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The Impact of the Credit Servicing Directive on Regulating Abusive Informal Debt Collection in the European Union

A Step Forward or a Missed Opportunity?

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The impact of the credit servicing directive on regulating abusive informal debt collection in the European Union: A step forward or a missed opportunity?

Contents

Abstract 2
Introduction 2
Primary focus: NPL transfers and ancillary safeguards 5
Removing impediments to NPL transfers 6
Limits and exclusions: no duplication of administrative burdens 7
Reporting obligations 9
Credit servicers and credit service providers: the same, but different? 10
Secondary focus: safeguards for borrowers 13
Direct protection 14
Duty not to outsource performing loans 14
Duty to act in good faith 15
Duty not to engage in unfair behaviour 15
Duty to consider the debtor's financial situation 16
Duty to provide information 19
Indirect general protections 20
Indirect specific protections – gatekeeping 21
Specific protections – separation of funds 25
Specific protections: publicity via registries 26
Specific protections: The issue of costs 27
The chain of liability 28
Enforcement 29
Conclusions 32

Abstract

This article critically evaluates the Directive on Credit Servicers and Credit Purchasers (DCSCP/the Directive)' provisions concerning the regulation of abusive informal debt collection practices in the European Union (EU). Through a normative and comparative analysis, the article discusses the positive and negative aspects of the EU legislator's approach to regulating abusive informal debt collection practices and assesses how this approach will impact consumer financial protection policy at the national level in the upcoming years. For the purposes of this article, abusive informal debt collection practices encompass all methods of private enforcement that a creditor employs for debt recovery that a) do not involve the judiciary or state agents and b) threaten consumers' physical, psychological, or economic wellbeing.

This article finds that while the DCSCP's adoption and upcoming transposition into national law across the Member States should improve consumer financial protection, its lack of clear and detailed guidelines as to what constitutes infringement represents a missed opportunity to tackle the issue of abusive debt collection effectively and adequately within the EU. Moreover, the Directive's enforcement mechanism is more likely to complicate than simplify an already complex web of national approaches and competent bodies.

Introduction

There is no denying that the ghost of the 2008 financial crisis, the recent COVID-19 pandemic, the war in Ukraine, rising inflation, and a foreseen increase in interest rates loom over the European Union (EU) and its financial sector. These economic challenges threaten to exacerbate Europe's long-standing problem of non-performing loans (NPLs). While the volume of European NPLs was EUR 706 billion in 2010, NPLs peaked in 2014 at EUR 1.2 trillion,[1] sending shivers down the spines of European financiers. In July 2017, the Council of the European Union (CEU) announced

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[1] Alessia Pirolo, 'Decade ends with lowest NPL levels on European bank balance sheets since 2010' (*Debtwire*, 13 January 2021) <https://events.debtwire.com/decade-ends-with-lowest-npl-levels-on-european-bank-balance-sheets-since-2010> accessed 22 November 2021.

its Action Plan to tackle NPLs in Europe[2] and urged the European Commission (EC/the Commission) to implement it. In March 2018, the EC presented a package of measures to address the risks of high levels of NPLs in Europe.

While the package made its way through the procedural labyrinth, by June 2019, the levels of NPLs recorded a steady decline, falling to EUR 635 billion.[3] According to the European Central Bank, in the first two quarters of 2020, NPLs decreased further to EUR 588 billion. However, the unknown effects of the COVID-19 pandemic and grave predictions[4] revigorated the EC's efforts. Progress reports indicated that although the total number of NPLs has declined, their amount remained high in some Member States (MS),[5] which caused concerns that another spike in NPLs levels might occur. Thus, in December 2020, the Commission's Communication on tackling NPLs in the aftermath of the COVID-19 pandemic reasserted its commitment to build on the measures presented by the CEU in 2017. The Communication urged the swift adoption of the proposal for a directive on credit servicers, credit purchasers, and collateral recovery (DCSCP/the Directive).[6]

After the Commission's statement, the adoption of the DCSCP gained momentum. The DCSCP was adopted by the Council on 5th November 2021.[7] The final act was published in the Official Journal of the EU on 12.08.2021.[8] With the benefit of hindsight, the timing of the DCSCP could not have been better; it came just before the start of the war in Ukraine, skyrocketing inflation, and a foreseen increase in interest rates, all of which are likely to escalate defaults in (consumer) loans and NPLs levels.

Although concerned with the activity of credit servicers (*i.e.,* debt collectors) and credit purchasers (*i.e.,* debt buyers), the DCSCP contained no measures concerning the regulation of informal debt collection practices (IDCPs), which could turn abusive by a) subjecting consumer-

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[2] Council of the EU, Press Release, 459/17.
[3] Pirolo (fn 1).
[4] Sam Fleming and Jim Brunsden, 'EU banks urged to prepare for bad loans as pandemic hits economy' *Financial Times* (London, 1 November 2020) <https://www.ft.com/content/3c6b4eb0-5b3d-4a37-87e5-d83da8de217d> accessed 22 November 2021.
[5] Council of the EU, 'Strengthening the Banking Union – presidency progress report' (OR. En) 14354/1/19 REV 1, Para 16', 28 November 2019.
[6] Commission (EC), 'Tackling non-performing loans in the aftermath of the COVID-19 pandemic. COM(2020) 822 final. 2020', 16 December 2020.
[7] Council of the EU, 'Voting result, Brussels', (OR. En) 13688/21, 9 November 2021.
[8] Directive (EU) 2021/2167 of the European Parliament and of the Council of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48/EC and 2014/17/EU, OJ L 438, 8.12.2021, p. 1–37.

debtors to violence, harassment, and/or invasion of privacy, b) causing family hardship, c) exposing consumers to public shame, and d) increasing the risk of over-indebtedness.[9] This omission attracted criticism from multiple stakeholders, such as the Financial Services User Group,[10] and Finance Watch.[11] These organizations advocated for the inclusion of high levels of consumer protection from abusive IDCPs in the Directive.

In January 2020, several Members of the EP advanced amendments that directly and extensively addressed the issue of abusive IDCPs.[12] The amendments would have introduced detailed provisions concerning common *de minimis* standards in debt collection, proposing "the provision of evidence for the debt, prior to any collection"; other transparency conditions and mandatory disclosures;[13] the banning of misleading information, harassment of the debtor, stigmatisation of the debtor, or threats;[14] protection of privacy and intimacy; regulation of debt collection costs;[15] and buy-back rights.[16] However, by 28 June 2021, when the compromise text of the DCSCP was adopted, most of the detailed amendments had disappeared. A second round of amendments was proposed in October 2021, during the EP's discussion of the compromise text. The final version – which constitutes the primary focus of this article – became the first document harmonising, to a certain extent, the regulation of abusive IDCPs at the EU level.

As empirical data shows, although widely spread across the EU,[17] abusive IDCPs are regulated by only a handful of MS. A 2020 pan-EU survey revealed that only nine out of 27 EU MS have sector-specific legislation addressing abusive debt recovery. Moreover, the existing national legislation varies significantly in coverage and enforcement.[18] Thus, the first pan-EU document to

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[9] Warren, E, Westbrook, J.L., Porter, K. Pottow, J.A.E., (2014) *The Law of Debtors and Creditors. Text, Cases, and Problems,* 7th edition, Aspen Casebook Series.
[10] The Financial Services User Group, 'Non-performing loans (NPLs) – letter to European Commission', 27 February 2018 <https://ec.europa.eu/info/sites/default/files/fsug-opinions-180227-npls_en.pdf> accessed 23 May 2022.
[11] Finance Watch, 'Non-performing loans plan: EU must protect taxpayers and vulnerable borrowers,' 7 June 2018 <https://www.finance-watch.org/press-release/non-performing-loans-plan-eu-must-protect-taxpayers-and-vulnerable-borrowers/> accessed 23 May 2022.
[12] European Parliament (EP), Committee on economic and monetary affairs, 'Amendments 204-468' (Draft Report), 2018/0063A (COD), 07 January 2020.
[13] Id at Amendments 336, 337, 350.
[14] Id at Amendments 336, 337, 350.
[15] Id at Amendment 350.
[16] Id at Amendment 338.
[17] Olivier Jérusalmy, Paul Fox and Nicolas Hercelin, 'Is the Human Dignity of Individual Debtors at Risk?' Finance Watch, 2020, p 33-37; Cătălin Gabriel Stănescu, 'Regulation of abusive debt collection practices in the EU Member States: An empirical account', [2021] J Consum Policy, 44, p. 194.
[18] Stănescu (fn 17), 197-207.

harmonise the regulation of abusive IDCPs is a welcome step forward, especially for the MS that lacked sector-specific protections. However, a closer analysis of its provisions reveals that the Directive falls short in several areas that may undermine its efficacy.

