# VULNERABLE CONSUMERS AND FINANCIAL SERVICES IN THE EUROPEAN UNION: THE POSITION OF THE EU COURT OF JUSTICE*

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*To a certain degree, owing to the informational asymmetry, the difference in negotiating power and the relative lack of transparency that is often inherent to the private law relationships between individual consumers and the businesses selling goods and services, and due to the ever-present risk of falling victim to unfair commercial practices, all consumers can be considered 'vulnerable'. This is particularly true in the case of financial products and services: transactions involving these goods are considered especially complex and, as the European Commission noted in a 2010 paper, consumers are often ill-prepared to make sound decisions about retail financial products not only due to asymmetric information or limited financial literacy, but also due in part to instincts that drive consumers towards choices that might be inconsistent with their long-term preferences (EC 2010). The European Parliament reached the same conclusions in its 2012 resolution on a strategy for strengthening the rights of vulnerable consumers, which referred to financial markets as a 'particularly problematic sector', the complexity of which could potentially result in any consumer becoming vulnerable. The resolution noted that while this complexity may lead consumers into excessive debt by itself, the situation is made even worse by the fact that 70% of financial institutions' and companies' websites were making basic errors in their advertisements and the basic required information on the products on offer, while the cost was presented in a misleading way (European Parliament Resolution 2011/2272[INI]).*

## 1. The Notion of the 'Average' Consumer

With these issues in mind, we should first discuss, at least briefly, the concept of the 'average consumer' and its interpretation by the European Court of Justice before moving on to a more detailed analysis of how the EU consumer protection regime treats those specific populations of consumers it deems to be 'particularly vulnerable'. When interpreting the legal term 'consumer', defined by the Directives 93/13/EEC (Unfair Contract Terms Directive, Council Directive 93/13/EEC) and 2008/48/EC (Consumer Credit Directive, Directive 2008/48/EC of the European Parliament and the Council) as „*a natural person who, in transactions covered by the Directives, is acting for purposes which are outside his trade, business or profession*", the Court of Justice had to determine the extent of protection that should be afforded to everyone falling under the scope of the term. The question of how the Court should approach the notion of the 'average consumer' was answered in Case *C-210/96 Gut Springenheide*, where the German court asked the ECJ whether, when assessing if statements designed to promote sales are likely to mislead the purchaser, it would base its assessment on an objectified concept of a purchaser, or whether it would consider the actual expectations of the

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consumers to whom the statements are addressed; and, in the case of the latter, whether it would use the test of the 'informed average consumer' or that of the 'casual consumer'. In its answer, the Court pointed out that there had been several earlier cases[2] – dating back to the late 1980s – in which the Court had to decide whether a description, trademark or promotional text can be considered misleading; and that in these cases, the Court – without specifically referring to it as a test – consistently based its decisions on the presumed expectations of an *average consumer who is reasonably well-informed and reasonably observant and circumspect* (Waddington 2013). Out of these pre-Gut Springenheide cases, Case *C-470/93 Mars* is of particular interest, as paragraph 24 of the Court's *Mars* decision marks the first explicit reference to the category of „*reasonably circumspect consumers*".

Following the landmark decision in *Gut Springenheide*, the case-law of the ECJ continued to utilize the 'Gut Springenheide formula' when interpreting the behavior of the average consumer: references to the formula in cases such as *C-342/97 Lloyd, C-465/98 Darbo* and *C-239/02 Douwe Egberts* show that a clear legal precedent has been established (Incardona & Poncibo 2007). This consumer benchmark has also made its way into EU consumer protection legislation with Directive 2005/29/EC, the Unfair Commercial Practices Directive, which explicitly refers to the economic behavior of the average consumer of a certain product in its definition of an 'unfair commercial practice' (Article 2). Recital 18 of the Preamble clarifies that the Directive *„takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice"*.

This interpretation of the average consumer – which remains the predominant approach of both EU consumer protection legislation and ECJ case law in assessing consumer behavior to this day – is based on the traditional information paradigm which assumes that by increasing the amount of available information and by ensuring complete transparency, consumers will find it easier to make rational decisions, and as such, any 'weakness' of the consumer can be eliminated solely through the provision of information (Domurath 2018). This standard has been criticized by academia and civil society as unrealistically demanding, overly simplified, and generally, a legal fiction far removed from the actual behavior of the individual consumer, both in terms of informedness and reasonability. An actual consumer – whether or not they are considered 'vulnerable' – cannot always be expected to be able and willing to thoroughly assess the wealth of information available to them before making a consumer decision; nor can they be expected to make perfectly rational choices that are unclouded by emotions and social influences (Incardona & Poncibo 2007, 31–36).

