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Synoptic approach regarding the implications generated by the use of 'ai systems' in business-to-consumer contracts

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Summary: Introduction. 1. What is the 'AI system' and how can it be used in a consumer context? 2. To what extent are the actions of digital assistants attributable to consumers? Comments. 3. The right of consumers to be informed at the pre-contractual stage, in the context of the use of digital assistants. Case law reflection. 4. The extent to which we can appreciate the need to regulate a new consumer's right – the right not to be discriminated against. Conclusions. Bibliography.

Abstract: The issue of the use of AI in the field of B2C contracts is in line with the European Union's objectives of ensuring the proper functioning of the internal market by establishing harmonised rules governing the use of artificial intelligence in the internal market while ensuring a high level of protection of public interests, such as health, safety and the protection of fundamental rights as recognised and protected by European Union law. The presence of 'digital assistants' in B2C contracts is a 'component' of the European Union's Digital Strategy to regulate artificial intelligence. Topics such as the presence of digital assistants and the implications of their actions in the pre-contractual, conclusion or execution stages of B2C contracts, as well as the identification of specific elements of B2C contracts, following their automation through the presence of AI, or the need for legislative adjustments precisely in order to increase the legal protection of consumers in the context of the presence of AI, will be topics of reflection advanced by the author in the present research.

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INTRODUCTION

Advances in new technologies and in particular the development of artificial intelligence and automated decision-making processes raise questions about consumer safety in the face of new challenges².

In the new context, we appreciate the potential of automated decision-making processes that offer consumers innovative services, including new digital services such as virtual assistants and chatbots. However, when interacting with a system that automates decision-making, consumers need to benefit from a robust, we believe innovative, legislative framework ... in the context of the current legislation, a 'recalibration of the legislation' is required.

The presence of the European Union, through its institutions involved in the decision-making process, is crucial and a common EU approach is needed to help ensure the benefits of artificial intelligence and automated decision-making processes and to reduce risks across the Union. Thus, there is currently a growing interest in legislating at EU level on the two issues mentioned above, including the draft Regulation (EU) on Artificial Intelligence, which lays down harmonised rules on: (a) the placing on the market, putting into operation and use of artificial intelligence systems – AI systems – in the European Union (e.g. the use of AI tools covering issues such as preventing the distribution of abusive content, managing the risks associated with the technology and promoting safe and secure AI); (b) the prohibition of certain AI practices; (c) specific requirements for high-risk AI systems and obligations for operators of such systems; including rules on market monitoring and surveillance.

With reference to the topic under review, this EU framework sets out a robust methodology on the risks posed by 'high-risk' AI systems³ that pose significant risks to consumer health and safety, circumscribed by business-to-consumer contracts. In the light of Recital 28 of the Artificial Intelligence Act, in line with the objectives of Union harmonisation legislation to facilitate the free movement of products in the

² Erjola Aliaj, E. T. "E-commerce regulation in Albania", *Juridical Tribune - Tribuna Juridica*, Volume 13, Issue 3, October 2023, pp. 441–455.

³ References to high-risk IA systems can be found in Title III, which contains specific rules for IA systems that create a high risk to the health and safety of individuals or their fundamental rights. In line with a risk-based approach, these high-risk IA systems are allowed on the EU market subject to certain mandatory requirements and an accurate conformity assessment. Thus, it is considered that a qualification of a system as high risk depends not only on the function performed by the AI system, but also on the specific purpose and modalities for which the system is used. The extent of the negative impact of the AI system on the fundamental rights protected by the Charter is particularly relevant when an AI system is classified as high risk. These rights include the right to human dignity, respect for private and family life, protection of personal data, freedom of expression and information, freedom of assembly and association and non-discrimination, consumer protection, workers' rights, rights of persons with disabilities, right to an effective remedy and to a fair trial, right of defence and presumption of innocence, right to good administration.

internal market and to ensure that only safe and compliant products are placed on the market, it is important that safety risks that may be generated by a product due to its digital components, including AI systems, are adequately prevented and mitigated.

In conclusion, it is essential that current levels of consumer protection are maintained, but it is crucial to understand consumer rights as part of a wider regulatory infrastructure for the Digital Single Market⁴.

1. WHAT IS THE 'AI SYSTEM' AND HOW CAN IT BE USED IN A CONSUMER CONTEXT?

In a current understanding, where AI is the ability of a machine to mimic human functions such as reasoning, learning, planning and creativity, the taxonomy of AI typologies can be summarised as (a) Software: virtual assistants, image analysis software, search engines, voice and facial recognition systems, and (b) Embedded AI: robots, autonomous cars, drones, etc.

