Bündnis gegen den Wucher
Coalition against Usury

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Evaluation of Directive 2008/48/EU with regard to the spread of Usurious Credit in Europe

Paper mandated by the German Coalition against Usury in connection with the European Coalition for Responsible Credit (ECRC) submitted to the *Open Public Consultation on the Evaluation of Directive 2008/48/EC*
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Summary

The German Coalition against Usury is a joint initiative of German Consumer Advice Agencies ('Verbraucherzentralen'), Debt Advice Associations, Trade Unions, Consumer Attorneys and Academics. The German Coalition against Usury has adopted a declaration to stop the rise of usurious credit in Germany. The Coalition also contributes to the work of the international network of the European Coalition for Responsible Credit (ECRC). The German Coalition against Usury declaration requires that insurance sold in connection with the credit be represented in the APRC (annual percentage rate of charge).

Art. 3 g)[1]*of Directive 2008/48 states that the total cost of the credit to the consumer means that 'all the costs, including interest, commissions, taxes and any other kind of fees (…)'. This article also notes that costs for ancillary services relating to the credit agreement, in particular insurance premiums, are also included if, in addition, "the conclusion of a service contract is* ***compulsory*** *in order to obtain the credit or to obtain it on the terms and conditions marketed".* This part of the definition of the notion of total cost of credit *should be changed back to the wording of Art. 12 (2) of the initial proposal COM(2002) 443 final of 11.9.2002 where the last limb of the sentence read: "if the insurance is taken out* ***when*** *the credit agreement is* ***concluded****."*

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[1] Reiterated in Art. 4 (3); 5 k); Annex II No 3 (3)

This simple return to the original requirement would stop the misuse of Payment Protection Insurance for usurious credit .[2] The imperative nature of the Directive has influenced significantly national civil law in all Member States and has led to the perverse situation whereby usurious payment protection insurance is now in all European contracts defined as "non-compulsory" although it represents up to 50% of the non-disclosed cost of credit. It is lenders who benefit from this. According to a survey of the German Financial Authority BAFIN payment protection insurance is kick back commission which often amounts to more than 70% of the paid premium. Other hidden profit for lenders takes the form of the unusual requirement to pay the premium in advance over a period of up to 12 years so that they can be financed by the credit awarded by the bank.

The Coalition has mandated this paper to voice its concern over the neglect of usurious practices in the Directive. This paper demonstrates that there is an urgent need for the Directive to address this problem. It discusses a number of practices causing detriment to consumers, including cases of usurious refinancing practices, exploitation of default, small credit, overrunning, credit card credit, combined credit and savings as well as systematically increased usurious cost of useless debt collection.

[2] See www.stopwucher.de.

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1 Introduction

The EU Directive 2008/48/EU has had problematic effects on the national combat against usury. It has eroded its foundations through a methodology of legislation in which usurious practices and products are implicitly acknowledged as legal because the Directive only links informational duties to their existence.

1.1 CCD and usury

The problem comes principally from the fact that:

- there are more than four different and inconsistent definitions of interest rates;
- the use of the word 'interest', which is a core concept in national usury legislation, is used arbitrarily in the Directive giving suppliers far too much discretion to adapt its definition(s) to suit their needs, leading to major restrictions being circumvented.

With the multitude of contradicting definitions the Directive has not achieved the promised results regarding transparency and information. Consumers need to be given information on an APRC which represents all the payments they are required to make to obtain the credit. In practice, the omission of insurance premiums from the costs that need to be included has led to APRC that reflect less than 50% of the cost of credit. Besides, the provision of a consistent payment plan based on the APRC is denied to consumers. Instead of a payment plan Art. 10 (2) (i) only requires an arbitrarily calculated amortisation table which has only to be handed out after conclusion of the contract.

The Directive thus implicitly contributes to social discrimination by accepting that "the poor pay more". This tendency is linked to a growth in refinancing and the spread of chain credit contracts, in which interest is artificially turned into interest bearing capital. In those chain contracts, usurious new contracts are imposed on defaulting consumers. Art. 16 of the Directive governing early repayment is used in a way which exploits the borrowers.

The initial draft of the Directive took care to require good standards of behaviour from lenders, by imposing a principle of responsible lending. However, the Directive itself as it was adopted instead requires that the consumer borrow responsibly. The principle of responsible borrowing protects usurious products and practices blaming consumers (and in particular the vulnerable) for the consequences of choosing a usurious product.

The solutions of the CCD assume that only markets with transparent information can cure the problems of exploitation and overindebtedness. This ideology has led to an information overload, where hundreds of pages of fine print with ever repeated inconsistent information hinder the search for valuable information even for specialists.

Usury assessment by credit advisors and courts has become nearly impossible. The right of withdrawal is not an adequate alternative. Although not yet surveyed by the Commission it is probably not at all used in the EU for purposes it has been introduced.

The CCD needs a new beginning in which the 2002 Draft of the EU-Commission which proposed a consistent regulation to combat usury and prevent overindebtedness could play an important role.

The first step should be the abolition of the imperative character of this Directive with regard to national law. This could allow the development of a more consistent, transparent and focussed consumer credit law as it was in force in many countries before the CCD intervened.

1.2 Total harmonisation

Recital 9 of the Directive explains that 'Full harmonisation is necessary in order to ensure that all consumers in the Community enjoy a high and equivalent level of protection of their interests and to create a genuine internal market. Member States should therefore not be allowed to maintain or introduce national provisions other than those laid down in this Directive.'

However, the effects of the Directive have not been to create an internal market where consumers enjoy a high level of protection with regards to usury practices, quite the contrary. It is full harmonisation that is at the root of the problem spreading across Europe and causing the most vulnerable to be harmed by usury credit practices.

The yardstick for the CCD 2008 should have been the lessons learned from the financial crisis 2008[3] expressed especially by the ten OECD/G20 *high level principles on Financial Consumer Protection* of October 2011.[4] There is much reason to believe that the "subprime" (= usury) crisis was due to irresponsible credit card and instalment credit lending in the US, refinanced by a delimited mortgage market whose bad debt and its cost were sold to foreign investors.

Usurious credit and overindebtedness were the core concern of the first draft for the Directive back in 2002. The draft had been thoroughly prepared using empirical research mandated by DG Consumer Protection and Health. However, the essence of

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[3] See Reifner, Die Finanzkrise - Für ein Wucher- und Glücksspielverbot, Wiesbaden 2017. (The financial crisis – towards a ban on usury and gambling)
[4] Principle 3 reads: *Lending has at all times to be cautious, responsible and fair. a) Credit and its servicing must be productive for the borrower. b) Responsible lending requires the provision of all necessary information and advice to consumers and liability for missing and incorrect information. c) No lender should be allowed to exploit the weakness, need or naivety of borrowers. d) Early repayment, without penalty, must be possible. e) The conditions under which consumers can refinance or reschedule their debt should be regulated.*

this draft Directive were lost and the 2008 final version of the Directive instead follows the opposite path paving the way for the development of a usurious consumer credit market exploiting the poorest in our societies because the Directive chose information as a means to control credit practices.

The final version of the Directive omitted consumer protection, prevention of over-indebtedness and usury from its goals by contrast with the original draft. They were replaced with “harmonisation” (Art. 1) that seemingly justified the “imperative nature of this Directive” (Art.22). This was in spite of surveys mandated by the Commission that showed that there neither lenders or consumers expressed a need for consumer credit to be bought or sold across the border in another Member State.[5] The only responses indicating such need were small banks located in Luxembourg or Switzerland. It is our view that those institutions are trying to escape effective bank supervision and practicing usurious terms of lending. Recital 9 of the Directive does mention that substantive consumer and debtor protection remains unaffected. However, the fact that definitions are open to pone-sided manipulations frees those who have the power to do so from traditional legal restrictions.[6] (Recital (9) 3rd phrase).

(9) Full harmonisation is necessary in order to ensure that all consumers in the Community enjoy a high and equivalent level of protection of their interests and to create a genuine internal market. Member States should therefore not be allowed to maintain or introduce national provisions other than those laid down in this Directive. However, such restriction should only apply where there are provisions harmonised in this Directive. Where no such harmonised provisions exist, Member States should remain free to maintain or introduce national legislation. Accordingly, Member States may, for instance, maintain or introduce national provisions on joint and several liability of the seller or supplier of services and the creditor. Another example of this possibility for Member States could be the maintenance or introduction of national provisions on the cancellation of a contract for the sale of goods or supply of services if the consumer exercises his right of withdrawal from the credit agreement. In this respect Member States, in the case of open-end credit agreements, should be allowed to fix a minimum period needing to elapse between the time when the creditor asks for reimbursement and the day on which the credit has to be reimbursed.

