Contact: j.biemans@uu.nl

CONSUMER PROTECTION DIRECTIVES AND PRIVATE LAW ENFORCEMENT: THREE CHOICES OF MEMBER STATES THAT MAKE IMPLEMENTATION SUB-OPTIMAL

Prof. Dr. Jan Biemans[1]

1. Introduction

This contribution discusses the implementation of consumer protection directives in national law from the perspective of private law enforcement by consumers. It focuses on the area of financial consumer law, where consumers meet supervised financial institutions, such as credit institutions ('banks'). The contribution addresses three types of choices Member States have when implementing directives and their consequences for the harmonisation of consumer protection and the completion of the internal market. It is argued that not only harmonisation of consumer protection, but also consumer protection itself are sub-optimal because of these freedoms: the same implementation mechanisms that lead to relative unclarity and invisibility of consumer rights and their enforcement, also lead to different implementation outcomes and sub-optimal harmonisation of consumer rights and their enforcement. Effective protection of consumers presupposes (i) clear, visible and specific substantial rules granting rights to consumers in the framework of their contractual relationship with their professional counterparties, (ii) with unconditional and sufficiently precise sanctions in case of infringement of these rights, (iii) guaranteeing consumers real and effective judicial protection in civil courts.[2] Because of three kinds of choices Member States can make in the implementation of directives not only the effective protection of consumers per Member State will vary, leading to a sub-optimal harmonisation of consumer protection and a sub-optimal completion of the internal market, but also consumer protection itself may be not as effective as it can be. First, Member States can choose to implement directives in national public (administrative) law,[3] in private ('civil') law or in both.[4] Second, Member States can choose to implement substantive EU rules in national law in the form of hard rules or open norms. Third, Member States can choose sanctions applicable to infringements of the national provisions adopted on the basis of the directives, as long as these sanctions are 'effective, proportionate and dissuasive'. The three choices of Member States interrelate. For example, implementation of a hard rule in public law rather than private law, may lead to different applicable sanctions. After discussing the general framework (para. 2), this contribution discusses the three types of choices (para. 3 through 5), paying special attention to consumer protection within the field of consumer credit agreements and consumer mortgage credit agreements, where professional counterparties of consumers are generally credit institutions regulated by financial supervision law. Consumer credit agreements and consumer mortgage credit

[1] Professor of Law, Utrecht University, the Netherlands; substitute-justice, Court of Appeals Arnhem-Leeuwarden, the Netherlands. LL.B/LL.M '98, University of Groningen, the Netherlands; LL.M '99, Harvard Law School, United States; M.A. (Philosophy), '00, University of Groningen; Ph.D (Law), '11, Radboud University Nijmegen, the Netherlands.

[2] [Reference].

[3] When it comes to financial institutions, such as credit institutions and investment firms, public law generally includes 'prudential law' as part of financial supervision law.

[4] Member States can also implement directives in criminal law.

agreements are governed by the Consumer Credit Directive 2008/48/EC [5] respectively Mortgage Credit Directive 2014/17/EU.[6] These three types of choices are interesting from the perspective of balancing unity and diversity: whereas directives presuppose the – often full – harmonisation of substantive consumer protection rules and probably regard the implementation process as subordinate or less relevant to this harmonisation, in fact the autonomy of the Member States implementing these rules may disturb harmonisation and undermine consumer protection.

2. Framework

the European Union (EU) issues directives in the field of consumer protection.[7] These directives are aimed at promoting the interests of consumers and to ensure a high level of consumer protection. The EU contributes to protecting, among other things, the economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.[8] The EU further contributes to the attainment of these objectives through measures in the context of the completion of the internal market, as an area in which the protection of a multitude of public interests, including consumer protection, comes together.[9]

To achieve the objective of consumer protection as part of the internal market, the European Union, among other instruments, issues directives for the approximation of the laws, regulations or administrative provisions of the Member States, directly affecting the establishment or functioning of the internal market.[10] Within harmonisation measures a distinction can be made between minimum and maximum harmonisation. If a directive concerns minimum harmonisation, Member States have the freedom to introduce or maintain stricter standards, protecting consumers in a more intensive way. If a directive concerns full harmonization, however, directives fully design the substantive standards of consumer protection within their scope, only sometimes giving member states options to choose from. After a directive has entered into force, Member States transpose its content in national legislation, adopting the laws, regulations and administrative provisions necessary to comply with the directive. Especially where it concerns full harmonisation, it would be expected that national law of all Member States would provide for equal law, regulations and/or administrative provisions seeing to the protection of the interests of consumers. However, as will be discussed below, this is not the case because of three freedoms Member States have when it comes to implementation of directives.

