Chapter 4: The legal definition of ‘vulnerable’ consumers in the UCPD: benefits and limitations of a focus on personal attributes

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# Introduction[[1]](#footnote-1)

Consumer vulnerability was at the center of EU consumer law in the early 1970s as, by virtue of their status, consumers were viewed as the weaker party.[[2]](#footnote-2) In the earlier days of consumer law, all consumers were therefore considered to be vulnerable. In contract law, and private law more generally, there were also remedies for parties in a weaker position before the conception of consumer law and those have continued to exist in parallel.[[3]](#footnote-3) As consumer law developed, it seems that the way this group was seen fragmented, with the ‘average consumer’ becoming the predominant standard. The more recent recognition of consumer ‘vulnerability’ does indeed confirm that consumers are no longer understood as a homogenous group and some require a higher level of protection than others.[[4]](#footnote-4) In spite of the growing interest in consumer vulnerability, there is not a singular, widely accepted definition.[[5]](#footnote-5) This is a reflection of the character of vulnerability being a flexible and wide-reaching concept, highly complex and lacking clarity.[[6]](#footnote-6)

There is no understating the importance of a 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.[[7]](#footnote-7) The EU has now enshrined in law a definition of what a ‘vulnerable’ consumer is. This chapter focuses on this legal definition contained in the Unfair Commercial Practices Directive (herein after UCPD).[[8]](#footnote-8) The UCPD has a broad scope of application. It covers all business-to-consumer transactions, before, during and after a transaction[[9]](#footnote-9) and across all sectors of the economy.[[10]](#footnote-10) As a maximum harmonisation text, the UCPD sets both the floor and ceiling of protection.[[11]](#footnote-11) Maximum harmonisation is meant to provide legal certainty, promote cross-border trade and consumer confidence. Yet it has been controversial, as it does not allow Member States to have stricter standards of protection, especially for vulnerable consumers.[[12]](#footnote-12)

The UCPD is organised in three levels. Firstly, article 5 UCPD contains a general prohibition. A practice is considered unfair when (*a*) it is contrary to the requirements of professional diligence, and (*b*) it distorts or is likely to materially distort the economic behaviour of the average consumer. The two conditions need to apply cumulatively.[[13]](#footnote-13) Secondly, it contains two smaller general clauses. Article 6 UCPD prohibits misleading actions, while article 7 prohibits misleading omissions. Aggressive practices are regulated by article 8 and article 9 sets the factors to decide whether a practice is considered to use harassment, coercion or undue influence and is therefore aggressive. The general prohibition of article 5 acts as a safety net that catches unfair practices that do not fall under these more specific provisions. 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. 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.

To decide on whether a commercial practice is unfair, it is assessed against the ‘average consumer’ or the ‘vulnerable consumer’ standard.[[14]](#footnote-14) Those standards apply across the board expect for the blacklist. The average consumer is ‘reasonably well-informed, reasonably observant and circumspect’.[[15]](#footnote-15) The inclusion of different standards in the UCPD generated questions.[[16]](#footnote-16) 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.[[17]](#footnote-17) However, the suitability of the ‘average consumer’ as a standard has been criticised,[[18]](#footnote-18) in particular regarding the place of the vulnerable consumer in the UCPD.

The vulnerable consumer standard has different strata. There is first a reference to the average vulnerable consumer as part of a group. There is also a list of those characteristics the vulnerable consumer has: ‘mental or physical infirmity, age, credulity’. This standard is to be employed for protecting vulnerable consumers in instances where a product is aimed at the general population of consumers but is only particularly harmful to vulnerable consumers.[[19]](#footnote-19)

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.

This UCPD definition is seen as ‘paternalistic and ‘superfluous’. It makes the Directive more confusing rather than more protective.[[20]](#footnote-20) In particular, the choice of factors for vulnerability appears quite arbitrary.[[21]](#footnote-21) This chapter places the legal definition within the theoretical debate around consumer vulnerability, especially the distinction between class-based and state-based vulnerability. It offers a thorough examination of the elements of the vulnerable consumer standard in the UCPD. Finally, it offers suggestions for improving the protection of vulnerable consumers in the EU taking into account recent developments.