The Directive has a major flaw with regard to usury: it claims that it does not affect existing national protective legislation and at the same time in the name of providing transparency evokes as we will see later a number of usurious products for whom general civil law would be competent. Choice is supposed to replace rights. Exploitation, usurious practices and the systemic misuse of bank power with regard to borrowers in difficult social situations are now indirectly accepted through EU-law.

The view in most Member States seems to have been that the Directive prevents sanctioning usury because its rules are not applicable if a consumer is deemed to have

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[5] See *Analysis of the Economic Impact of Directive 2002/65/EC concerning the distance marketing of consumer financial services on the conclusion of cross-border contracts for financial services between suppliers and consumers within the Internal Market Final Report.* Institut für Finanzdienstleistungen to DG Sanco. (with Pérez-Carillo, Elena; Knops, Kai-Oliver; Tiffe, Achim; Clerc-Renaud, Sebastien) (Project No. SANCO/2006/B4/034)

[6] For an overview of the author mandated by DG Market see Reifner/Schroeder *Usury Laws - A legal and economic Evaluation of Interest Rate Restrictions in the European Union* BoD: Norderstedt 2012 (460 p)

chosen ("not compulsory" Art. 3 (g)) a transparent product. Thus, usurious refinancing, PPI, wrong interest rate calculations, anatocism, compulsory refinancing, chain contracts, flipping and churning as well as credit where repayments are deviated into investment products with negative return are indirectly justified so long as the consumer was given the required information.

With its total harmonisation approach the Directive discriminates especially against poor people and breaks the commitment to a high level of consumer protection. To tackle this issue, we recommend observing the principle laid out in Art. 3 (3) EU-Treaty and return to the use of the minimum harmonisation principle set out in Art. 169 (4) which requires that *measures adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective measures.* In this respect Art. 41 Directive 2014/17/EU (MCD) for mortgage credit should be copied into the CCD as it avoids the circumvention of protective rules. In any event, the Directives (consumer credit and mortgage credit) ought to be merged as they were in the initial 2002 Draft, because the artificial separation of consumer credit into two different legal bodies leads to additional difficulty in the harmonisation of national law.

1.3 Usurious credit in practice

Instead of listing the numerous constructions in which banks are allowed to make usurious loans, we represent a typical credit chain of a large international consumer credit bank, where the original contract in 09/2003 was refinanced six times until 10/2012. Each of the following contracts was linked to a new financed PPI, which steadily increased to nearly five times its initial cost and much more in terms of life insurance at market premium that is not linked to a loan (see Table 1 and Figures 1, 2, 3).

The APRC required by the Directive was indicated in the contracts between 15.76% p.a. and 11.24% p.a. The mathematical definition in the annex requires that all instalments paid by the consumer are in proportion to all payments made by the bank to him or her. If this had been done neglecting the artificial separation into seven contracts, the correct APRC for the whole relationship would have been 25.12 % p.a. The calculation allowed by the Directive therefore significantly underestimates the usurious burden that this borrower has to bear. While the EU Commission commissioned empirical and mathematical research in 1998 to correctly understand the problems[7] in the preparation of its 2002 draft, CCD 2008 did nothing similar, although in particular the UK authorities supported by the press[8] have shown the true dimensions undisclosed PPI has for usurious loans.

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[7] See Reifner, U., Wüst, M., Haida, L., Bonhomme, C., *Harmonisation of Cost Elements of the Annual Percentage Rate of Charge, APR,* Project No.: AO-2600/97/000169, Hamburg, 1998; download http://www.responsible-credit.net/media.php?t=media&f=file&id=2221.

[8] See The Guardian Aug. 2, 2016: *PPI claims - all you need to know about the mis-selling scandal*

Figure 1: Cost of Payment Protection Insurance

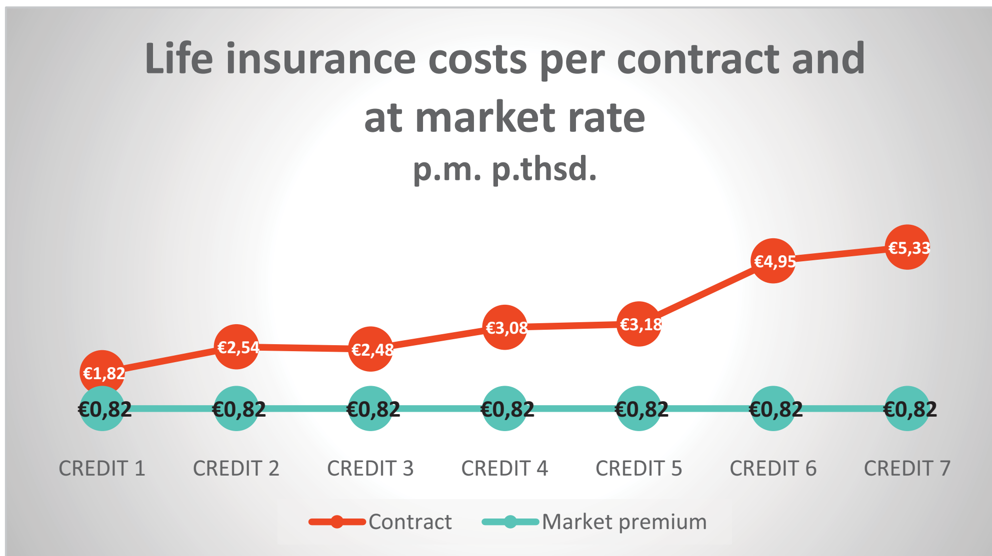


Figure 2: agreed and actual maturities of contracts

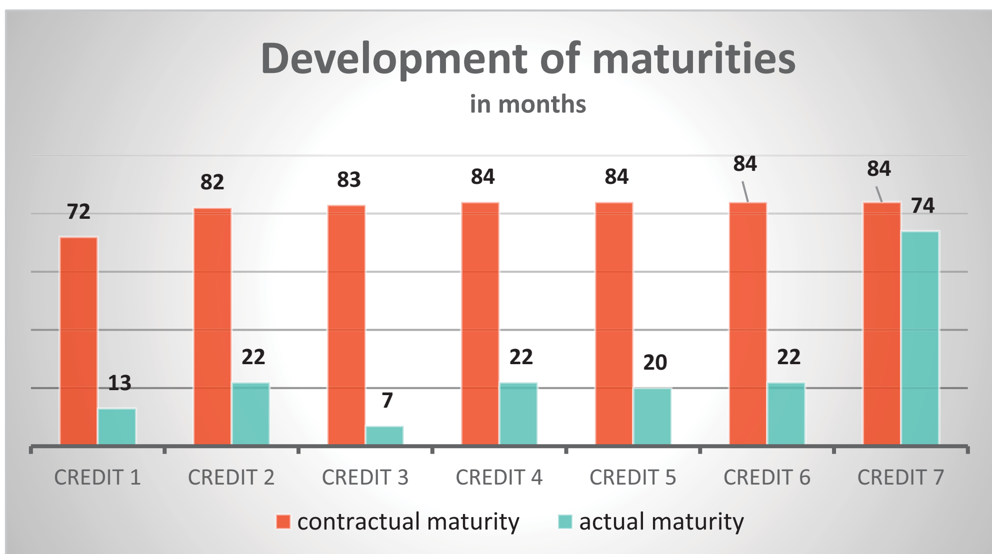
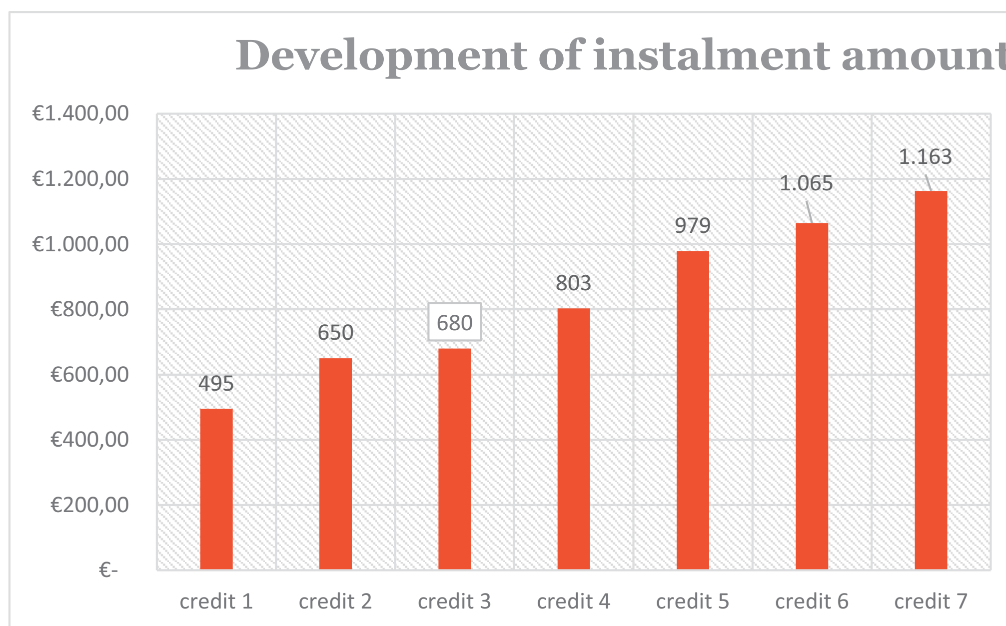


