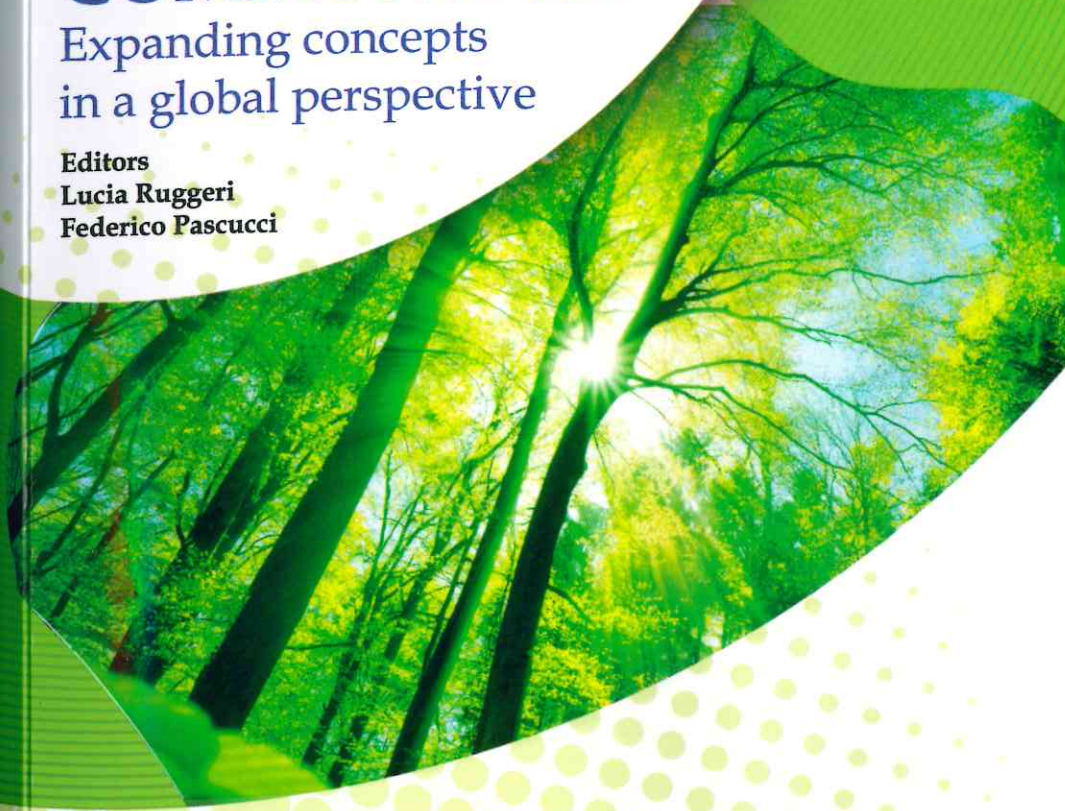


PROSUMERISM AND ENERGY COMMUNITIES

Expanding concepts
in a global perspective

Editors
Lucia Ruggeri
Federico Pascucci

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ecpe
enabling consumer
to become prosumer
in the energy transition era

2022

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Eds

Lucia Ruggeri and Federico Pascucci



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The Notion of Consumer: Comparative Legal Profiles

Maria Paola Mantovani

Abstract: Consumer law attends the growing diffusion of logic based on a collaborative economy. Emblematic of this process is the prosumer that the sharing economy has placed next to the consumer and the professional. Arising from this is the idea of carrying out a renewed reflection on the notion of consumer and prosumer in both domestic and French contexts.

Keywords: Private Comparative Law, Sharing economy, Consumer, Prosumer

1 Consumer Law and new Bargaining Methods

The switch from the national sphere to the European one has represented one of the main driving factors for the emergence of consumer legislation,¹ whose core is founded on the adoption of a system of rules inspired by the protection of consumer rights and interests. Protection of consumers represents one of the areas that have been lent greater impetus at European level, thanks to the adoption of a specific regulatory framework.²

The process of European integration has led to an expansion in the centres of legal production and, more generally, in the circle of regulatory sources, since we must currently talk of a system of sources marked by the presence of different regulatory levels (State-based, European and international)³. This has facilitated a broadening of market operations and economic exchanges, a contribution to which

¹ P. Perlingieri, 'Normativa comunitaria, rapporti economici e interpretazione' *Rivista giuridica del Molise e del Sannio*, 298 (1993); E. Caterini, 'Politica dei consumi e diritto dei contratti. Il paradigma del principio "generale" di sicurezza' *Rassegna di diritto civile*, 627 (2006); P. Nebbia, 'La politica comunitaria di tutela dei consumatori nell'ottica del mercato interno' *Obbligazioni e contratti*, 738 (2007).

² L. Nivarra, 'Rimedi: un nuovo ordine del discorso civilistico' *Europa e diritto privato*, 583 (2015), which, with specific regard to consumer contracts, excludes the remedial character of withdrawal 'highlighting, conversely, the nature of substantial rules that pursues the objective of incentivising access to some contractual types (and, therefore, to some markets or segments thereof) via a strategy witnessing the combination, pursuant to an undoubtedly rational design, of a strengthening of the communication flow and a weakening ("for a fixed term", given that, upon the expiry of a period that varies depending on when the consumer has been informed of the existence of the right of withdrawal, his right to enforce it falls away) of the contractual bond (or, if you prefer, with one part of the legal theory, watering down of its consolidation process)'.

