

Exploring vulnerability in EU Law: An analysis of 'vulnerability' in EU criminal law and consumer protection law

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**Exploring Vulnerability in EU Law: An
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Criminal Law and Consumer Protection
Law**

by

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Exploring Vulnerability in EU Law: An Analysis of “Vulnerability” in EU Criminal Law and Consumer Protection Law

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☞ Comparative law; Consumer protection; Criminal law; EU law; Vulnerable adults

Abstract

This article explores the understanding and use of the concept of vulnerability in European Union (EU) law, with a particular focus on the fields of criminal law and consumer protection law. It draws on Fineman’s understanding of vulnerability as a universal phenomenon, and considers the scope for, and policy implications of, incorporating (further) such an approach within these fields of law. The article reveals that there is no common understanding of the concept of vulnerability in the fields of EU criminal law and consumer protection law, and there is a lack of overall coherence across these two fields of law. In fact, a common understanding is not even necessarily found within single fields. The purposes served by highlighting “vulnerable” groups and individuals in legislation differs, and references to “vulnerability” result in a stronger focus on the need for individualised assessments, and tailored measures, in EU criminal law than is the case for EU consumer protection law. Indeed, the provisions addressing “vulnerable” consumers are particularly brief and provide very little extra protection. However, both fields of EU law also reveal evidence of a universal approach to vulnerability being taken with regard to communication and information provision, which should be tailored to individual needs and abilities.

Introduction

Numerous EU legislative and soft law instruments recognise the existence of so-called vulnerable groups and seek to provide measures or actions targeted at members of such groups.¹ References to groups who are “vulnerable” can be found in instruments addressing fields as diverse as motor vehicles,² the provision

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¹The terms “vulnerability” or “vulnerable” are sometimes used as labels which are automatically attached to specific groups and individuals sharing certain characteristics, such as young or old age. This use of the term stands in contrast to the understanding of vulnerability as a universal phenomenon. In order to distinguish this group-based or minority group model of “vulnerability” from both the generic use of the term and the use of the term in the context of universal vulnerability in this paper, the term is placed in speech marks when used in this way.

²Regulation 78/2009 on the type-approval of motor vehicles with regard to the protection of pedestrians and other vulnerable road users, amending Directive 2007/46 and repealing Directives 2003/102 and 2005/66 [2009] OJ L35/1.

of electricity and gas,³ the rights of the child,⁴ empowerment of young people,⁵ employment⁶ and health policy.⁷ Two areas where references to “vulnerable groups” and individuals are particularly prominent are criminal law and consumer protection law, and the relevant references in these fields are largely found in secondary legislation, rather than only non-binding policy documents. A third area where such references are found in legislation is asylum and refugee law.⁸

This article explores the understanding and use of the concept of vulnerability in EU law, with a particular focus on the fields of criminal law and consumer protection law. These two fields have been chosen because the legal framework in both areas contain frequent references to “vulnerable” individuals and groups, and because the legal instruments recognise the need to take specific account of the needs of individuals identified as “vulnerable”. Therefore, although these two areas of law concern individuals in very different situations, the relevant legal frameworks both acknowledge the existence of vulnerability, and attempt to remove some of the disadvantages linked to the status. Through an analysis of the relevant legal instruments, the paper considers whether there is a common understanding of vulnerability or “vulnerable groups” across these fields of EU law, and indeed within each of these two fields. This is linked to understanding the causes of vulnerability which are recognised in EU law. The article draws on Fineman’s understanding of vulnerability as a universal phenomenon, and considers the scope for, and policy implications of, incorporating (further) such an approach within these fields of law.

The article begins by exploring the concepts of vulnerability and “vulnerable groups”, before considering their use in the fields of EU criminal law and consumer protection law. It then reflects on the use of the concept in EU law, including considering the overall coherence of the way in which vulnerability is conceived and addressed, the strengths and weaknesses of the current approaches in criminal and consumer protection law, and possible alternative approaches. The article also explores whether there is greater scope for incorporating a universal approach to vulnerability in EU law.

Understanding vulnerability

Vulnerability is an open-textured, ambiguous and elusive notion which is used in many different disciplines,⁹ and which academics and commentators sometimes consciously choose not to define.¹⁰ At its most basic,

³ Directive 2009/72 concerning common rules for the internal market in electricity and repealing Directive 2003/54 [2009] OJ L211/55 and Directive 2009/73 concerning common rules for the internal market in natural gas and repealing Directive 2003/55 [2009] OJ L211/94.

⁴ “Communication from the Commission to the European Parliament, the Council, the European Council, the Economic and Social Committee and the Committee of the Regions: An EU Agenda for the Rights of the Child” COM(2011)0060 final.

⁵ “Communication from the Commission to the European Parliament, the Council, the European Council, the Economic and Social Committee and the Committee of the Regions: Engaging Connecting and Empowering young people: a new EU Youth Strategy” COM(2018)02569.

⁶ “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An Agenda for new skills and jobs: A European contribution towards full employment” COM(2010)682.

⁷ “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Solidarity in health: reducing health inequalities in the EU” COM (2009)0567.

⁸ See, e.g., Regulation 516/2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381 [2014] OJ L 150/168 art.2(i).

⁹ J. Herring, “Defining Vulnerability” in *Vulnerable Adults and the Law* (Oxford: Oxford University Press, 2016). R. Dehaghani and D. Newman, “‘We’re Vulnerable Too’: an (Alternative) Analysis of Vulnerability within English Criminal Legal Aid and Police Custody” (2017) 2 *Oñati Socio-Legal Series* 1199, 1207.

¹⁰ See I. Curry-Sumner, “Vulnerable Adults in Europe, European added value of an EU legal instrument on the protection of vulnerable adults”, Annex I to European Parliamentary Research Service, Protection of Vulnerable

to be vulnerable means to be at risk of harm,¹¹ but this definition does not reveal the individual characteristics or situations which lead to this risk, nor recognise the many complexities associated with the concept. On the other hand, it does reveal that vulnerability is not necessarily associated with harm or damage,¹² but involves a risk of exposure to such harm, implying that harm can be avoided through appropriate policies and support, and through acquisition of resilience.¹³

In general, there are two dominant ways in which vulnerability and the associated risks can be understood. First, particular groups or individuals with specific characteristics, such as children or people with disabilities, can be regarded as “vulnerable” per se, whilst other groups are not regarded as “vulnerable”.¹⁴ In the alternative, vulnerability can be regarded as a universal experience.¹⁵ The following sub-sections explore different models, elements and aspects of vulnerability.

Vulnerability as an attribute linked to specific characteristics

“Vulnerability” can be seen as a discreet attribute which is assigned to members of specific groups. This can be regarded as a minority group model of vulnerability.¹⁶ Under this model, the majority of the population is not seen as “vulnerable”, and does not require targeted support. Following this approach, Ippolito has argued that children are inherently “vulnerable” “due to their youth, their inability to look after themselves, and their emotional and educational immaturity”.¹⁷ Both lawyers such as Ippolito and economists sometimes adopt this approach.¹⁸ A somewhat more sophisticated version of this approach is

Adults, European Added Value Assessment, Accompanying the European Parliament’s Legislative Initiative Report (Rapporteur Joëlle Bergeron), PE 581.388, September 2016, p.49.

¹¹K. Nadakavukaren Schefer, “The Ultimate Social (or is it Economic?) Vulnerability: Poverty in European Law” in F. Ippolito and S. Iglesias Sánchez (eds), *Protecting Vulnerable Groups, The European Human Rights Framework* (Oxford: Hart Publishing, 2015), p.407. Fineman has also stated that vulnerability can be understood “as a state of constant possibility of harm”, M.A. Fineman, “The Vulnerable Subject: Anchoring Equality in the Human Condition” (2008–9) 20 *Yale Journal of Law and Feminism* 1, 11. However Dunn, Clare and Holland are critical of equating vulnerability with risk, as this approach largely fails to engage with an individual’s subjective experience of vulnerability and their wishes, and they criticise the use of inherent and situational accounts of vulnerability to justify court-ordered protective measures. M.C. Dunn, I.C.H. Clare and A.J. Holland, “To Empower or to Protect? Constructing the ‘Vulnerable Adult’ in English Law and Public Policy” (2008) 28 *Legal Studies* 234, 247 and 251. Moreover, while Fineman notes that “ultimately, our vulnerability results in weakness, or physical or emotional decline”, she also regards it as presenting “opportunities for innovation and growth creativity, and fulfilment”, and that it can “bring positive or negative results”. M.A. Fineman, “‘Elderly’ as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility” (2012) 20 *Elder Law Journal* 71, 96.

¹²Schefer, “The Ultimate Social (or is it Economic?) Vulnerability” in Ippolito and Iglesias Sánchez (eds), *Protecting Vulnerable Groups, The European Human Rights Framework* (Oxford: Hart Publishing, 2015), pp.407.

¹³M.A. Fineman, “Vulnerability, Resilience and LGBT Youth”, Emory Legal Studies Research Paper No.14-292.

¹⁴Herring, “Defining Vulnerability” in *Vulnerable Adults and the Law* (Oxford: Oxford University Press, 2016).

¹⁵Fineman, “The Vulnerable Subject” (2008–9) 20 *Yale Journal of Law and Feminism* 1, 8.

¹⁶In some respects the distinction between a universal and minority group model of vulnerability is mirrored in the distinction made between a universalist view of disability and a minority group model of disability. For an overview of the latter, see L. Waddington, “‘Not Disabled Enough’: how European Courts Filter Non-discrimination Claims through a Narrow View of Disability” (2015) 15 *European Journal of Human Rights Law* 11, 26.

