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# Comparing vulnerability?

How can EU Comparative law methods shed light on the concept of the vulnerable consumer.

Dr Jule Mulder\*

**Abstract:** The paper discusses the use of comparative law methods in the context of EU law on consumer vulnerability. It proposes a culturally informed comparative method that takes into account multi-layered national narratives that influences the interpretation and application of the EU concept at national level. This should help us to develop a sophisticated understanding of the concept and political, cultural and legal dynamics within the harmonisation process.

**Key words:** Consumer law, consumer vulnerability, culturally informed comparative method, European Comparative law

## I Introduction

This paper explores how to conduct a comparative study about the European concept of the vulnerable consumer. It is exploratory in nature and considers a number of issues that should be included in the comparison to produce sound conclusions within a feasible project. The proposed method aims to expose the factors that influence the interpretation and application of the EU concept once implemented into national law. As such, it can explain why the national application of the EU concepts differs between the Member States, despite the common EU origin and the CJEU's exclusive competence to interpret EU law. The approach challenges us to dig deep into the national context and analyse how legal and non-legal factors shape the concept's meaning and reach at national level. Using this method should thus help us develop a sophisticated understanding of the concept of the vulnerable consumer, its meaning within the diverse EU Member States, and its role within the broader harmonisation process.

The concept of the "vulnerable consumer" has entered the EU policy agenda. EU consumer law does not simply address consumer vulnerabilities in general, but at times also recognises that some consumers are more vulnerable than others and thus require special protection or means of empowerment. The recognition advances a new approach of assessment of business to consumer transactions, compared to the approach based on the benchmark of the average consumer. Firstly, while consumer law generally applies by virtue of the consumer status, protections regarding vulnerable consumers only apply to certain consumers, or more precisely, the specific vulnerability of some consumers requires a different assessment of the parties' actions. Secondly, while consumer law is usually mandatory, meaning that consumers cannot opt-out from the consumer protection even if they do not benefit from it, the vulnerability concept invites us to assess the effect of measures on different groups of consumers. For example, some consumer practices may only be unlawful if the targeted consumers would otherwise suffer a significant detriment due to their

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vulnerability.<sup>1</sup> The focus on the vulnerable consumer thus constitutes a significant shift within EU consumer law. However, EU law has not yet seriously engaged with the concept.<sup>2</sup> The specific meaning and scope of the concept is thus uncertain and deserves further analysis.

Analysing the concept of the vulnerable consumer from a comparative perspective can help us understand its precise meaning and scope. Given the diverse cultural, economic and legal traditions within the EU, it is likely that the Member States will retain significant differences in terms of application and interpretation when engaging with the undefined concept. These approaches are then able to feed back to the European level and thus influence the interpretation from the bottom up while also retaining their diversity. Thus, while the concept is introduced by EU law and interpreted by the CJEU, its potentially diverse and contradictory meaning can only be discovered by considering the Member States' approaches.

To explore what should be included in the comparative analysis of the reception of the concept of vulnerable consumer at the Member State level, the paper proceeds in three stages. Firstly, the paper briefly discusses the concept of the vulnerable consumer from an EU perspective, to identify the EU requirements for the implementation and application at a national level. It will be shown that EU law addresses some vulnerabilities in a targeted manner but remains imprecise in other areas. Secondly, the paper will then proceed to briefly discuss the proposed method for a comparative analysis within the context of European harmonised law. The aim is not to recap the extensive and diverse literature on comparative law methods and methodologies. Rather, the discussion will identify why some traditional approaches need some adjustment for the current context. Finally, the paper will identify the substantive scope of the analysis considering the EU concept of the vulnerable consumer, by reference to a number of issues that should be explored within the comparative analysis.

## II The vulnerable consumer within EU law

EU consumer law recognises and addresses consumer vulnerability by empowering consumers in the pre and post-contractual phase and by regulating the content of consumer contracts. While some of the provisions preserve the economic interest of the weaker party,<sup>3</sup> other rules are designed to empower average consumers, defined as "reasonably well informed and reasonably observant and circumspect".<sup>4</sup> For example, rules on disclosure and cooling-off periods presumably enable consumers to make informed decisions and re-examine the agreements after their conclusion. This is supposed to improve consumers' bargaining position, as they negotiate on a more equal playing field, without interfering with the contractual freedom of the parties or the content of the contract. However, these rules will not benefit consumers who are unable to engage with and respond to the information.<sup>5</sup> While it has been suggested that this is a justifiable limitation that protects the

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<sup>1</sup> EP and Council Directive (EC) 2005/29 concerning unfair business-to-consumer commercial practice in the internal market [2005] OJ L149/22 art 5(3).

<sup>2</sup> Lisa Waddington, 'Reflections on the Protection of 'Vulnerable' Consumers Under EU Law' (2013) no 242 Maastricht Faculty of Law Working Paper <>[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2532904](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2532904)> accessed 15 March 2019, 23.

<sup>3</sup> Stephen Weatherill, *EU consumer law and policy* (2<sup>nd</sup> edn, Edward Elgar 2013) chapter 5.

<sup>4</sup> See e.g. Recital 18 Unfair Commercial Practices Directive (n 1); Case C-210/96 *Gut Springenheide and Tusky v Oberkreisdirektor des Kreises Steinfurt* [1998] ECR I-4657, para. 31; C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln v Mars* [1995] ECR I-1923 para. 24.

<sup>5</sup> Weatherill (n 3), 92-94, 143; N Reich, 'Harmonisation of European contract law: with special emphasis on consumer law' (2011) 1 *China-EU Law Journal* 55, 60.

personal autonomy of the majority,<sup>6</sup> it remains questionable to what degree consumers are de facto empowered. Namely, it has been suggested that the average consumer does not exist and that consumers cannot behave in the manner envisioned by EU law.<sup>7</sup>

The concept of the vulnerable consumer appears in the CJEU case law and EU legislation as a subcategory of the average consumer that recognises vulnerability and thus moves away from a strict empowerment approach.<sup>8</sup> In *Cassis de Dijon*<sup>9</sup> and subsequent decisions on product requirements regarding packaging and ingredients,<sup>10</sup> the CJEU considered consumers empowered by the wider consumer choices in the integrated market and imposed the information cost on them. For example, consumers are expected to find out about the specific qualities of the product, even if the labelling is somewhat misleading and consumers de facto are not that rational, self-aware and investigative.<sup>11</sup> However, vulnerabilities regarding the specific characteristics of the targeted consumers,<sup>12</sup> specific sales environments,<sup>13</sup> or sectorial peculiarities<sup>14</sup> have led the Court to accept national regulatory measures that assess consumer abilities more realistically.<sup>15</sup> It has been suggested that the CJEU recognises consumer vulnerabilities when the regulation addresses a real and serious social ill that is existential and is not simply protectionist or addresses an issue that merely inconveniences the consumer.<sup>16</sup> If that is correct, the CJEU may balance competing interests. If the harm done to the consumer is not too serious, the market integration agenda prevails. For example, it could be said that it is not worth preventing market integration just to make sure that consumers who are unaware about different quality or packaging do buy the right type of pasta or butter as in *Drei Glocken* or *Rau* respectively.<sup>17</sup> However, recent cases on the requirement to change the steering wheel from right side of the car to the left one,<sup>18</sup> beg the question of how serious the harm has to be for the CJEU to recognise it.

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<sup>6</sup> Stefan Grundmann, 'Targeted Consumer Protection' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law* (Hart Publishing 2016) 223–244.

