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Understanding and Protecting Vulnerable Financial Consumers

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Abstract This article considers how consumer protection law and policy should address the interests of particularly vulnerable financial consumers. Specifically, the article proposes a taxonomy of vulnerability which helps to identify (a) what makes consumers particularly vulnerable, and (b) how consumer protection law and consumer policy (broadly understood) can respond to these causes in a way that provides such consumers with appropriate protection. Changes to economic conditions, legal requirements on traders and our understanding of consumer behaviour make discussion of these issues particularly topical. There is little doubt that finding solutions is extremely difficult. Trade-offs are necessary and some enduring factors that contribute to vulnerability, in particular poverty, sometimes appear intractable. Nevertheless, it is submitted that by identifying clearly both why consumers are vulnerable and how the factors that lead to such vulnerability can be addressed, it is possible to construct an environment which respects consumer choice while ensuring that the most vulnerable are protected appropriately.

Keywords Consumer protection · Vulnerability · Regulation · Consumer policy

Introduction

Protecting consumers is an obvious objective of regulating markets. However, the heterogeneity of consumers makes ensuring appropriate protection for all extremely difficult. Of particular concern is how we ensure that the interests of especially vulnerable consumers are properly addressed. The principal purpose of this article is to consider how consumer protection law and policy should address the interests of (particularly) vulnerable financial consumers. Specifically, the article proposes a taxonomy of vulnerability which helps to identify (a) what makes consumers particularly vulnerable, and (b) how consumer protection law and policy can respond to these causes in a way that provides such consumers with appropriate protection. It is hoped that the taxonomy will be helpful in focusing the minds of different stakeholders on the factors that are likely to make consumers more vulnerable and how these may be addressed.

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The article begins by examining the meaning(s) of vulnerable and disadvantaged consumers and constructs a taxonomy of vulnerability. It then suggests ways in which vulnerability can be tackled in the context of financial regulation. Finally, conclusions are drawn.

Defining Vulnerable and Disadvantaged Consumers

Consumers will sometimes be so vulnerable that they lack capacity and it is important that the law makes provision for such circumstances. This article, however, is concerned with individuals who have capacity, but who are particularly vulnerable when acting or seeking to act as consumers.

There is debate about whether the terminology of vulnerable or disadvantaged consumers is to be preferred, and what, precisely, these terms convey (Consumer Affairs Victoria 2004; Menzel Baker et al 2005; Morgan et al 1995). First, a vulnerable consumer might be viewed as one who "is capable of readily or quickly suffering detriment in the process of consumption" while a disadvantaged consumer is "a person in persistent circumstances and/or with ongoing attributes which adversely affect consumption thereby causing a continuing susceptibility to detriment in consumption" (Consumer Affairs Victoria 2004, p. 3). This definition of vulnerability is extremely broad; many consumers are capable of suffering detriment readily or quickly, even if they are generally well-placed to make informed decisions. The definition reflects the authors' view that consumer vulnerability involves exposure to the risk of detriment whether it results from personal or market dimensions. The personal dimension includes the attributes and circumstances of individuals which affect consumption decisions such as personal capacities, preferences, income, and the context in which individuals consume. The market dimension relates both to the nature of markets generally and the characteristics of the specific market in issue (Consumer Affairs Victoria 2004). This definition of disadvantage emphasizes persistent circumstances and ongoing attributes; indeed, the distinction between vulnerability and disadvantage "rests on the persistence of a specific adverse circumstance or condition causing vulnerability" (Consumer Affairs Victoria 2004, para 6.4). Thus, temporary circumstances, such as illness, may make a consumer vulnerable, but not necessarily disadvantaged, while disadvantaged consumers will, almost inevitably, be vulnerable consumers. Examples of relevant circumstances and attributes might be disability; illiteracy; gullibility; low income, low confidence, and geographical location.

Vulnerable consumers might alternatively be described as those that are "at a disadvantage in exchange relationships where that disadvantage is attributable to characteristics that are largely not controllable by them at the time of the transaction" (Andreasen and Manning 1990, p. 13). While this definition appears wide enough to cover temporary vulnerability, the authors' examples of vulnerable groups (children, the elderly, the uneducated, the structurally poor, the physically handicapped, minorities, and those with language problems) imply that temporary vulnerability (such as that resulting from bereavement) may not involve a "characteristic." The authors, therefore, appear to see vulnerability as something that persists.

Wilhelmsson distinguishes vulnerable consumers from "less privileged" consumers and uses the latter term to refer primarily to wealth and social status (Wilhelmsson 2007, p. 213). He avoids labelling consumers as vulnerable, viewing the term as stigmatic. Indeed, some regard the very concept of consumer vulnerability as "crude and unhelpful," preferring to describe certain consumers as "at a disadvantage" (George and Lennard 2007, p. 56). Nevertheless, they recognize that some people will be vulnerable in some way. These are important observations. There is a danger that by labelling particular consumers as vulnerable, an impression is created of there being "us and them." This has been recognized recently by Stearn, who counsels against any attempt to divide consumers into two groups: vulnerable consumers and the rest. In particular, he views vulnerability as both relative and dynamic (Stearn 2012). This article recognizes the danger to which the authors allude. Indeed, it accepts that “vulnerable consumers” do not constitute a discrete homogeneous group and that different consumers will be particularly susceptible to detriment in different circumstances. It uses the concept of consumer vulnerability as shorthand to reflect the elements that are liable to create a particular susceptibility to detriment beyond the norm and sees vulnerable consumers as those that display those elements to a greater extent than most. This is explained below in the context of the taxonomy of vulnerability. Many of us display elements of vulnerability in particular circumstances and the responses proposed will help to protect the interests of a wide range of consumers.

Conceiving and Addressing Consumer Vulnerability: the Taxonomy of Vulnerability

The Rationales for Regulation and the Taxonomy of Vulnerability

To understand how the suggested taxonomy of vulnerability reflects why consumers are liable to be vulnerable, it is helpful to consider how it relates to the way markets operate in classical economic theory.

