The New Concept of Digital Vulnerability and the European Rules on Unfair Commercial Practices

Mateja Durovic, Eleni Kaprou

A. Introduction

The rising digitalisation of the market has increased the likelihood of some consumers experiencing poor outcomes, particularly those who are vulnerable. A vulnerable consumer can be defined as someone who, due to their personal circumstances, behaviour, personal situation or market in which they act, is especially susceptible to detriment, particularly when the trader is not acting with appropriate levels of care. For instance, a recent Ofcom study demonstrated that an increasing percentage of younger teenagers turn to Google for "true and accurate information," but only a minority can correctly identify camouflaged forms of marketing such as native content and sponsored links. The digital vulnerability itself comes in many forms, it does not limit only to children or elderly population, and understanding of all versions of digital vulnerability is of essential importance and will represent the first step of my research. Moreover, Covid-19 pandemic, besides contributing to a faster pace of market digitalisation eventually resulted in even more vulnerability which remained even now when social distancing is over and has thus also forced the issue of consumer's vulnerability up board agendas.

In the contemporary digital economy, the consumer protection regulatory framework needs, on the one side, to ensure that vulnerable consumers get sufficiently protected, but, on the other side, the regulatory framework must not unreasonably inhibit innovation and further digitalisation of the market. Balance between these values, in reality, is very difficult to secure and this is where the regulatory intervention needs to be particularly cautious.

https://doi.org/10.5771/9783748940913-127 https://www.inlibra.com/de/agb - Open Access -

B. Consumers and the digital age

Technology is moving at a faster pace than ever before and new developments are transforming the marketplace, leading to a global regulatory battle of the digital market.[1] E-commerce is becoming ever more pervasive and many contracts are concluded online. The online environment is becoming the main avenue for receiving information on products and services as well as purchases and complaints handling. Consumer law has to adapt to all these technological challenges and consider whether the existing framework is still able to serve its purpose.

In the race to get ahead we must consider, who is getting left behind? Which are the consumers that are disadvantaged in this environment and what can regulation do for them? This is the question this paper will answer by focusing on consumer vulnerability in the online environment. It will seek to provide a framework for defining and assessing digital vulnerability and make the case that the digital environment is home to a host of challenges that are not well addressed by the current framework for consumer vulnerability in EU law. Furthermore, it will bring forward proposals on how regulators can take digital vulnerability into account within the existing framework and enhance consumer protection.

The chapter adopts an interdisciplinary approach, especially for approaching the topic of digital vulnerability. This is dictated by the interdisciplinary character of the concept of vulnerability, which has been the subject of study from several disciplines. Since the focus of the paper is on the marketplace, empirical and theoretical papers from marketing and especially the sub-area of ethical marketing have been illuminating in gaining a better understanding of digital vulnerability in the context of consumer law. This interdisciplinary analysis is used to inform the legal analysis which is essential for determining the role digital vulnerability is to play in the EU consumer law context.

The scope of the paper is focused on EU consumer law. The paper is going to cover the key instrument of the EU consumer law, the European Directive 2005/29/EC on unfair commercial practices. The European Union is a global leader both in consumer protection, as well as in the digital marketplace, which makes it an ideal foundation for this research. Furthermore, the EU Commission with its publications and surveys is

1 Anu Bradford, Digital Empires: The Global Battle to Regulate Technology (OUP 2023).

https://doi.org/10.5771/9783748940913-127 https://www.inlibra.com/de/agb - Open Access -

showing an increased interest in consumer vulnerability and its impact in transactions.[2]

This is timely research as EU consumer law is going through reform, following the ongoing process of the assessment of the suitability of the existing consumer law rules for the digital age. While an important part of the ongoing assessment process is ensuring that EU consumer law is able to respond to technological challenges, the subject of consumer vulnerability in relation to technology is glossed over. This is what this chapter aims to rectify and place the vulnerable subject in the centre of the discussion. The topic of consumer vulnerability is becoming ever more important in consumer law. This is mirroring broader discussions around the vulnerable subject in law. However, the vulnerable consumer continues to be only secondary to the prevailing image of the average consumer.

