

‘The current legal definition of vulnerable consumers in the UCPD: benefits and limitations of a focus on personal attributes’

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1. Introduction

Consumer vulnerability has been at the center of consumer law since the 1970s. In the earlier days of consumer law, all consumers were considered to be vulnerable. In contract law, and private law more generally, there were remedies for parties in a weaker position before the conception of consumer law and continued to exist in parallel with consumer law.¹ Consumer vulnerability signifies that consumers are not a homogenous group and some require a higher level of protection than others.² If the creation of consumer law was the exception from private law, then the discussion of the ‘vulnerable consumer’ signifies the exception from general consumer law. In spite of the growing interest in consumer vulnerability, there is not a singular, widely accepted definition.³ This is a reflection of the character of vulnerability being a flexible and wide-reaching concept that can fit into different settings. However, many authors highlight the complexity of the concept, as well as the lack of clarity surrounding it and emphasise the need for further research on the topic.⁴

¹ For example the doctrine of unconscionability in the US see Richard A Epstein, ‘Unconscionability: A Critical Reappraisal’ (1975) 18 *Journal of Law and Economics* 293. or in an EU context, Council Directive 93/13/EEC on unfair terms in consumer contracts [1993] OJ L95/29 (Unfair Contract Terms Directive).

² Peter Cartwright, ‘The Vulnerable Consumer of Financial Services: Law, Policy and Regulation’ (Nottingham University Business School, Financial Services Research Forum 2011) 6.

³ For some examples of definitions of consumer vulnerability see Debra Jones Ringold, ‘Social Criticisms of Target Marketing Process or Product?’ (1995) 38 *American Behavioral Scientist* 578, 584.; George P Moschis, Jill Mosteller and Choong Kwai Fatt, ‘Research Frontiers on Older Consumers’ Vulnerability’ (2011) 45 *Journal of Consumer Affairs* 467, 475.; Consumer Affairs Victoria, ‘Discussion Paper: What Do We Mean by “Vulnerable” and “Disadvantaged” Consumers?’ (Consumer Affairs Victoria ed., Consumer Affairs Victoria 2004) 3.; Stacey Menzel Baker, James W Gentry and Terri L Rittenburg, ‘Building Understanding of the Domain of Consumer Vulnerability’ (2005) 25 *Journal of Macromarketing* 128, 128.

⁴ See for example: Lucy Woodliffe, ‘Rethinking Consumer Disadvantage: The Importance of Qualitative Research’ (2004) 32 *International Journal of Retail & Distribution Management* 523; PM Mansfield and MB Pinto, ‘Consumer Vulnerability and Credit Card Knowledge among Developmentally Disabled Citizens’ (2008) 42 *Journal of Consumer Affairs* 425, 425.

There is no understating the importance of legal definition for consumer vulnerability in EU consumer policy. The image of the consumer has always been a key issue for consumer law, as it defines who is granted protection and under which circumstances.⁵ This is why this chapter focuses on the key legal definition of the vulnerable consumer in EU law, the one included in the Unfair Commercial Practices Directive. The Unfair Commercial Practices Directive (hereafter UCPD) has been one of the most significant developments in EU consumer law.⁶ The importance of the UCPD is signalled by its broad scope of application. It covers all business-to-consumer transactions, across all sectors of the economy.⁷ Furthermore, it covers commercial practices before, during and after a transaction.⁸ It should be noted that the UCPD is a maximum harmonisation directive meaning it sets both the floor and ceiling of protection.⁹ This means Member States cannot deviate from the UCPD standard to protect vulnerable consumers. Maximum harmonisation is meant to provide legal certainty, promote cross-border trade and consumer confidence along with it yet it has been controversial, as it does not allow Member States to have stricter standards of protection, especially for vulnerable consumers.¹⁰

Before proceeding to look at the vulnerable consumer standard in the UCPD, it is necessary to set out the structure of the Directive. The UCPD is organised in three levels: (a) a general clause, (b) two small general clauses for misleading and aggressive practices, and (c) a list of practices always to be considered unfair. First, article 5 UCPD contains a general prohibition of unfair commercial practices. A practice is considered unfair when (a) it is contrary to the requirements of professional diligence, and (b) it distorts or is likely to

⁵ For more on this see the contributions in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law* (Hart Publishing 2016) which explores different perspectives of the image of the consumer. See in particular: Norbert Reich, . Perhaps you could add a little more here and draw our attentions to some or if not, to add that the purpose of the book was to show the heterogeneity of the consumer under European law, so, perhaps a quick look at the variety.

⁶ Council Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149/22 (Unfair Commercial Practices Directive).

⁷ For financial services and immovable property it is a minimum harmonisation measure, see UCPD, rec. 9.

⁸ UCPD, art.3.1.

⁹ UCPD, rec.12,13.

¹⁰ Iris Benohr, *EU Consumer Law and Human Rights* (Oxford University Press 2013) 33.

materially distort the economic behaviour of the average consumer. The two conditions need to apply cumulatively for the practice to be characterised as unfair.¹¹

Secondly, the Directive contains two smaller general clauses on misleading and aggressive commercial practices respectively. Article 6 UCPD prohibits misleading actions, while art.7 prohibits misleading omissions. Aggressive practices are regulated by article 8 and article 9 sets the factors that decided whether a practice is considered to use harassment, coercion or undue influence and therefore is aggressive. The general prohibition of article 5 also acts as a safety net that catches unfair practices that do not fall under the more specific provisions governing misleading and aggressive advertising.

Thirdly, ANNEX I of the UCPD contains a list of both misleading and aggressive practices which are considered unfair in all circumstances, the so-called black list of the Directive. The practices mentioned there do not need to be assessed in relation to the average consumer as do the ones in articles 5-8 UCPD.

In order to decide on whether a commercial practice is unfair, it needs to be assessed against one of the consumer standards, namely the average consumer or the vulnerable consumer.¹² The consumer standards apply in the small general clauses for misleading and aggressive practices as well as for the general clause, thus showing its significance within the system of the UCPD. The average consumer who is ‘reasonably well-informed, reasonably observant and circumspect’ is the benchmark of the UCPD.¹³ The inclusion of different standards in the UCPD has generated questions as to when it should be applied and how useful it is.¹⁴ The accepted approach is to view the vulnerable consumer as the exception to the average consumer, to avoid undermining the average consumer as the benchmark.¹⁵ The average consumer has been the object of criticism, as to its suitability for protecting consumers

¹¹ Hans-W Micklitz, ‘The General Clause on Unfair Practices’ in Geraint Howells, Thomas Wilhelmsson and Hans-W Micklitz (eds), *European Fair Trading Law: The Unfair Commercial Practices Directive* (Ashgate Publishing Group 2006), 85.

