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Identifying and Responding to Consumer Vulnerability

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Identifying and Responding to Consumer Vulnerability

Introduction

The concept of vulnerability has been dealt with in many disciplines from a human rights perspective, yet the approaches have differed.¹ In consumer protection, the concept has evolved to depict the situation of consumers in at least three contexts:

- To describe the situation of consumers in relation to producers and suppliers,
- To highlight the special needs of disadvantaged groups of consumers, for example, the poor, the illiterate and those in rural communities; and more recently,
- To refer to individual consumers who become vulnerable due to combination of personal circumstances and particular market conditions.

The landmark *United Nations Guidelines on Consumer Protection* (UNGCP) adopted by the UN General Assembly in 1985 (henceforth UNGCP 1985), and the revised version adopted in 1999 (henceforth UNGCP 1999), do not use the term 'vulnerable consumers'. However, they both use an akin term 'disadvantaged consumers' and identify some categories of consumers as being disadvantaged. It was only in the 2015 version of the UNGCP (henceforth UNGCP 2015) that the term 'vulnerable' has been used, and this conjunctively with the term 'disadvantaged', as in 'vulnerable and disadvantaged consumers'. The UNGCP 2015 also requires UNCTAD and the Intergovernmental Group of Experts on Consumer Protection Law and Policy² to identify and support the approaches by which vulnerable and disadvantaged consumers may be protected in all member nations of the UN.

One approach that has resulted in an array of impressive initiatives and outcomes has been through the development by the British Standards Institution of the voluntary standard *BS 18477: 2010 Inclusive service provision - Requirements for identifying and responding to consumer vulnerability* (henceforth BS 18477). The success has been principally due to the support for the standard by government and regulators, notably the UK Financial Conduct Authority and utility regulators. The International Standards Organization is also in the process of developing an international standard on inclusive service for situations of consumer vulnerability: ISO/WD 22458.³

¹ A. Masferrer and E. García-Sánchez (eds), *Human Dignity of the Vulnerable in the Age of Rights: Interdisciplinary Perspectives*, Springer, Suiza, 2016.

² Established under Section VII. International institutional machinery, Guidelines 95 - 99 of UNGCP 2015.

³ International Standards Organization, [ISO/WD 22458](https://www.iso.org/committee/6614775/x/catalogue/) Inclusive service: identifying and responding to consumers in vulnerable situations, Development under the direct responsibility of ISO/PC 311. <https://www.iso.org/committee/6614775/x/catalogue/>

This paper first describes the use of the term 'vulnerability' in consumer protection. It then describes the manner in which the UNGCP deals with the terms 'disadvantaged' and 'vulnerable' consumers. The success that has been achieved by BS 18477 is then highlighted. The conclusion to the paper emphasises that consumer vulnerability is a concern for all - governments, regulators, companies and civil society. The paper ends with a call to UNCTAD and the Intergovernmental Group of Experts on Consumer Protection Law and Policy to urgently address their mandate for the protection of vulnerable consumers.

Consumer Vulnerability - An Evolving Concept

In consumer protection, the term 'vulnerable' has been used in at least three contexts, depicted here by the way the term has been used in three UK official publications.

The first use of the term 'vulnerable' is to consider all consumers as vulnerable vis-à-vis the producers and suppliers of goods and services. The UK Molony Committee for instance reported in 1962 "... the contention runs, the consumer finds it beyond his power to make a wise and informed choice and is vulnerable to exploitation and deception."⁴ What the Molony Committee regarded as a mere contention was accepted as a fact by Lord Denning MR. In what was to be his last judgement on 29 September 1982, His Lordship expressed in his inimitable way the inequality of bargaining power:

"None of you nowadays will remember the trouble we had - when I was called to the Bar - with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or timetables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of "freedom of contract." But the freedom was all on the side of the big concern which had the use of the printing press. No freedom for the little man who took the ticket or order form or invoice. The big concern said, "Take it or leave it." The little man had no option but to take it. The big concern could and did exempt itself from liability in its own interest without regard to the little man. It got away with it time after time. When the courts said to the big concern, "You must put it in clear words," the big concern had no hesitation in doing so. It knew well that the little man would never read the exemption clauses or understand them."⁵

Inequality of bargaining power is now an accepted rationale for consumer protection.

⁴ See for instance, UK Board of Trade, Final Report of the Committee on Consumer Protection (Molony Committee), Cmnd 1781/1962, Para 43.

⁵ *George Mitchell v Finney Lock Seeds Ltd* [1983] 1 AER 109 at 113. The judgement was delivered on 29 September 1982.

