

Consumer Credit Advertising in the United Kingdom and Italy: the Shortcomings of the Consumer Credit Directive and Scope for Review

FEDERICO FERRETTI* AND BEATRICE BERTARINI

Abstract

This contribution examines comparatively the national laws of the United Kingdom and Italy transposing the provisions of consumer credit advertising as set by the Consumer Credit Directive on account of its review. The Consumer Credit Directive is a full harmonization measure that aims to create a single market in the area of consumer credit with a high level of consumer protection. At the same time, the provision on consumer credit advertising offers a legal choice to Member States as regards its transposition into domestic law. The United Kingdom and Italy have opted for different legal choices. The ultimate question is the extent to which the Directive achieves its goal of creating an internal market and an adequate standard of consumer protection in advertising credit services to consumers.

A comparison of the two jurisdictions suggests otherwise. This is due to a combination of the limited scope of the Consumer Credit Directive, its full harmonisation character, and the transposition of the legal choice explicitly left to Member States by the law.

Keywords

Consumer credit, advertising, EU Law, national transposition, legal choice, comparative law, full harmonization, review

1. Introduction and Background

This contribution analyses comparatively the national laws of the United Kingdom ('UK') and Italy transposing the provisions of consumer credit advertising as set by

* Federico Ferretti, Associate Professor of Economic and Financial Markets Law, University of Bologna (Italy). He is the author who conceptualised and framed the article. He is the author of sections 1, 2, 4, 5. Beatrice Bertarini, Researcher, University of Bologna (Italy) is the author of section 3 on Italian Law (pp. 255-259). The corresponding author is Federico Ferretti. He can be contacted at f.ferretti@unibo.it.

the 2008 Directive on consumer credit (the ‘Consumer Credit Directive’ or ‘Directive’).¹

The Consumer Credit Directive is a full harmonization measure that aims to create a single market and achieve a level playing field for consumer credits across the EU. It is meant to enable the free movement of credit providers and users of financial services across the EU, as well as the free movement of credit services cross-border,² especially in an increasingly digitalized credit market that undergoes a constant innovation of services. Ten years after its adoption – and following to a first report on the implementation of the Directive adopted in May 2014³ – the European Commission is due to undertake a review of the thresholds laid down by the Directive itself and monitor the way in which the regulatory choices of the Member States affect the internal market and consumer protection.⁴ On this basis, the European Commission has already launched a fully-fledged evaluation over its impact and achievements.⁵

Advertising – which finds no definition in the Consumer Credit Directive but in Directive 2006/114/EC on misleading and comparative advertising as “the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services”⁶ – is an essential marketing technique for lenders in order to reach their target customers and gain market share. This is increasingly the case in a highly competitive sector across the EU characterized by multiple rivals such as traditional banks, non-bank specialist credit providers, credit intermediaries, credit card companies, or innovative start-up providers or platforms of digital financial technologies (Fintech). Equally, advertising has a key relevance for consumers on the transactional decisions they make, especially given the heterogeneity of consumers ranging from well-informed or wealthy to various forms of vulnerable groups vis-à-vis the growing complexity of financial services.

¹ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133, 22.5.2008, p 66-92.

² See also the latest policy impetus of facilitating the provision and access of cross-border financial services set by the Consumer Financial Services Action Plan in the context of the Action Plan for a Capital Markets Union. See European Commission, Communication from the Commission, Consumer Financial Services Action Plan: Better Products, More Choice, COM (2017) 139 final. European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Action Plan on Building a Capital Markets Union, COM/2015/0468 final.

³ European Commission, Report from the Commission to the European Parliament and the Council on the Implementation of Directive 2008/48/EC on Credit Agreements for Consumers, COM (2014) 259 final.

⁴ By express provision of Art. 27(2) of the Consumer Credit Directive.

⁵ See European Commission, Staff Working Document, available at <https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-3472049_en>. See also European Commission, Public Consultation – Evaluation of the Consumer Credit Directive, 14 January 2019 – 8 April 2019, at <https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-3472049/public-consultation_en>.

⁶ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ L 376, 27.12.2006, p 21-27.

Therefore, the regulation of consumer credit advertising assumes a key role for competition, the creation of a EU level playing field, the protection of consumers and the enhancement of their confidence, and to an extent the prevention of over-indebtedness.

Article 4(1) of the Consumer Credit Directive stipulates that “any advertising concerning credit agreements *which indicates an interest rate or any figures relating to the cost of the credit* to the consumer shall include standard information in accordance with this Article.”⁷ (*Emphasis added*).

When the advertising makes such an indication, the elements of standard information to be used shall comprise the borrowing rate (fixed or variable or both) together with any charges in the total cost of the credit, the total amount of credit, the annual percentage rate of charge (APR – except in the case of credit agreements in the form of an overdraft facility where Member States may decide that the APR need not be provided), the duration of the credit agreement, the cash price and the amount of any advance payment in the case of a credit in the form of deferred payment for a specific good or service, and the total amount payable by the consumer and the amount of the instalments.⁸

By contrast, the obligation to provide the above standard information does not apply where national legislation requires the indication of the APR in advertising concerning credit agreements that does not indicate an interest rate or any figures relating to any cost of credit to the consumer.⁹ This is an option left to Member States to decide that credit agreements not containing references to the cost of the credit to the consumer do not need to include standard information. In these circumstances, Member States have the legal choice to apply domestic law.

