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Robert Schuman Centre for Advanced Studies
Integrating Diversity in the European Union (InDivEU)

WORKING PAPER

**Flexible Implementation and the Consumer
Rights Directive**

Hubert Smekal, Alexander Hoppe, Michael Hübner,
Pavla Hosnedlová, Anna Taimr, Elaine Mak

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Integrating Diversity in the European Union (InDivEU) is a Horizon 2020 funded research project aimed at contributing concretely to the current debate on the 'Future of Europe' by assessing, developing and testing a range of models and scenarios for different levels of integration among EU member states. InDivEU begins from the assumption that managing heterogeneity and deep diversity is a continuous and growing challenge in the evolution of the EU and the dynamic of European integration.

The objective of InDivEU is to maximize the knowledge of Differentiated Integration (DI) on the basis of a theoretically robust conceptual foundations accompanied by an innovative and integrated analytical framework, and to provide Europe's policy makers with a knowledge hub on DI. InDivEU combines rigorous academic research with the capacity to translate research findings into policy design and advice.

InDivEU comprises a consortium of 14 partner institutions coordinated by the Robert Schuman Centre at the European University Institute, where the project is hosted by the European Governance and Politics Programme (EGPP). The scientific coordinators of InDivEU are Brigid Laffan (Robert Schuman Centre) and Frank Schimmelfennig (ETH Zürich).

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**Integrating
Diversity in the
European Union**

Abstract*

This report shows that despite the full harmonisation approach promoted by the European Commission and adopted by the EU legislature in the case of the Consumer Rights Directive, the member states still have some opportunities to adjust European norms to the national reality. Nevertheless, our sample of four EU countries – Czechia, Germany, Ireland, and the Netherlands – documents that the member states do not use the space for discretion offered by the Directive’s substantive provisions to a great extent. Our analysis shows that the four member states tried to preserve their existing consumer protection regimes to the greatest possible extent. They used discretion in such a way that enabled retaining existing domestic laws and practices. In contrast to largely harmonized substantive CRD norms, the enforcement rests largely in member states powers. The means of putting the consumer contract law into practice shows some overlaps, but their use varies largely. The member states differ, importantly, in the overall emphasis on private or public enforcement. More specific differences include lists of remedies, persons who can bring the complaints, bodies dealing with the complaints or in the range and severity of penalties. The availability of class actions and ADR, but especially their use, differs wildly.

Keywords

Differentiated integration, flexible implementation, European Union, Consumer Rights Directive

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1. Introduction¹

1.1 Background

This case study report was written as part of Work Package 7 (“WP7”) of the Horizon 2020 project “Integrating Diversity in the European Union” (InDivEU).² WP7, titled “Differentiation through Flexible Implementation”, studies whether flexible implementation can be used to cope with heterogeneity among member states, as a complement or an alternative to forms of differentiated integration. Whereas under differentiated integration, some member states are excluded from a part of EU law or policies altogether, under flexible implementation, (all) member states are given room to make further choices during the implementation process.

Flexible implementation may be a way for member states to tailor EU-wide standards to domestic conditions.³ At the same time, the resulting variation between member states may also lead to more fragmented and less effective policies.⁴ The aim of WP7 is to find out if and under what conditions these potential positive and negative effects of flexible implementation arise.

The work package is divided into two parts. The first part consisted of developing and creating a dataset that mapped the scope for flexible implementation in EU directives adopted in 2006–2015, the Flexible Implementation in the European Union (FIEU) dataset.⁵ This dataset was used to analyse overall patterns in the discretion offered to member states during implementation.⁶

The second part of the work package consists of three case studies, in the fields of environmental law, justice and home affairs, and the internal market, respectively. These case studies aim to analyse the actual implementation of a specific directive in four member states (Czechia, Germany, Ireland, and the Netherlands) in order to find out to what extent and in what ways member states make use of the flexibility offered to them in directives and what effects the resulting differences in implementation (if they occur) have on the effectiveness and legitimacy of the directive. The four selected member states offer a diversity of old and new member states, civil law and common law countries, different sizes of states and both presence and absence of a constitutional court.

In the remainder of this introductory section, we will explain why this directive was selected, how we applied our analytical framework, and what sources and methods we used to study its implementation in the four selected member states. Subsequently, we outline the structure of this case report.

1.2 Selection of the directive

This report discusses the implementation of the 2011 Consumer Rights Directive⁷ (hereinafter also “CRD” or “the Directive”), a directive in the field of EU internal market. The purpose of this report is to analyse the use of discretion provided by the Consumer Rights Directive in four selected EU member states (Czechia, Germany, Ireland, and the Netherlands). The report contributes to our understanding of flexible implementation, i.e., of a way of accommodating diversity in the EU. We show how much discretion the Directive’s provisions offer for the member states, to what extent they use it and with what effects.

1 This subsection uses parts of the text prepared by Sebastiaan Princen et al. for the Flexible Implementation and the Energy Efficiency Directive report.

2 See <http://indiveu.eui.eu/>.

3 Hartmann, “A Blessing in Disguise?”; Thomann, Customized Implementation of European Union Food Safety Policy; Zhelyazkova and Thomann, “I Did It My Way”.

4 Cf. Versluis, “Even Rules, Uneven Practices”.

5 Princen, Smekal and Zbiral, “Codebook Flexible Implementation in EU Law”.

6 Zbiral, Princen and Smekal, “Mapping the Legal Scope for Flexible Implementation in EU Directive”.

7 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

The selection of the CRD builds on the FIEU dataset.⁸ The dataset measures the degree of discretion given to member states in 164 directives adopted between 2006 and 2015. This timeframe was chosen because patterns of (differentiated) implementation take time to materialize after the adoption of a directive. This initial coding exercise revealed several key characteristics that make the CRD a good case for studying differentiated implementation.

To begin with, the CRD offers a relatively low degree of discretion to member states. In the directive, 13 out of 87 substantive provisions (or: 14.9%) include a form of discretion for member states. This is well under the mean of 26% and median of 22% in the dataset. Moreover, the Directive includes a total harmonization provision.⁹

From a broader perspective, it is interesting to examine a directive that adopted a full harmonisation approach on most aspects in the Directive and thus provided the member states with a low level of discretion on substantive norms. Yet, enforcement of the Directive is, predominantly, left to the member states. It raises a number of questions: Can the member states find legal ways to adapt such a maximum harmonisation directive to fit local conditions and practices? Do the member states use the space for discretion that the Directive offers? How do the member states enforce the obligations in the Directive?

The CRD uses different types of discretion. It invites member states to elaborate more in detail on general provisions in the Directive. Importantly, it includes also three provisions allowing scope discretion – i.e., the Directive leaves it to member states to decide if they want to apply the provision to a particular situation. Helpfully, the EU legislator specified, under the name “regulatory choices”, what it considered discretionary provisions.¹⁰

1.3 Analytical framework, sources and structure of the Report

We seek to answer the central question: what use have Czechia, Germany, Ireland, and the Netherlands made of the flexibility in implementation offered to them by the CRD and what effects has that had on the effectiveness and legitimacy of the Directive?

We answer this question in four steps, which form the analytical framework behind the case study:

1. What room for differentiation in implementation does the directive offer?

The scores of the CRD in the FIEU dataset show that it allows for a relatively low degree of discretion, which goes hand in hand with the full harmonization approach. An analysis of implementation practices requires a further, more qualitative analysis of the precise scope for flexibility in the directive.

2. How do member states make use of the room offered by EU law?

Discretion for member states in directives is only a starting point; from a flexible implementation perspective, it is crucial to what extent states used the option. This requires an in-depth analysis of implementation practices, which has been undertaken for four member states.

3. What are the motives behind the choices made in the domestic implementation process?

If and to the extent that differences in implementation occur, the next step is to analyse their implications. Do they lead to better or worse outcomes in terms of effectiveness and legitimacy? As a first step towards answering this question, we look at the motives behind the choices made in the four member states. This may shed initial light on whether differences in implementation result from attempts to tailor EU-wide standards to domestic conditions or other considerations.

⁸ Zbiral, Smekal and Princen, “Dataset Flexible Implementation in EU Law”.

⁹ Art. 4, Directive 2011/83.

¹⁰ Art. 29, Directive 2011/83.

4. What effects does the variation in implementation practices have?

Under this final question, we explore the effects of variation in implementation practices between member states. This is the final step towards answering the overarching central question.

The case study combines methods and approaches from law and political science/public administration. We trace the whole policy process from the European Commission's draft of the Directive, through its negotiation at the EU level, to transposition, application and enforcement at the national level. We draw from multiple sources to cover all these phases, including primary sources such as the Directive and its national transposition measures, EU and national policy documents, reports and evaluations, or debates in national parliaments. Interviews with civil servants from responsible ministries, representatives of consumer organisations, enforcement authorities, and academics proved highly valuable.¹¹ We triangulated the legal and political primary sources with the literature on the Directive and its domestic implementation. Mainly legal sources, such as the CRD itself and domestic transposition measures, provided answers to the first two questions on the extent of discretion in the Directive and its use in domestic transposition. Other sources, such as interviews, reports, academic literature etc., were instrumental in uncovering drivers and effects of flexibility on both the EU and domestic levels.

Following the analytical framework, the report first provides socio-political and legal background information on the Directive. It examines motivations for its adoption and the process of adoption, with a specific focus on preferences of crucial actors, including EU institutions and the member states, their differences and solutions devised to overcome disagreements. Next, the report summarises the Directive's legal content and analyses the overall extent of discretion and types of discretion. It also looks at the CJEU case law on the CRD (Section 2). Section 3 of the report investigates if and how Czechia, Germany, Ireland, and the Netherlands made use of the discretion granted in several provisions of the Directive in its transposition into domestic laws. Section 4 zooms in on the implementation of the Directive, especially on its enforcement. Section 5 studies drivers for discretionary choices which the four countries made. Section 6 discusses the broader question of the impacts of flexible implementation on the effectiveness and legitimacy of EU law and policies. Section 7 concludes.

Overall, we found that despite the full harmonisation approach employed by the Directive, the four member states still manifest considerable diversity. The differences follow from the member states' approach to consumer law, the closeness of fit in the wording of Directive's provisions and transposition measures, and the member states' regulatory choices. Most importantly, as substantive rules became relatively unified in the member states, the member states differ in putting those rules in practice, and specifically, in enforcing them.

2. Background information on the Directive

This Section explores the uneasy process of adoption of the Directive. It summarises its contents and assesses the overall extent of discretion. Before delving into the intricacies of the CRD, few words follow on the EU consumer law in order to locate the CRD in a broader field.

The EU obtained explicit legislative competence in consumer protection quite late, based on the 1992 Maastricht Treaty. The early consumer-related legislation made use of Art. 100 of the original Treaty of Rome on the approximation of laws. The early directives tackled issues such as misleading advertising (84/450), product liability (85/374), the labelling of foodstuffs (79/112), doorstep selling (85/377), and consumer credit (87/102). The European Commission played at first only a limited role, trying to coordinate national consumer policy projects. The 1986 Single European

¹¹ We conducted total of nine interviews with eleven interview partners and organized an expert workshop. For the full list of our interview partners, see the section References.

Act and the whole Single Market project aimed at the completion of the internal market, which also included the adoption of directives intended to promote consumer confidence. These directives included measures on package holidays (90/314), unfair contract terms (92/13), general product safety (92/59), price indication (98/6), distant selling (87/7), certain aspects of sale of goods and guarantees (99/44). The European Commission convinced reluctant member states to agree with such an extensive regulation by employing the minimum harmonization principle, which enabled preserving or introducing more protective standards.¹²

After the turn of the millennium, the European Commission switched to a full harmonization approach and managed to push through several directives based on this approach. These included directives on distant selling of financial services (2002/65), unfair commercial practices (2005/29), consumer credit (2008/48), and time-sharing (2008/122). Other directives followed, yet, appropriate enforcement of unified rules has remained a problem.¹³ Critics point that the EU consumer law moved from its social outlook towards a market-focused law. Its instrumentalization as a means of the completion of the internal market left behind more vulnerable consumers with unequal access to the market.¹⁴

2.1 Process of adoption of the Directive

At the time of the CRD adoption in 2011, the EU consumer *acquis* was characterised as unsystematic, lacking clear priorities, yet importantly influencing wide areas of national contract law.¹⁵ It was almost exclusively based on Article 114 TFEU, i.e., seeks to improve the functioning of the internal market. The need for a consumer rights directive stemmed from a "fragmented Consumer Acquis" incurring high costs on business.¹⁶ The Consumer Rights Directive was initially planned to "achieve a real business-to-consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises".¹⁷ According to the impact assessment of the CRD proposal, the Directive should meet the dual objective of "making it easier for business to sell cross-border to consumers and enhancing consumer confidence in cross-border shopping".¹⁸ The Commission published the proposal for the Directive in October 2008.

The following legislative process took full three years, in the course of which "its scope was changed drastically".¹⁹ The Commission had initially planned to assemble all four existing important Directives on EU consumer protection and thereby profoundly change or, in her own words, "tighten up the regulatory framework".²⁰ A sign for the complexity of this long legislative process – initially, the hope was to come to an agreement within a year – is the involvement of four different Council formations: (1) Competitiveness, (2) Environment, (3) Agriculture and Fisheries, and (4) Employment, Social Policy, Health and Consumer Affairs.

The proposal received much criticism from the member states, consumer organizations and academics, including that it would effectively reduce consumer protection levels in many of them.²¹ That is why in a General Approach in December 2010 and after two years of intense negotiations, the Council proposed a far-reaching limitation of the scope of the Directive, which should henceforth broadly apply to distance and off-premises contracts only.

12 Micklitz, "European Consumer Law," 527–29; Ward, *A Critical Introduction to European Law*, 133.

13 Micklitz, "European Consumer Law," 531–39.

14 Micklitz, "European Consumer Law," 526; Ward, *A Critical Introduction to European Law*, 133–136.

15 Weatherill, "The Consumer Rights Directive", 1280.

16 European Commission, "Proposal for a Directive on consumer rights".

17 Ibid.

18 European Commission, "Commission staff working document accompanying the proposal for a directive of the European Parliament and of the Council on consumer rights - Impact assessment report", 4.

19 Luzak and Mak, "The Consumer Rights Directive".

20 European Commission, "Proposal for a Directive on consumer rights".

21 See, e.g., positions taken by the Bundesrat and the Dutch Parliament (<https://secure.ipex.eu/IPEXL-WEB/dossier/document/SEC-20082545FIN.do#dossier-COD20080196>), or BEUC, "The Consumer Rights Directive: How to get it right". In addition, the CRD Draft lowered in some respects consumer protection contained in the four directives it aimed to replace (see van Boom, "The Draft Directive on Consumer Rights", 455, 464).