<sup>7</sup> See discussion below.

<sup>8</sup> Stephen Weatherill, 'Empowerment is not the only Fruit' in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law* (Hart Publishing 2016) 203, 217.

<sup>9</sup> Case 120/78 *Rewe v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

<sup>10</sup> Case 261/81 *Rau v De Smedt* [1982] ECR 3961; 407/85 *3 Glocken and Others v USL Centro-Sud and Others* [1988] ECR 4233; C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln v Mars* [1995] ECR I-1923; C-315/92 *Verband Sozialer Wettbewerb v Clinique Laboratories and Estée Lauder* [1994] ECR I-317; 178/84 *Commission v Germany* [1987] ECR 1227.

<sup>11</sup> Weatherill (n 3) 48-9; Stephen Weatherill, 'Who is the 'Average Consumer'?' in Stephen Weatherill and Ulf Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart Publishing 2007) 115, 128.

<sup>12</sup> Case 382/87 *Buet and Others v Ministère public* [1989] ECR 1235 concerning consumers that are behind their education within the context of canvassing for the enrolment of educational courses.

<sup>13</sup> Case C-441/04 *A-Punkt Schmuckhandel v Claudia Schmidt* [2006] ECR I-2093 concerning a ban on so called 'jewellery parties' held in private setting that exposed consumers to an environment with limited information and safeguards and additional psychological pressure to purchase.

<sup>14</sup> Case C-577/11 *DKV Belgium v Association belge des consommateurs Test-Achats* 7 March 2013 concerning insurances; C-265/12 *Citroën Belux v FnF* 18 July 2013 concerning financial services.

<sup>15</sup> Weatherill (n 8) 207-9; Weatherill (n 11) 131-33.

<sup>16</sup> Weatherill (n 11) 129-30, Grundmann (n 6) 231-4.

<sup>17</sup> N 10.

<sup>18</sup> Case C-639/11 *Commission v Poland* 20 March 2014; C-61/12 *Commission v Lithuania* 20 March 2014.

EU legislation also guarantees some social protection of vulnerable consumers.<sup>19</sup> This includes provisions on universal services<sup>20</sup> as well as specific rules on commercial practices<sup>21</sup> and advertising.<sup>22</sup> Vulnerable consumers are entitled to have access to certain essential services and their vulnerability may not be exploited. Namely, Article 5(3) of the Unfair Commercial Practices Directive<sup>23</sup> states that commercial practices which are likely to distort the economic behaviour of vulnerable consumers, “shall be assessed from the perspective of the average member of that group” rather than the average circumspect consumer.

The question is then what characteristics or features make a consumer vulnerable. EU law on universal services, gas and electricity identify diverse areas of vulnerability, including disabled users,<sup>24</sup> remoteness, poverty,<sup>25</sup> old age and social needs.<sup>26</sup> However, it is at times left to the Member States to define the concept of the vulnerable consumer.<sup>27</sup> Article 5(3) Unfair Commercial Practices Directive on the other hand refers to “mental or physical infirmity, age or credulity” that make consumers particularly vulnerable and recital 8 of the General Product Safety Directive specifically refers to children and the elderly.<sup>28</sup> Recital 34 of the Consumer Rights Directive<sup>29</sup> adds ‘psychological infirmity’ to that list. Additionally, there are special protections for minors.<sup>30</sup> Of course, these are not the only reasons why a consumer can be vulnerable. Indeed, the Unfair Commercial Practices Directive has been criticised for including a rather arbitrary list, ignoring important issues such as ethnicity, poverty or education.<sup>31</sup> While vague terms such as ‘credulity’ can address multitudes of disadvantages consumers are exposed to,<sup>32</sup> the wording implies that the list is exhaustive and not, as

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<sup>19</sup> Weatherill (n 8) 217.

<sup>20</sup> EP and Council Directive (EC) 2002/22 on universal service and users' rights relating to electronic communications networks and services [2002] OJ L108/51 (as amended by Directive 2009/136/EC); EP and Council Directive (EC) 2003/54 concerning common rules for the internal market in electricity [2003] OJ L17/37 art 3(5); EP and Council Directive (EC) 2003/55 concerning common rules for the internal market in natural gas [2003] OJ L176/57 art. 3(3); EP and Council Directive (EC) 2009/72 concerning common rules for the internal market in electricity [2009] OJ L211/55 art 3(7).

<sup>21</sup> N 1.

<sup>22</sup> EP and Council Directive (EU) 2010/13 concerning the provision of audiovisual media services [2010] OJ L95/1.

<sup>23</sup> N 1.

<sup>24</sup> EP and Council Directive (EC) 2002/22 on universal service and users' rights relating to electronic communications networks and services [2002] OJ L108/51 (as amended by Directive 2009/136/EC) art 7 and 23a.

<sup>25</sup> EP and Council Directive (EC) 2009/72 concerning common rules for the internal market in electricity [2009] OJ L211/55 art 3(7). See also EP and Council Directive (EC) 2009/73 concerning common rules for the internal market in natural gas [2009] OJ L211/94; EP and Council Directive (EU) 2014/92 on the comparability of fees related to payment accounts [2014] OJ L257/2014 regarding unbanked vulnerable consumers.

<sup>26</sup> EP and Council Directive (EC) 2002/22 on universal service and users' rights relating to electronic communications networks and services recital 7.

<sup>27</sup> See for example Article 3(7) Directive 2009/72/EC (n 25).

<sup>28</sup> See also EP and Council Directive (EC) 2001/95 on general product safety [2002] OJ L11/4 art 2(b).

<sup>29</sup> Directive 2011/83/EU on consumer rights OJ 2011 L304/64.

<sup>30</sup> EP and Council Directive (EU) 2010/13 concerning the provision of audiovisual media services [2010] OJ L95/1 concerning the protection of minors art 9.

<sup>31</sup> Jules Stuyck, Evelyne Terryn and Tom Van Dyck, ‘Confidence through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market’ (2006) 43 CML Rev 107, 122; Mateja Djurovic, *European Law on Unfair Commercial Practices and Contract Law* (Hart Publishing 2016) 43; Chris Willett, ‘Unfairness under the Consumer Protection from Unfair Trading Regulations’ in Mel Kenny and James Devenney (eds), *Unconscionability in European Financial Transactions* (CUP 2010) 350, 367-71.