The comparative analysis of transposed national credit advertising legislation is particularly timely for the upcoming review of the Consumer Credit Directive in light of the consequences of the legal choices undertaken by the Member States in implementing certain provisions of the Directive, to the extent allowed.

As a full harmonization legal instrument, national law should not exceed the terms of the legislation in those aspects regulated by the Directive and Member States may not maintain, introduce, or extend the scope of incompatible provisions in their domestic law.¹⁰ At the same time, some of the provisions have been left optional by the Consumer Credit Directive itself, leaving the Member States with a legal choice whether or not to implement their requirements.¹¹ Advertising is among the few provisions where the Directive left Member States with such a choice.

Hence, within the context of the review of the legal provisions of the Directive and the importance of advertising for consumer credit markets, the aim of this paper is to

⁷ Art. 4(1) of the Consumer Credit Directive, first limb.

⁸ Art. 4(2) of the Consumer Credit Directive.

⁹ Art. 4(1) of the Consumer Credit Directive, second limb.

¹⁰ For all, see Paul Craig and Gráinne De Burca, *EU Law*, 600 (Oxford: Oxford University Press, 2015).

¹¹ See Art. 2(5) and 2(6), Art. 4(1), Art. 4(2)(c), Art. 6(2), Art. 10(1), Art. 10(2)(g), Art. 14(2) and Art. 16(4) of the Consumer Credit Directive.

ultimately examine through the comparison the extent to which the consequences of the transposition of the legal choice of the Member States may affect the goals of the Directive to create an internal market in a sector that is subject to rapid developments and innovation characterized by new forms of lending and providers.

The UK and Italy are interesting jurisdictions to compare¹² for converging proportions of consumer credit to GDP and among the Member States with the highest specialist lender activity in the EU. At the same time, they have implemented the relevant provisions with the opposite legal choices allowed, where the UK has used the given legal choice and Italy has not.¹³

2. Consumer Credit Advertising in the United Kingdom

The regulation of consumer credit advertising has a long tradition in the UK and over time it has gone through lengthy and complex processes of reform. The last reform, effective from April 2014, provides for a highly detailed regulation of consumer credit advertising.

The Advertisements (Hire-Purchase) Act 1967 was the first regulatory instrument to control some aspects of the content of advertisements for credit by requiring certain essential information to appear in such advertisements. Likewise, the Hire-Purchase Act 1965 required the pre-contractual disclosure of the cash price of goods offered for disposal on hire-purchase or instalment sale terms. Since then, there have been several statutes and regulations affecting particular types of advertising in consumer loans.¹⁴ Conversely, the modern regulation of most consumer credit, hire and brokerage advertisements mostly derives from the Consumer Credit Act 1974. When originally enacted, it repealed previous legislation and it provided for the first time a coherent pattern of control over methods of seeking business in the consumer credit sphere, including advertising, canvassing, quotations and generally the display of information regarding credit and its cost. Over time, such a control was exercised partly under the provisions of the Consumer Credit Act 1974 itself (as updated or amended over time), partly under regulations made pursuant to its provisions, and partly through the guidance issued by the supervisory authority formerly in place (the Office of Fair Trading – OFT). Non-compliance with the norms or guidance of the

¹² As a side note, Brexit is looming and to some extent the choice of the studied jurisdictions may be subject to frustration. Arguably, however, the substance of the consequences of the legal options left by the Directive, and considerations over the legal techniques employed by the EU legislator, remain unaffected.

¹³ European Commission, Report from the Commission to the European Parliament and the Council on the Implementation of Directive 2008/48/EC on Credit Agreements for Consumers, COM (2014) 259 final.

¹⁴ Geoffrey Woodroffe, Christian Twigg-Flesner and Chris Willett, *Woodroffe & Lowe's Consumer Law and Practice*, 339 *et seq.* (10th ed., London: Sweet & Maxwell; 2016).

OFT could lead to sanctioning actions including the withdrawal of an advertiser's licence.¹⁵

The UK has implemented the Consumer Credit Directive with the Consumer Credit (EU Directive) Regulations 2010, SI 2010/1010 which revise the Consumer Credit Act 1974 as already amended in 2006. The so updated Consumer Credit Act remains the law that provides a framework to protect consumers when dealing with licenced lenders engaged in consumer credit business and/or ancillary credit business. All regulated consumer credit agreements entered on or after 1 February 2011 and certain aspects of pre-existing agreements entered before that date have to comply with the new amended regime (Regulations 99 and 100 of the 2010 Regulations).¹⁶

