**BETWEEN HUMAN RIGHTS AND CONSUMERS PROTECTION IN THE DIGITAL AGE OR THE RIGHTS OF DIGITAL CONSUMERS IN THE EUROPEAN AND INTERNATIONAL CONTEXT**

**-THE DIGITAL SERVICES ACT EXAMPLE-**

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***BRIEF OVERVIEW***

The European Union's Digital Services Act[[2]](#footnote-2) brought the latest adaptations marked by certain specific obligations, with the DSA entering into force in November 2022, with the provisions applying mainly from 17 February 2024 (Article 93)[[3]](#footnote-3) .

The accelerating digitisation of society and the economy has found some unregulated ground, sometimes leading to unfair conditions for investors or providers of these services and a dramatic reduction in consumer choice. We are now witnessing the digital transition from *rebus se subicere* to *res sibi subicere*. The consumer himself has an active role by definition, being a person who consumes material goods to satisfy his needs. Hence the protection of his own rights. It has been noted that since the end of the 20th century, both nationally and internationally, economic developments (in particular) have given certain insights that consumer rights activism continues to offer to the international human rights movement[[4]](#footnote-4) . The theme of this report highlights the obvious convergence of consumer protection and human rights within international and EU law. This merging produces a two-way consolidation: from fundamental (and other human) rights to consumer protection, and vice versa, especially in the digital sector where the consumer is often referred to as the user, and vice versa. Are all of them totally or partially service recipients?

The theory has known examining the conceptualization of consumer protection as a human right and specific influences[[5]](#footnote-5) . Does consumerism remove these two protections? Whether and to what extent consumer rights are human rights has been an issue discussed since the 1990s, when the digital age was beginning to take hold. Some authors proposed the gradual recognition of some consumer rights as human rights of a softer character that could later achieve full recognition, this being the general tendency of the international community to recognise new rights[[6]](#footnote-6) . As we shall see in the next chapter, there are some inadequacies that undermine this gradual recognition.

Although these protections are inextricably linked in the age of digitisation, consumer rights organizations are advised to be in an integral relationship with human rights movements. The theme of this report cannot be dealt with in isolation from cross-disciplinary approaches and these issues will lead to changes in the setting of different educational standards in the main. "Indeed, perhaps the most promising human rights organizations are those that undertake transdisciplinary activities, engage with the arts, media and broader forms of collective social organizing, so as to reinvent themselves for the times ahead"[[7]](#footnote-7) .

***HUMAN RIGHTS AFFECTED/ADDRESSED/COVERED: WHERE DOES CONSUMER PROTECTION FIT IN? SOME PROPOSALS***

The DSA has come up with regulations of online intermediary services and new responsibilities including surveillance to limit and discourage the spread of illegal content and illegal products online, with the intended effects being the protection of minors and users/consumers/people's access to more choice and transparency or accurate information. The discussion is relevant because the verbiage characterizing the action is that of participants in digital legal relationships and is commensurate with the role, size and impact of each of these actors in the online ecosystem, much of which are subjects of international law.

Experts are of the opinion that some provisions of the DSA jeopardize fundamental rights[[8]](#footnote-8) . These are some of the concessions that large platforms might make to European regulators when they negotiate agreements, trying to strengthen their own commercially-driven business. Against this backdrop, there has been public criticism from civil society groups that democratic processes would be undermined and the preservation of users' fundamental rights put at risk. The problems arise from the fact that the constitutions of some Member States do not include consumer protection, which makes this category, which we see as being part of the group of fundamental rights, vulnerable. Paragraph 72 of the DSA is very clear: "However, Member States should be able to entrust more than one competent authority with specific tasks and powers of supervision or enforcement of this Regulation, for example for specific sectors, such as electronic communications regulators, media regulators or consumer protection authorities, depending on their national constitutional, organisational and administrative structure." One of the vulnerabilities standing in the way of ethics and lawmaking is therefore the very margin of choice that this document gives to Member States.