Figure 3: Instalment payments in the credit chain



1.4 What consumers would need

Consumer credit provides access to future income for consumers who do not have sufficient liquidity and savings to pay in advance for the purchase of durables (cars, household appliances, computers, holidays, etc.), to bridge temporary liquidity crises (birth of children, illness, unemployment, education, etc.) or to invest in the future of young families (appliances, homes, education, job, etc.). For this they have to choose the cheapest credit (fair competition), which is best adapted to their foreseeable liquidity in the future (responsible credit). To achieve these goals, they must be protected from the exploitation of their hardships, poverty and needs by irresponsible loans offered in a profit-oriented market (usury).

The APRC plays a decisive role for all three functions. The Annex to the Directive refers to the only mathematical and therefore correct parameter to represent prices (truth in lending), to distribute costs evenly over the duration and amount of the outstanding loan (accessory principle) and to identify where an interest rate is "grossly disproportionate" to average market prices (usury).

From a technical point of view, 20 pages of repeated and superfluous descriptions of mostly identical information about rarely occurring marginal facts and situations do not provide the necessary basis for a rational decision.

Instead, a consumer credit agreement should culminate in the information compiled through a comprehensive payment plan. It would show what and when a consumer gets money at what time and what he has to pay to the bank. This payment plan should be calculated on the basis of an inclusive APRC. It would prove that the APRC is correctly applied, that there are no additional charges and hidden costs and that he or she has received the promised amount at the due date. Here is an example with

comprehensive information. It starts with a short table that could be made mandatory by the legislator for all lenders, as a similar regime is in use in the US. This would allow to compare the most important parameters and avoid information overflow.

Table 1: Contract information

Contract date	03.09.2014	Date of first instalment	01.11.2014
Net Credit	25,000.00 €	Last instalment	355.25 €
Insurance	6,912.29 €	at date	01.10.2022
Total Cost	20,385.25 €	Final debt	0.00 €
Maturity	8 years	APRC	17.57% p.a.
Instalments	474.00 €	Average Market rate	7.64% p.a.

Month	Date	Instal-ments	Debt
	03.09.2014		**APRC 17.57%**
			NC 25,000.00 €
1	01.11.2014	474.00 €	25,188.14 €
2	01.12.2014	474.00 €	25,051.18 €
3	01.01.2015	474.00 €	24,923.64 €
4	01.02.2015	474.00 €	24,794.33 €
5	01.03.2015	474.00 €	24,629.84 €
6	01.04.2015	474.00 €	24,496.47 €
7	01.05.2015	474.00 €	24,350.25 €
8	01.06.2015	474,.00 €	24,213.02 €
9	01.07.2015	474.00 €	24,063.01 €
10	01.08.2015	474.00 €	23,921.80 €
11	01.09.2015	474.00 €	23,778.63 €
12	01.10.2015	474.00 €	23,622.81 €
13	01.11.2015	474.00 €	23,475.51 €
14	01.12.2015	474.00 €	23,315.63 €
15	01.01.2016	474.00 €	23,164.09 €
16	01.02.2016	474.00 €	23,010.44 €
17	01.03.2016	474.00 €	22,834.01 €
18	01.04.2016	474.00 €	22,675.81 €
19	01.05.2016	474.00 €	22,505.23 €
20	01.06.2016	474.00 €	22,342.47 €
21	01.07.2016	474.00 €	22,167.43 €
22	01.08.2016	474.00 €	22,000.01 €
23	01.09.2016	474.00 €	21,830.26 €
24	01.10.2016	474.00 €	21,648.37 €
25	01.11.2016	474.00 €	21,473.77 €
26	01.12.2016	474,.00 €	21,287.10 €
27	01.01.2017	474.00 €	21,107.50 €
28	01.02.2017	474.00 €	20,925.42 €
29	01.03.2017	474.00 €	20,712.63 €
30	01.04.2017	474.00 €	20,525.09 €
31	01.05.2017	474.00 €	20,325.73 €
32	01.06.2017	474.00 €	20,132.83 €
33	01.07.2017	474.00 €	19,928.23 €
34	01.08.2017	474.00 €	19,729.83 €
35	01.09.2017	474.00 €	19,528.69 €
36	01.10.2017	474.00 €	19,316.00 €
37	01.11.2017	474.00 €	19,109.14 €
38	01.12.2017	474.00 €	18,890.84 €
39	01.01.2018	474.00 €	18,678.10 €
40	01.02.2018	474.00 €	18,462.41 €
41	01.03.2018	474.00 €	18,218.88 €
42	01.04.2018	474.00 €	17,996.85 €
43	01.05.2018	474.00 €	17,763.66 €
44	01.06.2018	474.00 €	17,535.33 €
45	01.07.2018	474.00 €	17,295.97 €
46	01.08.2018	474.00 €	17,061.17 €
47	01.09.2018	474.00 €	16,823.13 €

Month	Date	Instal-ments	Debt
48	01.10.2018	474.00 €	16,574.23 €
49	01.11.2018	474.00 €	16,329.45 €
50	01.12.2018	474.00 €	16,073.95 €
51	01.01.2019	474.00 €	15,822.26 €
52	01.02.2019	474.00 €	15,567.08 €
53	01.03.2019	474.00 €	15,287.40 €
54	01.04.2019	474.00 €	15,024.83 €
55	01.05.2019	474.00 €	14,751.87 €
56	01.06.2019	474.00 €	14,481.89 €
57	01.07.2019	474.00 €	14,201.67 €
58	01.08.2019	474.00 €	13,924.08 €
59	01.09.2019	474.00 €	13,642.65 €
60	01.10.2019	474.00 €	13,351.20 €
61	01.11.2019	474.00 €	13,061.84 €
62	01.12.2019	474.00 €	12,762.62 €
63	01.01.2020	474.00 €	12,465.13 €
64	01.02.2020	474.00 €	12,163.52 €
65	01.03.2020	474.00 €	11,846.81 €
66	01.04.2020	474.00 €	11,536.65 €
67	01.05.2020	474.00 €	11,217.02 €
68	01.06.2020	474.00 €	10,898.16 €
69	01.07.2020	474.00 €	10,569.98 €
70	01.08.2020	474.00 €	10,242.16 €
71	01.09.2020	474.00 €	9,909.81 €
72	01.10.2020	474.00 €	9,568.41 €
73	01.11.2020	474.00 €	9,226.74 €
74	01.12.2020	474.00 €	8,876.20 €
75	01.01.2021	474.00 €	8,524.96 €
76	01.02.2021	474.00 €	8,168.86 €
77	01.03.2021	474.00 €	7,796.84 €
78	01.04.2021	474.00 €	7,430.66 €
79	01.05.2021	474.00 €	7,056.09 €
80	01.06.2021	474.00 €	6,679.68 €
81	01.07.2021	474.00 €	6,295.06 €
82	01.08.2021	474.00 €	5,908.12 €
83	01.09.2021	474.00 €	5,515.83 €
84	01.10.2021	474.00 €	5,115.63 €
85	01.11.2021	474.00 €	4,712.38 €
86	01.12.2021	474.00 €	4,301.44 €
87	01.01.2022	474.00 €	3,886.93 €
88	01.02.2022	474.00 €	3,466.68 €
89	01.03.2022	474.00 €	3,035.96 €
90	01.04.2022	474.00 €	2,603.94 €
91	01.05.2022	474.00 €	2,164.79 €
92	01.06.2022	474.00 €	1,720.73 €
93	01.07.2022	474.00 €	1,269.75 €
94	01.08.2022	474.00 €	813.31 €
95	01.09.2022	474.00 €	350.56 €
96	01.10.2022	355.25 €	0.00 €

With such a table, the consumer can check each step in his development from one date to the next by using the formula given to calculate the amount of the next capital after a period of one month at the stated APRC. He would also be able to assess its accuracy if the final value were to correspond to what was convened, which in instalment credit is usually 0 €. For each month, the amount of the residual debt is indicated, so that in case of early repayment, the consumer knows where his debt stands. There are no false outstanding interest rates which would require additional calculations in the event of early repayment.

