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effectively within the EU and to the regulatory design itself. Only about a year ago, for instance, the EDPB concluded in its Opinion 28/2024 that regardless of how a large AI model was trained, it can be marketed and used in the EU with impunity if, at least in its trained end state, it is anonymous. In plain English: large US or Chinese models potentially enjoy de facto staying power, whereas new models can hardly be developed in the EU because the uncertainty around legal bases and sensitive data categories is too great – and it is precisely this that the Omnibus aims to change.

Could the Commission have done better? Yes – definitely. In particular, by taking more time, allowing for a more thorough debate, and presenting a more balanced proposal that not only enables greater innovation but also enhances further the protection of fundamental rights. As far as changes to the GDPR are concerned, the author herself advocates a more risk-based approach, having published a discussion draft for an AI data-protection regulation at the end of 2024,[10] which was later taken up and refined by the ELI.[11] This approach would have provided for a three-tier regulatory regime, offering stronger protection for high-risk cases, relief for low-risk cases, and the continued application of the GDPR as it stands – with a number of adaptations to new technologies – for all other cases. In addition, there would have been a blacklist of prohibited data practices that cannot be legitimised by consent. The Omnibus takes up individual elements of these proposals, all of which, however, are aimed only in one direction. With a more balanced approach, much of the public outcry we have seen could have been avoided.

What remains to be done now? Where the proposals need improvement, we should insist on changes in the legislative process. Where the proposals do not go far enough, we should insist on further steps to be taken within the wider Data Union Strategy.[12] However, blocking a long-overdue simplification would benefit large third-country players and the consulting industry, while doing little to help those whose rights are actually at stake.

Sergio Cámara Lapuente*

Digital Force, Green Fuse, and… Simplification: Do Not Let Consumer Law Wither Away (On the Occasion of the EuCML Best Paper Award 2025)

Digitalisation and sustainability. These have been the driving forces behind the transformation of European private law in recent times. Consumer law is compelled to ride both on the back of the European Digital Single Market and on the back of the European Green Deal and find a difficult balance along the way, without renouncing its essence. The first verse of *Dylan Thomas'* poem seems to capture the moment quite well: '*The force that through the green fuse drives the flower*'. Digital force drives the flower (EU) through the green stem. These were also the two topics that formed the backbone of the EuCML Annual Conference and Best Paper Award, granted by the jury of experts that deliberated at Villa Braida, near Venice, on 18 and 19 September 2025, and whose winner and finalists now have their work published in this latest issue of the Journal for 2025.

The European Union's legislative activity to tame the digital environment has been particularly intense over the last five years. Although it began by focusing on consumer protection, as evidenced by the 2019 Directives on the contracts for the supply of digital content and digital services (Directive 2019/770), on contracts for the sale of goods (Directive 2019/771) and the reform of Directive 2011/83 on consumer rights (CRD) through Directive 2019/2161/EU (Omnibus), it soon shifted towards defending business activity within the digital market, in particular to protect small and medium-sized businesses from internet gatekeepers and large platforms and intermediation services. The odd point is that European digital law increasingly applies tools traditionally associated with consumer law (B2C contracts) to business-to-business relationships, sometimes even extending their protective

10 <https://zivilrecht.univie.ac.at/fileadmin/user_upload/i_zivilrecht/Wendehorst/Workshop_Datenschutz/Draft_AI_Data_Protection_Regulation_WENDEHORST_24-12-20.pdf> (accessed 7 December 2025).
11 See footnote 8.
12 COM(2025) 835 final. See, in particular, p. 15 ("Building a future-proof data framework").
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function just in B2B contracts. This is done without a corresponding parallel or subsequent advance or change in consumer rights, except indirectly and rather marginally.

This phenomenon can be illustrated with multiple examples derived from the Platform to Business Regulation (P2B, with its already eloquent quasi-consumerist title of Regulation (EU) 2019/1150 on promoting *fairness and transparency* for business users of online intermediation services), the Digital Services Act (DSA), the Digital Markets Act (DMA), the Data Act and the Artificial Intelligence Act (AIA). For instance, Article 3 of the P2B Regulation creates a sanction of direct nullity for non-transparent clauses established without negotiation in general 'terms and conditions' inserted in B2B contracts (a concept, T&C, defined in Article 2.10, and not previously in consumer law rules!); this solution is more protective than the CJEU's interpretation of Articles 4(2), 5 and 6 of Directive 93/13 for consumers. Other rules directly forbid clauses or expressly classify them as 'unfair terms' in cases of online contracting between businesses through platforms and intermediaries, as is the case in several regulations (Article 8 of the P2B Regulation, Article 13 of the Data Act), and even establish black and grey lists of B2B unfair terms (Articles 13.4 and 13.5 Data Act); or general canons are created (see Article 13.3 Data Act) close to the concept of 'unfair term' to combat certain practices (Articles 8(8) and 12(5)(b) DMA).

