

"PARTICULARLY VULNERABLE": AT-RISK CONSUMERS IN THE EUROPEAN UNION CONSUMER PROTECTION REGIME*

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In a previous article, I explored the notion of the average consumer as defined in European Union law and its interpretation by the European Court of Justice. This current article aims to serve as a continuation of the previous study, with the objective of presenting a brief analysis of two potential interpretations of consumer vulnerability developed in the literature of consumer protection, followed by an examination of the appearance of a singular major exception to the average consumer concept within the European Union consumer protection regime: the narrow scope of consumers acknowledged as 'particularly vulnerable'.

1. Interpreting Consumer Vulnerability

The European Union's default benchmark of the reasonable and empowered average consumer can be examined in contrast with the notion of consumer vulnerability. While the importance of the concept is a common thread in the literature of European consumer protection law, there are significant disagreements in how exactly the vulnerable consumer standard should be applied in practice (Luzak 2016, 1-2). Two of the contrasting interpretations are worth briefly mentioning here, 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 do not 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 with free and non-discriminatory access to the market – in order to protect the objective of internal market freedom (Domurath 2018, 133-35).

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.

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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, 143-45). 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.

Furthermore, the idea of vulnerability should also be contrasted with the more traditional concept of the disadvantaged consumer. The application of these two approaches to disempowerment (generally defined as a weakening of the position of consumers in the market) often yields similar results but the concept of disadvantaged consumers operates solely on the basis of socioeconomic factors (such as poverty, advanced age, lower educational attainment or belonging to a minority group). In comparison, the vulnerability concept posits that equating consumer disadvantage with the presence (or absence) of certain clearly defined socioeconomic factors does not align with actual consumer behaviour and will not therefore be suitable for identifying and addressing all forms of disempowerment (Commission 2011, 6-7). The vulnerability approach interprets consumer powerlessness as arising not only from the characteristics of the person, but from the interaction of these characteristics with a consumption situation. While different interpretations of vulnerability vary in their focus on different internal or external factors, the interactional nature of vulnerability remains a common thread. This focus on the interaction between the consumer’s personal characteristics and marketing practices allows the vulnerability approach to be both more robust and more mindful of consumer agency in comparison with an interpretation of disadvantage based entirely on consumers objectively belonging to a particular group (Baker, Gentry & Rittenburg 2005, 128-29).

As *Peter Cartwright* points out, the term ‘vulnerability’ is not without issue, either. Some authors find that labelling particular consumers vulnerable is stigmatizing, creating the impression of a divide between ‘vulnerable consumers’ and ‘the rest.’ One solution to this issue is to consider vulnerability as relative and dynamic – an approach that is also compatible with our focus on the importance of marketplace interactions – and to recognize the vulnerability of different consumers in different circumstances instead of treating vulnerable consumers as a homogeneous group (Cartwright 2015, 119-38).

2. Consumer Vulnerability in European Union Law

We should touch upon the question of how the vulnerable consumer category found its way into Community law next. First, it is worth mentioning that while the majority of the ECJ’s case law followed the information paradigm closely, there were a few cases when 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

2014, 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...*”

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 and specific group of consumers (Domurath 2018, 126-27). 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 were first defined by the European Commission as “*market services subject to specific public service obligations by virtue of a general interest criterion*” and later as “*economic activities which deliver outcomes in the overall public good that would not be supplied [...] by the market without public intervention.*” While Member States generally enjoy wide discretion in defining what exactly qualifies as an SGEI, this discretion is considerably narrower in areas where EU regulation exists: this includes services such as the supply of electricity, gas, water, postal services, telecommunications and may even extend to certain financial services: the Commission’s 2011 recommendation on access to a basic payment account is based on the explicit acknowledgement that access to basic banking should be considered a SGEI, considering its importance “*for financial and social inclusion and to allow consumers to benefit fully from the single market.*”

This idea of extending public service obligations to basic banking services is also argued for in literature based on the legitimate expectations of consumers and the enhanced corporate responsibility of banking service providers (Cartwright 2014, 134-35). While the broader category of services of general interest (SGIs) also includes non-economic services (such as social services, public health and social housing) that are not subject to EU internal market and competition rules, SGEIs are economic activities characterized by public intervention in their respective markets to ensure universal, continuous, equal – and in certain cases transparent and affordable – access (Johnston 2018, 99-100).

