Aggressive Practices and Consumer Credit in the EU

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1. Introduction

The Unfair Commercial Practices Directive (hereafter UCPD) is one of the key developments in EU consumer law.[1] It covers all sectors of the economy and its broad scope is both strength and a weakness. A strength, to the extent that it ensures a uniform level of protection and a weakness in sectors such as financial services that may require special treatment, something that the Directive recognises, by making it minimum harmonisation in relation to them. It is worth noting that financial services are one of the fields for which the Unfair Commercial Practices has a minimum rather than a maximum harmonisation character.[2] This separation is justified in the recital due to the "complexities and inherent serious risks" of financial services.

One of the most important novelties of the UCPD has been the prohibition of aggressive commercial practices, which were not previously regulated in some Member States.[3]
The introduction of provisions on aggressive commercial practices has been a welcome respite from the usual focus of European consumer policy on misleading practices.[4] Aggressive practices provide the opportunity for a more holistic approach to unfair practices and the chance to address aspects of inequality of bargaining power between the parties. This opportunity has not been ceased as the provisions have not been widely used. Yet, the recent ECJ case law on aggressive practices points to a renewed interest in the provisions.[5]

When discussing financial services, it is important to point out that many of the EU directives on banking and credit were introduced as part of the EU's response to the 2008 financial crisis. impossible to ignore the elephant in the room; the global financial crisis. [6] The 2008 financial crisis served to question the old assumptions on the role of financial regulation and the laissez-faire mentality of the pre-crisis period. Challenging previous assumptions such as the focus on informational remedies and the quasi homo economicus image of the consumer may once again become imperative in light of the economic impact of the Covid-19 pandemic.[7]

This chapter will explore how aggressive commercial practices are regulated in EU banking and credit sector. The aim is to examine to what extent do current legislative instruments in the

[1] Council Directive 2005/29/EC 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, [2005], OJ L 149 11.6.2005.
[2] See rec.9 UCPD
[3] H Collins, 'Harmonisation by Example: European Laws against Unfair Commercial Practices' (2010) 73 The Modern Law Review 89, 108.
[4] Peter Cartwright, 'Under Pressure: Regulating Aggressive Commercial Practices in the UK' (2011) 1 Lloyd's Maritime and Commercial Law Quarterly 123, 124.
[5] Case C-628/17, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Orange Polska S.A.* (2019) ECLI:EU:C:2019:480; Case C-54/17, *Autorità Garante della Concorrenza e del Mercato v Wind Tre SpA and Vodafone Italia SpA* (2018) ECLI:EU:C:2018:710.
[6] E Ferran and others, *The Regulatory Aftermath of the Global Financial Crisis* (Cambridge University Press 2012) 1.
[7] See the projections in International Monetary Fund, 'World Economic Outlook: Chapter 1 The Great Lockdown' (April 2020), available online at https://www.imf.org/en/Publications/WEO/Issues/2020/04/14/weo-april-2020 (Accessed April 2020).

European Union take aggressive practices into account and if they offer a satisfactory standard of protection. In particular, it aims to identify gaps in protection between horizontal consumer legislation and sectoral directives on banking and credit. To the extent that these sectoral Directives overlap with the UCP Directive they will take precedence over it as lex specialis.

The chapter places consumer protection at centre stage focusing on consumers of financial services. Aggressive practices are particularly relevant to financial services as there is a greater disparity of power between trader and consumer and consumers are more likely to suffer serious harm as a result. Furthermore, the Unfair Commercial Practices Directive has a minimum harmonisation character in relation to financial services. As a consequence, Member States can take stricter measures to protect consumers from unfair practices in that sector. This offers the possibility to go beyond the UCPD to ensure protection of financial services consumers.

The structure of the chapter is as follows: first the rationales for financial regulation will be examined, focusing on consumer protection. This is followed by an introduction of the concept of aggressive practices in the UCPD and the analysis of the role aggressive practices play in EU Directives on retail banking and credit. Finally, the chapter concludes.

2. Rationales for financial regulation

This section will provide an overview of the rationales and objectives of financial regulation. Establishing why there is regulation in place and what it tries to achieve will provide the framework for understanding the role of aggressive practices regulation in the financial services. Rationales refer to why we regulate while objectives of regulation refer to what do we try to achieve through the use of regulation.[8] In answering the question why we regulate financial services can have many different answers, the answer to the question whether financial regulation is needed is affirmative. Financial services, financial firms and financial markets are regulated more than most products and services.[9]

There are two main types of financial regulation:[10]

(i) Prudential regulation, which focuses on the solvency and safety and soundness of financial institutions, and
(ii) Conduct of business regulation which focuses on how financial firms conduct business with their customers.

For prudential regulation one of the main rationales is that consumers alone are not able to assess the safety and soundness of institutions.[11] Conduct of business regulation is concerned with the conduct of businesses in relation to their clients, meaning business to consumer transactions.[12]. Out of these two types it is conduct of business regulation that is primarily associated with consumer protection. It deals with unfair practices, marketing practices, the honesty and integrity of firms and their employees as well as the level of competence of

[8] P Cartwright, *Banks, Consumers and Regulation* (Hart Publishing 2004) 7.
[9] GJ Benston, *Regulating Financial Markets: A Critique and Some Proposals* (AEI Press 1999) 1.
[10] Llewellyn 10.
[11] Llewellyn 10.
[12] Llewellyn 11.

financial services firms.[13] This type of regulation tackles the information asymmetry between businesses and consumers employing regulatory techniques such as mandatory information disclosure.
Similar to rationales for consumer protection, rationales for financial regulation can be divided to economic and non-economic. From an economic perspective, rationales for regulation include: 1) the correction of market failure, and especially externalities, 2) the need for monitoring financial firms, 3) the potential for gridlock, 4) moral hazard, 5) consumer demand for regulation and 6) ensuring consumer confidence.[14] Social rationales are the same as the general ones, extending to paternalism and distributive justice, as well as community values.[15] State intervention in favour of consumers may be conducive in restoring the balance between the parties where there is informational and power asymmetry, yet is it not certain that this always serves to the benefit of financial markets.[16]

Financial markets are different due to the higher likelihood of market failure.[17] Are also financial products different? Goods and services are often categorised into three categories: search goods, experience goods and credence goods.[18] Credence goods refer to those where determining the quality comes at a cost and is possible only post-purchase and in some instances may not be possible at all. Financial products are often categorised as credence goods. And this is one of the reasons why regulation is in place for financial products as it is near impossible for consumers to evaluate their quality before purchase and it will only become apparent at a later stage if at all. Benston has also made the case that financial services are not different from others and the reasons why we regulate them are the same as in other sectors namely, competition, reputation, informational disclosure and redress. [19]

