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CORE ANALYSIS

Not all consumers are the same: how is the differentiation between consumers operationalised in EU consumer law?

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Abstract

European Union (EU) consumer law is rather one-size-fits-all, meaning that it largely disregards differences between consumers and their protection needs. Consequently, there is underprotection, which can not only harm the internal market but is also at odds with the EU's commitment to ensuring a high level of consumer protection. To be able to propose directions for improving the differentiation between consumers in EU consumer law, this paper answers the question of how the differentiation between consumers is currently operationalised and how that results in underprotection. Building on, among others, Black's regulatory theory of the nature of legal rules, it is argued that a legal rule's level of differentiation depends on how accurately its application conditions predict the situations in which it should apply, considering its aim. Through the application of this theoretical framework, it is argued that it is not just EU consumer law's status-based application conditions that disregard individual differences between consumers. EU consumer law's fact-based and norm-based application conditions also do not prevent the status-based application conditions from paving the way for underprotection. In support of this argument, several bottlenecks regarding the differentiation between consumers are identified, including the use of the average consumer benchmark, the emphasis on situational fact-based application conditions, and the rather limited role of norm-based application conditions. Altogether, these findings provide several directions for improving the differentiation between consumers in EU consumer law.

Keywords: consumer heterogeneity; differentiation; EU consumer law; regulatory theory; underprotection

1. Introduction

To prosper, the internal market of the European Union (EU) needs empowered and confident consumers, meaning that it requires consumers who dare to trade across the border of their own Member State.[1] For consumers to be empowered and confident, they need a high level of

[1]See most explicitly Commission, 'A European Consumer Agenda – Boosting confidence and growth' COM (2012) 0225 final. See further and partly critical of the idea of a confident consumer S Weatherill 'The Evolution of European Consumer Law and Policy: From Well Informed Consumer to Confident Consumer?' in H-W Micklitz (ed), *Rechtseinheit oder Rechtsvielfalt in Europa? Rolle und Funktion des Verbraucherrechts in der EG und den MOE-Staaten* (Nomos 1996) 423–71; T Wilhelmsson, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law' 27 (2004) Journal of Consumer Policy 317–37; C Twigg-Flesner, 'The Importance of Law and Harmonisation for the EU's Confident Consumer' in D Leczykiewicz and S Weatherwill (eds), *The Images of the Consumer in EU Law* (Hart Publishing 2016) 183–202. See further on the idea of an empowered consumer K O'Reily, *Empowering Consumers Through Law? Rethinking the Concept of EU Consumer Empowerment* (PhD thesis, Maastricht University 2023) 141–86. Note that the idea of creating an internal market

protection across all Member States, generally due to a lack of information and bargaining power.[2] However, not all consumers are the same. Consumers do not only have different vulnerabilities and levels of skills and knowledge, but also find themselves in different situations. For example, '[t]he owner of a yacht cannot be compared to an electricity customer who cannot pay his bill and whose provider turns off the power'.[3] Therefore, the level of protection that consumers need to be empowered and confident varies per consumer.

Nevertheless, there seems to be little differentiation between consumers within EU consumer law.[4] Generally, all natural persons who act for purposes outside their trade, business, craft, or profession fall within the definition of a consumer and are entitled to the same level of protection regardless of their individual needs. As a consequence, some consumers suffer from underprotection. Think, for example, about a consumer who is insufficiently protected against unfair commercial practices because he or she is incapable of being as reasonably well-informed and reasonably observant and circumspect as the average consumer (Article 5 of the Unfair Commercial Practices Directive (UCPD)).[5]

To some extent, underprotection is inevitable because 'to legislate means to generalize'.[6] Nonetheless, underprotection should be avoided as much as possible while considering other factors and interests, such as the formal realisability of the law.[7] Otherwise, the EU does not take the objective of empowering consumers and boosting their confidence seriously, which can not only harm the internal market but would also be at odds with the EU's commitment to ensuring 'a high level of consumer protection' (Article 169(1) Treaty of the Functioning of the European Union (TFEU); Article 38 Charter of Fundamental Rights of the EU (Charter)).[8] With that in mind, others have already argued that EU consumer law is too 'one-size-fits-all',[9] 'impersonal',[10] 'categorical',[11] and 'standardised'.[12] Moreover, vulnerability-based arguments, which acknowledge that consumers demonstrate different degrees of proneness to consumer harms,[13] have recently gained traction in discussions about the necessary improvements of EU consumer law.[14] However,

by promoting cross-border consumption is being criticised from a sustainability perspective. See, among others, H-W Micklitz, 'The Price to Pay for Pick-a-Pack Dependency: Consumer Policy and Law Between Internal Market and Digital-Green Economy' 48 (2025) Journal of Consumer Policy 337–53.

[2]Case C-110/14 *Costea* ECLI:EU:C:2015:538, para 18.

[3]H-W Micklitz, 'The Future of Consumer Law – Plea for A Movable System' 5 (2013) Journal of European Consumer and Market Law 5–11, 5. Micklitz refers to Case C-99/96 *Mietz* ECLI:EU:C:1999:202.

[4]D Leczykiewicz and S Weatherwill, 'The Images of the Consumer in EU Law' in Leczykiewicz and Weatherwill (eds) (n 1), 8.

[5]Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149/22. Here, it is assumed that the vulnerable group benchmark and targeted group benchmark do not apply, which is a safe assumption because generally that is not the case. See further Section 4B.

[6]C Busch and A De Franceschi, 'Granular Legal Norms: Towards Data-Driven Personalization of Private Law?' in V Mak et al (eds), *Research Handbook in Data Science and Law* (Edward Elgar 2024) 317–32, 319. Busch and de Franceschi quote and translate H Kelsen, *Allgemeine Staatslehre* (Springer 1925) 232. See also J Black, *Rules and Regulators* (Oxford University Press 1997) 5.

[7]The formal realisability of the law refers to how easy or difficult it is to apply a legal rule in practice. See D Kennedy, 'Form and Substance in Private Law Adjudication' 89 (8) (1976) Harvard Law Review 1685–778, 1687.

[8]Consolidated version of the Treaty on the Functioning of the European Union, OJ C 202/47; Charter of Fundamental Rights of the European Union, OJ C 326/391.

[9]V Mak 'How Can Consumer Interests be Protected When Consumer Identities are Increasingly Diffuse?' in H-W Micklitz and C Twigg-Flesner (eds), *The Transformation of Consumer Law and Policy in Europe* (Hart Publishing 2023) 43–63, 43.

[10]Busch and De Franceschi (n 6) 324–6.

[11]M Hesselink, *Justifying Contract in Europe. Political Philosophies of European Contract Law* (Oxford University Press 2021) 273 and 334–5.

[12]H Rösler, 'Protection of the Weaker Party in European Contract Law: Standardized and Individual Inferiority in Multi-Level Private Law' 18 (4) (2010) European Review of Private Law 729–56, 755–6.

[13]M Grochowski, 'Consumer Vulnerability: A Genealogy' in S Grundmann and P Sirena (eds), *European Contract Law and Future Challenges* (Intersentia 2025) 23–52.

[14]See, for example, Commission, 'Fitness Check of EU Consumer law on Digital Fairness' SWD (2024) 230 final, 47–8.

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a systematic examination of where exactly the shoe pinches is still missing. Without such an examination, proposals for improving the differentiation between consumers to prevent underprotection bear the risk of being off the mark. Therefore, this paper aims to answer the two-fold question of how the differentiation between consumers is currently operationalised in EU consumer law and how that results in underprotection.

To some extent, the differentiation between consumers within EU consumer law is a recurring theme in scholarly debate.[15] At this moment in time, it is particularly important to address it once again for at least two reasons. First, the need for differentiation between consumers has rapidly increased due to the digitalisation of consumer markets. As Mak points out, the digitalisation of consumer markets, which has been recognised by the European Commission as a key priority to address,[16] gives rise to new, unaddressed forms of inequalities.[17] For example, online profiling techniques make all consumers more vulnerable, but those already in a vulnerable position even more so than others. The second, interconnected reason why it is important to address the differentiation between consumers again at this moment in time is the current 'dissolution of EU consumer law'[18] through the emergence of the EU digital policy legislation. For nearly fifty years, EU consumer law has been the driving force behind the regulation of consumer markets. Now, the EU digital policy legislation, like the Digital Services Act (DSA) and the Digital Markets Act (DMA),[19] has taken over this role. To some extent, this leads to a dissolution of EU consumer law because the EU digital policy legislation has largely renounced the traditional distinction between the consumer and trader. This dissolution of EU consumer law does not necessarily have to be a bad thing, but it should be avoided that the protection of those who need it the most becomes the price to pay for it.[20] To prevent that from happening, better insight into how the differentiation between consumers could be improved is essential.

To analyse how the differentiation between consumers is currently operationalised, this paper develops a theoretical framework. Building on Black's regulatory theory of the nature of legal rules and the rich body of literature on status-related rights and the distinction between rules and standards, it is argued that a legal rule's level of differentiation depends on how accurately its application conditions predict the situations in which a legal rule should apply, considering its aim.[21] The three types of application conditions that, among other things, aim to ensure that EU consumer law only offers a consumer protection up to the degree deemed necessary by the legislator are status-based application conditions, fact-based application conditions and norm-based application conditions.[22] Based on this theoretical framework and an analysis of EU consumer law's main application conditions, it is argued in this paper that it is not just EU consumer law's status-based application conditions that disregard individual differences between consumers. EU consumer law's fact-based and norm-based application conditions also do not

[15]The issue is, for example, also discussed in H-W Micklitz, 'Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought Provoking Impulse' 32 (1) (2013) Yearbook of European Law 266–367, 349–59; S Grundmann, 'Targeted Consumer Law' in Leczykiewicz and Weatherhill (eds) (n 1), 223–44. See in general about the recurring issues of EU consumer law H-W Micklitz and T Wilhelmsson, 'Looking Back to Look Forward' in H-W Micklitz (ed), *The Making of Consumer Law and Policy in Europe* (Hart Publishing 2021) 345–50.

