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UDK: 346.548(4-672EU)
BIBLID: 0352-3713 (2013); 31, (10–12): 1–10
ORIGINALNI NAUČNI RAD

CONSUMERS' LENDING IN THE EUROPEAN UNION

SUMMARY: Modalities of consumers' protection at consumers' lending in the European Union Member States are provided with a special directive of the European Parliament and the Council (the Directive 2008/48/EZ on contracts of consumer credit). Although this area has been regulated in the European Union by the directives since 1987 (the Directive 87/102/EEC), because of an economic crisis, it was increasingly coming to the fore that a consumer, as a weaker agreement party, was not protected enough. The Directive 2008/48/EC on contracts of consumer credit is based on the principle of a maximal harmonization and it regulates a minimal legislative framework for each of the member states.

Key words: consumers' lending, consumers' protection, the European Union, regulatory framework.

I Introduction to Consumers' Lending in the EU Member States

Consumers' lending is a companion and an integral part of the modern society as well as one of the most significant financial services in modern economies.¹ Because of that, consumer credit has a number of economic, legal

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¹ Pasula D. (2007) Consumer protection in the contract of distinction sale – the European and national law, Law – Theory and Practice, no. 1–2, p.36

and social aspects. By improving production and consumption, consumer credit has contributed to raising the standard of living and economic prosperity of the society.² The highest percentage of consumer loans in the structure of private consumption and gross domestic product was recorded in the most developed countries.³ The European Union has been trying to establish an equal level of consumer protection⁴ among the Member States⁵. The economic crisis and the instability of the financial market have recently brought to many new ways of consumers' crediting⁶, whereby differences in the regulations of consumers' protection among the Member States of the European Union came to the fore as a bad impact to the common market within its borders⁷. Aiming to further harmonization of the legal frameworks in this area and to strengthen business competitiveness, the European Parliament and the Council have brought a new legal framework for consumer credit in the Member States of the European Union⁸. By this directive, the European Union amended 800 billion EUR worth market and enabled all the consumers from the European

² Uzelac O., Protić D.(2011) Some issues of the legal aspects of Electronic Commerce Law – Theory and Practice, no. 10–12, p. 101

³ See Jovanić T. (2004) Consumer Credit – Legal Economic Aspects, The Association of Banks of Republic of Serbia, p.10.

⁴ The notion of a consumer is defined in Article 3. (a) of the Directive 2008/48/EC. "A consumer means a natural person who, in transactions covered by this Directive, is acting for purposes which are outside his trade, business or profession"/ a consumer is a natural person who contracts a consumer credit agreement with the target which cannot be attributed to his professional or business activities".

⁵ Fundament is Article 153. The Treaty on the European Union: "Consumer protection aims to protect the health, safety and economic interests of consumers, and promotes a consumer's right to information, education and organization in order to safeguard common interests."

⁶ See Petrić, S. (2007) Consumer Credit Agreement, in: Slakoper, Zvonimir (ed.), Banking and Financial contracts, p.539, Čulinović-Herc, E. (2005) Consumer Protection in Some Bank Contracts – Compliance with the European Law, ZPFR, vol. 26, No 1, p. 176; Article 5. The Directive 2008/48/EC of the European Parliament and of the Council of 23rd April 2008 on credit agreements for consumers and repealing the Council Directive 87/102/EEC, OJ L 133/66

⁷ See Wetherill S. (2005) EU Consumer Law and Policy (2nd edition, Edward Elgar, Cheltenham, ch1.

⁸ A basis for the adoption of the Directive 2008/48/EC of the European Parliament and of the Council on consumer credit contract is Article 95. , The Treaty on the European Union:"... Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,," Article 1. the Directive 2008/48/EC of the European Parliament and of the Council of 23rd April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133/66

Union to have the same rights in respect of credit arrangements and gave them the ability to compare credit terms all over the common market⁹.

The Directive 2008/48/EZ of the European Parliament and of the Council of 23rd April 2008 on the consumer credit contracts¹⁰ is effective from 11th June 2008 and by its adoption the Directive 87/102/EEC¹¹ was repealed; it referred to the approximation of laws, regulations and administrative provisions of the Member States concerning consumer credit of 22nd December 1986 (hereinafter: the Directive 87/102/EEC)¹². The Member States were obliged to implement a new directive into their legislations within two years (till 12th May 2010) with the aim of responsible lending and consumers' financial protection and strengthening of consumers' trust¹³. The Directive brought numerous changes related to consumers' protection and it also stipulated the obligation to publish regulations by which its provisions were implemented into a specific national law.¹⁴

⁹ See above the Review of consumer acquisition document, p. 4. See on the Green Paper and the responses thereto extensively M.B.M. Loos, the Review of the European Consumer Acquis, Sellier. European law publishers, Munich, 2008.

