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Fragile or Smart Consumers? Suggestions for the US from the EU

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Abstract

Due to advances in data processing, the use of digital technology is now widespread in many sectors of the world economy. It is possible that, in the near future, only a few markets will remain unaffected by this new industrial revolution. Therefore, even though this new stage in human progress raises some concerns, it is important to understand the many innovations that the digital economy has brought about. In particular, many worry about the millions of passive and relatively powerless digital consumers who, without proper education or awareness, could find themselves manipulated by a few huge and influential companies.
This paper will discuss the current state of affairs without fueling any further fear of the digital revolution by rejecting the premise that regulation can be used only as a shield to protect fragile digital consumers. Rather, by taking inspiration from some recent regulations enacted in the European Union, the paper posits that regulation can be used as a sword in the hands of consumers that grants them a leading role in the digital marketplace. It is important to consider how new rules might empower consumers and allow them to make decisions regarding the management of their personal data. After all, one of the cultural roots of Western societies is that every individual should be *faber ipsius fortunae*, i.e. individuals must forge and build their own destiny and must then be accountable for their choices.

Keywords: Digital markets; big data; personal data; consumers; data control; data portability.

JEL Codes: D83, K20, L50

Contents

1. Introduction.

Following the advent of digital technologies, many distinguished personalities in academia and elsewhere have discussed scenarios wherein digital consumers stand to be exploited, controlled, and misled by a few giant companies who are greedy for consumers' personal data and money. Often, when reading such newspaper articles and scientific reviews, it can seem like "fragile digital consumers" might soon be completely at the mercy of these increasingly powerful companies.

To defend against such a scenario, the European Union has adopted various regulations that give consumers the power to manage their personal data instead of being subject to automated decision-making. The right to data portability envisaged in the new General Data Protection Regulation (GDPR),[1] the open banking rule of the Second Payment Service Directive (PSD2),[2] and the "Retrieve Them All" provision of the proposed Digital Content Directive (DCD)[3] are all tools that will allow digital consumers to become the protagonists of their digital lives, instead of passive bystanders. Indeed, these provisions will give digital consumers the chance to decide which goods and services companies they trust with their data. Finally, the European Commission has recently presented a Communication entitled 'A New Deal for Consumers,' which presents various measures aimed at strengthening consumer rights online and giving consumers the tools to enforce their rights and receive compensation when necessary.[4]

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[1] Regulation 2016/679, (2016) OJ L 119/1.

[2] Directive 2015/2366 on payment services in the internal market, (2015) OJ L 337/35.

[3] Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, COM(2015) 634 final.

[4] European Commission, Communication 'A New Deal for Consumers', COM(2018) 183 final. The legislative package is composed of two instruments: a) a proposal for a Directive amending Council Directive 93/13/EEC (on unfair terms in consumer contracts), Directive 98/6/EC (on consumer

This paper argues that these new EU regulatory interventions suggest that a significant shift in the way policymakers, regulators and scholars conceptualize digital consumers is not only possible, but also desirable.

The paper is organized as follows. Section 2 briefly describes the most popular current paradigm of the 'fragile digital consumer.' Section 3 gives a concise account of the recently or soon-to-be enacted rules that the EU institutions have created to empower digital consumers and make them conscious decision-makers in digital markets. Section 4 then explores what might emerge as a new model of the digital consumer, that is, the paradigm of smart consumers. Finally, Section 5 concludes by elaborating on the legal and policy consequences of this new model of the smart consumer.

2. The narrative of the fragile digital consumer.

Over the last few years, an increasing number of scholars have denounced the fact that digital consumers find themselves in a disadvantaged position *vis à vis* large companies.

According to this narrative, digital consumers are unaware of the real profit-driven mechanisms governing digital platforms.[5] Misled by charming mottos evoking the free nature of digital services,[6] consumers do not realize that zero-price goods are not really

protection in the indication of the prices of products offered to consumers), Directive 2005/29/EC (on unfair business-to-consumer commercial practices) and Directive 2011/83 (on consumer rights) as regards better enforcement and modernisation of EU consumer protection rules, COM(2018) 185; b) a proposal for a Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, COM(2018) 184.

[5] See J. Whittington and C.J. Hoofnagle, 'Social Networks and the Law: Unpacking Privacy's Price', 90 *N.C. L. Rev*. 1327, 1357 (2012) observing that, "consumers profoundly misunderstand the rules underlying these transactions; they do not understand the terms of trade."