In the European Parliament (EP), the Committee for Internal Market and Consumer Protection (IMCO) was responsible for negotiating the file with the Council and initially not willing to accept the far-reaching limitation of the General Approach in December 2010.²² In its first reading, the EP hence worked with the original proposal by the Commission. Yet, with the compromises introduced by the EP in its first reading, especially changing "the provisions of the CRD concerning unfair contract terms and consumer sales contract from full to minimum harmonisation",²³ the two visions of the EP and the Council were not too far apart anymore, leading to a conclusion of the negotiation and adoption of the Directive in summer 2011 and publication in the Official Journal of the EU on 22 November 2011.

The road to the agreement in the Council was quite rocky as the member states discussed the Draft within the Council or its preparatory bodies four times. Twice it was listed as a B-item on the Council agenda, hinting towards disagreements among the member states. In the end, only Spain persisted in its opposition to the CRD proposal, while the rest of the member states approved the amendments by the European Parliament.²⁴ Spain opposed the CRD proposal because it deprived Spanish consumers of some of their rights. Besides other reasons, Spain expressed concern that maximum harmonisation does not leave room for manoeuvre when new challenges from new forms of business arise.²⁵

Positions of Czechia, Germany, Ireland, and the Netherlands in CRD negotiations

The Czech Government generally supported the initial ambitious Commission's CRD proposal, including the full harmonisation approach, although the support was not entirely straightforward. The issue was of relatively lower importance for the Government, led at that time by the economically liberal Civic Democratic Party (*Občanská demokratická strana*, ODS).²⁶ ODS endorsed rather business interests than consumer protection. However, at the time of CRD negotiations, Czechia held the rotating EU Council presidency (January – June 2009) and hence the executive was expected to make progress with the CRD draft. The EU Council presidency push revealed inconsistencies among the Czech ministries towards the preferred approach. While the Ministry of Industry and Trade favoured full harmonisation, the Ministry of Justice did not rule out the minimum approach.²⁷ Despite these internal disagreements between ministries, the Czech position remained overall favourable towards the full harmonisation approach.²⁸

The main reasons for the Czech political support for full harmonisation included the expectation that it will safeguard higher level of consumer rights and enhance consumer trust in cross-border shopping. Ministerial consumer law experts made an effort to explain to the then-strongest governmental party, ODS, that consumer protection enhances the market economy. It undoubtedly helped that Czech businesses voiced support for the CRD as they preferred unified rules to the need to follow 27 diverse national legal rules.²⁹

22 Luzak and Mak, "The Consumer Rights Directive".

23 Ibid.

24 Malta issued a statement regretting that the CRD would not be applicable to all sectors, particularly gaming (see "Statement by Malta", 6).

25 "Statement by Spain", 6.

26 Interview with a Ministry of Industry and Trade legal expert.

27 See Froňková, "The New Directive on Consumer Protection: objectives from the perspective of the EU and the member states," 91–96, and Břicháček, "Some remarks on the Proposal of a Directive on Consumer Rights," 97–98.

28 Then-Minister of Industry and Trade Martin Říman pointed to a possible confusion in terms when introducing the CRD proposal in the Czech Senate. He mentioned that Czechia supported full harmonization, but minimalist rather than maximalist. It follows from the context that Říman, as a pro-business economically liberal minister, meant minimalist harmonization in the sense that consumer rights, as regards e.g. the length of warranty period, should be kept at lower levels but still fully harmonized (see Říman, "Návrh směrnice Evropského parlamentu a Rady o právech spotřebitelů"). Committee on European Affairs, "Resolution of the Committee for European affairs no. 343"; Senate, "Resolution of the Senate no. 118"; European Union Unit of the Senate Chancellery, "Usnesení Senátu k návrhům legislativních aktů a komunikačních dokumentů EU v roce 2009: Předběžné vyhodnocení jejich dopadu na postoje vlády"; European Union Unit of the Senate Chancellery, "Usnesení Senátu k návrhům legislativních aktů a komunikačních dokumentů EU v roce 2011: Předběžné vyhodnocení jejich dopadu na postoje vlády".

29 Interview with a Czech Ministry of Industry and Trade legal expert.

The German position towards the initial proposal of the Commission was rather reluctant. The reason was that many parties in Germany, including consumer protection organisations, feared an effective reduction of consumer protection in Germany, had the initial proposal passed. Accordingly, the Bundesrat wrote in its reaction to the proposal that Germany would have been specifically affected by this downgrading, as the German consumer protection levels were high relative to other EU member states.³⁰ For this, the Bundesrat further argues, the EU lacks the legal competence, as the Commission could not sufficiently argue the Directive's use in improving the internal market.

Moreover, with the initial proposal, the directive would have demanded excessive changes within the German legal order and would have annihilated parts of the Civil Code, for which again Germany argued the Union does not have the legal competence.³¹ Therefore, Germany firmly pressed for the revisions that entered into the Directive in the first rounds of negotiations in the Council but could agree to the revised version, which considerably limited the Directive's scope.

Ireland was in principle in favour of the maximum harmonisation approach of the Directive. However, it had problems with the original proposal in relation to the 'sales' part of it, which conflicted with the existing domestic sales legislation.³² Ireland cooperated, in particular on the exclusion of the sales law, with the UK during the CRD negotiations.³³

Generally, the Irish were relatively satisfied with the content of the CRD, though they had reservations on the application of information requirements in regular consumer contracts.³⁴ There has been a long-standing practice of information requirements on these contracts in Ireland, where restaurants, hairdressers, etc., were required to have pricelists outside. Changing this would be problematic in practice. In light of this, the Irish also pushed for the day-to-day transactions exemption in the CRD.³⁵

The Netherlands was generally positive towards the original proposal of the CRD, including the full harmonisation approach, as uniform rules would be beneficial for consumers and traders. Nonetheless, it questioned whether full harmonisation is necessary on all aspects of the Directive.³⁶

During the negotiations, the Dutch took the position that the Directive should achieve a high level of consumer protection, which balanced a high level of consumer protection for consumers and the competitiveness of undertakings.³⁷ In this respect, the Dutch government was reluctant towards the initial CRD proposal because its provisions on the lack of conformity and the standard contract terms would have lowered the level of consumer protection in the Netherlands.³⁸

2.2 Legal summary of the content

The Consumer Rights Directive repealed and replaced Directive 85/577 on doorstep selling and Directive 97/7 on distance selling and slightly amended two other directives. It seeks to "contribute to the proper functioning of the internal market by approximating certain aspects of the laws, regulations and administrative provisions of the member states concerning contracts concluded between consumers and traders."³⁹ Its preamble declares that the Directive simplifies and updates existing rules and, moreover, moves away from the minimum harmonisation approach whilst

30 Bundesrat, Drucksache 765/08 zum Vorschlag für eine Richtlinie des Europäischen Parlaments und des Rates über die Rechte der Verbraucher, March 6, 2009, 3.

31 Ibid.

32 Donnelly and White, "Irish Consumer Law: Asserting a Domestic Agenda," 12–13.

33 Cox, interview.

34 Ibid.

35 Ibid.

36 Fiche: Richtlijn consumentenrechten, Kamerstukken II, 2008/09, 22 112, nr. 742.

37 KABINETSREACTIE OP HET SER-ADVIES «CONSUMENTENRECHTEN IN DE INTERNE MARKT», Kamerstukken II 2010/11, 22 112, nr. 992.

38 KABINETSREACTIE OP HET SER-ADVIES «CONSUMENTENRECHTEN IN DE INTERNE MARKT», Kamerstukken II 2010/11, 22 112, nr. 992; MOTIE VAN HET LID VOS C.S. Kamerstukken II, 2008/09, 31 700, nr. 30.

39 Art. 1, Directive 2011/83.

leaving member states some leeway.⁴⁰ The new full harmonisation approach of some regulatory aspects should arguably increase legal certainty for both consumers and traders.⁴¹ The provisions of the Directive concern contracts between traders and consumers, especially distance and off-premises contracts. Specifically, the Directive establishes rules on obligatory information in contracts and regulates the right of withdrawal.⁴² The Directive does not cover all contracts, as a number of categories of contracts are excluded from its scope (e.g., contracts for social services, healthcare, gambling, financial services, etc.).⁴³

As explained above, due to the political opposition, the initial ambitious proposal has been markedly watered down. For example, Stephen Weatherill contrasts the Directive's "grandiose title" with its "trivial" content, positing that a Directive on consumer rights "is so remote from deserving such an ambitious title".⁴⁴ The Commission's resolve to move from minimum to maximum harmonisation came at a price of a significantly curtailed material scope. While the 2008 Commission proposal had counted with fully harmonising large areas of consumer law, the Directive fully harmonised distance and off-premises contracts and focused on mandatory disclosure of information and right of withdrawal. Despite this, the Directive has a broad horizontal application on almost all consumer contracts.⁴⁵

The Directive consists of six chapters, dealing with (1) subject matter, definitions and scope; (2) consumer information for contracts other than distance or off-premises contracts; (3) consumer information and right of withdrawal for distance and off-premises contracts; (4) other consumer rights; (5) general provisions; and (6) final provisions.

Substantively, the Directive sets rules for information requirements, consumer's withdrawal from distance or off-premises contracts and deals with other consumer rights in sales and service contracts, concerning issues such as delivery, fees for the use of means of payment, passing of risk, communication by telephone and additional payments. General provisions of the Directive cover, among other, issues of enforcement, penalties and inertia selling.

The Directive was amended twice. While the first amendment⁴⁶ brought only slight changes and without much significance for issues of states' discretion and its use, the second amendment⁴⁷ seeks more profound changes under the motto "Strengthening EU consumer rights". An extensive evaluation preceded the current reform process when the European Commission conducted a 2017 Fitness Check of consumer and marketing law and the evaluation of the Consumer Rights Directive.⁴⁸ The Amending Directive 2019/2161 extends the Directive's scope to cover contracts regarding digital service or digital content and products offered in online marketplaces and strengthens the enforcement by elaborating on penalties.⁴⁹ The Amending Directive reacts to the situation when: "Current national rules on penalties differ significantly across the Union. In particular, not all member states ensure that effective, proportionate and dissuasive fines can be imposed on traders responsible for widespread infringements or widespread infringements with a Union dimension."⁵⁰

40 Recital 2, Directive 2011/83.

41 Recital 7, Directive 2011/83.

42 Recital 9, Directive 2011/83.

43 Art. 3 para. 3, Directive 2011/83.

44 Weatherill. "The Consumer Rights Directive" 1279–80.

45 Mak, interview.

46 Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC.

47 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules.

48 See all its components here: <https://ec.europa.eu/newsroom/just/items/59332/en>.

49 See the new Art. 24 of the Directive, as replaced by the Directive 2019/2161.

50 Recital 5, Directive 2019/2161. The European Commission's impact assessment of the Amending Directive 2019/2161 attributes the lack of compliance to: "(1) insufficient enforcement of the rules, (2) lack of awareness about consumer rights and (3) limited consumer redress opportunities." See European Commission, "Impact Assessment".

Similarly to the case of the original CRD, the proposal of the Amending Directive 2019/2161 brought controversy, and the Council or its preparatory bodies met fifteen times to discuss the proposal. Despite all the efforts, the proposal was not adopted unanimously, with Slovakia voting against, and Austria, Germany, and Poland abstaining.⁵¹ The member states shall transpose the Amending Directive 2019/2161 by 28 November 2021 and apply transposing measures from 28 May 2022.⁵² Therefore, it falls outside the scope of this (June 2021) analysis.

While the Amending Directive 2019/2161 shall help keep up the CRD with the digitalisation process and improve enforcement, some other significant changes in the EU consumer law regime are underway. The Commission ambitiously calls the whole package of legislative changes “A New Deal for Consumers”,⁵³ which includes in addition to the Amending Directive 2019/2161 also the Directive 2020/1828 on representative actions⁵⁴.⁵⁵ Despite the initial CRD ambitions and all the recent activities, the EU consumer acquis remains fragmented among several directives.⁵⁶

2.3 Overall extent of discretion and its types

The Consumer Rights Directive belongs among the bottom third of directives adopted in the period 2006–2015 as regards the ratio of discretion.⁵⁷ In other words, compared to other directives, the CRD does not provide member states with a lot of space for regulatory choices in the given area. Such categorisation fits the self-characterisation of the Directive’s approach as full harmonisation. Specifically, the Directive sets that national laws shall not diverge from the Directive’s provisions, including on stringency of a level of consumer protection.⁵⁸ Consumers may not waive their rights, and contractual terms waving or restricting the rights resulting from the Directive shall not be binding on them.⁵⁹ However, traders may offer consumers contractual arrangements which go beyond the protection provided for in the Directive.⁶⁰

Despite the self-proclaimed full harmonisation approach, the Directive contains a set of provisions granting the member states discretion to adopt more specific norms or referring to national norms for a definition of a legal concept. The Directive also includes a provision that enables states to decide on the scope of its application – states may decide not to apply the Directive for contracts not exceeding 50 EUR.⁶¹ The Directive itself lists six provisions that offer the regulatory choices for the member states.⁶² Our list of provisions offering discretion is broader because it adopts a more expansive understanding of the concept of discretion compared to the concept of the regulatory choices. Moreover, we include not only substantive provisions but also provisions concerning enforcement. However, we share the view that these six provisions offer the most straightforward substantive regulatory choices and thus can be considered the core discretionary provisions in the Directive. They include the choice not to apply the provisions to off-premises contracts if the payment does not exceed 50 EUR;⁶³ to impose language requirements regarding the contractual information;⁶⁴

51 See https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_13934_2019_INIT&from=EN.

52 Art. 7 para. 1, Directive 2019/2161.

53 European Commission, “A New Deal for Consumers”.

54 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

55 See the European Commission’s webpage on New Deal for Consumers (https://ec.europa.eu/info/law/law-topic/consumers/review-eu-consumer-law-new-deal-consumers_en).

56 For the overview see: https://ec.europa.eu/info/law/law-topic/consumers_en.

57 Based on the dataset produced as a part of this H2020 project. The dataset comprises 164 directives adopted between 2006 and 2015 (see Zbiral, Smekal and Princen. “Dataset Flexible Implementation in EU Law”).

58 Maximum harmonisation approach is embodied in Art. 4 of the Directive: “member states shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive.”

