

Article

To Gerald Spindler, an Outstanding Scholar and a Dear and Much-Missed Friend.

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A Third Directive on Consumer Credit

<https://doi.org/10.1515/ercl-2024-2001>

Abstract: The recently adopted Consumer Credit Directive incorporates new forms of credit and uses classic consumer protection instruments as well as introducing measures that increase control over lenders with the aim of preventing over-indebtedness. In general, more burdens are imposed on lenders and certain commercial practices are banned or restricted in all Member States. Moreover, the Directive is characterised by the fact that it includes consumer data protection and specifies a consumers' right not to be discriminated against, which may have some overlap with the General Data Protection Regulation and the on-going development of EU artificial intelligence legislation.

Résumé: La directive sur le crédit à la consommation récemment adoptée intègre de nouvelles formes de crédit et utilise des instruments classiques de protection des consommateurs, tout en introduisant des mesures qui renforcent le contrôle des prêteurs dans le but de prévenir le surendettement. En général, des charges plus lourdes sont imposées aux prêteurs et certaines pratiques commerciales sont interdites ou restreintes dans tous les États membres. En outre, la directive se caractérise par le fait qu'elle intègre la protection des données des consommateurs et énonce le droit des consommateurs à ne pas faire l'objet de discriminations, ce qui

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Full Professor of Civil Law in the Department of Private Law, Universitat de Barcelona (Spain). The research leading to this paper falls within the scope of the I+D+I Project PID2021-127197NB-I00, funded by MCIN/AEI/10.13039/501100011033/ and FEDER 'A Way of Doing Europe'; and Project 2021 SGR 00347, funded by the Generalitat de Catalunya. It is also part of the EU Private Law Jean Monnet Chair research funded by the EU Commission. Prof Markus Artz (University Bielefeld) shared an unpublished presentation on the CCD Proposal with me; and Prof. Miriam Anderson (University Barcelona) took the time to read a previous version of this article. I would like to thank them both for such generosity. As always, any errors or inaccuracies can only be attributed to me. After the submission of this article, the ECJ C-634/21 of 7.12.2023, *OQ v Land Hessen/Schufa*, on Article 22(1) of the GDPR, was published.

peut engendrer des chevauchements avec le règlement général sur la protection des données et le développement en cours de la législation de l'UE sur l'intelligence artificielle.

Zusammenfassung: Die kürzlich verabschiedete (neue) Verbraucherkredit-Richtlinie erstreckt ihren Anwendungsbereich auf neue Kreditformen und reguliert diese mit klassischen Verbraucherschutzinstrumenten, jedoch auch mit neuen Maßnahmen, die Kreditgebern noch stärker Präventionsschritte gegen Überschuldung aufgeben. Insgesamt werden Kreditgebern weitere Lasten auferlegt und gewisse Geschäftspraktiken in allen Mitgliedstaaten *a limine* verboten oder jedenfalls limitiert. Zudem bezieht die Richtlinie jetzt datenschutzrechtliche Elemente ein und spezifische Antidiskriminierungsaspekte für Verbraucher – beide Stoßrichtungen mit Überlappungen mit der EU-Datenschutz-Grundverordnung bzw. den gerade verhandelten Harmonisierungs- und Vereinheitlichungsmaßnahmen im Bereich Künstliche Intelligenz.

1 Introduction

Consumer credit was first regulated in Europe by the Consumer Credit Directive (CCD) 1987, which was amended in 1990¹ and 1998;² CCD 2008 was enacted over twenty years later, with amendments in 2011,³ 2014,⁴ 2016,⁵ 2019⁶ and 2021.⁷ Changes were required over time, and again more recently as a result of digitalisation, which has brought with it new players, new products and new ways of marketing them, as well as the development of artificial intelligence and big data, which has led to profiling and the use of non-conventional data in assessing creditworthiness. Furthermore, the Covid-19 crisis necessitated the inclusion of measures to support the most vulnerable consumers, just as the 2008 economic and financial crisis made it necessary to incorporate them into the MCD.

1 Council Directive 90/88/EEC of 22 February.

2 Directive 98/7/EC of 16 February.

3 Directive 2011/90/EU of 14 November amending Part II of Annex I to Directive 2008/48/EC providing additional assumptions for the calculation of the annual percentage rate of charge.

4 Directive 2014/17/EU of 4 February on credit agreements for consumers relating to residential immovable property (MCD).

5 Regulation (EU) 2016/1011 of 8 June on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds.

6 Regulation (EU) 2019/1243 of 25 July adapting a number of legal acts providing for the use of the regulatory procedure with scrutiny to Articles 290 and 291 of the Treaty on the Functioning of the European Union.

7 Directive (UE) 2021/2167 of 24 November on credit servicers and credit purchasers.

The Commission presented a new CCD Proposal on 30 June 2021.⁸ On 11 April 2023 the Council published the outcome of the political agreement with the European Parliament and on 27 April 2023 the Committee on Internal Market and Consumer Protection (IMCO) of the European Parliament⁹ adopted the provisional political agreement reached with the Council.¹⁰ The European Parliament adopted its position at first reading on 12 September 2023 and the Council held its vote on 9 October 2023. The result is the Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers and repealing Directive 2008/48/EC.¹¹

CCD 2023 is a limited attempt at harmonisation because, although it addresses some previously excluded types of credit, it covers only part of those that are aimed at consumption (Article 2); moreover, it combines full harmonisation with different regulatory options for Member States, pending further harmonisation (Article 42). Although the regulation takes the impact of digitalisation into account, the specific consumer credit regime takes precedence over the regime for financial services contracts concluded at a distance, which is undergoing a more modern regulation that should be incorporated into Directive 2011/83 (CRD).¹²

The following pages provide an overview of the main provisions of CCD 2023 and focus on new developments.

2 The Many Forms of Consumer Credit

CCD 2023 deals with some of the issues that were excluded from CCD 2008, which was very restrictive compared to the 2002 Proposal (Article 3(2)).

2.1 Small-Scale Financing and Short-Term Credit

CCD 2008 did not apply to credit agreements for amounts below EUR 200 or above EUR 75,000 (Article 2(2)(c)). In contrast, the new CDC 2023 includes all credit

⁸ Brussels, 30 June 2021, COM(2021) 347 final. Impact Assessment, SWD(2021) 170 final. Brussels, 30 June 2021.

⁹ Council of the European Union. Document 7758/23. Brussels, 11 April 2023.

¹⁰ Provisional Agreement resulting from Interinstitutional Negotiations of 27 April 2023 (PE746.917v01-00).

¹¹ *OJ L* of 30 October 2023.

¹² See European Parliament legislative resolution of 5 October 2023 at first reading, on the proposal for a directive amending Directive 2011/83/EU and repealing Directive 2002/65/EC.

agreements of up to EUR 100,000 (Article 2(2)(c))¹³ and also covers low-value credit agreements, which are usually below the minimum threshold of EUR 200 (Article 2.8(a)) and are repaid within a very short period (short-term high cost loans, especially payday loans), which have increased considerably as a result of digitalisation. Furthermore, it includes credit agreements where credit is granted free of interest and with no other charges (Article 2.8 letter (b)), in particular, ‘Buy Now, Pay Later’ credit, which involves advance financing of the purchase price of goods and is especially used for online purchases.¹⁴ However, credit of this type entails making quick decisions, encourages consumers to spend more than they have and contributes to a deterioration of their financial situation, because failure to repay and high late or non-payment fees are part of lenders’ business models.¹⁵ This group also includes forms of credit that have to be repaid within three months and carries insignificant charges (Article 2.8 letter (c)), which previously fell outside the scope of CCD 2008 (Article 2(2)(f)).¹⁶ They are now included, but Member States can make provision for partial application of CCD 2023 to one or more of them, in particular with respect to the duty to provide certain information in advertising, at the pre-contractual stage and in the agreement itself (Recital 15, Article 2.8).

