
RESEARCH ARTICLE

Social Justice in EU Financial Consumer Law

Andrea Fejős*

This paper¹ considers how social justice influences EU financial consumer law. It provides a new way of looking at social justice in consumer law by showing that *equality of status* based social justice 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 engaging in product and rights regulation that balances the parties' rights and duties and protects consumers from the consequences of status-based inequality. Looking forward 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.

Keywords: Financial consumer law; EU financial services; EU consumer law and policy; EU social market economy; social justice; equality of status

1 Introduction

This paper considers how social justice values are reflected in modern 'EU financial consumer law'. Using philosophical concepts of social justice, it shows that *equality of status* based social justice has increasingly come to the fore in EU financial consumer law (an emergent and complex set of private law and regulatory rules² on credit, insurance, investment and payment products). Researching 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 financial consumer law; and because being more explicit as to the role of social justice (in current rules and in setting a future agenda) may help develop consumer trust in the internal market.

This paper is original first of all in offering 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.³ This is shown to be an appropriate 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*.⁴ Problems of (in)equality are at the heart of a relationship between consumers and

* Lecturer, University of Essex, Colchester, UK, afejos@essex.ac.uk

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² 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).

³ *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. Consumers here also include investors. See Niamh Moloney, 'The investor model underlying the EU's investor protection regime: consumers or investors?' (2012) 13 *European Business Organizations Law Review* 169.

⁴ 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 of the difference see: Gideon Elford, 'Equality of Status and Distributive Equality' (2012) 46 *Journal of Value Inquiry* 353.

firms,⁵ yet observing this relationship from the angle of (in)equality has been under-researched in consumer and contract law scholarship.⁶ 'Inequality' here refers to the consumers' weaker position in terms of information and bargaining power in the process leading to contract conclusion; and the consumers' vulnerable position in terms of bearing the consequences of the resulting relations that are often weighted in favor 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 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 large financial sums and create long term commitments (for instance mortgages, pensions, life insurance); and unsuitable decisions can have severe consequences (for instance over-indebtedness) for consumers and their families.⁷

The second key contribution of the paper is to demonstrate that an equality of status based version of social justice influences EU financial consumer law. The paper argues that financial consumer law pursues a form of social justice when it goes beyond an information paradigm (considered usually ineffective to respond to the above inequalities),⁸ and regulates the substance of the firm-consumer relationship via 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; whereas *rights regulation* gives special entitlements to consumers such as a right to withdraw from or modify the contract. EU financial consumer law is shown here increasingly to do precisely these things, and thus to pursue a social justice agenda.

Looking to the future, the paper puts forward new arguments that this social justice approach must be made transparent as an express part of EU law and policy: both to raise consumer trust in the internal market as a market underpinned by welfarist values, and to more clearly set the future law and policy agenda.

The paper is structured as follows. Part 2 explains more fully why the topic is important. Part 3 uses prior work on social justice in the context of contract and consumer law to more fully explain 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 consumer law in the form of rules that regulate the substance of the relationship (product and rights regulation). Part 6 summarizes 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 several reasons why it is important to ask questions about social justice in EU financial consumer law.

First, credit, insurance, investment and payment are indispensable for consumers' daily lives. With the increasing relevance of *financialization*, i.e. the role of the financial sector in replacing welfare provision by Member States; consumers are becoming more reliant on financial products to make provision for example

⁵ Dimitry Kingsford Smith and Olivia Dixon, 'Can There be a Fair Share? Fairness, Regulation and Financial Markets' in Janis Sarra (ed), *An Exploration of Fairness* (Carswell Thompson 2013) 253.

⁶ Iain Ramsay and Toni Williams, 'Inequality, market, Discrimination, and Credit Markets' in Iain Ramsay (ed), *Consumer Law in the Global Economy: National and International Dimensions* (Ashgate 1997) 233; Thomas Wilhelmsson, 'Contract and Equality' in Peter Wahlgreen (ed), *Legal Theory 40 Scandinavian Studies in Law* (Stockholm 2000) 147.

⁷ Peter Rott, 'A plea for special treatment of financial services in unfair commercial practices law' (2013) 2 *Journal of European Consumer and Market Law* 61; Hans-W Micklitz, 'Conclusions: Consumer Over-Indebtedness and Consumer Insolvency – from Micro to Macro' in Hans-W. Micklitz and Irina Domurath (eds), *Consumer Debt and Social Exclusion in Europe* (Ashgate 2015); Patrice Muller et al, 'Consumer Protection Aspects of Financial Services' (EU Parliament, 2014), 43–63 <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/507463/IPOLIMCO_ET\(2014\)507463_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/507463/IPOLIMCO_ET(2014)507463_EN.pdf)> accessed 12 November 2018; David Llewellyn, 'The Economic Rationale for Financial Regulation' (1999) Financial Services Authority Occasional Paper 1/1999 <<http://www.fsa.gov.uk/pubs/occpapers/op01.pdf>> accessed 15 June 2018.

⁸ Olha O. Cherednychenko, 'Freedom of Contract in the Post-Crisis Era: Quo Vadis?' (2014) 10 *European Review of Contract Law* 390; Iain Ramsay, 'Changing Policy Paradigms of EU Consumer Credit and Debt Regulation in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law* (Hart 2016); Irina Domurath, 'The Case for Vulnerability as the Normative Standard in European Consumer Credit and Mortgage Law – An Inquiry into the Paradigms of Consumer Law' (2013) 3 *Journal of European Consumer and Market Law* 124; Catherine Garcia Porras and Willem van Boom, 'Information Disclosure in the EU Consumer Credit Directive: Opportunities and Limitations' in James Devenney and Mel Kenny (eds), *Consumer Credit, Debt and Investment in Europe* (CUP 2012); Vanessa Mak and Jurgen Braspenning, 'Errare humanum est: Financial Literacy in European Consumer Credit Law' (2012) 35 *Journal of Consumer Policy* 307; Lauren Willis, 'Against Financial Literacy Education' (2008) 94 *Iowa Law Review* 197; Moloney, note 3.

for house, pension and insurance.⁹ With this trend in Europe,¹⁰ financial products are increasingly considered *essential* for modern day living,¹¹ 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.¹² Albeit being essential, financial products are also prone to causing significant and long-lasting detriment. One key problem is their long-term nature (such as mortgage loans, pensions) and the high values involved in the transactions (for example house insurance, life-time saving, etc.).¹³ Consequently, unsuitable transactional decisions such as to take too much credit or to invest in risky financial products, can have long term negative effects on the well-being of consumers and their families; leading, among others, to over-indebtedness and financial exclusion.¹⁴

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.¹⁵ Although previously there had been rules in all sectors,¹⁶ these mainly required the provision of information.¹⁷ The Distance Marketing Directive is a perfect example of this, containing numerous requirements for pre-contractual provision of information.¹⁸ The policy logic of the 'information paradigm' is to empower consumers to make informed decisions, i.e. to understand the risks and benefits of the transactions; this in turn being expected to increase competitive discipline over the quality and fairness of products offered on the market.¹⁹ Until relatively recently there were few rules going beyond the information paradigm and directly regulating the substance of the parties' relationship; although one example was the consumers' right of early withdrawal in Art. 6 of the Distance Marketing Directive. Such protective provisions now play a much more significant role.²⁰

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;

⁹ Dimitry Kingsford Smit and Olivia Dixon, 'The consumer interest and the financial markets' in Niamh Moloney et al. (eds), *The Oxford Handbook of Financial Regulation* (OUP 2017) 699–700. For more details on financialization see: Thomas Palley, 'Financialization: What It Is and Why It Matters?' (2007) the Levy Economics Institute Working Paper 252/2007 <http://www.levyinstitute.org/pubs/wp_525.pdf> accessed 3 December 2018.

¹⁰ In 2016, 90% of EU consumers had at last one financial product. EU Commission, 'Special Eurobarometer 446: Financial Products and Services' (4 April 2016) <<http://ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/Survey/getSurveyDetail/search/446/surveyKy/2108>> accessed 15 June 2018.

¹¹ Asli Demirgüç-Kunt et al., *Finance for All? Politics and Pitfalls in Extending Access* (World Bank 2008) <http://siteresources.worldbank.org/INTFINFORALL/Resources/4099583-1194373512632/FFA_book.pdf> accessed 15 June 2018; Elaine Kempson, Sharon Collard, 'Developing a vision for financial inclusion' (Friends Provident Foundation 2012) <<https://www.fincan.co.uk/repository/uploads/sectionpdfs/95%20Developing%20a%20Vision%20for%20Financial%20Inclusion%20-%20Kempson%20&%20Collard%20March%202012.pdf>> accessed 15 June 2018.