¹⁰ The Directive 2008/48/EC of the European Parliament and of the Council of 23rd April 2008 on credit agreements for consumers and repealing the Council Directive 87/102/EEC, OJ L 133/66

¹¹ The Council Directive of 22nd December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (87/102/EEC), OJ L 42

¹² The negotiations within the Council focused on five areas: the first area includes the standardized information that all advertising credit agreement must contain. The second one is reduced to the standardized information any preliminary loan agreement and loan agreement should include, the third one refers to the conditions for termination of the contract, the fourth one to the repayment of the loan before the agreed term and the right to compensation for the lender, and the last one, the fifth one, refers to a calculation of the annual interest rate. Any advertisement or announcement of the credit agreement including the interest rate and the cost of the credit should clearly and concisely offer a consumer the following information: the total value of the loan, the interest rate, the length of loan, the total amount to be paid after the repayment of loans, and in case of loans with deferred payment and the price for cash payment, and the amount of any advance payment. It should be kept in mind, when considering these facts, those interest rates on consumer loans in the EU range from six percent in Finland to twelve percent in Portugal.

¹³ Article 8. The Directive 2008/48/EC of the European Parliament and of the Council of 23rd April 2008 on credit agreements for consumers and repealing the Council Directive 87/102/EEC, OJ L 133/67.

¹⁴ Grandov Z, Đokić M.(2009) Advertising and Consumer Protection Law – Theory and Practice, no. 11–12, p. 67.

II. The Directive 2008/48/EC on Contracts of Consumer Credit

As it had been mentioned earlier, the Directive 2008/48/EC of the European Parliament and of the Council of 23rd April 2008 on contracts of consumer credit (hereinafter: the Directive 2008/48/EC) has been in force since 11th June 2008 and the Member States were obliged to implement it in their legislation within two years, till 12th May 2010¹⁵. The Directive 2008/48/EC abolished the Directive 87/102/EEC of 22nd December 1986 and brought many novelties into consumer credit matter. Apart from the fact that the Directive 2008/48/EC, unlike the previous one, is based on the principle of a maximal harmonization¹⁶, it is necessary to emphasize the introduction of a credit intermediary as an entirely new subject of consumer credit. According to the definition adopted by the Directive 2008/48/EC of the Article 2. (f), a credit intermediary is a natural person or legal entity who does not act as a lender in the market and, within his professional or business activities conducted for a specific counter value¹⁷, represents or offers credit agreements to consumers or helps them over afore-mentioned preparatory actions preceded the conclusion of the contract or concludes credit agreements with consumers¹⁸. Besides that, the Directive 2008/48/EC introduces the obligation to inform the consumers in pre-contractual¹⁹ and contractual stages, the obligation to assess a consumer's creditworthiness²⁰, his/her right to cancel the loan agreement concluded for an indefinite period, and the right to terminate the loan agreement. Consumer information is a basic obligation of a creditor, with the purpose of achieving a greater degree of equalization of the parties²¹. The purpose of the Directive adoption was essentially informing a consumer about the consumer contract, thus eliminating a consumer's misconceptions regarding the advantages and disadvantages the individual creditor offers in

¹⁵ Article 27., The Directive 2008/48/EC

¹⁶ The Directive 87/102/EEC was based on the principle of a minimal harmonization

¹⁷ That counter value can consist not only of a financial commitment, but also of any other contractual economic benefit.

¹⁸ Article 3.(f) The Directive 2008/48/EZ "A *credit intermediary* means a natural or legal person who is not acting as a creditor and who, in the course of his trade, business or profession, for a fee, which may take a pecuniary form or any other agreed form of a financial consideration: (i) presents or offers credit agreements to consumers; (ii) assists consumers by undertaking preparatory work in respect of credit agreements other than as referred to in (i); or (iii) concludes credit agreements with consumers on behalf of the creditor"

¹⁹ Article 5 and 6 The Directive 2008/48/EC

²⁰ Article 8 The Directive 2008/48/EC

²¹ See, Foster, N. (2010) EU Treaties & Legislation 2010–2011. 21st edition, Oxford University Press Inc.

his contractual provisions²². Information are provided to a consumer in another durable medium²³ using the form from Annex II, the Directive entitled “The European Standard Information for Consumer Loans”. For other information, the creditor may provide the consumer in a separate document²⁴.

