

## THE FORMATION OF CREDIT AGREEMENTS FOR CONSUMERS

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**ABSTRACT:** *The purpose of Directive 2008/48/EC is to harmonize all aspects concerning credit for consumers, in order to unify the internal market and remove any distortion of competition arising from different national regulations. The instrument used consists in achieving a standard status of protection of the credit consumer.*

*O.U.G. no. 50/2010 on credit agreements for consumers, which transposes into the domestic legislation the European directive, develops like the latter a system of pre-contractual and contractual information and publicity, governed by the principle of transparency, aimed at ensuring the consumer the formation of an informed consent.*

**KEYWORDS:** *consumer credit, creditor, consumer, publicity, pre-contractual information, information formalism*

**JEL CLASSIFICATION:** *K 12, K 35*

### 1. PRELIMINARIES

There have been mainly two conflicting approaches to the relationships between Community law and the national systems of positive law in legal literature. One of them – of an embarrassing uncritical receptiveness, professes the need for a complete transposition of Community law into the domestic legal order, without a minimal adjustment to its specific realities and mentalities. The other, at the antipode, regarding Community law as the product of an “eurocracy”<sup>1</sup> foreign to each nation’s self, chimera of supranationalism, repudiates it and accuses it of violation, depreciation and depletion of the internal systems of law.

Between the servility of the first view and the pessimism of the second, I have long hoped that the “engagement” of Community law with the domestic one, through the *acquis*,

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<sup>1</sup> B. Oppetit, L'eurocratie ou le mythe du législateur suprême, D. 1990, chron., p. 73, cf. G. Loiseau, Le droit communautaire de la consommation et le droit français des obligations, in Le droit communautaire de la consommation. Bilan et perspectives, sous la dir. De D. Fasquelle et de P. Meunier, Éd. La documentation française, 2002, p. 167.

could produce more than a *mésalliance*. Our tempered optimism was subject to the condition that the national lawmaker would not cede to the haste and temptation of convenience, transferring Community law into the internal legal sphere at the level of legislative rhetoric. In other words, that it would “blow” creatively on the Community *acquis* and achieve not only a European law but also a Romanian one. This, because, as Eminescu said “true civilization of a nation does not consist in the uncritical adoption of laws, forms, institutions, labels, foreign clothes ...”<sup>2</sup>

Directive 2008/48/EC of the European Parliament and the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC is but part of the last generation of Community directives, which explicitly give up minimal harmonization in favour of a complete harmonization seeking the strengthening of the internal market. The third recital of the Directive shows that, in transposing the Directive 87/102/EEC, Member States used a variety of consumer protection mechanisms, in addition to those provided for by the Community enactment, “on account of differences in the legal or economic situation at national level”. National differences, resulting from more stringent provisions than those provided for in Directive 87/102/EEC, continues to complain the fourth recital, led to distortions of competition among creditors in the Community, created obstacles to the internal market and had consequences in terms of the demand for goods and services. Consequently, says apodictically the ninth recital, 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”. Therefore, in the field of harmonization of the directive “Member States should not be allowed to maintain or introduce other internal legal provisions” (A/N) than those contained therein<sup>3</sup>.

Accordingly, GEO no. 50/2010 on credit agreements for consumers<sup>4</sup>, transposing into national law Directive 2008/48/EC, can no more be accused of echoing the Community enactment like its forerunner, Law no. 289/2004, now repealed. Rather, the truer it is in its mimicry the more virtuous domestic law should be considered.

This development is in the logic of the evolution of the European Union itself. For the “European” credit agreement for consumers testifies both the supra-legal nature of the Community interventions in the field of private law and, particularly, the use of consumer law as an *instrumentum* in building and strengthening the internal market. Thus, on the one hand, what one used to call a “credit agreement” is but a single package of a number of techniques aimed at indebting the consumers, enabling them to quickly purchase products and services offered by trade professionals. In particular, these techniques use different types of *negotii iuris* recognized by the legal systems of the Member States, such as the

<sup>2</sup> M. Eminescu, *Semibarbaria*, Timpul, 25 octomber 1881, in M. Eminescu, *Opere*, vol. XII, Ed. Academiei RSR, 1985, p. 379. Our great thinker continued: „It (civilisation, A/N) consists in the natural, organic development of its own abilities. There is no general human civilization, available to all the people to the same degree and in the same way, but each nation has its own civilization, although there are also present a lot of elements common to other peoples.”

