

PAULA PORETTI^(*)

VULNERABLE PERSON

Abstract: Although the paper will briefly touch upon other aspects of vulnerability, its focus will be on vulnerability in the context of persons with disabilities, which derives from their cognitive, intellectual physical impairments. The main questions the paper seeks to answer are whether persons with disabilities, as vulnerable persons, have been redefined or changed by virtue of their activities or statuses through the measures introduced in EU law, and whether and how the traditional understanding of the term ‘vulnerable person’ in the context of the protection of persons with disabilities has been modified during the process of EU integration.

SUMMARY: 1. Introduction. – 2. Vulnerability of persons with disabilities under EU law. – 3. Conclusion.

1. — *Introduction.*

The paper aims to explore the term ‘vulnerable person’ as defined in the available literature and other relevant sources, as well as international and EU instruments. Although vulnerability is universal, in that the threat of harm in the form of physical damage from injury or disease affects all human beings to varying degrees at different points of time, it is also particular and experienced uniquely by every person due to differences in the magnitude and potential of vulnerabilities at the individual level⁽¹⁾.

Traditional approach towards the concept of vulnerability identifies certain groups in society who have specific characteristics, such as children,

^(*) J.J. Strossmayer University of Osijek, Chair for Civil law.

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⁽¹⁾ A. WIESBROCK, *Disability as a Form of Vulnerability under EU and CoE Law: Embracing the ‘Social Model’?*, in F. IPPOLITO, S. IGLESIAS SÁNCHEZ (eds.), *Protecting Vulnerable Groups: The European Human Rights Framework*, London, 2015, pp. 71-94, esp. p. 74.

elderly people, poor, Roma, minorities, migrants, asylum seekers, imprisoned or persons in detention or disabled persons as vulnerable persons. Hence, a wider definition of the term ‘vulnerability’ would include all of the aforementioned categories. A more narrow understanding of ‘vulnerability’ would confine it to just one category, emphasizing its specific characteristics. Perhaps the most widespread and socially accepted notion of ‘vulnerability’ is that of persons with disabilities.

According to the more recent legal literature, vulnerability should not be interpreted narrowly, in a manner which only takes account of certain groups in society which are considered as ‘vulnerable’. Instead, vulnerability should be understood as a particularly dynamic concept that encompasses, but also transcends, the notions of minority groups⁽²⁾. Although the paper will briefly touch upon other aspects of vulnerability, its focus will be on the vulnerability in the context of persons with disabilities, which derives from their cognitive, intellectual or physical impairments⁽³⁾. The complex background created through interweaving of concepts of protection of persons with disabilities developed in Member States (hereinafter: MS) will be considered. Thereby, the protection of persons with disabilities as vulnerable persons in Croatian legal system will be discussed only to the extent necessary to present the influence of contemporary EU instruments in the field on the development of standards of protection of vulnerable persons in the legal systems of MS. Main questions the paper seeks to answer are whether persons with disabilities as vulnerable persons have been redefined or changed by the virtue of their activities or statuses through the measures introduced in EU law and if and how the traditional understanding of the term ‘vulnerable person’ in the context of protection of persons with disabilities has been modified during the process of EU integration.

From traditional approach towards the modern understanding of vulnerability of persons with disabilities.

⁽²⁾ F. IPPOLITO, S. IGLESIAS SÁNCHEZ, *Introduction*, in F. IPPOLITO, S. IGLESIAS SÁNCHEZ (eds.), *Protecting Vulnerable Groups: The European Human Rights Framework*, cit., pp. 1-20, esp. p. 1.

⁽³⁾ A. WIESBROCK, *Disability as a Form of Vulnerability under EU and CoE Law: Embracing the ‘Social Model’?*, cit., p. 72.