<sup>32</sup> Weatherill (n 8) 216; Weatherill (n 11) 136.

suggested by the Commission, indicative.<sup>33</sup> There are thus limits regarding the type of vulnerabilities that can be considered. In that context, it has been suggested that the notion of vulnerable consumer regarding universal services and the UCPR should not be conflated as they serve different purposes. Accordingly, the law on universal services specifically focuses on poverty and related issues while the Unfair Commercial Practices Directive focuses on non-economic factors.<sup>34</sup> However, it is difficult to draw such a line. For example, commercial practices may be deemed especially aggressive because of consumer vulnerability that stems from difficulties to fulfil prior (financial) commitments.<sup>35</sup>

Vulnerability does not simply stem from individual economic or non-economic impairments or abilities but can be structural or situational, depending on the interaction with other people.<sup>36</sup> Some characteristics that may make consumers vulnerable within the current social structures are not addressed by consumer law but by EU non-discrimination law. While the latter is not limited to consumer contracts, it does cover them, and prohibits direct and indirect discrimination (including harassment) on grounds of race, ethnic origin and sex regarding the access to goods and services.<sup>37</sup> The concept of indirect discrimination seems particularly helpful here as it governs similar subject matters as the concept of the vulnerable consumer by focusing on the effects of measures on specific groups within society. A seemingly neutral and thus in principle acceptable practice can be challenged if it would put a person with a protected characteristic at a particular disadvantage.<sup>38</sup> The ban of indirect discrimination can thus go a long way to protect consumers with certain vulnerabilities. Within the national law this protection is also not necessarily limited to indirect race, ethnic origin or sex discrimination, as many Member States have opted to go beyond the EU requirements and recognise a wide range of protected characteristics concerning access to goods and services.<sup>39</sup>

The discussion above demonstrates that there is not one all-encompassing approach towards assessing and addressing vulnerable consumers. Instead, vulnerability is context dependent and EU law provides several targeted measures to address specific vulnerabilities.<sup>40</sup> It has multiple meanings and its definition at times is left to the Member States. This can also be demonstrated by reference to recital 7 of the Unfair Commercial Practices Directive. Accordingly, matters relating to taste and decency are excluded from the directive. As this will vary between the Member States, there is bound to be some divergence. The CJEU has also accepted that “social, cultural or linguistic factors”

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<sup>33</sup> Commission (EC), ‘Staff Working Document, Guidance on the Implementation of Directive 2005/29/EC on unfair commercial practices’ SEC(2009) 1666 final, 4 December 2009, at 2.3.2.

<sup>34</sup> Djurovic (n 31) 45-6.

<sup>35</sup> Marios Koutsias and Chris Willett, ‘UK Implementation of the Unfair Commercial Practices Directive’ in Willem van Boom, Amandine Garde and Orkun Akseli (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Ashgate 2014) 21, 37

<sup>36</sup> Fred W. Morgan, Drue K. Schuler and Jeffrey J. Stoltman, ‘A Framework for Examining the Legal Status of Vulnerable Consumers’ (1995) 14 *J of Public Policy & Marketing* 267-277.

<sup>37</sup> Council Directive (EC) 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22; Council Directive (EC) 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ [2004] L373/37. Many Member States have granted similar protection to additional characteristics, such as age, disability, sexual orientation or religion and belief.

<sup>38</sup> Article 2(2)(b) Directive 2000/42/EC; Article 2(b) Directive 2004/113/EC. It has also been suggested that the duty of reasonable accommodation could help advancing the protection of vulnerable consumers. Waddington (n 2) 29-30.

<sup>39</sup> See for example, the Dutch Algemene wet gelijke behandeling, the German Allgemeine Gleichbehandlungsgesetz, the Equality Act 2010.

<sup>40</sup> Waddington (n 2) 26-7.

may influence the assessment of consumers' vulnerability.<sup>41</sup> The concept's harmonising effect is therefore likely to be limited.<sup>42</sup> A comparative analysis of the Member States' approaches towards vulnerable consumers can thus greatly enhance our understanding of the meaning of vulnerability. Not only can it help to identify the scope and potential of the concept when applied at national level. It can also demonstrate how national influences shape the meaning of the concept as they interact with supranational EU law and thus advance our understanding of the harmonisation process.

Moreover, the diverse meaning of consumer vulnerability also underlines its political and social potential. While it has been suggested that comparative law should focus on apolitical areas of law,<sup>43</sup> this is certainly not possible within the focus of consumer vulnerability. The concept can have far reaching consequences, underpins a social dimension within consumer law and lends itself to other highly politicised areas of law such as equality and non-discrimination law. A comparative analysis thus needs to acknowledge these diverse and potentially contradictory influences on the concept's development at national level.

### III How to compare implemented harmonised legal concepts?

I advocate the use of a culturally-informed comparative law method that can engage with the multi-layered national and supranational narratives that influence the meaning and scope of the vulnerable consumer at national level. As discussed in more detail elsewhere,<sup>44</sup> this requires several steps. Firstly, one needs to establish an appropriate theoretical framework in which the comparative analysis can take place, in order to limit the scope and make the normative framework explicit within which the analyses takes place. Secondly, one needs to extensively engage with the national context of the compared Member States. This not only includes the broader legal context but also historical, cultural and economic paradigms that may influence the national meaning of the concept and are potentially contradictory and misleading. Finally, it requires an analysis of how the concept is integrated and interpreted within the national legal order. To do that, I propose a focus on case law, as an engagement with the courts' reasoning can expose how the previously discussed national factors influence the national interpretation and application of the concept. However, it is certainly possible to consider alternative areas of inquiry, for example, the use of the concept by enforcement agencies or civil-society organisations. The following will briefly outline the three steps and explain how the proposed approach can identify the factors that shape the meaning and scope of the concepts at national level.

#### *A The theoretical framework*

To compare the concept of the vulnerable consumer at national level one first needs to identify the theoretical framework in which the comparison takes place. How to do that has been the subject of many debates. Functional approaches would suggest that one should use social conflict as a starting point to identify the functionally equivalent laws for the comparison.<sup>45</sup> Without repeating the extensive criticism of this approach,<sup>46</sup> I submit that functionalism does not seem to be the most

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<sup>41</sup> Case C-220/98 *Estee Lauder Cosmetics v Lancaster Group* [2000] ECR I-117; Weatherill (n 11) 132.

<sup>42</sup> Amandine Garde, 'The Unfair Commercial Practices Directive' in Philip Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (CUP 2012) 118, 129-30.

<sup>43</sup> Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 45.

<sup>44</sup> Jule Mulder, 'New Challenges for European Comparative Law' (2017) 18 *German L J* 721-70.

<sup>45</sup> Zweigert and Kötz (n 43) 32-47.

<sup>46</sup> See for example, Günter Frankenberg, 'Critical Comparison: Re-thinking Comparative Law' (1985) 26 *Harvard Intl L J* 411-456; Günter Frankenberg, *Comparative Law as Critique* (Edward Elgar 2016); Pierre Legrand, 'Paradoxically, Derrida: for a Comparative Legal Studies' (2005) 27 *Cardozo L Rev* 631-717; Jaakko Husa,

useful approach within the comparison of EU harmonised law. Firstly, the way EU law is enforced and implemented in the Member States does not mean that the law necessarily responds to specific social ills at national level. Harmonised law does not develop that organically. EU directives are the result of intergovernmental political compromise and multiple political interests at the EU level. Consequently, the directives' regulatory content often does not provide solutions to specific social conflicts but several solutions for hazily defined problems. In that context, we should keep in mind that EU secondary legislation is aimed at harmonising national law and market integration, independently of the specific regulatory content of each directive. Within EU consumer law the notion of the average circumspect consumer is used for that purpose.<sup>47</sup> Moreover, Member States are obliged to implement the directives, whether they identify a social need at a national level or not and, at least in case of maximum harmonisation, may not go beyond the directives regulatory content. It is thus not too surprising that legal solutions within the Member States are rather similar, but that does not mean that they respond to the same needs. For example, the Unfair Commercial Practices Directive focuses on the protection of consumers only. Some Member States, on the other hand, have often viewed commercial practices from the perspective of unfair competition, not only consumer protection. The identified social ill is thus different and, in combination with the directive's maximum harmonising nature, introduces significant changes within some Member States as long as the issue falls within the scope of the directive. However, the role of enforcement authorities to ensure compliance with the directive means that businesses retain some indirect influence on the application and enforcement of the directive and may thus be able to protect their own interests, even if not under the rubric of unfair competition.<sup>48</sup> Secondly, analysing the harmonisation process at national level regarding specific legal concepts focuses on the process of integration via legal harmonisation (or so-called legal transplants<sup>49</sup>) that are imposed by supranational organisations, while also influenced by national factors. Such processes can hardly be assessed if the law is considered in isolation and in the context of their solution to specific social conflicts only. Finally, while functionalism may be useful to identify the appropriate laws to compare without getting distracted by formalities, legal categories and terminology, there is less need for such an abstraction of the legal problem within the context of EU harmonisation. After all, it seems entirely appropriate to focus on the national law implementing the EU law, if we want to analyse what happens to these harmonised rules and concepts once they reach the national area.