# A Multi-Disciplinary Conceptualisation of Consumer Vulnerability

Consumer vulnerability, far from being a solely legal concept, is regularly employed by other disciplines, most notably marketing. Therefore, this section draws on the literature of multiple disciplines to accurately reflect the developments in consumer vulnerability theory. A singular definition for consumer vulnerability has proved elusive in law and in other disciplines. Over time the conceptualisation of consumer vulnerability has also evolved significantly. The most notable change has been going from identifying certain categories of consumers (what is often termed ‘class-based’ approach), such as the elderly or women as vulnerable in their entirety to vulnerability increasingly viewed as a transient state (‘state-based’ approach).

Under the class approach, certain categories of consumers e.g. the poor or the illiterate are identified as vulnerable.[[22]](#footnote-22) A class approach often fails to consider the multiple factors contributing to consumer vulnerability, including factors related to the market.[[23]](#footnote-23) This may intensify the exclusion and stigmatisation of groups labelled as vulnerable.[[24]](#footnote-24) However, it has the crucial advantage of clarity as to who is considered vulnerable.[[25]](#footnote-25) This is particularly important in the legal context where 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.[[26]](#footnote-26)

State-based vulnerability was championed by Baker, Gentry and Rittenburg. In their leading paper, they define consumer vulnerability as an interaction of a variety of factors, both external as well as individual states and characteristics.[[27]](#footnote-27) They argued that interaction of these factors results into a state of powerlessness for the consumer and it is this outcome that determines whether the consumer is in a vulnerable position or not.[[28]](#footnote-28) 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. This approach allows for a multitude of factors to be considered, as well as highlighting that it is possible for consumers to work through their vulnerability.[[29]](#footnote-29)

The average vulnerable consumer of art. 5.3. UCPD is defined with the help of the criteria of age, infirmity (either physical or mental) and credulity, reflecting a class-based approach. This narrow selection does not allow other factors to be considered. This may obscure the role of other factors contributing to vulnerability, especially factors relating to the market[[30]](#footnote-30) or the fact 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 last decade, there has undoubtedly been a growing interest in consumer vulnerability as a concept, on a European scale, as various studies show.[[31]](#footnote-31) The most notable one, the 2017 study on ‘Consumer Vulnerability across key markets in the European Union’, offers a sophisticated definition, built around different dimensions, rather than categories of consumers:[[32]](#footnote-32)

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.

This definition reflects a shift towards a state-based approach to vulnerability noted in policy documents and academic publications, especially in the UK.[[33]](#footnote-33)

This highlights a clear disparity between the vision of vulnerability in contemporary EU policy reports and the more rigid class-based definition adopted in the UCPD. The rest of this chapter criticises the class-based standard of the UCPD and suggests that its shortcomings would be addressed by a move towards a state-based approach without discounting that in some cases focusing on the needs of specific groups may remain appropriate.

# Vulnerable Consumers in the UCPD

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 drafts of the Directive reveals a more sophisticated 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:[[34]](#footnote-34)

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.

The recital includes references to 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.

Following the second reading by the EP Parliament, only a narrow selection of class-based attributes made the cut. Many MPs expressed their regret that it was not possible to ensure a higher level of protection for vulnerable consumers, especially children.[[35]](#footnote-35) However, this was a necessary compromise to achieve a majority. The result of this compromise reveals that the objective of furthering the internal market is at odds with the protection of vulnerable consumers and the former prevailed.

The UCPD mentions vulnerable consumers in art.5.3 and in recital 19 UCPD. The latter 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.

The list in recital 19 is indicative (‘such as’), but the criteria listed in art.5.3 appear exhaustive. The indicative list in rec.19 suggests that the criteria in art.5.3 could also be indicative.[[36]](#footnote-36) However, in the CJEU case law, 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’.[[37]](#footnote-37) Recitals may be used to interpret operative provisions, but that cannot result in contra legem interpretation.[[38]](#footnote-38) Using recital 19 to interpret art.5.3 UCPD might result in conferring rights to consumers who might otherwise not enjoy them and whether that is allowed is unclear although it does not appear to be a widespread practice in the national case laws.[[39]](#footnote-39) While a broader interpretation of the criteria for vulnerability would benefit consumers, it is doubtful whether this can be achieved using recital 19.

