

# The European consumer: a case of mistaken identity?

## El consumidor europeo: ¿un caso de identidad equivocada?

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**Resumen:** Los consumidores europeos gozan de protección, si son personas físicas que actúan fuera de fines profesionales y tienen, como contrapartes, profesionales (comerciantes). Aplicando la prueba de las tres condiciones, es posible que los consumidores que no necesitan protección caigan dentro del alcance de las leyes de protección al consumidor. Ésta es la razón por la que nos preguntamos sobre la “identidad” del consumidor europeo.

Para dilucidar el tema utilizaremos algunas preguntas que, en una secuencia lógica, formularía cualquier jurista más o menos familiarizado con la materia de la protección del consumidor en la UE. ¿Por qué los consumidores necesitan protección? ¿Son vulnerables? ¿Cómo se protegen y se identifican los consumidores en los contratos transfronterizos? ¿La presunción irrefutable de vulnerabilidad del consumidor genera decisiones justas?

Concluiremos señalando que la protección del consumidor en la UE ha llegado a un momento crítico, en el que la presunción irrefutable de la vulnerabilidad del consumidor genera exageraciones y, posiblemente, desequilibrios. Las leyes protectoras son utilizadas como escudo por consumidores que en realidad no las necesitan, lo que produce resultados contrarios al propósito para el que fueron diseñadas.

**Palabras clave:** consumidor europeo, vulnerabilidad del consumidor, presunción irrefutable de la vulnerabilidad del consumidor, jurisprudencia del CJUE.

**Abstract:** European consumers enjoy protection, if they are natural persons who act outside professional purposes and have as counterparts professionals (traders). Applying the test of the three conditions, it is possible that consumers who do not need protection to fall within the scope of the consumer protection laws. This is the reason why we are wondering about the “identity” of the European consumer.

To elucidate the issue we will use a few questions, which, in a logical sequence, would be asked by any jurist more or less familiar with the matter of EU consumer protection. First, why do consumers need protection? Are they vulnerable? How are consumers protected and “identified” in cross-border contracts? Does the irrebuttable presumption of consumer vulnerability generate fair judgments?

We will conclude by pointing out that EU consumer protection has reached a critical moment, when the irrebuttable presumption of consumer vulnerability generates exaggerations and, possibly, imbalances. Protective laws are used as a shield by consumers who do not actually need them, which produce results that are contrary to the purpose for which they were designed.

**Keywords:** European consumer, consumer vulnerability, irrebuttable presumption of consumer vulnerability, CJEU case law.

**Sumario:** Introductory remarks. I. Why do consumers need protection? 1. Is the European consumer vulnerable? 2. In what ways does the European consumer’s vulnerability materialize? II. How is the European consumer “identified” in cross-border contracts? 1. The apparent contradiction

between the arguments of the CJEU in the legal characterization of the consumer. 2. Elucidation of the apparent contradiction. III. The irrebuttable presumption of consumers' vulnerability generates fair decisions? Final Remarks.

## Introductory Remarks

1. Why “a case of mistaken identity”? When European consumers and their protection are at the core of the European legislator's concerns and, frequently, under the analysis of the Court of Justice of the European Union (hereinafter, CJEU) and national courts, what made us doubt their identity?<sup>1</sup> Trying to unravel the mystery right from the beginning, we will draw attention to the fact that, in a few concrete cases, the protection granted to consumers is, to say the least, counter-intuitive. The consumer should not have been (mandatorily) protected, no matter what.

2. The consumers' protection in every single situation, without investigating whether they need protection, makes them equal to the adherents. Nonetheless, all consumer contracts are adhesion contracts (but not vice versa), which are characterized by an imbalance between the rights and obligations of the contracting parties. The imbalance (in both adhesion and consumption agreements) could refer to parties' economic, legal or informational power. The only difference between consumer contracts and adhesion ones is that the latter can also be concluded between professionals.

3. In an attempt to clarify the matter of the consumer's “identity”, we shall respond to a few queries that any reasonably-trained jurist with some familiarity with European Union (hereinafter, EU) consumer protection law would logically have. First, why do consumers need protection? Are they vulnerable? How are consumers protected and “identified” in cross-border contracts? Does the irrebuttable presumption of consumers' vulnerability generate fair judgments?