However, that does not mean that we can easily dismiss the need for a "tertium comparationis".<sup>50</sup> It is well understood that there need to be some common denominators between the objects of comparison.<sup>51</sup> Certainly, a framework needs to be set to limit the substantive comparative analysis and enable a critical engagement with the different Member States' approaches towards the

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'Farewell to Functionalism or Methodological Tolerance?' (2003) 67 *Rechts Zeitschrift für ausländisches und internationales Privatrecht* 419-47.

<sup>47</sup> Hans-W. Micklitz, 'Unfair Commercial Practices and Misleading Advertising' in Norbert Reich, Hans-W. Micklitz, Peter Rott and Klaus Tonner (eds), *European Consumer Law* (Intersentia 2014) 67, 101.

<sup>48</sup> On the discussion how traders often initiate proceedings, see Garde (n 42) 133-4.

<sup>49</sup> First coined by Alan Watson, 'Legal Transplants and Law Reform' (1976) 92 *L Q Rev* 79-84; Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht J of European and Comparative L* 111-124; Esin Örüçü, *The Enigma of Comparative Law* (Martinus Nijhoff 2004) chapter 9.

<sup>50</sup> Within comparative law, the tertium comparationis is a certain quality that the laws to be compared have in common. E.g. within functionalism the tertium comparationis is the function of the law. Thus, laws that serve the same function should be compared.

<sup>51</sup> Esin Örüçü, 'Methodology of comparative law' in Jan Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward-Elgar 2012) 560, 561.



concept of the vulnerable consumer. However, this should not limit the possibility of new insights.<sup>52</sup> So what framework could be used? Within the context of EU law, it could seem reasonable to use the directive as objective parameter given that the harmonised laws are all influenced by EU law and the CJEU has the exclusive competence to interpret EU law. However, as we have seen above, the EU law on the vulnerable consumer does not lend itself to such an analysis. Firstly, vulnerability is not clearly defined and seems highly situational. Secondly, the CJEU is unlikely to provide a clear and consistent definition of the concept.<sup>53</sup> Moreover, the national courts' dialogue with the CJEU should very much be part of the comparative inquiry. EU legislation and case law is thus not separate from the comparative analysis and cannot serve as an external framework.

Instead, I propose the use of a normative theoretical framework that enables critical engagement with the EU as well as national level. It does not start with a social ill that is addressed by the law but takes a normative point of view to critically engage with the compared approaches. Namely, it should theorise why consumers may become vulnerable consumers and how vulnerabilities can be recognised and potentially addressed by legal instruments. It thus theorises the specific disadvantages vulnerable consumers experience. This approach can provide a critical framework in which the national approaches can be discussed. It has several benefits. While functionalism thought to 'eradicate the preconceptions of his native legal system'<sup>54</sup> by introducing social conflicts as a neutral element, the choice of social conflicts and the epistemological assumptions underlining such an approach are not neutral at all. Moreover, it does not prevent the comparison being coloured by the comparators' conceptions of the compared laws, their biases, personalities, views and philosophies.<sup>55</sup> A normative starting point does not prevent this either, but it makes the normative point of view explicit and exposes the harmonisation project as the political project that it is. Additionally, it provides a critical framework to analyse the compared legal approaches. As such, it can help to expose the contradictions that often occur between the representation and theory that is used to justify the rules and how the rules operate within the legal system.<sup>56</sup> Finally, it limits the thematic scope of the inquiry to keep the work feasible.

### ***B The national context***

A comparative analysis that aims to provide explanations for the diverse developments within the harmonisation processes in the Member States, needs to engage with the broader national context in which the harmonisation process takes place. Post-modernism has challenged us to become immersed in the other legal culture and consider the multitude of influences on the law as well as the extra-legal factors and broader political, cultural, or linguistic considerations.<sup>57</sup> This seems especially important within the context of legal harmonisation, as it challenges legocentric views within comparative law by diverting the focus from the legal norm to the political, cultural, and socio-economic context. Thus, it engages with similarities and differences beyond and beside the implemented legal norm that often is adopted with a similar wording and scope. While the importance of the non-legal cultural context is uncontroversial, it is less clear how to achieve

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<sup>52</sup> Mark Van Hoecke, 'Methodology of Comparative Legal Research' [2015] *L and Method* <<https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001>> accessed 15 March 2019 who emphasises the need to develop a secondary language for comparative law.

<sup>53</sup> N 42.

<sup>54</sup> Zweigert and Kötz (n 43) 35.

<sup>55</sup> Örüçü (n 49) 163.

<sup>56</sup> Giovanni Marini, 'Critical comparative contract law' in Pier Giuseppe Monateri (ed), *Comparative Contract Law* (Edward Elgar 2017) 95-110.

<sup>57</sup> Vivian Grosswald Curran, 'Cultural Immersion, Difference and Categories in U. S. Comparative Law' (1998) 46 *American J of Comparative L* 43-92.

immersion into culture beyond the need for self-reflection, given culture's dynamic and diverse nature.<sup>58</sup> Certainly, our cognitive limitations make it impossible to consider every aspect of the compared legal cultures that could be relevant. Moreover, EU harmonisation processes are legal-political projects. The legal rules thus continue to be important even if the legal *mentalité* is not necessarily converging.<sup>59</sup> Pragmatic approaches have thus been championed and it has been stressed that differences do not necessarily mean inconceivability.<sup>60</sup>

The method advanced in this paper adopts a similar pragmatic tone but nevertheless emphasises the focus on the broader non-legal context. It accepts that the analysis will not provide an exhaustive discussion but stresses the need to make these limitations explicit by identifying the specific national context that is included in the analysis. More specifically, I propose a culturally-informed approach that considers the different cultural, legal and economic narratives that surround the concept of the vulnerable consumer at a national level. Subsequently, it will then be possible to consider how these narratives are reflected in the national interpretation and application of the EU harmonised law on the vulnerable consumer.

Considering multi-layered narratives can help identify relevant national influences on the harmonised law and reveal how national factors shape the EU harmonised law once it reaches the national level. Inspired by Sacco's structuralist work,<sup>61</sup> the aim is to reveal national influences that are often unspoken or intuitively engaged as part of the national legal culture and that are difficult to change via legal reforms initiated by the European or national legislator. Borrowing from linguistics, Sacco considers overt legal formants, such as the legislator, the courts and the legal academia, as well as crypto-typical ones, such as national legal or cultural paradigms, within his comparative analysis. As these formants differ between Member States, they can explain differences between national legal approaches and reveal the underlying influences that shape each legal system and legal transplants once introduced via legal reforms.<sup>62</sup> Significantly, Sacco stresses the creative power of judges, that can resist as well as foster the effectiveness of legal reform, and the relevance of unspoken influences that are difficult to detect but underpin each legal system. Regarding the latter, the inquiry must go beyond what is considered strictly legal and explore national cultural and economic paradigms. Moreover, the significance of each formant can vary depending on the specific circumstances, as they stand in a competitive relationship with each other. The relevance of each formant at each given time is thus uncertain. Considering the diverse and potentially competitive influences on the interpretation and application of law seems especially useful within the context of EU harmonised law, given that European influences that are potentially at odds with national approaches can also impose significant pressures on the national legislator and

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<sup>58</sup> M Graziadei, 'The functionalist heritage' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP 2003) 118-122; F v Benda-Beckmann and K v Benda-Beckmann, 'Why not legal culture?' in David Nelken (ed), *Using legal culture* (Wildy, Simmonds & Hill 2012) 86-103.