Vulnerable person protection, understood as a fundamental human issue⁽⁴⁾ is currently one of the topics highly discussed at international and EU level.⁽⁵⁾ The starting point of the discussion on persons with disabilities as vulnerable persons is the understanding of a person with disabilities as a holder of rights who is capable of making free and informed decisions within the limits of his/her capacity, and not a passive recipient of care and attention⁽⁶⁾. This is clearly a paradigm shift from the traditional understanding of a person with disabilities as a person in need of charity-oriented, medical-based approach in regard to his vulnerability. Namely, at international level, for a long time disability has been considered as a medical condition. The traditional approach towards appropriate terminology very much reflects it. Namely, most terms used in MS such as *behinderte Menschen* (Germany), *persona con disabilità/invalido* (Italy), *adultes handicapés* (France) or *osoba s invaliditetom* (Croatia) only focus on specific characteristics of a person which put him/her in an inferior position towards the ‘normal’ healthy population. Although it is difficult to find an adequate and appropriate term, legal literature highlights a consensus on the necessity to avoid terms which are based on incapacity,

⁽⁴⁾ C. SALM, *Protection of Vulnerable Adults. European Added Value Assessment. Accompanying the European Parliament’s Legislative Initiative Report*, European Parliamentary Research Service, 2016, p. 7.

⁽⁵⁾ See European Commission Communication, *European Disability Strategy 2010–2020. A Renewed Commitment to a Barrier-Free Europe*, COM (2010) 636 final, 15 November 2010; Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC) [2010] OJ L303/16; Disability Action Plan 2006-2015 (Rec(2006)5) and the Recommendation on the right to participation in political and public life (CM/Rec(2011)14); European Parliament Resolution of 22 May 2012 on a strategy for strengthening the rights of vulnerable consumers [2013] OJ C264 E/11.

A. LAWSON, *Disability, degradation and dignity: the role of Article 3 of the European Convention on Human Rights*, in *Northern Ireland Legal Quarterly*, 2005, 56, p. 462; L. WADDINGTON, *Reflections on the Protection of ‘Vulnerable’ Consumers under EU Law*, Maastricht University Working Papers, 2013, 2, p. 28.

⁽⁶⁾ J. BERGERON, *Draft report with recommendations to the Commission on the protection of vulnerable adults [2015/2085(INL)]*. European Parliament – Committee on Legal Affairs, available at www.europarl.europa.eu, p. 4.

limitations or disturbance a person faces due to his/her disabilities⁽⁷⁾. A more affirmative terminology should be introduced, which focuses on interaction among psycho-physical impairment; a person with disabilities as a whole person; individual barriers which he/she faces, as well as the effects of the environment surrounding him/her⁽⁸⁾. This would be in line with the efforts to introduce a more 'situational approach' towards vulnerability of persons with disabilities, which respects the fact that vulnerability of these persons is not always grounded in their disabilities⁽⁹⁾. However, legal framework which regulates protection of persons with disabilities at national level in different MS lacks a coherent approach towards the concept of vulnerability of persons with disabilities. The variety of instruments applicable at national level amounts to different level of protection of persons with disabilities in MS. This undermines legal certainty in national as well as cross-border situations concerning persons with disabilities. Hence, the need for a more harmonized approach at international and EU level was detected.

The first step in the direction was taken with the adoption of UN Convention on the Rights of Persons with Disabilities (hereinafter: CRPD) in 2006. Prior to the adoption of the CRPD, only soft law instruments (resolutions, declarations and protocols) regulated human rights of persons with disabilities at international and EU level.

The effect of the adoption of the CRPD is threefold. From 30th March 2007 until now, 175 States have ratified/accessed the CRPD and it is considered as the most comprehensive human rights treaty of the 21st century⁽¹⁰⁾. At

⁽⁷⁾ M. MARINČIĆ, *Jesu li osobe s invaliditetom „invalidi?“ Pitanje konceptualne naravi, ali i potreba izjednačavanja mogućnosti*, Zagreb, 17:1-2, available at <https://hrcaak.srce.hr/22743>, pp. 199-221, esp. p. 200.

⁽⁸⁾ M. MARINČIĆ, *Jesu li osobe s invaliditetom „invalidi?“ Pitanje konceptualne naravi, ali i potreba izjednačavanja mogućnosti*, cit., p. 203.

⁽⁹⁾ R.K. SCHOTCH, *Models of Disability and the Americans with Disabilities Act.*, in *Berkeley Journal of Employment and Labour Law*, 12, 2000, p. 215; A. WIESBROCK, *Disability as a Form of Vulnerability under EU and CoE Law: Embracing the 'Social Model'?*, cit., p. 93.