## I. Why do consumers need protection?

4. If we were to “translate” the socio-economic theories regarding the place and role of the consumer into the language of the digital age<sup>2</sup>, then the consumer would have several *avatars*: a vulnerable avatar, a liberated avatar, a sovereign avatar, an efficient avatar, and a marketised one. The *vulnerable avatar* impersonates the consumer at the origins of his/her protection. In the 1970s, the consumer was perceived as “vulnerable, susceptible and in need of state protection from a malfunctioning marketplace and manipulative advertising”<sup>3</sup>. The *liberated avatar* is the one who purchases goods and services freed from the pressure of marketers, who threaten to undermine competition and lure the consumer into buying things he/she neither wants nor needs<sup>4</sup>. The *sovereign avatar* is based on an American trend from the 1970s, “founded by business groups, free-market think tanks, and conservative politicians, who aimed to roll back the regulatory state.”<sup>5</sup> The sovereign avatar does not need the protection provided by state laws, she/he is rational and protects himself/herself using efficient market mechanisms<sup>6</sup>. Derived from the sovereign avatar, the *efficient consumer* is the one who makes the market efficient by obtaining his/her own well-being: ‘consumer welfare through market efficiency’<sup>7</sup>. Finally, the *marketized avatar*

<sup>1</sup> See also, C.T. UNGUREANU, “Cine este, de fapt, consumatorul European?”, Revista de Științe Juridice, 2021, vol. 38, Issue 1, pp.9-21.

<sup>2</sup> N. OLSEN, “Consumer Imaginaries, Political Visions and the Ordering of Modern Society”, in H.-W. MICKLITZ (ed.), *The Making of Consumer Law and Policy in Europe*, Hart Publishing, 2021, LCCN 2021032700 (ebook), pp. 277-304.

<sup>3</sup> N. OLSEN, *op. cit.*, pp. 284-287.

<sup>4</sup> *Ibidem*, p. 290.

<sup>5</sup> *Ibidem*.

<sup>6</sup> *Ibidem*, p. 291.

<sup>7</sup> H.-W. MICKLITZ, “The Consumer: Marketized, Fragmentized, Constitutionalized”, in D. LECZYKIEWICZ, S. WEATHERILL (eds.), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law*, Oxford, Hart Publishing,

is similar to the sovereign and the efficient avatar, the difference being that the marketized avatar is used “to transform, and re-enchant, the public sector through modeling it in the mirror of the market and by portraying the citizen as its customer and captain.”<sup>8</sup>.

5. Without analyzing the above listed concepts, we will only point out that, currently, in the EU, the consumer is considered<sup>9</sup> to be well-informed and reasonably circumspect, and that the place of the vulnerable consumer is taken by the efficient consumer<sup>10</sup>. If so, does the consumer need protection?

## 1. Is the European consumer vulnerable?

6. As a rule, vulnerable people are the ones who need protection. Are the consumers of the digital age vulnerable persons in need of protection as they were in the 1970s? Even though, at first glance, it would be reasonable to respond that consumers are more vulnerable than ever right now, the problem is not entirely clear.

7. What does it mean to be vulnerable, actually? A person is vulnerable if he/she is susceptible of being hurt, damaged in his/her health, patrimony, goods or interests<sup>11</sup>. Consumer protection had its origins in the idea that the consumers must be protected because they are unable to defend themselves and are not equipped to deal with their contractual partner, the professional (the trader)<sup>12</sup>. “In the earlier days of consumer law, all consumers were therefore considered to be vulnerable.”<sup>13</sup> and their protection was achieved through the enactment of protective laws to protect the weak from the strong<sup>14</sup>.

8. Currently, the concept of vulnerability<sup>15</sup> has acquired new, complex values, without, however, having a unanimously accepted meaning. Mainly, two theories have been outlined, one *class-based* and the other *state-based*<sup>16</sup>. According to the first theory, consumers who are part of a certain category are considered vulnerable, depending on their individual characteristics, such as age, level of education, physical or mental health, etc.. In the state-based theory, vulnerability results from a combination of internal and external factors, which may be temporary or permanent and which make the consumer vulnerable in his/her relations with the professional (the trader).