[6] "It is free and will always be" is, indeed, the statement appearing on the Facebook's home page.

gratuitous,[7] but traded in exchange for their attention[8] and personal data.[9] Thus, notwithstanding their many benefits for society, digital platforms are often considered to take advantage of their users, who cannot understand the full value of their personal data[10] and have no share in the profits that platforms make from that personal data.[11]

In addition, many scholars – especially those conducting research on privacy – complain about the strong information asymmetry between digital consumers and the companies holding their data.[12] Whereas consumers know almost nothing about these companies, the companies are often able to determine characteristics about consumers, even characteristics that their consumers do not want to reveal.[13] Moreover, the fact that big data analytics can generate in-depth consumer profiles can pave the way for many undesirable consequences such as: (*i*) the exploitation of the most vulnerable

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[7] J.N. Newman, 'The Costs of Lost Privacy: Consumer Harm and Rising Economic Inequality in the Age of Google', 40 *William Mitchell Law Review* 849, 860-861 (2014).

[8] T. Wu, *The Attention Merchants: How Our Time and Attention are Gathered and Sold*, Atlantic Books (2017); J.N. Newman, 'Antitrust in Zero-Price Markets: Foundations', 164 *U. Pa. L. Rev.* 149 (2015); D.S. Evans, 'Attention Rivalry Among Online Platforms', 9 *J. Competition L. & Econ*. 313 (2013).

[9] I. Graef, 'Market Definition and Market Power in Data: The Case of Online Platforms', 38 *World Competition* 473, 477 (2015). For consumers' lack of knowledge as to the value of their personal data, see A. Acquisti and J. Grossklags, 'What Can Behavioral Economics Teach Us About Privacy?', in A. Acquisti, S. Gritzalis, C. Lambrinoudakis, S. di Vimercati (eds.), *Digital Privacy: Theory, Technologies and Practices*, Auerbach Publications (2007), 363.

[10] See C. Argenton and J. Prüfer, 'Search Engine Competition with Network Externalities', 8 *J. Competition L. & Econ*. 73 (2012) claiming that Google Search users do not take into account that search engines extract wealth from personal data. See also S. Vaidhyanathan, *The Googlization of Everything (And Why We Should Worry)*, University of California Press (2011); J. Whittington and C.J. Hoofnagle, 'Unpacking Privacy's Price', 90 *N.C. L. Rev.* 1327 (2012); and A.P. Grunes, 'Another Look at Privacy', 20 *Geo. Mason L. Rev.* 1107, 1123 (2013).

[11] See H.A. Shelanski, 'Information, Innovation, and Competition Policy for the Internet', 161 *U. Pa. L. Rev*. 1663, 1678 (2013). In addition, R.T. Rust, P.K. Kannan, and N. Peng, 'The Customer Economics of Internet Privacy', 30 *J. Acad. Marketing Sci.* 455, 456 (2002) maintain that, "while the costs of obtaining and processing information about consumers are decreasing with the advances in technology, the value of consumer information for businesses has been increasing."

[12] F. Pasquale, *The Black Box Society*, Harvard University Press (2015).

[13] See O. Tene and J. Polonetsky, 'Big Data for All: Privacy and User Control in the Age of Analytics', 11 *Northwestern Journal of Technology and Intellectual Property* 239 (2013); D.J. Solove, 'Access and Aggregation: Public Records, Privacy and the Constitution', 86 *Minn. L. Rev.* 1137 (2002); D.J. Solove, 'A Taxonomy of Privacy', 154 *U. Pa. L. Rev.* 477 (2006).

consumers[14] via unfair terms and conditions as well as personalized prices;[15] (*ii*) discrimination against minorities and other categories of consumers[16] based on the use of sensitive criteria, such as gender or religion; [17] and (*iii*) data determinism,[18] which deprives individuals of autonomy and free choice in a world where their decisions are determined by algorithms and big data.[19]

Furthermore, some scholars maintain that in online markets digital consumers are unable to fully judge the merits of digital companies. The argument is that, in making their choices, consumers are essentially at the mercy of companies, especially when: (*i*) digital products and services are 'experience' goods, i.e., goods whose value is difficult to ascertain before consumption, or goods whose qualities are impossible for the consumer to ascertain at all, [20] such as a search engine; [21] (*ii*) prices are not a

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[14] See Newman, supra note 7, 857; D. Boyd and K. Crawford, 'Critical Questions for Big Data', 15 *Information, Communication and Society* 662 (2012); G. Rutherglen, 'Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality', 74 *Fordham L. Rev*. 2313 (2006); M. Selmi, 'Was Disparate Impact Theory a Mistake?', 53 *UCLA L. Rev*. 701, 702–704 (2006).

[15] M. Maggiolino, 'Personalised Prices in the European Competition Law', Bocconi Legal Studies Research Paper No. 2984840 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2984840.