The use of this high standard falls in line with the idea that the EU consumer protection regime is generally ruled by economic, and not social, considerations and, as *Norbert Reich* writes, *„that consumer protection understood as a form of social protection is generally the responsibility of Member States"* (Reich 2018). In this economy-focused approach, the freedom of the internal market – and particularly, a right to free choice in business-to-consumer contracts – is seen as key to the uninterrupted functioning of market integration, and thus, the EU appears generally

[2] The Court mentions, in particular, Cases *C-362/88 GB-INNO-BM*; *C-238/89 Pall*; *C-126/91 Yves Rocher*; *C-315/92 Verband Sozialer Wettbewerb; C-456/93 Langguth* and *C-470/93 Mars*.

wary of restricting the freedom of contract in the name of consumer protection. The information and transparency requirements imposed on the seller by the traditional information paradigm constitute only a minimum deviation from complete contractual freedom, as they do not encroach on the substance of the contract (Domurath 2018, 126).

Examining the legislation further, we can point out that the EU's interpretation of the information paradigm does allow for some leeway. Not only does the Consumer Credit Directive (2004/48/EC) require creditors to provide consumers with extensive information, but they are also required to make this information accessible in a standardized form (Domurath 2018, 127). The Unfair Commercial Practices Directive (2005/29/EC) takes this one step further: its wording shows an attempt at reconciling the two objectives of internal market freedom and adequate consumer protection while also moving from the minimum harmonization approach of previous Directives to one of total harmonization. According to Recital 24 of the Preamble, the objectives of the Directive are *„to eliminate the barriers to the functioning of the internal market represented by national laws on unfair commercial practices and to provide a high common level of consumer protection"*. This approach restricts the discretion of Member States with regard to the social elements of consumer protection while maintaining their responsibility (Reich 2018, 146–147).

## 2. Interpreting Consumer Vulnerability

The uniform benchmark of the reasonable average consumer can be contrasted with the concepts of 'consumer weakness' and 'vulnerability'. These two terms can be considered synonymous, which takes us back to the proposal, briefly mentioned in the introduction, that all consumers are vulnerable to a certain degree and as such, would universally require a higher standard of protection. Alternatively, we can retain the distinction between the two, defining 'weakness' as an intrinsic condition of all consumers that stems from their disadvantaged position in business-to-consumer transactions, while establishing a separate category of 'vulnerable consumer' to provide additional protection to consumers who are at particular risk of suffering harm or injury from specific market practices or products due to certain personal characteristics. Most of the literature on European consumer protection law takes the latter approach: however, there are significant disagreements in how exactly the vulnerable consumer standard should be applied in practice. Two of the contrasting interpretations are worth mentioning here in greater detail, due to their arguments dealing with issues related to the provision of financial services to consumers.

*Irina Domurath* argues that vulnerability should replace the traditional information paradigm completely as the normative standard in the field of consumer credit and mortgage law, a segment of the financial services sector characterized by some of the most complex business-to-consumer transactions. This approach is predicated on three key arguments: first, the lack of actual freedom of contract in consumer law due to the stronger bargaining and market position of the commercial party. Second, the concept of the average consumer not being rooted in factual evidence, considering both the fact that actual consumers don't exhibit rational market behavior and the shortcomings of the information paradigm when the quantity and complexity of available information become overwhelming to the consumer. Finally, the lack of an EU model of social

justice due to a preference for an 'access justice' approach – that is, justice interpreted as providing consumers free and non-discriminatory access to the market –-to protect the objective of internal market freedom (Domurath 2018, 133–135).

*Norbert Reich,* on the other hand, argues that the concept of vulnerability should be restricted to certain identifiable groups of consumers. These include physically and intellectually disabled consumers – two groups traditionally regarded as particularly vulnerable in business-to-consumer relations – and poor or 'economically marginalized' consumers, a group that is talked about much less often in the context of vulnerability. This approach bases economic vulnerability on studies showing that over-indebtedness leads to those living in poverty having to pay risk premiums to access a large number of goods and services, often including essential services such as energy, telecommunications, and housing. In the context of access to financial services, *Reich* posits that only those consumers *"who are in need of basic financial services and who, because of their economic situation, do not have access to them at all or who only have such access at unreasonable prices"* should be considered vulnerable (Reich 2018, 143–145). Regardless of their differences, these two approaches share the notion that the vulnerable consumer concept can constitute an important addition to European consumer law, particularly when it comes to the provision of financial services to customers.