3. First choice: administrative law and/or civil law?

Generally, a distinction is made between public law (or administrative law) on the one hand and private law (or civil law) on the other hand. The TFEU also makes that distinction.[11] Similarly, on a national level, a distinction can be made between public law sanctions and enforcement and private

[5] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22.5.2008).
[6] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ L 304, 22.11.2011).
[7] Article 4 (2) (f) TFEU.
[8] Article 169 (1) TFEU.
[9] Article 114 TFEU and Article 169 (2) TFEU.
[10] Articles 114 and 115 TFEU.
[11] See for example Articles 35 (4), 54, 272 TFEU

law sanctions and enforcement[12]. From the ECJ case law[13] it seems however to follow that EU law is blind to the distinction between public and private law when it comes to implementing rules of EU law. The ECJ allows directives[14] to be transposed into national law by a combination of public and private law.[15] Only in some cases, a directive may give a hint[16] or even prescribes[17] as to which provisions should be implemented in which kind of law.

Generally public law and private law are separated. Although public law and private law may be interrelated and/or cover similar topics, their nature differs. Public law mainly sees to government regulation, whereas private law regards relationships between private parties. Depending on the subject matter of a directive, its implementation may point consistently in one direction: either public law or private law. However, in some cases, both public law and private law will see to the same subject matter. This is especially true in the case of financial law, where contracts are concluded between consumers on the one hand and financial institutions (such as credit institutions and investment firms) on the other hand,. The applicable administrative law provisions – for example contained in a financial supervision act – will typically see to the regulation of the financial institution itself, and contain so-called prudential law. The responsible financial supervisory authority will have various administrative instruments to penalize the financial institution for any infringements of these public law provisions. The applicable civil law provisions are often contained in a Civil Code and typically see to the rights and obligations in the legal relationship between the consumer and its professional counterparty. Sanctions relating to infringements of such rights are private remedies. One party may demand performance of the other party, dissolve or rescind the contract and/or claim damages in the case of (financial) loss, thus granting the party effective judicial protection.

Implementation of consumer protection directives will generally lead to changes in the Civil Code, and not (or hardly) to any changes in public law. Examples of such directives are the Unfair Terms Directive 93/13/EEG[18], the Consumer Sales and Guarantees Directive 1999/44/EC[19] and the Consumer Rights Directive 2011/83/EU.[20] Such directives will lead to changes in the Civil Code, as the directive aim to protect consumers against their professional counterparties by addressing the content of their contractual relationships. Generally, the professional counterparties, acting in the course of trade, business or profession, are not regulated as such. Although a national central authority may guard some of the interests of consumers in general terms, most of the content of the directive will specifically see to the private law relationship between the consumer and its

[12] This will be further discussed below (par. 5).
[13] ECJ 29 April 2015, Case 51/13 (Nationale Nederlanden v Van Le), para. 28. The case concerned the sale of insurance policies with exorbitant management charges (so called '*woekerpolissen*').
[14] In the case of the Nationale Nederlanden-judgment, the Third Life Assurance Directive.
[15] See D. Busch, 'The Private Law Effect of MiFID: the Genil Case and Beyond', ERCL 2017; 13(1), p. 70–93, especially p. 80-81.
[16] See for example para 83 Preamble of the Mortgage Credit Directive: "Member States may decide to transpose certain aspects covered by this Directive in national law by prudential law, for example the creditworthiness assessment of the consumer, while others are transposed by civil or criminal law, for example the obligations relating to responsible borrowers."
[17] See for example the criminal enforcement of IP law and environmental law. [See for example, Directive 2004/48/EC on the enforcement of intellectual property rights (OJ L 195/16, 2.6.2004).]
[1818] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993).
[19] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999).
[20] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22.11.2011).

counterparty. As a consequence, those directive will generally be transplanted into private law and rely on private law sanctions and enforcement.

In the case of directives such as the Consumer Credit Directive and the Mortgage Credit Directive, the implementation would not only lead to change in civil law, but also changes in public law. In the case of financial consumer protection, the professional counterparties are financial institutions, and, as a consequence (heavily) regulated by public supervision law. Some of the substantive rules of the directive see to the rights and obligations of both parties within their contractual relationship (private law part); others see to the behaviour of the regulated institution as such, as supervised by the financial supervisory authority, and ultimately relate to the optimal functioning of financial markets (public law part); and still others see to both. Accordingly, if in a specific contract the financial institution does not comply with its obligations, the consumer can undertake action to enforce its rights. If a financial supervisory institution receives signals that a financial institution does not live up to its obligations, it may undertake action as well. The logic of this divide, however, is not reflected in the directives themselves. It is basically up to Member States to choose which EU provisions are implemented in its national public law, private law or both. It may also choose to transpose a directive into a separate statute, containing elements of both public law and private law.[21]

From the perspective of harmonisation, this choice by the Member States does not have to be problematic. Provisions only seeing to (the organisation of) the financial institutions itself could be implemented in public (financial supervision) law, whereas provisions seeing to the right and obligations in the legal relationship between consumer and financial institution should be implemented in private law, for example the Civil Code. Some provisions may be implemented in both, such as, in the case of credit agreements, information requirements towards consumers; the same rules will reappear both in public (financial supervision regulation) law and private law (the Civil Code).