First, in the perfect market, rational and well-informed consumers make consistent decisions in accordance with their preferences and so exert market discipline. Where information asymmetry exists between supplier and consumer, intervention (such as though mandatory disclosure) may play a role in correcting this. While many consumers suffer from information asymmetry, those for whom that asymmetry is greatest are especially vulnerable, and therefore deserve particular attention. This is referred to here as informational vulnerability. Second, in the perfect market, transactions are fully voluntary. In practice, consumers may be particularly vulnerable as a result of their greater susceptibility to pressure. This is described as pressure vulnerability. Third, the perfect market contains numerous players, while in practice a small number of firms may be dominant or consumers may otherwise lack choice. This is described here as supply vulnerability. Next, perfect markets are underpinned by private law, which allows consumers to hold traders to account for breaches. However, the availability of such remedies may be more apparent than real, with some consumers finding it particularly difficult to obtain redress. This is referred to as redress vulnerability.

These elements of vulnerability might be tackled in a variety of ways. Some solutions, such as improving information, increasing supply, and facilitating redress, are generally “market friendly” in the sense that they focus on improving the ability of the consumer to operate within the market. However, there is a danger that by focusing simply on improving the market, some consumers will be left even more vulnerable. It has been pointed out that where consumer law concentrates on tackling market failure, for example by improving the supply of information or the ability to seek redress, the results may be regressive (Wilhelmsson 1997). This is not an argument for abandoning such initiatives, rather a reminder that addressing the interests of vulnerable consumers demands a multi-faceted response. The article consequently suggests that there is a final element of vulnerability, which reflects the greater harm, or loss suffered by particular consumers from sub-optimal decisions (Burden 1998). This is described here as impact vulnerability.

Informational Vulnerability

Considerable attention has been paid to the role of information in consumer protection. Indeed, it has been argued that rectifying information asymmetry was the “key analytical basis for early consumer protection law" (Hadfield et al. 1998, p. 134). In his work for the Office of Fair Trading on vulnerable consumer groups, Burden argues that consumers may be vulnerable for two main reasons: first, because they may find it more difficult to obtain or to deal with information needed to make appropriate purchasing decisions, and second, because they may suffer greater loss than other consumers by making inappropriate purchasing decisions (Burden 1998). The first point is central to this part of the discussion.

In relation to obtaining information, difficulties may result from a variety of factors. For example, some consumers will not be able to access sources of information, perhaps because of physical disability or unfamiliarity with information technology. Others may miss useful information through being excluded from marketing (Kempson and Whyley 1999). It is well-established that rational traders may be reluctant to give consumers information from which such consumers would benefit, for example because it places their products in an unfavourable light, is difficult or uneconomic to communicate effectively, or is liable to reduce overall demand for the class of products (London Economics 1997). This affects all consumers, but may particularly exacerbate the situation of some. Furthermore, it has been argued that some consumers may be less inclined to seek out information, perhaps through lack of confidence or because of negative previous experiences (Consumer Affairs Victoria 2004).

In terms of processing information, Ringold describes vulnerable consumers as those who have "diminished capacity to understand the role of advertising, product effects or both" (Ringold 1995, p. 584). This illustrates the importance of individual characteristics in understanding informational vulnerability. Some consumers will find it particularly difficult to play the role traditionally expected of consumers by classical economics—that of rational maximizers of their own utility—because of individual characteristics that inhibit their ability to deal with information. These characteristics may have organic or experiential bases. Traders who are aware of such characteristics may, of course, take advantage of them. This has been recognized by the work undertaken by a range of organizations to tackle financial illiteracy, something which is considered below. Given the complex nature of some financial products, the financial sector is an area where barriers to understanding products may be particularly great (Llewellyn 1999).

Pressure Vulnerability

In the perfect market, the consumer's actions are fully voluntary, but in practice consumers sometimes make decisions under pressure. A study by the UK's Department of Trade and Industry in 2003 identified being subjected to high pressure sales techniques as one of the principal problems faced by vulnerable consumers across the various countries studied (DTI 2003). There may be overlap with other aspects of vulnerability; for example, consumers may be more easily pressurized into making a decision if they lack relevant information, such as about their options. However, there will be cases where information asymmetry is not the essence of the vulnerability, but power asymmetry is. Indeed, it has been suggested that all consumer problems result from one or more of a disparity of bargaining power, knowledge, and resources (Ziegel 1973). The three clearly are connected. For example, the inability to bargain effectively may arise from factors such as lack of knowledge and lack of choice. However, it may also result from a feeling of inferiority or susceptibility. Financial services is an area where providers will frequently be in a position of power in relation to consumers, and where there is the prospect of that power being misused. The pressure felt by consumers may arise from individual characteristics (such as age, lack of confidence, or knowledge), temporary individual circumstances (such as the loss of a loved one or similar life event), or physical situation (such as the presence of the seller in the buyer's home). It may also stem from the behaviour of the seller (for example acting in an intimidating manner). Furthermore, pressure is likely to be greatest when the consumer is in financial difficulty. As Best observes "being poor and subject to stressful financial circumstances can cloud one's judgment, making one far more receptive to disadvantageous business dealings" (Best 1981, p. 28). Consumer credit is, therefore, an area of particular relevance, especially when the consumer is indebted.

Consumer protection law requires mechanisms which allow these to be addressed, but difficult policy issues will frequently arise. One problem is that some power asymmetry is inevitable, the fundamental question often being "whether the promisee should be permitted to exploit his advantage to the detriment of the other party" (Kronman 1980, p. 480). While physical intimidation would doubtless justify a remedy, psychological pressure is more problematic. We might, for example, identify certain consumers as vulnerable because of their susceptibility to having their emotional weaknesses exploited (Ramsay 2012). Where consumers are vulnerable through their adverse financial circumstances, it may be appropriate to demand particularly high standards of firms with which they deal. The distinction between exploitative and persuasive trade practices is often contestable.