¹² Iain Ramsay, 'Regulation of consumer credit in Geraint Howells et al (eds), *Handbook of Research on International Consumer Law* (Edward Elgar 2018).

¹³ Llewellyn note 7, 18–19; Kingsford and Dixon, note 9, 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 Réseau Financement Alternatif, *Financial Services Provision and Prevention of Financial Exclusion* (EU Commission 2008); <<https://www.bristol.ac.uk/medialibrary/sites/geography/migrated/documents/pfrc0807.pdf>> accessed 12 November 2018; Civic Consulting, *The Over-indebtedness of European Households* (EU Commission 2013) <https://ec.europa.eu/info/sites/info/files/final-report-on-over-indebtedness-of-european-households-synthesis-of-findings_december2013_en.pdf> accessed 15 June 2018.

¹⁵ Cherednychenko, note 8.

¹⁶ See, among others:

- Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers [2008] OJ L 133/66 (Consumer Credit Directive);
- Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation [2002] OJ L 9; Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market [2007] OJ L 319;
- Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments [2004] OJ L 145;
- Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services [2002] OJ L 271 (Distance Marketing Directive);
- Regulation (EC) No 924/2009 of the European parliament and of the Council of 16 September 2009 on cross-border payments in the Community [2009], OJ L 266 (Cross-Border Payments Regulation).

¹⁷ 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).

¹⁸ Information is required for example as to the identity of the firm, the main characteristics of the contract, and the content of the terms and conditions of the contract. Distance Marketing Directive, arts 3–6.

¹⁹ Chris Willett, 'Competing Ethics of European Consumer Law in the UK' (2012) 71 *Cambridge Law Journal* 412, 425–429; Iain Ramsay, *Consumer Law and Policy* (3rd ed, Hart 2012) Chapter 2.

²⁰ Cherednychenko, note 8.

and given that EU financial markets include over 500 million consumers and an economy that produces 15 trillion euros annually.²¹ Financial markets are seen as essential components of the internal market.²² The 'new rules'²³ (adopted under Art. 114 of the Treaty of the Functioning of the European Union-TFEU to facilitate the development of the internal market in financial services) are more protective than before. Some responded to the harsh consequences of the 2008 financial crisis. For example, Art. 23 of the Mortgage Credit Directive mandates Member States to have measures in place to limit consumer exposure to exchange rate risk. This was arguably intended to respond to detriment caused by loans indexed in foreign currency that surfaced in the aftermath of the financial crisis.²⁴ Others instruments sought to reduce consumer detriment, by closing a regulatory gap caused by financial and technical innovation as in relation to payment services.²⁵ At the heart of the new approach are product regulation rules and improved consumer rights, both of which bring more substantive protection than before.

The third reason why this area deserves special attention is that 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 value highly their ability to trust financial markets;²⁶ however, consumer trust in banking (credit, payments and investment products) is lower than in many other markets.²⁷ The lack of trust is evidenced by low levels of cross-border transactions.²⁸ It is no surprise therefore that the lack of trust has been recently identified by the EU Commission as a key issue that its regulatory agenda must address.²⁹ Indeed, trust is crucial in financial consumer markets. Consumers 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 post-contractually.³⁰ Trust can be created and strengthened by regulation,³¹

²¹ EU Commission, 'Consumer Financial Services Action Plan: Better Products, More Choice' COM (2017) 139 final, 1.

²² EU Commission, COM (2017) 139, 1–2.

²³ · Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments [2014] OJ L 173 (MiFID2);
 · Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market [2015] (PSD2);
 · Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution [2016] OJ L 26 (Insurance Distribution Directive);
 · 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 [2014] OJ L 60 (Mortgage Credit Directive);
 · Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products [2014] OJ L 352 (PRIIPs);
 · 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 [2014] OJ L 257 (Payment Accounts Directive); and
 · Regulation (EU) No 260/2012 of the European Parliament and of the Council establishing technical and business requirements for transfer and direct debits in euro [2012] OJ L 94 (SEPA).

In addition, regulation on financial supervision also contain important protective measures and are relevant for the present research:

- Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory authority (European Banking Authority) (Regulation on EBA) [2010] OJ L 331;
- Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory authority (European Insurance and Occupational Pensions Authority) (Regulation on EIOPA) [2010] OJ L 331;
- 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) [2010] OJ L 331 (Regulation on ESMA);
- Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments [2014] OJ L 173 (MiFIR).

²⁴ Recital 3 Mortgage Credit Directive; see Andrea Fejős, 'Mortgage Credit in Hungary' (2017) 6 *Journal of European Consumer and Market Law* 139.

²⁵ PSD2, recitals 3–6.

²⁶ EU Commission, '2018 Edition Consumer Market Scoreboard' 19 <https://ec.europa.eu/info/sites/info/files/eujus15a-1816-i02_-_the_consumer_markets_scoreboard_2018_-_accessibility_final.pdf> accessed 12 November 2018.

²⁷ *Ibid* 42.

²⁸ Data from 2016 shows that only 7% of consumer's ever used a financial service or obtained a product from another Member State. EU Commission, Special Eurobarometer 446, note 10, 4. This is only a 1% increase from 2011. See EU Commission, 'Special Eurobarometer 373: Retail financial services' (2011) 5 http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_373_sum_en.pdf accessed 10 November 2018.

²⁹ EU Commission, COM (2017) 139, 1–2.

³⁰ See Financial Services Authority, *Product Intervention* (2011) Discussion Paper DP11/1, 16 <https://www.fca.org.uk/publication/discussion/dp11_01.pdf> accessed 12 November 2018.

³¹ *Ibid*.

in particular by substantive forms of regulation grounded in social justice values. This might help to 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 in 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.³² There is a serious lack of consumer trust in entire national financial systems, and in the ability of the EU to deliver a better life. The EU has been described as an ‘irredeemably neo-liberal market place.’³³ It is therefore important for academic work to highlight any evidence that this is inaccurate, including evidence that social justice does indeed play a significant role. However, as will be discussed further in Part 6, increasing trust also requires a much more prominent position to be given to social justice as a policy driver in EU financial consumer law; the EU being more systematic in developing social justice based rules and clearly labelling them as such. There is arguably a basis for this in Art. 3 of the Treaty on the European Union (TEU); which envisions the EU as a ‘highly competitive *social* market economy.’³⁴

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.³⁵ Many leading authors have dealt with various aspects of the arguments presented here. However, prior to this paper there has been no developed theoretical understanding of *equality of status* based social justice in *EU financial consumer law*.

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, etc. Commutative justice is concerned with remedying transactional injustice between the parties, the ‘wrongs’ done to the innocent party when the other breaks the contract.³⁶ 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 just in terms of the allocation of resources and benefits of a wide variety of rights, freedoms, opportunities, economic benefits, etc.³⁷ Kronman showed that, in addition to public law, contract law can have distributive social justice effects; that the design of contract law rules involves choices as to distribution of power, risks and resources between parties in market exchanges.³⁸

Collins developed Kronman’s work. He showed that traditional contract law with its focus on freedom of contract is not oriented towards distributive social justice.³⁹ However, Collins demonstrated 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.⁴⁰

³² A recent study showed that peoples’ subjective judgments about their own and their surrounding economic conditions influenced their voting more than the overall economic conditions, e.g. official statistics about unemployment and inflation rate of the state in which they live in. Harold Clarke et al, ‘Brexit: why Britain voted to leave the European Union’ (CUP 2017) 64.

³³ Phil Sypris, ‘EU law before and after the referendum- challenges and opportunities’ (2018) University of Bristol Law Research Paper 9/2018, 2 <<http://www.bris.ac.uk/media-library/sites/law/documents/Sypris%20BLRP%20No.%209%20-%20July%202018%20merged.pdf>> accessed 15 June 2018.

³⁴ Delia Ferri and Fulvio Cortese, ‘Introduction: The social market economy in the European Union. Theoretical perspectives and practical challenges’ in Delia Ferri and Fulvio Cortese (eds), *The EU Social market Economy: Theoretical Perspectives and Practical Challenges* (Routledge 2018).