¹⁷F. Ippolito, “(De)constructing Children’s Vulnerability under European Law” in F. Ippolito and S. Iglesias Sánchez (eds), *Protecting Vulnerable Groups, The European Human Rights Framework* (Oxford: Hart Publishing 2015), p.23. Amandine Garde also refers to the “special vulnerability of children”. A. Garde, “The Best Interests of the Child and EU Consumer Law and Policy: a Major Gap between Theory and Practice?” in J. Devenney and M. Kenny (eds), *European Consumer Protection: Theory and Practice* (Cambridge: Cambridge University Press, 2012), p.165.

¹⁸See G.G. Brenkert, “Marketing and the Vulnerable” (1998) 8 *Business Ethics Quarterly* 7 (who refers to the “specially vulnerable” who are different from “normal consumers”) and the response of David Palmer and Trevor Hedberg in “The Ethics of Marketing to Vulnerable Populations” (2013) 116 *Journal of Business Ethics* 406, who refer to consumers who are “specially vulnerable”.

to assume that all members of specific groups, or all people who share certain characteristics (such as young age or a mental health diagnosis) are “vulnerable”, but to require that this be confirmed via an individualised assessment.¹⁹

Vulnerability as a universal experience

Martha Albertson Fineman has been a prominent advocate of the understanding of vulnerability as a universal experience. From this perspective, all individuals are seen as vulnerable and vulnerability is an inevitable part of the human experience.²⁰ This is because we are all dependent on others to meet our needs,²¹ and cannot function and achieve our goals without the support of others. This exposes us to harm when that support is removed or when we require more support than is available. Consequently, vulnerability is a result of the human embodiment,²² although economic and institutional harms can also contribute to vulnerability.²³ Vulnerability can therefore result from “internal disintegration”, but also from “destructive external forces”.²⁴ In the latter case, one can speak of situational vulnerability,²⁵ which arises from the interaction of an individual with the environment, leading to the individual being exposed to harm. However, Fineman does not adopt this latter classification.

Causes of vulnerability

Vulnerability can be linked to both endogenous and exogenous factors.²⁶ Endogenous factors linked to vulnerability are innate or inherent to the individual or his or her physical or mental condition, and indeed Ippolito and Iglesias Sánchez refer to this form of vulnerability as “inherent”.²⁷ Such factors can be permanent, such as some mental or physical impairments, but also temporary, such as illness, meaning that an individual’s changing circumstances can potentially expose them to harm at any time.²⁸ Exogenous factors can also be linked to vulnerability. Exogenous factors are external, and can include lack of education in general or knowledge specific to a particular area, living in poverty, being a single parent or carer, or having insecure residence or employment status. These factors can be permanent, although, given their external nature, individuals may be able to change their position and therefore able to remove themselves from a situation of harm. Fineman refers to a variety of “external and internal ... negative events” to which individuals can be subject: “disease, pandemics, environmental and climate deterioration, terrorism and

¹⁹ I am grateful to Suzan van der Aa for pointing this out.

²⁰ F. Ippolito and S. Iglesias Sánchez, “Introduction” in F. Ippolito and S. Iglesias Sánchez (eds), *Protecting Vulnerable Groups, The European Human Rights Framework* (Oxford: Hart Publishing, 2015), p.1 and Herring, “Defining Vulnerability” in *Vulnerable Adults and the Law* (Oxford: Oxford University Press, 2016).

²¹ J. Herring, *Vulnerable Adults and the Law* (Oxford: Oxford University Press, 2016), p.10.

²² Fineman, “The Vulnerable Subject” (2008–9) 20 *Yale Journal of Law and Feminism* 1, 8–9.

²³ M.A. Fineman, “The Vulnerable Subject and the Responsive State” (2010) 60 *Emory Law Journal* 251, 268.

²⁴ Fineman, “Elderly” as Vulnerable” (2012) 20 *Elder Law Journal* 71, 89.

²⁵ See also, T. Wilhelmsson in “The Informed Consumer v the Vulnerable Consumer in European Unfair Commercial Practices Law—A Comment” in Geraint Howells et al. (eds), *The Yearbook of Consumer Law 2007*, (Farnham: Ashgate, 2007), p.218.

²⁶ Although note that some authors, such as Herring, argue that the distinction between these two sources of vulnerability, which he refers to as personal and social, is not robust. Herring, *Vulnerable Adults and the Law* (Oxford: Oxford University Press, 2016), p.28.

²⁷ F. Ippolito and S. Iglesias Sánchez (eds), *Protecting Vulnerable Groups, The European Human Rights Framework* (Oxford: Hart Publishing, 2015). Section I of the book addresses “Inherent Vulnerability” and includes chapters on children, older persons, disability and women.

²⁸ Consumer Focus, Citizens Advice and Citizens Advice Scotland, *Empowering Consumers in vulnerable positions*, Interim draft report.

crime, crumbling infrastructure, failing institutions, recession, corruption, decay, and decline”.²⁹ One can also regard the availability or absence of support structures for individuals as a particular kind of exogenous factor.

Where having a particular characteristic is regarded as a de facto marker of vulnerability, it reflects the minority group model described above. In contrast, under the universal model of vulnerability having one or more of these characteristics is not regarded as resulting in harm per se, but, depending on the environmental response and supports available, having certain characteristics can contribute to an individual experiencing harm in a particular situation.

The law’s response to vulnerability

The legal consequences of these two conceptions or models of vulnerability are potentially profound. If the law recognises the universality of vulnerability and assumes that everyone is vulnerable—whether that be, for example, when interacting with judicial authorities or entering into a consumer contract—the law should seek to be responsive to individual situations and to remove the risk of experiencing harm, whatever its cause, by empowering individuals in their specific situations. These are not easy tasks. As noted above, this view of vulnerability and the appropriate state response to vulnerability has been developed by Martha Fineman, who argues that justice is more likely to be achieved if the state is “built around the recognition of the vulnerable subject”, and that vulnerability is a conceptual tool through which to compel state responsiveness.³⁰ Her approach focuses on how societal structures can both create and manage vulnerability and create resilience,³¹ and she argues that “vulnerability must be at the heart of our ideas of social and state responsibility”.³²

The universal model of vulnerability also recognises that we are not all vulnerable in the same way and to the same extent. It acknowledges that some groups are more likely to experience harm than others, and endorses the adoption of measures targeting members of such groups. In this respect, Fineman argues that,

“universal, human vulnerability is also particular: it is experienced uniquely by each of us and this experience is greatly influenced by the quality and quantity of resources we possess or can command.”³³

Brandl and Czech, writing in the context of asylum seekers, refer to “graduations of vulnerability ... and ... personal factors, as well as affiliation to another vulnerable group, [that] may give rise to an increased vulnerability”.³⁴ These authors recognise both the non-binary nature of vulnerability and the individualised experience of vulnerability. Consequently, while vulnerability is universal, some people are more resilient or less likely to experience harm than others.³⁵

The minority group model of vulnerability, in contrast, assumes that only certain readily identifiable groups are “vulnerable”, and that the law should provide for specific or special measures which are intended

²⁹ M.A. Fineman, “Feminism, Masculinities and Multiple Identities” (2013) XIII *Nevada Law Review* 120.

³⁰ Fineman, “The vulnerable subject” (2008–9) 20 *Yale Journal of Law and Feminism* 1, 1–23 and Fineman, “The vulnerable subject and the responsive state” (2010) 60 *Emory Law Journal* 251.

³¹ Fineman, “The vulnerable subject and the responsive state” (2010) 60 *Emory Law Journal* 251, 269.

³² Fineman, “The vulnerable subject and the responsive state” (2010) 60 *Emory Law Journal* 251, 267.

³³ Fineman, “The vulnerable subject” (2008–9) 20 *Yale Journal of Law and Feminism* 1, 10.

³⁴ U. Brandl and P. Czech, “General and Specific Vulnerability of Protection-Seekers in the EU: Is there an Adequate Response to their Needs?” in F. Ippolito and S. Iglesias Sánchez (eds), *Protecting Vulnerable Groups, The European Human Rights Framework* (Oxford: Hart Publishing, 2015), p.270. The economists Clifford J. Shultz II and Morris B. Holbrook, make a similar argument in “The Paradoxical Relationships between Marketing and Vulnerability” (2009) 28 *Journal of Public Policy & Marketing* 124, 125–126, where they state that “vulnerability is a relative term that exists along a continuum with gray areas and gradations in between its extremes”.

³⁵ Dehaghani and Newman, “We’re vulnerable too” (2017) 7 *Oñati Socio-Legal Series* 1199, 1202.

to remove that “vulnerability” or provide protection for members of those groups. Some of these measures might be uncontroversial, and might not even involve the language of vulnerability, such as providing sign language interpretation for deaf individuals who communicate via this medium, while others might be highly contested, such as denying an individual agency³⁶ and removing their legal ability to enter into a contract or report a crime.

The approach of identifying a priori groups who are “vulnerable” can stigmatise those who are so labelled,³⁷ as well as not providing an individual solution which empowers affected individuals. It can lead to both over and under protection.³⁸ It also largely fails to consider how the way in which society is organised can create vulnerability, or bring about a reorganisation of existing structures. On the other hand, the approach does focus attention on groups who are likely to be particularly disadvantaged and excluded, and provides for an administratively simple way of identifying and responding to the needs and circumstances, or perceived vulnerability, of members of certain groups.³⁹

In line with the minority group approach, the a priori identification of “vulnerable groups”, which is linked to specific levels of additional protection beyond that provided to the majority, is often provided for in legislation and policy. For example, the European Court of Human Rights (ECtHR) adopts this approach in its case law, where it identifies some groups, such as children, persons with mental disabilities and persons held in detention, as “vulnerable”.⁴⁰ Nevertheless, some scholars argue that such binary distinctions are unhelpful or “not straightforward”,⁴¹ and that vulnerability should be understood in terms of the ability of an individual to protect oneself, or their level of resilience.⁴² In this respect, Herring writes:

“An individual characteristic can only be a source of vulnerability in the context of particular social circumstances. Being unable to walk might, or might not, render one at greater risk of being mugged depending on a wide range of social circumstances. It is better, therefore, not to rely on a distinction between inherent characteristics and external circumstances, but rather to simply focus on the risk of harm being faced and abilities to avoid the threat.”⁴³

Concluding remarks

The previous sub-sections have illustrated the complexity of the concept of vulnerability, different possible understandings of the concept, and the legal consequences of adopting different understandings. While classifying some groups a priori as “vulnerable”—and by implication other groups as not—may create an administratively simple way of identifying those who are “vulnerable”, it is submitted that this approach

³⁶ Fineman, “‘Elderly’ as Vulnerable” (2012) 20 *Elder Law Journal* 71, 85.