This article critically evaluates how the design of the DCSCP, directly and indirectly, affects consumer financial protection in the EU. By consumer financial protection, the article refers specifically to the regulation of abusive IDCPs and the consumers' expectation and right not to be subjected to behaviour that might negatively impact their physical, psychological, and economic well-being or undermines their trust in the financial or justice system. The analysis is normative (examining black letter and case law) and comparative (juxtaposing the current text and rejected amendments to the Directive (secondary EU legislation) with existing national sector-specific laws (primary and secondary national law of the MS). The goal is to identify both the positive and negative aspects of the EU legislator's approach to regulating IDCPs and to assess how this approach will impact consumer financial protection policy at the national level.

The article consists of four parts, each addressing a specific topic. First, it explores the primary focus of the Directive, which is to remove impediments and introduce safeguards to foster NPL transfers, and examines how this focus impacts consumer financial protection. Second, it discusses the active subjects of the Directive, focusing on the distinction between credit servicers and credit service providers. Third, it analyses the borrowers' direct and indirect safeguards against abusive IDCPs. Fourth, it addresses the issues related to the enforcement of consumer financial protection rules against IDCPs under the Directive's framework. The conclusion section summarises the findings and presents policy-making considerations.

Primary focus: NPL transfers and ancillary safeguards

It should be made clear from the outset that the Directive's goal is not to be a consumer financial protection instrument. According to the Directive (Recital 6), "strong and effective" consumer protection is only *ancillary* to implementing "a holistic strategy to enforce NPLs." In other words, the Directive's primary goal is to foster NPL transfers, while regulating informal debt collection is secondary.

The DCSCP seeks to enable credit institutions to better deal with NPLs by removing administrative hurdles and any other barriers to such activity. When institutions face large build-ups

of NPLs and lack either the staff or the expertise to service them properly, the Directive allows them to outsource or transfer the NPLs to a specialised debt collector that has the "risk appetite" and "expertise" to manage them (Recital 7). As a result, the Directive aims to foster secondary NPL markets by a) removing impediments to the transfer of NPLs, b) laying down safeguards for the transfer of NPLs to credit purchasers, and c) safeguarding borrowers' rights (Recital 9). The Directive plans to achieve these goals by establishing "a Union-wide framework for purchasers and servicers […] whereby credit servicers should obtain authorisation from and be subject to the supervision of home MS's competent authorities" (Recital 9). Given that the EU legislator intends to implement this trifecta of measures through the EU-wide harmonisation of authorisation requirements, each of the three elements of the Directive's approach is examined in more detail below.

Removing impediments to NPL transfers

One of the main barriers to NPL markets appears to be the lack of a dedicated and coherent regulatory and supervisory regime for credit purchasers and servicers, coupled with divergent national rules (Recital 10). Regarding the former, the EU acknowledges the absence of "common Union standards" for regulating credit servicers, particularly the regulation of debt collection and the limited number of MS that regulate credit servicing activities (Recital 13). This is a mere recognition of the current state of the art. Recent empirical studies have documented the lack of pan-EU or even MS legislation and the reasons for implementing sectorial regulation at the EU level.[19]

The EU legislator also cites divergent rules concerning credit purchasers. The most significant inconsistency lies in the requirements to obtain authorisation as a credit institution. In the legislator's opinion, the lack of harmonised rules increases compliance costs (Recital 10), limits competition (Recitals 10 and 15), and causes market inefficiencies (low volumes of traded NPLs and low prices for NPL portfolios; Recitals 11 and 15). Therefore, removing these barriers and building a pan-EU sectorial framework both constitutes effective policy and imbues the problem with an EU dimension, justifying EU intervention (Recital 16).

[19] Jérusalmy, et al. (fn 17), 39-41, Stănescu, (fn 17), 213-214.

The Directive acknowledges and integrates the existing Court of Justice of the European Union (CJEU) case law impacting the activity of debt collectors, namely *Verein für Konsumenteninformation v. INKO, Inkasso GmbH*, C-127/15 (INKO)[20], and consequently, the effects of existent EU and national legislation regarding one of the credit servicing activities: renegotiating the terms and conditions of a credit agreement. To be more precise, INKO held that a credit servicer engaging in renegotiation might qualify as a credit provider under Consumer Credit Directive (CCD)[21] (unless it acts solely in an ancillary capacity) and, thus, must observe the requirements therein. [22]

Ultimately, MS that have sectorial legislation that is equivalent to, or stricter than the rules set up by the DCSCP for credit servicing activities, must automatically recognise existing entities as authorised credit servicers, enabling them to continue their activity unencumbered by the transposition of the Directive's rules (Recital 25 and Art 32(2)). For all others, the Directive establishes a period of six months after the transposition for adapting to the new requirements (Recital 24 and Art 32(2)).

Limits and exclusions: no duplication of administrative burdens

As it is mainly concerned with market functionality and the removal of barriers, the DCSCP provides several limits and exclusions from its ambit. Significant attention is given to the potential unnecessary duplication of entry requirements (*i.e.* authorisation) and compliance costs. Unfortunately, this approach creates an inconsistent regulatory system and leaves space for loopholes that will need to be addressed at the MS level, undermining harmonisation efforts.

The Directive (Art 2(5)) lists several categories that are excluded from its scope: a) Union credit institutions that undertake credit servicing activities as part of their regular business, b) non-credit institutions that are supervised by a competent authority of an MS under the CCD or the Consumer Mortgage Directive (CMD),[23] and undertake credit servicing activities, in that MS for credit granted to consumers as part of their normal business, c) alternative investment fund

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[20] C-127/15 *Verein für Konsumenteninformation v. INKO, Inkasso GmbH*, ECLI:EU:C:2016:934.
[21] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133, 22 May 2008.
[22] INKO, *supra* fn 23, Paras 44–48.
[23] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, OJ L 60, 28 February 2014.

managers, management companies, and investment companies (provided that an investment company has not designated a management company), and d) professions that undertake ancillary activities similar to credit servicing activities as part of their profession, *e.g*., notaries, lawyers, and bailiffs. What all the categories have in common is the separation of regulation and supervision. Due to this separation, categories a) to c) are excluded from the scope of the DCSCP, while category d) could be exempted by the MS (Recital 23).

The concern for avoiding the duplication of administrative burdens is not something new brought by the Directive, as it already appears in the existing national sectorial laws addressing informal debt collection, *i.e.*, in Belgium, Denmark, Finland, and Sweden.[24]

However, the Directive covers not only procedural and institutional matters, but also substantive ones that regulate the behaviour of credit servicers and credit purchasers. Unlike national laws, which clearly specify that behavioural provisions are mandatory for all categories that are exempt from the duplication of administrative requirements, the Directive's wording ("are not covered," "should also not fall within the scope") indicates a total exclusion from its scope. Since they are completely excluded, the Directive's categories would not be bound by behavioural rules towards borrowers either, which is a significant loophole that MS should solve at the national level.

Moreover, each category has its own supervisory body with its own rules, which creates an inconsistent and largely inefficient system. Empirical data gathered from the MS that already have sectorial regulation in place reveals that these institutions have very rarely taken measures against their constituents; the exceptions are Greece[25] and Denmark.[26] Instead, the institutions expect other

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[24] See Art 2, Section 2 of the Belgian Law concerning amicable recovery of consumer debt (20 December 2002) corroborated with the Excerpt from the Constitutional Court's Decision no 99/16.09.2010; Art 1, para 2, of consolidated Danish Law no 1018/19.09.2014 concerning debt recovery. See also the positions taken in the Danish Parliament by Soren Sondergaard <http://webarkiv.ft.dk/Samling/20001/salen/L208_BEH1_79_4_6.htm> accessed 24 May 2022 or Karsten Nonbo <http://webarkiv.ft.dk/Samling/20001/salen/L208_BEH1_79_4_8.htm> accessed 24 May 2022); the Finnish Government's proposal to Parliament for a law on the registration of debt collection agencies and certain related acts (HE 206/2017 vp), Detailed Justification, Chapter 1, Section 1.1., Subsection 2; or Information concerning the application for a debt collection permit in Sweden, <https://www.datainspektionen.se/lagar--regler/inkassolagen/ansok-om-inkassotillstand/> accessed 24 May 2022.