³⁵ Anthony T. Kronman, ‘Contract Law and Distributive Justice’ (1980) 89 *The Yale Law Journal* 472; Hugh Collins, ‘Distributive Justice Through Contracts’ (1992) 45 *Current Legal Problems* 49; Iain Ramsay, ‘Consumer Credit Law, Distributive Justice and the Welfare State’ (1995) 15 *Oxford Journal of Legal studies* 177; Thomas Wilhelmsson, ‘Varieties of Welfarism in European Contract Law’ (2004) 10 *European Law Journal* 712; Study Group on Social Justice in European Private Law, ‘Social Justice in European Contract Law: a Manifesto’ (2004) 10 *European Law Journal* 653; Therese Wilson, ‘Consumer credit regulation and rights-based social justice: addressing financial exclusion and meeting the credit needs of low-income Australians’ (2012) 35 *UNSW Law Journal* 502; Vanessa Mak, ‘Social considerations in EU Consumer Law’ in Delia Ferri and Fulvio Cortese (eds), *The EU Social market Economy: Theoretical Perspectives and Practical Challenges* (Routledge 2018); Hans-W. Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar 2011); Thomas Wilhelmsson et al. (eds), *Private Law and the Many Cultures of Europe* (Kluwer Law International 2007); Iain Ramsay (ed.), *Consumer Law in the Global Economy* (Ashgate 1997); Luca Nogler and Udo Reifner (eds), *Life Time Contracts; Social Long-term Contracts in labour, tenancy and consumer credit law* (Eleven International Publishing 2014).

³⁶ Ernest Weinrib, ‘Corrective Justice in a Nutshell’ (2002) 52 *The University of Toronto Law Journal* 349.

³⁷ David Miller, *Justice for Earthlings* (CUP 2013) 40; see also on the difference Wilhelmsson, note 34, 716–718.

³⁸ Kronman, note 35.

³⁹ Collins, note 35, 49.

⁴⁰ Hugh Collins, ‘Regulating Contract law’ in Christine Parker et. al. (eds), *Regulating law* (OUP 2004) 18.

While Kronman and Collins had provided vital foundations by showing the general relevance of social justice, neither had considered how equality based social justice in consumer financial law might work. In this regard *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.⁴¹ This paper takes a similar approach. However, it frames the social justice issues in terms of status-based equality as a conceptually distinct notion from distributive social justice (as explained in section 4.2); and it is not concerned with equality of *access*, rather equality of treatment within the relationship.

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.⁴² More particularly, Wilhelmsson looked at the potential of consumer law to create social justice: concluding that information disclosure rules reproduce injustices by giving greater protection to privileged consumers, whereas rules that regulate the substance of the contract (such as interest rate ceilings), and rules that provide greater protection to disadvantaged consumers (for example to poor or unemployed), could be social justice tools.⁴³ This paper takes these thoughts further in the specialized area of EU financial consumer law, and grounded in a specific vision as to equality i.e. *status*-based equality.

The prevalence of information rules in general EU consumer law, has led scholars to argue that EU consumer law rules are not concerned with social justice. For example, Wilhelmsson has cited the exclusion of main subject matter and price terms from the test of fairness under the Unfair Terms Directive,⁴⁴ as evidence of a negative attitude towards 'redistributive welfarism'.⁴⁵ Micklitz has suggested that the vision of social justice in EU consumer law is 'access justice'. The rules equip consumers with necessary information to be able to participate in the market, and provide them with access to essential services (such as utility services). According to Micklitz, this leaves it to Member States to instate more protective 'social' justice.⁴⁶ Without disputing these valid thoughts, it is shown here that in the specialized area of EU financial consumer law the EU now *does* provide for a degree of social justice.

Strong views have been expressed that social justice *should* play a prominent role in legal policy underpinning EU consumer and private law more generally. The *Study Group on Social Justice in European Private Law* pointed out that a clear vision of social justice through fairness in contracts is missing from the EU market integration agenda.⁴⁷ The present paper argues that such characteristics (in the form of product and rights regulation) can now be found in EU financial consumer law. It is true that Cherednychenko has already recognized the shift away from reliance on an information paradigm to more substantive product regulation in this area; however, without placing these considerations within a broader framework of social justice.⁴⁸

A particular example of the recent social justice influence has been that 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.⁴⁹ 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 *fundamental (constitutional) rights*. By contrast, this paper, considers the developments in terms of equality of status based social justice in financial contracts.⁵⁰

It is important to emphasise that 'equality' has been discussed before in contract law scholarship. Aside from the abovementioned work by Ramsay on equality of access, Wilhelmsson has argued for developing a principle of equality for contract law based on providing more favourable treatment to those disadvantaged because of their race, gender, sexual orientation or social status such as poverty.⁵¹ This paper takes a different approach to equality. Similarly to Wilhelmsson, the focus is on status. However, it focuses on the

⁴¹ Ramsay, note 35, 178, 181.

⁴² Collins, note 35, 53–56.

⁴³ Thomas Wilhelmsson, 'Consumer Law and Social Justice' in Iain Ramsay (ed.), *Consumer Law in the Global Economy* (Ashgate 1997) 223–226.

⁴⁴ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJL 95.

⁴⁵ Wilhelmsson, note 35, 728.

⁴⁶ Hans-W. Micklitz, 'Introduction – Social Justice and Access Justice in Private Law' in Hans-W. Micklitz (ed) *The Many Concepts of Social Justice in European Private Law* (Edward Elgar 2011) 36–38.

⁴⁷ Study Group, note 35, 660; Geraint Howells et al, *Rethinking EU Consumer Law* (Ashgate 2018) 7–8.

⁴⁸ Cherednychenko, note 8.

⁴⁹ Hans-W. Micklitz and Norbert Reich, 'The Court and Sleeping Beauty: The revival of the Unfair Contract terms Directive (UCTD)' (2014) 51 CMLR 771; Howells et al, note 47, Chapter 4; Thomas Wilhelmsson and Chris Willett, 'Unfair Terms and Standard Form Contracts' in Howells et al (ed), *Handbook of Research of International Consumer Law* (Edward Elgar 2018).

⁵⁰ Mak, note 35.

⁵¹ Wilhelmsson, note 6, 147.

inequality of status that arises purely by virtue of being a consumer of financial products and irrespective of the consumer's class, gender, race, etc. Also, this paper is specifically focussed on recent developments in financial consumer law, and how these may be understood in social justice terms.

Finally, 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 consumer credit. However, Wilson does not deal with the specific equality of status based social justice addressed here. In addition, her focus is on financial exclusion and vulnerable low-income consumers, while the focus here is on the inequality of status existing between firms and consumers in general.⁵²

To sum up, there are three notable differences in the approach taken here compared to prior work on social justice: first, little attention has previously been given to contractual (in)equality, and none of the authors have framed their thinking in terms of equality of status; second, prior work often focusses on the position of especially vulnerable consumers while the focus here is on whether protections aimed at the generality of consumers are inspired by social justice aims; third, much of the previous work is 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 explains how product regulation and rights regulation can be conceptualized as social justice rules. It first explains the kinds of inequalities that exist between consumers and financial firms (section 4.1) and then shows how these inequalities can be understood in terms of the philosophical social justice concept of *status based* equality, as opposed to philosophical concepts of *distributive* equality (section 4.2). The section ends by arguing that product regulation and rights regulation, rather than information disclosure rules are required to achieve this equality of status based social justice (section 4.3).

4.1 The unequal nature of consumer –firm relationships

There are many inequalities in the consumer-firm relationship, and these inequalities can be traced back to the unequal nature of their contractual position. Contracts are central to consumer-firm relationship; they establish, regulate and end this relationship,⁵³ especially if contracts are understood broadly as here to include the pre- and post-contractual conduct of the parties.

Consumers are in a weak position relative to firms, because they do not typically have the understanding, expertise or bargaining power to negotiate for fair, suitable contracts or fair post-contractual treatment; and they are in weak position to bear loss arising out of the contract.⁵⁴ While these problems arise in consumer contracts generally, they are especially accentuated in financial contracts: due to financial products being so called 'credence' goods' and being particularly complex, expensive, risky and long term in nature.⁵⁵ 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.⁵⁶ Rather they can only decide whether to enter into the contract on a 'take it or leave it' basis.⁵⁷

Then there is the lack of informed choice.⁵⁸ In modern financial markets there is plenty of choice for consumers between various financial products,⁵⁹ however, the ability of consumers to make *informed* choices is limited.⁶⁰ 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 through

⁵² Wilson, note 35, 501–505.

⁵³ See more on the role of contracts in financial systems: Katrina Pistor, 'A Legal Theory of Finance' (2013) Columbia Law Research Paper 13/348 7–10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2262936> accessed 13 November 2018.

⁵⁴ Chris Willett, 'Re-theorizing consume law' (2018) 77 *The Cambridge Law Journal* 179, 187–188; Chris Willett and Martin Morgan-Taylor, 'Consumer protection' in Michael Furmston and Jason Chua (eds), *Commercial Law* (Pearson 2013) 385–387.

⁵⁵ See note 7.