9. At the EU level, the vulnerable consumer is looked at in a study<sup>17</sup>, from a state-based perspective<sup>18</sup>, being defined as “A consumer, who, as a result of socio-demographic characteristics, behavioral

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2016, pp. 21–41; H.-W. MICKLITZ, “European Consumer Law”, in E. JONES, A. MENON, S. WEATHERHILL (eds.), *The Oxford Handbook of the European Union*, Oxford, Oxford University Press, 2012, pp. 526–541.

<sup>8</sup> Ibidem, p. 298.

<sup>9</sup> H.-W. MICKLITZ, TH. WILHELMSSON, “Looking Back to Look Forward. Spring 2021”, in H.-W. MICKLITZ (ed.), *op.cit.*, p. 346.

<sup>10</sup> N. OLSEN, *op. cit.*, p. 298.

<sup>11</sup> J.-P. CHAZAL, “Vulnérabilité et droit de la consommation”, Colloque sur la vulnérabilité et le droit, 2000, Université P. Mendès-France, Grenoble II, France, p. 1, available at: <https://hal-sciencespo.archives-ouvertes.fr/hal-01053489>, accessed 14.3.2024.

<sup>12</sup> J.-P. CHAZAL, *op. cit.*, p. 2.

<sup>13</sup> E. KAPROU, “The legal definition of ‘vulnerable’ consumers in the UCPD. Benefits and limitations of a focus on personal attributes”, in CH. RIEFA, S. SAINTIER (eds.), *Vulnerable Consumers and the Law. Consumer Protection and Access to Justice*, Routledge, 2021, p. 51.

<sup>14</sup> J. CALAIS-AULOY, F. STEINMETZ, *Droit de la consommation*, Précis Dalloz, 4th Edition, 1996, no.18.

<sup>15</sup> For a detailed presentation of the vulnerability of the natural person, see, L. DUTHEIL-WAROLIN, *La notion de vulnérabilité de la personne physique en droit privé*, thèse de doctorat, 2004, available at: <http://www.theses.fr/2004LIMO0499>, accessed 10.3.2024.

<sup>16</sup> For example, OECD, *Consumer Vulnerability in the Digital Age*, OECD Digital Economy Papers, June 2023, No. 355, available at: <https://www.oecd.org/publications/consumer-vulnerability-in-the-digital-age-4d013cc5-en.htm>, accessed 2.3.2024, pp. 12-13; E. KAPROU, *op. cit.*, pp. 54-55.

<sup>17</sup> EC, *Consumer vulnerability across key markets in the European Union*, 2017, available at: <https://op.europa.eu/en/publication-detail/-/publication/79b42553-de14-11e6-ad7c-01aa75ed71a1>, accessed 4.4.2024.

<sup>18</sup> E. KAPROU, *op. cit.*, p. 55.

characteristics, personal situation, or market environment: is at higher risk of experiencing negative outcomes in the market; has limited ability to maximize their well-being; has difficulty in obtaining or assimilating information; is less able to buy, choose or access suitable products; or is more susceptible to certain marketing practices.”.

10. Although this definition of the European vulnerable consumer seems comprehensive, providing precise criteria for identifying the vulnerable consumer, it actually adds complexity and uncertainty to an already confusing field.

11. The confusion stems from the various “faces” that European consumers may have, which raises the potential question: Aren’t all consumers protected? It seems that the protection is granted to the so-called *average consumer*, who has at his/her turn a variety of “masks”: the vulnerable consumer (in the Unfair Commercial Practices Directive<sup>19</sup>), the ignorant consumer (in the MiFID Directive<sup>20</sup>), the negligent consumer (in the Payment Services Directive<sup>21</sup>), the consumer with a level of knowledge inferior to the professional (in the Unfair Terms Directive<sup>22</sup>).<sup>23</sup>

12. In the Unfair Commercial Practices Directive, considered one of the most important European instruments in the field of consumer protection<sup>24</sup>, the notion of *the average consumer* is used in a triple stance: the *standard average consumer*, the *targeted average consumer* and the *vulnerable average consumer*<sup>25</sup>. Although the directive’s considerations state that it is about the *sufficiently well-informed and attentive consumer, taking into account social, cultural and linguistic factors*<sup>26</sup>, none of these concepts are defined, so the task of interpreting the typical response of the average consumer in a particular situation is left to the courts and national authorities.