2.1. *The Regulation of Financial Promotions and Communications*

Within the above framework concerning the regulation of consumer credit in general, the Financial Services Act 2012 amending the Financial Services and Markets Act 2000 ('FSMA') has introduced a new institutional framework for the financial system. Under the new structure, with effect from 1 April 2014 the Financial Conduct Authority ('FCA') is the regulator in charge of ensuring the proper functioning of the financial market and the protection of consumers. It takes-over the functions previously exercised by the Financial Services Authority ('FSA') and the OFT, and it has set its rules in the FCA Handbook ('CONC'), which sits within the Consumer Credit Sourcebook section concerning the regulation of credit-related activities. Under this restructuring, from 1 October 2014 the FCA has issued new rules drawing upon the Consumer Credit Act (as amended over time) and the previous guidance from the OFT.¹⁷

Companies offering services such as consumer loans, payday loans, credit cards, hire purchase and debt management or advice have to be registered with the FCA. Moreover, Section 21 of the FSMA provides for the regulation of any 'invitation or inducement to engage in investment activity'. This provision is of wide application and it has been extended to consumer credit and consumer hire also with effect from 1 April 2014, thus effectively replacing the regime in place until that date under the Consumer Credit Act 1974 (as amended). Under the FSMA a financial promotion must be issued or approved by the FCA, unless exempt. A breach of this requirement may incur a fine, up to two years in prison, and unlimited financial liability to consumers or investors.

Significantly, the regulation of advertisements was within the first sweep of legislation that was originally made under the Consumer Credit Act 1974 (as amended) into the new consumer credit chapter of the CONC. The sweep was made effective by the Consumer Credit (High-Level Standards and Interim Regime) Instrument 2013 (FCA 2013/68) made by the Board of the FCA on 26 September 2013. This Instru-

¹⁵ E.g. see Woodroffe and Lowe, *supra* note 14; Iain Ramsay, *Consumer Law and Policy*, 361 *et seq.* (3rd ed., Oxford: Hart Publishing, 2012).

¹⁶ *Ibid.*

¹⁷ Financial Conduct Authority, *Consumer Credit Sourcebook (CONC)*, CONC 3 (1 April 2014).

ment was made by the FCA in the exercise of its powers and pursuant to related provisions in FSMA. The CONC 3 applies to all firms that communicate or authorise for communication, a financial promotion, or communication in respect of a ‘credit-related regulated activity’.

At the same time, the FSMA (Regulated Activities)(Amendment) (no 2) Order 2013 has repealed the original sections relating to advertising and seeking business of the Consumer Credit Act 1974 (as amended), alongside other previously existing ancillary legislation contained in the Consumer Credit (Advertisements) Regulations 2004 and the Consumer Credit (Advertisements) Regulations 2010.

The UK is one of the four EU Member States that have used the exception provided for in the second paragraph of Article 4(1) of the Consumer Credit Directive, according to which the obligation of including standard information does not apply where national legislation requires the indication of the annual percentage rate of charge in advertising concerning credit agreements. Therefore, it requires the indication of the APR in advertising concerning credit agreements which does not indicate an interest rate or figures relating to any cost of credit to the consumer, but not the ‘standard information’ listed in Article 4(2) of the Consumer Credit Directive.¹⁸

2.1.1. *Scope of Application*

Prior to its repeal, the law did not define an ‘advertisement’ but merely indicated that every form of advertising was caught, through whatever medium it was projected. The definition covered all forms of media used to advertise either consumer credit or hire facilities and it extended to any form of advertising, visual or acoustic, written or oral, including advertising on the radio or television, in-store or on the Internet (Section 189(1) of the Consumer Credit Act 1974).¹⁹ Under the current regulation, CONC 3 refers to financial promotions and communications with customers. Its scope is wider than before as it applies to all financial promotions and communications with customers in relation to a credit agreement, and not simply to ‘advertisements’.

At the same time, CONC 3.1.7 R(1) provides that CONC 3 does not apply to a financial promotion or communication that consists of only one or more of the following: (a) the name or trading name of the firm (or its appointed representative); (b) a logo; (c) a contact point such as address (including email address), telephone, fax number and website address; (d) a brief factual description of the type of product or service provided by the firm. The effect of the exceptions is that detailed information about the advertised credit cannot be given in this simple form of financial promotion. However, as expressly stated under CONC 3.1.8, CONC 3.1.7 R(1) remains subject to compliance with the rules specified in CONC 3.1.7 R(2) which require the inclu-

¹⁸ The other three Member States are Cyprus, Sweden, and Hungary. See European Commission, *Report from the Commission to the European Parliament and the Council on the Implementation of Directive 2008/48/EC on Credit Agreements for Consumers*, COM(2014) 259 final.

¹⁹ For example, in the case *Nine Regions Ltd (t/a Log Book Loans) v. The Office of Fair Trading* [2010] UKFTT 643 (GRC) it was held that the sending of text messages to selected existing customers whose payment history indicated that they might qualify for a top-up loan, constitutes the publication of a credit advertisement within the meaning of the Consumer Credit Act 1974, s 189(1).

sion of a representative APR in specified circumstances, that is an APR at or below which the firm communicating or approving the financial promotion reasonably expects, at the date on which the promotion is communicated or approved, that credit would be provided under at least 51% of the credit agreements which will be entered into as a result of the promotion. Firms should not include any information not referred to in CONC 3.1.7 R(1) and should avoid the use of names, logos or addresses, for example, which attempt to convey additional product or cost-related information.