We should touch upon the question of how the vulnerable consumer category found its way into Community law next. First, it's worth mentioning that while the majority of the ECJ's case law followed the information paradigm closely, there were a few cases where the Court took a more protective approach: the earliest and most impactful of these decisions being the Court's 1989 judgment in *Case C-382/87 Buet* (Waddington 2013, 14). In *Buet,* the Court found that a French regulation prohibiting the door-to-door sale of educational material did not constitute a disproportionate restriction of the Treaty provisions on the free movement of goods, given that *„the potential purchaser often belongs to a category of people who, for one reason or another, are behind with their education and are seeking to catch up. That makes them particularly vulnerable when faced with salesmen of educational material…"* (para. 13). The Court's decision in *Buet* is very limited in its scope, only applicable in the specific context of the canvassing of educational material, and while a small number of later ECJ judgments (such as the decision in Case *C-441/04 A-Punkt Schmuckhandel v. Claudia Schmidt)* present similar arguments, the approach taken in these cases always remained an exception to the general rule of interpreting the consumer as reasonably circumspect, applicable only in cases where the Court examined national legislation that provides extra protection to a narrow specific group of consumers (Domurath 2018, 126–127). Furthermore, with the EU's more recent consumer protection legislation leaning towards a total harmonization approach – both in general and in the specific context of off-premises sales – it is doubtful whether a case similar to *Buet* would lead to the same outcome (Reich 2018, 140–141).

Beyond these isolated cases, the vulnerable consumer concept has appeared in European Union legislation in the field of services of general economic interest (SGEIs). SGEIs are defined as *„market services subject to specific public service obligations by virtue of a general interest criterion"* and include services such as the supply of electricity, gas, water, and telecommunications (Johnston 2018). Beginning in the 1980s, public service reforms across the EU lead to deregulation, privatization and

trade liberalization in SGEI markets, promising greater choice and lower prices to consumers (Clifton & Díaz-Fuentes & Fernández-Gutiérrez 2019). It is against this backdrop that we can notice the first appearances of the vulnerable consumer concept in Directives 2002/22/EC (Universal Service Directive in electronic communication sector), 2009/72/EC (Electricity Directive) and 2009/73/EC (Natural Gas Directive). While these instruments don't explicitly refer to any consumers as vulnerable, they require the Member States to ensure the universal provision of SGEIs – in particular, telecommunications services, gas, and electricity – to all household customers, at an affordable price and in a specified quality (Domurath 2018, 128–129). This approach moves beyond the view of consumers as purely rational entities whose market participation serves to maximize their individual utility and considers their heterogeneity; that some of them may not be in a position to access the purported benefits of market reform (Clifton & Díaz-Fuentes & Fernández-Gutiérrez 2019, 267–268). While the limited scope of these Directives means that they provide a higher standard of protection to consumers only in the context of the provision of services of general economic interest, the more protective approach taken here has the potential to influence future legal instruments in the field of consumer protection.

## Conclusions

When it comes to business-to-consumer transactions in the field of financial services, consumers are in a particularly difficult position, left at the mercy of a commercial party with considerably stronger bargaining power. The shortcomings of the traditional information paradigm become particularly evident in cases where the sheer amount and complexity of available information paradoxically makes it more difficult for the non-specialist consumer to make informed decisions. This imbalance is further exacerbated in the case of certain consumers due to personal factors such as over-indebtedness or disability. In light of these observations, the additional protections provided by the vulnerable consumer concept appear particularly useful in the context of financial consumer protection, whether used sparingly to protect the interests of those consumers that are most vulnerable or potentially replacing the standard of the average consumer entirely.

This deviation from the current European consumer protection regime built on the ideas of the reasonably circumspect consumer and access justice could, however, potentially upset the delicate balance between consumer protection objectives and those of eliminating the barriers to the functioning of the internal market. Understandably, the European Union shows reluctance to raise its standard of consumer protection; however, developments such as the more protective approach taken with regards to services of general economic interest show that there is hope for systemic change.

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