⁽¹⁰⁾ Number of States which have ratified/accessed the CRPD as on November, 28th 2017. Information available at <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>.

EU level, the fact that the EU is a party to the CRPD resulted in acknowledgment that the relevant EU legal framework and policy should reflect standards of protection introduced through its provisions⁽¹¹⁾. Also, MS should make efforts in order to adapt the existing or adopt new legislation which follows the model focused on persons with disabilities as holders of human rights and freedoms as provided by the CRPD. Many of the targeted instruments at national level are EU instruments created by the EU legislator with the aim of promoting Single Market and advancing consumer protection.

The CRPD introduced a new ‘social model of disability’ which implies respect for human rights of persons with disabilities and promotion of their inclusion and participation in the society⁽¹²⁾. In order to comply with main principles of non-discrimination, equality, dignity, autonomy, independence, accessibility and inclusion of persons with disabilities, state parties should ensure reasonable accommodation for persons with disabilities in accordance with Article 5(3) CRPD. Thereby, Article 2 defines reasonable accommodation as necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and

⁽¹¹⁾ This has a direct influence not only on the interpretation and application of European instruments, but also CJEU’s jurisprudence. In *HK Danmark* and *Z v A Government Department and the Board of Management of a Community School* it explicitly aligned the EU concept of disability with that of the UN Convention. Acknowledging that disability must be seen as an ‘evolving concept’, it found that in line with Article 1 CRPD, disability must be understood as the result of the interaction between the individual’s impairment and the barriers created by society. As a result of the EU’s ratification of the CRPD, the EU concept of disability as applicable in various areas of EU law must, thus, be based on the social model of disability. Also, as the CJEU has noted, following the ratification by the EU of the UN Convention on Disability, the Convention can be relied upon for the purpose of interpreting Directive 2000/78 and defining the concept of ‘disability’ contained therein. Joined Cases C-335/11 and C-337/11 *Jette Ring and HK Danmark* [2013]; A. WIESBROCK, *Disability as a Form of Vulnerability under EU and CoE Law: Embracing the ‘Social Model’?*, cit., pp. 83, 87.

⁽¹²⁾ A. WIESBROCK, *Disability as a Form of Vulnerability under EU and CoE Law: Embracing the ‘Social Model’?*, cit., p. 72.

fundamental freedoms. Regardless of the expected potential of the CRPD to drive the harmonization of the rights of persons with disabilities as vulnerable persons at EU level, MS are not necessarily able to fulfill all of their obligations successfully. For example, in its Concluding observations to the Initial report of Croatia on the implementation of the Convention on the Rights of Persons with Disabilities from 2015, the Committee on the Rights of Persons with Disabilities was concerned that there is lack of understanding of the concept of reasonable accommodation and universal design in the field of education, health, employment and construction in Croatia.

Beside the compliance of MS with the obligations which arise from the ratification of the CRPD, the approach towards defining and understanding of the concept of vulnerability of persons with disabilities at EU level is decisive for determining the level of adequate protection which will be granted within the national legal system. Hence, the concept of vulnerability of persons with disabilities will be discussed in the next chapter. The findings will serve as a basis for the final conclusions on developments and possible/necessary future modifications of the current understanding of the term ‘vulnerable person’ in the context of protection of persons with disabilities at EU level.

2. — *Vulnerability of persons with disabilities under EU law.*

In the EU, legal framework affecting persons with disabilities was developed under the influence of the market integration policy, first in the soft-law instruments but more recently, with broader integration of human rights dimension, also in primary and secondary EU legislation. The initial step was taken with the introduction of the Communication on disability in 1996, but only after the entry into force of the Lisbon Treaty and the binding force of the EU Charter on Fundamental Rights, a number of legal guarantees were ensured for persons with disabilities, including independence, social and occupational integration and participation in the life of

the Community⁽¹³⁾. The main problem present both at EU level and in MS legislation is the number of instruments which regulate different rights of persons with disabilities as well as the incoherent approach towards their regulation⁽¹⁴⁾.