⁵⁶ Ramsay, note 19, 41.

⁵⁷ *Ibid*, Chapter 6; on contracts of adhesion more generally see: Friedrich Kasser, 'Contracts for Adhesion: Some Thoughts about Freedom of Contract' (1943) *Columbia Law review* 629; Melvin Eisenberg, 'The Bargain Principle and its Limits' (1982) *Harvard Law review* 741.

⁵⁸ See for a general overview Ramsay, note 19, Chapter 2.

⁵⁹ Dimitry Kingsford Smith, 'Regulating Investment Risk: Individuals and the Global Financial Crisis' (2009) 32 *University of New South Wales Law Journal* 514, 518.

⁶⁰ London Economics et al, *Consumer vulnerability across key markets in the European Union* (EU Commission 2016) 335 <https://ec.europa.eu/info/sites/info/files/consumers-approved-report_en.pdf> accessed 15 June 2018; Deloitte Luxembourg, *Study on the distribution system of retail investment products across the European Union* (EU Commission 2018) 42 <https://ec.europa.eu/info/sites/info/files/180425-retail-investment-products-distribution-systems_en.pdf> accessed 15 June 2018.

use.⁶¹ 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 can take advantage of this.⁶² It is now well documented that firms are able to take advantage of the way consumers read contracts: inserting the onerous terms to places that are likely to escape the attention of consumers.⁶³ For example, consumers will often not read the ancillary terms; but will focus on the headline price.⁶⁴ This enables firms to insert various cost elements into their complex cost structures, thereby developing extremely expensive and dangerous products.⁶⁵ 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.⁶⁶ For instance, given the complexity of cost structures, it is often challenging to determine the true cost of financial products;⁶⁷ or how likely it is that the circumstances the terms deal with will become relevant, such as whether contingent charges will become payable,⁶⁸ or how certain terms like foreign currency exchange clauses will operate in practice.⁶⁹

In addition, behavioural work has shown that even if consumers understand the terms of their contract, they frequently behave irrationally.⁷⁰ Consumers often wrongly interpret standard terms to appear more favourable than they are.⁷¹ As a result consumers might fundamentally misunderstand how financial products work and what the risks are, for example, that investments are not guaranteed,⁷² or they may not appreciate the full implications of the financial commitments in a credit contract.⁷³

Problems in making informed decisions are exacerbated by consumers' lack of experience with financial products.⁷⁴ This is especially acute with products consumers are likely to purchase a couple of times in their lives such as mortgage credit or life insurance.

Finally, consumers' decision making may be impaired by the highly persuasive, misleading, and even aggressive selling practices of firms that are extremely sophisticated and experienced in such activities. Naturally, consumers are much less experienced, knowledgeable and sophisticated than firms, and can easily be coaxed into buying unnecessary or otherwise unsuitable financial products. Indeed, such mis-selling (for instance mortgage loans indexed in foreign currency, or high-cost short-term loans) has been an especially widespread and pernicious problem in the financial sector.⁷⁵

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

⁶¹ Llewellyn, note 7, 632–640.

⁶² Omri Ben-Shahar, 'The Myth of the 'Opportunity to Read' in Contract Law' (2009) 5 *European Review of Private Law* 1; Ian Ayres and Alan Schwartz, 'The no-reading problem in consumer contract law' (2014) 66 *Stanford Law Review* 545; see also Michael Faure and Luth Hanneke, 'Behavioural Economics in Unfair Contract Terms, Cautions and Considerations' (2011) 34 *Journal of Consumer Policy* 337, 349–350.

⁶³ 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*.

⁶⁴ Willett, note 54, 18.

⁶⁵ 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 7, 43–63 for characteristics of particularly dangerous products and FSA, note 30, 30 for particularly dangerous product features.

⁶⁶ London Economics, note 60, 340.

⁶⁷ Chateret al. 'Consumer Decision-Making in Retail Investment Services: a Behavioural Economics Perspective' (EU Commission, 2010) 50–51 <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.185.4650&rep=rep1&type=pdf>> accessed 15 June 2018.

⁶⁸ Willett, note 54, 189.

⁶⁹ Fejős, note 65, 139 with further references.

⁷⁰ For an overview of behavioral economics and its role in consumer law and policy see Ramsay, note 19, 56–63 with further references.

⁷¹ Lawrence Solan et al, 'False consensus bias in contract interpretation' (2008) 108 *Columbia Law Review* 1268.

⁷² Kingsford Smith, note 59, 530.

⁷³ Omri Bar-Gill, 'Behavioural economics of consumer contracts, the exchange' (2008) 92 *Minnesota Law Review* 749, 763.

⁷⁴ London Economics, note 60, 340; Llewellyn, note 7, 37; Rott, note 7, 64.

⁷⁵ BEUC, 'The map of major mis-selling scandals' <<https://www.thepriceofbadadvice.eu/static-map/>> accessed 13 November 2018; Olha O. Cherednychenko and Jesse-M. Meindersma, *Consumer Credit: Mis-selling of Financial Products*; Fernando Zunzunegui, *Mortgage Credit: Mis-selling of Financial Products*; Veerle Colaert and Thomas Incalza, *Mis-selling of Financial Products; Compensation of Investors in Belgium* (EU Parliament 2018) <<http://www.europarl.europa.eu/thinktank/en/search.html?word=mis-selling>> accessed 10 December 2018.

degree of relief from their commitments based on financial hardship or adverse changed circumstances.⁷⁶ Firms may lack effective customer care and after sales services: making it very hard for consumers to discuss any problems they encounter when performing their contractual obligations and to effectively enforce their rights.⁷⁷ These various post contractual problems cause particular consumer detriment in the financial sector given the long term nature of many of the contracts such as mortgage credits, life insurance and pensions.⁷⁸

The consequences of unsuitable transactional decisions are likely to be more detrimental than for non-financial products. As with other products, when products do not operate as expected they may cause loss to consumers. This may include *financial loss* such as the product costing more than they should or not generating any substantial benefit for consumers. It may also include *non-financial loss* such as disappointment and distress.⁷⁹ However, with financial products there is an especially high risk of substantial financial loss seriously affecting consumers' financial health. For example, consumers may lose their life savings,⁸⁰ or they may experience severe debt problems that potentially lead to over-indebtedness, personal insolvency and maybe even homelessness.⁸¹ Debt problems in turn may prevent consumers from accessing finance (financial exclusion), ultimately, placing consumers and their families on the margins of society (social marginalization or social exclusion).⁸² Moreover, the above problems can cause further undesirable social consequences, such as family breakups, mental health problems and even suicide.⁸³

Unfortunately, the financial crisis and its aftermath provide bitter evidence that these 'dark' scenarios can easily become realities for many consumers, even for those that are more affluent (i.e. well-off, educated, etc).⁸⁴

We can therefore see that the position of consumers is highly subordinated to firms and that there is significant scope for the most serious detriment. In summary we can say that consumers' are *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. Consumers are also prone to being misled or persuaded by the much more experienced and sophisticated firm. This procedural inequality then leads to *substantive inequality*: to unsuitable and/or unfair contracts, unfair post-contractual treatment and potentially significant financial and non-financial detriment.⁸⁵

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 social justice (distributive equality), while under the other view, equality is an independent value from social justice (social equality or equality of status).⁸⁶ Although as we have seen in section 3, most private and consumer law scholars connect consumer

⁷⁶ Martin Coppack et al, 'Consumer Vulnerability' (2015) Financial Conduct Authority Occasional Paper 8/2015 <<https://www.fca.org.uk/publications/occasional-papers/occasional-paper-no-8-consumer-vulnerability>> accessed 15 June 2018; Office of Fair Trading, 'Payday Lending Compliance Review' (OFT, Final report 2013) 23 <<http://webarchive.nationalarchives.gov.uk/20140402170935/>> <http://www.offt.gov.uk/OFTwork/publications/publication-categories/guidance/consumer_credit_act/oft1481> accessed 15 June 2018.

⁷⁷ See Office of Fair Trading, *ibid*, 25–26.

⁷⁸ See Refiner, note 13.

⁷⁹ James Suter et al, 'An Analysis of the Issue of Consumer Detriment and the Most Appropriate Methodologies to Estimate It: Final Report' (EU Commission 2007) 3 <http://www.europe-economics.com/publications/study_consumer_detriment.pdf> accessed 7 December 2018; Civic Consulting, 'Study on Measuring Consumer Detriment in the European Union: Final Report' (EU Commission 2017) 39–41 <https://ec.europa.eu/info/sites/info/files/consumer-detriment-study-final-report_en.pdf> accessed 7 December 2018. See also Peter Huang, 'Emotional Impact Analysis in Financial Regulation: Going Beyond Cost-Benefit Analysis' Temple University Legal Studies Research Paper 21/2006 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=870453> accessed 7 December 2018.