2.1.2. Core Obligations

The substantive rules on advertising and price information are laid out in CONC 3.3.1 R, according to which a lending firm must ensure that a communication or a financial promotion is clear, fair and not misleading. The guidance at CONC 3.3.10 G provides non-exclusive examples of practices that are likely to contravene the clear, fair and not misleading rule in CONC 3.3.1 R. The practices include stating or implying that the firm is a lender (when this is not the case), misleading a customer as to the availability of a particular credit product, using false testimonials endorsements or case studies and, in relation to debt solutions, claiming or implying that a customer will be free of debt in a specified period of time or making statements emphasising a debt-free life or that a debt solution is a stress free or immediate solution, emphasising any savings available to a customer by proposing to reschedule a customer's debts without explaining that a lender is not obliged to accept less in settlement of the customer's debts than it is entitled to, nor to freeze interest and charges and that the result may be to increase the total amount payable or the period over which it is to be paid and to impair the customer's credit rating, etc. Finally, CONC 3.3.11 G offers guidance on misleading introductions. It provides that misleading a customer as to the availability of a particular credit product is likely to include stating or implying that the firm will introduce the customer to a provider of a standard personal loan based on repayments by instalment or of an overdraft facility on a current account or of a credit card, but instead introducing the customer to a provider of 'high-cost short-term credit', for example a 'pay day' loans.

Next, according to CONC 3.3.1(1A), firms must ensure that each communication and each financial promotion is: (a) clearly identifiable as such; (b) accurate; (c) balanced and, in particular, does not emphasise any potential benefits of a product or service without also giving a fair and prominent indication of any risks; (d) sufficient for, and presented in a way that is likely to be understood by the average member of the group to which it is directed or by which it is likely to be received; and (e) does not disguise, omit, diminish or obscure important information, statements or warnings.

A firm must ensure that, where a communication or financial promotion contains a comparison or contrast, the comparison or contrast is presented in a fair and balanced way and is meaningful [CONC 3.3.1(1B)]. A comparison or contrast may be a comparison or contrast with another person, or with another product or service, whether offered by the firm or by another person (CONC 3.3.8 G). Where a communication or a financial promotion contains a premium rate telephone number for a

customer response, it must include the price per minute of a call, the likely duration of calls and the total cost that the customer would incur if a call is made for the full estimated duration. This information must be given in a 'prominent way' (CONC 3.3.9 G).

In turn, CONC 3.3.2 R provides that firms must ensure that a communication or financial promotion uses plain and intelligible language, it is easily legible (or, in the case of any communication or promotion given orally, it is clearly audible), specifies the name of the person making the communication or communicating the financial promotion or the person on whose behalf the financial promotion is made and, in the case of a communication or financial promotion in relation to credit broking, indicates to the customer the identity of the lender (where this is known).

In a financial promotion or a communication to a customer, firms must not state or imply that credit is available regardless of the customer's financial circumstances or status (CONC 3.3.3(1) R). However, CONC 3.3.3(2) R specifies that this rule does not apply to a financial promotion or communication relating to a credit agreement under which a person takes an article in pawn and the customer's total financial liability (including capital, interest and all other charges) is limited under the agreement to the proceeds of sale which would represent the true market value of the article or articles pawned by the customer. It is clarified that a trading name, internet address or logo could fall within this rule and that a statement or an implication that credit is guaranteed or pre-approved, or not subject to any credit checks or other assessment of creditworthiness, might also contravene CONC 3.3.3R.

In addition to the above, CONC 3.3.6 G seeks to give some additional guidance on the clear, fair and not misleading rule. It provides that if a firm in a communication or a financial promotion names the FCA, the Prudential Regulation Authority or both as the regulator (or regulators) of the firm and refers to matters that are not within the remit of either or both of them, then it must ensure that the communication or financial promotion makes it clear which matters are so regulated and which are not.

Furthermore, under CONC 3.3.7 G when communicating information, firms are advised to consider whether the omission of any relevant fact would result in the information given to the customer being insufficient, unclear, unfair or misleading.

2.1.3. Content of Financial Promotions and Communications

CONC 3.5.3 R prescribes the content of financial promotions. Where a financial promotion includes a rate of interest or an amount relating to the cost of credit, whether expressed as a sum of money or a proportion of a specified amount, the financial promotion must also include a representative example (in accordance with CONC 3.5.5 R) and specify a postal address at which the person making the financial promotion may be contacted. This rule does not apply where the financial promotion includes a representative APR and does not indicate any other rate of interest. An annual rate of interest for the purposes of CONC 3.5.3 R above is not limited to an annual rate but also includes a monthly or daily rate and a reference to 0% credit. An amount relating to the cost of credit includes the amount of any fee or charge or any repayment of credit (CONC 3.5.4 G). The items of information to be included within

the representative example required by CONC 3.5.3 R (1) include the rate of interest, whether it is fixed or variable or both, expressed as a percentage applied on an annual basis to the amount of credit drawn down, the nature and amount of any other charge included in the total charge for credit, etc. The items of information must be specified in a clear and concise way, accompanied by the words ‘representative example’, presented together with each item of information being given equal prominence, and given greater prominence than any information relating to the cost of credit except any statement relating to an obligation to enter into a contract for an ancillary service [CONC 3.5.5. R (1)]. As affirmed under previous case-law, the APR should not be the driver of the interest rate; instead the monthly interest rate and the annual interest rate are what they are stated to be.²⁰