[16]Commission, 'Communication from the Commission to the European Parliament and the Council. New Consumer Agenda. Strengthening consumer resilience for sustainable recovery' COM (2020) 696 final, 10–4.

[17]V Mak, 'Redefining Equality in European Contract Law: Protecting Consumer Interests in a Post-consumer Society' 3 (2024) European Law Open 561–86.

[18]H-W Micklitz, 'Dissolution of EU Consumer Law Through Fragmentation and Privatisation' in N Helberger et al (eds), *Digital Fairness for Consumers* (BEUC 2024) 69–144.

[19]Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services, OJ L 227/1; Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector, OJ L 265/1.

[20]Micklitz (n 18) 142–3.

[21]See Section 3A.

[22]See Section 3B.

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prevent the status-based application conditions from paving the way for underprotection. In support of this argument, several bottlenecks regarding the differentiation between consumers are identified, including the use of the average consumer benchmark, the emphasis on situational fact-based application conditions and the rather limited role of norm-based application conditions.[23] Altogether, these findings provide both pragmatic and radical directions for improving the differentiation between consumers in EU consumer law.[24]

The structure of this paper is as follows. Section 2 first presents more background information about why it is important to reconsider the operationalisation of differentiation between consumers in EU consumer law. To do so, it further substantiates the claim that underprotection should be avoided as much as possible, because otherwise the EU does not take the objective of empowering consumers and boosting their confidence seriously, which cannot only harm the internal market but would also be at odds with the EU's commitment to ensuring a high level of consumer protection. Section 3 develops the theoretical framework of this paper. Although this paper's focus is on EU consumer law, it is a general issue of law that rules can be overinclusive and underinclusive. The broader relevance of the developed theoretical framework is that it can also be used to assess the operationalisation of differentiation in other areas of (EU) law, like platform regulation,[25] political advertising,[26] data protection,[27] corporate sustainability,[28] financial services,[29] and the supply of energy.[30] Throughout the paper, there will be references to these areas of EU law to contrast EU consumer law's approach to differentiation with other approaches. Section 4 systematically analyses EU consumer law through the lens of the theoretical framework. It maps the main status-based, fact-based, and norm-based application conditions of EU consumer law and analyses them from the perspective of underprotection. Section 5 concludes and provides several directions for improving the differentiation between consumers in EU consumer law.

2. The importance of preventing underprotection

EU consumer law has been described as rather one-size-fits-all.[31] However, consumers differ from each other, and so do their protection needs.[32] For example, a consumer who struggles to pay the bills probably needs more protection than a consumer whose main concern is choosing his or her next holiday destination.[33] Yet even if consumers find themselves in similar situations, the protection they need can vary due to their individual preferences, levels of knowledge, vulnerabilities and skills.[34] A consumer who wants to buy a bike for cycling in the mountains

[23]See Section 4.

[24]See Section 5B.

[25]See, in particular, the DSA but also Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186/57.

[26]Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising, OJ L 900.

[27]Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, OJ L 119/1.

[28]Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence, OJ L 1760.

[29]Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, OJ L 173/349.

[30]Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas, OJ L 157/125.

[31]Mak (n 9) 43.

[32]Micklitz (n 15) 350.

[33]D Caplovitz, *The Poor Pay More* (Free Press 1967). See also Micklitz (n 3) 5.

[34]Cultural differences between Member States can also prompt the need for differentiation, but this will not be included in this research. See G Howells et al, *Rethinking EU Consumer Law* (Routledge 2019) 326. See further on differentiation in implementation of EU law between Member States T van den Brink and M Hübner, 'Accommodating Diversity through

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needs different information to make a well-considered decision than a consumer who wants to buy a bike for cycling on the flat. And one consumer can be perfectly capable of ignoring a dark pattern, like a fake countdown timer on a booking website, while another consumer is incapable of doing so. Furthermore, the protection a consumer needs can vary depending on the time and context.[35] If a consumer does not need protection today, he or she might still need it tomorrow. And if a consumer does not need protection in one situation, he or she might still need it in a different one.

As the analysis in this paper will show, EU consumer law's disregard for consumer heterogeneity results in underprotection.[36] Underprotection means that a legal rule offers less protection than it aims to do.[37] For example, the right to withdraw from a distance or off-premises contract (Article 9 of the Consumer Rights Directive (CRD)) aims to enable consumers to make a well-informed and well-considered decision.[38] However, the time to revise a decision is probably not what a consumer needs to make a well-informed and well-considered decision if he or she cannot understand the information about the available options in the first place.

As discussed in the introduction, there is an increase in differences between consumers and their protection needs due to the digitalisation of consumer markets. However, that in itself is not a reason to be concerned with underprotection as a result of a lack of differentiation between consumers. Viewed from the perspective of EU law, the main reason to be concerned with underprotection is that it can harm the internal market and that it is at odds with the EU's commitment to ensuring a high level of consumer protection. Within EU law, the consumer is perceived as a market player whose economic activity across the border of its own Member State is vital for the functioning of the internal market, because it is for the consumer's 'financial resources that companies in the EU market are competing and it is their choices which trigger many other transactions'.[39] For consumers to play their vital role in the internal market by trading across the borders of their Member State, they need to be empowered and confident.[40] Therefore, inadequacies in consumer protection, like a disregard for consumer heterogeneity, need to be resolved.[41] Naturally, it is impossible to account for all differences between consumers.[42] However, as the analysis in this paper will show, EU consumer law now largely disregards differences between consumers and their protection needs. Consequently, there is still much to be gained in terms of truly improving the internal market through consumer empowerment and boosting consumer confidence.

According to some, the importance of empowering consumers and boosting their confidence for the functioning of the internal market is overstated.[43] Ensuring a high level of consumer protection is, however, also a self-standing goal of the EU since the Maastricht Treaty of 1993.[44] Currently, this goal is enshrined in Article 169 TFEU and, since the entry into force of the Lisbon Treaty in 2009, also in Article 38 of the Charter. Ensuring a high level of consumer protection is only achievable by accounting for differences between consumers. Failure to do so would mean that EU law only provides a high level of consumer protection to certain consumers, thereby

Legislative Differentiation: An Untapped Potential and an Overlooked Reality' 7 (3) (2022) European Papers – A Journal on Law and Integration 1191–209.

[35]Micklitz (n 15) 350.

[36]See Section 4.

[37]See N Reich, *General Principles of EU Civil Law* (Intersentia 2021) 47–56.

[38]Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ L 204/64.

[39]Leczykiewicz and Weatherill (n 4) 1.

[40]See most explicitly Commission, 'A European Consumer Agenda – Boosting confidence and growth' COM (2012) 0225 final.

[41]See Wilhelmsson (n 1) 319.

[42]It is in the nature of legal rules because to legislate means to generalise. See Busch and De Franceschi (n 6) 319.

[43]Wilhelmsson (n 1); Twigg-Flesner (n 1). As mentioned before, the idea of creating an internal market by promoting cross-border consumption is also being criticised from a sustainability perspective. See, among others, Micklitz (n 1).

[44]See in more detail about this development S Weatherill, *EU Consumer Law and Policy* (Edward Elgar 2014) 15–18.

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perpetuating inequality. In a recent paper, Hesselink argues that EU private law risks becoming 'an agent of injustice' as long as it 'creates, maintains, or facilitates interpersonal relationships or social structures that are not reasonably justifiable [. . .] towards those subject to them'.[45] In line with this argument, it can be argued that if EU consumer law is not doing everything it can to avoid underprotection as a result of a disregard for consumer heterogeneity as much as possible without a good reason, it maintains inequalities in interpersonal relationships that are not fully justifiable.[46] In a similar vein, Mak has recently called for a readjustment of the conception of equality in European contract law.[47] While before the digitalisation of consumer markets, the existing conception of equality could, in some sense and to some extent, get away with largely disregarding consumer heterogeneity, that is no longer the case. To prevent inequality in modern consumer markets, it is not only important to 'treat like cases alike',[48] but also to treat dissimilar cases differently.

Lastly, although the main reason to be concerned with EU consumer law's disregard for consumer heterogeneity is that it can harm the internal market and that it is at odds with the EU's commitment to ensuring a high level of consumer protection, it should be noted that, from an economic perspective, improving the differentiation between consumers may have the added benefit of reducing overprotection, which is the counterpart of underprotection. Overprotection means that a legal rule offers more protection than it aims to provide. Overprotection, for example, occurs when a consumer is entitled to the right to withdraw from a distance or off-premises contract without truly needing it or when he or she is allowed to use this right for purposes other than making a well-informed and well-considered decision.[49] From an economic perspective, it is often stressed that the costs that traders have to make to comply with consumer laws are passed on to their customers.[50] The costs of the protection that sometimes only some consumers need are then paid for by all consumers. To some extent, this is inevitable. However, if there is a significant amount of overprotection, protection costs can become unreasonably high and cause consumers to pay a considerable price for not only their own protection, which they might not even need, but also for the protection of others, who might (also) not need it – or worse: abuse their rights.[51]

3. Conceptualisation of differentiation

To analyse where exactly the current operationalisation of differentiation between consumers pinches, a theoretical framework consisting of a notion of what establishes differentiation is needed. Because there is no comprehensive conceptualisation of differentiation in law as of yet, this paper presents its own theoretical framework through a discussion of the meaning of differentiation in relation to legal rules, and through an overview of the three main operationalisations of differentiation in private law, which are the status-based approach, the fact-based approach and the norm-based approach. This theoretical framework has been

[45]M Hesselink, 'EU Private Law Injustices' 41 (2022) Yearbook of European Law 83–116, 110.

