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**POLICY DEPARTMENT**  
**ECONOMIC AND SCIENTIFIC POLICY** **A**



Economic and Monetary Affairs



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**Internal Market and  
Consumer Protection**



# Implementation of the Consumer Credit Directive

IMCO





**DIRECTORATE GENERAL FOR INTERNAL POLICIES**  
**POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY**

# **Implementation of the Consumer Credit Directive**

**STUDY**

## **Abstract**

The study examines the state and the main difficulties of the implementation of Directive 2008/48/EC on credit agreements for consumers using the examples of fourteen Member States of the European Union. The analysis focuses on fully harmonised aspects of the Directive as well as on the provisions for which the Member States were given a wide margin of appreciation in achieving the objective of the Directive and options provided by the Directive. Furthermore, new regulations and regulations requiring interpretation are dealt with. Finally, the study analyses the regulation of credit agreements which fall outside the scope of the Directive.

This document was requested by the European Parliament's Committee on the Internal Market and Consumer Protection.

### **AUTHOR(S)**

Ms Margaretha Lawrynowicz, in cooperation with Ms Elwira Macierzyńska-Franaszczyk (Chapter 2.1.2), Mr Marc Barmscheid (Chapter 2.1.3.) and Mr Shaun Charlton (Chapters 2.1.4 and 2.1.5)

Based on the national reports prepared by: Stephan Keiler and Martina Eliskases (Austria), Mr Dimitar Stoimenov (Bulgaria), Ms Galateia Kalouta (Cyprus), Ms Magda Schusterova (the Czech Republic), Mr Shaun Charlton (France, United Kingdom), Mr Christoph Kramer (Germany), Mr Evangelos Margaritis (Greece), Dr Geo Margi (Italy), Ms Ilze Ciematniece (Latvia), Ms Elwira Macierzyńska-Franaszczyk (Poland), Mr José Carlos de Medeiros Nóbrega (Portugal), Ms Mihaela Maravela (Romania), Ms Laura Tomàs Jimenez

Supervision: Prof. Dr Fryderyk Zoll, Prof. Dr Hans Schulte-Nölke (Members of the European Legal Studies Institute in Osnabrück, Germany)

### **RESPONSIBLE ADMINISTRATOR**

Ms Elke Ballon  
Policy Department A: Scientific and Economic Policy  
European Parliament  
B-1047 Brussels  
E-mail: [Poldep-Economy-Science@europarl.europa.eu](mailto:Poldep-Economy-Science@europarl.europa.eu)

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### **ABOUT THE EDITOR**

To contact the Policy Department or to subscribe to its monthly newsletter please write to: [Poldep-Economy-Science@europarl.europa.eu](mailto:Poldep-Economy-Science@europarl.europa.eu)  
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## LIST OF ABBREVIATIONS

- ABGB** Allgemeines Bürgerliches Gesetzbuch
- APR** Annual percentage rate of charge
- BGB** Bürgerliches Gesetzbuch
- BT-Drucks** Bundestagsdrucksache
- BWG** Bankwesengesetz
- CCA** Consumer Credit Act
- CMO** Common Market Organisation
- DL** Decreto-Lei
- EC** European Community
- EEC** European Economic Community
- e.g.** Exempli gratia
- EGBGB** Einführungsgesetz zum Bürgerlichen Gesetzbuch
- ESIS** European Standard Information Sheet
- et seq.** Et sequens
- (et seqq.)** (et sequentia)
- EU** European Union
- Fn.** Footnote
- GEO 50/2010** Romanian Governmental Emergency Ordinance no. 50/ 2010
- GPR** Zeitschrift für Gemeinschaftsprivatrecht
- KSchG** Konsumentenschutzgesetz
- MoP** Monitor Prawniczy
- ÖBA** Österreichisches Bankarchiv
- OJ** Official Journal of the European Union
- OJ L** Official Journal of the European Union for legislation
- ÖJZ** Österreichische Juristen-Zeitung

- PAngV** Preisangabenverordnung
- (S)ECCI** (Standard) European Consumer Credit Information
- SKOK** Spółdzielcze Kasy Oszczędnościowo-Kredytowe
- TUB** Testo unico Bancario
- UK** United Kingdom
- VKRG** Österreichisches Verbraucherkreditgesetz
- ZEuP** Zeitschrift für Europäisches Privatrecht

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## EXECUTIVE SUMMARY

### Subject matter and methodology

The Research Study concerns the implementation of the Consumer Credit Directive<sup>1</sup>. It is divided into mainly three parts using three different analytical approaches: one part on the “formal” aspects of implementation, one on the substantial aspects of implementation and finally one part on credit agreements going beyond the Directive’s scope of application.

Hence, first of all, the state of implementation in the Member States and difficulties during the implementation process are analysed. Secondly, specific aspects of the Directive, particularly the fully harmonised provisions, the provisions for which there is a wide margin of appreciation and certain newly introduced regulations when compared to the previous Consumer Credit Directive are taken into focus. Finally, the study analyses whether the scope of implementation has been extended and how credit agreements falling outside the scope of the Directive are regulated in the national legislation.

This analysis is based on national reports from fourteen Member States<sup>2</sup>. The reporters were asked to answer a questionnaire following the structure of this study.

### State of implementation and main difficulties of implementation

At present, all of the countries covered have implemented the Directive into the national legislation. Six<sup>3</sup> of the 14 countries, however, did not meet the deadline for transposition<sup>4</sup>. The final transposition law was that of Poland which came in force on 18 December 2011.

With respect to this, it could also be concluded from the analysis that the short timeframe for transposition was one of the main difficulties in the implementation of the Directive.

Furthermore, the scope of application of the Directive as well as the nature of the legal instrument used for the transposition and other reasons peculiar to certain Member States (consequences resulting from the application of the integrated method of implementation, the implementation procedure and necessary amendments of the implementation acts, the mode regulation the access to databases covered by a duty of confidentiality etc.) gave rise to difficulties.

### Implementation of fully harmonised aspects

In contrast to the previous Consumer Credit Directive of 1986, the new Consumer Credit Directive contains provisions which are fully harmonised.

When harmonisation takes place, Member States may not maintain or introduce national provisions other than those laid down in the respective directive.<sup>5</sup> However, in contrast to the implementation of a minimum harmonised measure, Member States implementing a measure on the basis of full harmonisation are not even allowed to exceed the level of (consumer) protection.<sup>6</sup>

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<sup>1</sup> Directive 2008/48/EC of 23 April 2008 of the European Parliament and of the European Council.

<sup>2</sup> Austria, Bulgaria, Cyprus, the Czech Republic, France, Germany, Greece, Italy, Latvia, Poland, Portugal, Romania, Spain, the United Kingdom; the national reports are available at: [www.zoll.jura.uos.de](http://www.zoll.jura.uos.de).

<sup>3</sup> Cyprus, Greece, Italy, Latvia, Poland and Spain.

<sup>4</sup> According to the Corrigendum to Directive 2008/48/EC the Directive had to be transposed by 11. June 2010.

<sup>5</sup> Compare Recital 9 of the Consumer Credit Directive 2008.

<sup>6</sup> Compare *M. B.M.Loos*, Full harmonisation as a regulatory concept and its consequences for the national legal orders. The example of the Consumer rights directive, Centre for the Study of European Contract Law Working

The fully harmonised aspects of the Consumer Credit Directive taken into focus within the framework of this Research Study are:

- pre-contractual information duties – SECCI (Articles 5 and 6),
- information to be included in credit agreements (Article 10),
- the right of withdrawal (Article 14),
- the right of early repayment (Article 16) and
- the fixed calculation method of the annual percentage rate of charge (Article 19).

Due to the fact that the specific information on a certain aspect of implementation and the difficulties related to the implementation of this aspect vary from Member State to Member State, only the state of implementation and some additional notes with respect to these aspects may be outlined.<sup>7</sup>

(1) In six<sup>8</sup> of the 14 Member States the **Standard European Consumer Credit Information** (SECCI) were transposed exactly; in four<sup>9</sup> of the 14 countries covered, there were slight differences in the wording but no change in content. The other four Member States implemented the SECCI with some slight changes.<sup>10</sup> The majority of these Member States did not have difficulties with the implementation. It was, however, mainly criticised that the SECCI was too comprehensive and thereby hard to understand and that provision of the SECCI would increase creditors' costs.

(2) Twelve of 14 Member States transposed **Article 10 (contractual information to be written into the credit agreement)** without any substantive problems, nor modifications with respect to the content. Only for Latvia and Romania have slight changes been reported. Both countries also did not transpose the provision on the conditions for the exercise of the right to withdraw from an overdraft agreement (Article 10 (5) (h)).

(3) The **right of withdrawal** has been implemented by all of the Member States covered. The various national implementations mainly correspond with Article 14 of the Directive. In many of the Member States a comparable right of withdrawal was already pre-existent.<sup>11</sup> Difficulties with implementation were reported for Austria, France, Germany and the United Kingdom. The main difficulties relate to the nature of the repayment of the amount due (whether repayment is a pre-condition for the right of withdrawal or a consequence resulting from exercise of the right?) and the period of withdrawal. The individual national rules on the period of withdrawal causing difficulties might not prove in conformity with the Directive.<sup>12</sup>

(4) In twelve of 14 Member States, the provision on **early repayment** has been implemented either verbatim, or, if not verbatim, then using very similar wording and in any case in compliance with the Article. Only for Portugal was it reported that the implementing Article, which provides that the consumer must give notice to the creditor of at least 30 days before the early repayment, might be not in conformity with the Directive. Half of the Member States covered took one or two of the options in Article 16 (4) modifying the regulation of compensation under Article 16 (2) (2).

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Paper Series No. 2010/03, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1639436##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1639436##), p. 5, 6.

<sup>7</sup> For further details, particularly on Member State specific difficulties, the changes compared to the previous regime etc. please see the respective chapter in the study.

<sup>8</sup> Austria, Bulgaria, Cyprus, Greece, Italy, Spain.

<sup>9</sup> The Czech Republic, Germany, Latvia, Poland.

<sup>10</sup> France, Portugal, Romania, the United Kingdom. However, the changes are marginal. For further details see chapter 2.1.1 (A) (i).

<sup>11</sup> Cyprus, France, Germany, Poland, Portugal, the United Kingdom.

<sup>12</sup> The difficulties are Member State specific. For further details see chapter 2.1.1 (C).

The provision containing rules on compensation for the creditor in the case of early repayment led to some criticism in the Member States, particularly in France, where it was pointed out that the level of consumer protection would be lowered.

(5) No specific difficulties were reported with respect to the implementation of the provision on the APR.

### Implementation of provisions containing a wide margin of appreciation

The Directive, on the other hand, regulates certain aspects which need to be transposed into the national legislation. However, some freedom is left to the Member States as regards the modalities of implementation.

The study particularly concerns the margin of appreciation provided in:

- Article 5 (6) (2) regarding the adequate explanations as to specific details of the credit agreement,
- Article 15 (2) (2) regarding the remedies against the supplier and
- Article 23 regarding the penalties for infringements of the Consumer Credit regulation.

(1) The general **duty to give explanation on the credit offer** under Article 5 (6) (1) was implemented by all of the Member States except of Italy<sup>13</sup>. Nine<sup>14</sup> of the Member States covered did not provide for clarification of this duty which constituted a margin of appreciation contained in Article 5 (6) (2). Germany listed some non-binding parameters for the interpretation of the national legislation in the preamble. Only Austria, France, Portugal and the United Kingdom gave greater precision as regards what it included in the duty to explain.<sup>15</sup>

(2) Three of the Member States<sup>16</sup> did not adapt specific **remedies for consumer credit and linked credit agreements**. Eight<sup>17</sup> of the Member States covered<sup>18</sup> expressly adapted remedies available against the creditor when withdrawing from a linked credit agreement. In all of these Member States, except for Germany, the subsidiary character of the remedies against the creditor was maintained.

(3) The majority of the Member States established national penalties for infringements of national legislation implementing the Directive.<sup>19</sup> Some of the Member States, however, did not adapt new national penalties assuming that the existing national rules would provide satisfactory sanctions in case of infringements.

### Implementation of options

The Directive furthermore provides options for the Member States. In case of options, Member States were free to take the fully harmonised option or not at all.<sup>20</sup>

The options analysed in the study are provided in:

- Article 2 (5) and (6) (option concerning credit agreements concluded by a specified organisation and option concerning credit agreements which provide for

<sup>13</sup> The **Italian** legislation did not transpose a separate duty to provide the consumer with additional assistance. Assistance under Italian legislation means "assistance" in the sense of article 5 (6) (1) and (2).

<sup>14</sup> Bulgaria, Cyprus, the Czech Republic, Germany, Greece, Italy, Latvia, Poland and Spain.

<sup>15</sup> For further details see chapter 2.1.2 (A).

<sup>16</sup> The Czech Republic, Greece and Romania.

<sup>17</sup> Austria, Cyprus, Germany, Latvia, Poland, Portugal, Spain and the United Kingdom.

<sup>18</sup> For Bulgaria, France and Greece see chapter 2.1.2 (B).

<sup>19</sup> For further details with respect to the mode and character of the sanctions provided see chapter 2.1.2 (B).

<sup>20</sup> *Ch. Wendehorst*, Das deutsche Umsetzungskonzept für die neue Verbraucherkreditrichtlinie, ZEuP 2011, p. 264 (268).

arrangements to be agreed by the creditor and the consumer in respect of deferred payment or repayment methods, where the consumer is already in default on the initial credit agreement in combination with a further specified circumstance)

- Article 4 (2) (c) (option concerning the application of the standard information to be included in advertising, particularly the APR in case of credit agreements in form of an overdraft facility),
- Article 6 (2) (option concerning the application of the pre-contractual information duties, particularly as regards the APR in case of credit agreements in form of an overdraft facility),
- Article 10 (5) (f) (option concerning the application of the information to be included in the credit agreement, particularly the APR in case of credit agreements in form of an overdraft facility),
- Article 14 (2) and (6) (option concerning the reduction of period of withdrawal in case of linked credit agreements and the option referring to the application of certain provisions if the contract by law had to be concluded through the service of a notary and other specified circumstances are fulfilled) and
- Article 16 (4) (options concerning specific provisions on the early repayment).

The following table illustrates which options were taken by the Member States and in which Member States difficulties implementing these options arose<sup>21</sup>:

**Table 1: Options taken by the Member States**

Option	Option exercised by
Article 2 (5)	Cyprus, Latvia, Romania
Article 2 (6) <sup>22</sup>	Cyprus, Czech Republic, Greece, Germany, Latvia, Poland, Portugal, Romania, Spain
Article 4 (2) (c)	Cyprus, the Czech Republic, France, Germany, Spain
Article 6 (2)	The Czech Republic, Germany, Romania, United Kingdom
Article 10 (5) (f)	The Czech Republic, Germany, the United Kingdom
Article 14 (2)	France
Article 14 (6)	Germany
Article 16 (4) (a)	Austria, Cyprus, Greece, Italy, Latvia, Poland, Spain
Article 16 (4) (b)	Cyprus

Source: Author

<sup>21</sup> For further details on the manner options were taken see chapter 2.1.3.

<sup>22</sup> In Italy neither the option provided by article 2 (5) nor by article 2 (6) were taken. There is however a proposal to modify the law and take the option.

## Implementation of certain new regulations

Many of the newly introduced regulations compared to the previous Directive (such as the SECCI, the duty to provide the consumer with explanations on the credit offer and the APR) are analysed in more specific parts of the study.<sup>23</sup> However, remaining newly introduced regulations are dealt with in this chapter.

In this chapter, the study particularly focuses on:

- the regulation on advertising requirements in Article 4 and
- the “sufficient assessment” of a consumer’s creditworthiness according to Article 8.

(1) In all of the Member States **Article 4 (1)**, which states that “any advertising concerning credit agreements which indicates an interest rate or any figures relating to the cost of the credit to the consumer shall include standard information...[in the form of a representative example]”, has been transposed. Difficulties within the Member States, however, arose in understanding what was meant by a “representative example”.<sup>24</sup>

According to Article 4 (1) (2) the obligation as stated in Article 4 (1) (1) does not apply “where national legislation requires the indication of the annual percentage rate of charge in advertising concerning credit agreements which does not indicate an interest rate or any figures relating to any cost of credit to the consumer”. In some of the Member States, however, the regulation as provided in Article 4 (1) (1) is also applied to credit agreements as defined in Article 4 (1) (2).<sup>25</sup> In France, the standard information is not mandatory and the previous regime for advertising applies. Bulgaria and Cyprus did not apply any standard for consumer credit advertising which does not include figures relating to the cost of credit.

The option provided in Article 4 (2) (c), as already indicated above, was solely taken by the Czech Republic, Germany, Poland, Spain and the United Kingdom. According to this Article, the representative example in case of overdraft facilities<sup>26</sup> does not need to indicate the APR.

(2) All of the Member States transposed the **duty to assess creditworthiness of the consumer**<sup>27</sup>. Some of the Member States<sup>28</sup> remained faithful to the formulation of the Directive which provides that relevant databases should be consulted “where necessary”. In Portugal and France, the consultation of relevant databases was made mandatory. In **Poland**, the Banking Act already included a legal definition of an assessment of creditworthiness.<sup>29</sup> The creditworthiness check is reserved solely for banks and credit institutions. Consumer credit providers subject to the **Polish** Banking Act are held to the standards of verifying ‘creditworthiness’.<sup>30</sup> Consumer credit providers which are not banks or credit institutions need only check the ‘credit risk’ of consumers. Member States such as Cyprus and Latvia, to name but two, have made direct reference to their respective laws on data protection in establishing the limits of creditworthiness checks.

<sup>23</sup> See above.

<sup>24</sup> For further see chapter 2.1.4 (A).

<sup>25</sup> Austria, Italy, Latvia, Portugal and Romania.

<sup>26</sup> As defined in article 2 (3) of the Directive.

<sup>27</sup> For more detailed information as regards the interpretation of « sufficient information » and the consequences of a failure to assess the creditworthiness see chapter 2.1.3 (B).

<sup>28</sup> Cyprus, the Czech Republic, France, Italy, Latvia, Romania and the United Kingdom.

<sup>29</sup> Article 70 of the Banking Act; Ustawa z dnia 29 sierpnia 1997 r.- Prawo bankowe, tekst jednolity Dz. U. 2002.72.665.

<sup>30</sup> Article 9 (4) of the CCA 2011. See Polish Report section 2.1.4 (C).

### Extension of the scope of application of the Directive

Finally, the study deals with the extension of the scope of application of the study to other credit agreements not covered by the Directive.

In many Member States covered it may be observed that the scope of application is extended as well as regards the personal scope of application<sup>31</sup> as the subject matter of the scope of application.

The following table illustrates the extension of the scope of application in the Member States as to its subject matter.

**Table 2: Extension of the scope of application of the Directive**

Extension of scope of application	Member State <sup>32</sup>
Extension to credit agreements secured on property <b>(Article 2 (2) (a))</b>	Austria, Cyprus, the Czech Republic, Latvia, Poland, Romania
Extension to credit agreements the purpose of which is to finance the acquisition or retention of property rights <b>(Article 2 (2) (b))</b>	Austria, Germany, Latvia, Romania, Spain
Extension of minimum limit with respect to the total amount of the credit <b>(Article 2 (2) (c))</b>	Poland
Extension of maximum limit with respect to the total amount of the credit <b>(Article 2 (2) (c))</b>	Austria, Germany
Extension of minimum and maximum limit with respect to the total amount of the credit <b>(Article 2 (2) (c))</b>	Latvia, Romania, the United Kingdom
Extension to hiring or leasing agreements in the sense of <b>Article 2 (2) (d)</b>	Austria, France, Germany, Poland, the United Kingdom
Credit agreements in the form of overdraft facility in the sense of <b>Article 2 (2) (e)</b>	Germany, Latvia, Poland
Credit agreements in the sense of <b>Article 2 (2) (f)</b>	Latvia

<sup>31</sup> This is the case in Germany. See § 13 BGB (definition of consumer) and § 502 BGB (extension of certain provisions to founders of a new business which according to the European legislation and jurisprudence are not regarded as "consumer").

<sup>32</sup> For details on the respective regulation, the circumstances under which the extension applies, the restrictions and the difficulties in implementation see chapter 2.2.1.

Credit agreements which are concluded with investment firms or credit institutions in accordance with <b>Article 2 (2) (h)</b>	Austria, Germany
Extension to credit agreements which are the outcome of a settlement reached in a court or before another statutory authority <b>(Article 2 (2) (i))</b>	Germany
Credit agreements upon the conclusion of which the consumer is requested to deposit an item as security, <b>Article 2 (2) (k)</b> and credit agreements concluded by organisations in the sense of <b>Article 2 (5)</b>	Poland
Credit agreements in the sense of <b>Article 2 (2) (l)</b>	Spain did not implement Article 2 (2) l. Hence, articles on credit agreements as provided by the Directive could also apply to credit agreements in the sense of Article 2 (2) l.

## Conclusion

The Consumer Credit Directive 2008 has been implemented into all national legislation of the Member States covered by the Research Study. As already indicated, the period of time for transposition has been very short compared to the relatively complex subject matter of the Directive. This led to delayed transpositions in some of the Member States. Furthermore, some difficulties for the implementation procedure but also for the correct implementation of substantial contents of the Directive were caused which required and still require amendments.

Despite some deficiencies, it may be generally concluded that most of the fully harmonised aspects of the Directive have been transposed correctly. However, particularly the implementation of the right of withdrawal appears to have caused more difficulties.

The same also seems to apply to the implementation of provisions for which there is a margin of appreciation and the options which were taken by the Member States.

It is, however, noteworthy that Bulgaria did not take any, Austria, France, Italy and Portugal took only one option. Cyprus, Germany and Romania were the Member States which took the most options. There seems, however, to be no connection between the short transposition time for implementation and the reluctance of other Member States to take the options provided by the Directive.<sup>33</sup>

Furthermore, it stands out that the option provided in Article 2 (6) concerning credit agreements which provide for arrangements to be agreed by the creditor and the consumer in respect of deferred payment or repayment methods, where the consumer is already in default on the initial credit agreement in combination with a further specified circumstance, and the option<sup>34</sup> provided in Article 16 (4) (a), concerning provisions on the early repayment limiting the claim for compensation,<sup>35</sup> were most commonly taken. In contrast, the options provided in Article 14 (2) concerning the reduction of the withdrawal period under certain circumstances, Article 14 (6) concerning the application of certain provisions if the contract needed to be concluded through the service of a notary and Article 16 (4) (b) regulating the opportunity of the creditor to claim higher compensation for early repayment are only taken each by one country.

