.
[50] ibid, art 4.
[51] ibid, art 6(1)(c).
[52] E-Commerce Directive, art 5(1).

approach of the E-Commerce Directive. It provides Member States with minimum measures to follow but allows them to take more stringent measures to protect their national consumers. The language used in Article 5 is quite weak and does not imply an imperativeness on service providers to supply information requirements to consumers.[53] The terms employed seek to ensure that businesses provide consumers with a means of communication such as a business landline number, a hotline, or service number for example which are guaranteed to allow consumers to inquire about the product or service before and after entering into a contract with the business. While this requirement for consumer protection corresponds with the consumer's right to be informed under the TFEU there is a possibility that the Directive may be more effective if stronger terminology with a focus on consumer protection was adopted in its drafting.

3.2.1 Method of Provision

A core element of the right of a consumer to be protected is the expectation of transparency from the business or service provider as to ensure consumers are not making purchasing decisions based on deceitful or false information. While the exact method of providing the information requirements are not described in the E-Commerce Directive and the Consumer Rights Directive, there are provisions and principles in both which allow deductions. The language of both Directives which ask of businesses and service providers to provide information to consumers in a clear or easy manner aligns with the principle of transparency established in the European Union. Under the E-Commerce Directive, businesses must provide consumers with detailed information about their identity, where they are located, and contact details.[54] This information should be given on the website of the business and is usually placed in the 'contact' page or 'about us' section. It should be comprehensive enough as to allow the consumer to know from first glance the exact licensed name of the business, the country and city they are located in, and the relevant contact information for speedy communication with the business. Furthermore, while there is no detailed explanation of what constitutes quick and efficient communication, it is reasonable to deduct from the development of the modes of communication in this age that there should be a dedicated landline number which serves as a 'helpline' to assist consumers whenever it is needed. Once the consumer in the e-commerce environment adds a product to their 'basket', they must be made aware of the contractual relationship which is being formed. This is typically done

[53] ibid.
[54] ibid.

through a list or document of terms and conditions disclosing to the consumer that they are engaging in a transactional relationship with the business, where they must agree to the one-sided conditions put forward in order to move forward with the purchase. In the penultimate stage of the transactional relationship, when the consumer intends to purchase the products chosen from his/her 'basket', the business must display to them the total price of the desired products, including delivery costs and other additional costs, as well as the consumer's right of withdrawal.[55] This is necessary to ensure that the consumer purposely intended on adding the products to his/her 'basket', and they are aware of their upcoming financial obligation once engaging in the contract. Determining the correct method of providing information requirements can be considered subjective, not to persons but to States. It is true that the E-Commerce Directive and Consumer Rights Directive aim to harmonise the laws on consumer protection in the European Union however, enforcement is left to Member States. This is a pitfall of both Directive as states have the autonomy to decide on e.g. what constitutes "clear and comprehensible manner".[56] Some states such as those in Eastern Europe may interpret "clear" in a way which is different to the Western European states. This opens up the Directives to being interpreted with variation, variation which may be too big and comes at the cost of consumer protection, leading to unequal consumer protection across the European Union even though uniform legislation exists.

The information requirements detailed above exist to enable the consumer to seek the information needed before purchasing a product. However, information requirements tend to be of a dual-sided nature; they can benefit consumers as they aim to provide consumers with information for their purchases, but they also may hide terms which can be detrimental to the consumer. This is done by providing terms and conditions to consumers through a hyperlink, the acceptance of which is not mandatory to move forward with the purchase of the good or service. This method of relaying information to consumers cannot be considered as relaying it in a "clear and comprehensible manner", and this was agreed on by the Court of Justice in Case C-49/11.[57] The provisions of the Directive fail to consider that information disclosures are drafted in a complex legal language which is difficult for the ordinary consumer to understand.[58] An ordinary consumer is one who, under European Union law, is expected to be

[55] Consumer Rights Directive, art 6.
[56] ibid.
[57] Consumer Rights Directive, art 5; Case C-49/11 *Content Services Ltd v Bundesarbeitskammer* [2012] EU:C:2012:419, para 51.
[58] Martien Schaub, 'How to Make the Best of Mandatory Information Requirements in Consumer Law' (2017) 25 European Review of Private Law 25, 27.

"reasonably well-informed, reasonably observant, and circumspect", an expectation which cannot be met by every consumer.[59] The average consumer either does not read through every detailed piece of information disclosed, or if the information is read, it is not understood by the consumer due to the language used. A study conducted showed that two, or even less than two out of one thousand people read terms and contracts in e-commerce.[60] Virtually every terms and conditions pop-up of an online webpage has multiple legal clauses included in it, overloading the consumer with excessive information which as a result, do not protect the consumer as he/she is not aware of all of his rights. Drawing back to the study above, the two participants who read the terms and conditions may be those who understand the importance of information requirements, thus not needing as much protection as the average consumer. Information asymmetries, which already exist due to the seller being more knowledgeable about a product or service and having the financial and legal backing to act as they please, is multiplied when information requirements are drawn into the scope of the equation. This is counteractive as a purpose of information requirements is to offset information asymmetries in the consumer-business relationship. Rather than a complicated stream of information and clauses given to consumers, it should be complemented with a simplified bullet point list of the core rights a consumer has in e-commerce to be more beneficial for the consumer's rights. It is imperative that the information requirements provisions in legislation addressing e-commerce holds the protection of consumers at the forefront of it.

The E-commerce Directive and Consumer Rights Directive complement each other where the former focuses on contract formation and its effects while the latter focuses on pre-contractual information, including information requirements. The Directives put forward the requirement of information disclosure to consumers, with the requirements spanning from the identification details of the trader to the post-contractual details such as payment and delivery. While the legislation is effective at protecting consumers from a lack of information and intend to keep consumers engaging in e-commerce informed at all stages of the shopping process, they have their pitfalls.

The form through which information requirements should be provided to consumers is not standardized in the European Union, it is left to the legislators of the individual Member States. This creates vulnerabilities in the consumer protection framework as each state in the

[59] Vanessa Mak, 'Standards of Protection: In Search of the "Average Consumer" of EU Law in the Proposal for a Consumer Rights Directive' (2011) 19 European Review of Private Law 25, 28.
[60] Bakos, Marotta-Wurgler and Trossen (n 38).

European Union is sovereign, with its own historical, economical, and cultural background, giving them different rationales for consumer protection. Due to the fact that the European Union does not erase national differences between states, enforcement of consumer protection laws uniformly is difficult. Furthermore, where information is disclosed to consumers, and both the Union legislators and national legislators have done their parts in furthering consumer protection, the manner by which information is disclosed may render it ineffective. For more effective consumer protection laws, the benchmark of an ordinary consumer in the sphere of information requirements should be reevaluated. A definition of an ordinary consumer which takes into account factors such as varying education levels, varying comfortability with technology, and varying cultural backgrounds would address the issues which call for consumer protection more effectively.

3.3 Misleading practices

The key players in online marketplaces are two: the seller and the buyer (consumer). Sellers advertise their products on their online marketplaces to attract attention from potential consumers to visit their page and place an order. As a result of the rapid expansion of e-commerce, there are countless online marketplaces offering every product and service one can think of: ranging from personal gadgets to grocery delivery services. This leads to sellers needing to employ sales and marketing tactics which allow them to stand out from other sellers. Due to the oversaturation of online marketplaces, sellers tend to employ misleading practices such as dark patterns and false advertising of products and services to attract consumers and gain sales.

3.3.1 False Advertisements

False advertising consists of businesses operating online marketplaces utilizing false claims to attract consumers. This can be sellers writing fake reviews on their products and services, presenting their product or service to consumers with fake images, making false promises to consumers, etc. It can be done by creating a fake customer profile on the online marketplace’s website and claiming the product met the fake consumer’s expectations, paying and incentivizing an individual to write a false review for a promise of receiving something in return, or adding a blurb to a product which promises results that are not backed up. Legislators of the European Union aimed to combat the practice of false advertising through both the Consumer Rights Directive and the Unfair Commercial Practices Directive which will be critically analyzed below.

The issue of misleading practices falls within the scope of the Unfair Commercial Practices Directive which defines the relationship between a business and consumer to include "advertising and marketing … directly connected with the promotion, sale or supply of a product to consumers".[61] This draws false advertising into the realm of the Directive as there is a direct link between false advertising and its effects on consumers. A misleading practice is defined in the Unfair Commercial Practices Directive as a practice which "contains false information and is therefore untruthful … or is likely to deceive the average consumer … or is likely to cause him (the consumer) to take a transactional decision that he would not have taken otherwise".[62] Misleading practices tend to result in consumers purchasing a product or service or making a financial decision which would not have been made without the misleading behavior of the seller. This definition is expanded on in the Unfair Commercial Practices Directive which deems practices by businesses to be unfair where it "materially distorts or is likely to materially distort … economic behavior … of the average consumer".[63]

When consumers look to purchase a product or service online, they rely on reviews uploaded to the online marketplace from previous consumers.[64] Reviews give consumers a sense of security to ensure the product or service being purchased functions as it should. Due to the impact of online reviews on the purchasing trends of potential consumers, businesses may publish false reviews on their online marketplaces to give their products a good reputation. False reviews push consumers to purchase a product or service as they believe the product or service is reliable and serves the intended purpose however, this has no basis. Consumers believe that they are viewing reviews from actual consumers and make an 'informed' decision based off that piece of information, not knowing the reviews are false. Reviews, especially false ones, falsely represent and advertise a product as being something it is not. Additionally, the Misleading and Comparative Advertising Directive deems advertisements "which … deceives or is likely to deceive the persons to whom it is addressed or whom it reaches" to be an action which needs combatting.[65] For that reason, the Unfair Commercial

[61] Unfair Commercial Practices Directive, art 2(d).
[62] ibid, art 6(1).
[63] ibid, art 5(2)(b).
[64] Juan María Martínez Otero, 'Fake Reviews on Online Platforms: Perspectives from the US, UK and EU Legislations' (2021) 1 SN Social Sciences 1, 2.
[65] Parliament and Council Directive 2006/114/EC of 12 December 2006 concerning misleading and comparative advertising [2006] OJ L376/21 ('Misleading and Comparative Advertising Directive'), art 2(b).