[46]Ibid., 98–9.

[47]Mak (n 17) 574.

[48]H Hart, *The Concept of Law* (Oxford University Press 2012) 150.

[49]For instance, in the *Messner* case, a consumer used her prolonged withdrawal right to return a second-hand laptop with a defective display, not because she made an uninformed decision, but because the repair was not provided for free. Case C-489/07 *Messner* ECLI:EU:C:2009:502. See for more examples Reich (n 37) 54.

[50]R Craswell, 'Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships' 43 (2) (1991) Stanford Law Reviews 361–98. See also O Bar-Gill and O Ben-Shahar, 'Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law' 50 (2013) Common Market Law Review 109–25, 114–15.

[51]See M Bartl, 'Socio-Economic Imaginaries and European Private Law' in F Kjaer, *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press 2020) 228–53, 248. Ehrlich and Posner point out that overinclusive legal rules can discourage desired behaviour I Ehrlich and R Posner, 'An Economic Analysis of Legal Rulemaking' 3 (1) (1974) The Journal of Legal Studies 257–86, 273. See also Black (n 6) 7–10.

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developed through an iterative process. After reviewing the literature that either explicitly or implicitly addresses differentiation in relation to legal rules, EU consumer law has been analysed to understand what the theoretical framework should be able to capture. With that in mind, the literature review was narrowed down, and the described process was repeated until the theoretical framework became satisfactory. As a result, the first part of the theoretical framework (Section 3A) mainly builds on Black's regulatory theory of the nature of legal rules.[52] The tripartite distinction introduced in the second part of the theoretical framework (Section 3B) is inspired by the work of Schelhaas,[53] but also builds on the rich body of literature on status-related rights and the distinction between rules and standards.[54]

A. Meaning of differentiation

In general, to differentiate means to distinguish. A more specific meaning of differentiation in relation to law is to distinguish between relevant facts and to tailor legal rules accordingly.[55] Generally, a legal rule has two sides: a fact side and a consequence side.[56] The fact side prescribes which facts have to occur for a legal rule to apply. These facts are the legal rule's application conditions. The consequence side prescribes what the legal consequences are if a legal rule's application conditions are satisfied. For example, Article 9 CRD states – in short – that its consequence applies if a distance or off-premises contract is concluded between a trader and a consumer. These application conditions constitute the fact side of that legal rule. If these facts occur – in other words, if these application conditions are satisfied – the consumer has the right to withdraw from the contract within 14 days, which is the consequence of Article 9 CRD.

The more relevant facts a legal rule takes into account, the more likely it becomes that its legal consequence only applies in the situations in which it should apply. A legal rule's level of differentiation is high if its application conditions distinguish between all relevant facts and its legal consequence therefore only applies when it should apply.[57] Such a legal rule is neither underinclusive nor overinclusive.[58] Applied to the context of consumer law, this generally means that the level of differentiation of a protective provision is high if its application conditions accurately predict whether a consumer needs the protection on offer. For example, the right to withdraw from Article 9 CRD aims to enable consumers to revise their decision if it is made under the influence of insufficient information, a surprise effect or psychological pressure.[59] If it is true

[52]Black (n 6). Literature on the nature of rules that also influenced the theoretical framework is, among others, Kennedy (n 7); F Achauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford University Press 1992); B Morgan and K Yeung, *An Introduction to Law and Regulation. Text and Materials* (Cambridge University Press 2007); R Baldwin et al, *Understanding Regulation: Theory, Strategy and Practice* (Oxford University Press 2011).

[53]H Schelhaas, *Commerciële contractanten – consistenter differentiëren?* (Boom Juridisch 2018).

[54]One of the seminal papers on the distinction between rules and standards is L Kaplow, 'Rules versus Standards: An Economic Analysis' 24 (3) (1992) Duke Law Journal 557–629. However, in this paper, the focus will not be on the economic analysis of rules and standards. Instead, the focus will be on the nature of legal rules and the distinction between rules and standards. See Black (n 6). See also J Black, 'Forms and Paradoxes of Principles-Based Regulation' 3 (4) (2008) Capital Markets Law Review 425–57. See about the rise of status-based rights in private law, amongst others, H Maine, *Ancient History: Its Connection with the Early History of Society, and Its Relation to Modern Ideas* (Cambridge University Press 2012); H-W Micklitz, 'Person, Civil Status and Private Law' in S Grundman et al (eds), *New Private Law Theory: A Pluralist Approach* (Cambridge University Press 2021) 341–59.

[55]This meaning of differentiation is somewhat similar to the meaning used in Micklitz (n 15) 354; Grundmann (n 15) and Schelhaas (n 53). A different meaning of differentiation used within EU law is taking differences into account between Member States. See Van den Brink and Hübner (n 34).

[56]Black (n 6) 21–2.

[57]Ibid., 25.

[58]In reality, legislation will always be underinclusive and overinclusive to some extent because rules are generalisations. See Black (n 6) 7.

[59]Recital 37 CRD. See further A Karampatzos, *Private Law, Nudging and Behavioural Economic Analysis: The Mandated Choice Model* (Routledge 2020) 86–9.

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that consumers generally need such protection in the case of a distant or off-premises contract, Article 9 CRD's level of differentiation is high. However, if this is not the case, this article's level of differentiation is rather low.

Note that a high level of differentiation can only be attained by distinguishing between relevant facts.[60] If a legal rule's application conditions distinguish between irrelevant facts, this could establish differentiation, but not a high level of differentiation. For example, if the right to withdraw would only apply if a contract is concluded during business days, this would establish differentiation but not a high level of differentiation because whether a contract is concluded during business days is likely to be irrelevant in light of the protection that a withdrawal right aims to offer. Furthermore, it should be noted that not all application conditions have the same function because differentiation is not always motivated by the same aim. Within EU consumer law, an application condition often aims to ensure that those who need protection are entitled to it and those who do not need it are not. However, application conditions sometimes also aim to balance different interests or to promote the general interest. For example, Article 4(2) of the Unfair Contract Terms Directive (UCTD) – in short – excludes so-called core terms from the scope of its unfairness test insofar as these terms are in plain, intelligible language.[61] This negatively formulated application condition aims to achieve a balance between a high level of consumer protection on the one hand and respect for party autonomy and freedom of contract on the other.[62] Furthermore, some of EU consumer law's application conditions aim to ensure that the EU stays within its legislative competencies (see Articles 114 and 169 TFEU).[63]

B. Types of application conditions

In addition to the different functions of application conditions, a distinction can be drawn between different types of application conditions. Three types of application conditions can be found in EU consumer law: status-based application conditions, fact-based application conditions and norm-based application conditions.[64] These types of application conditions should be considered ideal types of application conditions rather than strict categories. For example, there is a sliding scale between fact-based application conditions and norm-based application conditions, and most status-based applications have fact-based subapplication conditions. Nevertheless, the distinction between the different types of application conditions generally holds up and, most importantly, proves to be useful for the purpose of this paper.

Status-based application conditions

Some application conditions refer to legal status. The most general legal status in private law is the person, which includes natural persons and legal persons. In private law, this legal status started to become particularly important at the end of the 18th century when, as observed by Maine, there was 'a movement from Status to Contract'.[65] Whether someone could, for example, enforce a contract then started to depend on one's legal status as a person, which made one's societal status less important.[66] Since the beginning of the 20th century, more specific legal statuses have emerged

[60]See also Black (n 6) 7–8.

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

[62]Case C-26/13 *Kasler* ECLI:EU:C:2014:282, Opinion of AG Wahl, para 29.

[63]The EU shares its legislative competence concerning the internal market and consumer protection with its Member States (Art 4 TFEU) and is bound by the principles of subsidiarity and proportionality (Art 5(1) of the Treaty on European Union (TEU)). See in more detail S Weatherill, *The Internal Market as a Legal Concept* (Oxford University Press 2017) 151–86.

[64]This distinction is inspired by Schelhaas (n 53) 21.

[65]Maine (n 54) 170.

[66]Note that for a long time, not every human qualified as a person. For example, throughout history, women and slaves have not always been recognised as persons.

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in addition to the status of a person, such as the worker and the consumer.[67] Therefore, among others, Gravenson and Schmidt have argued that there is a movement back from contract to status.[68] However, they refer to status as legal status instead of societal status, like Maine.

Generally, if someone acts in the capacity of a specific legal status, that person is entitled to more protection than by default. Whether a person acts in a certain capacity depends on whether the subapplication conditions of a status-based application condition have been fulfilled. For example, to qualify as a consumer, EU consumer law generally requires that a natural person is acting for purposes that are outside his or her trade, business, craft, or profession (eg, Article 2(1) CRD). The level of differentiation a status-based application condition establishes depends on the relevance of its subapplication conditions in light of the aim of the legal rule. If a natural person who acts for purposes outside their trade, business, craft, or profession generally needs consumer protection, the status-based application condition of a consumer establishes a high level of differentiation. However, if, in many situations, the purpose for which a person is acting is irrelevant to whether protection is needed, the status-based application condition of a consumer establishes a rather low level of differentiation.[69]

Fact-based application conditions

Fact-based application conditions require a certain fact to occur to be fulfilled. Fact-based application conditions refer to either the characteristics of a situation or the characteristics of a person.[70] The characteristics of a situation include, among other things, what has happened or is happening during the pre-contractual phase and the content of a contract. Two examples of situational fact-based application conditions are the condition that a contract is not individually negotiated (Article 3(1) UTD) and that a contract is about the sale of a tangible movable item (Article 3 of the Sale of Goods Directive (SGD)).[71] In contrast, the characteristics of a person include, among other things, a person's attributes, capacities, and preferences. Two examples of personal fact-based application conditions are a person's age and the purpose for which a person is acting (see Article 2(1) CRD).