However, the lack of direction in which kind of statute – public law or private law – such provisions have to be implemented, means that the same rules may be implemented in one Member State in public law, and another in private law. This may be disadvantageous for the consumer if typical 'rights and obligation' provisions are not implemented in private law for two reasons. Generally, if a consumer wishes to gain something from enforcement, it is essential to know that the consumer have to civil proceedings in order to achieve something. Public enforcement will only have general 'administrative' consequences for the financial institution; it will for example not release a consumer from a specific disadvantageous contract or award monetary rewards to a specific consumer. As a consequence, first, the consumer seeking to know its rights and obligations, including the private enforcement in the case of infringement of its rights, will generally turn to the Civil Code and not any financial supervision act. After all, those public law provisions are drafted from the perspective of the optimal functioning of financial markets (which includes consumer protection *in general*, and which is, moreover, not limited to that aspect), and not from the perspective of the protection of a *specific* consumer. Financial supervision authorities will enforce the provisions enacted in the financial supervision act and related regulations, whether or not followed by administrative sanctions; the consumer will generally (or firstly) only rely on the Civil Code provisions detailing the contractual relationship with its financial counterparty. To put it differently, implementing provisions directly relating to consumer rights in public law, where instead or also private law would be expected,

[21] For example, the former Consumer Credit Directive 87/102/EEC was transposed in Dutch law in a separate statute, the Consumer credit act (Wet op het consumentenkrediet). Nowadays this act hardly contains any provision. Most of them are now part of the Dutch Financial Supervision Act and/or the Dutch Civil Code.

lowers the visibility and thus the effective consumer protection of such provisions.[22] Second, in the case of infringement of public law provisions, administrative sanctions may be clear, but private law sanctions not and private law sanctions may even be less effective. For example, according the Dutch Financial Supervision Act, the infringement of a mandatory (public) law provision of such financial supervision act will not be (as such) a ground for the (private law) rescission of the contract between the consumer and its professional counterparty,[23] but according to Dutch Supreme Court case law only a factor in determining whether the financial institution has acted unlawfully vis-à-vis the consumer, and may have to compensate a particular amount of financial loss to the consumer.[24] If the same provision would have been part of the Dutch Civil Code, any infringement of a mandatory law provision protecting the consumer would have been a ground for rescission of the contract.[25] Thus, from the perspective of effective judicial protection of the consumer, there is much at stake in which domain any provisions are implemented.

From this perspective, it is for example disadvantageous to consumers that Article 18 Mortgage Credit Directive was not implemented in the Dutch Civil Code.[26] According to Article 18 (1) Mortgage Credit Directive, the credit institution has to make a thorough assessment of the consumer's creditworthiness; the credit institution only makes the credit available to the consumer where the result of the creditworthiness assessment indicates that the obligations resulting from the credit agreement are likely to be met in the manner required under that agreement (Article 18 (5) (a) Mortgage Credit Directive), and, among other things, informs the consumer without delay of the rejection the credit, where the credit application is rejected the creditor informs the consumer (Article 18 (5) (c) Mortgage Credit Directive). It is clear that these provisions impose clear obligations on the credit institution vis-à-vis the consumer. It would be expected that such obligations and corresponding rights were to be part of the regulation of the legal relationship between consumer and credit institution in the Civil Code. However, the bank's obligation to assess the consumer's creditworthiness in Article 18 (1) Mortgage Credit Directive, just as the similar obligation in Article 8 Consumer Credit Directive, was only implemented in the Dutch Financial Supervision Act.[27] From the perspective of effective consumer protection, this manner of implementation is disadvantageous, as the obligations is not present in the consumer's domain of private law.

The aforementioned example shows that the choice of Member States for transposition of directives in public law or private law may not be without consequences for the protection of consumers. The fact that Member States may freely choose where to implement provisions of such directives – either in public law or in private law, or in both – will also have its implications for the harmonisation of consumer protection and the completion of the internal market. After all, Member States will make different choices in this regard.

In the most optimal situation, directives should indicate which provisions see to individual rights of consumers and have to be transposed in legislation directly related to the regulation of such individual rights. This would not only ensure the visibility of those rights for consumers, but also their effective judicial protection.

---

[22] These considerations also touch upon the debate on the effectiveness of private and administrative law enforcement, which intermingles with the subject discussed in paragraph 5 below.
[23] Article 1:23 of the Dutch Financial Supervision Act (DFSA).
[24] See Article 6:162 Dutch Civil Code (DCC), and the Dutch Supreme Court case law, as discussed in Asser/Biemans & Van Schaick 7-1A 2021/165 and 208, with further references.
[25] See Article 3:40 (2) DCC.
[26] As has been the case in the Netherlands.
[27] Article 4:34 DFSA.