I will apply the analysis to the same user/consumer/human thematic relationship (thinking for the meaning of recipient of digital services), where the boundaries are becoming increasingly fragile. In the case of digital services, the consumer is a user or can be -sometimes- a recipient of digital services. At national level, i.e. at the level of national law, fundamental rights are enshrined in constitutions. At the European Union level, the Charter of Fundamental Rights of the EU in Article 38 introduced consumer protection, stating: "Union policies shall ensure a high level of consumer protection." However, terminologically, protection is not for "every person" as the other rights sound but is, as in the case of environmental protection, a matter of Union policies. A clearer restatement of the provisions of this article would be welcome, such as, for example, "everyone is entitled to protection as a consumer." Other proposals for rewording Article 38: "every citizen of the Union is guaranteed consumer rights" or "every consumer has the right to protection in accordance with national, European and international rules". This Charter could be amended, especially as its preamble states that: "To this end, it is necessary to strengthen the protection of fundamental rights by making them more visible through the Charter, in the spirit of the evolution of society, social progress and scientific and technological developments". Technological developments have therefore been anticipated. The proposal takes account of the problems that arise when fundamental rights such as those in this Charter do not derive from the constitutional traditions common to the Member States, in which case these rights cannot be interpreted in accordance with those traditions. For example, Romania does not have consumer protection in its Constitution and never has. The timidity in formulating certain protections brings with it a number of question marks and problems of interpretation which it is advisable to avoid through specific amendments. In many constitutions, consumer rights are laid down in articles specifically designed to protect them. For example, Article 44 of the Constitution of Nepal contains clearer provisions than many constitutions of EU Member States, which demonstrates the ineffectiveness of the current provisions.

It is true that from 23 January 2023 we have the Digital Decade Bill of Rights and Principles, but the wording still leaves room for interpretation. The European Declaration on Digital Rights and Principles for the Digital Decade states that the European way of digital transformation puts people at the center and is underpinned by European values and EU fundamental rights, reaffirming universal human rights and benefiting all individuals, businesses and society as a whole[[9]](#footnote-9) . At the same time, the first principle presented in the declaration is that of people-centered digital transformation. From the date of publication of the Declaration in the Official Journal of the EU on 23.01.2023, it is understood that any document must be interpreted on the basis of the set of principles and rights in the Declaration. Paragraph 4 of the Preamble of this document, by its wording, casts further shade over the framing of consumer protection as a fundamental right, leaving it among ordinary principles: 'Parliament has made several calls for the establishment of ethical principles to guide the EU's approach to digital transformation, as well as to ensure full respect for fundamental rights such as data protection, privacy, non-discrimination and gender equality, as well as principles such as consumer protection, technological and net neutrality, credibility and inclusiveness. It also called for strengthened protection of users' rights in the digital environment, as well as workers' rights and the right to disconnect." The lower category of "some" principles, i.e. other than the fundamental ones, only further widens the gap between human rights and consumer protection. The Declaration also makes a distinction between consumer rights and user rights in the digital environment, which requires a further clarification of terminology. We understand from the DSA that the difference is that users can be commercial, whereas consumers cannot. In the chapter on definitions, according to the DSA: "(c)'consumer' means any natural person who is acting for purposes other than his commercial, economic or professional activity;". We do not have a definition of users, implying that a user is usually based on a contractual relationship with the supplier, which is also true for consumers. This leads us to the following relationship: does the user group include consumers or does the consumer group include users?