The vulnerable consumer standard of art.5.3 UCPD relates to a clearly identifiable group. Assessing when a ‘clearly identifiable group’ is particularly vulnerable to a practice or measure includes a normative element that requires the assessment of the said measure.[[40]](#footnote-40) The requirement for a ‘clearly identifiable group’ effectively narrows down the definition of the vulnerable consumer.[[41]](#footnote-41)

For example, in *Bulgarian Consumer Protection Commission v Bulgarian Telecommunication Company*, a case concerning distance sales of telecommunications services, the national Court found consumers over the age of 75 to form a clearly identifiable group[[42]](#footnote-42) Whereas merely pointing to ‘elderly’ consumers as a vulnerable group was found not sufficient; a clear-cut age limit was needed. This creates a few difficulties in so much that cognitive abilities may vary within the broader group defined as the ‘elderly’. Besides, it should not disadvantage consumers to the extent where a 75-year-old will be vulnerable, but a 74-year-old will not. Twigg-Flesner et al. also point out that these broad criteria for vulnerability do not account for variations within these groups.[[43]](#footnote-43) Finding a balance between legal certainty and flexibility is not an easy task. In order to achieve said balance this chapter suggests a combination of a reformed state-based definition of vulnerability in the UCPD, further qualified by codes of conduct and sectoral directives.[[44]](#footnote-44)

Besides, in assessing the vulnerable consumer standard under the UCPD, one must assess the cause of vulnerability (age, mental or physical infirmity and credulity), and foreseeability by the trader.

### 3.1. Vulnerability due to Age

Age as a criterion for vulnerability refers to two extremes, children or the elderly. The updated UCPD Guidance Document published by the Commission (hereafter: UCPD Guidance) states that middle aged consumers are best off, as both younger and elderly consumers can find themselves in a detrimental position.[[45]](#footnote-45) Still, there is a need to further qualify these terms. Up to what age does a child remain a child and at what age does someone become an elderly person?[[46]](#footnote-46) This, seemingly, is left to the discretion of the Member States and can be decided on a case-to-case basis taking into account all relevant circumstances, such as the type of goods/services or the targeted consumers.

The elderly is a group that is often cited as being vulnerable, yet the issues surrounding vulnerable consumers are complicated.[[47]](#footnote-47) The market behaviour of each consumer is the combination of a number of different characteristics and circumstances. For example, elderly consumers may be 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.[[48]](#footnote-48)

According to the UCPD Guidance, aggressive door-to-door selling is more of a problem for the elderly; it is not a practice that generally affects the average consumer.[[49]](#footnote-49) What is not explored is what exactly makes 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 trader, current middle-aged consumers ought to be less willing to trust traders when they grow ‘old’. If their vulnerability is based on the fact that they might spend more time at home, then other categories of consumers such as ‘housewives/househusbands’ should fall under the same category, which is not the case.

The UCPD pays special attention to the protection of children. They are also included in some of the blacklisted practices.[[50]](#footnote-50) Identifying dimensions of vulnerability of young consumers should take into account the developmental context, meaning the effect of social relationships and the differences in behaviour and goals between different stages of development.[[51]](#footnote-51) According to the Commission, teenagers may be considered as a potentially vulnerable group as they are more likely to take risks, are less likely to pay attention and can also be credulous.[[52]](#footnote-52) For younger consumers, it is necessary to highlight that they will not all have the same level of sophistication or 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, those consumers may be 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.

## 3.2. Vulnerability due to Infirmity

Infirmity encompasses both physical and mental infirmity. As the rules in the UCPD are meant to be without prejudice to national contract law,[[53]](#footnote-53) mental capacity issues are therefore covered by national law and not by the UCPD.[[54]](#footnote-54) The law on 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.[[55]](#footnote-55)

Infirmity is a characteristic that relates to non-discrimination of physically disabled consumers. In fact, consumer vulnerability more broadly serves social justice objectives in this context.[[56]](#footnote-56) There is legislation dedicated to disability rights, yet it is beneficial that the UCPD also reiterates and defends those rights. Ensuring the rights of disabled consumers, especially in relation to accessibility is a key issue in the EU.[[57]](#footnote-57) One in six EU citizens has a disability, and that proportion is bound to rise as a result of an ageing population.[[58]](#footnote-58) Disabled consumers may, amongst others, face significant access problems both in the physical as well as the digital market.[[59]](#footnote-59) The protection of disabled consumers in particular, is a topic that requires further research.[[60]](#footnote-60)

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. 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.[[61]](#footnote-61) If this aspect of elderly vulnerability is caught by infirmity, then age can be used to protect the elderly. This is particularly useful as the elderly are perceived in the marketplace and in society in general as particularly vulnerable, making them targets for certain practices such as door-to-door selling which have a high propensity for unfairness.