Practices Directive deems misleading advertising which impacts the purchasing decisions of consumers to be unfair.[66]

While the Directive effectively defines the elements of false advertising; that being that it is considered a misleading practice and is an unfair practice, it fails to specifically address the false advertising of products or services to consumers. There is a gap in the Directive which could be filled by explicitly defining what constitutes misleading advertising such as fake reviews, fake product pictures, greenwashing, etc. The Directive specifically addresses combatting false advertisements in terms of comparative advertising which has a misleading effect on consumers, causing them to believe the product of one seller is the same as a competitor. It stipulates that false advertising is that which is deceiving to consumers and therefore do not allow the consumer to make an informed decision.[67] An aim of the Unfair Commercial Practices Directive itself is to "protect traders against misleading advertising".[68] A trader is an individual who operates within his trade or profession, so the protection of consumers against misleading advertising does not explicitly fall under the goal of the Unfair Commercial Practices Directive. There is a possibility for the definition of false advertising in the realm of competitive advertising from the Directive to be extrapolated and extended to false advertising using factors such as fake reviews. This can be accompanied by the statement in Annex I of the Unfair Commercial Practices which stipulates that a business "falsely representing oneself as a consumer" is deemed to be unfair.[69] This would greatly improve the rights of consumers as every consumer has the right to make an informed and educated decision of where to spend their money. The Unfair Commercial Practices Directive does indeed stipulate that a practice which "materially distorts or is likely to materially distort the economic behavior … of the average consumer", which funnels down to impairing "the consumer's ability to make an informed decision" is prohibited.[70] The provision creates a wide margin of appreciation by utilizing the statement "likely to materially distort", as this may potentially include false advertising as it has the ability to skew transactional decision making of the consumer. In the transactional relationship between a business and consumer, the consumer is made the weaker party due to information asymmetries, resulting in a need for the consumer's decision-making power to be protected. However, a downfall of the above provision is that it does not specify what is to be considered a material distortion with

[66] Unfair Commercial Practices Directive, art 4(a).
[67] ibid, art 6(1).
[68] ibid, art 1.
[69] ibid, annex I(22).
[70] ibid, art 5(2)(b).

misleading advertising. It is specified for misleading omissions, but not misleading information.[71]

The Unfair Commercial Practices Directive seeks to protect the transactional decision-making of consumers, thereby protecting consumer rights.[72] However, it is onerous for the affected consumer to bring forward an action against the business' misleading advertising as there is a high burden of proof on the consumer. Distinguishing between a false review and a genuine review is difficult as it is not always perpetrated by the business owner himself, it can be done by the owner's relatives, or an affiliated marketing agency, or even any individual who is paid to write a false review.[73] The consumer must prove that reading e.g. the false review caused him to make a transactional decision which he would not have done without the review. This is quite difficult as it is impossible for the consumer to prove their mental train of thought initiated by reading the false review, which subsequently caused them to purchase the product or service. Additionally, the business perpetrating the false reviews may shift the blame to consumers claiming that in the age of technology, consumers have the ability to inform themselves by using search engines to research the product or service they wish to buy.[74]

By combining the provisions of the Unfair Commercial Practices Directive on misleading advertising, actions affecting the transactional decision-making of consumers, and distorting the economic behavior of consumers, in combination with Annex I of the Directive, a criteria can be created to determine if a false review published on an online marketplace can be considered an unfair practice. The false review should (1) serve to promote a product or service (2) be perpetrated by the business owner, affiliated marketing agency, relatives of the business owner, or any individual paid or compensated for giving a review (3) include false or untruthful information (4) deceive the consumer (5) lead the consumer to make a transactional decision. By using this criterion, consumers can determine if a review of a product or service online may be categorized as misleading and hence would be actionable. It is important, however, to remember that a caveat of the actionability of false review claims is that it is difficult to determine the intention of the business or trader when publishing the

[71] ibid, art 7.
[72] ibid, art 6(1).
[73] Sherry He, Brett Hollenbeck and Davide Proserpio, 'The Market for Fake Reviews' (2022) 41 Marketing Science 896, 896.
[74] Lauren I Labrecque and others, 'Consumer Power: Evolution in the Digital Age' (2013) 27 Journal of Interactive Marketing 257, 261.

review. It is not likely that an affected consumer will be able to prove that the business intended on misleading the consumer through the false review.

The Unfair Commercial Practices Directive with the aid of the Misleading and Comparative Advertising Directive set the correct definitions for misleading advertising and its potential effects, whilst considering the inability of any legislation to determine the true intention of a trader when publishing reviews on their online marketplace. However, the Directive fails to provide effective means for consumers to seek remedies where they buy a product based off of a false review and it does not meet the standards outlined in the product description or review. Furthermore, the Unfair Commercial Practices Directive was amended in 2019 with a focus on comparative advertising, its compliance, and legal remedies to combat the practice. While the amendments do contribute to consumer protection and consumer rights by combatting comparative advertising, due to its misleading effects on consumers, the amended Directive does not update the provisions on false advertising. This leads to the idea that the Unfair Commercial Practices Directive is outdated, considering the provisions on false advertising have not been changed since 2005, which witnessed only the beginning of the digital age. From 2005 to 2025, e-commerce has vastly developed and changed, creating new challenges for consumers such as the effects of false advertising on consumers' decision-making, which are not effectively protected by the Unfair Commercial Practices Directive.

3.3.2 Dark Patterns

Dark patterns in e-commerce online stores are design patterns which influence consumer actions or decision making through deception or compelling means, leading to a decision which would not have been taken otherwise.[75] Dark patterns can be employed through subscription traps which are long term hidden subscription costs on the seller's website which the consumer unknowingly agrees to.[76] Dark patterns include drip pricing, which are hidden costs which do not appear to the consumer until payment, causing the consumer to unwillingly agree to the costs as they are typically minor in relation to the cost of the product being purchased.[77] Additionally, sellers who display low-stock pop-ups to the consumer while

[75] Arunesh Mathur and others, 'Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites' (2019) 3 Proceedings of the ACM on Human-Computer Interaction 1, 2.
[76] European Law Institute, 'European Commission's Public Consultation on Digital Fairness – Fitness Check on EU Consumer Law - Response of the European Law Institute' (European Law Institute 2023), 20 https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Response_of_the_ELI_to_the_European_Commission_s_Public_Consultation_on_Digital_Fairness_.pdf accessed 20 March 2025.
[77] Thomas Robbert, 'Feeling Nickeled and Dimed – Consequences of Drip Pricing | Emerald Insight' (2015) 25 Journal of Service Theory and Practice 621, 621.

browsing the website to create a false sense of scarcity or countdown timers to create a false sense of urgency which pressures consumers into making a purchase without deliberation fall under dark patterns.[78] There are many other dark pattern tactics employed by online sellers such as the preselection of certain terms or fees to make it more onerous for the consumer to choose to opt out known as sneaking, or causing excessive difficulty for a consumer wishing to opt out of spam emails sent by the online marketplace.[79] No matter what dark pattern is used, they all have misleading effects on consumers as they may deceive or coerce the consumer into believing that they are getting the best 'bang for their buck'. Dark patterns have become extremely common in e-commerce, evidenced by the Commission's 2023 screening of retail websites which revealed that 148 of 399 e-commerce sellers employed dark patterns on their websites.[80] Dark patterns take away the ability of consumers to make an informed decision as the information they are viewing and using to make a purchase has the purpose of deceiving them and coercing them into making a purchase. Dark patterns are constantly evolving and new forms can be created easily in the technological age, leading to an ambiguity in the definition of a dark pattern due to the ever changing and quickly developing landscape of e-commerce. The European Commission described dark patterns as "manipulative practices that … push consumers into making choices that may not be in their best interest", which is the closest alternative to a legally set definition there currently is.[81] The legal uncertainty which exists as a result of the ambiguity of the definition of dark patterns may have a chilling effect on consumers looking for remedies as a result of manipulations by online sellers. However, this legal uncertainty does make sense in some regard as the e-commerce landscape is constantly changing, and it is difficult for legislators to attempt to detect and stop wrongdoings by online sellers before they harm consumers using preventative regulation rather than reactive regulation.[82]

While dark patterns are addressed broadly in European Union legislation, they are not explicitly defined. The Unfair Commercial Practices Directive has the purpose of regulating

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[78] OECD Directorate for Science, Technology and Innovation Committee on Consumer Policy, 'Consumer Vulnerability in the Digital Age' (DSTI/CP(2021)7/FINAL, 3 July 2023), 22 https://one.oecd.org/document/DSTI/CP(2021)7/FINAL/en/pdf accessed 20 March 2025.
[79] ibid.
[80] European Commission Press Corner, 'Consumer protection: manipulative online practices found on 148 out of 399 online shops screened' (Press Release, 30 January 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_418> accessed 2 February 2025.
[81] ibid.
[82] Anita Patil, 'The Rise of Dark Patterns in E-Commerce: Comparative Legal Challenges and Consumer Protection Strategies' (2023) 11 Russian Law Journal 1296, 1310.

"unfair commercial practices harming consumers" in the European Union.[83] The Directive does not explicitly frame a dark pattern as an unfair practice, nor does it define what it is or what it includes. Annex I(7) of the Directive classifies the act of "stating that a product will only be available for a very limited time" as an unfair commercial practice. This can be considered a step forward in terms of qualifying dark patterns as unfair, but there are remaining practices such as drip pricing and creating a false sense of scarcity which are not outright defined or listed as unfair. A definition for dark patterns is imperative as traders who employ dark pattern techniques may continue to do so due to it not being explicitly banned in the Directive. Due to no definition being set out, an interpretation of Articles 5 and 6 of the Unfair Commercial Practices Directive is needed. For a dark pattern technique to be considered unfair, it must meet the material criteria set out in Article 5(2) of the Unfair Commercial Practices Directive.[84] The dark pattern must violate a normal and foreseeable standard of good faith and honesty of the seller, and it must affect the purchasing decision of the "average" consumer.[85] To compensate for the lack of a definition of a dark pattern, there is a possibility it can be declared to be misleading under Article 6 of the Directive as it may "deceive the average consumer" by causing them to e.g. purchase a product without thinking about it due to believing it is the last piece available in stock.[86] While this may be considered deception, it does not take into account the thought that consumers should inform themselves of a product before making a purchase by checking the online stores of multiple sellers. It is very common with the rise of e-commerce that more than one seller sells the same product, giving consumers an alternative that would not be deceiving. The broad scope of the Unfair Commercial Practices Directive has both advantages and disadvantages. It is advantageous because it allows an inclusive approach to emerging practices which did not yet exist at the time of the adoption of the Directive. However, the broad scope also creates a downfall for regulation of dark patterns where traders may argue that their dark pattern designs do not fall within the ambit of a misleading practice, given how burdensome it is to determine the intention of a trader employing dark patterns to deceive a consumer.

Although the Unfair Commercial Practices Directive provides a broad scope for unfair practices in order to encompass emerging deceptive practices such as dark patterns, the concept of an "average consumer" used to assess the effects of a commercial practice is a

[83] Unfair Commercial Practices Directive, art 1.
[84] ibid, art 5(2).
[85] ibid, art 2(h); art 5(2).
[86] ibid, art 6.

deterrent for effective enforcement. The Directive assumes that every consumer purchasing a product through the website of an online seller is "well-informed, reasonably observant, and circumspect".[87] This assumes that at any given moment and on any seller's webpage, if a consumer were to be picked at random, they would meet the criteria above, which is an incorrect assumption.[88] Consumers have different thought processes when it comes to purchasing a product, some approach it rationally by calculating the advantages and disadvantages, while others impulse buy to fulfill a craving to have a new purchase, known as retail therapy. Employing the term 'average consumer' does not take into account the vast differences which exist in consumer behavior. There are various factors which could affect the purchasing behavior of a consumer and immediately remove them from the scope of the Unfair Commercial Practices Directive. Some consumers may come from lower income families where education is not seen as a priority and persons are not educated to a high school or university level, which could lead them to be more vulnerable to the effects of dark patterns. The Unfair Commercial Practices Directive by using the term 'average consumer' limited the scope of application of its provisions, consequently decreasing the scope of protection for consumers. A critical point of view of the concept of an 'average consumer' could be that the lawmakers expected that not all consumers are alike, and so taking an average would be the best attempt at finding a middle ground for all consumers.[89] However, the criteria established by the European Court of Justice of being "well-informed, reasonably observant, and circumspect" is rather limited considering the three elements are extremely similar to each other.[90] While the Directive does not define dark patterns and this is seen as a disadvantage due to it not being designated an unfair commercial practice, the wide scope of the concept of an unfair commercial practice may encompass dark patterns considering dark patterns affect the economic behavior of consumers.