2.2 Overdraft Facilities and Overrunning

Overdraft facilities and overrunning are increasingly common forms of consumer credit. An overdraft is a form of credit that was previously excluded from CCD 2008 if repayment had to be made within one month (Article 2(2)(e))¹⁷ and partially excluded if repayment had to be made on demand or within three months (Article 2(3)). In view of the high commission costs and the risk that lenders may decide to request immediate repayment, CCD 2023 now includes overdrafts in its scope of application, and no distinction is made in relation to the repayment period (Article 24). Overrunning

¹³ The European Parliament proposed allowing Member States to raise the amount to EUR 150,000. See I Report on the Proposal for a Directive on consumer credits. Committee on the Internal Market and Consumer Protection. Rapporteur: Kateřina Konečká, 28 August 2022 (PE696.560v03-00). Amendment 52 Proposal for a Directive Article 2 – Paragraph 3 a (new).

¹⁴ See A. Machura-Urbaniak and P.M. Lupinu, “‘Buy Now, Pay Later’ (BNPL) Payment Services. Opportunities and Legal Challenges for EU Consumers and Businesses’ *EuCML* 2023 (5) 184–193.

¹⁵ SWD(2021) 170 final, 16–17, 38, 45, 47–48; J. Wittig and A. Wittig, ‘Weitere Regulierung des Konsumentenkredits. Der Vorschlag der Europäischen Kommission vom 30.6.2021 zur Überarbeitung der Verbraucher kreditrichtlinie (COM(2021) 347 final)’ *WM* 2021 (49) 2370–2379, 2371.

¹⁶ For credit agreements where the credit is granted free of interest and without any other charges (except those aimed at covering costs directly linked to the security of the credit), see also Article 3(2)(c) MCD.

¹⁷ See also art 3(2)(d) MCD.

(Article 25) is partially covered by the Directive (Article 2(4))¹⁸ and Member States can also exclude the obligation to perform creditworthiness assessment (Article 2(4)(b)).

2.3 Credit Cards

The deferred debit card payment mode was excluded from the 2008 CCD when the amounts involved had to be repaid within three months and incurred only minimal charges.¹⁹ Member States can now opt to exclude this payment method when the full amount of the transactions is debited from the cardholder's current account on a specific date agreed in advance, normally once a month, after 40 days, without payment of interest and if only limited charges linked to the provision of the payment service are debited and is provided by a credit institution or a payment institution (Art. 2(5)).²⁰ The Council considered it reasonable not to apply CCD 2023 under these conditions, as this enables households to better manage their expenditure.²¹ The European Parliament, by contrast, suggested including such claims within the scope of CCD 2023 when they had to be repaid within one month, even for the purpose of applying the solvency check and obtaining adequate pre-contractual information.²² If the amount due exceeds the positive balance of the current account, the provisions on overdrafts and overrunning apply (Articles 24, 25). Other types of credit card payments, including revolving credit, do fall within the scope of the directive.

2.4 Leasing and Purchase Price

Although pay-per-use is a common form of financing,²³ both the European Parliament and the Council considered it appropriate to exclude leasing from CCD 2023's scope of application when it does not include a purchase option (Article 2(2)(g)).²⁴ The

¹⁸ See formerly art 2(4) CCD 2008.

¹⁹ Recital 13 and art 2(2)(f) CCD 2008.

²⁰ See recital 17 Regulation (UE) 2015/751 of 29 April 2015 on interchange fees for card-based payment transactions.

²¹ Council of the European Union. Document 9433/1/22 REV 1, Brussels 7 June 2022, point 10 (c) and recital 15c. Corresponds to recital 15f of the Provisional Agreement resulting from Interinstitutional Negotiations (27 April 2023). See recital 18 CCD 2023.

²² European Parliament Amendment 3 Proposal for a Directive Recital 15; Amendment 50 Proposal for a Directive Article 2 – paragraph 2 – point jb (new).

²³ J. Vogel, 'Circular Economy: Private Lease a Consumer Credit in Disguise?' *EuCML* 2020 (2) 51–60.

²⁴ EU Parliament Amendment 3 Proposal for a Directive Recital 15; Amendment 48 Proposal for a Directive Article 2 – paragraph 2 – point f a (new); Council of the European Union. Document 9433/1/22 REV 1. Brussels, 7 June 2022, point 10 (d), recital 15 quinquies, art 2(2) (fa).

financing of the cost of the goods in hire purchase arrangements does fall within the scope of CCD 2023, but the Council felt that it should not apply to deferred charge-free payments (except for limited late payment penalties) where there is no third party credit provider (which, however, is typically the case with Buy Now, Pay Later platforms) and payment in full is made within 50 days of delivery of the goods or provision of the service, or 14 days for large online goods and service providers (Article 2(2)(h)). If longer time limits are imposed, CCD 2023 does apply.²⁵

2.5 Credit on Immovable Property

CCD 2023 continues to exclude credit for the purpose of acquiring or retaining property rights over land or in an existing or projected building and specifies that this also includes premises for trade, business or professional use; that is, whether they are residential or not (Article 2(2)(b)).²⁶ However, like CCD 2008,²⁷ it also covers credits which are not secured either by a mortgage or by another comparable security commonly used for immovable property in a Member State or by a right related to immovable property for the purpose of renovating residential (immovable) property (Article 2(3)) (even if it exceeds the amount of 100,000 euros). MCD does not cover credit for purposes unrelated to acquiring or preserving property rights (e.g. to pay for holidays or medical bills) and which are secured by non-residential property (e.g. business premises, storage space and garages, for example) (Article 3(1)(a)). Perhaps surprisingly, CCD 2023 does not include them either.

3 Credit Marketing and Practices that Exploit Consumer Behaviour

In order to prevent consumers from spending more than they can repay CCD 2023, prohibits aggressive and non-transparent credit marketing practices, especially with regard to information on the cost of the credit or the total amount to be repaid (Article 7). Furthermore, Member States can prohibit advertising containing certain information that could affect or manipulate consumer decisions (Articles 8(7), 8(8)).

CCD 2023 continues to allow bundling practices, but prohibits tied selling practices more severely than Article 12 MCD. Nevertheless, it does allow two exceptions,

²⁵ With a slightly different proposal for a regulation, see Council of the European Union. Document 9433/1/22 REV 1. Brussels, 7 June 2022, Point 10 (b), recital 15b, article 2.2 (fb).

²⁶ See art 3(1)(b) MCD.

²⁷ Recital 14 and art 2a CCD 2008. See art 46 MCD.

the first concerning the possibility of requiring consumers to open or retain one or more accounts for the recording of payment transactions and credit drawdowns (Article 14(2)),²⁸ and the second regarding the purchase of insurance to cover repayment (Article 14(3)). In practice, borrowers are often not given the opportunity to choose an insurer that does not belong to the lending institution.²⁹ CCD 2023 now makes it compulsory for consumers to be given the option of choosing other policies on the market that cover the same risk, but this does not permit changes to the credit agreement conditions. Consumers must be given at least 3 days to compare insurance offers without the offers being changed,³⁰ but they can waive this period (Article 14(5)).

If the purchase of an associated service is compulsory in order to obtain credit, the consumer should be informed as to whether or not the service or product can be purchased separately and only then should they be asked to give their consent by means of an explicit agreement. CCD 2023 prohibits the granting of credit, such as sending out credit cards or unilaterally increasing overdrafts and card limits without consumers' prior request or via default options that could entail the presumption of consent, such as silence, pre-ticked boxes and inaction (Articles 15, 17).³¹

4 Information Provided Before Credit Agreements Are Concluded

CCD 2008 obliged lenders to provide consumers with information so that they could compare different offers and make informed choices (Article 5(1), 6(1) CCD 2008).³² This point of view is not only maintained in CCD 2023, but now more information is required and a distinction must be drawn between that given in advertising

28 According to ECJ C-778/18 of 15 October 2020, *Association française des usagers de banque* (§§ 57–58, 61–62) borrowers cannot be obliged to pay out their entire salaries or similar incomes via direct debit to a payment account for a certain period of time, regardless of the amount, the instalments and the duration of the loan.