At EU level, the European Parliament's amendments to the AI definition inserted into the EU's legislative framework on artificial intelligence reflect the version⁵ defined by the Organisation for Economic Co-operation and Development (OECD), namely, 'An artificial intelligence system (AI system) is a machine-based system that is designed to operate with varying levels of autonomy and that can, for explicit or implicit purposes, generate outputs such as predictions, recommendations or decisions that influence physical or virtual environments'. Artificial intelligence refers to the intelligence of machines acting as 'intelligent agents'. As intelligent agents, with the help of software, certain devices have the ability to perceive their environment and take action based on algorithms⁶.

Therefore, the presence of digital assistants in the contractual relationship between traders and consumers, the modalities of involvement, the limits of involvement are topics of reflection of the present research, etc.

The use of digital assistants in consumer relations. Two working hypotheses are identified in this respect, namely digital assistants can be implemented:

- by the consumer (e.g. the consumer purchases a digital application from a third party merchant other than the other party to the contract and downloads it onto his device, or the digital assistant is integrated into a smart product previously purchased by the consumer without any connection to the other party to the consumer contract);

⁴ See Tekla P., "Legal Dogmatic Questions About the Impact of the European Union's Digital Legislation on Hungarian Contract Law", *Juridical Tribune – Review of Comparative and International Law*, vol. 14, no. 1, March 2024, pp. 47–59 and Viorel B., "Considerations regarding consumer protection in Romanian and European law. The notion of consumer", *Juridical Tribune - Tribuna Juridica*, Volume 8, Special Issue, October 2018, pp. 20–26.

⁵ OECD (2019) Recommendation of the council on artificial intelligence. OECD/LEGAL/0449 Smith BC (2019) The promise of artificial intelligence: reckoning and judgment. The MIT Press, Cambridge, MA.

⁶ See some particular issues in Oleksandr S., I. Kompaniiets, O. Volianska, O. Shovkoplias and V. Baranchuk, "Electronic Administrative Judicial Procedure of Ukraine and the Right to Judicial Protection: Problems of Legal Regulation and Practical Issues", *Juridical Tribune – Review of Comparative and International Law*, vol.14, no. 1, March 2024, p. 98–115.

- by retailers (the digital assistant could be integrated into the application that the retailer uses or could be integrated into the website or be a feature of the product sold to the consumer. Therefore, we advocate two scenarios where the use of the digital assistant by the trader is highlighted, namely when the trader processes orders from consumers or provides digital assistants to consumers to automate orders placed by consumers on platforms agreed by traders.

- or both.

The present research proposes as a topic of reflection a brief analysis of the first hypothesis stated above, namely that the consumer acquires the algorithmic decision-making system (digital assistant).

How can digital assistants be provided to consumers?

- The smart assistant can be provided to the consumer, integrated into a smart product purchased by the consumer;

- The Smart Assistant can be provided to the consumer via a separate application, which is set up when a product is purchased (e.g. if the consumer purchases a smartphone via a consumer contract);

- A platform that provides an integrated digital assistant for the consumer to purchase products from the retailer using that platform.

2. TO WHAT EXTENT ARE THE ACTIONS OF DIGITAL ASSISTANTS ATTRIBUTABLE TO CONSUMERS? COMMENTS

It should be emphasized, as shown in the above presentation, that a business-to-consumer contract concluded after the prior provision of a digital assistant involves particularities that fundamentally differentiate it from a classic B2C commercial contract, namely:

- the consumer, in consideration of entering into a consumer contract, enters into a contract with a trader (third party supplier) for the provision of a digital assistant, referred to in this research as a 'digital assistants contract'.

- after the purchase of the digital assistant, the consumer will enter into a consumer contract, called an 'algorithmic contract', with the trader via the digital assistant. As stated in the European Law Institute's Interim Report (ELI Project on Guiding Principles and Model Rules on Algorithms in Contracts) entitled 'EU Consumer Law and Automated Decision-Making (ADM): EU Consumer Law is ready for ADM'⁷, the generic title 'algorithmic contract' will describe any contract where a digital assistant is used either by the consumer, the trader or both parties in B2C relations, at the time of the conclusion of the contract or at any other stage 'of the life cycle of the contract'.