<sup>3</sup> According to recital (46), the objective of this Directive, namely the establishment of common rules for certain aspects of the laws, regulations and administrative provisions of the Member States concerning consumer credit, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level. The Community may adopt measures, in accordance with the principle of subsidiarity and according to the principle of proportionality.

sale contract, the loan contract, locatio operis, etc., equalized by bringing them to the common denominator of the same legal regime, of the credit.

On the other hand, consumer credit is an essential lever which ensures effective absorption of the increasingly abundant cross-border offer of goods and services. The removal of legal differences between the Member States, real obstacles to the volatilization of national borders, through the harmonization of Community consumption and the assurance of a sufficient and identical level of protection for consumers has been the main task entrusted to this legal notion<sup>5</sup>.

Naturally, so, that the formation of credit agreements for consumers, we are dealing with in this paper, is governed, in domestic legislation, as in its European matrix, by the principle of transparency, capable not only of unifying the credit market, but also of assuring a certain balance between unequal private partners – the consumer and the professional credit provider (3rd section). The presentation of the scope of Community and national provisions on consumer credit will first outline the scope of the legal order covered by these regulations (Section 2).

## **2. SCOPE OF THE GOVERNMENT EMERGENCY ORDINANCE NO. 50/2010**

### **2.1. Consumer credit - field of public policy**

Apparently commercial matters which, as regards their content, would easily fall within the category covered by art. 3 section 11 of the Romanian Commercial Code, consumer credit relations were removed by the legislature from the private sphere and included in the field of a specific public order, the public economic order of protection. Consequently, the legal rules governing them, mainly imperative in nature, have, like the entire consumer law, an exceptional character<sup>6</sup> and shall only be applied when all the legal requirements are met, both in terms of the legal acts concerned and of the persons who conclude them<sup>7</sup>.

### **2.2. Scope according to the function of the covered operations**

Article 7 section 2 of the ordinance defines the credit agreement: the agreement “whereby a creditor grants, promises or stipulates the possibility to grant a consumer a

<sup>4</sup> Official Journal, Part I, no. 389 of June 11, 2010.

<sup>5</sup> See recitals (6), (7) and (8) of Directive 2008/48/EC.

<sup>6</sup> P. Vasilescu, *Un chip al postmodernismului recent: dreptul consumatorului*, in *Consumerismul contractual*, Sfera juridică Publishing House, Cluj, 2006, p. 41.

<sup>7</sup> Art. 1 of the Government Emergency Ordinance no. 50/2010 establishes that its scope consists in “the rights and duties concerning credit agreements for consumers.” The next article specifies in para. (1) that the ordinance shall apply to credit agreements, including credit agreements secured by mortgages, or by an interest in an immovable, as well as credit agreements whose purpose resides in acquiring or keeping ownership of an existing or projected immovable or the renovation, development, reconstruction, extension or increase of the value of a property, regardless of the total amount of the credit. Para. (2) enumerates contracts which are not subject to the ordinance. It is to be noted that the Romanian law used the relative freedom enshrined in recital (10) of the Community directive and included several contracts within its scope.

credit in the form of deferred payment, loan or other similar financial accommodation (...)” Based on this, two are, in our view, the functions of the “credit agreement” in the conception of the law. The first is consubstantial with the function of the entire consumer law, showing that the legal transactions to which it refers are meant to satisfy the personal and family related needs rather than the professional or the commercial ones. The second is the economic function of “credit.” To that effect, it should be noted that, due to a legislative technique akin to the one used to regulate the sale of tourist packages, the legislature organizes under one “umbrella” contracts of various kinds, whose common purpose is to provide “credit.” It does not matter that the nature of the contract to be concluded *in concreto* is that of a loan, a sale, a lease or any other, but that the operation allows a person “to immediately obtain a benefit (money, goods or services) whose value he will pay later”.<sup>8</sup> The gap in time is the hallmark of the credit: “the credit provider agrees to wait a while for the payment of his claim”.<sup>9</sup> These coordinates were besides retained in a praetorian definition of the credit: “the operation whereby the lender allows the borrower a term to reimburse the loan or pay the price for the sale or supply of services after delivery of the goods or service” (a. trans.)<sup>10</sup>.

### 2.3. Scope according to the capacity of the contractors

The title of the law is sufficient to circumscribe the categories of persons addressed by the enactment: credit consumers and financiers, briefly speaking, consumers and creditors, between them there being also possible to occur, in many of the contractual forms, a third actor - the credit intermediary.

The notion of *consumer* is used by the Government Emergency Ordinance no. 50/2010 in the restrictive meaning retained by the consumer law: the individual, party to the credit agreements, acting<sup>11</sup> for a purpose outside his trade or profession, namely to satisfy consumer needs, personal or related to his family (art. 7 pt. 1).