³⁷ M.A. Fineman, “Equality, Autonomy, and the Vulnerable Subject in Law and Politics” in M.A. Fineman and A. Grear (eds), *Vulnerability, Reflections on a New Ethical Foundation for Law and Politics* (Farnham: Ashgate, 2013), p.16.

³⁸ Fineman, “Equality, Autonomy and the Vulnerable Subject in Law and Politics” in M.A. Fineman and A. Grear (eds), *Vulnerability, Reflections on a New Ethical Foundation for Law and Politics* (Farnham: Ashgate, 2013), p.16.

³⁹ For a macroeconomic argument in favour of the adoption of a “class-based view of consumer vulnerability” by policy makers, see S. Commuri and A. Ekici, “An Enlargement of the Notion of Consumer Vulnerability” (2008) 28 *Journal of Macromarketing* 183.

⁴⁰ A. Timmer, “A Quiet Revolution: Vulnerability in the European Court of Human Rights” in M. Albertson Fineman and A. Grear (eds), *Vulnerability, Reflections on a New Ethical Foundation for Law and Politics* (Farnham: Ashgate, 2013), pp.152–154.

⁴¹ Herring, *Vulnerable Adults and the Law* (Oxford: Oxford University Press, 2016), p.27.

⁴² Dehaghani and Newman, “‘We’re Vulnerable Too’” (2017) 7 *Oñati Socio-Legal Series* 1199, 1202.

⁴³ Herring, *Vulnerable Adults and the Law* (Oxford: Oxford University Press, 2016), p.27.

fails adequately to identify all individuals who are in a situation of vulnerability, and risks stigmatising those who are labelled as “vulnerable”. This approach can also be both over and under inclusive.⁴⁴

As noted above, at its most basic to be vulnerable means to be at risk of harm. All individuals face this risk in specific situations, and vulnerability should therefore be understood as a universal experience, in line with the approach outlined by Fineman. In light of this, it is submitted that the goal of legislation and policy should be to reduce the risk of harm where possible, and legislation and policy should therefore focus on mechanisms for the prevention of actions and behaviour which can cause harm to individuals, as well as contributing to the creation of resilience and empowerment of individuals. In Fineman’s words “society and its institutions can address ... harms through law and policy that position vulnerability as the organizing principle and seek to alleviate these implications”.⁴⁵ Understanding vulnerability as this universal phenomenon also implies the need for individualised and tailored assessments and responses, and this is not simple.

Under the universal model, legislation and policy should recognise that vulnerability arises out of an interaction between an individual’s personal circumstances and characteristics and the environment in which they are located, and address both the identification of (potential) vulnerability and the removal of related harm. This implies that the issue of what support is granted to individuals who are regarded as “vulnerable” is not separate from the identification of “vulnerable” individuals, and that measures to address “vulnerability” can themselves influence who is regarded as “vulnerable” in specific circumstances. For example, if legislation focuses on the need for all individuals to receive information in a comprehensible form, then persons who have difficulty reading or understanding, and persons who are not familiar with the national language, might be amongst those who are targeted. However, if legislation or policy focuses on avoiding exposure to substances which may cause damage to health, then individuals with particular sensitivities to certain substances, or at risk of high exposure to such substances, would be the focus of attention.

Having explored the concept of vulnerability at a general level, this article now considers how EU law makes use of the concept in two fields: criminal law and consumer protection law. As noted above, numerous EU legislative and soft law instruments refer to “vulnerable” individuals and groups. In addition, many EU instruments target specific groups without explicitly identifying them as “vulnerable”. For example, Ippolito has argued that the EU Charter of Fundamental Rights recognises that some people—namely children, elderly persons and persons with disabilities—are all potentially more “vulnerable” than others, in that it provides special protection for all three groups,⁴⁶ although the Charter does not use the language of vulnerability.

Vulnerability in EU criminal law

The following sub-sections consider the use of the concept of vulnerability in EU criminal law and summarise critical commentary to date.

⁴⁴ Fineman, “Equality, Autonomy and the Vulnerable Subject in Law and Politics” in M.A. Fineman and A. Grear (eds), *Vulnerability, Reflections on a New Ethical Foundation for Law and Politics* (Farnham: Ashgate, 2013), p.16.

⁴⁵ Fineman, “The Vulnerable Subject and the Responsive State” (2010) 60 *Emory Law Journal* 251, 268.

⁴⁶ In arts 24, 25 and 26 respectively. F. Ippolito, “(De)Constructing Children’s Vulnerability under European Law”, in F. Ippolito and S. Iglesias Sánchez (eds), *Protecting Vulnerable Groups, The European Human Rights Framework* (Oxford: Hart Publishing, 2015), p.39.

Aims of EU criminal law

The EU aims to create an “area of criminal justice”.⁴⁷ Policies and legal instruments addressing both the rights of victim of crimes and the rights of suspects and accused persons, make up part of this “area”, with EU law establishing minimum standards on the rights, support and protection of victims of crime and basic rights for suspects and accused persons. Instruments targeting both groups recognise that some individuals may be in situations of particular vulnerability. EU criminal law and policy therefore identifies specific causes of “vulnerability” and aims to provide additional protection to those identified as “vulnerable”. An overall goal of the EU’s approach is to “increase people’s confidence in the fairness of proceedings, knowing that their rights are protected when they have to appear in court in another country, or if they fall victim to a crime”.⁴⁸

Addressing vulnerability in EU criminal law

EU criminal law addresses both the rights of victims of crime and the rights of suspects and accused persons, and adopts a noticeably different approach to protecting individuals identified as “vulnerable” in these two areas.⁴⁹ The key instrument protecting the rights of victims is the 2012 Directive establishing minimum standards of rights, support and protection of victims of crime (Victims’ Rights Directive).⁵⁰ In contrast, protection of the rights of suspects and accused persons is spread across a number of instruments, with the most elaborate specifications set out in a non-binding recommendation.⁵¹ There are a number of important differences between the approach adopted towards victims of crime, and suspects and accused, not least of all the fact that protection for victims regarded as “vulnerable” is set out in a legally binding instrument, whilst the key instrument addressing suspects regarded as “vulnerable” is a non-binding recommendation.⁵² However, this paper will focus only on the different kinds of protection and conceptualisation of vulnerability found in the various instruments, rather than their legal status.

Who is “vulnerable” and what protection do they receive?

The Victims’ Rights Directive aims to “ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings” (art.1). It sets out a number of rights relating to the provision of information and support for all victims and indicates that “persons who are particularly vulnerable ... should be provided with specialist support and legal protection” (Recital 38). A particular form of vulnerability which receives focused attention in the Directive is susceptibility to “secondary and repeat victimisation, to intimidation and to retaliation” and such victims “should be

⁴⁷ See https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice_en [Accessed 23 October 2020].

⁴⁸ See https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/eu-strategy-criminal-justice_en [Accessed 23 October 2020].

⁴⁹ Suzan van der Aa, “Variable Vulnerabilities? Comparing the Rights of Adult Vulnerable Suspects and Vulnerable Victims under EU Law” (2016) 7 *New Journal of European Criminal Law* 39, 42. For a different perspective on criminal law and vulnerability see J. Herring, “Criminal Law and the Protection of Vulnerable Adults” in *Vulnerable Adults and the Law* (Oxford: Oxford University Press, 2016), pp.183–223.

⁵⁰ Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57. See generally on EU law and policy regarding victims of crime, V. Mitsilegas, “The Place of the Victim in Europe’s Area of Criminal Justice” in F. Ippolito and S. Iglesias Sánchez (eds), *Protecting Vulnerable Groups, The European Human Rights Framework* (Oxford: Hart Publishing, 2015), pp.313–338.

⁵¹ European Commission Recommendation on procedural safeguards or vulnerable persons suspected or accused in criminal proceedings [2013] OJ C378/8.

⁵² Van der Aa, “Variable vulnerabilities?” (2016) 7 *New Journal of European Criminal Law* 39, 41–42.

offered appropriate measures to protect them during criminal proceedings” (Recital 58). Secondary victimisation “means the phenomenon of renewed victimisation due to an inadequate response to the primary act of victimisation by the criminal justice system”.⁵³ This could result from, for example, insensitive questioning, aggressive cross-examination, compulsory confrontations with the offender, long waiting periods, or lack of information on the case.⁵⁴ In this respect, Chapter 4 of the Directive addresses protection of victims and provides all victims with the right to protection, including the right to avoid contact with the offender (art.19), the right to protection during the criminal investigation (art.20), and the right to protection of privacy (art.20). The Directive also requires an individual assessment of victims to identify specific protection needs, which should take into account the personal characteristics of the victim, the type and nature of the crime and the circumstances of the crime (art.22(2)). The Directive directs attention to the factors which should be considered in the individual assessment, including whether the victim had a relationship or dependence on the offender which made them particularly “vulnerable”. It also indicates that in this regard, “victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities shall be duly considered” (art.22(3)). In the view of van der Aa, such victims are “more or less earmarked as vulnerable”, although she notes that these victims are not per definition “vulnerable”, and this must be determined by an individual assessment.⁵⁵ The Directive also presumes that child victims have specific protection needs (art.22(4)).