[25] Eleni Kaprou, 'Abusive informal debt collection practices in Greece' in Cătălin Gabriel Stănescu (ed), *Regulation of debt collection in Europe: Understanding informal debt collection practices,* (Routledge 2022)

[26] Hanne Christensen, and Vibeke Ø. Tarpgaard, 'God advokatskik i inkassosager' (Good Lawyer Practice in Debt Collection), *Advokaten*, 4/2013 <http://viden.advokatsamfundet.dk/sager/387/?get_pdf=1> accessed 24 May 2022, Astrid Kastberg Petersen, 'God advokatskik i inkassosager' (Good Lawyer Practice in Debt Collection), *Advokaten*,

bodies to act in most cases.[27] In addition, the multitude of institutional and supervisory frameworks only increases the burden placed on the aggrieved consumer, deterring them from acting. As shown later, the Directive's approach to enforcement exacerbates this effect with unnecessary complications and jurisdictional allocations.

The avoidance of duplication is also mentioned concerning reporting (see next subsection). Thus, while credit institutions are supposed to provide potential credit purchasers with transparency data templates to facilitate due diligence and evaluations, the Directive explicitly excludes securitisation transactions from such obligations, as they already have mandatory templates (Recital 38). Indeed, the DCSCP states that "any double reporting as a result of this Directive should be avoided" (Recital 38).

Reporting obligations

The Directive imposes a "reporting obligation" on credit institutions regarding transfers of non-performing credit agreements. The reporting must include, at a minimum, a) the aggregate outstanding balance of the credit portfolios, b) the number and size of credits included, and c) whether the transfer includes credit agreements concluded with consumers. These reports must be submitted to the credit institution's competent authority and the competent authorities of the host MS on a biannual basis. However, if the competent authorities deem it necessary, for instance, due to a high number of transactions during a crisis period, they can require that the information be provided every quarter (Recital 37). Moreover, for each credit portfolio transferred in a single transaction, the information must include the legal entity identifier (LEI) of the credit purchaser or its representative (Recital 37).

The purpose of the obligation is to create "harmonized and effective monitoring of the transfer of credit agreements within the Union" (Recital 37). For this reason, the competent authorities of the host MS are obliged to transmit the information to the authorities competent to supervise the credit purchaser. This provision must be considered part of the Union's attempts to tackle money laundering and terrorism financing. Nevertheless, such information should also enable MS to combat tax

2/2020 <https://www.advokatsamfundet.dk/nyheder-medier/tidligere-artikler/2020/advokaten-2/2020-advokaten-2-god-advokatskik-i-inkassosager/> accessed 24 May 2022.

[27] Stănescu (fn 17), 384.

avoidance and tax evasion via networks of contracts and assignments throughout the Union and its tax havens.[28]

The industry has criticised this obligation as burdensome and of dubious value to the supervisors.[29] The criticism is not entirely without merit, as it is still not altogether clear how competent authorities will use this information. However, the requirement already exists in some MS that regulate informal debt collection, such as Romania, although it should be mentioned that the figures reported to the supervisory agency and those publicly reported by the debt collectors' association do not always match.

Nevertheless, the measure cannot be expected to have a significant impact. The Directive states that to comply with the principle of proportionality, competent authorities should consider the information already available to them by other means to avoid duplication. In addition, the obligation of the authorities to transmit information to other authorities competent to supervise the credit purchaser might prove cumbersome and time-consuming, affecting their available resources.

Credit servicers and credit service providers: the same, but different?

Before tackling the consumer financial protection measures contained by the DCSCP, it is necessary to establish what 'credit servicing' is and how it relates to informal debt collection. The DCSCP (Art 3(9) (a)–(d)) defines "credit servicing activities" as one or more of a wide range of activities, including:

a) "*collecting or recovering* from the borrower, in accordance to national law, any payments due related to a creditor's rights under a credit agreement or to a credit agreement itself,"
b) "*renegotiating* with the borrower, in accordance with national law, any terms and conditions related to a creditor's rights under a credit agreement, or of the credit agreement itself, in line with the instructions given by the credit purchaser, where the credit servicer is not a credit intermediary" under the CCD or the CMD,

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[28] Cătălin Gabriel Stănescu and Camelia Bogdan, 'Regulatory arbitrage and non-judicial debt collection in Central and Eastern Europe: Tax sheltering and potential money laundering' [2021] *Accounting, Economics, and Law: A Convivium*, 11(2), 119-160.
[29] For instance, Credit Services Association, Cabot Credit Management Group, Federation of European National Collection Associations. All feedback received is available <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1446-Development-of-secondary-markets-for-non-performing-loans/feedback_en?p_id=190848> accessed 30 May 2022.

c) "*administering any complaints* relating to a creditor's rights under a credit agreement or to the credit agreement itself," and
d) "*informing* the borrower of any changes in interest rates or charges or of any payments due related to a creditor's rights under a credit agreement or to the credit agreement itself."

To begin with the obvious, in the view of the EU legislator, credit servicing appears to be a slightly broader concept than regular informal debt collection. The latter generally consists of the first two listed activities (*i.e.,* debt recovery and debt renegotiation), and requires little additional explanation. However, the last two activities are less clear, as no definitions are available in the Directive. Clues as to their meaning must, therefore, be sought in national sectorial legislation.

Administering complaints concerning a creditor's rights suggests the activity of "debt validation," which involves verifying and ascertaining that the creditor's pretensions are valid and correct or that the pursued borrower is the right one. This process could occur after a borrower challenges the title upon which the credit servicer's activities are based. The most important implication of such an interpretation is that the DCSCP imposes an obligation to fact-check as part of the activities of credit servicers, even if this obligation is only enforced following a complaint.

In this respect, the Directive is less demanding than some MS laws (*i.e.* Finland), which ban any efforts to collect non-verified debts. Moreover, the DCSCP does not specify any procedural steps or penalties for failing to observe this obligation, leaving the task to the MS.

Informing borrowers about changes in interest rates or charges could also be read in multiple ways. *Prima facie*, the provision would suggest a duty to notify borrowers concerning their obligations post-default, especially in cases when default would impose additional charges (debt collection fees) or changes in interest rates (as a penalty for default). Under this interpretation, the obligation would be closely linked to that of administering complaints relating to creditors' rights, such as in cases where borrowers challenge the correctness of the solicited amount. Nevertheless, the provision might simply reflect the different credit servicing and informal debt-collection approaches at the MS level and seek a more comprehensive coverage. A notable example is Greece,

where the activity of third-party debt collectors is "limited" to informing consumers of their outstanding obligations and renegotiating their agreements.[30]

Quite puzzling is the EU legislator's choice to introduce two provider categories: credit servicers proper and credit service providers. Credit servicers appear in the title of the DCSCP and are one of the two named subjects of the Directive (Art 3(8)), defined as

> a legal person that, in the course of its business, manages and enforces the rights and obligations related to a creditor's rights under a non-performing credit agreement, or to the non-performing credit agreement itself, on behalf of a credit purchaser, and carries out at least one or more credit servicing activities.

In contrast, a credit service provider is "a third party used by a credit servicer to perform any of the credit servicing activities" (Art 3(7)).

The choice to introduce two categories is hard to justify, since ultimately, the services are the same: performing "any of the credit servicing activities." It is also difficult to understand the distinction between a servicer and a service provider. Nevertheless, some differences can be noted. A credit servicer must be a legal person acting in the course of their business. This condition does not seem to affect credit service providers, which are referred to more generally as "third parties". The term encompasses both legal and natural persons who may or may not be acting in the course of their business. The latter category is, therefore, broader than the former. At the same time, although both categories act on behalf of others, credit servicers act on behalf of credit purchasers, while credit service providers act on behalf of the credit servicer. In fact, the Directive (Recital 31) refers to credit service providers in the context of "outsourcing credit activities," which implies that credit servicers could delegate some operations (though not all at once) to credit service providers. However, the same Recital clarifies that such outsourcing would not insulate credit servicers from liability and that they should thus exercise due care in choosing their subcontractors.

These differences suggest that, although linguistically misguided, the EU legislator's two categories represent an attempt to bring all credit servicing entities and their personnel into the DCSCP's ambit, whatever their form ("used by a credit servicer"). This mechanism ensures that legal entities will not circumvent their obligations by subcontracting to natural persons.