59 Art. 25, Directive 2011/83 (so-called “Imperative nature of the Directive”).

60 Art. 3 para. 6, Directive 2011/83.

61 Art. 3 para. 4, Directive 2011/83.

62 Art. 29 para. 1, Directive 2011/83.

63 Art. 3 para. 4, Directive 2011/83.

64 Art. 6 para. 7, Directive 2011/83.

to impose additional information requirements;⁶⁵ not to apply a simplified information regime for off-premises contracts to carry out repairs or maintenance;⁶⁶ to introduce additional requirements on the confirmation of the offer to the consumer for contracts concluded by telephone;⁶⁷ and to maintain legislation prohibiting the trader from collecting the payment during the given period after the conclusion of the contract.⁶⁸

2.4 CJEU case law on the Directive

The case law of the CJEU generally further clarifies the maximum harmonisation approach of the Directive. Essentially there are three lines of case law: (1) Uniformly applying non-defined concepts; (2) Strict interpretation of scope or exemptions; and (3) a mixture of cases.

The CRD works with various concepts but sometimes does not contain their definitions. Examples include concepts such as basic rate; an activity carried out on a permanent or on a usual basis; sealed goods which are not suitable for return due to health protection or hygiene reasons and which have been unsealed by the consumer after delivery; goods made to the consumer's specifications or clearly personalized; contract for the construction of a new building or the expression 'where available'.⁶⁹ These concepts are, thus, neither defined nor did the provision make a reference to the law of the member states in relation to the concept.⁷⁰ In these circumstances, the exact scope of the relevant provision cannot, in itself, be determined.⁷¹ Therefore, the CJEU held that "it follows from the need for a uniform application of EU law that such a concept must be given an autonomous and uniform interpretation throughout the European Union."⁷²

Not in all cases on the CRD, the Court explicitly regards the aforementioned concepts as autonomous concepts of EU law.⁷³ Yet, even in the cases where the Court does not make this explicit, it becomes clear that they are EU concepts, as the Court gives its own interpretation of the concept without reference to national law. The Court does this by looking at the wording of the provision, as well as the context and objective pursued by the rules of which it forms part.⁷⁴

As to the wording, the Court clarified in *Verbraucherzentrale Berlin* that an EU concept might be broader than a similar concept commonly used in the legal systems of the member states.⁷⁵ That is the concept 'contracts for the provision of ... transport ... services' is broader than the concept 'contracts of carriage'.⁷⁶

In relation to the Directive's objective, the Court has emphasized that the CRD undertakes "full harmonisation of certain essential aspects of contracts concluded between consumers and traders" and "that the level of consumer protection ensured by the member states' national provisions cannot deviate from that laid down by the directive, unless the latter provides otherwise."⁷⁷ In this way, the objective of a high common level of consumer protection across the EU can be achieved.⁷⁸

The second line of case law also leaves little room for the member states. In these cases, the CJEU clarifies that "where the terms to be interpreted appear in a provision which constitutes a derogation from a principle or, more specifically, from rules of EU law for the protection of consumers, they

65 Art. 6 para. 8, Directive 2011/83.

66 Art. 7 para. 4, Directive 2011/83.

67 Art. 8 para. 6, Directive 2011/83.

68 Art. 9 para. 3, Directive 2011/83.

69 C-568/15, par. 18; C-485/17, par. 26; C-649/17, par. 35; C-681/17, par. 30; C-208/19, par. 34; C-529/19, par. 21.

70 C-485/17, par. 26.

71 C-649/17, par. 35; C-681/17, par. 30.

72 C-485/17, par. 27; C-529/19, par. 21.

73 C-485/17, par. 28.

74 C-568/15, par. 19.

75 C-583/18, par. 29.

76 C-583/18, par. 29.

77 C-332/17, par. 27–28. Moreover, the CJEU clarified that Article 21 CRD does not constitute an exception to deviate from the level of protection laid down by the Directive.

78 C-332/17, par. 29.

must be interpreted strictly.⁷⁹ In the case of the CRD, the Court applies this strict interpretation to contracts to which the Directive shall not apply (Article 3(3) CRD) as well exceptions from the right of withdrawal (Article 16 CRD).⁸⁰ The strict interpretation of contracts to which the Directive shall not apply effectively limits the room for the member states to adopt legislation on contracts, which they would consider to fall outside the scope of the CRD. With the strict interpretation of the exceptions from the right of withdrawal, the Court emphasizes the importance of a high level of consumer protection, as it should not be easy to be excluded from the scope of the right of withdrawal.

In addition to these two lines of case law, there is a mixture of cases. The first part of the cases involves the balance between a high level of consumer protection and the competitiveness of undertakings.⁸¹ This balance is part of the CRD's objective, and the CJEU tries to ensure the right balance.⁸²

In contrast, the *Stichting Waternet* judgment elucidates the discretion for the member states in relation to general aspects of contract law.⁸³ CRD also mentions that it shall not affect national general contract law in so far as certain aspects are not regulated by the Directive.⁸⁴ The Court, in this case, held that Article 27 of the Directive does not regulate the conclusion of contracts.⁸⁵ More generally, it held that, "in the absence of harmonisation of the general aspects of contract law at EU level, the formation, conclusion and validity of contracts are regulated by national law."⁸⁶

3. Use of discretion in the transposition of the Directive

The member states should have transposed the Directive by 13 December 2013 and apply transposing domestic measures from 13 June 2014, to contracts concluded after 13 June 2014.⁸⁷ The member states in our sample approached the transposition very differently. While Germany and the Netherlands adopted only one legal act to transpose the Directive and Ireland two, Czechia listed 22 legal acts to achieve the same aim.⁸⁸ However, also in Czechia, the transposition concentrated mainly in changes to one legal act – the Civil Code, while other national measures dealt with transposition of more specific provisions of the Directive.⁸⁹

The CRD transposition, in general, has not been smooth, as 17 member states were late with their transposition. While Czechia, Germany and Ireland managed to transpose the Directive on time, the Netherlands belonged to the majority that did not. The Commission opened 21 structured dialogues with the national authorities ("EU Pilot cases"), which focused primarily on correcting definitions and key terms of the Directive.⁹⁰

3.1 Transposition in the four selected member states

First, we present a table summarising the selected states' choices on the regulatory offers provided by the Directive in the six "core" discretionary provisions (see *supra*). Second, we provide an overview of CRD transposition in Czechia, Germany, Ireland, and the Netherlands. Finally, we elaborate more on the six core provisions and other provisions offering more subtle space for states' discretion that we identified.

79 C-583/18, p. 27; C-208/19, par. 40.

80 C-583/18, p. 28; C-208/19, par. 41; C-681/17, par. 34; C-529/19, par. 22 ; C-641/19, par. 43.

81 C-430/17, par. 41-42; C-641/19, par. 30.

82 Recital 4 CRD; C-649/17, par. 44.

83 C-922/19.

84 Article 3(5) and recital 14 CRD.

85 C-922/19, par. 46.

86 C-922/19, par. 45.

87 Art. 28, Directive 2011/83.

88 *National transposition measures communicated by the member states concerning Directive 2011/83/EU* (<https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex%3A32011L0083>). In fact, in Ireland it is also only one act because the second act only amends the first one.

89 Act No. 303/2013 Coll., changing some acts in relation to the recodification of private law (the amendment to the Act on the consumer protection) and Government Regulation No. 363/2013 Coll., on the model instructions on withdrawal for distance and off-premises contracts and the model withdrawal form from these contracts.

90 European Commission. "Report on the application of Directive 2011/83/EU", 4–5.

Table 1: Use of the regulatory choices offered by the Directive⁹¹

Country	Art. 3(4)	Art. 6(7)	Art. 6(8)	Art. 7(4)	Art. 8(6)	Art. 9(3)
CZE	Not used	Yes	Not used	Yes	Not used ⁹²	Yes ⁹³
GER	Yes (40 €)	Yes	Not used	Not used	Not used	Not used
IRL	Yes (50 €)	Not used	Not used	Not used	Not used	Not used
NL	Yes (50 €)	Not used	Not used	Yes	Yes	Not used

Czechia

Czechia transposed the Directive mainly through the new Civil Code (Act No. 89/2012 Coll.).

The CRD transposition coincided with the works on the new Civil Code, which kept civil law experts very busy. The new Civil Code, consisting of more than three thousand sections, replaced the old communist-era Civil Code after almost half a century. On the background of this massive project, the importance of the CRD transposition paled, as consumer law was only one of many items in the new Civil Code. The CRD transposition did not gain political traction, and the Ministry of Justice approached it speedily and avoided the usual conciliation with intermediate committees and main stakeholders.⁹⁴

The new Civil Code, including CRD transition provisions, came into effect in January 2014, i.e. half a year before the Directive required. However, the Czech transposition has not proceeded entirely smoothly, as documented by the fact that the Commission started the EU-pilot procedure in 2015 and has not finished it to this day.⁹⁵

The Senate at one moment proposed postponing the entry into effect of the main CRD transposition measure until 2016, i.e. two years after the CRD should have been fully transposed and applied, but then quickly abandoned the idea.⁹⁶ A similar story happened in the Chamber of Deputies when parliamentarians wanted to modify the new Civil Code, which was not even in effect at that time. The Government managed to discourage MPs from postponing the new Civil Code coming into effect, not least by pointing to the CRD transposition deadline and a threat of an infringement action in case of a delay.⁹⁷

Given the context of the Civil Code overhaul, it is not surprising that some omissions occurred during the CRD transposition, which had to be legislatively rectified later. For example, no reference to the CRD appeared in transpositions measures, which changed only in 2015. More substantially, as a reaction to negative experiences with unfair selling events targeting vulnerable people, the Parliament passed prohibition for traders to collect the payment from the consumer during the first seven days after the conclusion of an off-premises contract. As discussed below, some disapproved of this change because Art. 9(3) CRD permits member states only to maintain existing national legislation but not to adopt a new one.

Another important structuring element of the Czech CRD transposition concerns the two-pronged approach to consumer law in the Czech legal system. Both the Consumer Protection Act, under the remit of the Ministry of Industry and Trade, and the Civil Code under the Ministry of Justice cover parts of consumer law. However, the two laws and Ministries differ in their approaches and preferences, which creates troubles for smooth transposition. When the Ministries finally found a way to unify their

91 Based on: RPA, CSES, EPRD, "Study on the application of the Consumer Rights Directive 2011/83/EU", 30–32.

92 However, a legislative proposal making use of the regulatory choice is underway in the Czech Parliament. See below in the subsection "Czechia".

93 Strictly speaking, Czechia should not have used this option because it applies only to maintaining an existing provision, while Czechia introduced a new one. See below in the subsection "Czechia".

94 Simon, expert workshop.

95 As of May 2021.

96 Senate of the Parliament of the Czech Republic, *Senátní tisk č. 259*.

97 Government of the Czech Republic, "Stanovisko vlády k návrhu zákona, kterým se mění zákon č. 89/2012 Sb., občanský zákoník," 2.

approaches to consumer law and create a common framework for a new unitary consumer codex, a political decision ended more than two years of work in 2019.⁹⁸

Overall, the final significantly watered-down version of the CRD proposal did not require dramatic changes to the Czech consumer law and was considered relatively insignificant by legal experts.⁹⁹

Czechia made use of three regulatory choices, and another one is in the process of adoption. In contrast to the remaining three countries in the sample, Czechia did not use discretion to limit the Directive application concerning off-premises contracts to payments exceeding 50 EUR (Art. 3(4) CRD).

In its information to the Commission on the regulatory choices under Art. 29, Czechia announced that it “has not used any regulatory choice provided for by the Directive”.¹⁰⁰ But it also added that “there is a certain exception concerning language requirement for contracts”¹⁰¹ because “the trader must make all his communication towards the consumer in a clear and comprehensible manner in the language in which the contract is concluded”.¹⁰² Czechia maintained this wording, which preceded CRD transposition and went beyond the CRD wording.¹⁰³ Therefore, we consider it an exercise of the member state’s discretion permitted by Art. 6(7) CRD.¹⁰⁴ Czech legislation is inconsistent in its language requirements because the Consumer Protection Act requires consumer information on the off-premises or distance contracts in Czech.¹⁰⁵

Czechia made its second regulatory choice in relation to Art. 7(4) CRD, concerning trader’s somewhat relaxed information obligations with respect to certain off-premises contracts (repairs or maintenance with the immediate performance of obligations) under 200 EUR.¹⁰⁶ Member states may decide not to apply this provision, and Czechia did exactly that (and thus used the regulatory choice). Hence, Czech law does not differentiate between the specified off-premises contracts under and over 200 EUR.

Regarding discretion stated in Art. 8(6) CRD, Czechia firstly considered it as irrelevant for transposition. However, due to unfair trader’s practices with concluding the contract only by telephone,¹⁰⁷ the Czech legislator later changed its mind. Thus, if adopted by the Parliament, the Czech Civil Code will newly require concluding of such contract not only through the telephone but also in the text form.¹⁰⁸ It is also the only case in which the revision of the transposition act explicitly mentions the use of discretion provided by the CRD.

Czech exercise of regulatory choice in Art. 9(3) CRD represents a controversial case. The said provisions reads: “Nevertheless, in the case of off-premises contracts, member states may maintain existing national legislation prohibiting the trader from collecting the payment from the consumer during the given period after the conclusion of the contract”. Because Czechia introduced the 7-day payment ban only in 2015, it did not maintain existing legislation but created a new one. However, the Commission has not found it particularly troubling,¹⁰⁹ in contrast, e.g., to EuroCommerce.¹¹⁰

98 ČTK, “Spotřebitelský kodex nebude”.

99 Simon, expert workshop. Other experts acknowledge that the final version of the Directive did not match initial ambitions but still consider it quite important piece in the mosaic of *European consumer acquis* and subsequently of domestic consumer law (cf. Turza, interview; see also Hunter and Riefa, *The challenge of protecting EU consumers*, 16–17).

100 CS *Regulatory choices CRD*.

101 CS *Regulatory choices CRD*.

102 CS *Regulatory choices CRD*. This requirement is based on Section 1811 of Act No. 89/2012 Coll., Civil Code.

103 Tichý and Večl, *Vývoj evropského spotřebitelského práva*, 71–2.

104 This goes in line with the assessment of RPA, CSES, EPRD, “Study on the application of the Consumer Rights Directive 2011/83/EU”, 31.