4. Second choice: hard rule or open norm?

Although some directives also include open norms,[28] most provisions in directives are so called hard rules, meaning provisions which entails clear and specific rights and obligations. It would be expected that such hard rules are transposed in national law as hard rules, with the same level of concreteness and specificity, but that is not always the case. In some cases, hard rules are transposed as open norms.

According to the definition of directives, Member States shall adopt 'the provisions necessary to comply with the directive'[29] or, in different general wording, 'the laws, regulations and administrative provisions necessary to comply with the specific directive',[30] but the directive does not state how this should be done. Just as with the choice between public law and private law, directives (or EU law in general) seem not to require from Member States that the provisions of the directive with hard rules need to be implemented in the same form. This leaves open the possibility that Member States may refer to existing open norms, such as the duty of care, as a broader principle relating to breach of contract or tort, already 'covering' the hard rules in the directive. Thus, a Member State may argue that a specific obligation imposed on one of the parties, contained in a hard rule in the directive, is already part of national law, as it falls under the umbrella of the duty of care, and needs no implementation as such.

According to Article 28 (5) Mortgage Credit Directive, Member States shall have procedures or measures in place to enable the 'best efforts price'[31] for the foreclosed immovable property to be obtained where the price obtained for the immovable property affects the amount owed by the consumer. Where after foreclosure proceedings outstanding debt remains, Member States shall ensure that measures to facilitate repayment in order to protect consumers are put in place. In the Netherlands, Article 28 (5) Mortgage Credit Directive has not been transposed in any specific rule in national law.[32] The legislator has referred to the existing procedures on foreclosure of real property in the DCC and the Dutch Code of Civil Procedure (DCCP). However, neither the DCC nor the DCCP contains specific measures or obligations imposed on the creditor to prevent that the consumer owes any amount to the bank after the foreclosure of its real property. In addition to the rules in the DCC and the DCCP, the legislator has referred to the special duty of care of financial institutions and general provisions and principles in the Dutch Civil Code, such as abuse of power, reasonableness and fairness, breach of contract and unlawful act (tort), which would encompass these obligations towards the consumer.[33] Other examples of this kind of implementation exist as well.[34]According to the legislator, the special duty of care of banks obliges them to aim for the highest price for the

[28] See for example the rule that investment firms must act honestly, fairly and professionally in accordance with the best interests of their clients, as laid down in Article 19(1) MIFID I and Article 24(1) MIFID II.
[29] For example, Article 27 (1) Consumer Credit Directive.
[30] For example, Article 42 (1) Mortgage Credit Directive.
[31] Meaning the price that a bank can achieve by its highest efforts.
[32] As for example has been the case with Article 28 (1) and (2) Mortgage Credit Directive which have been implemented in Article 7:128a (1) and (2) DCC.
[33] See Kamerstukken II 2015/16, 34292, 3, p. 5 (MvT); and J.W.A. Biemans, 'Grenzen aan de uitoefening van een hypotheekrecht Over de implementatie van art. 28 Richtlijn 2014/17/EU (hypothecair krediet)', Maandblad voor Vermogensrecht 2017/6, par. 3.1.
[34] The Netherlands has implemented the option to furnish additional information under the Third Life Insurance Directive by means of the requirement of reasonableness and fairness under Article 6:2 DCC (private law). See D. Busch, 'The Private Law Effect of MiFID: the Genil Case and Beyond', ERCL 2017; 13(1), p. 70–93, especially p. 80 and par. 2.4.

immovable property, even when the position of the bank is covered sufficiently. If the bank does not do so, the bank acts unlawfully towards the consumer and will be liable.[35] However, at the time of implementation it was unclear and it is still unclear what this duty of care of the bank towards the consumer precisely entails due to lack of any established and authoritative case law, including its effects on the amount of damages owed by the credit institution to the consumer.[36] Thus, it is easier said than done to state that the bank is liable towards in consumer due to breach of duty of care. The Member States should spell out more the exact consequence, in order not leave both financial institutions and consumers in the dark.