It is time to reconsider whether some of these techniques, extrapolated to the protection of the business as the weaker party and adapted to the digital environment, should not be brought back and readapted in Directive 93/13 on Unfair Contract Terms (UCTD), including a review of the list of unfair terms. Furthermore, the intersection between the use of personal data of contracting parties and contracts for digital services has also been addressed in the B2B sphere (Data Act), but is absent from the UCTD and other core consumer law rules, despite the path opened by Directive 2019/770 to the controversial issue of data as consideration.

Another striking feature of the new digital regulations do not refer to 'consumers' but rather to 'users', 'end users', 'business users', 'recipients of the service', 'recipients of data', 'data subjects', customers, clients, or other terms that do not correspond to the usual legal concept of consumers, resulting in fragmentation and dispersion that does not provide clarity[1]. The notion of 'average consumer' remains embedded in the *acquis* and in its interpretation by case-law (e. g., construction of Directive 2019/770 or Directive 93/13) and is often contrasted with that of the 'vulnerable consumer', when in the digital environment it must finally be accepted that the 'average consumer' is not the rational *homo economicus* that was assumed to be the norm, but rather a being of bounded rationality with easily manipulated cognitive biases that, by definition, make virtually all digital consumers vulnerable (that is the average consumer in this context, therefore), as was first highlighted by the CJEU in case C-646/22, *Compass Banca SpA*[2]. Transparency appears throughout the aforementioned Regulations/Acts, albeit with some features more focused on improving the quality of information, its presentation and transmission, i. e. on the 'how' and 'when' to inform rather than on the 'what' to disclose, in a trend that would be well worth transferring to specific consumer protection rules as well. In conclusion, to prevent consumer law from wilting due to lack of irrigation, it is necessary to fertilise it with some of these new advances in the protection of the weaker party in the digital context, a sort of 'cross-fertilisation'.

All of this European digital law is truly focused on the market: on refining competition between companies; on not imposing new obligations or obstacles on small businesses and start-ups in order to promote innovation and competitiveness; on restrictively limiting the scope of application of the rules (so that, for example, the incipient protection against dark patterns is not enforceable against any digital service provider, or the applicability of Article 25 DSA is uncertain insofar as it may be regulated by the UCPD or the GDPR); and on other legislative policy priorities, rather than on granting consumers new rights, remedies or means of exercising or enforcing existing ones. Consumer

1 Hans W. Micklitz, 'Dissolution of EU consumer law through fragmentation and privatisation', in Natalie Helberger/Betül Kas/Hans W. Micklitz/Monika Namysłowska/Laurens Naudts/Peter Rott/Marijn Sax/Michael Veale (eds), *Digital fairness for consumers* (BEUC, 2024) 71–144.

2 ECLI:EU:C:2024:957 (paras. 53, 57 and 59).

protection policy is being relegated in favour of the creation of a legal system of transparency and balance between businesses. This shift since 2019 can even be detected in the regulatory instruments chosen and in the new nomenclature: the aforementioned rules are Regulations and not Directives – with maximum harmonisation colonising the digital space and leaving little room for national legislation – but they are successfully marketed as ‘Acts’, which is a legislative instrument not expressly provided for in Article 288 TFEU[3]; eponymous legislation is created for technological phenomena, with simple and attractive titles that are easy for the population to remember and identify, which coin a short subtitle after the long and more anonymous titles usually found in European Regulations and Directives[4].