13. Nevertheless, references to this average consumer criterion are rather unused and formal in member states case law, indicating that national judges find it irrelevant<sup>27</sup>.

## 2. In what ways does the European consumer’s vulnerability materialize?

14. Putting all the theories and the consumer’s “faces” aside and looking back to where the concept of consumer protection originated, we can observe that vulnerability primarily stems from the consumer’s *inferiority* compared to the professional<sup>28</sup>, inferiority that manifests itself on an economic, cognitive and informational level.

<sup>19</sup> 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, OJEU, L 149, 11.6.2005

<sup>20</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, OJEU, L 173/349, 12.6.2014.

<sup>21</sup> Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, OJEU, L 337/35, 23.12.2015.

<sup>22</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Official Journal of the European Communities, L 95/29, 21.4.1993.

<sup>23</sup> L. BERCEA, “Standardul ,consumatorului mediu” și consimțământul pentru prelucrarea datelor cu caracter personal”, *Revista Romana de Drept Privat*, no. 1, 2018, pp. 26-51.

<sup>24</sup> P. CARTWRIGHT, “The consumer image within EU law”, in CH. TWIGG-FLESNER, *Research Handbook on EU Consumer and Contract Law*, Edward Elgar Publishing, 2016, ebook, pp. 199-200.

<sup>25</sup> For details, see, V. MAK, “The consumer in European regulatory private law. A functional perspective on responsibility, protection and empowerment”, in D. LECZYKIEWICZ, S. WEATHERILL (eds.), *op. cit.*, p. 386; P. CARTWRIGHT, *op. cit.*, p. 200-201.

<sup>26</sup> Recital 18 from Unfair Commercial Practices Directive.

<sup>27</sup> L. BERCEA, *op. cit.*, p. 9.

<sup>28</sup> M. CAMPO COMBA, *The Law Applicable to Cross-border Contracts involving Weaker Parties in EU Private International Law*, Springer Nature Switzerland, 2021, ebook, p. 17.

15. From an economic perspective, the professional is superior to the consumer, since the former engages in economic activities with the goal of obtaining a profit, in which people and goods are involved. The consumer enters into contracts in order to satisfy a personal or family interest<sup>29</sup>. Compared to the professional who concludes a plurality of identical or similar contracts with various consumers, the consumer concludes isolated contracts. *The regular and organized nature of the activity carried out makes the professional superior to the consumer*<sup>30</sup>. And this aspect also emerges from the CJEU case law. For example, in the case C147/16 (*Karel de Grote v. Susan Romy, Jozef Kuijpers*), the court pointed out at paragraph 59 that “(...) there is, in principle, an inequality between the educational establishment (CTU - the professional) and the student (CTU - the consumer), owing to the asymmetry of information and expertise between the parties, since such an establishment has at its disposal a permanent organization and an expertise that the student, acting on a private basis, does not necessarily have available to him when made incidentally with such a contract.”.

16. Also, consumer contracts are *adhesion contracts*, which the professional imposes, and the consumer either accepts them or does not enter into the agreement. The consumer does not have the opportunity to negotiate the contractual clauses, which the professional has pre-drafted, investing resources for this purpose.

17. In terms of *cognitive inferiority*, the professional is the specialist, and the consumer is the layman, who does not have enough information about the contracts he/she enters into.

18. The vulnerability of the consumer is a *relational vulnerability*, that is, he/she is vulnerable only in relation to the professional<sup>31</sup>, not in relation to another person who concludes contracts for a private purpose, and who could also be considered a consumer.

19. The protection of the consumer is therefore based on a double probability: the probability that he/she finds himself/herself in a situation of inferiority in relation to the professional and the probability that the professional has a tendency to abuse his/her position of superiority to the detriment of the consumer, who is in a vulnerable position<sup>32</sup>. Put it in another way, it can be said that the justification for the protection of the European consumer can be found, mainly, in the state of inequality and vulnerability in which the consumer is in relation to the professional from whom he/she purchases goods and/or services and in the informational asymmetry between the two<sup>33</sup>.