While the Unfair Commercial Practices Directive regulates misleading practices extensively, it does not fully regulate dark patterns as discussed above. The Consumer Rights Directive fits within the sphere of consumer rights protection in e-commerce and will be analyzed to determine whether dark patterns can fall within its net. Article 22 of the Consumer Rights Directive requires sellers to receive the "express consent" of consumers before charging for

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[87] Case C-210/96 *Gut Springenheide and Tusky v Oberkreisdirektor Steinfurt* [1998] ECR I-4681, para 31.
[88] Cătălin Gabriel Stănescu, 'The Responsible Consumer in the Digital Age: On the Conceptual Shift from "Average" to "Responsible" Consumer and the Inadequacy of the "Information Paradigm" in Consumer Financial Protection' (2019) 24 Tilburg Law Review 49, 51.
[89] European Law Institute (n 76), 39.
[90] *Gut* (n 87).

any sum of money which exceeds the amount agreed on for the product.[91] Additionally, if the seller attempts to coerce the consumer's consent by activating "default options" which must be explicitly rejected by the consumer, then the latter is entitled to reimbursement, meaning that it is a practice which is not permitted.[92] The dark pattern practice of sneaking additional items into a consumer's basket falls under Article 22 of the Directive. This is where a seller automatically, and without consent, selects an additional service or product to be placed in the consumer's basket. The additional service or product's price is typically extremely minor, causing some consumers to not take notice of it when purchasing their basket. The process of sneaking extra products with additional costs into a consumer's basket deprives them from the ability to make their own purchasing decision.[93] Article 22 completely prohibits the dark pattern practice of sneaking, a considerable step in the correct direction for consumer protection considering the quickly evolving nature of e-commerce. Hence, by generalizing the dark pattern of sneaking, it can be said that any practice by sellers which deprives consumers of making a purchasing decision by automatically selecting an additional product or service, which holds an additional fee, is prohibited by the Consumer Rights Directive. Consequently, the Consumer Rights Directive may catch certain types of dark patterns such as sneaking and drip pricing which escape the net of the provisions of the Unfair Commercial Practices Directive.

In summary, under the current EU law framework on consumer protection and consumer rights, it is difficult to regulate the use of dark patterns due to multiple factors discussed in this subsection. Firstly, there is no set definition in law of what a dark pattern is, and whether it can be clarified as a misleading practice or not. It has been determined above that it can be classified as an unfair commercial practice due to its ability to alter the purchasing decision and economic decision of the consumer, as well as being in violation of a seller's obligation of honesty, broadly categorized as "professional diligence".[94] However, the European Court of Justice established that the criteria of "professional diligence" does not need to be met where the criteria in Article 6(1) of the Unfair Commercial Practices Directive are met.[95] This is because the scope of the criteria is broad enough to classify a practice as unfair without the

[91] Consumer Rights Directive, art 22.
[92] ibid.
[93] Constanța Roșca, 'Chapter 6. Dark Patterns as Infringements of EU Consumer Law', *Digital Arms for Digital Consumer Harms: Mapping Legal and Technical Solutions for Dark Patterns in EU Consumer Law* (1st edn, Maastricht University Press 2024), 18 <https://pubpub.maastrichtuniversitypress.nl/pub/chapter-6-dark-patterns-as-infringements-of-eu-consumer-law/release/1> accessed 20 March 2025.
[94] Unfair Commercial Practices Directive, art 5(2)(a).
[95] Case C-388/13 *Nemzeti Fogyasztóvédelmi Hatóság v UPC Magyarország kft* [2015] EU:C:2015:225.

seller violating his diligence duties. Secondly, the benchmark of an average consumer set by ECJ case law makes it difficult to regulate dark patterns due to the fact that dark patterns exploit biases that only some consumers have, which may exclude them from the scope of an average consumer. Thirdly, as a result of the development of artificial intelligence and its ability to create new dark pattern practices for online sellers to employ, it is difficult for legislators to regulate proactively and create legislation which provides protection against constantly evolving technological advancements.

3.4 Unfair Contract Terms

The imposition of unfair contract terms in consumer contracts represents a significant consumer protection issue in e-commerce. As discussed in Chapter 2.3, online consumer contracts typically take on the form of standard form agreements such as clickwrap and browsewrap agreements. This makes the contract terms non-negotiable and can only be accepted by the consumer in the form they are drafted in, any individual provisions cannot be changed. As a result, businesses and sellers may embed unfair terms in the contract which creates a further imbalance between the contracting parties to the agreement. The European Union’s legislation has aimed to mitigate the risks of unfair contract terms through the Unfair Contract Terms Directive and the Consumer Rights Directive for goods and services supplied through e-commerce. This section examines the European Union’s approach to unfair contract terms by analyzing the legal framework and practical challenges arising. This analysis seeks to determine if the current legal framework effectively safeguards consumer rights and ensures they are protected in e-commerce interactions.

3.4.1 Standard Form Contracts and Asymmetries

Unfair contract terms in consumer contracts are those which negatively impact the rights of consumers. It is defined in the Unfair Contract Terms Directive as “contrary to the requirement of good faith…” causing a “…significant imbalance in the parties’ rights … to the detriment of the consumer”.[96] A significant imbalance in practical terms refers to the power asymmetry between businesses and consumers which favors the business over the consumer disproportionately. It has been established that consumers are the weaker party in e-commerce, and contract terms which are unfair to the consumer expand the already present asymmetries. Imposing a contract term which is unfair to the consumer is considered to be in violation of the good faith principle recognized in law. For a contract term to be considered

[96] Unfair Contract Terms Directive, art 3.

unfair and to fall within the scope of the Unfair Contract Terms Directive it must meet three criteria: it must (1) not be individually negotiated, (2) be biased against the consumer (3) be in violation of good faith.[97] E-commerce consumer contracts take on the form of a standard form contract, meaning that the terms of the contract are not individually negotiated between the consumer and business, but they are drafted prior to the transaction and imposed uniformly on all consumers. The fact that the contract is not individually negotiated tends to lead to a bias against the consumer as they have no say in the terms of the contract and may not negotiate against an unfair term, hence favoring the business unfairly.[98] Aside from the theoretical evidence proving that consumers do not have bargaining power in regards to contract terms, the Court of Justice agreed with the precedent that standard form contract terms must be controlled by the Unfair Contract Terms Directive as “the consumer is in a weak position vis-à-vis the seller … as regards both his bargaining power and his level of knowledge”.[99] The dominant theory in the discussion on unfair contract terms is that consumers need protection due to a wide range of reasons, all leading back to a lack of power in e-commerce contracts, calling on the need for protection of consumers.

This protection, however, is not fully provided by the Unfair Contract Terms Directive as the terms ‘good faith’ and ‘significant imbalance’ are left undefined which may lead to misinterpretations or broad interpretations which stray away from the goal of consumer protection. This issue was delineated in the *Catalunyacaixa* case by the Court of Justice where abiding by the ‘good faith’ principle requires the seller to deliberate that if the contract was individually negotiated with the consumer, would the consumer have agreed to the contractual term which is suspected to be unfair, or would the consumer have objected against the term and negotiated an adjustment.[100] As for the precise meaning of a ‘significant imbalance’, the seller must hypothetically remove the provisions of the Directive on unfair terms from the thought process, and consider if the national law in place instead of the Directive would afford the consumer more protection.[101] Hence, although the legislation left a gap in the definition of the above terms and hence a gap in consumer protection, the gap is filled in by the Court’s judgement and sets forward that contract terms must not place the consumer in an unfavorable position, and must consider whether consumers would

[97] ibid.
[98] Andrew Robertson, ‘The Limits of Voluntariness in Contract’ (2005) 29 Melbourne University Law Review 179, 190.
[99] Joined Cases C-240/98-C-244/98 *Océano Grupo Editorial SA* [2000] ECR I-4964, para 25.
[100] Case C-415/11 *Mohamed Aziz v Catalunyacaixa* [2013] EU:C:2013:164, para 76.
[101] ibid.

individually agree to the unfair terms set had it been individually negotiated. However, it is difficult for a seller to place himself in the hypothetical position of the consumer for the good faith deliberation, making it a test which cannot be easily fulfilled. There should be a set definition for a term being contrary to good faith requirements set by the Directive in order to avoid broad interpretations by national authorities upon implementation into their domestic systems, leading to better protection of consumer's rights.

The Unfair Contract Terms Directive is a fundamental pillar for consumer protection against unfair contract terms in online consumer contracts and serves as a form of intervention by the Union legislators to serve the needs of consumers. Rather than the Directive placing substantive rules on business and sellers, it puts forward procedural rules for businesses to meet when drafting standard form contracts which include transparency requirements and remedies where unfair terms are offered to consumers. Examples of what can be considered an unfair contract term is laid out in Annex I of the Directive and includes unfair terms hidden in long terms and conditions and relying on the common practice of consumers failing to read every page of the terms and conditions.[102] Based off of the examples in Annex I, the practice of including unfair terms in consumer contracts can be separated into two categories: procedural and substantive. Substantive unfair terms are those which create an unfair disadvantage to the consumer or a bias against them. This can include disproportionately high cancellation fees for the consumer when withdrawing from the contract, automatically extending or renewing a subscription without the consent of the consumer, or the seller unilaterally changing an aspect of the good or service ordered by the consumer.[103] Procedural unfair terms are those which knowingly take advantage of the power imbalance between the consumer and seller, and draft terms in the online consumer contract by relying on the common practice of consumers not fully reading the online contract, usually displayed as terms and conditions.[104] The Directive bans the above practices as well as several more, and places an obligation on Member States to ensure that unfair terms do not have a binding nature in consumer contracts.[105] This means that where a term is deemed to be unfair using the criteria set out in the Directive, the consumer must be allowed to withdraw from the contract without any additional costs or conditions for the consumer to fulfil which would pose a burden. This ensures the protection of consumers and ensures they are not deceived by

[102] Unfair Contract Terms Directive, annex.
[103] ibid, annex 1(e);(g);(k).
[104] Robertson (n 98), 188.
[105] Unfair Contract Terms Directive, art 6(1).

unfair contract terms which pose a burden to the consumer. Businesses must abide by the principle of restitution established in ordinary contract law which seeks to protect the consumer by ensuring that their personal position not be set back by the contract after taking the unfair contract term out of consideration. The European Court of Justice's case law supplements the legislation put forward by the Union and is essential to an accurate interpretation of the provisions. In Joined Cases C-154/15, C-307/15 and C-308/15 the Court put forward that unfair terms should be treated as though they have never existed and must return consumers "to the legal and factual situation that he would have been in if that term has not existed".[106] The principle of restitution aims to balance out the information and bargaining power asymmetries present in the business-consumer contractual relationship by vesting the consumer with a restoration of their rights. While the Unfair Contract Terms Directive does not explicitly give consumers the right to restitution, a combined reading of Article 6(1) and the Court of Justice's judgements may effectively protect consumer rights. Hence, while online consumer contracts will almost always subject consumers to a power imbalance, it can be remedied by ensuring the business is acting in good faith when drafting the contract, ensuring that consumers are not suffering from unfair contract terms which affect their rights, and ensuring that they may benefit from the right to restitution.