105 Simon, expert workshop.

106 Here our assessment departs both from *CS Regulatory choices CRD* and RPA, CSES, EPRD, “Study on the application of the Consumer Rights Directive 2011/83/EU”, 31.

107 ČTK, “Boj proti “Šmejdům””.

108 Simon, expert workshop.

109 Interview with a Ministry of Industry and Trade legal expert.

110 EuroCommerce, “*Single Market Barriers Overview*,” 12.

Given the full harmonization approach, no gold-plating¹¹¹ beyond explicit regulatory choices should take place. However, Czech transposition provides some examples of gold-plating, such as in some definitions,¹¹² and formal requirements for off-premises and distance contracts (Arts. 7 and 8 CRD). Similarly, the responsibility of consumers for used goods departs from the strict requirements of Art. 14 CRD.¹¹³ The instances of gold-plating shall be corrected by pending revision of the Civil Code.

The European Commission spotted some CRD transposition deficiencies early on and started the EU-pilot procedure (no. 7592/15/JUST) for incorrect/insufficient transposition of fourteen CRD provisions against Czechia in 2015. The deficiencies include the definition of digital content, information requirements, formal requirements of distance and off-premises contracts, the rights of withdrawal, obligations of a consumer withdrawing from a contract, the withdrawal from ancillary contracts, delivery, additional payments and, importantly, also the sanction regime.¹¹⁴ Czechia engaged in a dialogue with the Commission, which still has not closed the pilot procedure but, on the other hand, neither initiated an infringement action. In response to the continuing pressure from the Commission, the Ministry of Industry and Trade, and Ministry of Justice drafted a comprehensive bill on consumer protection. After the political failure of the draft in 2019, the CRD transposition efforts continue by including usable provisions of the failed draft into the Civil Code.¹¹⁵ However, the final version of the amendments has not been approved yet.

Germany

In Germany, the transposition can be structured in three phases, which is the conventional process of transposing EU legislation. First, a so-called “*Referentenentwurf*”, a first draft of the envisioned law, was drafted by the respective responsible unit of the Federal Ministry of Justice and Consumer Protection and published in September 2012.^{116, 117} The preparation of this draft begins in the respective unit, considering the potential discretion given in the Directive, the existing German legal context and developing possible options for transposition. The decision on the proposed (non-)use of the discretion granted is political, taken by the highest levels of the ministry, which was led by the liberal party member Sabine Leutheusser-Schnarrenberger.¹¹⁸

After consultation in Parliament and with stakeholders, the draft bill followed in March 2013. On 20 September 2013, the act was officially agreed, transposing the Directive nearly three months before the transposition deadline.¹¹⁹ Germany has transposed the Directive in a single act, the “Act implementing the Consumer Rights Directive and regulating the law regulating the property agency”,¹²⁰ which has profoundly changed German consumer protection law. Also, the German Civil Code, more precisely Book 2 Section 2, has been restructured in order to include general information requirements for consumer contracts and align the rules for off-premise contracts.¹²¹

In transposing the Directive, the legislator has made different choices with regard to the discretion offered. Art. 3 CRD was transposed in §312 ff. BGB, and the legislator has made use of the choice for the Directive not to apply in case of contracts for which payments do not exceed 40€ (Art.3(4)), even though the Directive offered the discretion to not to be applied in cases of up to 50€).

111 Gold-plating is generally understood as a situation when national law places burdens beyond the requirements of EU law. For the discussion of the concept, see Squintani, *Beyond Minimum Harmonisation*, 13–71.

112 The Czech Constitutional Court found the definition of distance contract transposed more broadly than the Directive required (see judgments II. ÚS 78/19, January 24, 2020, and II. ÚS 2778/19, November 5, 2019).

113 Section 1833 of the Civil Code departs from Art. 14 CRD regarding consumer liability for a diminished value of the goods resulting from the handling of the goods other than what is necessary to establish the nature, characteristics and functioning of the goods. Cf. Ministry of Industry and Trade and Ministry of Justice, *Návrh věcného záměru Zákon o ochraně spotřebitele*, 31.

114 Ministry of Industry and Trade and Ministry of Justice, *Návrh věcného záměru Zákon o ochraně spotřebitele*.

115 Interview with a Ministry of Industry and Trade legal expert.

116 Lengert, “Die Umsetzung der Verbraucherrechtlicherichtlinie in Deutschland und Frankreich.”

117 BR-Drucksache 817/12.

118 Interview with a German ministry official.

119 Lengert, “Die Umsetzung der Verbraucherrechtlicherichtlinie in Deutschland und Frankreich.”

120 Gesetz zur Umsetzung der Verbraucherrechtlicherichtlinie und zur Änderung des Gesetzes zur Regelung der Wohnungsvermittlung vom 20 September 2013, (BGBl. 2013 I, S. 3642).

121 Lengert, “Die Umsetzung der Verbraucherrechtlicherichtlinie in Deutschland und Frankreich.”

Article 6(7) offers the discretion to demand the information provided in an accessible manner to the consumer. Art. 246a §4 EGBGB states that the information must be clear and comprehensible, and in that sense, the German legislator made use of the discretion to the advantage of the consumer.¹²² The discretion in 6(8) has not been made use of. Similarly, the discretion to not apply the provisions of Art. 7 to certain forms of contract has not been made use of, as the provision has been taken over completely in Art. 246a §2 II EGBGB. Also, in Art. 8(6) and 9(3), the German legislator has not made use of the discretion offered. In the latter case, this is not surprising as the discretion entered the Directive on specific French demand, based on an existing regulation in the French consumer law the French legislator did not want to change.¹²³

Some of the provisions weakened the position of consumers in Germany, which is why the use has been made of discretion to keep current levels of consumer protection, such as in Art. 5(4). Yet, according to some, the Directive has led to a weakening of the consumer's position in several aspects. In contrast, our interviewees did not confirm the impression that the transposition of the Directive weakened the German levels of consumer protection.

Ireland

In Ireland, the legislator transposed the Directive in a new Regulation, European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013. Additionally, certain enforcement aspects are regulated by the Consumer Protection Act 2007, using the existing framework of enforcement.

The first part of implementation in Ireland is to decide on the instrument to be used, either an Act or a statutory instrument, which essentially is founded on three factors in case of the CRD. First, experiences from the past – with the extensive implementation of the Unfair Commercial Practices Directive¹²⁴ – led to difficulties in Ireland.¹²⁵ Second, consumer law is, generally, not politically contested in Ireland.¹²⁶ Third, the limited discretion in the CRD, which allowed for the use of a statutory instrument.

In light of these factors, the CRD was implemented through a statutory instrument. This choice means that legislation is laid before the Parliament, which has 10 days to respond,¹²⁷ but further debates do not take place.¹²⁸ Though the choice also means that a directive can only be implemented to the extent that is required by the EU, e.g. scope extensions are not possible with the statutory instrument.¹²⁹

The second part of implementation is to decide on the content. Though, a statutory instrument is limited to the measures necessitated by the obligations of EU membership, some regulatory choices can still be used.¹³⁰ Therefore, two consultations were held in Ireland on the CRD implementation. The first consultation concerned Articles 19 and 22, with the focus on the early implementation of these provisions.¹³¹ In line with the aforementioned, this early implementation was not possible with the use of a statutory instrument.¹³² The second consultation concerned the optional provisions in

¹²² Ibid., 168.

¹²³ Ibid.

¹²⁴ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

¹²⁵ Kelly, expert workshop.

¹²⁶ Cox, interview.

¹²⁷ The practice can differ, according to how many sitting days for the parliamentary scrutiny the parent act sets. In general, the executive makes secondary legislation and the Parliament (*Oireachtas*) can approve or veto it, but not amend. Only rarely, secondary legislation is challenged or debated. See Gupta, "Making and Scrutiny of Secondary Legislation".

¹²⁸ Cox, interview.

¹²⁹ Kelly, expert workshop.

¹³⁰ Seemingly, this is allowed because the CRD only provided little discretion, see also: Tomkin, "Implementing Community Legislation into National Law."

¹³¹ Department of Jobs, Enterprise and Innovation. *Consultation on Article 19 (Fees for the Use of Means of Payment) and Article 22 (Additional Payments) of Directive 2011/83/EU on Consumer Rights*.

¹³² Department of Jobs, Enterprise and Innovation. *Transposition of Consumer Rights Directive: Regulatory Impact Analysis*, para 57.

the Directive, which highlighted two particular aspects.¹³³ On the one hand, the consultation revealed the wish to extend the Directive's scope to health care and social services (which is not possible by a statutory instrument).¹³⁴ On the other hand, the consultation revealed problems with using Article 8(6) in the hotel and hospitality sector, as last-minute bookings could be burdened with a requirement for confirmation on a durable medium.¹³⁵

The CRD has been implemented carefully in Ireland, in particular due to aforementioned difficulties with the Unfair Commercial Practices Directive. Therefore, the Irish stayed in close contact with the Commission to ensure the correct implementation of the Directive.¹³⁶ Nevertheless, both the European Commission and Ireland missed an error in transposition, which later led to amendments of the Regulations.¹³⁷ The Regulations 2013 mostly adhered to the wording of the Directive.¹³⁸ However, the provisions were restructured to make the Regulations more user-friendly and the word “cancel” was used instead of “withdrawal”, which is a more frequently used word in Ireland.¹³⁹ Despite the limited room for legislative choices, the Irish legislator, where necessary, made use of the options the Directive provided. Specifically, Article 3(4) and 5(3) were used because of insignificant levels of consumer detriment and enforcement difficulties.¹⁴⁰ Moreover, the traders involved would often incur high costs without being of material benefit to consumers.¹⁴¹ At the same time, Article 7(4) has been implemented because the provision provides adequate safeguards for consumers while also reducing the compliance burden on traders.¹⁴² Lastly, Ireland did not use Article 8(6), taking into account the aforementioned considerations on the hospitality sector, it concluded that the protection was not necessary.¹⁴³

The Netherlands

The Netherlands transposed the provisions of the Directive within the system of the existing Civil Code (*Burgerlijk Wetboek*; book 6 and 7), which came into effect on 13 June 2014.¹⁴⁴ Though, in relation to the Directive's provisions on enforcement, the national provisions were considered sufficient, requiring no further implementation.

The general approach of implementation in the Netherlands is based on the national implementation guidelines. According to these guidelines, the legislature should align the Directive with existing national legislation, and neither incorporate additional national policy nor make use of the regulatory choices.¹⁴⁵ Furthermore, the Dutch legislator aimed to incorporate the terminology used in the Directive because of legal certainty reasons.¹⁴⁶ Our interviewees indicated that the approach focused on maintaining the national legislation as much as possible.¹⁴⁷ This was reinforced by the idea that the Directive should be transposed in time by doing as little as possible. Overall, the transposition went relatively smoothly in the Netherlands because quite some rules have not existed yet in the Netherlands and further changes were not necessary.¹⁴⁸

133 Department of Jobs, Enterprise and Innovation. *Consultation on the Implementation of Directive 2011/83/EU on Consumer Rights*.

134 Department of Jobs, Enterprise and Innovation. *Transposition of Consumer Rights Directive: Regulatory Impact Analysis*, para 55.

135 *Ibid.*, para 39.

136 Cox, interview.

137 European Union (Consumer Information, Cancellation And Other Rights) (Amendment) Regulations 2016.

138 Department of Jobs, Enterprise and Innovation. *Consultation on the Implementation of Directive 2011/83/EU on Consumer Rights*, para. 6.

139 Cox, interview.

140 Department of Jobs, Enterprise and Innovation. *Consultation on the implementation of Directive 2011/83/EU on Consumer Rights*, 18 and 28.

141 Department of Jobs, Enterprise and Innovation *Transposition of Consumer Rights Directive: Regulatory Impact Analysis*, para 23 and 28.

142 *Ibid.*, para 33.

143 *Ibid.*, para 36.

144 Transposition was too late in the Netherlands, which should have occurred on 13 December 2013, whereas the Dutch act was only adopted on 3 April 2014.

145 Implementatiewet richtlijn consumentenrechten, Memorie van Toelichting, 6; Aanwijzing voor de regelgeving 331 en 333.

146 Implementatiewet richtlijn consumentenrechten, Memorie van Toelichting, 6.

147 Loos, interview.

148 *Ibid.*

Still, the Dutch transposition made use of discretion in certain provisions. In the first place, the scope of the Directive was extended to hire purchase agreements, as well as to contracts for financial services (with certain amendments). Second, the regulatory choices that the Netherlands made use of were predominantly made in light of the question of whether it would lead to a ‘genuine’ reduction of administrative burden for traders.¹⁴⁹ The discretion in Article 8(6) of the Directive was used to provide consumers more protection against “cold calling”; however, the scope of this provision is limited to contracts for the regular supply of services or gas, electricity, water or district heating.¹⁵⁰ Additionally, the Dutch transposition extended the consumer sales law remedies to digital content not supplied on a tangible medium – not harmonized by the CRD – which allows for the annulment of the contract.¹⁵¹

The transposition of the “trader” concept into national law, has led to difficulties with the existing rules on representation in the Netherlands.¹⁵² The trader concept entails “persons who are acting, including through any other person acting in his name or his behalf, for purposes relating to his trade”. On the basis of the CRD provisions the person, on whose behalf is being acted, would be bound by the agreement. Whereas, under the former rules on representation, the middle man would have been bound by an agreement.¹⁵³

3.2 Concrete uses of discretion in the transposition of the Directive

Scope (Article 3)

Article 3 concerns the scope of the application of the Directive. The Directive shall apply to any contract concluded between a trader and a consumer.¹⁵⁴ Article 3(2) specifies exemptions to the application of the Directive. Some discretion is allowed for, namely under Articles 3(1) and 3(4). Under the former provision, the supply of water, gas, electricity or district heating shall, if provided on a contractual basis, also fall under the scope of the Directive. This provision was not utilized in Germany and Czechia. However, Czechia changed its previous decision, and the draft of the current revision of the Czech Civil Code includes the content of the Article 3.¹⁵⁵ Ireland and the Netherlands have broadened the scope of the application of the provision to include financial services.¹⁵⁶

The latter provision, Article 3(4), allows the member states not to apply the Directive or not to maintain or introduce corresponding national provisions to off-premises contracts worth less than 50 EUR. Member states may define a lower value in their national legislation. The Netherlands and Ireland used the option given by this provision, with the maximum value of 50 EUR. Germany also opted to use the option but set the threshold at 40 EUR. Czechia has not exercised legislative discretion, and the Directive shall thus apply to all off-premises contracts regardless of their value. The different purchase capabilities of 50 EUR in Czechia at that time explain the decision.¹⁵⁷

Information requirements for contracts other than distance or off-premises contracts (Article 5)

Article 5 concerns the pre-contractual information requirements for contracts other than distance or off-premises contracts. The trader is required to provide the consumer with a certain volume of information before the consumer is bound to a contract. This information includes the main

¹⁴⁹ Implementatiewet richtlijn consumentenrechten, Memorie van Toelichting, 6. In relation to Article 3(4), 5(3) and 7(4) Directive 2011/83.