C. EU digital environment

To start with, it would be useful to get an overview of the situation in the EU regarding the digital market. This is imperative as the vision for digital vulnerability will depend on the needs that arise from the specific context of the European Union. Already in 2015 the Juncker Commission announced the promotion of the digital single market as a strategic priority for the EU.[3] This is then followed by the Von Den Layen's Commission.[4] The digital single market is viewed as an extension of the single market in the digital world, relevant for all four fundamental freedoms of the Treaties. This choice hardly comes as a surprise as the digital world is becoming ever more important and information technology is becoming more pervasive in all aspects of life. The European Union wishes to establish itself as a

2 See for example, 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 February 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> accessed October 2023, Pete Lunn and Sean Lyons, 'Behavioural Economics and "Vulnerable Consumers": A Summary of Evidence' (2010).

3 European 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 Single Market Strategy for Europe, COM(2015) 192 final, 2.

4 The German Presidency of the EU Council, 2020, p. 8.

https://doi.org/10.5771/9783748940913-127 https://www.inlibra.com/de/agb - Open Access -

leader in information technology and reap the benefits of its development, financial or otherwise.

While there is a lot of discussion on the impact of technology, in fact, this is mostly referring to information and communications technologies (ICTs). ICTs in particular, have had a profound effect in many aspects of the economy and broadly of society. They are no longer limited to a specific sector but relevant to all; they are heralded as drivers of development. ICTs are also influential in public affairs, especially when governments use information technologies, usually described by the term e-government.[5] In this setting, consumers have an important role to play. The measures adopted in the context of the Digital Single Market strategy focus on the impact new technologies have on consumer behaviour.[6] The main reference to consumers is in relation to 'better access for consumers and businesses to online goods and services across Europe'. This better access is equated to the removal of trade barriers and differences between online and offline goods. New technologies and their impact on consumers become a vehicle for harmonisation of laws. Arguably, this harmonisation is not only for the benefit of consumers but also for the benefit of traders.

The need of harmonisation of standards is justified by the reported lack of trust of consumers in the digital environment. Consumers appear to have a number of concerns, especially in relation to how their data is being used as well as the security of online transactions. There is something to be said on the emphasis placed on legal environment and consumer rights as the main obstacle for consumers making cross-border online purchases. There is no mention in the strategy of other issues faced by consumers, such as lack of access to hardware or the skills required to navigate the digital marketplace. Furthermore, the image of consumers projected is one of them as passive receivers of the changes brought by new technologies. It ignores the relationship between consumers and the digital market is a lot more dynamic, as consumers are the main drivers of innovation in the sector.

On the one hand, the focus on the cross-border element can be easily explained by the legislative competencies of the EU, as the promotion of the

5 For a review of e-government in the EU, see Lourdes Torres, Vicente Pina, Sonia Royo, 'E-government and the transformation of public administrations in EU countries: Beyond NPM or just a second wave of reforms?', (2005) Online Information Review 29(5) 531-553.

6 COM(2015) 192 final, 5.

https://doi.org/10.5771/9783748940913-127 https://www.inlibra.com/de/agb - Open Access -

internal market is one of the primary objectives of EU consumer law.[7] On the other hand, harmonisation of laws will certainly produce benefits for traders engaging in cross-border trade, while only consumers already taking part in the digital market stand to benefit. It is not clear whether legislative harmonisation could have the effect of attracting more consumers to the digital marketplace.

It appears that the digital skills of consumers and their access to hardware and software are peripheral issues for the EU Commission with the focus being on harmonisation of laws. However, that is not the case when there is no longer talk of consumers, but of workers. There is a social aspect to the Digital Single Market Strategy, with a vision for creating an inclusive e-society citizens and businesses need to have the necessary skills to benefit from technology.[8] Interestingly, there is no talk of consumers as part of this e-society, even though all consumers are simultaneously citizens. Instead, the improvement of digital skills seems to be of paramount importance for another category, that of workers.

The Digital Single Market strategy focuses on the need to develop digital skills for employees so that they can cover the growing demand for ICT sector jobs.[9] There is no mention of improving the digital skills of citizens in order to benefit from the digital marketplace as consumers. Instead, education initiatives focus on the needs of the workplace rather than everyday life or even interaction with public services. Therefore, there seems to be a discrepancy between citizens as consumers who are perceived to possess the necessary skills to participate in the digital marketplace inhibited mostly by security concerns and workers who need to develop their skills to keep up with the needs of an ever-changing marketplace.