Supply Vulnerability

In the perfect market, consumers have numerous buyers and sellers in each sector with whom they potentially can deal. In practice, such choice may be lacking. In an attempt to better-capture the nature of consumer decision-making, Wilhelmsson offers several visions of the consumer. One of these is the consumer without choices, who has "a need which must be satisfied…[but] little choice concerning the manner in which such satisfaction is obtained" (Wilhelmsson 1996, p. 110). This lack of choice may lead to what is here called "supply vulnerability," particularly where consumers lack products essential to health and well-being such as energy, food, and health care (NCC 2004). As has been stated "to be excluded by poverty is to be denied the full freedom of choice which is supposed to be the pivot of a modern industrial society" (Golding 1986, p. 76; cited in Ramsay 2012, p. 96). This demonstrates the close link between supply vulnerability and impact vulnerability (considered below). Furthermore, it raises the question of which products should be viewed as essential. In his report entitled *Vulnerable Consumers and Financial Services*, the Director General of Fair Trading in the UK identified four financial services that he regarded as essential: cash transmission and banking; insurance; short-term consumer credit; and long-term savings (OFT 1999). Even if some of these products were not to de deemed essential, consumers may sometimes feel pressurized through lack of choice to purchasing products they can ill-afford. In such cases, many consumers will become vulnerable to exploitation by unscrupulous suppliers and, in particular, loan sharks. The link to pressure vulnerability is apparent, particularly where there is a situational monopoly.

Redress Vulnerability

In the perfect market, consumers exert market discipline, not only in choosing products but also in holding suppliers to account and obtaining redress where those products are unsatisfactory. In practice, consumers may be vulnerable through the greater difficulties they face in securing redress (redress vulnerability). Again, there will be a connection here with other aspects of vulnerability. For example, consumers may find it difficult to secure redress because they are unaware of their legal rights or of the mechanisms under which they can seek a resolution of their grievances. Alternatively, they may feel unable to take action because of pressure that has been applied to them. A lack of capacity and inclination to pursue redress are important factors in consumer vulnerability (Consumer Affairs Victoria 2004).

In some cases, complaining will be sufficient to receive redress, but there is evidence that disadvantaged consumers are less inclined to complain than others (Andreasen and Manning 1990). There are several explanations for this: Vulnerable consumers may have lower expectations, less knowledge (of their rights, of how to complain), or less confidence (either in themselves or in the willingness of suppliers to respond to them). Consumers may also exert market discipline and obtain satisfaction by switching from one supplier to another, something that may be particularly difficult for some. Ultimately, redress may require litigation. Whether complaining, switching, or suing, consumers face transaction costs, particularly in the form of enforcement costs (Ramsay 2012). Obtaining redress may require knowledge, confidence, and resources, and the absence of these contributes to consumer vulnerability. In particular, consumers need effective and affordable mechanisms under which they can enforce rights against suppliers. The courts provide the paradigm for obtaining redress, but many consumers will find the transaction costs of litigation prohibitive.

The barriers to obtaining redress constitute a significant and self-perpetuating source of vulnerability. Although reputable suppliers will be expected to make reparation on the basis of a justified complaint, it is less likely to be forthcoming from others. This is particularly problematic where "fly by night" traders are concerned and presents difficulties both for individual consumers and for the operation of the market (Duggan 2003). Traders who know they are unlikely to be held to account may be under incentives to supply poor quality products and engage in improper conduct. Poorer consumers are particularly likely to deal with such traders. The growth of financial ombudsmen worldwide is, perhaps, clear evidence of the barriers that courts prevent to consumers' achieving redress when dealing with financial services firms and the need for some form of alternative dispute resolution to address that (Thomas and Frizon 2012).

Impact Vulnerability

The relationship between the perfect market and consumer vulnerability has been emphasized. But consumers may be vulnerable, not only because they are more likely to make (or less able to resolve) poor choices but because they suffer more from making those choices. Burden, for example, sees some consumers as vulnerable because they suffer greater loss through making inappropriate purchasing decisions (Burden 1998). Consumer Affairs Victoria also make reference to the difficulties some consumers may have in coping with the negative consequences of injury or loss when it occurs (Consumer Affairs Victoria 2004). Where loss or harm impacts disproportionately upon certain consumers, it may be described as impact vulnerability.

Where financial services are concerned, the principal contributor to impact vulnerability will be poverty. The consequences of a wrong choice particularly harm certain consumers because they can ill-afford to make such mistakes. In 2000, research for the OFT concluded that a detriment of £1 suffered by a consumer with half the national average income was as significant as detriment of £2.50 suffered by a consumer with average income (OFT 2000). Problems for low income consumers are compounded by the "poverty premium": their being likely to pay more than others for their goods and services (Andreasan 1975; Caplowitz 1963; Stearn 2012). Reasons for this include the following: the need to pay by cash; the inability to buy in bulk; the difficulty in accessing a variety of suppliers; and the tendency for suppliers to charge more, for example for credit (National Consumer Council 2004).

Poverty is perhaps the most significant factor in vulnerability, as well as a constant justification for consumer protection law. As Ramsay has observed: "the alleviation of problems of poverty and the disadvantaged…has been a continuing undercurrent in consumer protection" (Ramsay 2012, p. 88).

Responding to Vulnerability

The taxonomy established above is designed to indicate the principal ways in which a consumer may be particularly vulnerable. The examples below are intended to reflect the principal responses that might be utilized to address these. In neither case are the examples entirely discrete. For instance, there are obvious overlaps between information, pressure, and redress vulnerability where consumers are misled about their legal rights. Nevertheless, it is submitted that the divisions below reflect the broad choices available to governments, legislators, and policy makers.

Improving Information and Education

Mandatory Disclosure

It is appropriate to start by considering the extent to which consumer vulnerability might be addressed by the provision of information. It was noted above that Burden saw consumers as being vulnerable where they may find it more difficult to obtain or to deal with information needed to make appropriate purchasing decisions (Burden 1998). If consumers are not receiving the information they need then requiring that information to be disclosed is an obvious response. Mandatory (sometimes called mandated) disclosure has attractions as a form of regulation and while it is not possible to critique it in great depth here, a number of points may be made (for detailed discussion see Sunstein 2011; Ben-Shahar and Schneider 2011). Mandatory disclosure is (relatively) inexpensive and market friendly. It also respects consumer choice, thus preserving autonomy (Beyer 1982). By encouraging consumers to take responsibility for their decisions, it also minimizes moral hazard, the tendency to take risks for which they do not bear the consequences. Despite these strengths, it has significant limitations.