¹⁵⁰ Kamerstukken II, vergaderjaar 2011–2012, 27 879, nr. 41; Implementatiewet richtlijn consumentenrechten, Memorie van Toelichting, 53

¹⁵¹ Implementatiewet richtlijn consumentenrechten, Memorie van Toelichting, 20. Loos, *Onvolkomenheden bij de implementatie van de richtlijn consumentenrecht*, p. 2684. This extension can also be seen as a form of gold-plating.

¹⁵² Mak, interview.

¹⁵³ Loos, “Onvolkomenheden bij de implementatie van de richtlijn consumentenrecht,” 2685.

¹⁵⁴ Art. 3 para. 1, Directive 2011/83.

¹⁵⁵ Government of the Czech Republic, “Vládní návrh zákona, kterým se mění zákon č. 89/2012 Sb., občanský zákoník,” 55, Sněmovní tisk 994.

¹⁵⁶ NL: Article 6:230h(2)(b) Burgerlijk Wetboek ; IRE: Regulations 3(3) European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013.

¹⁵⁷ Simon, expert workshop; Ministry of Industry and Trade legal expert, interview.

characteristics of the goods or services; the identity of the trader; the total price; the arrangements of payment and delivery; the presence of guarantees; and where applicable, the duration of the contract; the functionality of technical protection measures; and any relevant interoperability of digital content with hardware and software.¹⁵⁸ Article 5 para. 1(a) allows the member states to decide on the extent to which they deem the characteristics of the goods or services provided for by the trader to be appropriate. Germany, the Netherlands, and Ireland have all transposed the provision correspondingly to the way set out in the Article at hand.¹⁵⁹ Czechia has added a time requirement, noting that the pre-contractual information must be provided sufficiently in advance.¹⁶⁰ As a reaction to EU-pilot, Czechia will revise its current law and specify in more detail several information requirements (e.g. the geographical address at which the trader is established and his telephone number).¹⁶¹

Article 5(3) also allows for the member states not to require the said information to be provided in contracts that involve day-to-day transactions and which are performed immediately at the time of their conclusion.¹⁶² Germany, Czechia and Ireland decided to use this option¹⁶³ and thus do not require fulfilment of information obligations in day-to-day transactions performed immediately after their conclusion. The Netherlands has not chosen to do so on the basis of potential legal uncertainty on what constitutes a day-to-day transaction.¹⁶⁴

Furthermore, Article 5(4) allows for the member states to adopt or maintain additional pre-contractual information requirements for contracts to which this Article applies. The Netherlands has not used this option.¹⁶⁵ In Germany, the option has been used in order to maintain the current level of consumer protection. The broader pre-contractual information requirements for distance and off-premises contracts¹⁶⁶ are to also apply to any other contracts. In Ireland, there is the additional requirement of providing a legal identity. Finally, the Czech Civil Code requires that the trader communicates with the consumer in a clear and comprehensible manner in the language of the contract.¹⁶⁷ It thus goes beyond the requirement of Article 5(1) of the Directive, which talks about informing “in a clear and comprehensible manner”, but not necessarily in the language of the contract. This inconsistency was discussed above as the Czech law is itself very ambiguous in this case.

Information requirements for distance and off-premises contracts (Article 6)

Like Article 5, Article 6 looks at pre-contractual information requirements, but specifically for distance and off-premises contracts. The information to be given to the customer by the trader before the consumer is to be bound by a distance or off-premises contract is: the main characteristics of the goods or services; the identity of the trader; the trader’s contact details; the geographical address of the trader’s place of business; the total price including any taxes; the costs of distance communication; the arrangements for payment and delivery; details of the right of withdrawal (where existent as well as where absent), including any potential costs for the consumer; the presence of guarantees; the presence of relevant codes of conduct; and where applicable the duration of the contract; the duration of the consumer’s obligations; the existence and conditions of deposits; the functionality of technical protection measures; any relevant interoperability of digital content with hardware and software; and the possibility of having recourse to an out-of-court complaint and redress mechanism.¹⁶⁸

¹⁵⁸Art. 5 para 1, Directive 2011/83.

¹⁵⁹NL: Article 6:320(a) Burgerlijk Wetboek; DE: § 312c Allgemeine Pflichten und Grundsätze bei Verbraucherverträgen; IE: Regulations 2013 - Schedule 1.

¹⁶⁰89/2012 § 1811 odst. 2 návětí; § 1811 odst. 1; § 1811 odst. 2 písm. b).

¹⁶¹Ministry of Industry and Trade and Ministry of Justice, *Návrh věcného záměru zákona o ochraně spotřebitele, 14*; Government of the Czech Republic, “Vládní návrh zákona, kterým se mění zákon č. 89/2012 Sb., občanský zákoník,” 53.

¹⁶²Art. 5 para. 3, Directive 2011/83.

¹⁶³DE: Artikel 246 EGBGB, Absatz 2; IE: Regulations 2013 - Regulation 5(2); CZ: Act No. 89/2012 Coll., as amended, Art. 1811 para. 3 a).

¹⁶⁴Article 6:230(a) Burgerlijk Wetboek.

¹⁶⁵NL: paragraaf 5 algemene toelichting.

¹⁶⁶As covered in §§ 312 ff. BGB-E bzw. den §§ 355 ff. BGB-E.

¹⁶⁷Act No. 89/2012 Coll., as amended, Art. 1811 para. 1.

¹⁶⁸Art. 6 para. 1, Directive 2011/83.

Article 6 also allows for certain degrees of discretion. Similarly to Article 5, member states can decide on the extent to which the main characteristics of the goods and services need to be given, considering the medium of the good or service.¹⁶⁹ While Germany, Ireland and the Netherlands transposed (almost) verbatim the Directive's provision ("the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services"), Czechia used different wording. The Czech Civil Code requires an indication of the goods or services and a description of their characteristics¹⁷⁰ but does not include the phrase "to the extent appropriate to the medium and to the goods or services". However, the Czech legislator changed its mind, and the draft of the current revision of the Civil Code includes that phrase.¹⁷¹

Furthermore, Article 6(7) allows the member states to maintain or introduce into their national law language requirements regarding the contractual information to ensure accessibility towards the consumer. The Netherlands and Ireland have chosen not to use this option. Czechia and Germany require the trader to communicate with the consumer in a clear and comprehensible manner, in the same language in which the contract was concluded.¹⁷² For Czechia, this is the same case as Art. 5(4) CRD because Czech law does not distinguish in the language requirements between contracts other than distance and off-premises contract, on one hand, and distance and off-premises contracts themselves, on the other.

Lastly, Article 6(8) highlights that the information requirements laid down in this Directive are in addition to information requirements contained in Directive 2006/123/EC and Directive 2000/31/EC and do not prevent the member states from imposing additional information requirements in accordance with those Directives. It seems that in neither of our four member states additional information requirements were adopted.¹⁷³

Formal requirements for off-premises contracts (Article 7)

Art. 7 lays down requirements for off-premises contracts to fulfil, e.g. on providing information.¹⁷⁴ It offers discretion in 7(4) which concerns "services of the trader for the purpose of carrying out repairs or maintenance for which the trader and the consumer immediately perform their contractual obligations and where the payment to be made by the consumer does not exceed EUR 200".¹⁷⁵ The paragraph lays down which information and contract requirements should be fulfilled in this specific case, which is not as detailed and strict as the other general provisions in Art. 7(1-3). Discretion is offered as "member states may decide not to apply this paragraph".¹⁷⁶

The four member states handled this discretion differently, with Germany and Ireland transposing Art. 7(4), while the Netherlands and Czechia making use of the regulatory option not to apply the provision. In Germany, the legislator was of the opinion that "it is appropriate to adopt the simplified information requirements",¹⁷⁷ which was accordingly done in Art. 246a §2, BGBEG. Similarly, Ireland transposed the paragraph.

In contrast, the Dutch legislator did not see the simplifications to have a real alleviation effect for customers and providers and therefore decided not to apply the paragraph, just as Czechia.

169 Art. 6 para. 1(a) allows for this discretion.

170 Act No. 89/2012 Coll., as amended, Art. 1811 para. 2 b).

171 Government of the Czech Republic, "Vládní návrh zákona, kterým se mění zákon č. 89/2012 Sb., občanský Zákoník, art. 1820 para. 1 a).

172 Act No. 89/2012 Coll., as amended, Art. 1811 para. 1.

173 See for the Netherlands: Article 6:230i (4) Burgerlijk Wetboek.

174 Art. 7 paras. 1–3, Directive 2011/83.

175 Art. 7 para. 4, Directive 2011/83.

176 Art. 7 para. 4, Directive 2011/83.

177 Deutscher Bundestag, 2013, 75.

Formal requirements for distance contracts (Article 8)

Art. 8 regulates requirements for distance contracts, again relating to information requirements as well as requirements as to the provision of contracts on durable media, etc. Discretion is offered in Art. 8(6) and 8(7). Art 8(6) stipulates that “where a distance contract is to be concluded by telephone, member states *may provide* that the trader has to confirm the offer to the consumer who is bound only once he has signed the offer or has sent his written consent. Member states may also provide that such confirmations have to be made on a durable medium” [emphasis added].¹⁷⁸

Only the Netherlands firstly transposed the paragraph and requires that any contract agreed by telephone needs written consent by the buyer afterwards to take effect, except for the extension or renewal of the said contract.¹⁷⁹ Czechia made a move in a similar direction, and the current draft of the Czech Civil Code’s revision now includes the requirement to conclude the contract by both telephone and in text form.¹⁸⁰ In Germany, which did not transpose the paragraph, similar requirements were in place already in some sectors.

Art 8(7) requires the trader to “provide the consumer with the confirmation of the contract concluded, on a durable medium within a reasonable time after the conclusion of the distance contract, and at the latest at the time of the delivery of the goods or before the performance of the service begins” and adds two further requirements as to the content of this confirmation:

“(a) all the information referred to in Article 6(1) unless the trader has already provided that information to the consumer on a durable medium prior to the conclusion of the distance contract; and

(b) where applicable, the confirmation of the consumer’s prior express consent and acknowledgment in accordance with point (m) of Article 16.”¹⁸¹

All four member states transposed this provision, with Germany, the Netherlands and Ireland taking over the exact same wording of the provisions. Only Czechia deviated from said wording, requiring the trader to provide the consumer immediately after the conclusion of the contract with at least one copy of the contract. The pending revision of the Czech Civil Code copy-pastes the wording of the provision of Art. 8(7).¹⁸²

Right of Withdrawal (Article 9)

Art. 9 regulates the right of withdrawal, stating that the customer should normally have 14 days to withdraw from distance or off-premises contracts. Art. 9(3) grants discretion to the member states, as it stipulates that “the member states shall not prohibit the contracting parties from performing their contractual obligations during the withdrawal period. Nevertheless, in the case of off-premises contracts, member states may maintain existing national legislation prohibiting the trader from collecting the payment from the consumer during the given period after the conclusion of the contract”. So, only if there is existing national legislation in place regulating the performance of obligations during the withdrawal period may member states maintain it. This is also the reason why none of the four member states has made use of this option: Neither had existing national legislation in place. However, Czechia introduced it later (i.e., not maintained it) by the 2015 revision of the Act on Consumer Protection which prohibited traders from collecting the payment during the first seven days after the conclusion of the off-premises contracts.

¹⁷⁸Art. 8 para. 6, Directive 2011/83.

¹⁷⁹Article 6:230v(6) Burgerlijk Wetboek.

¹⁸⁰Government of the Czech Republic, “Vládní návrh zákona, kterým se mění zákon č. 89/2012 Sb., občanský zákoník, Art. 1820 para. 1 a).

¹⁸¹Art. 8 para. 7, Directive 2011/83.

¹⁸²Government of the Czech Republic, “Vládní návrh zákona, kterým se mění zákon č. 89/2012 Sb., občanský zákoník, Art. 1824a para. 1.

Effects of the exercise of the right of withdrawal on ancillary contracts (Article 15)

The effects of the withdrawal of a contract on ancillary contracts are regulated in Art. 15, stating that “the member states shall lay down detailed rules on the termination of such contracts”.¹⁸³

All member states regulate that, in general, the termination of a contract leads to the termination of all ancillary contracts, as well. In addition, the member states regulate, to different degrees, what constitutes ancillary contracts and what the exact procedures in case of cancellations are. For instance, Czechia experienced some difficulties as its provision on ancillary contracts was unclear and led to several unnecessary consumer disputes.¹⁸⁴ Therefore, the Czech legislator now hears the amendment to correct the law.¹⁸⁵

4. Use of discretion in the implementation of the Directive

While the CRD transposition largely removed differences among the member states regarding substantive rules, their putting into practice still lags behind expectations. The European Commission noted a lack of awareness among consumers and traders, difficulties in interpreting some provisions, lack of compliance by traders and significant differences in enforcement, including the level of penalties.¹⁸⁶ According to the latest Consumer Conditions Scoreboard, Czechia recorded noteworthy results – its retailers find it the most difficult to comply with consumer legislation, while Czech consumers are the most knowledgeable of their rights.¹⁸⁷ The Dutch and Irish consumers belong among the most trusting in the effectiveness of the redress mechanisms (49% and 47%, respectively), while Czechs and Germans belong to a moderately trusting group of consumers (42% and 38%, respectively).¹⁸⁸

The Directive leaves the enforcement of its provisions, to a great extent, up to the member states to arrange. In general terms, the member states are obliged to have adequate and effective means in place to ensure compliance with the Consumer Rights Directive.¹⁸⁹ This discretion leads to a variety of enforcement approaches, which can be mainly divided between private enforcement by individuals and consumer organisations, as in Germany, and a mixed approach of public and private enforcement in Czechia, Ireland, and the Netherlands.