Beginning in the 1980s, market-oriented public service reforms across the EU led to deregulation, privatization, and trade liberalization in SGEI markets, promising greater choice and lower prices for consumers (Clifton, Díaz-Fuentes & Fernández-Gutierrez 2019, 267). During this period, the consumer was primarily seen as simply a market participant, and consumer protection considerations within the field of SGEIs appeared only on rare occasions, such as in the Court’s decision in Case C-320/91 *Corbeau*,

(Johnston 2018, 109) in which the Court emphasized that a postal service monopoly that is “*entrusted with a service of general economic interest*” has a universal obligation to provide its service “*at uniform tariffs and on similar quality conditions, irrespective of the specific situations or the degree of economic profitability of each individual operation.*”

It is against this backdrop of SGEI market liberalization that we can notice the greater recognition of consumer protection issues and the gradual development of the vulnerable consumer concept in Directive 2002/22/EC (Telecommunications Universal Service Directive), as well as the Second² and particularly the Third Internal Energy Market (IEM) Packages.³ The Telecommunications Directive did not yet refer explicitly to a certain range of consumers as ‘vulnerable’ but placed a public service obligation on Member States by recognizing the right of all consumers to a contract with an undertaking providing public telephone services. The Second Electricity and Gas IEM Directives opted to use the terminologically ambiguous category of the ‘vulnerable customer’ as they established a wide-ranging public service obligation – in the case of the Electricity Directive, a universal service obligation – requiring Member States to ensure the provision of gas to all customers connected to the grid and the provision of electricity to all household customers at an affordable and non-discriminatory price and of a specified quality (Domurath 2018, 128-29). In implementing these obligations, Member States must ensure “*high levels of consumer protection*” and in particular, “*that there are adequate safeguards to protect vulnerable customers.*” Since the Directives do not provide a concrete definition of the term, it is up to the Member States to specify the groups of energy customers that are to be deemed vulnerable (Johnston 2018, 116-117).

The Third IEM Directives were the first to contain a direct reference to ‘vulnerable consumers’ as such: the preambles to both the Electricity and the Gas Directives mention the importance of further strengthening the public service requirements established in these areas “*to make sure that all consumers, especially vulnerable ones, are able to benefit from competition and fair prices.*” Furthermore, the public service obligations were expanded with more specific guidelines on how Member States should interpret vulnerability and through what methods they should address its consequences: these include referring to ‘energy poverty’ when defining vulnerable customers, the prohibition of disconnecting services to these customers in ‘critical times,’ and taking the appropriate measures to protect customers in ‘remote areas’ (while this final category had already been mentioned in the Second Package, here it changed from an optional consideration to an obligation of Member States). However, these categories were not explicitly defined in the Directives either; as such, wide discretion remained at

² Consisting of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity [2003] OJ L176/37 (Electricity Directive) and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas [2003] OJ L176/57 (Natural Gas Directive).

³ Consisting of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity [2009] OJ L211/55 (Electricity Directive) and Directive 2009/73/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas [2009] OJ L211/94 (Natural Gas Directive).