[16] See Federal Trade Commission, *Big Data. A Tool for Inclusion or Exclusion?* (2016) https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf; and White House, Executive Office of the President, *Big Data: A Report on Algorithmic Systems, Opportunity, and Civil Rights* (2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/2016_0504_data_discrimination.pdf; E. Ramirez, 'The Privacy Challenges of Big Data: A View from the Lifeguard's Chair', (2013) 8, https://www.ftc.gov/public-statements/2013/08/privacy-challenges-big-data-view-lifeguard%E2%80%99s-chair.

[17] See K. Crawford and J. Schultz, 'Big Data and Due Process: Toward A Framework to Redress Predictive Privacy Harms', 55 *B. C. L. Rev.* 93 (2014); D.K. Citron and F. Pasquale, 'The Scored Society: Due Process for Automated Predictions', 89 *Washington L. Rev.* 1 (2014); C. Dwork and D.K. Mulligan, 'It's Not Privacy, and It's Not Fair', 66 *Stan. L. Rev. Online* 35 (2013).

[18] S. Strauß, 'Big Data – Towards a new Techno-Determinism?', in Proceedings of the ISIS Summit Vienna 2015 (2015), https://sciforum.net/conference/isis-summit-vienna-2015/paper/2919/download/pdf+&cd=4&hl=it&ct=clnk&gl=it.

[19] See M. Gal and N. Elkin-Koren, 'Algorithmic Consumers', 30 *Harvard Journal of Law & Technology* 1, 15-17 (2017), maintaining that even the algorithms taking consumer-friendly decisions end to limit consumers' autonomy and free choice and expose consumers to privacy and security harms. See also M. Gal, 'Algorithmic Challenges to Autonomous Choice' (2017), https://ssrn.com/abstract=2971456.

[20] See A. Gaudeul and B. Jullien, 'E-commerce, two-sided markets and info-mediation', in E. Brousseau and N. Curien (eds.), *Internet and Digital Economics*, Cambridge University Press (2008), 268; M.E. Stucke and A. Ezrachi, 'The Curious Case of Competition and Quality', 3 *Journal of*

reliable indicator of the quality of those goods,[22] and also because they may be offered for free;[23] and (*iii*) entrepreneurs engage in deliberately complex behavior through the use of algorithms,[24] which are difficult to decipher.[25] According to this narrative, then, digital consumers would never truly be able to condition markets in relation to their desires and preferences.

Finally, some scholars have noticed that, in the digital economy, consumers are prone to being given false and misleading information. In a sense, they are prone to being controlled. For example, by analyzing big data, firms can take advantage of the cognitive biases that they associate with each consumer and thus offer personalized advertising and other pieces of customized information; the ultimate result is that

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Antitrust Enforcement 227 (2015), and D.S. Evans, 'Governing Bad Behavior by Users of Multi-Sided Platforms', 27 *Berkeley Tech. L. J.* 1201, 1215 (2012).

[21] M. Patterson, 'Google and Search-Engine Market Power', *Harv. J.L. & Tech.* 1 (2013), arguing that the inability to appreciate the quality of the research results would prevent the functioning of the reputational mechanism that should deprive Google of incentives to deteriorate its results, so as not to lose customers. See also J.D. Ratliff and D.L. Rubinfeld, 'Online Advertising: Defining Relevant Markets', 6 *J. Competition L. & Econ.* 1, 15 (2010), who instead believe that Google consumers would be ready to use it less or to prefer other search engines, if only Google worsen the results returned by its engine.

[22] It is customary to think that there is a positive correlation between prices and quality, so a high quality product would be sold at a higher price than the low quality price: see OECD, 'The Role and Measurement of Quality in Competition Analysis' (2013), 44, http://www.oecd.org/competition/Quality-in-competition-analysis-2013.pdf; and W.M. Sage and P.J. Hammer, 'Competing on Quality of Care: The Need to Develop a Competition Policy for Health Care Markets', 32 *U. Mich. J.L. Ref.* 1069, 1078-1088 (1999). Nonetheless, this relationship of direct proportionality is not always true even when prices are positive: see OECD, 'Role and Measurement', supra, 79; D.R. Desai and S. Weber Waller, 'Brands, Competition and the Law', 2010 *Brigham Young U. L. Rev.* 1425 (2010); Stucke and Ezrachi, supra note 20, 241, noting that, "consumers may not always respond as the agencies expect them to – not because of unforeseen bias or heuristic but rather because of the information landscape in which consumers operate and their ability to analyze and decode that information."

[23] See Newman, supra note 8, 179, noticing that, "there is no analogue to a "pricetag" for attention (or information) costs."

[24] See A. Ayal, 'Harmful Freedom of Choice: Lessons from the Cellphone Market', 74 *Law and Contemporary Problems* 91, 94 (2011); O. Bar-Gill and E. Warren, 'Making Credit Safer', 157 *U. Pa. L. Rev.* 1, 27-28 (2008); X. Gabaix and D. Laibson, 'Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets', 121 *Q. J. Econ.* 505, 505-508 (2006); E.J. Miravete, 'The Doubtful Profitability of Foggy Pricing', NET Institute Working Paper No. 04-07 (2004), http://ssrn.com/abstract=618465.