In the reasons and objectives of the DSA proposal, the fundamental rights of users (which users? Can users be robots?) are discussed (!) but not the fundamental rights of consumers[[10]](#footnote-10) . Further on, the exposition is even slower, presenting a desideratum that the regulation leaves still unclear:" It is also necessary to clarify certain aspects of these rules in order to remove factors that currently discourage intermediary service providers from carrying out their own investigations on a voluntary basis to ensure the safety of their users, and to provide some clarification of the role they play from a consumer point of view in certain circumstances. "According to general dictionaries a user is a person who uses something. According to the Cambridge Dictionary, user is "someone who uses a product, machine, or service". We understand that even a robot could be a user. Therefore some changes are needed by establishing specific definitions in the field of communications and new technologies. The conclusion is even more obvious from other definitions such as the Oxford Advanced American Dictionary: "a person *or thing* that uses something"[[11]](#footnote-11) . When EU legislation talks about the fundamental rights of users and more about fundamental rights of recipient of digital services, without specifying "natural person users", for example, we are faced with a vulnerability (it doesn't matter if it's temporary) whereby, according to most of the world's dictionaries, the user can also be a thing, so it could also be a robot. *Could we in this situation still discuss the fundamental rights of the robot?*

***IMPLEMENTATION/ADOPTION CHALLENGES? SHORT ANALYSIS***

However, the EU may not have the legal basis in the Treaties on which to base certain new regulations, since Article 114 of the Treaty on the Functioning of the European Union (TFEU) provides for the adoption of measures to ensure the establishment and functioning of the internal market. It is only the possibility of regulating certain aspects that relate solely to the EU internal market, more specifically the digital single market. But let us bear in mind one of the great merits of the Court of Justice of the European Union, namely the principle that the Treaties should not be interpreted in a rigid way, but should be seen in the context of the stage of integration and the objectives they have set. This principle has allowed the EU to legislate in areas that are not subject to specific provisions in the Treaties, for example the fight against pollution (in a judgment of 13 September 2005 - case C-176/03 - in which the Court actually authorized the EU to take measures related to criminal law when they are considered "necessary" to achieve the objective pursued in terms of environmental protection). This framework would be sufficient for the regulations they propose.

In the field of communications and new technologies, when a legal problem arises, EU law and international law come together to find the most appropriate solution. We believe that we must have clear definitions in the documents we have been talking about, all the more so as the EU is currently the leading global player in the regulation of communications and new technologies, and other states, including the US, are waiting for the implementation of the DSA or the Artificial Intelligence Regulation before taking certain legislative measures at the level of their domestic law, even though they urgently need an effective federal privacy law. The Federal Trade Commission, for example, in the United States through the FTC's International Consumer Protection Program promotes enforcement, policy development and technical assistance to protect consumers in the US and abroad. It has international arrangements, agreements and formal and informal bilateral and multilateral memorandum of understanding with competition and consumer protection agencies around the world (generally competition and antitrust). We recall in this context the United Nations guidelines for the protection of consumers (soft law) first adopted by the General Assembly in resolution 39/248 of 16 April 1985, subsequently extended by the Economic and Social Council in resolution E/1999/INF/2/add. 2 of 26 July 1999, and recently revised by the General Assembly by resolution 70/186 of 22 December 2015. The Guidelines cannot help us in defining the consumer of digital services as they do not have the legal force to produce a uniform definition. It mentions in point 3 of the chapter on purposes and applications that "For the purposes of these guidelines, the term 'consumer' generally refers to a natural person, regardless of nationality, who is acting primarily for personal, family or household purposes, while recognising that Member States may adopt different definitions to meet specific domestic needs". Another international issue is that of content considered illegal, which many countries such as Germany, Brazil, Australia, Poland, Mexico, the US and the UK have had several attempts to regulate.

In the EU, also a soft law rule, the Guide to Human Rights for Internet Users[[12]](#footnote-12) focuses on the following fundamental human rights and freedoms with reference to the Internet: 1) access and non-discrimination; 2) freedom of expression and information; 3) freedom of assembly, association and participation; 4) protection of privacy and personal data; 5) education and literacy; 6) protection of children and young people; and 7) the right to an effective remedy for invoking fundamental human rights and freedoms[[13]](#footnote-13) . Although we do not find a user definition here either, paragraph 1 of the Introduction states that: "This Guide is intended for Internet users, to help them become aware of human rights in the online space". The same vulnerability remains as there is today, namely not having a uniform international definition for either consumer, user or recipient of digital services.