Other factors that distinguish financial services from other goods and services is the complexity of many financial services, which means that consumers may be more susceptible to pressure selling, hence why a high level of protection is required.[20] Furthermore, financial services tend to be long-term commitments of high value and consumers who purchase an unsuitable service may suffer significant financial consequences. This is particularly relevant for consumers without an easy access to credit, as that might make them susceptible to aggressive practices.[21]

As far as objectives are concerned Stiglitz suggests that financial can pursue a variety of objectives placed in six categories namely: 1) consumer protection, 2) the solvency of banks, 3) macroeconomic stability, 4) competition, 5) growth of the economy and 6) improving the allocation of resources.[22]
Whereas according to Llewelyn objectives of regulation should be few in number and clear. He identifies three key objectives of financial regulation with consumer protection being one of them: 1) sustaining systemic ability, 2) maintaining safety and soundness of financial institutions and 3) protecting consumers.[23]

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[13] Llewellyn 11.
[14] Llewellyn 9.
[15] Cartwright, *Banks, Consumers and Regulation* 19–33.
[16] Stiglitz 31.
[17] Stiglitz 20.
[18] Llewellyn 34.
[19] Benston.
[20] Peter Rott, 'A Plea for Special Treatment of Financial Services in Unfair Commercial Practices Law' (2013) 2 Journal of European Consumer and Market Law 64.
[21] Rott, 'A Plea for Special Treatment of Financial Services in Unfair Commercial Practices Law' 64.
[22] Stiglitz 33.
[23] Llewellyn 9.

Niamh Moloney adds market efficiency, transparency and integrity to those.[24] Herring and Schmidt argue that a fourth objective should be added to those identified by Llewelyn, that of maintaining the integrity of financial markets. Included in that objective would be attempts to improve the efficiency and transparency of the price discovery system, market liquidity and the safety and soundness of the clearing and settlement process. It has been argued that for banking in particular the key objectives are: 1) maintaining stability and 2) ensuring confidence in financial institutions. In contrast to that, other financial services, such as insurance emphasise consumer protection and solvency of insurers.[25]
There may be differing views on what should be included in the objectives, but the consensus is that at their core are (as mentioned also by Llewelyn): 1) systemic stability, 2) solvency of financial institutions and 3) protection of investors.[26][27]

Another helpful way to conceptualise financial regulation is through narratives. Legal narratives are a term used to describe the stories that provide meaning and context to legal rules and advance the achievement of their goals.[28] Narratives help in imagining an alternative to how things would be without the regulatory intervention. For example, in financial law, if the reality is that there is inequality of bargaining power and the consumer as the weaker party is being exploited by the trader as the powerful party, the financial law narrative imagines an environment where consumers are treated fairly.[29] Benjamin envisions the 'consumerist narrative' as pertinent to consumer protection according to which consumers as the weaker parties require protection from the law. Consumers are envisioned as unable to give informed consent to risk, as opposed to commercial actors which is why the state intervenes to fulfil the goal of achieving fairness for consumers.[30] Fairness as a regulatory ambition will play a central role in this thesis, as in order to protect consumers from aggressive practices with their elusive nature it is preferable when a practice is judged holistically as to its fairness.

3. EU banking and credit regulation and aggressive practices

This part will examine the relevant European Directives on financial services, namely 1) the Distance Marketing of financial services Directive[31], 2) the Consumer Credit Directive[32], 3) the Mortgage Credit Directive[33], 4) the Payment Services Directive[34] and 5) the Payment Accounts Directive[35]. They are the ones aiming at harmonising key areas in retail banking and credit products for the benefit of the internal market and indirectly of consumers. The analysis aims to establish to what extent aggressive commercial practices are covered by these

[24] Ferran and others 111.
[25] Ferran and others xxiv.
[26] The term investors is construed here to include consumers of financial services.
[27] Maria Elena Salerno, 'The Renewed Objectives of Financial Regulation after the Global Financial Crisis' [2015] Journal of International Banking Law and Regulation 315, 317.
[28] Robert Cover, 'Nomos and Narrative' 97 Harvard Law Review 4.
[29] Joanna Benjamin, 'The Narratives of Financial Law' (2010) 30 Oxford Journal of Legal Studies 1, 789.
[30] Benjamin 799.
[31] Directive 2002/65/EC concerning the distance marketing of consumer financial services [2002] OJ L 271/16
[32] Directive 2008/48/EC of the European Parliament and of the Council on credit agreements for consumers [2008] OJ L133/66
[33] Directive 2014/17/EU of the European Parliament and of the Council on credit agreements for consumers relating to residential immovable property [2014] OJ L 60/34
[34] Directive 2007/64/EC on payment services in the internal market [2007], OJ L 319/1 (Payment Services Directive)
[35] Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, [2014] OJ L 257/214

Directives, in order to have an overview of the level of protection against aggressive practices in the EU financial services market.

Before doing so it is useful to start with establishing the meaning of aggressive practices, as that is defined in the UCPD, which is the lex generalis for unfair commercial practices and more specifically aggressive practices. It is against that standard that the sectoral directives for banking and credit will be examined.

3.1 UCPD and aggressive practices

The UCPD regulates aggressive practices in articles 8-9.

Article 8 sets 3 conditions for a practice to be characterised as aggressive: (*a*) the use of harassment, coercion and undue influence; (*b*) likelihood to significantly impair the freedom of choice of the average consumer; and (*c*) taking a transactional decision he would not have taken otherwise.

Freedom of choice of the consumer is central to aggressive practices. In this context, it relates to the viable options available to the consumer. There is overlap between the three concepts of harassment, coercion and undue influence and distinguishing between them is not always easy. In most cases, it will not be necessary, as it is the overall effect of the practice that will determine its aggressive character.

All three concepts are applicable to banking and credit, as e.g. communications by credit providers for buying new products or collecting debt may be harassing. However, the most relevant might be undue influence as due to the nature of financial products and the long-term contracts, traders are in a position of power in relation to the consumer and may choose to exploit it.