⁸⁰ See the example of Lehman Brothers 'certificates' in Cherednychenko, note 8, 396.

⁸¹ Iain Ramsay, 'Two Cheers for Europe; Austerity, Mortgage Foreclosure and Personal Insolvency Policy in the EU' in Hans-W. Micklitz and Irina Domurath (eds), *Consumer debt and Social Exclusion in Europe* (Ashgate 2015).

⁸² Oxera, 'A framework for assessing the benefits of financial regulation' (Financial Services Authority 2006) 8 <<https://www.oxera.com/wp-content/uploads/2018/03/Framework-for-assessing-benefits-of-financial-regulation.pdf>> accessed 13 November 2018; See also Kempson et al, note 11; Reseau Financement Alternatif and Civic Consulting, note 14.

⁸³ See e.g. Wilson, note 35, 508–510; Jason Houle and Michael Light, 'The Home Foreclosure Crisis and Rising Suicide Rates, 2005 to 2010' (2014) 104 *American Journal of Public Health* 1073; Pinter et al, 'The Damage of Debt', (The Children's Society 2006) <<https://www.childrensociety.org.uk/sites/default/files/the-damage-of-debt-2016.pdf>> accessed 7 December 2018.

⁸⁴ See, for instance, the mis-selling of Lehman Brothers 'certificates' in Cherednychenko, note 8, 396–397.

⁸⁵ See also on the relationship of procedural and substantive fairness in Chris Willett, *Fairness in Consumer Contracts: the Case of Unfair Terms* (Ashgate 2007) chapter 2.

⁸⁶ 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 4, 222–224. See for the use of the specific term 'distributive equality' Elford, note 4.

law with distributive social justice, it is shown here that the philosophical notion of *distributive equality* does not provide a suitable theoretical framework for above discussed unequal relationship between consumers and financial firms.⁸⁷ This special area of financial consumer law is conceptually more about equality of status than distribution.

4.2.1 Distributive equality

When political theorists talk about social justice they primarily contemplate *distributive social justice*.⁸⁸ 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, and one criterion for a just distribution may be equality.⁸⁹ 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).⁹⁰ As far as the 'what' is concerned, since the focus of this paper is on financial consumer contracts, it is clear that we are talking about the distribution of contractual rights and duties. The question then is how such rights and duties should be distributed under the concept of distributive equality. Here a distinction can be made between the strict egalitarian conception and the prioritarian conception of distributive justice.

Scholars supporting strict egalitarianism advocate 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.).⁹¹ Under this conception of justice, equality is subsumed under the notion of justice: justice is achieved through equality.⁹² A famous quote from Dworkin explains that equality is used in the sense that 'people should be the same, or treated the same way, as a matter of justice'.⁹³ This is normally taken to mean that everyone receives the same rights and benefits;⁹⁴ irrespective of their social, economic or other strengths or weaknesses. Conceptualizing social justice in this strict egalitarian sense in financial consumer law ignores the types of procedural and substantive imbalances/inequalities that we discussed above, and leads to social *injustice* rather than social justice. Take for example the consumers' right to early withdrawal from the contract.⁹⁵ This is intended to allow consumers to escape from the contract after having some reflection on it, possibly having now realised its unfairness or unsuitability. This recognises the consumer's limited ability to appreciate the full implication of the contract pre-contractually. Firms, by contrast, do not need this right. They are very well informed about the products they are selling and they do not need time for reflection. Moreover, treating everyone 'equally' by providing *firms* with an 'equal' right to withdraw from contracts could cause significant consumer detriment. 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 which they are likely to be unable to do so without suffering detriment.

Distributive equality can also be understood in a prioritarian sense. This view of distributive equality essentially follows the above approach: advocating equal treatment of everyone. However, it allows for deviation from this in exceptional circumstances 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).⁹⁶ This prioritarian version of distributive social justice might be thought to be suited to consumer-firm relationships. However, the danger is that the exception may be interpreted too narrowly, that social justice is considered to be achieved when protection is provided for the most vulnerable sub-groups of consumers (such as those on low income, unemployed, etc.), and that consumers in general are not viewed as the 'least advantaged members of society' worthy of protection vis-à-vis financial firms.

Distributive equality therefore does not provide an adequate conception of justice for the special area of financial consumer law. These theoretical conceptions of justice would lead to practical injustice, either not

⁸⁷ It must be noted however that distributive equality is not the only way to observe distributive social justice. See David Miller, *Social Justice* (Clarendon Press 1980), Part 1.

⁸⁸ David Miller, *Principles of Social Justice* (3rd edition, Harvard University Press 2003) 2; Equality of status is a much less researched and developed concept. See Miller, note 4, 232; Carina Fourie, 'What is Social Equality? An Analysis of Status Equality as a Strong Egalitarian Ideal' (2012) 18 Res Publica 107, 109.

⁸⁹ See for other possible criteria Miller, note 87, Part 1.

⁹⁰ Fourie, note 88, 108.

⁹¹ Miller, note 4, 223.

⁹² *Ibid.*

⁹³ Ronald Dworkin, 'What is Equality? Part 3: The Place of Liberty' [1987–88] 73 Iowa Law Review 1, 6 in *ibid.*

⁹⁴ *Ibid.*

⁹⁵ See the related discussion on withdrawal rights section 5.2.1.

⁹⁶ John Rawls, *A Theory of Justice* (OUP 1999) 65.

addressing the firm-consumer inequality at all (strict egalitarian distributive equality) or not addressing it to a sufficient extent (prioritarian distributive equality). It will now be argued that in order to provide a conceptual basis for rules and policies that indeed correct the above discussed procedural and substantive inequalities, social justice must be understood as equality of status.

4.2.2 Equality of status or social equality

The idea of equality of status originates from Miller,⁹⁷ and it 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'.⁹⁸ It depicts a society that is not 'marked by status divisions' based on which people would be placed in 'hierarchically ranked categories'.⁹⁹ '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,¹⁰⁰ or in our case, private companies (financial firms). 'Equality' of status refers to eradicating deeply rooted status related problems (e.g. oppressive practices and policies against persons based on their race, gender, class, etc.).¹⁰¹

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.¹⁰² Second, distributive justice may be an abstract concept.¹⁰³ By contrast equality of status is an 'empirically sound concept' reflected in 'real-life egalitarian movements'¹⁰⁴ for a social order in which people are equal.¹⁰⁵ movements against oppressive practices and policies such as against persons based on their race, gender, class etc.¹⁰⁶ 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'.¹⁰⁷ Of course, it is fairly intuitive to think that it is wrong for people to be treated differently on the basis, for instance, of gender, race, and class, and it might seem counter intuitive to think of financial firm-consumer relations in the same bracket. Arguably, however, it is indeed possible to view the inequalities between consumers and firms as significant problems of (in)equality of status for several reasons.

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, what we can call '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: for example, businesses supplying other services or tangible goods to consumers or to other businesses. 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 above in terms of the dominance and vulnerability in this relationship). In other words, one's *status* as a financial firm, one's *status* as a consumer of such products puts one at an enormous advantage or disadvantage compared to being a supplier or buyer in market transactions more generally. We can call this relationship 'Market citizenship' status inequality.

Third, it can be argued that being a financial consumer may put one at a massive 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*. For instance, bankruptcy, homelessness, etc. can cause social exclusion by placing consumers on the margin of society and potentially denying them access to 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 essential financial services). This again may place such consumers in an unequal position to those other citizens that

⁹⁷ Miller, note 4, 224. See also Anderson's 'democratic equality': Elizabeth Anderson, 'What Is the Point of Equality?' (1999) 109 *Ethics* 287.

⁹⁸ Fourie, note 88,112.

⁹⁹ Miller, note 4, 224.

¹⁰⁰ David Miller, 'Complex Equality' in David Miller and Michael Walzer (eds), *Pluralism, Justice and Equality* (OUP 2002) 207.

¹⁰¹ Anderson, note 97, 288.

¹⁰² Miller, note 4, 232; Anderson, note 97, 313.

¹⁰³ In particular, this is in sharp contrast with Rawls's model of distributive equality that is based on a hypothetical situation, the 'original position'. Rawls, note 96,102 *et seq.*

¹⁰⁴ Fourie, note 88, 110.

¹⁰⁵ Anderson, note 97, 313.

¹⁰⁶ *Ibid*, 288.

