Vulnerable consumers

SUMMARY

Compared to the average consumer, who is considered to be able to make rational choices to find the best deals and benefit from competitive markets, vulnerable consumers are not considered to be able to do so for a variety of reasons. There are two main approaches to identifying vulnerable consumers. One emphasises those individual characteristics of the consumer that increase the (theoretical) risk of becoming vulnerable, such as low socio-economic status, low education level, not being able to speak a particular language, or a minority status. The other suggests that all consumers can become vulnerable due to the interplay between their individual characteristics, the circumstances and the economic market. According to this view, consumers can move in and out of vulnerability, depending on their individual state. The European Commission’s 2018 consumer survey found that 43 % of EU citizens believed themselves to be vulnerable as consumers.

The image of vulnerable consumers in European Union (EU) law is narrower than that found in the academic literature. They are defined in the Unfair Commercial Practices Directive, which requires additional protection for consumers who are ‘particularly vulnerable due to their mental or physical infirmity, age or credulity’. This definition has been subject to much criticism, as it does not take the different variables that can make consumers vulnerable into account. Provisions protecting vulnerable consumers can be found in other horizontal consumer legislation, as well as legislation on specific sectors, for instance in the field of energy, finance and food legislation. The development of e-commerce and artificial intelligence have also been raising concerns about consumer vulnerability. For instance, the European consumer organisation BEUC is asking for a rethink of the concepts of ‘average’ and ‘vulnerable’ consumers, as some practices online, which combine collection of data with manipulating consumers, are making all consumers vulnerable and therefore require all consumers to be equally protected.

The European Parliament has long advocated a wider concept in defining vulnerable consumers, and stronger protection for them, including in the energy, finance and digital sectors.

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Introduction

Addressing the specific needs of certain consumer groups, including vulnerable consumers, is one of the priorities of the new consumer agenda, the European Commission strategy for consumer policy, adopted in November 2020. The new strategy announces measures to protect financially vulnerable consumers at risk of over-indebtedness, low-income consumers, older people and people with disabilities (especially those who have no access to the internet), children and minors, and consumers at risk of discrimination by biased artificial intelligence algorithms.1

In EU law, vulnerable consumers are defined in the Unfair Commercial Practices Directive (UCPD), which focuses on consumer information and marketing before consumers buy a product or a service. The directive defines the vulnerable consumers as an exception to the concept of the average consumer. Compared to the average consumer, who is ‘reasonably well-informed and reasonably observant and circumspect’, some consumers require additional protection because they are particularly vulnerable due to their mental or physical infirmity, age (children and elderly people) or credulity. Both concepts have been explicitly and implicitly used in other areas of consumer legislation, and both have been subject to criticism: the average consumer standard for being too high and not corresponding to actual consumer behaviour (which is not always rational); the vulnerable consumer standard for being too narrow; and the combination of the two for not affording appropriate protection for consumers who are 'below' the average consumer standard, but do not fall into the vulnerable consumer category.4

Who are vulnerable consumers

While there is no agreement on a single definition of vulnerable consumers, the concept of consumer vulnerability that emerges from the academic literature, including sociology, marketing and law is wider than that defined in the UCPD. Key themes mentioned in the definitions are powerlessness, not having control over the interactions on the marketplace and higher risk of suffering harm or detriment.5

There are two main approaches to identifying vulnerable consumers. One emphasises individual characteristics of the consumer, such as low income, unemployment, low education level or not being able to speak a particular language (this is often called the ‘class-based vulnerability’, as it concerns a certain class or group of people). These characteristics increase the (theoretical) risk of becoming vulnerable. The main advantages of this approach are that it offers legal certainty as to who should be considered vulnerable and is easier to legislate for. Another approach takes the context into account and suggests that all consumers can become vulnerable due to the interplay between their individual characteristics, personal circumstances and the economic market (and possibly also of wider societal conditions). This view of vulnerability is more dynamic, as consumers can move in and out of vulnerability, depending on their individual state (‘state-based vulnerability’). This can happen due to events that temporarily lower their ability to make rational decisions on the marketplace, for instance, being in mourning over losing a loved one, going through a divorce, facing serious illness or other stressful life events. This approach emphasises the actual experience of vulnerability. Other factors that can cause consumers

