

European Consumer Law after the New Deal: A Tryptich

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Abstract: In 2018/2019, EU private law experienced one of the most vigorous and meaningful changes in its evolution so far. The prominence of this alteration does not rest solely on the number of new rules, but—more importantly—on the substantially new perspective on economic and social tasks of European private law. The reform encompassed three core areas: consumer protection, sustainability and digital commerce. The paper seeks to better understand the transformative task of private law in the social and economic realm. The protection of the environment, on the one hand, and the informational autonomy and privacy, on the other, provide a new type of challenge for the existing agenda of private law, reaching beyond economic efficiency as its ultimate goal. Finally, the emergence of digitalization and sustainability as the new domains of private law reinvigorates the question of to what extent the European private law should directly engage itself in pursuing the social and economic agenda. The 2018/2019 legislation opened a new chapter in this discussion, facing private law with a new genre of tasks, which traditionally belonged to the domain of public ordering. The paper seeks to unpack the essence of this change by focusing on three intertwined issues: vulnerability, autonomy, and regulation. Mingled together they seem to form the backbone of the reform, which seems to provide an in-depth subversion of the existing conceptual structures of EU consumer law.

I. Awakening of consumer law

Over the past three years the development of EU consumer law has embodied the eminent bon-mot attributed to Mark Twain, who after reading his obituary responded wittily 'the report of my death was an exaggeration'.¹ The sense of somewhat astounding reinvigoration seems to underpin a great part of the current debate over the development and future of consumer law as a legal

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¹ On the history of this quote see eg E Petsko, 'Reports of Mark Twain's Quote About His Own Death Are Greatly Exaggerated', *Mental Floss*, 2 November 2018 <https://www.mentalfloss.com/article/562400/reports-mark-twains-quote-about-mark-twains-death-are-greatly-exaggerated> (accessed 15 August 2020).

and political enterprise. After abandoning the Common European Sales Law project,² EU contract law went through a period of a few years mostly reconsidering the existing *acquis*, without asking ‘thicker’ questions about the policy or regulatory technique. Even newly-arising problems (such as the early conceptualization of consumer protection in the digital economy³) were perceived mostly through the prism of the already existing framework of values and regulatory methods. This could have left one with a sense that EU consumer law, in terms of both its concepts and policy prospects, is heading towards a side track, being gradually recurrent and not ready to take a grip on the many actual characteristics of the present-day consumer market.

Over time, however, the European Commission was gradually developing a conviction that the existing agenda of consumer law—based on decades-old ideas and regulatory tools—became too obsolete to effectively address the new dimensions of consumer economy and new types of consumer rights’ infringements. Another refurbishment of the old structure, which would simply integrate the developments of case law and increase the casuistry of existing rules, is a long way from being able to encompass the new challenges posed by both the consumer economy and the social attitudes towards consumption.⁴

The inadequacy of the consumer law, as it existed in the mid-2010s, was apparent in several spheres. For the sake of this analysis⁵ three of them appear to be of particular importance. First of all, the underlying political agenda of consumer law was still confined almost entirely to the classic welfarist concept of the EU internal market and consumer protection. The conceptual link between welfare and the effectiveness of consumer market, which formed the cornerstone of this conviction, in the course of time turned out to be too reductionist to grasp the essence of new consumer concerns, which reach beyond economic interests and market vulnerability in classic terms.⁶ Secondly, consumer law seemed increasingly unable to accommodate the new types of market conduct—and the new externalities—crafted by the digitalization of

² On the reasons underlying that change see, amongst others, D Anagnostopoulou, ‘The Withdrawal of the Common European Sales Law Proposal and the European Commission Proposal on Certain Aspects Concerning Contracts for the Online and Other Distance Sales of Goods’, in: M Heidemann and J Lee (eds), *The Future of the Commercial Contract in Scholarship and Law Reform. European and Comparative Perspectives* (Cham: Springer 2017), pp. 127-159, esp. at 152–9; K Norris, ‘Common European Sales Law: A Missed Opportunity or Better Things to Come’ (2016) 37 *Business Law Review*, 29ff.

³ See section II.

⁴ On sustainability as a methodological vantage point for consumer concerns see also MJ Cohen, *The Future of Consumer Society: Prospects for Sustainability in the New Economy* (Oxford: Oxford University Press, 2017), 23f.

⁵ The analysis in this paper intentionally leaves aside the issues concerning reform of consumer rights enforcement, strongly endorsed both in the New Deal, as well as in the 2019/2161 Directive (and based generally on shifting accents from judicial enforcement over various forms of dispute settlement that do not involve a state court); cf. eg C Scott, ‘Consumer Law, Enforcement and the New Deal for Consumers’ (2019) 27 *European Review of Private Law*, 1279.

⁶ For further discussion of the link between vulnerability and weakness, see Section III.A.

consumer markets and by the growing prevalence of a data-based economy. The existing structures of consumer law were insufficient to grasp the specificity of the new ways of organizing consumer markets, not merely in terms of technicalities,⁷ but also regarding more essential concerns. The latter particularly included the rationale and the scope of protecting consumers towards novel types of conduct on the online market. Thirdly, consumer law lacked an adequate response to mounting tendencies towards the ‘politicization’ of consumer protection, by understanding it as an element of care for the common good.⁸ Although a perception of consumer law as the domain for pursuing political values has been an intrinsic part of EC (EU) consumer policy since at least the 1960s or 1970s,⁹ currently it has moved into the spotlight of the discussion about social meaning and ethicality of consumption. The question to what extent consumer law should respond to non-economic concerns encompasses not only environmental problems, but also other values related to consumption, especially the fair trade issue in supply chains.¹⁰ These concerns, further amplified by a few notorious incidents of misconduct in consumer markets (with ‘Dieselgate’ being the most prominent illustration¹¹) called equally strongly for a more appropriate response in EU consumer law.

A growing conviction that the conventional agenda of the consumer can no longer provide a satisfactory answer to the new types of needs arising on consumer market, incentivized the European Commission to attempt an ambitious reform that could shift EU consumer law on to a new track. It resulted in a series of new directives enacted in 2018–19. The pivotal part of this reform was formed by four acts. Two of them regulate areas previously unconquered by EU private law: contracts concerning the purchase of digital content (2019/770 Directive),¹² as well as other selected aspects of consumer contracts (the 2019/2161 Directive, often recognized as the ‘Omnibus Directive’).¹³ The other rules replaced or amended existing consumer

⁷ See eg problems with defining the essence of contract terms on the grounds of 93/13/EEC Directive, as mentioned below in fn. 82.

⁸ On the lack of a proper focus in EU consumer law on the environmental dimension(s) of consumption, see also L Krämer, ‘Vom Rechte, das mit uns geboren—der einzelne im gemeinschaftlichen Umweltrecht’, in L Krämer, H-W Micklitz, and K Tonner (eds), *Law and Diffuse Interests in the European Legal Order. Liber amicorum Norbert Reich* (Baden-Baden: Nomos, 1997), 752–4.

⁹ J Drexl, *Die wirtschaftliche Selbstbestimmung des Verbrauchers. Eine Studie zum Privat- und Wirtschaftsrecht unter Berücksichtigung gemeinschaftsrechtlicher Bezüge* (Tübingen: Mohr Siebeck, 1998), 59; H-W Micklitz, ‘The Transformative Politics of European Private Law’, in PF Kjaer (ed.), *The Law of Political Economy: Transformation in the Function of Law* (Cambridge: Cambridge University Press, 2020), 209–14.

¹⁰ See Section VI.B.

¹¹ Cf. Section V.C.

¹² 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, 22 May 2019, pp. 1–27).

¹³ Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/

protection schemes (the 2019/771 Directive¹⁴ and parts of the 2019/2161 Directive). The Commission accompanied these directives with a set of instrumental rules on sanctions and enforcement mechanisms in the 2019/2161 Directive. Through these acts, the European Commission shaped an umbrella scheme, further supplemented with other rules, mostly on the borderlines of consumer law and other domains of EU legal order.¹⁵

The depth of the change introduced by these acts clearly set EU consumer law on a new course. The change in question does not pertain merely to new rules and instruments, but subverts some of the more fundamental paradigms. The newly-enacted rules pose several fundamental questions about who should be protected by means of consumer law and what is the exact rationale for market intervention. The following observations attempt to reverse-engineer the conceptual and policy premises that underlie the 2018/2019 reform. Obviously, the analysis aspires neither to exhaust all the possible dimensions of this issue nor to provide an all-embracing explanatory framework. It attempts, though, to draw the 'one view of the Cathedral' (to put it in Calabresi's and Malamed's notorious words¹⁶), by framing the foundational concepts of the reform and by understanding better the essence of the change brought about by the new rules.

At the same time, the new face of consumer law is still too adolescent to allow for any final and certain conclusions. The exact outcomes of the reform will unfold incrementally, through the transposition of the new rules into Member States' legal orders. Only the bottom-down integration of domestic consumer law may actually follow the policy goals and values embroiled in the reform. Further, only after the transposition of the newly-enacted rules can it be possible

83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (OJ L 328, 18 December 2019, pp. 7–28).

¹⁴ 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, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (OJ L 136, 22 May 2019, pp. 28–50).

¹⁵ This pertains, in particular, to substantially augmented provisions on IP issues in the context of digital assets (Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17 May 2019, pp. 92–125) and to the environmental impact of consumer goods (Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment, OJ L 155, 12 June 2019, pp. 1–19), which both provided additional framing for creation and transfer of goods and services on the internal market. Finally, the reform of consumer law has been extended by unfair competition rules applicable to food and agricultural supply chains (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, 25 April 2019, pp. 59–72) and to business-to-business online intermediation services (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, 11 July 2019, pp. 57–79).

¹⁶ G. Calabresi and A.D. Malamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review*, 1089.

to understand how the concepts developed at the EU level may translate in the actual standards of consumer protection on the EU market.

With these *caveats* in mind, the analysis in this paper begins with a brief overview of what brought the European Commission to the 2018/2019 reform followed by a more in-depth analysis of its outcomes for the conceptual foundation of EU consumer law. In this respect the paper adopts a tripartite vantage point, attempting to unfold the underlying premises of the reform through three concepts that form the conceptual backbone of the reform: ‘vulnerability’, ‘autonomy’, and ‘regulation’. They will be discussed together, as three sides of the same set of ideas brought about by the 2018/2019 reform. Building on these premises, the article seeks an answer to a more fundamental question: to what extent does the 2018/2019 reform open a truly novel chapter in the development of EU private law and—if it does do so—what are the core distinguishing features of the new paradigm of private law, as foreseen in the European Commission’s policy agenda?

II. The New Deal and beyond

The reform of consumer law has been introduced as a chain of legislative actions taken up by the EU over 2018–19. They stepped into a policy and conceptual framework set a few years later by the Juncker Commission. The new agenda—endorsed as the ‘New Deal for Consumers’¹⁷—was founded on a thorough research exercise (the Regulatory Fitness and Performance Programme—‘REFIT’). It reevaluated the existing *acquis*, but also attempted to delve more deeply into the actual effectiveness of EU consumer law as an instrument of social and market steering.¹⁸ Building on these findings, the New Deal encompassed a general policy blueprint,¹⁹ accompanied by proposals for two new consumer directives: on the representative action²⁰ and a ‘horizontal’ act that aggregated multiple minor amendments to the existing consumer *acquis*—and which later entered into force as the 2019/2161 Directive.

The ambitious regulatory project initiated through these acts aimed to pitch EU consumer law to the changing realities on the retail market in the EU—and hence to provide it with a sturdier voice as an instrument of

¹⁷ On the history and general outline of this agenda see eg MBM Loos, ‘The modernization of European Consumer Law: A pig in a poke?’ (2019) 27 *European Review of Private Law*, 113, 116–20; C Twigg-Flesner, ‘Bad Hand? The “New Deal” for EU Consumers’ (2018) 15 *GPR—Zeitschrift für das Privatrecht der Europäischen Union*, 166.

¹⁸ The study was carried out in 2015–17 and concluded with a report published in May 2017 [SWD (2017) 209 final].

¹⁹ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: A New Deal for Consumers (COM/2018/0183 final); hereinafter: ‘New Deal’.