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[30] Law 3758/2009 Εταιρείες Ενημέρωσης οφειλετών για ληξιπρόθεσμες απαιτήσεις και άλλες διατάξεις, ΦΕΚ Α' 68/05-05-2009, Art 3, pct 3.

The provision is critical since national debt collection laws vary significantly in their personnel coverage and in the extent to which they allow natural persons to engage in debt collection activities on their own or on behalf of others. From the nine MS that regulated IDCPs, Finland, Greece, Germany, and Sweden expressly require proof of professional training and previous professional practice and evidence of theoretical and practical expertise. No such requirements were identified in Belgium, Denmark, Latvia, and Romania while the new proposal in the Netherlands makes professional training a matter of self-regulation. However, most MS require a clean police record.

Although both legal and natural persons are covered by the Directive, MS are not obliged to allow natural persons to act as debt collectors, and natural persons do not benefit from the passport rule (Recital 17 and Art 17(4)). This is a recognition of the current differences at the MS level. From the nine MS that regulate IDCPs, Greece, Germany, and Romania do not allow natural persons to engage in debt collection activities, while Belgium, Denmark, Finland, Latvia, and Sweden do. The new proposal in the Netherlands will also allow natural persons to undertake informal debt collection activities.

The above indicates that the two categories are not entirely the same despite a partial overlap in activities. Although somewhat clumsy, the EU legislator's distinction between the two categories is an attempt to extend and clarify who falls within the ambit of the law.

Secondary focus: safeguards for borrowers

As mentioned from the outset, the Directive was not intended as a consumer financial protection instrument. Under the original 2018 proposal, the DCSCP provided no safeguards for borrowers other than the indirect ones resulting from the authorisation procedure or national law. As a result, such safeguards were kept to an absolute minimum, merely recognising existing protections without additions or a dedicated cause of action to fend off potential abuse. Suffice it to say that at the moment when the Directive was brought to public attention, borrower protections were not part of the plan.

This attracted the rightful criticism of consumer organizations and caught the attention of MEPs. The 2020 proposed Amendments sought to rectify the situation by providing a detailed list

of banned abusive IDCPs,[31] which financial institutions and legal practitioners immediately questioned for lacking "empirical" backing.[32] The compromise text gave some additional recognition to borrower protection but removed the detailed amendments proposed by the EP. The final approach to borrower safeguards and consumer financial protection is, therefore, a mixture of direct and indirect measures, many of which remain to be defined by national law. This creates the risk of a divergent legal framework.

Direct protection

Direct protection stems from several duties incumbent on credit servicers, credit service providers and/or credit purchasers. Each of them is analysed in detail below.

Duty not to outsource performing loans

The first direct protection stems from the DCSCP's scope, which covers only credit purchasers that acquire non-performing credit agreements (Recital 11 and Art 1(b)); unless the agreement becomes performing again during recovery (Recital 12). The current wording is somewhat misleading, as one could read Recital 11 to mean that the Directive does not cover credit purchasers of performing loans. In that case, borrowers would be deprived of protection.

However, the original intent was only to limit the potential risks stemming from the sale of performing credits, not to ban such deals.[33] Such a ban would not only give rise to speculative and abusive behaviour, but would also remove the safeguards arising from the institution's status (*i.e.* supervision and prudential rules). Thus, the DCSCP recognises the right of MS to impose (additional) restrictions that would preclude the transfer of NPLs not terminated under national law that are past due or less than 90 days from being past due to non-regulated creditors. The task of carefully designing such additional rules is a great responsibility for the MS. It turns transposition into a daunting mission for which the two years envisioned for implementation might not suffice.

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[31] EP (fn 12).
[32] Michael Huertas and Holger Schelling, 'European Union: The EU's new credit servicers directive – Where are we now' *Mondaq*, 19 March 2020 <https://www.mondaq.com/germany/dodd-frank-consumerprotection-act/904974/the-eu39s-new-credit-servicers-directive-where-are-we-now> accessed 20 December 2020.
[33] Proposal for a Directive on credit servicers, credit purchasers and the recovery of collateral, Explanatory Memorandum, Brussels, 14 March 2018, COM(2018) 135 final, p. 4.

Duty to act in good faith

Direct protection comes in the form of both *positive* and *negative* obligations. To illustrate the former, under the DCSCP, credit servicers and credit purchasers must "always act in good faith," "treat borrowers fairly," and "respect their privacy." Prior to the first debt collection and whenever solicited by borrowers, they should "provide information to borrowers on the transfer that took place, the identification and contact details of the credit servicers or credit purchasers, and information on the amounts due, plus a statement to the effect that all relevant Union and national law continues to apply" (Recital 20 and Art 10(1) (a) and (c)).

None of the above terms – "good faith," "fairly," "respect of privacy," or "due consideration for the financial situation" – are defined by the DCSCP. Instead, they will have to be determined at the national level or extracted from existing EU legislation (such as Arts 7 and 8 of the EU Charter of Fundamental Rights,[34] Unfair Commercial Practices Directive (UCPD),[35] Art 6(1) of General Data Protection Regulation (GDPR),[36] respectively; Recital 27 and Art 6(6) of the CCD[37] or Recital 48 and Art 16(1) of CMD[38]).

Duty not to engage in unfair behaviour

Credit purchasers and servicers must not "harass or give misleading information to borrowers" (Recital 20 and Art 10(1)(d)). Although negative obligations, these are worded as a positive duty to treat debtors fairly. The ban on engaging in harassment and misleading information is linked to the UCPD, although the two do not overlap completely. The EU legislator stated that the DCSCP is "without prejudice", concerning the protection of consumers guaranteed by the UCPD (Recital 52 and Art 10(4)). The latter protections prohibit unfair commercial practices carried out during the enforcement of a contract in which a consumer is

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[34] EU Charter of Fundamental Rights, Art 7 and 8.

[35] 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 ('Unfair Commercial Practices Directive') (UCPD), OJ L 149, 11.6.2005, p. 22–39. For details, see EC, 'Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market', C/2021/9320, OJ C 526, 29 December 2021, p. 1–129, Section 2.1.

[36] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (GDPR), OJ L 119, 4.5.2016, p. 1–88, Art 6(1).

[37] CCD, Recital 27.

[38] CMD, Recital 48 and Art 16 (1).

> misled as to the consumer's rights and obligations or is subject to harassment, coercion or under the influence, including in terms of timing, location, nature or persistence of the enforcement actions, in terms of the use of threatening or abusive language or behaviour or in terms of threats to take any action that cannot legally be taken." (Recital 21)

This would seem to be a duplication of negative obligations concerning credit servicers and credit purchasers, which raises the question of the precise relationship between the DCSCP and the UCPD.

I posit that the former constitutes *lex generalis* and the latter *lex specialis* for several reasons. First, the DCSCP aims to protect all borrowers, whether they qualify as consumers or not, while the UCPD is a pure consumer protection instrument. Second, the DCSCP is a sectorial instrument that aims to *catch all* credit purchasing and servicing activities; this goes beyond the specific (yet limited) protections of the UCPD, whose application to debt collection is relatively marginal.[39] Third, the DCSCP also regulates the authorisation of credit purchasers and servicers, thus enabling national supervisory authorities with gatekeeping and constant monitoring powers beyond those established by the UCPD.

Finally, based on the corroborated provisions of the UCPD (Art 3(4) and Recital 10), the UCPD has the character of *lex generalis* in relation to other EU legislation. A provision will prevail over the UCPD if three cumulative conditions are met: 1) the provision has the status of EU law, 2) it regulates a specific aspect of commercial practices, and 3) there is a conflict between the two provisions or the content of the other EU law provision overlaps with the content of the relevant UCPD provision (*e.g.* by regulating the conduct at stake in a more detailed manner or by applying to a specific sector). The mentioned stipulations clarify that the UCPD only complements other EU legislation regulating specific aspects of unfair commercial practices and works only as a "safety net" by filling the existing gaps.[40]

Duty to consider the debtor's financial situation

The obligation to "act fairly" is also restated in connection with "due consideration for the borrowers' financial situation" (Recitals 28 and 32 and Art 5(1)(f)). A potential hint regarding the "due consideration for financial situation" of consumers stems from the Directive's requirement that

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[39] Catalin Gabriel Stănescu, 'Is the unfair commercial practices directive fit to effectively tackle abusive debt collection?' [2020] *Journal of European Consumer and Market Law*, 9(6), 247.
[40] EC (fn 35), Subsection 1.2.1.

creditors implement “adequate policies and procedures” and make “efforts to exercise, where appropriate, reasonable forbearance before foreclosure proceedings are initiated” per European Banking Authority (EBA) Guidelines (Recital 56). The DCSCP lists some factors to be considered in the decision concerning forbearance measures: a) individual circumstances of the consumer, b) the consumer’s interests and rights, and c) the consumer’s ability to repay the credit, especially where the credit is secured by residential immovable property that is also the consumer’s primary residence.