Vulnerability due to a temporary circumstance cannot be included in the average vulnerable standard.[[62]](#footnote-62) However, infirmity can be used to broaden the vulnerable consumer standard to include transient vulnerability. For example, in the Czech case of *Rada pro rozhlasové a televizní vysílání v Omega Ph*, the courtconfirmed that infirmity includes illness.[[63]](#footnote-63) That case concerned an advertisement for nutritional supplements that claimed to boost the immune system. The Czech 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 only the consumers who were ill were more inclined to fall prey to the misleading claims made in the advertisement. This could signal that national courts make use of their discretion to expand the meaning of the vulnerable consumer in the UCPD in a proportionate manner.

Individuals who are recently bereaved are another category of vulnerable consumers that might be included within the meaning of infirmity. Bereavement is a state that can have a profound effect on the health of the person experiencing it. Grief has been closely linked with depression, anxiety disorder and post-traumatic stress disorder.[[64]](#footnote-64) 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. It follows 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 an impact on their health that increases their vulnerability ought to be included. Such events could include a family member getting diagnosed with cancer or the breakdown of a relationship.[[65]](#footnote-65) 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.

## 3.3. Vulnerability due to Credulity

It is unclear who is meant to fall under this rubric. According to the Oxford English dictionary, ‘credulous’ is the term is used for someone who is ‘too ready or willing to believe; inclined to believe on weak or insufficient grounds.’[[66]](#footnote-66)

In the early period following the adoption of the UCPD, credulity was treated as a narrow concept. Micklitz argued that credulity could point to the legally ignorant consumer, meaning that three terms would need to be defined, namely credulity, commercial inexperience and ignorance of the law.[[67]](#footnote-67) 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’. Credulity can fill a very specific gap not covered by infirmity, namely 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 are clearly identifiable as vulnerable.[[68]](#footnote-68) 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, televangelists performing ‘healing rituals’ on stage, or a medium lifting curse. Some of these examples may amount to fraud or raise 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.[[69]](#footnote-69)

The difficulty with defining credulity is that, unlike the other two criteria, it does not point to any particular group of consumers. This makes it difficult to reconcile with the ‘clearly identifiable group’ requirement contained in Article 5(3) UCPD. Where other factors can explain the behaviour of the consumer, such as language skills or infirmity, credulity is arguably 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.[[70]](#footnote-70) The credulous consumer, as the consumer who readily believes every claim, is not a realistic version of the consumer.

In the UCPD Guidance document, credulity is 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. Credulity can cover consumers that for any reason are particularly influenced by a specific practice.[[71]](#footnote-71) The same argument is made by Weatherill who sees credulity as the category of vulnerable consumers that can be broadened to include other groups.[[72]](#footnote-72) Duivenvoorde also sees credulity as an open-textured term that can include any cause for vulnerability.[[73]](#footnote-73)

The UCPD Guidance Document offers an example of this revamped credulity concept coming from a Finnish case[[74]](#footnote-74) Where a trader had advertised they would plant a tree for every product sold despite having already agreed to a set number of trees. The Finnish court found that the trader took advantage of the credulity of consumers concerned about the environment.[[75]](#footnote-75) This is a surprising outcome as it suggests that an interest in protecting the environment may amount to credulity and is far removed from the common meaning of the term.

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.[[76]](#footnote-76) 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.

## 3.4 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’ ensuring a proportionate interpretation of the standard. However, this requirement is overly restrictive.[[77]](#footnote-77) Foreseeability adds to the conditions that limit the scope of consumer vulnerability, along with ‘clearly identifiable group’ and being ‘particularly vulnerable’. The manner in which the requirement is interpreted is crucial in defining the scope of the provision.

For example, traders should generally expect their product to reach disabled consumers. Whether the disabled consumer is particularly vulnerable in a given instance is however another issue. Lack of foreseeability should therefore not become an excuse for traders to neglect their duties towards vulnerable consumers and should be interpreted in a proportionate manner. Furthermore, the possibility for foreseeability to be more than a condition to limit the scope of vulnerability must be considered. It could mean that when the trader can reasonably foresee the impact on vulnerable consumers, there is a duty to modify the practice to mitigate its effect on vulnerable consumers as far as it is proportionate to do so (e.g. offering alternative formats for disabled consumers).