- It is relevant to note that the actions of the digital assistant are always predefined within the limits of the consumer's needs, and interestingly, it can be designed with the ability to learn and after implementation, necessarily with availability in terms of analyzing the data provided by the consumer in consideration of these actions that can be implemented, as appropriate, at the stage of negotiation, contract completion or, why not, in the execution of the contract.

⁷https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Interim_Report_on_EU_Consumer_Law_and_Automated_Decision-Making.pdf, p.22

- In summary, we advocate the 'creation' and implicitly the need for a regulation of a new type of B2C contract, which we can call 'algorithmic business-to-consumer contract' or 'automated business-to-consumer contracts' defined in the light of the ELI guiding principles as 'a contract in respect of which one or more parties use a digital assistant for the purpose of one or more of the negotiation, conclusion or performance of the contract'.

From the analysis of the characteristics identified above, a first question arises, namely, to what extent the actions of the digital assistant undertaken in any of the stages of negotiation, conclusion or performance of the contract, involve the liability of the consumer, in other words, these actions 'bind' the consumer from a legal point of view?

We believe that the answer to this question is a 'nuanced' one, thus in the academic literature⁸ various opinions have been expressed, ranging from the hypothesis that the consumer, when assisted by a digital assistant, will remain bound, with all the obligations incumbent on him as a contracting party, to the hypothesis that is in a true antonymy with the one mentioned above, which argues in favour of a radical interpretation, namely that once statements relating to the negotiation or conclusion of the contract, in so far as they are not only transmitted but also generated by computers, the latter 'deserve' legal personality and the transaction resulting from such statements must be attributed to them.

Also worthy of reflection are the views that such an analysis should be carried out by reference to the national law applicable to the subject matter of contracts, or the view that the progressive automation of the contracting process has led to a revival of theories that question the validity of contracts concluded using computers⁹.

We are of the opinion that the recurrent doubts expressed by some legal scholars regarding the validity of contracts concluded under the conditions of the actions of digital assistants should be eliminated, in view of the fundamental principles of contract law.

On the other hand, we cannot remain indifferent to the view that the AI system, in so far as it generates statements on the negotiation or conclusion of the contract, should have legal personality. The interpretation is based on the fact that any automated contracting 'benefits from autonomy enhanced precisely by the lack of human participation'. In support of this hypothesis, Professor Finocchiaro opines that 'Since there is no direct human participation in the resulting transaction, there is no "meeting of minds" and no contractual intent'¹⁰. Therefore, the doctrinaire proponents¹¹ of this thesis, go further with their reasoning and ask – are these contracts generated by an algorithmic decision-making system valid or not?

The answer to this question is based on clarifying the concept of 'autonomy' enjoyed by IA, a characteristic which gives it legal personality. It is argued that this

⁸ E. Mark, "The erosion of autonomy in online consumer transactions", *Law Innovation and technology*, vol. 8, Issue 1, 2016, p. 1-38.

⁹ E. Mik, "From Automation to Autonomy: Some Non-existent Problems in Contract Law" (May 1, 2020) *Journal of Contract Law*, 2020, Available at SSRN: <https://ssrn.com/abstract=3635346>

¹⁰ G. Finocchiaro, *Electronic Contracts and Software Agents: The Conclusion of the Electronic Contract through 'Software Agents' A False Legal Problem? Brief Considerations* (2003) 19 CLSR 20.

¹¹ Leon E. Wein, *The Responsibility of Intelligent Artefacts: Towards and Automation Jurisprudence* (1992), n. 9, Harv J. Law & Tech, p. 129.

autonomy is generated precisely by the embedded knowledge but also by the knowledge acquired (learned) after implementation¹². The more system is able to collect, analyse and act, the more autonomous it is considered to be.

We are of the opinion that such a theory cannot be supported, the answer being given in the context of clarifying the purpose of the creation of AI systems, namely, since, on the one hand, the autonomy of an AI system is strictly related to the concept of control (which in the author's opinion is explained whenever such an AI system has been designed at the behest of the consumer, while, on the other hand, people in general, and consumers in particular, use digital assistants to optimise performance, for example at the stage of negotiating a contract, and not to automate the entire legal process to the detriment of its humanisation.

