SOCIAL JUSTICE IN EU FINANCIAL CONSUMER LAW

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Abstract

Working with philosophical concepts of equality as social justice, this paper shows that the equality-based model of social justice as equality of status has increasingly come to the fore in modern EU financial consumer law. This emergent and complex set of private and regulatory rules on credit, insurance, investment and payment products has responded to the consequences of inequality between financial firms and consumers by adopting a set of product and rights regulation to balance the parties rights and duties and protect consumers from the consequences of status based inequality. Going forward the paper recommends that the social justice approach must be made transparent and become an express part of EU law and policy, both in order to raise consumer trust in the internal market and to more clearly set the future law and policy agenda.

Keywords

Financial consumer law – EU financial services – EU consumer law and policy- EU social market economy – social justice – equality of status
1 Introduction

Working with philosophical concepts of equality as social justice, this paper shows that the equality based model of social justice as *equality of status* has increasingly come to the fore in ‘*EU financial consumer law*: an emergent and complex set of private law and regulatory rules\(^1\) in credit, insurance, investment and payment products. Asking questions about social justice in this area is particularly important due to the significance of financial transactions in consumers’ daily life; the detriment these transactions may cause; the significant recent expansion of the rules in this area; and the fact that being more explicit as to the role of social justice in this area (in current rules and in setting a future agenda) may be important for developing consumer trust in the internal market.

The first original contribution of this paper is to offer a specific framework for understanding social justice in financial consumer law, one based on responding to the consequences of *status inequality* between firms and consumers.\(^2\) This is shown to be a better social justice equality concept to deal with the issues arising between consumers and financial firms, better than the concept of social justice based on *distributive equality*.\(^3\) Problems of (in)equality are at the heart of a relationship between consumers and firms,\(^4\) yet observing this relationship from the angle of

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\(^1\) See e.g. Olha O. Cherednychenko ‘Conceptualizing unconscionability in the context of risky financial transactions: how do converge public and private law approaches?’ in Mel Kenny et al. (eds), *Unconscionability in European Private Financial Transactions* (CUP 2010).

\(^2\) Consumers are understood in the paper as natural persons concluding financial contracts for their own personal needs (and their families) with firms that are professionals in selling and creating financial products. This paper also considers investors as consumers. See e.g. on this relationship; Niamh Moloney ‘The investor model underlying the EU’s investor protection regime: consumers or investors?’ (2012) 13 European Business Organizations Law Review 169.

\(^3\) This research primarily relies on the work of David Miller, who differentiates equality of status and equality as distributive justice (or distributive equality). See David Miller, ‘Equality and Justice’ [1997] *Ratio* 222, 224. For a more detailed account on the difference see Gideon Elford ‘Equality of Status and Distributive Equality’ (2012) 46 Journal of Value Inquiry 353.

equality has been neglected in consumer and contract law scholarship. Inequality here refers to the consumer’s weaker position in terms of information and bargaining power in the process leading to contract conclusion; and the consumer’s vulnerable position in terms of bearing the consequences of the resulting relations that are often weighted in favour of the firm. Although these inequalities exist in most consumer-business relations, they are especially marked in financial transactions because of the nature of financial products. Credit, investment, insurance and payments are increasingly becoming essential for consumer daily lives. Yet transactional decisions are based largely on a set of pre-formulated contract terms without an option to test and to experience products. These terms contain complex risks that are often very difficult for consumers to understand, and consumers would rarely have the bargaining power to force alteration in the terms. Contracts often involve high values and create long term commitments (e.g. mortgages, pensions, life insurance); unsuitable decisions can have severe consequences (e.g. over-indebtedness) for consumers and their families.

The second key contribution of the paper is to demonstrate that the equality of status based version of social justice plays a role in EU financial consumer law. The paper argues that financial consumer law pursues a form of social justice when it goes beyond an information paradigm (which is considered usually ineffective to


respond to the above inequalities), and regulates the substance of the firm-consumer relationship by way of product and rights regulation. **Product regulation** sets substantive standards of suitability and fairness for the financial product and the terms of the contract, for example providing a fair level of fees and charges; whereas **rights regulation** gives special entitlements to consumers such as a right to withdraw from the contract or to modify it. The paper shows that EU financial consumer law increasingly does precisely these things, and thus pursues a social justice agenda.

Going forward the paper argues that labelling rules based on product and rights regulation is important to re-emphasise their protective nature, and to send a clear signal to consumers that the EU intends to create a place for living based on the values of welfarism. To this effect, the paper recommends that this social justice approach must be made transparent and become an express part of EU law and policy, both in order to raise consumer trust in the internal market and to more clearly set the future law and policy agenda.

The paper is structured as follows. Part 2 explains more fully why it is important to study this area of law and the role of social justice within it. Part 3 discusses relevant prior work on social justice in contract and consumer law and explains, relative to this other work, the distinctive contributions of this paper. Part 4 develops the framework for understanding social justice in EU financial consumer law. Part 5 demonstrates that this form of social justice is part of EU financial law.

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consumer law in the form of rules that regulate the substance of the relationship (rules on product intervention and rights regulation). Part 6, the conclusion, sums up the arguments and highlights the importance of giving more explicit recognition to the role of social justice in EU legal policy on financial consumer law.

2 The importance of social justice in EU financial consumer law

There are a number of reasons that this area of credit, insurance, investment and payments is an important one to explore, and in particular an important area in which to ask questions about social justice.

First, credit, insurance, investment and payment are enormously important for consumers’ daily lives. With the increasing relevance of financialization, i.e. the importance of the financial sector in replacing the welfare provisions of Member States; consumers are becoming more reliant on financial products to make provision for e.g. house, pension and insurance.8 With this trend in Europe,9 financial products are increasingly considered essential for consumers modern day living,10 and access to these products is compared to services of general interest, i.e. services like gas and electricity without which it is impossible to function in society.11


11 See e.g. Iain Ramsay, ‘Regulation of consumer credit in Geraint Howells et al. (eds.) Handbook of Research on International Consumer Law (Edward Elgar, 2018).
Albeit being essential, it is well established that financial products are also prone to causing significant and long-lasting detriment. One key problem is the long-term nature of the products (such as mortgage loans, pensions) and the high values involved in the transactions (e.g. house insurance, life-time saving, etc.). Unsuitable transactional decisions e.g. to take too much credit or to invest in risky financial products can have long term negative effects on consumers’ own and their families’ well-being by leading e.g. to over-indebtedness and financial exclusion.

Second, there has been a significant recent expansion in EU rules regulating payment, insurance, credit and investment transactions, in particular rules that are more protective than before. Although previously there had been rules in all sectors, these mainly required the provision of information. The Distance Marketing Directive is a perfect example of the information paradigm, containing numerous requirements for pre-contractual provision of information e.g. as to the

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12 See e.g. Llewellyn note 6, 18-19; Kingsford and Dixon, note 8, 696-697 see also Udo Reifner, ‘Renting a Slave-European Contract Law in the Credit Society’ in Thomas Wilhelmsson et al. (eds) Private Law and the Many Cultures of Europe (Kluwer Law International, 2007).


14 E.g. Cherdenychenko, note 7.

15 E.g.


16 This approach was in line with a general favour for supporting freedom of contract and party autonomy in European Contract Law. See Stefan Grundmann et al. ‘Party Autonomy and the Role Information in the Internal Market – an Overview’ in Stefan Grundmann et al (eds), Party Autonomy and the Role of Information in the Internal Market (De Gruyter, 2001).
identity of the firm, the main characteristics of the contract, and the content of the
terms and conditions of the contract. The policy logic of the ‘information paradigm’
is that information empowers consumers to make more informed decisions, i.e. to
better understand the risks and benefits of the transactions; and that this in turn will
increase competitive discipline over the quality and fairness of products offered on
the market. These ‘old rules’ contained very few more protective rules, rules that
directly regulated the substance of the parties’ relationship; although one example
was the consumer’s right of early withdrawal e.g. in Art 6 of the Distance Marketing
Directive. Such protective provisions now play a much more significant role.