Defining the limits of foreseeability remains difficult. What happens when the trader did not foresee a vulnerability that became obvious to him to a later stage? Is the trader expected to 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.[[78]](#footnote-78) 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.[[79]](#footnote-79) This analysis has shown that the current largely class-based definition needs to be more nuanced to reflect vulnerability as a transient state. The following sections look into the options for moving the definition towards a state-based approach.

# The way forward for consumer vulnerability

The results of the Fitness Check for EU Consumer and Marketing Law[[80]](#footnote-80) make it clear that the vulnerable consumer standard is of limited practical relevance, but member states have not stepped in to fill in the gaps e.g. by introducing income criteria, one of the main omissions of the UCPD.[[81]](#footnote-81)

Subsequently, the ‘New Deal For Consumers’[[82]](#footnote-82) laid down an ambitious plan to strengthen consumer protection.[[83]](#footnote-83) However, vulnerable consumers play a very minor role in this New Deal; 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.[[84]](#footnote-84) While this brief mention offers a glimpse of a diverse criterion for vulnerability, it is not explained any further.

A series of legislative proposals followed the New Deal, including a Proposal on Better Enforcement and Modernisation (hereafter the Modernisation Directive) of particular relevance.[[85]](#footnote-85) At the time of writing, a provisional agreement on the text of the Modernisation Directive was reached in April 2019.[[86]](#footnote-86)

## 4.1 A missed opportunity to reform

For the UCPD in particular, the Fitness Check suggested significant reforms, including the average and vulnerable consumer standards, but the Modernisation Directive only delivers a few of these changes and none in relation to consumer standards.[[87]](#footnote-87) The Modernisation Directive only mentions vulnerable consumers as targeted in off-premises sales. This 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.[[88]](#footnote-88) 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.[[89]](#footnote-89) If this is indeed the case, this could have an impact on vulnerable consumers as Member States could claim that some of their citizens/residents are particularly susceptible to a practice. Indeed, the justification for this proposed exception is the impact of doorstep selling on vulnerable consumers.[[90]](#footnote-90)

The wave of reforms in EU consumer law have missed the opportunity to improve upon the vulnerable consumer standard. Reforming would be optimal, as it would allow for the protection of consumers that currently cannot benefit from protection, and yet can be classed as vulnerable, if one adopts the recently developed EU state-based approach to vulnerability. A second reform of the UCPD in a short time, seems unlikely.[[91]](#footnote-91) It therefore leads to reviewing which other avenues are available for protecting a broader range of vulnerable consumers.

## 4.2. Possible interim solutions

One option would be to make use of soft law to add other categories of vulnerable consumers and even promote a more holistic view of vulnerability. On the side of the Commission, the UCPD Guidance could be used to promote a broader interpretation of vulnerability in the UCPD, lacking at the moment.

At a national or supranational level, codes of conduct can be of use. The UCPD acknowledges the role such codes play as a means of reducing the need for recourse to administrative or judicial action and encourages their use.[[92]](#footnote-92) They can be particularly useful because non-compliance 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.[[93]](#footnote-93)

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.[[94]](#footnote-94) The diverse national approaches show that codes of conduct are a flexible instrument that Member States can adjust to fit their own needs and traditions. However, Pavillon, in her account of how the UCPD has influenced self-regulation, paints a somewhat gloomier 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.[[95]](#footnote-95) Self or co-regulation can be a useful instrument for promoting a more nuanced vision for consumer vulnerability, but should be viewed as a supplement to legislation.

Another weapon in the arsenal against practices that target vulnerable consumers are sectoral directives, as they offer a different conception of vulnerable consumers, adopted to the needs of the sector reflecting a state-based approach rather than an adherence to the criteria of age, infirmity and credulity. Examples of a different conception of vulnerability are found in the two Directives comprising the third Energy Package which require Member States to define the term ‘vulnerable consumer’.[[96]](#footnote-96) The Energy 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 remote areas.[[97]](#footnote-97) 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, it mentions consumers with no fixed address and asylum seekers.[[98]](#footnote-98)

Yet, in spite of such options, protection of vulnerable consumers without reform of the UCPD will have feet of clay. To achieve a high level of protection, there would be a need to combine the following 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. [[99]](#footnote-99).