The financier is called by the Romanian law<sup>12</sup> “the creditor”, word which, in our view, is confusing, given that any holder of a right of claim is called a creditor according to the general provisions of the law. More adequate to the legal mechanisms making up the consumer credit would have been in our opinion the term “*lender*”, used by the French version of the Community directive<sup>13</sup>. Indeed, it covers the core common meaning of any act of making available financial sources for the purchase of goods and consumer services.

Article 7 point 5 of the Romanian law offers the legal definition of “*lender*”, obviously similar to that of the European enactment: “legal person, including branches of credit institutions and foreign non-banking financial institutions that operate on the Romanian

<sup>8</sup> J. Calais-Auloy, F. Steinmetz, *Droit de la consommation*, Dalloz, 6-e édition, p. 387.

<sup>9</sup> *Idem*

<sup>10</sup> French Court of Cassation, in two judgments, of 1993 and of 1996, cited in G. Taormina, *Théorie et pratique du droit de la consommation. Aspects généraux et contrats spéciaux*, Ed. Librairie de l’Université d’Aix-en-Provence, 2004, p. 169, nr. 626. Also French case law held that consumer credit operations, according to the law, do not include the cases where the price was fully paid, even if by instalments, before delivery (*idem*).

<sup>11</sup> Buys, that is, „on credit”.

<sup>12</sup> But also in the Romanian version of the Community directive.

<sup>13</sup> prêteur.

territory, which gives or agrees to give credits in the course of its business or professional activity<sup>7</sup>. Of course, most often, the lender is a credit professional, a bank or other credit institution, but its function can be fulfilled in some contracts, even by the product vendor or the service provider<sup>14</sup>. Eventually, *the credit intermediary*, under Art. 7 point 10 of the Government Emergency Ordinance no. 50/2010, is that person which intermediates, for any type of fee, the signing of credit agreements, whether natural person or legal entity<sup>15</sup>.

### 3. FORMATION OF THE CREDIT AGREEMENT FOR CONSUMERS

#### 3.1. Rules that ensure the formation of an informed consent

Pre-contractual actions of the supplier or the credit intermediary, conducted in order to attract consumers, persuade them on the credit benefits may conceal many temptations. Often surprised by the subtle game of exaggerated statements and partial information relating to the “cheap” and “fast” welfare he can buy just by borrowing, the consumer delivers himself voluntarily to wake up subsequently a captive; the fall into temptation is captivity. Therefore, under the pressure of consumerist trends, as well as for considerations of competition policy, legislative measures have been designed to protect the consumer’s consent, so that his consent to a credit would be the result of sufficient information, of analysis and freedom of choice.

In this respect, national legislature has taken the provisions of the Directive 2008/48/EC, to which it added, in an imperfect manner, several rules that follow the French law model.

#### 3.2. Rules on publicity

There is no legal obligation which binds bankers to resort to publicity in order to promote their products. At the same time, the principle of free enterprise opposes any limitation on such measures: one can use, as in any other area open to competition, flyers, brochures, advertising, radio or video spots etc., as well as any other techniques that “stimulate” credit consumption. But, necessarily subject to compliance with the requirements imposed by the Law no. 363/2007 on combating unfair practices of traders in their relationship with customers and harmonizing regulations with the European legislation on consumer protection, and undoubtedly also subject to several special rules established by art. 9 of the Government Emergency Ordinance no. 50/2010. Accordingly, any publicity and any offer relating to a consumer credit agreement must specify, by means of a relevant example, certain standard information:

a) *the borrowing rate, fixed and/or variable<sup>16</sup>, along with information on any charges included in the total cost of the consumer credit.* The purpose of this obligation

<sup>14</sup> Anyway, it may not be a loan occasionally granted to an individual outside of his business.

<sup>15</sup> The purpose of his trade or profession is at least one of the following activities: a) present or offer – without having the capacity of creditor - consumer credit agreements; assist consumers by organizing preparatory activities; c) conclude consumer credit contracts with consumers on behalf of the creditor. The law also defines an “auxiliary” credit intermediary who engages in auxiliary activities relating to the main one.