The development of a more protective EU financial consumer law is
unsurprising given the above discussed importance of these transactions for
consumers’ daily lives and the potential detriment they may cause; and given that
EU financial markets include over 500 million consumers and an economy that
produces 15 trillion euro annually. These markets are seen as essential
components of the internal market. The ‘new rules’ adopted under Art. 114 of the

17 Arts. 3-6 Distance Marketing Directive.

18 See e.g. Chris Willett, ‘Competing Ethics of European Consumer Law in the UK’ (2012) 71 Cambridge Law

19 Cf Cherednichenko, note 7.

2017, 1.


financial instruments, OJ L 173 (MiFID2);
payment services in the internal market (PSD2);
distribution, OJ L 26 (Insurance Distribution Directive);
agreements for consumers relating to residential immovable property, OJ L 60 (Mortgage Credit
Directive);
key information documents for packaged retail and insurance-based investment products, OJ L 352
(PRiIPs);
Treaty of the Functioning of the European Union, to facilitate the development of the internal market in financial services contain more protective rules than before. Many of the new rules have been adopted very recently. Some responded to the harsh consequences of the 2008 financial crisis. For example, Art. 23 of the Mortgage Credit Directive mandate Member States to have measures in place to limit the consumers’ exposure to exchange rate risk. This was arguably intended to respond to detriment caused by loans indexed in foreign currency that surfaced during the financial crisis. Others instruments responded to detriment that research identified as causing significant harm to consumers, either by closing a regulatory gap such as by providing reformed and more comprehensive rules (in line with financial and technical innovation) in areas that have been previously addressed, such as the regulation of payment services. At the heart of the approach are product regulation rules and improved consumer rights, both of which bringing more substantive protection than before.

- Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, OJ L 257 (Payment Accounts Directive); and

In addition, regulation on financial supervision also contain important protective measures and are relevant for the present research:
- Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory authority (European Securities and Markets Authority), OJ L 331 (Regulation on ESMA);

23 Recital 3 Mortgage Credit Directive; see e.g. Andrea Fejős 'Mortgage Credit in Hungary' (2017) 6 Journal of European Consumer and Market Law 139.

24 See Recitals 3-6 PSD2.
The third reason this area is an important one to study relates to the development of consumer trust in the EU single market. More protective rules seemed necessary not only to reduce consumer detriment, but also to raise consumer trust in EU financial markets. The 2018 Consumer Scoreboard shows that consumers attribute high value to their ability to trust financial markets; however, consumer trust in banking i.e. credit, payments and investment services is among the lowest of all the markets covered. The lack of trust is also evidenced by low levels of cross-border transactions. In spite of the earlier interventions the consumer financial markets essentially remained fragmented, with data from 2016 showing that only 7% of consumers ever used a financial service or obtained a product from another Member State. In fact, the lack of trust has been recently identified by the EU Commission as one of the key aspects that its regulatory agenda needs to address. Indeed, trust is crucial in financial consumer markets. Consumer need to trust that they are getting the right product, that this product will operate as reasonably expected and that they will be treated fairly should something go wrong after obtaining the product. Trust can be created and strengthened by regulation. Providing (in addition to information rules) for substantive standards of protection (standards that it will be argued here are grounded in social justice values) may be capable of strengthening consumer trust in EU financial markets. It might help to

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26 Commission, ibid, 42.


29 See e.g. Financial Services Authority, Product Intervention (UK FSA DP11/1, 2011), 16.

30 Ibid.
reassure consumers that the EU not only provides choice in goods and services, but also provides a high level of protection for cross border and domestic transactions, one that protects consumers from their weaker position relative to firms.

Indeed, given the financial crisis and the more recent political crisis of Brexit it seems clear that trust problems go beyond the relationship between consumers and firms. There is a serious lack of consumer trust in entire national financial systems, and in the ability of Europe to deliver a better life. The EU has been described as an ‘irredeemably neo-liberal market place.’ It is therefore very important to highlight any evidence that this is inaccurate, including evidence that social justice does indeed play a significant role in financial consumer law at least. However, as will be discussed further in Part 6, increasing trust probably requires more than this. Going forward it may also be necessary to give a much more prominent position to social justice as a policy driver in EU financial consumer law, to be more systematic in developing specific rules reflecting this approach and labelling them appropriately as such. There is arguably a legal policy basis for doing exactly this in Art. 3 Treaty on European Union (TEU), which sets out the vision of the EU as a ‘highly competitive social market economy.’

31 A recent study showed that people’s subjective judgments about their own and their surrounding economic conditions influenced their voting more significantly than the overall economic conditions, e.g. official statistics about unemployment and inflation rate of the state that they live in. Harold Clarke at al, Brexit: why Britain voted to leave the European Union (CUP 2017), 65.


33 See for a recent commentary of Art. 3 TEU Delia Ferri and Fulvio Cortese, The EU Social market Economy: Theoretical Perspectives and Practical Challenges (Routledge, 2018); including consumer law: Vanessa Mak, Social considerations in EU Consumer Law, Chapter 12 in this volume.
3 Regulatory contract law, EU private law and social justice: the view of others

There is an undeniable interest in social justice in private law scholarship.\(^{34}\) Many leading authors have dealt with various aspects of the arguments presented here. However, there is so far no developed theoretical understanding of *equality of status* based social justice *in EU financial consumer law*. In order to fully appreciate the contribution of this paper to legal scholarship it is useful the sketch out where scholarship stands on social justice in consumer law, and where this paper fits in.

Kronman provided the first major contribution to distributive justice in consumer and contract law scholarship. He refuted the traditional view that contract law can only result in commutative justice and that distributive social justice can only be achieved via public laws on tax, health, education, social security i.e. tools that are far removed from contract law. Commutative justice is concerned with remedying transactional injustice between the parties, i.e. the ‘wrongs’ done to the innocent party when the other breaks the contract by failing to perform what is required under it.\(^{35}\) By contrast social justice is concerned with measuring behavior against some broader idea of fairness or justice in societal relations: i.e. some notion as to what is fair or justice in terms of the allocation of resources and benefits of a wide variety of


rights, freedoms, opportunities, economic benefits etc. Kronman showed that (in addition to public law) contract law too can be a distributive social justice tool in that the design of contract law rules involves choices as to distribution of power, risks and resources between parties in market exchanges.

Collins developed Kronman’s work. He specified that traditional contract law with its focus on freedom of contract is not oriented towards distributive social justice. However, Collins showed that when contracts are regulated they are capable of having social justice effects, provided regulation is designed by reference to the preferred distributive outcomes on the market. Similarly, Ramsay put forward strong arguments that consumer credit should be primarily understood through a distributive justice lens: as promoting values of security, autonomy and equality of access to credit, with a view to changing the balance of power between consumers and firms in the marketplace. This paper takes a similar approach, although it frames the social justice issues in terms of status-based equality as a conceptually distinct concept from distributive social justice (as explained in section 4.2).

In terms of how social justice could be achieved, Collins considered the choices between a vision of justice that is simply concerned with procedural fairness and one concerned with substantive fairness. More specially, Wilhelmsson has looked at the potential of consumer law to create social justice by comparing the tools of consumer law; concluding that information disclosure rules reproduce injustices by giving greater protection to privileged consumers; whereas rules that

36 David Miller, *Justice for Earthlings* (CUP, 2013), 40; see also on the difference Wilhelmsson, note 34, 716-718.
37 Kronman, note 34.
38 Collins, note 34, 49.
40 Ramsay, note 34, 178, 181.
41 Collins, note 34, 53-56.
regulate the substance of the contract such as interest rate ceilings, and rules that provide greater protection to disadvantaged consumers (for example those that are poor or unemployed), could be social justice tools. The paper takes these thoughts further in the specialized area of EU financial consumer law.

The prevalence of information rules in general EU consumer law, has lead scholars to argue that EU consumer and contract law rules is not concerned with social justice. For example, Wilhemsson has cited the exclusion of main subject matter and price terms from the test of fairness under the Unfair Terms Directive, as evidence of a negative attitude towards ‘redistributive welfarism’. Looking at information rights, Micklitz has suggested that the vision of social justice in EU consumer law is what he labelled ‘access justice’: rules enabling consumers to access the market on a fair and non-discriminatory basis. This form of justice equips consumers with necessary set of information rights to be able to participate in the market, and provides them with access to essential services (e.g. utility services). According to Micklitz, this model of ‘access justice’ is based on a different philosophy than those governing national consumer markets. This form of social justice is limited to providing access for consumers to the internal market, and any other form of social justice is left to Member States. Strong views have been expressed that social justice should have a prominent role on in the EU legal policy underpinning EU consumer law and EU private law more generally as an important addition to the internal market policy agenda. The Study Group on Social Justice in European Private Law pointed out that a clear vision of social justice through fairness in

44 Wilhemsson, note 34, 728.
contracts is missing from the EU market integration agenda.\textsuperscript{46} Taking these thoughts further, this paper looks at the most recent legislative interventions into the substance of the contract in the specialized area of EU financial consumer law. It shows that there has been a shift towards having more rules intervening into the substance of the contract than before, and these are argued to be social justice rules. It is true that Cherednychenko has already recognized the shift away from reliance on an information paradigm to more substantive product regulation; however, she did not frame her considerations in terms of social justice.\textsuperscript{47}

In addition to legislation, in the aftermath of the financial crisis the Unfair Terms Directive has been given an increasingly protective interpretation by the Court of Justice of the EU (ECJ): an interpretation that involves a greater focus on product regulation than before.\textsuperscript{48} This move has been discussed from a social justice perspective by Mak, but the focus of her analysis was social justice primarily understood in the light of \textit{fundamental (constitutional) rights}. By contrast, this paper, considers the developments in terms of an equality of status based approach to social justice.\textsuperscript{49}

Now, it is important to note that ‘equality’ has been discussed before in contract law scholarship. \textit{Wilhelmsson} has already discussed the possibility of developing a principle of equality for contract law: one based on providing more favourable treatment to those disadvantaged because of their race, gender, sexual

\textsuperscript{46} Study Group, note 34, 660, also more recently Geraint Howells et al., \textit{Rethinking EU Consumer Law} (Ashgate, 2018); 7-8.