³ 'In the current terminology, the expression "European law", again in the sense of European Union law, seems destined not only to supplant the more prosaic (Eurocratic) expression of Community law, made in any event obsolete by the Treaty of Lisbon, but also to represent, compared to the latter, a quality step ahead, which corresponds to a transcendence of the functionalist phase of economic integration, towards a constitutional phase of regulatory integration', (L. Moccia, 'Comparazione giuridica, diritto e giurista europeo: un punto di vista globale' *Rivista trimestrale di diritto e procedura civile*, 767 [2011]). G.A. Benacchio, *Diritto privato della Comunità Europea. Fonti, modelli e regole* (Padova: Cedam, 2nd ed, 2001), 276.

has undoubtedly come from the phenomenon of globalisation,⁴ though some prefer to speak of 'planetaryisation',⁵ of market economy.⁶

The contract-market pairing represents the cornerstone the regulation of consumer protection has drawn its origin from, and the study of new economic models cannot accordingly be tackled in a correct form unless we move from an analysis of the set of rules governing consumers.

In the current historical manual, a different perspective arises within which the market and the economic initiative come to be structured, that of the transnational markets, which operate within a global market economy. Arising from this is the advent of new bargaining methods founded on the exchange, offer and purchase of goods and services from and between subjects devoid of a professional nature.⁷

Emblematic in this sense is the energy market,⁸ as a market sector in which goods and services can be self-produced, one dominated by the presence of a new figure, the prosumer, who operates without professional intermediaries, and actively participates in the so-called collaborative or sharing economy,⁹ as a phenomenon delineating the offer and purchase of goods and services from and between subjects devoid of a professional nature.

We can consider the prosumer a consumer who is also a producer of goods or provider of services.¹⁰ The innovative impact intrinsically lies in the possibility, for non-professional subjects, of acting on the market as economic actors.

⁴ G. Iudica, 'Globalizzazione e diritto' *Contratto e impresa*, 867 (2008); G. Alpa, 'La c.d. giuridificazione delle logiche dell'economia di mercato' *Rivista trimestrale di diritto e procedura civile*, 725 (1999).

⁵ E. Fazzalari, "Mondializzazione", politica e diritto' *Rivista trimestrale di diritto e procedura civile*, 681 (2000).

⁶ N. Scannicchio, 'Il diritto privato europeo nel sistema delle fonti. I presupposti per la formazione del diritto privato europeo', in N. Lipari ed, *Trattato di diritto privato europeo* (Padova: Cedam, 2nd ed, 2003), I, 47; S. Pagliantini, *Nuovi profili del diritto dei contratti* (Torino: Giappichelli, 2014); C. Camardi, *Certezza e incertezza nel diritto privato contemporaneo* (Torino: Giappichelli, 2017).

⁷ A. Quarta, 'Il diritto dei consumatori. Prestatori di servizi e prosumers ai tempi della peer economy: primi spunti' *Europa e diritto privato*, 667 (2017).

⁸ In order to facilitate a process of ecological transition and energy efficiency that represents one of the priorities in the political agenda both nationally and worldwide, it is seemingly significant that among the Missions indicated in the National Recovery and Resilience Plan (PNRR), Mission 2 (Green Revolution and Ecological Transition) makes specific reference to investment and research programs for renewable sources, thereby facilitating energy efficiency and the redevelopment of buildings. (On the issue, A. Muratori, 'Il PNRR italiano all'esame della Commissione europea: le novità della "versione Draghi"' *Ambiente e sviluppo*, 417 [2021]). We should mention at European level that on 30 November 2016 the Commission presented the 'Clean energy for all Europeans' package, known as 'Clean Energy Package', which includes several regulatory measures in five essential sectors of European energy policy. The objective of the program is to set up an altogether new European system preserving the level of competitiveness and production of the entire Union, in the face of the changes imposed on markets by the transition towards clean energy. In other terms, the European Union shall have to adopt an integrated energy system at continental level enabling energy flows to freely transit between Member States, which is founded on competition and on the optimal use of resources, and, above all, implements a sustainable economy.

⁹ G. Smorto, 'Verso la disciplina giuridica della sharing economy' *Mercato, concorrenza, regole*, 245 (2015). D. Di Sabato and A. Lepore, *Sharing economy. Profili giuridici* (Napoli: Edizioni Scientifiche Italiane, 2018).

¹⁰ A. Toffler, *The Third Way* (New York: Morrow, 1980). M. Mauerer, 'Elementi di criticità nell'equiparazione, da parte dell'AEGLI, dei "prosumer" ai "consumatori" e ai "clienti finali"' *La nuova giurisprudenza civile commentata*, 406 (2015), remarks that outside legal jargon the expression prosumer indicates in any event a consumer who is in turn producer/professional or a consumer who contributes to the production. While the figure is well known in the IT sector and in the musical market, jurists are no doubt scarcely familiar with it.

We can identify the most problematic legal issues in this regard in the different characteristics of the consumerist system,¹¹ marked by an uneven bargaining,¹² in which control over the contractual balance is, first of all, a control over the synallagmatic relationship, in accordance with principles of rationality and equity, essential elements for the existence of a fair exchange,¹³ compared to the phenomenon of collaborative economy that seems far removed from the logic of an asymmetrical bargaining.

The mandatory nature of consumerist provisions operates as a result of the need to ensure a specific system of protections in favour of the weak contracting party, with a view to eliminating the informational asymmetries between professionals and consumers and thereby allowing the conclusion of contracts between parties sufficiently aware of advantages and risks and accordingly capable of expressing a consent based on a correct assessment of the convenience of the contractual transaction.¹⁴

In a different form, the model of collaborative economy is the expression of a logic of exchange characterised by a basically levelled position between the subjects, given that reference is made to a consumer who is simultaneously producer or professional, or to a consumer who contributes to the production side.

From an exegetical viewpoint, it is clear that the very possibility of offering and purchasing products and services from non-professional subjects threatens the basic premise of consumerist protection, namely, the existence of an imbalance between the parties,¹⁵ embodied in an informational and contractual, and not just economic, asymmetry between consumer and professional.