¹⁰⁷ *Ibid*, 313.

experience no problems, or those that do not even need to use potentially damaging products. This can be called 'Private citizenship' status inequality.¹⁰⁸

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-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.¹⁰⁹ 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 consumers:¹¹⁰ 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* in the relevant context.¹¹¹ For instance as we shall see below the equality of status concept is manifest in various consumer rights to withdraw from the contract, and to modify and terminate the contract. It would be contrary to equality of status if these rights were also given to firms.¹¹²

Social justice in the practical area of modern financial consumer law is therefore about equality of status rather than the distribution of social goods, and therefore neither strict egalitarian nor prioritarian conceptions of justice are useful. The equality of status concept provides an adequate framework for law and policy makers to design rules that address the inequalities between consumers and financial firms.

4.3 Equality of status and the available legal tools

We must now consider the appropriate legal tools for the law to respond to these status-based inequalities between consumers and financial firms. It is argued here that these tools are the product and rights regulation, rather than information disclosure rules.

4.3.1 Information disclosure regulation

One possible response to inequalities between consumers and firms is to empower consumers with information to enable them to make informed decisions. This involves mandating firms to inform consumers of the choices they are taking, to 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 contract conclusion). The idea of such an approach is that more informed decisions at the procedural stage will remove or radically reduce the scope for substantive detriment: because consumers will choose only safe products and competitive pressure will force out dangerous products from the market.¹¹³

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 need to discover their rights, the dominant view is that information disclosure is not enough to correct contractual inequalities between businesses 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.¹¹⁴

¹⁰⁸ For references on financial and social exclusion see the authors notes 11, 14 and 81.

See further on the link between consumers law and citizenship e.g.: Gareth Davies, 'The Consumer, the Citizen and the Human Being' in Dorota Leczykiewicz, Stephen Wetherill (eds), *The Images of the Consumer in EU Law* (Hart 2016); Martin Hesselink, 'European Contract Law: A Matter of Consumer Protection, Citizenship or Justice' (2007) 15 *European Review of Private Law* 323; Norbert Reich, 'Crisis or Future of European Consumer Law?' in Annette Nordhausen and Geraint Howells (eds), *Yearbook of Consumer Law* (Ashgate 2009); See further on the link between financial regulation and consumer citizenship: Kingsford Smith and Dixon, note 9.

¹⁰⁹ Miller, note 4, 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 100, 204–215. See further on contextual approach: Miller, note 37, Chapter 2.

¹¹⁰ Miller, note 4, 234–235; Miller, note 100, 203; Anderson, note 97, 313–314.

¹¹¹ See Miller and Elford, note 4.

¹¹² See the analysis above in section 4.2.1 on withdrawal rights.

¹¹³ See Willett, note 19, 425–529.

¹¹⁴ See Reich, note 108, 13–18; Omri Bar-Gill, Omri Ben-Shahar, 'Regulatory Techniques in Consumer Protection: A Critique of Consumer Contract Law' (2013) 50 *Common Market Law Review* 117; Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 *Journal of Law and Society* 349; See also notes for Section 4.1.

In financial contracts, information is especially likely to be of limited effect.¹¹⁵ No matter how transparent standard terms are the above problems would remain: 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 behave irrationally; and they are unlikely to be focussing pre-contractually on how they may be treated post-contractually when problems arise.¹¹⁶ 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.¹¹⁷

Thus, while the information approach does involve a distribution in favour of consumers (mandating firms to provide information, entitling consumers to receive this information), it will very often fail to actually respond to the status based inequalities: often failing to really improve the consumers' weaker procedural position (i.e. to produce more informed decisions) and consequently also failing to reduce the substantive imbalance in terms of outcomes.

4.3.2 Product and rights regulation

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 and in the performance of the contract.¹¹⁸ Product regulation responds to inequality by controlling for instance the level of prices and charges that consumers have to pay, the basic suitability of products, and how consumers should be treated when things go wrong.

Rights regulation provides consumers with special pre-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.¹¹⁹ These rights are an important complement to product regulation. They can for instance enable consumers to respond to changed circumstances by adjusting or ending their contractual relationships with firms.

By comparison with weak information rules, these more interventionist rules are directly aimed at improving the substantive position of consumers' *vis-à-vis* firms in their contractual relationships. Product regulation makes products cheaper, safer and the relationship generally more balanced and fair. For example, if excessive ancillary charges are banned outright, this will make products cheaper and safer to use.¹²⁰ An obligation on firms to show forbearance when consumers experience payment difficulties provides security for consumers that changes in their circumstances will be acknowledged by firms and they will be helped in finding solutions for their problems. This will prevent further negative consequences, such as over-indebtedness and broader financial and social exclusion.¹²¹

In addition, special contractual rights such as a right to early repayment of the outstanding debt or the right to early withdrawal from the contract are important additional protections. 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. It is also possible that the product may no longer be needed at all, and in such circumstances a right to terminate will assist the consumer.

Product and rights regulation can therefore reduce the status-based inequalities between firms and consumers; which in turn reduces the status-based inequalities that consumers would otherwise suffer relative to other market citizens and other private citizens.¹²²

¹¹⁵ See note 8 for references.

¹¹⁶ See related discussion and notes in Section 4.1.

¹¹⁷ Willett, note 19, 414.

¹¹⁸ See for more on product regulation: FSA, note 30; Moloney, note 3, 761–763; Cherednychenko, note 8, 398–401.

¹¹⁹ It should be noted that scholars also use 'rights regulation' to discuss fundamental human rights (see Mak, note 35, Wilson, note 35).

¹²⁰ See for instance the Mortgage Credit Directive on limiting default charges, arts 28 (2) and 28(3).

¹²¹ *Ibid.*, art 28(1).

¹²² See above at 4.2.2 on firm-consumer inequality leading to market citizen and private citizen inequality.

5 Equality based social justice in EU financial consumer law

This section demonstrates that product and rights regulation (shown above to be social justice tools that reduce status based inequality) have increasingly come to the fore in EU financial consumer law.¹²³

EU financial consumer law involves an emergent and complex set of private law and regulatory rules on the relationship of financial firms and consumers. This includes rules on payments, credit, insurance products and investment products:¹²⁴

- the Consumer Credit Directive and the Mortgage Credit Directive (regulating *credit* products);
- 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 instruments);
- the Regulation on EBA, the Regulation on ESMA, the Regulation on EIOPA (regulating the EU supervisory authorities).¹²⁵

5.1 Product regulation

Given the broad approach to understanding contracts as to include contract terms as well as pre- and post-contractual conduct, product regulation is also understood broadly here. It includes rules that control the cost elements of financial products; supervisory product intervention powers; rules that control the firm's conduct and rules that control the fairness of contracts more generally.¹²⁶

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 *ancillary charges*: banning charges outright, linking the amount of charges to the actual costs incurred or by imposing cost caps.¹²⁷

Some instruments prohibit firms charging for the fulfilment of their legal information disclosure duties. Art. 8 of the Mortgage Credit Directive contains a general prohibition on charging for the provision of any information, even though the Directive is significantly information based.¹²⁸ Other instruments ban charging for particular types of information. For example, under Art. 4(1) of the Cross-border Payments Regulation, the provision of information necessary for facilitation of payments must be free of charge. Similarly, Art. 12 of the 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 of the SEPA limits the amount chargeable for interchange fees i.e. 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(2) of the Mortgage Credit Directive, which entitles Member States to limit default charges to the actual costs incurred by firms.

¹²³ 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. note 18 above for the example of the Distance Marketing Directive, and note 128 for the example of the Mortgage Credit Directive.

¹²⁴ Modern financial consumer law is understood here as a set of relevant rules that are in force concluded with 30 June 2018.

¹²⁵ See for full references notes 16 and 23.

¹²⁶ See for more product intervention options: FSA, note 30, Chapter 6.

¹²⁷ 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.

¹²⁸ The Directive 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. See Mortgage Credit Directive, arts. 11–14 and 27. A similar approach is taken by PSD2, art 40.

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.¹²⁹ Therefore regulating these cost elements is important in terms of improving the position of consumers *vis-à-vis* firms and preventing any disproportionate burden.

In addition, there are examples of direct cost caps. Art. 16(2) of the Consumer Credit Directive caps charges payable for an early repayment of consumer credit with a fixed borrowing rate. The cap is set 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 at 0.5% (if this period is less than one year).¹³⁰ In any event, Art. 16(5) provides that the amount charged 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). Although it can be debated whether these caps are set at a fair level, they undoubtedly provide a degree of important protection for consumers *vis-à-vis* firms.¹³¹

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.¹³² Although not providing any specific limit, these provisions send important signals that product regulation measures such as this are in line with EU consumer policy.