Art. 9 sets out different factors for assessing the aggressive character of practices, including its timing, location, nature or persistence, the use of threatening or abusive language, the exploitation by the trader of any specific misfortune or circumstance of the consumer, any onerous or disproportionate non-contractual barriers to switching providers or terminating a contract , and any threat to take any action that cannot legally be taken.

These factors are especially helpful in specifying the meaning of aggressive practices. The most relevant here would be barriers to switching and terminating and taking advantage of misfortune of the consumer. Indeed, as seen below they are frequently mentioned in the sectoral directives.

3.2 Distance Marketing of Consumer Financial Services Directive

The Distance Marketing Directive (DMD) was enacted in 2002 and envisioned the distance marketing of financial services as one of the most tangible results of internal market.[36] It aims at increasing consumer confidence in using distance marketing of financial services such as

[36] DMD, rec.2

electronic commerce.[37] In order to achieve that, the Directive harmonises the diverging laws of the Member States.[38]
The Distance Marketing Directive covers different financial services; namely banking, credit, insurance, personal pension, investment or payment nature as opposed to the other Directives examined in this section which are more sector specific.[39] This is a reflection of the fact that this is the oldest one and the one that paved the way for other more sector focused Directives to come.
In relation to aggressive commercial practices, the DMD introduces a right to withdraw, a ban on inertia selling as well as restrictions of cold calling and spamming.[40] Inertia selling is one of the practices included in the blacklist of the UCPD.[41] The rules on cold calling are less clear. Persistent and unwanted solicitations by telephone or other remote media are a forbidden practice in the UCPD, so cold calls need to be persistent in order to be caught.[42] Bear in mind that the Distance Marketing Directive preceded the Unfair Commercial Practices Directive.

The consumer's right to withdrawal is set out in art.6 DMD. The cooling off period during which the consumer can withdraw without penalty and without giving a reason is 14 calendar days starting either from the day of conclusion of the contract or from the day when the consumer received the terms of the contract in a durable medium. The right to withdrawal is not universal, as the Directive sets out mandatory exceptions from it, as well as some voluntary exceptions that the Member States can follow if they wish. Exceptions from the right to withdrawal include services whose price depends on fluctuations in the market such as foreign exchange services and transferable securities as well as short-term insurance policies such as travel insurance.[43] Cooling off periods are of importance for aggressive practices as they open the possibility for a consumer that was pressured into entering an agreement to withdraw from it no-questions-asked.[44] What is also significant is that consumers are aware of their rights and the Directive ensures that consumers are informed about the existence of a right to withdrawal as well as how to exercise it.[45]

In fact that is not the only piece of information that the consumer should be provided with according to the Directive as it sets out detailed informational requirements in relation to the supplies, the financial service, the distance contract and the avenues for redress.[46] DMD places special weight on the importance of information provided to the consumer, which becomes even more important due to the nature of distance contracts. As the Directive does not fully harmonise the area, Member States are allowed to introduce stricter informational requirements in line with EU law.[47]

Articles 9 and 10 DMD cover unsolicited services and unsolicited communications respectively. According to art.9 DMD, the unsolicited supply of financial services to a

[37] DMD, rec.5
[38] DMD, art.1(1)
[39] See DMD art 2(b)
[40] DMD, rec.
23,25,26
[41] UCPD, ANNEX I no29
[42] UCPD, ANNEX I no26
[43] DMD, art.6(2)
[44] Cooling-off periods recognise bounded willpower of consumers as seen in behavioural economics literature. See for example: Christine Jolls, Cass R Sunstein and Richard Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 Stanford Law Review 1471, 1479.
[45] DMD, art.3(3)(a)
[46] DMD, art.3
[47] DMD, art.4(2)

consumer is prohibited when it includes a request for payment; the practice known as inertia selling. The consumer is not required to do anything to reject the offer and his absence of a reply should not be construed as consent. Art.10 regulates unsolicited communications prohibiting automated calls without the consumer's prior consent. However, with standard forms and pre-ticked boxes it is often the case that consumers may in fact be unaware of the fact that they at some point consented to unsolicited communications and in the case of automated calling systems objecting to being contacted in this manner can be problematic. It would also be useful to ensure that the traders provide an option to consumers to opt out in a clear way especially if prompted. For other means of distant communication such as calls with human intervention or emails, it is stated that they will not be authorised unless the consumer consented and should stop as soon as the consumer expresses his objection to them.[48] Financial services providers refraining from unsolicited communications should not bear any costs for the consumer.[49] Otherwise, consumers would be likely not only to be harassed into buying a service but also into paying a fee for the annoying communications to stop.

The Report of the Commission on the impact of the Distance Marketing Directive has some disappointing findings.[50] At the time of the study distance marketing of financial services was uncommon and cross-border distance marketing even more so, there were not enough data, even though the study tried to obtain it from a variety of sources. It contained some anecdotal evidence relevant to aggressive practices provided by ECC Luxembourg: "Unsolicited services from a French bank"; "New fees without consent; unclear information about the service" [51] This is not indicative of how widespread aggressive practices were in the sector as that was not the focus of the study.

3.3 Consumer Credit Directive

The current Consumer Credit Directive (hereafter CCD) was adopted on 23 April 2008, replacing the old Directive 87/102/EEC.[52] The first proposal for the new Directive was far more extensive than the previous Directive and aimed at total harmonisation of that area.[53] This was justified by the extensive studies commissioned by the European Commission that showed the divergence of the laws of the Member States that persisted after the introduction of the first Consumer Credit Directive.[54] But more importantly, the economic system had undergone a

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[48] DMD, art.10 (2)

[49] DMD, art.10(3)

[50] European Commission, 'Impact of Directive 2002/65/EC Concerning the Distance Marketing of Consumer Financial Services on the Conclusion of Cross-Border Financial Service Contracts between Professionals and Consumers' (2008).

[51] European Commission, 'Impact of Directive 2002/65/EC Concerning the Distance Marketing of Consumer Financial Services on the Conclusion of Cross-Border Financial Service Contracts between Professionals and Consumers' 22.