In the so-called peer economy or economy between equals, the relationship is presumed to be fully horizontal, not governed 'by hierarchical relations, and, therefore, the dimension of consumption once again expresses a relationship between equals, eschewing that principle of uneven law that, by enjoining the ascertainment of factual disparities, had contributed to establishing the consumerist system'.¹⁶

Specifically as regards the latter aspect, even within the scope of collaborative economy, however, we must necessarily take into account the positions of greater or lesser contractual force of the subjects who are the protagonists of the economy market.

That imposes on us a duty to verify, in the first place, the nature of the parties to the performance, lavishing special attention on the one that provides the service.

¹¹ Lastly, S. Pagliantini, 'In memoriam del consumatore medio' *Europa e diritto privato*, 1 (2021).

¹² Generally, as an example out of many, V. Roppo, 'Giustizia contrattuale e libertà economiche: verso una revisione della teoria del contratto?' *Rivista critica del diritto privato*, 599 (2007); F. Galgano, 'Libertà contrattuale e giustizia del contratto' *Contratto e impresa/ Europa*, 509 (2005); A. Zoppini, 'Il contratto asimmetrico tra parte generale, contratti di impresa e disciplina della concorrenza' *Rivista di diritto civile*, I, 515 (2008).

¹³ G. Vettori, 'Giustizia e rimedi nel diritto europeo dei contratti' *Europa e diritto privato*, 53 (2006).

¹⁴ S. Patti, 'Il contratto tra "autonomie de la volonté" e moderno "zwingendes Vertragsrecht"' *Rivista trimestrale di diritto e procedura civile*, 369 (2015).

¹⁵ A. Quarta, n 7 above, 667.

¹⁶ *ibid.*

Add to it the fact that the sharing economy is a sector dominated by production and consumption, which must be implemented in the most rational, balanced and efficient manner possible.¹⁷

The role of consumer legislation currently denotes signs of mobility and dynamism, which are not only translated into novel terms – just think of the contracting party who expresses all his potential both as producer and as user of the service¹⁸ –, but also impact on the contractual dynamics.

The contribution aims, from that viewpoint, to carry out a reflection on the notion of consumer¹⁹ within the Italian and French context, marked by a solid tradition in the consumerist field, and on the figure of the prosumer, starting from the idea that the notions do not simply deal with a definitional issue, since there is always a need to conduct an analysis on the manner in which the bargaining took place to ascertain whether, concretely speaking, the application of a specific regulatory body could be deemed to exist.

2 The Notion of Consumer

It is clear nowadays that 'to operate for the protection of the consumer does not only mean to restore to the non-professional counterparties of the business an institutional role of protagonists in every market sector. It means, even prior to that, to guarantee to them all forms of protection a consumer is entitled to as "person", according to the unequivocal rationale behind art. 2 of the Italian Constitution'.²⁰

In that sense, the consumer does not eclipse the person, conferring on it, instead, a peculiar declination as subject who taps into the market to satisfy his own needs.²¹ The quality of consumer confers on the person a position and a specific role, and acts as ineluctable prerequisite for the application of a structured regime of protections.²²

In the legislative interventions that have succeeded each other over time, the concept of consumer status²³ has been construed as instrument having a promotional function, as it acknowledges in favour of a peculiar category of subjects, that of consumers, a specific system of protections, in order to overcome a position of substantial weakness, heralding negative effects for both the legal-patrimonial sphere of the individual and the entire economic and exchange system.²⁴

Historically, the notion of consumer²⁵ has been constructed by relying on the conceptions of State, market and society,²⁶ and thus, to understand it properly we must refer to various economic, sociological and legal disciplines.²⁷

The market is the place of production, work and exchange of goods and services where a plurality of subjects with different and sometimes conflicting interests, such as the entrepreneur, the professional, the user and the consumer, operate.

From a regulatory viewpoint, the definition of consumer²⁸ could be discerned in the Consumer Code²⁹ that has forged a dual formulation, one of general character, in Art 3, para 1, letter a),³⁰ and the other, specific, governed by Art 18, para 1, letter a), dedicated to protection in the event of commercial practices, advertisement and other commercial communications.³¹ The regulatory framework³² is mainly characterised by a restrictive-negative connotation,³³ revolving around the notion of consumer-natural person who acts outside any professional or entrepreneurial activity he carries out.

²³ P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2006), 511. P. Rescigno, 'Status I) Teoria generale' *Enciclopedia giuridica* (Roma: Treccani, 1993), XXX, 1; id., 'Situazioni e status nell'esperienza del diritto' *Rivista di diritto civile*, I, 213 (1973); G. Alpa, *Status e capacità* (Bari: Laterza, 1993). There are those who consider status a specific subjective situation. Along these lines: A. Iannelli, *Stato della persona e atti dello stato civile* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1983), 58; F. Prosperi, 'Rilevanza della persona e nozione di status' *Rassegna di diritto civile*, 810 (1997).

²⁴ G. Chiné, 'Il consumatore', in N. Lipari ed, *Trattato di diritto privato europeo* (Padova: Cedam, 2nd ed, 2003), I, 469.

²⁵ F. Macario, 'Dalla tutela del contraente debole alla nozione giuridica di consumatore nella giurisprudenza comune, europea e costituzionale' *Obbligazioni e contratti*, 872 (2006).

²⁶ H.W. Micklitz, 'Il consumatore: mercatizzato, frammentato, costituzionalizzato' *Rivista trimestrale di diritto e procedura civile*, 859 (2016).

²⁷ G. Chiné, n 24 above, 435.

²⁸ L. Rossi Carleo, *Diritto dei consumi: soggetti, atto, attività, enforcement* (Torino: Giappichelli, 2015), 35.