First, to make fully informed choices, consumers particularly need information on price, quality, and terms of trade (London Economics 1997). Price is typically easier to communicate than quality and this leads to problems, both in regulatory design and in the response of firms to it. For example, difficulties in conveying quality may produce focal point competition, with firms focusing on one aspect of a product at the expense of others. Furthermore, bad products may drive good products out of the market, with suppliers under little incentive to provide high-quality high-price goods that they have difficulty distinguishing (Akerlof 1970). In addition, some aspects of quality, such as reliability and durability, may be particularly difficult to identify or communicate, only becoming apparent in the future. These inherent limitations do not affect vulnerable consumers more than others. However, other limitations of disclosure may be especially problematic for the more vulnerable. Because consumers differ in the information they would find useful, this may lead to information overload, with regulators insisting that a wide range of information be disclosed. This may be counter-productive, either confusing many consumers or leading to their ignoring the information (Simon 1982). It is reasonable to assume that some consumers will find an excess of information particularly troubling as they find it especially difficult to separate and assess the information provided. An additional concern is that for disclosure to succeed it a response from consumers is required. It has been suggested that frequently “consumers are unaware of the information disclosed, do not appreciate its significance, or simply do not employ the information provided in the marketplace” (Scott and Black 2000, p. 372). Indeed, it has been argued that disclosure reproduces or amplifies injustice because the consumers most in need of protection do not use it (Wilhelmsson 1997).

A final point is that disclosure is based to a large extent on the assumption that consumers act rationally, in the sense of acting consistently in accordance with their preferences. However, studies in behavioural economics have increasingly challenged these assumptions (Hansen and Kysar 1999; Jolls et al 1998). Examples are as follows: consumer preferences typically vary over time (usually with a preference for the short term); they tend to be over-optimistic; they respond very differently depending upon how questions are presented; and they tend to use heuristics (rules of thumb) to assess factors such as risk (Ramsay 2012). While these biases may affect a large proportion of consumers, they are particularly problematic for those with less experience or with poor literacy or numeracy skills. Cayne and Trebilcock, while sympathetic to the aims of disclosure, argue that it only succeeds if the consumer "is intellectually and psychologically equipped to apply the information which disclosure regulation entitles him to have" (Cayne and Trebilcock 1973, p. 406). It is unclear how many consumers are intellectually and psychologically equipped to make well-informed choices, particularly in areas like financial services where those choices may be especially complex.

The ways that mandatory disclosure is used in practice has come in form significant criticism (Ben-Shahar and Schneider 2011). However, while critics sometimes doubt the effectiveness of the tool, there is little enthusiasm for it to be abandoned. Attention has instead been focused on (a) the circumstances in which mandated disclosure might be used as part of a regime that includes other instruments; and (b) how mandated disclosure can be designed to better fulfil its objectives (BRE 2 (undated); Ben-Shahar and Schneider 2011; Sunstein 2011). Sunstein, for example, argues that disclosure should be used, but that there is a need for a much clearer focus on how people process information. In his view, "disclosure requirements should be designed for homo sapiens not homo economicus" (Sunstein 2011, p. 1369). The lessons learned from behavioural economics will be central to designing instruments appropriately.

For disclosure to be a successful tool for vulnerable consumers, certain steps are essential. First, there should be a sharp focus on providing the information that is of particular importance to vulnerable consumers. This might, in appropriate cases, include warnings about matters that would be obvious to many consumers, but not all. Where products are particularly likely to be used by vulnerable consumers, key warnings should be (a) phrased very simply and directly, and (b) especially prominent. In appropriate cases, messages might be effectively conveyed by images rather than text. It has recently been suggested that information is most likely to achieve its goals in changing behaviour where: it is clear who the information is aimed at; language is accessible to the lowest ability group likely to access it; volume is minimized to maximize impact; the sources of competition for attention are identified and overcome; and visual tools are used to guide choices (BRE 2 (undated), p. 14). The second point suggests that regulated information be driven by the lowest common denominator in terms of reading age but that "in designing information for the most vulnerable consumers all society will benefit from simple, concise messages" (BRE 1 (undated), p. 13). It should also be noted that simple disclosures, such as telling consumers where to go for advice, can make a significant difference in encouraging them to act (Andreasen and Manning 1990). It is also important to consider the distinction between summary disclosure (for example at point of sale) and full disclosure (typically on the internet). The former may be of more immediate importance to individual consumers. The latter, however, may be important in informing enforcers, regulators, interest groups, and other stakeholders, in appropriate cases facilitating their further actions. This will be particularly important where financial services is concerned, where authorities such as the Consumer Financial Protection Bureau and the Financial Conduct Authority have a wide range of powers and responsibilities. Financial regulators across the globe typically have a range of functions, which might include improving competition, protecting consumers, and educating the public. But it may be that while regulators demand full disclosure, this is most useful in facilitating the use of the disclosed information by stakeholders other than consumers. In Sunstein's words: "approaches of this kind provide information that private individuals and institutions can adapt, re-assemble and present in new, helpful and often unanticipated ways" (Sunstein 2011, p. 1384). Full disclosure may not assist consumers directly, and may particularly be seen as of little use to the most vulnerable, but it may greatly benefit such consumers indirectly.

