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The Consumer Right of Information and Advice in Credit Agreements in the European Union Law: an Analytical Legal Study

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Abstract:

This article detects much jurisprudence held by the Court of Justice of the European Union in the last five years, in terms of the consumer right of information provided in terms of the European Directive 2008/48/EC on credit agreements. Many rules and clarifications are provided in these decisions, which deal with the scope of application of the Directive, the consumer right to get time to investigate the content of the credit agreement and compare it with those provided by other creditors at the market, how information is to be provided to consumers, and the notion of the Standard European Consumer Credit Information form (SECCI) provided in the Directive. They also rule the party who must prove the creditor implementation of his obligations in addition to the right of Member States to provide penalties in the event of infringement of national law that implemented the Directive.

Keywords: Jurisprudences of the European Court of Justice in Consumer Credit, Consumer right of information, Pre- contractual information in Credit Contracts, Consumer Credit Contract.

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Introduction:

Consumer information in credit contracts is an essential condition of a high level of consumer protection. The complication and the importance of these contracts offered to consumers as well as the weak position in which consumers usually find themselves led to the conclusion that a legal intervention is needed to ensure a rational scale of protection for consumers. The European 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/ (hear after the Directive)(1) was enacted to ensure this protection. It should be possible for the free movement of credit offers to take place under optimum conditions for both those who offer credit and those who require it, with due regard to specific situations in the individual Member States.(2) To attain its objectives, the Directive provides some tools of protection including the consumer right of information. The idea is to make sure that both contracting parties are, to some extent, at the same level of knowledge at the time contracting, and consumers are to be the beneficiaries of all useful information before deciding and concluding the contract, so they can make appropriate choices for their needs. To enable consumers to make their decisions in full knowledge of the facts, they should receive adequate information, which the consumer may take away and consider, prior to the conclusion of the credit agreement, on the conditions and cost of the credit and on their obligations.(3)

Three articles of the Directive are of major importance in determining the creditor pre-contractual obligations. Article 5 obliges the Creditor to supply the consumer with specific information in good time before the conclusion of the agreement. Article 6 lists specific information, which the creditor has to supply the consumer with in order to enable him to compare different offers in order to take an informed decision on whether to conclude a credit agreement. Finally, article 8 obliges the Creditor to assess the creditworthiness of the consumer before the conclusion of the agreement. To ensure the objectives of the Directive provided in its preamble,(4) the Court of Justice of the European Union (Hereafter the CJEU)

(1) 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, 22.5.2008, p. 66–92.

(2) Para. 8 of the preamble of the Directive.

(3) Recital 19 of the Directive.

(4) Para. 7 of the preamble of the Directive **2008/48/EC.**

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has practiced its authority provided in article 267 (TFEU)[1] in order to ensure that EU law has the same meaning and effect in all the Member States, through providing clear answers to requests raised by national courts of EU member states. These decisions constituted much important jurisprudence that must be taken into consideration at the application of the rules of protection provided by the Directive. These Interpretive decisions present many details with regard to the subjective scope of the Directive, which information must be presented to the consumer and how they are presented, whom the party liable with the burden of proof, and the notion of sanctions that Member states can imply in its legal systems. This article provides many clarifications of these subjects in terms of decisions held by the (CJEU) in the last five years.

1. Definition of Consumer in Credit Contracts

Consumer information in the field of banking services has a significant role to ensure a high level of consumer protection. The importance of the supply of these services to consumers as well as the weak position of consumers when making these transactions lead to the conclusion that special legal care is needed in order to protect consumers as natural persons.[2] The Directive protects the average consumer which is off definition in its terms.[3] While the Directive defines the consumer as a natural person who, in transactions covered by this Directive, is acting for purposes which are outside his trade, business or profession, the (CJEU) defines the average consumers in many decisions as the person who is being reasonably well informed, observant and circumspect taking into account both of social and culture factors.[4] Nevertheless, even the average consumer is in a weak

(1) The Treaty on the Functioning of the European Union (2007), *Official Journal C 326, 26/10/2012 P. 0001 – 0390.*

(2) For more details, see: Paul Ali, Ian Ramsay and Cate Read, Behavioural Law and Economics: Regulatory Reform of Consumer Credit and Consumer Financial Services, Common Law World Review (2014) 43 PP. 298.

(3) For more details about the definition of the average consumer, see: M.Fayyad, A Glance at Unfair Terms in Consumer Transactions in Arab legal systems and Islamic Law; what Arab Lawyers can learn from the European Experience, International Journal of Private Law, (2012) 5/2, PP. 200.

(4) See the following CJEU decisions: C382/87, 481/99, 350/03, 361/89, 269/95, 542/99, 464/01. Conversely, a «creditor» is defined as a natural or legal person who grants or promises to grant credit in the course of his trade, business or profession. See also Para.

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position in relation with the creditor in credit contracts taking into account the consumer level of knowledge, his economic and bargaining power in comparison with the other contracting party (the creditor).(1) The problem that arises here is that the concept of consumer, as the person needs protection, is not always clear; the term (purposes) in this definition is the key term to understanding its scope. It refers to the destination of goods and services to a consumer, in addition to the intention of the consumer when making market transactions. For this reason, there are many cases where small businesses acting in credit transactions find themselves deserve the protection provided by the Directive in case they get credit for their commercial activities but not relate to their direct activities.(2) For instance, in case a library services office gets a credit to reconstruct its place or get the supply of Central heating system. Another example provided by jurists is the employment of the bill of sale as a form of secured lending raises the same question as well.(3)

1.1. Protection of Small Businesses in Credit Contracts

The right of small businesses of protection provided by the terms of the Detective may be concluded in terms of para. 19 of its preamble, which provides that: "In order to enable consumers to make their decisions in full knowledge of the facts, they should receive adequate information, which the consumer may take away and consider, prior to the conclusion of the credit agreement, on the conditions and cost of the credit and on their obligations". The need for full knowledge may include small businesses which are defined as "Business Consumers". This is also demonstrated in the Directive policy, which adopts the competitive fair market approach for all actors within the European markets as provided in Paragraphs 6

15 of the preamble of the **Directive 2008/48/EC**.

(1) K. Mathews Hunt, Cloud Consumer: contracts, codes & the law, Computer law & security review (2015) 45 PP. 477.

(2) K. Mathews Hunt, Ibid, P. 477, Akos Rona and Alya Guseva, Information and consumer credit in Central and Eastern Europe, Journal of Comparative Economics, (2013) 41 PP. 420.

(3) M.Fayyad, Misleading Advertising practices in consumer transactions, can Arab Lawmakers gain advantage from European Insight, Arab Law Quarterly Journal, (2012) 26/3, PP. 287, M. Fayyad, The Transportation of the European Directive (85/374/EEC) of Product Liability into Palestine and Jordan: is it Adaptable to Islamic Law?, Global Journal of Comparative Law, (2012) 1/2, PP. 194.

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and 7 of the Directive.(1) This is to say, if the definition of the consumer should take into account the imbalance of economic and educational position in credit contracts between the contracting parties, the small businesses should be included within the scope of protection.(2) In this regard, terms of "purposes" and 'outside his trade, business or profession" mentioned in the definition may open the debate for the following two different approaches, namely: the function-based approach and the competence- based approach.

First, the function-based approach indicates the consumer as a person who gets goods or services for his personal or family needs and not business needs.(3) Based on this approach, the function of the law is not to protect the weak party when making market transactions, but rather to protect the party who gratifies his personal or family needs.

Second, the competence-based approach indicated the consumer as a person who is in a weak position in relation with the other contracting party.(4) Weakness comes as a result of legal, economic, or any other reason that creates a status of non- balance between the contracting parties.(5) In this relation, a consumer will be in a position of technical inferiority compared to the other contracting party and therefore, the function of the law is not limited to protect the party that gratifies personal or family needs, but extends to protect weak parties when

(1) In accordance with the Treaty, the internal market comprises an area without internal frontiers in which the free movement of goods and services and freedom of establishment are ensured. The development of a more transparent and efficient credit market within the area without internal frontiers is vital in order to promote the development of cross-border activities.

(2) J. Hawkins, C. Johnson, and Nathalie Martin, Consumer credit in America, past, present and future, Law and Contemporary Problems (2017), 80, PP. 18.

(3) R. Disney & J. Gathergood, Financial literacy and consumer credit portfolios, Journal of Banking & Finance, (2013), 37, PP. 2246.

(4) M. Fayyad, A Glance at Unfair Terms in Consumer Transactions in Arab legal systems and Islamic Law; what Arab Lawyers can learn from the European Experience, PP. 200.

(5) B Heiderhoff, the Commission›s 2007 Green Paper on the consumer acquis: deliberate deliberation? European law review, (2007), 32- 5, PP. 740; Evans, assessing consumer detriment Phil Evans (2007) 28-1 European competition law review 26; P Nebbia, unfair contract terms in EC Law, (Hart publications: London 2007), PP. 75, see also the conception of the weak party in chapter one of this study

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making market transactions.(1) In other words, this definition may extend to include small sellers or traders that make market transactions not concerning their commercial activities (the ignorance weakness). On these grounds, one acts for purposes which are within his trade or profession only when making a contract which is an immediate and direct expression of his trade, in which he has technical knowledge and competence.