²⁹ G. Alpa, 'I diritti dei consumatori e il «Codice del consumo» nell'esperienza italiana, Sei voci sul «Codice del consumo» italiano' *Contratto e impresa/Europa*, 4 (2006).

³⁰ Art 3, para 1, letter a) of the Consumer Code: 'For the purposes of this code: a) consumer or user means: the natural person who acts for purposes unrelated to the entrepreneurial or professional activity he might carry out'.

³¹ Art 18, para 1, letter a) of the Consumer Code: 'For the purposes of this title, "consumer" means: any natural person who, in the commercial practices regulated by this title, acts for purposes that do not fall within the scope of his commercial, industrial, crafts-related or professional activity'.

³² On the notion of consumer, when implementing Directive 93/13, Greece, Spain and the Netherlands have expanded the definition of consumer until it eventually came to comprise legal persons and small professionals as well. England, in turn, considers the small entrepreneur, too, a consumer (business consumer), and in 2006, by means of the Consumer Credit Act, extended the provisions of consumer credit law even to bodies bereft of legal personality (such as body corporates and partnerships).

³³ G. Chiné, n 24 above, 435; V. Zeno-Zencovich, 'Consumatore (tutela del). Aggiornamento' *Enciclopedia giuridica* (Roma: Treccani, 2000), 1.

¹⁷ G. Napolitano, 'La tutela dei consumatori e la regolazione pubblica del mercato elettrico', in E. Bruti Liberati and F. Donati eds, *Il nuovo diritto dell'energia tra regolazione e concorrenza* (Torino: Giappichelli, 2007), 245.

¹⁸ It seems possible to state that even within the folds of consumer law a trend is developing, corroborated by the recent case law of the highest court (Cassation 14257/2020), which is grounded on the value of the principle of self-responsibility of the consumer.

¹⁹ M. Intravaia, 'Il restyling della nozione di consumatore' *La nuova giurisprudenza civile commentata*, I, 385 (2016).

²⁰ M. Bessone, 'La disciplina delle attività d'impresa e le norme costituzionali a tutela della persona-consumatore' *Giustizia civile*, II, 417 (1981).

²¹ A. Nicolussi, 'I consumatori negli anni Settanta del diritto privato. Una retrospettiva problematica' *Europa e diritto privato*, 906 (2007). (In the first sense, the consumer becomes a deliberately neutral objective element, a pawn within a context of organicistic regulation of the market in which the presumed maximisation of global wealth tyrannises any other viewpoint. To the extent, instead, that the market yields to the idea of so-called economic constitution understood as 'legal determination of an economic order complying with certain prescriptive principles laid down in the Constitution', the need arises for a 'legal order that implements the principle of man's pre-eminence over the economic matter').

²² Let me refer to M.P. Mantovani, *La vendita dei beni di consumo* (Napoli: Edizioni Scientifiche Italiane, 2009), 45.

Only contracts concluded for purposes unrelated to any entrepreneurial, commercial, artisanal or professional activity undertaken, and deployed in order to fulfil private consumption needs, may benefit from consumerist regulations. However, ascertaining when we can speak of personal purposes and how they can be distinguished from professional ones is no straightforward operation, as we must prioritise an objective interpretation, pursuant to the content, the subject matter and the circumstances under which the contract has been concluded.

According to the orientation of the Court of Justice,³⁴ the protection offered to consumers may not be extended to those subjects who act for mixed purposes, that is, for purposes that are simultaneously personal and relating to the professional activity, unless the latter, those linked to the professional activity, are so limited as to be irrelevant. Put it differently, one part of legal theory believes that legal protection may be extended to those who have concluded mixed contracts, provided that the personal activity is the prevalent one.³⁵

At European level, case law,³⁶ repeatedly called upon to decide on the issue relating to the qualification of consumer, has intervened, recently as well,³⁷ to ascertain whether a subject who initially used a service for purposes exclusively traceable to the private life could lose the initial qualification of consumer if he uses the same service for professional purposes, as the question revolves around the mutability of the consumer status.³⁸

It is worth noting that recital no 18 of the directive on alternative dispute resolution (directive 2013/11/EU),³⁹ despite confirmation of the interpretative line that revolves around the definition of 'consumer' as a natural person acting for purposes extrinsic to any commercial, industrial, crafts-related or professional activity, specifies that 'if the contract is concluded for purposes partly internal and partly external to the person's commercial activity (dual purpose contracts) and the purpose of the transaction is limited in such a manner that it does not prevail within the general context of the supply, such a person should likewise be deemed a consumer'.

The aforementioned regulatory scenario arises where a natural person purchases some good that is then used for both personal and professional reasons. This is further proof that there is a tendency to include in the regime of consumerist protections also those professionals who, in the light of an analysis to be conducted

³⁴ Case C-464/01 *Gruber v Bay Wa A G* [2005], ECR I-00439.

³⁵ E. Minervini, *Dei contratti del consumatore in generale* (Torino: Giappichelli, 2006), 31.

³⁶ Case C-89/91 *Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH* [1993], ECR I-00139; Case C-269/95 *Francesco Benincasa v Dentalkit Srl* [1997], ECR I-03767; Case C-464/01, n 34 above; Case C-110/14 *Horățiu Ovidiu Costea v SC Volksbank România SA* (EU Court [Fourth Chamber], 3 September 2015).

³⁷ Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited* (EU Court [Third Chamber], 25 January 2018).

³⁸ E. Guerinoni, *I contratti del consumatore. Principi e regole* (Torino: Giappichelli, 2011), 15, points out that the notion of consumer lacks certain contents and that 'the vagueness characterising it stems from its sociological and economic genesis more than from its legal one'.

³⁹ European Parliament and Council Directive (EU) 11/2013 of 21 May 2013 on alternative dispute resolution with regard to consumers-ADR directive [2013] OJ L165/63.

in a concrete form, acted for purposes falling outside the professional activity performed.