Controlling False and Misleading Information

As well as requiring useful information to be disclosed, the law can seek to prevent the provision misleading information. Some consumers may be vulnerable through a particular susceptibility to being misled. When designing a regime to prohibit the use of misleading information, a central issue is how that information is to be judged. While applying an objective standard of the reasonable, or average consumer may be attractive from the perspective of being (relatively) easy to apply, such a standard could incentivize less reputable firms to take advantage of the "ignorant, the unthinking and the credulous."[1] Europe's Unfair Commercial Practices Directive illustrates the dilemma. Although Financial Services Member States are entitled to impose more protective measures than those set out in the Directive, they must provide at least that level of protection. While taking as a benchmark the average consumer who is "reasonably well informed and reasonably observant and circumspect," the Directive allows practices to be judged from the perspective of the average member of a group where the practice is targeted at that group (which may consist of consumers who are vulnerable for particular reasons, for example lack of linguistic proficiency). Furthermore, recital 10 of the Directive states:

where certain characteristics such as age, physical or mental infirmity or credulity make consumers particularly susceptible to the underlying product and the economic behaviour of only of such consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee, it is appropriate to ensure that they are adequately protected by assessing the practice from the perspective of the average member of that group.

It is through this provision that account can be taken of vulnerable consumers for whom certain practices may be misleading (or, as will be seen later, aggressive). Allowing the standard to be lowered in these circumstances might be justified on different grounds. First, by encouraging traders to consider how potentially ambiguous statements might be understood, the clarity and quality of information are improved. Second, not all consumers can meet the standards a purely objective test would require of them. Any costs of greater scrutiny benefit the vulnerable, but are borne by all. This might be supported on the basis of distributive justice. Third, the test may assist in reinforcing trust (Ramsay 1996). But concerns remain. It has been suggested that "almost all substantive advertisements will deceive at least some people in the light of the exceptional heterogeneity of listeners and viewers" (Sunstein 1997, p. 284). Traders are likely to baulk at a test which requires them to consider how the average consumer with a mental infirmity might have understood a marketing campaign. It is submitted that the test is flexible enough to allow the courts to come to sensible conclusions, particularly because of the steer they are given by the legislation. However, the drafting of the test lacks clarity, and it is regrettable that it ignores many causes of vulnerability, in particular poverty (Rott 2013; Wilhelmsson 2007).

[1] *Charles of the Ritz* v *FTC* 143 F2d 676 39 FTC 657 (1944).

The Relationship Between Information Tools

As well as tackling misleading actions, the Unfair Commercial Practices Directive also prohibits misleading omissions. Article 7(1) states that a commercial practice is a misleading omission if, in its factual context, taking account of a series of matters, it *inter alia* "omits material that the average consumer needs, according to the context, to take an informed transactional decision." Article 7(2) suggests further than providing material information in "an unclear, unintelligible, ambiguous or untimely manner" will also amount to a misleading omission. This blurs the distinction between actions and omissions and the provisions raise a number of practical difficulties. The courts will have to consider the factual context of the transaction and the limitations of the medium used to communicate the practice, and there is the question of when the consumer "needs" rather than simply would benefit from particular information. In *Office of Fair Trading* v *Purely Creative*, Briggs J held that the question "is not whether the omitted information would assist, or be relevant, but whether its provision is necessary to enable the average consumer to take an informed transactional decision."[2] Nevertheless, the provision is a significant innovation and reveals an increasing willingness to require traders to inform consumers about matters that are likely to be of significant interest to them (Collins 2010). The test of the vulnerable consumer again becomes relevant here. Information may be material to some consumers that would not be to others, and there is an obligation on traders to ensure that vulnerable consumers are given the information that they need to make an informed choice in the circumstances identified.

Improving Financial Education and Capability

For information-based responses to be successful, consumers have to be able to use that information effectively. There should be emphasis on improving the ability of consumers to recognize and act upon information, for example, through advertising campaigns and consumer education. Indeed, improving consumer education should help to tackle different aspects of vulnerability. For example, making poor decisions less likely minimizes impact vulnerability, while improving assertiveness should both minimize the effect of pressure vulnerability and, by making consumers more willing to pursue their rights, reduce redress vulnerability. Using education to improve consumer awareness and competence is a long-term strategy but a valuable one. In the context of financial services in the UK, this role is played by the Money Advice Service. The Service has as its statutory objective enhancing the understanding and knowledge of members of the public of financial matters and the ability of the public to manage their own financial affairs. This demonstrates the enabling individuals to better play their role of informed consumers requires looking at demand as well as supply.

In addition, it is necessary to look beyond disclosure and education if consumers are to be persuaded towards socially more desirable outcomes. It has been argued that education is really a misnomer in the area of consumer policy with the principal aim of policy makers being to change behaviour rather than to improve information (Robinson 2006). While education can play a role in this, other tools may be more effective including prompts, nudges, default options, and incentives. It is not possible to examine all these in the paper although some are considered later. Suffice it to say that it is hard to disagree with the conclusion of Howells that "a more sophisticated and nuanced approach to information rules should be developed which enhances the effectiveness of the rules, whilst recognising their limitations" (Howells 2005, p. 362).

[2] [2011] EWHC 106 (Ch), para 74.

Cooling off Periods

Cooling off periods have two main objectives. First, they protect individuals against high pressure sales, and are therefore of particular relevance to those sectors, or practices, where high pressure is likely to be found. Second, they allow consumers time to access more information about a transaction and can therefore been seen to have a role in improving competition (Ramsay 2012). They have been incorporated into legislation in a number of areas, including doorstep selling and distance selling.

Cooling off periods have several strengths as a form of regulation. First, they are relatively market-friendly, as they make it easier for consumers to impose market discipline by making better informed decisions and, if desired, switching from one product to another. However, in many cases, the period may be inadequate to allow the consumer to be fully informed (Rekaiti and Van den Bergh 2000). Because they respect consumer choice, and place few burdens on traders, cooling off periods can be supported by those who favour market-based solutions to consumer detriment. They are, perhaps, examples of "asymmetric paternalism" creating significant benefits for those who would otherwise make mistakes, but placing few burdens on other parties (Camerer 2003; Ramsay 2012). Second, they provide an avenue of escape for a consumer who makes a decision under power asymmetry without the need for investigation into the circumstances.