Moreover, choosing this manner of transposition is problematic from the point of view of effective harmonisation and consumer protection. First, Member States doing so leave it implicitly to the judiciary to establish the specific content of the open norm in relation to the specific hard rules in the directive, even although the court has the duty to interpret national law – including open norms – in conformity with the relevant EU legislation[37]. They also implicitly presuppose that parties to the agreement, in our case consumer and financial institution, can and will take the initiative to litigate to have such substantive rules established in the first place. Getting results does not only cost energy and money, but also takes years and years for a Supreme Court to come up with a final answer, if any. Second, by choosing this manner of implementation, the specific provision from the directive lacks visibility in national legislation. Each Member State implementing directives should aim for as much transparency and legal certainty as possible. If these conditions are not met, consumers may not be aware of their specific rights. Even their lawyers may not always know: they would have to study the directive itself, instead of the regulation in national law implementing the directive, to find out. Third, directly related to aforementioned, if a consumer or its lawyer refers to the duty of care or if a court judges, they may not be aware of its EU origin, which is however relevant to determine its exact content. After all, courts will have to establish the meaning of the open norm – the specific duty of care of banks towards consumers – in conformity with the specific provision of the directive.[38] The duty of care cannot encompass more (or less) than the hard rule in the directive. For this, courts have to be aware in the first place that the obligation of the financial institution – based *in national law* on a general duty of care towards consumer – is actually based on a specific EU law provision.[39]

If national legislation of some Member States will contain specific rules, whereas that of others will only contain general open norms, there is no equal transposition of EU law in national law. Just as has been argued in the previous paragraph, if Member States operate differently in their choices this respect, consequently, effective consumer protection will also vary among Member States, jeopardizing harmonisation of EU consumer law and completion of the internal market. If the aim of consumer protection is achieved by protecting the economic interests of consumers and promoting their right to information, education and to organise themselves in order to safeguard their interests, these goals are not achieved if private law does not contain clear and transparent rules with regard

[35] See Kamerstukken II 2015/16, 34292, 3, p. 67-71 (MvT).
[36] See Asser/Biemans & Van Schaick 7-1A 2021/@; Biemans
[37] See for example, ECJ 13 November 1990, Case C-106/89 (Marleasing v. La Comercial Internacional de Alimentacion SA).
[38] See also with respect to private law enforcement in relation to MIFID II, D. Busch, 'The Private Law Effect of MiFID: the Genil Case and Beyond', ERCL 2017; 13(1), p. 70–93, especially p. 80-82; and ibidem, D. Busch, Why MiFID Matters to Private Law – The Example of MiFID's Impact on an Asset Manager's Civil Liability, Capital Markets Law Journal (2012) p. 386-413.
[39] Thus, when would come to foreclosure, the courts have to impose the special duty of care of banks in accordance with the Mortgage Credit Directive, even though this is not clear from the DCC itself.

to consumer rights or if the manner of implementation effectively forces consumers to engage in costly litigation to 'discover' the exact scope of their rights. If the manner of implementation varies among Member States, and the level of consumer protection depends on the kind of manner of implementation, it goes without saying that the *effective* level of consumer protection will not be equal, even although – as a manner of principle – the substantive rules on consumer protection should be the same throughout the Member States. It questions the degree of freedom Member States should have in the implementation process.

5. Third choice: sanctions

Although the TFEU[40] and some directives[41] contain specific private law sanctions on the infringement on substantive EU rules, in the field of consumer protection most directives do not deal with the topic of sanctions (or 'penalties') as such. According to Aronstein, "As regards the obligation upon Member States, including national courts, to provide for effective judicial protection of Union law, it is recalled that in most cases neither Union legislation nor case law of the Court of Justice stipulates the specific remedy for an infringement of Union law."[42] Directives contain provisions with substantive ('material') rules to protect the consumer and to promote the completion of the internal market in the form of full harmonisation, which need to be implemented in national law, but they do not contain any clear and specific (unconditional and sufficiently precise) sanctions relating to infringements of those rules. Directives – see for example the Consumer Credit Directive,[43] the Consumer Rights Directive[44] and the Mortgage Credit Directive[45] – only stress that the "member states shall lay down the rules on sanctions applicable to infringements of the national provisions adopted on the basis of this Directive and shall take all measures necessary to ensure that they are implemented." The only prerequisite for those sanctions is that they must be "effective, proportionate and dissuasive."[46] It fits the principle of national procedural autonomy, which,

[40] See Article 101 TFEU on competition, stating that "any agreements or decisions prohibited pursuant to this Article shall be automatically void".
[41] See for example the right to compensation in Article 7 (1) of the Flight Compensation Regulation (EC No 261/2004) on passenger rights, which spells out the exact amount of compensation; to a lesser extent, Article 6 (1) Unfair Terms Directive 93/13/EEC, which requires that unfair terms are not binding, although it is up to Member States to provide for specific measures through which that result can be achieved; and Article 3 Consumer Sales Directive 1999/44/EC, providing for several specific civil remedies, including: liability of the seller (para. 1), the right of the consumer to repair, replacement (free of charge) or price reduction (para. 2-4) and the right of the consumer to rescission of the contract (para. 5).
[42] I. Aronstein, Remedies for infringements of EU law in legal relationship between private parties (Series Law of Business and Finance, Vol. 18; doctoral thesis Nijmegen), Deventer: Wolters Kluwer 2019, nr. 268. See on this topic also F. Cafaggi & P. Iamiceli, 'The principles of effectiveness, proportionality and dissuasiveness in the enforcement of EU consumer law: the impact of a triad on the choice of civil remedies and administrative sanctions', 25 European Review of Private Law 2017, 3, pp. 575-618; M. Ebers, Rechte, Rechtsbehilfe und Sanktionen im Unionsprivatrecht, Jus Privatum 212, Tübingen: Mohr Siebeck 2016; N. Reich, 'Effective private law remedies in discrimination cases', in: R. Schulze (ed.), Non-discrimination in European private law, Tübingen: Mohr Siebeck 2011, pp. 57-79.
[43] Article 23 (1) Consumer Credit Directive.
[44] Article 24 (1) Consumer Rights Directive.
[45] Article 38 (1) Mortgage Credit Directive.
[46] See for examples of other directives, I. Aronstein, Remedies for infringements of EU law in legal relationship between private parties, 2019, nr. 271, footnote 22.