²⁰ Proposal for a directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM/2018/0184 final—2018/089 (COD).

economic and social steering.²¹ This explains a broad and comprehensive political and legislative agenda envisaged by the New Deal, which included not only further enhancement of substantive rights and guarantees, but paid equally stout attention to enforcement of consumer rules, by setting forth both direct rules to be implemented domestically, as well as guidelines for exercising by Member States' procedural autonomy. At the first sight, the New Deal opened merely another chapter in periodic reforms of EU consumer *acquis* and could be—seemingly—considered to provide a refurbishment rather than a revolution. The 'outer layer' of policy and legislative agenda was funded on a few much more profound and essential goals, which substantially alter the previous paradigm of consumer protection policy in the EU. It is hard to guess, to what extent the New Deal label was coined merely as a catchword and to what extent it tried to grasp the actual renegotiation of the political premises of consumer law (reaching back to its Rooseveltian origins). Even if inadvertently though, by using such a 'big' label, heavy with political and historical undertones, the Commission coined a catchphrase that reflected a big part of the actual meaning (and the actual potential) of the featured reform. Notwithstanding the deep changes for the private law agenda, the direct political premise of the New Deal seems, however, to follow the old track of striving towards the harmonization of consumer protection across the domestic markets of EU Member States.²²

As the Commission elucidates, the key focus of the New Deal is enhancement of 'consumer trust in the Single Market'.²³ Up to this point the reform may seem to follow the old track of EU consumer protection, laid in the 1960s as one of the tenets of the welfare state, on the one hand,²⁴ and a mean towards stronger economic integration of the Member States' markets, on the other.²⁵ A deeper insight into the sources of decreasing trust identified by the New Deal, however, divulges a more complex picture.

First of all, the document elevated environmental issues as one of the key substrates of consumer policy. The swelling environmental concern, as the

²¹ New Deal, 2f.

²² So H-W Micklitz, 'The Transformative Politics', 221f, who observes that the New Deal attempts to achieve the higher harmonization of consumer protection across Member States, stepping into the place where the 2011/83/EU Directive failed.

²³ New Deal, 2.

²⁴ Cf. eg K Tonner, *Europäisches Verbrauchervertragsrecht und Europäisches Vertragsrecht—Konvergenz oder Divergenz?*, in: Wolf-Rüdiger Bub, R Knieper, R Metz, and G Winter (eds), *Zivilrecht im Sozialstaat. Festschrift für Professor Dr. Peter Derleder* (Baden-Baden: Nomos, 2005), 147–50.

²⁵ It goes without saying that mingling the individualistic (consumer as a human being who deserves protection merely for the sake of being a market actor) and EU integration-oriented (consumer confidence and harmonization of law as vehicles for closer economic integration) rationale for consumer protection has been one of the ever-present *leitmotifs* of the European consumer law throughout its entire history; see also N Reich, H-W Micklitz, in: N Reich, H-W Micklitz, and P Rott, *European Consumer Law* (Cambridge–Antwerp: Intersentia, 2014), 17–21.

Commission declares, ‘makes it crucial to make sustainable products and services available to consumers and to encourage more sustainable consumption by them.’²⁶ This should translate, on the one hand, onto providing consumers with the array of market choices that could allow them to opt for environmentally-friendly goods.²⁷ On the other hand, consumers should also be protected from being misleadingly informed about environmental features of a good and hence from unfair market practices²⁸ (which resulted primarily as a trace of ‘Dieselgate’²⁹). In this way the New Deal departed quite clearly from the conventional perception of the goals of consumer law, which perceives them mainly through the prism of the efficiency of individual acts of market exchange.

Secondly, the New Deal also put considerable emphasis on online commerce. As part of this package, it primarily seeks to provide a better framing not only for the new ways of concluding agreements and the novel types of tradeable objects (including consumer data as a counter-performance³⁰), but also to address the evolving structure of the market as such (in an attempt to tackle the new modes of concluding and executing agreements online).³¹ The New Deal clearly acknowledged that the consumer retail market is becoming increasingly heterogeneous in terms of its internal structure. Traditional markets, governed by Member States, have been accompanied by ‘online marketplaces’³² (the use of plural does not seem coincidental), especially those facilitated and governed by online platforms.³³ The regulatory toolbox endorsed in this regard in the New Deal’s policy framework has been rather conservative and focused primarily on enhancing transparency through disclosure duties and on protecting consumers from deceitful conduct as a result of the new types of market organization.³⁴

²⁶ New Deal, 15.

²⁷ Ibid.

²⁸ Ibid 9, 15.

²⁹ See also V Mak and E Lujinovic, ‘Towards a circular economy in EU consumer markets—legal possibilities and legal challenges and the Dutch example’ (2019) 8 *Journal of European Consumer and Market Law*, 4, 5. Further on the underlying circumstances of the Dieselgate see FJ Cavico and BG Mujtaba, ‘Volkswagen Emissions Scandal: A Global Case Study of Legal, Ethical, and Practical Consequences and Recommendations for Sustainable Management’ (2016) 4 *Global Journal of Research in Business & Management*, 303.

³⁰ Cf. eg K van Elten and B Rehder, ‘Dieselgate and Eurolegalism. How a scandal fosters the Americanization of European law’ (2020) 17 *Journal of European Public Policy*, 1, 7–9; G. Pedrazzi, Civil and Consumer Law, in M. Frigessi di Rattalma (ed.), *The Dieselgate: A Legal Perspective* (Cham: Springer, 2017), 113ff.

³¹ On a more general overview see, amongst others, M. Đurović, ‘Adaptation of Consumer Law to the Digital Age: EU Directive 2019/2161 on Modernisation and Better Enforcement of Consumer Law’ (2020) 68 *Annals of the Faculty of Law in Belgrade—Belgrade Law Review*, 62, 68–72.

³² New Deal, 4f.

³³ On the policy issues triggered by the emergence of the platform economy cf. C Busch, H Schulte-Nölke, A Wiewiórowska-Domagalska, and F Zoll, ‘The Rise of the Platform Economy: A New Challenge for EU Consumer Law?’ (2016) 5 *Journal of European Consumer and Market Law*, 3, 3–5, 9f.

³⁴ For these reasons the new attitude has not been univocally endorsed by the commentators, who pointed out that it attempts to answer new types of problems with the slightly outdated and ostensible solutions—cf. eg TP Merdi, ‘The 2018 New Deal on Better Enforcement and Modernisation of EU

This rather well-settled picture reveals, however, a much more profound set of implicit convictions endorsed by the Commission. The new policy and legal instruments, presented under the umbrella concept of the ‘Digital Single Market’,³⁵ do not aim merely to provide consumers with a higher degree of protection in itself. They also aspire to frame and constrain the regulatory power of platforms,³⁶ which do not merely set up new markets, but also govern them and, in some instances, compete on them with their own users.³⁷ In this way the New Deal, along with the legislative proposal that ensued afterwards, opened the door to a more pluralistic view of consumer contract law. The pluralism in question acknowledges, first of all, that the nation states and the EU no longer enjoy a monopoly over creating consumer market(s) and producing rules for them. Secondly, it also assumes a more pluralistic and ‘thicker’ concept of consumer interest. It exceeds beyond a simple efficiency concern and also encompasses non-economic values—In particular, consumer sovereignty towards her personal details.

Moreover, in addition the 2018/2019 reform (re)posed another substantial question on the identity of European consumer law. It prompted a long-unseen debate about the profound political agenda of consumer protection, which has been frozen since 1970s when the current paradigm of European consumer protection achieved its final shape.³⁸ The paradigm set in this era has been a general ramification of the EU perception of the Common (Single) Market and the role that private law has to play within it. It endorsed individual welfare as the chief and ultimate goal of private law rules, relying on an implicit premise that consumer interest rests on ensuring a safe contracting environment, where individuals can make meaningful and considered market choices. This view was obviously not apolitical. At the same time, however, the type of political considerations that underlie it (namely, economic sovereignty of consumer-citizens seen as a way to build a welfarist polity of equals³⁹) for a few decades became an unquestioned dogma, rarely⁴⁰ subjected to critical scrutiny. The triptych of issues

Consumer Law: An Actually Good Digital Deal?’ in TE. Synodinou, P Jougleux, C Markou, and T Prastitou (eds), *EU Internet Law in the Digital Era* (Cham: Springer, 2019) 358–64.

³⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe {SWD(2015) 100 final}.

³⁶ The 2019/2161 Directive introduces, for instances, limitations to a platform’s control over the order of listings displayed to a consumer and mandates higher levels of transparency (see esp. recital 20 of the Directive and generally its Article 6a).

³⁷ Cf. LM Khan, ‘Amazon Antitrust Paradox’ (2017) 133 *Yale Law Journal*, 710, 754f; Khan, ‘The Separation of Platforms and Commerce’ (2019) 119 *Columbia Law Review*, (2019) 973.

³⁸ As H-W Micklitz puts it, ‘what is needed is a theoretical debate on what the role of consumer protection and consumer law could be and how a consumer law that meets the needs of a circular economy should be designed’ (Micklitz, ‘Squaring the Circle? Reconciling Consumer Law and the Circular Economy’ (2019) 8 *Journal of European Consumer and Market Law*, 229, 230).

³⁹ Cf. Drexler (n 9), 64–71.

⁴⁰ One of the noticeable endeavours to subvert the conventional rationale for consumer protection so far has been the ‘social justice’ project, which attempted to introduce a stronger degree of

discussed below tries to seize the essence of these changes and better understand how the European Commission's blueprint came to be translated into the conceptual backbone of consumer law.

III. Vulnerability

A. Vulnerability as an equalizing concept

The concept of vulnerability has always been at the very centre of the political agenda of European private law. It plays a pivotal role, not merely for its institutional design, but for the inherent legitimation of European private law as a regulatory enterprise. The focus on the vulnerability of an individual in various settings and forms has been the most intrinsic political foundation of European private law and one of its most distinctive features.⁴¹ It is also one of the main triggers for the strong orientation of European private law towards collective social values and a welfarist agenda. Under this foundational premise, EU private law does not adhere solely to the 'enabling' paradigm, where private law facilitates market operation, but focuses on pursuing particular political goals, much stronger and more bespoke than any in any other classic jurisdiction.⁴²

In EU law terms, vulnerability exceeds beyond a simple notion of 'weakness'. It does not refer to the actual weakness of one market actor vis-à-vis another, in a particular place and at a particular moment.⁴³ It encompasses instead a wider concept of inferiority in the market and social sphere, which makes an individual prone to duress and economic hardship.⁴⁴ In this way, the concept of

collectivistic and solidarist reflection into the debate over EU consumer law (and European private law in general)—cf. esp. G Brüggemeier et al., 'Social Justice in European Contract Law: a Manifesto' (2004) 10 *European Law Journal*, 653; MW Hesselink, *CFR & Social Justice: A short study for the European Parliament on the values underlying the draft Common Frame of Reference for European private law: what roles for fairness and social justice?* (Munich: Sellier, 2008).

⁴¹ Cf., amongst many others, H Rösler, 'Protection of the Weaker Party in European Contract Law: Standardized and Individual Inferiority in Multi-Level Private Law' (2010) 18 *European Review of Private Law*, 729; M Meli, 'Social Justice, Constitutional Principles and Protection of the Weaker Contractual Party' (2006) 2 *European Review of Contract Law*; M Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' (2015) 21 *European Law Journal*, 573.

⁴² On the interlink between consumption and social divide cf. D Markovits, *The Meritocracy Trap: How America's Foundational Myth Feeds Inequality, Dismantles the Middle Class, and Devours the Elite*, (London: Penguin, 2019), 216–28.

⁴³ See also C Riefa and H Gamper, 'Economic theory and consumer vulnerability: Exploring an uneasy relationship', in C Riefa and S Saintier (eds), *Vulnerable Consumers and the Law Consumer Protection and Access to Justice* (Abingdon: Routledge, 2020).

⁴⁴ Cf. H-W Micklitz, *The Politics of Justice in European Private Law. Social Justice, Access Justice, Societal Justice* (Cambridge: Cambridge University Press, 2018) 293–5; H-W Micklitz, 'The "New" European Private Law', in F Amtenbrink, G Davies, D Kochenov, and J Lindeboom (eds), *The Internal Market and the Future of European Integration* (Cambridge: Cambridge University Press, 2019), 583; some scepticism on the actual relevance of the concept of vulnerability for consumer law has been voiced by I Domurath, 'The Case for Vulnerability as the Normative Standard

vulnerability has a strongly equalizing character, much richer in meaning than a simple alignment of bargaining power.⁴⁵ The 2018/2019 reform clearly follows in the footsteps of the earlier approach in EU consumer law and approaches the idea of vulnerability—both directly and implicitly—as its cornerstone. The overall structure and wording of the newfangled rules does not seem to bring about a deep conceptual novelty in this respect. Quite the opposite: it seems instead to adhere to the old set of paradigms (one might say *clichés*) in perceiving vulnerability as an idea of contract law.

The changes in this regard are two-pronged. The first pertains to the domain of online commerce and data protection, where the private law interventions are motivated not only—and not primarily—by concerns about the equality of the exchange and access to a safe and market environment that is not exploitative. They build instead on the premise that the actual essence of vulnerability in consumer protection lies elsewhere—in one's susceptibility to infringements of one's private life and human identity. From this perspective a consumer is granted protection not merely against unfair market conditions. It is directed mostly against omnipresence of 'the market' and 'the economical' into the private arena of an individual, protecting the integrity of private consumers. Secondly, the reform seems to extend the notion of vulnerability in both temporal and personal field-related terms. The Commission seems to perceive that consumers should be protected not only in the particular moment, but also with a view to their future 'selves' and with respect to future society as a whole. The subsequent remarks will seek to give a preliminary outline of the nature of both changes.