2.1.4. *Representative Example*

Guidance on the representative example is given at CONC 3.5.6 G. This should not be limited to being representative of agreements featured within the financial promotion if the firm which either communicates it or approves it expects other agreements to be entered into as a result, whether with that person or a third party. Moreover, if a rate of interest applies for only a limited period of time, the duration of that period and the rate or amount following that period, if known or ascertainable, should be shown.

The provisions of CONC 3.5.7 R (1) set forth other types of financial promotion that must include the representative APR. These are financial promotions which indicate or imply in any way that (a) credit is available to persons who might otherwise consider their access to credit restricted, (b) any of the terms on which credit is available is more favourable either for a limited period or generally than corresponding terms applied in any other case or by any other lender, or (c) the way in which the credit is offered is more favourable than corresponding ways used in any other case or by any other lenders. Equally, under the same provision, financial promotions must include the representative APR in cases where there is any kind of incentive to apply for credit or to enter into an agreement under which it is provided. CONC 3.5.7 R (2) specifies that the representative example must be given greater prominence than any indication or incentive of the types set out above.

Last, CONC 3.5.9 R makes clear that the APR must be shown as “% APR”, where it is subject to change it must be accompanied by the word ‘variable’, and the representative APR must be accompanied by the word ‘representative’.

2.1.5. *Ancillary Services and Security*

CONC 3.5.10 R(1) states that a financial promotion must include a clear and concise statement in respect of any obligation to enter into a contract for an ‘ancillary service’ where the conclusion of that contract is compulsory in order to obtain the credit or to obtain it on the terms and conditions promoted, and where the cost of that ancillary service cannot be determined in advance. The statement required must be no less

²⁰ *Sternlight v. Barclays Bank plc* [2010] EWHC 1865 (QB).

prominent than any information required to be included by CONC 3.5.5 R(1) and be presented together with any representative APR included.

Where a financial promotion concerns a facility for which security is or may be required, it must state that security is or may be required as well as the nature of the security (CONC 3.5.11 R).

2.1.6. Restricted Expressions

CONC 3.5.12 R sets out a list of ‘restricted expressions’, i.e. expressions which must not be used in a financial promotion. Examples include the term ‘overdraft’ or any similar expression as describing any agreement for running-account credit (except where an agreement enables a borrower to overdraw on a current account), or the term ‘no deposit’ or any similar expression except where no advance payments are to be made. CONC 3.5.12(2) provides that a financial promotion must not include in relation to any repayment of credit the expression ‘weekly equivalent’ or any expression of like effect or any expression of any other periodical equivalent unless weekly repayments or other periodical payments are provide for under the agreement.

2.1.7. Other Provisions

To conclude, the CONC set out provisions regarding financial promotions and communications made by credit brokers (CONC 3.7), financial promotions and communications by debt counsellors and debt adjusters (CONC 3.9), and promotions not in writing (CONC 3.10)

On a final note, if a financial promotion has not been published or approved by an authorised person, this could lead to a potential breach of s.21 of the FSMA and a criminal offence. Furthermore, if rules in the CONC have been breached, a firm would open itself up to the full range of enforcement action available to the FCA. *Inter alia*, the FCA has the ability to ban financial promotions. Accordingly, moreover, as a side effect the firm would have to deal with the negative publicity this would create, as well as the costs of withdrawing the offending material.

2.2. Advertising and the CAP Code

Even if from April 2014 the FCA and its conduct rules have taken over from previous arrangements, ‘non-technical’ aspects of marketing communications of consumer credit (for example, offence, social responsibility, superiority claims, fear and distress and competitor denigration) are still fall within the remit of the Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (CAP Code). This is the rulebook for all non-broadcast advertisements, sales promotions and direct marketing communications in the UK under the Advertising Standards Authority (ASA). In this respect, there is a partial overlap with the regulation of financial services under the FCA. The ASA assesses complaints about broadcast ads and liaises with the FCA on technical matters covered by their rules. The CAP Code requires ads to comply with