[52] Directive 2008/48/EC of the European Parliament and of the Council on credit agreements for consumers [2008] OJ L133/66

[53] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers', [2002] COM(2002) 443 final

[54] Lea, M.J., Welter, R., Dübel, A., 'Study on the mortgage credit in the European Economic Area. Structure of the sector and application of the rules in the directives 87/102 and 90/88'; Final report on tender n° XXIV/96/U6/21 Seckelmann, R., 'Methods of calculation, in the European Economic Area, of the annual percentage rate of charge'; Final Report 31 October 1995, Contract n° AO 2600/94/00101, Reifner, U., 'Harmonisation of cost elements of the annual percentage rate of charge, APR', Hamburg 1998; Project n° AO-2600/97/000169. Domont-Naert, F., et Lacoste, A.-C., 'Etude sur le problème de l'usure dans certains états membres de l'espace économique européen', Louvain-la-Neuve 1997; Contrat

transformation as cash transactions, which were prevalent in the 1980s when the first Directive was enacted, gave their way to the ever increasing presence of consumer credit provided via a variety of instruments.[55]
The proposal was not welcomed, especially by representatives of banks who viewed it as overly protective and considered its ambitious goal to introduce principles of responsible lending as a regulatory burden for the banking industry.[56] The European Parliament echoing the views of the banking industry significantly amended the first proposal which led to the Commission producing a second proposal.[57] In the second proposal that eventually became the current Consumer Credit Directive the consumer protection and responsible lending provisions were weakened. The timing may not have been ripe then, but responsible lending did become a central concept in the Mortgage Credit Directive, as will be seen in the next section. Mortgages and other types of credit related to real estate were excluded from the scope of the Consumer Credit Directive the justification being the specific nature of mortgages.[58] However one cannot but notice there are great similarities between the two Directives.

The CCD is a maximum harmonisation Directive, yet the Member States can enact their own rules in the topics not covered by the Directive; for example rules on cancellation of a sale of goods contract when the consumers exercises his right of withdrawal from the credit agreement.[59] It aims at harmonising certain aspects of the law governing consumer credit.[60] Certain types of credit agreements fall outside the scope of the CCD, such as mortgages, overdrafts that have to be repaid within one month, and other types of short-term and interest-free credit.[61] The value of the credit agreement is also a criterion for the application of the CCD, as it applied only in agreements where the total amount of credit is from €200-75.000.[62]

The CCD aims at ensuring a high level of consumer protection in order to boost consumer confidence in the internal market and in cross-border provision of credit. In achieving that, as in all the retail banking and credit Directives, information plays a key role. Information should be provided at a pre-contractual stage and in the text of the contract to be concluded in order to achieve full transparency.[63] The CCD also regulates the information that should be included in advertising.[64] In fact, mere informational disclosure is not enough as creditors and credit intermediaries should provide 'adequate explanations'.[65] Requiring creditors (and credit

n° AO-2600/96/000260; Domont-Naert, F., et Dejemeppe, P, 'Etude sur le rôle et les activités des intermédiaires de crédit aux consommateurs'; contrat no AO-2600/95/000254, 1996, Balate, E., et Dejemeppe, P., 'Conséquences de l'inexécution des contrats de crédit à la consommation.' Etude AO-2600/95/000270 Commission européenne, rapport final, as quoted in COM(2002) 443 final note 7

[55] COM(2002) 443 final 201

[56] Peter Rott, 'Consumer Credit' in Norbert Reich and others (eds), *European Consumer Law* (2nd edn, Intersentia 2014) 205.

[57] European Parliament legislative resolution on the proposal for a European Parliament and Council directive on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers (COM (2002)443 C5-0420/2002 2002/ 0222(COD)[2004], OJ C104E/233; Rott, 'Consumer Credit' 205.

[58] CCD, rec.14

[59] CCD, rec.9

[60] CCD, art.1

[61] CCD, art.2(2)

[62] CCD, art.2(2)(c)

[63] CCD, art.5,6,10,11

[64] CCD, art.4

[65] CCD, art.5(6)

intermediaries) to take the circumstances and characteristics of different consumers into account and adapt the explanations given would be beneficial for vulnerable consumers that may have requirements different to those of the 'average consumer'. Furthermore, the mention in the CCD of the manner in which assistance is given could point to allowing Member States to regulate aggressive practices.[66] Informational disclosure also extends to credit intermediaries. Art.21 CCD states the obligations of credit intermediaries to consumers, including their obligation to disclose their position as well as the fees they receive from creditors. This is a useful measure against aggressive practices that employ undue influence, as consumers will no doubt be more critical to the suggestions of a credit intermediary if they understand his role more clearly.

Moreover, in order to facilitate comparison between different credit agreements, the CCD provides a method for the calculation of the annual percentage rate (APR). Still, the harmonisation of APR calculation has not had the desired impact. The report on the functioning of the European consumer credit market commissioned by the European Commission showed that in spite of the fact that there are financial education programmes in place in all the Member States, with the UK in first place with 10 programmes, financial literacy remains staggeringly low.[67] This is aptly demonstrated in the study when consumers were asked to choose the cheapest one between two offers differing only in the interest rate and APR, 61.5% failed to identify the correct answer.[68] Evidence like this points to the fact that simply providing consumers with information is unhelpful if they are not able to process the information and especially in financial services which tend to be complex that will be even more difficult for consumers to achieve.

The right of withdrawal and the right to early repayment established have a relevance for aggressive practices. Art.14 CCD establishes a right of withdrawal within 14 days. Cooling off periods are seen as a way to combat the effects of pressure selling, as consumers have time to think whether they really want this transaction to go forward and can withdraw from the contract easily, without providing reasons and without being charged. In relation to the right of withdrawal, the Commission study shows that only a very small percentage of consumers attempt to exercise it, only 1.1%, and out of that 1.1%, 42.2% do not succeed.[69] Unfortunately, the reasons why they do not succeed are not explored in the study but it could be because of barriers put up by the traders.

Art.16 CCD establishes the right to early repayment and the conditions for the creditor to claim compensation in the event of early repayment. The creditor is entitled to fair and objectively justified compensation for costs associated with early repayment that may not exceed 1% of the amount of credit repaid early, if the period of time between the early repayment and the agreed termination of the credit agreement exceeds one year. If the period does not exceed one year, the compensation may not exceed 0.5 % of the amount of credit repaid early.[70] There is contradicting evidence on the right to early repayment as consumer associations consulted for the Commission study reported that consumers rarely use these rights while the consumer survey conducted as part of the study showed otherwise as 22.3% of consumers attempted early

[66] UCPD, art.8
[67] European Commission, 'Study on the Functioning of the Consumer Credit Market in Europe' (2013) 154.
[68] European Commission, 'Study on the Functioning of the Consumer Credit Market in Europe' 157–158.
[69] European Commission, 'Study on the Functioning of the Consumer Credit Market in Europe' 179.
[70] CCD, art.16(2)

repayment and out of those 86.6% succeeded.[71] The right to early repayment is key to facilitating switching traders which is only possible after repayment.