## II. How is the European consumer “identified” in cross-border contracts?

20. Broadly speaking, the idea of protecting consumers in cross-border contracts means the assurance that they will not be forced to leave their comfort zone: the competent court for solving consumer disputes is the one at the consumer’s domicile (art. 18, Brussels I bis Regulation<sup>34</sup>), and the applicable law, according to art. 6 Rome I Regulation<sup>35</sup>, is the law of the consumer’s habitual residence<sup>36</sup>.

<sup>29</sup> J.-P. CHAZAL, *op. cit.*, p. 5.

<sup>30</sup> J. CALAIS-AULOY, F. STEINMETZ, *op. cit.*, p. 4.

<sup>31</sup> J.-P. CHAZAL, *op. cit.*, p. 6.

<sup>32</sup> *Ibidem*, p. 7.

<sup>33</sup> R. H. WEBER, “The Disclosure Dream – Towards a New Transparency Concept in EU Consumer Law”, *Journal of European Consumer and Market Law*, vol. 12, Issue 2, 2023, p. 67.

<sup>34</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJEU, L 351/1, 20.12.2012.

<sup>35</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJEU, L 177/6, 4.7.2008.

<sup>36</sup> A. L. CALVO CARAVACA, “Consumer Contracts in the European Court of Justice Case law. Latest Trends”, *Cuadernos de Derecho Transnacional*, Marzo 2020, Vol. 12, N° 1, p. 87.

21. How is the consumer “identified”? In both European regulations and in the CJEU case law, two criteria are used: the purpose of the contract must be outside the professional activity of the consumer and the other contractual party must be a professional<sup>37</sup>.

22. The state of vulnerability of the consumer does not play any role, the consumer is not held to prove that he/she needs protection due to the state of weakness in which he/she is in relation to the professional. Although the notion of vulnerability can be traced in the judgments of the CJEU, in the characterization of the consumer the only criteria whose fulfillment is verified are the two: the private purpose of contracting and the professional quality of the consumer’s contractual party.

## 1. The apparent contradiction between the arguments of the CJEU in the legal characterization of the consumer

23. At first glance, in the CJEU judgments seems to be a contradiction between the arguments used: on the one hand, it is said that the protected consumer is the disadvantaged one, who is in an inferior position in relation to the professional concerning his/her knowledge and information, and, on the other hand, it is stated that the consumer is protected regardless of the actual knowledge and information he/she may have.

24. For example, in the case C590/17 (*Henri Pouvin, Marie Dijoux v. Electricité de France*) in the paragraph 25, CJEU states that *it should be noted that the consumer is in a weaker position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge*. In the previous paragraph though, the court says that *the concept of ‘consumer’ 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*. The reasoning seems counter-intuitive.

25. The court reasoned similarly in the case C208/18 (*Petruchová v. FIBO*), where it considered that the notion of *consumer* must be interpreted restrictively, by referring to the position of the respective person in a certain contract, in relation to the nature and with its purpose, and *not to the subjective situation of the person* in question, one and the same person could be considered a consumer in certain agreements and a professional in others. The notion of consumer is defined in opposition to the notion of professional and has an *objective character*, being independent of the knowledge and information that the person in question actually has<sup>38</sup>. The natural person’s *knowledge* in the field in which she enters into contracts, her *skills*, *the risks* she assumes, the large sums she transfers are not relevant, because no European legislation imposes a certain consumer behavior or a value threshold for the contracts concluded by her, or that she acts with prudence and diligence<sup>39</sup>.

26. For clarity, we will briefly outline the dispute<sup>40</sup>. Jana Petruchová, domiciled in the Czech Republic, concluded a framework contract with FIBO, a brokerage company incorporated in Cyprus, for carrying out transactions on the international FOREX exchange market. *The framework contract provided for the conclusion, between Ms Petruchová and FIBO, of individual contracts, classified as financial contracts for differences, CFDs, which are financial instruments the objective of which is to make profit on the difference between the exchange rates applicable to the purchase and sale respectively of the base currency in relation to the quote currency*<sup>41</sup>. The dispute concerned the CFD under which Ms. Petruchova placed an order to buy 35 lots (each lot having a value of USD 100,000, which she was bo-

<sup>37</sup> We will not analyze the two criteria in this paper.