The level of differentiation a fact-based application condition establishes not only depends on its relevance in light of the aim of the legal rule but also on the accuracy of the method that has to be used to determine whether the fact-based application condition is satisfied. In general, that has to be done through observation. For example, contractual parties observe whether they are concluding a contract over the phone to determine whether the rules concerning distance contracts could apply (Article 6 CRD). Furthermore, a court observes this indirectly through testimonies and supporting documents. However, sometimes it is difficult to observe whether a fact-based application condition is satisfied. For example, it is not easy to observe whether a commercial practice materially distorts or is likely to materially distort the economic behaviour of a consumer (see Article 5 UCPD).[72] Determining whether such an application condition is satisfied requires knowledge about the capacities and preferences of a person. In theory, that knowledge can be acquired, but often that is not easy.

[67]See within the context of EU law Reich (n 37); H-W Micklitz, *The Politics of Justice in European Private Law* (Cambridge University Press 2018) 201–45.

[68]S Graveson, 'The Movement from Status to Contract' 4 (4) (1941) The Modern Law Review 261–72. See also K Schmidt, 'Henry Maine's 'Modern Law': From Status to Contract and Back Again?' 65 (1) (2017) The American Journal of Comparative Law 145–86.

[69]See further Section 4A.

[70]Note that the characteristics of a person are sometimes closely intertwined with the characteristics of a situation. For example, a person's capacity to make an informed decision not only depends on a person's capacity to process information but also on situational factors, like whether there is time pressure.

[71]Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, OJ L 136/28.

[72]Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149/22.

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When it is difficult to observe whether a fact-based application condition is satisfied, establishing this has to be done through approximation.[73] Roughly speaking, there are two ways to approximate: using a proxy and using a typification. Proxies and typifications generally adversely affect a legal rule's level of differentiation because they are a simplification or generalisation of reality and what causes a person's need for protection. A proxy is the assumption that a fact that can be observed more easily indicates that a harder-to-observe fact occurs. For example, to determine whether a person acts for purposes that fall outside the course of their trade, business, craft, or profession, the nature of the goods or services covered by the contract should, in particular, be taken into account, according to the Court of Justice of the European Union (CJEU).[74] The nature of the goods or services covered by a contract is thus used as a proxy for the purpose for which a person is acting, just like age is often used as a proxy for a person's decision-making capacities.[75] In turn, a typification is the assumption that a particular instance has the same characteristics as a model.[76] In EU consumer law, the most (in)famous typification is the average consumer benchmark. The level of protection that is offered against unfair commercial practices is not determined with reference to the level of protection a particular consumer needs but by using the level of protection the average consumer needs as a benchmark (Article 5 UCPD).[77]

Norm-based application conditions

Unlike fact-based application conditions, norm-based application conditions do not refer directly to a certain fact. Instead, they set a qualitative goal or threshold.[78] For example, Article 4(1) of the UCTD states – in short – that a term in a consumer contract is unfair if 'contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations'. This article sets a threshold that operates as an application condition. If a contract term exceeds this threshold, the contract term is not binding on the consumer (Article 6 UCTD). Norm-based application conditions are generally open-ended in the sense that the specific subapplication conditions they require to be satisfied are not fixed. They are further specified through a normative valuation of all the facts of a case. For example, determining whether a contract term does not exceed the threshold of Article 4(1) UCTD requires a normative valuation of what the open-ended norms 'good faith' and 'significant imbalance' mean within the context of a particular contract. Kaplow points out that fact-based application conditions determine the content of the law before the situation to which it applies has occurred, while norm-based application conditions do so after that situation has occurred.[79] Although this could be true in practice, it is not the main distinguishing feature of a norm-based application condition. More importantly, while fact-based application conditions formulate the facts that have to occur for a legal rule to apply, norm-based application conditions entrust the addressee of the legal rule to determine which specific facts have to occur for the application condition to be satisfied.

Because the specific subapplication conditions of a norm-based application condition are not fixed, norm-based application conditions generally allow for a rather high level of differentiation. However, if courts or other enforcement authorities only allow specific interpretations of a norm-based application condition, a norm-based application condition can in practice operate just like a

[73]See Black (n 6) 8.

[74]Case C-110/14 *Costea* ECLI:EU:C:2015:538.

[75]A Gosseries, 'What Makes Age Discrimination Special? A Philosophical Look at the ECJ Case Law' 43 (1) (2014) Netherlands Journal of Legal Philosophy 59–80, 61–6.

[76]Busch and De Franceschi (n 6) 410–11.

[77]The average consumer benchmark differs from the status-based application conditions of the consumer because the latter requires a person to act in a certain capacity, while the former is a fact-based application condition. Furthermore, they perform different functions within the legal setup of EU consumer law. See in more detail Sections 4A and 4B.

[78]Black (n 6) 20. The use of a norm-based application condition can often be equated with principle-based regulation. See further Black (n 54) 425–57.

[79]Kaplow (n 54) 557–629.

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fact-based application condition.[80] Yet the opposite can also occur. Because the application of a fact-based application condition always requires some interpretation,[81] a fact-based application condition can in practice operate just like a norm-based application condition.[82] Therefore, whether an application condition is fact-based or norm-based cannot only depend on whether it refers to a fact or sets a qualitative goal or threshold, but also on how it is applied in practice.

4. The operationalisation of differentiation in EU consumer law

Now that the theoretical framework is outlined, the question is how the differentiation between consumers is operationalised in EU consumer law and how that can result in underprotection. To answer this question, EU consumer law's main application conditions are analysed through the lens of the theoretical framework. Before doing so, however, some potential caveats of the analysis are in order. First, EU consumer law is analysed from a bird's-eye view, while sometimes the devil is in the details. Of course, the discussed legislation and case law have been examined in detail, but the scope of the analysis is rather broad. Therefore, some more specific problems regarding the differentiation between consumers and underprotection remain undiscussed. Second, the analysis in this paper is carried out from only one perspective, namely the differentiation between consumers. Why some of the identified bottlenecks regarding the differentiation between consumers exist can sometimes be explained from other perspectives, such as the legislative competencies of the EU and legal certainty. Such perspectives will eventually have to be taken into account when improvements for the differentiation between consumers are proposed to avoid underprotection and to help the internal market prosper. For now, however, the goal is first to understand how the differentiation between consumers is operationalised in EU consumer law. Third, the analysis in this paper focuses on the islands in the ocean – the EU consumer laws that operate alongside national laws.[83] If there is not much differentiation on the islands, sometimes the ocean can compensate for it. Rösler argues that EU consumer law is mostly concerned with standardised inferiorities, which are commonly occurring inferiorities between consumers and traders, while national laws mostly address individual inferiorities, which are incidentally occurring inferiorities between persons.[84] If such a division of labour between EU law and national law exists, it could be argued that if there is not much differentiation within EU consumer law, this should not necessarily be solved by EU consumer law itself, because national laws are supposed to compensate for this deficit. However, because almost all directives on consumer law demand full harmonisation, national laws are often not allowed to compensate for a lack of protection against individual inferiorities.[85] Furthermore, national laws protecting consumers can constitute unjustifiable barriers to interstate trade.[86]

[80]This is called formal principle-based regulation. See Black (n 54) 435–8.

[81]Hart refers to this as the open texture of legal rules. See H Hart (n 48) 124–36.

[82]This is called substantive principle-based regulation. See Black (n 54) 438–44.

[83]H Kötz, 'Gemeineuropäisches Zivilrecht' in H Bernstein et al (eds), *Festschrift für Konrad Zweigert zum 70 Geburtstag* (Mohr 1981) 481–500, 485. See also R Michaels, 'Of Islands and the Ocean: The Two Rationalities of European Private Law' in R Brownsword et al (eds), *The Foundations of European Private Law* (Hart Publishing 2011) 139–58.

[84]Rösler (n 12).

[85]Rösler also mentions this as a risk of full harmonisation Rösler (n 12) 755–6. See on the scope of full harmonisation V Mak, 'Full Harmonization in European Private Law: A Two-Track Concept' 20 (1) (2012) European Review of Private Law 213–36. See on the three models on the relationship between EU law and national private law O Cherednychenko, 'Islands and the Ocean: Three Models of the Relationship between EU Market Regulation and National Private Law' 84 (6) (2021) The Modern Law Review 1294–329. See on the influence of EU harmonisation on national private law doctrines M Schaub, 'Europese harmonisatie en algemene leerstukken van het verbintenissenrecht' (1) (2024) Nederlands Tijdschrift voor Burgerlijk Recht 1–3; J Torenbosch, 'Algemeen privaatrecht als ontoelaatbaar obstakel voor richtlijnen en verordeningen' (8) (2024) Nederlands Tijdschrift voor Burgerlijk Recht 193–206.

[86]The landmark case in this regard is Case C-120/78 *Cassis de Dijon* ECLI:EU:C:1979:42. See further S Weatherwill (n 63) 115–21.

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A. Status-based application conditions in EU consumer law

Main manifestations

To be entitled to consumer protection, EU consumer law generally not only requires that a natural person is acting for purposes that are outside his or her trade, business, craft, or profession but also that the counterparty of the consumer – the seller, supplier or trader – is acting for purposes relating to his or her trade, business, craft, or profession. These status-based application conditions – and slightly different variations thereof[87] – can, for example, be found in the Consumer Rights Directive (Articles 2(1) and 2(2) CRD), the UCTD (Articles 2(b) and 2(c) UCTD), the UCPD (Articles 2(b) and 2(c) UCPD), and the Sale of Goods Directive (Articles 2(1) and 2(2) SGD).