# Conclusion

The vulnerable consumer standard in the UCPD adopts a class-based approach to vulnerability, viewing certain categories of consumers as vulnerable in their entirety. In the UCPD, the criteria for vulnerability are limited to age, infirmity and credulity. The choice of these 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 these criteria, other conditions, such as those of a clearly identifiable group of consumers and the foreseeability by the trader further restricts the application of the standard. 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 more in line with a state-based approach to vulnerability. An open-texture 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 could be minimised. A holistic approach is required to ensure a high level of protection for vulnerable consumers and it is high time to stop neglecting the protection of those that need it the most.

1. All webllinks accessed on 12 december unless otherwise specified. [↑](#footnote-ref-1)
2. Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy [1975] OJ C92/1. Freeman comments that at the centre of the Resolution was the improvement of the quality of life of consumers. S Freeman ‘A short history of Consumer Policy in the EU’ in D Leczykiewicz and S Weatherill (eds) *The Images of the Consumer in EU Law: Legislation Free Movement and Competition Law* (Hart, 2016). [↑](#footnote-ref-2)
3. For example see, Council Directive 93/13/EEC on unfair terms in consumer contracts [1993] OJ L95/29 (Unfair Contract Terms Directive). [↑](#footnote-ref-3)
4. P. Cartwright, ‘The Vulnerable Consumer of Financial Services: Law, Policy and Regulation’ (Nottingham University Business School, Financial Services Research Forum 2011) 6. [↑](#footnote-ref-4)
5. For some examples of definitions of consumer vulnerability see D. Jones Ringold, ‘Social Criticisms of Target Marketing Process or Product?’ (1995) 38 *American Behavioral Scientist* 578, 584.; GP Moschis, J Mosteller and C 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 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>. S Menzel Baker, JW Gentry and TL Rittenburg, ‘Building Understanding of the Domain of Consumer Vulnerability’ (2005) 25 *Journal of Macromarketing* 128, 128. [↑](#footnote-ref-5)
6. See for example: L 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. [↑](#footnote-ref-6)
7. For more on this HW Micklitz, ‘The Consumer: Marketised, Fragmentised, Constitutionalised’ on the role of consumer law in promoting the internal market; Norbert Reich ‘Vulnerable Consumers in EU Law’ analysing different aspects of vulnerability and it challenges for EU contract law; Graeme B Dinwoodie, Dev S Gangjeet ‘The Image of the Consumer in EU Trade Mark Law’ for an illuminating analysis of the average consumer employed in trademark law, all contributions in Leczykiewicz, Weatherill (n 2) which explores different perspectives of the image of the consumer. [↑](#footnote-ref-7)
8. 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). [↑](#footnote-ref-8)
9. UCPD, art.3.1. [↑](#footnote-ref-9)
10. Although note that for financial services and immovable property it is only a minimum harmonisation measure, see UCPD, rec. 9. [↑](#footnote-ref-10)
11. UCPD, rec.12,13. [↑](#footnote-ref-11)
12. I Benohr, *EU Consumer Law and Human Rights* (Oxford University Press 2013) 33. [↑](#footnote-ref-12)
13. HW Micklitz, ‘The General Clause on Unfair Practices’ in G Howells, T Wilhelmsson and HW Micklitz (eds), *European Fair Trading Law: The Unfair Commercial Practices Directive* (Ashgate Publishing Group 2006), 85. [↑](#footnote-ref-13)
14. UCPD, art.5.3. [↑](#footnote-ref-14)
15. UCPD, rec.18. [↑](#footnote-ref-15)
16. Bram B Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer Publishing 2015) 26. [↑](#footnote-ref-16)
17. Micklitz (n 13), 113. [↑](#footnote-ref-17)
18. 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. [↑](#footnote-ref-18)
19. 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. [↑](#footnote-ref-19)