<sup>59</sup> Pierre Legrand, 'European Legal Systems Are Not Converging' [1996] 45 *International and Comparative L Q* 52-81.

<sup>60</sup> Sjeff Van Erp, 'Comparative Private Law in Practice: The Process of Law Reform' in Esin Örucü and David Nelken (eds), *Comparative law: a handbook* (Hart Publishing 2007) chapter 17.

<sup>61</sup> Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law - Instalment I' (1991) 39 *American J of Comparative L* 1-34; Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law - Instalment II' (1991) 39 *American J of Comparative L* 343-401. See also Mauro Bussani and Ugo Mattei, 'The Common Core Approach to European Private Law' <[www.jus.unitn.it/cardoza/common.core/insearch.html](http://www.jus.unitn.it/cardoza/common.core/insearch.html)> accessed 26 February 2019.

<sup>62</sup> *Ibid*, 397.

judiciary when implementing, interpreting and applying EU harmonised law. For example, the dialogue with the CJEU can encourage national courts to reconsider long standing legal paradigms.

However, structuralist analyses sometimes risk separating the law from its societal context as it emphasises that legal systems with very different socio-economical structures may still adopt similar operational rules that are then potentially deemed apolitical.<sup>63</sup> This seems difficult to reconcile with the deeply political nature of the EU project of harmonisation. I thus suggest not a structural analysis as such. Instead, the method suggested here emphasises the need to engage with the socio-historical, socio-economic and socio-cultural context of the Member States. The focus on diverse overt as well as unconscious factors influencing the interpretation and application of EU harmonised law at national level should be able to expose the epistemological assumptions and deep differences between the legal systems. It conceives these different factors as narratives that are multi-levelled, varied and situated in a non-hierarchically competitive relationship with each other. For example, this can include the diverse political debates on the subject that frame the concept and its legal implications differently within the national level, the historical development of the concept at national level, competing legal concepts, the socio-economic environment and the national cultural and legal paradigms that influence the legal caution regarding the protection of the vulnerable consumer. Once these narratives are discussed, it is possible to develop hypotheses regarding their influence, which can then be tested in the subsequent case-law analysis.

### *C Comparative case law analysis*

As highlighted earlier, a comparative case law analysis is only one of the possible perspectives. The meaning and scope of the concept at national level and the factors that influence it can also be discussed considering for example, litigation strategies, the actions of civil society organisations or enforcement agencies' practices. The focus on case law is proposed because it identifies how national courts handle the concept within the broader legal framework, how it is interpreted and applied, and how the previously discussed narratives find their way into the judicial interpretation. The importance is not so much in the outcome of the case, as there surely will be similarities between the Member States, especially if there is an authoritative CJEU interpretation on the matter. Rather, the focus should be on the legal reasoning of the courts, for example, how they frame the issues and how they reach their conclusions. This analysis can identify how much the cultural narratives that were discussed in the earlier stage indeed find their way into the courts' judgments or not. Thus, the focus on case law can test the hypotheses made and demonstrate how the national narratives influence the interpretation and application of the concept in the analysed area. It is then possible to expose the "false consciousness"<sup>64</sup> that suggests the neutrality of the ruling by identifying the difference between the theoretical statement justifying the rule and how the rule operates and thereby exposing the national political, ideological and cultural and supranational influences on the reasoning. Thus, within the case law analysis it should be possible to expose both the supranational influence (including the dialogue with the CJEU), as well as the national legal and non-legal context in which the legislation is embedded.

One way to map the national courts' engagement with national as well as EU influences is a focus on case sagas that include preliminary references as well as national appeals. This allows for an analysis of the national courts' long-term engagement with certain questions, their potentially changing assessment of the issues and competing principles that challenge the courts' approaches. The

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<sup>63</sup> Marini (n 56) 104; Rodolfo Sacco, 'Diversity and Uniformity in the Law' (2001) 49 *American J of Comparative L* 171, 188.

<sup>64</sup> Marini (n 56) 104-5.

comparative nature of the analysis is crucial. Thus, while the selection of national narratives can be presented in a comparative fashion, not all narratives included for each jurisdiction can be compared in the narrow sense of the word, at least not beyond any crude general comparison. After all, there may not be something one can compare them to. Cultural particularities vary in degree and relevance, but they nevertheless can be unique in each system. Moreover, the de facto effect of these narratives within the narrow window of case law can only be revealed via the comparative analysis. Thus, while the collection of narratives may be described as descriptive, as it simply discusses certain aspects of the national context, the case law analysis is mainly supposed to be analytical and the stage that should produce sound conclusions.

## IV Comparing vulnerability

To illustrate the briefly discussed method, the paper will proceed to explore some of the relevant elements that should be considered when analysing the concept of the vulnerable consumer from a comparative perspective. While this is by no means an exhaustive discussion, it aims to demonstrate the method's focus; i.e. what type of issues should be considered and how this can improve our understanding of the concept of the vulnerable consumer.

### *A The concept of consumer vulnerability*

Comparing consumer vulnerability requires a good understanding of what constitutes a vulnerable consumer. Unfortunately, the distinction between an average and a vulnerable consumer is not always clear. Vulnerability is not limited to specific groups of consumers. Rather, consumers are viewed as the weaker party per se and can be vulnerable because of information deficits, time-pressure, limited supplies, limited access to redress and the impact of their own decisions.<sup>65</sup> This weakness is not simply the result of a weaker bargaining position that may justify the regulation of contractual clauses and special pre-or post-contractual duties. Rather, the specific context in which consumer decisions take place and the limited resources available to consumers make them prone to become victims of their own irrationality and cognitive biases.<sup>66</sup> Consumers act within 'bounded rationality',<sup>67</sup> as it is impossible for them to evaluate every possible option or offer. Moreover, emotional decision-making processes make consumers prioritise their short-term over their long-term interests,<sup>68</sup> and consumers may act against their self-interest in reaction to perceived unfairness.<sup>69</sup> As the latter is hugely influenced by social and cultural norms there are also bound to be some differences within the EU Member States.<sup>70</sup> Consumer decision-making processes can be influenced by too much or irrelevant information, consumers' past experiences or optimistic future predictions as these blend out objectively more relevant factors of probability.<sup>71</sup> Under the notion of anchoring effects, it has also been shown how people estimate a value, such as e.g. the size of a

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<sup>65</sup> Peter Cartwright, 'Understanding and Protecting Vulnerable Financial Consumers' (2015) 38 J of Consumer Policy 119-138.

<sup>66</sup> Bastian Schüller, 'The definition of consumers in EU consumer law' in James Devenney and Mel Kenny (eds), *European Consumer Protection* (CUP 2012) 123, 136.