A second use of the term 'vulnerable' is to highlight the special needs of disadvantaged groups of consumers, for example, the poor, the illiterate and those in rural communities. The UK Department of Trade and Industry (DTI), in its 1999 publication *Modern Markets, Confident Consumers*, used the term for those "who have low levels of education and skills and on the socially excluded who get limited help from the community".⁶ Such a usage identified the vulnerable as those who were members of specified disadvantaged groups. In this context the term 'vulnerable' came to be even used interchangeably with the term 'disadvantaged'.

Consumer law is based on the notion of the average consumer, a model person who is rational and credulous. It is this fictive person that the law uses as the benchmark to assess the likelihood of confusion and misleading advertising. There is an accommodation made for 'disadvantaged groups', such as children, the elderly or the terminally ill. In relation to such groups, the benchmark is the effect of the practice on a reasonable member of that group.⁷

It is only of late that the term 'vulnerable' has been used in consumer protection as referring to individuals not identified by membership in a disadvantaged group, but rather upon their own situation. In such a perception, consumer vulnerability is situational and may be permanent, temporary or sporadic. BS 18477 uses this definition for consumers in a vulnerable position. (This is dealt with in greater detail below.)

UNGCP - Disadvantaged and Vulnerable Consumers

The landmark UNGCP adopted by consensus by the UN General Assembly in 1985⁸ (henceforth UNGCP 1985) acted as a catalyst for the development of consumer policy and

⁶ DTI, *Modern Markets, Confident Consumers* (Cm 4410/1999), Para 1.4 Social Exclusion.

⁷ See for instance Federal Trade Commission (1980) Letter from the FTC to Senators Ford and Danforth (Unfairness Policy Statement) HR Rep No 1 56, 19th Congress, 1st session, Pt. 1, at 33 (1983,) cited in Iain Ramsay, *Consumer Law and Policy, Text and Materials on Regulating Consumer Markets*, Hart Publishing: Oxford, 2007, p. 302. See also, Directive 2005/29/EC of the European Parliament and the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, Preamble Para 18 - 19. <http://data.europa.eu/eli/dir/2005/29/oj>. The directive was given effect in the UK by The Consumer Protection from Unfair Trading Regulations 2008. See section 2 (3) - (5).

⁸ As explained in the UNCTAD webpage United Nations Guidelines on Consumer Protection "This followed a long campaign by consumer associations in many countries, with Consumers International (then known as the International Organisation of Consumer Unions since its establishment in 1960 and granted general consultative status by the Economic & Social Committee in 1977) acting as interlocutor with the United Nations, having called upon the United Nations to prepare a 'Model Code for consumer protection' at its World congress in Sydney in 1975. This led, in 1977, to the Economic and Social Council (ECOSOC) directing the Secretary General to prepare a survey of national institutions and legislation in the area of consumer protection and in 1981, ECOSOC requested the Secretary General 'to continue consultations on consumer protection with a view to elaborating a set of general guidelines for consumer protection, taking particularly into account the needs of the developing countries'. Draft guidelines were circulated to governments for comments in 1982, submitted to ECOSOC in 1983, drawing on many sources including the Organisation for Economic Co-operation and Development (OECD), the United States Consumer Bill of Rights and materials

law in many developing countries. Even during the preparatory stage of the UNGCP 1985, there was consensus that the document should elaborate “a set of general guidelines for consumer protection, taking particularly into account the needs of the developing countries”⁹. Consequently, the UNGCP 1985 makes special mention of the needs of consumers in developing countries even in the first paragraph of the Preamble. This special attention to consumers in developing countries is also reiterated in two of the guidelines - it is included in Guideline 1 (in the section on Objectives) and again in Guideline 38 (in Section G. Measures relating to specific areas). The UNGCP 1999 extends this special focus on consumers in developing countries also to consumers in countries with economies in transition. This formulation has also been maintained in UNGCP 2015.

Of significance to the discussion in this paper is that the UNGCP makes special mention of particular categories of consumers as needing special attention. The UNGCP 1985 states even in its General Principles that:

“Governments should provide or maintain adequate infrastructure to develop, implement and monitor consumer protection policies. Special care should be taken to ensure that measures for consumer protection are implemented for the benefit of all sectors of the population, **particularly the rural population.**” (Guideline 4)

This is reiterated in relation to distribution facilities for essential consumer goods and services. Governments are required to, where appropriate, consider:

“(a) Adopting or maintaining policies to ensure the efficient distribution of goods and services to consumers; where appropriate, specific policies should be considered to ensure the distribution of essential goods and services where this distribution is endangered, **as could be the case particularly in rural areas.** Such policies could include assistance for the creation of adequate storage and retail facilities in rural centres, incentives for consumer self-help and better control of the conditions under which essential goods and services are provided in rural areas;

(b) Encouraging the establishment of consumer co-operatives and related trading activities, as well as information about them, **especially in rural areas.**” (Guideline 27)

The term ‘vulnerable’ is not utilised in the UNGCP 1985; however, there is one mention of the term ‘disadvantaged consumers’. This is in Section F that deals with Education and information programmes.

from national consumer protection agencies and consumer associations.”