20. Incardona and Poncibò (fn 18) 29. [↑](#footnote-ref-20)
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22. S Commuri and A Ekici, ‘An Enlargement of the Notion of Consumer Vulnerability’ (2008) 28 *Journal of* *Macromarketing* 183, 184. [↑](#footnote-ref-22)
23. Ibid. [↑](#footnote-ref-23)
24. Kate Brown, ‘“ Vulnerability ”: Handle with Care’ (2011) 5 Ethics and Social Welfare 313, 316. [↑](#footnote-ref-24)
25. Stacey Menzel Baker and Marlys Mason, ‘Toward a Process Theory of Consumer Vulnerability and Resilience’ in David Glen Mick et al. (eds), Transformative Consumer Reseach: For Personal and Collective Wellbeing (Routledge 2012) 544. [↑](#footnote-ref-25)
26. For a great example of this approach see G.Moschis, J Mosteller, C Kwai Fatt, ‘Research Frontiers on Older Consumers’ Vulnerability’,45 (2011) 45(3) *The Journal of Consumer Affairs* 467-491. [↑](#footnote-ref-26)
27. Baker, Gentry and Rittenburg (n 5) 134. [↑](#footnote-ref-27)
28. Ibid. [↑](#footnote-ref-28)
29. Baker and Mason (n 25) 545. [↑](#footnote-ref-29)
30. Commuri and Ekici (n 22) 184. [↑](#footnote-ref-30)
31. 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; 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://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/vulnerable_consumers_approved_27_01_2016_en.pdf;%20European%20Parliament,%20'Compilation%20of%20Briefing%20Papers%20on%20Consumer%20Vulnerability'%20(2012)%20%3chttp://www.europarl.europa.eu/RegData/etudes/etudes%20/join/2012/475082/IPOLIMCO_ET(2012)475082_EN.pdf) P Lunn and S Lyons, ‘Behavioural Economics and “Vulnerable Consumers”: A Summary of Evidence’ (Communications Consumer Panel 2010). [↑](#footnote-ref-31)
32. Commission, ‘Consumer Vulnerability across key markets in the European Union’ (n 31). [↑](#footnote-ref-32)
33. 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.; CN Smith and E 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 (n 5); Ofgem, *Consumer Vulnerability Strategy 2013* (102/13) < <https://www.ofgem.gov.uk/about-us/how-we-work/working-consumers/protecting-and-empowering-consumers-vulnerable-situations/consumer-vulnerability-strategy>>. Consumer Vulnerability: Challenges and Potential Solutions, (CMA 2019), available online at <<https://www.gov.uk/government/publications/consumer-vulnerability-challenges-and-potential-solutions>. [↑](#footnote-ref-33)
34. 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. [↑](#footnote-ref-34)
35. European Parliament, Debates: Unfair business-to-consumer commercial practices (23rd February 2005) P6\_CRE(2005)02-23(19) <<https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20050223+ITEM-019+DOC+XML+V0//EN&language=EN> >. [↑](#footnote-ref-35)
36. Duivenvoorde (n 16) 24. [↑](#footnote-ref-36)
37. Case C-162/97, Nilsson, [1998] ECR I-7477, para. 54. [↑](#footnote-ref-37)
38. Case 215/88 Casa Fleischhandels [1989] ECR 2789, para. 31. [↑](#footnote-ref-38)
39. 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. [↑](#footnote-ref-39)
40. HW Micklitz, Norbert Reich and Peter Rott, Understanding EU Consumer Law (Intersentia 2009) 94. [↑](#footnote-ref-40)
41. Stuyck, Terryn and Dyck (n 21)151. [↑](#footnote-ref-41)
42. Case 1483/2012, Bulgarian Consumer Protection Commission v Bulgarian Telecommunication Company, [2012], Supreme Administrative Court. [↑](#footnote-ref-42)
43. 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. [↑](#footnote-ref-43)
44. See s.4.2. [↑](#footnote-ref-44)
45. Commission, ‘Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices’ (Second Guidance Document) COM (2016) 320, 48. [↑](#footnote-ref-45)
46. Micklitz (n 13) 113. [↑](#footnote-ref-46)
47. C. Yoon, CA Cole and MP Lee (n 47). [↑](#footnote-ref-47)
48. SM Kuoppamäki, ‘Digital participation in service environments among senior electricity consumers in Finland’ (2018) *Technology in Society* 1, 1. [↑](#footnote-ref-48)
49. UCPD Guidance (n 45) 44. [↑](#footnote-ref-49)
50. See UCPD, ANNEX I, point 28 forbidding advertisements with direct exhortations to children to buy advertised products. [↑](#footnote-ref-50)