Member State level (Johnston 2018, 117). Finally, Annex I of both Directives contains a limited range of more specific consumer protection measures concerning the basic contractual rights of final customers in the gas and electricity markets and the commitment of Member States to the implementation of intelligent metering systems. These consumer protection considerations were finally brought to the forefront of regulatory attention with the entry into force of the Fourth Electricity Directive⁴ in 2019. Article 3 of the new Directive requires Member States to ensure the *competitive, consumer-centred, flexible and non-discriminatory* functioning of their electricity markets as a general organizational rule. While the legislator is still primarily motivated by market considerations – as exemplified by the emphasis on rules such as the free choice of supplier and the freedom of suppliers to determine their prices, and by the continued use of the ‘final customer’ terminology in the majority of provisions signifying their applicability on both household and commercial customers – the Directive also sets out the requirements for a ‘consumer-centred’ market in specific detail in its Chapter III entitled ‘Consumer Empowerment and Protection.’ Chapter III incorporates and greatly expands the measures that previously appeared in annexes to the Directives and as guidelines for the provision of public service obligations. With regard to the basic contractual rights of customers, Article 10 introduces a range of new measures to protect the interests of household consumers and particularly, vulnerable ones; these include requirements that customers *“be provided with a summary of the key contractual conditions in a prominent manner and in concise and simple language”* and that *“suppliers shall offer final customers fair and transparent general terms and conditions, which shall be provided in plain and unambiguous language and shall not include non-contractual barriers to the exercise of customers’ rights, such as excessive contractual documentation. Customers shall be protected against unfair or misleading selling methods.”*

Article 28 deals specifically with vulnerable customers: while the definition of the concept remains the responsibility of the Member States, the Directive includes a more extensive set of guidelines than before, incorporating in particular certain potential sources of vulnerability such as *“income levels, the share of energy expenditure of disposable income, the energy efficiency of homes, critical dependence on electrical equipment for health reasons, age or other criteria”* while also reprising previously established categories such as energy poverty, critical times and remote areas. Finally, Article 29 requires Member States to establish and publish their sets of criteria used for the assessment of the number of households in energy poverty, taking into account factors such as *“low income, high expenditure of disposable income on energy and poor energy efficiency.”* Given that the Directive sets 1 January 2021 as the deadline for transposition into national legislations, all Member States can now be expected to be in compliance with these heightened standards of consumer protection in the electricity market.

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

⁴ Directive (EU) 2019/44 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity [2019] OJ L158/125

benefits of market reform (Clifton, Díaz-Fuentes & Fernández-Gutierrez 2019, 267-68). 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.

The earliest piece of legislation within the narrower field of consumer protection to explicitly refer to the vulnerability of certain consumers was the Unfair Commercial Practices Directive (2005/29/EC). Article 5 of the Directive calls for additional protection against those “*commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee.*”

A similar provision appears in Recital (19) of the Preamble to the Directive. While the Directive uses the term ‘particularly vulnerable consumers,’ the definition it establishes refers to a ‘clearly identifiable group’ based on a small and exhaustively defined set of characteristics (mental or physical infirmity, age or credulity), and as such it is largely static in nature: a consumer is either considered vulnerable in every business-to-consumer interaction or not vulnerable at all.

This conceptualization of vulnerability omits many potential causes of vulnerability – such as poverty – and only differs from the traditional ‘disadvantaged consumer’ approach in the choice of terminology, having little in common with the dynamic and relational approaches developed in literature (Cartwright 2014, 127). This might prove particularly problematic in the field of financial consumer protection, considering that financial markets are so complicated and the service providers operating in these markets offer their services with such complex terms and conditions that, in practice, consumers are generally unable to meet the standard of a reasonable and well-informed ‘average consumer.’ In line with *Domurath’s* earlier-referenced argument, it seems reasonable to claim that this area would benefit considerably from legislation adopting a more dynamic approach from literature that would allow for any consumer to be considered vulnerable with regard to the particularities of a specific business-to-consumer interaction.

The Commission’s later guidance documents on the application of the Unfair Commercial Practices Directive provide further context to the evolving interpretation of the Directive’s provisions. The first guidance document, released in 2009, makes reference to the concept of ‘weak and vulnerable’ consumer (Commission 2009): while the legislator opted against using it as the generally applicable standard, the inclusion of the concept was still deemed necessary to protect all types of consumers. The document then elaborates on the criteria used in Article 5 to define vulnerability: *mental or physical infirmity* may include sensory impairment, limited mobility and other disabilities; *age* may be considered both from the perspective of older (elderly people) and younger consumers (children and teenagers); while *credulity* is a neutral term that covers any consumer ‘who may more readily believe specific claims.’ (Commission 2009, 28-29) A limit to the vulnerability concept is the requirement of *foreseeability*: businesses are not held responsible for consumers being misled or acting irrationally

due to such an extreme level of naivety or ignorance on their behalf that the seller could not have been reasonably expected to foresee.