5.1.2 Supervisory product intervention powers

The regulations establishing the EU financial supervisors confer consumer protection powers on the EU financial supervisors (i.e. the EBA, ESMA and EIOPA) to *temporarily prohibit or restrict* certain financial activities that threaten the orderly functioning and integrity of financial markets.¹³³ These supervisory powers are really 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 causing significant consumer detriment are not present on the market. Most recently, relying on Art. 40 of MiFIR, ESMA temporarily banned the marketing and distribution of binary options to consumers and restricted the marketing, sale and distribution of contracts for difference.¹³⁴ These high-risk investment products allowed 'betting' on financial indices such as the price of gold, or how currency will rise or fall over a fixed period of time, with highly uncertain outcomes, causing loss to consumers.¹³⁵

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 a temporary basis, Art. 42 of the MiFIR entrusts competent national supervisory authorities with powers to *permanently* prohibit or restrict the marketing, sale and distribution of financial products.¹³⁶ 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 potentially detrimental products (i.e. 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

There are also controls over the manner in which consumers can be treated throughout their contractual relationship with firms.

Firstly, Art. 28(1) of the Mortgage Credit Directive obliges 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 risks at an early stage and make reasonable attempts

¹²⁹ See the examples of UK unarranged overdraft charges in Willett, note 19; for high-cost short-term loans see Fejós, note 65.

¹³⁰ See for possible exemptions from and restrictions on the rule Consumer Credit Directive, art 16(4).

¹³¹ Consumer Credit Directive, recital 39.

¹³² Insurance Distribution Directive, arts 22(3).

¹³³ Regulation on EBA, art 9(5); Regulation on ESMA art 9(5); Regulation on EIOPA art 9(5). These powers are later concretized in relevant legislation, including the specific conditions under which they may be exercised, see MiFID, art 40(2); RIPPS, art 17; MiFIR, arts 40 and 41.

¹³⁴ ESMA, ESMA adopts final product intervention measures on CFDs and binary options, 1 June 2018 <<https://www.esma.europa.eu/press-news/esma-news/esma-adopts-final-product-intervention-measures-cfds-and-binary-options>> accessed 13 November 2018.

¹³⁵ BEUC, Call for evidence on product intervention: Measures proposed by ESMA: BEUC response, February 2018 <https://www.beuc.eu/publications/beuc-x-2018-009_esma_product_intervention.pdf> accessed 13 November 2018.

¹³⁶ Danny Bush, 'Product Governance and Product intervention under MiFID II/MiFIR, 13 *et seq*' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3206731> accessed 15 November 2018.

to resolve problems through other means before foreclosure proceedings are initiated.¹³⁷ Other means here arguably mean debt mitigation measures such as debt restructuring or debt rescheduling to adjust the loan to the new circumstances. Indeed, solutions should take into account the practical circumstances of consumers and their need to be able to cover essential living expenses.¹³⁸ In addition, Art. 28(5) states that where *after* foreclosure proceedings outstanding debt remains, Member States should ensure that creditors arrange repayments in a way to protect consumers. This arguably implies the arrangement of repayments in a way to guarantee minimum living conditions and to avoid long-term over-indebtedness.¹³⁹ This approach recognizes consumers' weak position in being unable to negotiate with firms reasonable forbearance. It also makes products safer and given the high values involved and the long-term nature of mortgage contracts, the rules can potentially prevent future adverse consequences such as over-indebtedness, and social and financial exclusion.

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 to achieve specific results. This includes the well-known 'responsible lending' rules in Art. 8 of the Consumer Credit Directive and Art. 18 of the Mortgage Credit Directive. These rules 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 the consumer cannot afford the loan.¹⁴⁰ Although responsible lending rules have been subject to criticism,¹⁴¹ they do improve the likelihood that consumers will not take unaffordable credit. They are especially significant in improving the position of consumers vis-à-vis firms in those Member States that did not previously have responsible lending rules.¹⁴²

Most recently, Art. 24(2) of the 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 considering the characteristics of a particular group of consumers for example their age and income level. If products are designed to be marketed to, for instance, pensioners; they are likely to prefer less risky products. In addition, the provision also obliges investment firms to sell or recommend products to individual clients only when it is in their interest, arguably taking into account their individual circumstances including their particular risk appetite. Although the value and effectiveness of the principled based approach is debated,¹⁴³ this kind of approach empowers firms to balance their own interest in achieving profits with consumer interest for safe and affordable products.¹⁴⁴

5.1.4 Broad fairness controls

While 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 this Directive has been used to protect consumers against unsuitable (primarily mortgage) products,¹⁴⁵ with the ECJ explicitly citing the goal of the Directive to combat the power imbalance between businesses and consumers.¹⁴⁶ This is manifest in various ways.

¹³⁷ Mortgage Credit Directive, Recital 27.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Mortgage Credit Directive, art 18(5); Cherednychenko, note 8, 412.

¹⁴¹ See Yesim Atamer, 'Duty of Responsible Lending: Should the European Union Take Action?' in Stefan Grundmann and Yesim Atamer (eds), *Financial Services, Financial Crisis and General European Contract Law* (Wolters Kluwer 2011); Federico Ferretti, 'The Never-Ending European Credit Data Mess' (BEUC 2017) <https://www.beuc.eu/publications/beuc-x-2017-111_the-never-ending-european-credit-data-mess.pdf> accessed 13 November 2018; Irina Domurath, 'A Map of Responsible Lending and responsible Borrowing in the EU and Suggestions for a Stronger Legal Framework to Prevent Over-Indebtedness of European Consumers' in Hans-W. Micklitz and Irina Domurath (eds), *Consumer Debt and Social Exclusion in Europe* (Ashgate 2015).

¹⁴² Peter Rott, 'Consumer Credit' in Hans-W. Micklitz et al (eds), *Understanding European Consumer Law* (2nd edition, Intersentia 2014) 219.

¹⁴³ Julia Black, 'The Rise, Fall and Fate of Principle Based Regulation' (2010) LSE Legal Studies Working Paper 17/2010 <<http://eprints.lse.ac.uk/32892/>> accessed 10 November 2018; Steven Schwarz, 'The 'Principles' Paradox' (2009) 10 *European Business Organization Law Review* 175.

¹⁴⁴ Andromachi Georgosouli, 'The FSA's 'Treating Customers Fairly' (TFC) Initiative: What is So Good About it and Why it May Not Work' (2011) 38 *Journal of Law and Society* 405, 417–418. See for a more general account: Robert Baldwin, 'Why rules don't work' (1990) 53 *Modern Law Review* 321.

¹⁴⁵ Andrea Fejős, 'Behind the frosty glass. The EU's Unfair Contract Terms Directive as a tool for justice in the modern financial sector' The BEUC blog, <<https://www.beuc.eu/blog/behind-the-frosty-glass-the-eus-unfair-contract-terms-directive-as-a-tool-for-justice-in-the-modern-financial-sector/>> accessed 19 January 2019.

¹⁴⁶ Joined cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores*, EU:C:2000:346, para. 25; C-484/08 *Caja de Ahorros* EU:C:2010:309, para. 27; C-168/05 *Claro v Centro Movil Milenium*, EU:C:2006:675, para. 25; C-415/11 *Aziz v CatalunyaCaixa*, EU:C:2013:164, para 44; C-26/13 *Kásler and Késlené v OTP Jelzálogbank*, ECLI:EU:C:2014:282, para. 72.

Firstly, the ECJ has given a generally protective interpretation of the Directive's 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. In the landmark *Aziz* case the ECJ introduced the 'agreement test'¹⁴⁷ 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.¹⁴⁸ 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.¹⁴⁹ 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.¹⁵⁰ This is also important because it will often be the case that these default rules have been designed to balance the interests of the parties, this necessarily taking into account the need to protect consumers.¹⁵¹

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 the assessment of the 'adequacy of the price' and the 'main subject matter' of the contract, provided these are in plain and intelligible 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 ECJ 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'.¹⁵² 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.¹⁵³ Finally, in the *Kásler case*, the ECJ defined the plain and intelligible language condition broadly.¹⁵⁴ 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.¹⁵⁵ 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 be affected, especially when dealing with complex financial issues such as the foreign currency exchange clause in the case at hand.¹⁵⁶ The result therefore may be that many such clauses (even if they are found to be the price or the main subject matter terms) will be able to be tested under the test of fairness.