1.2. The Scope of Consumer in Credit Contracts in Terms of the (CJEU) Approach

The approach of the (CJEU) obviously excludes those engaged in small business from the terms of protection provided by the Directive. Only natural persons who are acting for purposes which are outside their trade, business or profession, are only the target of protection provided by the Directive.(2) This is to say the (CJEU) follows the function based approach mentioned above. Most European consumer protection directives rely on a transaction definition according to which the consumer is a natural person who, in transactions that are covered by the measure concerned, is acting for purposes which are not within his trade or profession.(3) A core notion of a consumer under European community law as a "passive market participant", can be established by the following:(4) (a) consumers are generally natural persons,(5) (b) the activities of consumers are functionally

(1) P W. Dobson, Differential buyer power and the waterbed effect: do strong buyers benefit or harm consumers?, European competition law review, (2007), 28-7. PP. 393. R Incardona, the Corte di Cassazione takes «Courage». A recent ruling opens limited rights for consumer in competition cases, European competition law review, (2005), 26-8, PP. 445

(2) Judgment of the Court (Fourth Chamber), 18 December 2014. CA Consumer Finance SA v Ingrid Bakkaus and Others.
Request for a preliminary ruling from the Tribunal d'instance d'Orléans. Case C449/13. Para. 21. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli:ECLI:EU:C:2014:2464 visited on 14/2/2018.

(3) See judgment in *LCL Le Crédit Lyonnais*, C565/12, EU:C:2014:190, paragraph 42.

(4) H Micklitz and N Reich, understanding EU consumer law (Centro de Formacao Juridica e Judiciaria: Brussels 2009) 48. P Nebbia, unfair contract terms in EC Law (Hart publications: London 2007) 71.

(5) J Fazekas, Approximation of Hungarian Consumer law- the implementation of the EC Directive on unfair contract terms into the Hungarian Law (2001) 8-2 Consumer law journal 164.

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to be distinguished from those of undertakings, self employed persons and employees as described by the fundamental freedoms of community law,(1) (c) the role of consumers is not restricted to personal activities, but may also serve the consumption of others, provided this is done outside his trade, profession or business,(2) (d) in the field of non-economic protection of legal interests, the term consumer is independent of any activity and may be assigned to any natural person.(3)

The aforementioned conclusion is underlined in many (CJEU) decisions, so this approach was confirmed in the final draft provided by the EU Council of Ministers adopted in October 2011.(4) Due to the full harmonization technique provided by the Directive, it indicates clear strict orientation in the approach of the consumer definition since its preamble does not allow Member States to extend its protection to include both of legal persons and those acting for the purpose of their commercial activities.(5)

This strict interpretation was held by the (CJEU) in The Republic di Pinto case,(6) when the court was asked if the Directive could apply to a trader who had been canvassed in relation with advertising the sale of his business on the basis that he would be a consumer. The answer was therefore that a trader canvassed with a view to the conclusion of an advertising contract concerning the sale of his business is not to be regarded as a consumer protected by Directive.(7) The court justified its decision as "there is every reason to believe that a normally well-informed trader is aware of the value of his business and that of every measure

(1) M Dean, unfair contract terms: the European approach, Modern law Review, (1993), 56-4, PP. 581.

(2) P Rott, Minimum harmonization for the compellation of the internal market? The example of Consumer sales law, Common market law Review, (2003), 40, PP. 1113.

(3) See V. Mak & J. Braspenning, and E. humanum, Financial Literacy in European Consumer Credit Law, Journal of consumer policy, (2012), 35 PP. 307.

(4) See Proposed Consumer Rights Directive (COM 2008, 641 final, 2008/0196 COD) Art. 2

(5) Para (9) of the preamble OF THE **Directive 2008/48/EC**.

(6) The Judgment of the Court (First Chamber) of 14 March 2017. Criminal proceedings against Patrice Di Pinto. Reference for a preliminary ruling: Cour d›appel de Paris - France. Case C-361/17.

(7) Para. 19 of the aforementioned case decision.

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required by its sale, with the result that, if he enters into an undertaking, it cannot be through lack of forethought and solely under the influence of surprise".(1)

The same strict interpretation was held by the (CJEU) in Francesco Benincasa v Dentalkit Srl. Under article 13 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968), which deals with the jurisdiction in relation to consumer contracts.(2) The (CJEU) was asked whether the first paragraph of Article 13 and the first paragraph of Article 14 of the Convention must be interpreted as meaning that a plaintiff who has concluded a contract with a view to pursuing a trade or profession, not at the present time but in the future, may be regarded as a consumer. The answer to this question is that the first paragraph of Article 13 and the first paragraph of Article 14 of the Convention must be interpreted as meaning that, the contracting party who has concluded a contract with a view to pursuing a trade or profession may not be regarded as a consumer.(3) In other words, the concept of consumer would have to be strictly applicable and the subjective nature of the individual in relation to the contract in question was not to be taken into consideration. Rather the nature of the transaction in question has to be considered. This means that, a contracting party would never be a consumer in case he concluded a trade of professional contract regardless of his personal status.

In another case, this approach was also emphasized by the (CJEU) in the case regarding another (EC) directive that has a similar definition.(4) In the case "Bayerische Hypotheken- und Wechselbank AG v Dietzinger",(5) the (CJEU) accepted that a contract of guarantee may in principle fall in the directive, even though it was made for the benefit of a third party who is standing outside

(1) Para. 18 of the aforementioned case decision.

(2) Judgment of the Court (Sixth Chamber) of 3 July 2017. Francesco Benincasa v Dentalkit Srl. Case C-269/15.

(3) Para 19 of the decision provides that: the answer to the national court›s first question must therefore be that the first paragraph of Article 13 and the first paragraph of Article 14 of the Convention must be interpreted as meaning that a plaintiff who has concluded a contract with a view to pursuing a trade or profession, not at the present time but in the future, may not be regarded as a consumer.

(4) The Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31).

(5) CJEU 45/96 (1998) E.C.R. I-1199.

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the contract in question.(1) In this case, focus on the objective element of the transaction is particularly evident since a guarantee that is given by (Dietzinger) for the payment of his father's business debt was considered as made "in a course of his business".(2) (Dietzinger) provided the guarantee outside his business or profession; he had not run a financing company, nor did the guarantee fall in any other way within his trade or profession.(3) The guarantee was provided on a one-off basis in order to support his father. There was a close link between a credit agreement and the guarantee of securing its performance. A guarantor might assume joint and several liabilities for the repayment of the debtor.(4) The court emphasized the objective element relating to the contract itself. It held that a contract of guarantee that is made by a natural person, acting outside the course of his trade or profession, did not come within the scope of the directive where it guaranteed repayment of a debt contracted by another person who was acting within the course of their trade or profession.

2. The Obligations of Credit Intermediary

Credit intermediary is defined in article (3/f) of the Directive as a person, natural or legal, who is not acting as a creditor and who, in the course of his trade, business or profession, for a fee, which may take a pecuniary form or any other agreed form of financial consideration: presents or offers credit agreements to consumers, assists consumers by undertaking preparatory work in respect of credit agreements other than as referred to in , or concludes credit agreements with consumers on behalf of the creditor.(5) He is a person or a company which performs certain tasks without acting as a creditor. This could include presenting or offering you credit agreements, helping you with the preparation of an agreement, or concluding credit agreements with you on behalf of the creditor. The intermediary acts within the framework of his/her professional activity and

(1) See Para 18; 19; 20 and 23 of this case.

(2) R. Steennot, the right of withdrawal under the Consumer Rights Directive as a tool to protect consumers concluding a distance contract, Computer law and security review journal, (2013), 29, PP. 105.

(3) A. Rona-Tas, the Off-Label Use of Consumer Credit Ratings, Historical Social Research, (2017), 42/1, PP. 52.

(4) Para 20 of the above mentioned decision.

(5) Recital 24 of the Directive.

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for a fee.(1) There is no doubt that credit agreement, concluded with the consumer by a credit intermediary acting on behalf of that lender, must be considered as a credit agreement, within the meaning of Article 3(c) of the directive,(2) so the credit intermediary has the same obligation of the principal to supply the consumer with information laid down in articles 5 and 6 of the Directive. In addition, suppliers of goods or services acting as credit intermediaries in an ancillary capacity are off this obligation.(3) The question arises here is that: is a debt collection agency that offers instalment agreements in connection with the professional recovery of debts on behalf of its client and that charges fees for this service that are ultimately to be borne by the debtors operating as a 'credit intermediary' within the meaning of Article 3(f) of Directive 2008/48? The Supreme Court of Austria raised this question to the (CJEU).(4) The (CJEU) held that it is for the national courts to determine whether the main object of the activity of the credit intermediary in question, it may be considered to act as a credit intermediary in an ancillary capacity, within the meaning of the first sentence of Article 7 of that directive.(5) The exception has the sole effect of preventing persons who act as intermediaries only in an ancillary capacity from being subject to the pre-contractual information requirement. The other provisions of that directive provided in Article 21 thereof, on certain obligations of credit intermediaries towards consumers, remaining applicable in respect of those persons. The exception provided for in the first sentence of Article 7 of Directive 2008/48, in respect of suppliers of goods or services acting as credit intermediaries in an ancillary capacity, does not affect the lender's obligation to ensure that the consumer receives the pre-contractual

(1) See the following link: https://www.definedterm.com/credit_intermediary Visited on 14/1/2018.

(2) See Judgment of the Court (Third Chamber) of 8 December 2016. Verein für Konsumenteninformation v INKO, Inkasso GmbH. Case C-127/15. Para. 32. Available at: http://curia.europa.eu/juris/celex.jsf?celex=62015CJ0127&lang1=en&type=TXT&ancre visited on 9/1/2018.