Moreover, newly introduced regulations compared to the previous Consumer Credit Directive were introduced into the national legislation without major difficulties. Within the Member States, it was, however, not clear what was meant by a “representative example” in the sense of Article 4 of the Directive. The need for clarification at certain points, hence, became apparent.<sup>36</sup>

However, it is also noteworthy that the scope of application of the Directive has been extended in many of the Member States covered. Irrespective of the fact that unified regulations applicable to related subject matters facilitate the handling of such regulations, this could be interpreted as a sign for the success of the fully harmonised Directive.

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<sup>33</sup> From the aforementioned Member States only Cyprus and Italy did not meet the transposition deadline.

<sup>34</sup> Nine of 14 Member States.

<sup>35</sup> Seven of 14 Member States.

<sup>36</sup> The study does not encompass the analysis of aspects of the Directive requiring improvement and the revealing of recommendations as to this. At many points it, however, reveals difficulties caused by some regulations of the Directive of which one is the problem to understand what is meant by the « representative example ». The study, may therefore serve as a basis for further researches.

## GENERAL INFORMATION

### • KEY FINDINGS

- The subject of this study is the state and the main difficulties of implementation of the new Consumer Credit Directive 2008/48/EC
- The study is based on the information obtained from fourteen Member State reports.
- The issues at stake: full harmonisation provisions, the implementation of mandates to shape and options provided by the Directive, the implementation of newly introduced provisions compared to Directive 87/102/EEC and of provisions requiring interpretation.
- The regulation of consumer credit agreements falling outside the scope of the study is analysed.

### Subject-matter of the study

The subject-matter of the study relates to the **implementation of Directive 2008/48/EC** of the European Parliament and of the Council of 23 April 2008 on the credit agreements for consumers. This Directive repealed Council Directive 87/102/EEC. The Directive had to be transposed by the Member States by 11.6.2011.<sup>37</sup>

The main issues which the study focuses on are how Member States have implemented the Directive and the identification of the main difficulties of its implementation.

To this aim specific aspects of the Directive are examined. Since the Directive follows the full harmonisation approach, the main fully harmonised provisions are dealt with first. These particularly concern pre-contractual information duties (Articles 5 and 6), information to be included in credit agreements (Article 10), the right of withdrawal (Article 14), early repayment (Article 16) and the calculation method of the annual percentage rate of charge (Article 19). Furthermore, provisions in which Member States were given a wide margin of appreciation<sup>38</sup> and some selected options as regulated in Article 2 (5) and (6), Article 4 (2) (c), Article 6 (2), Article 10 (5) (f), Article 14 (2) and (6) and Article 16 (4) of the Directive are also treated in this study. In addition, the study covers some new regulations which were not provided for under Directive 87/102/EEC (requirements of advertising, Article 4 and sufficient assessment of creditworthiness, Article 8) and also deals with concepts such as "adequate explanation" and "in good time" which require further interpretation.

Finally, the study will examine the regulation of credit agreements which do not fall within the scope of the Directive.

<sup>37</sup> See Corrigendum to Directive 2008/48/EC of the Parliament and of the Council of 23 April 2008 on credit agreements for consumers repealing Council Directive 87/102/EEC, OJ L 207/14 of 11.8.2009.

<sup>38</sup> The study will examine the implementation of articles 5 (6) (2), 15 (2) (2) and e 23 of the Directive.

## **Methodology**

The study is based on reports from 14 Member States. In order to receive the most comparable results, the national reporters received a template containing all the aspects which constitute the basis for the study. The present structure adopted is essentially that of the template for the national reports. The reports were evaluated with particular attention given to similarities and differences between the implementation of the Directive by individual Member States. Substantial deviations from the Directive as well as problems encountered through the legislative process of its implementation were deduced on the basis of the information available.

## **Choice of Member States**

The study is based on reports from 14 Member States.<sup>39</sup> In order to assure the representativeness of the study it was important to include Common Law systems (United Kingdom, excluding Scotland which is a mixed legal system, and Cyprus) as well as Civil Law countries. It was important to give an account of Austria, France and Germany as the archetypal systems of the continental legal tradition. A focus was also laid on the “new” EU Member States.

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<sup>39</sup> Austria, Bulgaria, Cyprus, the Czech Republic, France, Germany, Greece, Italy, Latvia, Poland, Portugal, Romania, Spain and the United Kingdom.

## 1. GENERAL OBSERVATIONS

### KEY FINDINGS

- Six of the fourteen Member States investigated did not meet the deadline for transposition.
- The main difficulties implementing the Directive were related to the time frame for transposition, the scope of the Directive, the implementation instrument and other reasons peculiar to certain Member States (such as the integrated method of implementation, the implementation procedure and the necessary amendments within this framework, the mode of regulating the access to databases covered by a duty of confidentiality (especially of financial institutions) etc.)
- In all Member States covered except for Germany a modular rather than an integrated implementation has been adopted.

### 1.1. State of implementation and place in the legal framework

The following table illustrates the state and place of implementation of the Consumer Credit Directive 2008 in the fourteen Member States investigated. The deadline for implementation was the 11.6.2010<sup>40</sup>. Countries marked red did not meet this deadline.

**Table 3: State of implementation and place in the legal framework**

Country	Date of implementation	Legal framework	Other modifications/ Further notes
Austria	11.06.2010	Verbraucherkreditgesetz (Consumer Credit Act – VKrG)	Further modifications in the Bankwesengesetz (Austrian Banking Act - BWG); general reform of the credit law in the Allgemeines Bürgerliches Gesetzbuch (Austrian General Civil Code – ABGB)
Republic of Bulgaria	12.5.2010	Consumer Credit Act (State Gazette (SG) No. 18 from 5.03.2010, entered into force on 12.05.2010, last amendment SG No. 58 from 30.07.2010)	The new statute abolished the old Consumer Credit Act which has been adopted in 2006 aiming the implementation of the Council Directive 87/102/EEC.
Cyprus	19.11.2010	Law 107 (I)/ 2010 on consumer credit agreements (Ο περί των συμβάσεων καταναλωτικής πίστης Νόμος ΤΟΥ 2010)	Through this new law the following pre-existing laws have been revised: The previous basic law on consumers credit agreements, which was Law 39 (I)/2001 as for its amendments, specifically found in Law 166(I)/2001, Law 34(I)/2002, Law 77(I)/2002 and Law 33(I)/2004

<sup>40</sup> Corrigendum to Directive 2008/48/EC of the Parliament and of the Council of 23 April 2008 on credit agreements for consumers repealing Council Directive 87/102/EEC, OJ L 207/14 of 11.8.2009.

<b>The Czech Republic</b>	21.4.2010/ 1.1.2011	Consumer Credit Act No. 145/ 2010 Coll.	-
<b>France</b>	1.7.2010/ 4.2 and 1.5 2011	Law no. 2010-737 of 1.7.2010 reforming consumer credit (Loi n° 2010-737 du 1er juillet 2010 portant réforme du crédit à la consommation)	Several pieces of secondary legislation were used in relation to the implementation, coming into force respectively on 4th February by Décret n° 2011-136 du 1er février 2011 relatif à l'information précontractuelle et aux conditions contractuelles en matière de crédit à la consommation and 1st May 2011
<b>Germany</b>	1.6.2010	Integration into the BGB (§§ 491 et seq.) and the EGBGB (§ 247 EGBGB) by the Gesetz zur Umsetzung der Verbraucherkreditrichtlinie, des zivilrechtlichen Teils der Zahlungsdiensterichtlinie sowie zur Neuordnung der Vorschriften über das Widerrufs- und Rückgaberecht, Bundesgesetzblatt 2009 I, p. 2355. Amended by Gesetz zur Einführung einer Musterwiderrufsinformation für Verbraucherdarlehnsverträge, zur Änderung der Vorschriften über das Widerrufsrecht bei Verbraucherdarlehnsverträgen und zur Änderung des Darlehnsvermittlungsrechts, Bundesgesetzblatt 2010 I, p. 977.	Certain Aspects concerning the advertising for credit agreements can be found in the Preisangabenverordnung (PAngV)
<b>Greece</b>	23.6.2010	Common ministerial decision Z1-699/10 (Greek Governmental Newspaper, issue B, number 917 of 23.06.2010)	-
<b>Italy</b>	13.8.2010	d. legisl. 141/ 2010	<ul style="list-style-type: none"> <li>• amendments of:</li> <li>• d. legisl. 14.12.2010 no. 218;</li> <li>• decreto minister economia 3.2.2011;</li> <li>• Istruzioni Banca d'Italia 9.2.1011</li> </ul>
<b>Latvia</b>	6.1.2011/ 1.5.2011	1. Cabinet rules No. 1219 (2010) Noteikumi par patērētāju kreditēšanu (LV, 2 (4400), 05.01.2011) as a new code on Regulations regarding Crediting Consumers, in force since 6.1.2011	-

		<p>Chapters IV (pre-contractual information provided to consumers), V (pre-contractual information provided to consumers with regard to overdrafts), VI (information provided in credit agreements) and VII (requirements applicable to consumer credits against pledge of movables) had a transition period and came in force on 1.5.2011</p> <p>2. The Regulation provided in the Directive has been implemented by amendments also in Patērētāju tiesību aizsardzības likums (Consumers protection law), respective amendments in force since 01.01.2011, Kredītiestāžu likums (Credit Institutions law), respective amendments in force since 22.10.2010, Apdrošināšanas sabiedrību un to uzraudzības likums (Law On Insurance Companies and Supervision Thereof), respective amendments in force since 22.10.2010 and Krājaizdevu sabiedrību likums (Law on Credit companies), respective amendments in force since 22.10.2010</p>	
<b>Poland</b>	<p>Adopted 12.5.2011; Enforcement 18.12.2011</p>	<p>Consumer Credit Act from 12.5.2011 (Ustawa z dnia 12 maja 2011 r. o kredycie konsumentkim) published in the Polish Official Journal 2011 No. 126 pos. 715 on 17.6.2011 (Dz.U.2011.126.715)</p>	<p>Modifications of other acts:</p> <ul style="list-style-type: none"> <li>• Polish petty offences' code (Dz.U. 1971 Nr 12 poz. 2114, with further amendments),</li> <li>• Cooperate Credit and Savings Unions Act (SKOK) (Dz.U.1996 Nr 1 poz.2, with further amendments),</li> <li>• Liability of collective entities for acts prohibited under penalty Act (Dz.U.2001 Nr197 poz. 1661, with further amendments),</li> <li>• Access to economic and business data exchange Act (Dz.U. 2010 nr 81 poz. 530, with further amendments),</li> <li>• Former CCA2001 ceased to have effect since 18 December 2011.</li> </ul> <p>Amendments to CCA2011:</p>

			Implemented by the amending Act - Ustawa z dnia 29 lipca 2011 r. o zmianie ustawy-Prawo bankowe oraz niektórych innych ustaw, Dz.U.2011.165.984
<b>Portugal</b>	Adopted 2.6.2009; Enforcement 1.7.2009, except from art. 28 which is in force since 1.10.2009	Transposition by Decreto-Lei no. 133/2009 published in <i>Diário da República</i> no. 106/2009 Ser. I of 2 June 2009	Rectification by <i>Declaração de Rectificação</i> no. 55/2009 of 30 July 2009, published in <i>Diário da República</i> no. 147/2009 Ser. I of 31 July 2009, in force since 5 August 2009.  The rectification concerns DL 133/2009 in its preamble, arts. 5, 6, 8, 13, 30, 31 and annexes II and III.
<b>Romania</b>	9.6.2010	Government Emergency Ordinance no. 50 of 09.06.2010 regarding consumer credits.	The Government Emergency Ordinance no 50/2010 was amended by Law no. 288/2010, published in the Official Gazette of Romania no. 888 of 30.12.2010
<b>Spain</b>	Adopted 24.6.2011; in force since 25.9.11	Law 16/2011 of 24 June 2011, on credit agreements for consumers (Ley 16/2011, de 24 de junio, de contratos de crédito al consumo), in force since 25.9.11.	Article 2, law 28/1998, 28 July 1998, on the hire purchase of movables has been amended and now refers to its subsidiary application with regards to the recently enacted law 16/2011, 24 June 2011, on credit agreements for consumers.  Article 7.7., law 28/1998, of 28 July 1998, on the hire purchase of movables, which deals with the Annual Percentage Rate of Charge (APR). The new wording of this article refers to Article 32, law 16/2011, 24 June 2011, on credit agreements for consumers, which has been implemented in the same terms of the directive.  The law 1/2000, 7 January 2000, on civil procedure has also been amended in its Article 519 implying that the Public Prosecutor now <i>ex officio</i> may enforce actions for consumers and users grounded on a conviction without individual beneficiaries
<b>United Kingdom</b>	Transitional Regime: 30.4.2010; Compulsory Compliance: 1.2.2011	1. The Consumer Credit (EU Directive) Regulations 2010, (SI 2010, no. 1010) 2. The Consumer Credit (Total Charge for Credit) Regulations 2010 (Statutory Instrument 2010 No. 1011)	-

		<p>3. The Consumer Credit (Disclosure of Information) Regulations 2010 (Statutory Instrument 2010 No. 1013)</p> <p>4. The Consumer Credit (Agreements) Regulations 2010 (Statutory Instrument 2010 No. 1014)</p> <p>5. The Consumer Credit (Amendment) Regulations 2010 (Statutory Instrument 2010 No. 1969)</p> <p>6. The Consumer Credit (Advertisements) Regulations 2010 (Statutory Instrument 2010 No. 1970)</p> <p>7. The Consumer Credit (Amendment) Regulations 2011, no. 11</p>	
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Source: Author

## 1.2. Reasons for the late implementation of the Directive and the main difficulties implementing the Directive. Chosen method of implementation.

**Six of the fourteen Member States investigated did not meet the deadline of transposition.**<sup>41</sup> Particularly, the transpositions of Latvia (enforcement of the implementation act on 6.1.2011 respectively 1.5.2011), Spain (adoption of the implementation act on 24.6.2011; enforcement on 25.9.2011) and Poland (adoption of the text on 12.5.2011; enforcement on 18.12.2011) were exceptionally late.

**Four of the fourteen Member States investigated** did not have any problems with the implementation of the Consumer Credit Directive.<sup>42</sup>

### 1.2.1. Main difficulties implementing the Directive

#### A. Time frame for transposition

The **main difficulty implementing the Directive was the time frame** for transposition. It was deemed to be too short. In consequence, either the transposition did not meet the deadline or proposed amendments were not considered. The latter led to subsequent amendments being necessary in order to rectify inexactitudes or even mistakes of transposition. Particularly, this was explicitly reported for France, Portugal<sup>43</sup> and the United Kingdom.

The main problem concerning the implementation of this Directive from the **French perspective** was the procedure of its adoption. According to one French author, the conditions under which the law was adopted in France force one to reflect upon the

<sup>41</sup> See Table 1.

<sup>42</sup> These are Austria, the Czech Republic, Italy and Romania.

<sup>43</sup> Rectification by Declaração de Rectificação no. 55/2009 of 30 July 2009, published in Diário da República no. 147/2009 Ser. I of 31 July 2009, in force since 5 August 2009. The rectification concerns DL 133/2009 in its preamble, articles 5, 6, 8, 13, 30, 31 and annexes II and III.

authority and worth of parliamentary legislation.<sup>44</sup> This is in light of the fact that a piece of legislation which is to affect the lives of millions of citizens is debated in such a short time, with the upper chamber needing to adopt the text of the lower chamber without amendments solely to conform to the deadline for transposition.<sup>45</sup> The legislative text was adopted in the upper chamber amidst a continuing stream of proposals for amendments<sup>46</sup> and an impact assessment was not conducted.<sup>47</sup> The impact study of the transposition of diverse European directives in the areas of civil and commercial law does not make reference to the Directive in question.<sup>48</sup> The Government has, however, published headline information on the adoption of the implementing legislation, highlighting its benefits.<sup>49</sup>

For the **United Kingdom** the relatively short period of time in which the Directive had to be implemented also proved problematic. This is because many of the original regulations had later to be amended. For example, in Regulation 8, s. 66 A (2) the calculation of time was amended to read 'beginning with the day after the relevant day'. Likewise, 'in writing' was added to ss.74A and 74B to make the means by which the information duties should be imparted clear. Additionally, Regulation 75 was amended to 'clarify that all overdrafts are excluded from the scope of the Consumer Credit (Disclosure of Information) Regulations 2004 (SI 2004/1481) (see Regulation 24).' However, as explained in the explanatory memorandum, 'there has been no public or media attention in the changes. Interest has been confined to those businesses that will have to comply with the changes, legal firms and enforcement agencies. The changes are not politically or legally important'.<sup>50</sup>

The delay in **Poland** can also be explained by long public discussions on the effects of the implementation and with the necessary lengthiness of the legislative process. The assumptions to the government's draft of the new CCA, developed by the Office of Consumer Protection and Competition, were presented in September 2009 and adopted by the Council of Ministers in January 2010. On the basis of reported comments and further public consultations, the Government Legislation Centre drafted the new CC bill in collaboration with the Office of Consumer Protection and Competition which was then accepted by the Council of Ministers in October 2010. The bill was adopted and became law in 12 May 2011 and entered into force on 18 December 2011.

For **Spain** no specific reasons for the late implementation were pointed out.

## B. Scope of the directive

In **Cyprus** criticism was raised with respect to the scope of the Directive which does not cover housing loans and mortgages. The scope of the Directive is, hence, narrower than the corresponding former Cypriot law.

In **Poland** there was discussion regarding the scope for the new CCA. This concerned whether the CCA should be applicable to consumer credits granted by SKOK (Spółdzielcze Kasy Oszczędnościowo –Kredytowe) and whether consumers who are debtors of credit secured by way of mortgage are protected under the CCA.

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<sup>44</sup> G. Raymond, *Contrats, Concurrence, Consommation*, no.11, November 2010, p.10.

<sup>45</sup> G. Raymond, *Contrats, Concurrence, Consommation*, no.11, November 2010, p.10.

<sup>46</sup> G. Raymond, *Contrats, Concurrence, Consommation*, no.11, November 2010, p.10.

<sup>47</sup> Legifrance.gouv.fr: Les études d'impact des lois publiées depuis le 1er septembre 2009.

<sup>48</sup> 'portant transposition de diverses directives du Parlement européen et du Conseil en matière civile et commerciale':  
[http://www.legifrance.gouv.fr/html/etudes\\_impact/lois\\_en\\_preparation/2010/ei%20\\_transpo\\_dir\\_civiles\\_com.p df](http://www.legifrance.gouv.fr/html/etudes_impact/lois_en_preparation/2010/ei%20_transpo_dir_civiles_com.p df).

<sup>49</sup> [http://www.gouvernement.fr/gouvernement/reforme-du-credit-a-la-consommation-tous-les-decrets-d-application-seront-pris-courant-;](http://www.gouvernement.fr/gouvernement/reforme-du-credit-a-la-consommation-tous-les-decrets-d-application-seront-pris-courant-)<http://www.gouvernement.fr/gouvernement/reforme-du-credit-a-la-consommation-de-nouvelles-mesures-applicables-au-1er-mai-2011>.

<sup>50</sup> [http://www.legislation.gov.uk/ukxi/2010/1969/pdfs/ukxiem\\_20101969\\_en.pdf](http://www.legislation.gov.uk/ukxi/2010/1969/pdfs/ukxiem_20101969_en.pdf), para. [7.3-7.4].

### C. Instrument of implementation

In **Greece** the relevant ministerial decision was publicly discussed from 23.4.2008 to 23.4.2010. During the course of this discussion, concerns were expressed with respect to the legal basis and instrument for implementing the Directive. It was argued that, according to the Greek Constitution, the proposed instrument for implementation, the ministerial decision, is legitimate only when used to settle specific issues of local interest or of technical and detailed character. However, according to Article 14.4 of the Greek consumer act 2251/1991 an adjustment to and compliance with directives, decisions, regulations and recommendations issued by the competent institution of the European Union for consumer protection issues is achieved by a joint decision of the Ministers of Trade, Economy, Justice and any other relevant Minister. The directive, hence, was implemented in the same manner as its predecessor by means of a ministerial decision.

### D. Member States specific aspects

In **Bulgaria** many different opinions regarding the intended policy of several provisions were expressed. One of these was the proposal of the opposition (Bulgarian Socialistic Party). This proposal aimed at introducing a prohibition for the credit grantor to increase the applicable interest rate unilaterally more than the change of the EUR LIBOR rate plus the risk premium of Bulgaria announced by the Bulgarian National Bank. This proposal was, however, rejected by arguing that such a prohibition would have an adverse effect upon consumers because the banks would stipulate for higher interest rates from the very beginning of the credit agreement.

As detailed below, the method of implementation chosen in **Germany** gave rise to difficulties.

The late implementation in **Latvia** can be explained by the protracted approval of amendments in consumer protection law. These amendments concerned the adoption of part of the Directive's requirements and to determine the delegation of cabinet rules (Regulations Regarding Crediting Consumers). The said rules were aimed at introducing also a licensing system for non-bank credit issuers. The Government hesitated for a long time on whether to adopt a licensing scheme for the non-bank credit issuers sector. In the end the government decided in favour of licensing. Another issue was introducing some order in lombards' market, which was not regulated at all.<sup>51</sup>

Regarding the rules implemented by the Directive, the core discussion concerned standardised credit agreements. Several professional organisations such as Latvia's leasing association objected to the standardisation of consumer credit agreements. It was argued that such standardised forms could give market participants the opportunity to include disadvantageous terms for consumers, since the regular consumer does not read the agreement carefully. Particularly, consumers would be familiar with the standardised forms. Hence, there would be a risk, that they would not notice the additional, disadvantageous conditions included by credit issuers. Standard forms would slow down the development of crediting services, and thus would further limit consumers' choice. However, not only

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<sup>51</sup> Until the implementation of a licensing system there was no limitation whether a credit issuer is a legal or natural person. Natural persons were generally excluded from this scope. It was reported that there were many fraudulent activities as well as evading's from taxes conducted by natural persons who were acting as credit issuers. The consequences of the aforementioned were the inputs to shadow economy. The completely unregulated lombards' market in Latvia was the place for possible laundering of the proceeds of crimes. With the new amendments the working time of lombards is limited to 8 p.m.; there are set requirements with regard to security, registration of pledged property and insurance for lombards; see: <http://www.lvportals.lv/?menu=doc&id=224216>.

professional organisations, but also the Ministry of Economics was against single sample agreements.<sup>52</sup>

Furthermore, banks were of the opinion that the implementation would have to be restricted in its scope to only those credit agreements within the scope of the full harmonised Directive. However, in Latvia, the implementation extended the scope of credit agreements to which the regulation provided for by the Directive applies, e.g. there are no exceptions in new cabinet rules relating to the amount borrowed, thus the protection of consumer credit directive applies to credit below 200 EUR.<sup>53</sup>

In **Poland** the main difficulties connected to the implementation regarded the mode of regulating access to databases, information which otherwise would be covered by a duty of confidentiality. Furthermore, the adaptation of the notion of "creditworthiness" to the new CCA2011 caused difficulties, a notion which, in the Directive's formulation, was already pre-existing in the Polish legal system as applied to the banking sector and underlying the regime of the Banking Act.