¹² UCPD, art.5.3.

¹³ UCPD, rec.18.

¹⁴ Bram B Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer Publishing 2015) 26.

¹⁵ Micklitz (2006), ‘The General Clause on Unfair Practices’ 113.

and the level of protection granted to vulnerable consumers in the Directive.¹⁶ Examining the relationship between the average and the vulnerable consumer is helpful in illuminating the place of the vulnerable consumer in the UCPD. While the focus is on the vulnerable consumer, the average consumer will be mentioned where appropriate.

The average vulnerable standard is designed to be employed for protecting vulnerable consumers in instances where a product is aimed at the general population of consumers but is only harmful or particularly harmful to vulnerable consumers.¹⁷

Art. 5.3 UCPD states:

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, shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.

The UCPD definition of the vulnerable consumer has been criticised as a standard that is ‘paternalistic and ‘superfluous’ and one that makes the Directive more confusing rather than protective.¹⁸ In particular, the choice of factors for vulnerability appears quite arbitrary.¹⁹ This chapter places the legal definition within the theoretical debate around consumer vulnerability, especially the distinction between class-based and state-based vulnerability. Next, it offers a thorough examination of the elements of the vulnerable consumer standard in the UCPD drawing on case law from the Member States. Finally, it discusses recent developments in EU consumer law that affect the UCPD and offers suggestions for improving the protection of vulnerable consumers in the EU.

¹⁶ R Incardona and C Poncibò, ‘The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution’ (2007) 30 *Journal of Consumer Policy* 21, 28.

¹⁷ P. Cartwright, ‘The Consumer Image within EU Law’ in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar Publishing 2014) 12.

¹⁸ Incardona and Poncibò (2007) 29.

¹⁹ Stuyck, Terry and Dyck (2006) 122.

2. The Conceptualisation of Consumer Vulnerability

A singular definition for consumer vulnerability has proved elusive and over time the conceptualisation of consumer vulnerability has evolved significantly. The most notable change has been going from identifying certain categories of consumers, such as the elderly or women as vulnerable in their entirety to vulnerability increasingly viewed as a transient state. These tendencies can be broadly placed in two main categories, 'class approach' and 'state-based approach'.

Under the class approach, certain categories of consumers e.g. the poor or the illiterate are identified as vulnerable.²⁰ A class approach of vulnerability often fails to consider the multiple factors contributing to consumer vulnerability, including factors related to the market.²¹ This may intensify the exclusion and stigmatisation of groups labelled as vulnerable.²² Conversely, the main advantage of a class-based approach is clarity as to who is considered vulnerable.²³ This is of particular importance in the legal context where legal certainty may be a priority. Research or policy work on specific groups of consumers is valuable, yet it should be based on empirical evidence rather than assumptions and should make it clear that there will still be varied levels of vulnerability within that group.²⁴

State-based vulnerability was championed in the highly influential paper by Baker, Gentry and Rittenburg 'Building Understanding of the domain of Consumer Vulnerability', which defines consumer vulnerability as an interaction of a variety of factors, both external as well as individual states and characteristics.²⁵ They argued that interaction of these factors results into a state of powerlessness for the consumer and it is this outcome that will determine whether the consumer was in a vulnerable position or not.²⁶ This approach, more neutral, assists in moving past the stigmatisation of certain social groups. It allows policy makers to consider vulnerability against changing social conditions. The benefit of this approach is that it allows

²⁰ S Commuri and A Ekici, 'An Enlargement of the Notion of Consumer Vulnerability' (2008) 28 *Journal of Macromarketing* 183, 184.

²¹ Commuri and Ekici (2008) 184.

²² Brown (2011) 316.

²³ Baker and Mason (2012) 544.

²⁴ For a great example of this approach see G.Moschis, J Mosteller, C Kwai Fatt, 'Research Frontiers on Older Consumers' Vulnerability', (2011) 45(3) *The Journal of Consumer Affairs* 467-491.

²⁵ Baker, Gentry and Rittenburg (2005) 134.

²⁶ Baker, Gentry and Rittenburg (2005) 134.

for a multitude of factors to be considered, as well as highlighting that it is possible for consumers to work through their vulnerability.²⁷

The average vulnerable consumer of art. 5.3. UCPD, as seen above, is defined with the help of the criteria of age, infirmity and credulity, meaning the UCPD adopts a class-based approach to vulnerability. The narrow selection of criteria does not allow other factors to be considered, such as level of income. Furthermore, a focus on personal characteristics of consumers may obscure the role of other factors contributing to vulnerability, especially factors relating to the market.²⁸ The current definition does not reflect that not everyone within these categories will have the same degree of vulnerability.

However, the class-based definition of the vulnerable consumer in the UCPD is not the only vision of consumer vulnerability in the EU. In the last decade, there has been a growing interest in consumer vulnerability, as seen by the published studies on consumer vulnerability.²⁹ Most notably, the 2017 study on ‘Consumer Vulnerability across key markets in the European Union’ offers a sophisticated definition of vulnerability, built around different dimensions, rather than categories of consumers :³⁰

A consumer, who, as a result of socio-demographic characteristics, behavioural characteristics, personal situation, or market environment:

- 1) Is at higher risk of experiencing negative outcomes in the market;
- 2) Has limited ability to maximise their well-being;
- 3) Has difficulty in obtaining or assimilating information;
- 4) Is less able to buy, choose or access suitable products; or
- 5) Is more susceptible to certain marketing practices

²⁷ Baker and Mason (2012) 545.

²⁸ Commuri and Ekici (2008) 184.

²⁹ See Commission, ‘Consumer Vulnerability across key markets in the European Union’ (2016) <http://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/vulnerable_consumers_approved_27_01_2016_en.pdf> accessed July 2019; European Parliament, ‘Compilation of Briefing Papers on Consumer Vulnerability’ (2012) <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/475082/IPOLIMCO_ET\(2012\)475082_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/475082/IPOLIMCO_ET(2012)475082_EN.pdf)> accessed July 2019, Pete Lunn and Sean Lyons, ‘Behavioural Economics and “Vulnerable Consumers”: A Summary of Evidence’ (2010).