<sup>16</sup> According to art. 7 point 11 of the ordinance, the interest rate related to the credit is the interest rate expressed as a fixed or variable percentage yearly applied to the amount drawn from the credit. Point 12 of the same article states that the fixed interest rate related to the credit is the one that the parties to the credit agreement establish as the single interest rate related to the credit for the entire duration of the credit agreement. Shall also be deemed fixed rates those set by the parties solely as a fixed percentage for partial periods.

is obvious: avoidance of omissions in advertisements, intentional or not, that could create the appearance of a cheaper loan than it is actually. This would be, for instance, the case in which one indicates a low, attractive interest rate, but “forgets” other expenses incurred on borrowers, such as various other fees<sup>17</sup>.

b) *the total amount of the credit*. So it is specified, according to art. 7 point 13 of the Government Emergency Ordinance no. 50/2010, the ceiling or the amounts made available under a credit agreement. As we are in the space of publicity prior to entering into a contract, we can only speak of values of the proposed loans to consumers, by means of one or several examples.

c) *the annual percentage rate (APR)*. This is, according to art. 7 Section 6 of the ordinance, the *total cost of the consumer credit*<sup>18</sup> expressed as an annual percentage of the total loan amount, including a number of costs referred to in art. 73 para. (1) of the law<sup>19</sup>.

The APR listing requirement is aimed at protecting the consumers, but, without doubt, its consequences are more far-reaching. To the extent that beneficiaries of the publicity are able to know the offers of more loan providers and to compare them, eventually choosing the loan that they consider most suitable to their needs and reimbursement opportunities, the APR listing is an essential tool for achieving credit market transparency and stimulating competition.

Along with the annual percentage rate, according to art. 9 para. (3) of the Government Emergency Ordinance no. 50/2010, the obligation to conclude a contract for an auxiliary service related to the credit agreement – especially an insurance - when this obligation is imposed in order to obtain the credit itself or to obtain it the conditions described in the publicity material.

d) *duration of the credit agreement*. Information is obviously useful to any consumer who needs to know the amount of its debt not only in economic terms, but also in time.

e) in case of a credit in the form of deferred payment for a specific good or service, *the purchase price and the amount of any advance payment*. The new Romanian law on consumer credits thus brings to the plan of pre-contractual requisites of validity the credit mechanisms with predetermined purpose, characterized by the existence of two distinct but related contracts<sup>20</sup>. This approach is fully justified given that the consumer seeks one

<sup>17</sup> See J. Calais-Auloy, F. Steinmetz, op. cit., p. 394.

<sup>18</sup> According to art. 7 point 4 of the ordinance, the total cost of the credit includes all costs to be borne by the consumer in connection with the consumer credit agreement and which are known by the creditor, such as the interest, the commissions, the fees and other costs, namely the costs for auxiliary services related to the credit contract (e.g. insurance premiums), if the conclusion of the service contract is mandatory in order to get a particular credit. Exceptions are the notary fees.

<sup>19</sup> These are: a) costs of maintaining an account recording both payment transactions and withdrawals, b) costs of using a means of payment for both payment transactions and withdrawals, c) other costs related to payment transactions. APR calculation is made according to an equation shown in Annex 1, taken from the European directive, and it is based on the presumption that, during the agreed period, the credit agreement will remain valid, and the parties will faithfully fulfil their obligations under the agreed schedule.

<sup>20</sup> Law no. 289/2004, now repealed, treated very shallowly the relationship between the sale contract and the credit one, components of this mechanism. The new enactment, like the European law, approaches the mechanism of credits with a predetermined purpose in both its forms: the credit as a deferred payment for a specific good or service, when the two contracts are inextricably intertwined, where there is an identity between the seller and the credit supplier; the credit from the tripartite mechanism of related credit agreements, defined in art. 7 point 3 of the ordinance.

single purpose - that of acquiring a specific good or service, but actually gives consent for the formation of two contracts, in a symbiotic relationship. Nothing more natural than the fact that the publicity material aimed at promoting the credit should contain minimum information relating to the contract in respect of which the credit agreement will actually be concluded.

f) *the total amount payable by the consumer and the rate value*, as the case may be. This standard information was conceived by the Community legislature, followed by the domestic one, for the same reasons as the previous one: the consumer who will get into debt in order to purchase a good or service must be aware of the total amount that he will have to pay later, and the amount of the rates.

Under the influence of French law in this field, para. (2) of Art. 9 of the Government Emergency Ordinance no. 50/2010 provides that the standard publicity information must be written “clearly, concisely, visibly and readably, in the same visual field and with characters of the same size.”

We are thus noting that the idea of contractualizing publicity materials has also made its way in the structuring of the consumer credit, even if only implicitly, given that none of the articles of the law does specify *expressis verbis* that the one who offers credit is subsequently obliged, when setting the contract terms, to observe the value indicators announced by way of publicity<sup>21</sup>. He will have to comply with the requirements governing the duty of information, even as regards the pre-contractual acts of advertising and persuasion, whose purpose is, after all, one of *captatio*: completeness (taking into account the information on credit cost), readability and loyalty. Under this statutory duty, the professional, the borrower’s “confrere” in the realm of social interactions, is obliged to “enlighten” the latter’s consent and, in connection with this, keep his advertised promises.