II. 1 Fields of application

The Directive 2008/48/EC refers to the loan agreements defined as agreements whereby a creditor grants or promises to grant a credit to consumers in the form of deferred payment, loan or other similar financial aid²⁵, with the exception of agreements on a permanent service or delivery of goods of the same species the consumer pays in installments during the provision of services or delivery of goods²⁶. In Article 2. (a-1) the Directive 2008/48/EC explicitly states which contracts are excluded from its application²⁷ and

²² Article 6 The Directive 2008/48/EC

²³ The concept of a continuous medium is defined in Article 3. (m) of the Directive 2008/48/EC as any instrument enabling a consumer’s personal storage, so it is available for a future usage during the period corresponding to the purpose of the information and allowing the unchanged reproduction of the stored data.

²⁴ Article 5 The Directive 2008/48/EC

²⁵ See Wilhelmson T.(2004) The Abuse of the “Confident Consumer” as a Justification for EC Consumer Law, 27 *Journal of Consumer Policy*, p. 317.; Howells G., Schulze R.(2009) Overview of the Proposed Consumer Rights Directive, in: Geraint Howells/Reiner Schulze (ed.), *Modernizing and Harmonizing Consumer Contract Law* p.8; Micklitz H.W. (2009), *The Targeted Full Harmonization Approach: Looking Behind the Curtain*, in: Howells G, Schulze R.(ed.), *Modernizing and Harmonizing Consumer Contract Law* pp.53,71.

²⁶ Article 3. (c) The Directive 2008/48/EZ

²⁷ Completely excluded contracts are the following: the loan agreements, where the claim is secured by a mortgage or other similar collateral means which is usually contracted with real estates in the Member States, or the right to property; loan agreements intended for the acquisition or retention of the ownership of a real property or an existing or planned building; the loan agreement, in which the total amount of the loan is less than 200 or greater than 75 000 Euros; lease agreements and lease obligations when acquiring the ownership is not provided in the treaty or a separate contract; loan agreements interest-free and loan contracts with the maturity up to 3 months in which the borrower arises only negligible costs; loan agreements which are for free deferred payment of existing debt; the loan agreement where an employer approves as his secondary activity to his employees according to legislative regulations and in general interest allocated to a limited number of customers, whether at a lower interest rate than the market or without interest, or under the other conditions; loan agreements concluded with an investment company within the meaning of Article 4. of the Directive 2004/39/EZ on market and financial instruments or with a credit institution within the meaning of Article 4. of the Directive 2006/48/EC; the credit agreement as a result of a court settlement or a settlement before any other legally authorized body; loan agreements where consumers must give a creditor a thing to pledge to insurance claims and where the responsibility is strictly limited to the pledged asset.

further, in Article 3., which contracts are partially excluded from the application. There are primary credit agreements in the form of the possible exceeding the balance on current account (Article 3. (d), and the credit agreement in the form of a tacit overdraft balance on current account (Article 3. (e)). As noted above, the Member States must ensure lenders credit rating consumers when entering the loan agreement²⁸. They should have an access to information or receive them directly from customers or from the database. The information in the database must be available to the other Member States of the European Union²⁹. The information are crucial for a creditor when deciding whether to approve a loan (Article 8 of the Directive 2008/48/EC). The loan agreement must be drawn up on a durable medium; each of the parties must be given a copy of the contract³⁰.

II. 2 Special Rights of Consumers

In order to achieve a higher level of consumer protection, the Directive 2008/48/EC regulates some specific consumer rights such as:

a) The right to cancel the loan agreement for an indefinite period

The consumer is free at any time and without any obligations to cancel the loan agreement concluded for an indefinite period, unless the parties agreed the notice period which should not be longer than a month³¹.

b) The right to terminate the loan agreement

The consumer has the right to terminate the loan agreement within fourteen calendar days without giving a reason. The period of fourteen days starts on the date of the loan agreement or the date when the consumer was delivered the contract terms and information according to Article 10. the Directive 2008/48/EC if that day occurred after the day of signing³².