However, the Directive (1) does not provide for a right to a pre-contractual payment plan, (2) the indicated APRC does not cover a substantial part of the due payments and (3) instead of the APRC an arbitrary loan interest rate would be used to calculate the residual debt in case of early repayment.

2 Interest rate definitions favour circumvention

Since the first CCD in 1987, the APRC has been regarded as the greatest achievement of a one-price doctrine for credit in Europe. It should include all payments and indicate their due date. But it did not work. Ultimately, there are four competing definitions in the Directive.

2.1 Definitions 1a and b: Art. 19 (1) and Annex I No. I (growth rate)

The mathematical correct definition is almost hidden in Art. 19 (1). The APRC should be calculated *on an annual basis, corresponding to the present value of **all** future or existi*ng ***commitments** (drawdowns, repayments* and *charges) agreed between the creditor and the consumer*.

A second definition clarifies which element is to be equated with the other element in Annex I No. I. It defines the APRC as *the basic equation expressing the equivalence of **drawdowns** on the one hand and **repayments** and charges on the other.*

The additional cost of a credit with regard to cash payment is the difference between what a borrower receives and what he or she has to pay. It must also take into account the time during which each part of the declining capital can be effectively used. These three factors are necessary for any interest rate which measures the growth of capital instead of costs. Unlike cash prices, the interest rate takes into account that interest must be compounded at regular intervals. Such an interval is assumed to be one year. Only then rates are comparable as prices. This is confusing because the one-year compounding period is not included in the text of the Directive. The letters “p.a.” only indicate the form in which the APRC is presented and not the way it is calculated.

The mathematical formula is presented in an unnecessarily complicated form in the Directive, which instead adopts the lender's view of a present value instead of the consumer's view of the future value, which would be understandable.[9]

Since only growth can be calculated directly the formula is:

$$C_t = C_0 * g^t$$

Since the growth rate g is given by 1 plus the interest rate i, the formula can be written in the following way:

$$C_t = C_0 * (1 + i)^t$$

Thus the *initial capital* C_0 at time 0 grows by 1 plus the *interest rate (i)* to reach C_t at time t. Interest (or cost) are then given by the difference between the two capital amounts (C_t - C_0).

PPI premiums, including their financing costs, are part of the instalments to be repaid by the borrower. Banks also integrate PPI into one financing amount, although they mostly separate it in terms of "net credit." (*net loans*)

2.2 Definition 2: Art. 3 I (cost rate)

But the same APRC gets a second definition, which uses a different cost-related but outdated concept that ignores compounding and growth. Art. 3 I states: *'annual percentage rate of charge' means the **total cost** of the credit to the consumer, expressed as an annual percentage of the **total amount of credit**, including, where applicable, the costs referred to in Article 19(2).* The total amount of credit (net credit) is defined in letter (l) as *the ceiling or the total sums made available under a credit agreement*.

Credit cost is related to the net credit. The time of payment of these costs and the compounding of interest on the interest-bearing capital are not even mentioned. This misleading definition opens the door to their abuse by excluding certain payments from the APRC. It is no longer what the borrower pays to the bank, but what the law accepts as his or her "cost" for the credit. This is even present in the denominations. Instead of defining the APRC as what ordinary citizens understand by an *interest rate,* the only correct and true interest rate is called a "rate of charge", i.e. the "cost rate". Children learn at school that the compound interest period must be taken into account when calculating the cost of a loan. The p.a. rate does not achieve this transparency.

[9] Mathematically, both come to the same result, see the transformation of the EU-formula into the simple form used in Reifner/Feldhusen-Reifner, Handbuch Kreditrecht 2019 §21 para 56 ff.

2.3 Defintion 3: Art. 3 (j) (arbitrary borrowing rate)

There is even more confusion since the Directive knows a third rate, the '*borrowing rate*'. It *means the interest rate expressed as a fixed or variable percentage applied on an annual basis to the amount of credit drawn down.*

This concept alludes to a rate that represents the charges for borrowing. It even calls this borrowing rate an "interest rate" while the correct ones are called "charge rates". So one could assume that the borrowing rate is the true interest rate. But it is no interest rate at all. It is required to just present itself as if it were an interest rate. It shall only be written in the form of % p.a.

The Directive leaves it up to each bank to define how this rate is composed and calculated, which elements are included. With regard to the true cost and effects of a credit contract it is misleading. Experts ask for financial education to understand the APRC which also European law would need with regard to the borrowing rate.

It is not by chance that it is the main source for misrepresentation and circumvention. In order to make their borrowing rate look cheap banks require high closing fees up to 6% of the net credit, impose prepaid brokerage fees which are even financed, claim extra telephone cost, additional bank account fees and usurious insurance premiums which they cash in as part of their interest earnings through kick back commissions. Nothing of this is represented in the borrowing rate.

Why has this door been opened? It opens the door to that amount of interest a bank likes to declare as such. The consumer even serves as a pretext. Wrong calculations would better be understood than true ones. Defined as a percentage of the Capital, the borrowing rate seems to be able to calculate relatively equal interest by a simple multiplication: *interest* = $i * C_0 * t$ This cannot be called a high level of consumer protection.

Historically this has been different. Before computers came into use fist formulas were necessary because growth related calculations by hand consumed more time than the one-week bank holiday at the end of the year for calculation could provide. But they still knew what 7th grade pupils learned about interest compounding at school.

Computers were used already in the 1960ties. There capacities served to calculate instalment credit at an early state. But they did not change the cost formula to the growth formula. Today only a few have applied it to especially highly standardised small credit which thus becomes easy to understand with only one rate left. It is no longer the effort to calculate but its gains which define whether interest is calculated correctly or arbitrarily.

The existence of this borrowing rate is still the most important obstacle to comprehensive usury control.

3 Voluntary Usury and National Ceilings (Art. 3 g)

But another threat has emerged. Many MS have usury ceilings. They are enforced either by administration (F/NL/B/I/PL) or the court system (D) or just by public opinion (S/FIN/DEN). They all use directly or indirectly the average market rates from their official statistics to assess what since Roman law (laesio enormis) is defined as an "excessive disproportion" with regard to market rates. This is assumed to be the fruit of illegal exploitation of weakness, need etc. This comparison of prices needs the APRC. But it can only fulfil its task if it is properly defined in a way which shows the true difference as well as the true burden to the consumer. The burden are the instalments to be paid. It allows also to compare prices with competing offers.

The EU legislator was aware of the fact that its APRC would be used for usury ceilings as for price disclosure. Judges as well as administrations and even less consumers are unable to recalculate each credit using a different methodology than conceded to the banks for the APRC.[10] Usury must be obvious if effective. Instead the redefinition of the APRC as a cost related rate excluding factually insurance cost made this rate irrelevant and ineffective to uphold usury ceilings that should represent the true burden of a credit.[11]

This has been hidden in the form of the regulation. A new principle was invented: strict law can be circumvented when consumers agree to the circumvention. APRC rules should **not** be applicable to the certain cost if they were **not** imposed as "obligatory". It looked as if application was the principle. This was applied to usury regulation. Debtors and borrowers who signed the contract with the voluntary clause are no longer protected from usurious products and systems. Accepted usury is no longer indicted as usury. A tick or click onto a little case (mostly prepared by the bank employee) proves that the usurious burden was not usurious.

There is not a single case in Europe where a bank has included PPI into the APRC and made its conclusion obligatory. (*sham law*).

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[10] The German Supreme Court tried in vain to calculate it by himself with another methodology. He found that half of the insurance premium should at least be represented in the APRC. But he failed to do so. He frankly told the public that his mathematical deliberation led him the opposite result. (less usurious with more premiums) He gave up and ordered to take the APRC the Directive required. (see BGH 29.11.2011 – XI ZR 220/10 No 13; 12.03.1981 – III ZR 92/79, BGHZ 80, 153, 168 und Urt. v. 24.03.1988 – III ZR 24/87, WM 1988, 647, 648.)

[11] The background is the neo-liberal move of the EU-Commission before 2008. In its Post-FSAP Papers the EU-Commission never hid its intention to abolish national usury rates in Europe. They were thought as impeding a free internal market.