51. David Smahel, Michelle F. Wright, Martina Cernikova, ‘Classification of online problematic situations in the context of youths’ development’ (2014) 39 *Communications* 3, 233–260. [↑](#footnote-ref-51)
52. UCPD Guidance (n 45) 49. [↑](#footnote-ref-52)
53. UCPD, art. 3.2. [↑](#footnote-ref-53)
54. 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’. [↑](#footnote-ref-54)
55. Ewan McKendrick*, Contract Law Text, Cases and Materials*, (8th ed. Oxford University Press 2018), additional chapter 20a, 1. [↑](#footnote-ref-55)
56. Micklitz (n 13)111. [↑](#footnote-ref-56)
57. 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. [↑](#footnote-ref-57)
58. Commission, ‘EU Citizenship Report 2010: Dismantling the obstacles to EU citizens rights’ COM (2010) 603 final, 11 [↑](#footnote-ref-58)
59. 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, 259,; see also, L 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. [↑](#footnote-ref-59)
60. [↑](#footnote-ref-60)
61. C. Yoon, CA Cole and MP Lee (n 47)., ‘Consumer Decision Making and Ageing : Current Knowledge and Future Directions’ (2009) 19 Journal of Consumer Psychology 2 [↑](#footnote-ref-61)
62. Wilhelmsson (2007) 218. Reference for this [↑](#footnote-ref-62)
63. Case 4 As 98/2013 – 88, *Rada pro rozhlasové a televizní vysílání v Omega Pharma*, (2013) Nejvyšší správní soud [↑](#footnote-ref-63)
64. W Middleton et al., ‘Pathological Grief Reactions’ in MS Stroebe, W Stroebe and RO Hansson (eds), *Handbook of Bereavement* (Cambridge University Press 1993) 52–55. [↑](#footnote-ref-64)
65. See for example B Edwards and V 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. [↑](#footnote-ref-65)
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70. Iain Ramsay, *Advertising, Culture and the Law* (Sweet and Maxwell 1996), 70. [↑](#footnote-ref-70)
71. UCPD Guidance Document, (n 45) 50. [↑](#footnote-ref-71)
72. Weatherill (n 2) 216. [↑](#footnote-ref-72)
73. Duivenvoorde (n 16) 189. [↑](#footnote-ref-73)
74. MAO: 157/11, the Market Court of Helsinki, 8 April 2011 as cited in UCPD Guidance Document, (n 45) 46. [↑](#footnote-ref-74)
75. Ibid. [↑](#footnote-ref-75)
76. Erinn Gilson, ‘Vulnerability, Ignorance and Oppresssion’ (2011) 26 Hypatia 308, 310. [↑](#footnote-ref-76)
77. Stuyck, Terryn and Dyck (n 21) 151. [↑](#footnote-ref-77)
78. Stuyck, Terryn and Dyck (n 21) 122. [↑](#footnote-ref-78)
79. Wilhelmsson (2006), ‘Harmonizing Unfair Commercial Practices Law: The Cultural and Social Dimensions’ 487. [↑](#footnote-ref-79)
80. 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>>. [↑](#footnote-ref-80)
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84. COM (2018) 183 final, 15-16. [↑](#footnote-ref-84)
85. 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. [↑](#footnote-ref-85)
86. 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)). [↑](#footnote-ref-86)
87. Marco Loos, ‘The Modernization of European Consumer Law: A Pig in a Poke?’ (2019) 27(1) *European Review of Private Law* 113-134, 132. [↑](#footnote-ref-87)
88. Modernisation Directive, rec.54. [↑](#footnote-ref-88)
89. C Twigg-Flesner, (n 83), 170. [↑](#footnote-ref-89)
90. Modernisation Directive, rec.44. [↑](#footnote-ref-90)
91. For more on the agenda of President Ursula von der Leyen see <https://ec.europa.eu/info/strategy/priorities-2019-2024_en#documents>. [↑](#footnote-ref-91)
92. UCPD, rec.20. See also Art.2(f) UCPD for a definition. [↑](#footnote-ref-92)
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94. HW Micklitz, ‘A General Framework Directive on Fair Trading’ in Hugh Collins (ed), The Forthcoming EC Directive on Unfair Commercial Practices (Kluwer Law International 2004) 77. [↑](#footnote-ref-94)
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97. Gas Directive, art.3.3.; Electricity Directive, art.3.7.. [↑](#footnote-ref-97)
98. 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. [↑](#footnote-ref-98)
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