

The new Consumer Credit Directive: Most important changes and transposition options

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Brief historical overview

- First Consumer Credit Directive of 1986
- Second Consumer Credit Directive of 2008
- Mortgage Credit Directive of 2014
- Fitness Check
- Third Consumer Credit Directive of 2023

Main reasons for the reform

- Continuous legal fragmentation – no cross-border credit market
- Digitalisation of credit decisions (algorithmic decisions)
- Insufficient protection against imprudent borrowing decisions
- Inefficient support of pre-contractual decision-making
- Insufficient protection of consumers with repayment problems
- Perceived excessive sanctions on creditors for incorrect contractual information
- Insufficient professional skills of and control over credit intermediaries
- Codification of EU case law (*LCL Le Crédit Lyonnais*, *Lexitor*)

Level of harmonisation

- Still ‚targeted harmonisation‘ (as 2008 Directive) but new ‚targets‘
- Total harmonisation of regulated issues unless stated otherwise
 - No harmonisation of unregulated issues
 - Possible extension of the rules to credit agreements outside the scope of the Directive
- Explicit regulatory freedom (recital (13))
 - e.g. national provisions on the cancellation of a contract for the sale of goods or supply of services where the consumer exercises their right of withdrawal from the credit agreement
- Regulatory choices
 - Between 2 options, e.g. Art. 2(6) on mutual savings banks
 - Open choices, e.g. Art. 8(8) on credit advertisement and Art. 35 on forbearance measures
- Concretisation of provisions, e.g. Art. 12 on adequate explanations

Scope of application

- Extension to small credit (below 200 EUR) – frequent abuse and driver of over-indebtedness
- Extension to interest-free-credit – driver of over-indebtedness
- Extension to hiring and leasing contracts with purchasing option
- Other exceptions remain (but MS are free to apply the same rules)
- Options mainly related to deferred debit cards (up to 40 days, free of interest and with only limited charges) and deferred payment of existing debts

Pre-contractual information

- New limitations on credit advertisement targeting financially vulnerable consumers
 - ‘Caution! Borrowing money costs money’ (or equivalent)
 - Mandatory prohibitions, e.g. ‘irrelevance of registered credit’
 - Optional further prohibitions, e.g. advertisement with ease or speed
- New separation of general information and pre-contractual information (considering the needs and preferences of the individual consumer), following the model of the Mortgage Credit Directive
- Little change in substance
- But new first page with summary of the most relevant items

Adequate explanations and advisory services

- Long recognition of financial illiteracy of consumers (see also Art. 34 on financial education), therefore additional instruments to support informed borrowing decisions
- More detailed rules on adequate explanations
 - E.g. explanation of the specific effects that the credit agreement or the ancillary services proposed may have on the consumer, including the consequences of payment default or late payment by the consumer
 - Member States' freedom to concretise relevant situations (circumstances, type of consumer or type of credit)
- Strictly separate: advisory services (as in mortgage credit law)
 - Information versus recommendations
 - Additional service (paid or unpaid)
 - Minimum standards for recommendations, transparency of fees and status of the advisor

Creditworthiness assessment (1)

- Concretisation of the very vague requirements of the 2008 Directive, largely in line with the Mortgage Credit Directive
 - Application to original credit and to significant increase of existing credit
 - Significance related to remaining debt rather than the original credit amount
 - Follow-up loans should be treated as amendment of existing credit (economically and legally)
 - Optional exception for overrunnings
- Assessment must be based on relevant and accurate information on the consumer's income and expenses and other financial and economic circumstances
 - Not personal circumstances unless they are also economic circumstances (e.g. subsistence of children)
 - Expressly excluded: categories of data referred to in Art. 9(1) GDPR, including health

Creditworthiness assessment (2)

- Sources of information:
 - Internal documentation
 - Documentation provided by the consumer (but verified by the creditor)
 - Databases (where necessary) but explicitly not social media
 - Optional: Obligation to consult the credit register
- Procedural requirements
 - Duty to establish procedures for the creditworthiness assessment and document and maintain them (prudential supervision)
 - Duty to document the individual creditworthiness assessment (for at least the credit duration) – relevant for the burden of proof
- Credit only if the obligations resulting from the credit agreement are likely to be met
 - If rejected, creditor must inform the consumer and refer them to debt-advisory services, where relevant

Creditworthiness assessment (3)