The strong relation to lobby interest becomes visible if compared with the treatment of brokerage fees which represent politically less influential actors. These fees are paid to third parties and are less likely to be hidden interest while in bank insurance 70% of the premium is paid as hidden interest to the bank. There is also no question that brokerage fees are consented by the consumer even in a special contract with much more transparency than PPI. But they are enumerated in Art. 3 g expressively as "commissions" and especially enumerated in recital 20 as "fees for the credit intermediaries" which are part of "all the costs" that have to be included into the APRC. National courts and administrations use this APRC and compare it to the average (non-brokered) credit. Instead the loophole with regard to insurance has been made wide open for use. Insurance companies secretly admit that these products would not be theirs if banks would not have ordered it in this form.

4 Usurious Products admitted by the Directive

The second big assault to usury is the manipulation of the average market rate to which a contractual rate has to be compared. Since there are many products on the market different market rates for each product category are possible. Since the product of all credit contracts, the use of foreign money, is the same differences can only stem from different servicing and different risks. Secured credit is therefore cheaper than unsecured credit. Since consumer credit unlike mortgage loan is practically always unsecured there should be little space for price differences justified by higher transaction cost. But instead this system is used to design especially products and money lenders designed especially for poor people where the average price is much higher than in general. It is justified with higher risks. But the prices go far beyond such risks profiting from the weak position of poorer clients whose exploitation is easy to accomplish. This is why historically there have always been limits through usury legislation which at least narrow the span available to a usurious lender to less than the double of the average of credit in general. This advantage has been lost with the help of the Directive. A number of "special products" have been accepted by the Directive. The French administration publishes average market rates between 3 and 21% p.a.

Table 2: Usury Ceilings in France August 2018

Consumer Credit **< 75.000 €**	**% p.a.**	**Mortgage credit** **>75.000 €**	% p.a.
< 3000 €	21,12	0-10 years	2,93
3000 - 6000 €	12,69	10-20 years	2,95
> 6000 €	5,99	> 30 years	3,19
Overdraft	13,77	variable credit	2,59
		prêt du relais	3,28

In Germany the Bundesbank discloses a special high average rate for "overrunning" distinct from overdraft. It also has created a special market rate for high priced *true*

"credit card credit" which resembles the one for overrunning. Both show enormous differences to ordinary overdraft or instalment credit. In the UK credit of very small amounts ("payday loans") have been accepted with a special legal usury ceiling which lies at absolute 1,000% p.a. hidden under a daily rate which even a bank would not be allowed to disclose in this form.

The general idea that the form of credit (and not its group of borrowers) decides over its cost leads to a systematic discrimination of poorer people who are not denied credit but pushed into special banks and specially designed usurious products. Citibank, Santander, Targobank, Crazy George, SWK or in the UK Finance Companies held by major banks do such business.[12]

Even more known are products which as such are usurious like overrunning, very small credit, true credit cards and instalment credit linked to usurious insurance constantly refinanced into ever costlier credit in a chain.

The Directive favours such discriminatory segmentation by providing generous exemptions to such products which also affect national law.

4.1 Credit agreements below 200 € (Art. 2 c)

Small credit below the ceiling of 200 € is generally exempted. Specialised banks like SWK and brokers like Auxmoney offer interest rates far beyond the usury rate in Germany. These products are designed to create pressure for refinancing because it often refinances already an instalment from another credit (*flipping*) and does not create any value from which it could be repaid. Its duration is too short and the instalments too high. With regard to their special treatment in the law the Munich appeal court excluded them from ordinary usury ceilings. They would be too special to be compared with an average instalment credit. Thus he doubled the ceiling for them. Such credit leads indebted persons irrevocably into bankruptcy. Usurious credit may help to overcome the next two months but only by shifting a much bigger unsurmountable debt burden into the future of these families. The rules on anatocism are also circumvented.

4.2 Preferential refinancing of debt (Art. 2 j)

A special product has been accepted in Art. 2 (j) for the refinancing with credit free of charge. But it is designed for circumvention since it does not define the "existing debt". In practice such existing debt has already accumulated charges and interest which are thus turned into a net credit to which interest rate restrictions do not apply. Besides such credit provided in connection with the acquisition of used cars will within short delay be transformed into a usurious credit of the cooperating bank when the

[12] See Corr, Caroline, Alternative Financial Credit Providers in Europe, December 2007 Study mandated by FinanceWatch.

slightest liquidity problems force to ask the bank for adaptation which is denied for free credit.

4.3 "Free" credit card credit

Art. 2 c and f privilege overdraft credit which is short term (1 or 3 month) and free of charge. It introduces loopholes into the most usurious markets.

It would be understandable if the law had defined properly how the credit has to be paid back, what size the amount of credit can have and that refinancing of it is forbidden. In practice free credit is just a marketing system to lure especially people who need credit barely into a long lasting obligation. Once entangled in such a debt experience shows that banks are free to define the conditions of the follow up credit. There are numerous cases in which free credit is refinanced into usurious credit since the customer is captured by one provider and marked for this in the respective databases.

4.4 Overrunning Art. 3 c)

Hidden in the definitions of article 3 I "overrunning" has been legally acknowledged. This verbal monster was imposed onto national law. In terms of general law overrunning is an overdraft facility in default. It indicates that a debtor uses more credit than he or she had been consented and would be creditworthy. It further indicates that there is a liquidity crisis which would need a consensual adaptation of the overdraft with temporary increase of the credit limit and forbearance. Instead the Directive has turned it into a special product which allows higher prices and promises higher profit. The bank has got incentives not to adapt but to exploit this situation systematically. The German legislator has tried to cure this with an information duty where overrunning persists. But overindebted consumers are not stupid but in a temporary social situation which becomes more typical for the lower fifth of society.

Furthermore, Art. 2 (3) assumes that even in this factual default period the compounding period is less than three months. The assumption that all overdraft is repaid within this term is a fiction. In practice the sum due including the interest accrued are debited to the interest bearing capital. It legitimizes anatocism. National usury legislation ban interest on interest in default. The Directive starts from the opposite assumption.

Its definition is also not in line with national civil law. It allows a unilateral "tacitly accepted overdraft" to extend credit beyond the consented limits: an "overdraft of the overdraft". Civil law instead requires consensus from both parties. Standard contract terms can only provide unilateral changes of the duties but not the conclusion of a completely additional contract. The overrunning is characterised by interest rates which are presently about 5 times higher as the default rate set by the German legislator. This protection is suspended by the Directive.

4.5 Usurious Loans without Amortisation (Ar.5 (5))

A source for hidden usury are products in which a credit with repayment and interest payment is split into a credit without repayments and a savings product which collects the amortisation. The interest of the loan therefore remains as high as in the first month since amortisation does not diminish the capital. The savings contract is annexed mostly in the form of a disadvantageous capital life insurance or a housing savings plan (Bausparen). Just like in the PPI a bank gets a high commission from both products.

Since the annexed savings plans have significantly lower yields than the interest rates charged on the credit the consumer constantly loses its difference where he pays into this product instead reducing the outstanding debt. But the true problems are presently known from capital life insurance whose promised payouts in the future have been drastically reduced so that many linked credit contracts are not fully paid off at its convened end.

Factually they provide no more than an instalment contract where monthly payments should finally lead to the amortisation of the credit. If this would be taken into account in the APRC consumers would have no problem to find that the APRC of the credit alone is a fake and misleading. For housing savings plans this has recently been introduced in Germany. Since these constructions are not transparent, have high front up fees (commission up to 4% of the total amount of the credit) the extra profit can again be leveraged through repeated refinancing or parallel credit.

They circumvent national interest rate restrictions since they include anatocism, shift risks to the consumer and disguise their true prices. The Directive addresses this construction in Art. 5 (5) as a *"credit agreement under which payments made by the consumer do not give rise to an immediate corresponding amortisation of the total amount of credit but are used to constitute capital during periods"*. But it requires only a warning to the consumer *"that such credit agreements do not provide for a guarantee of repayment of the total amount …"* which seems protect it from the circumvention assessment.

This all has had extreme consequences in the UK mortgage market where endowment credit led to unexpected high debt burden and overindebtedness.

5 "Interest" without use of capital

To protect consumers from becoming over-indebted there are two important national legal principles, which the Directive ignores.

These are (i)the prohibition of lenders continually charging interest on interest ('anatocism') and (ii) that interest can only be charged if the capital has actually been put to use by the borrower (no interest without use: 'accessory principle').

This latter principle is the foundation of several consumer protections, which are especially applicable in the event of borrower default but also, for example, where interest has been prepaid under the pretext of closing fees.

Both principles are designed to prevent a revival of the debt servitude witnessed in previous times. However, the Directive undermines these long-standing legal principles.