3.4.2 Transparency Requirements

The Unfair Contract Terms Directive prescribes a transparency requirement on businesses when drafting and presenting contractual terms to consumers, vested in Article 5.[107] The transparency requirement can be split into two separate requirements. Firstly, it places a requirement on businesses and sellers to ensure the contractual terms are "drafted in plain, intelligible language".[108] The requirements entail that contract terms must be written and phrased in a manner which can be easily understood by the consumer. This pays respect to the fact that the consumer is less aware and educated on the details of the contract in comparison to the business or seller. However, there exists only one Article in the Directive laying out the transparency requirements, and it is considerably brief hence requiring an additional interpretation through case law and jurisprudence for an accurate understanding of the Article. There is no definition of "plain" or "intelligible" language given in the Directive

[106] Joined Cases C-154/15, C-307/15 and C-308/15 *Francisco Gutiérrez Naranjo v Cajasur Banco SAU, Ana María Palacios Martínez v Banco Bilbao Vizcaya Argentaria SA (BBVA), Banco Popular Español SA v Emilio Irles López and Teresa Torres Andre* [2016] EU:C:2016:980, para 61.
[107] Unfair Contract Terms Directive, art 5.
[108] ibid.

so it may be understood in numerous ways.[109] It can be understood to mean that the terms should be understood by the average consumer upon first reading. However, it was established in Chapter 3.3.2 that the benchmark of the average consumer in EU consumer law is flawed as it does not consider fundamental differences between consumers such as education levels and willingness to fully read terms and conditions. On the other hand, “plain” and “intelligible” language may mean that although the terms may not be understood upon the first reading, they can be understood by using an aid such as a legal dictionary. In either case, where there is uncertainty as to the meaning of a term of the online consumer contract, it must abide by the second requirement in Article 5 of the Unfair Contract Terms Directive. Where a contractual term is ambiguous or where confusion arises as to its meaning, it must be interpreted in favour of the consumer.[110] This requirement funnels down from the *contra proferentem* principle established in ordinary contract law and seeks to protect consumers by ensuring the power imbalance in the consumer-business contractual relationship is re-balanced in favour of the consumer.[111] The Court has provided clarity on the transparency requirements through Case C-186/16 where it states that the transparency requirements does not simply require businesses to draft contractual terms clearly, but they must also draft the terms in a way which allows the consumer to “evaluate … the economic consequences” that will occur as a result of entering into the consumer contract.[112] Since the consumer is always assumed to be the weaker party in consumer-business relationships, it would be beneficial for the consumer if the interpretation of the transparency requirements is done in a broad manner.[113] Additionally, tied to the transparency requirements is a ‘fall-back’ for the consumer where a contractual term is deemed to be unfair after fulfilling the unfairness test in Articles 3 and 4, the term is not binding on consumers and they are not legally obligated to remain in the contract. The transparency requirements do in fact protect consumers by placing a transparency obligation on businesses and sellers. Where the Directive falls short in specificity, the Court of Justice’s case law provides clarity for the protection of consumers.

[109] ibid.
[110] ibid.
[111] Pablo Salvador Coderch and Juan Antonio Ruiz Garcia, ‘The Principle Contra Proferentem in Standard Form Contracts. In Particular, the Spanish Case’ (2001) 1 Global Jurist Topics 1, 2.
[112] Case C-186/16 *Ruxandra Paula Andriciuc and Others v Banca Românească SA* [2017] EU:C:2017:703, para 45.
[113] Ola Svensson, ‘The Unfair Contract Terms Directive : Meaning and Further Development’ (2020) 3 Nordic Journal of European Law 24, 26.

3.4.3 Hidden Terms and Informed Consent

The most common unfair contract terms in online consumer contracts are usually buried in lengthy terms and conditions. They may be presented in the form of a small fine print which charges the consumer additional subscription fees upon a one-time free trial of a product or service. For example, a consumer may choose to register for a free trial to a music service, which comes at no charge, only to find out when the free trial period has lapsed that they were unknowingly charged for a subscription to the music service. In this case, the consumer is not aware of their acceptance of the additional subscription costs even if they clicked the 'I agree' button prior to confirming their free trial. The consumer's agreement to the terms and conditions signifies consent, however, the consent is not informed. The right to informed consent is the consumer's right to be knowledgeable and aware of the terms they are agreeing to in a contract.[114] For consent to be informed, the contract terms which the consumer agrees to must be drafted in a clear, intelligible, and transparent manner. The Unfair Contract Terms Directive prescribes a transparency requirement in Article 5. However, it does not require businesses to ensure that consumers have actually read the terms before agreeing to them. Businesses exploit this loophole as terms and conditions tend to be hidden in a hyperlink which do not require the consumer to open in order to confirm their purchase, giving consumers the illusion of consent. The practice of hidden terms may strip consumers of their right to make an informed decision as they agree to terms they may not understand. While the Unfair Contract Terms Directive does not directly regulate informed consent, it is complemented by the Consumer Rights Directive and E-Commerce Directive. The Consumer Rights Directive prescribes pre-contractual information requirements which seek to ensure that information is given to consumers in a "clear and comprehensible manner" to obtain their informed consent, and to receive consent from consumers before charging any additional costs.[115] Additionally, Article 10 of the E-Commerce Directive aims to ensure businesses provide consumers with contract terms transparently however the Unfair Contract Terms Directive, Consumer Rights Directive, and E-Commerce Directive all fail to specify the technical requirements of providing the contract terms to consumers to obtain their informed consent.[116]

[114] Rob Nicholls, 'Informed Consent to Online Standard Form Agreements' (2022) 3 Global Privacy Law Review 163, 167.
[115] Consumer Rights Directive, art 5; art 22.
[116] E-Commerce Directive, art 10.

3.4.4 'Unfairness' Test

In order to determine whether a clause in a consumer contract is unfair, a test must be carried out following the criteria laid out in Articles 3 and 4 of the Unfair Contract Terms Directive. For a contract term to be unfair to the consumer, it must (1) be pre-formulated, (2) be against good faith, (3) result in an "imbalance in the parties' rights", and (4) be detrimental to the consumer.[117] The criteria of the test is a cumulative one, a contract clause will not be deemed as unfair if it fails to meet even one of the four criterions. Similarly to other Articles of the Directive such as Article 5 and as discussed in Chapter 3.4.1, the phrases "good faith", "significant imbalance", and "detriment" are left undefined.[118] It may be said that this was done purposely by the legislators as there exists an assumption that individual Member States would seek clarity on the vague terms by a preliminary reference procedure with the Court of Justice.[119] This line of discussion flows logically from the rationale that there is uniformity across the European Union and through case law of the Court of Justice, terms should be interpreted in a uniform manner. The annex referred to in Article 3 that explicitly lists contract terms which can be deemed unfair is used alongside the unfairness test as a guide and an indicator where it is unclear if a clause meets the criteria for unfairness.[120] Article 3 makes clear that the list is "indicative" only, meaning that clauses which are suspected to be unfair must be assessed on an individual basis.[121] Supporting the theory on individually assessing contract clauses is Article 4 stating that the assessment of a contract clause must be conducted while "taking into account the nature of the goods or services" and "all the circumstances attending the conclusion of the contract".[122] For example, where a contract term looks to be unfair at first sight, but is made up for in other respects of the contract, such as the seller claiming he acted in good faith and reasonably believed the consumer would have accepted the terms had there been an individual negotiation, it may not be ruled unfair. An individual assessment is a major strength of the legislation as it ensures that the examination of unfair terms is not generalized, and attention is given to every detail of the contract so the decision is fair to both the consumer and business. Case C-472/10's judgement sort of dissented with the classification of the list in the annex where the Court stated that

[117] Unfair Contract Terms Directive, art 3(1).
[118] ibid.
[119] Catalina Goanta (ed), 'The Substantive Comparison', *Convergence in European Consumer Sales Law: A Comparative and Numerical Approach* (Intersentia 2016), 57 <https://www.cambridge.org/core/books/convergence-in-european-consumer-sales-law/substantive-comparison/CE97408D0F82118F99A38B1486B42588> accessed 20 March 2025.
[120] Unfair Contract Terms Directive, annex.
[121] ibid, art 3.
[122] ibid, art 4.

where the annex is not capable of establishing that a contract term is unfair, it still must be considered an "essential element" which the court can use as a foundation underpinning its decision that a contract term is unfair.[123] Hence, there are conflicting perspectives of the list in the annex since it is important to the assessment of the terms but it may also hold little to no effect in the decision resulting from the unfairness test.

While the unfairness test provides a comprehensive criterion for determining if a contract term is unfair and a flexible framework to allow courts to assess unfairness on an individual basis, it does not fully protect the rights of consumers. The Unfair Contract Term Directive's annex does not list contract terms or clauses which are fully prohibited, leaving room for varying interpretations by national courts. Although all national courts are expected to interpret legislation in a similar manner as a result of the similarity of States in the European Union, no one Member State is exactly similar to another in terms of their legal systems and traditions. These differences, no matter how small, may result in the legal fragmentation of consumer protection. Additionally, there is no full prohibition of the unfair terms listed in the annex, they are only a guiding tool, meaning that a case-by-case assessment is needed for each unfair term, further contributing to legal fragmentation. Finally, the effectiveness of the unfairness test and the rules on unfair contract terms relies on the assumption that consumers notice the unfair terms. This is highly unlikely considering that terms and conditions in standard form contracts tend to be extremely lengthy. The low probability of consumers reading long terms and conditions, in addition to the complicated legal jargon used in online consumer contracts, the effectiveness of the unfairness test is not likely to be high considering the average consumer does not have the legal resources or knowledge to challenge clauses they believe are unfair. Although the unfairness test established in the Unfair Contract Terms Directive strengthened consumer protection by allowing a broader interpretation of the unfairness criteria, it still needs reforms such as an outright prohibition on certain unfair contract terms such as automatically renewing subscriptions and unfairly high cancellation fees.