By exception, some EU consumer law directives do not employ the general status-based application conditions of the consumer and the trader. For example, the right to damages brought about by a defective product is not subject to the application condition that the plaintiff is a consumer (Article 5 Product Liability Directive (PLD)).[88] Although the damages have to be caused by the product of a manufacturer, a person qualifies as such if he or she is, in short, the product's developer, manufacturer or producer (Article 5(10) PLD), not necessarily when that person is acting for purposes relating to his or her trade, business, craft, or profession.[89] Furthermore, the Package Travel Directive (PTD) applies to travellers instead of consumers.[90] According to Article 3(6) PTD, a traveller is 'any person who is seeking to conclude a contract, or is entitled to travel on the basis of a contract concluded within the scope of this Directive'. From Recital 7 PTD, it can be inferred that the absence of the general status-based application condition of the consumer is motivated by the aim to also protect 'representatives of small business or professionals who book trips related to their business or profession through the same booking channels as consumers', because they 'often require a similar level of protection' as consumers. In addition, exceptions to the general status-based applications of EU consumer law can also be found in sector-specific secondary EU legislation that, at least to some extent, also aims to protect consumers.[91] For example, the Electricity Directive (ED) mainly imposes obligations upon suppliers and uses the statuses final customer, household customer, and non-household customer to differentiate between different types of customers (Articles 2, 10 and 28 ED).[92] Furthermore, EU digital policy legislation mainly differentiates between the providers of digital products, services, and technologies. For example, the DSA differentiates between providers of intermediary services, providers of hosting services, online platforms, very large online platforms (VLOPs), and very large online search engines (VLOSEs).[93] These partly overlapping statuses are linked to different levels of responsibilities towards, in principle, all kinds of recipients of their services. There are only a few additional responsibilities in case a consumer is the recipient of a service (Articles 29–32 DSA).

[87]See for an overview of the minor differences between some of the definitions M Schaub, 'Wie is consument?' (1) (2017) *Tijdschrift voor Consumentenrecht en handelspraktijken* 30–40; M Schaub, 'Wie is handelaar?' (1) (2019) *Tijdschrift voor Consumentenrecht en handelspraktijken* 5–13.

[88]Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products, OJ L 2853.

[89]Note that despite not explicitly referring to consumers, the Product Liability Directive is still likely to mostly benefit consumers because a person can only claim for damages that are caused by death or personal injury, and for damages to property that, in short, is not used exclusively for professional purposes (Art 6 PLD).

[90]Recital 6 of Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, OJ L 326/1.

[91]See also Micklitz (n 15) 300–8.

[92]Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity, OJ L 157/125.

[93]See in more detail and also about the layered structure of the DSA M Husovec, *Principles of the Digital Services Act* (Oxford University Press 2024) 22–30.

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Analysis

Exceptions aside, satisfying the general definition of a consumer is the first hurdle for a person to be entitled to consumer protection. However, the importance of this status-based application condition for the operationalisation of differentiation between those who need consumer protection and those who do not should not be overstated. Because the general definition of a consumer is quite broad, the net of consumer protection is widely cast.[94] From the perspective of avoiding underprotection, this makes sense. It is often better to be on the safe side and accept that some persons who are entitled to consumer protection do not need it than to risk denying protection to those who do. However, the risk of a broad definition of a consumer is that it puts pressure on the other types of application conditions. They become responsible for preventing underprotection by differentiating between those who need more consumer protection than others.[95] Sections 4B and 4C will examine the degree to which the fact-based and norm-based application conditions prevent underprotection.[96]

Here, it should be noted that although, when viewed from the perspective of underprotection, it makes sense that the general definition of a consumer widely casts the net of consumer protection, there is still the question of whether it does so at the right spot. Despite the broad definition of a consumer, is it still possible that people who need consumer protection are not entitled to it? Interestingly, the subapplication conditions of the general definition of a consumer are not a person's vulnerabilities, capacities, or level of knowledge, but whether a person is a natural person and whether that person is acting for purposes that are outside his or her trade, business, craft, or profession. As a result, a car dealer who buys a car for private purposes is entitled to consumer protection, while a small enterprise, such as a gardener without employees who buys a car mainly for gardening, is not.[97] The case law of the CJEU confirms that the definition of the consumer is indeed this inflexible. In the *Idealservice* case, which was about the UCTD, the CJEU confirmed that a legal person cannot qualify as a consumer.[98] In addition, from the *Di Pinto* case, which was about the Doorstep Selling Directive,[99] it can be inferred that a natural person who is acting for the purpose of his or her trade, business, craft, or profession but outside the scope of his or her core business also cannot qualify as a consumer.[100] Furthermore, in the *Costea* case, the CJEU ruled that the definition of a consumer in the UCTD is 'objective in nature and is distinct from the concrete knowledge the person in question may have, or from the information that person actually has'.[101] As a result, the person in this case qualified as a consumer when he entered into a credit agreement, despite also being a lawyer who practised in the field of commercial law.[102] Again, from the perspective of avoiding underprotection, this makes sense, but it also works the other way around, leaving, for example, small enterprises unprotected, while they can be just as ignorant and inexperienced as consumers, especially when they enter into agreements that do not cover

[94]Mak (n 9) 58.

[95]Klijnsma points out that if the definition of the consumer is overstretched there is a risk that consumer protection gets hollowed out. See J Klijnsma, *Contract Law as Fairness. A Rawlsian Perspective on the Position of SMEs in European Contract Law* (PhD Thesis, University of Amsterdam 2014) 107.

[96]See Sections 4B and 4C. There, the concept of the vulnerable consumer will also be discussed.

[97]See Micklitz (n 15) 351. In the case of a dual-purpose contract, a person only qualifies as a consumer if the professional purpose is 'so limited as not to be predominant in the overall context of the contract' according to recital 17 CRD, recital 22 SGD, and the CJEU in a case on the definition of a consumer in the Unfair Contract Terms Directive (Case C-570/21 *YYY* ECLI:EU:C:2023:456).

[98]Joined cases C-541/99 and C-542/99 *Idealservice* ECLI:EU:C:2001:625.

[99]Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L 372/31.

[100]Case C-361/89 *Di Pinto* ECLI:EU:C:1991:118.

[101]Case C-110/14 *Costea* ECLI:EU:C:2015:538, para 22.

[102]See in more detail E Terryn '"Consumers, by Definition, Include Us All" . . . But Not for Every Transaction' 24 (2) (2016) European Review of Private Law 271–86.

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their core business.[103] According to Cafaggi, legal status is therefore a poor proxy for a person's need for protection. He argues:

> Being a consumer, a small or medium-sized enterprise (SME) or a multinational company (MNC) in itself does not call for a special regime. Rather, asymmetric information, cognitive abilities and level of bargaining power, to name a few variables, might constitute the real rationales for devising specific legal rules.[104]

Next to the general definition of a consumer, the general definition of his counterparty – the trader, seller or supplier – could also lead to problems regarding the differentiation between those who need consumer protection and those who do not. In the *Kamenova* case, which was about the CRD, the CJEU ruled that determining whether a person acts for purposes relating to his or her trade, business, craft, or profession requires a 'case-by-case approach', taking into take into account a list of factors that is neither exhaustive nor exclusive.[105] Notwithstanding this nuanced approach, its outcome is binary: a person qualifies as a trader or does not qualify as a trader. There is no in-between. This could be problematic, especially on online platforms, where so-called 'prosumers' can become active on the supply side of a market offering products or services sometimes literally out of their living room.[106] A prosumer who qualifies as a trader must comply with the quite demanding legal rules of, among others, the CRD and the UCTD. From the perspective of the differentiation between consumers, this could be an issue because there is a risk of underprotection due to noncompliance if a prosumer who qualifies as a trader is unable to offer the required level of protection.[107] However, if a prosumer does not qualify as a trader, EU consumer law does not apply, which means that the consumer is at the mercy of national law for protection. This could lead to arbitrary differences in the levels of consumer protection, for example, on online platforms where third-party traders sell their products next to persons who do not qualify as traders. A consumer who contracts with a trader through an online platform has, amongst other things, a 14-day withdrawal right (Article 9 CRD), but a consumer who contracts through the same online platform with a person who does not qualify as a trader does not have such a right. An online platform, therefore, has to inform a consumer about the legal status of the counterparty (Article 6a(1)(b) CRD), but one of the problems of this information duty is that the online platform is allowed to trust the declaration of the counterparty about his or her legal status. Hopefully, the new 'know your business customer' obligation for online platforms of Article 31 DSA reduces the risk of traders being dishonest about their legal status.

B. Fact-based application conditions in EU consumer law

Main manifestations

After having analysed EU consumer law's general status-based application conditions, the focus is now on EU consumer law's main fact-based application conditions, which either refer to situational characteristics or to personal characteristics.[108] The situational fact-based application conditions used in the directives that only apply to a specific type of contract usually refer to the contract's subject or content. A comparable use of such application conditions can be found in the

[103]See from a Rawlsian perspective Klijnsma (n 95) 103–9.

[104]F Cafaggi, 'From a Status to a Transaction-Based Approach? Institutional Design in European Contract Law' 50 (1) (2013) Common Market Law Review 311–29, 313.

[105]Case C-105/17 *Kamenova* ECLI:EU:C:2018:808, para 37–8.

[106]Mak (n 9) 46.

[107]Note that the third-party trader can also be a weaker party in relation to online platforms. See further M Cos, 'Activating EU Private Law in the Online Platform Economy' in M Durovic and T Tridimas (eds), *New Directions in European Private Law* (Hart Publishing 2021) 147–68.

[108]See Section 3B.