Although the development of the concept of protection of persons with disabilities at EU level began autonomously through soft law instruments⁽¹⁵⁾, after the entry into force of the Treaty of Amsterdam, it became a part of the policies and activities aimed at eliminating discrimination. The EU Charter on Fundamental Rights introduced a number of provisions aimed at protection of persons with disabilities, including obligations of MS to ensure protection against discrimination of persons with disabilities (arg. *ex* Article 21) as well as a guarantee of respect of independence, social and occupational integration and participation of persons with disabilities in the life of the EU (arg. *ex* Article 26).

However, a vast majority of instruments which address protection of persons with disabilities at EU level are directly connected to the removing of obstacles for the proper functioning of the Single Market and realisation of the four freedoms. The first among these instruments is Directive 2000/78/EC which obligates MS to eliminate discrimination against persons with disabilities in relation to employment and occupation. Other instruments in the field of free movement, competition, protection of en-

⁽¹³⁾ A. WIESBROCK, *Disability as a Form of Vulnerability under EU and CoE Law: Embracing the 'Social Model'?*, cit., p. 82.

⁽¹⁴⁾ For example, in Croatia, the legal position of persons with disabilities is regulated in a number of instruments, CRPD (Official gazette MU, 6/07, 5/08), Anti-discrimination Act (Official Gazette 85/08, 112/12), Disability ombudsman Act (Official Gazette 107/07), while the employment possibilities are regulated by the Professional rehabilitation and employment of persons with disabilities Act (Official Gazette 157/13, 152/14).

⁽¹⁵⁾ In 1996 the European Commission adopted a Communication on disability (endorsed by the Council later that year), emphasising the significant added value of an EU-level involvement to the efforts of the member states and the importance of identifying and removing the various barriers to equal opportunities and full participation of people with disabilities in all aspects of life. A. WIESBROCK, *Disability as a Form of Vulnerability under EU and CoE Law: Embracing the 'Social Model'?*, cit., p. 81.

vironment and many others which directly or indirectly address disabilities also affect the legal position of vulnerable persons at EU level⁽¹⁶⁾. The jurisprudence of the CJEU was first to recognize the need to change the approach towards vulnerability of persons with disabilities at EU level. The initial definition of disability as a ‘limitation which, as a result of physical, mental or psychological impairments, hinders the participation of the person in professional life’⁽¹⁷⁾ was replaced by a notion more in line with the CRPD of ‘disability as the result of the interaction between the individual’s impairment and the barriers created by society’⁽¹⁸⁾. However, it seems that this has not contributed to the equal recognition of the concept of vulnerability of persons with disabilities at EU level. For now, the concept of vulnerability is furthered exclusively through the EU policy on market integration and consumer protection. Namely, recent developments in the field of EU consumer protection legislation are marked by the differentiation between the concepts of ‘average’⁽¹⁹⁾ and ‘vulnerable’⁽²⁰⁾ consumer. The very distinction of the concepts of an ‘average’ and ‘vulnerable’ consumer serves

⁽¹⁶⁾ Relevant areas of EU law range from free movement and competition law to agriculture, transport, taxation, external relations, environment, consumers and health protection, science information, education and culture, law relating to undertakings and the area of freedom, security and justice to economic and monetary, industrial, regional and social policy. Academic Network of European Disability experts (ANED), *Annotated review of European law and policy with reference to disability* (Brussels, ANED, 2009). Also, A. WIESBROCK, *Disability as a Form of Vulnerability under EU and CoE Law: Embracing the ‘Social Model’?*, cit., p. 82.

⁽¹⁷⁾ Case C-13/05 *Sonia Chacón Navas v Eurest Colectividades SA* [2006].

⁽¹⁸⁾ Joined Cases C-335/11 and C-337/11 *HK Danmark* [2014]; Case C-363/12 *Z v A Government Department and the Board of Management of a Community School* [2014].

⁽¹⁹⁾ According to the CJEU jurisprudence, the ‘average’ consumer is reasonably well informed, reasonably observant and circumspect.