(3) Article (7) of the Directive.

(4) Judgment of the Court (Third Chamber) of 8 December 2016. Verein für Konsumenteninformation v INKO, Inkasso GmbH. Case C-127/15. Available at: http://curia.europa.eu/juris/celex.jsf?celex=62015CJ0127&lang1=en&type=TXT&ancre visited on 9/1/2018.

(5) Para. 48 of the above case.

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information referred to in Articles 5 and 6 of that directive.(1) For the above, the (CJEU) held that debt collection agency is to be regarded as being a 'credit intermediary' within the meaning of Article 3(f), but not subject to the obligation to provide the consumer with pre-contractual information under Articles 5 and 6 of that directive.(2)

3. The Consumer Right to get pre- Contractual Information

Article 5 of the Directive requires the creditor to provide the consumer with certain information, so consumers can pass them through before concluding the credit agreement.(3) Creditors must provide an "adequate explanation" to a consumer about the credit offered to enable the consumer to decide whether the credit suits his needs and financial capacity or not. This obligation is to provide the consumer with the information needed to compare different offers in order to take an informed decision on whether to conclude a credit agreement.(4) The (CJEU) mentioned the necessity of this obligation in order to ensure that all consumers in the European Union enjoy a high and equivalent level of protection of their interests and to facilitate the emergence of a well-functioning internal market in

(1) Judgment of the Court (Fourth Chamber), 18 December 2014. CA Consumer Finance SA v Ingrid Bakkaus and Others.
Request for a preliminary ruling from the Tribunal d'instance d'Orléans. Case C449/13. Para. 21. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli:ECLI:EU:C:2014:2464 visited on 14/2/2018.
See also: Judgment of the Court (Third Chamber) of 21 April 2016. Ernst Georg Radlinger and Helena Radlingerová v Finway a.s. Case C-377/14. Para. 61. Available at: http://eur-lex.europa.eu/legal- content/EN/TXT/PDF/?uri=ecli:ECLI:EU:C:2016:283 visited on 18/1/2018.

(2) Judgment of the Court (Third Chamber) of 8 December 2016.
Verein für Konsumenteninformation v INKO, Inkasso GmbH. Case C-127/15. Para. 53. Available at:
http://curia.europa.eu/juris/celex.jsf?celex=62015CJ0127&lang1=en&type=TXT&anc re visited on 9/1/2018.

(3) Article (5/2) of the **Directive 2008/48/EC.**

(4) The Judgement of the Court (Third Chamber), 25 January 2017, BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG v Verein für Konsumenteninformation, In Case C375/15 Para. 3, Available at:
http://curia.europa.eu/juris/document/document.jsf?text=&docid=187125&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=13723 visited on 7/1/2018.

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consumer credit.(1) The same importance is also mentioned in recital 19 and 24 of the Directive.(2)

According to article (5/1) of the Directive, information must be provided in good time before the consumer is being bound by any credit agreement or offer. The term "good time" is not clear in the provisions of the Directive.(3) The Directive does not clarify if such obligation requires the credit agreement to be concluded in two steps - the first step being the provision of the information and the second one the conclusion of the agreement - and that a substantial amount of time passes between these two phases.(4) For instance, if the consumer is shopping around the market to buy by using a credit card, is it enough to provide him with necessary information and immediately afterwards conclude the credit agreement? Or is it required to inform him and give him a time to think and return back to conclude the credit agreement if he would agree the offer?(5) Member States have the right to determine this period provided that they have an obligation to ensure the objectives of the Directive.(6) For this reason, most of Member States considered that information should be provided to the consumer enough time in advance, but not less than 15 days before the conclusion of the credit agreement.(7) In this regard, Jurisprudences of the (CJEU) make sure that the clarification of this question requires that one must take into account this requirements' objective being to enable the consumer to compare offers of several creditors and to allow them to make an informed decision. If the consumer has the possibility to reflect on the information and then, being well informed, decides to conclude the credit

(1) Judgment of the Court (Fourth Chamber), 27 March 2014. LCL Le Crédit Lyonnais SA v Fesih Kalhan. Request for a preliminary ruling from the tribunal d'instance d'Orléans. Case C565/12. Para. 42. Available at: http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0565&lang1=en&type=TXT&ancre visited on 18/2/2018.

(2) See Recitals 19 and 24 of the **Directive 2008/48/EC.**

(3) P.Rott, P. 177.

(4) R. Steennot, PP. 121.

(5) Ibid.

(6) V. Mak, PP. 55.

(7) M.I. Ionescu, pre-contractual information in credit agreements for consumers, available at: http://webcache.googleusercontent.com/search?q=cache:G8FPr6Tu7rIJ:cks.univnt.ro/uploads/cks_2015_articles/index.php%3Fdir%3D02_privat_law%252F%26download%3DCKS%2B2015_privat_law_art.035.pdf+&cd=1&hl=en&ct=clnk&gl=ae . Visited on 22/1/2018.

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agreement immediately, we do not see why there would be a problem.(1) For this reason, the explanation of "In good time" is to mean that the creditor has an obligation to not unreasonably delay the provision of pre-contractual information and that the consumer must have the opportunity to take the information linked to a proposed regulated agreement away for further consideration. The customer is not obliged to take the Standards European Consumer Credit Information Form away if he wants to fulfill his obligations provided by the Directive. (2) In addition, the (CJEU) adopted a broad application of this obligation to include the case where the rates of interest are changed for any reason.(3) That notice, must provide any information as to the parameters applied to calculate the amount of those increases.(4)

3.1. Information required in credit Contracts

Information required to be provided to consumers is provided in article (5) of the Directive. That information must be provided on paper or on any other durable medium, written clearly and easy to read. The (CJEU) requires them to be given in easily understandable words and in a clear and comprehensible form, in an official language of the Member State where the payment service is offered or in any other language agreed between the parties.(5) Some Member States oblige

(1) R. Steennot, PP. 121.

(2) http://www.specialistautomotivefinance.org.uk/resources/pre-contract-information-document.html

(3) JUDGMENT OF THE COURT (Third Chamber), 25 January 2017, BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG v Verein für Konsumenteninformation, In Case C375/15 Para. 23. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=187125&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=13723 visited on 7/1/2018.

(4) Order of the Court (Sixth Chamber) of 12 October 2016. Renata Horžić and Siniša Pušić v Privredna banka Zagreb and Božo Prka. Joined Cases C-511/15 and C-512/15. Para. 18. Available at: http://curia.europa.eu/juris/celex.jsf?celex=62015CO0511&lang1=en&type=TXT&ancre visited on 15/1/2018

(5) Judgment of the Court (third Chamber), 25 January 2017, BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG v Verein für Konsumenteninformation, In Case C375/15 Para. 14.. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=187125&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=13723 visited on 7/1/2018.

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creditors to use specific font, color and size.(1) Getting into consideration the disparity of education and knowledge between both contracting parties in credit contracts, the (CJEU) did held in many cases that this information must be written so as not to mislead consumers via the use of technical expressions or ambiguous legal terms.(2) Abbreviations or initials of certain names are not allowed to be used well unless they are provided by national law or common in use in market transactions.(3) Moreover, technical terms shall be explained to consumers in writing, at no additional charge,(4) used medium must enable the consumer, in a similar way to paper form, to be in possession of the relevant information in order to enable him to use his rights, where necessary. What is relevant for the consumer is that he should be able to store the information which has been addressed to him personally, to rest assured that its content will not be altered,(5) that the information will be accessible for an adequate period and that it will be possible to reproduce

(1) For instance, information provided to consumers must be written using the Times New Roman font, 12p minimum. If the information is written on a paper, the paper color of the drawn form must be in contrast with the font used. See: M.I. Ionescu, PP. 251.

(2) Judgment of the Court (Third Chamber), 5 July 2012. Content Services Ltd v Bundesarbeitskammer.
Reference for a preliminary ruling from the Oberlandesgericht Wien. Available at: http://eur-lex.europa.eu/legal-%20content/EN/TXT/?uri=ecli:ECLI:EU:C:2012:419 visited on 16/1/2018.

(3) Order of the Court (Sixth Chamber), 3 July 2014. Liliana Tudoran and Others v SC Suport Colect SRL.
Request for a preliminary ruling from the Judecătoria Câmpulung. Reference for a preliminary ruling — Directives 93/13/EEC and 2008/48/EC — Application ratione temporis and ratione materiae — Events occurring prior to the accession of Romania to the European Union — Charter of Fundamental Rights of the European Union — Lack of implementation of EU Law — Manifest lack of jurisdiction — Articles 49 TFEU and 56 TFEU — Manifest inadmissibility. Case C92/14. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli:ECLI:EU:C:2014:2051 visited on 11/1/2018.

(4) Judgment of the Court (Third Chamber) of 9 November 2016, Home Credit Slovakia a.s. v Klára Bíróová
Request for a preliminary ruling from the Okresný súd Dunajská Streda, Reference for a preliminary ruling Case C-42/15. Avialable at: http://curia.europa.eu/juris/celex.jsf?celex=62015CJ0042&lang1=en&type=TXT&ancre= Visited on 22/1/2018.

(5) Judgment of the Court (Third Chamber), 5 July 2012. Content Services Ltd v Bundesarbeitskammer. Reference for a preliminary ruling from the Oberlandesgericht Wien. Case C49/11. Para. 42 to 44. Available at: http://curia.europa.eu/juris/celex.jsf?celex=62011CJ0049&lang1=en&type=TXT&ancre= vested on 16/1/2018.