The public discussion emphasised the increased costs resulting from the pre-contractual duties, the obligation of providing a SECCI to each potential client, extensive contractual information, as well as the compulsory assessment of creditworthiness (according to CCA: credit risk).

In **Spain** no reasons have been provided for the late implementation of the directive. The main legal reviews only outline the main topics of the Directive 2008/48/EC.<sup>54</sup> There are a few legal voices analysing obvious implementation problems. In this regard, the only problem identified by legal scholars has been the new understanding of "linked credit agreements" since the approach has slightly changed in comparison to the recent criteria of the tribunals and the previous legislation on consumer credits.<sup>55</sup> Although the Law 16/2011 of 24 June 2011 on Credit Agreements for Consumers has implemented the concept of "linked credit agreements" and mentions that these two agreements shall form "from an objective point of view, a commercial unit", the definition of what should be considered as "a commercial unit" has not been implemented by the Law 16/2011 of 24 June 2011.<sup>56</sup>

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<sup>52</sup> <http://www.lvportals.lv/?menu=doc&id=213576>.

<sup>53</sup> <http://www.lvportals.lv/?menu=doc&id=224216>

<sup>54</sup> *Marta Ordás Alonso*, El ámbito de aplicación de la directiva 2008/48/CE del Parlamento Europeo del Consejo, de 23 de abril de 2008, relativa a los contratos de crédito al consumo y por la que se deroga la Directiva 87/102/CEE del Consejo. Westlaw, BIB 200/2866; *Manuel Jesús Marín Lopez*, Los contratos vinculados en el Proyecto de ley de Contratos de Crédito al Consumo. <http://www.uclm.es/centro/cesco/trabajos19.asp>.

<sup>55</sup> *Manuel Jesús Marín Lopez*, Los derechos del consumidor en la fase de ejecución del contrato, según la ley 16/2011, de 24 de junio, de Contratos de Crédito al Consumo. Diario La ley, N° 7693, 13 Septiembre 2011, Año XXXII; *Manuel Jesús Marín Lopez*, Los contratos vinculados en el Proyecto de ley de Contratos de Crédito al Consumo. <http://www.uclm.es/centro/cesco/trabajos19.asp>.

<sup>56</sup> However, art. 3 ii), 2008/48/EC clearly states that "a commercial unit shall be deemed to exist where the supplier or service provider himself finances the credit for the consumer or, if it is financed by a third party, where the creditor uses the services of the supplier or service provider in connection with the conclusion or preparation of the credit agreement, or where specific goods or the provision of a specific service are explicitly specified in the credit agreement".

### 1.2.2. Method of implementation

There are two legislative methods of implementing Directive provisions. The implementation can be either modular or integrated. In a modular implementation, the provisions are inserted more or less in block into the national legislative framework. This means that provisions are not taken out of the legal context of the Directive. In an integrated implementation, provisions are taken apart and inserted into the respective parts in the national legal system which relate to the subject matter of the Directive. This means that provisions are taken out of the context of the Directive and put into the respective legal contexts of the national legislative framework.<sup>57</sup> The modular implementation typically involves, for example, inserting a new or amending a pre-existing chapter in a code. Other modular implementations include the introduction of a new consumer credit code or the amendment of an Act of Parliament treating consumer credit.

The majority of the Member States covered chose to implement the Directive in a modular way.<sup>58</sup> **Austria, Bulgaria, the Czech Republic, Cyprus, Greece, Latvia, Poland, Portugal and Spain** enacted a new law on consumer credit agreements. In **France**, the implementation is to be found in a separate chapter of the *code de commerce* dedicated to consumer credit. **Italy** added a new "capo" II title VI (Article 121 et seqq.) into the *Testo unico Bancario* (united banking text, TUB). Moreover, amendments and additions in other codes and chapter were necessary. The former regulations on consumer credit agreements now covered by Directive 2008/48/EC were repealed.

In **Greece** a ministerial decision transposed all parts of the Consumer Credit Directive.<sup>59</sup> **Romania** had to transpose the Directive by a Government Emergency Ordinance. The **United Kingdom** amended the pre-existing Act of Parliament through secondary legislation delegated to the relevant minister which is the traditional means of implementing EU Directives.

**Germany**, which forms an exception to the other Member States, chose an integrated method of transposition.

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<sup>57</sup> For the distinction between modular and integrated concept of transposition see: *Ch. Wendehorst, Umsetzung der Verbraucherkreditrichtlinie*, ZEuP 2011, p. 263 (271); *Ch. Wendehorst/ B. Jud, Neuordnung des Verbraucherprivatrechts in Europa?*, p. 176.

<sup>58</sup> All of Member States covered except for Germany.

<sup>59</sup> For further see chapter 1.2.1 (C).

## 2. SELECTED PROVISIONS OF THE CONSUMER CREDIT DIRECTIVE 2008/48/EC

### 2.1. Implementation of selected provisions of the Directive

The following chapter analyses specific aspects of the Consumer Credit Directive (2008/48/EC). Particularly the implementation of fully harmonised provisions, the provisions where Member States a wide margin of appreciation, options provided by the Directive, aspects which are newly introduced compared to Directive and provisions which require further interpretation are taken into focus.

#### 2.1.1. Fully harmonised provisions

The Consumer Credit Directive contains five full harmonisation provisions: pre-contractual information duties (Articles 5 and 6), information to be included in credit agreements (Article 10), the right of withdrawal (Article 14), the right of early repayment (Article 16) and a fixed calculation method of the annual percentage rate of charge (Article 19). The study will analyse whether the Member States comply with the full harmonisation, how the full harmonisation differs from the previous regime and which aspects of the Directive are considered problematic.

#### A. Pre-contractual information duties according to Article 5 and Article 6 of the Consumer Credit Directive and the Implementation of Standard European Consumer Credit Information (SECCI)

Articles 5 and 6 of the Directive regulate pre-contractual information requirements in credits agreements as defined under Articles 2 (1) and Article 2 (3), (5) or (6). These Articles furthermore refer to a standard form for pre-contractual information in Annex I and Annex II of the Directive.<sup>60</sup> The detailed regulation of pre-contractual information duties is new in the sense that these were not included in Directive 87/102/EEC. Articles 5 and 6 differ from each other insofar as Article 5 covering credit agreements in the sense of Article 2 (1) restricts pre-contractual information requirements more than Article 6 for certain specific credit agreements.<sup>61</sup> The following chapters reflect the state of implementation of these pre-contractual information duties and particularly of the Standard European Consumer Credit Information (SECCI).

##### (i) Transposition of the SECCI into the national legislation

##### Exact transposition of the Standard European Consumer Credit Information

In **Austria**<sup>62</sup>, **Bulgaria**<sup>63</sup>, **Cyprus**<sup>64</sup>, **Greece**<sup>65</sup>, **Italy**<sup>66</sup> and **Spain**,<sup>67</sup> Annex II of the Consumer Credit Directive has been transposed verbatim.

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<sup>60</sup> (Standard) European Consumer Credit Information ((S)ECCI).

<sup>61</sup> Compare also Recital 23 of the Consumer Credit Directive 2008.

<sup>62</sup> Annex II of the VKrG.

<sup>63</sup> Annex II of the Bulgarian CCA.

<sup>64</sup> Annex II Law 107 (I)/ 2010.

<sup>65</sup> Annex II of the Ministerial Decision Z1-699/19.

<sup>66</sup> According to Italian law, before the consumer is bound by any credit agreement or offer, the creditor and, where applicable, the credit intermediary shall give any useful information with a standard form that follows faithfully the Annex II of Directive 2008/48 (article 124 bis TUB), see: *F. Civale*, La nuova disciplina dei contratti di credito ai consumatori e dei contratti di credito collegati, available at: [http://dipartimenti.unicatt.it/scienze/giuridiche/scienze/giuridiche\\_Forensi\\_110305\\_Civale.pdf](http://dipartimenti.unicatt.it/scienze/giuridiche/scienze/giuridiche_Forensi_110305_Civale.pdf) and [http://www.abi.it/doc/127850169987264\\_g\\_servizi\\_1.pdf](http://www.abi.it/doc/127850169987264_g_servizi_1.pdf) (page 9).

<sup>67</sup> Annex II of Law 16/2011.

### Slight differences in wording, no change in content

In the **Czech Republic**<sup>68</sup>, **Germany**<sup>69</sup> **Latvia**<sup>70</sup> and Poland<sup>71</sup> the SECCI has been fully implemented. There are, however, slight differences in wording. In the majority of cases, the minimal changes were only conducted in order to improve or correct the language of the Directive. The content nonetheless remained unchanged.

### Member State specific implementation aspects

Both in **France**<sup>72</sup> and the **United Kingdom**<sup>73</sup> the SECCI has also been implemented almost verbatim, however, with some amendments. In France e.g. the consumer's right to be informed immediately and without charge of the result of a consultation of a database if credit is then refused (Article 5 (1) (q), Annex II no. 4) has been omitted. Instead it is stated that the creditor is bound to consult the database created for the purposes of verifying the solvability of borrowers.<sup>74</sup>

The **Polish** implementation of the SECCI form, found in Annex II and III of the Directive is almost word for word the same as the Directive. Additionally, a separate model was provided referring only to the SECCI-form and relating to credit secured by way of mortgage.

In general, the SECCI may be found in Annex I and Annex II of the Polish CCA2011. Annex I corresponds precisely to Annex II of the Directive. Also the SECCI found in Annex II of the CCA2011, which applies to credit agreements in form of an overdraft, remains consistent with the requirements of the Directive. In Annex II, the APR value is not given (see Article 6.2 Directive).

The SECCI implemented in Annex I and Annex II of the CCA2011, does not apply to credit agreements secured by way of mortgage (the CCA2011 is applied to them in the range indicated in Article 4 (2) point. 1 CCA2011). The Polish legislator proposed a modified form in Annex III of the CCA2011 based on the ESIS used for credit agreements relating to residential property.

In **Portugal** the SECCI was transposed into Annex II of the DL no. 133/2009. In most cases changes were of a linguistic nature, improving the translation. However, one complementary and another new requirement can also be identified. "Not included in APR = annual percentage rate" has been added for clarification in Annex III item 3 number 9. Furthermore, the content of item 4 number 2 has been changed. A new requirement has been added. According to this the consumer has the right to repay the credit at any time in full or partially *with a period of notice of not more than a month*.

In **Romania** the SECCI has been adopted almost verbatim.<sup>75</sup> There is, however, a slight difference in Annex II number 2 as regards the consumer's right to request a copy of the draft credit agreement free of charge. According to Article 5(1) (r), this provision shall not apply if the creditor does not want to conclude the credit agreement with the consumer at the time of the request. In the wording of the Romanian equivalent the provision shall not apply if the creditor *cannot* conclude the credit agreement.

<sup>68</sup> Annex VI Czech CCA 145/2010 Coll.

<sup>69</sup> Annex III to article 247 § 3 of the EGBGB.

<sup>70</sup> Annex II of the Regulations Regarding Crediting Consumers.

<sup>71</sup> Annex I and Annex II Polish CCA2011.

<sup>72</sup> Annex to article R311-3 of the *Code de la consommation*, « Informations précontractuelles européennes normalisées en matière de crédit aux consommateurs » de Décret n° 2011-136 du 1er février 2011 relatif à l'information précontractuelle et aux conditions contractuelles en matière de crédit à la consommation, JORF n°0028 du 3 février 2011, Le 7 novembre 2011.

<sup>73</sup> Schedule 1 of the Consumer Credit (Disclosure of Information) Regulations 2010, « Pre-Contract Credit Information (Standard European Consumer Credit Information ) ».

<sup>74</sup> Le prêteur doit, dans le cadre de la procédure d'octroi du crédit, consulter le fichier national des incidents de remboursement des crédits aux particuliers.

<sup>75</sup> Annex II of the Governmental Emergency Ordinance no. 50/ 2010 (GEO 50/2010).

## (ii) Changes to the previous national regime in force prior to the 2008 Directive

### Austria

According to § 33 of the Austrian BWG a draft of the credit agreement only had to be provided when requested. This provision has been superseded by the Verbraucherkreditgesetz 11.6.2010.

### The Republic of Bulgaria

According to the previous legal regime of pre-contractual information duties in Bulgaria, the creditor had to submit to the consumer all terms of the future contract in advance (Article 6(1) of the previous CCA). The submission did not have to be provided in written form.

### Cyprus

Prior the enforcement of the Directive, the Cypriot national regime about consumer credit used to be regulated through the Law 39 (I)/2001 and its amendments which were Law 166 (I)/2001, Law 34 (I)/2002, Law 77 (I)/2002 and Law 33 (I)/2004.

According to this previous national regime, the creditor generally was not obliged to give pre-contractual information. In accordance with the Commission Recommendation of 1 March 2001 on pre-contractual information to be given to consumers by lenders offering home loans, the lenders offering a home loan were, however, obliged to give pre-contractual information.<sup>76</sup> Following the above mentioned Commission's Recommendation, Standard Information was created which the Banks in Cyprus subsequently adopted and therefore provided to their customers in cases of home loans.

There was a standard information form already in force in Cyprus as it was previously in use for home loans. Since the enforcement of the Directive 2008/48/EC, the scope of Standard Information has been substantially expanded in order to cover as well other kinds of credits.

### The Czech Republic

Act No. 321/2001 Coll. on Certain Conditions for the Conclusion of Consumer Loans as amended by Act No. 64/1986 Coll. did not contain any specific requirements for pre-contractual information. There was previously only a related provision on the content of the consumer credit contract.

According to this provision, the contract had to be in writing and should contain information on:

1. the annual percentage rate of charges for the consumer loan,
2. terms and conditions under which the annual percentage rate charged on a consumer loan can be set,
3. the maximum amount of a consumer loan,
4. the amount of the various instalments, their number and a precise timetable,
5. the individual payments.

Furthermore, the creditor was obliged to inform the consumer during the performance of the contract of all changes with respect to the annual percentage rate charged on a consumer loan, the provisions on the right to repay a consumer loan before the end of the stipulated period of time, the conditions under which the contractual relationship could be terminated prematurely and, finally, the method of payment.

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<sup>76</sup> Commission Recommendation of 1 March 2001 on pre-contractual information to be given to consumers by lenders offering home loans (notified under document number C (2001) 477) (2001/193/EC), OJ L 69/ 25 of 10.3.2001.

## France

The previous regime in France had a “preparatory offer system” (système de l'offre préalable). Thus, once the functionally equivalent pre-contractual information was given, and signed, the preparatory offer formed the contract. However, this regime did not provide for a mandatory period of time to elapse beginning with the delivery of the offer and ended upon its signed return. This meant that, in practice, the preparatory offer was given to the consumer and signed contemporaneously.

## Germany

In Germany the provisions concerning the information duties of the creditor were mainly based on the former Consumer Credit Directive (87/102/ EEC) and could be found in § 492 BGB<sup>77</sup>. § 492 dealt with the minimum *content of the credit contract itself* and did not cover specifically pre-contractual information. The pre-contractual information in the sense of the new Directive is therefore new to the German law<sup>78</sup> and can be considered as increasing the level of consumer protection.

## Greece

Before 2002 the previous national regime in Greece did not include provisions on pre-contractual information duties. In 2002, Act no. 2501/2002 of the Director of the Bank of Greece introduced the obligation for financial institutions to disclose all terms of consumer credit agreements prior to their conclusion.<sup>79</sup>

## Latvia

Latvia's previous national regime did not provide for any standardised templates comparable to the SECCI. Banks did not have a duty to provide the consumer with pre-contractual information. With the implementation of Directive the level of consumer protection has therefore been raised.

## Poland

Directive 87/102<sup>80</sup> did not generally refer to the subject of pre-contractual information. The only strict pre-contractual duty was implemented by Article 16 of the Polish CCA2001 which obliged the creditor and credit intermediary to provide information on the APR in offers and advertising relating to the credit costs.

The lack of provisions was substituted by the rules of consumer protection. According to the prevailing interpretation of Article 16 CCA2001, particularly after its amendment in 2003<sup>81</sup>, the information related to APR had to be provided in advertising, and offers aimed at consumers. It was pointed out that both advertisement and other forms of advertising including price lists should be understood as offers in the context of the requirement of Article 3 Directive 87/102 and Article 71 of the Polish Civil Code.

Moreover, pursuant to postulates of consumer protection, the content of the offer presented to the consumer had to be compatible with previous advertising.<sup>82</sup>

A violation of the duty to inform could have resulted sanctions in form of a fine regulated by Article 138 (c) of Polish petty offences' code.<sup>83</sup>

<sup>77</sup> This provision implemented article 4 of the Consumer Credit Directive (87/102/EEC).

<sup>78</sup> BT-Drucks. 16/11643, p. 78.

<sup>79</sup> Part C. (1) (c) of Act no. 2501/2002 of the Director of the Bank of Greece.

<sup>80</sup> Transposed into the Polish Consumer Credit Act from 2001 (Ustawa z dnia 20 lipca 2001, Dz.U.2001.100.1081).

<sup>81</sup> Dz.U.2003.109.1030.

<sup>82</sup> J. Pisuliński, O nowelizacji ustawy o kredycie konsumenckim, MoP 2003, no. 19, p. 879

<sup>83</sup> Ustawa z dnia 20 maja 1971 r. - Kodeks wykroczeń, Dz.U. Nr 12, poz. 114 ze zm.)

## Portugal

The previous national regime in force in Portugal was DL no. 359/91 of 21 September 1991, which implemented the Consumer Credit Directive 87/102/ECC. This act was repealed by DL no. 133/2009.

Before DL no. 359/91 and DL no. 133/2009 there was no specific legislation in Portugal on consumer credit contracts. The Contract on credit sale was a matter of instalment sales (*venda a prestações*) as stated in Articles 934-936 of the Portuguese Civil Code, including retention of ownership (*reserva de propriedade*).<sup>84</sup> Information on essential terms of the credit contract in form of a written agreement was firstly introduced by Articles 6 and 7 of DL no. 359/91, which corresponded to Article 4 and Annex of Directive 87/102/EEC.

In the foreword to DL 133/2009, the Portuguese legislator expressly welcomes the SECCI and points out that the Consumer Credit Directive reinforces the rights of the consumers through the right of pre-contractual information.

## Romania

The respective previous national legislation in Romania (Law no. 289/2004)<sup>85</sup> provided in Article 6 that the creditor before concluding the contract has the obligation:

- to present the credit agreements offered, the most adequate type and total amount thereof, taking into account the financial situation of the consumer, the advantages and disadvantages of the product as well as the scope of the credit agreement,
- to present to the consumer complete and exact information regarding the credit that he intends to take,
- to give the consumer the information necessary in order to conclude the credit agreement which includes at least the following elements:
  - the current financial statements of the consumer and of any guarantors including the financial projections for the period until the credit is reimbursed and the interest is paid,
  - a description of the means of securing the full payment of the debt, and an evaluation of the assets object of security, as the case may be,
  - A description of the conditions of the credit including its value, the value of the annual effective interest, the interest rate, the reimbursement schedule and the purpose for the debtor taking the loan.

In case of contracts where credits are granted in the form of an advance in the current account (credit line) by a credit institution or a financial institution, other than those covered by a payment instrument of a credit card type, the Law no. 289/2004 provided that the consumer has to be informed in writing at the latest at the moment when the credit agreement is concluded, with respect to:

- the limit of the credit if existent,
- the annual interest and the costs arising from the moment the credit agreement is concluded as well as the conditions for amending them,
- the procedure whereby the credit agreement is terminated.

According to the provisions of Law no. 289/2004, the information provided for in Article 6 should have been provided in writing to consumers also in case of overdraft facilities tacitly accepted, when they were prolonged for a period exceeding 3 months.

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<sup>84</sup> cfr. *F. de Gravato Morais*, *Do regime jurídico do consumo de crédito* (2000), p. 374-376.

<sup>85</sup> Translation by the author of the Romanian national report.

## The United Kingdom

Previously in the United Kingdom there were pre-contractual duties for distance selling consumer credit agreements. The previous regime set out in the Consumer Credit (Disclosure of Information) Regulations 2004 is similar to the pre-contractual information duties of the Directive. There are instances in which the previous regime was more explicit or required further information and others in which the Directive adds new requirements.

The previous regime included information such as a description and the cash price of the asset to be acquired with the credit sought. The Directive provides for the provision of such information for deferred payment credits and linked credit agreements. The total cost of the credit was previously required to be stated expressly. Nevertheless, this can be calculated from the total credit and total amount payable, which are provided for by Articles 5 (1) (g) and 5 (1) (c) of the Directive. The previous regime also required examples to be given to illustrate how the creditor's 'compensation' for early payment would be calculated. Although differing from the previous regime, the Directive requirements are 'broadly equivalent' in terms of substance and purpose. The Directive adds new pre-contractual duties stipulating the conditions for drawdown and the charges for maintaining a compulsory account recording payment transactions and drawdowns.

Since the previous pre-contractual information regime for certain consumer contracts was conceived at the same time as the transposition of the Distance Marketing of Financial Services Directive, the pre-contractual information duties of the Financial Services (Distance Marketing) Regulations 2004 were applied to all distance sale consumer credit contracts. Following the Consumer Credit Directive, the UK government decided not to extend the Directive pre-contractual information duties to the distance regulations. As a result, there is a 'dual regime' of pre-contractual duties for consumer credit agreements.

On the one hand, there are those which fall outside the scope of the Directive and, as a consequence, are regulated by the distance regulations and, on the other hand, those which fall within the scope of application of the Consumer Credit Directive.

The SECCI must be issued for agreements which fall under the scope of the implementation of the Directive. Thus, the duties of Articles 5 and 6 of the Directive are applicable to agreements secured on land and authorised non-business overdraft agreements for credit exceeding £60,260. However, creditors may either comply with the previous distance marketing disclosure of information regime or issue the SECCI to prospective debtors for other credit agreements exceeding £60,260, agreements secured on land to which the Consumer Credit Act does not apply and agreements for wholly or predominantly business purposes.