3 *Le consommateur* in France

The French legal experience with the 1978 *Loi Scrivener* first and the *Code de la Consommation* subsequently,⁴⁰ has introduced a specific system of consumer protection, attesting to the central role played in the French legal model by the consumer protection policy.⁴¹

The essential lines of the French regulatory system refer to the structure of a contractual relationship between two categories of subjects, *professionnels* and *consommateurs*.

We must observe that one of the difficulties experienced by French law regards the determination of the subjective scope of application of consumer protection regulations, in view of the lack of a legal definition of *consommateur*. In France, the consumer is a variable notion associated with a diversified variety of characteristic acts and behaviours,⁴² and we can thus aver that '*n'existerait pas un consommateur mais des consommateurs*'.⁴³

The notion of consumer has long been derived thanks to the pronouncements made on a doctrinal level⁴⁴ and the contribution by binding judicial precedents that have operated as supplement to the (missing) legislative data.

French case law has consolidated a restrictive approach with regard to the notion of consumer, in line with European case law.

Thanks to the adoption of the criterion of direct relationship, in lieu of the one relating to professional proficiency, since 1995⁴⁵ the Cour de Cassation has arrived at a more restrictive conception of consumer. In the first place, a relevant aspect is that the consumer acts to fulfil personal needs, ie for other than professional purposes. We should furthermore stress that where the contract presents a direct relationship with the professional activity, consumer law may not be applied. That is the route the highest Court has taken to eventually assert, in a systematic fashion,

⁴⁰ Code de la consommation, 26 July 1993, J.O. 27 July 1993, 10538. A. Sinay-Cytermann, 'Protection ou surprotection du consommateur?' *La Semaine juridique*, 51 (1994).

⁴¹ N. Sauphanor, *L'influence de droit de la consommation sur le système juridique* (Paris: LGD), 2000.

⁴² L. Landy, 'Le consommateur européen: une notion éclatée', in F. Osman ed, *Vers un code européen de la consommation. Actes et débats de colloque* (Bruxelles: Bruylant, 1998), 57; A. Sinay-Cytermann, n 40 above, 51; G. Raymond, 'Définir le consommateur' *Contr., conc. consom.*, 3 (2004); G. Paisant, 'À la recherche du consommateur. Pour en finir avec l'actuelle confusion née de l'application du critère du «rapport direct»' *La Semaine juridique*, 549 (2003); J.P. Pizzio, 'Le droit de la consommation à l'aube du XXI siècle. Bilan et perspectives', in C. Albiges et al, *Études de droit de la consommation, Liber amicorum Jean Calais - Auloy* (Paris: Dalloz, 2004), 878; D. Mazeaud, 'Droit commun du contrat et droit de la consommation. Nouvelles frontières?', *ibid.*, 710; Y. Picod and H. Davo, *Droit de la consommation* (Paris: Armand Colin, 2005).

⁴³ J. Mel, 'La notion de consommateur européen' *Petites affiches*, 5 (2006), (*Il n'existerait pas un consommateur mais des consommateurs*).

⁴⁴ J. Calais-Auloy and F. Steinmetz, *Droit de la consommation*, Paris, Dalloz, 6th ed, 2003, 6. With regard to the energy market in France, T. Uriacher, *La nature juridique de l'énergie*, *Dalloz*, 599 (2019), remarks that in the civil code energy is considered a product, Art 1245-2 of the French Code Civil.

⁴⁵ Cour de Cassation, 24 January 1995, no 92/18.227, *Dalloz*, 327 (1995), note by G. Paisant.

that a consumer is a non-professional subject,⁴⁶ as it is all too obvious that consumer law has been conceived to protect consumers to the exclusion of other categories of subjects.

It follows that it is not in the field of consumer law that a professional can find adequate protection, but only by relying on the ordinary law of contract.⁴⁷

Despite the general application stability of the consumerist system, legal theory had long highlighted the opportunity of adopting a legal definition of consumer,⁴⁸ one capable of ensuring greater legal security, stressing the danger lurking in a broad conception that tends to make the frontiers of consumer law shifty, with evident implications in terms of lowering the level of protection to a contracting party who finds himself in asymmetrical conditions vis-à-vis his professional interlocutor.

Thanks to the directive of 25 October 2011 no 2011/83/EU,⁴⁹ transposed into French law by Law no 2014-344 of 17 March 2014, the so-called Loi Hamon, a specific definition of consumer has been introduced into the *Code de la Consommation*.⁵⁰ This definition was then broadened by ordinance no. 2016-301 of 14 March 2016 relating to the legislative part of the *Code de la Consommation*.

At a systematic level, the *Code de la Consommation* includes a general definition of consumer according to which a consumer is the natural person who acts for purposes that go beyond the framework of the activity carried out, more precisely, commercial, industrial, crafts-related or charitable activity, and one centred on the notion of consumer-vendor, destined to be integrated with Artt 121-99 to Law no 121-103 of the *Code de la Consommation*.

It is therefore convenient to distinguish between consumer vendor and consumer purchaser, bearing in mind, in practice, the specificities of the power relationship in the contractual ties between a purchaser-professional and a specific vendor.

The notion of consumer, whose source is legal, cannot but confirm what was already known, namely, that natural persons could be qualified as consumers.

Part of case law⁵¹ and legal theory,⁵² however, has shown itself favourably inclined to recognise the application of consumer regulations to '*personnes*

⁴⁶ L. Landy, n 42 above, 57.

⁴⁷ G. Paisant, 'À la recherche du consommateur, Droit commun du contrat et droit de la consommation. Nouvelles frontières?', in C. Albiges et al, n 42 above, 710.