The innovation of consumer law is truly protean, lending itself to readings in different registers. Thus, it is, on the one hand, true that we can talk about one of the manifestations of the contractual crisis, meaning that right now not everything that is seen as a contractual obligation is consensual<sup>22</sup>. Law no longer protects the contract but it became part, fibre of the contract, in a controlling action which gets to be confused with its object.

On the other hand, no matter how pronounced the marginalization of the autonomy of will, would be in the contractual forms of the consumer law, attaching the pre-contractual conduct undertaken by the one who offers credit a contractual meaning may still be interpreted as an application of the well known classical principle. From this perspective, the law merely imposes a necessary moral continuity with respect to the professional lender’s acts, regardless of the moment when they took place - before, at the time the

<sup>21</sup> Obviously, subject to variation clauses.

<sup>22</sup> F. Collart Dutilleul, *Quelle place pour le contrat dans l’ordonnement juridique ?*, in *La nouvelle crise du contrat*, sous la direction de C. Jamin, D. Mazeaud, Dalloz, Paris, 2003, p. 232, apud P. Vasilescu, *Un chip al postmodernismului recent: dreptul consumatorului*, Sfera juridică Publishing House, Cluj, 2006, p. 3.

contract was concluded or during its performance. He must be consistent with himself<sup>23</sup>, his volitional manifestations must be coherent.

### 3.3. Rules on informing and pre-contractual counselling

The new European directive and the Romanian legislative version, following the example of art. L. 311-10 of the French *Code de la consommation*, organizes the duty to inform *before* the conclusion of the contract, so that the consumer can compare several offers “to make an informed decision on whether to conclude a credit agreement” It is essential that it firmly establishes the obligation of the written form of the prior notification - *on paper or on another durable medium* - for all types of consumer credit. The use of the form “Standard information at the European level for the consumer credit”<sup>24</sup>, according to art. 11 para. (2) letter c) of the Ordinance, thus provides a precise mechanism for checking the fulfilment of the professional’s duty to inform the consumer (Art. 11 para. (4) of the Ordinance).

In addition, in order to form an informed consent, the credit applicant is entitled to a 15 day term to study the information provided by the banker, until the moment of the conclusion. We are talking of an actual term of thinking<sup>25</sup>, reflection, within which the consumer can reflect, away from any advertising pressure or the traps of his own weaknesses, on the opportunity to become indebted. We point out that the Community legislature, followed by the national legislature, took over the French model in this respect, very careful as to the objective pursued, namely the “enlightened” and not damaged consent of the consumer<sup>26</sup>.

The starting point of this phase in fact resides in an active exchange of information between the parties: the professional or the credit intermediary is offering the consumer its credit products and the consumer, in his turn, expresses preferences, options and provides information about its needs and possibilities of reimbursement. But only because it detains data concerning the financial situation of the consumer and the purpose of the

<sup>23</sup> See to that effect, J. Goicovici, *Forța contractuală a unor documente publicitare*, in *Dreptul consumației, Sfera juridică Publishing House, Cluj, 2006*, p. 51-70. It is true that European legislation recognized a notion belonging to English law, estoppel. Estoppel derives from the verb to estop, to bar. We are here interested in one of its forms, that of estoppel by representation and promissory estoppel. Estoppel by representation may be met in common law and in equity, with the following meaning: where one person has made a representation of fact to another person in words or by acts with the intention of inducing the latter to act on the faith of such representation. If, due to his acts, the latter suffers damage, the former is estopped from defending himself by claiming that the situation was different than the one he has asserted. During the 19th century, equity extended this concept to business relationships. In this area, representation no longer concerns existing facts, but an intention or a promise. Accordingly, when, by words or by conduct, a party to a contract makes a promise to the other, linked by their legal relationship, and, of the faith of the promise, - explicit or implicit – the other party acts to his detriment, the promisor will be prevented from acting contrary to this promise.

<sup>24</sup> Provided in Annex 2 of each of the two acts - European and domestic legislation.

<sup>25</sup> We shall find, indeed, the phrase in the annexes of the two acts, but with different content.