<https://unctad.org/en/Pages/DITC/CompetitionLaw/UN-Guidelines-on-Consumer-Protection.aspx>

⁹ The Economic and Social Council, Resolution 1981/62 of 23 July 1981 requesting the Secretary General to continue consultation with member states.

“Governments should develop or encourage the development of general consumer education and information programmes, bearing in mind the cultural traditions of the people concerned. The aim of such programmes should be to enable people to act as discriminating consumers, capable of making an informed choice of goods and services, and conscious of their rights and responsibilities. In developing such programmes, **special attention should be given to the needs of disadvantaged consumers, in both rural and urban areas, including low-income consumers and those with low or non-existent literacy levels.**”¹⁰ (Guideline 31)

UNGCP 1999 maintains this formulation.

It is in the 2015 version of the UNGCP that the term ‘vulnerable and disadvantaged consumers’ is first utilised. Very significantly, it is now included in Section III General Principles and in Section IV Principles of good business practices.

The section on general principles now provides that:

“The legitimate needs which the guidelines are intended to meet are the following:

...

(b) The protection of vulnerable and disadvantaged consumers;” (Guideline 5)

Section IV Principles for good business practices, provides that:

“The principles that establish benchmarks for good business practices for conducting online and offline commercial activities with consumers are as follows: (a) Fair and equitable treatment. Businesses should deal fairly and honestly with consumers at all stages of their relationship, so that it is an integral part of the business culture. **Businesses should avoid practices that harm consumers, particularly with respect to vulnerable and disadvantaged consumers.**” (Guideline 11)

There are three further references to vulnerable and disadvantaged consumers in UNGCP 2015. There is a requirement that alternative dispute resolution **procedures should take particular account of the needs of vulnerable and disadvantaged consumers** (Guideline 37). In developing education and information programmes, **special attention should be given to the needs of vulnerable and disadvantaged consumers, in both rural and urban**

¹⁰ Mention was also made of low income consumers groups in rural and urban areas in Guideline 34:

“Governments should encourage consumer organizations and other interested groups, including the media, to undertake education and information programmes, particularly for the benefit of low-income consumer groups in rural and urban areas”; and of low income consumers in section E. Measures enabling consumers to obtain redress: Guideline 28. “Governments should establish or maintain legal and/or administrative measures to enable consumers or, as appropriate, relevant organizations to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Such procedures should take particular account of the needs of low-income consumers.”

areas, including low-income consumers and those with low or non-existent literacy levels (Guideline 42). And, in the measures related to specific areas, special mention is made in relation to public utilities of **taking into account the needs of vulnerable and disadvantaged consumers** (Guideline 77).

A number of general observations may be made as regards the use in the UNGCP of the term 'vulnerable and disadvantaged consumers'.

The UNGCP recognises that there are consumers more vulnerable and disadvantaged than others. The UNGCP, however, neither provides a definition of the terms 'vulnerable consumers' or 'disadvantaged consumers' nor does it provide an exhaustive list of the categories of 'vulnerable and disadvantaged consumers'. It merely states that disadvantaged consumers exist both in the rural and urban areas and that low income consumers and those with low or no-existent literacy levels are disadvantaged.

Also, as contained in UNGCP 1985 and UNGCP 1999, though there is a call to recognise the need for special consideration of disadvantaged consumers in policy making and programme development, there is no definition of the term 'policy'. The UNGCP 2015 (Section III General Principles) remedies this. It provides that the legitimate needs which the UNGCP are intended to meet include the protection of vulnerable and disadvantaged consumers. It also defines the term 'policies' in Section II Scope of application which in Guideline 2, inter alia, provides that:

“For the purpose of these guidelines, consumer protection policies include the laws, regulations, rules, frameworks, procedures, decisions, mechanisms and programmes of Member States, as well as private sector standards and recommendations that protect consumer rights and interests and promote consumer welfare.”

It is now incumbent upon UNCTAD, and the UNCTAD and the Intergovernmental Group of Experts on Consumer Protection Law and Policy¹¹, to promote the interests and needs of disadvantaged and vulnerable consumers in accordance with Guideline 97 of UNGCP 2015.¹²

Vulnerable and Disadvantaged - What Are We Really Talking About?