relevant legislation and marketers should therefore ensure that ads comply with both FCA and CAP Code requirements. For instance, early decisions include some rules for debt management firms and high-cost short term credit (payday) lenders. Examples are the requirement for a risk warning in payday loan ads, and additional guidance clarifying whether references to ‘speed’ or ‘ease’ in the granting of credit constitute an incentive that is included in the APR.²¹ The latest case of *Santander UK plc*²² offers an illustration of the remit of the ASA taking into account the FCA regulations. A TV ad for the firm’s credit card showed customers making purchases and carrying out various other activities, and featured a voiceover saying: “With the new [firm’s name] credit card you get cashback on all your purchases ... there’s no fee when spending abroad ... and 0% on balance transfers for 40 months ...”. On-screen text displayed: “0.5% cashback. Retailer and ATM fees may apply abroad. 1% Balance Transfer Fee. Representative Example 0% pa on purchases for six months, then 15.9% pa (variable). Equivalent to 21.7% APR representative (variable) based on £1,200 credit limit. Monthly fee £3”. However, complaints suggested that the representative APR was not given adequate prominence within the ad. The ASA noted that CONC rule 3.5.7 (1) states that an ad must include a representative APR if it included, among other elements, an incentive to apply for credit or a favourable comparison relating to credit. The ASA considered that, in the context of an ad that invited consumers to apply for a credit card, cashback on all purchases and no fee when spending abroad were likely to be seen as incentives to apply for credit, and also as favourable comparisons with other credit providers. The ad featured three interest rates (0%, 15.9% and the representative APR). Consequently, requirements to include a representative APR as well as a representative example were triggered. CONC 3.5.7 (2) in relation to the representative APR and CONC 3.5.5 (d) in relation to the representative example provide that the representative APR and the representative example must be given no less prominence than the information which triggered their inclusion. In the ad, the representative APR and the representative example were presented in on-screen text which included other information and was present at the bottom of the screen for half of the ad’s duration. The ASA considered the size of the text and the time on-screen was sufficient to be clear to viewers. However, in the context of the advertisement, the ASA considered the visual footage of customers added prominence to the features described in the voiceover. The information in on-screen text was therefore likely to be seen as less prominent than information given verbally, and that, in this case, the use of on-screen text to present the representative APR and representative example was unlikely to meet the requirements of CONC. For that reason, the ad was considered to breach the CAP Code. As a consequence of the decision, the ad could

²¹ See the Advertising Standards Authority (ASA) at <<https://www.asa.org.uk/news/consumer-credit-advertising.html>> (last accessed 09/01/2018). In particular, in section 14 the CAP Code, whilst recognising that financial advertising is subject to other numerous statutes and regulations, provides general guidance on advertisements for financial products and services.

²² *Santander UK plc* (3 May 2017).

not be broadcasted again in that form and the firm was told to ensure its advertising complied with the requirements of CONC.

Other examples of cases concerning credit to consumers are *Sunny Marketing*,²³ *First Finance (UK) Ltd*,²⁴ *FCL Consumer Finance Ltd* and *Stop Go Networks Ltd*,²⁵ and *Elevate Credit International Ltd t/a Sunny*.²⁶

²³ In *Sunny Marketing* (12 December 2012) a website for a short-term loan provider Claimed that “Loan 100 Pounds. Period 10 Days. Loan fee 15 pounds. Repayment 115 Pounds. Transfer guaranteed within a few minutes!”. Underneath, claims stated “JUST SIGN UP ONE. The signup process is really easy and will take you only a few minutes to complete. APPLY FOR A LOAN. Need money quickly? Just log in and let us know”. Immediately beneath that text, it featured an image of a couple, where the woman was looking pensive and with a shopping bag over her shoulder. Next to that, the text stated “£100 ISSUED IN FEW MINUTES”. Immediately beneath, it showed another couple smiling and the woman was carrying a number of shopping bags. At the bottom of the web page, claims stated “Representative APR 16,831%. Representative example: Amount of credit £100 for 10 days. Total amount repayable £115. Interest £10.00. Interest rate 365% fixed. Transfer & credit check fee £5.00. Representative 16,831% APR”. The complainant challenged whether the claims and images of shopping bags were irresponsible because they trivialised the decision to take out a loan and encouraged irresponsible spending. The case was upheld and found to breach rules on social responsibility. The ASA found that there was no context to the images to explain why the woman in the image may have needed the money. The ASA found that the image suggested that she obtained a high interest, short-term loan quickly and she had spent that borrowed money to go on a shopping trip to make non-essential purchases. They considered the website’s depiction of using a high interest, short-term credit to fund such a shopping trip was likely to be seen as encouraging frivolous spending of that borrowed money. They therefore concluded that the ad was irresponsible.

²⁴ In *First Finance (UK) Ltd* (19 June 2013) the ASA ruled that a text stating “Hi Mate I’m still out in town, just got £1000 in my account from these guys [website address of company]” was irresponsible because it suggested a loan should be used to fund a social life

²⁵ In *FCL Consumer Finance Ltd* (25 March 2015) and *Stop Go Networks Ltd* (26 February 2014), the ASA found that the images in the ads, along with the claims to “treat yourself and a loved one” were irresponsible because they trivialised the decision to take out a loan and encouraged frivolous spending. They upheld the case and considered that taking a high-interest, short-term loan was a step that should only be taken following careful consideration and considered that marketers should take care to advertise those products responsibly, thus breaching the CAP code rule on responsible advertising.