Is there a place for digital vulnerability in this fragmented vision of the EU citizen in the digital environment? Yes, indirectly, there is a recognition. A lot of the initiatives center on improving digital skills *and learning across society*. This is an indirect recognition of the existence of digital vulnerability. It shows that the population across EU does not have the same digital skills, as can be expected, and that there is the need to address that. The EU is funding several programmes promoting digital inclusion.[10] However, digital inclusion in this context appears to be a more restricted concept,

7 Art. 26 TFEU.
8 COM(2015) 192 final,16.
9 COM(2015) 192 final,16.
10 For more information on digital inclusion see below.

https://doi.org/10.5771/9783748940913-127 https://www.inlibra.com/de/agb - Open Access -

including primarily disabled consumers.[11] What is telling is that the only programme for social inclusion concerns elderly consumers.

So, while the EU Commission has an understanding of the different needs and skill levels of citizens in the digital environment as well as potential issues with accessibility, there appears to be disconnect between that and their capacity as consumers. Consumers are perceived in this context as passive receivers of the benefits of technology and harmonisation of laws. In order to avoid making assumptions on digital vulnerability, and especially which groups are to be considered disadvantaged in the online environment, one would need to have the relevant empirical data on hardware and internet usage.

Fortunately, there is such a body of data for the EU.[12] While it cannot provide all the answers, it serves to point out general tendencies and is a useful tool to better understand where the EU digital market is now as well as how it evolved over time. For that purpose, there is a special Eurobarometer on E-communications and the digital single market which is published annually since 2006. Prior to that there were frequent Eurobarometer surveys under different names monitoring both the access to hardware e.g. how many households owned telephones and computers as well as the usage of such devices e.g. for internet access, making calls etc. The questions asked, and information collected slightly changes over time, reflecting the technological advances, such as the advent of the smartphone which also provides access to the internet as opposed to personal computers.

The Eurobarometer surveys can provide useful information on how the EU performs as a whole, as well as how the different Member States perform. The main unit of measurement is the household, thus making it less easy to distinguish the demographic characteristics of the population. However, there is also a socio-demographic analysis for certain aspects. Another metric that would be very interesting but is not included is the socio-economic status of respondents. Still, there is a palpable difference between north and south and west and east with the European south and eastern European Member states lagging behind. This suggests that bigger economies tend to perform better and there is greater penetration and

11 For a list of the funded EU projects on digital inclusion please see https://ec.europa.eu/digital-single-market/en/news/eu-funded-projects-digital-inclusion (Accessed November 2023).

12 For all the relevant Eurobarometer data and reports, please see the EU Open Data Portal at http://data.europa.eu/euodp/en/home (Accessed November 2023).

https://doi.org/10.5771/9783748940913-127 https://www.inlibra.com/de/agb - Open Access -

use of new technologies by their citizens. This can serve to point out the importance of income level or socio-economic status in this.

There a re encouraging messages coming out of the latest Special Eurobarometer, such as the fact that internet access is growing in the EU, with a three-point increase since 2015. However, it must be underlined that there are great disparities depending on the country, with Netherlands and Scandinavian countries having 90% access to internet, while southern and Balkan countries are doing the worst.[13] It is the countries with the lowest scores that have done the greatest strides in terms on internet access.[14] This point to geographic location as a factor for digital vulnerability in the EU. For example, a Greek consumer, who might have less access to technology may be more vulnerable compared to a Swedish consumer with almost universal access.

The socio-demographic analysis reveals another key factor for vulnerability, that of age. Elderly consumers appear to have less access to the internet. Elderly consumers are the ones that consistently score poorly in all the relevant categories. The most pronounced differences are in consumers aged over 75. Gender is another factor with women scoring lower than men. Still differences there are not significant. The available data does not suffice to provide a full picture as it cannot provide an answer as to why these differences in relation to age, gender and geographic location occur. Also, it would be helpful to include other factors, such as income, disability or education level to have richer data. It is also important to remember that technology is constantly evolving and this can be observed in the long-term changes in the data, such as the switch to mobile phones rather than computers for internet access.

D. Digital and consumer vulnerability

Vulnerability is a broader concept, used in a variety of disciplines, as well as in different areas of law, focus here is on consumer vulnerability. It is a fuzzy concept that does not have a single definition and often authors that use it do not engage with it sufficiently. [15] In consumer law there is the recognition that consumers are a heterogenous group, encompassing

13 ibid. at 43.
14 ibid. at 45.
15 Kate Brown, '" Vulnerability ": Handle with Care' (2011) 5 Ethics and Social Welfare 313, 315.

https://doi.org/10.5771/9783748940913-127 https://www.inlibra.com/de/agb - Open Access -

people with varied characteristics and abilities. This implies that some will be more vulnerable than others. However, there is a certain disparity between this accepted fact of vulnerable consumers and the legal standard for consumers.