Those victims who are identified as requiring special protection can be interviewed in premises designed or adapted for that purpose, be interviewed by professionals trained for that purpose, have all interviews with the same person, and be interviewed by a person of the same sex in the case of victims of sexual violence (art.23(2)). Additional protection can also be provided during criminal proceedings (art.23).

Lastly it is worth noting that the Directive pays particular attention to a number of groups, such as children and people with disabilities, without necessarily explicitly identifying them as “vulnerable”. Chapter 2 of the Directive, for example, concerns the provision of information and support to victims, and provides that communications with victims should be given in “simple and accessible language, orally and in writing”. It specifically indicates “[s]uch communications shall take into account the personal characteristics of the victims including any disability which may affect the ability to understand or to be understood” (art.3(2)). Meanwhile Recital 21, which also addresses information and advice provided by the competent authorities to victims, states,

“the victim’s knowledge of the language used to provide information, age, maturity, intellectual and emotional capacity, literacy and any mental or physical impairment should be taken into account. Particular account should be taken of difficulties in understanding or communicating which may be due to a disability of some kind, such as hearing or speech impediments.”

In conclusion, the Victims’ Rights Directive primarily adopts a view of vulnerability based on exogenous factors, and focuses on “vulnerability to secondary and repeat victimisation, and to intimidation and to retaliation”. This form of vulnerability is mainly related to the type or seriousness of the crime that the victim has suffered, or the behaviour of the person who committed the crime against the victim, but, at the same time, the Directive recognises that certain individuals, because of characteristics which are inherent (or endogenous) to them, such as children or people with disabilities, can find themselves particularly exposed to this kind of harm. Nevertheless, the Directive seems to acknowledge that all victims of crime are potentially vulnerable. The Directive is also notable for, on the whole, not classifying a priori any group as “vulnerable” and, when identifying needs that all victims have, such as the provision of

⁵³ Van der Aa, “Variable vulnerabilities?” (2016) 7 *New Journal of European Criminal Law* 39, 49.

⁵⁴ Van der Aa, “Variable vulnerabilities?” (2016) 7 *New Journal of European Criminal Law* 39, 49.

⁵⁵ Van der Aa, “Variable vulnerabilities?” (2016) 7 *New Journal of European Criminal Law* 39, 49.

information and support or access to premises, it directs attention to specific groups who may have particular needs in that context.

The needs of “vulnerable” victims are also referred to in the Directive on the European Protection Order.⁵⁶ Recital 15 of the Directive provides that in issuing and recognising protection orders,⁵⁷ authorities “should give appropriate consideration to the needs of victims, including particularly vulnerable persons, such as minors or persons with disabilities”. This indicates that the needs of all victims should be considered, whilst also focusing attention on victims who are regarded as “particularly vulnerable”.

A number of EU instruments addressing suspects and accused persons also pay particular attention to individuals identified as “vulnerable”. The 2009 Council Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings⁵⁸ foresaw the adoption of special safeguards for suspects or accused persons who are “vulnerable”, and resulted in the aforementioned Commission recommendation, as well as references to “vulnerable” suspects in several Directives which were adopted in the aftermath of the Roadmap.⁵⁹

Directive 2010/64 on the right to interpretation and translation in criminal proceedings,⁶⁰ directs the authorities to ensure that individuals are able to exercise their rights effectively “for example by taking into account any potential vulnerability that affects their ability to follow the proceedings and to make themselves understood” (Recital 27). More generally, this Directive can be seen as addressing a particular group of “vulnerable” suspects, namely “persons who do not speak or understand the language of the criminal proceedings concerned” (arts 2 and 3), without labelling them as de facto “vulnerable”. Indeed, the provision of the required interpretation and translations should remove the specific language-related cause of vulnerability.⁶¹ Directive 2012/13 on the right to information in criminal proceedings⁶² requires that suspects and accused persons be informed of their procedural rights in simple and accessible language, “taking into account any particular needs of vulnerable suspects or vulnerable accused persons” (art.3(2)). Directive 2013/48 on the right to access to a lawyer and on the right to communicate with third persons⁶³ establishes a generic duty owed to “vulnerable” suspects and accused persons by requiring Member States take their particular needs into account when applying the Directive (art.13). The provisions addressing persons regarded as “vulnerable” in these three instruments are rather brief and generally fail to provide elaboration, either in terms of the causes of “vulnerability” or additional duties that apply. This is especially true for Directives 2012/13 and 2013/48. Lastly, Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings⁶⁴ directs Member States to ensure that the particular needs of “vulnerable” persons are taken into account when

⁵⁶ Directive 2011/99 on the European protection order [2011] OJ L338/2.

⁵⁷ Defined as “a decision, taken by a judicial or equivalent authority of a Member State in relation to a protection measure, on the basis of which a judicial or equivalent authority of another Member State takes any appropriate measure or measures under its own national law with a view to continuing the protection of the protected person” (art.2(1)).

⁵⁸ Council Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, [2001] OJ C295/1.

⁵⁹ Van der Aa, “Variable vulnerabilities?” (2016) 7 *New Journal of European Criminal Law* 39, 41.

⁶⁰ Directive 2010/64 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1.

⁶¹ For a critical examination of how Directive 2010/64 (and Directive 2012/13) is being applied in practice and opinions on effective protection of procedural rights in line with the Directives see EU Agency for Fundamental Rights (FRA), *Rights of suspected and accused persons across the EU: translation, interpretation and information*, 2016.

⁶² Directive 2012/13 on the right to information in criminal proceedings [2012] OJ L142/1.

⁶³ Directive 2013/48 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1.

⁶⁴ Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1.

implementing the Directive, especially with regard to the right to be present at the trial and the right to a new trial (Recital 42). It specifically identifies children as “vulnerable” and provides that they should be given a specific degree of protection (Recital 43).

In substantive terms, the most significant EU instrument concerning suspects and accused persons regarded as “vulnerable” is the 2013 Commission Recommendation on the rights of vulnerable persons suspected or accused in criminal proceedings. The Recommendation defines “vulnerable persons” as those “who are not able to understand and to effectively participate in criminal proceedings due to age, their mental or physical condition or disabilities” (Recital 1). This definition focuses on endogenous factors. This understanding is reinforced by the Recommendation’s “presumption of vulnerability” which applies “in particular for persons with serious psychological, intellectual, physical or sensory impairments, or mental illness or cognitive disorders, hindering them to understand and effectively participate in proceedings” (art.7) and the recommendation to ensure that authorities have recourse to an independent expert who can carry out a medical examination (art.4).

The instrument recommends that Member States carry out an initial assessment to identify “vulnerable” individuals and their needs (Recital 6), and identifies a series of rights which such individuals should have, dependent on their circumstances. These include non-discrimination, information in an accessible format, the right to access a lawyer which should not be waived, medical assistance, recording of any questioning, and certain guarantees in the case of deprivation of liberty and privacy. The instrument also recommends that relevant officials receive training in how to treat “vulnerable” persons (Section 3, arts 5–17).

The Recommendation identifies both the causes of “vulnerability”, which are viewed only as endogenous and related to age, health and disability, and the “rights” of “vulnerable” individuals, which are identified in a far more precise way than in Directives 2010/64, 2012/13 and 2013/48. However, the Recommendation does not seem to cover suspects and accused persons who are vulnerable for a reason not specified in the text.

Critical commentary to date

Both the Victims’ Rights Directive and the Commission Recommendation on the rights of vulnerable persons suspected or accused in criminal proceedings have been subject to critical comment and reflection concerning how they conceive and address “vulnerability”.

Van der Aa has criticised the Victims’ Rights Directive, arguing that it fails to provide “tailored minimum rights for [victims who experience difficulty with communication]”. She notes “vulnerability as the inability to follow proceedings because of endogenic impairments does not lie at the heart of the Victim Directive”.⁶⁵ Undoubtedly greater clarity could have been provided, and the provisions related to persons with disabilities could have been strengthened, through the inclusion of a reference to the United Nations Convention on the Rights of Persons with Disabilities, to which the EU is a party, which addresses access to justice in art.13.

Turning to the Commission Recommendation on the rights of vulnerable persons suspected or accused in criminal proceedings, the civil society organisation, Fair Trials,⁶⁶ has criticised the instrument for being,

“a lost opportunity to broaden the notion of ‘vulnerable suspect’ and strengthen the protection afforded to numerous groups that could potentially find themselves in a situation of vulnerability.”⁶⁷

⁶⁵ Van der Aa, “Variable vulnerabilities?” (2016) 7 *New Journal of European Criminal Law* 39, 50.

⁶⁶ See <https://www.fairtrials.org/> [Accessed 23 October 2020].

⁶⁷ Fair Trials, Improving defence rights in Europe: Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, undated, p.2. See <https://www.fairtrials.org/wp-content/uploads/2017/06/Factsheet-on-Commission-Recommendation-on-procedural-safeguards-for-vulnerable-persons.pdf> [Accessed 23 October 2020].