Behavioural biases

Behavioural economists studied whether some consumers benefit less from competitive markets due to ‘behavioural biases’. They have identified a number of behavioural biases that can affect consumers’ ability to make rational choices, for instance: framing (how the choices are presented); and inertia (consumers are more likely to choose the defaults and the status quo). These biases can be exploited by businesses to charge higher prices.

Although behavioural biases affect all consumers, experiments showed strongest evidence of such biases for lower socio-economic groups, and some evidence for older people. This can be amplified in real-life situations where people who are better off can use their social networks to receive better information and advice from their peers, instead of relying on their biases.
to be vulnerable are **market characteristics**. Consumers tend to be more vulnerable in markets that offer complex products that make it difficult for them to compare different offers and understand complicated contracts, such as in the field of finance or energy services.

Vulnerability can take different forms. One **taxonomy** suggests that consumers can become vulnerable because of **information vulnerability** (linked to the ability to obtain and understand information or to make the right choice); **pressure vulnerability** (greater liability to **hard pressure selling** techniques); **supply vulnerability** (inability to afford essential goods or services or having less choice within an affordable price range); **redress vulnerability** (difficulty in seeking remedies for wrongs suffered); and **impact vulnerability** (being more affected by making bad choices).

A 2016 study for the Commission⁶ on 'Understanding consumer vulnerability in the EU's key markets' offered a definition of vulnerable consumers that is more in line with the academic literature. It concluded that all consumers can become vulnerable and that vulnerability is 'best viewed as a spectrum rather than a binary state'. According to the study, consumers can be vulnerable due to their socio-demographic characteristics, behavioural characteristics, personal situation or market environment. The study identified five core vulnerability dimensions and measured their incidence in three markets – energy, finance and online – through both surveys and experiments. It found that around a quarter of consumers felt vulnerable because of their personal characteristics, with most reporting feeling vulnerable due to financial (14 %) and employment (11 %) circumstances. On the other hand, the study suggested that the largest share of consumers may be vulnerable because they are susceptible to marketing practices, followed by being less able to choose or access suitable products (due to not comparing deals or not knowing how to), being at a higher risk of negative outcomes or impacts on well-being (due to not reacting when experiencing problems or overpaying for products because of a lack of certain payment methods) and having difficulty in obtaining and understanding information about products. Only 17 % of people surveyed reported no indication of vulnerability.⁷

A European Commission 2018 consumer survey measured self-perception of vulnerability and reasons for people feeling vulnerable (See Figure 1). It found that 43 % of the EU citizens believed themselves to be vulnerable as consumers for one or more reasons, mainly linked to their socio-demographic status. This percentage was an increase compared to the 35 % response in 2016. A third of consumers felt vulnerable because of the complexity of offers, terms and conditions.

![Figure 1 − Self-reported vulnerability in the EU: 2019 average](source: European Commission consumer survey, 2018).

The 2019 consumer conditions scoreboard⁸ also concluded that vulnerability is mainly linked to a difficult financial situation, as people in this group were more likely to report unfair commercial practices and have less trust and confidence in online shopping. It also suggested that younger consumers (18-34 years old) had a higher level of trust in companies, consumer protection public
authorities and consumer organisations, but were less knowledgeable about consumer rights, which can also make them vulnerable.

### Consumer vulnerability in EU law and policy

#### Unfair Commercial Practices Directive

Vulnerable consumers are defined in the *Unfair Commercial Practices Directive* (UCPD), which lays down rules on commercial communication, including advertising and marketing. The UCPD prohibits misleading or aggressive commercial practices that can materially distort average consumers' economic behaviour (i.e., that could cause them to purchase products or services they would otherwise not buy). However, commercial practices that could cause this behaviour in consumers who are particularly vulnerable to the practice have to be assessed from the perspective of the average member of that group. Vulnerable consumers are defined as: (i) a clearly identifiable group, (ii) vulnerable because of mental or physical infirmity, age or credulity, and (iii) a trader can be reasonably expected to 'foresee their vulnerability'.