It is remarkable that in the report of the European Commission on the Directive it recognises the fact that consumers sign contracts that are not suited to their needs still suggests that the way to address that is the proper enforcement of pre-contractual informational requirements without so much as mentioning other factors that may play a role in this such as aggressive practices.[72]

3.4 Mortgage Credit Directive

The Mortgage Credit Directive was introduced in February 2014 (MCD).[73] It is a Directive that was enacted after the crisis and as a response to the crisis and the problems that arose as irresponsible practices have jeopardised the stability of the system and consumers have lost their confidence.[74] It is a minimum harmonisation Directive, meaning that Member States are allowed to introduce measures stricter than those of the Directive in order to protect consumers.[75] It covers credit agreements secured by a mortgage or other comparable security for residential immovable property as well as credit agreements for acquiring property rights in land, which were outside the scope of the Consumer Credit Directive.[76][77] Eu Commission recognised that consumers were taking out mortgages without being aware of the risks.[78] Yet, the response of the EU for this problem, as seen in this Directive, is to focus on presenting information in a more efficient manner and to encourage responsible borrowing amongst others. The approach taken does not reflect the limits to what informational disclosure can achieve as a regulatory technique, but rather that disclosure of information can be improved to achieve the desirable result.

This Directive has ambitious objectives in setting standards for responsible lending and responsible borrowing in the EU. On the consumer's side, it aims at improving decision making for consumers via enhanced standardised information and enough time to contemplate the decision or a right of withdrawal. As for lenders and credit intermediaries the objective is responsible lending, via enhanced credit-worthiness assessments and business conduct rules that ensure that the interests of consumers are taken into account. Also, ensuring that the staff of the credit providers has the training and expertise to explain the requirements to consumers on a pre-contractual stage as well as in the event of payment arrears.

Mortgage credit is significant for consumer vulnerability as well, as many consumers that had taken out a mortgage could no longer afford to make their payments, resulting in over

[71] European Commission, 'Study on the Functioning of the Consumer Credit Market in Europe' 180.
[72] European Commission, 'Report on the implementation of Directive 2008/48/EC on credit agreements for consumers', 2014 COM (2014) 259 final, 9
[73] Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, [2014] OJ L 60/34
[74] MCD, rec.3
[75] MCD, art. 2
[76] CCD, art.2(2)a
[77] MCD, art. 3
[78] European Commission Memo, 'Commissioner Barnier welcomes the European Parliament's adoption of new rules on mortgages', 10.12.2013, available online at <http://europa.eu/rapid/press-release_MEMO-13-1126_en.htm?locale=en> (last accessed April 2020)

indebtedness and perhaps even to them losing their home.[79] Over indebtedness and homelessness are factors that contribute to vulnerability. Furthermore, when a consumer is in arrears, he is exposed to debt collection practices that have the potential to become aggressive. Of course, aggressive practices are likely to be used also in the precontractual stage, where a consumer may be pressured into an unsuitable mortgage agreement.

As mentioned, the Mortgage Credit Directive sets out conduct of business rules for credit providers and credit intermediaries. It includes extensive rules on informational disclosure as well as on how to assess creditworthiness. Moreover, the ANNEX includes a formula for the calculation of the annual percentage rate as diverse methods were employed for its calculation causing confusion to consumers. What is positive is that the MCD does not stop there in achieving its responsible lending aim as it also includes rules relating to how staff of credit providers and credit intermediaries should be behaving, aiming at ensuring that consumers are treated fairly. This kind of conduct of business rules have greater capacity at catching aggressive practices, even though once more they are not spelt out as such.

Debtors may at some point face financial difficulties or other extenuating circumstances, such as a health problem or bereavement that may mean they fall behind with their payments, thus putting them in a vulnerable position vis-à-vis the creditors. That is even more likely to happen in the context of a mortgage, as it is as a rule a long-term commitment of high value. This may make debtors vulnerable to aggressive practices employed to ensure debt repayment. Art. 9 UCPD cautions against taking using threatening language or behaviour as well as taking advantage of a specific misfortune of the consumer, both of which may be relevant in the context of payment arrears. The MCD also sets out rules for arrears and foreclosure. It sets limits on the charges the creditor can impose to the consumer in case of default. Such charges should not be punitive but only extend to what is necessary to cover the costs of the creditor with the Member States also being able to place caps on such charges.[80] It is desirable to regulate such charges as the position of a consumer in default will be significantly weakened and he could be easily coerced into paying.

In order to improve the position of the debtor the Directive provides that Member States should enact measures to encourage creditors to exercise 'reasonable forbearance' prior to initiating foreclosure proceedings.[81] The use of the word 'encourage' points towards regulators being expected to 'nudge' creditors into examining other alternatives prior to foreclosure. Art. 28 MCD also provides for the instance of foreclosure stating that Member States should take measures or enact procedures to ensure that the price obtained for the foreclosed property is the best possible, to the extent that it influences the amount owed by the consumer.[82]

MCD also covers the tying and bundling of products with tying being prohibited but bundling being allowed.[83] The prohibition is not absolute as there is a list of exceptions such as purchasing an investment product or a private pension aimed at providing added security.[84] Also the creditor is allowed to prove to the competent authorities that the tying of products results to a clear benefit to the consumers.[85] Furthermore, it is left to the discretion of the

[79] Financial Conduct Authority, 'Consumer Credit and Consumers in Vulnerable Circumstances' (2014) 5.
[80] MCD, art.28(2-3)
[81] MCD, art.28(1)
[82] MCD, art 28(5)
[83] MCD, art.12(1)
[84] MCD, art. 12(2)(b)
[85] MDC, art.12(3)

Member States whether to allow creditors to require consumers to hold out an insurance policy for the loan, provided that the insurance provider is different to the creditor, so as to avoid conflict of interest.[86] Given the large scale scandal with mis-selling of Payment Protection Insurance in the UK, simply requiring the use of different providers does not seem to warrant enough protection. In any case Member States are left free to decide what measures to take to address the issue.