Therefore, the use of digital assistants implies in fact *the attribution of their actions to consumers*, these being in fact a result of the delegation of competences with which they have been entrusted, always *coupled with the fulfilment of a set of requirements at the time of the design of the AI system* (e.g. it is envisaged that the AI assistant makes decisions based on a self-learning algorithms) *which gives the consumer the right to maintain control* over it, precisely in order to justify this attribution. An example of the control that the consumer can show towards the digital assistant is

- the right to set the parameters that will determine how the digital assistants will act in his or her interest – it is important to remember that this right can be conferred either by an express regulation on design requirements or by an agreement to this effect was concluded by the consumer with the supplier manufacturer when designing the AI assistant;

- its right to suspend its actions or disconnect it.

In view of the above, we open another horizon of reflection, namely the fact that the consumer's right of control is interdependent with the correlative obligation of the digital assistant provider to be liable for any damage caused to the consumer. The rationale would be that any action by the digital assistant which jeopardises the control to which the consumer is entitled would result in a non-compliant good or service and would likewise jeopardise the security and safety of the good or service purchased under the conditions of use of the AI.

3. THE RIGHT OF CONSUMERS TO BE INFORMED AT THE PRE-CONTRACTUAL STAGE, IN THE CONTEXT OF THE USE OF DIGITAL ASSISTANTS. CASE LAW REFLECTION

It has been held in the specialist doctrine that in the field of consumer protection, the obligation of information incumbent on the professional replaces the 'negotiation between the contracting parties' and cannot be reduced to 'a simple duty of care of the professional, especially when the legal relationship "has as its material object risky products or services, which also implies the obligation to warn of the risk"¹³. Therefore, the professional's obligation is not limited to a summary information

¹² E. Weitzenboeck, *Electronic agents and contract formation* (2001) 9 IJLIT 204.

¹³ See for further details, Gh. Piperea, *Consumer protection in commercial contracts. Easy money. On the irrational and the oligo-rational in commercial contracts*. C.H.Beck Publishing House, Bucharest, 2018, p. 39 et seq.

leaving the consumer to inform himself, but on the contrary, it implies a sufficiently clear and unequivocal information so that the consumer is convinced that his choice is a rational one in accordance with his interest. On the other hand, the information obligation is based on the economic, legal and technical inequality between the parties involved in the commercial relationship¹⁴.

In analysing this issue, therefore, we start from the premise that the trader is under an obligation to inform the consumer contracting party, whenever it is related to consumer contracts. Moreover, this pre-contractual information obligation is an essential component of the EU consumer law *acquis*.

The consumer's need to be informed at the pre-contractual stage is based on the rationale that an informed consumer will make the best informed decisions.

To what extent does this rationale remain viable when the consumer uses a digital assistant?

A first line of thought is that, regardless of the amount of information available to the consumer, and also regardless of whether this information came directly from the consumer or was communicated to him via the digital assistant, the trader's obligation to inform him at the pre-contractual stage remains, as laid down in current EU legislation on the subject.

A second direction of analysis concerns the typologies of information communicated to the consumer through the digital assistant, in this regard, we believe that we must decide between two such typologies that can be considered when designing the digital assistant, namely

- information to be provided to the consumer under consumer law;
- personalised information, assuming that the digital assistant has been custom designed to serve the specific needs of the consumer.

In summary, we consider that in either of the two situations mentioned above, informing the consumer via the digital assistant has the sole effect of improving the consumer's position (well known to be the inferior position¹⁵) in relation to the trader

¹⁴ Also see Adriana Deac, *Regulation (Eu) 2016/679 of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and the Free Movement of These Data*, Perspectives of Law and Public Administration, Volume 7, Issue 2 December 2018, pp. 151-155; and Adriana Moțatu, *The Proliferation of the Illegal Access to a Computer System*, Perspectives of Law and Public Administration, Volume 10, Issue 1 March 2021, pp. 65-68.

¹⁵ 'Regardless of whether we are considering contracts for the sale of goods and services, including digital goods and services, credit agreements, etc., we consider that their particularity is given by the fact that they are not relationships of legal equality between consumers and professionals, in the sense that the consumer is in a situation of legal inferiority, given by the impossibility of negotiating with the trader because the contracts under consideration are characterised by the presence of pre-established, non-negotiable clauses, to which the consumer can only agree or refuse to conclude, as the case may be. Therefore, the applicability of the principle of freedom of choice is limited to the consumer's possibility to enter into an obligatory relationship with the trader, i.e. to conclude or not to conclude a commercial contract, but it is not possible to assess the consumer's freedom to negotiate the contractual terms, in view of the above comment. See for further information, E. N. Vâlcu, "Brief considerations regarding the specific concept of 'consumer. Contracting parties involved in a commercial legal relationship", *International Journal of Legal and Social Order*, vol. 3, No. 1 (2023), Section Law, DOI: <https://doi.org/10.55516/ijlso.v3i1.159>, pp. 536-545.

and does not in any way relieve the latter of the obligation incumbent on him – that of informing the consumer at the pre-contractual stage.