29 In the immovable property credit field, among many, SAP Ourense (Section 1) de 28 January 2021 (ECLI:ES:APOU:2021:67).

30 See European Parliament Amendment 121 Proposal for a Directive art 14 – para 4.

31 Art 5(5), 15 Annex I UCP; art 8(2), 22, 27 CRD. See Guidelines on the interpretation and application of Directive 2011/83 issued by the European Commission (*OJ C* 525, 29 December 2021), 59, 62. In Spain, see art 89.4 TR-LGDCU on the nullity of the clause imposing unsolicited services. Hence, regarding insurance linked to a mortgage agreement, among many others, Santa Cruz de Tenerife (Section 4) Provincial Court Sentence of 21 June 2021 (ECLI:ES:APTF:2021:1566).

32 Under CCD 2008, see ECJ C-66/19 of 26 March 2020, *Kreissparkasse Saarlouis* (§ 35) (EU:C:2020:242); ECJ C-33/20, C-155/20, C-187/20 of 9.09.2021, *Volkswagen* (§ 70) (ECLI:EU:C:2021:736).

(Article 8), the general information to which consumers are entitled on the lenders' products on the market (Article 9) and information in the credit offer, tailored to their personal needs (Articles 10, 11).³³ For all or some of the new products added to the scope of CCD 2023, such as credit of less than 200 euros, at zero cost and limited interest for late payment, or repayable within three months at virtually no cost (Article 2(8)), Member States can exclude the obligations imposed on creditors in Articles 8(3)(d), (e) and (f), 10(5), Articles 11(4), 21(3). However, it is not clear in general how consumers would benefit from being unable to know what fees or late payment penalties they will be charged before they enter into an agreement, or from not knowing at the outset that they have the right to withdraw from a payday loan. Rather than avoiding information overload for consumers, this is about avoiding administrative overload for lenders.³⁴

4.1 Better Understanding of Relevant Information

With the aim of enhancing consumers' understanding of information, the Council has merged the Standard European Consumer Credit Information sheet and the Standard European Consumer Credit Overview form into one document with a maximum of two pages.³⁵ This may help to simplify matters, but the fact that a single document contains the essential credit data, prominently displayed, and then arranges the pre-contractual information in a more detailed presentation is not necessarily synonymous with greater clarity. For example, the first part of page 1 of the Standard European Consumer Credit Information should contain the borrowing rate, or all the borrowing rates if different rates apply in different circumstances (Article 10(3)(d)), the annual percentage rate of charge and the total amount payable by consumers (Article 10(3)(e)). Where different rates apply, the conditions governing the application of each borrowing rate and, where applicable, the index or reference rate applicable to each initial rate should appear separately on another page, as well as the deadlines, conditions and procedures for altering each borrowing

³³ See also art 11–14 MCD. P. Rott, 'Verbesserung, Verwässerung oder more of the same? – Zur Neuregelung des EU Verbraucherkreditrechts' *VuR* 2022, 283–292, 286. Against imposing the general obligation referred to in art 9 on retailers, R. Freitag, 'Über- und Unterregulierung im europäischen Verbraucherkreditrecht' *ZRP* 2022, 67–68.

³⁴ See recital 17 CCD 2023: '[...] in order to avoid an unnecessary burden for creditors, taking into account the market specificities and the particular characteristics of those credit agreements, such as their shorter duration, while ensuring a higher level of consumer protection'.

³⁵ See Council of the European Union. Document 9433/1/22 REV 1. Brussels, 7 June 2022. See also EESC Opinion 21 October 2021, § 4.6. Originally, see recital 31, art 10(2) and (4) and Annex I and II Commission Proposal. Against, Wittig and Wittig, n 15 above, 2374.

rate (Article 10(5)(c)). A representative example illustrating the percentage rate and the total amount to be paid by consumers, mentioning all the assumptions used to calculate the rate (Article 10(5)(f)), must also be provided. The information is not in fact summarised, but repeated in different ways on the first and second pages, and this can be confusing rather than helpful.

4.2 Timing of Information Provision

All an offer's terms and conditions must be supplied 'in good time' before the agreement is concluded or the consumer commits to a binding offer (Article 10(1)).³⁶ Recital 36 explicitly stresses that pre-contractual information cannot be provided at the same time as the conclusion of the credit agreement. This is to ensure that consumers have sufficient time to read and understand the pre-contractual information, compare offers and make informed decisions, a particularly useful warning with regard to online contracting, which enables consumers to move quickly through the different interfaces by ticking boxes or clicking on options.³⁷ However, if the information is provided less than a day before the transaction, all that happens is that lenders must remind consumers separately within 7 days that they have the option of withdrawing, and explain the procedure (Article 10(1) II). The measure may be effective for credits for which a simplified pre-contractual information scheme has been chosen, but otherwise the provision's usefulness is doubtful.³⁸ In any event, the rule shows that the legislation places no restrictions on the fast granting of credit.³⁹ National legislators can maintain and/or extend cooling-off periods, which could be necessary in order for adequate explanations to be provided,⁴⁰ and can decide on the validity of the consent of consumers who accept the contractual offer prematurely (Article 44).⁴¹

³⁶ Art 3(1), 5(1) Directive 2002/65 of 23 September 2002, concerning the distance marketing of consumer financial services. See also, arts 5, 6(1) CCD 2008, art 14(1)(b) MCD. On information in good time concerning changes in the borrowing rate, see art 27.4 MCD and art 23.1 CCD 2023.

³⁷ See also recital 26 and art 1(4) inserting a new art 16a(1) into the CRD, according to the amendments introduced by the European Parliament legislative resolution of 5 October 2023 at first reading, on the proposal for a directive amending Directive 2011/83/EU and repealing Directive 2002/65/EC.

³⁸ Hence, Freitag, n 33 above, 68; Wittig and Wittig, n 15 above, 2374. The Council had proposed abolishing the rule. See Council of the European Union. Document 9433/1/22 REV 1, Brussels, 7 June 2022, point 12 (b).

³⁹ In favour, Freitag, n 33 above, 68. Also, understanding that it would favour cases in which granting credit is urgent, Rott, n 33 above, 286.

⁴⁰ According to ECJ C-449/13 of 18 December 2014, Consumer Finance (ECLI:EU:C:2014:2464), they must be provided before agreements are concluded (§ 46).

⁴¹ Cf Freitag, n 33 above, 68.

5 Adequate Explanations

Consumers must be able to understand the obligations and risks they are taking on and thus need additional assistance in the form of adequate explanations about the product and associated services before concluding an agreement (Recital 36, 45, Article 12(1)).⁴² These explanations must not be personal recommendations (Recital 45), but are likely to be exactly that if they are given after the creditworthiness assessment and the lender considers that another credit option is better suited to a consumer's interests.⁴³ As usual, it is for Member States to adapt the way in which such explanations are provided (Article 12(2)) to the type of consumer (for example, consumers with disabilities or limited financial literacy), the type of credit (for example, it may be necessary to explain that the APR is not an indicator that represents the cost of microcredits),⁴⁴ or the circumstances in which credit is provided (for example, if explanations are given verbally in person in an establishment, Member States can require written records). It would be inappropriate to consider the obligation to provide adequate explanations to be fulfilled by referring consumers to websites with answers to Frequently Asked Questions. Should this be the case, this solution should go hand-in-hand with measures to enable consumers to obtain clarification of anything that they do not understand. If robo-advisers or chatbots are used, it should still be possible to request human intervention in the form of hotlines or other types of interactive communication.⁴⁵ Member States can require documentation of how and when this obligation is fulfilled (Recital 45).