<sup>26</sup> *Code de la consommation* requires the credit provider to maintain its offer for fifteen days from the date of issue (art. L. 311-8), period during which the consumer reflects, analyzes, evaluates and, possibly, finally agrees to conclude the credit agreement. And for the term to be effective, the payment of any amount of money is prohibited during its duration, on pain of a 30,000 euro fine. However, legal literature records the increasingly frequent practices of lenders to obtain the customer’s signature, even from the moment of launching the offer, operation which is not prohibited by law (J. Calais-Auloy, F. Steinmetz, *op. cit.*, p. 396).

credit, the professional will be able to send him the appropriate information and even, according to art. 13 of the Law, a draft of the credit agreement<sup>27</sup>.

The information owed by the banker is listed in art. 14 of the Ordinance no. 50/2010, under letter a) - Ț) and it includes: type of credit, identification data of the creditor or the credit intermediary, the total amount of the loan and the conditions governing the drawdown, duration of the credit, goods or services and the purchase price, in case of credit agreements with predetermined purpose, interest rate related to the credit and all the conditions, deadlines and procedures that govern it, effective annual interest rate and total amount payable by the consumer – calculated based on the consumer choices regarding the amount and duration of the loan, all management fees, duties, fees and costs to be borne by the consumer, as appropriate, the obligation to conclude a contract for an auxiliary service to the credit agreement, required collaterals, the presence or absence of a right of withdrawal etc..

The principle of transparency also becomes effective in special cases, such as in the case of loans secured by real estate or of the credit agreements whose purpose is to acquire or retain ownership rights on immovable property<sup>28</sup>, or in the situation of remote communications, for which the law provides for the information to be provided. In addition, a whole section - the 3rd - is dedicated to pre-contractual information to be provided for the conclusion of credit agreements in the form of “overdraft” and other special agreements. Without doubt, art. 18 of Ordinance no. 50/2010 outlines, together with the duty to inform, *a duty to counsel the consumer*, who should be directed to the most appropriate version of the contract to his interests and opportunities for reimbursement<sup>29</sup>. The text lists a set of explanations that the banker or the credit intermediary should offer the consumer, for him to have full representation as to the measure of his indebtedness: explanation of pre-contractual information required by the law, of the characteristics of the credit products offered and their impact on the consumer, explanation of all the credit costs and the consequences of non-payment by the customer. The duty to counsel required from the professional does not imply, however, its full responsibility for the credit agreement. The responsibility for the final decision of concluding the contract rests with the consumer, that alone must weigh the advantages and disadvantages of the loan.

#### **3.4. The duty to assess the consumer creditworthiness**

Following the model set by the European directive, in art. 30, the new enactment subjects the conclusion of the credit agreement to the condition of the financier’s

<sup>27</sup> Paragraph (a) of art. 13 provides that, upon the consumer’s request, the creditor must provide, free of charge, a copy of the credit agreement, unless, at the time of application, national rules do not allow the conclusion of the contract. In case of real estate secured loans and of credit agreements whose object is real estate, the professional has, according to par. (2) of the same article, the duty to provide such copy, with the same exception as in the previous paragraph.

<sup>28</sup> Case not covered by Community law.

<sup>29</sup> The duty of counselling is one of the major innovations of the European directive, together with the duty to provide certain information concerning the contract and the contractual clauses concerning the consumer’s right to withdraw.

<sup>30</sup> Or in another way chosen by the consumer and agreed upon by the creditor.

assessment of the consumer's creditworthiness. The sources of the information used are the borrower itself, as well as databases such as credit bureaus, which must ensure, in case of cross-border credit, access for creditors of the Member States in non-discriminatory conditions compared with national creditors.

The transparency of the relations between the professional and the consumer is ensured by the duty of the former to notify the latter in writing<sup>30</sup> on the identity of the database consulted and the outcome of this consultation, in case of rejection of his credit application.

### 3.5. Rules regarding the conclusion of the credit agreement

According to art. 33 of the GEO no. 50/2010, the contract shall be concluded<sup>31</sup> in writing - on paper or another durable medium<sup>32</sup>, in as many copies as there are parties. The law requires specific conditions of legibility in detail in order, to prevent any manoeuvres that may create confusion in the consumer's mind and block the formation of an informed consent.