[25] See C. Sandvig, K. Hamilton, K. Karahalios, and C. Langbort, 'An Algorithm Audit', in S.P. Gangadharan (ed.) *Data and Discrimination: Collected Essays*, New America Foundation (2014), 6–10.

companies can induce consumers to make choices that might be against their best interests.[26] In addition, it is said that in the digital environment, if some popular firms spread false and misleading information, their rivals might be unable to react against it by providing consumers with equally popular sources of alternative information.[27]

An in-depth discussion about whether this narrative is well-grounded goes beyond the scope of this paper. However, it is important to note that there are many voices who oppose this narrative, ranging from those who argue that consumers could not, on their own, extract any value from their personal data anyway, to those who argue that consumers are simply willing to trade their personal data for a valuable new digital service. There are also many who believe in the consumer's ability to discern good firms from bad ones.[28] Against this backdrop, the European Union has just adopted some rules that presuppose a different paradigm of the consumer and, furthermore, suggest that it is possible to promote a broader re-conceptualization of digital consumers.

3. The empowerment of the European digital consumer.

In the context of the Digital Single Market strategy, the EU has recently been experiencing a wave of regulatory interventions aimed at changing the paradigm of the digital consumer.[29]

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[26] R. Calo, 'Digital market manipulation', 82 *GW Law Review* 995, 999 (2014).

[27] M. Patterson, *Antitrust law in the new economy. Google, Yelp, LIBOR, and the Control of Information,* Harvard University Press (2017), 70.

[28] See, among others, H. Hovenkamp, 'Antitrust and Information Technologies', 68 *Fla. L. Rev.* 419 (2017); A. Goldfarb and C. Tucker, 'Shifts in Privacy Concerns', 102 *Am. Econ. Rev.* 349 (2012); P.A. Norberg, D.R. Horne, and D.A. Horne, 'The Privacy Paradox: Personal Information Disclosure Intentions Versus Behaviors', 41 *J. Consumer Aff.* 100 (2007).

[29] European Commission, Communication on 'A Digital Single Market Strategy for Europe', COM(2015) 192 final. The Digital Single Market is a strategy adopted in 2015 by the European

First and foremost, the new GDPR, which came into force on May 25, 2018, aims to empower individuals by giving them more control over their personal data. Due to rapid technological developments, the collection and sharing of personal data has increased significantly. It is important that people 'shall have control of their own personal data.'[30] Hence, a new right to data portability has been introduced in order to 'further strengthen [data subjects'] control' over their personal data.[31] Indeed, pursuant to Article 20 of the GDPR, each person has the right to have returned to them personal data they have provided to a company or organization on the basis of consent or contract. Furthermore, each person has the right to have that data transmitted without hindrance from one controller to another (even directly where technically feasible). Thus, owing to the data portability right, internet users are allowed to choose how to manage their data: they can transfer data between online providers; they are able to give their profiles, such as their past search history, to whoever will use these profiles to offer value-added personalized services; and they are capable of exerting influence over the trading and commercialization of their data. Therefore, thanks to the data portability right, digital consumers can become the conscious enablers of new business relationships consisting of the exchange and marketing of personal data between firms.

In addition, by affirming individuals' control over their personal data, data portability is expected to avoid the lock-in of personal data, to 're-balance' the relationship between data subjects and data controllers, (i.e., between digital consumers and digital platforms), and to encourage competition between companies.[32] Indeed, the rationale

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Commission to ensure access to online activities for individuals and businesses under conditions of fair competition, consumer and data protection, removing geo-blocking and copyright issues.

[30] GDPR, supra note 1, Recital 7.

[31] GDPR, supra note 1, Recital 68.

[32] Article 29 Data Protection Working Party, 'Guidelines on the right to data portability', 2017, 4. See also European Commission, Communication 'Stronger protection, new opportunities - Commission

for the data portability right does not end with the protection of individuals' digital identities. Consumer empowerment through individual control over personal data can be instrumental in achieving broader economic objectives and, in particular, more competitive markets.[33] Therefore, data portability is not only a matter of data protection but also of competition policy.[34]

The right to data portability is a novelty in the regulatory landscape, finding its only precursor in the portability of telephone numbers.[35] However, in the EU, data portability is no longer an isolated phenomenon, but rather an emerging tool.[36]

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guidance on the direct application of the General Data Protection Regulation as of 25 May 2018', COM(2018) 43 final. Other provisions included in the GDPR may further limit platforms' ability to gain access and to process users' personal data. Indeed, additional rights are recognized with regard to profiling: in particular, according Article 22(1) individuals will have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning them or similarly significantly affects them. Moreover, where personal data are processed for direct marketing purposes, individuals will have the right to object at any time to processing of personal data concerning them for such marketing, which includes profiling to the extent that it is related to such direct marketing (Article 21(2)).