\textsuperscript{47} Cherednychenko, \textit{note} 7.


\textsuperscript{49} Mak, note 33.
orientation or social status such as poverty. However, this paper takes a different approach to equality. Similarly to Wilhelmsson the focus is on status. However, in contrast to Wilhelmsson, this paper focuses on the inequality of status that arises purely by virtue of being a consumer of financial services and irrespective of issues of class, gender, race etc. Also of course, and in contrast to Wilhelmsson, this paper is specifically focussed on recent developments in financial consumer law, and how these may be understood in terms of social justice.

Finally, it must be acknowledged that there has even been prior work on equality in financial consumer law. Wilson has looked at equality as a theoretical concept, developing a well-grounded theoretical framework for the special areas of financial inclusion and vulnerable low-income consumers. However, Wilson does not deal with the specific equality of status based social justice addressed here. In addition, as indicated, Wilson’s focus is on financial inclusion and especially vulnerable consumers; while the focus here is on the inequality of status existing between firms and consumers in general.

To sum up then, we have seen that there is considerable work on social justice, and on the role of various regulatory tools in generating social justice. There are however three notable differences in the approach taken here: first, none of the authors framed their thinking on social justice in terms of equality of status; second, the above work often focusses on the position of especially vulnerable consumers while the focus here is on whether protections aimed at the generality of consumers can also be viewed as being inspired by social justice; third, much of the work is

50 Wilhelmsson, note 5, 147.
51 Wilson, note 34, 501-505.
about social justice in general EU or national consumer law, whereas this paper is focused on the specialized area of EU financial consumer law.

4 Social justice in financial consumer law: the theoretical framework

This section first explains the kinds of inequalities that exist between consumers and financial service providers; and then develops a framework that explains how these inequalities can be seen as being social (in)justice.

4.1 The unequal nature of consumer–firm relationships in financial consumer law

Contracts are central to consumer-firm relationship; they establish, regulate and end the relationship between consumers and firms. 52 Contracts here are understood broadly as to include the pre-and post-contractual relationship between the parties.

There is significant inequality in contracts between consumers and financial firms. Consumers are in a weak position relative to firms, because they do not typically have the understanding, expertise or bargaining power to negotiate pre- or post-contractually for fair, suitable contracts or fair treatment post-contractually; and they are in weak position to bear loss arising out of the contract. 53 While these problems arise in consumer contracts generally, they are especially accentuated in financial contracts: e.g. due to financial products being so called ‘credence’ goods’


and being particularly complex, expensive, risky and long term in nature. Let us now explore these issues in detail.

First, there is the problem of unequal bargaining power that exists in most business-consumer relations. At the point of contract conclusion, consumers have no power to negotiate the terms of their contract. Rather they can only decide whether to enter into the contract on a ‘take it or leave it’ basis.

Then there is the lack of informed choice. In modern financial markets there is plenty of choice for consumers between various financial products, however, the ability of consumers to make informed choices is limited. Financial products are ‘credence’ goods: abstract, intangible products that cannot be tested before purchase and the value (or detriment) of which may only become apparent later though use. This means that consumers must make their decisions based on the information received from the firms. Yet consumers will often have no time to fully read their complex and long contracts, and firms are able to take advantage of this.

It is now well documented that firms are able to use to their advantage the way consumers read contracts: inserting the onerous terms into the parts of document

54 See note 6.
55 Ramsay, note 18, 41.
57 See for a general overview Ramsay, note 18, Chapter 2.
60 See e.g. Llewellyn, note 6, 32-40.
that are likely to escape the attention of consumers.\textsuperscript{62} For example, consumers will often not read the ancillary terms; but will focus on the headline price.\textsuperscript{63} This enables firms to insert various cost elements into their complex cost structures, thereby developing extremely expensive and dangerous products.\textsuperscript{64} Even if consumers read their contracts, the highly technical language and small print is likely to prevent understanding, at least to an extent as to be able to really estimate the full economic consequences of their contractual commitment.\textsuperscript{65} For instance, given the complexity of cost structures, it is often challenging to determine the true cost of financial products;\textsuperscript{66} or how likely it is that the circumstances the terms deal with will become relevant e.g. whether contingent charges will become payable,\textsuperscript{67} or how certain terms like foreign currency exchange clauses will operate in practice.\textsuperscript{68}

In addition, behavioural work has shown that even if consumers understand the terms of their contract, they often act irrationally.\textsuperscript{69} Consumers often wrongly interpret standard terms to appear more favourable than they are.\textsuperscript{70} As a result, for example, consumers might fundamentally misunderstand how financial products work and what the associated risks are, for example, that investments are not

\textsuperscript{62} Evidence can be found in results of communication science, behavioral and neuroscience as well as linguistics, see with further references: Ognyan Seizov et al. ‘The Transparent Trap: a Multidisciplinary Perspective on the Design of Transparent Online Disclosure in the EU, (2018) Journal of Consumer Policy (online)

\textsuperscript{63} Willett, note 53, 18.

\textsuperscript{64} E.g. High-cost short-term loans such as payday loans see Andrea Fejős 'Achieving Safety and Affordability in the UK Payday Loans Market' (2015) 38 Journal of Consumer Policy 181.: see also Muller et al., note 6, 43-63 f for characteristics of particularly dangerous products and FSA, note. 29,30 for particularly dangerous product features.

\textsuperscript{65} See e.g. London Economics, note 60, 340.


\textsuperscript{67} Willett, note 53, 189.

\textsuperscript{68} Fejos, note 65, 139 with further references.

\textsuperscript{69} For an overview of behavioral economics and its role in consumer policy see Ramsay, note 1856-63 with further references.

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guaranteed,71 or the full implication of financial commitments that a credit contract requires..72

Problems in making informed decisions are exacerbated by consumers’ lack of experience with financial products.73 This is especially acute with products consumers are likely to conclude only a couple in their life such as mortgage credit or life insurance.

Finally, consumer decision making may be impaired by the highly persuasive, misleading, and even aggressive selling practices of firms who are extremely sophisticated and experienced in such activities. Consumers are of course much less experienced, knowledgeable and sophisticated than firms, and can easily be coaxed into buying an unnecessary or otherwise unsuitable financial product. Indeed such mis-selling (e.g. mortgage loans indexed in foreign currency, or high-cost short-term loans etc) has been an especially widespread and pernicious problem in the financial sector over the last two decades.74

Once consumers have entered into the contract, the unfair treatment can continue. Fair post-contractual treatment of customers is often of no priority for firms. For example, firms may fail to allow consumers a degree of relief from their commitments based on financial hardship or adverse changed circumstances.75

Firms may lack effective customer care and after sales services: making it very hard

71 Kingsford Smith, note 59, 530.
73 See e.g. London Economics, note 60, 340; Llewellyn, note 7, 37; Rott, note 7, 64.
for consumers to discuss any problems they encounter when performing their contractual obligations and hard to effectively enforce their rights. These various post contractual problems cause particular consumer detriment in the financial sector given the long term nature of many of the contracts in this sector such as mortgages, life insurance and pensions.

The consequences of unsuitable transactional decisions are likely to be more detrimental than for non-financial products. In addition to the loss associated with not meeting consumers’ reasonable expectations, including financial loss such as the products costing more than they should or not generating any substantial benefit for consumers and non-financial loss such as disappointment and distress; in more sever forms, financial products can lead to substantial financial loss seriously affecting the consumers financial health. For example, consumers may lose their life savings, or they may experience severe debt problems that potentially lead to over-indebtedness; homelessness, personal insolvency the inability of consumers to access finance (financial exclusion), ultimately placing consumers and their families on the margins of society (social marginalization or social exclusion). These

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77 See e.g. Reifner, note 12.
79 See the example of Lehman Brothers ‘certificates’ in Cherednychenko, note 7, 396.