In support of this thesis, the CJEU also ruled in its judgment of 3 September 2015 in Case C-110/14¹⁶, *Horațiu Ovidiu Costea v SC Volksbank Romania SA*, at paragraph 21, as follows “The concept of ‘consumer’ within the meaning of Article 2 lit. (b) of Directive 93/13, has [...] an objective character and is independent of the actual knowledge which the person concerned may have or of the information which that person actually possesses.” In the same case, Advocate General P. Cruz Villalón in his Opinion¹⁷ submitted on 23 April 2015, at paragraphs 28–33 argues that “[...] the notions of vulnerability and inferiority [...] relating both to the capacity to negotiate and to the level of information, constitute the *raison d’être* of the Directive, since it starts from a reality in which the consumer adheres to conditions drawn up in advance by the seller or supplier, without being able to exercise any influence over their content’. We therefore conclude that the obligation to provide information is neither linked to the absence of knowledge nor dependent on the consumer’s actual knowledge, and is therefore an ‘emanation of the Union legislator’ and should therefore not become questionable even in the context where the consumer uses a digital assistant.

4. THE EXTENT TO WHICH WE CAN APPRECIATE THE NEED TO REGULATE A NEW CONSUMER’S RIGHT – THE RIGHT NOT TO BE DISCRIMINATED AGAINST

In the context of the use of algorithmic decision-making in business-to-consumer contracts, we believe that a consumer should have the power to choose whether or not to use a digital assistant.

Therefore, we believe that it is the responsibility of the trader not to treat the consumer using an AI system differently, nor should they restrict consumers from using them (e.g. consumers should not be prevented by traders from using digital assistants through technical measures – ‘ADM blockers’ – especially in online sales or when providing digital services. Thus, in the context of this approach, we can consider that we are in the presence of a new consumer right not to be discriminated against on the grounds of the use of an AI system. We believe that such a view requires qualification, in the sense that such recognition must not place additional burdens on the trader, such as ‘additional burdens due to the need to adapt to technical specifications...’¹⁸.

CONCLUSIONS

We believe we can talk about a new generation of digital consumer contracts. It is relevant to note that these contracts are characterised by the extensive use of algorithms and artificial intelligence.

¹⁶ ECLI:EU:C:2015:538; <https://eur-lex.europa.eu/legal-content/ro/TXT/?uri=CELEX:62014CJ0110>

¹⁷ECLI:EU : C:2015:271; <https://eur-lex.europa.eu/legal-content/ro/TXT/?uri=CELEX:62014CC0110>

¹⁸https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Interim_Report_on_EU_Consumer_Law_and_Automated_Decision-Making.pdf, p. 29.

The academic and jurisprudential reaction has been commensurate with the interest shown by consumers, so we currently note significant academic contributions in this field, some of which we mention in this study, but also jurisprudential reflections on the matter¹⁹.

The legal aspects developed by the author in the present research, the topics of reflection put forward, the doctrinal theses stated as well as the jurisprudential opinions mentioned, certify the need to provide the consumer with additional legal security in the context of the use of algorithmic decision-making (the use of digital assistants) in any phase of the 'life process' of a contract.

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¹⁹ See for example Sónia De Carvalho, *The Significance of Article 102 of the Treaty on the Functioning of the European Union in the Assessment of Distribution Contracts*, *International Investment Law Journal*, Volume 2, Issue 2, July 2022, pp. 102–126; Cristina Elena Popa Tache, *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*, contributions to Report about the comparative content analysis of instruments adopted by international and European organizations/countries regarding human rights protection online (Deliverable No. 11), published by The Global Digital Human Rights Network (GDHRNet), 2023, available here as a scientific publication: <https://gdhrnet.eu/publications/scientific-publications/>, accessed on 01.01.2024 and Rodica Diana Apan, *Outlook of the European Court of Justice Regarding Comparative Advertising*, *International Investment Law Journal*, Volume 2, Issue 2, July 2022, pp. 149–164.

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