Precisely when the EuCML Annual Conference was held, the proposal for a future *Digital Fairness Act* (DFA), on which so many hopes are pinned, was and continues to be at the centre of the debate. The title is indeed attractive. But we had also other appealing titles, as the Consumer Rights Directive, which ended up merging only two and not four directives, for instance. It would be a new ‘Act’, this time on genuine consumer law, but it may only end up bringing together a series of partial and sectoral changes that ultimately do not address a genuine horizontal concept of ‘digital fairness’ or thoroughly adapt the UCTD to the digital age, but rather make just partial adjustments to some of the existing rules. The final form of the legal instrument and its content are still pending: following an initial public consultation in 2022-2023, the working document on the ‘Fitness Check for EU Consumer Law on Digital Fairness’ was published in October 2024[5]. The changes in the composition of the European Commission confirmed the priority of bringing about a DFA, but led to a second public consultation on the subject, which closed on 24 October 2025[6]: its questions continue to focus more on targeted harmonisation on specific issues than on an in-depth review. In short, as denounced in the one of the last editorials of this journal, we may continue to have a patchwork rather than a framework because we are not addressing the interface itself as a legal object[7], something that is also addressed in a certain way in the winning paper of the EuCML award now published. And there is a risk that the scientific debate will become scattered and distracted by the analysis of fragmentary and targeted reforms, rather than thinking critically and creatively about paradigm shifts. As *Hans Micklitz* aptly put it at one point during the September debate at Villa Braida, ‘we have too many rules and little law’.

However, along with the lack of irrigation and the lack of cross-fertilisation, the second danger to consumer law may be excessive pruning. Only two months have elapsed since that fruitful debate and innovative contributions on 19 September. On 19 November 2025, the European Commission sought to set out a new roadmap for digitalisation and sustainability with the simultaneous presentation of two initiatives full of new regulatory proposals: on the one hand, the so-called ‘Digital Package’[8], which is more focused on competitiveness and the removal of burdens on businesses in the shadow of the ‘Draghi Report’[9] and, on the other hand, as a counterpoint (but not much), the ‘2030 Consumer Agenda’[10], whose public label is eloquent: ‘A new impulse for consumer protection, competitiveness and sustainable growth’; in other words, consumer protection does not come alone, but is flanked by other priorities. In fact, in the new agenda, in addition to digitalisation, there are numerous announcements about the regulation of the green economy (a Circular Economy Act, measures on Green Design in E-Commerce, on transport – in relation to trains, bicycles or small electric cars – etc.). But if one idea predominates in all these announcements and proposals, it is ‘simplification’. In the 2030 Consumer

3 The reference in Article 289 TFEU to ‘legislative acts’ does not have that meaning.
4 On this trend, see Vagelis Papakonstantinou/Paul De Hert, ‘The Regulation of Digital Technologies in the EU: The law-making phenomena of “act-ification”, “GDPR mimesis” and “EU law brutality”’ (2022) *Technology and Regulation* 48-60.
5 European Commission, ‘Commission Staff Working Document Fitness Check of EU consumer law on digital fairness’, SWD(2024) 230 final, Brussels, 3.10.2024. See <https://commission.europa.eu/law/law-topic/consumer-protection-law/review-eu-consumer-law_en> (accessed 3 December 2025).
6 <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14622-Digital-Fairness-Act_en> (accessed 3 December 2025).
7 Monika Namysłowska, ‘Digital Fairness and the Courage to Regulate’ (2025) 4 EuCML 134.
8 See all new documents and proposals at: <https://digital-strategy.ec.europa.eu/en/policies/digital-rulebook> (accessed 3 December 2025).
9 Mario Draghi, ‘The future of European competitiveness’, Brussels, 9.9.2024 (<https://commission.europa.eu/topics/competitiveness/draghi-report_en> accessed 3 December 2025).
10 European Commission, ‘2030 Consumer Agenda and action plan for consumers in the single market. A new impulse for consumer protection, competitiveness and sustainable growth’, COM(2025) 848 final, Brussels, 19.11.2025.

Agenda, the word is used and highlighted no less than eleven times (in a 19-page text), including in reference to the DFA itself (p. 7: 'The Digital Fairness Act will also aim at simplifying rules for businesses'), and in the Digital Package its use is ubiquitous and constant, almost always with the mantra of simplifying digital rules to promote competitiveness; it will even promote 'unlocking data for AI', as subtitled in the Data Union Strategy[11] (with the recasting of the content of four Regulations/ Directives in the Data Act, and the repeal of the P2B Regulation), reversing some principles that until now defended citizens in relation to the concept of 'personal data' or the bases that allow its legitimate processing. I do not believe that in order to truly obtain a new authentic or 'great law' with consistent principles, but rather to continue fiddling around with an excessive amount of rules, albeit simplifying them, the Commission has announced another public consultation, open until March 2026 ('Digital Fitness Check')[12] to test 'the cumulative impact of EU digital rules'.