Cooling off periods raise difficult distributional questions. In particular, they will most commonly be used by relatively well-informed (rather than vulnerable) consumers. Wilhelmsson suggests that measures which help consumers to protect themselves and discipline the market through the action they take may reproduce or even strengthen injustice as those most in need of protection are least able to take the required action (Wilhelmsson 1996). The impact on vulnerable consumers may be exacerbated by traders factoring the uncertainty created by cooling off periods into the price of contracts when, in practice, it will tend only to be less vulnerable consumers who take account on the protection. Cooling off periods play a role but should not be heavily relied upon to protect the vulnerable.

Bans and Product Regulation

Although there has been something of a move away from "command and control" regulation in recent decades, there will be occasions when states choose to ban certain practices, products, and terms outright. Where there would otherwise be the risk of significant detriment, particularly to the more vulnerable consumer this might be an appropriate response. Several pieces of legislation provide such prohibitions. Where practices are concerned, Schedule One of the Unfair Commercial Practices Directive lists 31 commercial practices which are unfair in all circumstances. Some of these are relevant to financial services. A particular example is paragraph 27 which prevents firms from requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to persistent correspondence, in order to dissuade a consumer from exercising his contractual rights.

Where terms are in issue, the Unfair Terms in Consumer Contracts Directive does not provide a black list of terms in the way that the UCPD does of practices. Instead, it provides an "indicative and non-exhaustive" grey list of terms which may be regarded as unfair. However, there are some terms which are in fact banned. For example, under the Unfair Contract Terms Act, no contract term can legally have the effect of excluding liability for death or injury caused by negligence in the course of a business. Provided there is adequate enforcement, the banning of particularly egregious practices and terms is a simple and direct way of tackling vulnerability.

Where financial products are concerned, bans might come on the basis of the likely impact of certain products on vulnerable consumers. Product regulation has recently received attention in the financial services field, particularly in the UK (FSA 2011). Intervention can take a number of forms. Under the FSA's regime, firms were under obligations to ensure at any early stage that products were (in the broad sense) suitable. For example, to treat their customers fairly, firms have to ensure that "products and services marketed and sold in the retail market are designed to meet the needs of identified consumer groups and are targeted accordingly" (FSA 2006). The FCA has made clear that it will involve itself more in looking at product design. Lord Turner argued that product intervention was fundamental to shaping the regulatory philosophy of the FCA (Smit 2012). While not (for now) requiring pre-approval or pre-notification, FCA can act under s.137 of FSMA to make general rules to prohibit authorized person from entering into specified agreements. Rules could range from requiring certain product features to be excluded to banning the sales or marketing of product to all or to some types of consumer. Although such rules require consultation, s.138L provides an exception where the FCA considers that the delay would be prejudicial to the interests of consumers. More specifically, s.138M allows the FCA to make product intervention rules without consultation where it believes it to be necessary or expedient to do in order to advance its consumer protection or competition objective. The FSA issued a Statement of Policy which sets out how FCA will use these powers (FSA 2013).

These rules can be viewed as a form of mandatory standards (Ogus 1994). Where financial services are concerned, there has been considerable discussion about the extent to which regulators such as the FCA should impose such mandatory requirements by intervening in product design (FSA 2011; Smit 2012). One way in which products can be regulated and which is both highly controversial and of particular relevance to vulnerable consumers is through controls on price. By imposing price caps, regulation is essentially banning products with particular characteristics. The UK has tended to treat such controls with great scepticism, and many commentators suggest that controlling prices is typically an inefficient method of achieving distributive justice (Ogus 1994). Credit ceilings, common in much of Europe, are perhaps the most obvious example of price controls aimed at reducing what has been categorized above as impact vulnerability (IFF/ZEW 2010). However, they have been opposed on a range of grounds (OFT 2010). There is little doubt that short-term loans (particularly "payday loans") to borrowers with poor credit histories involve very high annual percentage rates (APRs), commonly over 4000% APR. The impact of payday loans on some vulnerable consumers has been well-documented (Burton 2010; Financial Ombudsman Service 2014). The UK Government announced in 2012 that it would give the Financial Conduct Authority the power to set interest rate ceilings. More details have now become available. In particular, for short-term credit loans, interest and fees must not exceed 0.8% per day of the amount borrowed; default charges for late repayment must not exceed £15, and borrowers must not be charged more in fees and interest than the amount borrowed (FCA 2014). The price cap will come into effect in January 2015.

There was concern from some quarters that this could leave many poorer consumers without access to lawful credit. Indeed, the FCA has estimated that 7% of current borrowers will no longer be able to access payday loans (FCA 2014). The subject divides observers starkly, with some worried that caps will drive desperate borrowers to illegal moneylenders. It is submitted that the exclusionary effect of credit ceilings can be lessened by the provision of appropriate alternatives, for example through governmental supply of low-cost credit for essentials as discussed below.

Judging by Open Texture Standards

As an alternative to bans and detailed product intervention, terms, practices, and products might be subjected to broad, open texture rules (Collins 1999; Cartwright 2011a, b). Open texture rules/standards allow practices to be judged on the basis of broad, flexible requirements and are commonly used as a consumer protection tool. For example, the Unfair Terms in Consumer Contracts Directive subjects terms to a test of fairness and the Unfair Commercial Practices Directive (UCPD) requires practices not to be unfair. Legislation will typically elaborate on the meaning of such concepts. For example, the UCPD identifies different types of unfair practice, namely those that are specifically prohibited, those that are misleading (both considered above), those that are aggressive, and those that are otherwise contrary to professional diligence (Collins 2010). Some types of unfairness will be particularly important in tacking specific forms of vulnerability identified in the taxonomy. As already mentioned, asking whether practices are misleading may be particularly helpful in tackling information vulnerability. Subjecting practices to the test of aggressiveness may be an effective way of guarding against pressure vulnerability. The UCPD prevents firms from engaging in conduct that involves harassment, coercion, or undue influence. Some consumers are particularly prone to being subjected to pressure, and while the aggressiveness provisions have been criticized for a lack of precision, the flexibility they involve may make them particularly useful in tackling different forms of inappropriate pressure (Cartwright 2011b).