[33] O. Lynskey, 'Aligning data protection rights with competition law remedies? The GDPR right to data portability', *European Law Review* 793, 803 (2017). See also V. Kathuria and J.C. Lai, 'User Review Portability: Why and How?' TILEC Discussion Paper No. 2018-023, https://ssrn.com/abstract=3203344, exploring the possibility of porting user reviews in order to enhance the competition among e-commerce platforms. It is worth to note that data portability may also result from the application of competition law. However, in this case the scope of application would be different. While the portability imposed by antitrust authorities applies to all (personal and not personal) data but only for dominant firms, the same provision under the GDPR applies only to personal data but for all firms.

[34] P. De Hert, V. Papakonstantinou, G. Malgieri, L. Beslay, I. Sanchez, 'The right to data portability in the GDPR: Towards user-centric interoperability of digital services', 34 *Computer Law & Security Review* 193 (2018); I. Graef, M. Husovec, N. Purtova, 'Data Portability and Data Control: Lessons for an Emerging Concepts in EU Law', TILT Working Paper No. 2017-041. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3071875; B.-J.Koops, 'The trouble with European data protection law', 4 *International Data Privacy Law* 250 (2014).

[35] Commission Staff Working Paper, 'Impact Assessment' accompanying the GDPR, SEC(2012) 72 final, 28: "Portability is a key factor for effective competition, as evidenced in other market sectors, e.g. number portability in the telecom sector." See also Lynskey, supra note 33, 796; De Hert, Papakonstantinou, Malgieri, Beslay, Sanchez, supra note 34, 194-196.

[36] More recently, see also the Proposal for a Regulation of the European Parliament and of the Council on a framework for the free-flow of non-personal data in the European Union, 2017/0228 (COD) seems to create a new right to also business-to-business data portability. In this regard, Article 6 assigns to the European Commission the duty to encourage and facilitate the development of self-regulatory codes of conduct, in order to define guidelines on best practices in facilitating the switching of providers and to ensure that they provide professional users with sufficiently detailed, clear and transparent information before a contract for data storage and processing is concluded.

Complementing the GDPR, Article 13(2)(c) of the proposed DCD would allow consumers to retrieve all content provided by the consumer and any other data produced or generated through the consumer's use of the digital content.

More generally, the DCD is an initiative aimed at providing harmonized rules for the supply of digital content and online sales of goods. Among other issues, the proposal tackles two contractual rights (modification and termination of long term contracts), which have been identified as problematic. In order to ensure that the consumer has the right to terminate a contract wherein digital content is exchanged not for a price but for some counter-performance other than money (e.g., by giving access to personal data), the supplier must allow the consumer to retrieve all data uploaded by the consumer, produced by the consumer with the use of the digital content, or generated through the consumer's use of the digital content.[37] By also covering data generated through the consumer's use of a platform, the scope of the provision is broader than GDPR data portability. Moreover, the degree of control granted to consumers is higher since, pursuant to Article 13(2)(b), the supplier must refrain from the use of data retrieved by the consumer after contract termination.[38] However, the proposal, unlike the GDPR, does not recognize a consumer's right to have their content directly transmitted to a new provider.

As part of the New Deal for Consumers initiative,[39] the recent proposal for a Directive on better enforcement and modernization of EU consumer protection rules introduces new consumer rights in relation to "free" digital services (i.e., digital services for

[37] DCD, supra note 3, Recital 39.

[38] Graef, Husovec, Purtova, supra note 34, 22-23; N. Duch-Brown, B. Martens, and F. Mueller-Langer, 'The economics of ownership, access and trade in digital data', Digital Economy Working Paper 2017-01, JRC Technical Reports; https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/economics-ownership-access-and-trade-digital-data .

[39] Supra note 4.

which consumers do not pay money but provide personal data). According to this provision, free digital services will be covered, just like paid services, by the Consumer Rights Directive.[40] In its current form, the Consumer Rights Directive only applies to paid digital services, but it is silent on the applicable rights for contracts where the consumer provides personal data instead of monetary payment. Pursuant to the proposed Directive, consumers would have the same right to pre-contractual information and to cancel the contract within a 14-day right-of-withdrawal period, regardless of whether they pay for the service with money or provide personal data.

The other major regulatory intervention aimed at giving consumers more control over their personal data is the PSD2, which was enacted on January 13, 2018. Even though the Directive is not part of the Digital Single Market strategy, it shares a similar rationale and goals regarding the relevance of big data in digital markets, the need to promote competition by lowering switching costs, and the active role that consumers should be entitled to play.