3.5 Defective Products

In e-commerce, the most appealing aspect is the ability to order goods and services from the comfort of one's own home. This means that consumers cannot physically inspect the good they are purchasing, leading to a high probability of receiving defective goods. This poses a

[123] Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* [2012] EU:C:2012:242, para 26.

consumer protection challenge as the defects may range from e.g. defective electronic devices to digital content which does not meet the standards expected by the consumer. The European Union legislators established a robust legal framework to protect consumers against defective goods, and to provide them with mechanisms for redress through the Product Liability Directive, Sale of Goods Directive and the Digital Content Directive. However, the discussion of liability for defective products is heightened when drawing the focus on seller liability rather than producer liability. This section analyses the legal framework of the Union and examines if and how the provisions address seller liability for defective goods and services. An emphasis will be placed on both physical and digital goods provided to consumers within the Union.

3.5.1 Product Liability

The Product Liability Directive of 1985 established a liability system for defective products where it put forward that a "producer shall be liable for damage caused by a defect in his product".[124] A strict liability regime is established by this Directive meaning that the consumer does not have to provide any proof of fault or negligence, the consumer must only show that there was damage suffered as a result of a defect in the product.[125] However, the scope of this thesis focuses on consumer protection when engaging in e-commerce directly with businesses and sellers, rather than manufacturers or producers. This shifts the focus from the Product Liability Directive to the Sale of Goods Directive. The Directive applies to transactions made directly between the consumer and seller and sets out requirements which the seller must meet to ensure the goods supplied are in conformity with the standards set out in the contractual agreement.[126] The Directive sets out subjective and objective requirements for goods sold to consumers. The subjective requirements are concerned with ensuring that the physical features of the good guaranteed by the sales contract are provided in that exact form to the consumer. This entails that the product must (1) match the description and physical functions of the product agreed on in the contract, (2) be fit for the intended purpose of the product (3) be delivered with the additional accessories attached to the product, guaranteed by the sales contract.[127] These requirements seek to ensure that the consumer receives the product agreed upon by the sales contract, protecting them against deception by

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[124] Parliament and Council Directive (EU) 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L136/28 ('Sale of Goods Directive'), art 2.
[125] ibid, art 4.
[126] ibid, art 5.
[127] ibid, art 6.

the seller. The objective requirements aim to protect consumers from the failure of a business or seller to meet contractual obligations by requiring that the product (1) meets technical requirements set by Union law, (2) meet the expected quality of the product, (3) provides a similar quality as that "reasonably" expected by the consumer in regard to "durability, functionality, compatibility, and security".[128] Sellers must meet both the subjective and objective requirements to ensure that they will not be held liable for a defect, or for not meeting the expectations of the consumer. Even where the seller acts as an intermediary between a producer and a consumer, and sells the consumer a defective product, the Court of Justice declared in Case C-149/15 that the seller cannot shift liability to the producer.[129] This judgement alongside the Sale of Goods Directive set a precedent that sellers hold the primary responsibility to ensure that a product sold is in conformity with Articles 6 and 7 of the Directive. However, while the Directive provides consumer's rights through seller obligations, it also falls short in one specific regard. In cases where a consumer purchases a good from an online retailer, without a discussion of the specific expected performance standards of the product, the subjective requirement of being "fit for a particular purpose … which the consumer made known to the seller" may cease to apply.[130] This may come to be the situation as Article 6(b) places the requirement of conforming with a "particular purpose" only if the consumer disclosed it to the seller.[131] In this case, the objective requirements would be used to determine if there was a defect in the product, not the subjective requirements. However, this does not mean that sellers can use the above claim to avoid liability if the product still fails to meet basic consumer expectations and general requirements. It is evident through the legislation and case law that the protection of consumers comes above the protection of businesses.

The Sale of Goods Directive seeks to ensure the utmost protection of consumers by extending the liability of the seller past only the time of delivery to two years after delivery.[132] The two-year period ensures that consumers are not left without legal remedies when defects appear in purchased products after the point of delivery. Additionally, there is a stark reversal of the burden of proof of defective goods where if a defect is detected by the consumer within a period of one year after the delivery of the good, the defect is assumed to have been there unless the business can prove otherwise. This may be viewed as both a highly consumer

[128] ibid, art 7.
[129] Case C-149/15 *Sabrina Wathelet v Garage Bietheres & Fils SPRL* [2016] EU:C:2016:840, para 46.
[130] Sale of Goods Directive, art 6(b).
[131] ibid.
[132] Sale of Goods Directive, art 10.

friendly provision, and one which creates an additional burden on sellers as it sets a high threshold for the seller to meet as it is challenging to provide proof that the defect did not exist at the time of delivery. Furthermore, the reversal of the burden of proof fully aligns with the consumer's position as the weaker party in the contract, seeking to protect the consumer and guarantee their rights before damage has even occurred. Consumers often lack the technical expertise to pinpoint the cause of a defect and provide evidence of the defect at the time of delivery, making the reversal of the burden of proof a key tool for effective redress of the consumer. This rule may be considered an 'over-protection' of consumers as it places an unfair obligation on businesses selling products which undergo wear and tear, such as kitchen gadgets. However, given the digital nature of e-commerce, and the inability of consumers to physically examine a product before entering into a transaction with the seller, a reversal of the burden of proof is a fundamental safeguard for consumer protection in the event of a defect. Additionally, the burden of proof reversal coupled with the two-year time period for defects prevents false claims of defects or damage caused by the consumer after delivery. The Directive's protection mechanisms are essential for the protection of consumers in e-commerce, and they aim to create a level playing field between the consumer and seller. However, the European Union legislators took on a minimum harmonisation approach specifically to the temporal aspect of the seller's liability for defective products, allowing Member States to adopt shorter or longer time periods to hold the seller liable for defects. This may result in legal fragmentation between Member States and does not allow a deduction of whether consumers are protected by the European Union legislation, as they may be protected when only looking at the laws in place in the Union as a whole however, looking at the national laws of the Member States may prove otherwise.

3.5.2 Remedies

3.5.2.1 Repair or Replacement

The Sale of Goods Directive is a cornerstone of European consumer protection law in regard to defective goods. Any legislation must provide a remedy for defects which arise under the responsibility of the seller, in order to holistically protect the rights of consumers. Article 13 of the Directive provides remedies for consumers in a hierarchical manner by empowering consumers to take the remedial approach on a step-by-step basis.[133] The first step of the approach for consumers to be remedied for defective products is the right to ask for the

[133]Alberto De Franceschi, 'Consumer's Remedies For Defective Goods With Digital Elements' (2021) 12 JIPITEC – Journal of Intellectual Property, Information Technology and E-Commerce Law 143.

product to be repaired or replaced. There are exceptions in place for the first step of the remedial basis, that being an 'impossibility exception' and a 'disproportionality exception'. If the seller cannot provide the consumer with a repair or replacement because it is deemed "impossible" or would cause an excessive burden on the seller, the seller may refuse to provide that remedy and the consumer may move forward to the second stage of the hierarchy. The first stage of the remedial approach in Article 13 of the Directive seems to empower both the seller and the consumer rather than solely the consumer. The consumer has the right to a repair or replacement without paying any additional costs, without undue delay, and without posing a burden to the consumer.[134] The undue delay that must be avoided by the seller entails allowing the consumer to simply communicate the presence of a defect to the seller in order to benefit from the remedies. Additionally, the seller must make it clear to the consumer that they hold a right under consumer protection law to seek remedies for defective products, ensuring that the terms are communicated to the consumer in a manner which is compliant with the Unfair Commercial Practices Directive.[135] While the remedy aims to return the consumer to the position he once was in, before the defect occurred, it leaves a gap where it does not prescribe where the place of performance of the remedy should be, this is left for each Member State to decide on. In cases of cross-border e-commerce transactions, this may present complications as varying rules on place of performance may exist in each Member State. Furthermore, the right of a consumer to make use of remedies may be affected by Article 14(4) which states that where a product that was used for an ordinary purpose requires replacement, the consumer does not have to take on any costs. However, this creates a gap in enforcement where a consumer uses the defective product for a cause which is not deemed ordinary. This subsequently leads to the need to consider another gap created by this provision. The Directive does not provide guidelines on what falls within the scope of "normal use" and what does not, creating a space where Member States may set a definition which does not sufficiently protect consumers.[136] Additionally, where the product was used for a purpose which does not fall within the scope of the ordinary purpose of that product, the consumer may be asked to pay for the cost of a repair or replacement, effectively striking out the intended purpose of the remedies provided to consumers.

[134] Sale of Goods Directive, art 14.
[135] Unfair Commercial Practices Directive, art 6.
[136] Sale of Goods Directive, art 14(4).

3.5.2.2 Price Reduction or Termination

In any case, whether the good was used for an ordinary purpose or not, if the repair or replacement poses a financial burden to the seller, or if the remedy is impossible to achieve, the seller may move on to the second step of the hierarchy, which is seeking a price reduction or a termination of the contract. For the seller to be legally obligated to provide the consumer with a price reduction or contract termination under the Directive, specific conditions must be met. Where either (1) the seller refused to repair or replace the product due to being impossible or burdensome, or the repair or replacement was not done without additional costs and undue delays, or (2) the seller's attempt at bringing the product into conformity was not successful, or (3) the unconformity is so "serious" that a price reduction or contract termination justifies so.[137] The conditions entail that for the consumer to benefit from the second stage of the remedial process, the consumer must have exhausted both the repair and replacement options. This may be burdensome for the consumer in regard to the temporal perspective, as the consumer must first either ask for a repair or replacement and have it refused, or have the repair and replacement done incorrectly by the seller where it does not bring the product into conformity. This is time consuming to the consumer and may discourage consumers from seeking remedies for defective products due to first having to experience a failure of the primary remedial option before a successful one. Where the consumer meets one of the above conditions, a proportionality test must be caried out by the seller to determine the reduction in price to be offered to the consumer. The Sale of Goods Directive prescribes that the price reduction must be proportional to the decline in value suffered by the consumer due to the unconformity of the goods, ensuring the consumer is compensated effectively for the effects of the unconformity.[138] Where the defectiveness of the product is only minor, the consumer cannot request termination of the contract.

The Sale of Goods Directive empowers the consumer by treating them as the weaker party, pursuant to the running theory that consumers are the weaker party vis-à-vis the seller by placing the burden of proof of the minority of a defect on the seller. There is no definition set for what a minor defect is, but it is reasonable to assume that a minor defect would be that which does not affect the functionality of the product. However, for more effective consumer protection, the Directive should lay down a framework to determine when a defect is minor and consequently does not allow contract termination, and where a defect is not minor,

[137] ibid, art 13(4).
[138] ibid, art 15.

resulting in the right to termination by the consumer. While the Directive does not empower consumers to a contract termination if the defect is minor, case law of the European Court of Justice has proven otherwise. In Case C-32/12, the Court put forward that even where a defect or unconformity of a good is minor, the Directive should be interpreted to allow national courts of the Member State in the place of performance of the contract to "grant … an appropriate reduction in the price of goods".[139] It is evident that where the Directive may lack effective consumer protection measures, the Court of Justice fills in the gaps to ensure the protection of consumers in the Union.