however, has to comply with the principle of effective judicial protection, as codified in Article 47 of the EU Charter of Fundamental Rights.[47]

The criterion that sanctions have to be effective, proportionate and dissuasive can be traced back to ECJ case law: starting with Von Colson and Kamann v. Land Nordrhein-Westfalen and Draehmpaehl v. Urania Immobilienservice OHG[48] and explicitly Commission v. Greece[49] as repeated in later cases, such as Kiriaki Angelidaki and Others.[50].

The first two aforementioned cases regarded the interpretation of Article 6 of the Equal Treatment (Employment) Directive 76/207/EEC.[51] That provision requires Member States to adopt measures which may be relied on before the national courts *by the persons concerned* (e.g., in our case, the consumers), thereby guaranteeing 'real and effective judicial protection' to those persons.[52] Such sanction implies that private law enforcement should be part of the sanctions provided for by the Member States. In my opinion, consumer protection directives dealing with consumer contracts also presuppose such sanctions.

[47] See on this principle for example, R.J.G.M., 'National Procedural Autonomy and General EU Law Limits', Review of European Administrative Law 2019, Vol 12, Nr. 2, p. 5-34, with further references.
[48] See especially ECJ 10 April 1984, Case 14/83 (Von Colson and Kamann), para. 18, 22-24; and ECJ 22 April 1997, Case C-180/95 (Draehmpaehl), para. 24, 25 and 39: "24. In this regard, it must be pointed out first of all that, even though the Directive does not impose a specific sanction on the Member States, nevertheless Article 6 obliges them to adopt measures which are sufficiently effective for achieving the aim of the Directive and to ensure that those measures may be effectively relied on before the national courts by the persons concerned (Case 14/83 Von Cohort and Kamann v Land Nordrhein-Westfalen [1984] ECR 1891, paragraph 18). 25. Moreover, the Directive requires that, if a Member State chooses to penalize breach of the prohibition of discrimination by the award of compensation, that compensation must be such as to guarantee real and effective judicial protection, have a real deterrent effect on the employer and must in any event be adequate in relation to the damage sustained. Purely nominal compensation would not satisfy the requirements of an effective transposition of the Directive (Von Colson and Kamann, paragraphs 23 and 24). […] 39. As the Court held in paragraph 23 of its judgment in Von Colson and Kamann, the Directive entails that the sanction chosen by the Member States must have a real dissuasive effect on the employer and must be adequate in relation to the damage sustained in order to ensure real and effective judicial protection." See also I. Aronstein, nr. 268: "As regards the obligation upon Member States, including national courts, to provide for effective judicial protection of Union law, it is recalled that in most cases neither Union legislation nor case law of the Court of Justice stipulates the specific remedy for an infringement of Union law."
[49] CJEU 21 September 1989, Case 68/88, ECR 2965 (Commission v. Greece), para. 23 and 24: "23. It should be observed that where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. 24. For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive."
[50] CJEU 23 april 2009, joined cases C-378/07 to C-380/07, ECR I-3071 (Kiriaki Angelidaki and Others), nrs. 158-160.
[51] Article 6 of the Equal Treatment (Employment) Directive 76/207/EEC: "Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities."
[52] ECJ 10 April 1984, Case 14/83 (Von Colson and Kamann), para. 18, 22-23; ECJ 22 April 1997, Case C-180/95 (Draehmpaehl), para. 25.