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Sale of Goods Directive, the Digital Content Directive (DCD),[109] the Consumer Credit Directive (CCD),[110] the Mortgage Credit Directive (MCD),[111] the Timeshare Directive (TD),[112] and the Travel Package Directive. Their fact-based application conditions limit the scope of the protection they offer to a specific type of contract, usually with some exceptions. In addition, the level of protection they offer sometimes differs depending on the specific contract terms. For example, the Sale of Goods Directive provides a higher level of protection than by default if the installation of a good is part of the sales contract (Article 8(a) SGD), and the CCD offers different levels of protection depending on the specific type of credit (eg, Article 11 CCD). In contrast, most of the situational fact-based application conditions that are being used in the directives that apply to basically all types of contracts refer to the circumstances under which a contract is concluded. For example, most provisions of the CRD only apply to contracts that are concluded through distance communication or outside the business premises of the trader (Articles 6, 7, 8 and 9 CRD), and the scope of the UCTD is, among other things, limited to terms that are not individually negotiated (Article 3(1) UCTD).[113]

In EU consumer law, there are only a few fact-based application conditions that refer to personal characteristics. The subapplication conditions of the general definition of a consumer and its counterparty have already been discussed.[114] The other major reference to the characteristics of a person is in the UCPD. The general and specific prohibitions of this directive refer to the capacities of the average consumer (Articles 5, 6, 7, and 8 UCPD). Whether a commercial practice is unfair largely depends on whether it 'materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed' (Article 5(2)(b) UCPD). The average consumer is a typification that originated in 1979 as a benchmark for determining whether national limitations on the free movement of goods are justified.[115] Since 2005, it has also been used in the UCPD for the assessment of the unfairness of a commercial practice (Articles 5, 6, 7, and 8 UCPD). Recently, it has been making a 'steady creep' into other areas of EU consumer law.[116] For example, it is now also used to determine whether contract terms and precontractual information are transparent.[117] In 1998, the CJEU described the average consumer in the *Gut Springenheide* case for the first time

[109]Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ L 136/1.

[110]Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers, OJ L 2225. The implementation of this directive has to apply from 20 November 2026 and repeals Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers, OJ L 133/66.

[111]Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property, OJ L 60/34.

[112]Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, OJ L 33/10.

[113]In contrast to the Consumer Rights Directive and Unfair Contract Terms Directive, the Unfair Commercial Practice Directive, which also applies to every type of transaction, does not attribute an important role to situational fact-based application conditions that refer to the way a contract is concluded because the definition of a commercial practice is rather broad. See Art 2(d) UCPD and Case C-281/2 *Trento Sviluppo* ECLI:EU:C:2013:859.

[114]See Section 4A.

[115]Case C-120/78 *Cassis de Dijon* ECLI:EU:C:1979:42. See further S Weatherill (n 63) 115–21. Due to the CJEU's interpretation of the average consumer benchmark, one could argue that it sets a certain threshold and should therefore be qualified as a norm-based application condition. In this paper, it has been categorised as a fact-based application condition because it is a typification that is used to, amongst other things, determine how susceptible consumers are to commercial practices.

[116]J Luzak, 'The Steady Creep of an Average Consumer as a Reference Consumer in the Assessment of the Transparent Provision of Mandatory Information' (5) (2020) *Tijdschrift voor Consumentenrecht en Handelspraktijken* 265–74.

[117]Case C-26/13 *Kasler* ECLI:EU:C:2014:282; Case C-249/21 *Fuhrmann* ECLI:EU:C:2022:269. See also critically F Esposito and M Grochowski, 'The Consumer Benchmark, Vulnerability, and the Contract Terms Transparency: A Plea for Reconsideration' 18 (1) (2022) European Review of Contract Law 1–31; J Luzak et al, 'ABC of Online Consumer Disclosure Duties: Improving Transparency and Legal Certainty in Europe' 46 (2023) Journal of Consumer Policy 307–33.

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as 'reasonably well-informed and reasonably observant and circumspect'.[118] Nowadays, this is still the leading characterisation of the average consumer, even though it has been heavily criticised for setting a standard that is too high and demanding because it is not in line with behavioural insights about human decision-making.[119] Although in the recent *Compass Banca* case, the CJEU has instructed national courts to take more realistic considerations into account, like behavioural insights, in this case, the CJEU also repeated from the *mBank* case that the average consumer, just like the general definition of a consumer, 'is an objective criterion'.[120] Therefore, it is 'independent of the specific knowledge which the person concerned may have or the information actually available to him or her'.[121]

Even though the average consumer benchmark disregards individual differences between consumers, the UCPD still allows for some differentiation between consumers because of its two alternative benchmarks. The average member of a particular group must be used as a benchmark if a commercial practice is directed at a specific group of consumers (Article 5(2)(b) UCPD). In addition, if a commercial practice is likely to materially distort the economic behaviour of only a clearly identifiable group of consumers who are particularly vulnerable because of their mental or physical infirmity, age or credulity in a way that a trader could reasonably be expected to foresee, a commercial practice must be assessed from the perspective of the average member of that group (Article 5(3) UCPD).

Analysis

It has been argued that because the general definition of a consumer is quite broad, EU consumer law's fact-based and norm-based application conditions have the responsibility to prevent the general status-based application conditions from paving the way for underprotection.[122] For at least two reasons, EU consumer law's fact-based application conditions do not fully succeed in taking up this responsibility. First, although the legal rules that aim to offer protection against insufficient bargaining power generally take the most relevant facts into account, they cannot always keep up with how modern consumer markets develop. Second, the number of relevant facts that have to be considered to determine whether a consumer needs help with making a well-informed and well-considered decision is often rather limited.

As mentioned, many of EU consumer law's fact-based application conditions refer to a contract's subject or content. This generally makes sense if the goal is to protect consumers against insufficient bargaining power or, put differently, to ensure that consumers can meaningfully enter into a certain type of contract. For example, consider the right to repay mortgage credit before the expiry of the credit agreement (Article 25 MCD). Although some consumers who enter into a mortgage credit agreement might not need this right because they have enough bargaining power to negotiate it themselves or because they do not consider it useful, those would be the exceptions. Generally, if the goal is to protect a consumer against insufficient bargaining power, the type of

[118]Case C-210/96 *Gut Springenheide* ECLI:EU:C:1998:369, para 31.

[119]I Incardona and C Poncibo, 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution' 30 (2007) Journal of Consumer Policy 21–38. Although the CJEU removed some of the sharp edges of the labelling doctrine in 2015, the average consumer benchmark still sets a high standard. See Case C-195/14 *Teekanne* ECLI:EU:C:2015:361. See for a more optimistic view H Schebesta and K Purnhagen, 'The Behaviour of the Average Consumer: A Little Less Normativity and a Little More Reality in the Court's Case Law? Reflections on Teekanne' 41 (2016) European Law Review 590–8; K Purnhagen, 'More Reality in the CJEU's Interpretation of the Average Consumer Benchmark – Also More Behavioural Science in Unfair Commercial Practices?' 8 (2) 2017 European Journal of Risk Regulation 437–40.

[120]Case C-646/22 *Compass Banca* ECLI:EU:C:2024:957, para 48. In the *mBank* case, the consumer knew about the specifics of a loan because he was an employee of the lending bank. However, according to the CJEU, this fact could not be taken into account when applying the average consumer benchmark due to its objectiveness. See Case C-139/22 *mBank* ECLI:EU:C:2023:692, para 61.

[121]Case C-646/22 *Compass Banca* ECLI:EU:C:2024:957, para 48.

[122]See Section 3A.

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contract he or she enters into is a good proxy for his or her protection needs. However, the risk of using contract types as proxies for protection needs is that it can be hard for the EU legislature to keep up with how modern consumer markets develop. Failure to do so is likely to cause underprotection. For example, Grochowski points out that traditional consumption, which is characterised by the acquisition of things and services, has lost its importance compared to new types of consumption, such as the consumption of information, emotions, and experiences on online platforms.[123] Contract types only function well as proxies for a consumer's protection needs if the EU legislature can keep up with such developments. The fact that the DCD was introduced in 2019, while, for example, Apple introduced its App Store in 2008, vividly illustrates that it is not always capable of doing so.[124] Furthermore, another risk of using contract types as proxies of protection needs is that they permit traders to develop contract types that fall outside the scope of a particular type of contract, but in practice demand the same level of consumer protection. This can lead to a cat-and-mouse game between new fact-based application conditions and new contract types. For example, 'Buy Now, Pay Later' payment services did not fall within the scope of the former CCD because usually they are free of charge (Article 2(1)(f) former CCD), and the credit often does not exceed the threshold of EUR 200 (Article 2(1)(c) former CCD).[125] However, because 'Buy Now, Pay Later' payment services can cause the same harm to consumers as most other types of credit, it has been decided to include them in the scope of the new CCD.[126] Nevertheless, the scope rules of this new directive will probably not solve the issue for long because Article 2(2)(g) of the new CCD allows traders not to rely on third parties for their 'Buy Now, Pay Later' payment services to avoid having to comply with the rules on consumer credit.

EU consumer law not only offers protection against insufficient bargaining power, but sometimes also aims to ensure that a consumer can make a well-informed and well-considered decision. However, the number of fact-based application conditions that have to be taken into account to determine whether a consumer needs help with making a well-informed and well-considered decision is generally rather limited. Take, for example, the CRD. The extent of the information duty of a trader (see Articles 5 and 6 CRD) and whether a consumer is entitled to a 14-day withdrawal right (Article 9 CRD) depends on whether there is a distance or off-premises contract. The justification for these situational fact-based application conditions is that in the case of a distance contract, a consumer cannot see with his or her own eyes what is offered before concluding a contract and that in the case of an off-premises contract, a consumer's decision-making capacity can suffer from psychological pressure or a surprise element.[127] Although these are valid reasons for a more extensive information duty than by default and a 14-day withdrawal right, it is obvious that, in reality, many more factors determine whether a consumer needs this additional protection. In reality, the protection a consumer needs to make a well-informed and well-considered decision not only depends on whether there is a distance or off-premises contract but, amongst others, also on the consumer's preferences, prior knowledge and how he or she processes information. According to behavioural research, people process information differently. While one person could benefit from as much information as possible, the same amount of

[123]M Grochowski, 'Consumer Law for a Post-Consumer Society' 12 (1) (2023) Journal of European Consumer and Market Law 1–3.