3.5.3 Digital Goods and Services

Before 2021, where a consumer purchased digital goods or services and discovered a defect, such as a song from an electronic album missing or a chapter from a book, the consumer had no EU wide remedy to rely on. However, after the boom of e-commerce and the shift of purchasing decisions in the digital sphere, the European Union established a framework for the liability of sellers when supplying digital goods and services to consumers, enshrined in the Digital Content Directive.[140] The Directive aims to prescribe rules on seller liability in cases of unconformity or failure to provide the digital good or service.[141] There must be a legal guarantee for consumers that businesses selling digital goods or services can be held accountable for defects. This is essential for consumer protection in the digital age. In relation to seller liability for defective digital goods and services, the legislator put forward a harmonized framework consisting of both subjective and objective requirements, mirroring those in the Sale of Goods Directive, to determine if a digital good or service is in conformity with the contract concluded.[142]

3.5.3.1 Subjective Requirements

The subjective conformity obligations are those which the seller must meet and are agreed upon by the consumer and seller in the contractual agreement prior to the provision of the good or service. This means that the digital good or service must (1) fulfil every description of the product which was outlined in the contract and given to the consumer, such as its

[139] Case C-32/12 *Soledad Duarte Hueros v Autociba SA and Automóviles Citroën España SA* [2013] EU:C:2013:637, para 44.
[140] Digital Content Directive.
[141] ibid, art 1.
[142] ibid, art 7; art 8.

functionality and quality, (2) be suitable for use for the purpose required by the consumer, (3) be given to the consumer with all of the necessary accessories, (4) be regularly updated.[143]

The subjective requirements essentially set out minimum requirements which the seller must meet to comply with the contract. This, however, creates the risk of sellers performing only their bare minimum duties, leading to providing a minimum standard of digital goods or services which does not effectively meet the expectations of consumers. This can be seen when considering subjective requirement two above, where the seller must make clear to the consumer that he/she accepts providing the digital good or service for the purpose specified by the consumer. The Directive does not specify what mode of acceptance must be given by the seller, whether it be an implicit acceptance which is implied when the contract is concluded, or whether it be an explicit acceptance by form of email or direct communication. The vague aspect of subjective conformity requirements coupled with the standard form contracts entered into by consumers may result in delivering a low standard of conformity to consumers.[144] The subjective requirements seek to ensure that sellers do not deliver goods to consumers which stray from their expectations. However, these requirements may only be considered enforceable where the terms of the contract explicitly stated a detailed description of the product or service e.g. functionality, quality, color (relating to goods only), software updates (related to services), etc.…[145] For that reason, subjective conformity requirements must be paired with objective conformity requirements to ensure the digital good or service provided to the consumer meets the consumer's standards.

3.5.3.2 Objective Requirements

Objective conformity requirements are those which apply to the digital good or service provided by the seller regardless of the contractual agreement made between the seller and consumer. They are intended to provide a minimum standard of conformity which must be met by sellers to fill in the gaps left by the subjective conformity requirements. The requirements prescribe that the product or service must (1) be useful for the intended use by the consumer when compared to products or services of a similar category, (2) meet the reasonable expectations of the consumer in terms of "functionality and accessibility", (3) be

143 ibid, art 7.

144 Przemyslaw Jacek Palka, 'Terms of Service Are Not Contracts – Beyond Contract Law in the Regulation of Online Platforms', *European Contract Law in the Digital Age*, vol 3 (Intersentia 2018) <https://www.cambridge.org/core/books/european-contract-law-in-the-digital-age/terms-of-service-are-not-contracts-beyond-contract-law-in-the-regulation-of-online-platforms/06837F552C19D1F4BB8F2A1D63445AFF> accessed 3 April 2025.

145 Katarzyna Wiśniewska and Przemysław Pałka, 'The Impact of the Digital Content Directive on Online Platforms' Terms of Service' (2023) 42 Yearbook of European Law 388, 395.

provided with the expected accessories, (4) updated on a regular basis to ensure its accessibility and continuity.[146] The provisions of the Digital Content Directive are similar to those of the Sale of Goods Directive in terms of the conformity requirements, exhibiting the similarity between ordinary contract law and online consumer contract law. The requirements apply independently of the specific agreement concluded between the parties to the transaction, ensuring that digital products and services are developed to a high standard which meets consumer expectations, regardless of whether the contractual agreement sets or does not set those minimum expectations.

However, while the provision explicitly states the conditions which must be met by the seller, there is some unclarity as to what should be reasonably expected of a consumer. This draws on the paper's discussion in previous chapters of the definition of an ordinary consumer. The European Court of Justice set a benchmark for what an ordinary consumer should be however, it has been debunked considering its failure to consider consumers who for example, have not had previous access to digital services such as streaming services, and have no reasonable expectation as to how the service should conform. Although the Directive takes a maximum harmonization approach for implementation, where no definition is set for a 'reasonable expectation', Member States are left to define the term in accordance with their national law provisions. This may cause variance in its implementation considering the differences in the legal system and culture of the Member States. While the Directive lists the subjective requirements before the objective requirements, the latter complements the former and must be met by the seller.[147] The link between the conformity of a product or service and consumer protection is that where a product is not in conformity with the provisions of the Directive, consumers have a double layer of protection. Where a product or service does not meet the subjective conformity requirements but satisfies the objective requirements, the consumer may still be able to seek a remedy, requiring the product or service to come into conformity with the requirements as the product does not meet the contractual specifications made by the seller. On the other hand, if a product or service meets the terms and qualities specified by the contractual agreement but fails to meet the objective requirements, it may be considered not in compliance with the conformity expectations considering the objective requirements must apply regardless of the contract terms specified.

[146] Digital Content Directive, art 8.
[147] Christian Twigg-Flesner, 'Conformity of Goods and Digital Content/Digital Services' (Social Science Research Network, 20 January 2020), 8 <https://papers.ssrn.com/abstract=3526228> accessed 3 April 2025.

3.5.3.3 Remedies

When consumers are initially put in a weaker position in the transactional relationship from the first stage of the contract formation due to the inherent asymmetries present, coupled with the possibility of their weaker position being abused by delivering goods or services which do not meet consumer expectations, there must be laws in place to provide remedies for consumers. Article 14 of the Digital Content Directive sets out a hierarchy of remedies for consumers against defective digital products and services, similar to that for physical goods and services. The remedies aim to balance the need to provide redress for consumers against products or services which do not meet the necessary requirements and the rights of sellers, reflecting the proportionality principle. The Directive prioritizes the consumer and puts forward a presumption where if the non-conformity is found within one year of delivery, it is presumed to have existed at delivery. There is then a reversal of the burden of proof, where the responsibility of proving a defect was present at the point of delivery is put on the seller, thereby increasing the likelihood of remedies being provided to the consumer.[148] This is due to the difficulty of proving that a digital good or service does not have any defects when the consumer receives it, as the goods should not be opened before reaching the consumer, and the service cannot be used before being set up by the consumer. Hence, where the digital product or service is found to be not in conformity with the subjective and objective requirements set out in Articles 7 and 8 within two years of the delivery, the liability is on the trader.[149] The reversal of the burden of proof highlights the consumer centric approach of the European Union legislatures which comes as a result of the information and monetary asymmetry between the seller and consumer. The seller is more equipped to demonstrate that the product or service is in fact compliant, and to prove the Directive's presumption wrong. The Directive clearly works in favor of the consumers and provides a sufficient time period for consumers to detect any e.g. glitches or bugs in the digital service. However, there may be latent issues with the digital service which appear after a year has lapsed, leaving consumers unprotected during that period of time.

A consumer's primary remedy is a request to repair or replace the digital good or service thus bringing the product into conformity. This is subject to conditions similar to physically defective goods or services where a repair or replacement is only possible if it does not cause a significant burden on the seller in terms of high costs, is not impossible, and does not cause

[148] ibid, art 12.
[149] Digital Content Directive, art 11.

a “significant inconvenience to the consumer”.[150] The Directive does not give any meaning to the inconvenience on the consumer, which is necessary in order to truly understand the rights of consumers and whether they are sufficiently protected by the Directive or not. Setting a benchmark for a maximum number of attempts by the seller to bring a product or service into conformity would remove a significant burden from both the seller and consumer and allow them to move on to the second stage of remedies without undue delay. For example, there are roadblocks to the effectiveness of the provision where a music streaming service is deemed to be not in conformity with the consumer’s expectations of having the lyrics displayed in real time while listening to the music, replacing or repairing the service would be extremely onerous for the seller as it requires a complete change in the coding and the system of the service. In that case, or in the case where the repair or replacement fails to bring the product or service into conformity, the consumer may move on to the second stage of remedies. The Directive entitles consumers to either receive a price reduction from the cost of the product or service or a termination of the contract where the primary remedial means cannot be provided to the consumer, or where the trader’s attempt at conformity was unsuccessful or too long, or the defectiveness has a “serious nature”.[151] The principle of proportionality is an essential element for the calculation of the decline in value of the product or service due to its defectiveness.[152] This, however, has the potential to fail at protecting consumers considering the valuation of a defective streaming service for example is highly subjective. Regarding specifically digital services, a contract termination would be far more effective at protecting the rights of consumers in comparison to a price reduction due to its permanent nature. With a price reduction, the consumer does not have their full rights compensated and the consumer’s access to the service is one which does not meet his/her expectations and the consumer is not likely to use the service again however with a termination, the consumer is fully reimbursed.[153] Hence, where a product does not meet a consumer’s “legitimate expectations”, it is deemed to be not in conformity with the Digital Content Directive and consumer protection mechanisms then come into play[154]. From the analysis above, the Directive succeeds at protecting consumers effectively, especially to compensate them for defective products and services. However, it does not protect consumers to the fullest extent possible.

[150] ibid, art 14(2); art 14(3).
[151] ibid, art 14(4).
[152] ibid, art 14(5).
[153] ibid, art 16(1).
[154] Marco BM Loos and Chantal Mak, ‘Remedies for Buyers in Case of Contracts for the Supply of Digital Content’ (University of Amsterdam 2012) Note PE 462.459, 11 <https://www.europarl.europa.eu/thinktank/en/document/IPOL-JURI_NT(2012)462459> accessed 4 April 2025.

There is a common pattern of Directives on consumer protection which is also evident in the Sale of Goods Directive and the Digital Content Directive of failing to prescribe definitions for terms which are essential to applying the consumer protection provisions effectively.

3.6 Right of Withdrawal

The right of withdrawal has always existed in European law, albeit not in harmonized European law, but in the domestic legal systems of States, and was known as the "right to repent".[155] Online consumer contracts always place consumers at a disadvantage. From the first stage of the contractual relationship between the consumer and seller, a bargaining and information asymmetry exists. This information asymmetry is further aggravated where the consumer cannot physically inspect the good or service, putting the consumer at a disadvantaged position in comparison to the seller. The right of withdrawal from a contract is a cornerstone of European consumer protection law to give consumers the opportunity to reconsider their purchase. It aims to act as a safety net to protect consumers and motivate them to engage in e-commerce considering that where a consumer is dissatisfied in any way by his/her purchase, or simply no longer wants the product, they have the right to withdraw from the contract without providing any justification.