As noted earlier, in the UNGCP 1985 and UNGCP 1999, only the term 'disadvantaged consumers' is used; it is only in UNGCP 2015 version that the term 'vulnerable' has been introduced and in each instance conjunctively with the term 'disadvantaged', as in 'disadvantaged and vulnerable'. What does including the term 'vulnerable and disadvantaged' in such a manner mean?

¹¹ Established under Section VII of the UNGCP 2015.

¹² Guideline 97 specifies the functions of the intergovernmental group of experts on consumer protection law and policy.

The Oxford Dictionary gives the meaning of the adjectives vulnerable and disadvantaged as:

Vulnerable - (of a person) in need of special care, support, or protection because of age, disability, or risk of abuse or neglect.

Disadvantaged - (of a person or area) in unfavourable circumstances, especially with regard to financial or social opportunities.

Are consumers vulnerable because they are disadvantaged or are they disadvantaged because they are vulnerable? Whatever it is that linguists may surmise each adjective to mean, it is a moot point since the terms have been used variously, a perhaps inevitable feature of a rapidly evolving concept.¹³ Some use the terms interchangeably; others treat disadvantaged consumers as a subset of vulnerable consumers. Yet, others see the defining characteristics of disadvantage (poverty, inability to read or write, old age, etc.) as merely indicative risk factors to assess vulnerability. There are even those who would not use the term 'vulnerable consumers' because it is stigmatic; they would rather use the term 'consumer vulnerability' because:

The term vulnerable consumers "implies that vulnerability is a constant state and can be applied to set groups of people with certain characteristics, affecting all of their transactions and interactions. In reality, vulnerability can affect any consumer and cannot be applied to fixed, identifiable groups of consumers with certain characteristics or personal circumstances."¹⁴

An early effort to distinguish the terms 'vulnerable and disadvantaged' is in the 2004 discussion paper of Consumer Affairs Victoria entitled *What Do We Mean by Vulnerable and Disadvantaged Consumers?* The definitions of the relevant terms in that discussion paper are as follows:

"Consumer vulnerability is exposure to the risk of detriment in consumption due to the interaction of market, product and supply characteristics and personal attributes and circumstances. The main cause of vulnerability is this interaction resulting in inadequate information, poor access to information and/or ineffective use of information by a consumer or in the deterrence of complaint or the pursuit of redress by a consumer.

Consumer detriment includes, in addition to physical harm or monetary loss associated with a purchase, satisfaction less than a consumer's reasonable ex ante expectation and the denial of a transaction sought by a consumer.

¹³ For a discussion of the different usage of the terms see Peter Cartwright, *The Vulnerable Consumer of Financial Services: Law, Policy and Regulation*, 1.2 Vulnerable Consumers: the Literature, pp. 7 - 10. <https://www.nottingham.ac.uk/business/businesscentres/gcbfi/documents/researchreports/paper78.pdf>

¹⁴ BS 18477:2010, Inclusive s provision - Requirements for identifying and responding to consumer vulnerability, BSI 2010. Terms and Conditions 2.7 Note for the use of the term 'consumer vulnerability'.

A vulnerable consumer is a person who is capable of readily or quickly suffering detriment in the process of consumption. A susceptibility to detriment may arise from either the characteristics of the market for a particular product, the product's qualities or the nature of the transaction; or the individual's attributes or circumstances which adversely affect consumer decision-making or the pursuit of redress for any detriment suffered; or a combination of these.

Consumer disadvantage is a persisting susceptibility to detriment in consumption.

A disadvantaged consumer is a person in persistent circumstances and/or with on-going attributes which adversely affect consumption thereby causing a continuing susceptibility to detriment in consumption. As a result, a disadvantaged consumer repeatedly suffers consumer detriments or, alternatively expressed, generally obtains below-average satisfaction from consumption.

Not all vulnerable consumers are disadvantaged consumers. Some consumers will be vulnerable only because of either temporary personal circumstance that adversely affects them in consumption; or adverse market, product or transaction characteristics specific to a particular purchase, rather than their purchases generally. Consumer vulnerability is the broader concept, but both are relative and dynamic concepts.”¹⁵

Consumer Affairs Victoria argue that disadvantaged consumers are those who are particularly handicapped in achieving adequate value for their consumer dollar, by contrast consumer vulnerability is a state of powerlessness that arises from an imbalance in marketplace interactions or from the consumption of marketing messages and products.¹⁶

The OECD Consumer Toolkit 2010¹⁷ also uses the adjectives 'vulnerable' and 'disadvantaged' as does the discussion paper of Consumer Affairs Victoria cited above.