B. Vulnerability and responsibility

In his 1980s seminal monograph on 'the weaker' in law and social policy, Eike von Hippel⁴⁶ encompassed—amongst other types of weakness—'future generations'. He understood them as the forthcoming inhabitants of the Earth whose life conditions (or even survival) are directly dependent on present-day choices in a micro- and macro-dimension. From this vantage point, weakness is no longer the effect of the perspective of an individual towards current social or economic realities, but rather results from an inseparable causal link between the present decisions and the fate of future individuals, affected by these choices without any

in European Consumer Credit and Mortgage Law—An Inquiry into the Paradigms of Consumer Law' (2013) 3 *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht*, 124, 136f.

⁴⁵ Apart from this fundamental observation, the concept of 'weakness', if applied literally, could be counterproductive, undermining the expected role of consumer protection on the Common Market. As Micklitz points out, '[s]uch a concept would be dysfunctional for the realization of the single European market. With a weak consumer in need of protection, a single European market is not feasible. A single European market needs an active, informed and adroit consumer; in short, one that is a normative optimized, omnipotent consumer.' (Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic' (2012) 35 *Journal of Consumer Policy*, 283, 289).

⁴⁶ E von Hippel, *Der Schutz des Schwächeren* (Tübingen: Mohr Siebeck, 1982), 140–68.

possibility of affecting them. From this vantage point, weakness becomes linked to the question of ‘when’ and not necessarily the ‘who’. One becomes weaker, and hence deserves protection, not because of her personal traits, but rather because of having (mis)fortune to be born in the particular historical moment (and hence being encumbered with the decisions taken by the people who lived previously).⁴⁷ The weakness in question is even stronger, since the future consequences of current choices are mostly unpredictable. Every present-day decision that may benefit or harm upcoming generations is therefore taken in a spectrum of uncertainty that exposes its future addressees to even higher risk.⁴⁸

This way of understanding weakness clearly alters several well-established paradigms of consumer law. At the most basic level, it departs from a classical understanding of the sole concept of ‘protection’ by means of private law and its underlying conceptual framework, which for decades has been pivotal for EU law. It no longer focuses on the classic rationale, which legitimized protection of ‘the weaker’ only when—and insofar as—imbalances on the market are strong enough to impede efficient and just exchange. In the simplest terms, both agendas can be seen as mutually contradictory. Indeed, protection of the environment builds on opposition towards the idea of self-oriented consumption and the classic concept of efficiency in consumer economy. It rests on the conviction that the market should be saturated with a higher degree of collective values and be sensitive not only towards selfish, but also to altruistic goals.⁴⁹

In this way the concept of the *pro futuro* vulnerability has been paired with the idea of responsibility for one’s own choices, envisaged by EU law for each particular consumer. The responsibility in question is not mandated and appeals rather to individual ethicality⁵⁰ and commitment by individual consumers to the idea of sustainability.⁵¹ In other words, the regulation in question does not envisage the classic command-and-control attitude, but assumes there is individual willingness to undertake voluntary activity for the benefit of the entire society.⁵² EU consumer law attempts to facilitate this expression in two principal ways. On the one hand, the 2019/771 Directive mandates professionals to pay attention to the durability of consumer products and to prioritize repair over replacement

⁴⁷ On the underpinning conceptual agenda of this change see P Galindo da Fonseca, ‘The Shift from Consumer Protection to Consumer Empowerment and the Consequences for Sustainable Consumption’, in A do Amaral Junior, L de Almeida, and L Klein Vieira (eds), *Sustainable Consumption The Right to a Healthy Environment* (Cham: Springer, 2020).

⁴⁸ So also von Hippel (n 46), 166.

⁴⁹ Drexel (n 9), 58, 179f.

⁵⁰ M Carrigan, ‘The myth of the ethical consumer—do ethics matter in purchase behaviour?’ (2001) 18 *Journal of Consumer Marketing*, 560, 564–8; R Wilk, ‘Consuming Morality’ (2001) 1 *Journal of Consumer Culture*, 245.

⁵¹ M Faber, T Petersen, and J Schiller, ‘Homo oeconomicus and homo politicus in Ecological Economics’ (2002) 40 *Ecological Economics*, 323, 326–8.

⁵² So also Drexel (n 9), 58.

amongst the remedies for non-conforming consumer goods.⁵³ Secondly, as the New Deal clearly sets forth, consumers should be protected for being misleadingly informed about the environment-related features of a product (which materialized as a clear ramification of ‘Dieselgate’ and less notorious instances of environmental fraud). Given such a conspicuous turn towards sustainability in EU consumer law, it seems clearly defensible to integrate this reasoning further within the existing legal design. The ‘sustainability deceit’ may turn out to be particularly meaningful for unfair commercial practices (2005/29/EC Directive) and for the concept of non-conformity of goods (which can also include frustrated expectations about the environmental friendliness of a product).⁵⁴

From all these perspectives, the newly-created EU consumer legislation adopts a much wider view of contract law ethics. It perceives the market as intrinsically underpinned not only by efficiency-related concerns, but also with a responsibility for the welfare of the others.⁵⁵ It assumes the strong involvement of individuals in setting forth detailed ethical standards and pursuing them. In this way, the 2018/2019 reform seems to be more forcefully underpinned by the concept of consumer as *homo politicus* than previous pieces of EU consumer law.⁵⁶ The values involved in this picture are not solely economic and not merely individualistic. They involve a strong conviction that individual consumers—through their market choices—adopt responsibility not only for their individual welfare, but also for the future well-being of the other contemporaries,⁵⁷ and future humanity as a whole.⁵⁸ It opens a new political prospect for private law, by forcing it to reevaluate its customary individualistic emphasis and turn towards more community-oriented values. The focus on sustainable growth and environmental protection unquestionably assumes a pre-existing responsibility to prevent certain

⁵³ See especially recitals 32 and 48 of the 2019/771 Directive; see also E Terryn, ‘A Right to Repair? Towards Sustainable Remedies in Consumer Law’ (2019) 27 *European Review of Private Law*, 851; K Kryla-Cudna, ‘Sales contracts and the circular economy’ (2020) 28 *European Review of Private Law*.

⁵⁴ J Vanherpe, ‘White Smoke, but Smoke Nonetheless: Some (Burning) Questions Regarding the Directives on Sale of Goods and Supply of Digital Content’ (2020) 28 *European Review of Private Law*, 251, 260f.

⁵⁵ N Oman, *The Dignity of Commerce: Markets and the Moral Foundations of Contract Law* (Chicago: University of Chicago Press, 2017); Z Bauman, *Does Ethics Have a Chance in a World of Consumers?* (Cambridge, MA: Harvard University Press, 2009), 31ff.

⁵⁶ See also further Section IV.C.

⁵⁷ Human beings do not care solely about their private interests in respect of their own individual preferences, but they also want to receive approval from their fellow citizens for what they say and for what they do. This does not mean that *homo politicus* maximizes consent by any means. *Homo politicus* wants not only to obtain but also to merit the approval of others. Guided by reason, the human being seeks agreement on justice and the common good with his surrounding community and, hence, tries to act and behave in a way such that he receives approval. To put it differently: human beings consider themselves as beings who do have—legal and moral—obligations and rights. In particular, the *homo politicus* considers the shaping of his social context as a right and, at the same time, feels an obligation to form this context in a just way (Faber et al. (n 51), 329).

⁵⁸ So also von Hippel (n 46), 168.

kinds of externalities, the effects of which cannot be fully determined in terms of their nature and scope at the moment when they occur. To put it another way, while all sustainability considerations can (in some approximation) be considered to be a 'third party' issue in contract law,⁵⁹ the exact knowledge on who the third party is and to what extent her interests may be affected can only unfold in the future.

C. The non-economic weakness

Conventionally, EU private law has been concerned with equality on two levels. First of all, it focuses strongly on the issue of protecting of 'the weaker', who so far have usually been equated with the consumer (and in rare instances with the weaker participant in a business-to-business contracts). Secondly, in doing so, EU private law was strongly concerned about access to the market on equal and fair terms.⁶⁰

The agenda introduced in the 2018/2019 reform partly preserves this conceptual background, by building on the concept of the consumer as the paradigmatic weaker participant in market dealings. The focus adopted by the 2018/2019 reform is, however, much broader and encompasses consumer interests that reach beyond the protection of just the economic sphere of market activity. One of the most illustrative instances for this change has been the protection of privacy and personal data, firmly endorsed in both the New Deal blueprint, as well as in the subsequent legislative reform. It protects consumers not merely through the prism of their market interests, but considers their privacy and sovereignty over personal data as regulatory objectives in themselves. Following this path, the 2019/770 Directive puts a strong emphasis on consumer's dispositions over personal data and privacy as a form of participation in the market (especially on trading personal data as a counter-performance in consumer agreements⁶¹).

The concept of data protection unavoidably shifts the previously-established division between 'the market' and 'the private', and significantly augmented the former by commodifying information about an individual's intimacy and providing predictions about behaviour in the private sphere. The strong emphasis put on data protection and data management issues clearly reaches beyond a pure individual perspective, and aims instead at the protection of collective interests. It should not be overlooked that the individual's privacy and control over his personal details is only one side of the issue.

⁵⁹ See also F Cafaggi, 'Regulation through contracts: Supply-chain contracting and sustainability standards' (2016) 12 *European Review of Contract Law*, 218, 227.

⁶⁰ Further on the 'access' dimension of the EU private law Micklitz, *The Politics of Justice* (n 44), 12–18 and *passim*; see also further below, section. V.

⁶¹ See eg C Langhanke and M Schmidt-Kessel, 'Consumer Data as Consideration' (2015) 4 *Journal of European Consumer and Market Law*, 218; A Metzger, 'Data as Counter-Performance What Rights and Duties do Parties Have?' (2017) 8 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 1.

What is even more important for the data protection mechanisms on the consumer market, however, is the scope of the protection that they adopt. The essence of this concern reaches beyond the simple privacy issue and tackles the much more profound issue of overlapping domains of privacy and individual sovereignty. The data economy builds on the use of massive pools of data, which aggregate information about immense clusters of individuals. Only in this way may details on particular people become relevant as a way to profit from ‘surveillance capitalism’ (where information about an individual is extrapolated from the pool of data, to construe a behavioural prediction about the future conduct of this person).⁶²

Therefore, access to personal data assumes more than an individual dimension, but becomes an overall social concern: ‘deeply personal privacy injuries demoralize and degenerate the civic functioning of individuals and as a result impoverish public spheres and institutions. . . . the harm directly affects public ecosystems and it is often unrelated to, nor channeled through, any impact on the specific individuals whose data are used.’⁶³ From this vantage point, mishandling of personal data—both at the level of collecting and processing—is not solely a problem of individual interests, but has a strong collective dimension. The vulnerability of consumers whose data is harvested and processed cannot be, hence, perceived with just an individual focus and should encompass a broader perspective of the society of consumers involved in the online market—both currently and with a more remote time horizon. In these terms, data protection and sustainability issues closely resemble each other in terms of the underlying perception of the mechanics that bring a consumer to become vulnerable in the market. Although the scope of both vulnerabilities, as well as their time horizon (especially the *pro future* dimension) are clearly different, the inherent perception of ‘who’ should be labelled as ‘the vulnerable’ becomes similar.

IV. Autonomy

A. Autonomy as control over one’s self

The concept of autonomy has traditionally been one of the core ideas of EU private law, being both endorsed and contested at various phases of development and in various problem domains. The idea of autonomy featured by EU private law (in particular in the sphere of consumer contracts) rests on a rather heterogeneous set of concepts, which combine formal and substantial autonomy and

⁶² Cf. S Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (New York: Profile Books, 2019), 9f, 278f.; JE Cohen, ‘The Biopolitical Public Domain: the Legal Construction of the Surveillance Economy’ (2018) 31 *Philosophy & Technology*, 213.

⁶³ O Ben-Shahar, ‘Data Pollution’ (2019) 11 *Journal of Legal Analysis*, 104, 118.

ascribe to them different types of rationale. The essence of the autonomy built up in EU private law can be framed, in somewhat generalized terms, as an attempt to guarantee that actors on the EU market will enjoy comparable ability to make meaningful market choices. This idea, initially based on the classic framework of institutional economy (principally on transaction costs theory and the classic notion of information deficits) has been occupying a key position within EU private law since its outset. The subsequent emergence of behavioural awareness—which greatly subverted the conventional notions of market rationality and drew attention to irrational and non-pragmatic determinants of consumer conduct—did not seem to confront the conceptual framework of autonomy. Quite the opposite, it seems to be incessantly concerned with the question of how the natural skewedness of human perception and decision making hinder the ability to make rational market choices. The crux of this discussion therefore remains within the narrower concept of autonomy equalized with autonomy to enter or exit a particular market relation based upon a contract.