⁴⁸ J. Calais-Auloy et al, *Droit de la consommation* (Paris: Dalloz, 8th ed, 2010), 13.

⁴⁹ G. Paisant, 'La directive du 25 octobre 2011 relative aux droits des consommateurs' *JCP G.*, 62 (2012).

⁵⁰ E. Gicquiaud, 'Le consommateur-vendeur', *Dalloz*, 559 (2014).

⁵¹ Cour de Cassation, 15 March 2005, no 02/13.285, *Recueil Dalloz*, 1948 (2005), note by A. Boujeka, and *RTD Civ*, 393 (2005), note by J. Mestre and B. Fages, relies on the idea that the distinct notion of non-professional, used by the French legislator, does not exclude the '*personnes morales*' from the protection against unfair clauses; J. Calais-Auloy, 'Une personne morale peut-elle bénéficier de la protection contre les clauses abusives?' *Revue Lamy droit civil*, 5 (2005).

⁵² G. Raymond, *Droit de la consommation* (Paris: LexisNexis, 2nd ed, 2011), according to whom the '*personnes morales*' who find themselves acting for purposes unrelated to the professional activity and are in need of special protection must look at the regime of protections in the ordinary law of contract rather than in consumer law.

*morales*⁵³ as well, relying on the fact that such extensive effect stems from an expansion of the notion of non-professional, as it possible to assimilate a '*personne morale*' who has concluded a contract to fulfil a need lying beyond the framework of the activity performed, and who is thus devoid of general and technical skills, to the notion of non-professional.⁵⁴

Indeed, alongside the consumer, the *Code de la Consommation* has established the category of '*non-professionnel*'⁵⁵ for all those subjects who act in pursuit of purposes falling outside the scope of the commercial or professional activity undertaken, to whom, however, the protection regime contained in the Code de la Consommation cannot be applied, being limited to those protection provisions that expressly legitimise the extensive effect, as in the regulations pertaining to unfair contractual clauses, unlike, for instance, consumer credit regulations.⁵⁶

4 The Figure of Prosumer and Collaborative Economy

Currently, new forms of collaborative economy, relating to sharing models in self-production and energy consumption, have been successfully tried out.

The new bargaining paradigms found in collaborative economy evolve, in particular, in the dimension of horizontal relationships, so-called peer to peer, of which the prosumer is a key player.⁵⁷

From this viewpoint, the relationship is established between non-professional service provider-user and materialises in a relationship between equals, which gives birth to the term peer economy.

By the expression 'collaborative economy' we refer to a model of production of goods or services by private subjects,⁵⁸ whose activities can be developed and facilitated by collaboration platforms that create an open market for the temporary use of goods or services.

⁵³ The textual amendment has not curbed the effort of case law to stretch the notion of consumer, revolving in particular on replacing the notion of consumer with that of '*non-professionnel*' and specifying that the consumer cannot be a legal person, Cour de Cassation, 2 April, 2009, no 08/11.231, *Dalloz*, 32 (2009). Cour de Cassation, 4 February 2016, no 14/29.347, *Petites affiches*, 9 (2016), note by G. Paisant. In Cour d' Appel de Paris, 3 July 1998, no 97/15750, *Recueil Dalloz*, 249 (1999), case law has pronounced itself, for the first time, by admitting an extension of the consumer protection regime, whereby '*une personne physique ou morale qui, sans expérience particulière dans le domaine où elle contracte, agit pour la satisfaction de ses besoins personnels et utilise dans ce seul but le produit ou le service acquis*'.

⁵⁴ Cour de Cassation, 23 June 2011, no. 10/30.645, *courdecassation.fr*.

⁵⁵ *Non-professionnel* means: *toute personne morale qui n'agit pas à des fins professionnelles. Professionnel: toute personne physique ou morale, publique ou privée, qui agit à des fins entrant dans le cadre de son activité commerciale, industrielle, artisanale, libérale ou agricole, y compris lorsqu'elle agit au nom ou pour le compte d'un autre profession.*

⁵⁶ We must observe the proliferation of multiple regulatory statutes in the texts of the numerous codes, think for instance of home sales, which refers to the purchaser of the product, or in consumer credit regulations, where reference is made to the borrower.

⁵⁷ The expression prosumer was coined by Toffler, even though it originated in a context radically different from that of the energy market, A. Toffler, n 10 above.

⁵⁸ Comunicazione della Commissione al Parlamento europeo, al Consiglio, al Comitato economico e sociale europeo e al Comitato delle regioni (COM/2016/0356 final), 'Un'agenda europea per l'economia collaborativa, 2 giugno 2016'.

The phenomenon of collaborative economy, as we have seen, is dominated by the figure of the prosumer, which sharing economy has placed side by side with the profiles of consumer and professional.⁵⁹

The very concept of prosumer⁶⁰ sketches one of the essential profiles of collaborative economy, indicating them as consumers who develop an entrepreneurial ability, as they can become producers of goods or providers of services.

This new system of organisation of relationships sees the prosumer as an active player in the dynamics of production and exchange of goods and services. By the term prosumer⁶¹ we identify a category of non-professional subjects who provide services, and each player is simultaneously producer and consumer.

The definition of 'prosumer' seems to diverge from that of 'consumer', generally accepted at supra-national and domestic level, according to which the consumer is 'any natural person who acts for purposes that fall outside the scope of his commercial, industrial, artisanal or professional activity'. It should moreover be noted that the 'prosumer' might also be other than a natural person (reference is made to the subject), and that an additional distinguishing element lies in the fact that he operates as professional/producer.