[124]Grochowski also argues that the current system has 'proven too stiff to acknowledge new sources of consumer harm brought about by the online economy'. See M Grochowski, 'Digital Vulnerability in a Post-Consumer Society. Subverting Paradigms?' in C Crea and A de Franceschi (eds), *The New Shapes of Digital Vulnerability in European Private Law* (Nomos 2024) 201–25, 202.

[125]See also Case C-409/23 *Riverty* ECLI:EU:C:2024:895.

[126]See Recitals 16 and 17 of Directive (EU) 2023/2225. See further A Machura-Urbanaik and P Lupinu, '"Buy Now, Pay Later" (BNPL) Payment Services. Opportunities and Legal Challenges for EU Consumers and Businesses' 12 (5) (2023) Journal of European Consumer and Market Law 184–93, 190–2.

[127]Recital 37 CRD. See also A Karampatzos, *Private Law, Nudging and Behavioural Economic Analysis: The Mandated Choice Model* (Routledge 2020) 89–93.

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information could cause information overload to a different person.[128] Although it is difficult to translate such personal characteristics into easy-to-apply fact-based application conditions, this does not mean that more or other fact-based application conditions than the ones used in the CRD could at least be considered as proxies for protection needs. For example, in a similar legal context, Cafaggi has proposed to distinguish between transactions that are standardised, customised, or something in between to determine the type of information duty that should apply.[129] According to him, if a transaction is standardised, information duties should focus on content regulation, meaning that an information duty should prescribe in substantive terms which information should be included in the contract (see Article 6(5) CRD). This is because standardised transactions often use a contract as a 'vehicle to convey information'.[130] In contrast, if a contract is customised, information duties should focus on process regulation, meaning that they should prescribe under which circumstances a person is allowed to rely upon what the other has said. This is because customised contracts are generally 'construed through a "conversation" between the parties'.[131]

The UCPD is also illustrative of the rather limited number of facts that have to be taken into account to determine whether a consumer needs help with making a well-informed and well-considered decision. It makes sense to refer to personal fact-based application conditions to determine whether a commercial practice is unfair. However, because the average consumer benchmark is a typification, it disregards consumer heterogeneity. The targeted group benchmark and vulnerable group benchmark do not obviate this problem because, due to their rather strict application conditions, their practical relevance is very limited.[132] Unfortunately, the limited practical relevance of, in particular, the vulnerable group benchmark is illustrative of a broader trend. The vulnerable consumer has been perceived as a developing consumer image of EU consumer law after its introduction in the energy market in 2003.[133] The vulnerable consumer is someone 'who cannot, or can no longer, cope with the requirements of the modern consumer society'.[134] In contrast to the responsible consumer, which is the main guiding image of EU consumer law,[135] the vulnerable consumer does not benefit from market competition but needs protection through market-rectifying measures instead of market-enhancing measures.[136] Even though the vulnerable consumer is seen as an evolving consumer image that could improve differentiation between consumers,[137] its practical relevance has been very limited thus far. EU consumer law has failed to link different levels of protection to different consumer images, as Micklitz has pointed out.[138] For example, Recital 34 of the CRD states that 'in providing [. . .] information, the trader should take into account the specific needs of consumers who are

[128]G Loewenstein et al, 'Disclosure: Psychology Changes Everything' 6 (2014) Annual Review of Economics 391–419, 398–400. See also C Vogrincic-Haselbacher et al, 'Not Too Much and Not Too Little: Information Processing for a Good Purchase Decision' 12 (2021) Frontiers in Psychology.

[129]Cafaggi (n 104) 311–29.

[130]Ibid., 323.

[131]Ibid.

[132]B Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer 2015) 69–71. See also N Helberger et al, 'Choice Architecture in the Digital Economy: Towards a New Understanding of Digital Vulnerability' 45 (2022) Journal of Consumer Policy 175–200, 179.

[133]Art 3(5) of Directive 2003/54/EC; Art 3(3) of Directive 2003/55/EC. See further about the vulnerable consumer Reich (n 37) 54–6.

[134]Micklitz (n 15) 293.

[135]Ibid., 352.

[136]See about the distinction between market-rectifying measures and market-enhancing measures T Wilhemsson, 'Varieties of Welfarism in European Contract Law' 10 (6) (2004) European Law Journal 712–33, 718–19.

[137]Especially within the digital context. For example, see recently C Crea and A De Franceschi (eds), *The New Shapes of Digital Vulnerability in European Private Law* (Nomos 2024).

[138]H-W Micklitz, 'De-or Re-typification through Big Data Analytics? The Case of Consumer Law' in C Busch and A De Franceschi (eds), *Algorithmic Regulation and Personalized Law: A Handbook* (Bloomsbury Publishing 2021) 203–20, 205.

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particularly vulnerable because of their mental, physical, or psychological infirmity, age, or credulity in a way which the trader could reasonably be expected to foresee'. However, there are no specific rules protecting vulnerable consumers in the CRD. Instead, the same recital of the CRD even notes that the specific needs of vulnerable consumers 'should not lead to different levels of consumer protection'.

C. Norm-based application conditions in EU consumer law

Main manifestations

EU consumer law has three important (clusters of) norm-based application conditions. First, as already discussed, Article 4(1) of the UCTD states – in short – that a contract term is unfair if 'contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations'. To guide the application of this unfairness test, the UCTD contains an indicative and non-exhaustive list of terms that may be regarded as unfair (Article 3(3) UCTD). Second, Article 5 UCPD states – in short – that a commercial practice is unfair if it 'is contrary to the requirements of professional diligence' and 'materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer' (Article 5(1)b UCPD). In addition to this general unfairness test, the UCPD contains more specific prohibitions on misleading actions (Article 6 UCPD), misleading omissions (Article 7 UCPD) and aggressive commercial practices (Article 8 UCPD). These specific prohibitions also refer to the average consumer benchmark and are accompanied by a list of factors that should be taken into account as part of their unfairness tests. Furthermore, the UCPD contains a list of commercial practices that are unfair under all circumstances (Article 5(4) UCPD). Third, Article 7 PLD states that a product is defective if it does not provide 'the safety which a person is entitled to expect'. This provision explicitly mentions that all circumstances should be taken into account to determine what safety a person is entitled to expect and mentions several examples of circumstances that could be taken into account. In addition to these three (clusters of) norm-based application conditions, there are also norm-based application conditions in other directives about EU consumer law that are less in the foreground. Some examples of these norm-based application conditions are 'reasonable expectations given the nature of the good' (Articles 7(2)(a) SGD and 8(1)(b) DCD); 'disproportionate costs' (Article 13(3) SGD); 'without undue delay' (Article 7(1) TPD); 'in good time' (Article 10 CCD); and 'sufficient information' (Article 8(1) CDD).

Analysis

In general, EU consumer law's norm-based application conditions allow for a rather high level of differentiation between consumers because they are open-ended. This probably also explains why the UCTD has proved to be still highly relevant after more than thirty years.[139] Nevertheless, at least two factors can limit the extent to which norm-based application conditions prevent the general status-based application conditions from paving the way for underprotection. First, their role in the operationalisation of differentiation between consumers is sometimes rather limited. Norm-based application conditions can play, at least in theory, an important role in the operationalisation of differentiation in the UCTD, the UCPD, and the PLD. However, the norm-based application conditions of the other EU consumer law directives can generally only have a limited effect on the overall level of differentiation between consumers. For example, the legal rule that a creditor should provide a consumer with certain information in good time before a credit agreement binds the consumer provides the latitude to take into account how much time a particular consumer needs to process the information (Article 10 CCD). However, the overall level

[139]There have been initiatives to revise the Unfair Contract Terms Directive but they have not succeeded. See for an overview M Fornasier, 'A Short Biography of the Unfair Contract Terms Directive on the Occasion of Its 30th Anniversary' 31 (6) (2023) European Review of Private Law 1143–74, 1146–50.

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of differentiation between consumers created by the latitude to take this into account is rather limited because whether a consumer has sufficient time to process the information is only one factor determining whether an information duty provides enough protection to a particular consumer.

Second, EU consumer law's norm-based application conditions can only live up to their full potential if their addressees not only feel free to take individual protection needs into account, but also the urge to do so. Guidance on the application of a norm-based application condition and court-approved abstract interpretations of norm-based application conditions could hamper this. As discussed, some directives provide guidance on the application of an open-ended norm. In addition, policy documents sometimes do so too. Consider, for example, the European Commission's notice on the interpretation and application of the UCPD.[140] Such guidance can – unconsciously – encourage an addressee of an open-ended norm to only consider a limited number of facts, which could hamper differentiation between consumers. In addition, court-approved abstract interpretations of open-ended norms can – unconsciously – encourage the addressee of an open-ended norm to ignore other, more concrete interpretations. For example, it is established case law of the CJEU that in the examination as to whether there is a significant imbalance in the parties' rights and obligations under a contract (Article 3(1) UCTD), 'particular account must be taken of which rules of national law would apply in the absence of an agreement by the parties in that regard'.[141] However, the assessment of whether there is a significant imbalance does not have to be restricted to this specific examination.[142] Yet, the addressees of Article 3(1) UCTD are not encouraged to use other examination methods because there is an easy-to-apply, court-approved abstract examination method. From the perspective of differentiation, this could be problematic because it reduces the urge for the addressee of an open-ended norm to consider all relevant facts, including a consumer's individual protection needs.

