

# Empowering consumers: Towards a broader interpretation of the vulnerable consumer concept in the European Union

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## ABSTRACT

The European Union, while acknowledging the pitfalls of problematic consumer markets, seems largely unwilling to deviate from an inflexible standard of consumer behaviour based on the ideal of the average consumer as a reasonably well-informed and observant market participant. The article aims to contrast this high consumer standard with the alternatives offered by the vulnerable consumer concept. The first part of the article deals with the notion of the average consumer as defined in European Union law and its interpretation by the European Court of Justice, particularly in cases concerning problematic markets. This is followed by a brief analysis of two potential interpretations of consumer vulnerability developed in the consumer protection literature. The final chapter examines in more detail 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.’

## KEYWORDS

EU consumer law, consumer protection, vulnerable consumers, financial markets, services of general economic interest

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## 1. INTRODUCTION

To a certain degree, owing to 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 businesses selling goods and services, and due to the ever-present risk of falling victim to unfair commercial practices, all consumers could be considered ‘weak’ or ‘vulnerable’ to a certain degree. This is particularly true in the case of markets characterized by especially complex transactions, such as the financial products and services market, where – as the European Commission noted in a paper from 2010 – consumers are often ill-prepared to make sound decisions about retail financial products not only due to asymmetrical 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.<sup>1</sup> 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 made basic errors in their advertisements and in the basic required information about the products on offer, while costs were presented in a misleading way.<sup>2</sup> The European Union, while acknowledging the pitfalls of these problematic consumer markets, seems largely unwilling to deviate from its inflexible standard of consumer behaviour based on the ideal of the average consumer as a reasonably well-informed and observant market participant. In the light of these issues, this article aims to contrast this high consumer standard with the alternatives offered by the vulnerable consumer concept. The first part of the article deals with the notion of the average consumer as defined in European Union law and its interpretation by the European Court of Justice, particularly in cases concerning problematic markets. This is followed by a brief analysis of two potential interpretations of consumer vulnerability that have been developed in the literature about consumer protection. The final chapter examines in more detail 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.’

## 2. THE NOTION OF THE ‘AVERAGE’ CONSUMER

When interpreting the legal term ‘consumer,’ as defined by the Directives 93/13/EEC (Unfair Contract Terms Directive)<sup>3</sup> and 2008/48/EC (Consumer Credit Directive)<sup>4</sup> as ‘a natural person who, in transactions covered by the Directives, is acting for purposes which are outside his trade,

<sup>1</sup>Commission (2010) 3.

<sup>2</sup>European Parliament Resolution of 22 May 2012 on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI)) [2012] OJ C264E/11.

<sup>3</sup>Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29.

<sup>4</sup>Directive 2008/48/EC of the European Parliament and the Council of 23 April 2008 on credit agreements for consumers. [2008] OJ L133/66.



business or profession,’ the Court of Justice had to determine the extent of protection that should be afforded to anyone 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*,<sup>5</sup> 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 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 have been several earlier cases<sup>6</sup> – dating back to the late 1980s – in which the Court had to decide whether a description, trademark, or promotional text could 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*.<sup>7</sup> 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.’<sup>8</sup>

Following the landmark decision in *Gut Springenheide*, the case-law of the ECJ continued to utilize the ‘Gut Springenheide formula’ when interpreting the behaviour 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.<sup>9</sup> This consumer benchmark has also made its way into EU consumer protection legislation with Directive 2005/29/EC, the Unfair Commercial Practices Directive,<sup>10</sup> which explicitly refers to the economic behaviour 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 behaviour 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.<sup>11</sup> This standard has been criticized by academia and

<sup>5</sup>C-210/96 *Gut Springenheide GmbH, Rudolf Tusky v. Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung* [1998] ECR I-4657.

<sup>6</sup>The Court mentions, in particular, Cases C-362/88 *GB-INNO-BM* [1990] ECR I-667, C-238/89 *Pall* [1990] ECR I-4827, C-126/91 *Yves Rocher* [1993] ECR I-2361, C-315/92 *Verband Sozialer Wettbewerb* [1994] ECR I-317, C-456/93 *Languth* [1995] ECR I-1737 and C-470/93 *Mars* [1995] ECR I-1923.

<sup>7</sup>Waddington (2014) 12–13.

<sup>8</sup>C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH* [1995] ECR I-1923.

<sup>9</sup>Incardona and Poncibo (2007) 24–25.