Another initiative confirms the trend mentioned before: the European Commission has approved the very same 19 of November a draft Recommendation on non-binding model contractual terms on data access and use and non-binding standard contractual clauses for cloud computing contracts.[13] However, these model terms and standard clauses, which take into account the unfairness control of the Data Act, are only proposed for business-to-business relationships and not for consumer contracts. There does not seem to be any plans to replicate this measure with a proposal for standardised contracts free of unfair terms for sectors of digital contracting with consumers. In times of crisis (and we are clearly in a crisis: economic, geopolitical, of values, of hegemony and digital power…), consumer law has always been relegated in favour of business growth. Simplification has its virtues, but as Einstein supposedly said, 'everything should be made as simple as possible, but not simpler'. The technical appearance of simplification should not include cutting rights without due consideration and debate.

But returning to the purpose of this editorial, namely the presentation of the papers resulting from the EuCML Best Paper Award call for papers, four of the five previously selected by the editors are published in this special issue. The format of the Annual Conference could not have been more scientifically beneficial: each of the papers was presented by its young author (PhD candidates or recent PhD holders) and then received suggestions and questions from both two senior discussants and the expert audience. After all these presentations, preceded by speeches from three keynote speakers (*Klaus Mainzer*, President of the European Academy of Sciences and Arts; *Frank Pasquale*, professor at Cornell Law School; and *Marco Scialdone*, director of the Consumer Empowerment Project), the jury, made up of these speakers, the moderators of each session and the discussants, among other prestigious experts in consumer law, chose the winner of the best paper, *Sarah Hink* (LL. M. at New York University and PhD candidate at Heinrich Heine University Düsseldorf), and also agreed to grant a special mention for the best oral presentation, given by *Jie Ouyang* (PhD candidate and lecturer at the University of Groningen).

In a nutshell, the four contributions bring fresh ideas to the current debate on digitalisation and sustainability in terms of their impact on consumer law: the possible role of competition law as a complementary tool for regulating the quasi-normative power of platforms and the role of law in relation to the rules embedded in the internet infrastructure itself (*Hinck*); the limits of a green strategy based on individual responsible and ethical consumerism, to the point of raising the provocative question of whether consumer law should be turned against itself (*Ouyang*); the revision of the idea of 'consent' in digital contracting, with a special focus on the characterisation of consent given through digital assistants and the proposals of the European Law Institute (ELI)[14] on this issue

11 European Commission, 'Communication: Data Union Strategy. Unlocking Data For AI', COM(2025) 835 final, Brussels, 19.11.2025.
12 European Commission, 'Digital fitness check – testing the cumulative impact of the EU's digital rules', available at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/15554-Digital-fitness-check-testing-the-cumulative-impact-of-the-EUs-digital-rules_en> (accessed 3 December 2025), call for evidence, open from 19.11.2025 to 11.3.2026.
13 European Commission, 'Communication: Approval of the draft Commission Recommendation on non-binding model contractual terms on data access and use and non-binding standard contractual clauses for cloud computing contracts (with Annexes), annexed hereto', C(2025) 7750 final, Brussels, 19 November 2025. The Commission will announce its formal approval when all language versions are available.
14 ELI Guiding Principles and Model Rules on Digital Assistants for Consumer Contracts <https://www.europeanlawinstitute.eu/projects-instruments/instruments/eli-guiding-principles-and-model-rules-on-digital-assistants-for-consumer-contracts/> (accessed 3 December 2025).

(*Mouttotos/Trinidad*); and the need to implement a notion of universal vulnerability and the broad interpretation of Article 25 DSA from that angle, with its (limited) veto on dark patterns and other forms of digital manipulation (*Ngamsanguan*).

The article awarded the Best Paper distinction, 'Technological Rule-Setting Power of Digital Platform Ecosystem Interfaces – A Competition Law Perspective', by *Sarah Hinck*, revisits Lessig's well-known 'Code is Law' to delve into the technical intricacies of digital platforms as IT infrastructures and to confirm that, through browsers, operating systems, APIs, interfaces and apps (and not merely through contractual clauses), the internet giants dictate binding rules for anyone who wants to offer digital services on the market. Certain companies with a dominant position in the market take on a hybrid role, as infrastructure providers to other companies and as market participants, moving away from the role of neutral intermediaries, especially when they technically consolidate their pre-eminence by restricting interoperability, excluding competitors through instructions or restrictions on APIs, etc. The article combines a lucid explanation of the technical ingredients of internet infrastructure with a review of classic issues such as the concept of 'rule', that of 'platform', the idea of platforms as legislators and the role of competition law in the face of this regulatory power. Through a German antitrust case in the digital sphere (*Microsoft* case, *Bundeskartellamt* ruling of 27 September 2024), the author highlights the importance of this setting of binding rules through technology and links it to the CJEU case C-333/2, *Superleague*, 21 December 2023[15], which is considered a milestone in terms of the possibility of limiting the regulatory power of private legal persons acting in the market.