Numerous criticisms find this definition too static, as it does not allow for temporary vulnerability based on situational factors, and only lists three groups of vulnerable consumers (infirmity, age and credulity), even though the biggest drivers of vulnerability seems to be low socio-economic status and unemployment. However, UCPD recital 19 and the Commission guidance on the implementation and application of the UCPD suggest that this list may not be exhaustive.

Another issue is that, in addition to the vulnerable consumer, the UCPD includes another exception to the average consumer standard: the *targeted average consumer*. If a commercial practice targets a certain group of consumers, then the practice has to be evaluated from the standpoint of the average member of that specific group. This means that the vulnerable consumer category can be considered only in rare situations where a commercial practice targets all consumers, but the trader can predict that it could be especially harmful only to the three categories of consumers defined as vulnerable. This could be the reason why the vulnerable consumer concept is rarely used by national enforcement authorities and the courts, and why the 'targeted average consumer' is used more often. It seems that because the targeted average consumer standard is more flexible, in that it can refer to any group, it has allowed for protection of some of the vulnerable categories that are formally not part of the vulnerable consumer definition.

A 2017 study prepared for the Commission for the fitness check of consumer and marketing law came to similar conclusions. It recommended that the UCPD provision on vulnerable consumers be revised and merged with the targeted average consumer definition. The definition would no longer mention particular characteristics of vulnerable consumers, nor foreseeability. A recital would be amended to note that vulnerability can be caused by internal and external factors and that it can be temporary. The study also suggested that Annex I, containing the blacklist of commercial practices that are always considered unfair, could be updated to ban practices that were shown by research to mislead vulnerable groups of consumers, e.g. embedded advertising in games, which can affect the behaviour of children. However, the Commission's final report on the consumer law fitness check, while accepting that the definition of vulnerable consumers was of 'limited relevance in practice', concluded that it causes no significant problems either, so changes may not be necessary. Nor did the report suggest any new inclusions on the blacklist. The subsequent Commission strategic document, the 2018 *New Deal for Consumers*, mentioned vulnerable consumers only in the context of improving consumer education programmes, while the *Directive on better enforcement and modernisation of EU consumer protection rules*, which amended the UCPD, mentioned them only in a recital, as a reason to allow Member States to ban unsolicited visits by a trader to a consumer's home, as well as excursions organised by a trader, often targeting elderly consumers with the aim or effect of promoting or selling products to consumers.
Other consumer legislation

References to vulnerable consumers are also found in the Consumer Rights Directive. Recital 34 suggests that traders should take account of the specific needs of ‘consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity’ when providing consumers with pre-contractual information. Recital 8 of the General Product Safety Directive suggests that categories of consumers that can be ‘particularly vulnerable to the risks posed by the products under consideration, in particular children and the elderly’ should be taken into account when assessing product safety. Article 2(b) further stipulates that products that are not safe for categories of consumers who are at risk when using the product, in particular children and the elderly, could be considered unsafe. Article 5 of the Regulation on Online Dispute Resolution (ODR) requires that the ODR platform is ‘accessible and usable for all, including vulnerable users (“design for all”), as far as possible’. The Unfair Contract Terms Directive, while not explicitly mentioning vulnerable consumers, requires in its recitals that ‘in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties’. European Commission guidance also suggests that vulnerable consumers should be taken into account when assessing the effectiveness of remedies for unfair contract terms provided by national laws.