<sup>67</sup> The development of the concept is usually associated with Herbert A Simon, 'A Behavioral Model of Rational Choice' (1955) 69 Q J of Economics 99-118. More recently, the implications of consumers' bounded rationality have been demonstrated by e.g. Cass R Sunstein, Christine Jolls and Richard H Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 Stanford L Rev 1471-1550.

<sup>68</sup> Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Penguin 2009); Richard H Thaler, *Misbehaving: The Making of Behavioural Economics* (Penguin 2016).

<sup>69</sup> Schüller (n 66) 131.

<sup>70</sup> Ibid, 132.

<sup>71</sup> Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux 2013).

coloured area of a packaging (as at issue in the *Mars* case<sup>72</sup>), by reference to the initial (potentially irrelevant) value at which they are activated.<sup>73</sup> Thus, even if consumers want to make rational choices and are well-informed and circumspect, they are limited by their own cognitive abilities and biases and thus vulnerable, even if the degree of vulnerability may vary depending on the circumstances.<sup>74</sup> To identify certain vulnerable groups within the heterogeneous universe of consumers and distinguishing these from the average consumer thus seems somewhat arbitrary and does not recognise general consumer behaviour and situational vulnerability.<sup>75</sup> It has thus been suggested that the vulnerable consumer should be used as a general benchmark, at least concerning certain type of contracts.<sup>76</sup>

Nevertheless, it seems plausible to recognise that certain vulnerabilities go beyond our normal cognitive limitations. Accordingly, it has been suggested that there are three types of vulnerability: physical impairment, intellectual impairment and economic impairment,<sup>77</sup> as also recognised in EU law.<sup>78</sup> For example, poor or immobile consumers are often excluded from consumer goods and services or must pay an additional risk-premium to access them. Consumers with intellectual impairments may be unable to evaluate the risk and value of the services and goods offered to them or struggle to understand the information provided to them. These impairments are thus likely to create vulnerabilities. However, focusing on impairment alone perceives vulnerability rather narrowly. Namely, it only focuses on internal deficits that are outside the individual's control and may limit the decision-making capacity, and ignores the broader structural, societal and situational context in which consumers may become especially vulnerable. The European Parliament emphasised the need to recognise endogenous and exogenous causes for vulnerability, the latter referring to external factors such as lack of education, new technologies or types of contracts,<sup>79</sup> as well as technological illiteracy.<sup>80</sup> Personal characteristics protected by non-discrimination law may also make a person vulnerable without the characteristic being an impairment *per se*. Certainly, not all older consumers struggle to act within the consumer market even if old age is viewed as an indicator for vulnerability. Disability studies have long emphasised how social barriers limit disabled

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<sup>72</sup> N 10.

<sup>73</sup> Kai P Purnhagen and Erica van Herpe, 'Can Bonus Packs Mislead Consumers? A Demonstration of How Behavioural Consumer Research Can Inform Unfair Commercial Practices Law on the Example of the ECJ's *Mars* Judgement' (2017) 40 J of Consumer Policy 217–234.

<sup>74</sup> Cristina Poncibò and Rossella Incardona, 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution' (2007) 30 J of Consumer Policy 21–38; Schüller (n 66) 123–142.

<sup>75</sup> Poncibò and Incardona (n 74) 29; Anne-Lise Sibony, 'Can EU Consumer Law Benefit from Behavioural Insights? An Analysis of the Unfair Practices Directive' (2014) 6 Eur J of Private L 901–42; Jeannie Marie Paterson and Gerard Brody, "'Safety Net" Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct to Respond to Predatory Business Models' (2015) 38 J of Consumer Policy 331, 338.

<sup>76</sup> Irina Domurath, *Consumer Vulnerability and Welfare in Mortgage Contracts* (Hart Publishing 2017); Irina Domurath, 'The Case of Vulnerability as the Normative Standard in European Consumer Credit and Mortgage Law—An Inquiry into the Paradigms of Consumer Law' (2013) 2 J of Eur Consumer and Market L 124, 133–5.

<sup>77</sup> Norbert Reich, 'Vulnerable Consumers in EU Law' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU law* (Hart Publishing 2016) 139–158.

<sup>78</sup> See discussion above.

<sup>79</sup> Waddington (n 2) 17; Maria Irigoyen Pérez, 'Report on a strategy for strengthening the rights of vulnerable consumers' (2011/2272/(INI)), 8.5.2012, A70155/2012, Committee on the Internal Market and Consumer Protection, Explanatory Statement, 12

<<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2012-0155&language=EN>> accessed 15 March 2019.

<sup>80</sup> See e.g. Kathy Conklin et al, *Consumer behaviour and ICSS: exploring how consumers respond to Information, Connection and Signposting Services* (2018) University of Nottingham <<http://eprints.nottingham.ac.uk/id/eprint/51375>> accessed 15 March 2019.

peoples' ability to fully participate within society rather than the impairment alone.<sup>81</sup> The focus should thus be on accommodation and support.<sup>82</sup> Other personal characteristics are not an impairment at all but may nevertheless lead to vulnerabilities. For example, ethnic minorities do not have any specific physical, intellectual or economic impairments because of their ethnicity. However, studies have suggested that they are more likely to be targeted by fraudulent commercial practices and may thus be especially vulnerable.<sup>83</sup> There are thus multiple circumstances that can leave consumers especially vulnerable, not just limitations internalised by the individual consumer. Such situational vulnerability may also differ in the different Member States, since consumer behaviour can be influenced by linguistic, cultural, political and social and geographic context.<sup>84</sup>

Accordingly, it seems appropriate to perceive vulnerability in more general terms. Developing her vulnerability theory, Martha Fineman challenges us to perceive vulnerability as part of the human condition rather than specific to the weak, victims or minorities. All humans are prone to vulnerability and dependency because of events beyond their control, including their living circumstances, their health and their relationships.<sup>85</sup> As no human being can avoid their vulnerability, even if it can be exacerbated or reduced by economic and social relationships, it is for societal institutions to ensure people have access to "assets" that, cumulatively, provide individuals with resilience.<sup>86</sup> To avoid paternalistic rules that use imprecise proxies for vulnerability, such as age, it has been suggested that there should be a focus on supporting conditions that increase peoples' resilience within the different environments they are active in.<sup>87</sup>

A focus on vulnerability thus requires rejecting the idea of the liberal subject, currently prevalent within the context of EU consumer law,<sup>88</sup> and instead recognise the vulnerability inherent to all of us. The vulnerable consumer is then not a consumer with a specific impairment but any consumer depending on the circumstances. Financial, mental or physical impairments certainly matter, but external factors such as the specific environment, the broader circumstances and the particular goods or contractual relationships may also be relevant. Within that framework, a critical analysis of the approaches towards the concept of vulnerable consumer would require us to identify to what extent they recognise the diverse nature of consumer vulnerability and support the resilience of consumers within the economic, cultural and legal environments of the Member States.

### ***B National narratives on consumer vulnerability***

The discussion will now turn to the national context. Namely, the following section will discuss some of the national narratives that seem relevant concerning consumer vulnerability. This discussion is in no way exhaustive. Rather, it aims to demonstrate what type of narratives should be included.

#### 1 The broader national legal framework

The first suggested narrative is a legal narrative and as such familiar to most comparative lawyers.<sup>89</sup> It considers the broader legal framework that protects consumers within the national legal sphere.