³⁰ Commission, ‘Consumer Vulnerability across key markets in the European Union’ (2016) <http://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/vulnerable_consumers_approved_27_01_2016_en.pdf> accessed July 2019, 47.

The definition above, would fall under the state-based approach to vulnerability and reflects the shift towards a state-based approach to vulnerability noted in policy documents and academic publications, especially in the UK.³¹

However, there is a clear disparity between the vision of vulnerability in EU policy reports and the more rigid class-based definition of the UCPD. The policy reports offer a more sophisticated version of vulnerability, employing the latest research and in line with empirical evidence. By contrast, the legal definition enshrined in the UCPD is lagging behind. What is arguably a widely accepted conceptualisation of consumer vulnerability as a state, finds its limits in the law.

This chapter adopts a state-based definition of vulnerability and argues for a reform of the vulnerable consumer standard in that direction, without discounting that in some cases focusing on the needs of specific groups may be appropriate. One obvious hurdle to reforming the vulnerable consumer standard would be the fear of jeopardising legal certainty, which is the main advantage of having a definition built around set consumer characteristics. The extent to which the current definition ensures legal certainty is debatable and a more flexible conceptualisation of the vulnerable consumer would ensure the protection of a broader range of consumers. A state-based definition of the vulnerable consumer could be perceived as undermining the average consumer standard. However, given that the vulnerable consumer standard is subject to other conditions besides the criteria of age, infirmity and credulity the risk of the vulnerable consumer replacing the average consumer is minimised.

³¹ See for example TM Pavia and MJ Mason, 'Vulnerability and Physical, Cognitive, and Behavioral Impairment: Model Extensions and Open Questions' (2014) 34 *Journal of Macromarketing* 471.; Craig N Smith and Elisabeth Cooper-Martin, 'Ethics and Target Marketing: The Role of Product Harm and Consumer Vulnerability' (1997) 61 *The Journal of Marketing* 1, 4.; Consumer Affairs Victoria, 'Discussion Paper: What Do We Mean by "Vulnerable" and "Disadvantaged" Consumers?' (Consumer Affairs Victoria 2004); *Occasional Paper No 8: Consumer Vulnerability*, (FCA 2015), available online at <https://www.fca.org.uk/publications/occasional-papers/occasional-paper-no-8-consumer-vulnerability> accessed July 2019; Ofgem, *Consumer Vulnerability Strategy 2013* (102/13) available online at < <https://www.ofgem.gov.uk/about-us/how-we-work/working-consumers/protecting-and-empowering-consumers-vulnerable-situations/consumer-vulnerability-strategy>> , accessed July 2019; Consumer Vulnerability: Challenges and Potential Solutions, (CMA 2019), available online at <<https://www.gov.uk/government/publications/consumer-vulnerability-challenges-and-potential-solutions>> accessed September 2019.

3. Vulnerable Consumers in the Unfair Commercial Practices Directive

The vulnerable consumer definition included in art.5.3. UCPD is the product of lengthy debate during the adoption of the UCPD. The examination of previous drafts of the Directive reveals a completer and more nuanced version of the vulnerable consumer than the diluted version of the UCPD. In the version after the first reading by the European Parliament rec.15 read:³²

Since the most vulnerable consumers are those most likely to be the victims of the unfair commercial practices covered by this Directive, it is appropriate that their interests as consumers be protected, due regard being had, according to the circumstances of the case, to factors such as age (for example minors and the elderly), particular physical or mental conditions (for example maternity or bereavement) and level of literacy. To this end, it is necessary to prevent undue exploitation of the vulnerable characteristics of a particular group of consumers. In addition, personal characteristics which make individuals particularly vulnerable, such as physical or mental disabilities, ought to be taken into account in cases of direct relations with individual consumers, such as door-to-door sales or solicitations or harassment directed towards individual consumers before, during and after the conclusion of a contract.

This version of the recital has a more sophisticated notion of consumer vulnerability than the one currently included in the UCPD. Indeed, it includes temporary conditions, such as bereavement and maternity. Not only does it draw attention to personal characteristics of consumers, but also to certain practices that may place consumers in a vulnerable situation, such as door-to-door sales or harassment. This is consistent with a state-based approach to vulnerability. Having an indicative list of factors is an easy way to allow for a variety of factors to be taken into account, ensuring flexibility of the definition.

Following the second reading by the EP Parliament, many MPs expressed their regret that it was not possible to ensure a higher level of protection for vulnerable consumers,

³² European Parliament, 'Legislative resolution on the Council common position for adopting a directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive')(11630/2/2004 — C6-0190/2004 — 2003/0134(COD)) [2005] OJ C 304 E/351.

especially children.³³ However, this was seen as a necessary compromise in order to achieve a majority. The result of this compromise reveals that the objective of furthering the internal market at odds with the protection of vulnerable consumers and the former prevailed.

Vulnerable consumers in the UCPD are not only mentioned in art.5.3, but also in recital 19 UCPD which reads:

Where certain characteristics such as age, physical or mental infirmity or credulity make consumers particularly susceptible to a commercial practice or to the underlying product and the economic behaviour only of such consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee, it is appropriate to ensure that they are adequately protected by assessing the practice from the perspective of the average member of that group.

While the list in recital 19 as indicated by the use of ‘such as’ is indicative, the criteria listed in art.5.3 seem to be exhaustive. It has been argued that the indicative list in rec.19 suggests that the criteria in art.5.3 are also indicative.³⁴ In the case law of the CJEU, the recitals have ‘no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question’.³⁵ Recitals may be used to interpret operative provisions, but that cannot result in contra legem interpretation.³⁶ Using recital 19 to interpret art.5.3 UCPD in light of recital 19 UCPD might result in conferring rights to consumers who might otherwise not enjoy them and whether that is allowed is unclear. This matter has not been clarified by the CJEU and it does not appear to be a widespread practice in the case law of the Member States.³⁷ While a broader interpretation of the criteria for vulnerability would be beneficial for

³³ European Parliament, Debates : Unfair business-to-consumer commercial practices (23rd February 2005) P6_CRE(2005)02-23(19) available online at <<https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20050223+ITEM-019+DOC+XML+V0//EN&language=EN>> (accessed October 2019)

³⁴ Duivenvoorde (2015) 24.

³⁵ Case C-162/97, Nilsson, [1998] ECR I-7477, para. 54.