Unfortunately, the financial crisis and its aftermath provides bitter evidence that these sorts of ‘dark’ scenarios can fairly easily become realities for many consumers, even for those that are more affluent, i.e. well-off, educated etc.\footnote{See eg. the mis-selling of Lehman Brothers ‘certificates’ Cherednychenko, note 7, 396-397.}

We can therefore see that the position of consumers is highly subordinated to firms and that there is significant scope for unfair treatment causing the most serious detriment. To sum up: Consumers are \textit{procedurally unequal} compared to financial firms: they are unequal in the process leading to conclusion of the contract. Consumers are unable to influence the content of their contracts and it is extremely difficult for them to make informed choices by comparing offers on the market. They are also prone to being misled or persuaded by the much more experienced and sophisticated firm. This procedural inequality then leads to \textit{substantive inequality}: to unsuitable and/or unfair contracts, unfair post-contractual treatment and potentially significant financial and non-financial detriment as discussed above.\footnote{See also on the relationship of procedural and substantive fairness in Chris Willett, \textit{Fairness in Consumer Contracts: the Case of Unfair Terms}, (Ashgate, 2007), chapter 2.}

It is now shown that these procedural and substantive inequalities can be seen as social (in)justice.
4.2 The equality based concept of social justice in financial consumer law

The role of equality in social justice is an important theme of philosophical discourse. Broadly speaking, under one view, equality is subsumed under the notion of distributive justice (distributive equality), while under the other view, equality is an independent value from social justice (social equality).

4.2.1. Distributive equality

When political theorists talk about social justice they primarily think about distributive social justice. Their thinking revolves around finding ways to distribute resources and opportunities in a just way within the society or amongst a given group or class of people. Consequently, contemporary scholarship on distributive equality focuses on the kind of equality to be achieved (equality of ‘what’) and the pattern of distribution (‘how’ to achieve this equality).

Under this distributional approach equality broadly means that people should be treated the same and that they should be made as equal as possible in social goods (such as welfare, opportunities, etc.). Here equality is subsumed under the notion of justice: justice is achieved through equality. A famous quote from Dworkin

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84 In addition to her discussed Dworkin and Rawls, Miller also refers to Amartya Sen and Gerald Cohen as scholars associated with significant contribution to developing the concept of distributive equality. Miller, note 3, 222-224. See for the use of the specific term ‘distributive equality’ Elford, note 3; also Carina Fourie, ‘What is Social Equality? An Analysis of Status Equality as a Strong Egalitarian Ideal’ (2012) 18 Res Publica 107. Equality of status is a much less researched and well developed concept. Fourie at 109.


86 Fourie, note. 84, 108.

87 Given our context of financial consumer law, it is clear that in our context contractual rights and duties are distributed (so there is no question as to equality of ‘what’), we need to see how these rights would be distributed under the concept of distributive equality.

88 Miller, note 3, 223.

89 Ibid.
explains that equality is used in the sense that ‘people should be the same, or treated the same way, as a matter of justice’. This is normally taken to mean that everyone receives the same rights and benefits; irrespective of their social, economic or other strengths or weaknesses.

This distributive version of equality does not address the above described equality problems between consumers and financial firms. It effectively decontextualizes problems, ignoring the types of procedural and substantivte imbalances/inequalities that we have seen above. It might simply enshrine the traditional principles of freedom and sanctity of contract. The logic would be that this is what equality requires: an equal right to choose whether and with whom and on what terms to contract; and an equal obligation to be held to the terms of the contract.

Even to the extent that freedom and sanctity of contract are to be compromised in some way(s), the logic of this (non-contextual) distributive version of equality is that both parties should benefit equally from such compromises. So for example take the consumer’s right of early withdrawal from many financial contracts. This is intended to allow consumers to escape from the contract having given it some reflection, possibly having realised its unfairness or other unsuitability for them: things that were not apparent when first making the contract. The point is to recognise the consumer’s more limited ability to appreciate these problems pre-contractually. Firms, by contrast, do not face such problems. They are very well informed about the products they are selling. So treating everyone ‘equally’ by providing firms with an ‘equal’ to withdraw from contracts would be to ignore the

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91 Ibid.
92 See e.g. Art. 14 Consumer Credit Directive and Art. 6 Distance Marketing Directive.
inequalities between consumers and firms. It would also lead to unjust results for consumers. For example, if credit is withdrawn, consumers need to repay the money that has already been advanced, or if insurance is withdrawn they need to bear the risks themselves. This approach would create a formal equality that does not recognise the contextual realities, and in effect it would reinforce the inherent inequalities rather than correct them.

Then there is a view of distributive equality that essentially follows the above approach: advocating equal treatment of everyone, although allowing for a deviation from this in fairly exceptional circumstances. Here formal equal distribution remains the key principle, but some exceptions are allowed to accommodate competing values. For example, the basis of Rawls’ theory of justice is that ‘each person has an equal claim to a fully adequate scheme of equal basic rights and liberties;’ but this bears an exception, allowing for unequal distribution in favour of the least advantaged members of the society (the so called difference principle).\footnote{John Rawls, \textit{A Theory of Justice} (OUP, 1999 Revised Edition), 65.} This approach might seem attractive-potentially allowing for unequal distribution in favour of consumers to recognise their vulnerable position vis-à-vis firms: to recognise that there is not actually an equal relationship between firms and consumers. However, the risk is that the idea of an exception here is not interpreted sufficiently broadly to allow for this, i.e. that consumers in general are not viewed as the ‘least advantaged members of society’. This does in fact seem a quite likely conclusion, given that the vast majority of people are consumers, many being wealthy and highly educated, so that it seems quite counter-intuitive to label such a broad group as ‘least advantaged members of society’. It seems quite likely that for many this characterisation is only considered appropriate in the case of some sub-groups of consumers such as the
most vulnerable e.g. low income, unemployed etc. In other words, the risk is that the Rawlsian distributive equality approach ignores the very vulnerable position of the vast majority of consumers relative to most financial firms.

Distributive equality is therefore not an adequate concept for our purposes. It would either require no action to be taken in response to the firm-consumer inequalities in financial contracts; or at best for action only to be taken to protect the most vulnerable consumers and not the generality of consumers. In fact, as illustrated above, instead of correcting inequalities this approach might even reinforce inequalities between consumers and financial firms.

We now turn to the version of social justice demanding equality of status, which it will be suggested does require action to protect consumers from the inequalities in their relationship with financial firms.

4.2.2. *Equality of status or social equality*

The idea of equality of status was developed by Miller and is a conception of society where ‘people stand in equal relation to each other rather than being treated as better or worse, inferior or superior’. It depicts a society that is not ‘marked by status divisions’ based on which people would be placed in ‘hierarchically ranked categories.’ ‘Status’ thus means the person’s standing in the society; as manifested by the way the person is treated by public institutions and private individuals, or in our case, private companies (financial firms). ‘Equality’ of status refers to eradicating

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95 Fourie note 84,112
96 Miller, note 3, 224.
deeply rooted status related problems e.g. oppressive practices and policies against persons based on their race, gender, class etc.\textsuperscript{98}

Equality of status is different from distributive equality in two key ways. First, while distributive equality focuses on developing a just pattern in the distribution of social goods, equality of status is more focused on the relationship between people, and how they ‘rank’ between each other.\textsuperscript{99} Second, distributive justice may be an abstract concept.\textsuperscript{100} By contrast equality of status is an ‘empirically sound concept’ reflected in ‘real-life egalitarian movements’\textsuperscript{101} for a social order in which people are equal:\textsuperscript{102} e.g. movements against oppressive practices and policies against persons based on their race, gender, class etc.\textsuperscript{103} Equality of status therefore requires the abolition of ‘oppression’, of social relationships by which some people ‘dominate, exploit, marginalize, demean and inflict violence upon each other’.\textsuperscript{104} Now of course, it is fairly intuitive for many of us to think of it as wrong for people to be treated differently on the basis of gender, race, class etc; and it might seem odd and counter intuitive to think of financial firm-consumer relations in the same sort of bracket (assuming of course that there is no race, gender, class etc discrimination being applied to either the firms or the consumers). Arguably, however, it is indeed possible to view the inequalities between consumers and financial firms as significant problems of (in)equality of status for several reasons.