### (iii) Problems with the SECCI discussed at national level before the implementation or subsequent to the transposition

#### No problems with the implementation of the SECCI

**No problems** with the implementation of the Standard European Consumer Credit Information discussed at national level were identified for **Bulgaria, Cyprus, the Czech Republic, France, Greece, Poland, Portugal and Spain.**

#### General criticism of SECCI

Even though the Directive provides for the obligation to explain the information given to the consumer adequately, the effectiveness of SECCI was questioned. It was pointed out that, in practice, the SECCI would be too comprehensive and thereby hard to understand and the

information given too technical<sup>86</sup> which may create the impression of high complexity. As a result, the consumer might be discouraged in analysing the content of the SECCI effectively.<sup>87</sup>

It was also doubted whether the SECCI could actually serve as an instrument for comparing credit agreement offers.<sup>88</sup>

Furthermore, it was argued that the provision with SECCI would increase creditors' costs.<sup>89</sup>

Following a public consultation conducted in the United Kingdom, it was furthermore proposed to remove the boxes in the SECCI, to shorten its length, to format questions consistently, to include key features of products and to amend it for revolving credit products.

### Mandatory nature of SECCI?

In **Austria** it was questioned whether the SECCI was of a mandatory nature or whether the creditor could meet the information requirements in another way. The version of Article 6 (1) (2) of the VKrG currently in force, the format of the SECCI is mandatory.<sup>90</sup>

It is argued that the wording of Article 5 (1) (2) "shall be provided by means of the Standard European Consumer Credit Information" (in comparison Article 6: "may be provided") and the purpose of the SECCI to give the consumer the opportunity to compare credit agreement offers leads to the assumption that the usage of the form in Annex II of the Directive is mandatory.<sup>91</sup> Furthermore, it could also be considered that the obligation to use the standard form is necessary to protect the consumer with respect to the burden of proof when it is argued that information duties have not been fulfilled. If Article 5 (1) (2) is interpreted in favour of the obligation to use the SECCI, the consumer would only have to prove that the standard form has not been used. On the other hand, the presumption would be profitable for the creditor leading to more legal security when using the form. A balanced protection of the interests of both sides would be guaranteed. However, if there was no such obligation, the consumer would always have to prove that certain information had not been provided, which proves to be a higher barrier for litigation. Article 5, by introducing a presumption in favour of the creditor, would then be solely of advantage for the creditor. Hence, it could be argued that the introduction of an obligation to use the SECCI serves one of the purposes of the Directive, namely consumer protection, although balancing the interests of both parties.

### When does the SECCI have to be provided?

In **Austria** it was discussed whether the SECCI has to be provided every time a consumer inquiry for credit was submitted. Following the discussion regarding the purpose of the SECCI as intended by the Directive, it was concluded that the SECCI needs to be provided every time a consumer inquiry for a credit is submitted.<sup>92</sup>

This problem relates to the question of interpretation of "in good time" in Article 5 (1) of the Directive with respect to the time of provision of pre-contractual information duties.<sup>93</sup>

<sup>86</sup> For the Italian legal discussions on information duties in general see: *Grisi*, Gli obblighi di informazione, in Mazzamuto, Il contratto e le tutele. Prospettive di diritto europeo, Torino, 2002, p. 149; *Roppo*, Prospettive del diritto contrattuale europeo. Dal contratto del consumatore al contratto asimmetrico, in *Corr. giur.*, 2009, p. 267 et seq.; *Gentili*, Informazione contrattuale e regole dello scambio, in *Riv. dir. priv.*, 2004, 555 ss.; *Bocchini*, In principio erano le informazioni, in *Giur. comm.*, 2008, p. 35.

<sup>87</sup> See Polish National Report, p. 5.

<sup>88</sup> See the Polish report. Similar the Report for United Kingdom.

<sup>89</sup> See Polish National Report, p. 5.

<sup>90</sup> The usage of the form is also compulsory e.g. in Germany (see. article 247 § 2 (1) EGBGB) and in Poland. The nature of the form was, however, also issued in Poland, see the Polish report.

<sup>91</sup> Cf. *B. Koch*, Informations-, Aufklärungs- und Sorgfaltspflichten bei der Kreditvergabe nach der neuen Richtlinie 2008/48/EG von 23.April über Verbraucherkreditverträge, ÖBA 2009, p. 98 (99, 100).

<sup>92</sup> *W. Dehn*, Die neue Verbraucherkredit-Richtlinie: Geltungsbereich – Umsetzungsoptionen – Sanktionen, ÖBA 2009, p. 185.

<sup>93</sup> For further see chapter 2.1.5 (A).

## B. Contractual information to be written into the credit agreement, Article 10 of the Directive

Article 10 (1) of the Directive regulates the form in which credit agreements have to be concluded and determines that all contracting parties shall have a copy of the credit agreement. The credit agreement does not have to be on paper anymore.<sup>94</sup>

The requirement is also fulfilled where the credit agreement is drawn up on another durable medium.<sup>95</sup> Furthermore, the information to be included in the credit agreement and the manner in which it should be provided ("clear and concise") is specified (Article 10 (2)).

There is no standard form for the contractual information to be included into the credit agreement. The information requirements are more comprehensive than in the previous Consumer Credit regime.<sup>96</sup>

### (i) Implementation of Article 10 of the Directive

In twelve of the fourteen Member States investigated, Article 10 was transposed without any problems and modifications in respect to the content. These countries are **Austria**<sup>97</sup>, **Bulgaria**<sup>98</sup>, **Cyprus**<sup>99</sup>, the **Czech Republic**<sup>100</sup>, **France**<sup>101</sup>, **Germany**<sup>102</sup>, **Greece**<sup>103</sup>, **Italy**<sup>104</sup>, **Poland**<sup>105</sup>, **Portugal**<sup>106</sup>, **Spain**<sup>107</sup> and the **United Kingdom**<sup>108</sup>.

<sup>94</sup> See article 4 of the former Consumer Credit Directive (87/102/EEC).

<sup>95</sup> In **Germany** the "in writing" requirement has been retained, § 492 (1) BGB, but extended by § 492 (1) (3) which states that the statement of the lender need not to be signed if it is made with the help of automatic equipment (Official translation by Langenscheidt Translation Service for the *Bundesministerium der Justiz*). The prescribed form is fulfilled if the electronic form according to §§ 126 (3), 126 a BGB is fulfilled. The *Zentraler Kreditausschuss* in his opinion to the draft of the implementing act provided by the government on 11.2.2009 (p. 11) questioned whether retaining the writing form is in conformity with the Directive. It is, however, argued that this provision may be regarded as a national rule regarding the validity of the conclusion of credit agreements which is in conformity with Community Law (article 10 (3) (3)), see: *P. Wösthoff*, Die Verbraucherkreditrichtlinie 2008/48/EG und deren Umsetzung ins deutsche Recht, p. 153, 154. In **Romania** the written form has been retained as well, even specified as to the font, the font size and the paper. However, the form has been extended to the possibility to provide the agreement drawn up another durable medium.

<sup>96</sup> See article 4 of the former Consumer Credit Directive (87/102/EEC).

<sup>97</sup> Article 9 VKrG.

<sup>98</sup> Article 11 CCA.

<sup>99</sup> Article 10 Law 107 (I)/ 2010 on consumer credit agreements.

<sup>100</sup> Article 10 (1) has been transposed to § 6 of the Consumer Credit Act No. 145/ 2010 Coll., article 10 (2) to Annex III of the Consumer Credit Act No. 145/ 2010 Coll. to which § 6 (1) refers, article 10 (4) to article 1 (t) of Annex III of the Consumer Credit Act No. 145/ 2010 Coll., article 10 (2) (i) to § 7 (4) of Consumer Credit Act No. 145/ 2010 Coll., article 10 (5) to article 2 (a) – (d) of Annex III of the Consumer Credit Act No. 145/ 2010 Coll. There are, however, some changes in wording which do not affect the content of the provision.

<sup>101</sup> L 311-18 – L 311-21 of the Commercial Code.

<sup>102</sup> §§ 492 (1), 506 (1) BGB in connection with article 247 EGBGB.

<sup>103</sup> Article 10 of the Ministerial Decision.

<sup>104</sup> Article 121 et seqq. TUB.

<sup>105</sup> Article 10 (1) was transposed to article 29 (1) CCA2011, article 10 (2) to articles 29 (3), 30, 31 (1), 33, 37 (1) of the CCA2011, article 10 (3) to article 37 (1), article 10 (4) in article 30 (2) CCA2011; article 20 (5) in article 32 CCA2011.

<sup>106</sup> Article 10 (1) (1) has been transposed to article 12 (1) DL 133/2009, article 10 (1) (2) to article 12 (2) DL 133/2009, article 10 (2) (a) – (h) to article 12 (3) with reference to article 6 (3) (a) – (h) (1) DL 133/2009, article 10 (2) (i) (1) and article 10 (3) to article 12 (3) (a) DL 133/2009, article 10 (2) (i) (2) to article 12 (4) DL 133/2009, article 10 (2) (j) – (v) to article 12 (3) (b) – (o) DL133/2009; article 10 (4) to article 6 (4) DL 133/2009, article 10 (5) (a) – (i) to article 12 (5) (a) – (d) with reference to article 6 (3) (a) – (d) and article 6 (3) (f) DL 133/2009. article 6 DL 133/2009 concerns pre-contractual information requirements.

<sup>107</sup> Articles 16, 17 of Law 16/2011 of 24 June 2011.

<sup>108</sup> Reg. 3 with reference to column 2 Schedule 1 (for the information) and column 1 Schedule 2 (for the form) of the Consumer Credit (Agreements) Regulations 2010. Furthermore, Reg. 3 specifies the requirement for the information to be "clear" and Reg. 4 provides rules on the signing of the agreement. Reg. 8 provides respective rules on the form and content of authorised overdraft agreements. However, there are slight changes in wording which do not change the content.

In **Latvia**, the provision has also been transposed exactly as stated in the Directive<sup>109</sup>. However, **Latvia** did not transpose Article 10 (5) (h). The Latvian legislator argued that the information requirements under Article 10 (5) (h) have already been regarded as a mistake according to the European Commission.<sup>110</sup> This provision regulates the conditions for the exercise of the right to withdraw from the credit agreement in form of overdraft facilities as referred to in Article 2 (3) of the Directive.

Also **Romania** transposed Article 10 almost exactly into its national legislation.<sup>111</sup> However, there are some slight differences, particularly as regards the implementation of Article 10 (3)-(5) of the Directive. According to Article 10 (3), a statement of account in the form of an amortisation table needs to be made available under certain circumstances. Article 47 of the GEO no. 50/2010, implementing Article 10 (3), specifies the conditions which the bank excerpt should comply with. Article 47 (2) of the GEO no. 50/2010 indicates details that need to be listed (due instalments, terms and conditions for payment) and Article 47 (3) comprises details of each reimbursement.<sup>112</sup>

Furthermore, the provision on the conditions for the exercise of the right to withdraw from an overdraft agreement (Article 10 (5) (h) of the Directive) has not been transposed to the respective Article 49 of the GEO no. 50/2010.

## (ii) Member State specific implementation aspects

For **Austria** it was pointed out that there is an ongoing discussion on the interpretation of the term "*unverzöglich nach Vertragsabschluss*" (*without any undue delay* after the conclusion of the contract) which was added with respect to the receiving of a copy of the credit agreement.<sup>113</sup>

The corresponding **German** provision corresponds with the provisions of the Directive, as already stated. However, the German legislation introduced sanctions in cases where the information requirements are not met.<sup>114</sup> According to these provisions, the creditor may not rely on declarations which were either not accurate or not correctly included in the contract. In cases of *essentialia negotii*<sup>115</sup>, the interpretation which best favours the consumer shall be adopted.<sup>116</sup> It is argued that Article 14 (1) (b) is exclusive with respect to infringements of Article 10.<sup>117</sup> It is questionable, however, whether sanctions as provided under the German law may be justified by Article 23 of the Directive. Voices in the legal literature argue that these sanctions undermine the full harmonisation approach and are not covered by Article 23 of the Directive.<sup>118</sup>

<sup>109</sup> Clause 35 -38 of the Regulations Regarding Crediting Consumers.

<sup>110</sup> [www.mk.gov.lv/doc/2005/EMAnot\\_271210\\_kredits.3598.doc](http://www.mk.gov.lv/doc/2005/EMAnot_271210_kredits.3598.doc), p. 14. However, this source does not give reference to the respective opinion. This opinion could also not be found.

<sup>111</sup> Article 33 (1) of the GEO no. 50/2010 transposes article 10 (1) (1) of the Directive, article 10 (1) (2) is transposed to article 34 of the GEO no. 50/2010, article 10 (2) to article 46 of the GEO no. 50/2010, article 10 (3)-(5) to article 47-49 ) of the GEO no. 50/2010.

<sup>112</sup> The reimbursement of the total value of the credit, the interest calculated on the basis of the interest for the credit, supplementary costs need to be shown.

<sup>113</sup> For the discussion see: *J. Stabentheiner*, Das Verbraucherkreditgesetz – EU Vorgaben, Geltungsbereich, vorvertragliche Informationspflichten, Bontitätsprüfung, Vertragsdokument, ÖJZ 2010, p. 531 (544).

<sup>114</sup> See §§ 494 (4) - (7) and 507 (2) - (5) BGB.

<sup>115</sup> « Denotes the minimum contents of a contract for it to be held effective and legally binding », see : <http://definitions.uslegal.com/e/essentialia-negotii/>; compare also R. Bork, in Staudinger, BGB - Neubearbeitung 2010, Vorbem. zu §§ 145-156, marginal number 37 and *T. Riehm*, JuS Lern-CD Zivilrecht I, 3rd ed. 2003 (Describing *essentialia negotii* as « essential aspect/ terms » of a contract (« *wesentliche Vertragsbestandteile* »)).

<sup>116</sup> *Ch. Wendehorst*, Umsetzung der Verbraucherkreditrichtlinie, ZeuP 2011, p. 263 (274).

<sup>117</sup> *T. Riehm/ B. Schreindorfer*, Das Harmonisierungskonzept der neuen Verbraucherkreditrichtlinie, GPR 2008, p. 244 (248).

<sup>118</sup> *T. Riehm/ B. Schreindorfer*, Das Harmonisierungskonzept der neuen Verbraucherkreditrichtlinie, GPR 2008, p. 244 (248).

### C. Right of withdrawal for the consumer until 14 days after the conclusion of the credit agreement, Article 14 of the Directive

Article 14 of the Directive provides a harmonised right of withdrawal. According to this provision the consumer may withdraw from credit agreements without giving any reason within a period of 14 calendar days. Article 14 (1) then specifies the time from which the period for withdrawal shall run. Article 14 (3) provides that the consumer shall notify the creditor of the withdrawal in compliance with the conditions as laid out in Article 14 (3) (a). Furthermore, after the exercise of the right of withdrawal, the consumer must repay the capital and the accrued interest without any undue delay and within 30 calendar days. It is, moreover, stated that the consumer shall not be liable for any compensation, except for non-returnable charges paid by creditor to any public administrative body, Article 14 (3) (b) (3). Once the withdrawal has been exercised, the consumer is no longer bound by the credit agreement, nor by any ancillary service contract (Article 14 (4)).

The consumer's right to withdraw from the credit agreement excludes rights of withdrawal which would otherwise be derived from Article 6 and Article 7 of Directive 2002/65/EC on the distance marketing of consumer financial services and Article 5 of Directive 85/577/EEC on contracts negotiated away from business premises.

Finally, Article 14 (2) and (6) provide certain options for the Member States.<sup>119</sup>

The right of withdrawal has been **implemented by all** of the Member States covered in this paper.<sup>120</sup> The various national implementations **mainly correspond with Article 14** of the Directive.

**A right of withdrawal already pre-existed in many of the legal systems** of the Member States. However, in most cases, the period of withdrawal amounted to periods from only five days to two weeks, or the right was limited to specific contracts or applicable only on certain conditions.<sup>121</sup>

In **Austria** there has been discussion on whether repaying the amount due constitutes a pre-condition for the right or a consequence of the right to withdrawal. Finally, the resulting legislation seems to be based upon the assumption that - according to the wording of the rule (in particular § 12 Para 3 VKrG) - the repayment cannot be seen as a pre-condition but

<sup>119</sup> The implementation of these options is discussed in chapter 2.1.3 (E).

<sup>120</sup> **Austria:** § 12 VKrG; **Bulgaria:** articles 29-31 CCA; **Czech Republic:** article 14 (1) has been transposed to § 11 (1) Consumer Credit Act No. 145/ 2010 Coll., article 14 (3) (a), (b) to § 11 (2), (3) Consumer Credit Act No. 145/ 2010 Coll., article 14 (4) to § 11 (4) Consumer Credit Act No. 145/ 2010 Coll. and article 14 (5) to § 11 (5) Consumer Credit Act No. 145/ 2010 Coll.; **France:** L 311-12 Code de la consommation; **Germany:** §§ 495, 506 BGB and §§ 355 et seqq. BGB; **Greece:** article 14 of the Ministerial Decision; **Italy:** article 125ter TUB; **Latvia:** Clause 12 of the Consumer Protection Law (not the Regulations Regarding Crediting Consumers); **Poland:** article 14 (1) has been transposed to article 53 (1) and 53 (2) CCA2011, article 14 (3) (a) to article 53 (3) - (5) CCA2011, article 14 (3) (b) to article 54 (1)-(4), article 14 (4) to article 55 CCA2011, article 14 (5) to article 58, 63 CCA2011; **Portugal:** article 17 DL 133/2009 with some improvements in wording; **Romania:** article 58 - 62 of the GEO no. 50/2010; **Spain:** article 28 of the Law 16/2011 of 24 June 2011; **the United Kingdom:** Reg. 13 of the Consumer Credit (EU Directive) Regulations 2010 amending s. 66 A of the Consumer Credit Act 1974.

<sup>121</sup> See e.g. article 8 (d) Law 39 (I) 2001 in Cyprus (10 days), also in Poland in article 11-14 CCA 2001 (10 days), in Portugal in article 8 (1) DL 359/91 of 21 September 1991 (7 days), in Germany in §§ 495 (1) in connection with § 355 (1) (2) BGB in its version before June 2010 (two weeks). There has also been a right of withdrawal in France since 1978 (loi n° 78-22 du 10 janvier 1978 relative à l'information et à la protection des consommateurs dans le domaine de certaines opérations de crédit, « loi Scrivener »). In the United Kingdom there has been a 'right of withdrawal' since the enactment of the Consumer Credit Act in 1974. However, this right of cancellation was only applicable to certain agreements (in principle, all credit agreements excluding those relating to land, non-commercial agreements, overdraft bank account) and on condition that the contract was signed off-trade premises and that there were no oral representations (s. 67 of the CCA 1974). The so called "cooling-off" period was 5-14 days depending on the circumstances laid down in s. 68 of the CCA 1974.

rather a consequence of the right to withdrawal<sup>122</sup>.

The **French legislation** increased the protection afforded to the consumer by modifying the conditions for the formation or 'perfection' of the contract. There must be a 'double acceptance'. In order for the credit agreement to be enforceable, the lender therefore must give the borrower notice of the decision to accord credit within 7 days after the borrower has accepted the offer of the lender.<sup>123</sup> This may prove problematic when determining the beginning of the period for withdrawal: should period of withdrawal run from the acceptance of the consumer, or that of the creditor? The right of withdrawal of the *Code de la consommation* seems *prima facie* to run from the consumer's first acceptance.

However, the Directive clearly states that time should run at the earliest from the 'conclusion of the credit agreement'.<sup>124</sup>

In **Germany**, there is an on-going debate in the legal literature concerning the conformity of some aspects of the implementation of the right of withdrawal with the Directive. Some of the evident incompatibilities (e.g. deviation of the period of withdrawal) have already been corrected in the German legislation.<sup>125</sup> In the following text, an explanation will be given of the remaining problems.

(1) § 508 (1) BGB states that, instead of the right of withdrawal, a right of return can be granted to the consumer if he has received goods in connection with the credit agreement. Some authors argue that the right to return equates with the right of withdrawal and therefore that § 508 is in conformity with the Directive.<sup>126</sup> They base this opinion on Recital 35 of the Directive, which states that for these kinds of credit agreements the Directive should be without prejudice to any regulation by Member States of questions concerning the return of the goods or any related questions.<sup>127</sup> However, it seems more likely that § 508 (1) BGB is not conform to the Directive. The purpose of Recital 35 is only to clarify that respective national rules shall not be affected by the Directive. In contrast, § 508 (1) BGB does affect the implemented provisions of the Directive by granting an alternative to the right of withdrawal, something which is not provided for by the Directive. Furthermore, a right to return forces the consumer to give away possession of the goods which constitutes the only pressurising medium against the other party in case the consumer has already paid in advance.<sup>128</sup> It may, therefore, be concluded that § 508 (1) is not in conformity with the concept of full harmonisation.

The enunciation of the legal consequences of a right to return can be found under § 356 BGB to which § 508 refers. This provision states that the period of withdrawal (respectively period of return) does not begin before the good is received.<sup>129</sup>

This could result in a lengthening of the period for withdrawal which possibly does not conform to the concept of full harmonisation.<sup>130</sup>

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<sup>122</sup> See *Ch. Wendehorst*, in: *Ch. Wendehorst/ B. Zöchling-Jud, Verbraucherkreditrecht*, Vienna 2010, § 12 marginal number 35.

<sup>123</sup> L311-13 of the *Code de la consommation*.

<sup>124</sup> Article 14(1) of Consumer Credit Directive 2008.

<sup>125</sup> *Ch. Wendehorst*, *Das deutsche Umsetzungskonzept für die neue Verbraucherkreditrichtlinie*, ZEuP 2011, p. 263 (279) gives a good overview.

<sup>126</sup> *R. Welter*, in: *M. Gebauer/ T. Wiedmann, Zivilrecht unter europäischem Einfluss, Die Richtlinienkonforme Auslegung des BGB und anderer Gesetze – Erläuterung der wichtigsten EG-Verordnungen*, 2<sup>nd</sup> edition, 2010, chap. 12, marginal number 82.

<sup>127</sup> *Ch. Wendehorst*, *Das deutsche Umsetzungskonzept für die neue Verbraucherkreditrichtlinie*, ZEuP 2011, p. 263 (277).

<sup>128</sup> *Ch. Wendehorst*, *Das deutsche Umsetzungskonzept für die neue Verbraucherkreditrichtlinie*, ZEuP 2011, p. 263 (281).

<sup>129</sup> § 356 (2) BGB.