Sector-specific legislation

Possibly the strongest protection for vulnerable consumers comes from energy legislation, which deals with vulnerability under ‘energy poverty’. The Electricity Markets Directive and the Gas Directive require Member States to ensure there are adequate safeguards to protect vulnerable customers. The definition of vulnerable customers is left to the Member States. The definitions can refer to energy poverty and the prohibition of disconnection of electricity to such consumers in critical times, and can also include income levels, the share of disposable income that consumers spend on energy, the energy efficiency of homes or critical dependence on electrical equipment due to health, age or other reasons. Member States are required to take measures to address energy poverty, such as providing benefits through their social security systems or providing energy efficiency improvements. In addition, the 2018 Renewable Energy Directive requires Member States to address accessibility of self-consumption of renewable energy sources and participation in the energy communities for customers in low-income or vulnerable households (who would not otherwise have sufficient up-front capital to invest in renewable energy technologies, but who could exit energy poverty thanks to reduced energy bills). The EU monitors energy poverty indicators and measures through the EU Energy Poverty Observatory.

The financial services sector is often mentioned as a market where a lot of consumers have difficulty in understanding and comparing complex offers and contracts and can find themselves in a vulnerable position as a result of over-indebtedness. The Basic Payment Account Directive requires Member States to ensure that ‘unbanked vulnerable consumers’ (i.e. people with no access to a basic bank account) are sufficiently informed about the availability and characteristics of payment accounts with basic features. Member States can also require credit institutions to allow more advantageous conditions to such consumers. When it comes to over-indebtedness, the 2017 consumer financial services action plan announced several measures to prevent low-income households from falling into over-indebtedness linked to credit activities. The new consumer agenda announced measures, such as funding for actions enhancing the availability and quality of debt advice services in Member States, and possible harmonisation of standards and rules for assessing creditworthiness to reduce the risk of consumers getting trapped in debt, as well as to evaluate the best means to deal with over-indebtedness where it exists, including via the discharge of debts. With regard to the complexity of offers and contracts in the finance services sector, the Consumer Credit Directive, the Mortgage Credit Directive and the Distance Marketing of Consumer Financial Services Directive do not include specific provisions on vulnerable consumers. However they do include provisions introduced with a view to reducing consumer vulnerability in general, such as requirements for all consumers to receive easier to understand information (including for
example the total cost of credit) and the right of withdrawal for some products. The evaluation of the Distance Marketing of Consumer Financial Services Directive warned that consumers are in a vulnerable position due to a rise in online and mobile sales of financial services, as they are able to purchase these, often complex, services with a single click and are at the same time being influenced by providers using tools such as 'big data'.

Vulnerable groups are also mentioned in food legislation. For instance, the Regulation on flavourings notes in the recitals that 'where possible, attention should be focused on whether or not the use of certain flavourings could have any negative consequences on vulnerable groups', while the Regulation on nutrition and health claims made on foods notes in its recitals that the European Court of Justice (ECJ) had made provisions to prevent the exploitation of consumers whose characteristics make them particularly vulnerable to misleading claims and that the impacts of the claims specifically aimed at a particular group of consumers, such as children, should be assessed from the perspective of the average member of that group. The EU also has special legislation on foods intended for infants and young children.

New frontier: e-commerce and artificial intelligence

The development of e-commerce and artificial intelligence technologies have also raised concerns about consumer vulnerability. The 2017 external study for the fitness check of EU consumer and marketing law warned that certain groups of consumers, especially vulnerable groups, could be particularly at risk from being targeted by unfair practices that exploit consumers' cognitive biases, enabled by advances in technological innovation and behavioural insights (such as online behavioural advertising). The new consumer agenda also warned that the digital transformation together with the underlying data collection, processing and analysis of consumers' behaviour and their cognitive biases – can make it harder for consumers to make informed choices, and may limit the effectiveness of the current rules, including on unfair consumer practices. It warned that practices such as the use of user interfaces aimed at manipulating consumers ('dark' patterns), abusing consumer behavioural biases, profiling, hidden advertising, false or misleading information and manipulated consumer reviews, need to be tackled. The agenda noted that some of the issues have been addressed by the Directive on Better Enforcement and Modernisation of EU Consumer Law, which has for instance equipped consumers with additional information on the way search results are ranked in online marketplaces such as Amazon or eBay, and banned false online product reviews. However, the Commission announced that consumer interests should be further taken into account in the rules governing the digital economy. It also announced that it would update its guidance on the application of the UCPD and the Consumer Rights Directive by 2022, and analyse whether additional legislation is needed.