<sup>10</sup>Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22.

<sup>11</sup>Domurath (2018) 125–27.



civil society as unrealistically demanding, overly simplified, and generally, a legal fiction far removed from the actual behaviour of the individual consumer, both in terms of informedness and reasonability. An actual consumer – whether or not they are to be 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 emotion and social influence.<sup>12</sup>

The development of the idea of the ‘empowered consumer’ – first appearing in the EU Consumer Policy Strategy for 2007–2013 – aimed to improve the reasonably circumspect consumer concept in the name of more effective consumer protection and improved consumer welfare. According to the European Commission, consumers need ‘real choices, accurate information, market transparency and the confidence that comes from effective protection and solid rights’ to be empowered market participants.<sup>13</sup> When interpreting the data collected on consumer knowledge, skills, and confidence in its Eurobarometer on consumer empowerment,<sup>14</sup> the European Commission corroborated the critical observations mentioned above, stating that ‘consumers are often less informed and assertive than policymakers assume, and prove that there are significant national differences in consumer empowerment throughout the EU.’<sup>15</sup> According to the Commission’s observations, even though the majority of European consumers consider themselves ‘reasonably empowered and knowledgeable,’ they are not aware of crucial details of their rights as consumers, they usually do not read terms and conditions, or read them only partly (because they are too long, the print size is too small, or because they trust the provider) and they are ill-informed about consumer organizations and consumer protection public authorities.<sup>16</sup> The idea of empowerment – often combined with market deregulation policies – as a ‘holy grail of current EU strategy and research’ was similarly criticized by the European Consumer Association (BEUC), which pointed out that when faced with information overload, the increasing (sometimes artificial) complexity of markets, and the overly (often artificially) complex ways in which essential information is delivered, actual consumers often end up disempowered instead, thus acting in a less informed and less circumspect manner, in stark contrast with the EU’s stated aims.<sup>17</sup> The BEUC report also emphasizes that the most problematic market sectors are ‘the most essential sectors for consumer wellbeing,’ including certain services of general interest such as energy and digital telecommunications, and the financial services sector which the report refers to as a ‘failed sector’ characterized by the

needless complexity of financial products, a lack of transparency within businesses and lack of trust in the business itself; bad or insufficient advice and hidden commissions for intermediaries resulting in financial product miss-selling (sic) to consumers; high costs and risk compared to revenues in investments; and no access to basic banking for some of the most vulnerable consumers.<sup>18</sup>

<sup>12</sup>Incardona and Poncibo (2007) 31–36.

<sup>13</sup>Commission, ‘EU Consumer Policy strategy 2007–2013: Empowering consumers, enhancing their welfare, effectively protecting them’ (Communication) COM (2007) 99 final.

<sup>14</sup>Commission (2011).

<sup>15</sup>Commission (2012) 3.

<sup>16</sup>Commission (2012) 4.

<sup>17</sup>BEUC (2012) 7–8.

<sup>18</sup>BEUC (2012) 8–9.



On the other hand, the use of this high standard falls in line with a claim echoed in literature: 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.’<sup>19</sup> According to *Angus Johnston*, the idea that the processes of market liberalization and free competition are key to advancing the interests of consumers is a ‘general, structural presumption’ of the traditional EU law approach.<sup>20</sup> In this economy-focused approach, the freedom of the internal market – and particularly, the right to free choice in business-to-consumer contracts – is seen as key to the uninterrupted functioning of market integration, thus the EU appears generally 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.<sup>21</sup>

Finally, 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.<sup>22</sup> 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.<sup>23</sup>

### 3. INTERPRETING CONSUMER VULNERABILITY

The uniform benchmark of the reasonable and empowered average consumer can be examined in contrast to 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 (or particularly vulnerable) consumer’ to provide additional protection to consumers who are at particular risk of suffering harm or injury from specific market practices

<sup>19</sup>Reich (2018) 146.

<sup>20</sup>Johnston (2018) 94.

<sup>21</sup>Domurath (2018) 126.

<sup>22</sup>Domurath (2018) 127.

<sup>23</sup>Reich (2018) 146–47.



or products due to certain distinguishing characteristics or status.<sup>24</sup> Most of the literature on European consumer protection law takes the latter approach: however, there are significant disagreements about 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 that deal 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 behaviour 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.<sup>25</sup>

*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.<sup>26</sup> 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

<sup>24</sup>Luzak (2016) 1–2.