It also regretted the failure to agree a comprehensive definition of “vulnerable adult persons” in line with case law of the ECtHR⁶⁸ or certain international instruments, and pointed out that a previous Commission document, the Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union,⁶⁹ identified a broader list of potentially “vulnerable groups”, including foreign nationals, people with children or dependents, people with low literacy levels, refugees, asylum seekers and people addicted to alcohol or drugs.⁷⁰ Dehaghani and Newman have adopted an even broader view of “vulnerability” in the context of suspects or persons accused of committing a crime, noting that such individuals can be “vulnerable” “due to their position of relative weakness to state”.⁷¹ The European Rights Network *Justicia* made similar points to Fair Trials and argued, shortly after the Recommendation was proposed in 2013, “in order to ensure that all vulnerable groups are effectively protected, an extensive but not exhaustive definition of vulnerability should be included in the proposal”.⁷² In fact, the absence of agreement on a common definition of “vulnerable adult persons” was one of the reasons given by the Commission for adopting a non-binding recommendation rather than legislation.⁷³

Commentators have also reflected on the substantive differences between the EU instruments addressing “vulnerable” victims on the one hand, and “vulnerable” suspects and accused persons on the other. Van der Aa has argued that “vulnerable” victims have “more elaborate privacy rights and more attention ... paid to their proper treatment during questioning”, while “vulnerable” suspects have “stronger interpretation and translation rights”.⁷⁴ She argues that this is related to the different conceptualisations of “vulnerability” found in the Victims’ Rights Directive and the Recommendation:

“They differ both in terms of the range of persons they aim to protect and in terms of the negative consequences they wish to remedy. When it comes to suspects, factors from within the suspect himself—his personal characteristics—determine whether the Recommendation applies or not. The Victim Directive, on the other hand, mainly focuses on exogenic factors, such as the type or the seriousness of the crime that the victim has suffered. Furthermore, while the Recommendation seeks to remedy the suspect’s diminished ability to effectively follow and understand the criminal procedure, the Victim Directive aims to prevent harm as a consequence of participation in the criminal procedure (secondary victimisation).”⁷⁵

⁶⁸ Much of this case law relates to art.5 ECHR on the right to liberty and security and art.6 ECHR on the right to a fair trial.

⁶⁹ Commission Green Paper, “Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union” COM(2003) 0075 final.

⁷⁰ Fair Trials, *Improving defence rights in Europe: Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings*, undated, p.2. The same point is made the *Justicia* European Rights Network in their Interim Position Paper on Vulnerable Suspected and Accused Persons in Criminal Proceedings Reform Presented by the European Commission on 27 November 2013, December 2013, p.10, <http://eujusticia.net/index.php/proceduralrights/category/vulnerable-accused-and-suspected-persons-measure-e/submissions-publications4> [Accessed 19 November 2019].

⁷¹ Dehaghani and Newman, “‘We’re vulnerable too’” (2017) 7 *Oñati Socio-Legal Series* 1199, 1221.

⁷² *Justicia* European Rights Network in their Interim Position Paper on Vulnerable Suspected and Accused Persons in Criminal Proceedings Reform Presented by the European Commission on 27 November 2013, December 2013, p.10.

⁷³ “Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings” COM(2013) 0822 final — 2013/0408 (COD), Explanatory Memorandum, para.10.

⁷⁴ Van der Aa, “Variable Vulnerabilities?” (2016) 7 *New Journal of European Criminal Law* 39, 42.

⁷⁵ Van der Aa, “Variable Vulnerabilities?” (2016) 7 *New Journal of European Criminal Law* 39, 42.

Summary conclusion

EU criminal law and policy pays attention to “vulnerable” victims of crime, and “vulnerable” suspects and persons accused of a crime, and seeks to ensure that their specific needs are addressed to some extent. However, in doing this, EU law does not adopt a common understanding of the concept of vulnerability. Victims of crime are perceived as “vulnerable” primarily because of exogenous factors, namely the risk of secondary and repeat victimisation, intimidation and retaliation, while suspects and accused persons are regarded as “vulnerable” primarily because of endogenous factors, namely age, physical or mental condition or disability. For both sets of instruments identified above, the perceived causes of vulnerability determine the purpose of the additional protection provided and the way in which “vulnerability” is assessed. Strengths and weaknesses in the approach adopted by EU law to “vulnerable” victims and “vulnerable” accused persons and suspects can be identified, as highlighted by van der Aa above. In particular, the instruments in question do not identify or target all individuals who can be in a situation of vulnerability, creating the risk that some individuals at risk of particular harm will be overlooked and consequently be exposed to that harm.

Vulnerability in EU consumer protection law

The following sub-sections consider the use of the concept of vulnerability in EU consumer protection law and summarise critical commentary to date.

Aims of EU consumer protection law

EU consumer policy aims at “protecting consumers from serious risks and threats that they are unable to tackle as individuals; empowering them to make choices based on accurate, clear and consistent information; enhancing their welfare and effectively protecting their safety as well as their economic interests”.⁷⁶ This is done within the framework of achieving internal market objectives, and the protection provided is largely based on the notion of an “average consumer”, who is deemed to be reasonably well informed, observant and circumspect. However, a number of Directives also recognise that some consumers are “particularly vulnerable”, and seek to provide a degree of extra protection to those consumers.

Who is “vulnerable” and what protection do they receive?

A number of EU consumer protection directives make explicit reference to “particularly vulnerable” consumers and address their situation in some way.⁷⁷ The Unfair Commercial Practices Directive,⁷⁸ the Consumer Rights Directive⁷⁹ and the General Product Safety Directive⁸⁰ all contain at least one such reference to “vulnerable” consumers.

⁷⁶ J. Valant, “Consumer Protection in the EU: Policy Overview”, European Parliamentary Research Service, September 2015, PE 565.904, p.3, [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA\(2015\)565904_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA(2015)565904_EN.pdf) [Accessed 23 October 2020].

⁷⁷ Some of the text in this section draws on L. Waddington, “Vulnerable and Confused: the Protection of “Vulnerable” Consumers under EU Law” (2013) 38 E.L. Rev. 757.

⁷⁸ Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450, Directives 97/7, 98/27 and 2002/65 and Regulation 2006/2004 (“Unfair Commercial Practices Directive”) [2005] OJ L149/22.

⁷⁹ Directive 2011/83 on consumer rights, amending Council Directive 93/13 and Directive 1999/44 and repealing Council Directive 85/577 and Directive 97/7 [2011] OJ L304/64.

⁸⁰ Directive 2001/95 on general product safety [2002] OJ L11/4.

The Unfair Commercial Practices Directive makes a distinction between “average” and “particularly vulnerable” consumers in providing protection from certain unfair commercial practices.⁸¹ According to art.5(2) of the Directive, commercial practices are considered to be unfair if they fail to comply with the requirement of professional diligence and materially distort the economic behaviour of the average consumer, who is assumed to be reasonably well informed, reasonably observant and circumspect.⁸² The Directive also aims at preventing the targeting and exploitation of “particularly vulnerable” consumers.⁸³ Article 5(3) of the Directive therefore awards special protection to “a clearly identifiable group of consumers who are particularly vulnerable” to a certain commercial practice or product. “Vulnerability” for the purpose of the Directive may arise out of the consumers’ “mental or physical infirmity, age or credulity”.⁸⁴ According to the European Commission, the reasons for establishing vulnerability are listed “indicatively” and cover a wide range of situations.⁸⁵

Commercial practices which are likely to “materially distort the economic behaviour” of such specifically “vulnerable” consumers will be assessed from the perspective of the average member of that group (art.5(3)). However, the trader must have been “reasonably expected to foresee” the “vulnerability” of the consumer (art.5(3)). Moreover, the protection of the “vulnerable consumer” does not preclude “the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally” (art.5(3)).

A further reference to “particularly vulnerable” consumers can be found in the Consumer Rights Directive, which lays down harmonised rules for the “common aspects of distance and off-premises contracts”⁸⁶ and other contracts.⁸⁷ The Directive provides for full or uniform harmonisation with regard to consumer information and the right of withdrawal from such contracts. Recital 34 of the Preamble states that in providing clear and comprehensible information to the consumer prior to the completion of any contract, the trader “should take into account the specific needs of consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee. However, taking into account such specific needs should not lead to different levels of consumer protection”. No further reference is made to “vulnerable” consumers in the recital or main body of the Directive.

In 2018 the Commission published a proposal for a Directive to amend both the Unfair Commercial Practices Directive and the Consumer Rights Directive.⁸⁸ The proposal does not address issues related to “vulnerable” consumers, other than to indicate that the Unfair Commercial Practices Directive is without prejudice to Member States’ freedom to make arrangements to protect the legitimate interests of consumers with regard to unsolicited visits at their home by a trader, where such arrangements are justified on grounds of public policy or the protection of private life. In Recital 44, it notes that,

⁸¹ For a discussion of the Unfair Commercial Practices Directive and the “vulnerable” consumer, see R. Incardona and C. Poncibò, “The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution” (2007) 30 *Journal of Consumer Policy* 28.

⁸² Recital 18. See also *Gut Springenheide* (C-210/96) EU:C:1998:369 at [31] and *Konsumentombudsmann v Viking Sverige AB* (C-122/10) EU:C:2011:299 at [22].

⁸³ Commission, “Proposal for a Directive concerning unfair business-to-consumer commercial practices in the Internal Market” COM(2003) 356 final.

⁸⁴ See art.5(3) as well as recital 19 of the Directive’s preamble.

⁸⁵ “Commission, Staff Working Document, Guidance on the Implementation of Directive 2005/29 on unfair commercial practices” SEC(2009) 1666, pp.29–31.

⁸⁶ Recital 2 and Chapter III of the Directive.

⁸⁷ See Chapter II of the Directive.

⁸⁸ “Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13 of 5 April 1993, Directive 98/6, Directive 2005/29 and Directive 2011/83 as regards better enforcement and modernisation of EU consumer protection rules” COM(2018) 185.

“some particularly aggressive or misleading marketing practices in the context of visits to the consumer’s home without the consumer’s prior agreement or during commercial excursions can put consumers under pressure to make purchases of goods they would not otherwise buy and/or purchases at excessive prices, often involving immediate payment. Such practices often target elderly or other vulnerable consumers.”

Lastly, the General Product Safety Directive also contains a reference to “particularly vulnerable” consumers. The Directive is intended to secure a high level of product safety for consumer products in the EU and to contribute to the proper functioning of the internal market. Safety is to be assessed through a variety of means including European standards, Community (now EU) technical specifications, codes of good practice, the state of the art and the expectation of consumers (art.3(3)). Recital 8 of the Preamble refers to “particularly vulnerable” consumers, and provides that one of the factors to be taken into account in assessing the safety of products is the risk they pose to such consumers, and “in particular children and the elderly”. Under the Directive, safety is to be assessed with regard to the “reasonable foreseeable use” of a product, and, when assessing the safety of the product account shall be taken of “the categories of consumers at risk when using the product, in particular children and the elderly” (art.2(b)).