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<sup>81</sup> See also Article 1 United Nations Convention on the Rights of Persons with Disabilities.

<sup>82</sup> Waddington (n 2).

<sup>83</sup> Stuyck, Terryn and Van Dyck (n 31) 121-2.

<sup>84</sup> Stuyck, Terryn and Van Dyck (n 31) 116; Sibony (n 75) 913.

<sup>85</sup> Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale J L & Feminism* 1, 9-10.

<sup>86</sup> *Ibid*, 13; Martha Albertson Fineman, 'Vulnerability and Inevitable Inequality' 4 *Oslo L Rev* 133-149

<sup>87</sup> Nina A. Kohnt, 'Vulnerability Theory and the Role of Government' (2014) 26(1) *Yale J L & Feminism* 1, 23-5.

<sup>88</sup> Sibony (n 75) 904.

<sup>89</sup> Norbert Reich and Hans-W Micklitz, *Consumer Legislation in the EC Countries* (VNR 1982); Geraint Howells, Christian Twigg-Flesner, Hans-W. Micklitz, Chen Lei (eds), *Comparative Consumer Sales Law* (Routledge 2017).

This includes general observations about consumer protection as well as a specific focus on the protection of vulnerable consumers. Regarding the first, the rank and place of consumer law within the national legal systems seems important. For example, civil law countries may integrate consumer law in a general civil or commercial code or pass separate acts.<sup>90</sup> Such regulatory choice reveals something about the role of consumer law and how it is integrated within the general contract law. Regarding the latter, it seems relevant how vulnerability has been recognised and protected prior to the EU intervention. For example, the French Consumer Code already recognised vulnerable consumers prior to any specific EU legislation on the issue. Article L122-8 Code de la Consommation focuses on situations “where circumstances show that the person was unable to assess the extent of the commitments he was undertaking or to detect the tricks or artifices deployed to convince her to subscribe to it.”<sup>91</sup> The wording seems to include situational vulnerability and is thus potentially broader than the definitions advanced by EU law. As *Buet*<sup>92</sup> demonstrates, it *inter alia* considers level of education and the vulnerability this poses considering certain goods in certain selling environments.<sup>93</sup> Other Member States have handled different definitions. For example, the old version of § 4(2) German Act Against Unfair Competition focused on commercial inexperience (especially of children and youths), which continued to be part of the definition until recently.<sup>94</sup> While it could be said that the current EU definition covers inexperience under the term credulity and also specifically protects children, it is not limited to that.<sup>95</sup> The different German focus thus seems revealing and potentially influences the meaning of the concept in the future. Accordingly, it is not surprising that many of the German cases deal with advertisements that mislead children.<sup>96</sup>

Beyond that, it is important to understand how consumers are conceived in general. For example, German consumers law’s image of a consumer was that of a causal consumer that is significantly less circumspect than the image advanced by the CJEU.<sup>97</sup> It is also interesting to consider how general open textured norms such as good faith provisions are at times able to recognise and protect vulnerable contractual partners. This includes legal systems, such as the English common law, that only introduced the good faith provisions because of EU obligations. These provisions may make a high level of protection possible but also allow the retention of national approaches.<sup>98</sup> It is obvious how these national approaches towards consumer vulnerability influence the application of EU harmonised law in that area. Especially, they are likely to shape the understanding and appreciation of vulnerability on national level.

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<sup>90</sup> See regarding different approaches T Tóth (ed), *Unfair commercial practices: the long road to harmonized law enforcement* (Pázmány Press 2014).

<sup>91</sup> Author’s translation.

<sup>92</sup> N 12.

<sup>93</sup> Today EU and Council Directive (EU) 2011/83 on consumer rights [2011] OJ L304/64 would apply to the situation.

<sup>94</sup> See the old version of section 4 German Act Against Unfair Competition prior to 30 December 2008, changed by Art 1 of the Act from the 22 December 2008, BGBl. I S. 2949.

<sup>95</sup> For example, Weatherill (n 32) argues for a broad interpretation of term credulity.

<sup>96</sup> See German Federal Supreme Court (BGH) judgment from 6.4.2006, I ZR 125/03; judgment from 22.1.2014, I ZR 218/12.

<sup>97</sup> See e.g. Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln v Mars* [1995] ECR I-1923; C-465/98 *Verein gegen Unwesen in Handel und Gewerbe Köln v Darbo* [2000] ECR I-2297; C-210/96 *Gut Springenheide and Tusky v Oberkreisdirektor des Kreises Steinfurt* [1998] ECR I-4657.

<sup>98</sup> Koutsias and Willett (n 35); Günther Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences’ (1998) 61 MLR 11-32.

The relevant national framework needs however to go beyond that. Especially, it seems relevant to consider vulnerabilities within contractual relationships and how these interests are balanced with other legitimate ideals, such as contractual freedom. One aspect that could be considered is the role of constitutional protections. These can come in two forms. Firstly, consumer protection can be recognised in the constitution.<sup>99</sup> Secondly, other human rights may potentially influence contractual relationships including consumer contracts. For example, the German approach to indirect effect of constitutional norms within the private law context, that can take effect via the civil code's open-texture norms on good faith (§ 242 BGB) and public policy (§ 138 BGB),<sup>100</sup> could be relevant here.

To appreciate the diversity within the legal narrative, it seems to be necessary to recognise both dimensions, the dogmatic reasoning underpinning the rules and how they are applied in practice. This can expose both, the limitations within the national legal systems as well as its potential to address vulnerability.

## 2 Historical development of consumer protection law

The second proposed narrative focuses on the historical development of national consumer protection with a focus on vulnerable consumers. There should be a general and a specific dimension to the discussion. How did consumer protection develop in general and how were the diverse EU concepts of the vulnerable consumer implemented within the legal system? Regarding both, the focus should not simply be on the results, but also zoom into the process and the academic as well as political debates surrounding the development. Beyond academic writing one may, for example, consider the parliamentary debates on the issue, the actions of civil society organisations and other stakeholder, or grass-root movements. By identifying controversies or their absence within the process, a revelation of the political and philosophical paradigms should be possible. Tracking the diverse political influences as well as the cultural and philosophical heritage will help identify influences that shape the understanding of the concepts and retain their unique national flavour. Moreover, it can help us understand how the concept of consumer vulnerability is conceived and how it relates to other concepts that are part of the legal heritage.

For example, it has been shown how the analyses of the legal heritage and philosophy within different countries can reveal real differences between the understanding of freedom of contract. Accordingly, while liberalism and legal pragmatism prevail in the UK, the French freedom of contract is a political project especially regarding the social dimension of contract law. The introduction of the Code de la Consommation was underlined by a strong political dimension and a national consumer rights' movement.<sup>101</sup> Different again, German legal philosophical heritage is based on German idealism as the development of law was seen as an academic exercise. Consumer law thus is seen separately from that, perceived as a foreign body within the Code, and comes along in a rather paternalistic fashion.<sup>102</sup> Additionally, certain aspects addressed by EU consumer law would not necessarily fall within its scope at the national level. For example, it has often been pointed out that unfair commercial practices are not only a question of consumer law but also a question of unfair competition.<sup>103</sup> The UK's success in limiting the Unfair Commercial Practices Directive to consumer

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<sup>99</sup> See for example Article 51 Spanish Constitution; Article 60 Portuguese Constitution.

<sup>100</sup> German Constitutional Court 1 BvR 12/92 (06.02.2001) BVerfGE 103, 89-111; 1 BvR 567/89 (19.10.1993) BVerfGE 89, 214-236.