Where financial services are concerned, regulation has gone further. In particular, the FCA's *Principles for Businesses* require all firms to treat their customers fairly. The FSA implemented this requirement in part through their Treating Customers Fairly Initiative (TCF). This involves a form of "meta regulation," where the regulator set the broad objectives it expected firms to achieve but left it to firms to decide and justify how they would achieve this (Black et al 2007). TCF is also an example of the use of principles rather than detailed rules. Black et al. notes the characteristics of such principles: they are broad, concerned with evaluative terms, focused on behaviour, purposive, and ultimately lead to enforcement action (Black et al 2007). Well before the creation of the FCA, the FSA had begun to refer to outcomes-based (rather than principles-based) regulation, but it is clear that broad and purposive requirements, however they are labelled, will remain important to the regulatory regime.

Responsiblization

By subjecting firms to a broad duty to treat customers fairly but not specifying in detail how it is to be done, financial regulation might be viewed as responsiblizing firms. TCF focused heavily on changing the culture of organizations. In some relationships, there are very specific requirements to act in the interests of consumers (for example is when providing regulated financial advice). However, in other parts of the financial services sector, there has also been a move towards requiring forms to take greater responsibility towards consumers. Perhaps the best example is found in the Consumer Credit Directive's provisions on responsible lending. The FCA took on responsibility for the regulation of consumer credit in the UK in April 2014. The FCA's Consumer Credit Sourcebook demonstrates how far firms are required to go before lending to consumers. The Guidance makes clear that in making a creditworthiness assessment or the assessment required by CONC para 5.2.2 R (1), a firm should take into account more than assessing the customer's ability to repay the credit. In particular, such assessments should include "the firm taking reasonable steps to assess the customer's ability to meet repayments under a regulated credit agreement in a sustainable manner without the customer incurring financial difficulties or experiencing significant adverse consequences" (CONC para 5.3.1 G).

It is not possible here to do justice to the interesting arguments about where, from a normative perspective, the line should be drawn between the responsibility of different parties. FSMA states that the FCA's consumer protection objective requires the Authority to recognize that consumers should take responsibility for their decisions. This has implications for a range of relationships. First is the division of responsibility between the firm and the consumer. If it is assumed that firms need to take greater responsibility than has previously been the case, there are further questions in some markets about the extent to which that responsibility should be divided between producers and distributors (Smit 2012). There is also a need to consider the responsibilities if the regulator itself and what the statutory objectives mean in practice for the FCA. The FCA's Chief Executive, Martin Wheatley, has stated that it should not be assumed that consumers are rational (Wheatley 2013). This has implications for how firms engage with consumers but also when the regulator steps in. Indeed, Wheatley has argued that regulators will need sometimes to "step into [consumers'] footprints." It is the practical interpretation of the consumer responsibility test in FSMA that will need to be carefully observed.

Improving Redress

Redress Through Voice

Effective redress is central to consumer protection policy in all sectors, but it is clear that the significant barriers to redress that some consumers face make them particularly vulnerable. Some of the barriers faced by such consumers might be addressed by information/education-based responses, helping consumers to be more assertive, while others may only be addressed through greater intervention. Andreasen and Manning use the concept of "amplified voicing" to describe where consumers enlist the help of third parties such as consumer groups and regulatory agencies to act on their behalf (Andreasen and Manning 1990, p. 12). It is a particular concern that any cuts to important sources of support (such as Citizens Advice) would impact disproportionately upon already vulnerable consumers.

Facilitating Litigation

Where formal action is required, one response is to simplify the obtaining redress through the courts. Recent studies have confirmed previous findings that some consumers (particularly those on low income but also those showing other characteristics of vulnerability) lack knowledge of their rights and of where to go for redress (Wilson et al. 2009). The introduction of the small claims procedures in the county court was supposed to help achieve this. However, despite the user-friendly procedure envisaged by *Justice out of Reach* (Consumer Council 1971), the reality has been a court which is used primarily by the "well heeled and articulate" (Baldwin 1997). As Ramsay observes: "when [the poor] do appear, it is primarily as a defendant." (Ramsay 2012, p. 233). This experience appears to be shared across the globe (Duggan 2003). It seems unlikely that the most vulnerable consumers will benefit where they are expected to litigate. Many users of the small claims process found it to be cumbersome, bureaucratic, and intimidating (Bello 2010). Furthermore, figures on the use of small claims ignore those "lumpers" who are dissuaded from using the scheme in the first place (Genn 1999). Other options are essential, with perhaps the best example in the context of financial services being mechanisms for alternative dispute resolution (ADR).

Alternative Dispute Resolution

ADR mechanisms allow consumers to by-pass the courts. They take a number of forms, as is recognized by the Directive of May 2013 on Consumer ADR (European Commission 2003)[3]. Perhaps the most prominent example of ADR is the statutory Financial Ombudsman Scheme (FOS) in the UK. Under the Scheme, the Ombudsman makes decisions "by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case."[4] In making this judgement, the Ombudsman will take into account "the relevant law, regulations, regulators' rules and guidance and standards, relevant codes of practice and, where appropriate, what he considers to have been good industry practice at the relevant time."[5] This allows for considerable discretion to ensure justice in individual cases. However, it has been suggested that the test may be too wide. Commenting on a similar test found in private ombudsman schemes, Lord Ackner suggested that they made the industry "the hostage to fortune of uncertain and therefore unpredictable liability"(Ackner 1993, para 93). But there are also concerns that the needs of more vulnerable consumers may not be met, even when broad standards are applied and access is free. Lord Hunt's Report concluded that the FOS still resembled a middle class service for middle class people (Hunt 2008). One difficulty is that consumers are required to have exhausted firms' internal complaints procedures before the Ombudsman will consider their grievance and this may present a barrier to those who find such procedures difficult to negotiate. However, it should be noted both that the FOS has made considerable efforts to broaden its appeal, and that most forms of redress scheme are likely to be used predominantly by those from higher income groups, particularly if the scheme is centred on financial services. The fact that the FOS is free at point of use, and that its staff are able to provide significant assistance to consumers, make it particularly well-suited to addressing the needs of vulnerable consumers.

