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THE PROTECTION OF VULNERABLE CONSUMERS IN THE DIGITAL AGE

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*Presentation of Dr Christine Riefa, Reader in Law, Brunel University London
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Panel: Protection of Online Consumers

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The protection of vulnerable consumers in the digital age

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Defining the vulnerable consumer

The concept of ‘vulnerability’ originates from political sciences notably and the work of Prof Fineman. **According to Fineman, vulnerability is a universal, ever-present experience, which may be exposed at any given moment by our individual circumstances or embeddedness, (i.e. our relationship with the institutions and others around us).**¹ On this point, the coronavirus crisis has illustrated how much consumers, even the well-off and the most educated, have struggled to obtain refunds for cancelled holidays or being able to buy first necessity goods and services. The crisis has also brought to the fore many pre-existing problems regarding the sale of dangerous products or the link, somewhat forgotten between economic rights and social justice. Indeed, one key consequence of ‘vulnerability’ when it is not offered any protection, is social exclusion. This is why it is acutely important to reflect on the protection of vulnerable consumers as economic detriment will not simply affect their purse. It will affect their lives and those around them.

The focus of debate on the best way to protect vulnerable consumers has traditionally been on the personal attributes, and the cognitive capacities of consumers. Payment problems and poverty were public law issues and dealt with under welfare law² not consumer law. But with the progressive withdrawal of the welfare state and growing inequalities worldwide, the literature on consumer vulnerability is now moving beyond strict personal characteristics (age, gender, locality, education and language).³ It is considering an ever-growing range of socio-economic factors, as well as looking at how external elements may

¹ M A Fineman, Vulnerability and Inevitable Inequality (2017) *Oslo Law Review* Vol.4, No.3-2017, 133-149.

² P Rott, ‘The low-income consumer in European Private Law’ in P Rott and K Purnhagen *Varieties of European and Economic Law and Regulation* (Springer 2014) 675.

³ See for eg, N. Reich, ‘Vulnerable consumers in EU law’ in Leczykiewicz, Weatherill, *The Images of the Consumer in EU Law* (n 9) 141. Reich identified three types of vulnerability for consumers: physical disability, intellectual disability, and economic disability; see also CMA, *Consumer Vulnerability: Challenges and Potential Solutions* (Feb 2019) 4-8 that looks into market specific vulnerability alongside vulnerability associated with personal characteristics.

create, influence or reinforce vulnerabilities. The coronavirus crisis again provides a case in point here.

At international level, the UN **guidelines the protection of vulnerable and disadvantaged consumers is a legitimate consumer need protected in Guideline 5b**.⁴ The addition of ‘disadvantaged’ to the term vulnerable recognizes that socio-economic factors are linked to vulnerability but it does not amalgamate the notions. Vulnerability thus could be said to remain attached to personal attributes. In the EU, there has been some recognition of the need for a **broader conceptualization of consumer vulnerability** notably through an important report from the Commission, on *Consumer Vulnerability across Key Markets in the European Union*.⁵ The report proposed the adoption of a more exhaustive definition of vulnerable consumers that would notably pay attention to socio-demographic characteristics, behavioural characteristics, personal situation, or market environment, because a combination of these factors does mean that consumers are:

- at higher risk of experiencing negative outcomes in the market;
- having limited ability to maximise their well-being;
- having difficulty in obtaining or assimilating information
- less able to buy, choose or access suitable products; or
- more susceptible to certain marketing practices.⁶

The digital sphere as a systemic vulnerability

To date, consumer vulnerabilities are more or less self-contained in the regulation of public utilities and essential services⁷ and where they are embedded in horizontal instruments, such as the Unfair Commercial Practices Directive in the EU for example, they remain limited in scope and focused on personal attributes.

When we try to reflect on vulnerability in the digital sphere, we are automatically faced with the realization that consumers bring with them their personal and circumstantial attributes and those may exacerbate the difficulties they were already experiencing in the physical world. But in addition, all consumers do experience another layer of vulnerability. One that is directly brought by the system in which they are asked to operate:

- for example, access to the digital world or lack thereof creates a barrier. Lack of access to the internet is a key issue for many developing countries and studies have showed

⁴ For more on the international conceptualisation of vulnerable consumers, see R. Simpson, A universal perspective on vulnerability, International definitions and targets in C Riefa, S. Saintier (eds.), *Vulnerable Consumers and the Law: Consumer Protection and Access to Justice* (Routledge 2021) 31-50.