6 Creditworthiness Assessment

CCD 2023 adopts a new approach to assessing creditworthiness, which is no longer based on trust in the decisions of informed consumers, but on lenders' duty to act in their interests (Article 18(1)).⁴⁶ This means that credit can only be granted when the results of the creditworthiness analysis are positive (Article 18(6)), although, firstly, it

⁴² Art 5(6) CCD 2008; art 16 MCD.

⁴³ According to ECJ C-449/13 of 18 December 2014, *Consumer Finance* (ECLI:EU:C:2014:2464), creditworthiness assessments may require adapting the explanations provided (§ 45).

⁴⁴ In this regard, in Spain, A. Agüero Ortiz, 'Estadísticas de las TAES y precios medios aplicados a los micropréstamos' *Revista Cesco de Derecho de Consumo* 2023 (47) 1–43. Available at: doi.org/10.18239/RCDC_2023.47.335.

⁴⁵ See recital 15, 40 and art 1(4) inserting a new art 16d (3) into the CRD, according to the amendments introduced by the European Parliament legislative resolution of 5 October 2023 at first reading, on the proposal for a directive amending Directive 2011/83/EU and repealing Directive 2002/65/EC.

⁴⁶ Cf art 8 CCD 2008; arts 18, 20 MCD. See SWD (2020). 254 final, 61.

is still up to Member States to decide on the procedures by which lenders conclude that consumers are likely to repay the credit (Article 18(4)), and secondly, it is also up to national law to stipulate the consequences of disregarding negative creditworthiness (Article 44). Credit that was formerly granted in less than 24 hours and was paperwork-free is not excluded from this supervision, but some may perhaps benefit from the circumstances provided for in Recital 55, when it concerns, *inter alia*, the financing of studies or one-off health care expenses.⁴⁷ On the whole, it is unclear whether the loans on which many FinTech companies base their business will be able to remain on the market, given that in many cases nothing more than a current account or simple proof of income was previously required.⁴⁸

In addition, CCD 2023 seeks to align itself with the provisions of the GDPR and prohibits the inclusion of sensitive data in creditworthiness assessments (Article 9(1) GDPR) as well as the collecting of this or other unstructured data, such as images, videos or audios, from social networks (Article 18(3)). Only financial and economic data concerning expenditure and income can be considered for creditworthiness assessments and these must be related to the credit type, duration and amount (Recital 55, Article 18(3)). Article 18(8) CCD seems to settle the debate surrounding the interpretation of Article 22 GDPR on the granting of credit.⁴⁹ In fact, Article 18(8) refers to lenders' 'use' of automated processing and this seems to make it impossible to distinguish between the business model used by online fast lending platforms involving no human intervention (for example, Buy Now, Pay Later) and the traditional model of lenders who rely on input from credit rating agencies before making personalised decisions.⁵⁰ As other cases involving automated

47 The Council deleted point 2 of art 18(4) of the Commission Proposal, which became recital 47 (now recital 55). See Council of the European Union. Document 9433/1/22 REV 1, Brussels, 7 June 2022, point 13(a).

48 P. Rott, 'Small credit through online platforms' *Law and Financial Markets Review* 2023, 1–14, 9 (published online: <https://doi.org/10.1080/17521440.2023.2167523>). The article is not open access and was kindly provided by the author in mid-August 2023 through Prof Gerald Spindler. On such practices in Spain, Facua, 'Créditos rápidos. Programa de información a los consumidores' 3, 8–9.

49 On the scope of art 22 RGPD, P. Rott, 'A Consumer Perspective on Algorithms', in L. De Almeida *et al* (eds), *The Transformation of Economic Law. Essays in Honour of Hans-W. Micklitz* (Oxford: Hart, 2019) 81–96, 88; K. Langenbucher, 'Diskriminierung bei der Vergabe von Verbraucherkrediten? Eine Anmerkung zu den Plänen des europäischen Gesetzgebers' *BKR* 2023, 205–214, 209; P. Buck-Heeb, 'Rechtsrisiken bei automatisierter Kreditwürdigkeitsprüfung und Kreditvergabe' *BKR* 2023, 137–145, 139–140; G. Spindler, 'Algorithms, credit scoring and the new proposals of the EU for an AI Act and on a Consumer Credit Directive' *Law and Financial Markets Review* 2023, 1–23, 10–11 (published online: <https://doi.org/10.1080/17521440.2023.2168940>). See AG Priit Pikamäe's broad interpretation in the conclusions on case C-634/21, *OQ v Land Hessen/Schufa*.

50 Spindler, n 49 above, 20. Accepts the inclusion of external rating in art 18(6) Proposal CCD 2023, in spite of the fact that it is not clear, *a priori*, that this is provided for in art 22 GDPR, Buck-Heeb, n 49 above, 143.

processing, Article 18(8) grants consumers the right to review by a human and in the present case this includes a clear and comprehensible explanation of the creditworthiness assessment that must address the logic and risks of the automated processing of personal data, as well as its meaning for and impact on the decision to grant credit (Article 18(8)(a)). Inasmuch as this may affect companies' right to keep the way the algorithm functions secret, it is unclear what consumers are entitled to,⁵¹ and whether these appropriate explanations referred to in Article 18(6)(a) amount to the same thing as 'meaningful information', mentioned in Article 15(1)(h) GDPR.⁵² According to AG Pikamäe, the latter excludes the obligation to disclose the algorithm, but certainly includes the right to obtain sufficiently detailed explanations about the method used to carry out the rating and to be informed of the reasons that have produced a given outcome.⁵³ This makes sense, as consumers should be able to express their points of view (Article 18(8) (b)) and contest decisions (Article 18(8)(c), 18(9)) and therefore need to know what data was used, the importance of some data compared to others and how they have been related, in order to be able to identify any errors or bias.⁵⁴ Companies must be prepared to explain their algorithms' complexity and, if this is impossible, in the dual sense that they lack sufficient resources to do so (for example, small-scale providers of fast credit) and/or because of the 'black box problem', this begs the questions as to whether such programs can continue to be used.⁵⁵ Significantly, Recital 37 of the Artificial Intelligence Regulation seeks to exclude creditworthiness assessments carried out by small-scale lenders for their own use from the high-risk systems category. It should come as no surprise that the European Parliament is opposed to this exclusion.⁵⁶

Article 18(8) does not distinguish on the basis of whether or not credit has been granted, but Article 18(9) specifically addresses situations in which the application for credit has been rejected to say that consumers are then entitled to human assessment of the creditworthiness. Therefore, consumers have the right to have their creditworthiness assessments reviewed, as previously in Article 18(8)(c), but it

51 Cf recital 63 GDPR. F. Ferretti, 'Consumer access to capital in the age of FinTech and big data: The limits of EU law' *MJ* 2018 (4) 476–499, 497; Buck-Heeb, n 49 above, 141. Recital 10 Directive 2019/2161 does not require detailed explanations from traders on the functioning of their rating mechanisms, including algorithms. Spindler, n 49 above, 20–21 warns that the protection of secrets may only apply to third party rating service providers vis-à-vis the lender.