³⁶ Case 215/88 Casa Fleischhandels [1989] ECR 2789, para. 31

³⁷ See Decision Vj-5/2011/73 by the Hungarian Competition Authority, 10 November 2011 as cited in Second Guidance Document note 114 as the only example of a Member State authority expanding the criteria for vulnerability.

consumers, it is doubtful whether this can be achieved using recital 19. This paper will focus on art. 5.3 UCPD as operative provisions of the directive prevail.

The vulnerable consumer standard of art.5.3 UCPD will be analysed by breaking it down to the following elements: (a) clearly identifiable group, (b) vulnerability due to age, mental or physical infirmity and credulity, and (c) foreseeability by the trader. These elements are examined below. Art.5.3 also sets out the effect the practice should have on the group of vulnerable consumers which is the ‘material distortion of economic behaviour’. It also includes an exception from the standard for exaggerated statements made in advertising.

3.1 Clearly identifiable group

Clarifying what qualifies as a ‘clearly identifiable group’ of consumers may be problematic. Assessing when a clearly identifiable group is particularly vulnerable to the practice or measure includes a normative element that requires the assessment of the measure.³⁸ The requirement for a ‘clearly identifiable group’ is in place to narrow down the definition of the vulnerable consumer.³⁹ The restrictive nature of this requirement can be seen also in the case law of the Member States.

In a Bulgarian case concerning distance sales of telecommunications services, the Court found that consumers over 75 form a clearly identifiable group.⁴⁰ Merely pointing to elderly consumers as a vulnerable group was not sufficient; a clear-cut age limit was needed to have a ‘clearly identifiable group’. It is true that cognitive abilities may vary within the broader group defined as ‘elderly’. However, it should not disadvantage consumers to the extent where a 75-year-old will be vulnerable, but a 74-year-old will not.

Finding a balance between legal certainty and flexibility is not an easy task. Twigg-Flesner et al. in their Report also point out that these broad criteria for vulnerability do not account for variations within these groups.⁴¹

³⁸ Micklitz, Reich and Rott (2009) 94.

³⁹ Stuyck, Terry and Dyck (2006) 151.

⁴⁰ Case 1483/2012, Bulgarian Consumer Protection Commission v Bulgarian Telecommunication Company, [2012], Supreme Administrative Court.

⁴¹ Twigg-Flesner C et al., ‘An Analysis of the Application and Scope of the Unfair Commercial Practices Directive’ (Department of Trade and Industry, 2005), para 2.61.

3.2 Age

Age as a criterion for vulnerability was designed to refer to the two extremes, children or the elderly. Utilising the findings of the vulnerability study, the updated UCPD Guidance Document published by the Commission (hereafter: UCPD Guidance Document) states that the consumers that are best off are middle aged consumers as both younger and elderly consumers can find themselves in a detrimental position.⁴² Still, there is a need to further qualify these terms. Up to what age does a child remain a child and in what age does someone become an elderly person?⁴³ It seems like this is something that is left to the discretion of the Member States and can be decided according to the context.

The elderly is a group that is often cited as being vulnerable, yet the issues surrounding vulnerable consumers are complicated.⁴⁴ The market behaviour of each consumer is the combination of a number of different characteristics and circumstances. For example, elderly consumers may be considered as less familiar with technology, rendering them more vulnerable in the context of e-commerce. Yet, psychological factors, such as attitudes to technology and individual judgements, as well as socio-economic factors such as education and income can play a significant role in the usage of technology by the elderly.⁴⁵

According to the UCPD Guidance aggressive door-to-door selling is more of a problem for the elderly, while it is not a practice that affects the average consumer.⁴⁶ What is not explored is what exactly is supposed to make elderly people more susceptible to door-to-door practices? Is it, for example, their willingness to trust strangers? This could be a generational problem more than an age problem. If previous generations were more inclined to trust generations and then current e.g. middle-aged consumers, this means that when the middle-aged of today are elderly they would be less willing to trust traders. If their vulnerability is based on the fact that they might spend more time at home, then other categories of consumers

⁴² Commission, 'Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices' (Second Guidance Document) COM(2016) 320, 48.

⁴³ Micklitz (2006), 'The General Clause on Unfair Practices' 113.

⁴⁴ Moschis, Mosteller and Fatt (2011).

⁴⁵ Sanna-Mari Kuoppamäki, 'Digital participation in service environments among senior electricity consumers in Finland', *Technology in Society* (2018) 1, 1.

⁴⁶ UCPD Guidance document, 44.

such as housewives/househusbands should fall under the same category, yet that does not seem to be the case.

The UCPD pays special attention to the protection of children as beside their mention in the recital and the age criterion they are also included in some of the blacklisted practices.⁴⁷ Identifying dimensions of vulnerability of young consumers should into account the developmental context, meaning the effect of social relationships and the differences in behaviour and goals between different stages of development.⁴⁸ According to the Commission findings, teenagers may be considered as a potentially vulnerable group as they are more likely to take risks, they are less likely to pay attention and they can also be credulous.⁴⁹ For younger consumers, same as for elderly consumers, it is necessary to highlight that consumers do not have the same level of sophistication and do not pay the same level of attention to all markets, to all products and services. Teenagers may be quite sophisticated consumers in some markets (e.g. videogames) but more vulnerable in others, such as financial services. Also, there is a point to be made in differentiating between being vulnerable to different aspects of a practice. For example, a teenager may be well versed in using new technologies to locate information about a product but may be more susceptible to marketing practices using emotional pressure.

3.3. Infirmary

Infirmary can refer either to physical or mental infirmary. In relation to the UCPD, it is important to remember that it is meant to be without prejudice to national contract law.⁵⁰ For that reason, mental capacity issues will be covered by national law and not by the UCPD.⁵¹ The law on

⁴⁷ See UCPD, ANNEX I, point 28 forbidding advertisements with direct exhortations to children to buy advertised products.

⁴⁸ David Smahel, Michelle F. Wright, Martina Cernikova, 'Classification of online problematic situations in the context of youths' development' (2014) 39 Communications 3, 233–260.

⁴⁹ UCPD Guidance Document, 49.

⁵⁰ UCPD, art. 3.2.