My preferred definition of a vulnerable consumer is that of the European Commission. In the comprehensive European Commission study *Consumer vulnerability across key markets in the European Union*, a review is undertaken of consumer protection literature on vulnerability. The study concludes:

“... the concept of consumer vulnerability is a diffuse one, with existing academic and grey literature approaching consumer vulnerability in a number of ways. In addition, from a policy perspective, a general agreement that vulnerability is a dynamic

¹⁵ Consumer Affairs Victoria Discussion Paper, What Do We Mean by Vulnerable and Disadvantaged Consumers?, 2004, p 3.

¹⁶ As in footnote 13 above.

¹⁷ OECD Consumer Toolkit 2010, pp. 55-56. https://read.oecd-ilibrary.org/governance/consumer-policy-toolkit_9789264079663-en#page1

concept extends the potential target group for any intervention to the entire population of consumers.”¹⁸

An outcome of the study is a more comprehensive definition of consumer vulnerability. A vulnerable consumer is:

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

- Is at higher risk of experiencing negative outcomes in the market;
- Has limited ability to maximise his/her well-being;
- Has difficulty in obtaining or assimilating information;
- Is less able to buy, choose or access suitable products; or
- Is more susceptible to certain marketing practices.”¹⁹

In this more comprehensive definition, the term ‘vulnerable consumer’ subsumes within it the notion of the ‘disadvantaged consumer’ (that is vulnerability as a result of socio-demographic characteristics).

A Standard to Identify and Respond to Consumer Vulnerability

The British standard ‘BS 18477:2010 Inclusive service provision - Requirements for identifying and responding to consumer vulnerability’ aimed at all service providers has proven to be a landmark development in addressing the issue of consumer vulnerability. The standard was initiated by public interest groups and civil society including Citizens Advice, the Royal National Institute of Blind People and Consumer Futures (at that time known as Consumer Focus). The involvement during its development stage of these organizations that work with consumers in situations of vulnerability ensured that the standard was sensitive to the needs of such consumers. As noted earlier, the standard prefers the use of the term ‘consumer vulnerability’ and not ‘vulnerable consumers’. (Nevertheless, organisations that have since adopted the standard have defined the term ‘vulnerable consumers’ to suit their particular mandates.²⁰

¹⁸ European Commission, Consumer vulnerability across key markets in the European Union, Final report, January 2016, p 44.

¹⁹ Věra Jourová, Commissioner for Justice, Consumers and Gender Equality, Understanding consumer vulnerability in the EU’s key markets, Directorate-General for Justice and Consumers, European Union, Factsheet, February 2016.

²⁰ For a summary of these definitions see Financial Conduct Authority, Consumer Vulnerability, Occasional Paper No.8, February 2015, p 20.

BS 18477 sets out with clarity its scope, the guiding principles for inclusive service provision, identification of the risk factors, the required review of the existing service, the implementation of an inclusive service that addresses consumer vulnerability, and the required ensuing compliance, evaluation and improvement. Also included in the standard are two informative Annexes which explain potential effects of consumer vulnerability and scenarios to illustrate how organizations can handle situations better. The practical examples illustrate how organisations can identify vulnerable consumers and treat them fairly. BS 18477 also covers aspects such as high-level policies, flexibility at the frontline, staff training, fair marketing and sales, and providing a range of contact methods and accessible information formats.

The endorsement given BS18477 by the British government and regulators has led to its greater acceptance. Though the initial adoption of the standard was largely confined to financial services sector and the utility companies, its adoption has over time become more widespread.

The following are illustrative of initiatives spurred by BS 18477 that resulted in positive outcomes:

Financial Ombudsman Service (FOS) - The FOS which was established in 2000 and given statutory powers in 2001 by the Financial Services and Markets Act 2000 helps settle disputes between consumers and UK based financial service providers. It was the first organisation to adopt BS 18477 and was showcased in the 2013 BSI white paper for service providers entitled *Providing fair, flexible and inclusive services - a business perspective*.²¹ In August 2015, the FOS published an index of twelve case studies illustrating the types of situations with banks and insurance companies that the FSO is called into where the consumers involved could be described as vulnerable. The case studies give examples of the FSO's approach to handling the cases, with examples, on the FSO website.²²

Consultation Papers, Reports, Taskforces and Networks

Adoption of BS 18477 by the sector regulators was in most instances accompanied by reports/consultation papers which dealt with consumer vulnerability in the respective regulated sector. This was the case with the Financial Conduct Authority (FCA),²³ the Office of Gas and Electricity Markets (**Ofgem**),²⁴ the Water Services Regulation Authority (Ofwat)²⁵

²¹ BSI, *Providing fair, flexible and inclusive services - a business perspective*, 2013.

²² Financial Services Ombudsman, *Consumers in vulnerable circumstances*, Ombudsman news, Issue 127 August 2015.