\textsuperscript{98} Anderson, note 94, 288
\textsuperscript{99} Miller, note.3, 232; Anderson, note 94,313.
\textsuperscript{100} In particular this is in sharp contrast with Rawl’s model of distributive equality that is based on a hypothetical situation, the ‘original position’. Rawls, note 94,102 et seq.
\textsuperscript{101} Fourie, note 84,110.
\textsuperscript{102} Anderson, note 94, 313.
\textsuperscript{103} Ibid, 288.
\textsuperscript{104} Ibid, 313.
First, there is a status relationship between financial firms and consumers, one that allows firms to dominate and potentially exploit consumers via complex products, unfair terms, and unfair selling and enforcement practices; and this may cause serious hardship for consumers. ['Firm-consumer’ status inequality]

Second, we can also think about the status of both consumers and financial firms in terms of a *comparison* with those that participate in other markets: e.g. businesses supplying other services or tangible goods to consumers or to other businesses or private individuals contracting between each other. Compared to such other market participants, it will often be the case that financial firms obtain huge advantages as market players and financial consumers suffer huge disadvantages/detriment (for all the reasons explained already in terms of the particular dominance and vulnerability in this relationship). In other words, one’s *status* as a financial firm, ones *status* as a consumer of such service/products puts one at a huge advantage or disadvantage compared to being a supplier or buyer in market transactions more generally ['Market citizenship’ status inequality].

Third, it can be argued that being a financial consumer may put one at a huge disadvantage compared to *other private citizens*. As we have seen, financial consumers may suffer large, damaging financial burdens. This in turn may affect their ability to *fully participate in society as citizens*: bankruptcy, unemployment, homelessness, poverty etc. can cause social exclusion by placing consumers on the margin of society and potentially denying them the ability to access education, healthcare, and other essential services and products on an equal basis with other citizens. It may also cause financial exclusion i.e. restrict access to financial services that are essential for modern living. This again may place such consumers in an unequal position to those other citizens that experience no problems, or those that
do not even need to use potentially damaging products ['Private citizenship’ status inequality].

The consumer-firm relationship therefore raises important social justice concerns based on inequality of status. Following the logic of other egalitarian movements, the law should respond to these problems. First of all, any response must be done in ways that reflect the distinctive characteristics of the consumer-financial firm relationship (i.e. the various imbalances of information, power etc set out above). This is in line with Miller’s vision that equality of status requires ‘complex equality’ which means a tailored approach depending on the characteristics of a particular context where equality problems need to be addressed. Secondly, this response must involve some form of distribution. Although ‘distribution’ is typically understood in relation to distributive equality, it cannot be denied that distribution in at least one sense will be involved when it comes to addressing the equality of status problems caused by the consumer-financial firm relationship. There needs to be some form of distribution in favour of the consumer: some regulation of how firms design products, and how they treat consumers. The key difference between the two approaches is that while with distributive equality, equality determines the pattern of distribution, i.e. everyone gets an equal share from the distributed social goods; under the equality of status concept, equality is the ultimate value, the aim that should be achieved, and the pursuit of this aim may well require unequal distribution

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106 Miller, note 3, 236. See for more on the notion of complex in Michael Welzer, Spheres of Justice (Blackwell, 1983), Chapter 2; and more on how complex equality connects to equality of status Miller, note 97, 204-215. See more on contextual approach: Miller, note 36, Chapter 2.

107 Miller, note 3, 234-235; Miller, note 97, 203; Anderson, note 94, 313-314.
in the relevant context. So for instance as we shall see below the equality of status concept is manifest in various consumer rights to withdraw, modify and terminate the contract. It would be contrary to equality of status if these rights (were also given to firms.

So what choices do we have? One possible response is to empower consumers with information to enable them to make informed decisions. This involves mandating firms to inform consumers on the choices they are taking, make the risks involved in these choices more apparent for consumers. Such an approach is focussed on the procedural inequality between the parties (the inequality affecting the process leading to conclusion of the contract). The idea of such an approach is that more informed decisions at this procedural stage will remove or radically reduce the scope for substantive detriment, consumers will choose only safe products because competitive pressure will force out more risky products from the market.

The degree of effectiveness of information rules has been extensively explored in consumer law literature. Although information can be useful in some instances such as when there is a dispute and consumers want to discover their rights, the dominant view is that information disclosure is not enough to correct inequalities between firms and consumers: it does not really enable consumers to avoid choosing dangerous products, nor does it exert sufficient competitive pressure to remove such products from the market. This is particularly true in financial

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108 See Miller and Elford, note 2.
109 See Willett, note 18, 425-529.
contracts, where information is especially likely to be of limited effect.¹¹¹ No matter how transparent standard terms the above problems would remain, e.g. consumers may not notice some charges or they may underestimate the risks of other charges becoming payable; they may not be able to properly assess whether the product is suitable for them; they may be behave irrationally, and they are unlikely to be focussing on how they may be treated post-contractually when problems arise. Even if they could make an informed decision that certain risks were unacceptable, they would not be able to negotiate lower charges, a more suitable product or guarantees as to post-contractual treatment. Notwithstanding more information provision, consumers are likely to continue to conclude contracts for unsuitable products, with substantively one-sided terms.¹¹² So while the information approach does involves a distribution in favour of consumers (mandating forms to provide information, entitling consumers to receive this information), it will very often be unsuccessful in protecting consumers from serious detriment. It will therefore ultimately not address the status based inequality problem, the above discussed problems of consumer firm inequality, market-citizen inequality and private citizen inequality.

The other possible response is to provide consumers with *substantive* protection: which we can classify under the headings of ‘product regulation’ and ‘rights regulation’. Product regulation requires firms to meet certain standards of quality and fairness in designing the terms of the contract (including of course the core nature of the financial product) and in performance of the contract. It responds to inequality by controlling the level of prices and charges that consumers have to pay, the basic suitability of the product, and how consumers can be treated when things go wrong. Rights based regulation provides consumers with special pre-

¹¹¹ See note 7 for references.

¹¹² Willett, note 18, 414.
contractual and post-contractual rights for example a right to withdraw from the contract; a right to modify the agreement; and a right to terminate the contract early. These rights are an important complement to the above-discussed product regulation. Notwithstanding the product intervention rules, serious problems may still arise. For example, regulators may not yet have got around to removing certain unsuitable products or reducing some harsh charges; or even if they have, the product may still be unsuitable. In such circumstances, for example, a later right to modify the agreement may enable charges to be reduced or especially unsuitable product features to be removed or amended.

By comparison with weak information rules, these more interventionist rules more directly address the status based inequality problems generated by the consumer-financial firm relationship. Product and rights regulation makes products cheaper, safer and the firm-consumer relationship generally more balanced and fair. For example, if excessive charges are banned outright, this will make products safer and consumers will be assured that they are not going to be charged too highly even if they cannot negotiate how high these charges are for themselves. An obligation on firms to show forbearance when consumers experience payment difficulties provides security for consumers: changes in their circumstances will be acknowledged by firms and they will be helped in finding solution for their problems to prevent further negative adverse consequences such as over-indebtedness and broader social and financial exclusion.

5 Equality based social justice in EU financial consumer law

The previous section having shown that product and rights regulation can be viewed as appropriate tools to address the status based inequalities flowing from the
consumer-financial firm relationship, this section demonstrates that these forms of regulation have increasingly come to the fore in EU financial consumer law.\textsuperscript{113}

The specialised area of EU financial consumer law involves an emergent and complex set of private law and regulatory rules that regulate the relationship of financial firms and consumers. This includes rules on payments, credit, insurance and investment regulation:\textsuperscript{114}

- the Consumer Credit Directive and the Mortgage Credit Directive (regulating credit transactions);
- the MiFID2 and MiFIR and the PRIIPs (regulating investment products);
- the PSD2, the Cross-border Payments Regulation, the SEPA and the Payment Accounts Directive (regulating payments);
- the Insurance Distribution Directive (regulating insurance);
- the Distance Marketing Directive and the Unfair Terms Directive (horizontal directives);
- the Regulation on EBA, the Regulation on ESMA, the Regulation on EIOPA (regulating the EU supervisory authorities).\textsuperscript{115}

\textbf{5.1 Product regulation}

Given the broad approach to understanding contracts as to include pre- and post-contractual terms and conduct, product regulation is also understood broadly here. It includes rules that control the cost elements of financial products; supervisory

\textsuperscript{113} We should be clear that the information rules still dominate EU financial consumer law; usually requiring key information about the product and main consumer rights such as the right to withdrawal to be provided in the pre-contractual communication and to be included into the contract. See e.g. the Consumer Credit Directive.

\textsuperscript{114} Modern financial consumer law is understood here as a set of relevant rules that are in force at the time of writing of the paper (concluded with 30 June 2018).