In the member states with public enforcement, there is a ‘general’ supervisory authority responsible for enforcing the provisions of the regulation.¹⁹⁰ This is the Czech Trade Inspection Authority in Czechia, the Competition and Consumer Protection Commission in Ireland and the *Autoriteit Consument & Markt* (ACM) in the Netherlands. However, each of them also has one or more additional authorities which are charged with the supervision of a specific aspect. In the Netherlands, the *Autoriteit Financiële Markten* (AFM) is charged with the supervision in relation to financial services and activities. In Ireland, the Commission for Communications Regulation deals with the supervision of electronic communications networks and services and premium rate services. Finally, in Czechia, various specialized authorities deal with food, public health etc.¹⁹¹ Germany

¹⁸³Art. 15 para. 2, Directive 2011/83.

¹⁸⁴Case before the Czech Constitutional Court (case no. II. ÚS 908/16).

¹⁸⁵Government of the Czech Republic, “Vládní návrh zákona, kterým se mění zákon č. 89/2012 Sb., občanský zákoník, Art. 1836a.

¹⁸⁶European Commission. “Report on the application of Directive 2011/83/EU,” 5–6.

¹⁸⁷European Commission. “Consumer Conditions Scoreboard 2019,” 5, 31. German consumers also knew relevant legislation, while Irish and Dutch consumers scored rather worse. As regards retailers' knowledge of consumer legislation, German retailers proved the most knowledgeable, followed by the Dutch and Czech retailers, with the Irish retailers belonging among the least knowledgeable of consumer legislation (see European Commission. “Consumer Conditions Scoreboard 2019,” 33). In contrast, in perceptions of domestic compliance with consumer legislation, the Irish retailers belong among the most optimistic, followed by the Dutch, while German retailers count among rather pessimistic and the Czech among the most pessimistic in the EU (see European Commission. “Consumer Conditions Scoreboard 2019,” 41).

¹⁸⁸European Commission. “Consumer Conditions Scoreboard 2019,” 29. Trust of German consumers in effectiveness of the redress mechanisms fell from 59% to 38% between 2016 and 2018, arguably due to the “Dieselgate” affair.

¹⁸⁹Article 23 para. 1, Directive 2011/83.

¹⁹⁰Article 2.2 Wet handhaving consumentenbescherming; Article 23 para. 1 Act No. 634/1992; Section 10 Competition and Consumer Protection Act 2014.

¹⁹¹Article 3.1 Wet handhaving consumentenbescherming; Department of Jobs, Enterprise and Innovation. *The European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013: Guidance Note*, par. 92; Article 23, Act No. 634/1992 Coll., as amended.

does not have a general supervisory authority,¹⁹² though, similar to the other member states, it has specific authorities responsible for the supervision and enforcement in the financial services and telecommunication sector.¹⁹³

The supervisory authorities all have in common that they can investigate infringements, either on the basis of complaints or by themselves, and impose fines. Furthermore, these authorities have a variety of other measures they can use to ensure compliance with the rules. In the Netherlands, the supervisory authority can issue a public warning or impose binding instructions.¹⁹⁴ The Czech supervisory authority may issue binding instructions for the elimination of identified deficiencies.¹⁹⁵ Lastly, the Irish supervisory authority can make use of civil and criminal enforcement options. The civil options consist of a prohibition order, the undertaking and compliance notices, whereas the criminal options are criminal proceedings and fixed payment notices.¹⁹⁶ Moreover, the Irish supervisory authority publishes twice a year a list of persons against whom enforcement is taken by the authority.¹⁹⁷

The Dutch supervisory authority plays an important role in enforcing the CRD in the Netherlands.¹⁹⁸ The approach of this authority is problem-oriented and aims to resolve major non-compliance issues.¹⁹⁹ Essentially, the approach of the Irish supervisory authority (Competition and Consumer Protection Commission) is rather similar. This authority has many powers to enforce the CRD, thereby it makes use of a pyramid of regulatory approaches, with applying more informal powers at first, and fines and criminal offences only in serious cases.²⁰⁰ For example, the authority can first issue a fixed payment notice (a fine of €300), and if a trader does not pay, the authority may initiate criminal proceedings.²⁰¹ As a result, only a limited number of criminal court cases exists on infringements of the CRD.²⁰² Moreover, in monitoring compliance, the supervisory authority takes a risk-based approach, on the basis of market-monitoring (inspections), taken together with more evidence-based (consumer complaints). The Irish Competition and Consumer Protection Commission tends to engage with well-intentioned but ill-informed traders who are given opportunity to improve their compliance. Well-intentioned traders generally receive guidance and support from the Irish authority. Hence, the criminal means are reserved for ill-intentioned traders.²⁰³

Private enforcement, in contrast, is the primary means of ensuring compliance with the Directive in Germany. This means that the rights of individuals are enforced by themselves in court proceedings.²⁰⁴ In these proceedings, they can claim, specific performance, reimbursement of costs or damages.²⁰⁵ The German system relies on three main pillars: The (1) civil code, to be made use of by (2) competitors (of non-compliant businesses) and official (and partly public) consumer rights associations and (3) independent private organizations. It is important to note that while courts are the last resort to settle disputes, very often these disputes are settled out of court between the disputing parties directly. This form of mostly private enforcement often provokes initial critical reactions by the European Commission, but according to our interviewees has turned out to be very effective to enforce the Directive.²⁰⁶ The other member states also have similar private law remedies in place (the

192 Except in cross-border situations, then Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, applies.

193 RPA, CSES, EPRD, "Study on the application of the Consumer Rights Directive 2011/83/EU," 35.

194 Article 2.8 and 2.23 Wet handhaving consumentenbescherming.

195 Article 23a, Act No. 634/1992 Coll., as amended.

196 Section 71, 73, 75 and 85 Consumer Protection Act 2007.

197 Section 86 Consumer Protection Act 2007.

198 Loos, interview.

199 Mak, interview.

200 Kelly, expert workshop.

201 Murphy, Dormer and O'Toole, interview.

202 Kelly, expert workshop.

203 Murphy, Dormer and O'Toole, interview.

204 RPA, CSES, EPRD, "Study on the application of the Consumer Rights Directive 2011/83/EU" 35.

205 Inter alia, section 241 and 280 BGB.

206 Interview with a German ministry official.

Netherlands: damages, right to claim specific performance, rectification;²⁰⁷ Ireland: damages, also on the basis of breach of statutory duty and prohibition order;²⁰⁸ Czechia: damages and injunctions²⁰⁹).

The member states are generally left free to decide their enforcement approach. However, there is one aspect that the member states must arrange in their national law. That is, one or more bodies must be able to take action before the courts or the administrative bodies to ensure compliance with the provisions of the Directive.²¹⁰ These bodies can be public bodies, consumer organisations having a legitimate interest in protecting consumers or professional organisations having a legitimate interest in acting.²¹¹

In Czechia, Germany and the Netherlands, similar rules have been adopted to provide professional or consumer organisations with the right to initiate court proceedings. The Czech law provides that associations or professional organisations with a legitimate interest in protecting consumers and entities included in a list of persons entitled to bring an action can initiate court proceedings to protect consumer interests and ask for injunction.²¹² Similar are the bodies in Germany, though, also business organisations and Chambers of Industry and Commerce may bring proceedings.²¹³ In the Netherlands, the representative collective action allows a foundation or an association to initiate proceedings to protect the similar interest of a particular group.²¹⁴ In contrast, in Ireland, consumer organisations have no standing in Court. It is the supervisory authority there that is mainly charged with taking an action to the court.²¹⁵

The main action for these bodies under national law is to bring injunctive relief.²¹⁶ In Germany, also claims for removal may be triggered, while in the Netherlands, all civil actions are possible. Moreover, in Czechia and the Netherlands, the aforementioned organisations may complain to the supervisory authority.²¹⁷ This is in contrast to Ireland, where the supervisory authority may institute summary proceedings for an offence and may also apply, on behalf of an aggrieved consumer, to pay damages.²¹⁸ To receive damages, the trader must first be convicted, whereafter the Court decides whether damages must also be paid.

Collective redress

The only remedy not possible in most member states is to initiate a class action for damages. However, since 2019 the possibility exists in the Netherlands to collectively claim monetary damages for consumer infringements.²¹⁹

Additionally, also in the Czech Republic, the situation might change. The Government, represented by the Ministry of Justice, sent the draft law on class actions to the Chamber of Deputies in March 2020. However, as of May 2021, no real progress happened.²²⁰ The legislative proposal on consumer class actions reacts to the fact that the existing possibility for consumer organizations to go to a court with a claim seeking a prohibitory injunction on behalf of a consumer is “completely non-functional”.²²¹

207 Article 6:74 and 6:162 BW; Article 3:296 BW; Article 6:167 Burgerlijk Wetboek.

208 Sections 19-20 and 25-27 European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 in conjunction with section 74 Consumer Protection Act 2007; Section 71 Consumer Protection Act 2007.

209 Articles 2909, 2910 or 2913 Act No. 89/2012 Coll., as amended; Art. 25 Act No. 634/1992 Coll., as amended.

210 Article 23 para. 2, Directive 2011/83.

211 Article 23 para. 2, Directive 2011/83.

212 Article 25 para. 2, Act No. 634/1992 Coll., as amended.

213 Section 3 Unterlassungsklagengesetz; Section 8 Gesetz gegen den unlauteren Wettbewerb.

214 Article 3:305a-3:305d Burgerlijk Wetboek.

215 Kelly, expert workshop.

216 Article 3:305a-3:305d Burgerlijk Wetboek; Section 25 Zákon č. 634/1992 Sb.; Section 3 Unterlassungsklagengesetz; Section 8 Gesetz gegen den unlauteren Wettbewerb.

217 Art. 26, Act No. 634/1992 Coll., as amended; Article 7.2 Wet handhaving consumentenbescherming.

218 Section 81 and 84 Consumer Protection Act 2007.

219 Wet afwikkeling massaschade in collectieve actie.

220 See <https://psp.cz/sqw/text/historie.sqw?o=8&t=775>.

221 Government of the Czech Republic, *Vládní návrh zákona o hromadném řízení*, 47.

Out of court dispute resolution procedures

At last, all member states have some kind of out-of-court dispute resolution mechanism (such as alternative dispute resolution, ADR, and online dispute resolution, ODR, managed by the European Commission), which also ensures the enforcement of the Directive.²²² However, the actual use of these out-of-court dispute resolution mechanisms varies; e.g., in the Netherlands, they seem pretty active, while in Ireland, they are only little used.²²³

The Czech Trade Inspection Authority has run an ADR since 2016. Consumers and traders participate at this ARD voluntarily when intending to reach an amicable settlement of a dispute. The ARD does not deal with health services, higher education and non-economic services of general interest. Moreover, some sectors, such as financial services, electronic communication and postal services, and the electricity, gas and heat industry have their specific ADR institutions for settling disputes.²²⁴

Alternative dispute resolution in the form of a consumer complaint commission (*geschillencommissie*) is an important part of private enforcement in the Netherlands.²²⁵ The majority of cases are not solved by the court but by these commissions, which also apply the national law implementing the Directive.²²⁶ This approach is favoured, in particular, because the costs are comparatively low, and the procedures are speedy and simple.²²⁷ Nonetheless, these commissions are de-facto separated from the legal system, as these committees cannot ask preliminary questions. In practice, a party in the proceedings could challenge a decision of a committee before the court. However, costs and procedural requirements often form a barrier to acting further on this.²²⁸

Germany has a variety of ADR bodies which specialize in individual sectors, such as, e.g., airlines, insurances and financial institutions. When a dispute does not fall under a jurisdiction of a specialised ADR body, then a General Consumer Conciliation Body can hear the case.²²⁹

Penalties

To ensure compliance, the Directive further requires that the member states adopt rules on penalties applicable to infringements, which must be effective, proportionate and dissuasive.²³⁰ The Directive does not further define the concept of penalties, thus it seems that it includes administrative, civil and criminal penalties.²³¹

Across the four member states, there are a variety of penalties in place. All four have civil penalties in place, whereas in Germany, this is the main penalty imposed on traders. The German law allows consumers to receive reimbursement of costs, as well as damages, in case of non-compliance with the national provisions. Under certain circumstances, though, criminal penalties can be imposed upon traders in Germany, for example, for fraud.²³²

The Irish law punishes infringements by penalties in criminal proceedings. The sanction imposed there depends on whether it concerns a summary conviction (max. fine of € 5.000 or maximum of 12 months of prison or both) or a conviction on indictment (max. fine of € 60.000 or maximum of

222 Article 20d, Act No. 634/1992 Coll., as amended; European Union (Alternative Dispute Resolution for Consumer Disputes) Regulations 2015; Stichting Geschillencommissie voor Consumentenzaken; Section 15 Gesetz gegen den unlauteren Wettbewerb.

223 Murphy, Dormer and O'Toole, interview.

224 Czech Trade Inspection Authority, *Information about ADR*.

225 Stichting Geschillencommissie; Implementatiewet richtlijn consumentenrechten, Memorie van Toelichting, p 10.

226 Loos, interview.

227 Mak, "Enforcement and Effectiveness of Consumer Law" 395.

228 Loos, interview.

229 See <https://www.evz.de/en/shopping-internet/alternative-dispute-resolution/adr-bodies-in-germany.html>.

230 Article 24 para. 1, Directive 2011/83.

231 Article 20d, Act No. 634/1992 Coll., as amended; European Union (Alternative Dispute Resolution for Consumer Disputes) Regulations 2015; Stichting Geschillencommissie voor Consumentenzaken; Section 15 Gesetz gegen den unlauteren Wettbewerb.

232 RPA, CSES, EPRD, "Study on the application of the Consumer Rights Directive 2011/83/EU," 35.

18 months of prison or both).²³³ Furthermore, the Irish supervisory authority may use any of its civil/administrative measures (prohibition order and undertaking) as well to sanction infringements.

Table 2: Fines for infringements of the CRD

	Maximum fine
Czechia	€ 200 000 (CZK 5 000 000)
Germany	-
Ireland	€ 5 000/ € 60 000
Netherlands	€ 450 000 (since 2015: € 900 000) ²³⁴

The Czech and Dutch supervisory authorities have the power to impose penalties by themselves.²³⁵ In Czechia, the authority may impose an administrative fine of up to € 200,000, whereas the fine in the Netherlands can be as high as € 900,000.²³⁶ Moreover, instead of a fine, the Dutch supervisory authority may impose an administrative order subject to a financial payment, which requires the trader to remedy the infringement.²³⁷ However, the Dutch authority will be reluctant to impose the maximum penalty because a ministerial decree laid down more detailed sanctioning guidelines.²³⁸ According to these guidelines, CRD infringements fall either under category II (sanctioned by a fine between €75,000 and €300,000) or category III (a fine between €150,000 and €600,000).²³⁹

Nevertheless, high penalties sometimes remain only set in law books, but the reality looks very different. For instance, in Czechia, enforcement of consumer rights has remained a long-time problem. E.g., the European Commission criticizes ineffective sanctions and supervision, which Czechia tries to improve only now.²⁴⁰ The regime largely relies on private enforcement through courts; however, Czech consumers do not end up before courts frequently due to high costs and length of proceedings.²⁴¹ Consumer organizations²⁴² assist consumers in their disputes with businesses and seek to support general awareness and education of consumers. The problem with enforcement might change in the future with the proposed class actions. The ADR mechanisms do exist, but their relevance is limited. The public oversight by the Czech Trade Inspection Authority has its limits due to a lack of powers²⁴³ and resources.