The 2018/2019 reform brings about a deep shift in the very core of the autonomy idea in EU private law. It intervenes in some of the fundamental premises of this concept and attempts to redefine both the essential premises of autonomy and the way it translates into the regulatory toolbox. In both regards, the new EU consumer protection agenda tends to augment the notion of autonomy and to perceive it in a more holistic and thorough way (mostly by defining it through the prism of non-individualistic motivation and interests). This amplification shadows the generally broader perspective of EU consumer law, as one of the most conspicuous highlights of the 2018/2019 reform.

The attempt to trace back the new underlying understanding of autonomy is not merely a conceptual exercise. The novel and (as will be further explained below) materially different understanding of autonomy is one of the backbones of the 2018/2019 reform, both in terms of the policy goals (the attempt to enhance consumer autonomy is a common denominator for the bulk of the newly-enacted provisions), as well as with regard to more precise points of interest that the reform brings into the spotlight. The further analysis in this paper will be centred around two areas where the reform triggers particularly meaningful and apparent challenges to the conventional understanding of autonomy in consumer law. First will be the algorithmic calculation of prices, referred to in the 2019/2161 ‘Omnibus’ Directive, as an amendment to the 2011/83 Directive on consumer rights.⁶⁴ Secondly, the analysis will also delve more deeply into the concept of consumer autonomy that frames the sustainability concerns of consumer law, incorporated in the 2019/771 Directive and appearing to underpin

⁶⁴ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22 November 2011, pp. 64–88).

the EU consumer policy that has been developing in accordance with the New Deal outline.

B. The inclusive concept of autonomy: an example of algorithmic pricing

The algorithmic price calculation may seem to be a mere incidental detail of the 2018/2019 reform. It has been tackled in one brief provision—Article 4(4)(a)(ii)—of the 2019/2161 Directive, which mandates notifying consumers ‘that the price was personalized on the basis of automated decision-making’.⁶⁵ This laconic mention encompasses an ample array of practices on consumer retail markets where prices are adjusted to the profile of an individual consumer with the use of algorithmic analysis of personal data gathered by a professional.⁶⁶ The practice of differentiating prices due to the specific features of an individual (or more precisely, due to the way the algorithm allocates these features against the pool of big data about consumers and markets⁶⁷) triggered multiple concerns⁶⁸ related to fairness,⁶⁹ possible price discrimination,⁷⁰ and the objectification of an individual as merely a data source.⁷¹ The unrest around algorithmic pricing has been voiced by the doctrine, in various forms; however it is also shared in everyday consumer perception.⁷² An average consumer seems to be relatively more sensitive towards fairness concerns in algorithmic price-setting than to

⁶⁵ The provision introduced by Article 4(4)(a)(ii) the 2019/2161 Directive amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (OJ L 328, 18 December 2019, pp. 7–28).

⁶⁶ Further on price personalization as a market phenomenon see, amongst many, FZ Borgesius and J Poort, ‘Online Price Discrimination and EU Data Privacy Law, *Journal of Consumer Policy*’ (2017) 40 *Journal of Consumer Policy*, 347; AA Miller, ‘What Do We Worry About When We Worry about Price Discrimination—The Law and Ethics of Using Personal Information for Pricing’ (2014) 19 *Journal of Technology Law & Policy*, 41, 44–8.

⁶⁷ See also JE Cohen, ‘Turning Privacy Inside Out’ (2019) 20 *Theoretical Inquiries in Law*, 1, 11 who points out that algorithmic pricing is ‘correlation-based rather than causation-based’.

⁶⁸ The discussion about admissibility of algorithmic pricing originated as early as in 2000, when it became apparent that Amazon differentiates prices for DVDs (J Adamy and K Ridder, ‘E-Tailer. Price Tailoring May Be Wave of Future, *Chicago Tribune*’, 25 September 2000). The general unrest of that time, encapsulated in P Krugman’s op-ed ‘What Price Fairness?’, *New York Times*, 4 October 2000, animated an ample debate over personalization of prices, which before existed only to a limited extent—on a historical outline of this discussion see eg Borgesius and Poort (n 66), 348–50. The general types of concerns that underlie the algorithmic pricing debate are comprehensively summarized by Miller (n 66), 68–96.

⁶⁹ G Wagner and H Eidenmüller, ‘Down by Algorithms? Siphoning Rents, Exploiting Biases, and Shaping Preferences: Regulating the Dark Side of Personalized Transactions’ (2019) 86 *The University of Chicago Law Review*, 581, 589f.

⁷⁰ See eg O Bar-Gill, ‘Algorithmic Price Discrimination. When Demand Is a Function of Both Preferences and (Mis)perceptions’ (2019) 86 *The University of Chicago Law Review*, 217.

⁷¹ Cf. Cohen (n 67), 11.

⁷² Cf. eg L Xia et al., ‘The Price Is Unfair! A Conceptual Framework of Price Fairness Perceptions’ (2004) 68 *Journal of Marketing*, 1, 3–6; R Wetzelaer, ‘Airliner’s Pricing Strategies and Perceived Price Fairness’, <https://essay.utwente.nl/64470/1/Rick%20Wetzelaer.pdf>, 5.

establishing prices on bricks-and-mortar marketplaces⁷³ (not only when established through bargaining,⁷⁴ but also when set unilaterally by a retailer⁷⁵). The consumer propensity for backlashing against algorithms⁷⁶ can plausibly be attributed to a general anxiety about being profiled by an unfathomable ‘black box’, which makes a judgement relying on personal data, sometimes of an intimate or sensitive character (which in a classic market setting would be of no relevance to the price range).

Looking for a more coherent legal framework for the concerns articulated in this way, it seems rather clear that the common conceptual denominator for all the problems raised is the question of the sovereignty of an individual consumer towards an automated decision concerning the price. The essential ground for the unrest and eventual backlashes against algorithmic calculation of prices does not rest on the final outcome of the process (ie the price), but rather the process itself. It is the use of a depersonalized machine and the focus on personal data that seem to trigger most of the apprehension against prices set by algorithms. The question about the relation of an individual towards a price personalized against personal data is hence essentially a question of individual autonomy, which merges two principal considerations. First of all, it includes elements of the classically-understood autonomy, framed (along the general lines of EU private law) as a freedom to make sovereign decision about one’s own contractual relations without any form of duress, deception, or constraint. Secondly, in the context of algorithms, this view is being extended by one more substantial dimension: sovereignty over individual privacy and data. Such a ‘thicker’ concept of autonomy therefore encompasses not only parties’ freedom to remain sovereign towards a decision on entering a contract and determining its content (including price), but also towards control over personal details and consequences drawn upon them by other market actors.⁷⁷

The challenge for contractual autonomy, posed by the algorithmic calculation of prices, is threefold. First of all, existing market structures do not seem to provide a sufficiently feasible potential to refuse being personalized. The algorithmic calculation of prices is usually offered on a take-it-or-leave-it basis, along with the entire contract. In other words, individuals who do not want to be offered a

⁷³ M Fassnacht and S Unterhuber, ‘Consumer response to online/offline price differentiation’ (2016) 28 *Journal of Retailing and Consumer Services*, 146.

⁷⁴ KL Haws and WO Bearden, ‘Dynamic Pricing and Consumer Fairness Perceptions’ (2006) 33 *Journal of Consumer Research*, 304, 306f, 309; TJ Richards et al., ‘Personalized Pricing and Price Fairness’ (2016) 44 *International Journal of Industrial Organization*, 138, 150.

⁷⁵ PK Kannan and PK Kopalle, ‘Dynamic Pricing on the Internet: Importance and Implications for Consumer Behavior’ (2012) 5 *International Journal of Electronic Commerce*, 63, 70, 73; Haws and Bearden (n 74), 306f.

⁷⁶ See eg Khan (n 37), 763; Bar-Gill (n 70), 242; Borgesius and Poort (n 66), 55f.

⁷⁷ On the concept of autonomy vis-à-vis processing personal data also T Zarsky, ‘The Trouble with Algorithmic Decisions: An Analytic Road Map to Examine Efficiency and Fairness in automated and Opaque Decision Making’ (2015) *Science, Technology, & Human Values* <https://doi.org/10.1177%2F0162243915605575>, at 129 and Miller (n 66), 80.

personalized price must leave the entire agreement. The ability to refuse personalization, without refusing the contract as such, definitely constitutes one of the tenets of freedom of contract and—as such—is grounded directly in contractual autonomy.⁷⁸ In other words, regardless of the fairness of the process or outcome of personalization, each individual, by virtue of its market sovereignty, should be able to decide on the personalization of a price or to refrain from it. Secondly, the use of algorithms is also questionable from an ethical perspective. It leads to the substantial objectification of individuals, who are considered as mere ‘entries’ in the collection of data, not as autonomous and fully sovereign beings. In a further extension of this concern, the autonomy of contactors may be infringed simply by subjecting them to a mechanism that—much stronger than a human’s agent who sets up prices—is prone to biases and systematic misconceptions. The utopian promise of algorithmic price-calculation rests, first and foremost, on the intrinsic inability of machine-learning tools to create equal pricing schemes.⁷⁹ As has been convincingly proven, the algorithmic design (even if built on the machine-learning scheme) ‘cannot escape the influence of discriminatory rubrics that are deeply embedded in the data because they are deeply embedded in our society.’⁸⁰ Further, they may also lead to a further entrenchment of the wealth divisions in the society, by putting the more well-off consumers in even more favourable position.⁸¹

With this backdrop in mind, it offers the possibility to understand better the nature of the change introduced by the 2019/2161 Directive. Traditionally, EU private law mostly took a hands-off approach towards any kind of intervention into the substance of prices on consumer markets. The most vivid illustration of this attitude has been incorporated into the 93/13/EEC Directive, which in Article 4(2) excludes any review of fairness of contract clauses with regard to terms that determine ‘the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other’.⁸² The whole mechanism is underpinned by

⁷⁸ M Hildebrandt, ‘Privacy as Protection of the Incomputable Self: From Agnostic to Agonistic Machine Learning’ (2019) 20 *Theoretical Inquiries in Law*, 83, 119.

⁷⁹ Further on the biases embedded in the algorithmic design see eg A Chander, ‘The Racist Algorithm?’ (2017) 115 *Michigan Law Review*, 1023; Zarsky (n 77), 125f.

⁸⁰ Cohen (n 67), 11.

⁸¹ See also J Turov, *The Aisles Have Eyes. How Retailers Track Your Shopping, Strip Your Privacy, and Define Your Power* (New Haven–London: Yale University Press, 2017) 247, who observes ‘the practice of social discrimination is very much at the core of the transformation of everyday retailing today. . . . The opportunity to receive personally relevant offers is one lure that companies use to entice customers to join the data-collection bandwagon. Enjoying the rewards of protection, privilege, and games relating to loyalty are others.’

⁸² Further on this provision and its rationale, see G Heirman, ‘Core terms: interpretation and possibilities of assessment’ (2017) 6 *Journal of European Consumer and Market Law*, 30; T Wilhelmsson, ‘Varieties of Welfarism in European Contract Law’ (2004) 10 *European Law Journal*, 728f.

a strong assertion that fairness-based intervention into prices may be legitimized only as long as the minimal formal requirements have been met in the process of establishing the price.⁸³ Although case law from the Court of Justice of the EU tends to define this exception in rather narrow terms,⁸⁴ it provides a rather clear-cut exclusion for price control mechanisms. This general exemption was accompanied by the somewhat incidental provision of the 2005/29/EC Directive⁸⁵—Article 6(1)(d)—which mandated professionals not to mislead consumers about the criteria used to determine a price. With some dose of interpretive flexibility, this provision could be extended over algorithmic price calculation. Beyond doubt, however, up to the 2019/2161 Directive, EU private law did not provide any organized response to a mounting issue of algorithmic pricing and the use of personal data for this purpose.⁸⁶

At first sight, the attitude adopted in the 2019/2161 Directive does not differ greatly from both the general attitude of EU consumer law towards the problems of weakness and autonomy up to today, as well as from the overall reluctance for more intense price control on consumer markets. The newly-introduced rules primarily indicate a concern about the procedural fairness of algorithmic pricing,⁸⁷ by imposing on professionals a duty of disclosure (which follows the overall model of information requirements in EU law). It also cannot be overseen that EU law vests individuals with a right to object to machine-provided personalization (Articles 21–22 of the General Data Protection Regulation (GDPR)). The disclosure duty provided by the 2019/2161 Directive can be seen as an extension of this general provision, awarding consumers the knowledge necessary to exercise their rights to abstain from personalization. There are admittedly well-substantiated⁸⁸

⁸³ Cf. T. de Graaf, 'Consequences of Nullifying an Agreement on Account of Personalised Pricing' (2019) 8 184–93, at 185; Yesim M Atamer, 'Why Judicial Control of Price Terms in Consumer Contracts Might Not Always Be the Right Answer—Insights from Behavioural Law and Economics' (2017) 80 *Modern Law Review*, 624, 627–629.