Based on the experience of MS and the EU with vulnerable consumers, the individual circumstances could refer, among others, to the consumers’ age, health, social or employment status.[41] The consumers’ interests and rights might be a new reference to their legitimate expectations for physical, psychological, and economic well-being, implying freedom from abuse, unnecessary exposure to public shaming, and disproportionate consequences. Some MS with sectorial IDCP legislation have specific rules banning the collection of payment from minors[42] or collection that results in unreasonable or unnecessary costs or inconvenience for the debtor.[43]

Finally, the consumer’s ability to repay the credit could be considered to distinguish between recalcitrant debtors (who could repay but do not) and unfortunate debtors (who would repay but cannot). Given the Directive’s precise reference to the CCD and CMD, one should read this factor in conjunction with the creditworthiness assessment. Thus, if either the assessment was incorrect or the elements that justified a positive assessment have changed (*i.e.,* the consumer has lost their job, become the victim of an accident, fallen ill, *etc.*), the creditor should consider forbearance measures and even share the non-payment risk.

The Directive defines “forbearance” to mean certain concessions to the consumer and lists several of them. However, according to its wording, it is not an exhaustive enumeration, and MS are free to provide for additional ones: 1) total or partial refinancing or 2) modification of the current terms, including, among others, a) an extension of its term, b) a change of the type of credit agreement, c) a deferral of payment of all or part of the instalment payments for a period, d) a

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[41] EC, ‘Consumer vulnerability across key markets in the European Union’ Final Report, January 2016 <https://ec.europa.eu/info/sites/info/files/consumers-approved-report_en.pdf> accessed 25 June 2020.
[42] The Finnish Consumer Ombudsman’s Guidelines – Good Practice in Consumer Debt Collection (2014), Section 2.9.
[43] Ibid, Section 2.10 corroborated with the Finnish Debt Collection Act, Section 4 (2). A similar provision in found in the Swedish Debt Collection Act (1974:182), Section 4.

change in interest rate, e) an offer of a payment holiday, f) partial repayments; g) currency conversions, and h) partial forgiveness and debt consolidation (Recital 56 and Art 27(2) or Art 28(2)).

Specific measures are mentioned for deficiency payments that remain after foreclosure. In such cases, MS are to ensure the protection of minimum living conditions and implement measures to facilitate debt repayment while avoiding long-term over-indebtedness (Recital 56). Since the deficiency payments are directly related to the price obtained for the residential immovable property at foreclosure, the Directive recommends that "creditors take reasonable steps to obtain the best-efforts price for the foreclosed residential immovable property in the context of market conditions" (Recital 56). Although this provision leaves enough room for manoeuvre for creditors, it mirrors the "commercially reasonable" rule from the Uniform Commercial Code (UCC) Article 9 concerning the disposal of repossessed movable property.[44] Such a rule also exists in the New Civil Code of Romania (NCCR) (Art 2445), which was heavily influenced by UCC Article 9.

The issue, however, is that the Directive provides no guidance about enforcing this provision or the consequences of non-compliance. Based on the two examples mentioned, an appropriate solution would be to provide criteria and sanctions for breaches of the obligation to obtain the best price.[45] These sanctions could be either monetary compensations payable directly to the debtor or discharges of the debt (in whole or part). For instance, Art 2475 of the NCCR states that in case of a breach, the creditor will pay the debtor a compensation amounting to one-third of the value of the foreclosed goods or equal to the difference between the obtained price and the value of the foreclosed goods (whichever is larger). In addition, a breaching creditor loses the right to any deficiency payments that remain uncovered after the sale of the foreclosed goods.

At the same time, MS are encouraged to permit situations where parties agree to transfer the security to the creditor in full compensation for the credit – *datio in solutum* (strict foreclosure). Although this provision is another reflection of the UCC Article 9, it does not mention any protection for consumers who have built equity into the mortgaged asset to ensure that they do not end up on the wrong side of the bargain. According to UCC Section 9-620 (e) and 9-624, if the

[44] Uniform Commercial Code (UCC), Section 9-610 (a) and (b).

[45] New Civil Code of Romania (NCCR), Art 2446 describes what is meant by "commercially reasonable sale" and sets criteria that can be used by courts in evaluating claims of unreasonableness.

debtor has paid at least 60% of the debt, the creditor may not use strict foreclosure unless the debtor signs a statement after default renouncing their right to bar strict foreclosure and to force a sale. A consumer who refuses to sign such a statement would force the secured creditor to sell the collateral. Any failure to sell the goods within 90 days, in good faith and in a commercially reasonable manner, would make the creditor liable to the consumer.

As noble as these forbearance measures may sound, they prove problematic for two main reasons. First, forbearance measures are mostly absent at the national level, and MS must ensure that "appropriate" ones will be implemented. As mentioned, MS enjoy the freedom to establish additional measures, coupled with the possibility of removing some of the Directive's provisions. This poses the risk that forbearance measures will vary among MS, creating further incentives for forum shopping. Second, according to recent empirical research, forbearance measures were not given proper attention and remain unused, even in MS, where they exist.[46]

Duty to provide information

The obligation to provide information takes two forms. On the one hand, credit purchasers and servicers cannot begin debt collection activities without providing the borrower with a list of *de minimis* information: 1) their assignment title, 2) their contact details, 3) the amount due, and 4) a mandatory disclaimer. On the other hand, there is an additional obligation to provide information to borrowers *whenever* they request it. Providing mandatory information to borrowers (especially consumers) reflects the propensity of the EU legislator for the *information paradigm* via mandatory disclosures. This should help the borrower make informed decisions about repaying the solicited debt. To that end, given the further negative obligation to refrain from misleading information, the information provided should be accurate and correct. This adds a positive obligation for credit purchasers and servicers: to exercise due diligence in assessing and validating the credit information. All these obligations should be mentioned explicitly in the transposition instruments to avoid ambiguity.

The Directive's wording – "in advance of the first debt collection" – suggests that submitting the initial information to the borrower might be a *sine qua non* condition of engaging in debt

[46] Finance Watch, 'Tackling causes of over-indebtedness in the EU consumer credit market. An in-depth study of the key topics that need to be addressed by the Consumer Credit Directive Review', 2022, <https://www.finance-watch.org/wp-content/uploads/2022/03/CDD-consumer-credit-directive-rootcause-overindebtedness.pdf> accessed 25 May 2022.

collection. However, it is less clear what consequences arise if such information is not provided. Potential consequences and sanctions will have to be established at the national level. Other issues and ambiguities may stem from borrowers requesting such information "whenever" they wish. First, the DCSCP does not distinguish between the preliminary information, and the information borrowers can request during the debt collection process. Is it the same information, or can the borrower request additional data? Will this information be provided for free, or will it be against payment?

Moreover, "whenever" removes any limitations concerning the timing or number of requests. Can the borrower solicit data only if it was not provided before debt collection? This would undermine the *sine qua non* character of the prior information. However, should the borrower request such data every day, it could amount to reverse abusive behaviour by placing an enormous burden on the credit purchaser or servicer. The most logical interpretation would be to allow the borrower to solicit and receive *updated* information concerning the amounts due after (each) payment or following their contestation of the claimed amount or debtor status. This right can be derived from the obligation set out in the Directive that borrowers are provided with evidence of their repayment and the discharge of their debt on paper or any other durable medium (Art 6(2)(d)). Once again, it is of utmost importance to address all these matters at the national level during transposition via careful regulatory design.

Indirect general protections

Since the DCSCP is not primarily a consumer protection instrument, most protections are indirect. These can be classified into general protections, framed in broad terms, and specific protections, tackling matters such as personnel selection, combating the grey economy, or access to personal data.

Concerning the general protections, according to the Directive, consumer-borrowers retain all existing rights and protections under EU law. These include the right to a fair and public hearing and the possibility of being advised, defended, or represented by a lawyer free of charge, as provided by the Charter of Fundamental Rights of the EU (Recital 22). Both rights are of fundamental importance. The first ensures *ex-post* judicial review of debt collection activities. The second ensures *effective access to justice* for all borrowers, especially those lacking sufficient resources. The possibility of obtaining legal assistance could, if adequately implemented, constitute an empowering incentive for private action by aggrieved borrowers (mainly consumer debtors)

against abusive credit servicers. However, it is unclear whether borrowers will be afforded this possibility under the Directive, and details will likely depend on the transposition into national law.