<sup>38</sup> Paragraph 55 of the decision.

<sup>39</sup> Paragraph 55 of the Opinion of Advocate General Evgeni Tanchev in the Petruchová case.

<sup>40</sup> Paragraphs 15-22 of the decision .

<sup>41</sup> Paragraph 17 of the decision.

rowing from FIBO, using the *leverage effect*) at a fixed rate of exchange against Japanese yen. Since FIBO delayed the execution of the order by 16 seconds, during which the exchange rate fluctuated, Ms. Petruchova claimed that she made 3 times less profit than if the order had been executed on time.

27. Mrs. Petruchova was considered a consumer, even though from the description of the factual situation, it is clear that she was not a vulnerable person who needed protection: she was well informed, had extensive knowledge of financial instruments, invested large sums of money, from which could be inferred that she had a certain economic comfort.

28. The situation is frustrating and at the same time seductive: whatever the consumer does or does not do he/she is protected. It is frustrating, because it doesn't seem fair. It is seductive, for certain people, because, if they intend to make abuse of this overprotection, they have free rein.

## 2. Elucidation of the apparent contradiction

29. The apparent contradiction has its roots in the usage of a irrebuttable presumption of consumers' vulnerability. Even if the concept of the European consumer makes no reference to the vulnerability, this is a fact already assessed, which does not need further analysis. In every EU law on consumers the meaning of "consumer" is the same (with slight oscillations on wording): a natural person who acts outside her/his professional purposes. The consumers' vulnerability presumption is settled by law, it is a legal presumption and a irrebuttable one. The consumer *must be* protected in any situation: "a judge is *legally obliged to follow*"<sup>42</sup> and it cannot be rebutted, meaning it supports no contrary evidence.

30. The CJEU, though, does not use the term *presumption, per se*, (to the best of our knowledge) in any judgement, although its meaning emerges from the wording of various judgments or from the advocate general opinions.

31. For example, from the opinion of Advocate General Bobek in case C590/17 (*Henri Pouvin, Marie Dijoux v. Electricité de France*) it follows that in the interpretation of European legislation, the CJEU uses presumptions to characterize the consumer according to *objective criteria*. The Advocate General states at paragraph 26 of his opinion that "(...) the underlying rationale for the (consumer) protection (...) presupposes that, in relation to the 'seller or supplier', the consumer 'is in a weaker position, in that *he must be deemed* to be less informed, economically weaker and legally less experienced than the other party to the contract'.". The protective system is "(...) based on the assumption that 'the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge' (...)". Then at paragraph 29 he says that that consumer characterization "(...) does not depend on a relative balancing exercise of the positions of the parties in terms of knowledge, specialization or economic power. The EU legislature has already embedded that balancing exercise in the legislation. It has done so by including a *generalisation*: those who act outside their business, trade, or profession usually possess a lower level of knowledge and, more importantly, their bargaining power is weaker where contractual terms are drawn up in advance by the seller or supplier, as they are unable to influence their content. The broad definition of both the notions of 'seller or supplier' and of 'consumer', based on functional and objective criteria, is indeed connected with this protective aim (...)". Words like *presuppose, assumption, generalization, must be deemed*, all point to the concept of presumption.

32. Why, however, is the presumption not named as is, by the CJEU? It is the Advocate General Bobek who also explains the usage of the presumptions in his Opinion in Case C621/15 (*WXY v. Sanofi Pasteur*). He stresses out, in paragraph 28, that "(...) at first glance identically sounding (or at least translated) notions are understood, and in fact operate, rather differently in the various national legal

<sup>42</sup> Paragraph 34 of the decision.

systems. As is often the case in a multilingual and multicultural EU legal system, a notion that apparently has the same name can have different meanings.”.

33. This could be the reason why the CJEU does not use the term *presumption* in its judgments, but lets it be understood that it would be about presumptions. This aspect, although it defends the idea of autonomy of the CJEU, which interprets European law autonomously from the national law of Member States<sup>43</sup>, does not facilitate the understanding of the reasoning of consumer protection for the jurist, who uses the case law of the CJEU in solving concrete practical cases and beyond that. The jurist should not interpret at his/her turn the judgment given by the CJEU, as it is considered that CJEU has already done it.