²³ Financial Conduct Authority, *Consumer Vulnerability*, Occasional Paper No.8, February 2015.

²⁴ Ofgem, *Energy Affordability: helping develop Ofgem's Vulnerable Consumer Strategy*, March 2012 (Ref: 49/12) <http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=54&refer=Sustainability/SocAction> ; Ofgem, *Proposals for a new Consumer Vulnerability Strategy*, Consultation, Reference: 124/12, 28 September 2012. <https://www.ofgem.gov.uk/ofgem-publications/57055/proposals-new-consumer-vulnerability-strategy-pdf> ; Ofgem, *Vulnerable Consumers and the Priority Services Register*, A report prepared for Ofgem by

and the Office of Communications (Ofcom).²⁶ Another early adopter of BS 18477, the Legal Services Consumer Panel,²⁷ published a report entitled *Recognising and responding to consumer vulnerability: A guide for legal services regulator in October 2014*.²⁸ The Legal Services Board itself subsequently updated its consumer toolkit to incorporate lessons from BS 18477.

These documents were complemented by numerous reports from public interest groups and civil society.²⁹ Each of these dealt with how consumer vulnerability may be identified and responded to. Taskforces were established to implement programmes in the interest of consumers in situations of vulnerability. An example is the Financial Services Vulnerability Taskforce established by British Banking Association. Membership in the taskforce is of financial service providers, charities and consumer groups.³⁰ This taskforce published its first report in February 2016 outlining best practice recommendations for the industry³¹ and a summary report in October 2018 reviewing progress in implementation.³² The UK Regulators Network (UKRN)³³ has a programme entitled 'Promoting fairness for all

BritainThinks, June 2013. <https://britainthinks.com/pdfs/Ofgem-Vulnerable-Consumers-and-the-Priority-Services-Register.pdf>

²⁵ Ofwat, Vulnerability focus report, February 2016. https://www.ofwat.gov.uk/wp-content/uploads/2016/02/prs_web20160218vulnerabilityfocus.pdf

²⁶ Ofcom, Access and Inclusion in 2018, Consumers' experiences in communications markets, Publication Date: 14 January 2019. https://www.ofcom.org.uk/data/assets/pdf_file/0018/132912/Access-and-Inclusion-report-2018.pdf

²⁷ The Legal Services Consumer Panel is an independent arm of the Legal Services Board, created by the Legal Services Act 2007. The Panel has legal powers to publish advice which the Legal Services Board has a legal duty to explain its reasons when it disagrees with such advice. The Panel adopted BS 18477 in 2012.

²⁸ Legal Services Consumer Panel, *Recognising and responding to consumer vulnerability - A Guide for legal service regulators*, October 2014.

²⁹ See for instance, Citizens Advice, *Access for All - The importance of inclusive services*, March 2011; Jonathan Stearn, *Tackling Consumer Vulnerability - An action plan for empowerment*, Consumer Focus in conjunction with Citizens Advice and Citizens Advice Scotland, December 2012; Centre for Consumers and Essential Services, University of Leicester, *Research report for Citizens Advice, Tackling consumer vulnerability: Regulators' powers, actions and strategies*, July 2014; and Citizens Advice Bureau, *Treating consumers fairly, Flexible and inclusive services for all*, January 2015.

³⁰ Consumer sector/charitable bodies' members of the taskforce are Age, UK Alzheimer's Society, Citizens Advice, Essential Services Access Network (ESAN), Financial Services Consumer Panel Macmillan, Cancer Support, Money Advice Service, Money Advice Trust, Office of the Public Guardian, StepChange Debt Charity, Royal College of Psychiatrists, and Toynbee Hall.

³¹ BBA, *Improving outcomes for customers in vulnerable circumstances*, February 2016.

<file:///C:/Users/User/Downloads/Improving-outcomes-for-customers-in-vulnerable-circumstances-FINAL-web-version-v2.pdf>

³² Lending Standards Board, *Summary Report: Financial Services Vulnerability Taskforce Principles and recommendations: Review of progress towards implementation*, 8 October 2018. <https://www.lendingstandardsboard.org.uk/wp-content/uploads/2018/10/Vulnerability-Taskforce-summary-report-FINAL.pdf>

³³ UKRN brings together the Civil Aviation Authority (CAA), The Financial Conduct Authority (FCA), Office of Communications (Ofcom), The Office of Gas and Electricity Markets (Ofgem), Office of Water Regulation (Ofwat), the Office of Rail Regulation (ORR) and the Northern Ireland Authority for Utility Regulation (UREGNI). Monitor and the Water Industry Commission for Scotland (WICS) are also participating as observers. <https://orr.gov.uk/news-and-media/press-releases/2014/uk-regulators-launch-new-network-to-bring-cross-sector-regulation-closer-together>

consumers' which champions "success where innovative approaches are taken to delivering positive experiences for consumers, including those in vulnerable circumstances".³⁴

Standards would remain unimplemented unless there is appropriate support for their adoption. BS18477 is a voluntary standard and its adoption by regulators was incentivised by a number of developments in the UK. The more cogent of these are discussed below.