Both creditors and their representatives must ensure that consumer rights are protected (Recital 19). One of these rights stems from consumer protection measures adopted under Recital 24 of CCD and Recital 44 of CMD. It refers to situations in which credit purchasers qualify as creditors, subjecting them to the specific obligations set out there and the general regulation of creditors to be supervised by an independent body or authority (Art 20 of CCD and Art 35 of CMD).

The Directive also introduces a "general principle" of *no harm*. It states that borrowers cannot be worse off following the transfer of their credit agreement from a credit institution to a credit purchaser, even in cases where the transfer of the credit agreement takes the form of a novation rather than an assignment (Recitals 52 and 55). The *no-harm* principle is restated on several occasions throughout the Directive and the Action Plan, signalling a solid stance of the EU legislator. Moreover, the Directive provides that MS can apply stricter provisions to protect borrowers, though it fails to give any specific examples.

Indirect specific protections – gatekeeping

Indirect protection also stems from the Directive's gatekeeping rules, which address the prudential concerns associated with credit servicers.

Clean criminal record

The DCSCP states that "to avoid a reduction in borrower protection" and "to promote trust," the management or administrative organ of credit servicers must a) have a clean police record in relation to relevant criminal offences and b) not be subject to an insolvency procedure nor have previously been declared bankrupt (Recital 27 and Art 5(1)(b)(i) and (iv)). The Directive contains a non-exclusive list of relevant crimes, including crimes against property, crimes related to financial activities, money laundering, fraud and crimes against physical integrity, all of which are meant to keep out rogue individuals via *pre-emptive control*. A similar consideration concerns the requirement regarding solvency (which is closely linked to potential crimes related to financial activities). These are typical requirements in most MS with IDCP legislation, such as Belgium, Denmark, Finland, Germany, Latvia, Romania, and Sweden. However, the Directive's reference to the members of the managerial body is somewhat limited, as these could still employ dubious individuals.

In addition, members of credit servicers' management or administrative organs are required to have been transparent, open, and cooperative in their past business dealings with supervisory and regulatory authorities. This vetting procedure, which will be based on the "previous information available, or knowledge of the competent authority" (Recital 27), constitutes an exciting addition to pre-emptive control. It is likely to increase the gatekeeping powers of the supervisory bodies by allowing them to blacklist untrustworthy and recalcitrant businessmen. Though not without merit, the measure is rather vague. It leaves open the potential for arbitrary enforcement, and it is difficult to foresee how it will function in practice. The DCSCP emphasises the management's adequate knowledge and experience to conduct business in a "competent and responsible manner," which should be apparent from previous dealings with competent authorities (Recital 28).

The task of laying down requirements of good repute, adequate knowledge, and experience is left to the MS, with one condition: that they will not impair the free movement of authorised credit servicers within the Union (Recital 28). The apparent intention here is to allow MS the freedom to preserve current requirements (where they exist) and the flexibility to adapt them to local needs. However, the provision leaves the door open to forum shopping, as credit servicers will likely seek to incorporate and register in friendlier jurisdictions (*i.e.* those with the least requirements).

Handling of personal data

The Directive specifically addresses two more concerns. The first is compliance with personal data protection rules, which should be seen in connection with debtor protection and other EU sectorial legislation (GDPR). Abusive debt collection practices have long been associated with the breach of intimacy and privacy (*e.g.* disclosing information about the debt and the debtor to third parties, breaching the sanctity of the debtor's home, *etc.*). Such practices are generally banned by sector-specific legislation at the MS level (*e.g.* Belgium, Finland, Denmark, Greece, Latvia, Romania, and Sweden). Moreover, a person's personal and financial data must be handled consistently with GDPR principles in a transparent and proportionate manner (Recital 51). The experience of several MS without sector specific IDCP legislation, including Poland[47] and Estonia[48] shows that privacy laws were successfully used to tackle some abusive IDCPs. Thus, credit servicers are expected to give due consideration to these concerns. In addition, they should also

[47] Jakub Kepinski, 'Regulation of abusive informal debt collection practices in Poland' in Stănescu (ed.) (fn 25).
[48] Karin Sein, 'Abusive debt recovery practices in Estonia', in Stănescu (ed) (fn 25).

design "appropriate governance arrangements, internal control mechanisms, and procedures for recording and handling complaints" (Recital 28 and Art 5(1)(e) and (g)). The internal dispute resolution mechanisms should be "efficient," for these will affect their "good reputation" (Recital 50). This language is a signal that the EU wishes to encourage "naming and shaming" to influence the behaviour of credit servicers.

However, the issue of personal data protection goes beyond the above considerations given the specificities of the DCSCP, which grant credit purchasers and credit servicers access to "all relevant information" concerning borrowers (Recital 36). In the Directive's wording, this would translate into "detailed information […] to enable […] assessment of the value of a creditor's rights under a non-performing credit agreement or of the non-performing credit agreement itself" so that the prospective purchasers could make an "informed choice before entering a transaction" (Recital 36 and Art 15(1)). This information entails sharing the "borrower's personal data," "limited to what is necessary to enable prospective purchasers to assess […] the likelihood of the recovery" (Recital 36 and Art 15(1)). In other words, credit purchasers would gain access to the entirety of borrowers' financial data held by the credit institution. This severe intrusion is deemed legitimate, necessary, and justified so that credit purchasers can make informed choices. However, it is limited to only one access before the conclusion of the transfer contract, and its use must comply with the GDPR (Recital 36). Nevertheless, it is hard to evaluate whether subsequent accesses would be necessary and how such accesses would further damage the borrower.

Tackling the grey economy

The second concern refers to the risk of criminal activity, mainly money laundering and financing of terrorism. Empirical data shows that the multi-layered contractual nexus that debt purchasers and debt collectors use in designing their operations to minimise tax exposure also raises significant red flags about potential money laundering and terrorism financing.[49] Indeed, several MS that regulate informal debt collection have recently raised concerns about shadow activities, recognising this criminal potential (*e.g.,* Finland, Latvia). The EU also implemented anti-money laundering and counter-terrorist financing procedures via Directive (EU) 2015/849 to protect the financial system. Thus, it is no surprise that the DCSCP requires credit servicers to have adequate

[49] Stănescu and Bogdan (fn 28).

measures when designated as obliged entities under Directive 2015/849 and the transposing legislation (Recital 28 and Art 5(1)(h)).

Proportionality

According to the recitals, the authorisation should be subject to a uniform and harmonised set of conditions to be applied by the competent authorities in a "proportionate" manner (Recital 26 and Art 23(2)). Since the DCSCP does not define the meaning of proportionality in this context, it must be sought in similar instruments[50] and CJEU practice.

In *Commission of the European Communities v Italian Republic* (C-134/05),[51] a case with direct reference to proportionality in regulating cross-border informal debt collection, the CJEU held that "the requirement for a declaration of good conduct" from an EU-based debt collector seeking authorisation to operate in Italy cannot be held to go "beyond what is necessary to attain the objective pursued, which is to ensure close supervision of extrajudicial debt recovery activities" and was, therefore, in accordance with the principle of proportionality.[52]

Specificities regarding credit purchasers

The above provisions refer only to credit servicers. Credit purchasers are exempt from the obligation to apply for authorisation. The EU legislator explained that since credit purchasers do not create new credit but merely purchase existing non-performing credit agreements at their own risk, they do not raise prudential concerns or pose systemic threats (Recital 40). Moreover, most will be either credit or non-credit institutions under the supervision of a competent authority of an MS, subject to the provisions of CCD and CMD.