While the new consumer agenda did not announce a reform of the vulnerable consumer definition, the European consumer organisation (BEUC) called for a rethink of the reliance on average and vulnerable consumer standards in EU law. It noted that their relevance is questionable, as the 'constant monitoring and manipulation when interacting in the digital world' creates a state of 'permanent vulnerability' or 'vulnerability by default'. BEUC considers that due to the complexity of consumer markets and the power imbalance between the businesses and consumers, informing the consumer no longer provides adequate protection. BEUC warns that mandatory information requirements are not always a solution and calls for the principle of 'protection by default and design' that would be built into all EU law. A 2021 BEUC report on structural asymmetries in digital consumer markets provides a detailed analysis of consumer vulnerability online. The report argues that 'digital vulnerability' is not there by chance, but that the 'choice architecture' within which interactions between consumers and sellers take place online is used deliberately to discover and even create vulnerabilities in individual consumers, so that they can be exploited. This is made possible by constant data collection and analysis of consumer behaviour and reactions online. The report warns that 'digital vulnerability potentially applies to all consumers in the digital marketplace' and that the 'vulnerable consumer is the norm, rather than the exception'.
European Parliament view

Parliament has long advocated stronger protection for vulnerable consumers, most notably in its [resolution](#) of 22 May 2012 on a strategy for strengthening the rights of vulnerable consumers. Parliament stressed the 'diversity of vulnerable situations' consumers can find themselves in, and adopted the view that as well as being permanently vulnerable (due to their 'endogenous' or inherent characteristics, such as age, credulity or mental, physical or psychological disability), consumers can also become temporarily vulnerable, due to a 'gap between their individual state and characteristics on the one hand, and their external environment on the other hand'.

Parliament warned that all consumers can become vulnerable at some point of their life and that this should be taken into account in EU legislation. The European Parliament also noted that the concept of an average consumer 'sometimes does not correspond to real-life situations', and asked the Commission and the Member States to provide protection for all consumers, 'regardless of ability and at whatever stage of life'. Parliament expressed concern that focusing on providing information may not be sufficient to protect vulnerable consumers. It warned that consumers can be especially vulnerable in understanding contracts, understanding information on and advertising of financial products; and to exposure to intrusive online advertising techniques in the digital sector (especially when it comes to children and adolescents). Parliament also warned that consumers who cannot or do not use the internet can also become vulnerable due to the increased digitalisation of services.

Its previous [resolution](#) of 15 November 2011, on a new strategy for consumer policy, Parliament called on the European Commission to guarantee special protection for vulnerable consumers, including those who were made vulnerable by their social and financial situation. Parliament urged the Commission to make sure that vulnerable groups have access to the essential products and services they need, which would 'clearly demonstrate the social dimension of consumer policies'. It also emphasised that older people and people with disabilities continue to face safety and access problems in connection with mainstream products and services.

Parliament has addressed energy poverty on several occasions. In its [resolution](#) of 15 April 2014 on 'consumer protection – protection of consumers in utilities services', it suggested that Member States could introduce 'appropriate arrangements' for vulnerable consumers to gain access to utility services, irrespective of their financial circumstances. Parliament noted that the Member States are responsible for addressing factors and situations linked to energy and vulnerable consumers. Several subsequent resolutions addressed vulnerable consumers living in energy poverty in particular, including: the [resolution](#) of 15 December 2015 'Towards a European energy union', in which Parliament asked the Commission to present an action plan on the eradication of energy poverty, and its [resolution](#) of 14 April 2016, in which Parliament called on the Commission to 'build bridges between social policy and energy policy', introduce a winter heating disconnection moratorium, and provide microcredits with no interest charges to low-income households for energy efficiency and renewable energy investments.