⁽²⁰⁾ The CJEU jurisprudence also recognized the concept of ‘vulnerable’ consumer who are entitled to higher level of protection. Also, consumer law instruments, such as Unfair Commercial Practices Directive, the General Product Safety Directive and the Consumer Rights Directive emphasize the need to ensure specific protection of vulnerable persons. Also A. WIESBROCK, *Disability as a Form of Vulnerability under EU and CoE Law: Embracing the ‘Social Model’?*, cit., pp. 83-85.

as means for better understanding of a certain commercial practice, a level of standard of safety of products or standards of distance or off-premise contract as being adequate in case of an ‘average’ consumer or in need of alteration in respect of ‘vulnerable’ persons in order to ensure special protection, due to their ‘mental or physical infirmity, age or credulity’⁽²¹⁾, the fact that they are ‘particularly vulnerable to the risks posed by the products under consideration’⁽²²⁾ or ‘who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee’⁽²³⁾.

However, two problems regarding the current concept of ‘vulnerability of persons with disabilities’ as consumers as defined in EU law can be detected. The first, revealed in the legal literature, concerns ‘vulnerability’ stemming from ‘mental infirmity’ or ‘credulity’ which cannot be clearly defined or determined, due to which, there is no clear notion of how the average member of a group of either ‘mentally infirm’ or ‘credible’ consumer could be assessed. Also, neither the concept of ‘physical’ or ‘mental’ infirmity is not in line with the CRPD, although the concept of disability, as contained in the Consumer Rights Directive, should be understood and interpreted according to the CRPD⁽²⁴⁾. The second problem is acknowledged in the court practice and concerns the fact that national courts and enforcement authorities seem rather reluctant to apply the special rules of Article 5(3) Unfair Commercial Practice Directive (hereinafter: UCPD) for consumers needing more protection. Article 5(3) UCPD is not frequently used in the decisions of relevant authorities and courts. The main explanation appears to be that the average consumer benchmark was designed and is clearly perceived as the normal consumer benchmark, the vulnerable consumer being the exception to be interpreted strictly. Moreover, where practices are directed to a particular target group, the

⁽²¹⁾ Art 5(3) as well as recital 19 of the Unfair Commercial Practices Directive’s preamble.

⁽²²⁾ Recital 8 of the Product Safety Directive’s preamble.

⁽²³⁾ Recital 34 of the Consumer Rights Directive’s preamble.

⁽²⁴⁾ Joined Cases C-335/11 and C-337/11 *Jette Ring and HK Danmark* [2013], paras 37 to 39, Also A. WIESBROCK, *Disability as a Form of Vulnerability under EU and CoE Law: Embracing the ‘Social Model’?*, cit., p. 87.

modulated average consumer benchmark applies, i.e. the benchmark of the average member of that target group (as set out in Article 5(2)(b) *in fine* UCPD). National courts and enforcement authorities tend to apply the *modulated* average consumer benchmark, instead of the “vulnerable consumer” benchmark of Article 5(3) UCPD. The fact that consumers do not form a homogenous group justifies a different assessment of the unfairness of a practice targeted at a particular group of consumers⁽²⁵⁾. Also, findings from the research into national practice in the MS confirm that the concept of ‘vulnerability’ is still vague and widely used in a broader context (i.e. not necessarily regarding unfair commercial practices) in respect of persons with mental or physical diseases as well as elderly people, children and young persons, but also in respect of unemployed persons, migrants and poor and indebted people⁽²⁶⁾. In Croatia, for example, the concept of a ‘vulnerable consumer’ has been introduced through the transposition of the UCPD in Croatian Consumer Protection Act (arg. *ex* Article 32/2), but it has not been sufficiently recognised or promoted in the court practice, so it cannot be argued that it has had an positive effect on protection of persons with disabilities as consumers⁽²⁷⁾.

3. — *Conclusion.*

Although vulnerability of persons with disabilities has been tackled under EU law, a specific legal framework providing protection of persons with disabilities is still missing. ‘Vulnerability’ as a separate concept is still not defined in EU law or by its case law. At EU level, protection of persons

⁽²⁵⁾ Fitness Check (2017), p. 43-45.

⁽²⁶⁾ Fitness Check (2017), p. 44.