⁵¹ In the UK the issue of capacity is regulated by the Mental Capacity Act 2005 (MCA). MCA s.1(2) sets out the principle that 'a person must be assumed to have capacity unless it is established that he lacks capacity'; MCA s. 2(1)-2(2) states that 'a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain' and 'it does not matter whether the impairment or disturbance is permanent or temporary'.

incapacity in the UK struggles to find a balance between protecting those who lack capacity and those that deal with them in good faith but tends to favour the latter.⁵²

Infirmity is a characteristic that showcases the social justice aspect of the UCPD, as it relates to non-discrimination of disabled consumers. In fact, consumer vulnerability more broadly serves social justice objectives.⁵³ There is legislation dedicated to the disability rights, yet it is beneficial that the UCPD also reiterates and defends those rights in relation to consumer protection law. Ensuring the rights of disabled consumers, especially in relation to accessibility is a key issue in the EU.⁵⁴ One in six EU citizens has a disability, and that proportion is bound to rise as a result of the ageing population.⁵⁵ Disabled consumers may, amongst others, face significant access problems both in the physical as well as the digital market.⁵⁶ The protection of disabled consumers in particular, is a topic that requires further research.⁵⁷

Infirmity is a concept broader than that of disability as it may include infirmity that is temporary e.g. due to (not chronic) illness or infirmity that owes itself to the process of ageing. Infirmity due to aging shows the overlap between infirmity and age. Vulnerability of the elderly can be partially attributed to a decline of their cognitive abilities and general health due to ageing, which of course affects people in various degrees.⁵⁸ If this aspect of elderly vulnerability is caught by infirmity, then age can be used for protecting the elderly from the market dimension of vulnerability. This refers to how the elderly are perceived in the

⁵² Ewan McKendrick, *Contract Law Text, Cases and Materials*, (8th ed. Oxford University Press 2018), additional chapter 20a, 1.

⁵³ Micklitz (2006), 'The General Clause on Unfair Practices' 111.

⁵⁴ Commission, 'Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Agenda for Europe' COM(2010)245 final, 25; Commission, 'EU Citizenship Report 2010: Dismantling the obstacles to EU citizens rights' COM(2010) 603 final,11.

⁵⁵ Commission, 'EU Citizenship Report 2010: Dismantling the obstacles to EU citizens rights' COM(2010) 603 final, 11

⁵⁶ Commission, 'Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Agenda for Europe' COM(2010)245 final, 2592013.

⁵⁷ See for example Lynden Griggs, 'The Consumer with an Intellectual Disability -- Do We Respond, If So, How?' (2013) 21 *Competition & Consumer Law Journal* 1, calling for traders to exhibit reasonable care when dealing with intellectually disabled consumers, allowing them to play a more active role in the marketplace.

⁵⁸ C. Yoon, CA Cole and MP Lee, 'Consumer Decision Making and Aging : Current Knowledge and Future Directions' (2009) 19 *Journal of Consumer Psychology* 2.

marketplace and in society in general, making them targets for certain practices such as door-to-door selling.

It has been argued that vulnerability due to a temporary circumstance cannot be included in the average vulnerable standard.⁵⁹ However, infirmity can be used to broaden the vulnerable consumer standard to include transient vulnerability. For example, a Czech case confirmed that infirmity includes illness.⁶⁰ That case concerned an advertisement for nutritional supplements that claimed to boost the immune system. The Supreme Administrative Court found that the advertisement targeted people that had the flu and the fact they were sick, meant they were less critical and more likely to believe the claims than a healthy consumer. This was a product that could be of interest also to healthy consumers, but it was only the ill consumers that were more inclined to fall prey to the misleading claims made in the advertisement. It comes as a surprise that in this case infirmity included common and not particularly serious conditions, like the flu. This could signal that national courts make use of their discretion to expand the meaning of the vulnerable consumer in the UCPD. Still, in exercising their discretion courts should beware of not placing an overly onerous duty on traders.

Another category of vulnerable consumers that might be included in the criterion of infirmity is the recently bereaved. Bereavement is a state that can have a profound effect on the health of person experiencing it. Grief has been closely linked with a number of conditions, such as depression, anxiety disorder and post-traumatic stress disorder.⁶¹ This is not to suggest that every bereaved person will suffer from such conditions, but to show that bereavement has serious consequences that can exacerbate vulnerability. The term mental infirmity may not be the best-suited for bereaved consumers, yet under the current legal definition it may be the best way to account for this temporary vulnerability.

This broader conception of infirmity has the potential to expand the vulnerable consumer standard. Infirmity does not have to amount to a diagnosis of a mental condition, in the same way that illness can be included under infirmity without amounting to a chronic illness or a disability. An event that places the consumer under a situation of heightened stress, having

⁵⁹ Wilhelmsson (2007) 218.

⁶⁰ Case 4 As 98/2013 – 88, *Rada pro rozhlasové a televizní vysílání v Omega Pharma*, (2013) Nejvyšší správní soud

⁶¹ Warwick Middleton et al., ‘Pathological Grief Reactions’ in Margaret S Stroebe, Wolfgang Stroebe and Robert O Hansson (eds), *Handbook of Bereavement* (Cambridge University Press 1993) 52–55.

an impact on their health that increases their vulnerability can be included. Such events could include a family member getting diagnosed with cancer or the breakdown of a relationship.⁶² Whether in such circumstances the other conditions for the application of the average vulnerable standard, notably foreseeability by the trader, would be fulfilled depends on the context of the practice or the product.

3.4 Credulity

Credulity is the most ambiguous of the criteria used in the definition of the vulnerable consumer. It is not clear who is meant to fall under the rubric of the credulous consumer. The dictionary definition of the term can be a useful starting point in defining its meaning as a legal term. According to the Oxford English dictionary, the usual sense now is ‘too ready or willing to believe; inclined to believe on weak or insufficient grounds’.⁶³

In the early period following the adoption of the UCPD, credulity was treated as a narrow concept. In 2005, Micklitz argued that credulity could point to the legally ignorant consumer meaning three terms would need to be defined, namely credulity, commercial inexperience and ignorance of the law.⁶⁴ This suggestion creates more problems than it answers. Under what circumstances legal ignorance would be justified? One possibility would be for people who have developmental difficulties or reduced cognitive abilities. This would create an overlap with ‘infirmity’. It is argued that credulity can fill a very specific gap not covered by infirmity. It would be consumers who fall just below the threshold of contractual incapacity, yet their decision-making may place them in a vulnerable position. This includes consumers who are more inclined to believe claims made by traders without examining them critically.