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it unchanged.(1)

In this regard, creditors used to supply consumer with this information in electronic format transmitted by the bank to the electronic mailbox of the customer as part of the online banking website e-banking, so that the customer can retrieve this information by clicking on it after logging into the online banking website e-banking. The question arises here is that is this way of information can be a durable medium provided by the Directive? The (CJEU) clarified this matter in C375/15,(2) provided that: this way is not be considered a durable medium within the meaning of the Directive unless these two conditions are met: (1) that website allows the user to store information addressed to him personally in such a way that he may access it and reproduce it unchanged for an adequate period, without any unilateral alteration of its content by that service provider or by another professional being possible. (2) If the payment service user is obliged to consult that website to become aware of that information, the transmission of that information must be accompanied by active behavior on the part of the provider aimed at drawing the user's attention to the existence and availability of that information on that website.(3)

The most important information provided in article (5/1) of the Directive are: the type of credit, the total credit amount, the duration of the credit agreement, the borrowing rate and terms applicable to this rate, the annual percentage rate and the total amount due by the consumer, the amount, number and frequency of payments, fees related to or resulting from the agreement, and consequences of late

(1) Judgment of the Court (Fourth Chamber), 18 December 2014. CA Consumer Finance SA v Ingrid Bakkaus and Others.
Request for a preliminary ruling from the Tribunal d'instance d'Orléans. Case C449/13. Para. 42. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli:ECLI:EU:C:2014:2464 visited on 14/2/2018.

(2) JUDGMENT OF THE COURT (Third Chamber), 25 January 2017, BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG v Verein für Konsumenteninformation, In Case C375/15. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=187125&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=13723 visited on 7/1/2018.

(3) Judgement of the court (third Chamber), 25 January 2017, BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG v Verein für Konsumenteninformation, In Case C375/15. Para. 53. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=187125&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=13723 visited on 7/1/2018.

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payment and non-performance.(1) The most important information is the costs of the credit relates to the annual percentage rate charge (APR) which the consumer has to be informed with. The (APR) is defined in many cases as the total cost of the credit to the consumer, expressed as an annual percentage of the total amount of credit.(2) It incorporates all the known costs for consumer like the interest rate, the charges, taxes and any other kinds of fees which the consumer has to pay in connection with the credit agreement and which are known to the creditor.(3) (APR) is not just an s addition of those costs, but also is calculated according to a mathematical formula used by all creditors from the Member States. It is a useful tool but only under the condition to obtain personalized information from the creditor on similar offers, the same duration of the contract, the same number of rates, the same type of interest. APR changes in case the values of one element of the credit offer changes.(4) In case of credit offers with fixed interest rate, (APR) will be the same during the whole period, and in cases of variable interest rate, the value of the (APR) will be available only at the moment of calculation. For the purpose of the calculation of the annual percentage rate of charge, the overall cost of the credit to the consumer shall be recognized, with the exception of any charges payable by the consumer for non-compliance with any of his commitments laid down in the credit agreement. In addition, the costs of using a means of payment for both payment transactions and drawdowns, and other costs relating to payment transactions shall be included as well. The calculation of the annual percentage rate of charge shall be recognized for the total period of the contract regardless the decision of the consumer to early payments. In case of the credit agreements containing clauses, allowing variations in the borrowing rate the calculation of the (APR), shall get into account the assumption that the borrowing rate and other charges will remain applicable until the end of the credit agreement.(5)

It has to be noted that, the required aforementioned information has to be provided to consumers on paper or on a durable medium through the use of the Standard European Consumer Credit Information form (SECCI). The form

(1) See: P. Rott, Ibid, P. 177.

(2) Article (3/i) of the Directive.

(3) L. Whitehouse, the First Legal Mortgagor: a Consumer without Adequate Protection?, Journal of consumer policy, (2015), 38, PP. 161.

(4) A. Rona, PP. 52.

(5) P. Rott, PP. 180.

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standardizes the information to be given to consumers pre-contract, depending on the type of credit being provided.(1) The reason behind the use of this form is to standardize information provided to consumers to insight his will before making the agreement.(2) In addition to that, it simplifies the content of the required information that has to be presented to consumers since consumers can understand their content and consequences easily.(3) The question arises here is the notion of this list of information; is it exclusive so member states can impose others or is it non-exclusive to member states are not allowed to add more? The (CJEU) answered this question in some decisions provided that the list of information is exclusive.(4) This is to say that, Member States cannot impose more information upon creditors, because the Directive adopts the maximum harmonization technique on which Member states must maintain the criteria of protection provided by the Directive. As creditors must provide all of the information set out in the (SECCI) as a minimum, they also have the right to supply the consumer with other information in order improve the provided services for the requirement

(1) The form Provided at: https://ec.europa.eu/info/sites/info/files/standard_european_consumer_credit_information_en.pdf visited on 4/2/2018.

(2) Judgment of the Court (Fourth Chamber), 27 March 2014. LCL Le Crédit Lyonnais SA v Fesih Kalhan.
Request for a preliminary ruling from the tribunal d'instance d'Orléans. Case C565/12. Available at: http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0565&lang1=en&type=TXT&ancre. Visited on 17/1/2018.

(3) Order of the Court (Sixth Chamber), 3 July 2014. Liliana Tudoran and Others v SC Suport Colect SRL.
Request for a preliminary ruling from the Judecătoria Câmpulung. Reference for a preliminary ruling — Directives 93/13/EEC and 2008/48/EC — Application ratione temporis and ratione materiae — Events occurring prior to the accession of Romania to the European Union — Charter of Fundamental Rights of the European Union — Lack of implementation of EU Law — Manifest lack of jurisdiction — Articles 49 TFEU and 56 TFEU — Manifest inadmissibility. Case C92/14. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli:ECLI:EU:C:2014:2051 visited on 11/1/2018.

(4) Judgment of the Court (Fourth Chamber), 27 March 2014. LCL Le Crédit Lyonnais SA v Fesih Kalhan. Request for a preliminary ruling from the tribunal d'instance d'Orléans. Case C565/12. Available at: http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0565&lang1=en&type=TXT&ancre visited on 18/2/2018.

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of competition in the market.(1) In this case, that information must be provided in a separate document that can be attached to the "Standard European Consumer Credit Information form.(2)

3.2. Pre-Contractual Information in case of Distance Contracts

In case of the consumer credit contract is prepared and concluded by means of distance communications, the creditor shall be deemed to have satisfied not only the requirements provided in article (5/1) provided above, but also those of articles (3/1), (2), (3/3) and (4) of Directive (2002/65/EC).(3) In this case, the following additional information provided in article (3/3-b) of the Directive 2002/65/EC(4) must be provided to the consumer. This information is: the identity of the person in contact with the consumer and his link with the supplier; a description of the main characteristics of the provided service; the total price to be paid by the consumer to the supplier for the service including all taxes paid via the supplier; notice of the possibility that other taxes and/or costs may exist that are not paid via the supplier or imposed by him; and the existence or absence of the consumer right of withdrawal.(5) In case the right of withdraw is of existence, the creditor must inform the consumer with its duration and the conditions for exercising it, including information on the amount which the consumer may be required to pay for the service provided before withdrawal. In addition to that, the annual percentage rate of charge illustrated by means of a representative example and the

(1) P. Rott, PP. 177.

(2) http://www.specialistautomotivefinance.org.uk/resources/pre-contract-information-document.html

(3) Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directives 90/619/EEC and directive 97/7/EC and 98/27/EC (OJ L 271, 9.10.2002, pp. 16-24.

(4) Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC. Official Journal L 271, 09/10/2002 P. 0016 – 0024.

(5) Judgment of the Court (Third Chamber), 25 January 2017, BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG v Verein für Konsumenteninformation, In Case C375/15 Para. 7. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=187125&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=13723 visited on 7/1/2018.

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total amount payable by the consumer must be presented the consumer as well.

If the distance contract is concluded at the consumer's request so that information cannot be provided, the creditor shall immediately, after the conclusion of the agreement, provide the consumer with the pre-contractual information using the form Standard European Consumer Credit Information. According to the (CJEU), this rule can be interoperated in broad sense. The Directive in this case allows softening for the rules of all types of consumer credit contracts that are concluded at the consumer request using a mean of distance communication which does not enable the information to be provided according to article (5/1) of the Directive, which does not only cover voice telephony but also multimedia messages services.(1) In this case and if the consumer requests that the overdraft facility(2) be made available with immediate effect, the description of the main characteristics of the service must at least include: the total amount of credit the borrowing rate; the conditions governing the application of that rate and it's method of calculation; the annual percentage rate of charge, illustrated by means of representative examples mentioning all the assumptions used in order to calculate that rate; for the credit agreements which are granted in the form of an overdraft, an indication that the consumer may be requested to repay the amount of credit in full at any time; the interest rate applicable in the case of late payments and the arrangements for its adjustment, and, where applicable, any charges payable for default.