\textsuperscript{115} See for full references notes 15 and 22.
product intervention powers; rules that control the firm’s conduct and rules that control the fairness of contracts more generally.\textsuperscript{116}

5.1.1 Control of charges

A substantial number of EU financial consumer law instruments aim to make products cheaper and safer to use by regulating \textit{ancillary charges}: by banning charges outright, by imposing a cost cap or by linking the amount of charges to the actual cost incurred.\textsuperscript{117}

Some instruments prohibit firms charging for the fulfilment of their legal information disclosure duties. To this effect, Art. 8 of the Mortgage Credit Directive contains a general prohibition in regard to charging for the provision of any information, even though the Directive is significantly information based: it mandates standard information to be provided in advertising, general information to be provided about available credit products such as the purpose for which the credit may be used, possible duration of the credit, etc., than once a consumer considered taking a loan, creditors must tailor standard information to the needs of the particular consumer and finally while the duration of the contract creditor must provide information on changes in borrowing rate.\textsuperscript{118} Other instruments ban charging information that is not provided under a legal obligation per se, but that is provided at the consumers’ request. For example, under Art. 4(1) of the Cross-border Payments Regulation the provision of information necessary for facilitation of payments must

\textsuperscript{116} See for more product intervention options: FSA, note 29, Chapter 6;

\textsuperscript{117} See for a detailed discussion on the ways to restrict price and charges and debates around costs and benefits of such intervention: Iain Ramsay, ‘To Heap Distress upon Distress: Comparative Reflections on Interest Rate Ceilings (2010) 60 University of Toronto Law Journal 707.

\textsuperscript{118} See Arts. 11, 13, 14 and 27 of the Mortgage Credit Directive. For a similar approach, see Art. 40 of PSD2.
be free of charge. Similarly, Art. 12 Payment Accounts Directive obliges Member States to ensure that when consumers are switching accounts, they can access free of charge their personal information regarding existing standing orders and direct debits.

Some ancillary charges are limited such as to reflect the actual costs incurred. Art. 8 SEPA limits the amount chargeable for interchange fees, fees paid between the two payment service institutions for direct debit transactions; Art. 12(4) of the Payment Accounts Directive controls the fees for switching bank accounts, and Art. 25(3) of the Mortgage Credit Directive controls the charges payable for early repayment of the outstanding debt. An especially important measure is Art. 28 of the Mortgage Credit Directive which obliges Member States to cap charges payable upon default in line with the actual costs incurred.

Although some of these charges discussed above are minor and are unlikely as individual charges to cause significant detriment for consumers, they can easily accumulate into more substantial costs.\(^{119}\) Therefore regulating these cost elements of products is important in terms of improving the position of consumers vis-à-vis firms, and preventing any disproportionate burden.

In addition, there is an example of a direct cost cap. Art. 16(2) of the Consumer Credit Directive provides a cap on a charge payable for an early repayment of consumer credit with fixed borrowing rate. The cap is determined at 1% of the amount of the credit repaid early (if the period between the date of repayment and the agreed termination of the contract is more than one year), or 0.5% (if this period is less than one year).\(^{120}\) In any event, the amount charged

\(^{119}\) See the examples of UK unarranged overdraft charges in Willett, note 18 and high-cost short-term loans in Fejős, note 65.

\(^{120}\) See for possible exemptions from and restrictions on the rule Art. 16(4) of the Consumer Credit Directive.
should not exceed the interest that would be payable for the given period (between the early repayment date and date when the contract is terminated). Assuming that the fixed cost cap would result in a higher amount than the interest, this is an additional safety net provided by Art. 16(5). Although it can be debated whether the cap is set at a fair level, this is an important measure that signals a clear intention to protect consumers vis-à-vis firms.\textsuperscript{121}

The above rules involve caps that are determined at EU level. However, EU-law also empowers Member States to regulate products should it be necessary to protect consumers. The Insurance Distribution Directive gives an option for Member States to limit or prohibit the fees, commissions or other monetary or non-monetary benefits paid to insurance distributors.\textsuperscript{122} Although not providing any specific limit, these sort of provisions send important signals that product regulation measures such as this are in line with EU consumer policy and that they should be used when circumstances require addressing inequalities between firms and consumers for protecting consumers.

\textit{5.1.2 Supervisory product intervention powers}

Next, we find examples of supervision-based product intervention in the EU.

The regulations establishing the EU financial supervisors confer consumer protection powers on the EU financial supervisors (i.e. the EBA, ESMA and EIOPA) to \textit{temporarily prohibit or restrict} certain financial activities that threaten the orderly functioning and integrity of financial markets.\textsuperscript{123} These supervisory powers are really

\textsuperscript{121} See Recital 39 of the Consumer Credit Directive.

\textsuperscript{122} Art. 22(3) and Art. 29(3) of the Insurance Distribution Directive.

\textsuperscript{123} Art. 9(5) of the Regulation on EBA, the Regulation on ESMA, the Regulation on EIOPA. These powers are later concretized in relevant legislation, including the specific conditions under which they may be exercised, see e.g. Art. 40(2) of MiFID, Art. 17 of RIPPS; Art. 40 and 41 of MiFIR.
important in terms of reducing consumer detriment that may otherwise flow from the status based inequality between firms and consumers: allowing proactive action to ensure that the most dangerous products capable of casing significant consumer detriment are not present on the market. Most recently, relying on Art. 40 of MiFIR, ESMA for the first time temporarily banned the marketing and distribution of binary options to consumers and restricted the marketing, sale and distribution of contracts for difference. These high risk investment products allowed ‘betting’ on financial indices such as the price of gold, or currency will rise or fall over a fixed period of time, with highly uncertain outcomes, causing significant loss for consumers.

In addition, there are examples where the EU law-maker specially empowers Member States to intervene. While the above product intervention power is provided for EU supervisory authorities on temporary basis, Art. 42 MiFIR provides competent national supervisory authorities to permanently prohibit or restrict the marketing, sale and distribution of financial products. Another example is Art. 24(7) of the Insurance Distribution Directive under which Member States may intervene on a case-by-case basis to prohibit the sale of packaged insurance products with ancillary services such as investment when they can demonstrate that the products are detrimental to consumers.


5.1.3 Control of business conduct

In addition to the controls over the level of charges and the general suitability of products, there are controls over the manner in which consumers can be treated throughout the relationship.

Firstly, Art. 28 of the Mortgage Credit Directive provides a specific obligation to Member States to introduce legal arrangements that encourage creditors to exercise reasonable forbearance before foreclosure proceedings are initiated. Creditors should act pro-actively in addressing emerging credit risks at an early stage, and make reasonable attempts to resolve the situation through other means before foreclosure proceedings are initiated.\textsuperscript{127} Other means here arguably mean debt mitigation measures such as debt restructuring or debt rescheduling that is able to adjust the loan to new circumstances in a sustainable manner. Indeed, solutions should take into account the practical circumstances and reasonable need for living expenses of the consumer.\textsuperscript{128} In addition, Art. 28 continues that where after foreclosure proceedings outstanding debt remains, Member States shall ensure that measures to facilitate repayment to protect consumers are put in place. This obliges Member States to secure the protection of minimum living conditions and put in place measures to facilitate repayment while avoiding long-term over-indebtedness. This approach recognizes consumers’ weak position in being unable to negotiate with the firm to persuade it to exercise forbearance. It also makes products safer and given the high values involved and the long term nature of mortgage contracts, it has the potential to prevent future adverse consequences such as over-indebtedness, and social and financial exclusion..

\textsuperscript{127} Recital 27 Mortgage Credit Directive.
\textsuperscript{128} Ibid
In addition to these specific conduct requirements; EU financial consumer law also contains examples of a broader principle-based approach by imposing fairly broad standards of behavior but requiring specific results to be achieved. This includes the well-known ‘responsible lending’ rules in Art. 8 of the Consumer Credit Directive and Art. 18 of the Mortgage Credit Directive that mandate firms to lend only to those consumers that can afford repayments, introducing an obligation to assess the consumers’ creditworthiness, and in case of the Mortgage Credit Directive, even a duty to refuse credit if the creditworthiness assessment shows consumers cannot afford the loan.\textsuperscript{129} Although these rules have been subject to criticism,\textsuperscript{130} they do improve to at least some extent the likelihood that consumers will not undertake credit that they cannot afford and that will lead to over-indebtedness, social and financial exclusion. This could be particularly significant in improving the position of consumers in those Member States that did not previously have these kinds of rules.\textsuperscript{131}

Most recently, in Art. 24(2) MiFiD2 imposed an obligation on investment firms to ensure that financial products meet the needs of targeted groups of consumers. This might mean for example that products are developed by taking into account the characteristics of a particular group of consumers for example their age and income level. If products are e.g. designed to be marketed to pensioners, it must be considered that they are likely to prefer less risky products for a moderate price. The

\textsuperscript{129} Cherednychenko, note 6, 412.


provision also obliges investment firms to sell or recommend these products to individual clients only when it is in their interest. It might not for example be in the best interests of a retired consumer to buy the investment if it is too risky or too expensive taking into accounts the individual circumstances of the consumer. Even if the product may be suitable for the majority of pensioners, it might not be for the consumer in question. Although the value and effectiveness of the principled based approach is debated;\textsuperscript{132} these kind of provisions are for allowing firms to balance their own interest for achieving profits with consumer interest for safe and affordable products in a way that suite them the best.\textsuperscript{133}

5.1.4 Broad fairness controls

While the all the above measures could be said to aim at achieving contractual fairness, the fairness of the terms of the contract is also explicitly controlled by the Unfair Terms Directive. In the aftermath of the financial crisis the Unfair Terms Directive has been used to protect consumers against unsuitable (primarily mortgage) products;\textsuperscript{134} with the ECJ explicitly citing the goal of the Directive to combat the power imbalance between businesses and consumers.\textsuperscript{135} This is manifest in various ways.