<sup>130</sup> *Ch. Wendehorst*, *Das deutsche Umsetzungskonzept für die neue Verbraucherkreditrichtlinie*, ZEuP 2011, p. 263 (282).

(2) Furthermore, the extension of the period of withdrawal under certain circumstances has been criticised.<sup>131</sup> According to § 492 (6), the time in which the consumer has to withdraw from the contract may be extended by up to a month where certain relevant information is not included in the contract but was incorporated later on. It could be argued that the period for withdrawal is also a fully harmonised aspect of the Directive and therefore that it cannot be extended by the Member States.

On the other hand, Article 23 states that the Member States shall lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to the Directive. It could therefore be argued that the extension of the period of withdrawal is a sanction for not meeting the information requirements as laid down in Article 10 of the Directive.<sup>132</sup> The question whether § 492 (6) is compatible with the Directive for this reason cannot be definitively answered.

In the **United Kingdom** Consumer Credit (Amendment) Regulations,<sup>133</sup> the words 'the day after' were inserted to 66A (2) (2) to read 'before the end of the period of 14 days beginning with the day after the relevant day.' Although rectified before the enforcement deadline, a transitory period had been given to businesses during which they could comply with either the previous or the new regime. This was problematic because 'transitory provisions' had to be enacted to govern the credit agreements concluded during the transition period in which the right of withdrawal ran at the earliest with the day of the conclusion of the agreement.

#### **D. Conditions for early repayment, Article 16 of the Directive 2008/48/EC**

According to Article 16 of the Directive, the consumer is entitled to early repayment at any time. In Article 16 (1) - (3), the provision stipulates the consequences which flow from early repayment of the loan. In particular, the consumer has an entitlement to a reduction of costs (1) and the creditors are entitled to fair and objectively justified compensation for possible costs resulting from the early repayment under the circumstances and conditions as laid out in (2). Exceptions are then listed in Article 16 (3). Article 16 (2) (2) provides for an upper limit of the compensation which can be owed to the creditor upon early repayment of the loan by the consumer. Article 16 (4) offers options which can be taken by the Member States with respect to the compensation.<sup>134</sup>

##### **(i) Implementation**

**Austria**<sup>135</sup>, **Bulgaria**<sup>136</sup>, **Cyprus**<sup>137</sup>, **the Czech Republic**<sup>138</sup>, **France**<sup>139</sup>, **Germany**<sup>140</sup>, **Greece**<sup>141</sup>, **Italy**<sup>142</sup>, **Latvia**<sup>143</sup>, **Poland**<sup>144</sup>, **Spain**<sup>145</sup> and **the United Kingdom**<sup>146</sup>

<sup>131</sup> T. Riehm/B. Schreindorfer, *Das Harmonisierungskonzept der neuen Verbraucherkreditrichtlinie*, p. 244 (248).

<sup>132</sup> Ch. Wendehorst, *Das deutsche Umsetzungskonzept für die neue Verbraucherkreditrichtlinie*, ZEuP 2011, p. 263 (279).

<sup>133</sup> SI 2010, 1969.

<sup>134</sup> For the implementation of the options provided in article 16 (4) of the Consumer Credit Directive 2008 see chapter 2.1.3 (F).

<sup>135</sup> § 16 VKrG

<sup>136</sup> Article 23 CCA.

<sup>137</sup> Article 16 of Law 107 (I)/2010.

<sup>138</sup> Article 16 (1) has been transposed to § 15 (1) of the CCA No. 145/ 2010 Coll., article 16 (2) to § 15 (2), (3) of the CCA No. 145/ 2010 Coll, article 16 (3) to § 15 (4) of the CCA No. 145/ 2010 Coll and article 16 (5) in § 15 (5) of the CCA No. 145/ 2010 Coll.

<sup>139</sup> L311-22 of the Code de la consommation.

<sup>140</sup> Article 16 (1) (1) has been transposed to § 500 (2) BGB, article 16 (1) (2) to § 501 BGB, article 16 (2) and (3) to § 502 BGB.

<sup>141</sup> Article 16 of the Ministerial Decision.

<sup>142</sup> Article 125 sexies TUB.

<sup>143</sup> Clause 72-74 of the Regulation Regarding Crediting Consumers.

implemented Article 16 if not verbatim, then using very similar wording and in any case in compliance with the article.

## (ii) Member State specific aspects

In addition to the implementation of Article 16 of the Directive, the **Greek legislation** introduced sanctions under Article 23 of the Directive. The creditor is not entitled to compensation if he infringed pre-contractual information duties or did not include exact details in the contract about the duration of the credit agreement, about the consumer's right to withdraw, about rights resulting from Article 15 of the Directive or the exercise of these rights, about the right to early repayment, the procedure for early repayment or about the creditor's right to compensation and the way compensation will be determined.

In **Portugal** Article 16 of the Directive is transposed in Article 19 of the DL-133/2009. According to Article 19 (2), the consumer needs to give notice to the creditor of at least 30 days before the early repayment. This differs from Article 16 insofar as, according to 16 (1), the consumer is entitled, *at any time, to discharge fully or partially his obligation*; hence, to exercise his right in a real way. Giving notice cannot therefore be a pre-condition for the exercise of the consumer's right. Furthermore, there must not be an expiry of period between giving notice and repaying. The exercise of the consumer's right is as a result unnecessarily impeded by the Portuguese regulation. It could, hence, be argued that Article 19 (2) of the DL-133/2009 is not in conformity with the Directive.

The **Romanian law** implemented Article 16 of the Directive nearly verbatim into Articles 66-69 of the GEO no. 50/2010. There are, however, some slight differences or rather additions when compared with Article 16 of the Directive. According to Article 66 (2), states that early repayment may not be restricted by the payment of a certain amount or number of instalments.

Furthermore, the creditor must, according to Article 67 (3), establish a calculation method for the compensation which is clear and easy to verify and which the creditor has to present to the consumer before the contract is concluded.

## (iii) Options according to Article 16 (4) of the Directive

Half of the number of the Member States covered also took one or, in case of Cyprus, two of the options provided in Article 16 (4) which modifies the regulation of the compensation under Article 16 (2) (2) of the Directive.<sup>147</sup>

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<sup>144</sup> Article 16 (1) is transposed to article 48 (1), article 49 (1), (2) of the CCA2011, article 16 (2) to article 50 (1) – (3) of the CCA 2011 whereby the option of article 16 (4) (a) was taken, article 16 (3) to article 50 (1) and article 51 of the CCA2011, article 16 (4) (a) has been implemented – as already indicated – to article 50 (1), article 16 (5) to article 50 (4) of the CCA2011.

<sup>145</sup> Article 30 of the Law 16/2011 of 24 June 2011.

<sup>146</sup> Full early repayment is regulated by s. 94 (1) and (2) of the Consumer Credit Act and the Consumer Credit (Early Settlement) Regulations 2004. Partial early repayment may be found in Reg. 30 of the Consumer Credit (EU Directive) Regulations 2010 inserting s. 94 (3) – (6) into the Consumer Credit Act. Furthermore, Reg. 77-84 of the Consumer Credit (EU Directive) Regulation 2010 amends the Consumer Credit (Early Settlement) Regulations 2004 adding Reg. 4 A.

<sup>147</sup> For further see chapter 2.1.3 (F).

#### (iv) Criticism

A right as provided in Article 16 (1) of the Directive was already provided for in some of the Member States.<sup>148</sup> In most of the previous legal regimes of these Member States, the consumer had the right to repay partially or even fully, usually an amount dependent on the accrued interest and the contract period. However, compensation for the creditor was either not granted or only granted under certain circumstances for specific credit agreements.<sup>149</sup> In respect of the detailed regulation on compensation now available under Article 16 of the Consumer Credit Directive, it has been criticised that consumer protection has thereby been lowered.<sup>150</sup> Particularly in **France**, Article 16(2) was the subject of intense parliamentary discussion and criticism.<sup>151</sup> The Senate had already adopted a resolution in which it asked the government to make sure that the Member States could dispose of a right to compensation in the case of early repayment.<sup>152</sup> At first reading, the French Senate even rejected the right to compensation. The Article as adopted complies with the Directive; however, its effect has been limited as far as was possible.

In contrast, the provision was welcomed in **Cyprus** where the regulation on compensation in comparison to Article 16 of the Consumer Credit Directive 2008 was even less favourable to the consumer.

It was also pointed out that the provisions clearly stipulate the mode of calculation of the compensation and establish limits to it, which protect the consumer's financial interests.<sup>153</sup>

### E. Calculation method for the Annual Percentage Rate of Charge (APR), Article 19 of the Directive

**Austria**<sup>154</sup>, **Bulgaria**<sup>155</sup>, **Cyprus**<sup>156</sup>, the **Czech Republic**<sup>157</sup>, **France**, **Germany**<sup>158</sup>, **Greece**<sup>159</sup>, **Latvia**<sup>160</sup>, **Poland**<sup>161</sup>, **Romania**<sup>162</sup>, **Spain**<sup>163</sup> and the **United Kingdom**<sup>164</sup> have fully and correctly implemented Article 19 and Annex I of the Consumer Credit Directive.

<sup>148</sup> Austria (§ 33 (8) BWG and for consumer credit agreements § 12 a KSchG restricting this right to contracts which were not excluded by article 12 a (2) of the KSchG), Cyprus (article 23 et seqq. of the Law 39/2001), France, Latvia and Poland.

<sup>149</sup> In **Austria** the creditor generally did not receive any compensation. However, there were exceptions in cases of a fixed borrowing rate period, a mortgage loan or a credit agreement to finance residence. These exceptions were only applicable under certain conditions. According to article 12 a (1) (2) KSchG (regulating early repayment in consumer contracts) the creditor was not entitled to any further costs. Paragraph one was only applicable to certain contracts. In **Cyprus** 5-10% of the amount reduced because of early repayment was deducted for administrative costs, article 23 of the Law 39 (I) 2001. Compensation granted by the court only had to be adequate, article 26 of the Law 39 (I) 2001. In **Latvia** the creditor was not entitled to compensation. Reasonable compensation for administrative expenses was only granted in case where the consumer was refinancing its credit to another creditor. In **Poland** the consumer could repay early without having to compensate the creditor. In the **United Kingdom** the previous regime regulated full early repayment in s. 94 of the CCA1974 and in the Early Settlement Regulations 2004. In relation to full early repayment the new regime remained almost unchanged. There was, however, no equivalent provision on the partial early repayment.

<sup>150</sup> See the Austrian and Polish national report.

<sup>151</sup> Conscient de la faible marge de manœuvre du Parlement sur les deux premiers points compte tenu de la contrainte d'harmonisation maximale de la directive, le Sénat a néanmoins émis des réserves sur l'exigence communautaire - transposée par le présent article en droit français - d'une indemnité du prêteur en cas de remboursement anticipé.

<sup>152</sup> Résolution n° 27 (2006-2007) sur la proposition de directive du Parlement européen et du Conseil relative à l'harmonisation des dispositions législatives, réglementaires et administratives des Etats membres en matière de crédit aux consommateurs (E 2103).

<sup>153</sup> Polish national report.

<sup>154</sup> Article 19 and Annex I of the Directive have been transposed to § 27 and Annex I VKrG.

<sup>155</sup> Article 19 and Annex I of the Directive have been transposed to Article 19 and Annex I of the Bulgarian CCA.

<sup>156</sup> Article 19 (1) of the Directive has been transposed to article 19 (1) of the Law 107 (I)/ 2010, article 19 (2) to article 19 (2), (3) of the Law 107 (I)/ 2010, article 19 (3) to article 19 (4) of the Law 107 (I)/ 2010, article 19 (5) to article 19 (6) of the Law 107 (I)/ 2010. Annex I of the Directive has been transposed to Annex I of the

According to Article 121 (3) TUB, the Annual Percentage Rate of Charge in **Italy** is calculated based on the indications of the *Banca d'Italia*. Article 125 bis (7) (a) TUB stipulates standards for the calculation of the APR.

In **Portugal** Article 19 (1) of the Directive has been implemented by Article 24 of the DL-133/2009. Article 24 (2) refers to Part I of Annex I of the DL-133/2009 stipulating the calculating method. Here also some expressions of DL 359/ 91 of 21 September 1991 implementing Directive 87/102/EEC have been superseded. Article 19 (2) (2) of the Directive corresponds with Article 24 (4) DL 133/2009.

In **Spain** the 4th final provision of the Law 16/2011 of 24 June 2011 refers to Article 19 (5) of the Consumer Credit Directive authorising the Ministry of Economy and Finance to determine additional rules for calculating the Annual Percentage Rate of Charge when Article 32 and Part II of Annex I do not suffice when calculating the APR, whereas, according to Article 19 (5), the Consumer Credit Directive only allows the Commission to “determine the necessary additional assumptions for the calculation of the annual percentage rate of charge, or modify existing ones. (...)” In the preliminary recitals of the Law 16/2011 it is, however, specified that the Ministry of Economy and Finance will be allowed to add further APR calculation methods only with the consent of the Commission.

Whereas in **Austria** the current state of provisions is more detailed in general and corresponds with commercial practice, it was stated for the **United Kingdom**, that:

“(t)he methodology for the proposed calculation is the same as that followed in the UK; the assumptions provided where credit agreement terms have not been finalised appear to be less sophisticated than those currently used in the UK and do not appear to cater for as wide a range of situations. That said, these simpler assumptions appear to produce the same result in terms of calculated APR for the majority of cases”.<sup>165</sup>

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Law 197 (1)/2010. The “new” provisions correspond to the “old” provisions of Law 39 (I) 2009. Therefore, there are barely changes.

<sup>157</sup> Article 19 (1) – (5) and Annex I of the Directive have been transposed to § 10 (1) – (5) and Annex I of the CCA No. 145/ 2010 Coll.

<sup>158</sup> Article 19 and Annex I of the Directive have been transposed to § 6 (3) and Annex I of the PAngV. No deficiencies became apparent. For further details see: *P. Wösthoff, Die Verbraucherkreditrichtlinie 2008/48/EG und deren Umsetzung ins deutsche Recht*, p. 174

<sup>159</sup> Article 19 and Annex I of the Directive have been transposed to article 19 and Annex I of the Ministerial Decision.

<sup>160</sup> Article 19 and Annex I have been implemented in clauses 5-10 and Annex I of the Regulations Regarding Crediting Consumers.

<sup>161</sup> Article 19 (1) of the Directive in principle was implemented by article 25 (3) of the CCA2011, article 19 (2) has been transposed to article 25 (1) No. 1 and 2 of the CCA2011. The Polish legislator in order to indicate who has to pay the charges in the sense of article 19 (2) (1) of the Directive used the personal pronoun “swoich” (their). This might lead to confusions but does practically not change the content of the provision. article 19 (3) has been implemented by (3) (1) of the assumptions listed in Annex 4 of the CCA2011, article 19 (4) has been transposed to article 25 (2) of the CCA2011, Annex I of the Directive to Annex IV of the CCA2011.

<sup>162</sup> Article 19 and Annex I of the Directive have been transposed to articles 72 – 76 and Annex I of the Geo no. 50/ 2010.

<sup>163</sup> Article 19 and Annex I of the Directive have been transposed to article 32 and Annex I of the Law 16/2011 of 24 June 2011.

<sup>164</sup> Article 19 and Annex I of the Directive have been implemented by Reg. 5 and the Schedule of the Consumer Credit (Total Charge for Credit) Regulations 2010 (SI/1011).

<sup>165</sup> Extract from the Explanatory Memorandum.

### 2.1.2. Implementation of provisions with a wide margin of appreciation, Articles 5 (6) (2), 15 (2) (2) and 23 of the Directive

The purpose of this section is to elucidate the state of implementation according to the way in which the Member States have dealt with aspects to be implemented in a manner defined by the directive ("may", "shall"). Particularly, the margins of appreciation provided in Articles 5 (6) (2), 15 (2) (2) and Article 23 of the Directive are brought into focus.

#### A. Margin of appreciation to adapt a manner by which and the extent to which assistance is given to the consumer<sup>166</sup>

Article 5 (6) (1) of the Directive imposes a general duty to "assist" the consumer in stipulated circumstances.<sup>167</sup> The autonomous nature of the additional assistance to be given to the customer in a form of adequate explanations is emphasised in Recital 27 of the Directive. Member States shall ensure their national provisions impose that additional assistance be given by credit providers, or credit intermediaries where applicable, independently from the pre-contractual information. The essence of the assistance focuses on increasing consumer awareness of the specific consequences of the credit agreement, or of the consumer's understanding of the pre-contractual information which enable him to assess the suitability of the proposed product to his needs and financial situation.<sup>168</sup>

Article 5 (6) (2) allows Member States to assign specific conditions to the type of assistance to be provided, such as the particular situation in which the credit is offered, the addressee and the type of credit. The discretion includes the possibility to adjust the manner and extent of the assistance to the consumer as well as to determine by whom the explanations should be given.

The general duty to explain under Article 5 (6) (1) was implemented by almost all of the Member States covered, with the exception of **Italy**.<sup>169</sup> The **Italian** legislation did not transpose a separate duty to provide the consumer with additional assistance.<sup>170</sup> The comprehensive provisions implemented by the **other thirteen Member States**<sup>171</sup> ensure a general duty to provide assistance before the conclusion of the credit agreement which enables the consumer to decide whether the agreement is suited to his specifications and financial situation<sup>172</sup>.

**Austria, France** and the **United Kingdom** transposed the general duty of assistance through a list of the standard scope of information covered by the duty.<sup>173</sup> The national provisions generally indicate that the responsibility for delivering explanations applies to the creditor or the credit intermediary. However, the **Greek provision** establishes the duty with respect to credit institutions.<sup>174</sup>

The national legislation of some Member States maintained a different approach to the margin of appreciation contained in Article 5 (6) (2). **Nine of the Member States covered**<sup>175</sup> did not provide further clarification of the duty at all. The **German**

<sup>166</sup> Assistance' in the sense of article 5 (6) (1) and (2).

<sup>167</sup> As to the implementation and interpretation of the term "adequate explanation", as provided by article 5 (6) (1) of the Directive see chapter 2.1.5 (B).

<sup>168</sup> See Recital 27 and article 5 (6) (1) of the Directive.

<sup>169</sup> See Table below.

<sup>170</sup> A. Antonucci, 'Credito al consumo e zone limitrofe' 141 del 2010, in NGCC, 2011, p. 303.

<sup>171</sup> Austria, Bulgaria, Cyprus, the Czech Republic, France, Germany, Greece, Latvia, Poland, Portugal, Romania, Spain and the United Kingdom.

<sup>172</sup> For further details see chapter 2.1.5 (B).

<sup>173</sup> For further details see chapter 2.1.5 (B).

<sup>174</sup> Greek national report.

<sup>175</sup> Bulgaria, Cyprus, the Czech Republic, Germany, Greece, Italy, Latvia, Poland and Spain.

transposition, although not providing further clarification of the duty in the legislative text itself, does indicate in its preamble certain parameters of the duty. However, in German law the use of the indications in the preamble is not mandatory for the interpretation of national provisions<sup>176</sup>. Only four Member States, namely **Austria, France, Portugal** and the **United Kingdom**, gave greater precision to the content of the duty by adapting the manner or extent of the explanation or by determining who is responsible for providing the consumer with explanations, as in accordance with certain types of credits or the specific circumstances in which a credit is offered.<sup>177</sup>

In general, by expanding the scope of the standard information for repayment and foreign currency credits, the **Austrian** implementation affects the contents of the credit assistance.<sup>178</sup> With regard to repayment vehicle credits, an additional requirement was added for the creditor to deliver to the consumer a graphic presentation showing the value of a repayment vehicle over a period, illustrating the risk of the assessment and percentage-based and a possible value-based presentation of the deviation of total costs.<sup>179</sup> The pre-contractual information with respect to foreign currency credits must emphasise the risk of changes in the exchange rate and the interest rate resulting from the other currency. Provision is also made for a duty to present, in the form of a graph, an illustration of changes in the exchange rate and – in case of credits based on a varying rate – the development of the relevant rate of reference.<sup>180</sup>

The **French** provisions clarify the duty of assistance for credits offered on the premises of the creditor. Pursuant to Article 311-8 (2) LOI, the creditor is obliged to provide comprehensive and adequate explanation on the premises and in a manner which ensures commercial confidentiality.

In the **United Kingdom**, the legislation specifies that the assistance may be given orally or in written form.<sup>181</sup> Where the general information listed in section 55A (4) of the Consumer Credit Regulation which relates to the loan and its influence on the financial situation of the debtor was previously provided orally or in person to the consumer, the explanation of other matters must also be given orally.

The transposition in the **United Kingdom** extended the duty to provide additional assistance in certain circumstances to cover credit agreements outside of the scope of the Directive.<sup>182</sup>

Further shape was given to the duty to assist by two of the Member States in relation to the type of creditor. In the **United Kingdom**, the creditor is excused from this duty where the credit intermediary provides the explanations.<sup>183</sup> The **Portuguese** legislation emphasises that the credit intermediary is legally bound to transmit the relevant information in full from the creditor (being responsible for providing information) to the consumer.<sup>184</sup>

**In Austria and Portugal**, moreover, standards are set to ensure the quality of the explanations given. The **Portuguese** implementation introduced a general requirement to present explanations in a clear, concise and legible way, while the **Austrian** provisions require that the explanations be clear and concise in highlighting additional costs which may arise in loans which are valued in a currency other than the Euro.

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<sup>176</sup> They indicate that consumer may receive explanations in a direct conversation, as well as by phone or in a written form. The degree of precision of the explanation shall be adjust to the complexity of a specific provision and ensure full clarity to the consumer. Further details see: BT-Drucks. 16/11643, p. 78, 79.

<sup>177</sup> See the Austrian, French, Portuguese national reports and the national report of the United Kingdom.

<sup>178</sup> § 5 (5)-(7) of the VKrG.

<sup>179</sup> § 5 (6) of the VKrG

<sup>180</sup> § 5 (7) VKrG

<sup>181</sup> Section 55A (3) and (4) the Consumer Credit Regulation 2010, SI 2010, no. 1010.

<sup>182</sup> loans in excess of £60 260 and loans secured on land, but not loans secured by way of pledge.

<sup>183</sup> Section 55A (5), the Consumer Credit Regulation 2010, SI 2010, no. 1010.