European Union (EU) law and public international law are two distinct legal systems with their own rules and principles, but they interact strongly in the context of regulating new technologies. The European Union can adopt legal acts implementing and integrating the rules and principles of public international law into its legislation. The Treaty on European Union (EU Treaty) provides that the EU shall respect public international law. Thus, when the EU acts in the field of new technologies, it must ensure that its actions comply with public international law obligations and principles, such as human rights in their entirety. The EU and its Member States work together with other states and international organizations to find solutions to issues related to the regulation of new technologies by negotiating and concluding international agreements, such as agreements on data transfer, cyber security or environmental protection.

Attempts to fragment the internet, a shift in its technical governance towards the integration of controllable standards and centralized enforcement, could undermine the multi-layered protection of rights that derive from international, supranational and national constitutional law. The often-discussed polarization is visible to the naked eye from every corner: the American and Chinese techno spheres extend beyond standard-setting processes into the dynamics of global governance, whether for international convention-making or for normative efforts. Ultimately, the hybridization of Internet governance is achieved through international and the continued blurring of the private-private order in the exercise of public interest functions in both democratic and authoritarian systems. When tech giants and digital platforms exercise unlimited power, at stake is the fullness of individual and collective rights and freedoms guaranteed by constitutionalism*. [[14]](#footnote-14)*

The European Declaration on Digital Rights and Principles for the Digital Decade includes a special chapter on safety, security and capacity. This is Chapter 5, where the commitments made by EU Member States are to protect "the interests of individuals, businesses and public institutions against cybersecurity risks and cybercrime, including data breaches and identity theft or identity manipulation." and to "combat and hold accountable those within the EU who seek to undermine online security and the integrity of the digital environment or who promote violence and hatred through digital means". Doesn't this commitment to protection also include classifying consumer protection as a fundamental digital right?

***RECOMMENDATIONS***

Internationally uniform definitions are needed for the consumer and user of communications and new technologies. Why? Because digitisation finds its regulation in international law on communications and new technologies. If we don't have uniform international definitions for the consumer, user or recipient of digital services, it is like not having uniform definitions for net neutrality, IoT, data protection, etc. Any characterisation of a branch of law starts from its sources and subjects or participants. Discussions about the international or national nature of new technology law are devoid of content and finality because, for example, if we have states and international organizations as the main subjects of law, then we are dealing with international law. The discussion is similar to that of the law of the sea or maritime law, because new technologies have no borders but also depend on geography. However, what regulations at international level could be drawn up and adopted urgently in relation to the situation described? First of all, the categories of fundamental rights and the definitions of terms such as consumer, user or recipient of digital services should be amended to make them as universal as possible, preferably laid down in treaties and implemented in fundamental rights protections at the level of each state, so that constitutions explicitly provide for these protections. Some proposals we have shown in the chapter: *Human Rights Affected/Affected/Covered: Where is the Place of Consumer Protection?Some proposals.*

At a general level, future legal regulations already have a basic structure of suitable solutions in the European area, among which we will consider: 1) relevant institutions and mechanisms in the regulation of new technologies and their continuous development; 2) national and international approaches based on coordination and cooperation between states; 3) the relationship between European regulations and relevant international conventions following examples of innovative legal solutions in other countries; 4) assessment of the effectiveness and applicability of current regulations; or 5) continuous adaptation and innovation of regulations in the face of new technologies. Internationally, the focus remains on legal challenges associated with new technologies, such as uniform international terminological clarification of key concepts.

This is where the importance of legal research and education comes in, as international law comprises the only category of instruments in which the joint effort of states and specialists to analyse and restore boundaries through appropriate regulations[[15]](#footnote-15) comes first.