⁽²⁷⁾ P. PORETTI, *Study for the Fitness Check of EU consumer and marketing law, Final report. Part 3 - Country reporting-Croatia*, Directorate-General for Justice and Consumers, European Union, 2017, pp. 151-194, esp. pp. 180-182. On the other hand, sector specific provisions on vulnerable consumers such as provided under Article 39 of the Energy Act seem to be interpreted and understood more in the context of poor or indebted persons as ‘vulnerable’ consumers than persons with disabilities, although the provision of Article 39 also covers ‘persons with disabilities or physical or intellectual impairments’.

with disabilities is being developed through the distinction of the concepts of an ‘average’ and a ‘vulnerable’ participant at the market, immanent to EU consumer law. Thereby, it should not be disregarded that EU consumer protection policy and legislation has developed as part of the efforts of the European legislator to promote market integration. Hence, limitations of the scope of protection provided to persons with disabilities under the concept of ‘vulnerability’ are largely influenced by several factors, which all stem from the market integration policy. Being developed under EU consumer law, ‘vulnerability’ is construed as a wide concept, implying protection of different potentially vulnerable groups of consumers such as children, elderly, poor or indebted and persons with disabilities being just one possible group among them. In this sense, it is possible to agree that it is not clear which groups of consumers can be categorised as ‘vulnerable’ and EU law fails to differentiate between various groups of ‘vulnerable’ consumers and the kinds of additional protection that they should be granted⁽²⁸⁾. At the same time, when assessing ‘vulnerability’ of persons with disabilities, the courts of MS are not obligated to take into account specific situation of an individual. Instead, national courts usually apply the typical categories of consumers, without considering situational vulnerability of persons with disabilities which is not caused by person’s impairment but the social barriers which are imposed by human behaviour or unadjusted environment. Also, in situations in which the courts should provide additional protection due to vulnerability of consumers, requirement of the functioning of the internal market emerges as a limit to the scope of protection awarded to them. However, in order to question such practice of the national courts before Courts, the CRPD and its requirement that state parties take all appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity (arg. *ex* Article 12/3) cannot be directly relied on in exercising EU law⁽²⁹⁾.

⁽²⁸⁾ L. WADDINGTON, *Reflections on the Protection of ‘Vulnerable’ Consumers under EU Law*, cit., p. 16.

⁽²⁹⁾ Case C-363/12 *Z v A Government Department and the Board of Management of a Community School* [2014], para 90.

It terms of other EU instruments which could be invoked or serve as a basis for enhancing protection of persons with disabilities, the possibilities are limited. Although the European Consumer Agenda⁽³⁰⁾ included the concept of vulnerable consumers, it failed to further its development or application. From the current activities of the EC in setting the new consumer programme for the next period it is not possible to foresee whether any developments should be expected⁽³¹⁾. Due to the fact that the concept of protection of persons with disabilities will most probably continue to be observed through the goals of the market integration policy, as the European Disability Strategy⁽³²⁾ has implied, the restrictions of its effectiveness should be accepted. Namely, the main problem is the fact that it is difficult to expect instruments related to consumer protection which also serve the aim of market integration to focus on the real needs and circumstances of persons with disabilities or practices and attitudes they face, in the same manner as the CRPD. In this sense, in order to ensure a high level of protection of persons with disabilities at EU level based on the social model of disability, introduction of a concept of social vulnerability in the binding EU legislation should be advocated. Only such an approach would guarantee the shift in the practice of the national courts as well the possibility for the Courts to safeguard that there are no legal, physical or social obstacles in the MS which prohibit persons with disabilities to acquire the same level of protection and exercise their rights and obligations as ‘fully equal’ members of society.

⁽³⁰⁾ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, A European Consumer Agenda-Boosting confidence and growth SWD(2012)132 final.

⁽³¹⁾ DG Justice and Consumers of the European Commission has commissioned two interlinked evaluations (ex-post evaluation of the Consumer Programme 2007-2013 and the mid-term evaluation of the Consumer programme 2014-2020) which will provide an adequate basis for the considerations regarding the new programme.

⁽³²⁾ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, European Disability Strategy 2010-2020; A new commitment to A barrier-Free Europe (SEC(2010)1323).