\textsuperscript{134} See note 48 for references.

First of all, the ECJ has given a generally protective interpretation of the Directives general test of fairness. Under Art. 3(1) a contract term is unfair if contrary to good faith it causes significant imbalance to the detriment of the consumer vis-à-vis firms. In the landmark Aziz case the ECJ introduced the ‘agreement test’ according to which an imbalance arises ‘contrary to the requirement of good faith’ if the consumer would not have agreed to the term in individual negotiations. This approach takes account of the reality of pre-formulated standard contracts and the consumer’s inability to negotiate with firms. In particular, in referring to what the consumer would have agreed to, it becomes clear that the question is what substantive term the consumer would have agreed to, that a term must be substantively fair. It is not therefore sufficient for a term simply to be expressed transparently if it is not substantively fair. In further explaining how to apply the test of fairness the ECJ in Aziz also made it clear that a term will result in significant imbalance between the parties if it deviates from the applicable default provisions. This is also important because it will often be the case that these default rules have been designed based to balance the interests of the parties, taking also into account the need to protect consumers.

A second way in which the Unfair Terms Directive has been used to protect consumers is the approach taken to Art. 4 (2). This provision allows Member States to exempt from the fairness test assessment of the ‘adequacy of the price’ and the ‘main subject matter’ of the contract, provided these are in plain and intelligible

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136 Howells et al, note 46, 148.
137 C-415/11 Aziz, note 135, para 69
138 Howells et al, note 46, 152.
139 C-415/11 Aziz, note 136. para 75
140 Of course exceptions from this rule are possible. See C-280/13 Barclays Bank v Sanchez Garcia and Chacon Barrera, EU:C:2014:279 where it transpired that several default provisions of the applicable Spanish law were significantly favouring the interest of the bank.
language. This provision came under scrutiny in Kásler where the court interpreted the provision in a restrictive manner (making it more likely that the test of fairness will be able to be applied). The court established that a contract term transferring the exchange rate risk onto consumers (where the banks more expensive selling rate of exchange is applied to calculate loan instalments) can only be exempted from the test of fairness as the ‘main subject matter’ if it represents the ‘essential obligation’ that ‘characterizes the contract’.\textsuperscript{141} It also established that such a term can only be exempted from the test as a 'price' term if there is a service provided in exchange.\textsuperscript{142} Finally, in Kásler the ECJ defined the plain and intelligible language condition broadly.\textsuperscript{143} It was said that a term is only in plain and intelligible language where it was expressed such as to enable consumers to estimate the economic consequences of the term in question for their own financial situation.\textsuperscript{144} This sets quite a demanding standard of transparency. It will often not be particularly realistic for terms (no matter how clear they are) to really enable consumers to work out how they might affect them (other than in a very broad sense). This seems likely especially to be the case with terms dealing with complex financial issues such as the foreign currency exchange clause in the case at hand.\textsuperscript{145} The result therefore may be that many such clauses (even if they are found to be the price or main subject matter terms) will be able to be tested under the test of fairness.

Finally, there is the approach of the ECJ to Art. 6 (1), the provision stating that unfair terms are not binding on consumers. The court has provided a very consumer protective interpretation of Art. 6(1); arguably seeing this provision as taking a lead in

\textsuperscript{141} C-26/13 Kásler, note 135, para. 49.
\textsuperscript{142} Ibid para. 58.
\textsuperscript{143} Ibid, para. 72.
\textsuperscript{144} Ibid, para 74.
\textsuperscript{145} Ibid, para 58.
improving the contractual position of consumers vis-a-vis firms.\textsuperscript{146} It has held that courts must be entitled to rule on their own motion on the fairness of terms;\textsuperscript{147} that there should be no limitation period for invoking unfairness;\textsuperscript{148} and that the applicability of the test of fairness is not limited to the stage of the process\textsuperscript{149} or the type of process,\textsuperscript{150} and it certainly includes a mortgage enforcement processes.\textsuperscript{151} These approaches are especially important in allowing the fairness test to be used a shield to protect consumers from the detriment that might come with proceedings that might otherwise end with ever increasing debts and possibly repossess of property and consequent homelessness.\textsuperscript{152}

Enabling the courts control over the substance of the terms, including those of price, are important product intervention powers of the court that contribute to the overall package of measures that can be seen as responding to status based inequality.

5.2 Rights regulation

The other equality based social justice provisions that set substantive protection standards are rules that can be referred to as ‘rights regulation’: e.g. a consumer right to withdraw from the contract; a later right to modify the agreement; and a right

\begin{align*}
\textsuperscript{146} &\text{C-168/05 Claro, note 135, para. 36; C-40/08 Asturcom Telecomunicaciones v Rodriguez Nogueira,}\nonumber \\
&\text{EU:C:2009:65, para. 47; C-453/10 Pereničová and Perenič v SOS finance, EU:C:2012:144, para. 28; C-618/10 Banco Español de Crédito v Camino, EU:C:2012:349, para. 40; C-415/11; C-109/17 Bankia v Merino and others EU:C:2018:735, para 38.}\nonumber \\
\textsuperscript{147} &\text{JC-240/98 to C-244/98 Océano, note 136; C-243/08 Pannon GSM v Győrfl, EU:C:2009:350, para. 28.}\nonumber \\
\textsuperscript{148} &\text{C-473/00 Cofidis v Fredout, EU:C:2002:705, para. 38.}\nonumber \\
\textsuperscript{149} &\text{Camino, note 146. see also C-397/11 Jőrös v Aegon Hitel EU:C:2013:304.}\nonumber \\
\textsuperscript{150} &\text{E.g. Claro (review of the validity of the arbitration clause), note 146; Camino (order for payment procedure), note 146.}\nonumber \\
\textsuperscript{151} &\text{Most notably, C-415/11 Aziz, note. 135.}\nonumber \\
\textsuperscript{152} &\text{In Aziz the court especially underlined that the mortgage property was a family home and that it would cause great loss to the consumer and its family to lose a home. C-415/11 Aziz, note 135, para. 61.}\nonumber
\end{align*}
to terminate the contract early. As indicated in section 4, such rules are important additional protections against the various inequalities: product intervention rules may not have been used, even if they have been used products may remain unsuitable or too costly for some consumers or they may no longer be needed.

5.2.1 Early withdrawal rights

Several instruments provide a right of early withdrawal for consumers shortly after the contract is made. For example, Art. 14 of the Consumer Credit Directive and Art. 6 the Distance Marketing Directive oblige Member States to provide a 14 day period of right of withdrawal for consumers that they can exercise without giving any reasons and without incurring any financial costs. The right of withdrawal is commonly used in more general consumer policy, the rationale of this right being to provide a ‘cooling off’ period for consumers, to provide additional time to consider the affordability and the suitability of the particular (financial) product.

The right of withdrawal builds on information disclosure rules. Even if consumers may pay little attention to the disclosed risks prior to entering the contract, they may be more prone to reflect on these risks after the initial ‘excitement’ of the purchase wears off, and when they are also free of the possible high pressure tactics preceding the sale. If they conclude that the transaction is too costly, risky or unsuitable, the right to withdraw allows them to escape from it. It is true that the nature of financial products, especially the likelihood that the real value of the products will not transpire in 14 days might negatively affect the practical use of this

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153 These rights are exceptions from binding nature of contracts (pacta sunt servanda) under which consumers would be bound from the moment of agreement, and which would only allow for modification or termination based on the express terms of the contract (or perhaps in the case of termination, based on breach by the business).

154 See on the evolution of the right of withdrawal: Howells et al., note 46, 115-119.

155 Ibid, 123.
right. Nevertheless, consumers may reflect more seriously in some circumstances eg. where they have particular concerns over their needs and whether the product covers them, or where they had felt uncomfortable about the pressure they felt under when agreeing to the purchase or the haste with which they agreed. So at least in such cases, the withdrawal right provides some scope to avoid unsuitable and potentially damaging products. In this sense the withdrawal rights can be said to contribute to addressing the status based inequality in the consumer-firm relationship.