⁵ European Commission, *Consumer Vulnerability across Key Markets in the European Union* (Brussels, 2016) 319 <https://ec.europa.eu/info/sites/info/files/consumers-approved-report_en.pdf>.

⁶ *ibid* 169.

⁷ European Commission, *Consumer Vulnerability across Key Markets in the European Union* (Brussels, 2016) 319 <https://ec.europa.eu/info/sites/info/files/consumers-approved-report_en.pdf>.

that here again existing inequalities tend to be exacerbated (lack of access tends to be more acutely felt along gender and socio-economic lines).

- and when the consumer gains access, the way the system operates also creates unique challenges.

Consumers in digital markets often disengage and let the algorithm guide them without a fight. We do not attempt to disable privacy notices, we shop around in the knowledge that actually prices may be personalized, we do not read the terms and conditions that enable the operator to harvest our data and use it to their advantage, and so on and so forth. On this latter point, Siciliani, Riefa and Gamper have highlighted how **‘disengaged’ consumers find themselves in vulnerable purchasing situations, not because of particular cognitive failings or socio-demographic characteristics, but because the structure of the consumer markets on which they evolve leads to apathy through obfuscation.** It is here another systemic vulnerability that needs to be noted.

It is in fact rational for consumers in those situations to disengage and not shop around, thus leading to detriment.⁸ The disengagement is the result of the operation of a market that is bent on treating consumers unfairly and thus creates a vulnerability as well as disruptions in the marketplace itself as fair traders cannot really compete if they default to fair practices. Consumers only do the most rational thing they can – not waste time by shopping around. In this particular case consumers are often not starved of information. Instead, too much information tends to be given. Consumers choose to ignore it because using it does not really lead to positive outcomes.⁹ It is therefore rational to disengage and it is somewhat the behaviour we expect of the average consumer in consumer law. It is because I am well informed that I understand I cannot change the way things work and thus decide for apathy. Interestingly some studies have also showed that consumers who do shop around, end up being less satisfied with their choice than those who do nothing or little.¹⁰

Access to justice and redress for vulnerable consumers

‘Regrettably, no matter how consumer vulnerabilities are defined or conceptualized, consumers at risk of vulnerability are overall less likely to represent their own interests; are at greater risk of suffering detriment; and the impact of any detriment suffered is likely to be greater’.¹¹

⁸ P Siciliani, C Riefa, H Gamper, *Consumer Theories of Harm, An economic approach to consumer law enforcement and policy making* (Hart 2019) 40.

⁹ For more on this issue, see P Siciliani, C Riefa, H Gamper, *Consumer Theories of Harm, an economic approach to consumer law enforcement and policy making* (Hart 2019); see also C Riefa, H Gamper, ‘Economic theory and consumer vulnerability: Exploring an uneasy relationship’ in C Riefa, S. Saintier (eds.), *Vulnerable Consumers and the Law: Consumer Protection and Access to Justice* (Routledge 2021) 17-30.

¹⁰ Citizens Advice, ‘Against the Clock: Why more time is not the answer for consumers’ (November 2016).

¹¹ Ibid. See also Caplovitz, *The Poor Pay More, Consumer Practices or Low-Income Families* (1967). Little has changed in the US, see E Mierzwinski, ‘Colston E Warne Lecture: Consumer Protection 2.0 – Protecting Consumers in the 21st Century’ (2010) 44 *Journal of Consumer Affairs* 581. According to NC Smith and E

Sadly, what we find is that access to justice or lack thereof is also a systemic vulnerability in itself. It adds to other pre-existing vulnerabilities (cognitive impairment, or poverty for example) to which we can also add digital markets (as explained above) and we have a perfect storm. Indeed, even if access to courts or ADR is guaranteed, in an online set up, consumers are faced with having to gather the required evidence of wrong-doing. This is of course near impossible.

So how can consumers in vulnerable situations be protected? There are primarily two routes: private or public enforcement, neither yet able to tackle the issues pointing to a need for legal reforms.