34. As being settled that the CJEU uses an irrebuttable presumption - the presumption of consumers' vulnerability - every time it is asked to interpret the notion of consumer, the inclusion in the consumers' category of lawyers<sup>44</sup>, CFDs investors<sup>45</sup>, poker players<sup>46</sup>, tree growers<sup>47</sup>, millionaires<sup>48</sup>, etc., is no longer surprising. However, the question of the fairness of the consumer's characterization remains.

### III. The irrebuttable presumption of consumers' vulnerability generates fair decisions<sup>49</sup>?

35. In the digital age, more than ever, the consumer is vulnerable. At international level<sup>50</sup> is pointed out the need for an increased protection of all consumers in the context of a complexed vulnerability determined, among other factors, by the use of artificial intelligence (algorithms) in online commerce<sup>51</sup>, by neuro-marketing techniques<sup>52</sup>, by the commercialization of personal data<sup>53</sup>, by dark commercial patterns<sup>54</sup>, to name just a few.

36. However, the consumer is not always vulnerable. In certain specific cases, as we have shown, the European consumer is *neither poorly informed, nor inexperienced, nor in a state of economic inferiority*. When she/he is not vulnerable, is his/her protection justified? Isn't it possible that, in the absence of the state of vulnerability, protection to be an excessive favor, a privilege<sup>55</sup>?

37. Consumer vulnerability is probable, but not invariable<sup>56</sup>. *General and abstract* consumer protection appears to be *unfair* because it also protects consumers who do not need protection. This injustice has its origin precisely in the abstract character of the protection: the consumer is *presumed*

<sup>43</sup> For details, D. KUKOVEC, “Autonomy: The Central Idea of the Reasoning of the Court of Justice”, European Papers, Vol. 8, 2023, No 3, pp. 1403-1439, available at: [www.europeanpapers.eu](http://www.europeanpapers.eu), accessed 34.2024.

<sup>44</sup> Reference to the case *Costea v. Volksbank Romania* (C110/14).

<sup>45</sup> Reference to the cases *Petruchová v. FIBO* (C208/18) and *AU v. Reliantco Investments* (C500/18).

<sup>46</sup> Reference to the case *AB and BB c. Personal Exchange International Limited* (C774/19).

<sup>47</sup> Reference to the case *UEX v. ShareWood* (C595/20).

<sup>48</sup> Reference to the case *Petruchová v. FIBO* (C208/18), Opinion of Advocate General Evgeni Tanchev, paragraph 52.

<sup>49</sup> For legal reasoning of the CJEU, see M. BOBEK, “Legal Reasoning of the Court of Justice of the EU”, May 27, 2014, available at: <https://ssrn.com/abstract=2442235>, accessed 5.3.2024.

<sup>50</sup> For example, international organizations such as OECD in OECD, *Consumer Vulnerability in the Digital Age*, op. cit., OECD DIGITAL ECONOMY PAPERS June 2023 No. 355, <https://www.oecd.org/publications/consumer-vulnerability-in-the-digital-age-4d013cc5-en.htm>

<sup>51</sup> See, for example, M. DUROVIC, J. WATSON, “Nothing to Be Happy about: Consumer Emotions and AI”, *J—Multidisciplinary Scientific Journal*, 2021, 4, pp. 784–793, <https://doi.org/10.3390/j4040053>

<sup>52</sup> See, for example, C.T. UNGUREANU, E.A. AMIRONESI, “Neuromarketing in International Commercial Law”, in *Challenges of the Knowledge Society*, International Conference volume, 2021, <http://cks.univnt.ro/articles/15.html>, pp. 317-331.

<sup>53</sup> C. T. UNGUREANU, “Legalitate echivocă în comerțul internațional cu date”, *Scientific Annals of the „Alexandru Ioan Cuza” University of Iasi*, Vol. LXVIII/1, Legal Sciences Series, 2022, pp. 7-35, DOI: <http://doi.org/10.47743/jss-2022-68-1-1>; C. T. UNGUREANU, “Proprietatea asupra datelor digitale: realități, neliniști și posibile soluții”, *Revista Română de Drept Privat*, no. 2, 2023, pp. 75-90.