<sup>184</sup> Article 7 (2) DL 133/2009

**Table 4: Implementation of Article 5 (6) (1) and (2)**

Country	Implementation of duty Article 5 (6)(1)	Further precision in accordance with Article 5 (6) (2)
Austria	§ 6 (5) and (8) of the VKrG	§ 6 (6) and (7) of the VKrG
Republic of Bulgaria	Article 6 CCA	Not exercised
Cyprus	Article 5 (10) and (11) of the Law107(I)/2010	Not exercised
Czech Republic	Article 5 CCA No.145/2010Coll.	Not exercised
France	Article L. 311-8 al. 1 LOI n°2010-737	Article L. 311-8 al. 2 LOI n°2010-737
Germany	§ 491a (3) and § 655a (2)(2) BGB	Not exercised
Greece	Article 5 (6) of the Ministerial Decision Z1-699/10	Not exercised
Italy	Article 125 (4) bis TUB does not seem to be an adequate implementation	Not exercised
Latvia	Article 27 Cab. Reg. No.1219	Not exercised
Poland	Article 11 Ustawa o kredycie konsumenckim	Not exercised
Portugal	Article 7 (1)of the DL no. 133/2009	Article 7 (2) – (4) of the DL no. 133/2009
Romania	Article 18 (1) and (2) of the GEO no. 50/2010	Not exercised
Spain	Article 11 Law 16/2011	Not exercised
United Kingdom	Section 55A(1-2) Consumer Credit Regulation 2010	Section 55A(3-7) Consumer Credit Regulation 2010

Source: Elwira Macierzyńska-Franaszczyk

## **B. Margin of appreciation to determine the extent to which and under which circumstances remedies are available under Article 15 (2) (2)**

Article 15 (2) of the Directive refers to consumer remedies where the creditor is in breach of the linked agreement for the supply of goods or services.<sup>185</sup> According to Recital 38 of the Directive, Member States must provide legal remedies available for consumers against the creditor where remedies pursued against the supplier proved unsatisfactory. This obligation is further reflected in Article 15 (2) of the Directive. Moreover, according to the text of the Directive, the remedies against the creditor are subsidiary in relation to those raised against the supplier. Hence, Member States are obliged to provide primarily remedies available against the supplier of goods or services. However, **German legal scholars** argue that the requirement of subsidiarity is not a fully harmonised aspect of the Directive and even that Member States can depart from the requirement of subsidiarity on the basis of Article 15 (2) (2).<sup>186</sup> Nevertheless, Member States are authorised to determine the extent of the remedies against the creditor and the conditions of their application, which, pursuant to the essence of Recital 38 and Article 15 (2) (2) of the Directive, shall preserve the subsidiary of these remedies nature to those remedies against the supplier.

<sup>185</sup> Linked credit agreement as defined in article 3 (n) of the Directive.

<sup>186</sup> P. Bülow in P. Bülow/ M. Arzt, Verbraucherkreditrecht, p. 433.

Member States have adapted different legislative measures when implementing the system of consumer remedies. The **Czech Republic, Greece and Romania** did not adapt specific remedies for consumer credit and linked credit agreements. The **Czech legislation** emphasised that provisions of the Czech Civil Code applied as the legal basis for consumers' claims.<sup>187</sup> Under **Romanian law**, claims against the creditor can be exercised under the terms of Law no. 449/2003 regarding the sale of products and the connected guarantees.<sup>188</sup> Similarly, under **Greek law**, the general rules of the Civil Code determining the legal consequences of non-performance of the sale contract are applicable.

The transpositions in **Austria, Cyprus, Germany, Latvia, Poland, Portugal, Spain** and the **United Kingdom** expressly regulate the remedies available against the creditor withdrawing a linked credit agreement<sup>189</sup>. In all of these Member States, except for Germany, the subsidiary character of the remedies against the creditor is maintained. The requirement of subsidiarity was not implemented into the **German** transposition.<sup>190</sup>

In **Latvia, Italy, Portugal** and the **United Kingdom**, expressly state the types of non-performance which give rise to remedies. In contrast, the **Austrian** transposition allows consumers to raise objections against the creditor resulting from the agreement with the supplier or service provider other than those arising from non-performance and other breaches of the contract.

In accordance with Article 15 (2) (2) of the Directive in which there was a margin of appreciation in regulating the extent of consumer claims, **Bulgaria** and **Poland** limited the value of the creditor's liability for non-performance of the linked contract agreement for the supply of goods or services. The **Bulgarian CCA** provides in Article 28 (1) that the consumer is allowed to claim compensation to the extent of the difference between the value of the good or service and the value of the good or service actually supplied. In **Poland**, pursuant to Article 59 (2) of the CCA2011, the creditor is liable only to the value of the loan granted to the consumer.

### **C. Margin of appreciation to lay down rules on penalties in the sense of Article 23**

Pursuant to Article 23 of the Directive, Member States are obliged to implement legal sanctions applicable to creditors (or credit intermediaries) who infringe the national provisions implementing the Directive. Sanctions must be effective, proportionate and dissuasive.

The **majority of the Member States covered** satisfied this requirement by establishing special national sanctions under their consumer credit legislation. Some Member States decided to omit the implementation of special provisions and assumed that the existing regulations would provide satisfactory sanctions in the case of infringements. This was the legislative approach adopted in **Latvia** where no additional sanctions were created.<sup>191</sup>

There is great diversity in the nature of legal sources used in the national legislation. **Most Member States** integrated sanctions into their consumer credit legislation.<sup>192</sup> However, some of the national legislation referred to sanctions contained in pre-existing primary

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<sup>187</sup> See the Czech national report.

<sup>188</sup> Implementing Directive 1999/44/EC on certain aspects of the sale of consumer goods and guarantees.

<sup>189</sup> See the national reports on the mandate in article 15 (2) (2).

<sup>190</sup> An exception can be found in § 359 (2) BGB for contracts where a right to cure (in the sense of "Nacherfüllung" according to § 439) is available.

<sup>191</sup> See Latvian national report.

<sup>192</sup> Austria, Cyprus, the Czech Republic, Latvia, Romania.

legislation of administrative nature<sup>193</sup>, or even to criminal law.<sup>194</sup> Nevertheless, civil law and administrative law sanctions are more common.

Since the Directive determined neither the mode nor the character of the applied sanctions, national provisions –as already indicated above – differ greatly in nature. Generally three types of sanctions can be distinguished: civil sanctions,<sup>195</sup> administrative sanctions<sup>196</sup> and criminal sanctions.<sup>197</sup>

The **civil law sanctions** can be sub-divided into two groups. In **Germany, Italy and Romania**, the legislation provides for general sanctions on the grounds of any infringement of the consumer credit regulations.<sup>198</sup> In **most of the Member States**, the sanctions are formulated in a more specific manner and, as a result, correspond to particular infringements of consumer credit regulations.

The degree of specificity in the civil law sanctions has a direct influence on individual consumer credit agreements. Examples of civil law sanctions implemented by the national transpositions include the right to terminate the consumer credit contract<sup>199</sup>, interest-free repayment of the loan,<sup>200</sup> invalidity, or rewriting, of certain clauses in the consumer credit agreement,<sup>201</sup> the application of a default interest rate,<sup>202</sup> early repayment free of compensation,<sup>203</sup> or claims for damages.<sup>204</sup>

An infringement of information duties is the most common ground for civil law sanctions. **Austrian** law provides specific consequences for the breach of information duties. Where information is omitted with respect to borrowing rate, the annual percentage rate of charge or the total amount of the credit, the sanction takes the form of a default interest rate set by law (currently set at 4%).<sup>205</sup> The absence of information on the mode of early repayment, and any compensation due in this regard, results in the striking out of any compensation due should the consumer repay the loan early. In **Greece**, the breach pre-contractual information or compulsory information duties may result in a right for the consumer to terminate the credit agreement.<sup>206</sup>

In contrast, the legislation in **Poland** provides a severe sanction, effectively a free loan. Thus, all charges otherwise applicable for the loan nullified should the creditor infringe national provisions relating to the form and content of a credit agreement.<sup>207</sup> However, the sanction is subject to the condition that the consumer notifies the creditor within one year calculated from the day of the first performance of the credit agreement. This sanction is also applicable in **France**.<sup>208</sup>

The lack of binding effect of contractual provisions may also result from a failure to provide the consumer with information related to charges, such as: modifications of the borrowing rate<sup>209</sup>; charges for maintaining accounts; charges for using a certain method of payment;

<sup>193</sup> See German National Report.

<sup>194</sup> See Polish National Report.

<sup>195</sup> Austria, France, Germany Greece, Italy, Poland, Romania.

<sup>196</sup> Austria, Cyprus, the Czech Republic, Germany, Italy, Portugal, Romania.

<sup>197</sup> Poland.

<sup>198</sup> See German, Romanian and Italian National Report.

<sup>199</sup> Greece.

<sup>200</sup> France, Poland.

<sup>201</sup> Austria, Greece, Italy.

<sup>202</sup> Austria.

<sup>203</sup> Austria.

<sup>204</sup> Germany.

<sup>205</sup> § 1000 (1) ABGB.

<sup>206</sup> See Greek National Report.

<sup>207</sup> Articles 29 (1), 30 (1) no. 1-8, 10, 11, 14-17 and articles 31-33 CCA2011. The consumer bears only the costs for securing the credit, if these were provided by the agreement, article 45 (4) of the CCA2011.

<sup>208</sup> Article 311-48 of the Code de la consommation.

<sup>209</sup> Austria.

charges deriving from the credit agreement within the meaning of Article 10 (2) (k) of the Directive<sup>210</sup>; interest rates applicable for late payments; and charges payable on default.<sup>211</sup> Article 47 of the **Polish** CCA2011 provided the general sanction of invalidity for contractual provisions which limit or exclude the consumer's rights provided in the CCA2011. Similarly, the **German** provisions implement more general sanctions for the violation of the consumer credit regulations, such as claims for damages.<sup>212</sup>

**Administrative law sanctions** constitute another distinct group. These include fines<sup>213</sup>, the forced suspension of the activity of the credit institution and restitution of misappropriated money<sup>214</sup>, or the monitoring of contractual clauses.<sup>215</sup>

Member States use different legislative techniques for implementing administrative law sanctions, depending also on the degree of specificity within the legal system. Some Member States separate the rules on administrative law sanctions from the substantive rules on consumer credit regulations, placing them in administrative law statutes<sup>216</sup>, while others include the applicable sanctions within the respective statutes treating consumer credit agreements.<sup>217</sup>

The only Member State to provide a criminal law sanctions was **Poland**.<sup>218</sup> A criminal law fine is applicable for infringements of the rules on pre-contractual duties, the duty to provide standard information in advertising relating to the cost of the credit and the duty to assess the creditworthiness of the consumer.<sup>219</sup>

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<sup>210</sup> Greece.

<sup>211</sup> Austria.

<sup>212</sup> See German national report.

<sup>213</sup> Austria, Italy, Portugal, Romania.

<sup>214</sup> Italy.

<sup>215</sup> Portugal.

<sup>216</sup> Germany, Cyprus.

<sup>217</sup> Austria, Italy, Portugal, Romania.

<sup>218</sup> Article 138 (c) of the Polish petty offences' code provided for under article 60 of the CCA2011; Ustawa z dnia 20 maja 1971 r. - Kodeks wykroczeń, Dz.U. Nr 12, poz. 114 ze zm.

<sup>219</sup> Polish national report.

### 2.1.3. Implementation of options

The purpose of this section is to elucidate the state of implementation according to the way in which the Member States took options provided by the Directive. In contrast to the provisions in which Member States had a margin of appreciation for implementation, the provisions analysed in this section must be taken in their fully harmonised form not at all.<sup>220</sup> The fully harmonised options which will be analysed in this section can be found in Articles 2 (5) and (6), 4 (2) (c), 6 (2), 10 (5) (f), 14 (2) and (6) 16 (4) of the Directive

#### A. Has the option in Article 2 (5) and (6) been taken? If so, how was the option taken?

The option in Article 2 (5) of the Directive allows Member States to restrict the scope of application of certain Directive provisions where credit agreements are concluded by organisations in the sense of that paragraph.

The option laid down in Article 2 (6) of the Directive concerns agreements 'which provide for arrangements to be agreed by the creditor and the consumer in respect of deferred payment or repayment methods, where the consumer is already in default on the initial credit agreement' under particular circumstances.

##### (i) Implementation of Article 2 (6) only

Many of the Member States decided not to take the option in Article 2 (5), but to implement only the option laid down in Article 2 (6). In **the Czech Republic**<sup>221</sup>, **Greece**, **Portugal**<sup>222</sup> and **Spain**<sup>223</sup> the option was exercised **in conformity** with the directive.

The present option was also implemented in **Germany** and **Poland**.<sup>224</sup> However, the scope of application of the relevant provisions differs from that provided by the Directive. Since these options could only be taken fully or not at all, it could be concluded that the **German** and **Polish** transpositions are **not conform** with the Directive in this respect.<sup>225</sup>

Especially in **Germany** legislation transposing<sup>226</sup> the option made **several mistakes**.<sup>227</sup> Article 2 (6) (a) of the Directive only requires a *likelihood* of averting legal proceedings to allow arrangements between the creditor and the consumer in respect of deferred payment or repayment methods. The wording in the German implementation of the option, however, demands that legal proceedings *are* in fact avoided.

Further, the question of how to define whether the "terms [are] less favourable for the consumer" in the sense of Article 2 (6) (b) of the Directive was also transposed in a different way from the specifications in the Directive. The German transposition simply refers to the full amount of the contract as defined in § 247 EGBGB. In addition, the scope of application was modified as § 495 (3) (1) BGB excludes agreements defined in Article 2 (6) only from the right of withdrawal. In addition, Article 247 § 2 EGBGB declares the use of the standard information as optional without changing the duty to inform the consumer in general.

<sup>220</sup> Ch. Wendehorst, Das deutsche Umsetzungskonzept für die neue Verbraucherkreditrichtlinie, ZeuP 2011, p. 264 (268).

<sup>221</sup> Transposed to Annex II Part 2 (2) of the Consumer Credit Act No. 145/ 2010 Coll.

<sup>222</sup> Transposed to article 3 DL no. 133/2009, see *Gravato Morais*, Crédito aos consumidores – Anotação ao Decreto-Lei n.º 133/2009 (2009), p. 22-23.

<sup>223</sup> Transposed to article 4 (4) of the Law 16/2011 of 24 June 2011.

<sup>224</sup> Transposed to article 4 (1) no. 5 of the CCA2011.

<sup>225</sup> Ch. Wendehorst, Das deutsche Umsetzungskonzept für die neue Verbraucherkreditrichtlinie, ZEuP 2011, p. 263 (282).

<sup>226</sup> Transposed to § 495 (3) no.1 BGB.

<sup>227</sup> Ch. Wendehorst, Das deutsche Umsetzungskonzept für die neue Verbraucherkreditrichtlinie, ZEuP 2011, p. 263 (282).

## (ii) Both Article 2 (5) and (6) were implemented

Both of the options stipulated in Article 2 (5) and (6) were taken in **Cyprus**<sup>228</sup> as well as **Latvia**.<sup>229</sup> In both Member States they were implemented **in conformity** with the provisions of the Directive.

In **Romania** both options were exercised, although with **certain modifications**. With respect to paragraph 5, certain provisions extend the applicability of this option beyond the scope provided by the Directive.<sup>230</sup> With regard to the option in paragraph 6 it was stated that, for example, clauses regarding the credit agreements commissions were added. As previously mentioned, it can therefore be argued that such transpositions of the option are not **in conformity** with the Directive.

## (iii) Neither the options in Article 2 (5) nor (6) were exercised

None of the aforementioned options were taken by **Austria, the United Kingdom, Bulgaria** or **France**.

In **Italy**, the legislation did not implement these options either, but there has been a proposal to amend the law and take the option.

## B. Has the option in Article 4 (2) (c) been taken? If so, how was the option taken?

According to Article 4 (2) (c) of the Directive the Member States may decide in the case of credit agreements in the form of an overdraft facility and where the credit has to be repaid on demand or within three months (Article 2 (3)), that the annual percentage rate of charge need not be provided in advertising.

### (i) Option in Article 4 (2) (c) was taken

**The Czech Republic**<sup>231</sup>, **France**<sup>232</sup> and **Cyprus**<sup>233</sup> implemented the option that information about the APR need not be provided in the case of credit agreements in form of an overdraft facility where the credit has to be repaid on demand or within three month. These transpositions are **in conformity** with the Directive.

The **German** and **Spanish** transpositions include this option. However, the national legislation modifies the content of the option.

For **Spain** it was reported that the legislation deviates from the Directive in various aspects. Although Article 4 (2) (c) refers to Article 2 (3) which makes reference to certain provisions of the Directive, the implementation in the Spanish Law 16/2011 of 24 June 2011 excludes Article 18 from the scope, but extends the application to further Articles such as Articles 10 (5)<sup>234</sup>, 12<sup>235</sup> and 19<sup>236</sup> of the Directive.

In **Germany**, Article 4 (2) (c) was implemented in § 6 b PAngV, but the requirements of the option were not transposed properly.

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<sup>228</sup> Transposed to article 2 (4) (a) and (b), (5) and (6) of the Law 107 (I)/2010 on consumer credit agreements.

<sup>229</sup> Transposed to Clause 2.8., Section V, Clause 42 and 43 of the Regulations Regarding Crediting Consumers.

<sup>230</sup> See articles 31, 32, 45, 56 and 57 of the GEO no. 50/2010.

<sup>231</sup> Annex I (2) of the CCA 145/ 2010 Coll.

<sup>232</sup> s.5 (5) and s.6 (3), Consumer Credit (Advertisements) Regulations 2010, n° 1970 (specifically non-business overdraft agreements).

<sup>233</sup> Transposed to article 4 (3) and (4) of the Law 107 (I)/2010.

<sup>234</sup> Transposed to article 17 of the Law 16/2011 of 24 June 2011.

<sup>235</sup> Transposed to article 19 of the Law 16/2011 of 24 June 2011.

<sup>236</sup> Transposed to article 29 of the Law 16/2011 of 24 June 2011.

While the option offers the possibility of exempting the creditor from having to provide the APR, the German legislation **replaced the exemption with another substitutive obligation**. Thus, under § 6 b PangV, the creditor must provide the annual borrowing rate and the interest period for this rate if he does not include the APR.

#### (ii) Option in Article 4 (2) (c) was not taken

All of the other Member States covered, namely **Bulgaria, Greece, Italy, Latvia, Poland, Portugal** and **Romania**, did not make use of the present option. The APR must therefore also be specified in an advertising for a credit falling under Article 2 (3) of the Directive (credit agreement in form of an overdraft facility).

In **Austria** there are specific provisions for overdrafts in § 5 in connection with § 18 (2) (1) VKrG, which focus on pre-contractual information duties and mandatory terms. However, it can be assumed that the APR has to be provided. Hence, the option was not explicitly exercised.

### C. Has the option in Article 6 (2) been taken? If so, how was the option taken?

Similarly to the previously analysed option, Article 6 (2) allows the Member States to determine that the APR need not be provided „[i]n the case of a credit agreement of the kind referred to in Article 2(3)“ in the pre-contractual information.

#### (i) Option in Article 6 (2) was not taken

The majority of the Member States covered in this study decided not to exercise the option, namely **Austria, Bulgaria, Cyprus, France, Greece, Italy, Latvia, Poland** and **Spain**.

#### (ii) Option in Article 6 (2) was taken

In the Czech Republic the option in Article 6 (2) was taken.<sup>237</sup> As regards pre-contractual information duties, the creditor does not have to inform the consumer about the APR in case of credit agreements in form of overdraft facilities.

#### (iii) Option in Article 6 (2) was implemented, but with modifications

Further Member States chose to implement the option. It was reported that in **the United Kingdom, Romania** and **Germany** the option was implemented with modifications.

The implementation in **Germany** suffers from the **similar difficulties** as referred to earlier concerning the option in Article 2 (6), i.e. it was implemented but the scope of application was modified.

In **Romania**, the relevant provisions of the GEO stipulate that the **APR only has to be provided for certain types** of overdraft credit agreements.

According to Article 27 GEO No. 50/2010, for example, the APR should be included when the consumer enquirers. With regard to overdrafts which are to be reimbursed within one month, the APR also has to be included pursuant to Article 28 GEO No.50/2010. Since there is no regulation stating that the APR has to be provided in general, the option – although not explicitly – seems to be taken that in regard to those credit agreements in form of an overdraft which do not fall under the aforementioned categories, the APR need not be provided.

In the **United Kingdom**, the transposition exempts loans in the form of an overdraft from providing an APR. The option can thus be considered to have been taken. Nevertheless, it was stated that according to Regulations 10 and 11 of the Consumer Credit (Disclosure of

<sup>237</sup> Annex I point II (1) of the CCA No. 145/ 2010 Coll.

Information) Regulations 2010, it set the condition that an **example illustrating the total costs** of the credit has to be provided instead. The reason for this condition is set out fully in the United Kingdom Government's response to the consultation on proposals for implementing the consumer credit Directive.<sup>238</sup>

#### **D. Has the option in Article 10 (5) (f) been taken? If so, how was the option taken?**

According to Article 10 (5) (f) of the Directive the Member States may decide in the case of credit agreements in the form of an overdraft facility and where the credit has to be repaid on demand or within three months (Article 2 (3)), that the annual percentage rate of charge need not be included in the credit agreement.

##### **(i) Option in Article 10 (5) (f) was not taken**

The possibility to exempt the creditor from having to provide the APR as stipulated in Article 10 (5) (f) was rejected by the vast majority of the Member States covered, namely **Austria, Bulgaria, Cyprus, France, Greece, Italy, Latvia, Poland, Portugal, Romania and Spain**.

##### **(ii) Option in Article 10 (5) (f) was taken**

Only in **the Czech Republic**<sup>239</sup>, **Germany**<sup>240</sup> and **the United Kingdom**<sup>241</sup> was this option exercised.

However, the implementation in **Germany** suffers from the **same problematic aspects as explained above** with respect to the options in Article 4 (2) (c) and Article 6 (2) of the Directive occurred. The German legislation implemented again a substitute instead of an exception.

As with regard to the previous option, in **the United Kingdom**, an **example illustrating the total cost of credit** must be provided in the agreement rather than the APR.

#### **E. Has the option in Article 14 (2) and (6) been taken? If so, how was the option taken?**

Article 14 of the Consumer Credit Directive provides a right of withdrawal to the consumer. This right needs to be exercised within the periods as referred to in Article 14 (1) (a) and (b). In the case of linked credit agreements defined under Article 3 (n), however, the Member States may deviate from this period if national legislation at the time of the entry into force of the Directive already provided that funds cannot be made available to the consumer before the expiry of a specific period. They may reduce to this specific period at the explicit request of the consumer.

According to Article 14 (6) of the Directive, Member States may provide that paragraphs 1 to 4 of this Article shall not apply to credit agreements which by law are required to be concluded through the services of a notary, provided that the notary confirms that the consumer is guaranteed the information rights provided for under Articles 5 and 10 (pre-contractual and contractual information).