Twigg-Flesner et al. mention tourists or asylum seekers as potentially credulous categories due to their language skills, but generally think that it is difficult to find groups that

⁶² See for example Ben Edwards and Valerie Clarke, ‘The Psychological Impact of a Cancer Diagnosis on Families: The Influence of Family Functioning and Patients’ Illness Characteristics on Depression and Anxiety’ (2004) 13 *Psycho-Oncology* 562.

⁶³ Oxford English Dictionary, 3rd ed March 2013, available online at < <https://www.oed.com/view/Entry/44135?redirectedFrom=credulous#eid> >, accessed October 2019.

⁶⁴ Micklitz (2006), ‘The General Clause on Unfair Practices’ 114.

are clearly identifiable as vulnerable.⁶⁵ However, language skills and a general lack of familiarity with the market and mechanisms of a Member State are reason enough in themselves to increase vulnerability, without implying that consumers are somehow naïve and credulous. Conversely, credulity could cover consumers who are more inclined to accept certain claims due to their beliefs. This could include religious consumers or new age beliefs, such as astrology. An example would be the practice of televangelists charging tickets for their sermons performing ‘healing rituals’ on stage. Or a medium charging several visits to lift a curse. Some of these examples may amount to fraud or in the televangelist example there may be conflicts between consumer law and freedom of religion. Yet, they are worth considering, especially in the context of aggressive practices, as the relationship between a religious consumer and a trader of products related to religion may amount to undue influence.⁶⁶

The difficulty with defining credulity showcases how, unlike the other two criteria, this does not point to any particular group of consumers. This makes it difficult to reconcile with the ‘clearly identifiable group’ requirement. It is argued that where there are other factors at play that can explain the behaviour of the consumer, such as language skills or infirmity, credulity is not the best choice. It can be a stigmatising term as it is associated with naivety and gullibility. Credulity has been used in the past as a synonym for vulnerability, as credulous and vulnerable consumers were the ones who momentarily needed consumer protection, as opposed to the more rational consumer.⁶⁷ The credulous consumer, as the consumer who readily believes every claim, is not a realistic version of the consumer. It appears inspired by the standards previously employed by European Member States which aimed at establishing a high level of consumer protection.

In the UCPD Guidance document credulity is viewed as an open term that refers to the tendency to more readily believe certain claims. It is stated that, unlike the previous criteria, any consumer can be credulous. They suggest that ‘credulity’ can cover consumers that for any reason are particularly influenced by a specific practice.⁶⁸ The same argument is made by Weatherill who sees credulity as the category of vulnerable consumers that can be broadened

⁶⁵ Twigg-Flesner et al. (2005) para 2.65.

⁶⁶ Peter W Edge, ‘Believer Beware: The Challenges of Commercial Religion’ (2013) 33 *Legal Studies* 382, 395.

⁶⁷ Ramsay (1996) 70.

⁶⁸ UCPD Guidance Document, (note 67) 50.

to include other groups.⁶⁹ Same for Duivenvoorde who also sees credulity as an open-textured term that can include any cause for vulnerability.⁷⁰

The UCPD Guidance Document offers an example of this revamped credulity concept coming from a Finnish case.⁷¹ In that case, a trader advertised that for every product sold they would plant a tree. However, they had already agreed to plant a set number of trees. The Finnish market court found that the trader took advantage of the credulity of the consumers that were concerned about the environment. This is a surprising outcome that serves to showcase the gaps of the Directive. This was a claim made by a trader that does not appear to be mere puffery or a claim not designed to be taken literally. To call a group of consumers ‘credulous’ simply because they are interested in protecting the environment, is far removed from the common meaning of the term and is stigmatising.

Attempting to interpret the meaning of credulity in such a broad manner is an indirect recognition of the fact that the definition of vulnerability in the UCPD fails to effectively cover many instances of vulnerability. However, it is doubtful whether simply claiming that credulity is an umbrella term that covers all types of vulnerability is a well-suited solution. If that is to be believed, then why not do away also with the criterion of age that could also be included in that *lato sensu* ‘credulity’? Vulnerability is a broader term than credulity and one that can have positive aspects as it opens us to new experiences, learning and otherwise and human relations.⁷² Credulity on the other hand, is a narrower term pointing to a gullible individual; it can be more stigmatizing than vulnerability and lacks the breadth to capture instances that may not relate to the readiness of consumers to believe certain claims.

3.5 Foreseeability by the trader

Art.5.3 UCPD requires that the clearly identifiable group of consumers is vulnerable in a way ‘which the trader could reasonably be expected to foresee’. It is meant to ensure that the average vulnerable standard is interpreted in a way that is proportionate. However, the foreseeability requirement has been criticised as being overly restrictive.⁷³ Foreseeability adds to the conditions that limit the scope of consumer vulnerability, along with ‘clearly identifiable

⁶⁹ Weatherill (2016) 216.

⁷⁰ Duivenvoorde (2015) 189.

⁷¹ UCPD Guidance Document, 50.

⁷² Erinn Gilson, ‘Vulnerability, Ignorance and Oppression’ (2011) 26 *Hypatia* 308, 310.

⁷³ Stuyck, Terry and Dyck (2006) 151.

group' and being 'particularly vulnerable'. How the foreseeability requirement will be interpreted is crucial in defining the scope of the provision. For example, traders in most occasions should expect that their product will reach disabled consumers. Whether the disabled consumer will be particularly vulnerable in this instance is another issue. Lack of foreseeability should not become an excuse for traders to neglect their duties towards vulnerable consumers and should be interpreted in a proportionate manner.

It is intriguing to consider the possibility for foreseeability being more than a condition to limit the scope of vulnerability. It could mean that when the trader can reasonably foresee the impact on vulnerable consumers, then there is a duty to modify the practice in order to mitigate its effect on vulnerable consumers. For example, by offering alternative formats for disabled consumers. Proportionality is important to ensure that this kind of indirect duty does not place a significant burden on the trader.

Also, the foreseeability requirement appears to envision a practice such as an advertising campaign that will be designed and then reach the consumer, without the consumer interacting with it. However, what happens when the trader did not foresee vulnerability, yet that became obvious to him to a later stage? E.g. when the consumer is about to sign a contract or even in the post-contractual stage. Is the trader expected to not alter his behaviour, as they could not have reasonably foreseen the vulnerability? The phrasing of art.5.3. UCPD lacks clarity on these issues and there is no case law to provide guidance.