52 According to Spindler, they are not. See Spindler, n 49 above, 21.

53 AG Priit Pikamäe in the conclusions on case C-634/21, *OQ v Land Hessen/Schufa* (§§ 57–58).

54 AG Priit Pikamäe in the conclusions on case C-634/21, *OQ v Land Hessen/Schufa* (§§ 57–58).

55 Clearly feeling that they cannot, Rott, n 48 above, 9; Rott, n 49 above, 92.

56 COM(2021) 206 final, Brussels, 21 April 2021. European Parliament Amendment 67 recital 37 [Amendments adopted by the European Parliament on 14 June 2023 (P9 TA(2023)0236)].

is not easy to tell whether Article 18(9) refers to a different challenge procedure.⁵⁷ New assessments should take new data into account, after erroneous previous data or other data whose use is prohibited have been eliminated. Recital 56 recalls that reviews should not necessarily lead to credit being granted, which certainly applies when the evidence continues to indicate lack of creditworthiness. Otherwise, consumers who are found to be creditworthy following a review should be entitled to an agreement at the market conditions offered to other individuals whose creditworthiness is not in doubt (for example, at the same interest rate).⁵⁸

7 Form and Content of Agreements

Article 20(1) CCD 2023 stipulates that consumer credit agreements and any modification of such agreements must be drawn up in writing on paper or some other durable medium and that all contracting parties must receive a copy. This makes it easier to check that the loan matches what has been agreed and is proof that the agreement has been concluded. CCD 2023 still fails to regulate the functions of the written form (Article 20(2)), nor does it make provision for sanctions for infringements other than extending the withdrawal period (Article 26(2)). Article 21 sets out and details the mandatory particulars of agreements, i.e. information to be included, which must be clearly legible and adequately displayed on all the different channels used (Article 21(1) II). One of the statements should reflect the type of durable medium the consumer wishes to use for receiving specific information throughout the contractual relationship (Article 20(1)(q)). To the extent that the definition of a durable medium (Article 3(11)) includes paper, this provision should be viewed as being sensitive to the needs of vulnerable consumers who have little or no familiarity with digital technology.

8 Three Ways to End Contracts

Article 26 CCD 2023 regulates the right of withdrawal *ad nutum*; Article 28 establishes the right to terminate an open-end agreement (contract of indefinite duration); and Article 29 deals with early repayment. The directive does not deal with termination for non-performance or breach of contract (Recital 68).

⁵⁷ Buck-Heeb, n 49 above, 144.

⁵⁸ On the uncertainty surrounding this issue, Langenbucher, n 49 above, 210.

8.1 Right to Withdraw from Agreements

Article 26 CCD 2023 maintains a consumer's right to withdraw from agreements at will.⁵⁹ Member States cannot dispense with the recognition of the right to withdraw, even if they retain the cooling-off period (Article 26(9)).⁶⁰ The time limit for exercising the right to withdraw is 14 days from the date on which the contract was concluded, or later, when consumers have received all the information regarding the agreement (Article 26(1)). The right expires 12 months and 14 days after the conclusion of the credit agreement if consumers have not received the contractual terms and conditions and all mandatory information in accordance with Article 20 (form of the agreement) and 21 (mandatory information) beforehand. However, if the information omitted is precisely that relating to the right to withdraw, then the period for exercising the right does not end until that specific information is provided in accordance with the provisions of Article 21(1)(p),⁶¹ in other words, not only if the right is not disclosed, but also if it is not disclosed in accordance with the legal requirements.

Since nothing is said to the contrary, this seems to be the case even if the agreement has been fully executed. Nonetheless, the fact that a breach of the lender's duty will not always prevent the consumer from withdrawing should not be overlooked.⁶² The issue is that Recital 64 removes the requirement for the right not to be exercised in bad faith, contrary to what the Commission had originally provided for.⁶³ Therefore, CCD 2023 does not unequivocally answer the question as

⁵⁹ Formerly, art 14 CCD 2008; later, art 14(6) MCD. For distance contracts, see also arts 6 and 7 Directive 2002/65 and the new art 11a (exercise of the right of withdrawal from distance contracts concluded by the means of an online interface) inserted into the CRD by art 1(3) of the European Parliament legislative resolution of 5 October 2023 at first reading, on the proposal for a directive amending Directive 2011/83/EU and repealing Directive 2002/65/EC.

⁶⁰ Cf the range of options offered by art 14(6) MCD. Taking a critical approach to this, Freitag, n 33 above, 68. But see now art 16b (5), (6) and (7) inserted into the CRD by art 1(4) of the European Parliament legislative resolution of 5 October 2023 at first reading, on the proposal for a directive amending Directive 2011/83/EU and repealing Directive 2002/65/EC.

⁶¹ Council of the European Union. Document 9433/1/22 REV 1, Brussels, 7 June 2022, Point 13(b). European Parliament, Amendment 184 Proposal for a Directive Article 26 – Paragraph 1 b (new). Also ECJ C-481/99 of 13 December 2001, *Heininger* (§§ 45, 47) (ECLI:EU:C:2001:684) vis-à-vis the more restrictive ECJ C-412/06 of 10 April 2008, *Hamilton* (§§ 46–47, 49) (ECLI:EU:C:2008:215). In the insurance policy field, also ECJ C-209/12 of 19 December 2013, *Walter Endress* (§ 32) (ECLI:EU:C:2013:864).

⁶² B. Gsell, 'Informationspflichten im europäischen Verbraucherrecht' *ZfPW* 2022, 130–153, 149–153, regarding ECJ C-355/18 a C-357/18 and C-479/18 of 19 December 2019 *Rust Hackner* (§§ 78–82) (ECLI:EU:C:2019:1123) and ECJ C-20/19 of 2 April 2020, *kunsthau muerz* (§ 26) (ECLI:EU:C:2020:273), in the field of insurance policies.

⁶³ This requirement is not necessary under CCD 2008 according to ECJ C-33/20, C-155/20, C-187/20 of 9 September 2021, *Volkswagen* (§ 127) (ECLI:EU:C:2021:736).

to whether this means that opportunistic exercise of the right in order to obtain credit elsewhere on better terms is still possible, or whether what ultimately counts is, on the other hand, sanctioning lenders for failing to properly inform consumers of their right.⁶⁴

8.2 The Right to Terminate Open-End Credit Agreements

Consumers can still terminate open-ended credit agreements at any time, free of charge. Although there is no special procedure to follow, the parties can agree on a notice period, which must not exceed one month. Lenders also have this right if it is stipulated in the agreement, but must give consumers at least two months' notice (Article 28(1)). Member States have the option of setting the minimum period that has to elapse between the time at which a lender requests repayment and the date on which this has to take place (Recital 13). Furthermore, agreements may provide for a lender's right to terminate a consumer's drawdown for justified reasons, for example, suspicion of unauthorised or fraudulent use of the loan or a significant increase in the risk of not being able to meet the repayment, without prejudice to possible effects on the termination of the contract (Recital 68, Article 28(2)). Lenders must give prior notice of the loss of this right and the reasons for it, preferably before the measure is taken or immediately afterwards, unless providing such information is prohibited (Article 28(2)).

8.3 Early Repayment

The Consumer Credit Directive maintains consumers' right to settle all or part of their obligations before the date stipulated in the credit agreement (Article 3(22)). This is an *ex lege* right which must be stated in the pre-contractual information as well as in the agreement (Article 21(1)(s)) and entitles consumers to a reduction in the total cost of the credit (Article 29(1)). This includes all costs that are known to the lender, within the meaning of Article 3(5) CCD 2023, i.e. interest, commissions, costs relating to ancillary services and, in particular, insurance when it is compulsory. Payments for notary services are excluded. At the Council's suggestion, Recital 70 specifies that only lender-imposed costs should be taken into

⁶⁴ In favour of the latter option, Rott, n 33 above, 289–290. Against, Wittig and Wittig, n 15 above, 2378. A further preliminary ruling is pending (Beschluss des Zivilsenats 31 January 2022 – XI ZR 113/21).

account, but not fees or taxes charged to consumers that are paid directly to third parties.⁶⁵ As a result of CJEU C-383/18 of 11 September 2019, *Lexitor*,⁶⁶ Recital 70 specifies that the right to costs reduction also embraces those that do not depend on the duration of the contract, including any already paid or fully exhausted at the time that the credit is granted (e.g. formalisation fees). It is surprising that the ECJ does not apply the same criterion to credits on immovable property, therefore creating the risk that lenders will change the payment method for the costs in order not to be affected by the reduction.⁶⁷ With the exception of the cases provided for in Article 29(3), lenders are entitled to compensation, which Member States can limit (Recital 71, Article 29(4)(a)). This still requires a fixed interest rate to have been agreed or early repayment to take place within a period in which the borrowing rate is fixed (Article 29(2)). This excludes compensation in the case of variable interest rates, which is understandable, but in these cases lenders should also be able to claim for administrative costs incurred by early repayment. Perhaps this is not because these costs are thought to have been largely passed on in interest rates, but this should have been clarified.⁶⁸ Compensation cannot exceed the amount of interest that would have been paid during the period between early repayment and the credit agreement's agreed termination date (Article 29(5)).