Financial Compensation Schemes

The mechanisms described above provide redress for consumers who are dealing with solvent firms. The Financial Services Compensation Scheme (FSCS) provides compensation if a financial services firm is unable, or likely to be unable, to pay claims against it (for example because it has been declared to be in default). The FSCS protects a range of products, namely, deposits, insurance policies, and insurance broking; investment business, and home finance. Although the deposit insurance element of the Scheme in particular has an important role in maintaining confidence in the sector, the principal rationale for compensation schemes is consumer protection. It is possible to see the basis of compensation schemes as information asymmetry, with consumers unable to make informed choices about the soundness of an institution with which they deal. But such schemes can also be justified on the basis of the significant loss that would be suffered by consumers when a firm fails. Less affluent consumers, in particular, frequently have a large proportion of their assets in the form of deposits. Furthermore, as well as standing to lose the highest proportion of their assets, some consumers will be vulnerable on the basis of being less likely to be the least able to judge the soundness of an institution. This makes it particularly important to provide some form of safety net. In the past, the deposit protection scheme (as it was then known) was weighted towards protecting a

[3] Directive on consumer ADR of 21 May 2013, Directive 2013/11/EU, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF.

[4] FSA DISP 3.8.1.R.

[5] Ibid.

higher proportion of the deposits of the least affluent. Now that 100% protection up to the total of £85,000 is protected, the overwhelming majority of depositors have full cover. Whether consumers are aware of this cover is, however, a moot point (Cartwright 2009). Indeed, it has been argued that widespread awareness of such schemes produces a moral hazard, with consumers being under too little incentive to take care (Kaufman 2007). However, awareness is likely to be higher following the financial crisis and given the difficulties that most consumers would face in making informed decisions about the risk posed by a particular institution, it is suggested that the moral hazard argument is over stated.

Addressing Supply

Competition-Based Responses

It was argued above that lack of choice can be a major factor in consumer vulnerability. This "supply vulnerability" can sometimes be addressed directly by encouraging competition, for example through reducing barriers to entry or using competition law to increase the number of suppliers. However, there are concerns with such approaches. First, they may improve supply for some consumers without improving access for the more vulnerable. Second, some competition-enhancing initiatives, such as the removal of licensing requirements, may increase vulnerability by increasing the number of less reputable traders (Scott and Black 2000). Increasing competition should not be viewed as a panacea.

Public Service Obligations

Where products or services were traditionally provided by the public sector, it is common to place public/universal service obligations on suppliers. This guarantees access to a service of a particular quality at an affordable price regardless of economic, social, or geographical situation (Rott 2007). The EC Treaty recognizes the existence of "services of general economic interest" which are subjected to public service obligations through a criterion of general interest (European Commission 2003; European Commission 2004). Several Directives include public service obligations, including those on telecommunications, postal services, and energy markets. Public service obligations found in the Directives include the right of access, the right to affordable services, and the right to identical service under comparable conditions.

Public service obligations are an obvious response where consumers might otherwise lack some essential products; but should this be extended to financial services? Wilhelmsson argues so on the bases of legitimate expectations and corporate responsibility (Wilhelmsson 2003; see also Micklitz 1995). On the first basis, while it is unlikely that consumers would believe they are entitled to expect access to all financial services, a case might be made for such access in relation to a basic bank account. Indeed, on 18th July 2011, the European Commission published a recommendation urging member States to ensure all Europeans have access to basic banking services (European Commission 2011). In relation to corporate responsibility, Wilhelmsson suggests that consumers have a special trust in (some) corporations, which justifies imposing enhanced responsibility, that those corporations can easily redistribute any increased cost, and that should bear responsibility for problems they cause (Wilhelmsson 2003). The final point resonates particularly where banking is concerned. Of course, where other essential goods (such as food) are concerned, public service obligations are unlikely to be viable.

There is a danger that improving supply may sometimes be a cause of vulnerability, as consumers become more vulnerable as a result of being encouraged to access inappropriate products. There is therefore sometimes a case for tightening supply (for example through responsible lending provisions) as well as for expanding it (OFT 2011).

Governmental Supply

It is possible for the State to provide or subsidize essential goods and services. Simple examples of this include initiatives such as the social fund. The fund includes both a regulated scheme, which provides grants such as maternity, funeral, and cold weather payments (which do not have to repaid), and a discretionary scheme, which provides budgeting loans (which are repayable but interest free). This raises important questions about boundaries: between consumer law and social policy; between public and private; between the market and the state. These initiatives are rooted in social policy and operate alongside the activities of the third sector (such as the provision of food banks). Such social policy is, of course, frequently explained on the basis of distributive justice, something which may also provide a rationale for consumer protection law (Ramsay 2012). Supply vulnerability has at its heart vulnerability through lack of choice, and, as it is perhaps trite to observe, a principal barrier to consumer choice is money (Gabriel and Lang 2006).

Conclusions

This article has proposed a taxonomy of vulnerability which helps to identify (a) what makes consumers particularly vulnerable, and (b) how consumer protection law and policy can respond to these and so ensure that such consumers are appropriately protected. The article recognizes the value of competitive markets and suggests how consumer law and policy may provide appropriate protection to vulnerable consumers without placing unwieldy or counter-productive obligations upon traders.

Deciding how the interests of vulnerable consumers should be protected requires careful consideration and judgement. The proposed taxonomy aims to provide a useful tool through which some of the key issues can be addressed. While the issues might be viewed primarily as matters for legislators, regulators, and courts, they have implications for others too. For example, traders concerned about whether their sales and marketing methods are fair to vulnerable consumers may decide to use the taxonomy to help answer this. While it will not always provide a definitive answer, it should help both to clarify the questions to be asked and to illuminate the responses. Of course, an optimum system which encourages and respects consumer choice but which also ensures that the most vulnerable are protected appropriately is difficult to design. This article considers the factors such a system might have to take into account. Despite the steps that can be taken, some problems will remain intractable, especially those related to poverty. As Caplowitz concluded: “until poverty is eradicated, only limited solutions to…[the poor’s] problems as consumers can be found” (Caplowitz 1963, pp. 191–2).

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