5.1 Inadequate definition of "interest"

In the first instance, the Directive fails to adequately define the concept of interest. For example, it states (Art. 10 (i)) that where capital amortisation of a credit agreement with a fixed duration is involved, borrowers have a right to request a statement of account in the form of an amortisation table. In these cases, the table provided to the borrower must contain a breakdown of each repayment showing capital amortisation and "the interest calculated on the basis of the borrowing rate".

However, this definition of interest is circular because Art. 3 (j) states that "the borrowing rate means the interest rate…applied…to the amount of credit drawn down".

Further problems arise because Art.3 (g) of the Directive identifies interest as just one element of the total cost of credit. The others are "commissions, taxes and any other kind of fees"; "insurance premiums"; "penalties", and other "charges".

In practice this definition allows lenders to make very different interpretations of what does and does not constitute 'interest'. Some lenders, commonly those making credit available to wealthier borrowers, declare all the cost of their credit as interest. In these cases, the borrowing rate comes close to the APRC. However, it is common practice for lenders targeting those on lower incomes to define up to 60% of the total costs of their credit as other, 'non-interest', elements.

5.1.1 Link to Usurious Refinancing

This has severe consequences for national debtor protection law. Its worst effects are with regard to usurious refinancing since it allows lenders to rename interest as fees or as new capital on which interest is then charged when the refinancing of credit agreements takes place.

Although the Directive's 'imperative' character limits the ability of national law to intervene on this issue, it does not provide for the harmonisation of lender practice and create standardisation in contract terms.

There are about thirty instances in the Directive where the concept of interest is critical to its application but where no binding definition of interest is provided. Examples include:

- Art. 2(f) "credit agreements where the credit is granted free of interest and without any other charges"
- Art. 10 (i) "the interest calculated on the basis of the borrowing rate";
- Art. 14 (3) (b) "The interest shall be calculated on the basis of the agreed borrowing rate."
- Art. 10 (j) "interest are to be paid without capital amortisation,"
- Art. 16 (1) "the interest and the costs for the remaining duration"
- Art. 16 (5) "shall not exceed the amount of interest"

As a result of this failure to create a standard interpretation of interest, lenders are highly incentivised to neglect the more consistent interest definition of the APRC and apply interest hidden in the 'borrowing rate', which is open for manipulation.

5.1.2 Amortisation Plan (Art. 10 (2) (i)

As indicated above, Art. 10 (2) (i) refers to an 'amortisation plan'. A 'payment plan' would be more useful for consumers. In the amortisation plan the clearer definition of the APRC is not required, and lenders can use their own arbitrary borrowing rate instead. The amortisation plan thus reflects the failure of the Directive to properly define interest and standardise contract terms, and is misleading to consumers. The chance to warn customers of the dangers of over-indebtedness, by showing them the exact amount of debt they have outstanding, was not taken.

5.1.3 Sanctions expressed in terms of the 'borrowing rate'

Due to the 'imperative' nature of the Directive, transposition of its Articles into national law was usually undertaken with little Parliamentary scrutiny or discussion. In addition, sanctions – for example in respect of making incorrect price disclosures – have usually been expressed in terms of adjustments to the 'borrowing rate'. For example, in German law (section 494 (3) of the Civil Code) if a lender discloses an APRC which was lower than the actual charge being applied, then the sanction is for the 'borrowing rate' to be reduced. It would, however, have been better to require that lenders apply the originally stated APRC to the agreement.

5.2 Disregard of the accessory principle (Art. 3 (c); 16 (1))

The accessory principle has been a core element in the shaping of laws to prevent borrowers from exploitation. It links the payment of interest to the effective use of the capital. It is hidden in Art. 3 (c) with the wording "where the consumer **pays for such services or goods for the duration of their provision** by means of instalments." This indicates that consumers should only be required to pay for what has actually been received as capital plus any **earned** interest (and charges). However, the Directive subsequently ignores this, particularly when it deals with the issue of early repayment.

5.2.1 Unearned interest as "Reduction of cost" (Art. 16 (1) 2nd phrase)

In the case of early repayment (Art. 16 (1) 2nd) does not accept that only those interest and charges have to be paid which represent the effective use of the capital in the past. Instead the Directive turns it round so that the unearned interest becomes the focus:

> *"In such cases, [the borrower] shall be entitled to a reduction in the total cost of the credit, such reduction consisting of the interest and the costs for the remaining duration of the contract"*

Because the definition of the total cost of credit (Art. 3 (g)) includes all unearned interest which may become due over the lifetime of the agreement this implies that the amount outstanding at any given time is that total cost. Consequently, the early repayment of capital requires a 'reduction' in the borrower's liability for the 'remaining duration of the contract'.

Turning the accessory principle on its head in this way has consequences in practice and can give rise to usury. For example, capital can be paid to the borrower in ways which hinder their ability to use it effectively – i.e. onto accounts with restricted use.

The wording of Art. 16 also combines with the lack of standardisation in lender interest calculations to have serious implications for borrowers who seek to repay early. It provides lenders with the opportunity to unreasonably limit the 'reduction' in the debtor's liability because:

- Article 16 does not specify that unearned interest or other charges which may have become payable over the lifetime of the agreement be 'refunded' in their entirety, only that these be 'reduced';
- The calculation for the reduction in interest follows the borrowing rate which in most Member States is still allowed to be used in a mathematically wrong methodology of cost related interest calculation. The Directive seems to allow even more simplifications. Many banks even apply the thump rule of 78 sometimes "simplified" to a formula that calculates the relation of the square value of the residual month to the square of all months convened. This hidden "Uniform" methodology has been blamed for its mathematical inconsistency in the first CCD with regard to APRC calculations and made imperative in the 1998 Directive. It seems to be accepted where it appears as the rule of 78 which mathematically is the same only expressed differently.

Instead of providing borrowers with a comprehensive payment plan which tells them, at any time, how much interest has thus far been accrued, the Directive orders lenders to calculate reductions in interest in the event of early repayment in the same way that they did before. This allows lenders to keep the fruits of the poisonous tree. Biased interest calculations, anatocism, and accumulation of default and contractual

interest diminish what has to be restored to the consumer. Lenders are thus allowed to treat consumers in default unequally.

5.2.2 "Justified Compensation" for early termination (Art. 16 (2))

While national law before 2008 allowed a credit to be repaid at any time (reflecting that to combat over-indebtedness consumers should not be captured in debt) the Directive introduced an early repayment charge as an "objectively justified compensation" (Art. 16 (2)). This contradicted the promise of the Commission to maintain the highest level of consumer protection.

It is also in conflict with the one of the main principles governing compensation in civil law: specifically, that compensation levels should relate to the true damage that has been suffered. A rule that no payment of interest should be made if there has been no use of capital would be consistent with this principle. But the Directive reversed the burden of proof. Lenders are not required to calculate and prove that they have suffered loss due to early repayment. The Directive allows them to levy compensation as a penalty against borrowers who repay them early.

This is achieved through the use of the limitations laid down in Art. 16 (3) and (4). Although the Directive states that lenders shall only be entitled to 'fair and objectively justified compensation', it proceeds to set maximums that can be charged in this respect. As a result, in many cases, lenders simply apply these maximums automatically.

Also the use of the term **'justified'** is challenging. According to national law concerning damages, economic disadvantages have to be assessed "correctly". The replacement of this by **"justified"** introduces a normative notion for damages which most national legal orders reject.

In addition, it should also be noted that lenders are able to pressurise borrowers who are in arrears with payments by threatening them with the acceleration of their full liability under the contract plus the imposition of further charges and penalties. Consumers who are struggling with repayments should enjoy the protection of the law rather than be forced, as many currently are, into usurious refinancing of existing debt to avoid these penalties.

5.3 Usurious Refinancing through Credit Chains

Since the 1980's many consumer credit lenders have developed business models which involve the refinancing of their borrowers existing debts on a regular basis. The penalties for borrowers in default are harsh, yet credit contracts offer very little flexibility for people whose financial circumstances change for the worse. As a result, borrowers who require relatively small amounts of additional credit or who fall into arrears with as few as two instalments can find themselves at the mercy of their lenders. Switching to another lender in these situations if often impossible.

Thus usurious lenders use even the smallest breaches of contract as an opportunity to replace the existing agreement with another, more exploitative, version. We have seen instances where lenders use refinancing in this way to hugely increase the total liabilities of borrowers: leveraging an extra 30% of the original agreement's cost and trapping the borrower in increased levels of debt. The Directive seems to accept this after Art. 15 (f) of the first draft tried to provide choice even to those who have to refinance.