5.2.2 Right to modify contractual relationships

EU financial consumer law contains provisions that enable consumers to modify their existing contractual relationship with firms. These are particularly important entitlements in long term relationships, enabling consumers to adjust their contracts to changed circumstance, adjustments that they would unlikely to be able to negotiate due to their weak bargaining position relative to the firm.

In particular, Art. 23(1) of the Mortgage Credit Directive obliges Member States to have in place an appropriate regulatory framework allowing for modifications in the case of loans in foreign currencies. Such loans are indexed to a benchmark that tracks the movement of the currencies in question on money markets, and they have the potential to adversely affect consumers by making the installments much more expensive than initially anticipated. The Mortgage Credit

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156 See also on possible behavioural barriers: Joasia Luzak, ‘To withdraw or not to withdraw? Evaluation of the mandatory right of withdrawal in consumer distance selling contracts taking into account its behavioural effects on consumers’ (2013) 37 Journal of Consumer Policy 91.
158 See for an overview of possible limits to this right in credit relationships: Rott, note 131, 224-225..
Directive now obliges Member States to give an option to consumers to convert to an alternative currency, a currency that will make installments more affordable and less volatile to changes. These options could be either the currency in which consumers receive their income or hold assets, or the currency of the Member State in which the consumer was either resident at the time when the contract was concluded or is currently resident.\textsuperscript{159} This right therefore enables consumers to mitigate the adverse consequences of unfavorable changes on money markets: a right that they would hardly be in a position to negotiate given the significant profits that foreign currency loans generated for banks. This is an important provision given that loans indexed in foreign currencies were especially common in the pre-crisis era, many of them having been mis-sold, causing significant detriment to consumers and their families.\textsuperscript{160}

Further examples of modification rights are contained Art. 16 of the Consumer Credit Directive and Art. 25 Mortgage Credit Directive. These provide consumers with the right to repay part of their outstanding debt before the agreed end of the credit agreement. As opposed to the above negative change in circumstances, consumers may also experience positive changes, such as having more money than planned (e.g. through a salary increase, or an inheritance). In that case, the above provisions provide consumers with an option to pay off a part of their loan, thus reducing the interest and other associated costs and bringing down the total cost of the credit.\textsuperscript{161}

5.2.3 Right to end contractual relationships early

\textsuperscript{159} Art. 23(2) Mortgage Credit Directive.

\textsuperscript{160} Recital 4 Mortgage Credit Directive; see also Zunzunegui, note 74, Fejős note 23,139 with further references.

\textsuperscript{161} See on possible restrictions of this right: Rott, note 131,225-226.
Finally, Art 16 of the Consumer Credit Directive and Art. 25 of the Mortgage Credit Directive provides consumers with the right to fully repay their general credit or mortgage debts early reducing the total cost of their credit. If the consumer has come into enough money, they may wish not merely to modify the agreement as above by substantially reducing the debt, but to end it altogether: thus escaping all further interest and other associated costs. Given the firms interest to have regular income from credits provided for consumers and the consumers’ weak bargaining power, it is unlikely that consumers would be able to negotiate early termination of their relationships with firms. So once again there is a contribution to response to status based inequality.

6 Conclusion and recommendations

By applying the equality of status based theoretical framework for understanding social justice in financial consumer law, this paper has provided an original interpretation of the values underpinning modern financial consumer law. Under the framework developed here financial consumer law pursues a form of equality based social justice when it goes beyond an information paradigm and regulates the substance of the parties’ relationship by product and rights regulation. The paper has showed that this equality based model of social justice has increasingly come to the fore in the modern EU financial consumer law. The next step for the EU must be to make this approach transparent, an express part of EU law and policy, both in order to raise consumer trust and also to more clearly set the future law and policy agenda.
It was suggested in section 2 that the more protective product and right based rules are not only capable of reducing consumer detriment but are also essential for raising consumer trust in the internal market and European integration more generally. Whilst various examples of product and right based rules have been highlighted, these remain hidden among the many non-social justice oriented information disclosure rules and can only been discovered with comprehensive and targeted research. However, in order to generate trust, the social justice approach must be made transparent. This means that the more protective rules must be labelled expressly as social justice measures and they must be connected with a broader social justice policy goal. Making the social justice approach transparent signals that social justice measures are not simply introduced on random occasions under the influence of various interest groups, but rather they are part of a coordinated policy of social justice aimed at improving the lives of consumers.

First, then it is important to apply the label of social justice to protective product and right based legal tools. Labelling re-emphasises their protective nature, enabling consumers to appreciate the efforts of the EU lawmaker to deliver a high level of consumer protection. Labelling also gives a deeper meaning to the rules, connecting them to underling values in the society, values that signal that EU intends to take care of their citizens, and to create a place for living based on the values of welfarism.

Second, it is then of paramount importance to connect these protective, social justice rules with broader policy making: to declare social justice as a clear part of EU consumer policy at least in the financial sector. This policy agenda is currently dominated with the dual aim of providing consumer protection and enhancing
competition on the internal market.\textsuperscript{162} Regulation for ‘better products’ in the most recent Consumer Financial Services Action Plan to intervene into ‘market dynamics’\textsuperscript{163} could be read as the EU Commission’s language of justifying the use of social justice measures within its consumer protection agenda. This is however only a possible interpretation, and one that remains deeply hidden. In order to gain or increase the trust of consumers, the EU legislators should declare loudly and proudly that their legislative agenda is in line with social justice. This could be achieved by connecting this policy with the vision of an EU ‘social market’. This fairly new understanding of the internal market was built into Article 3 TEU by the Treaty of Lisbon, making one of the objectives of EU integration the creation of a ‘highly competitive social market economy’ that includes ‘a high level of protection’. The combination of the notions of ‘social’ with ‘market’ provoked strong views about the relationship of these two notions, and a significant debate on this must be left for another time.\textsuperscript{164} Suffice to say that the European model of social market economy is distinct from national social market models. It is certainly different from the model of German post-war Soziale Marktwirtschaft not the least because the EU lacks competences to provide for EU-wide traditional social justice measures such as subsidized housing, free healthcare and education.\textsuperscript{165} However, the EU does have competence to instate the model of social justice developed here; one where rules intervening into the substance of the parties’ contract get a prominent place in addressing the status based inequality in the consumer-firm relationship. The

\textsuperscript{162} See e.g Domurath, note 7, 125.
\textsuperscript{163} EU Commission, COM (2017) 139, 15, 2.
\textsuperscript{165} Joerges and Rödl, ibid.
number of recent product and right based rules in EU financial consumer law are important developments towards a social market economy of the EU, and it is important to recognize this at the broader policy level. As in other areas of EU law, EU financial consumer law remains ‘distinctively light on ‘social’ and heavy on ‘market’ elements,166 but the social elements are undeniably present.

Making the social justice oriented approach transparent is also important to more clearly set the future law and policy agenda. Labelling the protective rules as social justice measures and making them part of the policy agenda would force the EU-lawmakers, primarily the EU Commission, to rethink and make their legislative approach to including social justice measures (more) systematic. This means rethinking what is meant by a ‘high level of consumer protection’ and what regulatory tools are capable of achieving this. This would also mean having a better idea as to what kind of product and rights regulations work best at EU level, and which ones should be left to Member States. It would also mean making a conscious decision to use social justice measures across the board in financial consumer contract regulation, instead of the current unsystematic, patchy approach to rule making. For example, while mandatory information disclosure is frequently present, only a couple of instruments provide for the free of charge provision of this information.

Some of the social justice trends already flagged up by this paper could be a starting point for considering more precisely what a social justice based EU consumer policy should look like. The question of values underpinning EU law and policy is highly topical given recent EU Commission initiatives to improve general consumer law167 and academic concerns about the current direction of EU consumer

166 de Witte, note 166, 2.
167 The REFIT of Consumer law that required a major evaluation of key consumer law directives and resulting in a package of measures to strengthen enforcement of consumer law. See Commission, Results of the Fitness Check of consumer and marketing law and of the evaluation of the Consumer Rights Directive <
Further research is needed to examine the extent to which the theoretical model discussed here is suitable for transplantation more generally in EU consumer law, i.e. what social justice measures are already in place in general consumer law, how effective they are, and what could be implemented by analogy to those used in financial contracts. One important dimension of this will involve questioning where the balance lies across EU consumer policy generally between the information paradigm which as we have seen is of very limited effect in addressing inequalities, and more substantive regulation of terms, products and services, which is likely to be more effective in this regard and can therefore more legitimately claim to have social justice goals.