⁶⁵ Council of the European Union. Document 9433/1/22 REV 1, Brussels, 7 June 2022, Point 13(c).

⁶⁶ ECJ C-383/18 of 11 September 2019, *Lexitor* (ECLI:EU:C:2019:702).

⁶⁷ ECJ C-555/21 of 9 February 2023 (ECLI:EU:C:2023:78) *UniCredit Bank Austria AG*, considers that art 25.1 MCD should be interpreted as not precluding national regulations which stipulates that consumers' right to reductions in the total cost of loans in the event of early repayment only includes interest and charges based on the duration of the contract. Critical of this discrepancy in interpretation of both directives, J. Hoffmann and M. Samek, 'Cost Reduction in the Event of Early Repayment Under the Mortgage Credit Directive: A Surprising U-turn After *Lexitor*' *EuCML* 2023 (4) 164–167. Previously, see however, M. Natale, 'Estinzione anticipata nel credito immobiliare ai consumatori. Novità legislative e spunti comparative dall'esperienza austriaca', in A. Addante and L. Bozzi (a cura di), *I Contratti di credito immobiliare fra Diritto europeo e attuazione nazionale. Strumenti di prevenzione del sovraindebitamento del consumatore* (Bari: Caccuci, 2022) 79–101, 86–88, 101.

⁶⁸ This provision has generated some perplexity under CCD 2008 and the Spanish transposition rule. To F. Peña López, 'Art 30 LCCC', in M.J. Marín López (ed), *Comentarios a la Ley de Contratos de Crédito al Consumo* (Cizur Menor: Aranzadi, 2014) 1089–1106, 1099, when the interest rates are variable it does not make sense for lenders to be unable to recover the costs of early repayment; P. Álvarez Olalla, 'Contratos de crédito al consumo. Tarjetas de crédito', in M.J. Santos Morón and M^a N. Mato Pacín (coords), *Derecho de consumo: visión normativa y jurisprudencial actual* (Madrid: Tecnos, 2022) 217–218, is not certain that compensation can be excluded when the agreed interest rate is variable, although she admits that it should be possible to charge a lower percentage than if it is fixed.

9 Caps on Interest Rates, the Annual Percentage Rate (APR) and the Total Cost of the Credit

The maximum permissible cost of credit is regulated in national legislation,⁶⁹ but Article 31 CCD 2023 now obliges Member States to introduce measures to ensure that consumers cannot be charged excessively high rates of interest, APRs or the total cost of credit. These are non-cumulative measures that seek to curb unreasonable and/or unfair costs and are particularly useful for short-term fast credit⁷⁰ and revolving credit.⁷¹ In fact, specific additional rules were initially envisaged for the latter.⁷²

The provision does not oblige Member States to introduce interest rate ceilings or caps.⁷³ At the Council's request, Article 31 allows for the introduction of national measures equivalent to interest rate ceilings, which have proven to be effective and are also designed to protect consumers from excessive rates or charges.⁷⁴ It could well be, therefore, that Member States would continue to rely on the courts to determine usury, with the consequent legal uncertainty in view of the range of criteria for assessing it. In Spain, Article 20(4) of Law 16/2011 prohibits the setting of annual percentage rates that exceed the legal interest rate by 2.5 points for loans granted in the form of tacit overrunning, but the law does not generally impose caps

69 ECJ C-503/20 of 25 March 2021, *Banco Santander and YC* (§§ 26–27, 29) (ECLI:EU:C:2021:254); ECJ C-779/18 of 26.03.2020, *Mikrokasa* (§§ 48–49) (ECLI:EU:C:2020:236).

70 Wittig and Wittig, n 15 above, 2377. On the high cost of payday loans, O. Cherednychenko, 'The proposal for a new EU Consumer Credit Directive: towards responsible lending in the digital age?' *Law and Financial Markets Review* 2021, 15 (3–4), 183–206, 196. On the microcredit market in Spain, Agüero Ortiz, n 44 above, 10 *et seq.* On the controversy over what are considered additional services that should be part of the total cost of loans, CJEU C-686/19 July 2020, *Soho Group* (ECLI:EU:C:2020:582). See Rott, n 48 above, 5–6.

71 Rott, n 33 above, 290; Rott, n 48 above, 10. The SWD(2020) 254 final, 59 also refers to the practice of some Member States to limit the cost of short-term high-cost loans or revolving credit, for instance.

72 Art 31.2 Proposal for Commission Directive 2021. For a critical analysis of the Proposal, A. Fejós, 'European Union Cost Caps: One Step Forward Two Steps Sideways to Substantive Harmonisation of Consumer Credit Law (May 17, 2022):' *European Journal of Consumer Law/Revue Européenne de Droit de la Consommation* 2022, Available at SSRN: <https://ssrn.com/abstract=4479988> or <https://doi.org/10.2139/ssrn.4479988>.

73 Pros and cons of interest ceilings, with particular reference to payday loans, I. Ramsay, 'Regulation of Consumer Credit', in G. Howells, I. Ramsay and T. Wilhelmsson, *Handbook of Research on International Consumer Law* (2nd ed, Cheltenham: EE Publishing, 2018) 340–362, 355–357. For the task of policy makers combining *ex ante* losses and *ex post* gains, see G. Helleringer, 'A behavioural perspective on consumer finance', in H.-W. Micklitz, A.-L. Sibony and F. Esposito (eds), *Research Methods in Consumer Law. A Handbook* (Cheltenham: EE Publishing, 2018) 334–355, 351–352.

74 Council of the European Union. Document 9433/1/22 REV 1, Brussels, 7 June 2022, Point 13(d).

on interest rates (Article 1755 CC). However, the Spanish Supreme Court has recently done so for revolving card loans, establishing usury at 6.30 points above the APR.⁷⁵

On the initiative of the European Parliament, Article 31(2) also provides that Member States can adopt prohibitions or caps on specific charges or fees applied by lenders in their national territory, although again, this is not mandatory.⁷⁶

No rules or guidelines are set out for the measures to be taken, or how the caps are to be calculated, but provision is made for EBA monitoring and assessment in a report to be made public six years after the Directive is enacted (Article 31(4)).

10 Other Preventive Measures

To prevent individual or systemic situations from exacerbating harm to consumers and increasing over-indebtedness, CCD 2023 introduces some preventive measures obliging Member States to promote financial education and digital literacy initiatives (to be regularly assessed by the Commission) (Article 34), to take measures to encourage lenders to be reasonably tolerant in cases of default (Article 35)⁷⁷ and to set up debt counselling services (to be made publicly available by the Commission) (Article 36).

In order to improve payment conditions, the European Parliament also aimed to oblige Member States to specify prohibited practices.⁷⁸ In the context of the recovery of debts arising from a credit agreement or surety agreements, Article 27 of the Proposal for a Consumer Credit Directive of 2002 established a number of illegal practices in the debt collection process, but just as it was unsuccessful then, the legislator now leaves it to the rules on unfair commercial practices to fix the sanction

⁷⁵ STS 15 February 2023 (RJ 2023\1101). Explaining the vagaries of jurisprudence and highly critical of the calculation method, A. Agüero Ortiz, 'Evolución jurisprudencial en materia de usura de las tarjetas de crédito revolving' *ADC* 2023 (forthcoming). Previously, R. Casas Vallés, 'Informe sobre la eventual calificación como usurarios de los intereses remuneratorios estipulados en contratos de crédito revolving' *Revista Jurídica sobre consumidores vLex* 2020 (February) 19–40. For default interest caps, see E. Arroyo Amayuelas, 'The Dialogue between Courts Concerning Directive 93/13 with Special Regard to Default Interest Terms', in H. Schulte-Nölke and A. Janssen (eds), *Researches in European Private Law and Beyond – Contributions in Honour of Reiner Schulze's Seventieth Birthday* (Baden-Baden: Nomos, 2020) 141–162.