<sup>101</sup> Hans-W Micklitz, 'On the Intellectual History of Freedom of Contract and Regulation' (2015) 4 Penn State J L & Intl Affairs 1-32.

<sup>102</sup> Ibid, 21-6; Jule Mulder, *EU Non-Discrimination Law in the Courts* (Hart Publishing 2017) 75-80.

<sup>103</sup> Monika Namysłowska, 'To B2C or Not to B2C. Some Reflections on the Regulation of Unfair Commercial Practices from a Polish Perspective' (2013) 36 *J of Consumer Policy* 329-342; Jules Stuyck, 'The Court of Justice



protection at the EU level, does not mean that other Member States easily adopt a similarly narrow perspective on the problem.

Beyond the general development of consumer protection law, a special focus on the process of implementation of EU law specifically recognising the vulnerable consumer can further reveal different factors influencing the concepts at national level. Thus, while the different manners of implementation are important,<sup>104</sup> the analysis also needs to include the political process. For example, German law modified its Act Against Unfair Competition several times in order to implement the Unfair Commercial Practices Directive. Each time, its definition of the vulnerable consumer became more aligned with the EU Directive.<sup>105</sup> Namely, the reference to inexperience and to children and youth has been deleted. It would be very revealing to see why the legislator considered these changes necessary and how different interest groups influenced the process.

### 3 Cultural, political and economic contexts

The final proposed narrative is that of the broader cultural, political and economic context. Obviously, this narrative can be sub-categorised. However, for the current discussion a brief overview of a number of relevant streams within the narratives shall suffice. Mainly, there needs to be an appreciation of the socio-economic system. The point is to identify issues related to cultural identity that frame the legal consciousness of the actors shaping the meaning of consumer vulnerability.

Certainly, beyond the legal requirements, it matters whether the concept is embedded in a socialist-capitalist mixed economic system that provides strong protections for its citizens and directly aims at enhancing individual autonomy,<sup>106</sup> an economy that is prone to state interventions with roots in Mercantilism, or a liberalised economy with limited social protections of its citizens.<sup>107</sup> The question is how much the protection of vulnerable consumers fits within the national cultural identity as reflected in the economic environment. These differences cannot simply be discovered by focusing on the consumer law. The broader economic system needs to be considered, including companies' social responsibilities within the economic environment and their embeddedness in local or social communities, as this will potentially influence their decision-making processes and how their commercial practices are viewed. What is deemed to be acceptable conduct and exploitation of vulnerability is not simply a dogmatic legal question but a cultural one and its roots can be found, inter alia, in the economic environment. This may also include past experiences within changing economic environments. For example, a Polish court considered it relevant that Polish consumers have not been exposed to commercial practices in the same manner than consumers from 'the West'.<sup>108</sup>

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and the Unfair Commercial Practices Directive' (2015) 52 CMLR 721-52; Manuela Finger and Sandra Schmieder, 'The New Law Against Unfair Competition: An Assessment' (2005) 6 German L J 201-16.

<sup>104</sup> See for an example of such an analysis Marija Bartl, 'Affordability of Energy: How Much Protection for the Vulnerable Consumers?' (2010) 33 J of Consumer Policy 225-245.

<sup>105</sup> See for current version section 3(4) 2<sup>nd</sup> sentence UWG.

<sup>106</sup> For example, Scandinavian economic systems can be distinguished from Continental and UK forms of capitalism. Jan Smits, 'Nordic Law in a European Context: Some Comparative Observations' in Jaakko Husa, Kimmo Nuotio and Heikki Pihlajamäki (eds), *Nordic Law Between Tradition and Dynamism* (Intersentia 2007) 55-64; Peter Hall and David Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (OUP 2001).

<sup>107</sup> Micklitz (n 101).

<sup>108</sup> Rafal Sikorski, 'Implementation of the Unfair Commercial Practices Directive in Polish Law' (2009) 2 *Medien and Recht-Intl Ed* 51, 52.

Moreover, consideration of the broader political culture may help to understand how the concept of the vulnerable consumer was integrated in the national context. Consensus-driven political systems that include a vast number of diverse opinion and stakeholders in the political process may be more capable of converting the concept into a national one than adversarial political systems. Namely, the effort is more likely to be supported by groups with different political leanings and the implementation process is more likely to be accompanied by controversial engagement with the process. It may also allow consumer protection agencies to directly influence the process because there will be more effort to include different stakeholders in the process.<sup>109</sup> Alongside that, the changing political-economic environment may play a role. In particular, the recent bank and sovereign debt crisis has created new financial vulnerabilities within some Member States. This potentially required a more direct engagement with groups of vulnerable consumers, while the general financial pressures and slow economic growth may also favour deregulation and reduction of commercial costs. The concept of a vulnerable consumer is likely to develop differently within those environments than within stable economies.

Finally, it is interesting to consider certain cultural myths that shape national identity. For example, it may not be enough to consider the constitutional protection of consumers in the legal narrative but the role of the constitution within society as part of national identity may also be relevant. After all, whether the constitution provides for indirect broad or limited consumer protection does not tell us how much influence the constitutional approach has on the broader understanding of the appropriate level of protection. If the constitution is viewed as the measure of all things it will be difficult to advance concepts that are contrary to, or go beyond, the constitutional perspective. If the constitution is less present in the legal consciousness, it should be less likely to interfere with the development of the concept. Regardless of their accuracy, “national scandals” that required a specific legal reaction and that continue to shape the domestic understanding of the role of the legal system and of economic actors in preventing any repetition should also be taken into account.<sup>110</sup>

## V Concluding remarks

This paper has discussed how a comparative analysis of the concept of the vulnerable consumer could be conducted. It has been argued that there is a need to consider the broader cultural economic and political context within the comparative analysis in order to expose the political nature of the harmonisation project as well as the social potential of the concept of the vulnerable consumer within the normative framework. Of course, this approach bears several risks. Once we dive into the cultural sphere, we face contradictions, parallel developments and hidden story lines that are difficult to detect. Moreover, culture is not static, as the explored narratives can change over time and space. Consequently, the exploration of national cultural narratives can only ever be investigative, never complete. A limited view should not prevent us from engaging with the national non-legal environment to develop some understanding regarding the concept’s meaning and the national influences upon it. It is only important to make these limitations explicit by engaging with the narratives separately and explicitly.

While claims to include the broader cultural framework within comparative works are certainly not new, I suggest that narrative approaches enable us to put the broader national context front and centre. The subsequent case law analysis is then viewed through these narratives. Thus, the

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<sup>109</sup> See for the Netherlands as example, Mulder (n 102) 100-11.

<sup>110</sup> For example, the Spanish 1981 cooking oil scandal, which continues to shape consumers’ perceptions on product safety and product liability rules; Colin Doeg, *Crisis Management in the Food and Drinks Industry: A Practical Approach* (2<sup>nd</sup> edn, Springer 2005) 217-218.

comparative legal analysis is filtered through the cultural dimension. This should help to analyse the case law within the cultural context and expose the challenges within the harmonisation process.

Somewhere between the cultural and legal focus we should then be able to identify the harmonisation process, which includes national as well as supranational influences, and allows for legal concepts to be both integrated within national law and being identified as European. Certainly, the focus on the cultural context will expose the diverse challenges that harmonisation processes face once they introduce politically charged legal concepts that fall within the social as well as the legal dimension.