Adoption of the Equality Act 2010

In 2010, the UK adopted the Equality Act, legislation that combined the provisions of the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995 with the purpose of protecting individuals from discrimination in both the workplace and wider society. The protected characteristics that were specified in the Act are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.³⁵ Since the EA came into force in October 2010, individuals have had the right to pursue cases of discrimination on any of these grounds, first from the organisation concerned, then via alternative dispute resolution and when all else fails, challenge the organisation in a court or tribunal. The Equality Act also provides for a public sector equality duty. A public authority or a person exercises the functions of a public authority must, in the exercise of its functions, have due regard to the need to eliminate discrimination and advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.³⁶

Establishment of the Financial Conduct Authority

The Financial Services Act 2012 abolished the Financial Services Authority effective 1 April 2013 and split its responsibilities between two new agencies: the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) of the Bank of England. This "twin peaks" model meant that there was now a dedicated authority, the FCA, to ensure that financial services organisations treat customers fairly. The FCA has wide ranging powers including power to investigate individuals and organisations, regulate marketing of financial products, specify minimum standards and specify requirements on products.

Since 1 April 2014, the FCA is also responsible for regulating the consumer credit industry, a function previously performed by the Office of Fair Trading. The Consumer Credit Act 2006 includes provisions relating to unfair relationships between creditors and debtors.³⁷ The Act

³⁴ UK Regulators Network, Promoting fairness for all consumers. <https://www.ukrn.org.uk/>

³⁵ Equality Act 2010, section 4.

³⁶ Equality Act 2010, section 149.

³⁷ Section 140A, Unfair relationships between creditors and debtors, Consumer Credit Act 1974 as amended by section 19 of the Consumer Credit Act 2006.

permits the court to make an order if it determines that the relationship between the creditor and the debtor arising out of an agreement, including for the way in which the creditor has exercised or enforced any of his rights under the agreement or any other thing done, either before or after the making of the agreement. In deciding whether to make a determination, the court shall have regard to all matters it thinks relevant, including matters relating to the creditor and matters relating to the debtor. The court has powers to make a range of orders by way of remedy for the debtor.

In 2015, the FCA issued an important occasional paper on vulnerable consumers³⁸ that set the bar for all financial service providers to identify and provide for consumer vulnerability.

FCA enforcement action takes into account whether a breach of the duty to treat customers fairly had an effect on particularly vulnerable people, whether intentionally or otherwise, when determining the seriousness of a rule breach by a firm or an individual. In assessing the effect of a breach on a vulnerable person, the FCA will take into account, among other things, the inconvenience and stress caused to the person, as well as financial loss. The seriousness of the breach is relevant to the level of penalty that is imposed – the more serious the breach, the higher the level of penalty.³⁹

Statutory Mandate of Utility Providers

The Office of Gas and Electricity Markets (Ofgem) became a leader in the adoption and implementation of BS18477.⁴⁰ The commitment of the senior management of Ofgem to be so was crucial for this.

Ofgem also has a statutory obligation to cater to the special needs of particular groups of vulnerable consumers. The Electricity Act 1989, as amended, provides the principal objective of the Secretary of State and the Gas and Electricity Markets Authority in carrying out their respective functions is to protect the interests of consumers and in performing that duty they shall have regard to the interests of individuals who are disabled or chronically sick, of pensionable age, with low incomes, and those residing in rural areas. An important addendum to the subsection that specifies the categories of disadvantaged persons is the qualifier “but that is not to be taken as implying that regard may not be had to the interests of other descriptions of consumer”. Pursuant to this statutory obligation

³⁸ Financial Conduct Authority, Consumer Vulnerability, Occasional Paper No.8, February 2015.

³⁹ Financial Conduct Authority, Consumer Vulnerability, Occasional Paper No.8, February 2015, footnote 48 records that even between April 2013 and April 2014, the FCA issued four Final Notices, which referred to the effect on vulnerable people of breaches of FCA rules. The penalties imposed in those Notices totalled £45.8m.

⁴⁰ Western Power Distribution became the first organisation in the UK to be assessed by BSI as compliant with BS18477. Citizens Advice Bureau, Treating Consumers Fairly, Flexible and inclusive services for all, January 2015, p 12.