<sup>54</sup> OECD, *Consumer Vulnerability*., op. cit., pp. 21-22.

<sup>55</sup> *Ibidem*.

<sup>56</sup> *Ibidem*.



to be *irrebuttably* weak, and the professional is presumed to be *irrebuttably strong*<sup>57</sup>. And this can lead to privileging the consumer, who is not vulnerable<sup>58</sup>. In this way, the principle of equal treatment is not followed: vulnerable and non-vulnerable consumers benefit from equal protection.

38. Every time the legal protection is abstract and general, i.e. without being proportional to the real state of vulnerability of the consumer, it is an unfair protection that benefits people who are not in a state of real weakness<sup>59</sup>. This unfair treatment has two *main effects*: on the one hand, experienced, knowledgeable people who are not in a state of weakness tend to hide their bad faith, to disguise it under the consumer mask, and on the other hand, consumers, feeling they are universally and arbitrarily protected, become irresponsible<sup>60</sup>.

39. A concrete case-by-case analysis of the consumer's vulnerability would depart from the EU Consumer Protection Policy<sup>61</sup>, could be burdensome for the courts and affect predictability, including in determining the competent court and the applicable law in the cross-border consumer protection. But a fair approach to consumer protection would involve using a simple, non-irrebuttable presumption of the consumer's vulnerability, which allows evidence to be presented to show the contrary whenever the professional has reasonable suspicions that the contractual partner is abusing the position of the consumer.

40. Cases such as *Petruchová v. FIBO* (C 208/18), *AU v. Reliantco Investments* (C 500/18), *AB and BB v. Personal Exchange International Limited* (C 774/19), *EU v. ShareWood Switzerland* (C595/20) made us wonder what the vulnerability of these consumers is and why they are treated the same as those who genuinely need protection. A closer look reveals that these consumers are equally vulnerable—not as consumers, but as adherents—because they enter into adhesion contracts<sup>62</sup>, agreeing to terms that have been predetermined by the professional without being able to influence the content of those terms<sup>63</sup>.

## Final Remarks

41. In 1999 I completed my doctoral thesis<sup>64</sup> saying that the premise of consumer protection should not be forgotten, namely the restoration of the balance between powerful professionals, from an economic and legal point of view, and weak, defenseless consumers exposed to their practices. *Exaggerating in one direction or another leads to new imbalances*.

42. The EU seems to be at a turning point right now, with consumers who do not require protection being protected owing to the absolute presumption that they are vulnerable. This could lead to overreach and potential imbalances. Utilizing consumer status improperly, by abusing it, is the flip side of the coin. However, from an alternative standpoint, as Professor Caravaca stated, *it is necessary for the ECJ to open up new ways of protecting the consumer that keep up with times*<sup>65</sup> to ensure that those who truly require protection can fully benefit from it.

<sup>57</sup> *Ibidem*, p. 17.

<sup>58</sup> G. RIPERT, *Aspects juridiques du capitalisme moderne*, Librairie Générale de Droit et de Jurisprudence, Paris, 1951, no. 16, *apud* J.-P. CHAZAL, *op. cit.*, p. 17.

<sup>59</sup> J.-P. CHAZAL, *op. cit.*, p. 17.

<sup>60</sup> *Ibidem*.

<sup>61</sup> Available at: <https://www.europarl.europa.eu/factsheets/en/sheet/46/consumer-policy-principles-and-instruments>, accessed 13.4.2024.

<sup>62</sup> C.T. UNGUREANU, "Cyberspace, the Final Frontier? Concluding and Performing Agreements. Unfair Terms in B2B Adhesion Contracts", in *Scientific Annals of the „Alexandru Ioan Cuza” University of Iasi*, Vol. LXVII, Legal Sciences, Supplement 2, 2021, DOI: 10.47743/jss-2021-67-4-1, pp. 9-24.

<sup>63</sup> For example, C-110/14, paragraph 18; C590/17, paragraph 25.

<sup>64</sup> C.T. UNGUREANU, *Drept internațional privat. Protecția consumatorilor și răspunderea pentru produsele nocive*, All Beck Publishing House, Bucharest, 1999, p. 182.

<sup>65</sup> A. L. CALVO CARAVACA, *op. cit.*, p. 96.