In EU consumer law, there is a renewed interest in consumer vulnerability, both in terms of policy documents, as well as academic publications.[16] Policy documents, such as the recent EU report on consumer vulnerability present a more sophisticated image of consumer vulnerability. One that is influenced by the marketing literature on vulnerability, such as the landmark paper of Baker, Gentry and Rittenburg. [17] Baker, Gentry and Rittenburg with their model have contributed in shifting the attention away from who is vulnerable, to what is vulnerability and viewing it as a state that may be experienced by anyone.[18]

In legal scholarship that trend is less noticeable, with focus still being on defining certain vulnerable groups of consumers. For example, Reich identified the three types of 'consumer vulnerability': (*a*) physical disability, (*b*) intellectual disability, (*c*) economic disability.[19] This tendency can be explained to an extent by the definition of vulnerable consumer in EU consumer law. The key definition for the vulnerable consumer can be found in the Unfair Commercial Practices Directive (hereafter UCPD). While this definition is not employed in other EU directives, it remains highly influential, also due to the broad scope of the UCPD.

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

16 M Friant-Perrot, 'The Vulnerable Consumer in the UCPD and Other Provisions of EU Law' in Willem van Boom, Amandine Garde and Orkun Akseli (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Ashgate Publishing Group 2014); Norbert Reich, 'Vulnerable Consumers in EU Law' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law* (Hart Publishing 2016).

17 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.

18 ibid. at 134.

19 Reich (2016) 141.

https://doi.org/10.5771/9783748940913-127 https://www.inlibra.com/de/agb - Open Access -

trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group'

This is a definition that has been criticised as narrow, as it limits the criteria for vulnerability to that of infirmity, age or credulity. [20] An addition to the UCPD that is confusing and unable to protect vulnerable consumers. [21] Still, this paper is asking something slightly different. Is this definition and the rights provide by EU consumer law able to protect those that are vulnerable in the digital environment? To answer that question, we must consider the factors influencing vulnerability in the online environment and why a special case must be made for digital vulnerability.

E. Related terms

The term 'vulnerability' is not frequently employed for the digital environment; instead the related terms of 'digital divide', 'digital inequality' and 'digital exclusion' are far more common. The use of these terms indicates the outcome of the digital revolution as one that has winners and losers and a sharp distinction between the two. Still, this paper will use the term vulnerability, as one that is in use in consumer law and treats the above terms as explaining vulnerability.

The term digital divide was popularised in the US, in 1999, in the National Telecommunications and Information Administration (NTIA)'s 'Falling Through the Net' report, where the term was defined as the disparities in access to telephones, personal computers (PCs), and the Internet across certain demographic groups.[22] Similar to consumer vulnerability, there is no uniform definition for digital divide. In fact, the origin of the term is disputed. Earlier, digital divide was used not to describe different level of access to technology among users; instead it has been used to describe the

20 JHV Stuyck, E Terryn and TV Dyck, 'Confidence through Fairness?: The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market' (2006) 43 Common Market Law Review 107, 122.

21 R Incardona and C Poncibò, 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution' (2007) 30 Journal of Consumer Policy 21, 29.

22 National Telecommunications and Information Administration (NTIA) (1999) *Falling through the Net: Defining the Digital Divide*. Washington, DC: US Department of Commerce, available at http://www.ntia.doc.gov/ntiahome/fttn99/contents.html. (Accessed November 2023).

https://doi.org/10.5771/9783748940913-127 https://www.inlibra.com/de/agb - Open Access -

opposite camps in relation to technology, those that view technology as positive force that will bring progress and the technophobes that are wary of new technologies and their effects.[23]

The definition of digital divide cannot remain unchanged as it necessarily evolves along with the technology itself. There have already been great strides in the use of technology. For example, a key metric for measuring digital divide or inequality has been access to hardware. That has evolved from access to a telephone to include access to a computer and increasingly, access to a smartphone. Furthermore, there are other aspects that would need to be taken into account today, such as access to internet and internet usage skills. These developments reflect a democratisation of technology and certain technologies becoming more accessible as well as widely used. Personal computers may have been large sized and expensive when first introduced, but they are becoming ever more accessible and easier to use.