The potential applications of big data analytics, together with new business models which provide innovative digitally-enabled services (FinTech), can improve the competitiveness of banking and financial services. Indeed, financial services are awash with data and all kinds of financial services and products could be impacted as the use of big data technologies start serving various purposes. These services could include the profiling of customers and identification of patterns of consumption in order to create targeted offers and personalized products and services, as well as the support of finance and risk control activities.[41]

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[40] Directive 2011/83/EU, (2011) OJ L 304/64.

[41] European Supervisory Authorities, Joint Committee Discussion Paper on The Use of Big Data by Financial Institutions, 2016, 8-10, https://www.esma.europa.eu/sites/default/files/library/jc-2016-86_discussion_paper_big_data.pdf.

New FinTech services – such as those that provide insights into personal spending, budgeting and comparison tools, and tailored financial planning – are based on the innovative use of financial data. Therefore, they need access to accounts' data to implement their business model, whereas traditional players have always kept a strict and exclusive control over this information in order to consolidate their market power. To help FinTech achieve its pro-competitive potential, the PSD2 introduces the access-to-account rule, which allows providers of payment services and account information services to have free access to a user's account data, on the condition that it is accessible online and the customer gives his explicit consent.[42] Here, again, consumers are in a position to make a conscious choice not only as to the use of their data, but also as to who can use it to provide them services and goods. Once again, consumers are enabled to play an active role in digital markets.

Data portability rights enshrined in the GDPR and the PSD2 share the same rationale of enabling and encouraging inter-platform competition in digital markets by lowering consumers' switching costs and avoiding personal data lock-in. While the GDPR explicitly recognizes individual control over personal data as an objective of data protection law, the PSD2, by introducing the access-to-account rule, aims to generate competition within retail payment markets by empowering consumers to control and transfer their own data. Finally, the proposed DCD increases the degree of individual control, allowing the consumer to retrieve not only all content provided, but also any data produced or generated through their use of the platform. As a consequence, these

[42] PSD2, supra note 2, Articles 36, 66, 67 and 68. Since account data is personal data, when customers ask for their data to be portable, they will need to make a choice between which regimes they intend to opt for (PSD2 or GDPR). As clarified by the Article 29 Data Protection Working Party, supra note 32, 8, since the access rule envisaged in the PSD2 is a sector-specific regime, the potential option exercised by the customer overrides the application of the general data portability principle established in the GDPR.

new EU rules require the European digital consumer to play the role of an active decision-maker.

Moreover, to further confirm the active role that European institutions would like to assign to digital consumers, we should also consider Article 22 of the GDPR. The provision grants data subjects the right to seek and receive an explanation for decisions made by algorithms, especially if these algorithms indicate the use of profiling techniques.[43] Thus, Article 22 is not related to the control that individuals can have over their personal data, but rather over automated, algorithm-based decision-making processes.

From this perspective, Article 22 is a further specification of the broader right of access granted by Articles 13-15 of the GDPR which mandate that individuals have the right to inquire about "the existence of automated decision-making, including profiling, […] and, at least in those cases, [to ask for] meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject." Once the provision has been adopted, consumers who choose not to exercise the right thereby assigned cannot complain that they have unconsciously undergone algorithm-based decisions.

4. The age of the smart consumer.

The recent EU regulatory interventions bring to the fore a reshaping of the traditional landscape of consumer protection rules. Indeed, by granting consumers the right to transfer data from one controller to another, the right to allow third-party providers to

[43] Article 22 of the GDPR states that, "[t]he data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her."

access their bank account data, and the right to retrieve any data produced or generated through their use of a platform, the GDPR, the PSD2 and the DCD together introduce a different paradigm of the consumer.

Since the European strategy relies on empowering individuals by giving them more control over their data, it stands to create consumers who are aware of the risks and potentialities of digital technology and are able to take advantage of the aforementioned new rights in order to manage their data and digital identity.

Rather than being just a fragile individual regularly exposed to the threat of exploitation, discrimination, control and deception by tech companies, the digital consumer is expected to be a smart individual able to make conscious choices and to play an active role in the market.

By embracing the digital revolution, this European choice is forward-looking; it abandons a purely protective and paternalistic regulatory approach focused on consumers' fragilities in order to experiment with a more proactive approach. After all, a mere defensive strategy would run the risk of being ineffective: individuals at the heart of the fragile consumer paradigm are considered so naïve and powerless that it is hard to think of a fully-fledged regulation capable of really protecting them. In addition, such a regulation would also be very costly: not only because it would occur at the expenses of entrepreneurs' "animal spirits," but also because the digital revolution is going to involve an increasing number of economic sectors. If digital consumers require a specific regulation to defend them, in a few years an increasing number of markets will have to be regulated, which is a very expensive option. Finally, a purely defensive approach merely assigns to regulators and public officers (rather than to entrepreneurs) the right to make decisions on behalf of consumers. In this scenario, consumers' autonomy and self-determination is still reduced.