However, in most consumer protection directives,[53] other than the requirement that the sanctions need to be effective, proportionate and dissuasive, the directives leave it to Member States what the sanctions should be, without any guidance. First, the directives do not prescribe whether the sanctions or penalties have to be of a public or private nature. -The term sanction or penalty may refer to several sanctions, both administrative or criminal sanctions, and civil remedies or compensation.[54] The directives do not specify whether the sanctions may (only) come from, for example, a national (financial supervisor or consumer protection) authority in the form of administrative sanctions, imposed after a periodically review of the administration of the supervised (financial) institution), or whether sanctions also need to include private law actions that can be instituted by the consumer itself before a court. Second, in addition and in line with the first point, the directives generally[55] do not spell out the private law sanctions on the infringement of provision by the professional counterparty of the consumer, such as dissolution, rescission of the contract or damages for which amounts or types of loss. Third, moreover, according to ECJ case law, whether a sanction or a remedy is effective, proportionate and deterrent has to be determined on a case by case basis, in light of the specific circumstances at hand.[56] It may not surprise that legal doctrine has criticized the ECJ for its "rather ambiguous" and "uncertain and inconsistent position" "with regard to sanctions for breaches of European Union law."[57]

As a consequence, the sanctions imposed will be fully governed by national law. Aside from the requirement that the sanctions have to be effective, proportionate and dissuasive, Member States can freely choose and determine sanctions in accordance with their national circumstances and legal systems.[58] They may adopt additional and/or specific remedies for infringements of specific rules of EU law, but also apply the existent general repertoire of civil remedies to particular infringements of EU law.[59] If a Member State chooses for specific remedies for infringements of specific rules of EU law, such sanctions will be more visible and could therefore, as they will be more tailor made, generally be more effective than if a Member State chooses to maintain the existent repertoire of civil remedies. Especially when it comes to financial consumer law, it is often unclear what kind of financial loss should compensated or for what amount. If a Member State does not impose specific sanctions, it implicitly refers to the existent repertoire of civil remedies. However, as the exact application of general civil remedies, including damages, may be unclear with regard to new, specific

[53] In other fields this is not always the case, see for example M. Eliantonio & E. Muir, 'Conclusions on the 'Proceduralisation' of EU Law Through the Backdoor', Maastricht Faculty of Law Working Paper No. 2015/2, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2620729.
[54] See L. Meurkens, 'The status quo of punitive damages rejection in Europe: toward more liberalness?', in: R. de Groot, T. Hartlief, J. Smits & L. van Vliet (eds.), Kritiek op recht (Liber amicorum Gerrit van Maanen), Deventer: Kluwer 2014, par. 15.4, referring to B.A. Koch, 'Punitive Damages in European Law', in: H. Koziol & V. Wilcox (eds.), Punitive Damages: Common Law and Civil Law Perspectives, Vienna: Springer Verlag 2009, p. 200-202.
[55] See for exceptions, footnote **[31]** above.
[56] ECJ 2 August 1993, Case C-271/91 (Marshall II; Marshall v Southampton and South-West Hampshire Area Health Authority), para. 25, also relating to the interpretation of the Equal Treatment (Employment) Directive 76/207/EEC; I. Aronstein, Remedies for infringements of EU law in legal relationship between private parties, 2019, nr. 272. See further, generally, Aronstein 2019, chapter 6 on the requirement that remedies or sanctions for infringements of Union law are proportionate.
[57] This has in particular been done in the light of punitive damages. See L. Meurkens, 'The status quo of punitive damages rejection in Europe: toward more liberalness?', in: R. de Groot, T. Hartlief, J. Smits & L. van Vliet (eds.), Kritiek op recht (Liber amicorum Gerrit van Maanen), Deventer: Kluwer 2014, par. 15.4, with further references.
[58] See for example ECJ 10 April 1984, Case 14/83 (Von Colson and Kamann), nrs. 9, 12, 14.
[59] I. Aronstein, Remedies for infringements of EU law in legal relationship between private parties, 2019, nr. 269, which further references to ECJ case law.

obligations, the Member State leaves it to the parties to litigate and to the courts to determine what the private law remedies are. Even although a Civil Code may contain consistent general rules on damages, often it is not clear how these general rules on damages will translate if applied to specific kinds of loss. As financial loss is complex and often also unprecedented in legal history, there is no previous case law to fall back on. Existing general remedies may therefore point in different directions; parties may argue in different directions and various lower courts may come to different solutions. Only through litigation it will become clear which standards have to be met in order to get compensated and which kinds of loss are awarded with which kinds of damages in a national system, subject to approval of the European Court of Justice. As stated in paragraph 4 of this contribution (Second choice: hard rules or open norm), getting results does not only cost energy and money, but also takes years and years for a Supreme Court to come up with a final answer, if any. It would be preferred if Member State could implement or at least communicate in an explanatory memorandum what the application of the existing repertoire will mean in the case of the infringement of the specific provisions of the directive, and, even better, if the EU directives would contain specific sanctions, tailor made to the specific consumer rights at hand.