This characteristic of new technologies as ever-changing presents challenges that go beyond defining digital vulnerability. Law struggles to keep up with constant changes in technology and their regulation. There is a debate, especially in private law which is our focus, whether the current legal framework can respond to these challenges with some amendments, or whether there is a need for reconsidering the entire legal system in a more radical manner in order to adapt to the changes.[24] The law is not well-suited to being constantly changed and adapted, to the extent that legal certainty is one of its aims.

F. The common elements of consumer vulnerability and digital divide

What has become clear is that the digital divide is not best described as a binary, a sharp distinction between the have and the have-nots, as this approach fails to consider the social resources different groups can contribute.[25] Therefore, it has been argued that the digital divide is best seen as a gradation. This is explained by Warschauer in his example of comparing

23 Dinty W. Moore, The Emperor's Virtual Clothes: The Naked Truth about Internet Culture, (Algonquin Books 1995).

24 Christian Twigg-Flesner, 'Disruptive technology-Disrupted law? How the Digital Revolution Affects (Contract) Law in European Contract Law and the Digital Single Market: The Implications of the Digital Revolution by Alberto de Franceschi (ed), (Intersentia 2016), 21-48, 27.

25 Mark Warschauer, 'Reconceptualising the digital divide', (2002), 7 First Monday 7.

https://doi.org/10.5771/9783748940913-127 https://www.inlibra.com/de/agb - Open Access -

a university professor in the US with a high-speed internet connection to a student in Seoul who occasionally visits an internet café and a rural activist in Indonesia who has no computer or phone line but whose colleagues download and print information for her.[26] In a strict division, all three of these examples would be found to have access to online material, though their circumstances and level of access varies significantly.

This means that the digital divide can be described as relative, meaning that there are varying degrees of intensity experienced by different persons. The same characteristic has been attributed also to consumer vulnerability, meaning there are varying degrees of vulnerability.[27] Vulnerability varies according to the circumstances of the consumer, the market and the transaction. Another key characteristic of consumer vulnerability is its dynamic nature, as vulnerability changes throughout the course of a consumer's life.[28] This is another shared characteristic with digital divide.

In the first years of the development of the internet, around the 1980s-1990s there was a euphoric climate concerning new technologies, such as the internet. There was the view that technology would help humanity overcome the burdens of the past, allow for greater individuality, diversity and above all freedom.[29] However, this has not shown to be the case, and soon after the first enthusiasm came the concern that, in fact, inequality would be exacerbated by technology.[30] While technology is not a cure-all for society's problems, it is clear that it is dynamic and the same can be said for digital vulnerability. Digital vulnerability can vary due to a number of factors, including technology itself, for example, if hardware becomes cheaper and therefore more affordable for consumers who did not have access to them before.

---

26 Mark Warschauer, 'Reconceptualising the digital divide', (2002), 7 First Monday 7.

27 Consumer Affairs Victoria, 'What do we mean by vulnerable and disadvantaged consumers?'(2004),available online at https://www.consumer.vic.gov.au/resources-and-tools/research-studies (accessed November 2023) 4.

28 See for example, 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 November 2023, 44, adopting that position.

29 Esther Dyson, 'Cyberspace and the American Dream: A Magna Carta for the Knowledge Age (Release 1.2, August 22, 1994)' (1996) The information society 12, no. 3 295-308, 303.

30 Paul DiMaggio, Eszter Hargittai, 'From the 'Digital Divide' to `Digital Inequality':Studying Internet Use As Penetration Increases', (2001). Princeton: Center for Arts and Cultural Policy Studies, Woodrow Wilson School, Princeton University, 4(1), 4-2.

https://doi.org/10.5771/9783748940913-127 https://www.inlibra.com/de/agb - Open Access -

G. Conceptualising digital vulnerability

The conceptualisation of the digital divide has evolved and now reflects a more sophisticated view. An excellent example of that is in the work of Van Dijk on the definition of access.[31] He distinguishes four kinds of barriers to access and the type of access they restrict:

1. *Lack of elementary digital experience* caused by lack of interest, computer anxiety, and unattractiveness of the new technology ("mental access").
2. *No possession of computers and network connections* ("material access").
3. Lack of *digital skills* caused by insufficient user-friendliness and inadequate education or social support ("skills access").
4. Lack of significant *usage opportunities* ("usage access").