In contrast, a more proactive approach focusing on consumers' ability to manage their data and choose who can use it has many merits. First, by requiring consumers to make choices as to their digital identities and digital consumption, they are incentivized to educate themselves and to be accountable for their decisions. Second, by giving consumers more control over their data, it increases the competition between firms, since they would no longer be able to use their data booty to defend their legacy market positions. Notably, both the data portability rule and the access-to-account rule aim at encouraging inter-platform competition and challenging incumbents by lowering consumers' switching costs and avoiding personal data lock-in. Furthermore, these rules suggest that, with the free flow of data, platforms will compete to provide their services and products. Therefore, if in such an environment consumers continue to prefer incumbents, this means that those platforms will be the most efficient and innovative and will offer the most preferred goods. Indeed, this new proactive approach taken by the EU institutions undermines the opinion that today's tech-giants do not deserve their dominant positions because they have acquired them by exploiting consumers' fragilities.[44]

In other words, when it comes to regulation, it is true that it can be used as a shield to protect the weakest economic agents. Yet regulation can also be perceived as a sword in the hands of consumers, assigning them the lead role that they should have in any market economy. Indeed, one should not forget that the market is a selective

[44] The relevance of corporate size is one of the issues raised in the lively debate recently fueled by the so called "New Brandeis" movement (colorfully labeled also as "Hipster Antitrust" movement). The proponents of this movement call for a return to antitrust's original goals, criticizing the consumer welfare standard and the efficiency-based approach: according to their reasoning, rather than endorsing the Chicago School approach and adopting the maximization of consumer welfare as its exclusive goal, antitrust should focus on the size of firms, the level of industry concentration, injuries to small business, fairness, and wealth redistribution. As regards to the size of firms, this concern raises the question about the distinction between market power and corporate bigness: see D.A. Crane, 'Four Questions for the Neo-Brandeisians', 1 *CPI Antitrust Chronicle* 63, 66 (2018), maintaining that "[e]ven during the era in which Brandeisian views largely prevailed in the Supreme Court, mere corporate bigness was not sufficient to constitute an antitrust offense."

mechanism that sifts out the most efficient and innovative firms based on the preferences of consumers.

The route paved by the EU institutions could also be taken by the US government, not only because digital markets are global but also because the idea of consumer empowerment coupled with minimal governmental intervention is entirely consistent with US culture.[45] In other words, it is true that the GDPR and the PSD2 are full of many detailed and sometimes unclear prescriptions that may make business cumbersome and uncertain. Yet, among such an array of provisions, data portability and access-to-account rules are, for the reasons stated above, the tools that make markets more open and more prone to competitive pressure.

In this regard, it is worth noting that the California Consumer Privacy Act was approved in June 2018 and is set to go into effect on January 1, 2020. The Act provides consumers (defined as natural persons who are California residents) with "an effective way to control their personal information," by ensuring the following rights: (a) the right to request that a business disclose the categories and specific pieces of personal information that it collects, the sources from which that information is collected, the business purposes for collecting or selling the information, and the identity of third parties with which the information is shared, sold or disclosed; (b) the right to request deletion of personal information; (c) the right to opt out of the sale of personal information by a business; (d) the right to receive equal service and pricing from a business, if they opt out and exercise their privacy rights. In relation to the last right, it

[45] Although consumer empowerment holds several meanings across literature, the conceptualization which dominates the US (as well as Western) culture equates consumer empowerment with the power to chose and with neighborhood rights, such as the right to be informed, the right to be educated, and the right to complain – the so-called "consumer voice." See A. Shankar, H. Cherrier, and R. Canniford, 'Consumer empowerment: a Foucauldian interpretation', 40 *European Journal of Marketing* 1013 (2006); T. Harrison, K. Waite, and G.L. Hunter, 'The internet, information and empowerment', 40 *European Journal of Marketing* 972 (2006); C. Brennan, and M. Coppack, 'Consumer empowerment: global context, UK strategies and vulnerable consumers', 32 *International Journal of Consumer Studies* 306 (2008); B. Rezabakhsh, D. Bornemann, U. Hansen, and U. Schrader, 'Consumer power: a comparison of the old economy and the Internet economy, 29 *Journal of Consumer* Policy 3 (2006); J.W. Huppertz, 'Firms' complaint handling policies and consumer complaint voicing', 24 *Journal of Consumer Marketing* 428 (2007).

is important to note that businesses are allowed to charge a different price or provide a different level of service to a customer "if that difference is reasonably related to the value provided to the consumer by the consumer's data." Businesses can also offer financial incentives to consumers for the collection, sale, or deletion of personal information, subject to specific conditions and notice requirements.