5. Conclusions and directions for improvement

A. Conclusions

The question asked in this paper is how the differentiation between consumers is currently operationalised and how that can result in underprotection. To answer this question, it has been argued that a legal rule's level of differentiation depends on how accurately its application conditions predict the situations in which it should apply, considering its aim. EU consumer law employs three types of application conditions: status-based application conditions that require a person to act in a certain capacity to be satisfied, fact-based application conditions that require a certain fact to occur to be satisfied, and norm-based application conditions that set a qualitative goal or threshold that cannot be exceeded. Note that these types of application conditions are ideal types of application conditions, not strict categories.

The status-based application conditions of the consumer and the trader generally make the first selection of those who are entitled to consumer protection. These status-based application conditions exclude legal persons, persons acting for purposes relating to their trade, business, craft or profession, and persons without a counterparty who acts for purposes relating to his or her trade, business, craft or profession from the scope of EU consumer law. While it makes sense from the perspective of avoiding underprotection that the net of consumer protection is widely cast, the problem is that the purpose for which a person is acting is often not a good proxy for protection needs. Instead, cognitive capacities and levels of bargaining power and knowledge, amongst

[140]Commission, 'Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market' COM (2021) 9320.

[141]Case C-226/12 *Constructora Principado* ECLI:EU:C:2014:10, para 21. This test was first adopted in Case C-237/02 *Freiburger Kommunalbauten* ECLI:EU:C:2004:209.

[142]Case C-321/22 *Provident Polska* ECLI:EU:C:2023:911, para 47.

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others, determine a person's actual protection needs. However, the broad reach of the definition of a consumer and a trader would not have to be an issue if EU consumer law's fact-based application conditions and norm-based application conditions prevented the status-based application conditions from paving the way for underprotection. Unfortunately, EU consumer law's fact-based application conditions and norm-based application conditions fall short in this regard for several reasons. First, most fact-based application conditions refer to a contract's subject or content, or the circumstances under which a contract is concluded. While, by this means, the legal rules that aim to offer protection against insufficient bargaining power generally take the most relevant facts into account, there is a risk of underprotection because fact-based application conditions are quite static and thus require the EU legislator to keep up with the rapid development of consumer markets. So far, the EU legislator has not always been able to do so. Second, because fact-based application conditions are quite static, they can create a cat-and-mouse game between new fact-based application conditions and new contract types. Third, because personal fact-based application conditions sometimes use the average consumer as a typification, the number of relevant facts that have to be taken into account to determine whether a consumer needs help with making a well-informed and well-considered decision is often quite limited. Fourth, while, in principle, norm-based application conditions allow for a rather high level of differentiation between consumers, they can only play a significant role in the operationalisation of differentiation between consumers in the UCTD, the UCPD, and the PLD. Furthermore, guidance on the application of a norm-based application condition and court-approved abstract interpretations of norm-based application conditions can hamper the level of differentiation they establish in practice.

In sum, EU consumer law is indeed rather one-size-fits-all. Its status-based application conditions are very broad, and its fact-based application conditions and norm-based application conditions do not take much differences between consumers and their protection needs into account. As a result, EU consumer law's fact-based application conditions and norm-based application conditions do not prevent the broad status-based application conditions from paving the way for underprotection. Therefore, the operationalisation of differentiation between consumers in EU consumer law needs to be reconsidered. The EU would otherwise not take the objective of empowering consumers and boosting their confidence seriously, which can not only harm the internal market but would also be at odds with the EU's commitment to ensuring a high level of consumer protection (Article 169(1) TFEU; Article 38 EU Charter of Fundamental Rights). Building on this paper's analysis and the work of others, several directions for improving the differentiation between consumers can be identified. Before mapping these directions at the end of this paper, it should be noted that they are not concrete proposals for improvements. The proposed directions are not exhaustive, need further elaboration, and – most importantly – it is still an open question which factors and interests should carry weight in determining the optimal level of differentiation between consumers. Indeed, if an improvement of differentiation between consumers is, for example, not workable in practice, it could be undesirable for that reason.

B. Directions for improvement

Amongst the several directions for improving the differentiation between consumers in EU consumer law, a distinction can be drawn between pragmatic and radical directions. The pragmatic directions use a patchwork approach. They solve a problem regarding differentiation by changing EU consumer law as little as possible, just to reduce underprotection and overprotection to an acceptable level. In contrast, the radical directions try to eliminate the source of a problem regarding the differentiation between consumers. The radical directions generally require fundamental changes. A potential disadvantage of the radical directions is that, in general, they are

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less likely to be implemented because a patchwork approach sits better with the current piecemeal development of EU consumer law than proposals for radical change.[143]

On the level of the status-based application conditions, a pragmatic direction for improving differentiation would be to introduce the prosumer as a new status with fewer responsibilities than a trader, but with more than a consumer would have under national laws.[144] In addition, a pragmatic direction to avoid underprotection as a result of the purpose-oriented definition of a consumer would be to include small and medium-sized enterprises (SMEs) within the scope of the definition or to recognise SMEs as a separate status entitled to a certain level of protection. To some extent, these options are already put into practice in other fields of EU law. The P2B Regulation promotes the fairness and transparency of general terms and conditions used by online intermediation services in relation to business,[145] and there is a directive that protects certain professional buyers of agricultural and food products against unfair trading practices of professional sellers.[146] Furthermore, the EU regulation of telecommunications services, energy, financial services, and online platforms mainly refers to customers, users, clients and recipients, instead of consumers.[147] These status-based application conditions can include persons who act for the purpose of their trade, business, craft, or profession.

On the level of the fact-based application conditions, an obvious pragmatic direction for the improvement of differentiation would be to recognise better and more exceptions to the average consumer benchmark. For example, the application conditions of the vulnerable group benchmark could be improved by recognising more factors that could trigger its application.[148] In addition, as Duivenvoorde proposes, there could be exceptions to the average consumer benchmark depending on the degree a commercial practice is targeted.[149] To improve the differentiation between consumers in the context of information duties, Cafaggi's earlier-discussed proposal to distinguish between standardised and customised transactions could be considered.[150]

On the level of norm-based application conditions, a pragmatic – yet also quite radical – direction for the improvement of differentiation would be to introduce a general provision of good faith. The supplementary function of good faith could potentially provide additional protection in the case of severe underprotection.[151] What distinguishes good faith as an open-ended norm from most other open-ended norms is that it is not only open-ended on the fact side but also on the consequence side.[152] Whether it applies and, if so, what its legal consequence is can only be determined in light of all the facts of a case.

[143]G Howells et al, *Rethinking EU Consumer Law* (Routledge 2019) 329. See also H-W Micklitz, 'The Full Harmonization Dream' 11 (4) (2022) Journal of European Consumer and Market Law 117–21, 121.

[144]Mak (n 9) 51.

[145]Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186/57.

[146]Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, OJ L 111/59.

[147]See Art 2(13) of the Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, OJ L 321/36; Art 2 (1) ED; Art 2 (24) of the Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas, OJ L 211/93; Art 4 (9) of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173/349 and Art 2 (1) DSA.

[148]See Micklitz et al, 'Towards Digital Fairness' 13 (1) (2024) Journal of European Consumer and Market Law 24–30, 28–9.

[149]B Duivenvoorde, 'Redesigning the UCPD for the Age of Personalised Marketing: A Proposal to Redesign the UCPD's Consumer Benchmarks and General Clauses' 12 (5) (2023) Journal of European Consumer and Market Law 177–84.

[150]See Section 4B.

[151]In this regard, an interesting development is the introduction of the general duty of care for creditors and credit intermediaries in addition to the more specific rules on consumer credit in the new Consumer Credit Directive. See Art 32(1) new CCD. See further on this topic O Chrednychenko, 'On the Bumpy Road to Responsible Lending in the Digital Marketplace: The New EU Consumer Credit Directive' 47 (2024) Journal of Consumer Policy 241–70, 256–8.

[152]M Hesselink, 'The Concept of Good Faith' in A Hartkamp et al (eds), *Towards a European Civil Code* (Kluwer Law International 2011) 619–49, 627.

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A radical direction for the improvement of differentiation between consumers would be to recognise more consumer images.[153] Micklitz has pleaded for a 'movable system' of consumer law in which different rules apply to different consumer images.[154] Although he does not discuss the operationalisation of such a system in detail, one option would be to use consumer images as status-based application conditions. Each consumer image would then have its own set of legal rules. Another option would be to use consumer images as fact-based application conditions, which would mean that correspondence to a different consumer image than the default consumer image would lead to a different level of protection – just like the application of the vulnerable group benchmark (Article 5 UCPD) already, at least in theory,[155] leads to a different level of protection against unfair commercial practices. Recently, several authors have explored the possibility of personalising EU consumer law with the use of technological advances, like big data analytics and machine learning.[156] Perhaps personalised law could also be used to operationalise the differentiation between different consumer images. In its most advanced application, this would mean that every consumer gets his or her own consumer image with individually tailored rules. In addition, another more radical direction for the improvement of differentiation would be not to expand the scope of the status-based application conditions of the consumer, but to renounce them altogether. Fact-based application conditions and norm-based application conditions would then get the full responsibility for differentiating between those who need protection and those who do not. To take up this responsibility, they would, for example, need to focus more on the different types of products traders offer and the different activities they perform, just like the DSA and the Artificial Intelligence Act already do to some extent.[157] Indeed, renouncing the definition of the consumer would lead to a further dissolution of EU consumer law, but, as mentioned before, that would not necessarily have to be a bad thing as long as it is to ensure a high level of consumer protection for all consumers.

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[153]How radical this direction for the improvement of differentiation would be depends on how it is operationalised.

[154]Micklitz (n 3).

[155]See Section 4B.

[156]See, for example, O Ben-Shahar and A Porat, *Personalized Law. Different Rules for Different People* (Oxford University Press 2021); C Busch and A De Franceschi (eds), *Algorithmic Regulation and Personalized Law: A Handbook* (Bloomsbury Publishing 2021).

[157]Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence, OJ L 1689.

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