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<sup>238</sup> [16.23], Government Response to the Consultation on proposals for implementing the consumer credit Directive, Business for Trade and Industry (2009).

<sup>239</sup> Transposed to Annex III (2) of the CCA no. 145/2010 Coll.

<sup>240</sup> Transposed to § 492 (2) BGB in connection with article 247 § 10 (3) EGBGB.

<sup>241</sup> Transposed to Regulations 10 and 11 of the Consumer Credit (Disclosure of Information) Regulations 2010.

### (i) Option in Article 14 (2) was not taken

Almost all of the Member States chose not to exercise the option in Article 14 (2) of the Directive providing that the period of time to withdraw from the credit agreement may be reduced at the explicit request of the consumer. The option was rejected in **Austria, Bulgaria, Cyprus, the Czech Republic, Germany, Greece, Italy, Latvia, Poland, Portugal, Spain and the United Kingdom.**

### (ii) Option in Article 14 (2) was implemented

Only in **France**<sup>242</sup> was the present option taken.

It was pointed out that the period of withdrawal **may be reduced to three days** if the consumer writes a particular phrase provided for at Article R. 311-9 of the 'Code de la consommation' on the contract (except contracts concluded at the consumer's home).

### (iii) Option in Article 14 (6)

The option to exclude Article 14 (1)-(4) in case the credit agreement is required by law to be concluded by the services of a notary, provided that the notary confirms that the consumer is guaranteed the rights provided for under Articles 5 and 10 was **only taken**, though properly implemented, **in Germany** in § 495 III Nr. 2 BGB.<sup>243</sup>

The other Member States decided not to resort to this option, mostly because the option was not applicable under the previous regime before the enactment of the Directive.

## F. Have the options in Article 16 (4) (a) and (b) been taken? If so, how were the options taken?

Article 16 of the Directive deals with the early repayment of a credit. Paragraph 4 of this Article allows the Member States to regulate specific aspects regarding the compensation of the creditor in such cases. Half of the Member States investigated decided not to take this option. **Six of the 14 selected Member States** participating in this study chose to solely implement **Article 16 (4) (a)**. **Only the legislator of Cyprus took both** the option in Article 16 (4) (a) and (b).

### (i) Member States that did not exercise the option in Article 16 (4)

The following Member States neither took the option in (a) nor the one laid down in (b) of Article 16 (4) of the Directive: **Bulgaria, the Czech Republic, France, Germany, Portugal, Romania and the United Kingdom.**

### (ii) Implementation of Article 16 (4)

Except for **Cyprus**, which also chose to fully implement Article 16 (4) (b)<sup>244</sup>, **all of the other Member States covered** (except the ones mentioned under 2.1.3 (F) (i)) only implemented Article 16 (4) (a) of the Directive. Under this provision, Member States may provide that the compensation in case of early repayment "[...] may be claimed by the creditor only on condition that the amount of the early repayment exceeds the threshold defined by national law. That threshold shall not exceed €10 000 within any period of 12 months".

<sup>242</sup> Transposed to articles L.311-35 and L. 121-20-12, IV (2) Code de la consommation.

<sup>243</sup> The rights provided in articles 5 and 10 of the Directive were implemented in §§ 491a, 492 BGB.

<sup>244</sup> Article 16 (4) (a) of the Directive was implemented in article 16 (5) (a) (i) and article 16 (4) (b) of the Directive in article 16 (5) (a) (ii), (b) and (c) of the Law 107 (I)/ 2010.

In **Austria**<sup>245</sup>, **Greece** and **Italy**<sup>246</sup> the threshold was set at exactly 10 000 €. In **Latvia**, it was set at 7000 LVL which corresponds approximately to the sum in Euros (according to exchange rate of Bank of Latvia on 15.11.2011).

The **Polish** legislation takes a slightly different approach determining the relevant threshold. According to Article 50 (1) CCA2011, the compensation might be charged by the creditor if the amount of the early repayment during the twelve-month period exceeds the **triple average salary in the business sector**, announced in the Official Journal "Monitor Polski" by the President of the Central Statistical Office in December of the year preceding the year of early repayment.<sup>247</sup>

Although the option was taken in the **Spanish** legislation as well in Article 16 (4) of the Law 16/2011 24 June 2011, **no threshold** setting an upper limit for compensation was adopted.

#### 2.1.4. Implementation of selected "new" regulations

The following chapter deals with some of the newly introduced regulations of the Consumer Credit Directive 2008 compared to the old Directive 87/102/EEC. Particularly the regulation on advertising requirements in Article 4 and of the "sufficient assessment" of consumer's creditworthiness according to Article 8 of the Directive are analysed with respect to the implementation in the Member State investigated.

##### A. Advertising requirements, Article 4 of the Directive

Article 4 (1) of the Directive provides that 'any advertising concerning credit agreements which indicates an interest rate or any figures relating to the cost of the credit to the consumer shall include standard information...[in the form of a representative example]'. In relation to overdraft facilities,<sup>248</sup> Member States had the option of allowing creditors to derogate from providing the APR in certain advertising on the basis of Article 4 (2) (c).<sup>249</sup> Article 4 (2) provides an exception to the rule in Article 4 (1). Under this exception, national legislation can require the annual percentage rate of charge to be provided even when figures relating to the cost of credit are not intended to be included in the advertising of credit agreements.

There are thus **three different 'standards' for compliance** with the advertising requirements. In the first, the representative example must consist of all of the standard information including the APR. This is a fully harmonised element **and all of the Member States have transposed this requirement** where figures are intended to be used in the advertising of consumer credit transactions.<sup>250</sup>

As for advertising which mentions figures relating to the cost of credit in the form of an overdraft facility and where the credit has to be repaid on demand or within three months, Member States had two options. Member States could apply the first 'standard', thus including the APR within the standard information for overdraft advertisements.

<sup>245</sup> Transposed to § 16 (2) no.3 of the VKrG.

<sup>246</sup> Transposed to article 125 septies (d).

<sup>247</sup> According to the Polish national report the value of the average salary in the enterprises sector for December 2010 was 3847,91PLN.

<sup>248</sup> As defined in article 2 (3) of the Directive.

<sup>249</sup> For further see chapter 2.1.4 (A).

<sup>250</sup> Austria: § 5 of the VKrG; Bulgaria: Article 25 of the CCA; Cyprus: Article 4 of the Law 107 (I)/2010, the Czech Republic: Article 4 of the CCA no. 145/2010 Coll; France: L.311-4 and: L.311-5; Germany: § 6a, Preisangabenverordnung (PAngV); Poland: Articles 7 and 8 of the CCA 2011; Portugal: Article 5 (1)-(3) of the DL no. 133/2009; Romania: Article 8 of the GEO no. 50/2010; Spain: Article 9 of the Law 16/2011 of 24 June 2011; and the United Kingdom: Regulation 4 of the Consumer Credit (Advertisements) Regulations 2010.

Or, Member States could apply the second 'standard' by which the representative example must include all the standard information except the APR. In **Austria, Cyprus, Greece, Italy, Latvia** and **Romania** the first standard was applied.<sup>251</sup> In the **Czech Republic, Germany, Poland, Spain** and the **United Kingdom** the second standard was applied.<sup>252</sup>

The third 'standard' relates to advertising which does not mention figures relating to the cost of credit irrespective of whether the credit is in the form of an overdraft. Under this standard Member States are allowed to maintain the mandatory inclusion of the APR without any of standard information or a representative example. In Member States which wish to make the indication of the annual percentage rate of charge for all consumer credit advertising mandatory, this article acts as a derogation from the need to include any further information. Due to this, other Member States are free to apply any of the three standards or none at all for advertising which does not mention figures relating to the cost of credit. In **Austria, Italy, Latvia, Portugal** and **Romania** where the same standard is applied to all consumer credit advertising, the first standard (thus, with indication of the APR) also applies where the advertising makes no reference to the cost of credit.<sup>253</sup> In **France**, the standard information is not mandatory and the previous regime for advertising applies. **Bulgaria** and **Cyprus** did not apply any standard for consumer credit advertising which does not include figures relating to the cost of credit.

In relation to previous regimes of advertising for consumer credit, the transposition note for the **United Kingdom** explains that '[c]ompared to existing information requirements under the Consumer Credit (Advertising) Regulations 2004, the manner in which information is presented under Article 4 is less prescriptive (and therefore less onerous) for lenders.'<sup>254</sup> As stated in the report publicising the government's intentions for the transposition which went out for public consultation, 'Under the 2004 Regulations, all advertisements have to include the name of the lender. Where an interest rate is quoted, the APR must also be displayed. The inclusion of an APR does not require the provision of other financial information. However, where other financial information is given, APRs have to be located with, and be twice the size of any other financial information in the advertisement. The APR quoted in an advertisement has to be typical of the business that it is expected to generate. This means that the advertisement must quote the highest APR that at least 66% of the eventual number of consumers formally accepting a credit agreement in response to the advertisement are expected to be given – the typical APR (TAPR) requirement'.<sup>255</sup>

In the *travaux préparatoires* in **France**, many additions to the previous regime were praised such as: (1) enriching the amount of compulsory information to be provided (2) compulsory inclusion of a representative example (3) reinforcing the requirements of form (size of text in advertisements) (4) prohibition of statements which suggest that the loan could improve the financial situation of the borrower.

<sup>251</sup> Where not already covered above: Cyprus: Article 6 (6) and (2) (f) of the Law 107 (I)/2010.

<sup>252</sup> Germany: § 491a BGB in connection with Article 247 EGBGB § 10 (3); Spain: Article 4(1) of the Law 16/2011 of 24 June 2011; the United Kingdom: regulation 4(2) of the Consumer Credit (Advertisements) Regulations 2010; for details as to the implementation these options in Germany and in Spain see chapter 2.1.3 (B) (i).

<sup>253</sup> Austria: § 5 of the VKrG is applicable to all agreements covered by the scope of the VKrG in general according to § 4 of the VKrG.

<sup>254</sup> Department for Business, Innovation & Skills, 'Explanatory Memorandum to the Consumer Credit (EU Directive) Regulations 2010 2010 No. 1010, The Consumer Credit (Total Charge For Credit) Regulations 2010, 2010 No. 1011, The Consumer Credit (Advertisements) Regulations 2010, 2010 No. 1012, The Consumer Credit (Disclosure Of Information) Regulations 2010, 2010 No. 1013. The Consumer Credit (Agreements) Regulations 2010, 2010 No. 1014', paragraph [142].

<sup>255</sup> Department for Business, Enterprise and Regulatory Reform, 'Consultation on proposals for implementing the consumer credit directive' (April, 2009), [2.12].

There was some difficulty within the Member States in understanding what was meant by a representative example. The **United Kingdom** provides a good illustration of this, 'The CCD requires the standard information to be specified in a clear and concise manner by means of a representative example.

There has been some uncertainty as to the exact meaning of a representative example but our view is that it is intended to comprise one over-arching example of a particular offer, which would include all of the relevant pieces of standard information'<sup>256</sup>

This response to clarifying what a representative example is seems also consistent with the actions of the other Member States.

## **B. Sufficient assessment of the consumer's creditworthiness by the credit provider (Article 8 of the Directive)**

Article 8 (1) of the Directive provides that, "Member States shall ensure that, before the conclusion of the credit agreement, the creditor assesses the consumer's creditworthiness on the basis of sufficient information, where appropriate obtained from the consumer and, where necessary, on the basis of a consultation of the relevant database."

**All of the Member States** transposed the duty to assess creditworthiness.<sup>257</sup> Additionally, as provided by the Directive, a reassessment of the consumer's creditworthiness must be carried out before any significant increase in the total amount of the credit owed which is not provided for by the initial credit agreement. In **Poland**, where the increase in the total amount of credit is not significant, the creditor may demand that consumers update the information on their financial situation. Where significant, a new credit assessment shall be carried out by the creditor. It is for creditors to appreciate whether the increase is significant. Furthermore, as also provided by the Directive, if the creditor decides not to proceed with the credit agreement after consultation of a database, the creditor shall inform the consumer immediately and without charge of relevant information, such as the particular database searched.

**Cyprus, the Czech Republic, France, Italy, Latvia, Romania** and the **United Kingdom** remained faithful to the Directive's formulation of when recourse should be had to a database. Thus, in these Member States relevant databases should be consulted 'where necessary'. Such databases often take the form of 'central credit registers'.<sup>258</sup> Other Member States, such as **Portugal**, made the consultation of relevant databases compulsory.<sup>259</sup>

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<sup>256</sup> Department for Business, Enterprise and Regulatory Reform, 'Consultation on proposals for implementing the consumer credit directive' (April, 2009), [2.21].

<sup>257</sup> Austria: article 7 of the VKrG; Bulgaria article 16 of the CCA; Cyprus: article 8 of the Law 107 (I)/2010; the Czech Republic: article 9 of the CCA; France: L311-9 and L333-4 of the *Code de la consommation*; Germany: § 18 (2) of the *Kreditwesengesetz* (KWG) applies to credit agreements and "non-gratuitous financing assistance" concluded by credit institutions and financial services institutions and § 509 BGB applies to "non-gratuitous financing assistance" where the creditor is not which is neither a credit nor financial services institution. "Non-gratuitous financing assistance" is an official translation of the German "*entgeltliche Finanzierungshilfe*", available at [http://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p1790](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1790); Italy: article 124 *bis* TUB; Latvia: article 8(4), Consumers protection law; Poland: articles 9 and 40)of the CCA 2011; Portugal: article 10 DL no. 133/2009; Spain: articles 14 and 15 of the Law 16/2011 of 24 June 2011; United Kingdom: S. 55B inserted into the Consumer Credit Act on 1.2.2011 by The Consumer Credit (EU Directive) Regulations 2010 (S.I. 2010/1010), regulations 5 and 99 (1) (with regulations 100 and 101).

<sup>258</sup> For example, in the Czech Republic: Central register of debtors (Centrální registr dlužníků) (<http://www.centralniregistrdruzniku.cz/>); Bulgaria: Central Credit Register; Spain: 'ficheros de solvencia patrimonial y crédito'.

<sup>259</sup> Article 10(1) DL no. 133/2009 makes clear that beyond the information obtained from the consumer, the creditor shall assess the creditworthiness of the consumer through a compulsory consultation of the so-called

In **Poland**, the Banking Act already included a legal definition of an assessment of creditworthiness.<sup>260</sup> The creditworthiness check, being of a public law nature, is reserved solely for banks and credit institutions and comprises a rather deep investigation into the credit history of the consumer. Consumer credit providers subject to the **Polish** Banking Act are held to the standards of verifying 'creditworthiness'.<sup>261</sup> Consumer credit providers which are not banks or credit institutions need only check the 'credit risk' of consumers. Member States such as **Cyprus** and **Latvia**, to name but two, have made direct reference to their respective laws on data protection in establishing the limits of creditworthiness checks.

The assessment of creditworthiness must in all Member States be based upon sufficient information received from the consumer and, where applicable, a database credit check. All Member States have directly translated the element 'sufficient information', a term which would need to be appreciated on the facts of each case.<sup>262</sup> However, in creating a form, the so-called "*fiche de dialogue*", relating to the consumer's financial situation, i.e. resources and debts, attested to through documentary evidence once a certain limit of proposed credit has been reached, all of which must be assessed by the creditor as to its exactitude (L311-10), and finally by providing that no other information other than that of the form can be used against the prospective borrower, **France** has effectively determined exactly what constitutes sufficient information. In **Greece**, three sources of information are mentioned in the transposing legislation: (1) the data which the customer reveals to the creditor during the pre-contractual stage, (2) the data that the creditor possesses from previous transactions with the customer and (3) the data collected from a database.

In several Member States, guidance is available for the actual assessment of the information relating to the consumer's creditworthiness. In **Austria**, the credit history of the consumer as well as the credit amount in the particular proposed agreement, the amount and frequency of the proposed instalments and any outstanding debts of the consumer have to be taken into account. In the **Czech Republic**, the credit provider has to consider the ability of the consumer to pay the credit in relation to the information available under professional expertise. In the **United Kingdom**, it is the regulatory body's view that 'all assessments of affordability should involve a consideration of the potential for the credit commitment to adversely impact on the borrower's financial situation, taking account of information that the creditor is aware of at the time the credit is granted'.<sup>263</sup> As best practice in the **United Kingdom**, there are a number of factors which are to be taken into account proportionately: (1) the type of credit being sought (2) the amount of credit to be provided and the associated cost and risk to the borrower (3) the borrower's financial situation at the time the credit is sought (4) the borrower's credit history (5) the borrower's existing and future financial commitments (6) the impact of a future change in the borrower's personal circumstances (7) the vulnerability of the borrower. In **Germany**, however, the question of what will constitute a sufficient assessment of the consumer's creditworthiness is left to the courts.

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"*Central de Responsabilidades de Crédito – Central of Credit Responsibilities*", as stated in DL no. 204/2008 of 14 October 2008. Article 10 (2) DL no. 133/2009 refers also to the consulting of public lists of executions/enforcements, as stated in DL no. 201/2003 of 10 September 2003, or in any data bases what can be useful for the purpose of assessing the creditworthiness of the consumer.

<sup>260</sup> Article 70 of the Banking Act; Ustawa z dnia 29 sierpnia 1997 r.- Prawo bankowe, tekst jednolity Dz. U. 2002.72.665.

<sup>261</sup> Article 9(4) of the CCA 2011. See Polish Report section 2.1.4 (C).

<sup>262</sup> For illustrative purposes: In Italy, all the information useful to value and compare the credit offer should be given, article 124 (1) TUB; in Cyprus, sufficient information, 'επαρκή στοιχεία', is required, article 8 (1) of the Law 107 (I)/2010. In Poland, the consumer must provide the creditor with documents and information necessary to assess the risk of default. In Austria, 'ausreichende Information', article 7 (1) of the VKrG.

<sup>263</sup> OFT, Irresponsible lending – OFT guidance for creditors (2011), para. [4.1].

The consequences of a failure to assess the creditworthiness of the consumer vary amongst the Member States. In **Greece**, for example, non-compliance results in the consumer being discharged from the total cost of the credit, including the rates, and only subject to make restitution of the capital received according to the modalities under the credit agreement. In the **United Kingdom**, on the other hand, the regulatory body can employ the normal disciplinary sanctions. However, the sole fact of breach does not turn the agreement into an “unfair credit relationship” by which the contract could be set aside.<sup>264</sup> Instead, should the creditor apply to court for an enforcement order of unpaid interest following an improperly executed creditworthiness check, the court may, at its discretion, dismiss the application where it considers it just to do so having regard to the prejudice caused and degree of culpability.<sup>265</sup>

### 2.1.5. Implementation of provisions requiring interpretation

This section provides an answer to the question whether there were any problems related to the transposition of provisions requiring interpretation. Particularly, the implementation “in good time” according to Article 5 (1) of the Directive as well as “adequate explanation” in the sense of Article 5 (6)<sup>266</sup> are analysed. The term “sufficient information” according to Article 8 of the Directive has already been considered in chapter 2.1.4 (B).

#### A. Implementation of the “In good time” according to Article 5 (1) of the Directive 2008/48/EC

Article 5 (1) of the directive provides that, “in good time before the consumer is bound by any credit agreement or offer, the creditor ... provide[s] the consumer with the information needed to compare different offers in order to take an informed decision on whether to conclude a credit agreement.”

In **Austria, Bulgaria, Cyprus, the Czech Republic, France, Germany, Greece, Latvia, Romania, Spain and the United Kingdom**, the term ‘in good time’ translated into the respective languages was used in the national legislation.<sup>267</sup> **Italy, Poland and Portugal** have not adopted a literal transposition of the phrase ‘in good time’ into their legislative framework. In these Member States, the legislative requirement states that the information is to be provided ‘before the conclusion of the contract’.<sup>268</sup> In **Italy**, it appears therefore that as long as the information is given before the conclusion of the contract, an Italian lender will have complied with the national transposing legislation. However, according to Article 124 (6) (a), the *Banca d’Italia* shall give further instructions clarifying the content and the way in which the information must be provided.

In **Poland**, the explanatory memorandum to the CCA indicates, in accordance with the general interpretation of consumer law in Poland, that the time between the provision of the information and the conclusion of the credit agreement should enable consumers to

<sup>264</sup> s.140A of the CCA 1974.

<sup>265</sup> *PB Leasing Ltd v Patel* [1995] CCLR 82, *Smerdon v Ellis* [1997] CLY 960, *Rahman v Brassil* [1998] CLY 2503.

<sup>266</sup> Additionally see chapter 2.1.2 (A).

<sup>267</sup> Austria: ‘rechtzeitig’ of the § 19 (1)(1) VKrG; Bulgaria: ‘своевременно’, articles 5 (1) and 8 (1) of the CCA; Cyprus: ‘σχευόλογοχρονικόδιόσσημα’, article 5 (1) of the Law 107 (I)/2010; the Czech Republic: ‘s dostatečným předstihem’, § 5 (1) of the CCA no. 145/2010 Coll.; France: ‘en temps utile’, L. 121-20-11 of the Code de la consommation; Germany: ‘rechtzeitig’, § 247 § 1, EGBGB; Greece: ‘εύλογος χρόνος’, article 6 (1) of the Ministerial Decision; Latvia: ‘SAVLAICĪGI’, MK NOTEIKUMI NR. 1219 (2010), LV, 2 (4400), 05.01.2011; Romania: ‘cu suficient timp înainte’, article 11 (2) (a) of the GEO no. 50/2010; Spain: ‘Con la debida antelación’, article 10(1) of the Law 16/2011 of 24 June 2011; United Kingdom : ‘in good time’, s.55A (3)(2) of the CCA.

<sup>268</sup> Italy: *prima della conclusion del contratto*, article 124 TUB, Pre-contractual Duties; Poland: *przedzawarciem umowy o kredytkonsumencki*, article 13(1) CCA2011; Portugal: at the date of the presentation of a credit offer or previously to the conclusion of the credit contract, article 6 (1) DL no. 133/2009.

familiarise themselves in detail with the terms and costs of the consumer credit as well as the obligations arising from the contract.<sup>269</sup>

Several Member States seem to have had difficulty with the policy decision of when the pre-contractual information duties must be satisfied in order to be beneficial in practice, rather than becoming a mere legal formality. Member States have seen that there is a balance to be struck between, on the one hand, protecting consumers by making sure that they have all of the information necessary to make a reasoned decision before concluding a credit agreement and, on the other hand, the interests of commerce by not unduly restricting the conclusion of credit agreements upon which many of the Member States economies rely heavily.