Addressing vulnerable consumer issues in financial services, Parliament's [resolution](#) of 14 November 2017 on the action plan on retail financial services called for high street banks to be maintained, as they are of particular benefit to the elderly and to vulnerable consumers who are less likely to use e-banking and favour face-to-face interaction. Parliament also urged the Commission to recognise the importance of controlling predatory lending and payday loans, which have resulted in the exploitation of vulnerable consumers. The European Parliament has insisted on protecting vulnerable consumers through the efficient implementation of the Basic Payment Account Directive and has noted that further measures, such as financial education policies, were also required.

Parliament also addressed issues faced by consumers in the online environment. In its [resolution](#) of 20 October 2020 on the Digital Services Act and fundamental rights issues posed, Parliament noted that the current digital ecosystem encourages 'problematic behaviour, such as micro-targeting based on characteristics exposing physical or psychological vulnerabilities'. It particularly warned of
the 'potential negative impact of micro-targeted and behavioural advertisements and of assessments of individuals, especially minors and vulnerable groups, by interfering in the private life of individuals, posing questions as to the collection and use of the data used to personalise advertising, offer products or services or set prices'. On the same day, another Parliament resolution on the single market aspects of the Digital Services Act, expressed concern about the ability of vulnerable consumers to access support when companies increasingly use virtual assistants and chatbots for these purposes. It underlined that digital service providers should not exclusively use automated decision-making systems for consumer support. Parliament had previously raised automated decision-making systems and consumer protection issues in a dedicated resolution of 12 February 2020. This expressed concern that automated decision-making systems could have a particularly significant impact on consumers in vulnerable situations, making it vital to ensure that both high-quality and unbiased data sets and explainable and unbiased algorithms are used.

MAIN REFERENCES


Riefa C. and Saintier S. (Eds.), Vulnerable consumers and the law: Consumer protection and access to justice, Routledge, 2020.

ENDNOTES

1 Similar priorities were included in the previous European consumer agenda in 2012.

2 The concept of the average consumer, even when not explicitly mentioned in a piece of legislation, is taken into account in EU consumer law and thus goes beyond the UCPD. This has been less the case regarding vulnerable consumers, who are considered an exception specific to the UCPD.

3 The concept of an average consumer was developed in the case law of the European Court of Justice, see e.g. Case C-210/96.


5 For an overview, see for instance Consumer vulnerability across key markets in the European Union, pp. 41-43.

6 The report was prepared by the London Economics, WVA Consulting and Ipsos Mori consortium.

7 Although the study has not led to a change in the way vulnerable consumers are defined in EU law, it does seem to inform EU policy, where non-legislative measures have been moving towards this wider understanding of vulnerable consumers. The new consumer agenda, for instance, notes that 'the vulnerability of consumers can be driven by social circumstances or because of particular characteristics of individual consumers or groups of consumers, such as their age, gender, health, digital literacy, numeracy or financial situation'.

8 Since 2008, the European Commission uses the consumer scoreboards to 'monitor consumer outcomes and provide evidence to inform policy'.


10 See for instance P. Cartwright, op. cit.

11 Ibid.
It also recommended that the average consumer standard be clarified.

The UCPD already bans advertising to children, for instance, but only when it includes ‘a direct exhortation to children to buy advertised products’.

In a similar vein, the chemicals legislation, which is also concerned with the consumer physical integrity, requires special attention to be paid to consumers vulnerable to particular chemicals. For instance, the Regulation concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) requires ‘vulnerable sub-populations’ to be taken into account when authorising certain substances. Similar provisions can be found in the Directive on biocidal products, Regulation on maximum levels of pesticides or Regulation on persistent organic pollutants.


This approach was presented in the explanatory statement of the Committee on the Internal Market and Consumer Protection (IMCO) report, which suggested that vulnerability can result from endogenous causes (which can be temporary or permanent, but are inherent to the consumer’s physical or mental situation), or exogenous causes (which are external).