This is consistent with what was mentioned above on the relativity of digital vulnerability. It also reflects the particular character of digital technologies where in order to participate a number of factors play a role, such as access to hardware and digital skills. In relation to digital skills, it is important to note that they go beyond operating computers and accessing networks to include also the ability to search, select, process and apply information from many sources.[32] This can have significant implications for consumer law, especially in relation to selecting and processing information. Informational disclosure, even though it has been strongly criticised, it remains one of the main regulatory techniques for consumer law.[33]

Likewise, a unique feature of digital vulnerability is the existence of mental barriers to engaging with technology. There are those that while they have the financial means to have access to hardware and software that would allow them to take part in the relevant market, refuse to do so. Such mental barriers may leave individuals feeling excluded and insecure, yet often they are neglected in the literature on access.[34]

---

31 Van Dijk, Jan. 1999. *The Network Society, Social Aspects of New Media. Thousand Oak*s, CA: Sage

32 Jan van Dijk & Kenneth Hacker, 'The Digital Divide as a Complex and Dynamic Phenomenon', (2003) The Information Society, 19:4, 315-326, 316.

33 Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 Journal of Law and Society 349; O Ben-Shahar and Carl Schneider, *More than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press 2014).

34 Jan van Dijk & Kenneth Hacker, 'The Digital Divide as a Complex and Dynamic Phenomenon', (2003) The Information Society, 19:4, 315-326, 317.

https://doi.org/10.5771/9783748940913-127 https://www.inlibra.com/de/agb - Open Access -

DiMaggio and Hargitai have also suggested different dimensions to digital inequality, based on the understanding that digital inequality is relative and dynamic.[35]

1) Technical means of how people access the internet
2) Level of autonomy in internet usage
3) Level of skill in internet usage
4) Social support available to the users
5) Purposes for which they use the technology

These dimensions and their importance will fluctuate as time goes on. For example, with the rise in usage of smartphones, autonomy in internet usage is increasing, as opposed to earlier where multiple persons may have shared one computer. For vulnerability, the social support available to users is also of critical importance as it can help users overcome their mental barriers as well as improve digital skills. Based on the analysis above, it is appropriate to make some remarks on digital vulnerability for the purposes of this paper. First, it is worth highlighting the aspects that set the digital marketplace, and by extension digital vulnerability, apart.

1) *Digital technologies as all encompassing.* They no longer signify one sector but impact on and are being employed by all sectors of the economy as well as by public authorities.
2) *High likelihood of detriment for consumers.* As the importance of digital technology is increasing, so is the likelihood of detriment for consumers who may not be able use it accordingly.
3) *Relative and dynamic.* More so than other kinds of vulnerability, for digital vulnerability there is a sense that the situation is improving, this is reflected in particular in the increase of access to hardware and an internet connection in the EU. Still, as mentioned above access is more complex than access to hardware and a connection.

Digital vulnerability may be multi-faceted, yet there are some aspects that will be more relevant to consumer law than others. This is also dictated by the objectives and nature of consumer law. For example, while digital vulnerability may impact on social inequality, there are limits to what

35 Paul DiMaggio, Eszter Hargittai, 'From the 'Digital Divide' to `Digital Inequality':Studying Internet Use As Penetration Increases', (2001). Princeton: Center for Arts and Cultural Policy Studies, Woodrow Wilson School, Princeton University, 4(1), 4-2, 7-8.

https://doi.org/10.5771/9783748940913-127 https://www.inlibra.com/de/agb - Open Access -

consumer law can do to address that. With that in mind, here are some helpful aspects for assessing digital vulnerability

1) Assessing different mediums of communication (e.g is something offered only digitally?_
2) Usability (Assessing design features of hardware, software and webpage design)
3) Presentation of information (this is a key feature in the online environment, to consider not only what kind of information is being conveyed, but also how.)

H. Categories of vulnerable consumers

There can be a number of categories of consumers that can be disadvantaged online, yet due to limited space for discussion, this paper will focus on the categories of vulnerable consumers that are set out in the UCPD, as the key definition for consumer vulnerability in EU law. The criteria for consumer vulnerability presented in the UCPD are those of age, infirmity and credulity. With credulity being a vague problematic criterion that does not allow for a specific group of consumers to be singled out for the purposes of research, this paper will be limited to the criteria of age and infirmity. What about the categories that are left out? E.g. a homeless person or in a precarious living situation who may not have access to the internet- would not fall under any of these categories. Conversely an elderly person with enough money to get the latest iphone but unsure how to use it.