⁸⁴ See eg CJEU decisions: of 30 April 2014, *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt.*, C-26/13 (ECLI:EU:C:2014:282), p. 42; of 23 April 2015, *Jean-Claude Van Hove v CNP Assurances SA*, C-96/14 (ECLI:EU:C:2015:262), p. 31 and of 20 September 2017, *Ruxandra Paula Andriciu and Others v Banca Românească SA*, C-186/16 (ECLI:EU:C:2017:703), pp. 34–6.

⁸⁵ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ L 149, 11 June 2005, pp. 22–39).

⁸⁶ Cf. P Rott, 'A Consumer Perspective on Algorithms', in L de Almeida, M Cantero Gamito, M Djurovic, and K Peter Purnhagen (eds), *The Transformation of Economic Law. Essays in Honour of Hans-W. Micklitz* (Oxford: Edward Elgar, 2019), 48–55.

⁸⁷ T. de Graaf (n 83), 185.

⁸⁸ The general assertion that algorithms should be transparent does not give a final answer to the question of what the optimal shape of this requirement should be. Certainly, simple transparency of the algorithm (disclosure of the code) has much less informative value for an average person than the algorithmic explainability—ie the possibility of understanding the origins of particular price, in particular the clarity of premises taken into account in price calculation (on this issue, against the backdrop of EU consumer law, cf. eg C Twigg-Flesner, 'The EU's Proposals for

doubts⁸⁹ about whether this attitude is sufficient to achieve the high level of consumer protection sought.⁹⁰ Notwithstanding this, the 2019/2161 Directive clearly extends the notion of autonomy (which is classically concerned with making well-informed choices about entering or exiting an agreement) to the question, to whether the premises of such a choice (especially the price) have not been established in a way that infringes individuals' privacy and sovereignty vis-à-vis sensitive personal information. Fairness of algorithmic price and consumer sovereignty form a strong nexus, which cannot be easily resolved at the theoretical level and from the doctrinal perspective. Moreover, it does not seem advisable to cut this connection from the regulatory perspective.⁹¹ The response to most of the specific concerns triggered by price personalization in the competition domain and for consumer protection inevitably require that the gathering and analysis of data are tackled.⁹² Conversely, comprehensively tackling the privacy issue necessitates addressing the question of algorithmic profiling (as illustrated by Articles 21–22 GDPR). To put it another way, the autonomy in question merges the 'pure' contractual autonomy

Regulating B2B Relationships on online platforms—Transparency, Fairness and Beyond' (2018) 7 *Journal of European Consumer and Market Law*, 222, 230). For further discussion on the practical mechanics of algorithmic transparency, see K Hosanagar, 'People Want to Know About Algorithms—but not too much', *Wired* 12 March 2019).

⁸⁹ At the same time, however, a considerable part of the literature plainly advocates for transparency as one of the preferable regulatory responses to the problems entailed by algorithmic pricing—cf. Wagner and Eidenmüller (n 69), 604f; Borgesius and Poort (n 66), 356–64; M Gal, 'Algorithmic Challenges to Autonomous Choice' (2018) 25 *Michigan Technology Law Review*, 59, 74; Zarsky (n 77), *passim*; see also M Bourreau and A de Stree, *OECD Directorate for Financial and Enterprise Affairs Competition Committee, The regulation of personalised pricing in the digital era*, 2018 ([https://one.oecd.org/document/DAF/COMP/WD\(2018\)150/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)150/en/pdf)), pp. 6, 10–12.

⁹⁰ The idea of empowering individuals by providing them with a right to exit from the personalization of a price seems questionable on at least two levels. First of all, from the perspective of market structure, for many services and goods provided for a personalized price consumers do not enjoy any meaningful alternative within the same sector. For instance, opting out from personalized fare offered by care sharing companies (such as Uber or Lyft) usually means that they are unable to find a similar service and have to recourse to a taxi or public transport. Secondly, for most providers of goods and services who apply personalized pricing, this is the only way of price-setting and they cannot provide any actual way of fixing a price, if a consumer withdraws from a personalization scheme. In this way the opt-out tool provided by GDPR may turn out to be simply impractical and providing an 'empty' alternative. On similar scepticism see also B Barth, 'The Defector', *New Yorker*, 2 December 2019, who points out with regard to GDPR: 'as soon as consumers consent, it's more or less back to business as usual. And the rules are relatively loose when it comes to meta-data. Even if the contents of a phone call are protected, the time of the call or the parties involved might not be.'

⁹¹ See eg Miller (n 66), 104.

⁹² It also cannot be excluded that the 'thicker' concept of autonomy may, in the final run, lead to creating false regulatory incentives. This peril seems to be suggested also by LM Khan, 'Why You Might Pay More Than Your Neighbor for the Same Bottle of Salad Dressing' (<https://qz.com/168314/why-you-might-pay-more-than-your-neighbor-for-the-same-bottle-of-salad-dressing/>), who observes that '[t]he degree to which consumers permit retailers to mine personal data may limit how finely they can tailor discounts, but retailers could also simply charge a premium for opting out.'

and the data-related autonomy.⁹³ They seem to be closely intertwined and, as such, can be considered as one entity from the perspective of the existing theoretical and legal framework. Understood in this way, the transparency of algorithms operates not as a merely procedural requirement, but as an indirect guarantee that the process of price calculation will be understandable for the person regarding whom the personalization is made (personalizee) and will allow her to scrutinize its premises and to make an informed decision about opting out from the personalization scheme.

C. Autonomy and the citizen-consumer

The second domain in which the 2018/2019 reform seems to open a new chapter in understanding autonomy in private law relates to the sustainability issues, embroiled in various parts of the new rules and their policy background. The concept of sovereignty has been one of the most intrinsic and pivotal ideas of the EU consumer protection scheme. Conventionally, its understanding has been associated with market sovereignty, understood as an ability to satisfy one's individual consumption needs through potentially efficient agreements.⁹⁴ The turn towards sustainability calls for a reframing this concept, by understanding the extent to which consumers may (or should) remain sovereign in the face of market choices that entail environmental ramifications.

The idea of sustainability, merged with consumer protection, is inherently political in itself. Moreover, it assumes the active involvement of individuals in pursuing political aims to the common benefit of the society. This concept appeals directly to the idea of collective responsibility for the protection of environment and, in this way, for the present and future quality of life as well as the trajectory of economic development. In other words, it involves values that reach beyond efficiency concerns and the economic welfare perceived in simple terms—and which claim higher awareness of the consequences that may be generated by the production of goods and services and by consuming them.⁹⁵ The new EU provisions on sustainable consumer sales explore this area, by mandating sellers and producers, responsible for the conformity of consumer goods,⁹⁶ to prioritize environment-friendly products and technologies. Self-evidently, however, the expectations for goods' conformity and remedies, expressed in the 2019/771

⁹³ On anonymity as one of the values related to autonomy in consumer contracts also H Dagan and M Heller, *The Choice Theory of Contracts* (Cambridge: Cambridge University Press, 2017), 81.

⁹⁴ P Penz, *Consumer Sovereignty and Human Interests* (Cambridge: Cambridge University Press, 2011), 5ff.

⁹⁵ Cf. M Faber, R Manstetten, and T Petersen, 'Homo Oeconomicus and Homo Politicus. Political Economy, Constitutional Interest and Ecological Interest' (1997) 50 *Kyklos*, 457.

⁹⁶ Cf. D Staudenmayer, 'The Directives on Digital Contracts—First Steps Towards the Private Law of the Digital Economy' (2020) 28 *European Review of Private Law*, 219, 240.

Directive, do not aim to address the consumer interests understood in classical efficiency-related terms.⁹⁷

This idea refers implicitly to a well-established concept of citizen-consumer, vividly endorsed in political and sociological accounts of democratizing market relations.⁹⁸ It rests on the concept of shifting portions of responsibility for the common interest from the bottom-up state ordering onto decentralized governance by private actors. Consumption plays one of the pivotal roles in this setting, building on the assumption that individual market choices also carry material political weight.⁹⁹ By choosing particular goods and services or by refraining from them, consumers do not only express particular attitudes towards values and political goals, but also ‘vote with money’ by using their funds to directly or indirectly subsidize particular political agendas. Self-evidently, the roles of a consumer oriented towards individual welfare and of a citizen are not fully coherent and, indeed, generate tensions between them.¹⁰⁰ In this context, the role of legal interventions—such as the ones made in the 2019/771 Directive—may both indirectly or directly support the involvement of individuals in pursuing common, non-individualistic goals and (re)allocate costs and risks that arise as a spillover of participation in the drive for sustainability.

Although the general premises of consumer activism in the sphere of sustainability seem almost self-evident, their detailed translation onto the conceptual framework of EU contract law triggers much more profound issues. The problem originates at the very outset, while defining the elementary policy agenda of sustainability in the Common Market. As Frank Trentmann rightly concludes, ‘[f]or the European Union, individual choice in the present had to be moderated by social responsibility for the future. This is a noble aspiration, but it also contains a real dilemma. For European integration has been all about the free

⁹⁷ Quite notable from this vantage point are the first two sentences of the recital 32 of the 2019/771 Directive’s preamble. They seem to distinguish between sustainability and the ‘increas[ing] trust in the functioning of the internal market’ (the latter referring quite clearly to the classic rationale of the EU consumer protection).

⁹⁸ R Sassatelli, ‘Consumer Culture, Sustainability and a New Vision of Consumer Sovereignty’ (2015) 55 *Sociologia Ruralis*, 483; M Viherala, ‘Climate citizenship in the European union: environmental citizenship as an analytical concept’ (2017) 26 *Environmental Politics*, 343, 350–2; P Söderbaum, ‘Democracy, Markets and Sustainable Development: The European Union as an Example’ (2004) 14 *European Environment*, 342, 345ff; G Spaargaren and P Oosterveer, ‘Citizen-Consumers as Agents of Change in Globalizing Modernity: The Case of Sustainable Consumption’ (2010) 2 *Sustainability*, 1887, 1892–4; S Livingstone, P Lunt, and L Miller, ‘Citizens, consumers and the citizen-consumer: articulating the citizen interest in media and communications regulation’ (2007) 1 *Discourse & Communication*, 63 with further references.

⁹⁹ Noteworthy, although in the current discourses the idea of citizen-consumer is attributed to a broad variety of spheres of public interests, it is genetically rooted in the individual consumer involvement in addressing environmental concerns—cf. J Davies, *The European Consumer Citizen in Law and Policy* (Basingstoke: Palgrave Macmillan, 2011); see also J Clarke and J Newman, ‘What’s in a Name? New Labour’s Citizen Consumers and the Remaking of Public Services’ (2007) 21 *Cultural Studies*, 738.

¹⁰⁰ J Johnston, ‘The citizen-consumer hybrid: ideological tensions and the case of Whole Foods Market’ (2008) 37 *Theory and Society*, 229, 232–4.

movement of goods and people. A low-carbon environment requires less driving and fewer flights and lorries. Unless the laws of physics give way, it is difficult to see how the European project can possibly have it both ways.¹⁰¹ Even passing over this issue, however, does not provide a final answer to the question of how the sustainability agenda can be integrated with the existing intellectual and policy structures of EU consumer law.

To resolve this puzzle, inevitably one must refer back to the—somewhat dismembered—conceptual foundations of consumer policy as an element of European integration. The idea of consumer protection as a political venture can be traced back to the reformulation of the welfare state concept and the role of individuals on the market since approximately the mid-1960s and throughout the next decade.¹⁰² That was the period when the foundations of modern environmental policy were laid down in Europe and worldwide. The link between these two threads of thinking about market and society does not rest merely on the temporal proximity, but on the related intellectual and ethical basis.¹⁰³ They build on the joint premise that enhancing individual profit-seeking—rooted in the then already antiquated *laissez-faire* ideas—does not (and should not) constitute the ultimate goal of state governance of various social domains. Both consumer and environmental awareness shared a similar vantage point over the role of an individual and the concept of that individual's sovereignty.¹⁰⁴ On both trajectories an individual was perceived as two intertwined roles: as a subject who requires protection, but at the same time as someone who—if he enjoys a particular level of actual independence—can become an actual actor on the market and beyond it.¹⁰⁵ This general idea established the most intrinsic foundation for the emergence of the citizen-consumer concept, which encapsulated the roles and capacities of an individual within the 'new' welfarist agenda.¹⁰⁶

¹⁰¹ F Trentmann, *Empire of Things. How We Became a World of Consumers, from the Fifteenth Century to the Twenty-First* (New York: Harper, 2016), 560.