On the private side, ADR has often been catapulted in the centre stage. ADR offers many advantages and can help alleviate some thorny issues when courts are not performing as they should. For example in England, the overall direction of travel has been the withdrawal of the state from civil disputes¹² and no legal aid available for consumer disputes. ADR has come to largely replace the courts for consumer disputes, but both structures are found lacking and are still under-utilised by those consumers who need it the most. Access to courts and ADR are indeed the preserve of a few, primarily white, male, well-educated, middle-class and middle-aged consumers.¹³ Other potential problems with ADR concern substantive justice rather than access to justice. The idea here is that ADR provides access to justice but it may not be the right justice.

Meanwhile, public enforcement has not yet come to fill the gap and collective redress is still severely limited.¹⁴ Yet, the public side of enforcement has a bigger role to play. No matter how

Cooper-Martin, 'Ethics and Target Marketing: The role of Product Harm and Consumer Vulnerability (1997) 61 *Ethics and Target Marketing* 1, 4 vulnerable consumers are more susceptible to economic, physical or physiological harm in, or as a result of economic transactions because of characteristics that limit their ability to maximise their utility and well-being. In the UK, the situation is no better with the CMA 2019 report on vulnerability (n 3) acknowledging being on low income is a vulnerability alone and people on low income are also more likely to suffer from other vulnerabilities (paras 59-75).

¹² H Genn, 'What is Civil Justice For? Reform, ADR and Access to Justice' (2012) 24 *Yale J.L. & Human* 397.

¹³ Graham (ch 10). A risk Howells and Weatherill highlighted in 2005 (Howells and Weatherill (n 21) 605). For more recent evidence, see BEIS, *Resolving Consumer Disputes: Alternative Dispute Resolution and the Court System*, final report (April 2018) 4. This report confirms that it is the same profile of consumers that use both the courts and ADR processes.

¹⁴ Collective redress is highlighted as a necessary tool in the EU for over a decade. Regarding violations of consumer law, see Green Paper on Consumer Collective Redress, COM (2008) 794 final; Reding, Almunia and Dalli, Joint Information Note, 'Reinforcing the coherence of the European approach in collective redress: next steps', SEC (2010) 1192. This was followed by consultations, public hearings, as well as a Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under EU law, OJ L 201/60, 27 July 2013. Recital 1 of this Recommendation explains: '*The Union has set itself the objective of maintaining and developing an area of freedom, security and justice, inter alia, by facilitating access to justice, as well as the objective of ensuring a high level of consumer protection*'. In 2018, prompted by the Volkswagen emission scandal, the project of a collective action was fast tracked. The Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, *A New Deal for Consumers* COM (2018) 183 final introduced a proposal for Directive on representative actions for the protection of the collective interests of consumers (repealing Directive 2009/22/EC). This Directive is currently in the trilogue stage. However, Consumer organisations focused on how to improve specific acts or enforcement of rights in general prior to the latest wave of reforms. See, European Parliament, 'Consumer Protection in the EU, Policy Overview' (Sept 2015) <[https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA\(2015\)565904_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA(2015)565904_EN.pdf)> 12,

determined consumers may be to enforce their rights, it is very hard to do this against internet giants and many consumers will not even be aware they have been the victim of wrong-doing.

But on the public enforcement side, enforcers also struggle in a world with no borders because their ability to enforce remains attached to geographical borders. Meanwhile businesses have largely franchised themselves and are able to operate from many different places in the world and switch their operations.

The rise of the platform economy further complicates the way consumer rights can be enforced. Platform's liability is a difficult area, with generally no blanket obligations for platforms to monitor activity on their site. It is my view that intermediaries ought to take on more liability especially when they benefit financially from the transactions (either directly through a commission or indirectly through the collection of personal data for eg). More need to be done also with regards to monitoring and enabling enforcers to have direct notice and take down process to signal infringement of consumer law. I also believe consumers ought to be able to report content as they will often have first-hand knowledge. There is such automatic procedure in place yet.

The online world seems to have almost taken over with seemingly little that can be done to protect consumers in effective and sustainable ways. Finding ourselves in this situation is however not a fatality, it is through choice. The choice the legislators make when adopting laws that see consumers as economic agents only and do not make the link with the wider environment consumers find themselves in. Choice the politicians make when they decide on budget for the public enforcement of consumer law and the funding of access to justice. For consumers, the choice of changing operator or claiming their right in court or through ADR is no longer real... Indeed, when the machines can make inferences about you, can present advertising and frame product choices for you, can even calculate what you may find an acceptable price (willingness to pay), consumers become powerless. Consumers cannot influence the way the market works. Worse, there is often no meaningful alternative choice.¹⁵

Coronavirus can act as a catalyst to transform the way we see consumer law and its enforcement.¹⁶ I hope that in 2021, we come to think less of vulnerability as what happens to the 'other consumers' (the ones that are not as clever, not as fortunate) and hope that we can ***think of vulnerability as an integral part of who we all are***. After all, some empathy in law making will go a long way in ensuring we design more 'human' systems of protection not just economic ones.

referencing the work of BEUC, BEUC priorities 2015 <http://www.beuc.eu/publications/beuc-x-2014-101_memoandum_for_the_latvian_presidency.pdf>.