Nevertheless, three qualifications must be made for 1) borrower defences, 2) credit purchasers that are also credit servicers, and 3) third country-based credit purchasers. First, exclusion from authorisation requirements does not cover the application of Union and national consumer protection rules or borrowers' rights as per the initial credit agreements (Recital 40). In other words, the status of the credit purchaser cannot be used to circumvent existing protections stemming from the credit agreement. Second, in cases where credit purchasers service their portfolios, the exemption ceases to apply because prudential concerns take precedence (Recital 44). To clarify, if

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[50] EC, (fn 35) 21.
[51] C-134/05, *Commission of the European Communities v Italian Republic*, ECLI:EU:C:2007:435.
[52] Id at Para 29-30.

one undertaking fulfils the roles of both credit purchaser and credit servicer, it will be bound by the latter's stricter obligations. Third, credit purchasers may be from a non-EU country. In this case, borrowers may find it difficult to rely on their rights, and competent authorities may not be able to supervise the enforcement of non-performing credit agreements. This may have a distortive effect by discouraging credit institutions from transferring portfolios to non-EU credit purchasers. Therefore, the DCSCP requires the representative of a third-country purchaser to appoint an entity authorised in the Union for credit servicing to ensure the same standards of protection for borrowers (Recitals 41, 43 and Art 19). This obligation applies solely when the purchased non-performing credits concern natural persons, micro-enterprises, or small and medium-sized enterprises. However, the host MS can extend this obligation to other credit agreements (Recital 43).

The provision appears to be another example of the extra-territorial effect, which forces third-country businesses to submit to EU law if they wish to engage in operations affecting specific categories of EU borrowers. Nevertheless, the measure is a mere expression of consistency. It reflects the will to ensure adequate protections (Recital 47) by preventing potential forum shopping and the circumvention of EU laws related to consumer protection or money laundering.

Specific protections – separation of funds

The DCSCP leaves it up to the MS to allow credit servicers on their territory to receive and hold funds from borrowers during the performance of credit servicing activities. Nevertheless, it does not allow credit service providers to hold funds (Art 12(5)). Since the nine MS that regulate informal debt collection have different stances in this regard, it may be that the EU legislator sought to preserve the existing approaches rather than impose an additional requirement where none existed previously. Nevertheless, MS that allow such an option will have to ensure adequate protection against insolvency and fraud. Such protection could entail "account and funds segregation" and amendments to the national insolvency laws to insulate recovered amounts from the claims of other creditors of the credit servicers (Recital 29 and Art 6(2)). Crucially, if a credit servicer's home MS prohibits this option, that servicer will not be allowed to receive or hold funds even in other MS that allow it, and vice versa, credit servicers whose home MS allows this option can engage in it even in MS where it is prohibited (Recital 29). While the measure seeks to ensure consistency, the EU legislator's approach increases the likelihood of forum shopping once the Directive is transposed into national law.

The need for additional requirements where such an option will be allowed is an expression of broader protection that covers all stakeholders, not just borrowers. Since borrowers could liberate themselves via payment, in many instances, the potential insolvency of the credit servicers might impact creditors or state budgets more than borrowers. Allowing the funds to be amalgamated would mean that in case of bankruptcy, the recovered amounts could be used to pay the credit servicer's debts, although the funds would not belong to the servicer. MS such as Denmark, Finland, and Germany already require debt collectors to keep separate accounts, to designate who is entitled to their proceeds, and even to set deadlines for the funds' transfer to the rightful owners (the creditors).[53]

Specific protections: publicity via registries

Transparency is a two-way street. On the one hand, given that the primary concern of the Directive is to foster secondary markets of NPLs and facilitate credit servicing operations, the DCSCP states the need to establish clear and brief procedures concerning authorisation. In particular, it describes the information applicants must submit and the reasonable deadlines for administrative decisions (Recital 30). These should ease application procedures and increase legal certainty for interested businesses.

On the other hand, the Directive stresses the need for transparency and publicity concerning authorised and de-authorised entities. First, lists or registries must be set up in the home and host MS and made publicly available on the websites of competent authorities to reflect the number and identity of authorised entities. These lists or registries must be constantly updated, and any de-registration or withdrawal of authorisation should be communicated among competent authorities (Recital 30). The Directive appears lenient as to the timing of these communications, as it only provides for "reasonable deadlines" that remain undefined (Recital 33).

Public registries are already functioning in most MS with sector-specific legislation (*i.e.,* Belgium, Finland, Greece, Romania). The only addition is the requirement to inform other MS of any changes in the entity's status to prevent unlawful operations outside the home MS. It would have made more sense to establish a pan-EU registrar with free public access in which all

[53] See for instance: Executive Order on authorization and security, etc., when carrying out debt collection activities (BEK No. 752 of 26/09/1997), Sections 10–12 in Denmark, Finnish Debt Collection Act, Section 11 or Act on Out-of-Court Legal Services (Rechtsdienstleistungsgesetz – RDG), Section 13 g.

competent authorities have editing rights, ideally in all official languages of the EU, like other websites of EU institutions. In this manner, interested parties could have kept track of all authorised entities across MS and significantly reduced the burden of aggrieved borrowers in checking whether the credit servicer is licensed in various MS.

Specific protections: The issue of costs

Empirical evidence shows that costs associated with informal debt collection – namely, costs arising from default and debt collection operations – represent one of the most contentious issues related to IDCPs.[54] In many cases, these inflate the original debt and thus expose the debtor to over-indebtedness. Critics of such added costs emphasize that allowing credit servicers to charge additional amounts artificially increases the debt and creates further hardship for vulnerable debtors.[55] Supporters, mainly from the industry, argue that additional costs help to pressure debtors to repay their debts. Furthermore, they claim that additional charges are valuable in sanctioning recalcitrant debtors (*i.e.,* those who could repay but refuse to).[56]

The DCSCP states that MS should ensure that "no costs related to the transfer of the credit agreement, other than those already included in the credit agreement" are charged to the borrower (Recital 55). In other words, unless the original credit agreement says that the borrower will suffer any charges due to non-performance (increased interest, penalties, collection costs or transfer costs), such charges cannot be levied.

While generous, this provision does little to alleviate the risk of surcharges for consumers. Most credit agreements are adhesion contracts into which credit institutions can easily insert such clauses. For this reason, the recitals provide that regarding default charges imposed on consumers, the CCD will be amended along the lines of CMD; the amendment will place caps on fees and penalties (Art 27(2)) that will reduce the exposure of consumers in case of default. It remains to be seen how effective these caps will be once they are implemented.

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[54] Stănescu, (fn 17), 196-197.
[55] Cătălin-Gabriel Stănescu, *Self-help, private debt collection and the concomitant risks: A comparative law analysis* (Springer 2015) 261–262)
[56] Stănescu, (fn 17), 210.

The chain of liability

The Directive clarifies that "outsourcing" credit servicing activities to credit service providers does not insulate credit servicers from liability. This poses an important question: which liability and to whom?

First, it is stated that the contractual relationship between credit servicer and credit purchaser remains unaltered (Recital 31). Thus, credit servicers remain contractually liable toward credit purchasers even when resorting to credit service providers.

Second, the Recital implies an additional "duty of care." Credit servicers are responsible for ensuring that outsourcing their activities will not "result in undue operational risk or non-compliance by the credit service provider with any requirements of Union or national law or restrict the capacity of the regulatory supervisor to monitor and safeguard borrower rights" (Recital 31). This translates into a further statutory liability arising from non-compliance with legal provisions concerning fair debt collection practices towards the borrower, the state, or both.

The Directive also mentions that when credit purchasers use credit servicers to service the credit agreement, MS can require that the credit servicer notify the credit purchaser before outsourcing these activities. Should an MS exercise this option, it would create another obligation – a duty to inform or disclose – for the credit servicer (Recital 32).

Nevertheless, these provisions suffer from ambiguities. For instance, while the credit servicer remains liable to the credit purchaser under the contract, who is liable to the aggrieved borrower? The DCSCP states that even when the credit purchaser delegates its rights and duties to the credit servicer, it remains ultimately responsible (Recital 32). However, it is unclear who the beneficiary of that ultimate liability is, although one could presume it is the borrower or the state, depending on the situation. Otherwise, liability could be pushed down the contractual nexus from the credit purchaser to the credit servicer and further to the credit service provider.

Another question concerns the duty to inform about further outsourcing and its consequences. The Directive does not specify whether the prior notice is purely informative or requires confirmation from the credit purchaser. This difference is significant because in the former case, the credit purchaser only takes note of the delegation, while it can veto it in the latter. The issue of consequence is also essential. One may wonder what the effect of delegating without prior notice

would be. Would the credit purchaser be absolved of liability? While the wording of Recital 32 suggests not, the answer might depend on national law provisions.