<sup>25</sup>Domurath (2018) 133–35.

<sup>26</sup>Reich (2018) 143–45.



identifying and addressing all forms of disempowerment.<sup>27</sup> 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.<sup>28</sup>

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.<sup>29</sup>

#### 4. 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*.<sup>30</sup> 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...<sup>31</sup>

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

<sup>27</sup>Commission (2011) 6–7.

<sup>28</sup>Baker, Gentry and Rittenburg (2005) 128–29.

<sup>29</sup>Cartwright (2015) 119–38.

<sup>30</sup>Waddington (2014) 14.

<sup>31</sup>C-382/87 R *Buet and Educational Business Services (EBS) v Ministère public* [1989] ECR 1235.



specific group of consumers.<sup>32</sup> 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.<sup>33</sup>

#### 4.1. Consumer vulnerability in the field of services of general economic interest

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'<sup>34</sup> and later as 'economic activities which deliver outcomes in the overall public good that would not be supplied [...] by the market without public intervention.'<sup>35</sup> 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<sup>36</sup> 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.'<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> 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*,<sup>41</sup> in which the Court emphasized that a postal service monopoly that is 'entrusted with a service of general

<sup>32</sup>Domurath (2018) 126–27.

<sup>33</sup>Reich (2018) 140–41.

<sup>34</sup>Commission, 'Services of general interest in Europe' (Communication) 96/C 281/03.

<sup>35</sup>Commission, 'A Quality Framework for Services of General Interest in Europe' (Communication) COM (2011) 900 final.

<sup>36</sup>Commission Recommendation 2011/442/EU of 21 July 2011 on access to a basic payment account [2011] OJ L190/87.

<sup>37</sup>COM (2011) 900, 10.

<sup>38</sup>Cartwright (2015) 134–35.

<sup>39</sup>Johnston (2018) 99–100.

<sup>40</sup>Clifton, Díaz-Fuentes and Fernández-Gutiérrez (2019) 267.

<sup>41</sup>Johnston (2018) 109.





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.’<sup>42</sup>

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<sup>43</sup> (Telecommunications Universal Service Directive), as well as the Second<sup>44</sup> and particularly the Third Internal Energy Market (IEM) Packages.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> 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.’<sup>48</sup> 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.<sup>49</sup>

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.’<sup>50</sup> 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

<sup>42</sup>C-320/91 *Criminal proceedings against Paul Corbeau* [1993] ECR I-2533.

<sup>43</sup>Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services [2002] OJ L108/51.

<sup>44</sup>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).

<sup>45</sup>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).

<sup>46</sup>Directive 2002/22/EC, Article 20 para 2.

<sup>47</sup>Domurath (2018) 128–29.

<sup>48</sup>Directive 2003/54/EC, Article 3 para 5. Directive 2003/55/EC, Article 3 para 3.

<sup>49</sup>Johnston (2018) 116–17.

<sup>50</sup>Directive 2009/72/EC, Recital (50). Directive 2009/73/EC, Recital (47).



final category had already been mentioned in the Second Package, here it changed from an optional consideration to an obligation of Member States).<sup>51</sup> However, these categories were not explicitly defined in the Directives either; as such, wide discretion remained at Member State level.<sup>52</sup> 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 Directive<sup>53</sup> 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.<sup>54</sup> 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’<sup>55</sup> 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.<sup>56</sup>

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’<sup>57</sup> 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

<sup>51</sup>Directive 2009/72/EC, Article 3 para 7. Directive 2009/73/EC, Article 3 para 3.

<sup>52</sup>Johnston (2018) 117.

<sup>53</sup>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.

<sup>54</sup>Directive 2019/44, Article 3.

<sup>55</sup>Directive 2019/44, Article 10 para 3.

<sup>56</sup>Directive 2019/44, Article 10 para 8.

<sup>57</sup>Directive 2019/44, Article 28 para 1.



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'.<sup>58</sup> 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 benefits of market reform.<sup>59</sup> 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. As a final note on the topic of SGEIs, it is worth mentioning Article 36 of the EU Charter of Fundamental Rights which emphasizes the importance of access to SGEIs 'as provided for in national laws and practices, in accordance with the Treaties'.<sup>60</sup> While the Charter has become legally binding with the Lisbon Treaty, the potential effect of this specific provision is limited by the continued deference it shows to the discretion of Member States.