⁷⁶ European Parliament Amendment 193 proposal for a directive art 31 – para 2 a (new).

⁷⁷ Previously introduced by directive (EU) 2021/2167. Also, art 28 MCD. The extent to which art 35(2) and (3) reiterate art 31(1) and (2a) is not clear.

⁷⁸ EU Amendment 211 proposal for a directive art 36 a (new). See Finance Watch, 'Is the human dignity of individual debtors at risk? A research paper on debt collectors' practices and the protection of debtor household income' 2020 (available at: https://www.finance-watch.org/wp-content/uploads/2020/01/Report_Human-dignity_final_with-annex.pdf).

for harassment on the part of lenders, such as persistent telephone calls and inclusion on defaulter blacklists.

11 Sanctions and Remedies

Member States must provide for effective, proportionate and dissuasive sanctions if national provisions adopted in the application of CCD 2023 are infringed (Article 44(1)). Article 44(2) only refers to fines. In the absence of data on cross-border transactions, the Council proposed deleting the obligation to apply penalties up to a maximum of at least 4 % of lenders' annual turnover in cases of serious cross-border infringements.⁷⁹ However, it is well-known that in addition to depriving offenders of the financial benefits deriving from infringements, the harm suffered by the consumers concerned in particular must be compensated and private law remedies should therefore be available to consumers.⁸⁰ In some countries sanctions stemming from non-compliance with formal requirements can affect the validity of the contract and/or a range of other consequences are also provided for on the basis of erroneous or non-existent statements in pre-contractual information and/or in the credit agreement itself.⁸¹ CCD 2023 continues to leave this issue to the Member States and only refers to extending the withdrawal period when information on the right to withdraw is incorrect or non-existent or any other mandatory mention is omitted (Article 26(2)). The European Parliament proposed a more interventionist measure stipulating that consumers should be entitled to compensation for damages and, where appropriate, to a reduction in the price and the termination of their contract.⁸² It also referred specifically to the right to obtain compensation for breach of the duty to assess creditworthiness.⁸³ The latter specification would have been useful in countries such as Spain, where part of academia considers it impracticable to require civil liability from lenders,⁸⁴ and/or in countries where this duty is only imposed by prudential

⁷⁹ Art 21 directive (UE) 2017/2394. Council of the European Union. Document 9433/1/22 REV 1, Brussels, 7 June 2022, point 13(f). The European Parliament had proposed increasing the percentage to at least 6 %. See Amendment 222 proposal for a directive art 44 – para 2. In this regard, Cherednychenko, n 70 above, 202–203. See directive 2019/2161, recitals 10 *et seq* and arts 1(4), 3(6), 4(13).

⁸⁰ ECJ C-303/20 of 10 June 2021, *Ultimo Portfolio* (§ 32) (ECLI:EU:C:2021:479); ECJ C-679/18 of 5.03.2020, *OPR-Finance s r o* (§ 20) (ECLI:EU:C:2020:167). EESC “Opinion on the Proposal”, no 4.11.

⁸¹ For a comparative overview, see E. Arroyo Amayuelas, ‘La forma del crédito al consumo y las sanciones para el caso de contravención’ *Revista Electrónica de Derecho* 2014 (1), 1–28 (available at: https://cij.up.pt/client/files/0000000001/1_692.pdf).

⁸² European Parliament Amendment 224 proposal for a directive art 44 a (new).

⁸³ European Parliament Amendment 140 proposal for a directive art 18 – para 2 c (new).

⁸⁴ Among others, M.J. Marín López, ‘La obligación del prestamista de evaluar la solvencia del prestatario’, in A. Carrasco (ed), *Comentario a la Ley de Contratos de Crédito Inmobiliario* (Aranzadi:

regulations.⁸⁵ The CJEU has confirmed that loss of interest is a proportionate sanction,⁸⁶ although it has not always considered it to be effective (Article 44(1)).⁸⁷

The infringing of other rules on unfair terms or unfair commercial practices,⁸⁸ data protection⁸⁹ and anti-discrimination⁹⁰ should also be taken into consideration, especially when it is a consequence of using artificial intelligence.⁹¹

12 Final Reflections and Conclusions

12.1 Why Two Consumer Credit Directives?

The European legislator has enacted a new CCD that is adapted to developments in the consumer credit market, which coexists with the MCD, which only applies to credit on immovable property. Notwithstanding the need for a differentiated approach at times, many of the proposed changes, such as those concerning creditworthiness assessments, the oversight of lenders and intermediaries and the need to monitor refinancing or modification of the terms and conditions of a credit agreement measures are based on MCD provisions. Likewise, a consistent approach to consumer protection suggests that future reform of the latter regulation, which is already underway,⁹² will also take into account the new developments recently included in CCD 2023. It is not unreasonable to wonder about the logic of pursuing and continuing to retain two different and complementary rules, with the risk of arbitrarily different interpretations,⁹³ especially if CCD 2023 turns out to include (as the previous CCD 2008 did) unsecured loans for the purpose of renovating residential property (Article 2(3)). This doubling-up is even less understandable if it is noted,

Cizur Menor, 2019) 211–256, 252–254. Against, E. Arroyo Amayuelas, ‘Responsible lending’, in S. Grundmann and P. Sirena (eds), *European Contract Law in the Banking and Financial Union* (Intersentia, 2023 (forthcoming)).

⁸⁵ Cherednychenko, n 70 above, 203. For the understanding that a right to individual protection also derives from the prudential standards for overseeing the banking sector, see Arroyo, n 84 above.

⁸⁶ Recently, ECJ C-303/20 of 10 June 2021, *Ultimo Portfolio* (§§ 39–40) (ECLI:EU:C:2021:479).

⁸⁷ ECJ C 565/12 of 27 March 2014, *Crédit Lyonnais* (§ 55) (ECLI:EU:C:2014:190).

⁸⁸ See the reform initiated by Directive 2019/2161 (arts 1, 3–4).

⁸⁹ Art 82 GDPR.

⁹⁰ In Spain see art 27.2 L. 15/2022 of 12 July, for equal treatment and non-discrimination (non-pecuniary damage).

⁹¹ COM(2002) 496 final.

⁹² See call for evidence for an impact assessment – Ares (2021) 7165942; Report from the Commission to the European Parliament and the Council on the review of the Directive 2014/17/EU (COM/2021/229 final), Brussels, 11 May 2021.

⁹³ Recall ECJ C-555/21 of 9 February 2023, *UniCredit Bank Austria AG* (ECLI:EU:C:2023:78).

firstly, that mortgages have often been used to secure the purchase of consumer goods, and secondly, that the marketing techniques used for credits of both types are the same. In short, it is not clear why all consumer credit, including credit on immovable property, should not be covered by a single rule, nor why, in the end, neither directive refers to consumer credit secured by non-residential property. Article 46(1)(a) proposes performing an assessment six years after the date of entry into force of the Directive and every four years thereafter to analyse whether the latter solution is appropriate (see also Recital 93), a conclusion that will not be unrelated to decisions that the legislator may have taken earlier in the reform of the MCD.