The average vulnerable consumer was introduced with good intentions, but the overly narrow scope and restrictive conditions do not allow it to sufficiently protect vulnerable consumers. It has been criticised for failing to include other characteristics that, as supported by empirical evidence, are likely to cause vulnerability such as education, ethnicity or level of income.⁷⁴ Furthermore, by treating the average vulnerable standard as an exception, the UCPD does not consider the fact that vulnerability may concern large parts of the consumer population or the notion that anyone may experience vulnerability at one point.⁷⁵

4. The way forward for consumer vulnerability

⁷⁴ Stuyck, Terryn and Dyck (2006) 122.

⁷⁵ Wilhelmsson (2006), 'Harmonizing Unfair Commercial Practices Law: The Cultural and Social Dimensions' 487.

This is an exciting period for EU consumer law, as the main consumer law directives are being reformed and new legislation is being introduced. The current reform began following the publication of the results of the Fitness Check for EU Consumer and Marketing Law.⁷⁶ The results of the fitness check make it clear that the vulnerable consumer standard is of limited practical relevance and that member states have not stepped in to fill in the gaps in the criteria for consumer vulnerability in their practice- by introducing e.g. income criteria which is one of the main omissions of the UCPD.⁷⁷

Following the Fitness Check, the EU published its communication, ‘A New Deal For Consumers’.⁷⁸ The New Deal for Consumers laid down an ambitious plan to strengthen consumer protection, even though it has been argued that the ‘New Deal for Consumers’ is not offering an overhaul of the consumer law framework but rather some key additions and changes.⁷⁹ The aim of the New Deal For Consumers is not only to respond to the outcomes of the Fitness Check but also to bring consumer legislation in line with the digital age and address consumer scandals such as dieselgate and dual quality of products.⁸⁰ Vulnerable consumers play a very minor role in the New Deal for Consumers, as they are only mentioned in relation to strengthening consumer education programmes and as a justification for measures for e-commerce which may increase vulnerability of certain types of consumers.⁸¹ While this brief mention of vulnerability in the e-commerce setting may offer a glimpse of a diverse criterion for vulnerability, it is not explained any further.

A series of legislative proposals followed the ‘New Deal for Consumers’, including a Proposal for Representative Actions and a Proposal on Better Enforcement and Modernisation (hereafter the Modernisation Directive). At the time of writing, these Proposals are at various stages of their adoption with the Proposal for Representative Actions gone through the first

⁷⁶ European Commission, ‘Study for the Fitness Check of EU consumer and marketing law, Part 1- Main Report’ (Civic Consulting 2017), available online at < https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332> (Accessed July 2019).

⁷⁷ Fitness Check Main Report, 44-45.

⁷⁸ European Commission, Communication from the Commission to the European Parliament, the Council and the European and Economic Social Committee: A New Deal for Consumers, COM (2018) 183 final.

⁷⁹ Christian Twigg-Flesner, ‘Bad Hand? The “New Deal” for EU Consumers’, (2018) 15 (4) Zeitschrift für das Privatrecht der Europäischen Union 166-175, 175.

⁸⁰ COM (2018) 183 final, 4.

⁸¹ COM (2018) 183 final, 15-16.

Parliamentary Reading in May 2019 and the provisional agreement on the text of the Modernisation Directive reached in April 2019.⁸²

The proposed Modernisation Directive includes changes to the UCPD, however, even though the fitness check clearly identified the gap in relation to the vulnerable consumer standard, the Commission has chosen to not take it any further. In fact, only few of the recommendations of the Fitness Check have been included in the proposals put forward by the Commission. This disparity may point to the fact that the Commission uses legislative evaluations as an excuse to promote changes that were already planned, rather than responding to the results of the evaluation. It is a claim to be made cautiously as the Commission also wished to tackle other important issues, such as those arising from technological advances, within the same framework.

For the UCPD in particular, the Fitness Check suggested significant reforms, including the average and vulnerable consumer standards, but the Modernisation Directive delivers only a few of these changes and none in relation to consumer standards.⁸³ However, the Modernisation Directive briefly mentions vulnerable consumers as targeted in off-premises sales. It allows Member States to take measures tackling off-premises sales for reasons other than consumer protection, thus weakening the scope of application of the UCPD.⁸⁴ It has been argued that the introduction of this exception on off-premises sales may encourage Member States for exceptions to maximum harmonisation where there is no cross-border effect.⁸⁵ If this is the starting point for more derogations this could have an impact on vulnerable consumers.

⁸² Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC COM/2018/0184 final - 2018/089; European Parliament legislative resolution of 17 April 2019 on the proposal for a directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the , European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules (COM(2018)0185 – C8-0143/2018 – 2018/0090(COD))

⁸³ Marco Loos, 'The Modernization of European Consumer Law: A Pig in a Poke?' (2018) *European Review of Private Law* (to be published in 2019/1); Amsterdam Law School Research Paper No. 2018-26; Centre for the Study of European Contract Law Working Paper No. 2018-05; Law and Justice Across Borders Research Paper No. 2018-05, available online <https://ssrn.com/abstract=3258421> (Accessed July 2019), 15-16.

⁸⁴ Modernisation Directive, rec.54.

⁸⁵ Christian Twigg-Flesner, 'Bad Hand? The "New Deal" for EU Consumers', (2018) 15 (4) *Zeitschrift für das Privatrecht der Europäischen Union* 166-175, 170.

For instance, Member States could make a claim that some of their citizens/residents are particularly susceptible to a practice and thus wish to protect them further. After all, the justification for this proposed exception is the impact of doorstep selling on vulnerable consumers.

The wave of reforms in EU consumer law have not had an effect on the vulnerable consumer standard and that is a great missed opportunity to address this issue. The option of reforming the vulnerable consumer standard remains the optimal one, as it would allow for the protection of more consumers that currently cannot benefit from the vulnerable consumer standard. Furthermore, it would align the legal definition with the influential state-based approach to vulnerability, which even the Commission adopts in its policy publications. However, the exclusion of consumer standards in the UCPD and the vulnerable standard in particular, from the New Deal for Consumers shows that a reform of the vulnerable consumer standard is not on the cards for the time being and a second reform of the UCPD in a short time, seems unlikely.⁸⁶

With a reform of the average vulnerable standard in the UCPD becoming a distant possibility, which other avenues are available for protecting a broader range of vulnerable consumers? One option would be to make use of soft law to further add other categories of vulnerable consumers and even promote a more holistic view of vulnerability. On the side of the Commission, the UCPD guidance document could be utilised to promote a broader interpretation of vulnerability on the UCPD, though at the moment that is not the case. On the national or even supranational level, codes of conduct can be of use for protecting vulnerable consumers. The UCPD acknowledges the role codes of conduct can play encouraging their use as a means of reducing the need for recourse to administrative or judicial action.⁸⁷ Art.2(f) UCPD contains a definition for code of conduct:

‘code of conduct’ means an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors;

⁸⁶ For more on President-elect Ursula von der Leyen see https://ec.europa.eu/commission/interim_en (Accessed July 2019)

⁸⁷ UCPD, rec.20.