The aforementioned question related to the nature of the information required in case of distance contract is of importance as well. The challenge of this question comes from the difference of harmonization techniques that are used in both related Directives. As the Directive (48/2008) adopts the maximum harmonization technique so the exclusive notion of the list prevails, the (65/2002) Directive adopts the minimum harmonization technique so the non-exclusive notion of the list appears. The (CJEU) prevails to the exclusive notion of the list; it clarifies that the correct solution to this might be that the main characteristics of a consumer credit, that have to described under article (3/3-b) of the directive (65/2002) are now fully harmonized by article (5/2) of the Directive (48/2008), whilst the member States maintain their competence to require additional information to be supplied in distance contracts that are not related to the characteristics of credit

(1) P. Rottm PP. 197, footnote 54.

(2) Overdraft facility means an explicit credit agreement whereby a creditor makes available to a consumer funds which exceed the current balance in the consumer's current account.

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transactions.(1)

4. The Consumer Right to get Pre- Contractual Explanation

Article (5/6) of the Directive obliges the creditor to provide adequate explanations to the consumer, in order to place the consumer in a position enabling him to assess whether the proposed credit agreement is adapted to his needs and to his financial situation. The background is the consumer image that regards the consumer as not sufficiently informed but receptive to information.(2) This to say that the obligation of the creditor extends to explain, where appropriate, the pre-contractual information to be provided, as well as the vital characteristics of the products proposed and the specific impact they may have on the consumer (including the consequences of default in payment by the consumer).(3) That duty implies the creditor obligation to advise on alternative credit products which are usually offered by him, but finally it is up to the consumer to decide which credit agreement is most appropriate, and not up to the creditor or credit intermediary.(4) In contrast, if amongst the credit agreements offered by the creditor, there is not an appropriate one, the creditor has to refuse the conclusion of the agreement.(5) This is to enable the consumer to assess whether the proposed credit agreement qualifies his needs and to his financial situation as well. Although article 5.6 of the Directive allows Member States to adapt the manner by which and the extent to which such assistance is given, so they can oblige the creditor to assist the consumer by choosing the most appropriate type of credit, this possibility is limited to the particular circumstances of the situation in which the credit agreement is offered and the person to whom it is offered or the type of credit that is offered.(6) Therefore, Member States can only decide that the creditor must

(1) Judgment of the Court (Fourth Chamber), 27 March 2014. LCL Le Crédit Lyonnais SA v Fesih Kalhan. Request for a preliminary ruling from the tribunal d'instance d'Orléans. Case C565/12. Para. 9. Available at: http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0565&lang1=en&type=TXT&ancre visited on 18/2/2018.

(2) P. Root, PP. 197.

(3) R. Steennot, PP. 121.

(4) A. Rona and A. Guseva, Information and consumer credit in Central and Eastern Europe, Journal of Comparative Economics, (2013), 41, PP. 420.

(5) R. Steennot, P. 121.

(6) Judgment of the Court (Fourth Chamber), 18 December 2014. CA Consumer Finance SA

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choose the most appropriate credit agreement in case of particular circumstances, in case of the provision of credit to vulnerable consumers or for specific types of credit agreements.(1) For example, it can be argued that this provision enables Member States to introduce specific rules on centralization of credit agreements.(2)

The problem arises here is that the scope of this obligation is not clear enough from the wording of Article (5/6) mentioned above, and the Directive does not provide the scope of the obligation of the credit intermediaries as well.

The (CJEU) provides the obligation of the creditor to establish, among the credit agreement they usually offer, the most appropriate type and the advantages and disadvantages associated with the proposed product in addition to the purpose of the credit.(3) In addition, it realizes the consumer necessities of additional assistance in order to decide the appropriate agreement to his needs getting into consideration his financial capacities.(4) It is the right of member states to select the manner to ensure that the creditor provides such assistance in relation to the credit products which he offers to the consumer.(5) In contrast, the creditor is

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v Ingrid Bakkaus and Others.
Request for a preliminary ruling from the Tribunal d'instance d'Orléans. Case C449/13. Para. 11. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli:ECLI:EU:C:2014:2464 visited on 14/2/2018.

(1) P. Rott, Ibid, P. 198.

(2) S. Grundman & J. Hollering, EC Financial Services and Contract Law Development, European review of contract Law, (2007), 4/1, PP. 46.

(3) Order of the Court (Sixth Chamber), 3 July 2014. Liliana Tudoran and Others v SC Suport Colect SRL.
Request for a preliminary ruling from the Judecătoria Câmpulung. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli:ECLI:EU:C:2014:2051 visited on 11/1/2018.

(4) Judgment of the Court (Fourth Chamber) of 27 February 2014 (request for a preliminary ruling from the Krajský soud v Plzni - Czech Republic) – Ochranný svaz autorský pro práva k dílům hudebním o.s. (OSA) v Léčebné lázně Mariánské Lázně a.s. (Case C-351/12), para.14. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=150055&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1277431 visited on 22/1/2018. See also recital 27 of the Directive.

(5) Judgment of the Court (Third Chamber), 5 July 2012. Content Services Ltd v Bundesarbeitskammer.
Reference for a preliminary ruling from the Oberlandesgericht Wien. Available at: http://

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not obliged to mention the consumer with more alternative or suitable products that may be offered by other competitors.(1) In other words, the creditor is off in obligation to advise the consumer to go to another creditor if the latter offers a type of credit which is more appropriate (e.g. cheaper) than the types of credit the creditor himself offers.(2) The second problem was also mentioned in many (CJEU) Decisions. As far as credit intermediaries are concerned, distinction between credit agents and credit brokers must be considered. Credit agents act exclusively for one creditor so they can only choose the most appropriate type of credit amongst the agreements offered by that creditor. In contrast, credit brokers are entitled to act on behalf of different creditors so they should choose the most appropriate credit agreement amongst the credit agreements offered by all the creditors for whom they intermediate. Therefore, the obligation to find the most appropriate type of credit is more elaborate for credit intermediaries not acting as a credit agent.(3)

Another question arises here is the right of member states to go beyond the requirements of article (5/6) mentioned above and therefore impose other duties upon the creditor? The (CJEU) prohibits this action due to the maximum harmonization technique, which the Directive recognizes. Nonetheless, it allows member states to adopt the manner by which and the extent to which such assistance is given, to the particular circumstances in the situation in which the credit agreement is offered, which means that they can make distinction between the average consumer and other groups of consumers.

5. The Creditor Obligation to Assess Creditworthiness of the Consumer

Article 8.1 of the Directive obliges the creditor to assess the consumer's credit worthiness before the conclusion of the credit agreement. This occurs on the basis of sufficient information "where appropriate" obtained from the consumer and

eur-lex.europa.eu/legal- content/EN/TXT/?uri=ecli:ECLI:EU:C:2012:419 visited on 16/1/2018.

(1) P. Root, PP.198.

(2) Juge de Paix Courtrai 29 June 2004, *Annuaire Juridique du Crédit* 2004, 55. Mentioned in: R. Steennot, PP. 121.

(3) R. Steennot, PP. 121.

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where necessary, on the basis of a consultation of the relevant database.(1) This means that the creditor or credit intermediary must get information from the consumer with regard to his financial position and his capability to reimburse the credit and the later must provide the creditor or credit intermediary with correct answers and full data if necessary.(2) In addition, the creditor has also an obligation to consult a central database containing information on previously concluded credit agreements.(3) The use of the words "where necessary" show that the obligation to consult the Database for Consumer Credit in all cases is not possible. However, one must consider that article 8.1 of the Directive states that Member States, whose legislation already required creditors to assess the creditworthiness of consumers on the basis of a consultation of the relevant database, could retain this requirement.(4) The duty of the creditor to assess the consumer's creditworthiness also applies in cases where the parties agree to a significant increase of the total amount of credit after the conclusion of the credit agreement.(5)

The above is only what the Directive provides about this obligation. Many questions may arise here, namely: the party who should get the initiation to get, or disclose, the required information; the limits and the boarders of the consumer obligation to disclose the required data; and finally, who is responsible for not disclosing these data? Many (CJEU) decisions provided clear answers to these questions.

First, it is the obligation of the creditor to take the initiative to obtain the necessary information from the consumer.(6) The consumer is not obliged to

(1) S. Grundman & J. Hollering, PP. 46.

(2) See the Belgian case: Juge de Paix Courtrai 17 October 2007, *Annuaire Juridique du Crédit* 2007, 68

(3) See Belgian Civil Court Namur 8 October 2007, Jurisprudence de Liège, Mons et Bruxelles 2008, 73, Civil Court Antwerp 16 January 2004, *Nieuw Juridisch Weekblad* 2004, 1065.

(4) Judgment of the Court (Fourth Chamber) of 12 July 2012. SC Volksbank România SA v Autoritatea Națională pentru Protecția Consumatorilor - Comisariatul Județean pentru Protecția Consumatorilor Călărași (CJPC). Reference for a preliminary ruling: Judecătoria Călărași - Romania. Case C-602/10. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0602 visited on 15/1/201.

(5) P. Root, PP. 199.