The right of withdrawal has an interplay with the right of a consumer to be remedied for a defective product or service. However, the difference between the two rights is that the right to withdrawal is a right which can be unilaterally practiced by the consumer. The right of withdrawal is enshrined in Article 9 of the Consumer Rights Directive and prescribes a period of fourteen days to allow consumers to withdraw from the contract, known as the cooling off period.[156] The fourteen day period gives the consumer ample time to reconsider their purchase and evaluate the product or service they purchased. It is classified as a mandatory consumer right which every seller interacting with consumers on e-commerce platforms is obligated to uphold.[157] This means that the seller must inform the consumer of the right to withdraw from the contract in a clear and accessible manner or risk the period of withdrawal being extended to twelve months.[158] This extension provision exists to remedy the consumer where their right to withdrawal has not been adequately disclosed to them. The provisions on

[155] Evelyne Terryn, 'The Right of Withdrawal, the Acquis Principles and the Draft Common Frame of Reference', *Common Frame of Reference and Existing EC Contract Law* (De Gruyter european law pub 2008), 145 <https://doi-org.uaccess.univie.ac.at/10.1515/9783866538009.3.145> accessed 10 April 2025.
[156] ibid, art 9.
[157] Elias Van Gool and Evelyne Terryn, 'The Role of European Consumer Regulation in Shaping the Environmental Impact of E-Commerce' (2021) 10 Journal of European Consumer and Market Law 89, 94.
[158] Consumer Rights Directive, art 10.

the right of withdrawal therefore have a primary provision (Article 9), and a safety net provision (Article 10), illustrating a mechanism of double protection for the consumer. The primary aspect of the right of withdrawal in the Consumer Rights Directive can be said to efficiently protect consumers, and the safety net aspect can even be considered an overprotection of consumers as an extension of the cooling off period to twelve months in the case of insufficient disclosure to the consumer is quite a long time period.

3.6.1 Exercise of the Right of Withdrawal

For a consumer to exercise the right of withdrawal pursuant to the Consumer Rights Directive, there are requirements which must be followed. The consumer must (1) communicate to the seller that they wish to withdraw from the consumer contract, or (2) use the form set out in the Directive, and (3) return the physical product to the seller without paying additional costs (for goods) , or (4) cease from the use of the service and ensure it is not distributed to third parties.[159] The burden to prove the exercise of the withdrawal right is placed on the consumer where the seller has fulfilled their duty of informing the consumer of their right and the consumer chooses to inform the seller, through a statement, of their wish to withdraw rather than filling out the form.[160] For that reason, the notice by the consumer should be "unequivocal", and not create room for any doubt by the seller of the consumer's wish to withdraw from the contract.[161] The moment at which the consumer exercises their right to withdraw from the online consumer contract and the seller refunds the consumer for the cost of the good or service, marks the termination of both of the parties' contractual obligations towards each other. However, exercising the right of withdrawal should not be made burdensome for the consumer hence, a statement which includes the terms 'withdraw', terminate', or 'rescind' should be sufficient to express the consumer's will to withdraw the contract. A clarification on this issue in the Consumer Rights Directive would further cement the mode of exercise of the consumer's right to withdraw from the contract. The Directive sufficiently protects the rights of consumers through the extension period of the right of withdrawal where consumers are not timely informed as it places a strong incentive on sellers to comply with disclosing the right of withdrawal to the consumer. There is an exception to the additional cost requirement upon exercising the right of withdrawal where the return of the good purchased without an additional cost would place an unnecessary burden on the seller. This exists in cases where the consumer opted for express shipping, which typically

[159] ibid, art 11; art 12; art 14(2)(a).
[160] ibid, art 11(4).
[161] ibid, art 11(1)(b).

costs more than standard shipping, or where the good purchased is heavy, bulky, and requires disassembly such as furniture. In the case of a digital product such as a streaming service or digital content created by a seller, the right of withdrawal has a stricter scope. When applying the provisions on the right of withdrawal on digital content, it becomes evident that at the moment the content is accessed by the consumer, such as creating an account for a streaming service or watching and sharing digital content, the right of withdrawal ceases to exist. This is because the nature of digital content in and of itself is intangible, meaning that it cannot be fully returned to the seller.[162] Additionally, it is common for consumers to save copies of digital content such as videos and images on their personal devices. Allowing a consumer to withdraw from a digital content contract where they have reproduced the content would jeopardize the rights of sellers. Before the digital content to the right of withdrawal applies, the consumer must (1) be given explicit approval to the performance of the contract, and (2) agree to losing their right of withdrawal, and (3) be given a regurgitation of the information by the seller on a permanent and reliable medium.[163] While the Directive provides an escape clause for consumers unhappy with a good or service purchase, the digital content exception may cause consumer protection issues. This is because, in practice, consumers may be unaware that their right to withdrawal is waived upon using digital content. The requirements which must be met by sellers in Article 16(m) of the Consumer Rights Directive are frequently circumvented through dark patterns such as the waiver hidden in long terms and conditions, and consent to the waiver typically masked through pre-ticked boxes which the consumer does not deselect.

3.6.2 Period of Withdrawal

Since there is a difference in the period of withdrawal between a case for the provision of services and for the sale of goods, a distinction must be drawn between service contracts and sales contracts as a precise calculation of the withdrawal period is essential for legal certainty and consumer protection.[164] Service contracts are those where an agreement is made between the consumer and seller for the provision of a service to the consumer. On the other hand, contracts for the sale of goods are those where the seller agrees to hand over ownership of a certain agreed upon good to the consumer, in exchange for financial renumeration.

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[162] Dominika Bezáková, 'The Consumer Rights Directive and Its Implications for Consumer Protection Regarding Intangible Digital Content' (2013) 7 Masaryk University Journal of Law and Technology 177, 184.
[163] Consumer Rights Directive, art 16(m).
[164] Reinhard Steennot, 'The Right of Withdrawal under the Consumer Rights Directive as a Tool to Protect Consumers Concluding a Distance Contract' (2013) 29 Computer Law & Security Review 105, 108.

The Consumer Rights Directive draws a difference between the withdrawal period for a sales contract and a service contract. For a service contract, the period of withdrawal begins from the "day of the conclusion of the contract" and expires fourteen days later to effectively protect the rights of consumers and allow them the full fourteen day period to reconsider their purchase.[165] In the case of a contract for the sale of goods, the period of withdrawal begins on the day where the consumer "acquires physical possession of the goods".[166] The withdrawal period for sales contracts seems to provide consumers with more time to reconsider their purchase as it begins only when the consumer has the good in their hands. The period between the consumer's payment for the good and the delivery of the good is essentially an extra period of time for the consumer to consider withdrawal. In a service contract, the consumer does not have extra time between the conclusion of the contract and performance of the service to reconsider their purchase. Additionally, it is imperative to remember that the right of withdrawal is classified as a mandatory right and in the case of either a contract for the sale of goods or a contract for the provision of a service, the right to withdrawal cannot begin before the consumer is informed of his/her right to withdrawal. However, there is a point of contention regarding the 'day' where the contract is concluded (services contract) and the day where the consumer physically possesses the good (sales contract) which can be settled by calculating the period of withdrawal in accordance with the EURATOM Regulation which puts forward that the day on which the contract is concluded "shall not be considered as falling within the period in question".[167] This effectively means that the period of withdrawal officially begins the day after the contract is concluded for a service contract, and the day after which the consumer is in physical possession of the goods for sales contract, a result of the legal certainty created by the Regulation. While the Consumer Rights Directive does not clarify the precise calculation method for the fourteen day period, the EURATOM Regulation can be used as a supplementary legislation to aid consumers in understanding their right to withdraw from the contract. This right can be strengthened by placing an additional requirement on sellers to disclose to consumers that the fourteen day period of withdrawal does not begin on the day of the contract conclusion or delivery of goods, but a calendar day after. Moreover, the safety net of an extension of the withdrawal period for consumers where the right of withdrawal is not adequately disclosed acts as a strong deterrent for sellers.

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[165] ibid, art 9(2)(a).
[166] Consumer Rights Directive, art 9(2)(b).
[167] Council Regulation 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits [1971] OJ L124/1, art 3(1) ('EURATOM Regulation').

3.7 Vulnerable Consumers

An essential element in evaluating the effectiveness of the European Union's legal framework in protecting consumers is its capacity to protect vulnerable consumers. A distinction should be drawn between traditional vulnerability and digital vulnerability for a correct evaluation of the legislation. Traditional vulnerability arises from traditional characteristics which may lead to vulnerability regardless of the situation, such as mental capacity, age, and literacy. On the other hand, digital vulnerability arises from situationally specific factors such as information asymmetries, dark patterns, and (in)frequent use of technology. As e-commerce platforms utilize automated algorithmic systems which can personalize advertisements displayed to consumers and dark patterns which manipulate even non-vulnerable consumers into taking transactional decisions, the e-commerce environment creates intensified risks for both categories of vulnerable consumers. These intensified risks can present themselves as a result of different actions; minors completing purchases without being aware of it and being liable for financial payment upon concluding the transaction, elders purchasing e.g. more items than they intended to or falling victim to additional purchases automatically added into their basket which require deselection, or persons with e.g. visual disabilities using platforms which do not offer auditory descriptions of the products selected. Additionally, unfair commercial practices and unfair contract terms may affect people of digitally vulnerable populations most due to the heightened asymmetries. Digitally vulnerable persons tend to have limited access to and experience with technology, meaning they are most likely unaware of what fair contract terms should present themselves as. Furthermore, the digitally vulnerable population are most likely to fall victim to misleading practices such as false urgency popups on sellers' websites or additional items placed into the consumer's basket by default.

The European Union's legislation on consumer protection does not uniformly or categorically define vulnerable consumers, meaning an interpretation of the related terms is necessary for the evaluation. The Consumer Rights Directive does not explicitly define a vulnerable consumer; however, it recognizes the digital elements of e-commerce which may lead to an exploitation of vulnerable consumers, thereby placing an obligation on sellers to provide consumers with the necessary information requirements to make an informed purchasing decision. This may work in favor of the traditionally vulnerable such as the elderly, or persons with disabilities who can recruit the assistance of a less vulnerable person in understanding the information. However, e-commerce platforms should be set up to allow even vulnerable persons to independently make informed decisions. This is not yet standard in European Union legislation as a result of the benchmark of an average consumer created by the legislation. The Unfair Commercial Practices Directive uses the above benchmark to determine if a measure is unfair on most consumers. However, the average consumer benchmark evidently does not take vulnerable consumers into account as they fall below the benchmark. The Directive defines a vulnerable consumer as one who is vulnerable as a result of "mental or physical infirmity, age or credulity", essentially describing traditional vulnerability.[168] However, the Directive places an expectation of the vulnerability of the consumer being reasonably foreseeable by the seller. The expectation is not realistic as this would only be the case where the seller purposely targets vulnerable consumers such as minors or elders. As a result, this means that sellers must make their e-commerce platforms accessible and safe to use for both vulnerable and non-vulnerable consumers as the effects of unfair commercial practices and unfair contract terms are multiplied when comparing vulnerable consumers to the average consumer. It is thus important to consider that while the Unfair Commercial Practices Directive recognizes the category of vulnerable consumers, it does not proactively set targeted duties for traders to follow. Additionally, the reasonable consumer in light of the vulnerable consumer may be interpreted in an alternative way where the fact that the reasonable consumer does not read the entirety of the information requirements given to them should be considered.[169] This means that all consumers may be deemed vulnerable to practices which seek to take advantage or weaken their purchasing power such as dark patterns and false advertisements. The distinction between traditionally vulnerable and situationally vulnerable individuals in e-commerce can be funneled down into purely situational vulnerability as a result of the digital marketplace. Any consumer can be taken advantage of through dark patterns and misleading practices, especially where legislation does not explicitly ban the said practices. Hence, in order to safeguard the rights of consumers, especially vulnerable consumers, in the digital marketplace, European Union legislation should include obligations for traders to ensure their e-commerce platforms are easily accessible for all consumers, and that consumers are aware of the progression of the e-commerce process, from the stage of adding the products into their 'basket' to the stage of financial payment.