The following piece argues for the need to depart from the definition of the average consumer and for the adoption of the definition of consumer vulnerability proposed by Yap et al.[36] when dealing with digital consumers. This is largely motivated by the fast-paced integration of digital content and dependence on digital services in the life of a consumer. The main issues identified with this fast-paced integration are the lack of time to adapt to the online environment and the online choice architecture, the high action costs, as well as the modified behaviour of consumers when dealing with the online environment.

36 Sheau-Fen Yap, Yingzi Xu, LayPeng Tan, 'Coping with crisis: The paradox of technology and consumer vulnerability' (2021) 45 International Journal of Consumer Studies, 1239.

https://doi.org/10.5771/9783748940913-127 https://www.inlibra.com/de/agb - Open Access -

I. The façade of the average consumer

The average consumer is a legal construct used to determine whether the rights of the consumers are respected and to avoid instances in which businesses take advantage of consumers by imposing unfair terms or by employing unfair commercial practices. The average consumer is an individual who is reasonably well-informed, observant and circumspect.[37] This construct is prevalently employed in determining whether a contract term is fair or unfair. Employing the concept leads to an unrealistic standard for consumers who are often the victims of heuristics and can be manipulated by businesses through behavioural economics. Thus, the legal construct seems to work against the consumer rather than come to their rescue when abused by market-leading businesses.

The issues brought by the average consumer construct are even more concerning in the online environment. The main cause of this is the completely different behaviour of consumers when it comes to reading and agreeing to terms and conditions online. It has been shown that consumers skim rather than read the information presented and are more responsive to recommendations.[38] In addition, Weinreich et al. found that out of the pages surveyed 25% had been displayed for less than 4 seconds, 52% of the visits lasted less than 10 seconds, with only 10% of visits lasting longer than 2 minutes.[39] This highlights the lack of attention paid by consumers when it comes to activating in the online environment.

There are two prevalent issues present in the online environment that should highlight the vulnerability of consumers activating in the online environment. First, the complexity of language and the use of pre-selected options influences consumers as it determines them to agree to less favourable policies. Jachimowicz et al. showed that a default is 27% more likely to be selected out of two options.[40] Thus, by exploiting this modified behaviour, businesses are able to ensure a higher rate of agreement with their potentially unfair terms and conditions.

---

37 Case C-26/13 *Kásler v OTP Jelzálogbank Zrt* [2014] 2 All ER 443, para 74.

38 Geoffrey Duggan, Stephen Payne, 'Skim reading by satisficing: evidence from eye tracking' (2011) proceedings of the SIGCHI conference on human factors in computing systems, 1141.

39 ibid.

40 Jon Jachimowicz, Shannon Duncan, Elke Weber, Eric Johnson, 'When and why defaults influence decisions: A meta-analysis of default effects' (2019) 3 Behavioural Public Policy, 159.

https://doi.org/10.5771/9783748940913-127 https://www.inlibra.com/de/agb - Open Access -

Second, even if defaults had not been used and the consumers were equipped to understand the information presented, the aforementioned privacy policies still remain too long. McDonald and Cranor have shown that the average time that would be required to read privacy policies adds up to 244 hours per year.[41] Coupled with the shorter attention spans of users, it is undeniable that the cost of becoming familiar with the information is too high for consumers. Hence, consumers often agree to the terms without reading them as they may believe that as a lot of other consumers had priorly accepted the same terms and conditions, these cannot be 'that' harmful. Thus, it is evident that rather than being observant and circumspect these consumers rather operate in an unfamiliar environment.

L. An appeal to recognise the vulnerability of consumers

Another relevant legal construct is the vulnerable consumer. These consumers attract a lower threshold that they must satisfy to show that a commercial practice may be unfair. This construct has been defined in Article 5(3) of the Unfair Commercial Practices Directive[42], as a member 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 of credulity in a way which the trader could reasonably be expected to foresee'. This construct has been brought about to highlight the lack of familiarity with different environments of particularly sensible groups.[43] These groups are often defined by an inability to navigate the marketplace, falling victim to the imbalance of power in the business-to-consumer relationship. The role of the vulnerable consumer concept is to ensure equality of bargaining power while preserving freedom to contract. The exact borders of this concept tend to be unclear especially in the UK due to the need to protect the caveat emptor principle.