²⁸ See Van Boom, W.H. (2009). 'The Draft Directive on Consumer Rights: Choices Made & Arguments Used', *Journal of Contemporary European Research*. Volume 5, Issue 3, pp. 452–464. Available at: <http://www.jcer.net/ojs/index.php/jcer/article/view/208/169>, access 10th August 2013

²⁹ Article 6. 1. The Directive 2008/48/EC

³⁰ See Wilhelmsson T.(2008) Full Harmonization of Consumer Contract Law?, *Zeitschrift für Europäisches Privatrecht*, p. 227.

³¹ Article 13. The Directive 2008/48/EC

³² According to Article 14. The Directive 2008/48/EC consumer may be entitled to terminate the agreement achieved in a way that allows him proving according the national law; notice of termination, which should be promptly sent on paper or another durable medium and be available to a creditor or be available to him; after termination, the creditor must, without delay and no later than thirty days after sending the statement of termination return the loan and the interest of the loan amount calculated from the date of the beginning of the day to repay the loan.

c) Related Agreements

The related loan agreement³³ is an agreement in which the loan serves solely for financing the delivery contract of certain goods or the provision of certain services, and objectively speaking, the two contracts constitute a single economic entity³⁴.

*d) Early Repayment*³⁵

The consumer has the right at any time to fulfill their obligations from the loan agreement partially or entirely, whereby they become eligible for the reduction of the total cost of the loan which consists of interest and costs of the remaining duration of the contract. Assuming that the pre-payment followed in a period fixed by NCS, the creditor has the right to demand a fair and objectively adequate compensation for possible costs directly linked to an early repayment of the loan³⁶.

e) The Transfer of Rights

When the creditor transfers their rights from the contract or transfers 'the loan agreement', the creditor retains all the objections he had to the first provider of credit, including the objection of compensation if the objection is allowed in the law of Member State³⁷. The Directive 2008/48/EC promotes the amicable solving of consumer's disputes occurring in consumer's credit contract, stipulating that the Member States must ensure the existence of consumer's disputes resolutions³⁸. The ultimate goal of this provision is actually a trend, which is promoted by the Directive 2008/48/EC, to facilitate a

³³ Article 3. (n) of the Directive 2008/48/EC

³⁴ A single economic unit exists when a supplier or provider of goods finances the loan himself in favor of a consumer, or when a lender is funded by the third party in the preparation or conclusion of the loan agreement and uses the cooperation of the supplier of goods or provider of services, or, when the certain goods or a service is expressly stated in the loan agreement.

³⁵ Article 16., Paragraph 1, The Directive 2008/48/EC – During the negotiations, the issue of the loan repayment before the agreed terms emerged as a major stumbling block. The achieved compromise solution gives creditors a limited right to compensation for an early loan repayment in the amount of 0.5 to 1 percent of the loan amount prepaid. This benefit, however, applies only to the fixed interest rates in cases where the benchmark rate is lower in the period of early repayment than at the time of the loan agreement conclusion. Moreover, the EU Member States may restrict the bank's request for compensation in cases when the amount of the repayment period of 12 months exceeds the maximum limit of 10 000 Euros.

³⁶ See Faure M.(2008) Towards a Maximum Harmonization of Consumer Contract Law, 15 Maastricht Journal of European and Comparative Law p. 441.

³⁷ Article 17., paragraph 1 The Directive 2008/48/EC

³⁸ See, Micklitz H.W (2009) The Targeted Full Harmonization Approach: Looking Behind the Curtain, in: Geraint Howells / Reiner Schulze (ed.), *Modernizing and Harmonizing Consumer Contract Law*, pp.66–67; Poncibò C.(2009) Some Thoughts on the Methodological Approach to EC Consumer Law Reform, 21 *Loyola Consumer Law Review*, p. 357, Faure M.(2008) Towards

cooperation between all bodies, in order to increase the share of cross-border loans, and to contribute to a cross-border dispute resolutions³⁹.

III. Conclusion

The European Union has been emphasizing consumer protection as one of the most important segments requiring a special attention for many years. In order to create the increased consumer protection and greater transparency of consumer loans at the unique European market, there was adopted the Directive 2008/48/EC. A new legislative framework, adapted to the changes at the financial market, has brought a number of innovations in the field of consumer protection among the Member States. Except that, unlike the previous Directive 87/102/EEC, based on the principle of a maximum harmonization, and regulated the minimum legislative framework for each of the Member States, the Directive 2008/48/EC on consumer credit contract in a matter of consumer lending introduced a number of novelties. The introduction of credit intermediaries as an entirely new entity in consumer lending, the need to inform consumers in the pre-contractual and contractual stages and obligation to conduct assessment of creditworthiness of consumers are some of the important novelties that we emphasized.