In art.25 the MCD establishes the right to early repayment, which is also relevant for aggressive practices as ensuring that means that consumers are less likely to be exposed to aggressive practices, such as excessive charges to allow early termination of the mortgage agreement.[87] Consumers are also entitled to a reflection period of seven days after receiving pre-contractual information so as to have time to compare offers and make an informed decision.[88] Similarly to a cooling off period this could also help to avoid consumers being pressured to conclude an agreement. Still it is important to not overestimate the abilities of consumers to process information.[89]

The Directive also sets out informational requirements for credit providers and intermediaries both general and for the pre-contractual stage. Some of the information disclosed is meant to allow consumers to make an informed decision in instances where there might be a conflict of interest or the advice given to consumers is not independent due to e.g. the receipt of commission. Also, the staff of creditors and credit intermediaries is required to possess an appropriate level of knowledge in relation to these agreements or intermediation activities.[90] Credit intermediaries are obliged to offer information such as whether they are tied to one or more creditors, whether they offer advisory services, how are their fees calculated and if they receive commission by the creditor.[91] In case they receive both a fee from the consumer and commission from the creditor intermediaries have to explain if the commission will be offset against the fee.[92] Besides the disclosures credit intermediaries are also required to disclose their capacity to the consumer before dealing with them.[93] It is useful for consumers to be aware of the role of the credit intermediary as well as the fees and possible commissions she might be receiving, as that might make them more critical of their advice and suggestions. However, there is still an aggressive dimension that is not addressed by these disclosures as credit intermediaries will still be experts compared to consumers and have the incentive to pressure them towards specific choices. Also, the Directive may be overestimating the ability of consumers to process such complex information, not to mention the fact that vulnerable consumers may not wish to question the intermediaries for fear of their credit application being rejected.[94] It is difficult to imagine a real life scenario where a consumer is offered a lengthy document about the role of credit intermediaries, possibly when he is already in the premises and actually reads it before the meeting.

Advisory services are treated slightly differently to credit intermediaries as art.22 MCD states that the creditor must inform the consumer as to whether advisory services are being provided

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[86] MCD, art.12(4)
[87] See also UCPD, art.9(d)
[88] MCD, art.14
[89] Jon D Hanson and Douglas A Kysar, 'Taking Behavioralism Seriously: The Problem of Market Manipulation' (1999) 74 NYUL Rev. 630, 700.
[90] MCD, art.9
[91] MCD, art.15(1)
[92] MCD, art.15(3)
[93] MCD, art. 15(5)
[94] Rott, 'A Plea for Special Treatment of Financial Services in Unfair Commercial Practices Law' 67.

or can be provided and that advisors should also ensure they offer the consumer one or several credit agreements suitable to the consumer's needs and circumstances. This has to be ensured as the consumer is likely to follow the advice given and if it is an unsuitable product it could have serious repercussions. Due to the nature of advising and the potential harm that could arise Member States have the power to go beyond the Directive in restricting, or even prohibiting, the use of the terms 'advice' and 'advisor'. Consumers attach significance to the terms "adviser" and "advice" and in the case of providing advice in the form of personal recommendation consumers need to be made aware of when are advisory services provided and what is meant by advisory services.[95] Especially where financial advice is being described as independent Member States can take measures to ensure that consumers' expectations are being met. Advisory services are especially relevant to undue influence which is more likely to take place in the environment of financial services where consumers are in need of advice and especially when the advice is or the consumer considers it to be, independent.

Art.22 MCD Goes beyond mere informational disclosure to cover the substantial issue of whether consumers are advised to buy a product suited to their needs. Also, art. 16 MCD goes beyond mere disclosure of information to require that creditors (or credit intermediaries) provide adequate explanations to the consumer in order to place him in a position that will enable him to assess whether the proposed credit agreements are adapted to his needs and financial situation, feeding into the familiar narrative of EU consumer law of empowering consumers to make informed decisions.[96] The provision of 'adequate explanations' could be particularly relevant for vulnerable consumers as they would benefit the most from explanations/ trader behaviour adapted to their needs.

3.5 Payment services Directive

Payment services are a sector that is highly important for the European Union, as efficient and reliable payments are key to the internal market. There is strong will to harmonise payment services regulation as the existing fragmentation is costing €130 billion a year.[97] There have been a number of EU legislative initiatives aiming at harmonising payment services including two Directives on Payment Services; the first one was enacted in December 2007.[98] The Payment Services Directive aimed at opening access to payment markets for merchants as well as increasing consumer protection. The first Payment Services Directive also provided the essential legal framework for the Single Euro Payments Area (SEPA). It is of vital importance for the internal market, let alone the success of the Eurozone, that consumers and other users of payment services are able to make payments quickly, safely and efficiently.

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[95] MCD, rec.63

[96] Norbert Reich and HW Micklitz, 'Economic Law, Consumer Interests, and EU Integration' in Norbert Reich and others (eds), *European Consumer Law* (2nd edn, Intersentia 2014) 21.

[97] European Parliament Press Release, 'Opening up the online payments market, so as to reduce fees and fraud risks', 08.10.2015, available online at <http://www.europarl.europa.eu/news/en/news-room/content/20151002IPR95307/html/Opening-up-the-online-payments-market-so-as-to-reduce-fees-and-fraud-risks>

[98] Directive 2007/64/EC on payment services in the internal market [2007], OJ L 319/1 (Payment Services Directive)

In July 2013 the European Commission proposed a revision of the Payment Services Directive, which was finally adopted by the European Parliament in October 2015.[99] The new Payment Services Directive 2 2015/2366 was adopted in 2015. The new Directive has aimed at promoting innovation, as there have been significant technological advancements since the adoption of the first Payment Services Directive, especially on electronic and mobile payments.[100] Also, recognising that the growing complexity of electronic payments has introduced new risks, the new Directive aims at improving security of payments.[101] Thirdly, it aims at ensuring a high level of consumer protection, as consumers should trust the harmonised payments market.

In relation to aggressive practices, payment services are one of the most basic financial services, used by the majority of consumers and its popularity will continue to grow as electronic payments and card payments become ever more popular. They are also fraught with hidden charges and fees that consumers are either unaware of or when they realise, they have little choice but to accept them.
Bear in mind that PSD2, same as the first one, applies to all users of payment services; consumers and undertakings alike but recognises that in certain instances consumers require an enhanced level of protection.[102] It also mentions, as most financial services EU Directives that consumers should be protected against unfair commercial practices in accordance with the UCPD amongst others.[103]

The second Payment Services Directive, same as the first one focuses on informational requirements to the consumer, what type of information is to be given, when and in what way should it be presented. Information should be provided in a durable medium, so as to be accessible for future reference.[104] Having information in a durable medium prior to concluding a contract enables consumers to compares offers, which according to the Directive ensures a high level of consumer protection.[105] Arguably, it is beneficial for consumers to have access to key information about the available products, yet once more providing information does very little against aggressive practices. Prior to the conclusion of the payment services contract information should come free of charge, however the same is not true after the conclusion of the contract. In that case only basic information, such as monthly statements, will be provided free of charge with the parties left free to decide on possible charges for further information, but the charges have to be 'reasonable'.[106] It is positive that the burden of proof for conforming to the informational requirements belongs to the provider of payment services.[107] Given that there are diverging practices on the issue between Member States this could mean that a consumer as an existing customer would be more easily pressured into paying extra for information and also it is not clear what should be considered as non-essential information. It is important for consumers to be able to be in charge of their finances and in a position to control their payments.