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2. DSA - *brevitatis causa*, within this report. [↑](#footnote-ref-2)
3. See Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act). [↑](#footnote-ref-3)
4. Daniel R. Quiroga-Villamarín, *Standardisation instead of litigation: what can human rights advocates learn from consumer protection at the ISO?* In Australian Journal of Human Rights, 2022, 28:1, pp. 40-55, DOI: 10.1080/1323238X.2022.2094214. [↑](#footnote-ref-4)
5. Benöhr, Iris, *The Evolution of Consumer Protection and Human Rights*, EU Consumer Law and Human Rights, Oxford Studies in European Law (Oxford, 2013; online edn, Oxford Academic, 16 Apr. 2014), https://doi.org/10.1093/acprof:oso/9780199651979.003.0003, accessed 5 Feb. 2023. [↑](#footnote-ref-5)
6. Deutch, Sinai, *Are Consumer Rights Human Rights?*, in Osgoode Hall Law Journal 32.3, 1994, pp. 537-578, available online here: [http:](http://digitalcommons.osgoode.yorku.ca/ohlj/vol32/iss3/4)//digitalcommons.osgoode.yorku.ca/ohlj/vol32/iss3/4, accessed 05.02.2023. The author states in his conclusions: "It is indeed the right time, both in domestic and international law, for such recognition". [↑](#footnote-ref-6)
7. Peter Joseph, *The New Human Rights Movement: Reinventing the Economy to End Oppression*, BenBella Books 2017. [↑](#footnote-ref-7)
8. "The damage will be harder to identify, but I think it will be real. One set of risks involves the rights of internet users. Civil society groups have sounded the alarm, for example, about future behind-the-scenes negotiations between regulators and platforms as part of the 'crisis response mechanisms' under Article 36 or the 'risk mitigation' measures under Article 35." Daphne Keller, The EU's new Digital Services Act and the Rest of the World, published on 07 November 2022 in Verfassungsblog on constitutional matters, available here: [https:](https://verfassungsblog.de/dsa-rest-of-world/)//verfassungsblog.de/dsa-rest-of-world/, accessed 27.06.2023. [↑](#footnote-ref-8)
9. At the European level, a source for principles and rights in communications and new technologies is: European Declaration on Digital Rights and Principles for the Digital Decade 2023/C 23/01/PUB/2023/89. Recently, on 23.01.2023, this Declaration was published in the Official Journal of the European Union. [↑](#footnote-ref-9)
10. "Confirming the objectives of the e-Commerce Directive, the resolution calls for measures to focus on consumer protection by including a detailed section on online multi-stakeholder platforms, and to ensure consumer confidence in the digital economy while respecting the fundamental rights of users." [↑](#footnote-ref-10)
11. See the definition in the Oxford Dictionary available online here: [https:](https://www.oxfordlearnersdictionaries.com/definition/american_english/user)//www.oxfordlearnersdictionaries.com/definition/american\_english/user, accessed 27.06.2023. [↑](#footnote-ref-11)
12. Recommendation CM/Rec(2014)6 of the Committee of Ministers to member states on the Human Rights Guidelines for Internet Users and Explanatory Memorandum adopted by the Committee of Ministers on 16 April 2014. [↑](#footnote-ref-12)
13. On 16 April 2014, the Committee of Ministers adopted Recommendation CM/Rec(2014)6 on Human Rights Guidelines for Internet Users. The material is available here: [https:](https://rm.coe.int/guide-to-human-rights-for-internet-users-romanian-/1680768064)//rm.coe.int/guide-to-human-rights-for-internet-users-romanian-/1680768064, and was accessed on 06.02.2023.

    [↑](#footnote-ref-13)
14. See for details Giovanni De Gregorio, Roxana Radu *, Digital constitutionalism in the new era of Internet governance*, International Journal of Law and Information Technology, Volume 30, Issue 1, Spring 2022, Pages 68-87, https://doi.org/10.1093/ijlit/eaac004. [↑](#footnote-ref-14)
15. Cristina Elena Popa Tache, *Elements of Transdisciplinary Dynamics in Public International Law*, Ed. Pro Universitaria, 2023, p. 187. [↑](#footnote-ref-15)