(6) e.g. Rb. Oudenaarde 4 December 2002, *Annuaire Juridique du Crédit* 2002, 104; Juge

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provide this information at his own initiative, as far as the information is not directly related to the questions asked by the creditor or the credit intermediary. For instance, if the bank is aware of the fact that the consumer does not own a house, it has an obligation to obtain on the rent the consumer must pay.(1) Again, if a creditor is - or should be - aware of the fact that the consumer is divorced (e.g. because the consumer concludes the credit agreement with his bank which has been previously notified about the divorce), it is up to the creditor to ask whether the consumer has to pay alimony.(2)

Second, it is the obligation of the consumer to provide the creditor with correct and complete information, i.e. answer questions in good faith.(3) For instance, if a consumer was asked about his income and he knew that his employment ends in the near future because he had been dismissed, he would not satisfy the requirement to answer questions completely by solely mentioning his income. He would also have to inform the creditor or the credit intermediary on his dismissal.(4)

Finally, even though it is the responsibility of the consumer to disclose the exact required information, the responsibility of both contracting parties comes together and both jointly liable if the creditor knew, or should have known, that the information was incorrect.(5) For example, even if the consumer claims he is free from any obligations resulting from previously concluded credit agreements, the creditor will be jointly liable if the consultation of the Database for Consumer Credits shows – or would have shown – otherwise.(6) In the (Revue des Juges de

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de Paix Courtrai 31 October 2006, *Annuaire Juridique du Crédit* 2006, 23; Juge de Paix Saint-Nicolas 4 December 2001, *Algemeen Juridisch Tijdschrift* 2001-2002, 1030; De Boeck, 1996; De Muynck, 2011. Mentioned at: R. Steennot, PP. 121.

(1) Juge de Paix Courtrai 26 September 2000, *Annuaire Juridique du Crédit* 2000, 73. Mentioned in: R. Steennot, PP. 121.

(2) Juge de Paix Arendonk 29 September 2009, to be published in *Revue des Juges de Paix* 2011. Mentioned at: R. Steennot, PP. 121.

(3) Civil Court Bruges 31 January 2003, *Revue des Juges de Paix* 2003, 224; Civil Court Antwerp 16 January 2004, *Annuaire Juridique du Crédit* 2004, 55; De Muynck, 2011.

(4) R. Steennot, PP. 121.

(5) The Belgian case: Civil Court Antwerp 16 January 2004, *Annuaire Juridique du Crédit* 2004, 55.

(6) Juge de Paix Saint-Nicolas 8 February 1999, *Revue des Juges de Paix* 2002, 105. Mentioned at: R. Steennot, PP. 121.

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Paix) case, the court held that In this case the creditor should have been aware of the existing credit agreements because the new credit agreement was concluded to reimburse two existing credit agreements. The creditor is also jointly liable if he does not be sure from the consumer's answers with regard to his income, simply because such verification can be easily made by asking the consumer for his latest remuneration slip.(1)

6. The Burden of proof

Another important issue that has no provision in terms of the Detective is the burden of proof. Is it the onus on the creditor to prove that it has correctly and fully complied with its obligations under national law transposing the directive when a credit agreement is entered into and performed or it is the obligation of the consumer to prove otherwise? In addition, creditors used to insert a standard term in credit agreements provides that the consumer acknowledges the fulfilment of those obligations, without that term being supported by documents issued by the creditor and supplied to the borrower. The question arises here is the impact of the existence of that term, and does it relive the creditor to prove his fulfillment of obligations arising under law? The Directive is off provision in that respect, so the (CJEU) did provide clear answers to these requests.

In the Case (CA Consumer Finance SA v Ingrid Bakkaus and Others), the Tribunal d'instanced'Orléans raised the above two requests to the (CJEU). It should be noted that the pre-contractual obligations referred to in the questions contribute to attaining the objective of providing the consumer some specific information, in order to ensure that all consumers in the European Union enjoy a high and equivalent level of protection of their interests and to facilitate the emergence of a well-functioning internal market in consumer credit.(2) According to settled case-law, in the absence of relevant EU rules, the detailed procedural rules that

In this case the creditor should have been aware of the existing credit agreements because the new credit agreement was concluded to reimburse two existing credit agreements.

(1) Juge de Paix Ghent 6 January 2005, *Rechtspraak Antwerpen, Brussel, Gent* 2005, 345. Mentioned in: R. Steennot, PP. 121.

(2) Judgment of the Court (Fourth Chamber), 27 March 2014. LCL Le Crédit Lyonnais SA v Fesih Kalhan. Request for a preliminary ruling from the tribunal d'instance d'Orléans. Case C565/12. Para. 42. Available at: http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0565&lang1=en&type=TXT&ancre visited on 18/2/2018.

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aim to protect the rights of individuals provided in the EU law are a matter for the domestic legal order of each Member State. This protection is to be in accordance with the principle of the procedural autonomy of the Member States, provided that they do not make it in practice impossible or excessively difficult to exercise rights conferred by the EU legal order (principle of effectiveness).(1) According to the principle of effectiveness, every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analyzed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies.(2) In this case, the (CJEU) held that the court is not authorized to rule on the interpretation of provisions of national law, that being a matter exclusively for the national court.(3) There is doubt that the consumer does not qualify to prove that the creditor did not perform his obligations to supply the consumer with information provided by the law. On the other hand, consumer rights provided by the Directive require the creditor to prove to the court that those pre-contractual obligations are fulfilled. A diligent creditor must be aware of the need to gather and retain evidence that its obligations to provide information and explanations are fulfilled.(4) In conclusion, the (CJEU) interpretation precludes national rules according to which the burden of proving the non-performance of the obligations lies with the consumer.

Regarding the second question, Article (22/3) of the Directive shows that such

(1) see, inter alia, judgment in *Specht and Others*, C501/12 to C506/12, C540/12 and C541/12, EU:C:2014:2005, paragraph 112. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=ecli:ECLI:EU:C:2014:2005 visited on 18/1/2018.

(2) Judgment of the court (Third Chamber) 10 September 2014, In Case C-34/13, requests for a preliminary ruling under Article 267 TFEU from the Krajský súd v Prešove (Slovakia), made by decision of 20 December 2012, received at the Court on 23 January 2013, in the proceedings Monika Kušionová v SMART Capital a.s., para. 52. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=ecli:ECLI:EU:C:2014:2189 visited on 12/1/2018

(3) Judgment of the Court (Fourth Chamber), 18 December 2014. CA Consumer Finance SA v Ingrid Bakkaus and Others.
Request for a preliminary ruling from the Tribunal d'instance d'Orléans. Case C449/13. Para. 26. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli:ECLI:EU:C:2014:2464 visited on 14/2/2018.

(4) See para. 28 of the aforementioned case.

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a term cannot allow the creditor to circumvent its obligations.(1) The standard term is an indication, which the creditor is required to substantiate with one or more relevant items of evidence. In addition, the consumer must always be in a position to state that he did not receive that form or that the form did not enable the creditor to fulfil its pre-contractual obligations to provide information. The recognition of that term would result in a reversal of the burden of proving the performance of those obligations such as to undermine the effectiveness of the rights conferred by the Directive. Thus, the provisions of the Directive preclude national courts from the recognition of the use of these standard terms, so the use of these terms is off impact and the creditor remains liable with the burden of proof.

7. Sanctions

The Directive does not provide specific sanction in case the creditor does not fulfill his obligations in credit agreement. Article 23 of the Directive authorizes Member States to lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive; they should take all measures necessary to ensure that they are implemented. This authority is conditional with the objectives of these penalties to be effective, proportionate and dissuasive.(2) In general, there is a general orientation in all member states regulations to forfeit the creditor entitlement to interest, in whole or in such proportion as the court may decide in case he breaches his obligations.(3) For instance, the second and third paragraphs of Article L. 311-48 of the French Consumer Code provides that where the creditor has not complied with the requirements laid down in Articles L. 311-8 and L. 311-9, it shall forfeit entitlement to interest, in whole or in the proportion fixed by the court.(4) The borrower shall be required only to repay the

(1) This article provides that: Member States shall further ensure that the provisions they adopt in implementation of this Directive cannot be circumvented as a result of the way in which agreements are formulated, in particular by integrating drawdowns or credit agreements falling within the scope of this Directive into credit agreements the character or purpose of which would make it possible to avoid its application.

(2) Article (23) of the **Directive 2008/48/EC.**

(3) See also articles 10 and 11 of the Belgian credit consumer act.

(4) Judgment of the Court (Fourth Chamber), 27 March 2014. LCL Le Crédit Lyonnais SA v Fesih Kalhan. Request for a preliminary ruling from the tribunal d'instance d'Orléans. Case C565/12. Para. 9. Available at: http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0565&lang1=en&type=TXT&ancre visited on 18/2/2018.

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principal in accordance with the schedule provided for and also, where appropriate, to pay the interest not forfeited by the creditor. Sums received by way of interest, which produce interest at the statutory rate from the date of their payment, shall be reimbursed by the creditor or set off against the principal remaining due.(1) This is to say, the judge can decide that the consumer does not have to pay (part of the) interests due for late payment or can decide to reduce the consumer's obligations to the amount borrowed.(2) In the latter case the consumer retains the benefit of reimbursing the amount borrowed in installments.(3) In practice, national courts of member states apply the second sanction,(4) which means that the consumer has obtained the credit for free.

The aforementioned provisions invoke the following questions: (1) does the requirement for effective, proportionate and dissuasive penalties laid down in Article 23 of the Directive preclude the existence of national rules that allow the creditor, which has been penalized by forfeiture of its entitlement to interest as provided for in national law, to benefit, after the imposition of the penalty, from interest payable by operation of law at a statutory rate?(5) (2) May national

(1) Judgment of the Court (Fourth Chamber), 18 December 2014. CA Consumer Finance SA v Ingrid Bakkaus and Others.
Request for a preliminary ruling from the Tribunal d'instance d'Orléans. Case C449/13. Para. 11. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli:ECLI:EU:C:2014:2464 visited on 14/2/2018.