The negative effects of a system in which sanctions are left to Member States are twofold. First, if a directive does not spell out the specific sanctions to the infringement of a specific rule, the EU runs the risk that Member States only provide for public (administrative) law sanctions imposed by a supervision authority or rely on existing private law remedies, without implementing or specifying which specific private law sanctions can be used for the infringement of specific rules from the directive. This may hinder effective judicial protection of consumers before a court. If there are only public law remedies, only the supervision authority can undertake action. If the private law remedies are not unconditional and sufficiently precise, for example because Member States rely on the existing body of remedies, the consumer will have to litigate to the Supreme Court to find out what the sanction exactly is. In other words, if Member States fail to provide – either in legislation or in the explanatory notes to the legislation implementing the directive – the specific sanctions relating to the infringement of specific directive provisions, they implicitly 'delegate' this task to the judiciary[60] ánd to the consumer, as stated above. If a directive contains specific rules of which it is not clear what the specific private law sanctions are in case of the infringement of these provisions, the requirement of 'effective sanctions' should include that Member States impose such private law remedies in national law or at least state what they are under the existing body of sanctions.[61]

Second, parties and courts will eventually have to go to the ECJ to determine whether the sanctions – if known at all – meet the requirement that they are effective, proportionate and dissuasive. From the perspective of effective judicial protection, this seems ineffective. If the EU comes up with substantial rules protecting the consumer, why would so much uncertainty be left with regard to the sanctions? On the basis of the principle of procedural autonomy the Member States can designate which courts have jurisdiction and determine the procedural conditions governing the legal actions,[62] but these procedural aspects cannot be made equal to the sanctions, which are part of substantive law. The argument that sanctions should be left to Member States in order to maintain their own legal system is not convincing, as often other substantive rules from directives already have clashed with and disrupted existing private law systems in the form of Civil Codes. Member States should also

[60] See also F. Cafaggi & P. Iamiceli, 'The principles of effectiveness, proportionality and dissuasiveness in the enforcement of EU consumer law: the impact of a triad on the choice of civil remedies and administrative sanctions', 25 European Review of Private Law 2017, 3, pp. 575-618.
[61] See also Aronstein 2019/275, Meurkens 2014/15.2.
[62] See Widdershoven 2019, par. 2.

be able to absorb prescribed sanctions. Even more, there are various examples of directives in which such clear sanctions have been part of the directive.[63]

Third, harmonisation of substantive rules without harmonisation of sanctions, and especially private law sanctions (remedies), renders the harmonisation of consumer protection and the completion of the internal market ineffective and unfinished. If there is no harmonisation of sanctions, it will differ per Member State whether the sanctions are of a public law or a private law nature and whether the sanctions are rule specific or not. The combination of both (see also para. 2 above, 'First choice: public or private law;) determines to what extent the consumer can rely on effective judicial protection before a court. As a consequence, although the sanctions in all Member States may be effective, proportionate and dissuasive, the sanctions may vary in numerous ways and inevitably sanctions of some Member States will be more effective and/or dissuasive than those of other Member States, rendering harmonisation of consumer protection and completion of the internal market less effective. Description and analysis of the implementation of the Mortgage Credit Directive shows that sanctions vary widely.[64] ECJ case law with regard to the assessment of creditworthiness not only affirms this, but also shows that various sanctions do not comply with the requirement that sanctions have to be effective, proportionate and persuasive.[65]

6. Closing remarks

Member States have three types of choice that make the implementation and the effectiveness of European consumer protection provisions and accordingly the harmonisation of consumer protection, especially in the field of financial law, less effective that it could be. EU consumer protection provisions should be implemented in national private law in such a manner that not only the rights and obligations of both consumer and its professional counterparty are clearly described, but also that specific private law sanctions are available to parties, preferably stated in the directive itself. Member States should not have the freedom to only transpose European consumer protection provisions that grant individual rights to consumers in public law or to transpose such provisions in open norms, as it renders them invisible and ineffective, and delegates too much of the hard work to courts. In addition to substantive rules, directives should spell out more and pay more attention to formulating effective and persuasive sanctions from the perspective of consumer protection and its harmonisation.

[63] See footnote **[31]** above.
[64] See Miriam Anderson & Esther Arroyo Amayuelas (eds.), The Impact of the Mortgage Credit Directive in Europe. Contrasting Views from Member States, Groningen: European Law Publishing 2018; reviewd by J.W.A. Biemans, Common Market Law Review, 2019, vol. 56, issue 1, pp. 293-294.
[65] See [[ECJ 27 March 2014, C-565/12 (Crédit Lyonnais/Kalhan); ECJ 18 December 2014, C-449/13, NJ 2015/262 (CA Consumer Finance/Bakkaus); ECJ 21 April 2016, C-377/14 (Radlinger en Radlingerová); ECJ 9 November 2016, C-42/15, NJ 2017/404 (Home Credit Slovakia/Klára Bíróová); and ECJ 7 November 2019, C-419/18 and C-483/18 (Profi Credit Polska); and ECJ 5 March 2020, C-679/18 (OPR-Finance)]]. Asser/Biemans & Van Schaick 7-1A 2021/207 and 208, with further references