Finally, there is the approach of the ECJ in interpreting the scope of Art. 6 (1) according to which unfair terms are not binding on consumers. The ECJ has provided protective interpretation of Art. 6(1), arguably seeing this provision as taking the lead in improving the contractual position of consumers *vis-à-vis* firms.¹⁵⁷ It has held that national courts must be entitled to rule on their own motion on the fairness of terms;¹⁵⁸ that there should be no limitation period for invoking unfairness;¹⁵⁹ that the applicability of the test of fairness is not limited to any particular stage of the process¹⁶⁰ or any particular type of process,¹⁶¹ and that it certainly includes a mortgage enforcement process.¹⁶² These approaches are especially important in allowing the fairness test to be used as a shield to protect consumers from the detriment that might come with proceedings

¹⁴⁷ Howells et al, note 47, 148.

¹⁴⁸ C-415/11 *Aziz*, note 146, para. 69.

¹⁴⁹ Howells et al, note 47, 152.

¹⁵⁰ C-415/11 *Aziz*, note 146, para. 75.

¹⁵¹ 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.

¹⁵² C-26/13 *Kásler*, note 146, para. 49.

¹⁵³ *Ibid*, para. 58.

¹⁵⁴ *Ibid*, para. 72.

¹⁵⁵ *Ibid*, para 74.

¹⁵⁶ *Ibid*, para 58.

¹⁵⁷ C-168/05 *Claro*, note 144, para. 36; C-40/08 *Asturcom Telecomunicaciones v Rodriguez Nogueira*, 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-109/17 *Bankia v Merino and others* EU:C:2018:735, para. 38.

¹⁵⁸ C-240/98 to C-244/98 *Océano*, note 146; C-243/08 *Pannon GSM v Györfi*, EU:C:2009:350, para. 28.

¹⁵⁹ C-473/00 *Cofidis v Fredout*, EU:C:2002:705, para. 38.

¹⁶⁰ Camino, note, 157. See also C-397/11 *Jórs v Aegon Hítel* EU:C:2013:304.

¹⁶¹ E.g. Claro (review of the validity of the arbitration clause), note 146; Camino, note 157 and *Pénzügyi Lízing v Schneider* EU:C:2010:659 (order for payment procedure).

¹⁶² Notably C-415/11 *Aziz*, note 146.

that might otherwise end with ever increasing debts and possibly repossession of property and consequent homelessness.¹⁶³

Consequently, these judicial controls over the substance of the terms, including the price, are important product intervention powers 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': i.e. right to withdraw from the contract; a later right to modify the contract; and a right to terminate the contract early.¹⁶⁴

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 of the Distance Marketing Directive oblige Member States to provide a 14 day 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 law, 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.¹⁶⁵

The right of withdrawal builds on information disclosure rules.¹⁶⁶ 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 right.¹⁶⁷ Nevertheless, consumers may reflect more seriously in some circumstances. For example, where they have particular concerns over their needs and whether the product covers them; or where they are uncomfortable about the pressure they felt under when agreeing to the purchase or the haste with which they agreed.¹⁶⁸ At least in such cases, the withdrawal right provides some scope to avoid unsuitable and potentially damaging products.¹⁶⁹ 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 circumstances, adjustments that they would unlikely to be able to negotiate due to their weak bargaining position relative to firms.

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 a currency 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 above provision now obliges Member States to provide a right to consumers to convert their loan to an alternative currency, a currency that will make installments more affordable and less volatile to changes. Based on Art. 23(3) the alternative currency 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

¹⁶³ 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 146, para. 61. See also Ramsay, note 81, 204–206.

¹⁶⁴ 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 firms).

¹⁶⁵ See on the evolution of the right of withdrawal: Howells et al, note 47, 115–119.

¹⁶⁶ *Ibid.*, 123.

¹⁶⁷ 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.

¹⁶⁸ Marco Loos, 'Rights of Withdrawal' (2009) CSECL Working Paper 2009/4, 6–7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1350224&download=yes> accessed 13 November 2018.

¹⁶⁹ See for an overview of possible limits to this right in credit relationships: Rott, note 142, 224–225.

was either resident at the time when the contract was concluded or is currently resident. 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.¹⁷⁰

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 changes in circumstances, consumers may also experience positive changes, such as having more money than planned (such as through bonuses or 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.¹⁷¹

5.2.3 Right to end contractual relationships early

Finally, Art. 16 of the Consumer Credit Directive and Art. 25 of the Mortgage Credit Directive provide consumers with the right to *fully* repay their general credit or mortgage debts early reducing the total cost of their credit. If the consumers' have come into enough money, they may wish not merely to modify the agreement as above by reducing the debt, but to end it altogether, thus escaping all further interest and other associated costs. Given the firms interest in receiving regular income from credit contracts 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 these provisions can be seen as a 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 discussed 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 shown that this equality-based model of social justice plays an increasingly important role in modern EU financial consumer law. The next step for the EU must be to make this approach transparent, an express element of EU law and policy, both to raise consumer trust and to more clearly set the future law and policy agenda.

It was suggested in section 2 that the more protective product regulation and improved consumer rights are not only capable of reducing consumer detriment but are also essential for raising consumer trust in the internal market and in European integration more generally. Whilst various examples of product and rights regulation have been highlighted in this paper, these remain hidden among the many non-social justice oriented information disclosure rules and can only be discovered with comprehensive and targeted research. However, in order to generate trust, the social justice approach must be made transparent.

First, 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 underlying values in the society, values that signal that the 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 forward looking policymaking: to declare social justice as a clear part of EU consumer policy at least in the financial sector. This policy agenda is currently dominated by the dual aim of providing consumer protection and enhancing competition on the internal market.¹⁷² The most recent Consumer Financial Services Action Plan refers to regulation for 'better products' to intervene in 'market dynamics;' and this could be read as the EU Commission's way of explaining the use of social justice measures within its consumer protection agenda.¹⁷³ This is however only a possible interpretation, 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

¹⁷⁰ Mortgage Credit Directive, recital 4; see also Zunzunegui, note 75, Fejós note 24,139 with further references.

¹⁷¹ See on possible restrictions of this right: Rott, note 142, 225–226.

¹⁷² Domurath, note 8, 125.

¹⁷³ EU Commission, COM (2017) 139, 15, 2.

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 of the 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.¹⁷⁴ 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.¹⁷⁵ However, it is arguable that the EU does have competence to instate the model of social justice developed here. Product and right-based rules discussed in this paper are adopted under Art. 114 TFEU and in this regard are justifiable as developing the internal market. As indicated above, in developing the internal market it is now provided by Art. 3 TEU that the aim should be a 'highly competitive social market economy'; this indeed arguably meaning that EU internal market rules and policies should reflect social justice values.¹⁷⁶ The recent product and rights regulation in EU financial consumer law are important developments towards such an EU social market economy, and it is important to recognize this at the broader policy level. Although EU financial consumer law remains 'distinctively light on 'social' and heavy on 'market' elements¹⁷⁷ the social elements are undeniably present.

Making the social justice approach transparent is not just about engendering consumer trust. It is also important in terms of coherent legal policy making: 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.¹⁷⁸

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 law¹⁷⁹ and academic concerns about its current direction.¹⁸⁰ 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 in EU consumer law and 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.

Competing Interests

The author has no competing interests to declare.

¹⁷⁴ Christian Joerges and Florian Rödl, 'Social Market Economy' as Europe's Social Model? (2004) EUI Working Paper 8/2004 <<http://cadmus.eui.eu/handle/1814/2823>> accessed 15 June 2018; Floris de Witte, 'The Architecture of a "Social Market Economy"' (2015) LSE Working Paper 13/2015 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2613907> accessed 15 June 2018; Sacha Garben, 'The constitutional (im)balance between "the market" and "the social" in the European Union' (2017) 13 European Constitutional Law Review 23.

¹⁷⁵ Ibid.

¹⁷⁶ See also Ferri and Cortese, note 34.

¹⁷⁷ de Witte, note 175, 2.

¹⁷⁸ For example, while mandatory information disclosure is frequently present, only a couple of instruments provide for the free of charge provision of this information See section 5.1.1. above.

¹⁷⁹ The REFIT of Consumer law that required a major evaluation of key consumer law directives and resulted in a package of measures to strengthen the 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 <http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332> accessed 15 June 2018; EU Commission, A New Deal for EU Consumers (COM/2018/0183 final, 2018).

¹⁸⁰ Geraint Howells, 'Europe's (Lack of) Vision of Consumer Protection: A Case of Rhetoric Hiding Substance?' in Dorota Leczykiewicz and Stephen Wetherill (eds), *The Images of the Consumer in EU Law* (Hart 2016); Hans-W. Micklitz, 'The future of consumer law – plea for a movable system' (2013) 1 Journal of European Consumer and Market Law 5; Howells et al, note 47, 7–8.

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