In addition to the explicit references to “particularly vulnerable” consumers found in the three instruments discussed above, the Credit Agreements for Consumers Directive⁸⁹ includes provisions which could be interpreted as providing for additional de facto protection for consumers who are disadvantaged or “vulnerable” for one reason or another. The Directive provides for protection for consumers, by ensuring that all consumers receive certain specified information regarding the credit agreement, as well as facilitating and promoting an internal market in consumer credit. For both these reasons, the Directive provides for “full harmonisation” in the relevant field.⁹⁰ Unlike the Directives considered above, this instrument contains no reference to “vulnerable” consumers. However, all consumers should benefit from the provision of clear written information regarding consumer credit agreements.⁹¹ In addition, Recital 27 to the Preamble provides that,

“Where appropriate, the relevant pre-contractual information, as well as the essential characteristics of the products proposed, *should be explained to the consumer in a personalised manner* so that the consumer can understand the effects which they may have on his economic situation.” [emphasis added]

The Directive therefore seems to expect that additional efforts are made by sellers to explain the nature of credit agreements to consumers who would have difficulty understanding the standard information as provided for in the Directive, or understanding the individual implications of purchasing the product. Such consumers could include some elderly or young people, people with learning difficulties, people who have difficulty reading the language in which the information is provided, and people with limited experience of financial matters. It could also potentially include people with visual impairments, who are not able to read the information provided in standard formats.

Critical commentary to date

As noted above, the Unfair Commercial Practices Directive provides that vulnerability may arise out of the consumers’ “mental or physical infirmity, age or credulity”. A similar reference to the causes of “vulnerability” is found in Recital 34 of the Consumer Rights Directive. Wiesbrock has argued that the

⁸⁹ Directive 2008/48 on credit agreements for consumers and repealing Council Directive 87/102 [2008] OJ L133/66.

⁹⁰ Directive 2008/48 on credit agreements for consumers and repealing Council Directive 87/102 [2008] OJ L133/66, Recital 9.

⁹¹ Article 4(2) requires that specified information be provided in a “clear, concise and prominent way”.

exact definitions of “mental infirmity” and “credulity” are not clear and the vagueness of the latter concept is bound to lead to difficulties in proving the existence of “vulnerability”.⁹² More generally, she argues that the Directives apply a “non-individualistic, stereotypical test to the identification of consumer vulnerability”.⁹³ In the context of the Unfair Commercial Practices Directive, Wilhelmsson has argued that art.5(3),

“only concerns vulnerable groups that are ‘clearly identifiable’ [and] it is primarily useful with regard to certain particular groups of consumers as for example children, if a practice is considered sufficiently to affect such groups.”

He states that what he describes as “situational vulnerableness”, “easily falls outside the scope of the provision”.⁹⁴ “Situational vulnerability” arises from the interaction of a person with a situation of consumption, rather than an inherent characteristic.⁹⁵ One example of situational vulnerability would be a blind person who is unable to access information about his or her purchase, including instructions for how to use the product and safety information, because that information is provided on paper and in written format. The (potential) harm in this situation could be removed by requiring that relevant information be available in an accessible format on request.

The European Parliament Committee on the Internal Market and Consumer Protection has discussed some of the factors contributing to vulnerability in a report.⁹⁶ The Committee has criticised the concept of “vulnerable consumers” as understood in EU consumer protection law because it is “endogenous” and “targets a heterogeneous group comprised of persons who, on a permanent basis, are considered as such because of their mental, physical or psychological disability, age, credulity or gender”.⁹⁷ The Committee argued that,

“the concept of vulnerable consumers should also include consumers in a situation of vulnerability, meaning consumers who are placed in a state of temporary powerlessness resulting from a gap between their individual state and characteristics on the one hand, and their external environment on the other hand”.⁹⁸

The Committee’s report notes that the diversity of vulnerable situations has hindered a uniform approach in EU law, and that currently vulnerability is addressed on a case-by-case basis. In contrast, the report

⁹² A. Wiesbrock, “Disability as a Form of Vulnerability under EU and CoE Law: Embracing the ‘Social Model’?”, in F. Ippolito and S. Iglesias Sánchez (eds), *Protecting Vulnerable Groups, The European Human Rights Framework* (Oxford: Hart Publishing, 2015), p.87.

⁹³ A. Wiesbrock, “Disability as a Form of Vulnerability under EU and CoE Law: Embracing the ‘Social Model’?”, in F. Ippolito and S. Iglesias Sánchez (eds), *Protecting Vulnerable Groups, The European Human Rights Framework* (Oxford: Hart Publishing, 2015), p.90.

⁹⁴ T. Wilhelmsson, “The Informed Consumer v the Vulnerable Consumer in European Unfair Commercial Practices Law—A Comment” in G. Howells et al. (eds), *The Yearbook of Consumer Law 2007* (Farnham: Ashgate, 2007), p.218.

⁹⁵ Wilhelmsson in “The Informed Consumer” in Howells et al. (eds), *The Yearbook of Consumer Law 2007* (Farnham: Ashgate, 2007), p.218.

⁹⁶ *Report on a strategy for strengthening the rights of vulnerable consumers* (2011/2272/(INI)), A7-0155/2012, Committee on the Internal Market and Consumer Protection, Rapporteur: M. Irigoyen Pérez. A similar approach is identified by S. Menzel Baker, J.W. Gentry and T.L. Rittenberg, “Building Understanding of the Domain of Consumer Vulnerability” (2005) 25 *Journal of Macromarketing* 128, 129–131.

⁹⁷ *Report on a strategy for strengthening the rights of vulnerable consumers* (2011/2272/(INI)), A7-0155/2012, Committee on the Internal Market and Consumer Protection, Rapporteur: M. Irigoyen Pérez, Finding D, p.6.

⁹⁸ *Report on a strategy for strengthening the rights of vulnerable consumers* (2011/2272/(INI)), A7-0155/2012, Committee on the Internal Market and Consumer Protection, Rapporteur: M. Irigoyen Pérez, Finding D, pp.6–7.

submits EU legislation must take into account consumers’ various needs, abilities and circumstances.⁹⁹ In fact this would also seem to require a case-by-case analysis, but, unlike current EU consumer protection law, the Committee’s favoured approach seems to reflect the universal view of vulnerability.

It is also worth noting that the amount of additional protection offered to the groups of consumers who are regarded as “vulnerable” under these instruments is limited. Jules Stuyck, commenting on art.5(3) of the Unfair Commercial Practices Directive, has stated that the scope of the protection offered is “a compromise”, “rather limited” and the categories of “vulnerable” consumers recognised “seems arbitrary”.¹⁰⁰ The arbitrariness of the protected groups is similarly reflected in the General Product Safety Directive, where children and elderly people are recognised as consumers who may be at particular risk, but, for example, persons with disabilities are not.¹⁰¹

Summary conclusion

The Unfair Commercial Practices Directive, the Consumer Rights Directive and the General Product Safety Directive aim to provide limited additional protection to consumers who are regarded as “vulnerable”. The Directives conceive of vulnerability as a condition which largely attaches to specific groups, which are identified by an “infirmity”, their youthful or elderly age or because they are “particularly credulous” or, in the case of the General Product Safety Directive, “children and the elderly”. This reflects a largely endogenous view of the causes of vulnerability. Under these Directives, consumers are regarded as separable into two groups: “average consumers” and “particularly vulnerable consumers”, with the latter group entitled to a minimum degree of additional protection.

The Credit Agreements for Consumers Directive adopts a somewhat different approach, and requires that all consumers benefit from the provision of clear written information, with the Directive’s preamble indicating that information should be provided in a personalised manner where needed. This requirement is not directed to a pre-defined group of consumers, and seems to recognise that all consumers may potentially struggle to understand information related to financial matters.

Critique

In addition to mapping and understanding how EU criminal law and consumer protection law understands and makes use of the concept of vulnerability, this paper set out to explore the strengths and weaknesses of the current approach, and whether the protection of individuals who are vulnerable, or are at risk of harm, could be achieved in other ways.

This section firstly reflects on the different approaches to vulnerability found in EU criminal law and consumer protection law, and the implications that flow from those approaches, and then considers whether and how the universal understanding of vulnerability could be incorporated within these areas of EU law, and the implications of that. The section also considers whether the current approach, involving different understandings of “vulnerability” within and amongst different areas of EU law, could be justified in principle, or whether a coherent or common approach, based on the universal model of vulnerability, would be more appropriate.

⁹⁹ *Report on a strategy for strengthening the rights of vulnerable consumers* (2011/2272/(INI)), A7-0155/2012, Committee on the Internal Market and Consumer Protection, Rapporteur: M. Irigoyen Pérez, para.1, p.7.

¹⁰⁰ J. Stuyck, “The Notion of the Empowered and Informed Consumer in Consumer Policy and How to Protect the Vulnerable Under Such a Regime” in G. Howells et al. (eds), *The Yearbook of Consumer Law 2007* (Farnham: Ashgate, 2007), pp.178 and 179.

¹⁰¹ See Recital 8 and art.2(b)(iv) of the Directive, referred to above.

Vulnerability as an attribute linked to specific characteristics in EU criminal and consumer protection law

The minority group view of “vulnerability” is dominant in both the fields of EU criminal law and consumer protection law. For example, Recital 15 of the Directive on the European Protection Order adopts such an approach, and provides that authorities “should give appropriate consideration to the needs of victims, including particularly vulnerable persons, such as minors or persons with disabilities” when issuing and recognising protection orders. The examples of victims who are regarded as “vulnerable” is based on endogenous characteristics and seems to label minors and persons with disabilities as “vulnerable” per se.