Articles 46-49 of the ordinance indicate the mandatory elements that must be specified in the consumer credit contracts. These provisions of the law actually covers, clause by clause, the entire contents of such an agreement, which proves to be but a legal receptacle, in which the understanding of the parties is to be "poured". We think that a particular impact on the integrity and the freedom of consent of the consumer will have the following:

- the total amount of the credit and the conditions governing the drawdown;
- the good or service and its purchase price, in case of credits in the form of deferred payment or connected contracts;
- interest rate and conditions governing its application, formula based on which it is calculated, as well as the deadlines, conditions and the procedure for amending the loan interest rate;
- APR value and the total amount payable by the consumer, calculated at the time of the conclusion of the credit agreement;
- a reimbursement scheme to include the amount, the number and the frequency of payments to be made by the consumer;
- the consumer's right to receive upon request, free of charge, throughout the performance of the credit agreement, on paper or on another durable medium, a bank statement in the form of an amortization table / graph for reimbursement;
- management costs of one or more accounts recording both payment transactions and withdrawals;
- a warning on the consequences of failing to make payments;

<sup>31</sup> The law does not connect the formation of the contract to a particular moment, so that, as provided under the common provisions of the law, it will be that when the two parties' agreements will become a common consent, materialized by the signature of the instrument (obviously, not only the consumer's consent follows a temporal path, marked out by the legislature, but also the professional lender's consent will only be expressed at the end of a period of assessment of the profitability and the risks of the concrete credit operation).

<sup>32</sup> According to Recital 20 of Directive 2002/65/EC concerning the distance marketing of financial services for consumers, durable support means computer diskettes, CD-ROMs, DVDs and consumer PC's hard disk that stored the e-mail.

- required guarantees and insurance, if any;
- the existence or absence of a right of withdrawal, term and conditions. Let us dwell a little on the clause, which requires a number of clarifications. The law refers to an actual right of withdrawal, in other words, to the right recognized to the consumer to terminate the contract unilaterally, within a term whose duration is variable, depending on the parties' bargaining. The situation is unprecedented even for consumer law, because, unlike other consumer contracts, in whose case the legislature has assumed the full burden of the revolutionary power recognized to the consumer to terminate alone, free of charge and without explanation, the bundle of contractual relations<sup>33</sup>, this time the option is transferred to the parties. Thus, the creditor will be able to grant the party who contracts debt the right to change his mind, to deny the obligations undertaken by signing the contract. The source of validity of such clauses is still the law<sup>34</sup>, the exceptional law that governs the consumer relationships, even if the legislature's will is now only the support on which the parties' will comes to be added, and from this point, the very easily visible similarity with the purely potestative condition, deemed absolutely void under the general legal provisions, when accompanying the debtor's obligation (art. 1010 of the Civil Code).

- the right of early repayment and the repayment procedure;
- the existence or absence of a non-judicial mechanism for resolving disputes arising from the contract.

The transparency of credit relations, aimed at increasing the protection of the vulnerable consumer faced with the multi-potent professional, is also reinforced by other provisions of the law governing the conclusion of the credit agreement, where:

a) they prohibit the introduction and the imposition of new taxes, fees, charges, bank charges and other contract costs, or increase those included in the contract according to the law (art. 35 para. (1) letters a), b));

b) they prohibit the imposition of a fee for cash deposit for the payment of credit rates (art. 35 para. (1) letter c));

c) they prohibit the imposition of a withdrawal fee for amounts drawn from the credit (art. 35 para. (1) letter d));

d) they prohibit contractual terms that give the creditor the right to unilaterally amend the contractual terms (those whose presence in the contract is legal).

### **3.6. Consumerist neo-formalism and informational formalism and the sanction of non-compliance with the formal conditions**

We remind the premise of consumerist contractualism – the unbalanced nature of consumer contracts, in this case, the consumer credit agreement - and we emphasize the purpose reserved to the duty of information, present in all stages of the formation of the contract: a free and informed consent of the consumer, as a factor of rebalancing the relationship between him and the credit professionals. However, we cannot disregard the

<sup>33</sup> Like, for instance, that of the sale of tourist packages, or of the sale outside the premises.

<sup>34</sup> Article L. 311-15 and L. 311-16 of Code de la consommation provide a more effective consumer protection by enshrining a withdrawal term of seven days, which commences from the time the offer is accepted, i. e. when the contract is signed. Therefore, according to French law, the consumer has a twenty-two day term, resulting from the addition of the two time periods - for reflection and for withdrawal.

ambivalence of the duty to inform, in the sense that its first mission is to ensure transparency in competition relations, the establishment and the consolidation of a single intra-community credit market, while the Romanian domestic law governing credit intended for consumption is but a piece of European legislation put in place by the Directive 2008/48/EC. Besides, these two coordinates are, without hypocrisy, revealed by Community case law.