¹⁰² Drexel (n 9), 58f; see also D Wilkinson, 'Towards sustainability in the European Union? Steps within the European commission towards integrating the environment into other European Union policy sectors' (1997) 6 *Environmental Politics*, 153, 158f.

¹⁰³ K Tonner, 'Consumer Protection and Environmental Protection: Contradictions and Suggested Steps Towards Integration' (2000) 23 *Journal of Consumer Policy*, 63; J Schmidt-Salzer, 'Verbraucherschutz, Produkthaftung, Umwelthaftung, Unternehmensverantwortung' (1994) *Neue Juristische Wochenschrift*, 1305, 1314; E von Hippel, *Verbraucherschutz* (Mohr Siebeck: Tübingen, 1986) 296.

¹⁰⁴ On the conceptual and social proximity of these concepts see eg G Scherhorn, 'Consumers' Concern About the Environment and Its Impact on Business' (1993) 16 *Journal of Consumer Policy*, 171.

¹⁰⁵ V Mak and E Terry, 'Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment Through Consumer Law' (2010) 43 *Journal of Consumer Policy*, 227.

¹⁰⁶ S Barra, A Gilga, and G Shawb, 'Citizens, consumers and sustainability: (Re)Framing environmental practice in an age of climate change' (2011) 21 *Global Environmental Change*, 1224, 1225f; on earlier accounts of this interconnection see eg D MacKenzie, 'The Rise of the Green Consumer' (1991) 1 *Consumer Policy Review*, 68.

This well-established interpretation does not, however, exhaust the entire spectrum of relations between consumption and sustainability. Beyond a doubt, a safe and healthy natural environment constitutes a good in itself,¹⁰⁷ being a marketable commodity that may be traded upon and exchanged for money or other goods. This is not only the domain of the tourist and leisure industries (where clean air or a noise-free ambient are tradeable commodities in themselves), but also speaks to the more profound convictions of consumers that the acquired good meets particular environmental characteristics.

Consumers' desire for a high standard of environmental characteristics can be further elucidated by reference to 'Dieselgate', which was one of the cornerstones of the recent shift of EU consumer law towards sustainability. Apart from the undeniably wrongful practices of car companies towards the supervising authorities, the contempt for skewing engine tests results can also be seen in other terms, exemplified by the expression of consumers' outrage over the environmentally forged product traded to them. Before the scandal broke, the low emissions of diesel engines (or at least a false conviction about them) was presented by car companies to prove compliance with public-law environmental requirements. At the same time, it was also communicated to consumers—usually in a conspicuous and telling manner—as a tenet of distinctive features of the particular vehicle (which was marketed as environmental-friendly) and of the manufacturing company itself (contributing to its social standing as consciously caring for the environment and respecting high standards of corporate social responsibility). In both regards, the consumer was offered a product with particular technical features, but additionally one with a particular 'environmental status'.¹⁰⁸

The product marketed by car companies therefore involved more categories of consumer expectations than simple (utility-based) functionality and the value/price relation. The market offer for the, allegedly, low emission cars involved a broad set of other values that could trigger far-reaching consumer expectations, including not only the emission figures as such, but also the sense of involvement in a common endeavour to protect the atmosphere, prevent global warming, and contribute to public health. Such beliefs embroiled in the purchase of a low emission car combine collective goals with individual aspirations. While buying a 'green' diesel car, consumers could reasonably imagine that this choice may contribute to their individual well-being (eg by improving the conditions of everyday

¹⁰⁷ Cf. especially G Calabresi, *The Future of Law and Economics. Essays in Reform and Recollection* (New Haven and London: Yale University Press, 2016), 43, along with further references to literature at 191.

¹⁰⁸ From the perspective of political economy, it might be questioned, whether by purchasing such genres of 'environmental' goods consumers should merely acquire 'access' to the particular quality of life or exclusivity over particular parcels of the unspoiled environment. The latter seems more defensible in terms of the social role of the environmental protection and the values that underpin it. In short, to put it again in Calabresi's words, the quality of the environment can be counted amid 'merit goods' that should constitute a common commodity and that should be free from 'conditioning on wealth distribution' (Calabresi (n 108), 43, 73).

life in a city with a high rate of air pollution) and health (eg by contributing to reducing the factors that cause certain diseases). Finally, and this cannot be underestimated either, for many consumers the purchase of low emission vehicles meant their subscription to a particular set of values, and was often in line with other sustainability-oriented choices. In other words, by choosing cars marketed as environmentally-friendly, consumers could be driven not merely by pragmatic reasons, but also by a sense of affinity towards certain ethical convictions.

Despite the apparent conclusions that may be drawn from the 2018/2019 reform, the new consumer contract law does not build on a concept of sustainable consumption considered in classic terms. According to this conventional understanding, it perceives the quality of the environment as a collective goal for the whole of society. The new EU consumer rules seem to adopt a more heterogenous approach, by focusing not only on sustainability as the overall public good, but also on sustainability as a concept that incorporates individual consumer interests. In other words, the 2018/2019 reform builds on the view that consumer autonomy should also comprise the autonomy to follow one's convictions about market and social ethics. This view of autonomy is, obviously, much more politicized than the classic notions and it clearly enhances the 'emergence of structures of altruistic motivation for consumers'.¹⁰⁹ In this way an individual becomes more robustly co-responsible for pursuing common values and policy goals—combining the role of consumer with 'the political'.¹¹⁰ The role of law is primarily to enhance the proper array of options that consumers may choose from¹¹¹ and to make the choice transparent and non-deceitful. This leads to a further question about the concepts of market regulation and paternalism that underpin the 2018/2019 reform.

V. Regulation

A. Regulation and paternalism

The third component of the triptych—the concept of regulation by means of private law—also belongs traditionally to the foundational questions of EU consumer law and the consumer.¹¹² This question also naturally translates onto a

¹⁰⁹ Drexl (n 9), 59.

¹¹⁰ See also K Nyborg, 'Homo Economicus and Homo Politicus: interpretation and aggregation of environmental values' (2000) 42 *Journal of Economic Behavior & Organization*, 305, 319–21.

¹¹¹ Similarly also U Schrader, 'The moral responsibility of consumers as citizens' (2007) 2 *International Journal of Innovation and Sustainable Development*, 79, 88: 'Consumer citizens can only choose sustainable ways of consumption when they are available. Availability means that they do exist and that they are attractive offers for consumers "at competitive prices" . . .'

¹¹² See for instance N Reich, 'A European Contract Law, or an EU Contract Law Regulation for Consumers?' (2005) 28 *Journal of Consumer Policy*, 383, 391–3, 398–403; O Bar-Gill and O Ben-Shahar, 'Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law' (2013) 50 *Common Market Law Review*, 109; H-W Micklitz, 'The Visible Hand of European Regulatory Private Law—The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation' (2009) 28 *Yearbook of European Law*, 3, 9–17.

more general issue: to what extent contract law as such should be merely facilitative (by supplying a legal framework for concluding and executing agreements and thereby reducing transaction costs) and insofar as it should adopt a more proactive approach, pursuing a certain policy agenda. This issue, although it is somewhat superficial and simplifying in comparison with the actual variety of governance toolbox in EU consumer order,¹¹³ clearly sets out one of the main threads in discussions over the current identity of European private law.¹¹⁴ It is also a tacit protagonist of the 2018/2019 reform. The coherent conceptual underpinning of the new rules is, however, rather hard to grasp. Both the New Deal political blueprint and the new directives clearly steer clear of making any 'big' pronouncements on the concept of social justice and interference with the free market dynamics that underly this change. At the same time—at least on face of it—the new rules stick to the regulatory paradigm already established in EU consumer law, which rest primarily on the assumption that consumers should mostly be protected from making 'unreasonable deals'—that is, from involving themselves in contracts in circumstances that could impede a free and sovereign decision.

In this way, protection of the weaker is strongly and obviously underpinned by concepts of individual justice and the fair allocation of goods. This concept of protection has been inseparably intertwined with the second one, which focuses on collective and overarching outcomes of consumer protection for the EU economy. From this vantage point, consumer law provides one of the key¹¹⁵ building blocks of the Common Market by reducing frictions in the cross-border functioning of the consumer market¹¹⁶ and by enhancing the trust and comfort of individual non-professionals.¹¹⁷ The two political substrates set the classic paradigm, which for decades dominated EU consumer law. It was centred around the concept of the individual market agent, who should be protected in terms of her particular market decisions and who (for the sake of upholding the entire concept of the EU unified economy) should enjoy a safe contracting environment.

¹¹³ For illustration see eg H-W Micklitz, 'Regulatory strategies on service contracts in EC law' in F Cafaggi and H Muir Watt (eds), *The Regulatory Function of European Private Law* (Cheltenham and Northampton: Edward Elgar, 2009), 16ff.

¹¹⁴ See also H Dagan, 'Between Regulatory and Autonomy-Based Private Law' (2016) 22 *European Law Journal*, 644, 646–9.

¹¹⁵ Cf. eg Bartl (n 41), 582.

¹¹⁶ As Micklitz observes, in its initial stage the development of EU consumer law was mostly concerned with the harmonization of existing rules, combined with awarding a minimum level of protection—but was not opting for too much regulatory innovation; Micklitz (n 44), 'The 'New'', at 582.

¹¹⁷ See eg F Cafaggi and P Iamiceli, 'The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions' (2019) 25 *European Review of Private Law*, 575, 582.

In these terms EU consumer law has been strongly regulatory, by pursuing particular political goals, mostly through mandatory rules.¹¹⁸ At the same time, however, its degree of paternalism—understood as arbitrarily mandating a substantive solution for the parties¹¹⁹—has been relatively limited and (if existent) based mostly on various forms of incentivizing rather than on the direct imposition of particular solutions.¹²⁰ The conceptual architecture situated EU consumer law within the ambit of instruments designed to foster coherence between domestic markets, by providing possibly seam- and frictionless economic convergence. In this way EU consumer law did not primarily seek to shape the content of consumer contracts, but mostly to create an ambit, in which consumers could conclude fair agreements, well suited to their preferences.¹²¹ Setting aside the dispute about the type of economic rationale that underpins this view,¹²² the primary objective of European private law has quite clearly been the maximization of collective welfare through the promotion of individual welfare (and hence, a strong focus on the efficiency of particular agreements for consumers). In its regulatory dimension, European private law has been cast in a somewhat classical role, rooted in the well-established envisioning of private law as an “enabler” of a transaction-costs-efficient market.

A deeper look at the New Deal and the 2018/2019 reform, however, reveals a few traits that call for a rethinking of this established picture. The most conspicuous instance in which the new consumer rules shift the underlying premise of low-paternalism is undoubtedly brought about by the desire for sustainability. The political agenda that underpins this concept, as well as the legal instruments designed to foster sustainability, quite clearly reach beyond the attitude previously typical for EU consumer law. The new sustainability policy does not merely aim to safeguard a safe and non-exploitive environment for decision making; it

¹¹⁸ Further to publication referred to in fn. 113 see also U Mattei, ‘Efficiency and Equal Protection in the New European Contract Law: Mandatory, Default and Enforcement Rules’ (1998–99) 39 *Vanderbilt Journal of International Law*, 537, 543–6.

¹¹⁹ See eg P Hacker, *Verhaltensökonomik und Normativität. Die Grenzen des Informationsmodells im Privatrecht und seine Alternativen* (Tübingen: Mohr Siebeck, 2017), 211ff; F Esposito, ‘Conceptual Foundations for a European Consumer Law and Behavioural Sciences Scholarship’, in H-W Micklitz, A-L Sibony, and F Esposito (eds), *Research Methods in Consumer Law. A Handbook* (Cheltenham and Northampton: Edward Elgar, 2018); G Helleringer and A-L Sibony, ‘European Consumer Protection through the Behavioral Lens’ (2016–17) 23 *Columbia Journal of European Law*, 607, 611. As the authors observe, ‘[i]n Europe, paternalism is rarely seen as a matter of principle’.

¹²⁰ See eg V Mak, ‘The Myth of the ‘Empowered Consumer’: Lessons from Financial Literacy Studies’ (2012) 1 *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht*, 254; Helleringer and Sibony(n 120), 643–5.

¹²¹ Even the review of unfair contract terms under the 93/13/EEC Directive, considered to provide one of the most profound intrusions in the mechanics of consumer agreements, is concerned with the exclusion of non-negotiated clauses that harm consumer interest, not with providing positive and substantial solutions.