CRD before courts in Czechia, Germany, Ireland and Netherlands

On the national level, there is a variety of case law on the application of the national law implementing the Consumer Rights Directive. However, when specifically searching on case law that either explicitly refers to the Directive or the specific national act transposing the Directive, the amount becomes limited. The majority of cases referring to one of these legal acts comes from Germany, which also asked a bunch of preliminary questions to the Court of Justice. In contrast, there seems to be a limited amount of cases in Ireland, as only in three cases there was a reference to the CRD or the national implementing act.

²³³Section 38 European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013.

²³⁴Wet van 23 december 2015 tot wijziging van een aantal wetten op het terrein van het Ministerie van Economische Zaken en het terrein van het Ministerie van Infrastructuur en Milieu, houdende een verhoging van voor de Autoriteit Consument en Markt geldende boetemaxima (Staatsblad 2016, 22).

²³⁵Some of the special authorities in Germany may also impose administrative penalties (Section 20 UWG).

²³⁶Art. 24 para. 17 and Art. 24b, Act No. 634/1992 Coll., as amended; Article 2.15 Wet handhaving consumentenbescherming.

²³⁷Article 2.9 Wet handhaving consumentenbescherming.

²³⁸Boetebeleidsregel ACM 2014.

²³⁹Artikel 2.5 Boetebeleidsregel ACM 2014.

²⁴⁰Turza, interview.

²⁴¹Simon, expert workshop.

²⁴²For the list of Czech consumer organizations: <https://www.mpo.cz/cz/ochrana-spotrebitele/spotrebitelesky-asistencni-system/spotrebiteleske-organizace--251663/>.

²⁴³Not all duties can be supervised by the Czech Trade Inspection Authority because not all of them are punishable as offences. For example, in order to deal with the violations of trader's information duties, the Trade Inspection Authority used legal construction that such practice corresponds to unfair commercial practices. Cf. Turza, interview.

The Czech Constitutional Court cited the Directive in three rulings.²⁴⁴ The Constitutional Court found that consumer protection is a fundamental right, based on the EU Charter of Fundamental Rights and the Czech Charter of Fundamental Rights and Freedoms, which Czech courts should take into account when deciding cases on consumer protection. The Constitutional Court has dealt with discretionary CRD provisions in none of these three cases. However, the Court pointed out that the Czech definition of the distance contract is broader than the CRD sets.

Similarly, rulings on consumer rights by other Czech apex and higher courts do not involve frequent references to the CRD. Courts sometimes use the Directive to define some terms, such as distance or off-premises contracts or right of withdrawal from the distance or off-premises contract, or as a source of consumer rights protection in general. Czech courts rely much more on the provisions on unfair commercial practices than on rights stemming from the CRD.²⁴⁵ Overall, Czech courts – including on lower levels – sometimes exhibit a lack of understanding of a consumer rights approach.²⁴⁶ This might be partially explained by the tendency of Czech consumers not to bring their cases before the courts,²⁴⁷ arguably due to the perceived costs, both in money and time.

In the case law of the German courts, there seems to be a high awareness of the full harmonisation nature of the CRD, to the extent that they often emphasize this aspect.²⁴⁸ This comes forward in a case before the *Bundesgerichtshof* (BGH) in which the court had to interpret Article 8(5) CRD.²⁴⁹ This provision requires the trader – when making a phone call to a consumer with a view to concluding a distance contract – to disclose his identity at the beginning of the conversation. Moreover, Article 8(10) CRD prohibits member states from imposing any further formal pre-contractual information requirements for the fulfilment of the information obligations as laid down in the Directive. According to the German legislature, Section 312a(1) BGB transposes Article 8(5) CRD; however, this provision suggests as if the person calling – being an employee – must also provide his identity. The BGH interpreted this provision in light of the full harmonisation approach and of CRD Article 8(10) and concluded that such a requirement would be a pre-contractual information obligation. Consequently, the caller would only be required to provide the identity of the trader and not of himself.

On the other hand, the *Bundesgerichtshof* also identified the boundaries of the full harmonisation approach in one case. In relation to Article 19 CRD, which prohibits traders from charging consumers fees that exceed the cost borne by the trader for the use of the payment means, the BGH held that a national provision, requiring companies to provide at least one common and reasonable payment option in contracts with consumers, was not covered by the CRD and therefore fell outside the scope of the Directive.²⁵⁰ The BGH thereby held that the national provision did not contradict the Directive' full harmonisation approach, as recital 14 clarifies that the CRD does not affect the general contract law of the member states.

The *Bundesgerichtshof* also asked some preliminary questions to the Court of Justice, perhaps in light of the full harmonisation nature (C-430/17 *Walbusch/Zentrale*; C-649/17 *Bundesverband/Amazon EU*; C-681/17 *Slewo*; C-266/19 *EIS*).²⁵¹ On the basis of the latter three judgements, the German *Bundesgerichtshof* simply applied the European ruling in the national case.²⁵² In the *Amazon* case, this meant that the BGH had to consistently interpret the national norm, which required a trader before concluding a distance contract to provide their phone number in all circumstances, in light of Article 6(1)(c) CRD, which only states that traders should provide a phone number when available.²⁵³

244 Two judgments concerned withdrawal from the distance contract on services (case no. II. ÚS 78/19) and goods (case no. II. ÚS 2778/19), and the third one (case no. II. ÚS 908/16) focuses on the right of withdrawal from the off-premises contract.

245 Cf. Simon and Müllerová, *Efficient collective redress*; Simon, expert workshop; Turza, interview.

246 Turza, interview.

247 Simon, expert workshop.

248 BGH 11.4.2019, I ZR 54/16.

249 BGH 19.4.2018, I ZR 244/16.

250 BGH 18.7.2017, KZR 39/16.

251 The Dutch Court also posed a question C-922/19 *Waternet*, however, the *Hoge Raad* has not given a final judgement on the national case.

252 BGH 3.7.2019, VIII ZR 194/16; BGH 24.9.2020, I ZR 169/17; BGH 19.12.2019, I ZR 163/16.

253 BGH 19.12.2019, I ZR 163/16.

Application of the CJEU judgements may also lead to norm-setting by the national court. In the application of the *Amazon* case, the BGH had to determine whether online chat services or call-back facilities constitute 'direct and effective communication'.²⁵⁴ In the application of the *Walbusch* case, the BGH, similarly, determined whether all information as set out in Article 6(1) CRD may objectively be displayed within a certain communication, having regard to space and time occupied by the communication and the minimum size of the typeface which is appropriate for the average consumer targeted by that communication. Thereby, the BGH adopted its own norm to determine whether this is the case. It held that it is regularly assumed that an advertising message is not reduced if the mandatory information – when using a typeface appropriate for the average consumer – occupies no more than a fifth of the space available for a specific print advertisement.²⁵⁵

The crucial role for national courts seems to be determining whether a particular activity falls inside or outside the CRD scope. In a single case, the BGH confirmed that the German legislature (partly) extended the scope of the CRD to contracts for the rental of accommodation for residential purposes.²⁵⁶ Though, it also held that a certain aspect – the consent to a rent increase – was not covered by the provisions. In contrast, in the majority of cases – in Germany, Ireland and the Netherlands – the courts were concerned with clarifying that a certain aspect was not covered by the CRD. The German courts held that contracts that unilaterally bind the consumer (such as suretyships; *bürgschaftverträge*) and severance agreements (*arbeitsrechtliche Aufhebungsverträge*) were not covered by the CRD.²⁵⁷ Similarly, the High Court of Ireland applied Article 3(3) CRD and held that a purchase agreement and mortgage are contracts to which the CRD was not applicable.²⁵⁸

The High Court of Ireland also had to deal with the question of whether a person was borrowing as a consumer or in the capacity of a business partner.²⁵⁹ In contrast, a Dutch court dealt with the opposing question of whether a horse stud farm, when selling a horse truck, acted as a trader or that this activity should not be considered part of its business activities.²⁶⁰ In another Dutch case before the Supreme Court, the question was not whether a person was an enterprise but whether the scope of protection should be extended to 'small enterprises'.²⁶¹ This was not the case, as the court reiterated the legislature intention not to extend the scope of the CRD to this group.

A particular aspect that covered the question of whether it concerned an off-premises or 'on-premises' contract, and thus also whether the consumer had the right to withdrawal, came forward in three cases in the Netherlands and one in Germany. In the German case, the Court simply applied the CJEU criteria and held that a fairstand at Messe Rosenheim was a movable retail premise where the trader carries out his activity on a usual basis.²⁶² In the Dutch cases, the answer was less clear, as the regional court held in preliminary relief proceedings that a stand in a shop, which is open daily and whose activity can be considered of a usual basis, could be considered a business premise and the contract concluded on-premises.²⁶³ However, in two other cases (not being preliminary relief proceedings), the court held that acquiring customers through a stand in another person's store is to be qualified as off-premises sales.²⁶⁴

Lastly, a German court had to deal with the enforcement discretion of the member states. The *Bundesverwaltungsgericht* held, in line with recital 56 CRD, that national law may regulate which persons or organisations have a legitimate interest in protecting consumers.²⁶⁵ Accordingly, German

²⁵⁴ Ibid.

²⁵⁵ BGH 11.4.2019, I ZR 54/16.

²⁵⁶ BGH 17.10.2018, VIII ZR 94/17.

²⁵⁷ BGH 22.9.2020, XI ZR 219/19; BAG 7.2.2019, 6 AZR 75/18.

²⁵⁸ *KBC Bank of Ireland v Brennan* (Approved) [2020] IEHC 247 (25 February 2020); *Governor and Company of the Bank of Ireland v Phelan* (Approved) [2020] IEHC 484 (21 July 2020).

²⁵⁹ *Harrington & anor v Gulland Property Finance Ltd & anor No. 2*. [2018] IEHC 445 (25 July 2018).

²⁶⁰ *Gerechtshof 's-Hertogenbosch* 28.2.2020, ECLI:NL:GHSHE:2020:589.

²⁶¹ HR 27.5.2016, ECLI:NL:HR:2016:996.

²⁶² BGH 10.4.2019, VIII ZR 82/17.

²⁶³ *Rechtbank Oost-Brabant (kort geding)* 13.5.2016, ECLI:NL:RBOBR:2016:2425.

²⁶⁴ *Rechtbank Amsterdam* 30.3.2017, ECLI:NL:RBAMS:2017:2005; *Rechtbank Noord-Nederland*, 8.8.2017, ECLI:NL:RBNNE:2017:2980.

²⁶⁵ *BVerwG* 3.4.2019, 8 C 4.18

law requires that organisations are non-commercially active in providing information and advice in the interest of consumers. Moreover, the *Bundesverwaltungsgericht* held that this law is not in conflict with the principle of effectiveness. Instead, it increases the efficacy of EU law as it promotes the consistent safeguarding of consumer interests without the influence of the association's or third-party economic interests.

To conclude, national court rulings show a mixed picture as to their impact on the CRD implementation. In the first place, there is a difference in the number of national cases that refer to the CRD or the domestic act transposing the Directive. Second, there is a strong awareness surrounding the discretionary room for the member states, where in particular the German courts often reiterate the full harmonization approach of the CRD. Moreover, the courts play a role in the factual interpretation and application of legal concepts, often simply applying EU criteria but sometimes also setting their own approaches.

5. Drivers of differentiation

In the following, the reasons for the four member states for using the discretion offered, or not, will be presented. In the end, some overarching trends are identified. State-specific or policy-specific factors might drive differentiation in EU secondary law. Firstly, member states differ when it comes to their political system, administrative capacities, and established national traditions, including local identities, norms and preferences.²⁶⁶ Secondly, due to specific historical trajectories of EU policies and corresponding EU competencies, leading to the different density of common rules, member states can adopt different market (policy) regime. In the case of consumer policy, the regime might be shaped by the role of government, state authorities, industry associations or consumer organisations in defining consumer interests and needs. Together with legal tradition, regulatory tradition and enforcement tradition defining the level of consumer protection in a given country, all these factors also determine countries' preferences in negotiation (or implementation) processes that can also influence the state's position to full harmonisation approach.²⁶⁷

Czechia provides a fertile ground for demonstrating (almost) all the aforementioned elements in action. Lack of agreement on the appropriate design of consumer law structured Czech CRD negotiation position, transposition and implementation. As described in Section 3.1, two main approaches clash. The first approach favours creating a new consumer codex, whereas the second improving the status quo with two acts (the Civil Code and the Consumer Protection Act).²⁶⁸ CRD transposition has remained an issue of low political salience dominated by often contrasting views of legal experts from the Ministry of Industry and Trade, responsible for the Consumer Protection Act, and the Ministry of Justice, responsible for the Civil Code. Divergent positions between both ministries concerned, e.g., the position towards the full harmonization approach; the transposition of definitions of concepts (not preferred by those responsible for the Civil Code); and subsequently also enforcement, because the Civil Code relies on civil means of redress, and not on public authority supervision.

With their idiosyncratic legal approaches and path-dependencies, legal experts at both ministries dominated throughout all stages of the CRD implementation processes. Politicians typically intervened when powerful business interests disliked a more ambitious step forward, such as a consumer codex, and supported only incremental piece-meal changes.

Czechia claimed that it did not use any regulatory choices, but in fact, it used two at the time of proper transposition, one at a later stage (Art. 9(3)) and another one (Art. 8(6)) is currently under parliamentary negotiations. The reason behind the use and non-use of regulatory choices seems

²⁶⁶ Andersen and Sitter, "Differentiated Integration: What is it and How Much Can the EU Accommodate?", 325; Börzel, *Why noncompliance*.

²⁶⁷ Austgulen, "Understanding National Preferences in EU Consumer Policy".