- Automatisierung of the creditworthiness assessment
 - Overlap with Art. 22 GDPR (CJEU – *SCHUFA*): Decision must not be based solely on a credit score
 - Right to request (qualified) human intervention, in particular
 - A clear and comprehensible explanation of the assessment of creditworthiness, including on the logic and risks involved in the automated processing of personal data as well as its significance and effects on the decision
 - Right to express one's own point of view
 - Correction of data, challenge of the use of data that must not be used (e.g. health data), provision of additional information
 - Right to request a review of the assessment of the creditworthiness and the decision on the granting of the credit by the creditor
 - Duty to inform the consumer of these rights – should be extended to non-automated decisions

The contract

- Unchanged formal requirements
- Slightly extended list of items of information, e.g.
 - the type of durable medium on which the consumer chooses to receive post-contractual messages
- Sanctions for missing or incorrect information?
 - Competence of the Member States, principle of effectiveness
 - E.g. loss or reduction of charges, invalidity of the contract
 - ECJ case-law: distinction according to whether or not the mistake is capable of affecting the consumer's decision (principle of proportionality)
 - Example for not so important information: name and address of the competent supervisory authority (CJEU – *Home Credit Slovakia*)

Usury

- Unregulated under the 2008 Directive
- Attempt of the European Commission to introduce caps on borrowing rates, annual percentage rates of charge or total costs of credit
- Weakened in the final Directive (but under review with a report by the EBA due in November 2029)
 - Member States shall introduce measures to effectively prevent abuse and to ensure that consumers cannot be charged with excessively high borrowing rates, annual percentage rates of charge or total costs of credit to the consumer
 - Caps are an example of such measures
 - Alternative: Flexible system based on immorality – effective?

The right of withdrawal

- No changes to the regular right of withdrawal (within 14 days)
 - Exceptionally extended in a linked contract where the good can be returned after more than 14 days
- But major changes to the extended right of withdrawal (in case of missing or incorrect contractual information)
 - Generally: Extension to 12 months and 14 days
 - Still distinction between important and less important information given that the withdrawal right is no longer eternal in these cases?
 - Missing or incorrect information about withdrawal right: still eternal withdrawal right
 - Probably still only if the mistake is capable of affecting the consumer's decision
 - No abuse of right or forfeiture (CJEU – *Volkswagen Bank*)
 - No compensation with other sanctions, such as the loss of compensation for early repayment (CJEU – *BMW Bank*)

Arrears and forbearance

- Requirement of reasonable forbearance, where appropriate (but normally only once)
- List of possible measures
 - Shall include: modification of the existing terms and conditions (extension of the term, deferring payment, reducing the borrowing rate, partial repayments, currency conversions, partial forgiveness and so on)
 - May include: refinancing of the credit
- Member States' regulatory freedom to make individual measures mandatory
- Caps on additional charges for consumers in default (Germany: 5%)
- No creditworthiness assessment needed when the total amount payable by the consumer is not significantly increased

Debt advisory services

- European Commission, Provision of actions to extend the availability and improve the quality of debt-advice services for European households, 2021
 - Highlighting the relevance of debt advisory services
 - Calling for public funding and contributions of creditors and for early detection of financially vulnerable households
- European Consumer Debt Network but debt advice is not available in all Member States and varies greatly
- Definition: Personalised assistance of a technical, legal or psychological nature provided by independent professional operators
- Creditors: Duty to refer consumers who experience difficulties in meeting their financial commitments to debt advisory services easily accessible to the consumer
 - In particular: delay with repayment of 90 days

Credit intermediaries

- Obligations continued from the 2008 Directive
 - Status transparency
 - Transparency of fees and agreement on paper or another durable medium
- New rules on prudential supervision: adequate admission process, registration and supervision arrangements set up by an independent competent authority
- Minimum knowledge requirements: appropriate level of knowledge and competence (but no concretisation, unlike under Annex III Mortgage Credit Directive)
- Optional exception for suppliers of goods or providers of services who qualify as micro, small and medium-sized enterprises acting as credit intermediaries in an ancillary capacity

Other new features

- Prohibition of discrimination (mainly discussed in relation to age)
- Rules on tying and bundling
- Prohibition of inferred credit agreements, in particular by pre-ticked boxes
- Ban on unsolicited granting of credit
- Conduct of business rules
 - Competence of staff
 - Remuneration policies

Remedies and sanctions

- Overarching principle of effectiveness
- Public law enforcement: typically fines and injunctive orders
 - New: Disclosure of administrative penalties
 - One could imagine orders with benefits for consumers
 - Order to inform consumers about a breach and measures they can take
 - Acceptance of undertakings to remedy the situation
 - Remedial orders, in particular reimbursement orders
- Private law remedies: necessary where the Directive wants to protect individual consumers
 - Clarified for the creditworthiness assessment
 - Forbearance measures?
 - Duty to refer consumers to debt advisory services?
 - Conduct of business measures?