¹²² Cf. M Bartl, ‘Socio-Economic Imaginaries and European Private Law’ in PF Kjaer (ed.), *The Law of Political Economy: Transformation in the Function of Law* (Cambridge: Cambridge University Press, 2020), 241–6 along with further references.

directly obliges contracting parties to observe particular requirements—for instance, to prefer the particular remedy in the case of a good's non-conformity,¹²³ which is underpinned with a clear paternalistic rationale.

In this way, the new rules promote sustainability as a collective goal that acts to the benefit of a generic class of present-day citizens and which at the same time benefits the forthcoming generations of individuals. In this way, the EU concept of sustainability makes an indirect subscription to the concept of 'future weakness'. The *soziale Aufgabe* of private law rests here not on enhancing actual welfare.¹²⁴ It focuses on providing what is assumed to be welfare to those who are weaker solely by virtue of being excluded from making economic decisions at a particular moment in time. Obviously, this concept of vulnerability is not limited solely to "future generations" (as von Hippel could frame it).¹²⁵ It also encompasses present-day consumers who will have to bear the negative externalities of their market choices—made by both business actors and by themselves—in the undetermined future. From this vantage point, the concept of the protection of 'the weaker' ('the vulnerable'), developed in the 2018/2019 reform of consumer law, is palpably more paternalistic than the traditional concept of consumer protection developed in EU law. It does not aim merely to enhance consumers' ability to make meaningful and autonomous market decisions. It is also (or even primarily) concerned with protecting the society, along with consumers themselves, from the outcomes of their own choices. It is done by mandating the use of sustainable technologies and durable products and hence, by limiting the array of decisions available to consumers.

B. Paternalism and distributive concerns

Similar conclusions can also be drawn for the second pivotal part of the 2018/2019 reform, that is, the digital consumer market. As for the previously discussed transformation of the autonomy concept, novel attitudes towards regulation and paternalism can also be discussed against the backdrop of algorithmic pricing. Although the cursory framework introduced in the 2019/2161 Directive builds mostly on the autonomy-enhancing concepts of disclosure and transparency,¹²⁶ it also conveys a clear view of market relations, which seems partly to diverge from existing attitudes in EU consumer law. The proliferation of algorithmic decision making substantially challenges the concept of relational fairness and autonomy as the backbone ideas of a liberal picture of contract law.

¹²³ See Section III.B.

¹²⁴ Amongst the recent reiterations of that classical quandary see C Jansen, 'Unser Privatrecht wird sozialer sein, oder es wird nicht sein', in A Janssen and J Schulte-Nölke (eds), *Researchers in European Private Law and Beyond. Contributions in Honour of Reiner Schulze's Seventieth Birthday* (Baden-Baden: Nomos, 2020), 327f and passim.

¹²⁵ See also Section III.B.

¹²⁶ See also Section IV.B.

The classic perception of price fairness builds on the assumption that price control mechanisms should be applied as a way of safeguarding autonomy from market conduct which would distort its essence—that is, the rudimentary degree of reciprocity and non-exploitation. Depending on the particular theoretic angle, it may accentuate either the way of building contractual relations (such as non-discrimination in entering a contract) or its content—alternatively, it may intermingle them, creating a more hybrid notion of fairness.¹²⁷ Under this view, fairness is mostly considered as a commutative benchmark for contracts as a product of an interpersonal link between parties, aiming to provide a minimal standard of parity in exercising private autonomy. Distributive concerns are mostly outside this picture.

Although distributive¹²⁸ and paternalistic concerns are mostly outside this picture, the involvement of ethical values related to privacy and processing personal data (as done by the 2019/2161 and 2019/770 Directives intertwined with GDPR¹²⁹) opens up a substantially new perspective. The massive commodification of data on modern markets significantly shifts the focus from the protection of privacy as a purely human virtue to the governance of data flows between market actors (and thus, on limiting its possible use). Data protection law therefore exerts a clearly distributive effect, since it limits the degree of commodification of data, disincentivizing consumers from using them for analysis and making behavioural predictions.¹³⁰

The acts in question attempt to limit the commodifying effect that exerts on personal data as its main fuel. Strengthening a consumer's sovereignty towards her data implies further distributive effects, by partial decommodification of data on the consumer market. A particularly meaningful role in this sphere is played by the 2019/770 Directive, which in its Article 16 strongly accentuates the protection of data after the termination of a consumer agreement and focuses mostly on the seller's/supplier's duty to erase data or cease using them. In this way the consumer is granted direct control over the data and the possibility to 'withdraw' them from all the analytical procedures. This solution thereby creates a directly distributive effect, by extracting data from the mechanics of 'surveillance capitalism' and hence by depriving them of market value for the particular professional.

¹²⁷ See eg the example of the the EU unfair contract terms directive (discussed above), which combines substantive and procedural fairness, using the notions of transparency (as a tenet of actual autonomy in decision making) as an organizing criterion.

¹²⁸ Further, on the possibilities to further distributive justice through contract rules, see AT Kronman, 'Contract Law and Distributive Justice' (1979–80) 89 *Yale Law Journal*; A Bagchi, 'Distributive Justice and Contract' in G Klass et al. (eds), *Philosophical Foundations of Contract Law* (Oxford: Oxford University Press, 2014).

¹²⁹ See Section IV.B.

¹³⁰ See also Section III.C.

B. Regulation and global value chains

The regulatory agenda set in the 2018/2019 reform can be furthered with more subtle tools. This pertains, in particular, to fostering sustainable production and consumption along global value chains.¹³¹ Establishing sustainability standards in this area may take place mostly through contractual means, by creating and spreading rules within a chain.¹³² For these reasons, pursuing the EU sustainability agenda may be based—to a certain degree—either on mandating particular requirements¹³³ or by steering parties to adopt particular solutions by various forms of indirect pressure and encouragement, carried out through both legal and non-legal tools.¹³⁴

Global value chains undoubtedly play a pivotal role in the present-day production and retail distribution of goods—and hence, they fall directly under the scope of the sustainability policy set out in the New Deal. The increasing awareness of the role of value chains in the globalizing economy finds its direct reflection in the 2019/633 Directive, which attempts to enhance the fairness of practices in business-to-business supply chains. The Directive attempts to take a first step towards filling in a gap in the EU *acquis* with regard to abusive practices in agreements between professionals.¹³⁵ The underlying paradigm of protection rests implicitly on the notion of market vulnerability, due to the presence of uneven bargaining power.¹³⁶ Apart from contributing to vulnerability (extended upon B2B relations), the Directive instigates one more substantial development. It provides a very early attempt to frame supply chains as a peculiar regulatory environment, with a strong self-regulatory dimension. The Directive acknowledges this specificity and directly takes over such privately-made schemes as part of the

¹³¹ Cf. K Eller, *Rechtsverfassung globaler Produktion* (Tübingen: Mohr Siebeck, 2020).

¹³² See more generally V Ulfbeck and O Hansen, ‘Sustainability Clauses in an unsustainable Contract Law?’ (2020) 16 *European Review of Contract Law*, 186; K Peterková Mitkidis, *Sustainability clauses in international business contracts* (The Hague: Eleven International Publishing, 2015), 85–100; C Poncò, ‘The Contractualisation of Environmental Sustainability’ (2006) 12 *European Review of Contract Law*.

¹³³ The requirement to prioritize repair over replacement of a good, as well as expectations for longer durability of a product—as expressed in the 2019/771 Directive—count quite vividly within this ambit; on other instances see eg FW Mayer, N Phillips and AC Posthuma, ‘The political economy of governance in a “global value chain world”’ (2016) 25 *New Political Economy*, 129; D Harnesk, S Brogaard, and P Peck, ‘Regulating a global value chain with the European Union’s sustainability criteria—experiences from the Swedish liquid transport biofuel sector’ (2017) 153 *Journal of Cleaner Production*, 580, 581.

¹³⁴ In part on this shift of paradigms also A Beckers, ‘Using contracts to further sustainability?’ in B Sjøfjell and A Wiesbrock (eds), *Sustainable Public Procurement under EU Law, New Perspectives on the State as Stakeholder* (Cambridge: Cambridge University Press, 2015).

¹³⁵ See eg C Twigg-Flesner, ‘Towards a European law on unfair B2B trading practices?’ (2018) 7 *Journal of European Consumer and Market Law*, 93, 95.

¹³⁶ This conceptual foundation is rather salient from the very outset of the 2019/633 Directive, which in Article 1(1) defines unfair practices not only as substantially contrary to good commercial conduct, good faith and fair dealing—but also as being ‘unilaterally imposed by one trading partner on another’.

chain's governance architecture.¹³⁷ Although this dimension of the Directive remains rather humble, it undoubtedly takes an important step forward in modernizing the regulatory toolbox of EU private law.¹³⁸

Although the 2019/633 Directive provides the most conspicuous instance of the EU's growing interest in grasping and taming the phenomenon of supply chains, the 2018–19 reform provides at least two other fields for such consideration. First of all, it directly addresses the question of soft standards created by private market actors.¹³⁹ This pertains, especially, to various types of codes of conduct and good practice, which in many instances tackle head on ethical standards and environmental features that should be complied at various stages during the production and distribution of goods.¹⁴⁰ The regulatory toolbox is provided mostly by the 2005/29/EC Directive, which mandates honesty when referring to codes of conduct in market communication with consumers.¹⁴¹ Secondly, after the 2018/2019 reform, EU consumer law also contains other instruments that may increase the effective enforcement of sustainability standards in a supply chain. This pertains, for instance, to the previously mentioned possibility to claim the non-conformity of a consumer good when it does not meet the sustainability standards a consumer could reasonably expect. At the same time, the consumer market creates various informal systems to incentivize professionals to observe sustainability values along a chain. This applies, for example, to a consumer enhancing or spoiling a producer's/supplier's reputation by, which forms an intrinsic part of the fair-trade movement.¹⁴²

Enhancing sustainability in the global value chains deserves particularly in-depth consideration, as it provides a meaningful instance of the novel types of consumer market regulation that the New Deal (and the subsequent legislative reform) seem to facilitate. It rests on the paradigm of splitting market ordering

¹³⁷ See p. 41 of the Directive's preamble, which makes explicit recourse to 'voluntary governance measures, such as national codes of conduct or the Supply Chain Initiative'.

¹³⁸ Cf. eg F Cafaggi and P Iamiceli, 'Unfair Trading Practices in Food Supply Chains. Regulatory Responses and Institutional Alternatives in the Light of the New EU Directive', <https://ssrn.com/abstract=3380355> or <http://dx.doi.org/10.2139/ssrn.3380355>, 18–20 and *passim*.

¹³⁹ So also V Hauffler, *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (Washington, DC: Carnegie Endowment for International Peace, 2001).

¹⁴⁰ See A Beckers, 'Corporate codes of conduct and contract law: a doctrinal and normative perspective' in R Brownsword, RAJ van Gestel, and H-W Micklitz (eds), *Contract and Regulation: A Handbook on New Methods of Law Making in Private Law* (Cheltenham and Northampton: Edward Elgar Publishing, 2017), 131; K Peterková Mitkidis, 'Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements' (2014) *Nordic Journal of Commercial Law*, 1.

¹⁴¹ See Article 6(2)(b) of the 2005/29/EC Directive of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC, and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ L 149, 11 June 2005, pp. 22–39).

¹⁴² See eg J Grabs and S Ponte, 'The evolution of power in the global coffee value chain and production network' (2019) 19 *Journal of Economic Geography*, 803; J Humphrey and H Schmitz, 'Governance in Global Value Chains' (2001) 32 *IDS Bulletin*, 19, 24f.

between the sovereign regulator (EU), vested with traditional political power, and private parties, which ground their steering capacity in the economic power within the chain. In these terms, '[t]he rise of global value chains breaks down the distinction between product and process and makes it theoretically possible for the lead company to exercise control over the whole process, including the degree to which local, regional and national standards on labour, consumer and environment are respected.'¹⁴³

At the same time, the regulatory perspective on global value chains includes the concept of the involvement of a consumer (a citizen-consumer) in the creation and enforcement of sustainability standards.¹⁴⁴ This sets another link between individual autonomy and activism in pursuing collective policy goals—which seems to be one of the key underlying premises of the 2018/2019 reform.¹⁴⁵ Also, in this instance, exercising one's autonomy aims typically to protect individual interests (usually: the need to participate in ethical consumption, which respect to certain sustainability standards), but in this way it also acts in favour of the public good. In other words, as in the examples discussed above in Section IV.C., the ideal of citizen-consumer combines self-oriented motivation, which at the same time is a vehicle for involving individuals in the bottom-up setting and enforcing of collective standards and requirements.