As a result of the policy decisions taken, the governmental guidance issued in the **United Kingdom** on the implementing regulations explains that 'what constitutes 'in good time' will depend on the precise circumstances of the transaction'.<sup>270</sup> It furthermore stipulates that, 'the borrower must be given adequate opportunity to consider the pre-contractual information (and any accompanying explanation) before being invited to sign the credit agreement. The borrower should be able to pause and reflect on the proposed transaction, and compare with other credit offers if he wishes, before proceeding. He should not be subjected to pressure to conclude a credit agreement.'

Likewise, in **Poland**, although the implementing legislation simply requires the satisfaction of the pre-contractual duties before the conclusion of the contract, it is understood according to Polish consumer law that the provision of the information prior to the conclusion of the contract must give consumers a real opportunity to familiarise themselves with the offer.<sup>271</sup>

Other solutions to the wide discretion provided for by 'in good time' have been suggested. In **Greece** and **Poland**, it was discussed in the legislative process whether 'in good time' could be transposed by a minimum number of days.<sup>272</sup> In **Poland**, it was eventually considered that a specified time period requirement would be too heavy a burden for the national consumer credit industry to bear. The final texts of both **Greece** and **Poland** kept the formulation of the directive. In **Romania**, on the other hand, the transposition includes both an appreciation of the temporal element *in concreto* subject to a specific minimum period of time. Thus, the information must be provided 'within a sufficient period of time before, but *a priori* not less than 15 days before the consumer concludes a credit agreement or accepts an offer'.<sup>273</sup> However, the minimum 15 day period can be shortened through the written agreement of the consumer.<sup>274</sup>

In striking the balance between consumer protection and not unduly burdening the consumer credit market, the guidance issued in the **United Kingdom** makes clear that 'in certain retail credit situations, the borrower may wish to proceed straight to the conclusion of the agreement following provision of the pre-contractual information, and the [regulations] do not preclude that if it is what the borrower wants to do. 'This perhaps explains why most of the Member States chose to maintain the wording of the directive

<sup>269</sup> Uzasadnienie rządowego projektu ustawy o kredycie konsumenckm (druk sejmowy nr 3596), p.10-11, available at: <http://orka.sejm.gov.pl/proc6.nsf/opisy/3596.htm>

<sup>270</sup> Office of Fair Trading, 'Irresponsible lending – OFT guidance for creditors' (2011), [9.4].

<sup>271</sup> K. Zagrobelny, in: E. Gniewek, Kodeks cywilny. Komentarz, Warszawa 2008, article 384, s. 617.

<sup>272</sup> Greece: 'three days', see article 5 (1) of the Ministerial Decision; Poland: Uzasadnienie rządowego projektu ustawy o kredycie konsumenckm (druk sejmowy nr 3596), p.11, available at: <http://orka.sejm.gov.pl/proc6.nsf/opisy/3596.htm>

<sup>273</sup> Article 11 (2) GEO no. 50/2010.

<sup>274</sup> Article 11 (3) GEO no. 50/2010.

which bestows a greater freedom of appreciation to the judiciary as to whether in a given case the information was provided 'in good time' by the creditor.

In **Germany**, there is an ongoing discussion concerning the exact interpretation of how much time should pass between the provision of the pre-contractual information and the conclusion of the contract.<sup>275</sup> In the **United Kingdom**, the public consultation conducted prior to the implementation revealed that the approach taken to 'in good time' was supported and took the view that 'its lack of definition in other legislation had not caused consumer detriment or complaint'.<sup>276</sup>

## B. Implementation of the term "adequate explanations" in to Article 5 (6) of the Directive

The Directive provides that the Member States shall 'ensure' that 'adequate explanations' are given so that the debtor can assess whether the proposed credit agreement is adapted to the needs and financial situation of the debtor. Certain elements to which the explanation relates are then listed. **Italy** did not transpose the duty to give adequate explanations.<sup>277</sup> In **Austria, Bulgaria, Cyprus, the Czech Republic, France, Germany, Greece, Portugal, Romania, Spain** and the United Kingdom, the term 'adequate explanations' respectively translated was used in the national legislation. In **Latvia**, the transposing instrument does not include the word 'adequate', it provides that explanations must be given.<sup>278</sup>

In Member States such as **Austria, Cyprus, France** and the **United Kingdom** the elements to which the adequate explanations refer are expressly stipulated, i.e., the pre-contractual information, essential characteristics of the product, effects and consequences of default. In **Romania** it is stipulated that the 'adequate explanations' relate 'at least' to elements of the directive, as well as the costs which form part of the total cost of the credit for the consumer in order that consumers understand what they are paying for. In **Poland**, although there is a duty to explain, the function of the word 'adequate' is transposed more descriptively through tailoring the explanations 'in a manner which enables the consumer to choose'. In **France**, the initial legislative draft had framed adequate explanations to conform to the borrower's choices. This was modified after the first reading in the upper chamber, the *Sénat*, to its current formulation of adequate explanation tailored to the consumer's needs, as it was considered that this was a more exact transposition of the directive and provides a greater degree of protection to the consumer.<sup>279</sup>

Previously, in **France** the *Code de la consommation* did not impose a duty to give 'adequate explanations' to the consumer, however, two "praetorian" duties, that is to say developed through case law (*jurisprudential*), were imposed upon the lender before the conclusion of the contract. Thus, the lender must warn and also not lend excessively.<sup>280</sup> These duties extended to situations, for example, in which a bank did not investigate the financial means of borrowers and subsequently gave a loan which was excessive in relation the borrower's capacity to honour his obligations.<sup>281</sup> As the source of these duties is *jurisprudential*, it is

<sup>275</sup> M. Arzt in P. Bülow/ M. Arzt, Verbraucherkreditrecht, p. 146.

<sup>276</sup> Department for Business, Innovation and Skills, 'Government Response to the Consultation on Proposals for Implementing the Consumer Credit Directive' (Dec. 2009), [3.9].

<sup>277</sup> A. Antonucci, 'Credito al consumo e zone limitrofe una scheda di lettura del d.legis.'141 del 2010, in NGCC, 2011, p. 303.

<sup>278</sup> Article 27 of the Regulations Regarding Crediting Consumers.

<sup>279</sup> Rapport n° 447, Chapitre III – Conditions de formation du contrat.

<sup>280</sup> (1) *devoir de mise en garde* et (2) *interdiction d'octroi de prêts excessifs*.

<sup>281</sup> Cour de cassation, Ch. mixte, 12 juillet 2005, Bull. n° 327. This was confirmed by another decision (Cour de cassation, Ch. mixte, 29 juin 2007, Bull. n° 7.) in which a lender had not informed a borrower ignorant of the risks of bankruptcy when borrowing credit having taken into account his financial means.

not fully clear how they will interact with Article L.311-8 providing for a duty of explanation. Arguably, the duties developed through case law go slightly further than the duty of explanation; not only must the lender adequately explain the implications of the credit objectively, but also warn the consumer. The prohibition of excessive lending may act contrary to the spirit of Article 5 (6), given that the directive seems to imply that is for the consumer to evaluate whether the loan is excessive or not.

In order to 'ensure' that 'adequate explanations' are given correctly, **France** has put in place a programme of training for those giving the explanations.<sup>282</sup> In the **United Kingdom**, guidelines have been issued for ensuring that the explanations are adequate.<sup>283</sup> As the body issuing the guidance, the Office of Fair Trading (OFT), is a watchdog for infringements of consumer credit legislation, that guidance is indicative of when it may bring judicial proceedings against any purported infringements, although it is not binding upon the courts. In the OFT's view, 'the explanation should enable the borrower to make a reasonable assessment as to whether he can afford the credit and to understand the key associated risks.' For the OFT, the extent of the explanations to be given depends upon the following criteria: (1) the type of credit being sought (2) the amount of credit to be provided and the associated cost and risk to the borrower (3) the apparent level of understanding of the borrower of the explanation provided - to the extent that this is evident and discernable<sup>284</sup> (4) the channel/medium through which the credit transaction takes place. Additionally, 'The OFT would not consider an explanation to be 'adequate' where the creditor had not made reasonable provision to ensure that borrowers were likely to understand the explanation of the matters specified in section 55A (2) of the Act and/or where the creditor had clear grounds to suspect that the borrower did not understand key aspects of the explanation. Under circumstances in which the creditor has clear grounds to suspect that the explanation provided has not placed the borrower in a position whereby he is enabled to assess whether the agreement is suited to his needs and his financial situation, we would expect further explanation to be provided'.<sup>285</sup>

Finally, if the internet is the medium of communication between the parties, as in on-line applications, the OFT's understanding of 'adequate explanations' would be satisfied by an 'appropriately comprehensive online 'FAQ' or a call centre for further advice.

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<sup>282</sup> L. 311-8, al. 3.

<sup>283</sup> OFT, Irresponsible lending – OFT guidance for creditors (2011).

<sup>284</sup> i.e. language difficulties of the borrower.

<sup>285</sup> OFT, Irresponsible lending – OFT guidance for creditors (2011).

## 2.2. Extension of the scope of application to credit agreements falling outside of the scope of the Directive and credit agreements falling outside the 'newly' harmonised regime

The following chapter analyses whether the transpositions of the Directive has been extended to credit agreements which fall outside the scope of the Directive. Furthermore, the question was raised of how credit agreements which fall outside the newly harmonised regime are regulated under the national legal systems.

### 2.2.1. Has the scope of the implementing legislation been extended beyond that of the Directive?

In most of the Member States covered (at least 9 of 14<sup>286</sup>), the scope of application of certain implementing provisions was extended.

#### A. Extension with respect to the personal scope of application

The **German legislator** extended the scope of application of the implementing provisions with respect to the parties capable of concluding a credit agreement.

The directive states in Article 3 (a) that a consumer for the purpose of the directive "means a natural person who, in transactions covered by this directive, is acting for purposes which are outside his trade, business or profession".

The German legislation uses the definition of "consumer" which can be found in the general part of the BGB (§ 13) and therefore applies to all the provisions in the BGB. According to § 13 BGB a consumer in the sense of the BGB is "every natural person who enters into a legal transaction for a purpose that is outside his trade, business or *autonomous* profession".<sup>287</sup> The provisions on consumer credit agreements are therefore also applicable to e.g. employed field representatives who use the loan to finance the purchase of a car for professional purposes.<sup>288</sup>

Furthermore the German legislation extends the scope of certain provisions which implement the directive also to founders of a new business (§ 502 BGB). This group is not covered by the European notion of "consumer".<sup>289</sup>

#### B. Extension to credit agreements secured on property, Article 2 (2) (a)

In **Austria** the scope of the implementing legislation has been extended to credit agreements in the sense of Article 2 (1) (a) of the Directive, namely credit agreements secured on immovable property. However, in case of the agreements secured by immovable property the consumer shall not have a right to withdraw.<sup>290</sup> He is, however, entitled to repay early.<sup>291</sup>

The scope of the implementing legislation in **Cyprus** has been extended to credit agreements secured on land by way of mortgages up to the amount of 35 000 €.

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<sup>286</sup> Austria, Cyprus, the Czech Republic, Germany, Latvia, Poland, Romania, Spain and the United Kingdom.

<sup>287</sup> Translation by the author.

<sup>288</sup> Example by *Ch. Wendehorst*, *Das deutsche Umsetzungskonzept für die neue Verbraucherkreditrichtlinie*, ZEuP 2011, p. 263 (273).

<sup>289</sup> ECJ 03.07.1997, C269/95 – Benincasa/Dentalkrit Srl.

<sup>290</sup> § 12 (6) of the VKrG.

<sup>291</sup> Specific rules on early repayment are provided in § 16 (4) of the VKrG.

In the **Czech Republic**, the provisions which implement the Directive are applicable to credit agreements secured by a lien and provided for the purpose of living. However, both conditions must be met.

In **Germany**, the scope of the provisions which implement the Directive has also been extended to credit agreements secured by way of the so-called "Grundpfandrechte".<sup>292</sup>

Also in **Latvia and Romania**, the provisions which implement the Directive are applied to credit agreements which are secured either by way of mortgage or any another comparable security commonly used in Latvia and Romania on immovable property or which are secured by a right related to immovable property.

In **Poland** the average value of credit secured by way of mortgage does not exceed the limitation of the consumer credit (255.550 PLN). Due to this fact, the Polish legislature considered the application of the Directive provision as a reasonable means of protecting the interest of borrowers of credit secured by way of mortgage who are in a similar situation to the debtors of ordinary consumer credit.

However, the scope of application is nevertheless limited. In case of credit agreements secured by way of mortgage, the provisions on pre-contractual information (Article 22 of the CCA2011), the obligation to provide the consumer with credit information in the form elaborated in Annex III to the CCA2011 (Article 23 of the CCA), the contractual provisions on the form and content of the agreement (Articles 29, 35 of the CCA2011) and the sanctions for infringing Article 35 of the CCA2011 are applicable.<sup>293</sup>

### **C. Extension to credit agreements the purpose of which is to finance the acquisition or retention of property rights, Article 2 (2) (b)**

In **Austria, Germany, Latvia, Romania** and **Spain** the respective nation provisions which implement the Directive are also applicable to credit agreements the purpose of which is to finance the acquisition or retention of property rights in land or buildings.

### **D. Extension of minimum/ maximum limit with respect to the total amount of the credit, Article 2 (2) (c)**

#### **(i) No maximum limit**

The **Austrian legislator** provides for a minimum limit with respect to the total amount of the credit for the provisions to be applicable.<sup>294</sup> However, there is no maximum limit as provided in Article 2 (2) (c) of the Directive.

Provisions implementing the Consumer Credit Directive are **in Germany** also applicable to credit agreements where the total amount of credit accounts is greater than 75.000 €. <sup>295</sup>

The same applies to the **Spanish transposition**.

<sup>292</sup> Grundpfandrechte are security interests in land under German law (subitems are the Hypothek and the Grundschuld). Exceptions and modifications may be found in § 503 BGB and article 247 § 9 EGBGB.

<sup>293</sup> See article 4 (2) no. 1 of the CCA2011.

<sup>294</sup> See § 4 (1) VKrG.

<sup>295</sup> Exceptions may be found in § 494 (4) (2) and (3) BGB (Legal consequences of missing information on Securities).

## (ii) No minimum limit

However, in **Poland**, the CCA2011 applies to credit agreements involving a total amount of credit less than 200 €. <sup>296</sup> It is argued that it would be unreasonable to exclude these contracts from the scope of application of the consumer friendly provisions in the CCA2011 since the number of loans made for less than €200 is significant. Furthermore, it was argued that such a restriction in the application of the provisions which implement the Directive would result in creditors making several loans for less than €200 rather than for a sum greater than €200 in order to circumvent the application of more stringent regulations. Article 3 CCA2011, however, states that consumer credit in the sense of this law means any credit agreement not amounting to more than 255.550 PLN (or any sum of another currency having equal value).

## (iii) No minimum, no maximum limit

In **Latvia, Romania** and the **United Kingdom** the provisions which implement the Directive also apply to credit agreement loans worth less than €200 and more than 75 000 €. The application of certain provisions in the United Kingdom is, however, restricted. The Consumer Credit Directive right of withdrawal is not applicable for loans above £60 260. Adequate explanations also do not have to be given. Furthermore, the assumptions for calculating the APR are also not regulated for loans below £160.

## E. Extension to hiring or leasing agreements in the sense of Article 2 (2) (d)

Leasing agreements under the **Austrian Law** are regarded as financial accommodation. <sup>297</sup> Hence, most of the provisions in chapter two of the *Verbrauchercreditgesetz* (§§ 4-17) are in addition to the specific provisions in §§ 26 et seq. *VkrG* applicable as well to these agreements. <sup>298</sup>

Also in **Germany** some of the leasing agreements excluded by Article (2) (d) of the Directive fall within the scope of the German transposition. <sup>299</sup>

The **Polish legislator** provided that the implementing legislation is applicable to hiring and leasing agreements if a separate agreement provides an obligation to transfer the property on the respective object to the contract on the creditor's demand. <sup>300</sup>

The **Polish legislation** provides that the provisions which implement the Directive are applicable to hire and leasing agreements on the condition that a separate agreement provides for an obligation to transfer the ownership of the hired item on the creditor's demand. <sup>301</sup>

The **United Kingdom** and **France** extend the scope of application of the provisions which implement the Directive to hire purchase as well. However, the provisions on the variation of interest rates and the termination of open-end agreements are not applicable in the **United Kingdom**. Furthermore, the personal scope of application is restricted since credit intermediaries are excluded from such duties.

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<sup>296</sup> Such provision has already pre-existed under the former regime in the CCA2001.

<sup>297</sup> *B. Zöchling-Jud*, in: Ch. Wendehorst/ B. Zöchling-Jud, *Verbrauchercreditrecht*, Wien 2010, § 26 marginal number 1.

<sup>298</sup> See particularly § 26 (1) No. 3 and 4 *VKrG*.

<sup>299</sup> Exceptions and modifications may be found in § 506 (2) (2) *BGB* and article 247 § 12 (2) *EGBGB*.

<sup>300</sup> See article 4 (4) of the CCA2011.

<sup>301</sup> See article 4 (4) of the CCA2011.

## **F. Credit agreements in the form of overdraft facility in the sense of Article 2 (2) (e)**

In **Germany**, the provisions which implement the Directive are also applicable to credit agreements in the form of overdraft facility and where the credit has to be repaid within one month.<sup>302</sup> Facilities, which have to be repaid within one month, are governed by organic Austrian law<sup>303</sup>.

Also in **Latvia** and **Poland** credit agreements in the form of an overdraft facility and where the credit has to be repaid within one month are covered by the implementing legislation. However, according to Article 4 (2) no. 2 of the Polish CCA2011 in this case only Article 17 (4) regulating selected pre-contractual information duties applies.

## **G. Credit agreements in the sense of Article 2 (2) (f)**

In **Latvia** the provisions which implement the Directive are also applicable to credits granted free of interest and without any other charges and credit agreements under the terms of which the credit has to be repaid within three months and only insignificant charges are payable.

## **H. Credit agreements which are concluded with investment firms or credit institutions according to Article 2 (2) (h)**

In **Austria** credit agreements as defined in Article 2 (2) (h) of the Directive are not explicitly excluded from the scope of the *Verbraucherkreditgesetz*. Such credit agreements fall also under the scope the provisions which implement the Directive in **Germany**.<sup>304</sup>

## **I. Extension to credit agreements which are the outcome of a settlement reached in a court or before another statutory authority, Article 2 (2) (i)**

In **Germany**, the provisions which implement the Directive also apply to credit agreements which result from settlements reached in a court or before another public law authority.<sup>305</sup>

## **J. Credit agreements upon the conclusion of which the consumer is requested to deposit an item as security, Article 2 (2) (k) and credit agreements concluded by organisations in the sense of Article 2 (5)**

In **Poland** the provisions of the CCA2011 implementing the Directive are also applicable to credit agreements upon the conclusion of which the consumer is requested to deposit an item as security in the creditor's safe-keeping and where the liability of the consumer is strictly limited to that pledged item.

Furthermore, credit agreements which are concluded by the *Spółdzielcza Kasa Oszczędnościowo-Kredytowa* (Cooperative Savings and Credit Union, SKOK) which is an organisation for the purposes of Article 2 (5) of the Directive and are, according to Article 2 of the CCA2011, subjected to the provisions of the CCA 2011 in full.

<sup>302</sup> Exceptions may be found in § 495 (3) no. 3 according to which the right to withdraw is excluded for these contracts.

<sup>303</sup> § 18 (3)VKrG.

<sup>304</sup> An exception is stipulated by § 359a (3) BGB. For discussed incompatibilities with the Directive with respect to this see: *Ch. Wendehorst*, *Das deutsche Umsetzungskonzept für die neue Verbraucherkreditrichtlinie*, ZEuP 2011, p. 264 (284).

<sup>305</sup> Exceptions and modifications may be found in § 491 (3) BGB.

## K. Credit agreements in the sense of Article 2 (2) (I)

In **Spain**, Law 16/2011 Article 2 (2) (I) was not implemented. Therefore, the provisions which implement the Directive also apply to credit agreements which relate to loans granted to a restricted section of the public under a statutory provision with a general interest purpose, and at lower interest rates than those prevailing on the market or free of interest or on other terms which are more favourable to the consumer than those prevailing on the market and at interest rates not higher than those prevailing on the market.

### 2.2.2. Credit agreements falling outside of the 'newly' harmonised regime?

In most Member States, credit agreements involving a total amount of credit less than €200 have been excluded from the scope of application of the Directive regime. Since SMS loans, or pay-day loans, are usually for lesser amounts, they probably would only be regulated by the provisions which implement the Directive in **Latvia, Poland** and **Romania** which do not provide such minimum limits for the application of the respective provisions.<sup>306</sup>

From the national reports, it appears that the credit agreements falling outside of the newly harmonised regime either are treated according to the Consumer Credit Directive regime (see chapter 2.2.1.) or according to general civil law provisions.<sup>307</sup> Despite the extension of the scope of the Directive to certain credit agreements not covered by the Directive, no changes to the previous regimes could be identified.

## 3. CONCLUSION

The Research study revealed still existing deficiencies in the implementing national legislation. It, however, appears that these deficiencies are not serious and that it is not impossible to improve these gradually. It became also apparent that clarification on certain aspects such as the "representative example" according to Article 4 of the Directive would be desirable.<sup>308</sup>

It is also notable that the scope of application of the Directive has been extended in many of the Member States covered.

Having regard to the complexity of the subject matter of the Directive and despite the delayed implementation in some Member States and the still existing deficiencies in the national implementing legislation, it may, however, be concluded that the transposition of the Directive - generally speaking - is satisfactory.

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<sup>306</sup> For **Poland** it was stated that the Polish legislator did not answer the question of SMS-loans directly. However, article 15 (1) CCA2011 considers credits concluded by means of distance communication. Moreover, SMS-loans were not excluded from the CCA2011 scope. It may hence be concluded that even though the Polish legislator did not mention SMS-loans as a separate subjective group of credits in the CCA2011, SMS loans would be credits concluded by means of distance communication. Taking into account the minimum value adopted in article 3 (1) CCA2011, it seems the CCA shall apply in case of SMS-loans.

<sup>307</sup> This was explicitly reported for Bulgaria. Also for the Czech Republic it was reported that land mortgages are regulated in the Act on Bonds No. 190/2004 Coll., in the Czech Commercial Code No. 512/1991 Coll. The principles of the lien laid down in the Czech Civil Code No. 40/1964 are applicable as well. There are, however, no further explanations as to the regulations of credit agreements falling outside the scope of the Directive for other Member States.

<sup>308</sup> See Fn. 36.

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