5.3.1 Misuse of Early Repayment Rights (Art. 16; 10 (2) (r))

The belief in the sanctity of contracts ('pacta sunt servanda') which forms of the basis of much national law needs to be qualified with the recognition that fundamental changes of circumstance can render their clauses inapplicable ('*clausula rebus sic stantibus')* . This is particularly apt in the case of borrowers who experience unforeseen changes that result in liquidity crises.

In these instances, lenders could offer borrowers assistance, for example by deferring payments; recalculating the duration of the contract, or by granting additional credit at the present interest rate. Before the Directive organised the rules for early termination offering these types of help was common sense in national law.

However, following the introduction of the Directive, we now find that lenders prefer to refinance agreements on terms which are worse than before. Refinancing is offered as the only possible and adequate solution. Whilst it can reduce the level of the instalments required from borrowers it increases their overall level of debt and multiplies the interest extracted from them. In refinancing, lenders misuse the consumer's right to take the initiative to cancel the existing contract. Thus the restrictions to their own cancellation rights in case of default do not apply.

In these cases, it appears that the 'voluntary' acceptance of usurious practice by the consumer is sufficient excuse for legislators to ignore that the practice is nevertheless usurious and highly exploitative.

5.3.2 Insufficient and arbitrary reduction of the total cost of credit

The opportunities to withhold unearned interest and transform interest into capital is especially detrimental where credit is refinanced several times. It allows a leverage effect that maximises detrimental effects for consumers the earlier a credit is cancelled.

5.3.3 Redefining interest as lost fees

The biggest detriment to borrowers has been created by the transformation of interest into an up-front cost, considered to have been incurred by the borrower as a liability in full at the time the contract is entered into.

In Germany courts have used standard contract law to ban some of this liability instead of applying the circumvention rules. Some cases of usury were solved, but others have made immune by the Directive. These include:

- *Closing fees,* even if they are financed by the credit contract;
- *Disagio,* where the borrower has to prepay significant parts of the interest resulting in less capital available for their use; and
- *Commissions, including those* paid to the credit broker even if part of these are then channelled back to the lender, and those paid to lenders by insurance companies for the sale of Payment Protection Insurance.

5.3.4 Increased interest and insurance premiums

Refinancing a contract with a borrower who has become captured in default is attractive to lenders because:

- So-called ‘risk-based pricing’ practices allow for customers in default to be charged more for subsequent contracts. The interest rates on refinanced credit can therefore be increased. A credit concluded for 84 months may de facto increase its cost significantly if it is refinanced after 6 months. This can be repeated.
- National jurisprudence has limited the extent to which lenders can exploit borrowers in this way, but many banks have therefore switched to increasing the cost of linked insurance products. Here the borrower is denied full compensation for the residual unearned premiums linked to the first agreement, because it is argued that the commissions have already been earned by the broker (which is, in fact, the bank);
- In addition, a new insurance contract is imposed on the borrower at the time of the refinancing. This has the effect of doubling the insurance costs every time the agreement in refinanced. In some cases, the cost of the insurance has been raised to four times the initial premium paid on each thousand Euros per month within a four-year period. The profit is transferred to the bank in the form of kick back provisions. The Directive provides strong incentives to use this loophole which causes even greater harm than the traditional increase in interest rates.

6 Responsible Credit (Art. Art. 8 and 5 (6))

The main lesson learned from the 2008 financial crisis for credit extension was the fact that usurious (“subprime”) credit products and refinancing mechanisms had systematically ruined private households.[13]

[13] See Reifner, Die Finanzkrise, 2017 pp 94 ff.

According to the G20 as well as to the worldwide Coalition for Responsible Credit the legal responsible should have been to incorporate a principle of 'responsible credit'[14] into consumer credit legislation. This concept of responsible credit had been formulated prior to the crisis, in the 2002 Draft.

6.1 Unworthy Borrowers (Art. 8)

But the Consumer Credit Directive only mentions this principle in Recital 26 and replaces it, in Article 8, with its precise opposite.

Article 8 assumes that lenders failed in advance of the crisis because they advanced credit to people who were not 'creditworthy'. Instead of addressing the exploitative ways in which lending was being conducted – the excessive interest rates, usurious refinancing, impeded amortisation, exploitation of default etc. – the Directive focuses on the concept of 'creditworthiness' and requires that lenders assess this prior to entering into agreements.

It does not, however, require lenders to put in place measures to ensure that the credit they subsequently advance to people who are identified as less 'creditworthy' than others is responsibly provided and does not exploit them.

In fact, the Directive enshrines the practice of exploiting financially weak consumers. They are punished for previous financial problems by systems of credit scoring. The data which underpins these credit scores is, in many countries, owned by the credit industry itself and the algorithms and analytical methods used to classify borrowers into separate risk groups are kept secret.

This system provides for the exploitation of borrowers by enabling the practice of so-called 'risk-based pricing', with interest rates set higher for those who have struggled to maintain contracts in line with lender expectations in the past. In this respect, the structure of credit products and the contractual requirements made of borrowers can themselves increase the likelihood of future default: generating further 'risk' and providing the cover for lenders to hike up interest and other charges.

New forms of usury are becoming apparent. For example, people with poor credit scores are offered credit at exploitative rates of interest as an opportunity to 'rebuild' their credit score. *Secured credit cards* even require that the borrowed sum is kept as a security with the supplier so that customers borrow their own money. The widespread marketing of the importance of maintaining a good credit score imposes a 'disciplinary effect' on borrowers, which in turn drives them to refinance agreements rather than default upon them in times of financial difficulty.

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[14] For a review of its development and representation in this Directive see Reifner, Responsible Credit in European Law in: The Italian Law Journal Vol. 4, Issue 2 (2018) pp 423 – 450. Diritto Europeo e Credito (ir)responsabile, in: Diritto del mercato finanziario e assicurativo, E.S.I., n. 1/2018 pp. 1 - 33

The G20 principle that credit should be invested “productively” is ignored. For example, a single mother who needs a car to take her children to Kindergarten and to get to work could be refused credit because of a previous history of payment problems. The reasons behind those previous payment problems are not considered. Neither is the fact that, irrespective of previous problems, making credit available now could benefit not only the single mother and her child but broader society too. Making productive credit available on responsible terms to people who are in financial difficulty can make sense. Instead of requiring people to be creditworthy we need people-worthy credit products and systems.

The Directive’s requirement for lenders to conduct creditworthiness assessments but its lack of a prohibition on price discrimination (or at the very least the imposition of a limit on its extent) runs counter to the principles of regulation adopted in other areas of life. For example, Art. 3 (1) (a) Directive 2000/78/EC of November 27, 2000 forbids discriminatory practice in the labour market. Yet, credit – which offers the opportunity to transform future earnings potential into present income – is not subject to the same approach.

As a result, we have arrived at a situation where lenders are seemingly able to argue:

- That the information held on databases about current and prior financial history makes people a high ‘risk’;
- This justifies higher prices;
- Despite the sale of additional insurance for life, unemployment and incapacity to work which reduces the risk of default;
- And the fact that the information held on databases reflects the inflexible and often exploitative nature of previously held credit products.

6.2 Responsible Credit Art. 5 (6), Recital 26

But there are elements in the Directive which should be taken more seriously and which are much broader than Article 8.

For example, Article 5 (6) obliges lenders:

> *“to place the consumer in a position enabling him to assess whether the proposed credit agreement is adapted to his **needs** and to his **financial situation**, …, the essential characteristics of the **products** proposed and the specific **effects** they may have on the consumer, including the consequences of **default** in payment by the consumer.”*

A lender does not provide adequate advice if he offered a usurious product since any offer is by itself already the strongest advice possible. This is why the advice protocol of usurious lenders which always contain a recommendation for usurious PPI are a proof of irresponsible lending practices. Art. 5 (6) and Recital 26 follow the tradition

that the primary occupation of lenders is to offer responsible credit and not to supervise irresponsible consumers. This may be a prerogative of bank supervision but in contract law it amounts to a path to a strange new Lenders' Protection Directive.

7 Transparency, Information and Right of Withdrawal

The Directive failed to implement transparency, informed choice and more reflection into the decision-making process of consumers.

7.1 Transparency

There is no consistent order in the numerous overlapping and partly contradictory information duties stipulated by the Directive. They appear to be an amalgamation of special interests, where the exemptions address more significant elements in practice than the rules themselves.