In the domestic legal system, the prosumer⁶² has received a legal orientation in the sector of self-production of electricity, thanks to the definition conferred on it by the Italian Regulatory Authority for Electricity, Gas and Water (AEEGSI), which considers the prosumer as 'the subject who is simultaneously producer and end-user of electricity'.⁶³

⁵⁹ E. Gabrielli, 'Il consumatore e il professionista', in P. Rescigno and E. Gabrielli eds, *Trattato del contratto* (Torino: UTET, 2005), I, 5; L. Delli Priscoli, 'La tutela del consumatore fra accertamento della non professionalità del suo agire, tutela della concorrenza e affidamento della controparte' *Contratto e impresa*, 1533 (2007); M. Maugeri, 'Smart contracts, smart grids e smart meters: i nuovi orizzonti nel mercato dell'energia e la tutela del consumatore/prosumer' *Studi senesi*, 85 (2020).

⁶⁰ M. Maugeri, 'Elementi' n 10 above, 406.

⁶¹ The expression prosumer represents the crisis of the terms producer and consumer, and introduces a new subject who operates in the production, use and exchange of goods and services. Put it in a nutshell, he is a consumer who is in turn producer and/or professional or a consumer who contributes to the production. According to M. Meli, 'Autoconsumo di energia rinnovabile e nuove forme di energy sharing' *Le nuove leggi civili commentate*, 630 (2020), Toffler coined the expression prosumer, which for the author is a crisis of the terms producer and consumer. Others, however, believe that the expression should be understood as crisis of professional and consumer, (S.J. Cole, 'The Prosumer and the Project Studio: The Battle for distinction in the Field of Music Recording' *Sociology*, 451 [2011]).

⁶² A. Quarta, n 7 above, 667. F. Bertelli, 'L'armonizzazione massima della direttiva 2019/771/UE e le sorti del principio di maggior tutela del consumatore' *Europa e diritto privato*, 553 (2019).

⁶³ This definition is found in Annex A to resolution no. 188/2012/E/com of 18.05.2012, as amended and supplemented by resolution no. 59/2014/E/com of 20.02.2014 and resolution no. 605/2014/E/com of 11.12.2014, and in Annex A to resolution no. 188 286/2014/R/com.

We could imagine this new economic player⁶⁴ as a kind of consumer-actor⁶⁵ who plays a central and active role in the choice and acquisition of goods and services.⁶⁶

At the level of supra-national sources, we must recall EU directive 2018/2001 on promoting the use of energy from renewable sources, whose underlying rationale is to facilitate the adoption by Member States of an economy attentive to renewable energies, thanks also to citizens placing value on forms of collaborative aggregation for production and consumption in the energy sector.

More specifically, Art. 21 of EU directive 2001/2018 lays down the legislative regulation of the prosumer,⁶⁷ defined as self-consumer of renewable energy. Significant in that sense is the preservation for such figures of rights and obligations as end-consumers, a sentence intentionally present to envisage an extension of the set of protections in favour of such subjects as well in those instances where contractual balances are tilted towards one of the parties.

Art 42-bis⁶⁸ (under Law no 8/2020) has partially implemented the directive at domestic level, thanks to the introduction of mechanisms for sharing the self-production and consumption of energy.

This leads to broadening the range of possibilities within which self-production and consumption can materialise, given the shift from an exclusively individual dimension to collective forms of self-consumption. The subjects taking part in the initiative are deemed producers, despite the fact that they do not actually own the production plants, as they hold them on some other ground while being at the same time consumers.⁶⁹

Of further relevance to the discourse is EU directive 2019/944 on the common rules for the internal electricity market, where the possibility of producing, consuming, accumulating and selling self-produced energy is incentivised. One of the regulatory innovations lies in the fact that it expressly acknowledged the active customer or prosumer (in accordance with Art 15, chapter III of EU directive 2019/944, significantly headed 'Consumer empowerment and protection').

⁶⁴ M. Flumian, *Citizen as prosumers: the next frontier of service innovation* (Ontario: Institute on Governance, 2009).

⁶⁵ C. Fuchs et al, 'The psychological effects of empowerment strategies on consumers' product demand' *74 Journal of Marketing*, 65-79 (2010).

⁶⁶ M. De Pamphilis, 'I contratti di consumo tra esigenze di armonizzazione e nuovi modelli negoziali' *Archivio giuridico Filippo Serafini*, 411 (2019).

⁶⁷ Directive 2018/2001 defines the notion of self-consumer of sources of renewable energy singled out Art 21 of the directive. Art 21, para 2, letter d) of the directive expressly lays down that Member States are in any event bound to ensure to such figures the preservation of their 'rights and obligations as end-consumers', being a sentence intentionally introduced in order to ward off the danger of any erroneous interpretation of the global system of protections the European Union intends to acknowledge in favour of this category.

⁶⁸ Through Art 42-bis, decreto legge 30 December 2019 no 162, so-called 'a thousand extensions', converted into legge 28 February 2020 no 8 has regulated in our legal system the institutions of collective self-consumption from renewable energy sources and has introduced in our system two new figures, termed "collective self-consumption" and 'energy communities' (Renewable Energy Communities - REC), stipulated by European legislation on promotion of the use of renewable energy sources.

⁶⁹ Likewise relevant is Directive 2019/944 on common rules for the internal energy market that amends Directive 2012/27/EU. The new regulatory package enables entirely new forms of interaction between purely passive consumers and new 'prosumers'.

The 'prosumer' differs from the 'consumer', even though we can detect points of convergence in relation to contracts for promiscuous use, where there is an exclusion of consumer protection for those subjects who act for a mixture of personal and professional purposes, unless the latter are so limited as to prove marginal.

The issue of contracts for promiscuous use has raised a debate also at the level of legal theory, in which there was no lack of voices in favour of recognising the application of consumer regulations where the purpose behind the purchase does not fall mainly within the professional or entrepreneurial activity conducted by the consumer.⁷⁰ Put it differently, the case law of the Court of Justice⁷¹ has excluded the application of consumer law to contracts for promiscuous use, that is, for a good partly destined to a professional use and partly to one unrelated to the professional activity, unless the professional use is so marginal that it played a negligible role in the global context of the transaction.