When comparing the California legislation with the GDPR, some significant differences emerge.[46] First, whereas according to the GDPR users must opt-in to give their consent, the Californian Act does not require companies to obtain user consent before processing their personal information; instead it requires businesses to offer consumers the opportunity to opt-out to prevent the sale of user data. Moreover, while both grant users the right to know what personal information a company has about them, the GDPR includes some relevant additional provisions, such as the right to rectification (Article 16), the right to be forgotten (Article 17), the right to data portability (Article 20), and the right not to be subject to a decision based solely on automated processing (Article 22). With regards to data portability, while Article 20 of the GDPR grants to each person the right to have returned personal data they have provided and allows the direct transmission of the data from one controller to another (where technically feasible), the Californian Act states that a business that receives a consumer request to access personal information shall promptly take steps to disclose and deliver the information by mail or electronically, "and if provided electronically," the information shall be in a portable and, "to the extent technically feasible," in a readily useable format that allows the consumer to transmit this information to another entity without hindrance.

[46] Both the legislations has been recently criticized by the FTC Commissioner Noah Joshua Phillips ('Keep It: Maintaining Competition in the Privacy Debate', remarks at the Internet Governance Forum, Washington D.C., 27 July 2018 <https://www.ftc.gov/es/system/files/documents/public_statements/1395934/phillips_-_internet_governance_forum_7-27-18.pdf> accessed 4 August 2018): "The American approach stands in contrast to the privacy regime now in place in Europe, and the one set to become effective in California in 2020. Fundamentally, these regimes require everybody to adhere to one set of standards (and one set of costs) that apply to all online entities—regardless of size, regardless of service, regardless of risk." Phillips raises concerns about the costs and benefits of these interventions, namely that regulatory burdens may exclude potential market entrants or inhibits innovation and that privacy rules in particular may skew to benefit large incumbents.

5. Concluding remarks.

Faber est suae quisque fortunae is the Latin saying that represents the idea that any individual must forge and build their own destiny and must then be accountable for their choices. This saying belongs to the culture of Western societies, and we believe that the array of principles that it includes should also frame the conceptualization of digital consumers.

Because of the many efficiencies and innovations that the digital revolution is capable of engendering, it is a phenomenon that is likely going to impact an increasing number of markets and economic sectors. In contrast, even if the apocalyptic flavor of some statements about digital consumers is questionable, it is true that the digital revolution might expose consumers to some perils by depriving them of wealth, equal opportunities, self-determination and autonomy.

Given this state of affairs, policy makers, regulators, and scholars have two paths they can take. On the one hand, they can continue to focus on the many limits that characterize digital consumers and thus make a claim for rules harnessing entrepreneurs and preventing any practice that could harm the fragile digital consumer. But this comes with the ultimate risk of being over-deterrent. On the other hand – or in addition – they can empower consumers by not only making them the true protagonists of digital markets but also by assigning credit to their decisions. Moreover, such a proactive approach would be more efficient because it decreases the overall cost of governmental intervention in markets.

The European Union seems ready to go forward with this second route. For several reasons we support this choice, and we would like its rationale to be followed on many other occasions and in other jurisdictions. First, we doubt that regulators will actually be able to protect digital consumers; if the paradigm of the fragile consumer were fully

accepted, there would be no regulation capable of preventing the many harms that such a consumer might suffer. Second, we do not understand how consumers would be better off if those who decide for them are regulators, rather than entrepreneurs. In other words, if autonomy and self-determination are the values to be protected, the call for rules protecting consumers is a misguided one. Third, the costs of regulations sheltering the fragile consumer would be very high, not only because entrepreneurs' freedom to experiment with innovations will be limited but also because the digital environment is going to become ubiquitous. Indeed, in a few years the distinction between digital and non-digital consumers will no longer make sense. As a consequence, the current sector-based regulation enacted to defend digital consumers would have to become a universal regulation in order to defend all consumers. But this would mean a path to a centralized economy, where consumers' choices are devoid of meaning because consumers themselves are deemed fragile.

We hope that in the future an increasing number of individuals will become responsible and conscious digital consumers, fully empowered with the ability to decide what is in their best interest. Regulatory provisions, such as the right to data portability granted by the GDPR and the access-to-account rule envisaged in the PSD2, pursue this goal by entrusting individuals with more control over their data and digital consumption. choices. Such proactive regulatory actions, accompanied by a cultural change as to the conceptualization of consumers, would even make antitrust interventions less necessary; instead, we will be able to say "in consumers we trust."