[99] European Parliament, 'Legislative resolution of 8 October 2015 on the proposal for a directive of the European Parliament and of the Council on payment services in the internal market and amending Directives 2002/65/EC, 2013/36/EU and 2009/110/EC and repealing Directive 2007/64/EC', 08.10.2015
[100] Ibid para 27-28
[101] Ibid para 7, 29, 30
[102] Ibid para 53
[103] Ibid para 55
[104] PSD2, art.44,51
[105] Ibid note 116, para.59
[106] PSD2, art.40
[107] PSD2, art.41

Also, as the Directive aims to strengthen the position of the consumers it establishes some new rights. It regulates termination of the payment service on behalf of the user. Art. 9(d) UCPD states that any onerous or disproportionate barriers the trader sets to termination of a contract may amount to an aggressive practice. Art. 55(1) PSD2 ensures a user can terminate the service at any time, unless a notice period has been agreed and, in any case, that period should not exceed one month. Moreover, it states that termination should be in principle free for the users, unless the contract has been in force for less than six months and in case there are charges they should be appropriate.[108] Finally, it ensures that any charges applicable for the service will apply proportionally until the termination of the contract and if they were paid in advance, the user should be reimbursed.[109]

Payment Services Directive 2 lays out specific rules on aggressive practices in relation to termination of a contract, even though they are not identified as such, and thus achieves a higher level of protection. It covers common barriers to termination such as penalties for termination, time limitations and the frustrating practice of continuing to be charged after the termination of the service. It even allows for Member States to go further in introducing measures more favourable to users.[110]

Consumers are protected against additional charges or reductions as if they were not informed about them before the transaction started, they do not have to pay.[111] However, this does not cover aggressive practices, as someone may have been informed about the charge but still had no choice but to accept it in order to conclude the transaction. Especially in cases where such disclosures are made as fine print in lengthy documents with technical language, it would be easy to imagine a case where a consumer was considered informed while in fact having no idea about the charges.[112]

Finally, the Directive also forbids inertia selling, a practice included in number 29 of Annex I of the UCP directive, as a practice that is to be considered unfair in all circumstances, under the heading of aggressive practices. In the PSD2 payment service providers should refrain from sending an unsolicited payment instrument, for example a consumer receiving a pre-approved credit card he never applied for in the mail. This is important also for some vulnerable consumers that may be more likely to fall prey to such practices.

3.6 Payment Accounts Directive

There second Directive on payment services focuses on switching accounts and access to a basic bank account (hereafter Payment Accounts Directive) and was also enacted post-crisis.[113] This Directive has a narrower scope compared to the Payments Services Directive one, as it focuses on two specific issues: switching accounts and ensuring access to a basic payment account. Both of these topics are relevant for this chapter. According to art. 9(d) UCPD, placing onerous or non-contractual barriers to switching between providers can amount to an aggressive practice. This Directive recognises that there are significant barriers in switching payment services providers and that action needs to be taken on a European level. As for access

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[108] PSD2, art.55(2)
[109] PSD2, art.55(4)
[110] PSD2, art 55(6)
[111] PSD2, art. 60(3)
[112] Presentation of information has an impact on how it is processed. See for example: A Tversky and D Kahneman, 'The Framing of Decisions and the Psychology of Choice' [1981] Science <http://www.brainvitge.org/papers/tverski_kahneman.pdf> accessed 24 June 2019.
[113] Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, [2014] OJ L 257/214

to a basic bank account, it highlights the issue of financial exclusion of certain vulnerable consumers that are disadvantaged due to not having access to a basic payment service.[114]
Same as all Directives on consumer protection, Payment Accounts Directive is also motivated by the internal market. The harmonising of rules within the European Union is meant to facilitate the free movement of goods, persons, services and capital, which in turn is meant to increase consumer choice and make services more transparent and of better quality.[115] With regard to payments, the European Commission believes there has already been significant progress in the area, following the introduction of the Payments Directive. (The same is not true of other areas of retail financial services, such as credit where cross-border provision has been minimal).

The Commission highlights the importance of payment services for the development of the internal market. It is important to ensure the universal provision of payment services, especially for ensuring that the more vulnerable consumers are not left behind. The purpose of this Directive is to push forward for a more inclusive economy.[116] Some consumers have been excluded from payment services, either because they are not desirable customers for banks or because there no products suitable for them. The Commission views this exclusion as a barrier to participation in the internal market.

Prior to the introduction of this Directive there have been soft law initiatives to tackle obstacles to switching accounts, namely the Common Principles on Bank Accounts Switching by the European Banking Industry Committee.[117] Moreover, there was a Recommendation by the Commission on the issue of basic bank accounts.[118] Yet, the two initiatives were not particularly successful, making the introduction of the Directive necessary.[119]

This Directive is a positive development to the extent that it places vulnerable consumers in the centre stage and ensures access to one of the most basic financial services, a bank account, to groups that may have been previously excluded. As usual, the justification for this is the development of the internal market and cross-border mobility, seen as key for consumer welfare.

The Directive focuses on the provision of information to consumers in a way that is easier to understand, so that they can compare the different offers, for example via the use of a fee information document accompanied by a glossary of terms.[120]
Emphasis is placed on how to present information and improve transparency so as to facilitate consumers making informed decisions; for example, by standardizing information making it easier to compare offers.[121]

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[114] James F Devlin, 'A Detailed Study of Financial Exclusion in the UK' (2005) 28 Journal of Consumer Policy 75, 76–77.
[115] Dir 2014/92/EU, rec.1
[116] Dir 2014/92/EU, rec.3
[117] European Banking Industry Committee, *Common Principles for Bank Account Switching*, [2008], available online at
http://www.ebic.org/Position%20Papers%20Archive/2008.12.01%20Common%20Principles.pdf#search=bank%20switching (last accessed April 2020)
[118] Commission Recommendation 2011/442/EU of 18 July 2011 on access to a basic payment account, [2011] OJ L 190
[119] Dir 2014/92/EU, rec.8
[120] Dir 2014/92/EU, rec.19
[121] Dir 2014/92/EU, rec.16

Access to a basic bank account may be related to undue influence, since certain vulnerable consumers, such as those mentioned in the Directive (asylum seekers, persons with no permanent address etc.) require access to a payment service but are at the mercy of the provider. Ensuring the right to a basic bank account is a welcome development.