²⁶ In *Elevate Credit International Ltd t/a Sunny* (1 July 2015) a TV ad for the company’s short-term loans featured scenes of a market trader at work. The voiceover said: ‘When Ben needed money to expand his market stall, he turned to [Name of Company]. Because they give him the flexibility to repay early, without penalties ... Discover [website address] today. The flexible way to borrow from £100 up to £2,500.’ On-screen text said: ‘Warning: Late repayment can cause you serious money problems. For help go to [website address]’ and ‘Subject to status and a credit assessment. Terms and conditions apply. 18+’. It was challenged whether the ad was compliant with financial advertising rules as it did not mention the Annual Percentage Rate (APR) of interest. The ASA challenged whether the company’s claims breached the CAP Code by presenting consumers’ legal rights as a unique feature of the offer. The ASA noted that, according to CONC, ads for financial products which included certain triggering information also needed to include the representative APR. Such information included an incentive to apply for credit, or enter into agreement under which credit was provided. The ASA considered the references to flexibility, and to early repayment without penalties, amounted to an incentive to apply for credit, in which case the representative APR should have been included. The ASA also considered the claims suggested those features were unique to the company, and as such not available via their competitors, and therefore also constituted a comparative indication. They considered that the representative APR should therefore also have been disclosed for that reason.

3. Consumer Credit Advertising in Italy

3.1. *The Consumer Code*

The Consumer Code issued in 2005 (Legislative Decree of 6 September 2005, no. 206), having the aim of simplifying a complex regulatory framework, included articles dedicated to consumer credit. The regulation of consumer credit appears to be due to multiple regulatory sources but only following the implementation of the Directive 2008/48/EU it came to an organic legislation in the Italian legal system.

The current regulations on consumer credit, starting with Legislative Decree no. 141 of 2010 – which came into force on 17 October 2012 in implementation of Directive 2008/48/EU – intervenes to modify the previous legislation. It provides that consumer credit shall be regulated in the Consolidated Law on Banking.²⁷ In order to create a reference standard on consumer credit in the Italian legal system, the Consolidated Law on Banking dedicates fifteen articles to consumer credit which provide for its various aspects, starting from the identification of what it is meant by consumer credit as well as specifying, for example, pre-contractual obligations, advertising obligations, the characteristics of the contract, the consumer's right of withdrawal.

In a detailed analysis of the discipline dictated in the Consolidated Law on Banking for consumer credit in the implementation of Directive 2008/48/EU, the starting point is art. 121 where the different expressions related to consumer credit find definition. The norm essentially reproduces Article 3 of the Consumer Credit Directive. It establishes that by 'consumer' it is meant a natural person who is acting for the purposes of his or her business, trade, craftsperson status or profession. A 'creditor' is a person who offers or stipulates credit agreements being authorized by the relevant public authority²⁸ to provide loans to professional securities in Italy. A 'credit agreement' is the contract with which a creditor grants or promises to grant a credit in the form of a deferred repayment, loan or other similar financial accommodation. Finally, the 'total cost of credit' is defined as the total cost of credit, including commissions, and any other kind of fees, except notarial costs (if any), which the consumer is required to pay in connection with the credit agreement and which are known to the creditor – lender in turn, the 'annual percentage rate of charge' is defined as the total cost of credit to the consumer expressed as an annual percentage of the total amount of credit.²⁹

It should be noted that the following art. 122 of the Consolidated Law on Banking identifies a series of cases to which the provisions concerning consumer credit do not apply; these cases reproduce and extend Article 2 of the Consumer Credit Directive and are: a) loans of less than 200 euros or more than 75,000 euros; b) supply contracts

²⁷ Consolidated Law on Banking Legislative Decree of 1st September 1993, n 385.

²⁸ In Italy the public authorities that have the power to authorize are the Bank of Italy and CONSOB (the Italian authority for the supervision of financial markets).

²⁹ The same article also defines the linked credit agreement, the total amount of credit, the credit intermediary, the overflow, the durable support.

provided for by Arts 1559 et seq. of the Civil Code and procurement contracts referred to article 1677 Civil Code; c) loans in which the payment of interest or other charges is excluded; d) loans for which the consumer is obliged to pay only commission for an insignificant amount, if the repayment of the credit must take place within three months from the use of the sums; e) financing for the purchase or retention of a property right on a land or a built or planned property; f) loans secured by a mortgage on real estate; g) loans, granted by banks or investment firms, aimed at carrying out a transaction involving financial instruments; h) loans granted on the basis of an agreement reached before a judicial authority or another authority established by law; i) extensions of the payment of a pre-existing debt granted free of charge by the creditor; l) loans secured by a pledge on a movable asset, if the consumer is not obligated for an amount exceeding the value of the asset; m) lease contracts; n) microcredit established on article 111 of the Consolidated Law on Banking and other credit agreements identified by law relating to loans granted to a limited public, for purposes of general interest, which do not provide for the payment of interest or provide for rates lower than those prevailing on the market or at other conditions more favourable to the consumer than those prevailing on the market and at interest rates not higher than those prevailing on the market; o) credit agreements in the form of overdraft facility on the current account.