The standing of codes of conduct is fortified by the UCPD which states that non-compliance of the trader with commitments contained in a code of conduct that the trader has agreed to be bound by, will be a misleading practice under certain conditions.⁸⁸

Codes of conduct have been employed with varied levels of success throughout the Union. For the UK and Ireland, codes of conduct are an important part of the government policy for fair trading standards. Civil law countries, such as Italy and the Netherlands also employ codes of conduct, while in Scandinavian countries the Consumer Ombudsman issues non-legally binding guidelines.⁸⁹ The diverse approaches taken in the Member States show that codes of conduct are a flexible instrument that Member States can adjust to their own needs and national traditions. However, Pavillon in her account of how the UCPD has influenced self-regulation paints a not so encouraging picture. Her findings are that the UCPD does not appear to have spurred an increase in self-regulation, something that can be partially attributed to the framework character of the UCPD, as opposed to a sector-specific Directive.⁹⁰ Self or co-regulation can be a useful instrument for promoting a more nuanced vision for consumer vulnerability, but should be viewed as a substitute to legislation.

Apart from codes of conduct, another weapon in the arsenal against practices that target vulnerable consumers can be sectoral directives. In some of the fields of application of the UCPD, sectoral directives can offer a different conception of vulnerable consumers, adopted to the needs of the sector, which is not based on the criteria of age, infirmity and credulity. Some examples of a different version of vulnerability can be found in the two Directives comprising the third Energy Package which require Member States to define the term ‘vulnerable consumer’.⁹¹ The two Directives point to aspects of vulnerability that may be included in the definitions in national law, such as energy poverty and consumers who live in

⁸⁸ UCPD, art.6.2(b).

⁸⁹ Micklitz (2004) 77.

⁹⁰ Charlotte Pavillon, ‘The Interaction between the Unfair Commercial Practices Directive and Self-Regulation: The Case of Codes of Conduct’ in Willem H van Boom, Amandine Garde and Orkun Akseli (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Ashgate Pub Limited 2014) 152.

⁹¹ Council Directive 2009/73/EC concerning common rules for the internal market in natural gas [2009] OJ L 211/94 (Gas Directive); Council Directive 2009/72/EC concerning common rules for the internal market in electricity [2009] OJ L 211/55 (Electricity Directive).

remote areas.⁹² In the financial services sector, the Payment Accounts Directive focuses on providing access to a payment account to vulnerable consumers and while there is no definition, there is mention of consumers with no fixed address and asylum seekers.⁹³

Still, even with these options available, protection of vulnerable consumers without reform of the UCPD will have feet of clay. In order to achieve a high level of protection for vulnerable consumers, there is a need to combine these different layers of protection: 1) a horizontal definition of vulnerable consumers in the UCPD that is broader and allows for greater flexibility with the criteria for vulnerability, 2) soft law and codes of conduct that further qualify this definition in order to promote legal certainty and 3) sectoral directives defining vulnerability in different contexts, particularly where consumers are susceptible to greater harm.

A successful example of this kind was presented by Cosmo Graham researching the UK market for energy and financial services, where the regulators, the Office of Gas and Electricity Markets (OFGEM) and the Financial Conduct Authority (FCA) respectively, adopted a broad conceptualisation of vulnerability without change to the legal framework and change was achieved when big companies committed to changing their organisational framework.⁹⁴

5. Conclusions

This chapter focused on the vulnerable consumer standard in the UCPD, by far the most important and influential definition of the term in EU consumer law. The vulnerable consumer

⁹² Gas Directive, art.3.3. states: ‘...the concept of vulnerable customers which may refer to energy poverty and, inter alia, to the prohibition of disconnection of gas to such customers in critical times. Member States shall ensure that rights and obligations linked to vulnerable customers are applied. In particular, they shall take appropriate measures to protect final customers in remote areas who are connected to the gas system...’; Electricity Directive, art.3.7. states ‘...the concept of vulnerable customers which may refer to energy poverty and, inter alia, to the prohibition of disconnection of electricity to such customers in critical times. Member States shall ensure that rights and obligations linked to vulnerable customers are applied. In particular, they shall take measures to protect final customers in remote areas...’.

⁹³ Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features [2014] OJ L 257/214, art.16.2.

⁹⁴ Cosmo Graham, ‘Tackling consumer vulnerability in energy and banking: towards a new approach’ (2018) *Journal of Social Welfare and Family Law*, 40:2, 241-261, 257.

standard falls within the class-based approach to vulnerability, viewing certain categories of consumers as vulnerable in their entirety. In the case of the UCPD, the criteria for vulnerability are limited to these of age, infirmity and credulity. The choice of this criteria means not only that other potentially vulnerable groups are excluded, but also the consumers falling within these groups are homogenised and it is not possible to differentiate between their circumstances and skills.

The analysis of the elements of the vulnerable consumer standard reveals that besides the criteria, other conditions, such as those of a clearly identifiable group of consumers and the foreseeability by the trader are in place that render the vulnerable consumer standard narrow and restrictive. Ultimately, the fear that the vulnerable consumer will threaten the average consumer has resulted into a standard that struggles to fulfil its purpose and is difficult to employ.

This chapter has argued for a reform of the standard in line with a state-based approach to vulnerability. An open-textured definition of vulnerability, is open to the criticism of undermining legal certainty, as it may not always be easy to predict when a consumer will be in a vulnerable position. Yet, for the UCPD to offer effective protection to vulnerable consumers, it needs to offer a flexible definition. With the support of soft law, codes of conduct and sectoral legislation where necessary, the impact on legal certainty can be minimised. A holistic approach is required to ensure a high level of protection for vulnerable consumers.

The EU Commission may have missed the opportunity for reform of the vulnerable consumer standard but it is high time to stop neglecting the protection of those that need it the most.