Book Review

Federico Della Negra, *Financial Services Contracts in EU Law* (Oxford: Oxford University Press, 2023) xxv + 311 pp ISBN 978-0192866608

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Consumer finance is increasingly impacted by EU financial markets legislation. Both consumers and retail investors are subject to similar weaknesses – such as behavioural biases and information asymmetries. Arguably, these vulnerabilities arise independently of the type of service being used, be it a consumer loan, a mortgage, a payment or investment service.

Nonetheless, the EU's regulatory approach in these sectors remains highly fragmented. Rules aimed at protecting the users of financial services against market failures and misconduct are often sector-specific. EU law harmonizes different aspects of private law for each type of consumer or retail investment contract, while the remaining matters are left to national private law.

This raises several questions. For instance, to what extent should national judges be guided by the EU's objective of consumer protection when interpreting national private law? More broadly, what private law remedies are available to consumers when neither EU nor national legislation provides clear guidance?

The book 'Financial Services Contracts in EU law' by Dr Federico Della Negra offers essential insights into these central questions.

The volume examines critically how the European Court of Justice (CJEU) interprets classic private law rules in consumer financial transactions: the scope of precontractual information duties, the type of remedy for breach of those duties, the conditions for the validity of contract terms, the effects of invalidation of those terms. These issues are examined chiefly with respect to the Directive on unfair contract terms,[1] the Directive on consumer credit,[2] as well as the PSD II[3] and MIFID II.[4] The discussion thus covers consumer and mortgage loans, as well as payment and investment services contracts.

Structurally, the book is composed of three parts. The first part deals with EU rule-making and illustrates the principles and legal tools with which the EU legislator

1 Dir 1993/13/EEC on unfair contract terms.

2 Dir 2008/48/EC on consumer credit.

3 Dir (EU) 2015/2366 on payment services (so called PSD II).

4 Dir 2014/65/EU on markets in financial instruments (so called MIFID II).

typically regulates financial services contracts. The second part of the book – which is its core – offers a detailed and critical analysis of the CJEU case law on financial services contracts by looking at the Court's rationales and argumentation. The third part provides a normative evaluation of the case law, outlining the role of general principles of EU law within it, and identifying the innovative private law principles that emerge from this body of jurisprudence.

The book brings two main innovations to legal scholarship. It first collects and categorizes a highly complex and fragmented case law. The increase in the accessibility and visibility of the case law will be particularly appreciated by the practice-oriented reader. Systemization is complemented by critical examination. The author clarifies how, in cases where pointy legislative harmonisation is lacking, the CJEU relies markedly on general principles of EU law, such as effectiveness, proportionality and deterrence.

For example, the CJEU leveraged the principle of deterrence to reinforce consumers' rights and remedies in the area of consumer credit. Accordingly, private law remedies such as the compensation of damages are transformed into dissuasive – and not merely compensatory – tools. Further, the CJEU increasingly relies on proportionality to balance consumers' rights and remedies with the freedom of contract of financial services providers, or with general objectives, such as market efficiency.

The book makes an interesting finding on the emerging patterns in the application of certain legal principles. The CJEU seems inclined to rely on the principle of effectiveness in relation to procedural rules, to foster access to justice (e.g. by requiring national courts to conduct an ex officio assessment of unfair terms). Differently, it applies proportionality on substantive private law issues (e.g. the effects of partial invalidity of contracts) to balance the competing interests of consumers and financial services providers.

Building upon such analysis, the book makes its second – and main – scholarly contribution. In fact, the author reveals how the CJEU is re-shaping national private law, and creating new principles of EU private law. While applying private law rules to financial services disputes, the CJEU relies on a heavily sectorial interpretation, typically avoiding analogical or contextual methods of interpretation. For instance, the CJEU has kept separate the reasoning on pure consumer directives from that on investment services legislation such as MIFID II.

Accordingly, the CJEU refrains from openly acknowledging its use of innovative principles. Nonetheless, the author infers them through a detailed analysis of case law. It is thus revealed how similar principles are emerging from the Court's jurisprudence on pre-contractual duties and remedies, fairness and transparency of contract terms, and powers/duties of national courts.

After deriving such innovative principles, the book argues for their explicit cross-sectoral application to increase legal certainty and predictability. In fact, these new principles could be the foundation of a judge-made minimum common denominator to interpret national private laws across the EU. The basis of such contention is that retail, or consumer financial products, irrespective of their nature, are sold as standardised products, without individual negotiation. As a result, consumers find themselves in a structurally imbalanced position in relation to financial service providers.

Naturally, calls for a more consistent interpretation of private law rules across neighbouring financial sectors are hardly a novelty. However, the book advances this view with a solid basis on the CJEU's jurisprudence, pointing out how further consistency would better protect consumers and retail investors, and overcome certain outstanding issues.

First, regulatory segmentation neglects the relative uniformity of the risks to which consumers and retail investors are exposed to, such as behavioural biases and information asymmetries. Also, consumers increasingly rely on financial products which have both a consumer and investment purpose (e.g. foreign currency denominated loans, or unit-linked insurance) especially to hedge against inflation. This market reality undoubtedly casts doubts on any regulatory compartmentalization.

Second, the private enforcement of consumer and retail financial contracts remains heterogeneous across EU Member States. National courts afford very different remedies for similar misconducts (e.g. failure to properly inform a consumer about the risks of a mortgage). Out-of-court dispute resolution mechanisms, as well as collective enforcement mechanisms (including under the recent Directive on representative actions) differ significantly across the EU.[5]

Interestingly, the book stresses that the implications of CJEU judgments go beyond their mere private law dimension. In fact, an adequate enforcement of consumer and retail finance contracts fosters financial stability, since cases of misselling and fraud weaken the confidence of consumers and retail investors in financial markets, and may lead them to withdraw funds from banks and financial intermediaries. Further, the so-called redress costs, namely the cost that banks and intermediaries have to pay due to fines, private law remedies, and court proceedings reflect negatively on their prudential situation, and reputation.

If the case for cross-sectoral consistency is well made, a shortcoming of the book lies in its limited engagement with objections to legal harmonisation. At times, it may still be appropriate to distinguish the type and degree of protection afforded to consumers and retail investors. In particular, on account of the differing objectives of

5 Dir (EU) 2020/1828 on representative actions.

users of financial services in distinct areas such as consumer finance, investment services, insurance, and payment services. An exploration of these divergences could have offered a more nuanced perspective on the advisable degree of harmonisation.

Despite the breadth of material covered, the book maintains an accessible structure and style, making it a valuable resource not only for academics, but also for practitioners engaged in the regulation and litigation of consumer and retail finance.

Ultimately, this book represents a highly valuable contribution to legal scholarship on consumer finance and EU private law. It significantly advances the discussion on the need for more effective harmonisation of private law within the EU, while also shedding light on the practical role that general principles play in this domain.