(2) To explain this sanction, Prof. Steennot provides the following example: Suppose that a consumer has borrowed 12.000 euro which he has to reimburse within a period of 5 years. The borrowing rate is 6% which implies he has to pay 60 installments of 231.32 euro. If the judge, after the consumer has already paid 12 installments, decides that the creditor did breach is obligations, the consumer will only have to pay 213 euro during 48 months. 12.000 (amount borrowed) – 1775,84 (installments already paid (12 x 231.32) = 10224,16: 48 (remaining duration of the credit agreement) = 213 euro. R. Steennot, PP. 121.

(3) R. Steennot, PP. 121.

(4) e.g. Juge de Paix Ghent 6 January 2005, *Rechtspraak Antwerpen, Brussel, Gent* 2005, 345; Juge de Paix Courtrai 28 June 2005, *Annuaire Juridique du Crédit* 2005, 34; Juge de Paix Saint-Nicolas 22 October 2003, *Annuaire Juridique du Crédit* 2003, 29. Mentioned at: R. Steennot, PP. 121.

(5) For instance, Under Paragraph 1000(1) of the Allgemeines Bürgerliches Gesetzbuch (Austrian General Civil Code): 'Interest rates which have been agreed without specifying the level or which apply by law shall be paid at an annual rate of four per cent, unless otherwise provided by law. In addition, Paragraph 1333 of that Code provides, the damages

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criminal provision be interpreted consistently with Article 23 of the Directive, as meaning that the penalties laid down for breach of a national provision may not be applied to breaches that may be found in respect of credit agreements ongoing at the date of the implementation of the national implementing measures?. These two requests were lift to the (CJEU) in terms of article 267 TEFU from national courts.

First, the (CJEU) answered the first questions in many cases.(1) For instance, in

which the debtor owes his creditor as a result of the default in payment of a monetary claim are compensated for by the statutory interest (Paragraph 1000(1)). In addition to statutory interest, the creditor may also seek the reimbursement of other damages caused to him by the fault of the debtor, in particular the necessary costs of extrajudicial enforcement or collection, provided these are reasonably proportionate to the claim pursued. Another example is the French law. Article L. 313-3 of the French Monetary and Financial Code (code monétaire et financier) provides that, where a monetary award is made by a decision of a court, the statutory rate of interest shall be increased by five percentage points on expiry of a period of two months from the date on which the decision of the court became enforceable, even if it was immediately enforceable. However, the enforcement judge may, on application by the debtor or the creditor, and in consideration of the debtor's situation, exempt the debtor from that increase or reduce the amount thereof. The first, second and third paragraphs of Article 1153 of the French Civil Code (code civil) provide that in obligations which are restricted to payment of a certain sum, the damages resulting from delay in performance shall consist only in the award of interest at the statutory rate, except for special rules on commerce and securities. Those damages shall be payable without the creditor being required to demonstrate any loss. They shall be payable only from the date of the demand for payment or of another equivalent act such as a personal letter where the claim is clearly stated, except where they are automatically payable by operation of law. Under Article 1154 of the French Civil Code: interest due on the principal may produce interest, either by a judicial claim or by special agreement, provided that, either in the claim or in the agreement, the interest concerned has been owed for at least one whole year. Article 1254 of the same Code provides that a debtor of a debt which bears interest or produces arrears may not, without the consent of the creditor, attribute the payment which he makes to the principal in preference to the arrears or interest: a payment made on the principal and interest, which is not made in full, is to be attributed first of all to the interest.

(1) See for instant: Judgment of the Court (Third Chamber) of 8 December 2016. Verein für Konsumenteninformation v INKO, Inkasso GmbH. Case C-127/15. Available at: http://curia.europa.eu/juris/celex.jsf?celex=62015CJ0127&lang1=en&type=TXT&ancre visited on 9/1/2018. Judgment of the Court (Fourth Chamber), 18 December 2014. CA Consumer Finance SA v Ingrid Bakkaus and Others.

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the case (LCL Le Crédit Lyonnais SA v Fesih Kalhan)[1] the (CJEU) held that the applicability of Article 23 of the Directive to the national system of penalties, it applies to 'penalties applicable to infringements of the national provisions adopted pursuant to the Directive.[2] In the light of the objective of the Directive, article 23 provides that the system of penalties applicable is to be established in such a way as to ensure that the penalties are effective, proportionate and dissuasive and, furthermore, that the Member States are to take all measures necessary to ensure that they are implemented. In addition, it can be seen from recital (47) and the preamble of the Directive, within those limits, the choice of penalties remains within the discretion of the Member States.[3] In this regard, the (CJEU) held that while the choice of penalties remains within the discretion of Member States, they must ensure in particular that infringements of EU law are penalized under conditions, which are analogous to those applicable to infringements of national law of a similar nature and importance and to make the penalty effective, proportionate and dissuasive.[4] This is to say, the severity of penalties must be commensurate with the seriousness of the infringements for which they are

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Request for a preliminary ruling from the Tribunal d'instance d'Orléans. Case C449/13. Para. 11. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli:ECLI:EU:C:2014:2464 visited on 14/2/2018.
Judgment of the Court (Fourth Chamber), 27 March 2014. LCL Le Crédit Lyonnais SA v Fesih Kalhan. Request for a preliminary ruling from the tribunal d'instance d'Orléans. Case C565/12. Para.. Available at: http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0565&lang1=en&type=TXT&ancre visited on 18/2/2018.

(1) Judgment of the Court (Fourth Chamber), 27 March 2014. LCL Le Crédit Lyonnais SA v Fesih Kalhan. Request for a preliminary ruling from the tribunal d'instance d'Orléans. Case C565/12. Para. 9. Available at: http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0565&lang1=en&type=TXT&ancre visited on 18/2/2018.

(2) Para 34 of the Judgment of the Court (Fourth Chamber), 27 March 2014. LCL Le Crédit Lyonnais SA v Fesih Kalhan. Request for a preliminary ruling from the tribunal d'instance d'Orléans. Case C565/12. Available at: http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0565&lang1=en&type=TXT&ancre visited on 18/2/2018.

(3) Para. 43 of the above decision.

(4) See: Joined Cases C-387/02, C-391/02 and C-403/02 Berlusconi and Others [2005] ECR I-3565, paragraphs 64 and 65, and Case C418/11 *Texdata Software* [2013] ECR, paragraph 50). Mentioned at http://eur-lex.europa.eu/search.html?DN=62002C?0387&qid=1520671976656&DTS_DOM=ALL&type=advanced&lang=en&SUBDOM_INIT=ALL_ALL&DTS_SUBDOM=ALL_ALL visited on 16/1/2018.

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imposed, in particular by ensuring a genuinely dissuasive effect, while respecting the general principle of proportionality. In that regard, the national court notes that, according to national case-law, the penalty of forfeiture of entitlement to interest relates only to contractual interest, with the result that creditors are automatically entitled to interest at the statutory rate, which, in the vast majority of cases, is also automatically increased by five percentage points. In the main proceedings, the referring court indicates that, for 2012, the rate of contractual interest was 5.60%, whereas the interest at the statutory rate, increased by five percentage points, amounted to 5.71%. The difference between those rates would have been even more pronounced in regard to 2013. It follows, according to the referring court, that the application of the forfeiture penalty, as provided for by the national legislation, is liable to confer an advantage on the creditor.(1) The (CJEU) held in another case that If the penalty of forfeiture of entitlement to interest is weakened, or even entirely undermined, by reason of the fact that the application of interest at the increased statutory rate is liable to offset the effects of such a penalty, it necessarily follows that that penalty is not genuinely dissuasive.(2) If the penalty of forfeiture of entitlement to contractual interest is not genuinely dissuasive, it must be noted in this respect that a national court to consider the whole body of rules of national law and to interpret them in the light of the wording and purpose of the applicable directive.(3) This is to say that, article 23 of the Directive precludes the application of a national system of penalties under which, that creditor forfeits its entitlement to contractual interest, but is automatically entitled interest provided at the statutory rate, if court finds that the contractual interest are not significantly

(1) Para. 48 of the above decision.

(2) Judgment of the Court of 8 June 1994. Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland. Safeguarding of employees rights in the event of transfers of undertakings. Case C-382/92. European Court Reports 1994 I-02435. Para. 56-58. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1520672544897&uri=CELEX:61992CJ0382 visited on 16/1/2018.

(3) Judgment of the Court (Fourth Chamber) of 27 February 2014 (request for a preliminary ruling from the Krajský soud v Plzni - Czech Republic) – Ochranný svaz autorský pro práva k dílům hudebním o.s. (OSA) v Léčebné lázně Mariánské Lázně a.s. (Case C-351/12), para.14. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=150055&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1277431 visited on 22/1/2018.

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lower than those which it could have received had it complied with its obligation.(1)

Second, the (CJEU) responded the second request in many cases as well. For instance, Article 26(1).28 of the Croatian Law on consumer credit provides for the imposition of a fine on the lender or intermediary for the loan which does not comply with its obligations. In case (Renata Horžić and Siniša Pušić v Privredna banka Zagreb and Božo Prka),(2) as the Directive adopts the maximum harmonization technique, the validity of this criminal sanction was questionable at the Prekršajni sud u Bjelovaru (Criminal Court, Bjelovar, Croatia), so it asks the clarification of the (CJEU). The (CJEU) clarified that as Full harmonization is necessary to ensure that all consumers in the [European Union] enjoy a high and equivalent level of protection of their interests and to create a genuine internal market, Member States should therefore not be allowed to maintain or introduce national provisions other than those laid down in this Directive. However, such restriction should only apply where there are provisions harmonized in this Directive. Where no such harmonized provisions exist, Member States should remain free to maintain or introduce national legislation.(3) Jurisprudences of the (CJEU) show that Member States are not authorized to maintain or introduce national provisions other than those provided for by that directive.(4) In contrast, it is also clear from

(1) Judgment of the Court (Fourth Chamber), 27 March 2014. LCL Le Crédit Lyonnais SA v Fesih Kalhan. Request for a preliminary ruling from the tribunal d'instance d'Orléans. Case C565/12. Para. 55. Available at: http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0565&lang1=en&type=TXT&ancre visited on 18/2/2018.