²⁶⁸ Forejtová, *Směrem k revizi spotřebitelského práva*; Simon, Expert Workshop; dTest, *Kulatý stůl*; Pauknerová and Skalská, *Enforcement of Consumer Law in the Czech Republic*, 232–33; Rücklová, *Rozhovor: Miloš Borovička*; Kruliš, interview; Turza, interview.

pretty straightforward: path-dependency, from which reluctance to change existing laws emerges. Therefore, when the CRD offered an option to keep the current wording, Czechia did so. Only the late discretionary choice (7-day payment ban in off-premises contracts, Art. 9(3) CRD) is motivated by a different rationale because it responded to a newly emerging problem by a legislative change. The same rationale applies to the pending revision of a regulatory choice (Art. 8(6) CRD), which reacts to the data from Czech consumer associations pointing to numerous negative experiences with concluding contracts by telephone.

All our Czech interview partners agreed that the Czech legislature generally acts unnecessarily creatively and develops its own wording of transposition measures. While Germany, Ireland, and the Netherlands pretty frequently transpose the CRD provisions verbatim, the Czech legislator tries to fit EU legal acts into existing national legal structures without using the CRD wording directly.²⁶⁹ This creates a space for unintended differentiation because the wording does not always fully align with the CRD provisions.

Though not flawless, Czech legal regulation of consumer rights seems quite sufficient at the domestic level. While substantive norms have been harmonized at the EU level, the rules on enforcement have remained predominantly a domestic affair. This has led to substantial differences among member states which typically preserved their existing systems of consumer law enforcement. Therefore, in the Czech case, the push for improvement comes again from the EU level, as the need to transpose the Directive (EU) 2019/2161 of 27 November 2019 on better enforcement and modernisation of Union consumer protection rules coincides with the Czech legislative efforts to improve the CRD enforcement. So far, the system has relied on the supervision by the Czech Trade Inspection Authority, which lacks in powers and resources, and awareness-raising and assistance to consumers by consumer associations. Czech consumers do not belong among highly litigious; therefore, Czech courts remain underused and are not familiar with consumer-friendly perspective. Neither ADR nor class actions work effectively in Czechia. Hence, every trigger towards better CRD enforcements might contribute to improving the non-ideal situation.

In Germany, several factors explain how far discretion has been made use of in the transposition of the CRD. In general, first of all, the current legal context plays an important role: While there was no general prevalence of the existing provisions on consumer protection in Germany, existing measures, especially if they have proven overall successful, are maintained. For the CRD, this mainly counts for Art. 3(4) and 6(7). Accordingly, making the directive fit with existing approaches and, where possible, comply with the EU legislation without changing the existing national provisions has been the main driver for making use of discretion in Germany. However, it has become apparent in the interviews that, in general, the (non-)use of discretion is potentially an item for political discussion, which involves, among others, stakeholders in a process of discussions around the first draft of the legal text. Yet, it seems that in Germany, no larger debates about the (non-)use of the discretion offered took place, which is partly explained by the significant role of the existing legal consumer rights regime. In addition, discretion has in part been used to maintain existing high levels of consumer protection and, where possible, go a bit beyond what the Directive offers. Accordingly, also in the enforcement mechanisms, Germany relied on existing and successful forms of enforcement based on the involvement of private actors rather than regulatory authorities, despite regular initial criticism by the European Commission.

The main driver for differentiation in the Netherlands is the preference to keep the legislation as much as possible intact. This idea is given by the government legislative strategy, which provides that changing the law should only occur when necessary to comply with the Directive. Based on this, the discretion in the Directive is mainly used to maintain the national law. However, the national strategy also includes that regulatory choices should not be used, where this is not necessary for the alignment of the Directive with the national legislation. In addition, secondary factors may play

²⁶⁹ One of our interview partners (Kruliš, interview) pointed to sometimes lower quality of Czech translations of EU documents. This might partially motivate Czech legislators to come up with their own solutions, instead of copy-pasting Directives' provisions.

a role in the implementation. The extent to which the use of discretion would lead to a reduction of administrative burden for traders is one such factor. Moreover, the use of discretion in Article 8(6) was driven by political factors, as the national parliament proposed using this option to achieve a better balance between a high level of consumer protection and the competitiveness of enterprises for the Dutch system. Lastly, the Dutch government considered that the Dutch legal system provides an effective enforcement system, which adequately guarantees effective remedies and dissuasive penalties as required by the Directive. Thus, in line with the main approach, discretion is here also used to keep the existing national legal framework.

The use of discretion in Ireland is, generally, determined by choice of instrument to transpose the Directive. For transposing the CRD, a statutory instrument has been used, which profoundly limited the government to make substantial reforms, including scope extensions. Nevertheless, some regulatory choices still could have been made within the statutory instrument, and the following factors drove these. First, the public consultations provided input in the discretion to be used. Second, it is the responsible government department that eventually determines what discretion is used. Thereby, the department often tries to strike the right balance between providing protection to the Irish consumer as well as not overburdening the Irish trader. Moreover, existing legislation and practices also were considerations in using discretion in relation to Articles 3(6), 5(3) and 8(6) CRD, either because they were considered effective or because preserving standing practices provided legal certainty for consumers. In relation to enforcement, discretion was also used to maintain the existing system of enforcement. On the one hand, because it was considered effective, on the other hand, it ensures consistency in enforcement approaches of other consumer protection legislation.

All in all, the analysis has shown that especially in a situation of full harmonization, there seems to be one important consideration for using the discretion offered in EU legislation: Preserving existing national legal and policy frameworks. In the four countries, the prevention of changing national law has played an important role in the consideration on how to make use of the leeway granted in the Directive. In addition to the general preference for existing law, the effectiveness of these existing provisions has been an important factor as well: Particularly in the case of enforcement, the good experience with the national approaches in the past has been an important driver for a conservative implementation. A factor which seems to have supported this tendency is the low political salience of the transposition and implementation processes. In the absence of a political debate, actors promoting change seem to have been disadvantaged in the face of (often legal) experts and officials with a preference for existing legal frameworks. Integrating the Directive into the existing national law with changing the latter as little as possible therefore seems to have been the main motivation behind the (non-)use of discretion in the four member states analysed.

6. Effects of differentiation

The double objective of the Consumer Rights Directive is to contribute to a high level of consumer protection and better functioning of the business-to-consumer internal market. Arguably, differences in national consumer protection legislation would negatively impact legal certainty for both consumers and traders. Full harmonisation has, therefore, been adopted. Yet, differences are allowed on the basis of various options in the Directive. To the extent the member states have made use of these options, the effects of these options differ.

Full harmonization

When discussing whether and in how far the discretion offered and used in the case of the CRD has contributed to the legitimacy of the Directive, it is important to firstly note that the legitimacy of choosing total harmonization in the first place was highly disputed. Legitimacy, here, is, of course, directly linked to the level of consumer protection offered in the early debate on the Directive, especially in comparison to existing levels in the Member States. Particularly in light of this debate, the lack of flexibility necessarily coming with full harmonization was harshly criticised by member

state governments and consumer rights organizations at the national and EU level.²⁷⁰ Moreover, legal scholars criticized the maximum harmonization approach of the CRD Draft because it lacked clarity as regards its subject matter and which legal aspects were to be harmonized. In the end, the Commission's insistence on full harmonization arguably was one reason for the reduction in the scope of the Directive. Also this reduction was in turn criticized: It invited academic criticism pointing not only to its numerous individual flaws but also to the lack of a broader vision, as the narrowed final version of the directive reduced original more ambitious plans.²⁷¹

The Commission focused more on mechanisms such as Fitness check or Consumer scoreboard to hear those who worked with the CRD (or its transposed parts) and possibly reflect their concerns that might become the basis for further harmonisation, such as in the case of strengthening enforcement mechanism across the EU. All these can also reinforce legitimacy requirements, such as participation of actors affected, ex ante and ex post accountability, transparency and responsiveness, at least at the EU level. At the national level, the picture is more diverse and needs more research. In the member states, there is much less information about the effectiveness of the transposed CRD provisions. Nevertheless, for instance in the Czech Republic, incorrect transposition or negative experiences with rogue business led to the change of the law based on the CRD, such as later transposition of Art. 8(6) or 9(3) CRD.²⁷²

At the same time, however, the full harmonisation approach did not stop some member states to adopt a more country-specific approach to the transposition leading to the gold-plating, of which Czechia is the most obvious case. The reason for that is unknown for us but, the long-term national traditions, including the lower level of development of economics (in general) and consumer market (in particular) compared to the Western counterparts, seem to play an important role.²⁷³

Enforcement

There are two aspects of enforcement to be discussed when assessing the legitimacy of the approaches taken. First, member states have chosen widely varying approaches towards enforcement. Especially in light of the total harmonization approach, the wide scope of differences in enforcement is remarkable. This is mainly due to the fact of leeway given to the member states in the enforcement of the Directive. From a harmonisation perspective, seeing harmonisation as overall desirable would, of course, lead to problematic assessments. However, when for example, considering the diverging German approach, we see that the rationale behind this was not only to keep the already existing national approach but mainly doing so for the reason of positive experience with enforcement. In terms of the goals of the Directive, any working enforcement mechanism can possibly be considered legitimate and seen from this perspective, differences in enforcement approaches are no problem for the legitimacy. On the contrary, flexibility allowing for incorporating national differences can be considered legitimacy-enhancing.

Yet, another finding, especially from our interviews, might be more problematic. We have seen that the enforcement of the Directive, especially when centralized, is generally weak. Often, it is only on the basis of other Directives or an overall conception of certain business actors being problematic that the CRD is being enforced. This can be seen as an argument for flexibility: Decentralized approaches seem to be better suited to enforce the Directive, and are, everything else being equal, more likely if the Directive offers the flexibility for the member states to choose their own enforcement systems. However, enforcement flexibility might prove tricky for countries with a less established tradition of consumer protection. For example, in Czechia, an external trigger (Directive (EU) 2019/2161 amending the CRD) for increasing the effectiveness of the enforcement regime might be seen as welcome.

²⁷⁰ See, e.g., BEUC (Berger, interview).

²⁷¹ Chirita, "The Impact of Directive 2011/83/EU on Consumer Rights"; van Boom, "The Draft Directive on Consumer Rights", 455, 464.

²⁷² Simon, expert workshop.

²⁷³ Interview with a Ministry of Industry and Trade legal expert; Simon, expert workshop; Turza, interview.

Overall

In the case of full harmonization, the room for manoeuvre for member states is necessarily limited. The analysis has shown that, mostly, the given discretion has been used to fit national approaches into the Directive and hence be compliant without having to change existing and working approaches. While, on the one hand, the discretion and use thereof reduced the level of harmonization, on the other hand, the substantive differences, except for enforcement, remained very limited. Therefore, discretion can be regarded as legitimacy-enhancing, as it allowed (limited) embedment of existing approaches into the Directive and thereby also increased acceptance at the national level, without, however, leading to high differentiation between different member states. As far as our analysis has shown, the difference in choices has not led to cross-border problems in EU consumer law.

7. Conclusion

This report shows that despite the full harmonisation approach promoted by the European Commission and adopted by the EU legislature in the case of the Consumer Rights Directive, the member states still have some opportunities to adjust European norms to the national reality. Nevertheless, our sample of four EU countries – Czechia, Germany, Ireland, and the Netherlands – documents that the member states do not use the space for discretion offered by the Directive’s substantive provisions to a great extent. Out of the six core regulatory choices, Ireland used only one, Germany two, the Netherlands three, and Czechia three as well and has another one currently (June 2021) pending in the Parliament. Article 3(4), which enables to limit the scope of application on contracts over 50 EUR or less, stands as the most used provision which grants discretion. On the other hand, none of the member states in the sample has used the discretion provided in Articles 6(8) (to impose additional information requirements in distance and off-premises contracts) and initially also in 9(3) (to maintain legislation prohibiting the trader from collecting the payment during the given period after the conclusion of the contract).²⁷⁴

We have found other discretionary provisions beyond the six proclaimed as regulatory choices by the Directive itself. These further opportunities for the member states to use discretion are usually more subtle, for example, when the Directive uses vague language which domestic legislator can translate differently into national laws or can decide to retain existing formulations in national laws which roughly correspond to the general terms used by the Directive. Again, the member states approach such opportunities differently, some copy-pasting (parts of) the Directive’s provisions, some adopting their own formulations.

Our analysis shows that member states – at least the four in our sample – tried to preserve their existing consumer protection regimes to the greatest possible extent. They used discretion in such a way that enabled retaining existing domestic laws and practices. More recently, Czechia used a CRD regulatory choice in reaction to rogue business practices and the same rationale is provided in case of a pending legislative change.

In contrast to largely harmonized substantive CRD norms, the enforcement rests largely in member states powers. The means of putting the consumer contract law into practice shows some overlaps, but their use varies largely. The member states differ, importantly, in the overall emphasis on private or public enforcement. More specific differences include lists of remedies, persons who can bring the complaints, bodies dealing with the complaints or in the range and severity of penalties. The availability of class actions and ADR, but especially their use, differs wildly.

Despite all shortcomings, we have found out that the EU consumer rights norms significantly contributed to an improved level of consumer protection’s legal framework, at least in some countries with less established consumer protection regimes, as our interview partners in Czechia confirmed.²⁷⁵

²⁷⁴ Czechia used the regulatory choice only later.

²⁷⁵ All our interview partners in Czechia agreed on this.

The report corroborated what some experts²⁷⁶ posited when the Commission published the CRD draft. While the overall quality of substantive norms is satisfactory and the CRD brought further approximation among EU member states, the enforcement has remained highly diverse. The four states differ in the ways they approach policing compliance with consumer law. These approaches are structured by their pre-existing regimes of consumer protection which remain highly path-dependant. While the decision to leave enforcement largely on domestic authorities seems fully legitimate in member states with established domestic consumer protection regimes, it might not yield desired effects in countries with less established regimes, for which larger benefits could be brought by more detailed supranational regulation on enforcement. Hence, it will be interesting to observe to what extent the Directive 2019/2161 and the Consumer Protection Cooperation Regulation (Regulation 2017/2394), which both react to the problem of enforcement, tackle the issue.

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Authors

Hubert Smekal

Masaryk University

hsmekal@fss.muni.cz

Alexander Hoppe

Utrecht University

a.hoppe@uu.nl

Michael Hübner

Utrecht University

m.r.hubner@uu.nl

Pavla Hosnedlová

Masaryk University

440527@mail.muni.cz

Anna Taimr

Utrecht University

a.taimr@uu.nl

Elaine Mak

Utrecht University

e.mak@uu.nl