The 2013 Commission Recommendation on the rights of vulnerable suspects and accused persons also adopts such an approach and defines “vulnerable persons” as those “who are not able to understand and to effectively participate in criminal proceedings due to age, their mental or physical condition or disabilities” (Recital 1). While the identified persons are undoubtedly at a disadvantage,¹⁰² the Recommendation does not seem to acknowledge many other factors which could potentially contribute to the vulnerability of suspects and accused persons, such as lack of knowledge of the national language, emotional factors,¹⁰³ insecure residency status or low level of education. Indeed, the assumption seems to be that “vulnerability” is to be equated with young (or possibly old) age, disability and health status, and a universal approach is not taken.¹⁰⁴ The Recommendation therefore does not seem to cover suspects and accused persons who are vulnerable for a reason not specified in the text. This impression of “vulnerability” under the Recommendation is reinforced by a report of the EU Fundamental Rights Agency on the rights of suspected and accused persons relating to translation, interpretation and information, which, in the chapter on “vulnerable” individuals, only focuses on persons with disabilities (both physical and intellectual) and children.¹⁰⁵

The approach is arguably even more dominant in EU consumer protection law, where the Unfair Commercial Practices Directive, the Consumer Rights Directive and the General Product Safety Directive all conceive of vulnerability as a condition which largely attaches to specific groups. This reflects an endogenous view of the causes of vulnerability which distinguishes “vulnerable” consumers from “average” consumers. Based on the interpretation given to these Directives by the EU Court of Justice, Weatherill has concluded that “vulnerable consumers are sacrificed to the interests of self-reliant consumers in deregulation, market integration and wider choices”.¹⁰⁶ Weatherill’s view is also relevant from the perspective of Fineman’s vulnerability theory. Fineman has argued that the “‘vulnerable subject’ must

¹⁰² For example, in the United Kingdom it is estimated that 20–30 per cent of offenders have learning difficulties which make it difficult for them cope with the criminal justice system, Dehaghani and Newman, “‘We’re Vulnerable Too’” (2017) 7 *Oñati Socio-Legal Series* 1199, 1208. However, while some individuals with learning difficulties will be regarded as persons with serious impairments or cognitive disorders, others may not be regarded as meeting this threshold, and may therefore not be identified as vulnerable under the Recommendation.

¹⁰³ Van der Aa, “Variable Vulnerabilities?” (2016) 7 *New Journal of European Criminal Law* 39, 47.

¹⁰⁴ Some authors have argued for an even broader approach to vulnerability in the criminal justice system. R. Dehaghani and D. Newman, for example, refer to “three layers of vulnerability”, including not only suspects, but also custody officer and defence lawyers, and institutions (the police service and criminal legal aid system). They argue “all those involved in the criminal process should be considered as worthy of attention as widening our conceptions of vulnerability can highlight systematic weaknesses that reveal the frailty of access to criminal justice in practice, impacting on all who rely on the state to uphold justice”. Dehaghani and Newman, “‘We’re Vulnerable Too’” (2017) 7 *Oñati Socio-Legal Series* 1199, 1212.

¹⁰⁵ EU Agency for Fundamental Rights (FRA), *Rights of suspected and accused persons across the EU: translation, interpretation and information*, Ch.4, 2016.

¹⁰⁶ S. Weatherill, “Recent Case Law Concerning the Free Movement of Goods: Mapping the Frontiers of Market Deregulation” (1999) 36 *C.M.L.R.* 51, 58.

replace the autonomous and independent subject asserted in the liberal tradition”.¹⁰⁷ This is a far more realistic (but also more complex) way of perceiving of market participants, and would result in a state which would be “more responsive to and responsible for the vulnerable subject”.¹⁰⁸ In contrast, EU consumer law is currently very much modelled on the average consumer who is a “competent social actor” and able to make “rational choices”,¹⁰⁹ and interventions to protect consumers who are vulnerable in some way are kept to a minimum. EU law perceives most consumers as not “vulnerable”, but regards a small group of “others” as “vulnerable”. As such, it may contribute to the marginalisation and stigmatisation of those who are identified as “vulnerable”.

Vulnerability as a universal experience in EU criminal and consumer protection law

Both EU criminal law and consumer protection law reveal isolated instances in which vulnerability is regarded as a universal phenomenon, potentially impacting on everyone who comes into contact with the criminal justice system or who considers or enters into a consumer contract. This understanding implies that law and policy should seek to remove factors which contribute to a situation of vulnerability, and empower all individuals, rather than classifying certain individuals as “vulnerable” per se.

The Victims’ Rights Directive is notable for, on the whole, not classifying a priori any group as “vulnerable” and, when identifying needs that all victims have, such as the provision of information and support or access to premises, it directs attention to specific groups who may have particular needs in that context. It therefore adopts a universal approach, whilst recognising that certain victims may face a greater risk of harm. Chapter 2 of the Directive, for example, concerns the provision of information and support to victims, and provides that communications with victims should be given in “simple and accessible language, orally and in writing”. In that sense, the Directive can be viewed as aiming to empower individuals by requiring Member States to take account of different and individual circumstances, although it often fails to elaborate on how the needs of particular individuals with specific characteristics are to be met.

The Credit Agreements for Consumers Directive also includes provisions which could be interpreted as based on the universal approach to vulnerability. It requires that all consumers receive clear written information regarding consumer credit agreements, and Recital 27 to the Preamble provides that information “should be explained to the consumer in a personalised manner”. By not identifying and confining protection to specific groups of consumers who are pre-identified as “vulnerable”, but instead requiring a personalised approach for all consumers, Recital 27 opens the door to the provision of information in adapted formats whenever needed. It does this in the same way as the provisions concerning communication in Chapter 2 of the Victims’ Rights Directive, although the latter provisions are legally binding, rather than found in the preamble. It seems that requirements relating to the provision of information may lend themselves to a universal recognition of vulnerability in these two areas of EU law, although that language is not used explicitly. However, it should also be noted that, in the consumer context, information transparency which is intended to allow individuals to make an informed choice,¹¹⁰ “is the least protective approach possible,

¹⁰⁷ Fineman, “The Vulnerable Subject” (2008–9) 20 *Yale Journal of Law and Feminism* 1, 2. See also A. Timmer, “A Quiet Revolution: Vulnerability in the European Court of Human Rights” in M. Albertson Fineman and A. Grea (eds), *Vulnerability, Reflections on a New Ethical Foundation for Law and Politics* (Farnham: Ashgate, 2013), p. 150.

¹⁰⁸ Fineman, “The Vulnerable Subject” (2008–9) 20 *Yale Journal of Law and Feminism* 1, 2.

¹⁰⁹ Fineman, “The Vulnerable Subject” (2008–9) 20 *Yale Journal of Law and Feminism* 1, 10. See also, Fineman, “The Vulnerable Subject and the Responsive State” (2010) 60 *Emory Law Journal* 251, 262–263 on the “liberal subject”.

¹¹⁰ Note also that there is a great deal of literature which argues that consumers frequent do not act rationally, even when presented with clear information regarding the consequences of entering a consumer contract, and that consumer rationality is bounded. For a brief overview of this argument see B. Schüller, “The Definition of Consumers in EU Consumer Law”, in J. Devenney and M. Kenny (eds), *European Consumer Protection: Theory and Practice* (Cambridge: Cambridge University Press, 2012), pp. 130–132.

involving the smallest relative deviation from a traditional freedom of contract approach” and implies that “as long as the information is provided in the appropriate format, consumers are treated as free to choose how to proceed”,¹¹¹ without any further recognition of “vulnerability”.

Adopting different understandings of vulnerability in EU criminal law and consumer protection law?

This article has already identified certain problems which can be associated with the minority group model of vulnerability, including the risks of stigmatisation and marginalisation, and being under or over inclusive of individuals at risk of, or experiencing, harm. However, one could argue that, in light of the different structures and objectives of EU criminal law and consumer protection law, it may still be appropriate to adopt differentiated understandings of vulnerability in, and within, these different fields law, and that the absence of a single concept does not necessarily lead to incoherence, but rather may facilitate a tailored approach in light of different risks, different client groups and different policy goals. Alternatively, in light of the complexity of the concept of vulnerability itself, it could be appropriate to adopt a variety of different models to ensure different “vulnerable groups” are recognised.

However, it is submitted that the universal model of vulnerability is sufficiently flexible to address differentiated areas of law and policy and different (potential) causes of harm experienced by vulnerable individuals. This is because the model seeks to (re)define the relationship between the individual and the state in all areas, and recognises that all institutions and provisions of the state must be used to meet the needs of all.¹¹² It also focuses attention on “how social provision can ameliorate or magnify our vulnerability”.¹¹³ Such institutions and provisions exist across all areas of life and policy, and include, for example, the criminal justice system and the rules regulating consumer contracts. Moreover, since the universal model of vulnerability allows for the recognition that individuals with certain characteristics, such as old or young age, or physical or mental impairment or disability, can be at particular risk of harm in certain circumstances, it can focus attention on such groups without, however, excluding other individuals from protection.

In contrast, the minority group model of vulnerability is inadequate to meet these challenges, and based on a false premise in that it fails to recognise that everyone is vulnerable. Moreover, a set of laws and policies which are based primarily on the minority model of vulnerability, with occasional nods of recognition to the universal model, as is the case for both EU criminal law and consumer protection law at present, is incoherent in that it sends out conflicting and inconsistent messages about what vulnerability is, and the responsibility the EU and Member States have to address vulnerability and empower vulnerable individuals.