C. Covid-19 and the real New Deal?

The reform of consumer *acquis* has been carried out under the invisible shadow of the 2020 pandemic. Covid-19 and the ensuing lockdown triggered massive suppression of the consumer market, distorting the regular functioning of many parts of the consumer economy.¹⁴⁶ Apart from various, rather ephemeral concerns (such as price gouging in certain market sectors¹⁴⁷), the pandemic triggered much more substantial consequences for the consumer economy, which go beyond simple quality- and price-related considerations. The pandemic caused a severe distortion in the functioning of some supply chains,¹⁴⁸ which may entail

¹⁴³ Micklitz (n 38), 234.

¹⁴⁴ See eg M Stanco, C Nazzaro, M Lerro, and G Marotta, 'Sustainable Collective Innovation in the Agri-Food Value Chain: The Case of the "Aureo" Wheat Supply Chain' (2020) 12 *Sustainability*, 5642.

¹⁴⁵ See in more details Section IV.C.

¹⁴⁶ For an overview of consumer issues triggered by the pandemic cf. COVID-19—Consumer Law Research Group, 'Consumer Law and Policy Relating to Change of Circumstances Due to the COVID-19 Pandemic' (2020) *Journal of Consumer Policy*, 2f.

¹⁴⁷ See eg J Noble, 'Competition law in times of crisis—tackling the COVID-19 challenge: a producer perspective' (2020) 8 *Journal of Antitrust Enforcement*, 293, 294f.; RA Woodcock, 'The Efficient Queue and the Case against Dynamic Pricing' (2020) 105 *Iowa Law Review*, 1759, 1791.

¹⁴⁸ M Snoep, 'Competition enforcement in times of crisis—a perspective from the ACM' (2020) 8 *Journal of Antitrust Enforcement*, 267, 268.

The exact impact in this sphere differs See also JE Hobbs, 'Food supply chains during the COVID-19 pandemic' (2020) 68 *Canadian Journal of Agriculture Economics*, 171, 174f.

prolonged disruption in the availability of products and price fluctuations, coupled with decreasing consumer welfare¹⁴⁹ and rising privacy issues.¹⁵⁰

The pandemic, and the subsequent economic crisis have created a strong and unprecedented challenge for EU private law. Although the depth and duration can be only speculated, it will undoubtedly bring about immense distress for the entire market, subverting the regular dynamics and decreasing overall welfare. The pandemic again brought contract law to the verge of a classic problem, posed over a century ago by O. von Gierke: to what extent should private law operate merely as market efficiency-enhancing machinery and to what extent ought it to immerse itself in ‘drops of social oil’.¹⁵¹ In most of the EU Member States the unfolding crisis has reinvigorated long-unseen inclinations towards more intense market regulation, which in many instances seem to trump free-market attitudes.¹⁵² At the same time, it also triggered strong concern about deepening social inequalities, already quite profound in the pre-pandemic era, as well as instrumentalizing free market instruments (including contract law) for rent seeking in the extraordinary market circumstances.¹⁵³

In the aftermath, the ‘New Deal’ rhetoric, originally revoked by the Commission as a catchphrase for the new consumer agenda, may ironically turn out to be an even more profound metaphor for the problem that EU consumer law has been facing since the outbreak of the pandemic. In all probability the crisis currently unfolding will force European private law (and possible also

¹⁴⁹ Cf. A Lau Andersen, E Toft Hansen, N Johannesen, and A Sheridan, ‘Pandemic, Shutdown and Consumer Spending: Lessons from Scandinavian Policy Responses to COVID-19’ (<https://arxiv.org/abs/2005.04630>), 13–17; O Coibion, Y Gorodnichenko, and M Weber, ‘The Cost of the COVID-19 Crisis: Lockdowns, Macroeconomic Expectations, and Consumer Spending’, Munich Society for the Promotion of Economic Research (CESifo) Working Paper No. 8292 (2020), https://www.econstor.eu/bitstream/10419/219110/1/cesifo1_wp8292.pdf, 15–19; from an overall perspective also A Mathios, H-W Micklitz, LA Reisch, J Thøgersen, and C Twigg-Flesner, ‘Consumer Policy in the Age of Covid-19’ (2020) *Journal of Consumer Policy*.

¹⁵⁰ AR Brough and KD Martin, ‘Consumer Privacy During (and After) the COVID-19 Pandemic’ (2020) 20 *Journal of Public Policy & Marketing*, 1; see also S Dehmel, P Kenning, GG Wagner, C Liedtke, HW Micklitz, and L Specht-Riemenschneider, *Die Wirksamkeit der Corona-WarnApp wird sich nur im Praxistest zeigen. Der Datenschutz ist nur eine von vielen Herausforderungen, Veröffentlichungen des Sachverständigenrats für Verbraucherfragen* (Berlin: Sachverständigenrat für Verbraucherfragen 2020), 9f.

¹⁵¹ O von Gierke, *Die soziale Aufgabe des Privatrechts* (Berlin–Heidelberg: Springer, 1889).

¹⁵² As it was framed quite early after the pandemic outbreak, Covid-19 created a strong plea for ‘rethinking of that anachronistic dichotomy to include approaches drawing on values beyond compliance with government and individual gain. . . . If we embrace the intrusion of moral language into our daily conversations, however uncomfortable, it will enrich our economic vernacular and aid both private and public decision-making as we prepare for a sustainable futur.’ (W Carlin, ‘Covid-19 is resetting the way we talk about the economy’ *Financial Times*, 23 April 2020). On the US side of this debate see eg DA Hoffman and C Hwang, ‘The Social Cost of Contract’, University of Pennsylvania Law School, Institute for Law and Economics. Research Paper No. 20-42 (2020), <https://ssrn.com/abstract=3635128> or <http://dx.doi.org/10.2139/ssrn.3635128>, with further references.

¹⁵³ See eg S Bouali, ‘COVID-19 Pandemic and Abuse of Economic Dependence. Short-run Market Vulnerability and Exploitative conduct’, <https://hal.archives-ouvertes.fr/hal-02564678> (2020).

domestic systems of private law) to reconsider not only its structure and instruments, but also its underlying political agenda. It seems likely that the 2014 'New Deal', along with the subsequent legislative reform, could be only a prelude for a more in-depth renegotiation of some of the underlying values and policies of EU private law.¹⁵⁴ As usual, the final answer to the question, whether (and to what ends) such rethinking will turn out to actually be feasible will rest somewhere mid-way between EU policy and law and the Member States' legal orders. Even if an organized conceptual response to the challenges posed by Covid-19 will turn out not to be (fully) feasible, the actual shift in values and paradigms is already taking place from the bottom up, in the form of various regulatory responses adopted in domestic law¹⁵⁵ (and plausibly soon also in judicial practice).

The 2018/2019 reform of consumer law facilitates this change in two important ways. First of all, it provides several strong hints that will open private law up to stronger endorsement of 'social oil', beyond its traditional focus on individual market choices and individual welfare. Credibly, the post-pandemic European private law will have to ask again its fundamental question about the balance between 'facilitation' and 'steering'. Within this issue, EU consumer law should revisit the fundamental question about the model of justice and attempt to understand to what extent it should take over distributive tasks. The latter seems inevitable in the pandemic-affected economy, where the classic value/price relation was substantially harmed: '[i]f we are not going to allocate precious goods based mainly on price, we should deploy the next best alternative for deciding who gets what and ensuring adequate investment in supply. We can do better than price caps and queues.'¹⁵⁶

Secondly, the new consumer rules also provide numerous points of entry that allow for the inclusion of market and non-market relations that surround consumer agreements. It allows for a more ample set of values to be accommodated, which do not merely concern market activity, but which also address values of a more communitarian character. The latter became particularly conspicuous during the pandemic and pertained especially to consumer access to particular goods (such as face masks and other basic medical products) on fair and equal terms. In this way, the protection of individual consumer interests translated directly into increase of the collective welfare.

¹⁵⁴ See also H-W Micklitz, 'The COVID-19 Threat: An Opportunity to Rethink the European Economic Constitution and European Private Law' (2020) 11 *European Journal of Risk Regulation*, 249.

¹⁵⁵ Cf. M Grochowski, 'Towards a Renaissance of Price Control in Contract Law? Preliminary Observations on COVID-19 and Price Regulation on Consumer Market' in E Hondius, M Santos Silva, A Nicolussi, P Salvador Coderch, C Wendehorst, and F Zoll (eds), *Coronavirus and the Law in Europe* (Antwerp–Portland: Intersentia, 2020), <https://www.intersentiaonline.com/publication/coronavirus-and-the-law-in-europe/v-710c0bf4-1157-df60-a994-2355327d4fe4/681#H0>.

¹⁵⁶ S Evans, 'Planning for catastrophes' (2020) 8 *Journal of Antitrust Enforcement*, 273, 275.

VI. Towards conclusions

The 2018/2019 reform clearly seems to open up new perspectives for EU consumer protection as a political and legal project. The former—that is, an attempt to reformulate some of the underlying political and legal foundations of EU law—seems to be by far the most meaningful outcome of the change proposed by the Commission in the 2018 New Deal and pursued further through particular pieces of consumer legislation. At first sight, the actual newness of the New Deal itself and of the legislative toolbox used by the 2018/2019 reform may seem rather questionable. The Commission opted mostly for well-established instruments, such as disclosure duties, transparency, and withdrawal rights, the actual efficiency of which have long been questioned.¹⁵⁷ Also, from a more fundamental political perspective, the New Deal follows the old conceptual pattern, based on perceiving EU consumer law as a vehicle for the approximation of domestic law and of the creation of a possibly unified standard of protection. Although this approach creates much friction and does not seem to fully achieve its aims, the EU seems wedded to this attitude in the New Deal and the ensuing legislative activity. From this vantage point, the New Deal and the legislation that ensued may appear to be a missed opportunity rather than a well-seized chance for improvement. The actual essence of the change rests, however, elsewhere. The novelty it has brought about is not based merely on the expansion of consumer law into new, mostly uncharted, areas—in particular: environmental protection, data and privacy issues, and online commerce. Much more meaningful is the way new rules and policy principles transform the underlying intellectual fabric of EU consumer law. By setting forth the three problems discussed above, this paper has attempted to provide a more precise understanding of the new conceptual movements outlined in EU law. The protection of the environment, on one hand, and informational autonomy and privacy, on the other, provide a completely new type of challenge for the existing contract law. They reach beyond economic efficiency as the ultimate goal of private law. Finally, the emergence of digitalization and sustainability as the new domains of private law reinvigorates the question to what extent EU private law should directly be engaged in pursuing a social and economic agenda. The 2019 legislation opened a new chapter in this discussion, confronting private law with a new ‘genre’ of tasks, which traditionally adhered to the sphere of public ordering (the protection of collective goods and allocation of the social cost of technological progress in society). The EU approach to these issues seems, however, to experience an identity split: while infusing private law with these new concepts, it seems supremely stuck to the classic efficiency-based idea of private law as a vehicle for the single market and economic growth.

¹⁵⁷ Merely for illustration of the long-lasting debate over the actual efficiency of the consumer protection toolbox see Bar-Gill and Ben-Shahar (n 113), *passim*, along with further sources referred to by the authors.

The newly-enacted rules reach further into the underlying conceptual structures of EU consumer law. The new rules do not merely focus on the perspective of collective interests as their key *soziale Aufgabe*. They implicitly adopt a much more holistic view of consumption as a social and market phenomenon than the previous EU *acquis*. They construe a different view of market ethics (more strongly oriented towards non-economic values) and sketch out a new concept of a consumer, who (through the lenses of privacy and sustainability) is perceived in a broader perspective than merely as an individual who acts to satisfy her purely economic (consumptive) needs. Finally, the paper tries to ask a question: what impact can the new rules have on the Member States' systems of private law. In particular, it attempts to understand the extent to which the 2019 reform may redesign paradigms of domestic contract law and what challenges the new goals and values of EU private law may pose for domestic legal traditions.

These few remarks attempt merely to sketch the general conceptual outline of the changes elicited by the 2018/2019 reform and its underpinning political agenda. The text does not aim to dot the i's or cross the t's in this discussion, nor does it seek to provide a complete analytical framework for the new consumer rules and the consumer policy. The future of the endeavour started by the New Deal and substantiated in the set of 2018/2019 Directives, seems still shrouded with vagueness. This is not just due to the unknown paths of implementation of the new rules in consumer contracts. Equally importantly, the return of 'the political' to discussions of EU consumer law—for decades kept mostly settled, if not petrified—seems to open new paths, the trajectory and impact of which on consumer markets are still vague and under construction.¹⁵⁸ For these reasons the article does not aspire to put a full stop, but rather leaves a semicolon.

¹⁵⁸ See for instance the Commission's attempts to facilitate new techniques of regulating the 'environmental footprint' of consumer goods (which seems to be partly another spillover of the 'Dieselgate' and other mischievous communications on the environmental features of consumer goods): <https://ec.europa.eu/environment/eussd/smgp/index.htm>.