Art.8 refers to packaging other unrelated financial products to the payment account. It states that the consumer should be informed about the possibility to purchase the products separately and what are the costs and fees related to the products if purchased separately. Recital 24 also refers to the tying of products and why it is problematic. The lack of transparency on tying of financial products such as e.g. a current bank account and an insurance product is mentioned and their negative impact on consumers (consumer mobility in particular). The tying of products may be a misleading practice, especially when consumers are either not aware of the tying or are misled as to the benefits of this product for them. However, tying may potentially have an aggressive dimension as well, to the extent that consumers may be pressured to purchase the bundle of products or the bank may exert undue influence to get consumers to accept or not question the tying of products.[122] The remedy offered in the Directive is again focused on the provision of information and does not address the aggressive dimension. It is of course a positive step to require information to be given to consumers as to the possibility to purchase one product without the other, but that may still not be helpful when a consumer has no other viable options or may be in a vulnerable situation and pressured by the bank representative to purchase the bundle of products unaware of the fact that they are unsuitable to their needs.

Rec.35 forbids the exclusion of consumers form a basic bank account on the ground of financial circumstances. This is essentially a provision for the protection of vulnerable consumers. It is worth contrasting the provisions here with those of the Unfair Commercial Practices Directive on vulnerable consumers. Where the UCP Directive adopts the criteria of age, infirmity or credulity for vulnerable consumers, this Directive focuses on financial circumstances as it regulates financial products.[123] Recital 35 provides a non-exhaustive list of factors such as level of income, credit history and employment status. According to the Directive, the Member States also have to ensure that consumers are not discriminated against on the basis of their nationality or place of residence.[124] Another aspect of vulnerability taken into account is whether there is access to the internet or not, and therefore a basic account as defined in the text of the Directive should not be available only online.[125] This discrepancy can be justified by the different focus and objectives of the two directives. The Unfair Commercial Practices Directive does not focus on a specific sector of the economy, while this Directive not only focuses on financial services, but aims to ensure access to one of the most basic financial services for all and especially the vulnerable groups more likely to be excluded.

The Directive also mentions the importance of the behaviour of staff towards the consumers in two ways. The first, ensuring that they are adequately trained is something that is particularly important when dealing with vulnerable consumers, as especially the frontline staff need to be aware of the different needs of vulnerable consumers and how to direct them to the proper channels.[126] For example, it is of no use to have legislation in place ensuring the right to a basic

[122] Rott, 'A Plea for Special Treatment of Financial Services in Unfair Commercial Practices Law' 67.
[123] Dir 2005/29/EC, art.5.3
[124] Dir 2014/92/EU, rec.34
[125] Dir 2014/92/EU, rec.44
[126] Becky Rowe and others, 'Vulnerability Exposed : The Consumer Experience of Vulnerability in Financial Services' (2014) 25.

bank account, if a consumer is denied the bank account because the staff are not aware of the changes in the law or are unsure on how to treat a non-standard customer e.g. a consumer without a permanent address, and do not show the required flexibility. The second is ensuring that conflicts of interest do not have a negative impact on the consumer. It is peculiar that an issue as important as conflict of interest that can lead to a number of unfair practices is only a fleeting mention in the recital of the Directive.[127] A potential conflict of interest may offer an incentive to staff to use unfair practices either by misleading consumers or by pressuring them into purchasing a product unsuitable for them.

As far as switching is concerned, thankfully the Directive is not limited to the disclosure of information required for switching but also regulates other areas. It prohibits the transferring payment service from blocking payments prior to the date specified in the consumer's authorisation.[128] The justification for this is practical, so as the consumer is able to make payments during the switching process without interruption. Still, besides that it also protects the consumer from a scenario where the service provider can put pressure on him to perhaps cancel the transfer procedure as they wouldn't be able to make any payments. Moreover, fees about the switching and financial loss of the consumers are included. If the consumer suffers a loss as a result of the payment service provider's non-compliance to the Directive, then the consumer can ask for a refund.[129] However, in practice it is doubtful whether consumers will be aware of when the requirements of the Directive are not being followed.

4. Concluding Remarks

The analysis of the above Directives reveals that all of them address issues related to aggressive practices, whether that is inertia selling, switching of accounts or unsolicited communications. It is clear that many of these issues are related to an imbalance of power between consumer and trader, especially in the issue of credit intermediaries in the MCD and access to a bank account in the PAD. However, there is a fault in how these issues are addressed. They are treated as problems to be rectified with the provision of information. They recognise that it is better to use simplified, targeted information for the benefit of consumers but do not go beyond that to examine the possibility of aggressive practices. Aggressive commercial practices have a low level of visibility as a term and as a legal concept and this hinders the task of establishing their frequency and treatment by the regulators.

While ensuring that key information is disclosed to consumers and improving the way that it is being presented to them is a positive development, it does not address all the problems that arise in the banking and credit market for consumers. More specifically, it is a response unsuited to aggressive practices. If a consumer is pressured into making a decision it does not matter which information he is presented with as the decision is not made freely. There is the need for legislation to acknowledge that there are factors beyond provision of information that play a part in consumer decision making, and aggressive practices are a part of that.

There is a ray of hope in the two Payment Services Directives which are distinct from the other ones as they pay greater attention to dimensions of aggressive practices and offer solutions beyond information, such as the right to terminate the contract in the case of PSD or safeguards, such as adequate training or prohibition of blocking payments in the PAD. This may be explained by the nature of payment services being seen as more essential than credit and thus,

[127] Dir 2014/92/EU, rec.41
[128] Dir 2014/92/EU, art.10.6
[129] Dir 2014/92/EU, art.13.1

emphasis is placed on access for all consumers. There is a long way to go for banking and credit regulation to effectively address aggressive practices, but payment services may lead the way.