However, at this point it seems worth noting that this article has hinted at what may be an important difference between how EU criminal law and EU consumer law view the protection of “vulnerable” individuals. EU consumer protection law places a high importance on achieving internal market objectives at the same time as providing consumers with protection. The provision of additional protection to consumers regarded as “vulnerable” seems to be a delicate balancing act which should not place anything more than limited additional obligations on sellers, as this could be seen as undermining internal market aims, such as deregulation and market integration. In this balancing act, the scales may be weighed against

¹¹¹C. Willett and M. Morgan-Taylor, “Recognising the Limits of Transparency in EU Consumer Law” in J. Devenney and M. Kenny (eds), *European Consumer Protection: Theory and Practice* (Cambridge: Cambridge University Press, 2012), pp.148–149.

¹¹²Fineman, “The Vulnerable Subject and the Responsive State” (2010) 60 *Emory Law Journal* 251 and Herring, “Defining Vulnerability” in *Vulnerable Adults and the Law* (Oxford: Oxford University Press, 2016), p.19.

¹¹³Herring, “Defining Vulnerability” in *Vulnerable Adults and the Law* (Oxford: Oxford University Press, 2016), p.32.

“vulnerable” consumers, and both the scope of vulnerability and the nature of any additional protection is consequently restricted. This is reflected in Weatherill’s arguments noted above. On the other hand, the TFEU itself establishes the goal of ensuring “a high level of consumer protection” (art.169). Nevertheless, if high levels of protection of “vulnerable” consumers and an individualised analysis and approach are indeed seen as a threat to the internal market, then policy makers may not wish to provide protection to all individuals who are in a situation of vulnerability, and to leave some, or indeed, many vulnerable consumers unprotected or under-protected. Space does not allow for this contentious suggestion to be explored further. However, if the goal is to provide partial protection to a limited group of “vulnerable” consumers, then this may be challenged by the adoption a universal approach to vulnerability. In contrast, the minority group model of vulnerability allows such restrictions.

EU criminal law must also carry out a balancing act to some degree, and balance the interests of suspects and accused persons against those who are victims of crime, and the needs of society in general. However, this balancing act does not seem to be weighed against those regarded as “vulnerable”, whichever side of the legal process they fall, and the level of protection provided and the range of vulnerabilities recognised, whilst perhaps limited at times, does not seem to be influenced by the need to ensure other goals. Protecting all “vulnerable” individuals is consistent with the overall goal of ensuring justice and, in this sense, there seems to be an alignment between the policy goals of EU criminal law and the universal model of vulnerability.

An alternative approach: embracing the universal model of vulnerability

It has been argued above that vulnerability is a universal phenomenon and that legislation and policy should focus on mechanisms for the prevention of actions and behaviour which can cause harm to individuals, as well as contributing to the creation of resilience and empowerment of individuals. Both EU criminal law and EU consumer protection law can be criticised for failing to do this adequately at present, and the criticism seems particularly justified in the areas of consumer protection law and EU criminal law with regard to suspects and accused persons.¹¹⁴

Given the flaws identified with the minority group model of vulnerability, and the restricted use of the universal model of vulnerability in EU criminal law and consumer protection law at present, the question arises whether EU law could protect individuals who are at risk of harm in other ways and, indeed, in better ways. It is submitted that one way in which this could be achieved, would be to expand the recognition of vulnerability as a universal experience under EU criminal law and consumer protection law.

In terms of how to legislate to promote the recognition and responsiveness to this understanding of vulnerability in EU criminal law and consumer protection law, the provisions concerning communication and information provision in the Victims’ Rights Directive and the Credit Agreements for Consumers Directive arguably already provide one model. Neither instrument refers to “vulnerable” individuals in the context of communication and information provision, but both address the provision of information in a personalised manner, taking account of individual needs and abilities. Both instruments therefore identify a need shared by everyone in a specific situation, and indicate that the relevant organisation, body or seller should take account of individual circumstances to meet that need. This approach recognises universal vulnerability—in that it identifies a shared or common need which, if unmet, would leave each of us in a disadvantaged situation—and requires that that need is met taking account of individual circumstances. Fineman has also proposed such an approach in the context of bargaining and contracting, and proposed that capacity “might be seen as existing on a spectrum, not as an absolute attribute”; “partners” could provide support for (older) people in need of monitoring; fiduciary duties could be placed on family

¹¹⁴ See: L. Waddington, “Vulnerable and Confused” (2013) 38 E.L. Rev. 757 and Van der Aa, “Variable Vulnerabilities?” (2016) 7 *New Journal of European Criminal Law* 39.

members and carers, lawyers, bank officials and other actors; and a duty of fair dealing could be placed on creditors or other financial actors. She argues that, since many people are vulnerable when interacting with financial institutions, such approaches should be generalised and “fashioned on the universal vulnerable subject”, rather than confined to elderly people.¹¹⁵

This approach, of identifying common needs and requiring that they be met in a personalised manner, can be complemented by legislative provisions which address specific causes of disadvantage for certain groups and seek to remove those. Such an approach is compatible with the understanding that while vulnerability is universal, some individuals are more likely to experience harm than others in specific situations. An example of EU legislation which adopts this targeted approach is the European Communications Code.¹¹⁶ The Code aims to modernise EU telecoms rules and covers electronic communications networks, electronic communications services, associated facilities and associated services. Whilst the Code is a very long instrument, it pays particular attention to the situation of persons with disabilities, who, in some circumstances, may be at risk of being unable to access and use the relevant services because of lack of accessibility or other reasons. The Code states in its preamble (Recital 296):

“In line with ... the obligations enshrined in the United Nations Convention on the Rights of Persons with Disabilities, the regulatory framework should ensure that all end-users, including end-users with disabilities, older people, and users with special social needs, have easy and equivalent access to affordable high quality services regardless of their place of residence within the Union.”

Consequently a key aim of the Directive is to,

“ensure the provision throughout the Union of good quality, affordable, publicly available services through effective competition and choice, to deal with circumstances in which the needs of end-users, including those with disabilities in order to access the services on an equal basis with others, are not satisfactorily met by the market and to lay down the necessary end-user rights. (Article 1 (2)(b)).”

The Code therefore sets out requirements intended to ensure that people with disabilities are able to access electronic communications, such as the telephone network and the internet, on an equal basis with others.¹¹⁷ The end goal is to achieve choice and equivalent access for users with disabilities (art.3(2)(d)). In this respect, the Code does not use the language of “vulnerability”, but rather identifies a particular group which may be at risk of disadvantage, and requires that action be taken to prevent that disadvantage. This approach has also been applied in other areas of EU law,¹¹⁸ and illustrates the possibility to adopt targeted measures for specific groups at risk of harm or disadvantage, without necessarily using the language of vulnerability. Moreover, by identifying specific groups who are at risk of harm, and specifying what steps must be taken to avoid that harm, greater clarity and guidance can be established with regard to the specific action which should be taken. Where such individuals and the relevant measures can be readily identified, the need for an individualised analysis and response is removed, creating greater certainty and efficiency. However, this will not be possible with regard to all forms of vulnerability in all settings.

¹¹⁵ Fineman, “‘Elderly’ as Vulnerable” (2012) 20 *Elder Law Journal* 71, 94–95.

¹¹⁶ Directive 2018/1972 establishing a European Electronic Communications Code (Recast) [2018] OJ L321/36.

¹¹⁷ The specific requirements set out in the Code in this respect are not explored further in this paper.

¹¹⁸ See, e.g., Directive 2001/83 on the Community code relating to medicinal products for human use [2004] OJ L311/67, as amended by Directive 2002/98, Directive 2004/24 and Directive 2004/27, which requires that medicinal products must be labeled in Braille, and Directive 2011/24/ on the application of patients’ rights in cross-border healthcare [2011] OJ L88/45, which requires that information be provided on the accessibility of hospitals for people with disabilities be made available, and that this information be provided in disability accessible formats.

Conclusion

This examination of the understanding of vulnerability and “vulnerable groups” in the fields of EU criminal law and consumer protection law has revealed that there is no common understanding of the concept and a lack of overall coherency across the two policy fields. Indeed, a common understanding is not even necessarily found within single fields, with EU criminal law in particular adopting different views of “vulnerability” with regard to victims of crime, and suspects and accused persons, respectively. The understanding of “vulnerability” with regard to victims is situational, and therefore mostly exogenous, whilst “vulnerability” is understood largely as based on inherent (endogenous) characteristics in the context of suspects and accused persons. The latter minority group approach is also dominant in the field of EU consumer protection law.

The purposes served by highlighting “vulnerable groups” and individuals in legislation are also different. References to “vulnerability” result in a stronger focus on the need for individualised assessments, and tailored measures, in EU criminal law than is the case for EU consumer protection law. The provisions addressing “vulnerable” consumers are particularly brief and provide very little extra protection. EU legislation in this field very much emphasizes market freedom and consequently limited additional protection is provided to those individuals who are regarded as “vulnerable” in the market.

However, both fields of EU law also reveal evidence of a universal approach to vulnerability being taken with regard to communication and information provision, which should be tailored to individual needs and abilities. These requirements, found in both the Victims’ Rights Directive (Recital 21 and art.3(2)) and the Credit Agreements for Consumers Directive (Recital 27), are based on the understanding that all individuals may have difficulty understanding and appreciating information in certain circumstances, and indicate a need for a personalised approach. Neither instrument refers to vulnerability in this context, although there is sometimes some recognition that particular groups, such as children and people with disabilities, are more likely than others to require the provision of information in an adapted format. This approach seems to be based on empowering all individuals. It may be that information provision is a field which lends itself in particular to a recognition of the universal nature of vulnerability—however, the legislative language also reveals the potential for EU to such an approach to vulnerability in other areas, and this potential should be explored and developed further in the future. A wider recognition of the concept of universal vulnerability in EU law, involving a broad understanding of the causes of particular vulnerability, might allow for better protection of all individuals, whilst avoiding stigma and labelling of specific groups.