The need to achieve the two objectives has generated, it is known, a certain formalism, which, though it took the essence of classical formality - and we only refer here to the *ad validitatem* formalism<sup>35</sup> - does not fully follow its pattern. The requirement of a written form of the contract and of the offer really makes reference to the concept of formalism understood as “solemnities” conditioning the validity of the act. The requirement to insert certain information - in the publicity of the credit, the offer documentation and the contractual instrument - still shapes a different kind of formalism<sup>36</sup>. It determines the contents of the contract itself<sup>37</sup> and can be described, without hiding certain malice, as formalism of mentions. But mentions that, only themselves can provide proof of transmission of the information considered by law as essential to the “enlightenment” of the consumer’s consent, so that he can choose between the offers of competing credit institutions<sup>38</sup>. This “neoformalism” was called in legal literature informational formalism, precisely because it “prolongs and enhances the consumer’s right to information and, more specifically, because it completes the conditions necessary to achieve contractual transparency ...”<sup>39</sup>

The non-compliance with the pre-contractual and contractual information is no more sanctioned, as in Law no. 289/2004, with absolute nullity, sanction which was not able to ensure the effectiveness of Community rules: on the one hand, the invalidation of the credit agreement did not serve the objective of the internal market development; on the other hand, the very consumer’s interests were affected since, as an effect of the retroactive nullity, he would be required to rendered the borrowed amount.

This time the Romanian legislature opted for other types of penalties, less respectful of the classical heritage, but more pragmatic and efficient<sup>40</sup>. First, like the previous regulation, violations of any information requirements constitute misdemeanours, provided with substantial fines<sup>41</sup>. But the law also provides a complementary set of sanctions. Some of them are meant to heal the informatively vitiating contract (art. 88):

- bringing the contract in accordance with the law, within 15 days at the most (letter c));

<sup>35</sup> We exclude, as it is not of interest for our analysis, *ad probationem* and publicity formalism.

<sup>36</sup> For formalism specific to credit agreements, see H. Davo, *Formalisme bancaire et protection du consommateur*, in *Liber amicorum J. Calais-Auloy*, Éd. Dalloz 2004, p. 329.

<sup>37</sup> Legal determination of the content of consumer credit agreements, according to the European directive model, provides - as in the case of other contracts covered by the Community legislature - its harmonization Europe-wide.

<sup>38</sup> According to art. 11 para. (4) of GEO. 50/2010, if the lender provides the form “Standard information at the European level on Consumer Credit” it shall be deemed that he complied with the information requirements imposed by law.

<sup>39</sup> É. Poillot, *op. cit.*, p. 105.

<sup>40</sup> The text of Article 23 of the EU Directive provides that Member States should adopt “effective, proportionate and dissuasive” sanctions.

<sup>41</sup> The finding out of offences and the infliction of penalties shall be made by authorized representatives of the National Authority for Consumer Protection, upon notification by consumers, consumer associations, or *ex officio*, if, in violation of the laws, consumer interests are or may be affected (art. 87).

- repairing deficiencies ascertained in the report, within 15 days at the most (letter d)).
- The purpose of others is strongly deterring, being aimed at healing the entire credit market:
- the repayment of amounts collected without legal basis, within 15 days (art. 88);
  - the suspension of the credit activity until the entry into legality and / or the bringing of all the similar contracts in accordance with the law, within 90 days<sup>42</sup>.

#### 4. CONCLUSION

In conclusion, we consider important to make a few remarks:

- Community law has been relatively long absent in the realm of the protection of credit consumers. Directive 87/202/CEE has had only a marginal role, leaving it to the will of domestic legislators the upheaval of the common provisions of contract law to build the suitable legal mechanisms able to recalibrate the unbalanced consumer credit agreements. Bankers have triumphed, and the internal market continued to suffer from fragmentation.

- However, European legislation has evolved and there has been adopted Directive 2008/48/EC of the European Parliament and the Council, which has perturbed banking environments<sup>43</sup>. The new enactment enhances the arsenal of tools of consumer protection in the plan of contractual transparency and multiplies prohibitions on commissions and fees. In addition, it replaces minimum harmonization with a maximum one, which means that all European credit establishments will be subject to the same rules within the European Union. It seems therefore that the loss of legislative sovereignty also has a positive reverse: the “timidity” of domestic legislators is tempered by the obligation to comply with European supra-law.

- Directive 2008/48/EC, like the Romanian enactment that implements it, represent, in our view, but one step on the road to European legislative unification of the consumer protection in the field of credit. It is to be assumed that, sooner or later, its place will be taken by another European law which will extend the harmonization to other banking fields, now omitted (e.g., real estate credit), and will strengthen the position of the fragile consumer in his relations with the professional lender, together with obtaining the unity of the credit market.

<sup>42</sup> This measure may be proposed by the inspector and ordered by an order issued by the head of NACP.

<sup>43</sup> The “revolt” of Romanian banks against GEO no. 50/2010 Romanian is only a Romanian reflection of the mood of European bankers in relation to Directive 2008/48/EC.