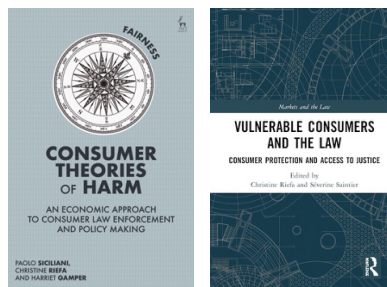
¹⁵ Note however that privacy friendly rivals are starting to emerge, but to date their reach remains quite limited. See for example in the search engine market, Duckduckgo.com and Quant.com.

¹⁶ C. Riefa, Coronavirus as a catalyst to transform consumer policy and enforcement (2020) <https://link.springer.com/article/10.1007/s10603-020-09462-0>

To protect vulnerable consumers we need to reverse expectations. It should no longer be about consumers defending themselves (using rather imperfect instruments in the process); but it should be about businesses behaving fairly. ***Fairness in digital markets should be by design and not something that is offered to consumer simply as a remedy after the damage has already occurred.***

Thank you for your attention.

For more on the issues, see:



C. Riefa, S. Saintier, *Vulnerable Consumers and the Law: Consumer protection and Access to justice* (Routledge 2021) <https://www.routledge.com/Vulnerable-Consumers-and-the-Law-Consumer-Protection-and-Access-to-Justice/Riefa-Saintier/p/book/9780367204686>

This book charts the difficulties encountered by vulnerable consumers in their access to justice, through the contributions of prominent authors (academic, practitioners and consultants) in the field of consumer law and access to justice. It demonstrates that despite the development of ADR, access to justice is still severely lacking for the vulnerable consumer. The book highlights that a broad understanding of access to justice, which encompasses good regulation and its public enforcement, is an essential ingredient alongside access to the mechanisms of traditional private justice (courts and ADR) to protect the vulnerable consumer. Indeed, many of the difficulties are linked to normative obstacles and lack of access to justice is primarily a vulnerability in itself that can exacerbate existing ones. In addition, because it may contribute to ‘pushing’ already vulnerable consumers into social exclusion it is not simply about economic justice but also about social justice. The book shows that lack of access to justice is not irreversible nor is it necessarily linked to consumer apathy. New technologies could provide solutions. The book concludes with a plea for developing ‘inclusive’ justice systems with more emphasis on public enforcement alongside effective courts systems to offer the vulnerable with adequate means to defend themselves. This book will be suitable for both students and practitioners, and all those with an interest in the justice system.

P. Siciliani, C. Riefa, H. Gamper, *Consumer Theories of Harm: An Economic Approach to Consumer Enforcement and Policy Making* (Oxford, Hart Publishing 2019) <https://www.bloomsburyprofessional.com/uk/consumer-theories-of-harm-9781509916856/>

It has long been thought that fairness in European Consumer Law would be achieved by relying on information as a remedy and expecting the average consumer to keep businesses in check by voting with their feet. This monograph argues that the way consumer law operates today promises a lot but does not deliver enough. It struggles to avoid harm being caused to consumers and it struggles to repair the harm after the event. To achieve fairness, solutions

need to be found elsewhere. Consumer theories of harm offer an alternative model to assess where and how consumer detriment may occur and solutions to prevent it. It shows that a more confident use of economic theory will allow practitioners to demonstrate how a poor standard of professional diligence lies at the heart of consumer harm. The book provides both theoretical and practical examples of how to combine existing law with economic theory to improve case outcomes. The book shows how public enforcers can move beyond the dominant transparency paradigm to an approach where firms have a positive duty to treat consumers fairly and shape their commercial offers in a way that prevents consumers from making mistakes. Over time, this 'fairness-by-design' approach will emerge as the only acceptable way to compete.