The second guidance document (Commission 2016b), released in 2016, introduces a new, multi-dimensional interpretation of consumer vulnerability based on the Commission's 2016 study on vulnerability across key markets (Commission 2016a). According to the study, consumer vulnerability can be defined along five core dimensions: consumers facing a heightened risk of negative outcomes or impacts on their well-being; consumers having characteristics that limit their ability to maximize their well-being; consumers having difficulty in obtaining or assimilating information; the inability or failure of consumers to buy, choose or access suitable products; and the higher susceptibility of such consumers to marketing practices. According to the guidance document, the fifth dimension – consumers being more susceptible to certain marketing practices – is the most relevant to the approach used by the Directive, closely matching the definition given in Article 5 ('particularly vulnerable to the practice or the underlying product') but in practice, the majority of consumers show vulnerability in at least one dimension while a third of consumers are vulnerable in multiple dimensions (Commission 2016b, 43).

Directive 2011/83/EU (Consumer Rights Directive) only mentions vulnerability briefly in Recital (34) of its Preamble, adopting the definition introduced in the Unfair Commercial Practices Directive: "*the trader should take into account the specific needs of consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee.*" The Directive does not elaborate further on this provision besides establishing its limits by noting that "*such specific needs should not lead to different levels of consumer protection*"; the Commission's 2014 guidance document is similarly reticent on the topic. As per the Commission's recent announcement, it will release new guidance documents to both Directives by 2022 as part of its New Consumer Agenda, set in action in November 2020. Since consumer vulnerability is considered one of the five key areas of the Agenda,⁵ there is hope that the new documents will promote a more empowering approach towards the interpretation of the provisions on vulnerable consumers.

Conclusions

The power imbalance inherent in business-to-consumer interactions is further exacerbated in the case of certain consumers due to personal factors such as age, over-indebtedness or disability. The additional protections provided by the vulnerable consumer concept could prove particularly useful to these consumer subgroups, especially in the context of problematic sectors – such as the consumer financial services market – either applied on a case-to-case basis as an extension to the standard of the "reasonable and empowered" average consumer to protect the interests of those most at risk from certain commercial practices or potentially replacing the current

⁵ It is worth mentioning that one of the specific objectives within this key area – *improving the availability of debt advice services in Member States* – is directly aimed at the previously mentioned 'particularly problematic sector' of the financial services market.

average consumer standard completely. To help identify cases of consumer vulnerability, detailed guidelines utilizing categories similar to the ones seen in the case of energy markets – such as “energy poverty”, “critical times” and “remote areas” – could also be developed for other consumer markets, based on those characteristics that have the greatest potential to adversely affect the ability of consumers to make informed decisions in a specific sector.

While the term “particularly vulnerable consumers” has already made an appearance in EU consumer protection legislation, the current approach omits many potential causes of vulnerability – such as poverty – and only differs from the traditional ‘disadvantaged consumer’ approach in the choice of terminology, having little in common with the dynamic and relational approaches developed in literature. This might prove particularly problematic in the field of financial consumer protection, considering that financial markets are so complicated and the service providers operating in these markets offer their services with such complex terms and conditions that, in practice, consumers are generally unable to meet the standard of a reasonable and well-informed ‘average consumer’. In line with *Domurath’s* arguments referenced earlier, it seems reasonable to claim that this area would benefit considerably from legislation adopting a more dynamic approach from literature that would allow for any consumer to be considered vulnerable with regard to the particularities of a specific business-to-consumer interaction.

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