(2) Order of the Court (Sixth Chamber) of 12 October 2016. Renata Horžić and Siniša Pušić v Privredna banka Zagreb and Božo Prka. Joined Cases C-511/15 and C-512/15. Available at: http://curia.europa.eu/juris/celex.jsf?celex=62015CO0511&lang1=en&type=TXT&ancre visited on 15/1/2018

(3) See recital 9 of the Directive.

(4) Judgment of the Court (Fourth Chamber) of 12 July 2012. SC Volksbank România SA v Autoritatea Națională pentru Protecția Consumatorilor - Comisariatul Județean pentru Protecția Consumatorilor Călărași (CJPC). Case C-602/10. Para. 38 provides that: It follows from Article 22(1) of Directive 2008/48, interpreted in the light of recitals 9 and 10 in its preamble, that, so far as concerns credit agreements which fall within the directive's scope, the directive provides for full harmonisation and — as is evident from the heading of Article 22 — is imperative in nature, factors which must be understood as meaning that, as regards the matters specifically covered by that harmonisation, the Member States are not authorised to maintain or introduce national provisions other than those provided for by the directive.
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recital 10 of that directive, Member States may apply provisions of the directive to areas not covered by its scope.(1) The (CJEU) held that they might, in respect of credit agreements not coming within the directive's scope, maintain or introduce national measures corresponding to the provisions of the directive or to some of them.(2) Consequently, the harmonization for which the Directive provides does not preclude a Member State from including such agreements within the scope of a national measure designed to transpose that directive, in order to apply all or some of the directive's provisions to those agreements.(3) Member States have the right to determine the conditions in which they propose to extend their national set of rules transposing that directive to credit agreements, which do not fall within one of the areas for which the European Union legislature sought to lay down harmonized provisions.(4) The same applies with regard to the system of penalties laid down by Article 23 of the Directive. Thus, that article does not preclude a Member State from applying, in its national legislation concerning ongoing credit agreements not coming within the material scope of Directive 2008/48, provisions in respect of penalties in the event of infringement of the provisions

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(1) Order of the Court (Sixth Chamber), 3 July 2014. Liliana Tudoran and Others v SC Suport Colect SRL.
Request for a preliminary ruling from the Judecătoria Câmpulung. Case C92/14. Para. 31. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli:ECLI:EU:C:2014:2051 visited on 18/1/2018.

(2) Judgment of the Court (Fourth Chamber) of 12 July 2012. SC Volksbank România SA v Autoritatea Națională pentru Protecția Consumatorilor - Comisariatul Județean pentru Protecția Consumatorilor Călărași (CJPC). Reference for a preliminary ruling: Judecătoria Călărași - Romania. Case C-602/10. Para. 40. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli:ECLI:EU:C:2012:443 visited on 22/1/2018.

(3) Judgment of the Court (Fourth Chamber) of 12 July 2012. SC Volksbank România SA v Autoritatea Națională pentru Protecția Consumatorilor - Comisariatul Județean pentru Protecția Consumatorilor Călărași (CJPC). Reference for a preliminary ruling: Judecătoria Călărași - Romania. Case C-602/10. Para. 40 and 43. Avaliable at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli:ECLI:EU:C:2012:443 visited on 22/1/2018.

(4) Order of the Court (Sixth Chamber) of 12 October 2016. Renata Horžić and Siniša Pušić v Privredna banka Zagreb and Božo Prka. Joined Cases C-511/15 and C-512/15. Para. 31. Available at: http://curia.europa.eu/juris/celex.jsf?celex=62015CO0511&lang1=en&type=TXT&ancre visited on 15/1/2018

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of that legislation.(1) This is to say that Member states have the right to provide in their national laws criminal penalties in order to enforce Creditors to comply with his obligations provided in the related national measures.(2)

8. Conclusion

This article shows many decisions held by the (CJEU), which constituted many details and clarifications for the terms of the Directive. The Directive provides many rules of protection for the average consumer in order to ensure that he is at the same level of knowledge at the time of making the agreement. For this reason, the Small Businesses may need the protection provided by the Directive. Despite this fact, this party is excluded from the terms of protection provided by the Directive: only natural persons who are acting for purposes which are outside their trade, business or profession, are only the target of protection provided by the Directive. Therefore, a contracting party would never be a consumer in case he concluded a trade of professional contract regardless of his personal status. Credit intermediary has also the same obligations of Creditor to provide the consumer with clear and adequate information in order to insight his will. He is a person or a company which performs certain tasks without acting as a creditor. It is clear from many (CJEU) decisions that debt collection agency is to be regarded as being a 'credit intermediary' in terms of the Directive, but not subject to the obligation to provide the consumer with pre-contractual information provided by the Directive.

According to the Directive, information must be provided sufficiently earlier before the conclusion of the agreement. Good time is to mean that the creditor has an obligation not to unreasonably delay the provision of pre-contractual information and that the consumer must have the opportunity to take the information linked to a proposed regulated agreement away for further consideration. In addition, decisions of the (CJEU) require information to be given in easily understandable words and in a clear and comprehensible form, in an official language of the Member State where the payment service is offered or in any other language

(1) Ibid, para. 33.

(2) See also Recital 47 of the Directive, which provides that: Member States should lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and ensure that they are implemented. While the choice of penalties remains within the discretion of the Member States, the penalties provided for should be effective, proportionate and dissuasive.'

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agreed between the parties. That information must be written so as not to mislead consumers by using technical expressions or ambiguous legal terms, and any used abbreviations are not allowed to be used unless they are provided by national law or commonly used in market transactions. The required aforementioned information has to be provided to consumers on paper or on a durable medium through the use of the Standard European Consumer Credit Information form (SECCI). The list of information is exclusive. The supply of this information in electronic format transmitted to the electronic mailbox of the customer is not to be considered as a durable medium within the meaning of the Directive unless that website allows the user to store information and the transmission information must be accompanied by active behavior on the part of the provider. In case of a contract concluded by means of distance communications, the creditor shall be deemed to have satisfied other conditions provided in the Directive (2002/65/EC).

Article (5/6) of the Directive obliges the creditor to provide adequate explanations to the consumer, to place him in a position enabling him to assess whether the proposed credit agreement is adapted to his needs and to his financial situation. Member states have the right to follow the manner to ensure that the creditor provides such assistance. In contrast, the creditor is not obliged to advise the consumer to go to another creditor if the latter offers a type of credit which is more appropriate (e.g. cheaper) than the types of credit the creditor himself offers. In addition, the Directive obliges the creditor to assess the consumer's creditworthiness before the conclusion of the credit agreement. It is the obligation of the creditor to take the initiative to obtain the necessary information from the consumer, and the consumer is obliged in this case to provide the creditor with correct and complete information.

Finally, the (CJEU) precludes national rules according to which the burden of proving the non-performance of the obligations lies with the consumer. The use of standard terms providing the accomplishment of the Creditor duty to supply the consumer with the required information is off recognition as well. The Directive authorizes Member States take all measures necessary to ensure the appropriate application of the terms of the Directive. They also have the right to determine the conditions in which they propose to extend their national set of rules transposing the Directive. The same applies to the system of penalties laid down by Article 23 of the Directive, so they have the right to legislate penalties in the event of infringement of the provisions of national legislation, which implemented the Directive.

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حق المستهلك في الحصول على المعلومات والنصح في عقود الائتمان في القانون الأوروبية

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ملخص البحث:

تهدف هذه الدراسة الى بيان وتحليل عدد كبير من قرارات محكمة العدل الأوروبية في السنوات الخمس الأخيرة، الخاصة بحق المستهلك في الحصول على المعلومات والنصيحة من مانح الائتمان، وفقاً لما ورد من نصوص التوجيه الأوروبي رقم 48 لسنة 2008 الخاص بحماية المستهلك في عقود الائتمان المصرفي. رصد البحث عشرات القرارات الصادرة عن محكمة العدل الأوروبية ذات العلاقة بالنطاق الشخصي لتطبيق التوجيه، طبيعة قائمة البيانات التي يجب على مانح الائتمان مراعاتها الواردة في ملحق التوجيه من حيث كونها حصرية أم على سبيل المثال، الطرف الذي يقع عليه عبء اثبات عدم التزام مانح الائتمان بالإعلام والنصح، وأخيراً حق الدول الأعضاء في فرض جزاءات جنائية على مانح الائتمان إن أخل بالتزاماته الواردة في نصوص التوجيه، في وقت ينص فيه التوجيه على فرض جزاءات مدنية فقط.

الكلمات الدالة: مبادئ محكمة العدل الأوروبية في عقود الائتمان، حق المستهلك في الاعلام في عقد الائتمان، حماية المستهلك في الاتحاد الأوروبي، التزام مانح الائتمان بالإعلام.

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