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Potrošačko kreditiranje u Evropskoj uniji

R e z i m e

Modaliteti zaštite potrošača kod potrošačkog kreditiranja u državama članicama Evropske unije su osigurani posebnom direktivom Evropskog parlamenta i Veća (Direktiva 2008/48/EZ o ugovorima o potrošačkom kreditu).

a Maximum Harmonization of Consumer Contract Law, 15 of Maastricht Journal of European and Comparative Law 2008, p.443.

³⁹ See Micklitz H.W, Reich N.(2009) Crónica de una Muerte Anunciada: The Commission Proposal for a “Directive on Consumer Rights”, 46 Common Market Law Review, p. 481.

Iako je ovo područje u Evropskoj uniji regulisano direktivama još od 1987. godine (Direktiva 87/102/EEZ), zbog ekonomske krize sve više je dolazilo do izražaja da potrošač, kao slabija ugovorna strana, nije zaštićen u dovoljnoj meri. Direktiva 2008/48/EZ o ugovorima o potrošačkom kreditu zasnovana je na načelu maksimalne harmonizacije, te uređuje minimalni zakonodavni okvir za svaku od država članica.

Ključne reči: potrošačko kreditiranje, zaštita potrošača, Evropska unija, regulatorni okvir.

References

1. The Council Directive of 22nd December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (87/102/EEC), OJ L 42;
2. Čulinović-Herc, E. (2005) Consumer Protection in Some Bank Contracts – Compliance with European Law, ZPFR, vol. 26, No 1;
3. The Directive 2008/48/EC of the European Parliament and of the Council of 23rd April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133/66;
4. Faure M. (2008) Towards a Maximum Harmonization of Consumer Contract Law, 15 of Maastricht Journal of European and Comparative Law;
5. Foster, N.(2010) EU Treaties & Legislation 2010–2011, 21st edition , Oxford University Press Inc.
6. Grandov Z, Đokić M.(2009) Advertising and Consumer Protection Law – Theory and Practice, no. 11–12;
7. Howells G., Schulze R.(2009) Overview of the Proposed Consumer Rights Directive, in: Geraint Howells/Reiner Schulze (ed.), Modernizing and Harmonizing Consumer Contract Law 8;
8. Jovanić T. (2004) Consumer Credit – Legal Economic Aspects, The Association of Banks of Republic of Serbia;
9. Loos M.B.M. (2008) Review of the European Consumer Acquis, Sellier. European law publishers, Munich;
10. Micklitz H.W. (2009), The Targeted Full Harmonization Approach: Looking Behind the Curtain, in: Howells G, Schulze R.(ed.), Modernizing and Harmonizing Consumer Contract Law ;

11. Micklitz H.W (2009) The Targeted Full Harmonization Approach: Looking Behind the Curtain, in: Geraint Howells / Reiner Schulze (ed.), *Modernizing and Harmonizing Consumer Contract Law*;
12. Micklitz H.W, Reich N.(2009) Crónica de una Muerte Anunciada: The Commission Proposal for a “Directive on Consumer Rights”, 46 *Common Market Law Review*.
13. Pasula D. (2007) Consumer protection in the contract of distance sale – the European and national law, *Law – Theory and Practice* , no. 1–2;
14. Petrić, S. (2007) Consumer Credit Agreement, in: Slakoper, Zvonimir (ed.), *Banking and Financial contracts*;
15. Poncibò C.(2009) Some Thoughts on the Methodological Approach to EC Consumer Law Reform, 21 *Loyola Consumer Law Review*;
16. Uzelac O., Protić D.(2011) Some issues of the legal aspects of electronic commerce Law – *Theory and Practice*, no. 10–12;
17. Van Boom, W.H. (2009). ‘The Draft Directive on Consumer Rights: Choices Made & Arguments Used’, *Journal of Contemporary European Research*. Volume 5, Issue 3. ; Available at: <http://www.jcer.net/ojs/index.php/jcer/article/view/208/169>, access 10th August 2013
18. Wetherill S.(2005) *EU Consumer Law and Policy* (2nd edition Edward Elgar, Cheltenham, ch1;
19. Wilhelmsson T.(2008) Full Harmonization of Consumer Contract Law?, *Zeitschrift für Europäisches Privatrecht*;
20. Wilhelmson T.(2004) The Abuse of the “Confident Consumer” as a Justification for EC Consumer Law, 27 *Journal of Consumer Policy*.