## 4.2. Vulnerability in the European Consumer Acquis

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.<sup>61</sup>

A similar provision appears in Recital (19) of the Preamble to the Directive.<sup>62</sup> 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.<sup>63</sup> This might prove particularly problematic in the field of financial consumer protection, considering that financial markets are so complicated and the

<sup>58</sup>Directive 2019/44, Article 29.

<sup>59</sup>Clifton, Díaz-Fuentes and Fernández-Gutiérrez (2019) 267–68.

<sup>60</sup>Charter of Fundamental Rights of the European Union, Article 36.

<sup>61</sup>Directive 2005/29/EC, Article 5 para. 3.

<sup>62</sup>Directive 2005/29/EC, Recital (19).

<sup>63</sup>Cartwright (2015) 127.



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,<sup>64</sup> released in 2009, makes reference to the concept of ‘weak and vulnerable’ consumer: while the legislator opted against using it as the generally applicable standard – the more specific provisions of the Directive, especially Articles 6–8 on misleading and aggressive commercial practices, refer instead to the average consumer – 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.’<sup>65</sup> 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,<sup>66</sup> released in 2016, introduces a new, multi-dimensional interpretation of consumer vulnerability based on the [Commission’s 2016](#) study on vulnerability across key markets.<sup>67</sup> 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. In establishing these dimensions, the study also makes reference to the literature of vulnerability and the two distinct approaches previously discussed: a narrow reading of vulnerability based on specific personal characteristics of the consumer and a broader concept which takes into account the transactional nature of consumers’ interactions on the market. The study also points out that most definitions in the literature recognize that vulnerability is not a static condition – ‘[c]onsumers may move in and out of states of vulnerability and they may be vulnerable in respect of some categories of transaction but not others’ – and that it is ‘best viewed as a spectrum rather than a binary state’ but defends the ‘clearly identifiable groups’ approach used in EU consumer policy as ‘in some policy contexts, it

<sup>64</sup>Commission (2009).

<sup>65</sup>European Commission (2009) 28–29.

<sup>66</sup>Commission, ‘Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices’ (Commission staff working document, 2016b).

<sup>67</sup>Commission, ‘Consumer vulnerability across key markets in the European Union: executive summary’ (Policy document, 2016a).



may be important to recognise that some personal characteristics can imply that vulnerability remains an enduring characteristic for particular groups of consumers.<sup>68</sup> 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.<sup>69</sup> With regard to the specific criteria listed in Article 5, the guidance document recalls the EU’s 2010 ratification of the United Nations Convention on the Rights of Persons with disabilities, which has the potential to further the protection of consumers falling under the ‘infirmity’ criterion; while the examples listed for vulnerability based on age show a broader interpretation than before: in some instances, even young adult consumers (16–24 years old) can be found vulnerable in comparison with middle-aged consumers.<sup>70</sup>

Directive 2011/83/EU (Consumer Rights Directive)<sup>71</sup> 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.’<sup>72</sup> 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,<sup>73</sup> there is hope that the new documents will promote a more empowering approach towards the interpretation of the provisions on vulnerable consumers.<sup>74</sup>

## 5. CONCLUSIONS

The power imbalance inherent in business-to-consumer transactions is further exacerbated in the case of certain consumers due to personal factors such as age, over-indebtedness, or disability. This is especially the case in the context of problematic sectors such as the consumer

<sup>68</sup>Commission (2016a) 2–3.

<sup>69</sup>Commission (2016b) 43.

<sup>70</sup>Commission (2016b) 43–44.

<sup>71</sup>Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] OJ L304/64.

<sup>72</sup>Directive 2011/83/EU, Recital (34).

<sup>73</sup>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.

<sup>74</sup>Commission, ‘New Consumer Agenda, Strengthening consumer resilience for sustainable recovery’ (Communication) COM (2020) 696 final.



financial services market, where consumers find themselves 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. The additional protections provided by the vulnerable consumer concept could prove particularly useful to these consumer subgroups; 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 average consumer standard completely.

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 seen evolving in the legislation of services of general economic interest show that there is hope for systemic change. Detailed guidelines utilizing concepts comparable to the ones utilized by the IEM Packages – such as ‘energy poverty,’ ‘critical times’ and ‘remote areas’ – could also be developed for other consumer markets based on characteristics that have the greatest potential to adversely affect the ability of consumers to make informed decisions in a specific sector. The firm commitment to support ‘consumers that are more vulnerable than others’ expressed in the New Customer Agenda is certainly encouraging in this regard.

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