[168] Unfair Commercial Practices Directive, art 5(3).
[169] OECD Directorate for Science, Technology and Innovation Committee on Consumer Policy (n 79), 30.

3.8 Chapter Conclusion

This chapter examined the extent to which the current European Union legal framework effectively safeguards consumer rights in the digital marketplace. Through an analysis of the legislation of the European Union on consumer protection measures, including the Consumer Rights Directive, the Unfair Commercial Practices Directive, the Unfair Contract Terms Directive, and the Digital Content Directive, this chapter demonstrated that the legal framework currently in place offers only partial protection of consumers. This can be attributed to the highly dynamic and evolving nature of e-commerce, where new developments are introduced, such as dark patterns, which the legislation cannot overcome through proactive actions but rather only reactive actions.

The key findings of this chapter reveal that while the European Union has successfully established a thorough set of legal instruments, supplemented by the European Court of Justice's judgements, the framework remains fragmented and unsuitable for the evolving nature of digital markets. The legislation certainly has protections against key behaviors which threaten consumer behavior such as misleading practices, dark patterns, and unfair contract terms. However, there are structural limitations as a result of the broad drafting of specific provisions which weaken the effectiveness of the provisions.

Key digital specific issues which are most common in electronic commerce such as dark patterns, unfair contract terms, false advertisements and defective products are not sufficiently addressed under the current legal framework. A particularly important finding of the examination is the provisions on information requirements which effectively set out obligations for sellers to follow when engaging in transactional relationships with consumers. In that regard, both the Consumer Rights Directive and the E-Commerce Directive sufficiently safeguard the right of consumers to receive mandatory information before purchasing a good or service. As regards misleading practices in e-commerce, the unfair Commercial Practices Directive defines misleading practices in an effective manner and is formulated broadly to include any practice which can affect the purchasing decision of consumers. This broad formulation works both in favor of and against the consumer where the broad definition may include false advertising practices by consumers. However, the lack of specificity and direct reference to false advertising practices and dark patterns compared to e.g. comparative advertising may make it difficult for the enforcement of measures against false advertising. The Unfair Contract Terms Directive sets out a test with a cumulative criterion to determine if a clause is unfair, allowing national authorities to objectively determine if a clause in an online consumer contract is unfair. However, this examination has the potential to be subject to national interpretation measures of the Member States of the European Union when using the Annex as a reference as it does not contain an outright prohibition of the terms listed, it is merely used as a guiding tool for the evaluation.

The legislation on defective products, specifically the Sale of Goods Directive, effectively protects the rights of consumers by placing requirements on sellers which must be met when selling a product to consumers. Additionally, the two year period where consumers may claim a defect provides extended protection of consumer rights. Moreover, while the Digital Content Directive successfully set in place both subjective and objective conformity requirements for digital goods and services, a large part of the objective requirements is based on the reasonable expectations of the consumer. The issue in question here is the ‘average consumer’ benchmark developed by case law, which has proved to be unreliable due to varying interpretations by Member States. The right of withdrawal is one of the most well-defined and enforced consumer rights from those discussed in this paper. It is well defined in the Consumer Rights Directive and provides consumers with a fourteen day period to withdraw from the contract, supplemented by the EURATOM Regulation for an accurate calculation of the withdrawal period. Additionally, the Directive provides a safety net for consumers who are not adequately informed of their right to withdrawal. Lastly, while the Unfair Commercial Practices Directive defines vulnerable consumers, there is no specific clause which addresses measures which must be taken by sellers to protect those most vulnerable. Legislation should draw a focus on the protection of vulnerable consumers making purchases on e-commerce platforms, aimed at both traditionally and situationally vulnerable consumers.

Furthermore, this chapter has shown that a factor which keeps the legislation from being fully effective is the interpretation of the legislation by Member States. Where terms in the legislation are left open-ended, it is left to the national authorities of Member States of the European Union to interpret the terms accordingly. Due to the differences between the legal backgrounds of Member States, this leads to diverging interpretations and as a result, legal uncertainty. Finally, in terms of research contribution, this chapter offered a holistic evaluation of how the different Regulations and Directives in the legal arsenal of the European Union may interact to shape the consumer protection sphere. To conclude, the legal framework on consumer protection established a strong baseline for consumer protection, however, it does not safeguard those rights effectively.

Chapter 4 - Recommendations for Improvement

In light of the evaluation carried out in this thesis, it is fair to say that while the European Union has indeed developed an extensive legal framework to protect consumers in e-commerce transactions, there are certain weaknesses in the legislation which thwart its effectiveness. The thesis has illustrated that the current framework is more reactive rather than preventative, failing to catch wrongdoings by sellers before they cause harm to consumers. This chapter aims to outline recommendations for the legislators of the European Union aimed at improving the effectiveness of the existing legal framework on consumer protection.

The starting point for a reform of the legal framework is a modification of the definition of the benchmark of an 'average consumer'. As demonstrated throughout this thesis, a majority of the legislation's effectiveness relies on the notion of a consumer created by the European Court of Justice being "reasonably well-informed, reasonably observant, and circumspect". However, this standard does not consider the complex and more realistic behavior of consumers in e-commerce, which cannot be funneled down into one standard. Consumers are mentally overloaded when encountering terms and conditions which are not easily understood by the average consumer and tend to fall victim to manipulative advertising or marketing designs, realities which are inconsistent with the definition of an average consumer. A modified definition of the benchmark which considers actual and realistic consumer behavior, including cognitive overload, vulnerable consumers, and the possibility of digital inexperience would surely strengthen the effectiveness of the legislative framework.

Additionally, given the fact that e-commerce and the strategies behind the sale of products and services are rapidly evolving, faster than the legislation can keep up with it, establishing European Union wide working groups which regularly monitor rising practices which may threaten the protection of consumers would certainly be beneficial. Issues adjacent to the practice of dark patterns and misleading advertising may be discussed by specialists able to predict upcoming trends. Their advice could be a guiding, supplementary tool to the legislators.

In relation to the key consumer protection issue of defective products, specifically regarding the Unfair Contract Terms Directive, there are two reforms which can significantly improve the protection of consumers. Firstly, a 'blacklist' of unfair terms should be introduced alongside the Annex of the Directive, where practices or terms which allow e.g. unilateral price changes or automatic extended subscriptions without consent would be automatically prohibited from inclusion in online consumer contracts. This would significantly offset the current evaluation of contract terms, which relies on a case-by-case analysis of the contract clause, allowing the formation of disparities and legal uncertainty between Member States. Secondly, the meaning of the terms ‘good faith’ and ‘significant imbalance’ should be clarified through a clearcut legal definition which can be uniformly applied by Member States and their national authorities. This can be done through an application of the European Court of Justice’s judgements from the *Catalunyacaixa* case into the Directive on how the principles should be applied.

While the current reversal of the burden of proof for product liability arising from defective goods is an effective tool in the European Union’s legal arsenal, it is not proportionate. This is especially true regarding situations where the defect in the product may be a result of wear and tear. Guidance in the legislation on situations which are considered wear and tear would allow a balance to be struck between consumer protection and avoiding harm to online sellers. Additionally, a uniform definition on what a ‘minor defect’ is would remove the ambiguity which may lead to disputes over the suitability of contract termination and remedies resulting from it. This will ensure that the framework on defective products is effective in protecting consumers yet also proportionate.

Chapter 5 – Concluding Remarks

This thesis aimed to answer the research question: **To what extent does the current EU legal framework on e-commerce effectively safeguard consumer rights in the digital marketplace?** By adopting a doctrinal analysis with a critical perspective of the European Union legislation on consumer protection, supplemented by case law of the European Court of Justice, it has been demonstrated that while the current legal framework offers a strong foundation for consumer protection, its effectiveness is limited by gaps in the legislation.

The evaluation commenced by analyzing various aspects of online consumer contracts which are the core starting point of e-commerce transactions. How these contracts are formed and concluded, as well as the asymmetries arising from consumer contracts were discussed to form a strong basis for the examination in Chapter 3. Chapter 2 showed that the legislation does indeed provide rights for consumers, especially during the contract formation stage, and filled in gaps in the legislation especially when defining terms such as contract conclusion, and highlighted issues arising from digital contracts and electronic signatures. This also brought to light the inherent information and power asymmetries which place consumers in a weaker position, intensified by the one-sided nature of online contracts.

Chapter 3 built on the foundation established by Chapter 2 and expanded on it to critically evaluate key consumer protection concerns in e-commerce. This included information requirement obligations, misleading practices, unfair contract terms, defective products and their remedies, digital goods and services, the right of withdrawal, and the protection of vulnerable consumers. This was done by conducting a holistic analysis using multiple Directives including the Consumer Rights Directive, Unfair Contract Terms Directive, Unfair Commercial Practices Directive, and the Digital Content Directive. The analysis resulted in concluding that the European Union's legal arsenal has its strengths and weaknesses. It is comprehensive and provides consumers with at least the minimum rights needed in e-commerce, but it is fragmented in implementation, leading to weak effectiveness. The lack of clarity of notions such as 'detriment', 'good faith', and 'significant imbalance', the varying implementations of the Directives by Member States, the inability of the legislation to keep up with emerging practices, and the 'average consumer' benchmark all contribute to the weak effectiveness of the legislation.

This thesis put forward two original contributions to the current field of research. Firstly, the thesis adopted a holistic approach in examining the legislation to provide a 'full picture' of the European Union's legal arsenal for consumer protection rather than a fragmented approach. This allowed uncovering weaknesses in the legislation as well as gaps in concepts which are central to the protection of consumers. Secondly, the thesis criticized the benchmark of the average consumer, arguing that the benchmark must take into account the constant technological developments of sellers and the realistic behavior of consumers.

In conclusion, the current European legal framework on consumer protection in e-commerce provides consumers with comprehensive rights, which cannot sufficiently protect consumers against evolving risks in the digital marketplace. By recognizing that the e-commerce environment is rapidly evolving, and implementing more adaptive methods for protection, the European Union can build a more consumer-centric legal framework.

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