These remarks should induce in us a reflection on the existence of a shifting borderline concerning the figure of the prosumer as well,⁷² since we cannot exclude beforehand an extension of the protective regime of consumer legislation, conditional on the verification of the individual contractual transaction.

We should nevertheless highlight that the energy prosumer or consumer is a player in the economic activity, whereas the consumer is deemed a recipient of the professional's economic and entrepreneurial activity.

Another aspect emerging within the folds of the discourse is the central role played by regulatory activity⁷³ in the energy sector,⁷⁴ which has long been directing attention to the development of further tools available to the end-customer to

⁷⁰ E. Gabrielli, 'Sulla nozione di consumatore' *Rivista trimestrale di diritto e procedura civile*, 1149 (2003); R. Calvo, 'I contratti del consumatore', in F. Galgano ed, *Trattato di diritto commerciale e di diritto pubblico dell'economia* (Padova: Cedam, 2005), 295.

⁷¹ Case C-464/01, n 34 above. The case in question concerned an agricultural entrepreneur who had purchased tiles intended to cover the roof of a building used for residential purposes as well as a shelter for the animals with a surface area of approximately 40% of the total. This is deemed sufficient to prevent the acquisition of the consumer status.

⁷² A.M. Benedetti, 'Lo scambio dei ruoli ovvero l'utente che produce energia: la regolazione convenzionale dello "scambio sul posto"', in G. Napolitano and A. Zoppini eds, *Annuario di Diritto dell'Energia. Regole e mercato delle energie rinnovabili* (Bologna: Il Mulino, 2013), 189.

⁷³ The State has switched from being 'entrepreneur' to being 'regulator'. Essentially, within the folds of the discourse, it is the exercise of regulatory powers by the authorities that is capable of laying down the rules of conduct individual economic operators must comply with in their relationships with users, thereby inevitably impacting on the rules governing individual agreements. It is in this scenario that the first independent regulatory Authorities make their appearance. (M. Orlandi, 'Autonomia privata e autorità indipendenti', in G. Gitti ed, *L'autonomia privata e le autorità indipendenti* [Bologna: Il Mulino, 2006], 75; L. Di Bona, *Potere normativo delle autorità indipendenti e contratto. Modelli di eteronomia negoziale nei settori dell'energia elettrica e del gas* [Napoli: Edizioni Scientifiche Italiane, 2008], 86; G. Di Gaspare, *Diritto dell'economia e dinamiche istituzionali* [Padova: Cedam, 2017]; T. Favaro, *Regolare "la transizione energetica": Stato, mercato, innovazione* [Padova: Cedam, 2020], 65).

⁷⁴ Autorità di Regolazione per Energia Reti e Ambiente (ARERA). For E. Tedesco, 'Regolazione dell'economia e integrazione del contratto. Il rapporto tra le Autorità di regolazione e l'autonomia privata', *I contratti*, 231 (2021), 'the regulation aims to correct two different market failures: the existence of a natural monopoly, due to the presence of a limited number of networks, owned by individual private operators; and the informational asymmetries, which do not permit an efficient allocation of energy resources'.

operate in the market, not only in a capacity as producer (*prosumer*) but also as subject capable of providing ancillary services to the system.⁷⁵

Generally speaking, consumer legislation,⁷⁶ historically tasked with ensuring protection for the contractually weak subject *vis-à-vis* the professional counterparty, opens up to new application perspectives and is sensitive to the emergence of scenarios.⁷⁷

Nowadays we speak of post-modern consumer⁷⁸, as paradigm of a new contractual model and a new way of understanding the relationship between businesses and the market.

In the light of the picture that has been outlined, to borrow the words of Micklitz, the markets appear fragmented, and each market segment has its own system or rules; in a similar vein, the consumer is 'fragmented' since in each of these markets he receives a differentiated protection.⁷⁹

It is thus ostensibly necessary to remark that each sectoral discipline, think for instance of consumer codification or of the energy sector, which knows new forms of peer-to-peer exchange between prosumers, simultaneously producers and consumers of energy,⁸⁰ must be read and interpreted against the backdrop of a unified systematic logic.

If, on the one hand, the emergence of new economic dynamics and new contractual models has seemingly fuelled the debate on a potential extension of the notion of consumer, on the other hand it must not make us forget the impact that the creation of different sub-systems might have on the general system. It follows that 'the moment we speak of secondary rights as sub-systems, we implicitly acknowledge that the contingent and peculiar situation that characterises the exception is transcended: something that finds confirmation in the plurality of sources a secondary right consists of for it to be such, i.e., once again, system'.⁸¹

⁷⁵ P. Schlesinger, 'Il "nuovo" diritto dell'economia', in G. Gitti ed, n 73 above, 53.

⁷⁶ J.L. Bergel, 'À la recherche de concepts émergents en droit' *Dalloz*, 1568 (2012).

⁷⁷ E. Gabrielli, 'Sulla nozione', n 70 above, 1149.

⁷⁸ G. Capilli ed, *I contratti del consumatore* (Torino: Giappichelli, 2021), 1.

⁷⁹ H.W. Micklitz, 'Il consumatore: mercatizzato, frammentato, costituzionalizzato' *Rivista trimestrale di diritto e procedura civile*, 859 (2016).

⁸⁰ V. Cappelli, 'Il mercato dell'energia alla prova della sharing economy' *La nuova giurisprudenza civile commentata*, 1398 (2020).

⁸¹ C. Castronovo, 'Diritto privato generale e diritti secondi. La ripresa di un tema' *Europa e diritto privato*, 397 (2006).