The only harmonising element of the Directive is its imperative mandate. This unified application was made possible by giving up internal cohesion and consistency. The following table is copied from a German case book on credit law.[15] There it shows how even key notions have different definitions in the Directive, the European Standard Information Sheet, national law, and in practice. It shows that contrary to its imperative character it allows each country to offer its own notions and interpretations. Transborder comparison is less possible than before. To provide an understanding for those who do not understand German we have translated it into English. It is not the use of these notions in the English text of the Directive or Consumer Credit Act. We only want to induce lawyers from other countries to do what we did for Germany. Similar differences will then appear in all languages used in the European Union which translated back into English will probably produce hundreds of competing denominations.

[15] Taken from Reifner/Feldhusen-Reifner, Handbuch Kreditrecht, 2. Ed. Munich 2019 pp 354 f

Table 3: Different legal notions in the CCD/MCD and German credit law

	§§491 ff BGB, Art. 247 EG-BGB	**ESIS (CCD; MCD)**	**Praxis**
Kind of Loan	Verbraucherdarlehensvertrag Zahlungsaufschub Finanzierungshilfe	Verbraucherkredit Überziehungskredit Umschuldungen	Verbraucherkredit Abzahlungsgeschäft Finanzierungsleasing
	Allgemein-Verbraucherdarlehensvertrag	Verbraucherkreditvertrag	Ratenkredit
	Immobiliar-Verbraucherdarlehensvertrag	Wohnimmobilienkreditvertrag	Baufinanzierung
	grundpfandrechtlich oder durch Reallast besicherter Immobiliar-Verbraucherdarlehensvertrag	Grundpfandrechtlich besicherte Kreditverträge	Hypothekenkredit
	Immobilienverzehrkreditvertrag	Immobilienverzehrkreditvertrag	Umgekehrte Hypothek
	Überziehung	Kreditverträge mit Überziehungsmöglichkeit	Kontoüberziehung
	Teilzahlungsgeschäft		Teilzahlungskredit
Interest related notions	effektiver Jahreszins	Effektiver Jahreszins	Effektivzinssatz
	Nettodarlehensbetrag	Kreditbetrag	Nettokredit
	Sollzinssatz	Zinssatz	Nominalzins / Rechenzins / Vertragszins
	Vertragslaufzeit	Laufzeit des Kredites	Vertragsdauer
	Betrag Zahl und Fälligkeit der einzelnen Teilzahlungen	Häufigkeit der Ratenzahlungen, Zahlungsintervall; Höhe der einzelnen Raten	Betrag, Zahl und Fälligkeit der einzelnen Raten
	Gesamtbetrag	zurückzuzahlender Gesamtbetrag	Bruttokredit
	Auszahlungsbedingungen		Auszahlungsbedingungen
	sonstige Kosten	regelmäßig anfallende Kosten, einmalige Kosten	sonstige Kosten
	Verzugszinssatz Verzugskosten	Verzugszinssatz Verzugskosten	Verzugszinssatz Verzugskosten
other	Gesamtkosten		Zinsen und sonstige Kosten
	Tilgungsplan	Tilgungsplan	Zahlungsplan
	Darlehensvermittler		Makler
	Vorfälligkeitsentschädigung	Ablösungsentschädigung	Schadensersatz bei Kündigung
	Zinsanpassung	Variabler Zinssatz	Anpassung des Rechenzinses
	Sonstige Kosten	anfallende Kosten	Kontoführungsgebühr, Wertermittlungsgebühr Versicherungsprämien Prämienfinanzierungskosten
	Nennbetrag	-	Finanzierungsbetrag
	Referenzzinssatz	Referenzzinssatz	Anpassungszinssatz
lacking notions	Tilgungsverrechnung, Wertstellung		Gutschrift
	Ablösebetrag		Ablösebetrag
	Barauszahlungsbetrag		Barauszahlung

Table 4: English translation of German notions

	§§491 ff BGB, Art. 247 EG-BGB	ESIS (CCD; MCD)	Praxis
Kind of Loan	Consumer loan contract deferral of payment financial aid	Consumer loan Overdraft loan debt re-scheduling	Consumer instalment loan financial leasing
	General consumer loan contract	Consumer loan contract	instalment credit
	real estate consumer loan contract	residential real estate loan contract	construction financing
	Real estate mortgage or real-estate secured consumer loan contract	Loan agreements secured by mortgages	mortgage loan
	real estate consumption credit contract	real estate consumption credit contract	Reverse mortgage
	overdraft	Credit agreements with overdraft facility	overdraft
	instalment business		instalment credit
Interest related notions	annual percentage rate	annual percentage rate	effective interest rate
	net loan amount	loan amount	net credit
	debit interest rate	interest rate	Nominal interest rate / Calculated interest rate / Contract interest rate
	term of contract	Term of the loan	term of a contract
	Amount number and due date of individual instalments	Frequency of instalment payments, payment interval; amount of the individual instalments	Amount, number and due date of the individual instalments
	Total amount	total amount to be repaid	gross credit
	disbursement conditions		disbursement conditions
	other expenses	Regular costs, non-recurring costs	other expenses
	Default interest rate, Default costs	Default interest rate, Default costs	Default interest rate, Default costs
other	Total cost		Interest rates and other cost
	redemption schedule	redemption schedule	Payment plan
	loan broker		Broker
	prepayment penalty	redemption fee	Damages in the event of termination
	interest rate adjustment	Variable interest rate	Adjustment of the arithmetic interest rate
	Other cost	costs incurred	Account maintenance fee, valuation fee, insurance premiums, premium financing costs
	face amount	-	amount of financing
	reference interest rate	reference interest rate	adjustment interest rate
lacking notions	Repayment settlement, value date		Credit note
	redemption amount		redemption amount
	cash payout amount		cash payout

Instead just a payment plan based on the correct APRC as well as the data shown in the table 1 would suffice to inform consumers. But the Directive omits what is most necessary in order to give what is more misleading than informative. Details like the definition of the “total amount of credit” as “the total sums made available” illustrate that instead of defining the net credit it remains open whether insurance is part of it or not.

7.2 Information overload

The number of pages in a consumer credit contract has risen from two to twenty pages because of the requirements of the Directive. And because the Directive failed to provide consumers with the right to obtain a second copy on demand, consumers also have to keep their previous information on file. The consumer may easily pile up his fine print to forty pages with the most relevant information scattered and hidden between much irrelevant text. Four different insurance contracts are added which may account for another fifteen pages. Other ancillary services add to the information overload. If a credit is refinanced eight times in four years it amounts to a few hundred pages of fine print unsorted and with no visible structure in a confusing and jargon ridden language.

The same information is provided at least five times during a contact with the lender. The information has to be handed out mostly in paper at the following steps:

- Advertising Art. 4;
- Pre-contractual information Art. 5 and 6;
- contractual information Art. 10;
- Post contractual information Art. 12 and 13;
- Standard European Consumer Credit Information Annex II

Especially vulnerable consumers can only pile this up. The first page of this pile of papers often has consistent information which a lender finds necessary, so that at least their own employees understand the nature of the agreement. But the date of the contract may be placed elsewhere. The same is true for what can be different dates for the duration of the linked insurance product. The amortisation plan has to be developed by the borrower him- or herself out of the number and dates of the instalments, which on some occasions can deviate from the standard instalment.

The information overload has created jurisprudence which instead of identifying usury, anatocism, disguised interest etc. is focussed on formal mistakes in the wording. Attorneys therefore prepare their files with the same gravity and language which adds to the confusion. Nobody can understand why the lack of a comma may justify the withdrawal from a contract which had been concluded eight years ago. Lender's lawyers have called this right of withdrawal a Joker.

7.3 Reflection time (Art. 14)

The right of withdrawal to be exercised within fourteen calendar days has been praised as the core justification of the informational approach to consumer protection.

It would be easy to assess whether this right has been used in consumer credit relations in the last ten years. No such survey is, however, known. Whilst the banking

authorities could easily provide numbers concerning its use, its effectiveness or otherwise remains a subject of speculation. Our speculations are based on the following:

- We have not seen a single legal decision among the hundreds we have scrutinised which concerns the right of withdrawal, and where this right was exercised within the first fourteen days after the contract was concluded;
- Consumer research shows that borrowers do not understand the impact of what they have concluded. Only the fact of the conclusion is visible. They are aware of the effects of the credit when they get the money and pay the first instalment. This is usually not earlier than four weeks after the money has been received;
- Because a consumer who receives credit usually uses this quickly the requirement that they repay the amount borrowed plus earned interest in full within thirty days (Art. 14 (3) (b)) is an unsurmountable obstacle for those who just want to get a less usurious deal or want to try to refinance it with another bank;
- Lenders form a legal cartel in line with Art. 8 when they inform each other of the credits that have been requested. Borrowers are therefore prevented from refinancing with another lender. This may be different for wealthier borrowers, but these are not our primary concern.