Jie Ouyang's article is eloquently titled 'Turning EU consumer law against itself? Taking stock of the EU's sustainable consumption strategy'. The underlying, more radical idea, following a critical examination of the numerous regulations approved in the context of the European Green Deal, is that the solution to sustainability is not more responsible consumption, but how to consume less; and this, in the author's opinion, can only be achieved with public policies that prioritise the collective, solidarity, sustainability by design and affordability by design, so that not everything is left to individual choice. *Ouyang* denounces the failure of what he calls 'ethical consumerism', which is a 'mutant of the information paradigm' anchored in neoliberal theory, which continues to believe that informed consumers will make rational and informed decisions that can be also ethically oriented towards sustainability. In his view, the paradigm must shift from an information-oriented system to a product-oriented system in which the production process is regulated above all, with sustainability by design, and responsibility is placed on companies rather than on the ethical decisions of individual consumers, who, at the end of the day, only choose from the options available to them, which are not always the most sustainable and often cannot be afforded, if they exist, for reasons of time or money.

Under the title 'A requiem for the 'illusion' of consent in consumer contracts? Reasonable expectations as a standard for determining the validity of the consumer contract', Dr *Nicholas Mouttotos* (Scientific Associate at the University of Bremen) and *Eva Angeline Trinidad* (LL. M. candidate at the same university) examine the possibilities of automated consumer consent through AI. To date, the doctrinal approach ranges from an optimistic view, in the sense that commerce through digital agents or assistants can revive the importance of contractual consent – if these agents access consumer data and preferences, process vast amounts of information and do not have the cognitive limitations of humans – to a pessimistic view that predicts a total abandonment of the role of personal consent in these cases. This issue presents very different profiles in situations currently experienced in practice, where the digital assistant requests the consumer's final consent and therefore remains a tool, compared to more futuristic scenarios where the AI system generates consent on its own as an agent, based on its training in consumer preferences and prompts. It is for these cases that the authors highly value the provision of Article 22(2) of the ELI Guiding Principles and Model Rules on Digital Assistants for Consumer Contracts; according to this proposal, if the actions of the digital assistant deviate from the reasonable expectations of the consumer, assessed on an objective basis, the

15 ECLI:EU:C:2023:1011.

responsibility of the consumer will be limited. The authors consider that this standard of reasonable expectations can play a broad role in the automated contracting context.

Finally, *Thitinan Ngamsanguan* (PhD candidate at the Law School of the University of Exeter) in her paper entitled 'Digital Fairness, Algorithmic Manipulation and Behavioural Exploitation in the EU: A Universal Vulnerability-Informed Critique of Consumer Protection in the Digital Services Act' argues for normative recognition of human cognitive limitations, rather than replacing the notion of the average consumer. The regulatory trend of protecting only vulnerable groups is insufficient in environments deliberately constructed to exploit the vulnerabilities shared by all users, a statement with which I agree and which the CJEU is also beginning to recognise (CJEU *Compass* case, above). Therefore, the author advocates a theory of universal vulnerability with which she proposes to broadly reinterpret the concept of deception enshrined in Article 25(1) DSA, as well as revising the problem of the individual burden of proof and the opportunity to establish some rebuttable presumptions of the unlawfulness of certain dark patterns that should be considered manipulative unless the platform proves otherwise.

All in all, EuCML opens its pages to innovative ideas promoted by young highly-qualified researchers. Consumer law has undoubtedly come of age[16] but it is still young and needs new vigour. Academia must not remain silent in the face of the new challenges that digitalisation and sustainability pose in this area of law, but neither mere simplification nor the tide of a multitude of small new rules with other policy-preferences should divert attention from what is truly important, which is the construction of solid principles, a genuine sustainable digital consumer law. Only in this way will we avoid languishing in the bitterness of *Dylan Thomas*' poem: '*The force that through the green fuse drives the flower / drives my green age; that blasts the roots of trees / is my destroyer. / And I am dumb to tell the crooked rose / my youth is bent by the same wintry fever*'.

16 As it was already alluded, no less than 20 years ago (!), in the essay by Thomas Wilhelmsson/Geraint Howells, 'EC Consumer Law: Has It Come of Age?' (2003) European Law Review, 370-388.