41 Aleecia McDonald, Lorrie Cranor, 'The Cost of Reading Privacy Policies' (2008) 4 Journal of Law and Policy for the Information Society 543, 550.

42 Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive').

43 ibid.

https://doi.org/10.5771/9783748940913-127 https://www.inlibra.com/de/agb - Open Access -

Although the most common age groups that are emphasised in debates surrounding vulnerable consumers are the young and the elderly, it is possible to observe that vulnerability may be created by external factors such as pandemics.[44] This was observed in the context of the COVID-19 pandemic which forced consumers to become dependent on the online environment. Yap et al. define consumer vulnerability as 'a temporary and fluid state of powerlessness stemming from the inability of consumers to cope with the uncertainty and instability brought by sudden unforeseen disasters such as human-made disasters and natural disasters that threaten lives and disrupt the functioning of a community or society. Powerlessness occurs when consumers experience a lack of control or agency in consumption goals, and ultimately leads to a loss of consumer welfare'.[45]

It is submitted that the aforementioned definition of the vulnerable consumer is able to accommodate the vulnerability of consumers acting in the online environment better than the one provided by the Unfair Commercial Practices Directive. The digital vulnerability of consumers is architectural as the digital choice architects create it by abusing behavioural economics.[46] In the digital world, vulnerability concerns the inability of consumers to make uninfluenced decisions and the impossibility of preventing businesses from influencing consumers' desires, behaviour and decision-making process.

In addition, the high action costs involved in the online environment increase the vulnerability of consumers who choose to remain unaware of the terms that they agree to when making use of products and services. In addition, the inclusion of consumers activating in the online environment in the category of vulnerable consumers may incentivise businesses to develop more favourable privacy policies as it would be easier to show that terms are unfair.

44 Sheau-Fen Yap, Yingzi Xu, LayPeng Tan, 'Coping with crisis: The paradox of technology and consumer vulnerability' (2021) 45 International Journal of Consumer Studies, 1239.

45 ibid. at 1241.

46 Natali Helberger, Marijn Sax, Joanna Strycharz, Hans Micklitz 'Choice Architecture in the Digital Economy: Towards a New Understanding of Digital Vulnerability' (2022) 45 Journal of Consumer Policy 176, 187.

https://doi.org/10.5771/9783748940913-127 https://www.inlibra.com/de/agb - Open Access -

M. Conclusive remarks

In conclusion, it has been shown that consumers activating in the online environment cannot and should not be equated with the average consumer who is observant and circumspect. The low attention spans of online users as well as the high action costs demanded by the online environment argue for the expansion of the 'vulnerable consumer' category and the inclusion of consumers activating in the online environment in this class where the threshold of showing that a contract term or a commercial practice is unfair is lower. In addition, it has been argued that the definition of consumer vulnerability proposed by Yap et al. shall be adopted as it accounts for digital vulnerability.

Digital asymmetry captures the position of imbalance between traders and consumers online, alongside the embedded vulnerability of consumers. Such imbalance and vulnerability are: (1) *relational* (due to the position they have in a complex digital environment where equal interaction is made impossible), (2) *architectural* (due to the way user interfaces are designed and operated), and (3) *knowledge-based* (as the trader benefits from detailed insights about the consumer while the consumer often knows - or understands - very little about how the trader and the service operate).[47]

Because digital asymmetry automatically embeds all digital consumers with innate vulnerability, "vulnerability as an exception to the average consumer benchmark becomes less useful to assess the behavioural distortion an interface could cause".[48] Thus, it was vital that the European Commission has acknowledged that the UCPD average consumer benchmark must be interpreted in light of these changing market realities, so as to accommodate vulnerabilities or any other seemingly exceptional circumstances that may actually be cultivated by interfaces themselves.[49] Regrettably, this approach "falls short in addressing the scale of the problem".[50] A more holistic and extensive reform of the UCPD will be required to thoroughly adapt consumer law regulations to the fluctuating digital economy.

47 ibid.

48 https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-013_dark_patters_paper.pdf.

49 Commission notice Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market.

50 https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-013_dark_patters_paper.pdf.

https://doi.org/10.5771/9783748940913-127 https://www.inlibra.com/de/agb - Open Access -