Enforcement

The Directive notes that different authorities are entrusted with the authorisation and supervision of credit servicers, and purchasers in the MS. Empirical data also highlights a wide variety of competent bodies, which makes the task of aggrieved borrowers a daunting one, especially in a cross-border context. Moreover, the multitude of competent internal bodies complicates matters even further.[57]

Thus, one must welcome the Directive's recommendation that MS "clarify the role of such authorities and allocate them adequate powers, especially as they might need to supervise entities engaged in providing services in other MS" (Recital 48). Examples of adequate powers are obtaining necessary information, investigating possible infringements, handling borrowers' complaints, and imposing administrative penalties and remedial measures, including the withdrawal of authorisations (Recital 48 and Art 22). These provisions reflect existing informal debt collection legislation implemented at the MS level and do not represent novel approaches.

Besides investigative and sanctioning powers, competent authorities must have "effective and accessible procedures to deal with borrower's complaints" (Art 23(2) and (3)). These must include at least the power to grant, refuse, or withdraw the authorization, prohibit any credit servicing activities, conduct on-site and off-site inspections, impose administrative penalties and remedial measures, and require credit servicers to remove members of their management or to update or modify their internal governance arrangements or control mechanisms to enforce borrowers' rights and fair treatment (Art 22(1)(a)–(j)). The listed powers indicate that the Directive favours an administrative type of enforcement rather than incentivising and empowering the consumer to act against abusive debt collectors. This approach will likely increase the burden and expenses of the supervisory agencies, which might hinder enforcement. Applied sanctions must be proportionate,

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[57] Cătălin-Gabriel Stănescu, 'Is there a Scandinavian model for regulating abusive informal debt collection practices?' in Caroline Heide-Jørgensen, I. Lund-Andersen, and Jesper Lau Hansen (eds.), *Festskrift til Linda Nielsen* (Djøf Forlag 2022), 383-386.

reasoned, and subject to judicial review, as provided in other pieces of EU legislation (Recital 48) and requested by industry representatives.[58]

The Directive provides for a non-exhaustive list of situations that attract administrative penalties and remedial measures (Art 23(1)) and a set of relevant circumstances to determine the type of measures to be applied. Such circumstances include the gravity and duration of the infringement, the degree of responsibility, the financial strength of the responsible credit servicer or purchaser, the losses caused to third parties (if they can be determined), the level of cooperation by the credit servicer, previous infringements, or any actual or potential systemic consequences of the breach (Art 23(4)).

While such evaluation criteria are salutary, the absence of clear and harmonised guidelines concerning what constitutes an infringement will likely lead to significant differences in MS's approaches, generating inconsistency in the Directive's application across the Union. Such inconsistency will generate various standards of consumer protection, which, combined with the jurisdiction of the home MS for enforcement purposes, will increase the likelihood of forum shopping.

Moreover, there is a substantial risk that these criteria will lead to sanctions with only a weak deterrent effect, even though the annual turnover of the abusive credit servicer is listed among the criteria. In fact, unlike other EU legislation, the term "deterrent" is nowhere present in the DCSCP; instead, the Directive uses the term "dissuasive," and only once. An enforcement system designed along with the US Fair Debt Collection Practices Act 1977, which combines administrative with private and collective actions, would have been preferable. This approach would have incentivised consumers to act on their own with statutory penalties for technical infringements and collective actions with minimum awards, enabling state agencies to focus their energy and resources on larger cases and systemic violations instead of conducting case-by-case assessments for every complaint. Unfortunately, it is unlikely that the administrative and remedial measures will achieve their goals as they stand, thus undermining effective consumer financial protection.

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[58] Federation of European National Collection Associations (FENCA), 'Feedback on the European commission's proposal for a directive on credit servicers, credit purchasers and the recovery of collateral,' 8 June 2018 <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1446-Development-of-secondary-markets-for-non-performing-loans/F11904_en> accessed 01 June 2022, p. 8.

Administrative enforcement will be further weakened by the lack of expertise and financial resources, especially in MS with limited regulatory resources. As industry representatives have also observed, it is unlikely that all MS will have a sufficient budget, expertise, and operational capacity to fulfil all the Directive's requirements.[59] Empirical evidence shows that even MS with experience and financial capabilities face difficulties when confronting major or systemic fair debt collection violations and must rely on third-party finances and expertise. For instance, the Danish Financial Supervisory Authority ordered Danske Bank to perform and pay for an impartial inquiry into the measures that it had taken concerning its over-collection from thousands of customers for several years.[60] While inventive, this solution suggests that administrative enforcement is less reliable than the EU legislators want to believe.

Another downside of the enforcement mechanism of the Directive is the jurisdiction of the home MS of the credit servicer and the cooperative system. This requires the host MS to take a secondary support role in sanctioning abusive debt collectors (Arts 14 and 22). It is unclear how this cooperative mechanism will function and whether it will prove efficient or time-consuming. Indeed, it is difficult to believe that such cooperation will be successful if it is even possible. On the contrary, the Directive's requirement that the host MS solicits the home MS to act against an unethical debt collector makes the process cumbersome, lengthy, and likely to leave the consumer without an adequate and swift remedy.

As noted by industry representatives, although supervision by the home MS might appear sensible, the requirement of cooperation between the home and host MS regarding a credit servicer's branch located in a host MS creates dual regulation and supervision.[61] This requirement will be burdensome for the competent authorities. After all, it entails inspection and liaison teams across the Union with little likelihood of effectiveness because they would duplicate their efforts and increase their regulatory burden. Ironically, although the Directive insisted on removing duplications, it created some of its own.

In another case of duplication, the DCSCP states that its provisions concerning infringements are "without prejudice" to an MS's right to intervene in cases of violations of national law relating

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[59] FENCA (fn 58) 7.
[60] Stănescu (fn 57) 384–385 and fn 115, 116.
[61] FENCA (fn 58) 5.

to consumer protection, borrower's rights, or criminal activities (Recital 49). Host MS may also act when the home MS does not take adequate or effective steps to rectify infringements or when there is a need for immediate action to address a serious threat to the collective interests of borrowers (Art 14(12)). In such cases, the competence belongs to the authorities of the host MS and the MS where the credit was granted, and they will decide whether an infringement of national law occurred.

The Directive seems to imply that multiple liabilities could arise concomitantly in cases where an infringement violates other national provisions. Sanctions under the transposing act of the DCSCP do not exclude sanctions under other transposing acts or pieces of national legislation (such as Civil Codes or Criminal Codes). Once again, however, the choice is left to the MS. In theory, civil, administrative, and criminal liability could occur in parallel, which should enhance consumers' protection and access to remedial action. Whether this will happen in practice remains to be seen. What is certain is that based on the empirical data available and the analysis of the Directive, enforcement will remain one of the most significant challenges in tackling abusive IDCPs at both the national and Union levels.

Conclusions

The DCSCP's adoption and its upcoming transposition into national law across MS will generate a significant legislative effort that should produce a degree of harmonisation and legal certainty regarding the activity of debt collectors and purchasers across the EU. This is a significant step forward that will require the 18 EU MS without sector-specific legislation regarding abusive IDCPs to design and implement such regulation, thus improving consumer financial protection. However, the conspicuous flaws and the limited level of harmonization may also suggest that the MS did not really want a full harmonization of this area, seeing that most proposals for amendments came from the MEPs and they did not make it to the adopted text.

With all its flaws, the transposition of the DCSCP should positively impact consumers' lives. Debt collectors will have to be authorised to provide their services, bringing them under supervision and control in all MS. Moreover, the gatekeeping rules will establish a first line of defence against the presence of rogue collectors. The harmonisation of the authorisation procedure should also limit, though not eliminate, the likelihood of forum shopping. Indeed, since MS will decide which practices will be deemed abusive and what penalties will be applied for breaches, debt collectors may choose the MS with the least stringent regulation as their home.

Finally, the Directive's lack of clear and detailed guidelines as to what constitutes infringement represents a missed opportunity to tackle the issue of abusive debt collection within the Union adequately and effectively. Because the Directive is not meant to be a consumer protection instrument, most of its rules address consumer protection indirectly, leaving many dots to be filled in. This task is outsourced to the MS, which will undoubtedly, have different approaches to tackling the problem. Coupled with the absence of clear guidelines, the multitude of approaches will undermine the consistency of legislation across the Union and lead to various standards of protection against abusive IDCPs in the MS. Moreover, the mechanism provided by the DCSCP, which emphasizes home enforcement, is more likely to complicate than simplify an already complex web of national approaches and competent bodies that consumers have to navigate. It remains to be seen whether this approach will generate the cross-border cooperation the EU legislator envisions or become a barrier to swift and effective action against abusive practices.

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No data is associated with this article.

Ethics and consent

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