12.2 Not a Trace of Financing for Sustainable Consumption

Zero-interest loans, which are included in CCD 2023 for the first time, must be repaid in less than three months and are therefore probably not the type of instrument that consumers can rely on to purchase electric cars. They could be used to buy other types of energy-saving household appliances, but the fact is that there is no reference to green consumer credit in CCD 2023, not even with regard to loans for the purpose of home renovation (Article 2(3)) (for example, installing solar panels and thermal insulated doors and windows).⁹⁴ These are loans that could benefit from an increase in capital or lower interest rates; of course, the provision set out in Article 31 could also be used to cap interest rates on this green consumer credit. However, the legislator preferred to wait for market developments before regulating the conditions under which these loans should be put on the market (Recital 93, Article 46(1) (c)).⁹⁵

12.3 For the Future, Crowdfunding Platforms

On the Council's initiative, direct crowdfunding credit services between private individuals were deleted from the Commission's Proposal.⁹⁶ The upshot is that when

⁹⁴ Cf on pre-contractual information on any environmental or social objectives targeted by the financial service, see recital 29 and art 16a (1)(o) CRD introduced by art 1(4) of the European Parliament legislative resolution of 5 October 2023 at first reading, on the proposal for a directive amending Directive 2011/83/EU and repealing Directive 2002/65/EC.

⁹⁵ See BEUC, 'Affordable green loans: getting consumers on board of the green transition' 2021, 1–17. On green financing in housing lending, which has its own specificities, M. Anderson, 'Green Mortgages for Greener Multi-Unit Buildings. Perspectives from Composite Models', in G. Lentner, Chr. Lüke and S. Barth (eds), *Kernfragen des Europäischen Wirtschaftsrechts zwischen Recht, Ökonomie und Theorie* (Munich: C H Beck: 2023) 93–110.

⁹⁶ Council of the European Union. Doc 9433/1/22 REV 1, Brussels, 7 June 2022, Point 10(a). See K. Sein, 'Crowdfunding credit services under the new proposal for a new Directive on Consumer Credits' *Law*

providers of crowdfunding credit services lend directly to consumers, the provisions of CCD 2023 relating to lenders will apply to them. When, on the other hand, they merely facilitate the granting of loans between lenders acting in the course of their trade, business or profession and consumers, the crowdfunding service providers act as credit intermediaries and must therefore be subject to the obligations imposed on credit intermediaries by CCD 2023 (Recital 17), as defined in Article 3(12).⁹⁷ Two years after CCD 2023 comes into force, the Commission is expected to assess the need to protect consumers who borrow and invest through crowdfunding platforms, when these platforms do not act as lenders or credit intermediaries and facilitate consumer-to-consumer lending (Article 46(2)).⁹⁸

12.4 Classic Protection Instruments

CCD 2023 continues to rely on traditional consumer protection instruments. In line with tradition, it provides legal operators and consumers with pre-contractual information sheets that aim to make it easier to understand and compare offers. The expansion of online credit and the need for information to be appropriately displayed on different communication channels would have required taking further steps to standardise the presentation on different devices.⁹⁹ The possibility of providing consumers with a standard digital tool for comparing offers would certainly have been welcome.¹⁰⁰

On the other hand, the exercise of the right to withdraw is strengthened. In the regulation of this right, which is so important in fast contracting by means of algorithms that facilitate the process, some of the consequences of its exercise are not explained. In particular, the legislator does not make it clear whether lenders must return any other amounts received from consumers which are not the interest to which they are entitled. In short, it is unclear whether lenders can retain other

and *Financial Markets Review* 2023, 1–18 (published online 18 February 2023: <https://doi.org/10.1080/17521440.2023.2174381>), esp 8–10, 15–16. The article is not open access and was kindly provided by the author in the middle of August 2023, through Prof Gerald Spindler; C. Díez Soto, ‘La incidencia del derecho de consumo en el crowdfunding financiero’ CDT 2023 15(1) 313–355, 343–349.

⁹⁷ See art 3(f) CCD 2008 and art 4(5) MCD.

⁹⁸ For how peer-to-peer lending fits in with the current CCD 2008, see M. Ebers and B.M. Quarch, ‘The New EU Crowdfunding Regulation: A New Tool for Protecting Consumers?’ *EuCML* 2022 (4) 122–129, 126–127. I am grateful to Prof Martin Ebers for facilitating access to several of his papers on the subject.

⁹⁹ On possible forms of presentation, see recitals 30–33 and art 1(4) introducing a new art 16a(7) into the CRD, of the European Parliament legislative resolution of 5 October 2023 at first reading, on the proposal for a directive amending Directive 2011/83/EU and repealing Directive 2002/65/EC.

¹⁰⁰ The idea and its development in Gsell, n 62 above, 137 *et seq.*

costs.¹⁰¹ This contrasts with the regulation on early repayment, in which it is explained for the first time that the reduction of the total cost of a loan includes fees for services already provided and paid. It may also be asked whether eliminating lenders' rights to receive interest on amounts owed by consumers would have been a deterrent to possible breaches of the duty to inform about the right to withdraw, or, at least, whether it would have been advisable to reduce the amounts to the legal level when this was lower than that agreed. The extension of the right's existence *sine die* is not a new development; what may be is that this only applies when lenders omit to mention the right to withdraw. Since other rules of the *acquis* do impose limits, the reason for the differences should have been explained.¹⁰²

12.5 New Measures to Prevent Indebtedness

CCD 2023 recognises the business nature of the activity of granting credit and does not aim to ensure that consumers necessarily receive the credit they request. It is not clear how providing personalised prices can affect the prohibition on discrimination (Article 6 I) but *a priori* this is recognised to be a justifiable commercial strategy even when automated processing is used (Articles 6 II, 13). This may come as a surprise because it leads to higher, perhaps exclusionary prices for a sector of the population, while at the same time the requirements for assessing creditworthiness are tightened precisely in order to avoid the risks inherent in the inability to repay (Article 18(6)). This aims to prevent loans from being given to individuals who are known from the outset to be unable to repay them and is thus an incentive to eliminate the granting of high-cost credit, which is only profitable for lenders when borrowers default. However, this is where Member States can play an important role in capping the cost of credit in order to end the worst conditions under which it is offered to some people. Rather than representing a paternalistic approach,¹⁰³ the European legislator's decision is to be applauded, both from the financial stability perspective and also for the respect that it shows

101 But see the new art 16c (4) CRD introduced by art 1(4) of the European Parliament legislative resolution of 5 October 2023 at first reading, on the proposal for a directive amending Directive 2011/83/EU and repealing Directive 2002/65/EC.

102 Cf art 10 CRD; art 6(3) (b) Directive 2008/122, on timeshare. Art 6.1 Point 2 Directive 2002/65 does not provide for a *dies ad quem*, but art 6.2(c) allows the right to be extinguished if a contract has been fully executed at the consumer's express request before he or she exercises the right to withdraw. However, the reform of the CRD is in line with the provisions of CCD 2023. See recital 35 and art 16b (1) II inserted into the CRD by art 1(4) of the European Parliament legislative resolution of 5 October 2023 at first reading, on the proposal for a directive amending Directive 2011/83/EU and repealing Directive 2002/65/EC.

103 Wittig and Wittig, n 15 above, 2379; Langenbucher, n 49 above, 207, 208.

for human dignity.¹⁰⁴ It should also be noted that the special circumstances suggested in Recital 55 that allow for the relativizing of hypothetical negative credit-worthiness should be taken into consideration, especially those that take into account the possibility that credit can be useful for improving consumers' financial situation. CCD 2023 deems it necessary for consumers in financial difficulties to be directed to independent advice services (Article 18(9), 21(1)(x), 25(2) II, 36) but at the same time maintains their options for dealing with unforeseen expenses or temporary solvency problems (for example through deferred debit cards or the possibility of overdrafts or overrunning), without prejudice to the higher charges that are generally imposed on lenders.

104 S. Grundmann, 'European Contract Law and the Common Good plus Private Party Participation in the EU Banking Union– the Overall Challenge', in Grundmann and Sirena (eds), n 84 above: 'Not having the means for consumption now is seen as the solution superior to that of having such consumption now at a high risk of future insolvency, destruction of one's economic existence, albeit (in consumer insolvencies) only for a certain number of years. This in turn can perhaps best be conceptualized as an emanation of the right to human dignity to be protected (also against own over-optimism as to future developments), the latter ranging among the most foundational human rights'.