(and obligations under EU Directives⁴¹), even as early as 2005 Ofgem had a Social Action Strategy, one of the four themes of the strategy was “encouraging best practice among energy suppliers, using research to identify effective ways to address fuel poverty and help vulnerable customers”.⁴²

A similar statutory mandate also governs the Water Services Regulation Authority (Ofwat). The principal objective of Ofwat is to protect the interests of customers and when doing this, the Authority shall have regard to the interests of individuals who are disabled or chronically sick, of pensionable age, with low incomes, residing in rural areas, and those in premises not eligible to be supplied by a licensed water supplier. Again, there is the important proviso “but that is not to be taken as implying that regard may not be had to the interests of other descriptions of customer”.⁴³ The same also applies to the Office of Communications (Ofcom). It also has statutory obligation to cater to particular groups of consumers who may be vulnerable: the disabled, elderly, on low incomes, living in rural areas⁴⁴ or any other circumstances that appear to put them in need of special protection.⁴⁵

The utility regulators had a statutory duty and a culture of providing for categories of vulnerable consumers even before BS18477 was developed. BS 18477 provided an opportunity to reconsider their understanding of consumer vulnerability and fairly cater for consumers who may be in situations of vulnerability.

Significant Role of Civil Society

BS18477 was achieved very much by the effort of civil society organisations - their sustained campaigns, strategic alliances, and collaboration with likeminded personnel of industry, government agencies, and regulators and with the British Standards Institution.

This was followed by a number of excellent reports by civil society organisations advocating the need to adopt the standard and the manner in which vulnerable consumers can be catered for fairly. Civil society organisations continue to play a role as advisers and consultants to regulatory agencies implementing programmes for addressing consumer vulnerability and identifying where there is a need for intervention/advocacy in the interest of consumers in vulnerable situations.

⁴¹ EU Electricity and Gas Directives place obligations on Member States to ensure safeguards for vulnerable consumers. Directive 2009/72 (Electricity) Article 3(7), Directive 2009/73 (Gas) Article 3(3). Directive 2009/72 (Electricity) Article 36, Directive 2009/73 (Gas) Article 40. See Financial Conduct Authority, Consumer Vulnerability, Occasional Paper No.8, February 2015, pp. 70 - 71.

⁴² Section 3A, Electricity Act 1989. The principal objective and general duties of the Secretary of State and the Gas and Electricity Markets Authority (GEMA) as amended by the Utilities Act 2000 and the Energy Act 2004.

⁴³ Section 2 (2A) (a), Water Industry Act 1991.

⁴⁴ Section 3 (4) Communications Act 2003.

⁴⁵ Ofcom website, What is consumer vulnerability? <https://www.ofcom.org.uk/about-ofcom/what-is-ofcom/consumer-vulnerability>

The forgoing discussion of the adoption in the UK of BS18477 indicates the important outcomes that a standard with appropriate support mechanism can yield. The International Standards Organization is currently developing a similar standard⁴⁶ informed by BS18477 and its adoption in the UK. UNCTAD and the Intergovernmental Group of Experts on Consumer Protection Law and Policy need to provide explicit support for this initiative.

Conclusion

Consumer vulnerability is a matter of urgent concern; addressing it will deliver welfare outcomes to benefit the vulnerable and disadvantaged. Addressing it needs to be a concern for all - governments, regulators, companies and civil society:

- **Governments** need to provide the legal framework that mandates regulators to act in the interest of consumers who are in situations of vulnerability and to periodically report on the progress made by the regulated entities and subject their efforts to periodic independent reviews.
- **Regulators** need to clarify what the responsibilities are of the regulated entities as regards their consumers who are in situations of vulnerability - the measures they need to introduce and the performance indices that they have to meet. Incentives and sanctions are essential to ensure compliance.
- **Companies** need to understand how they may identify and respond to vulnerability amongst their consumers: what they need to do to ensure that all their consumers, and especially those in vulnerable situations are treated fairly.
- **Civil society** need not only serve individual consumers who are in a situation of vulnerability but also address the systemic aspects of consumer vulnerability. They need to campaign for and monitor the policies, programmes and projects that need to be in place to ensure that consumer vulnerability is addressed effectively.

UNCTAD and the International Group of Experts on Consumer Protection Law and Policy need to focus on consumer vulnerability and provide leadership so that consumer vulnerability is addressed in all member states of the United Nations.

⁴⁶ International Standards Organization, [ISO/WD 22458](https://www.iso.org/committee/6614775/x/catalogue/) Inclusive service: identifying and responding to consumers in vulnerable situations, Development under the direct responsibility of ISO/PC 311.
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