Having defined the scope of consumer credit, the Consolidated Law on Banking outlines a consumer protection system that aims to regulate the various phases of the contractual relationship.

First of all, the Consolidated Law on Banking, implementing the provisions of art. 20 of Directive 2008/48 on the regulation of creditors – which establishes that “Member States shall ensure that creditors are supervised by a body or authority independent from financial institutions, or regulated” – provides that this task must be fulfilled by the Bank of Italy.

At the same time, the Consolidated Law on Banking attributes powers on consumer credit to various authorities, such authorities being the Bank of Italy, the Interministerial Committee for Credit and Savings, and the Minister of Economy and Finance. A central role is assigned to the Bank of Italy, which not only controls consumer credit transactions, but it also has general powers to regulate the banking market.

In fact, the Consolidated Law on Banking establishes that the Bank of Italy defines, in accordance with the resolution adopted by the Interministerial Committee for Credit and Savings,³⁰ the methods for calculating the annual percentage rate (APR) (Article 121.3); it specifies the characteristics and methods of disclosure of advertisements (Article 123.2); it defines provisions on pre-contractual information and clarifications to be provided to the consumer (Article 124.7) and on the subject of verification of the creditworthiness assessment (Article 124-bis.3); it establishes the information and

³⁰ See Francesco Mazzini, *Credito al consumo: il CICR delega Banca d'Italia alla definizione delle regole per gli intermediari finanziari. Vanno ricomprese nella percentuale del TEAG le spese per ottenere il finanziamento richiesto* 11 Guida al Diritto 54-58 (2011).

conditions that must contain the contracts (Article 125 – bis.1); it establishes the contents and methods for communicating the periodic information that the consumer must receive (Article 125 bis.4); it defines the methods by which the consumer must be informed in case of assignment of the credit or credit agreement (Article 125 – septies.2); finally, it specifies provisions on the subject of overriding (Article 125 – octies.3).

As far as it concerns the specific regulation of advertising in consumer credit, art. 123 of the Consolidated Law on Banking represents the instrument for the normative protection of consumers under which they can compare the characteristics of the various offers on the market.³¹ Article 123, is without prejudice to the provisions of the Consumer Code in Part II, Title III dedicated to commercial practices, advertising and other commercial communications (this part of the consumer code deals in detail with unfair, misleading and aggressive commercial practices). More specifically, it specifies that advertisements must indicate clearly, concisely and graphically the information related to the interest rate, the total amount of credit, the annual percentage rate of charge, the presence of any ancillary services necessary to obtain the credit or to obtain it under the advertised conditions, the duration of the contract (if determined), and finally if it can be determined in an anticipated manner what is the total amount owed by the consumer as well as the amount of the individual instalments.

In addition to outlining this reference framework, art. 123 specifies that it is the task of the Bank of Italy – in accordance with the deliberations of the Interministerial Committee for Credit and Savings – to specify the characteristics of the information to be included in the advertisements and the methods of disclosure.

It should be noted that in the implementation of the provisions of the Interministerial Committee for Credit and Savings by decree dated 3 February 2011 no. 117, art. 1 specifies that the purpose of the decree is to spread responsible practices in the granting of credit whilst ensuring a high degree of consumer protection. To this end, it is established that the information and explanations should be provided correctly, clearly, completely and concisely, so that the consumer may become aware and informed of the different characteristics that distinguish the contracts offered by different lenders in the market.

It is also specified that the information provided must be characterized by graphical readability, syntactic simplicity, lexical clarity, structural logic and it should be consistent with the communication instrument chosen. Finally, Article 4 of the decree establishes that it is the duty of the Bank of Italy to specify how to disclose advertisements related to credit agreements.

³¹ The Consolidated Law on Banking seems to refer to whereas number 18 of Directive 2008/48 which states that “this Directive should contain specific provisions on advertising concerning credit agreements as well as certain items of standard information to be provided to consumers in order to enable them, in particular, to compare different offers”.

3.2. *The Role of the Bank of Italy*

In the implementation of the provisions of the decree, the Provision of 29 July 2009 and subsequent amendments entitled “Transparency of banking and financial transactions and services; fairness of relations between intermediaries and customers” aims to make known to customers the essential elements of the contractual relationship and the variations that may occur; the principles of transparency and correctness of customer relations are recalled by the provision to ensure that the creditor holds them in the conclusion of credit contracts.

Section VII of this Provision is dedicated to credit to consumers specifying both general provisions and provisions relating to contracts and communication to customers, as well as in paragraph 4 detailing the regulation of advertising and pre-contractual information. First of all, this section, considering precisely the importance of pre-contractual information, highlights how in the pre-contractual phase, i.e. the phase that leads the consumer to choose a particular product, it is necessary to define specific obligations for lenders in order to protect the consumer. In other words, it can be maintained that the creditor must provide the consumer with the necessary information to enable him or her to compare the different credit offers on the market so that the consumer can make an informed decision about the contract to be concluded.³² It is also specified that the creditor provides clarifications free of charge and in an appropriate manner to the consumer so as to allow the latter to assess whether the credit agreement is suitable for his or her needs and/or financial situation.³³

The information should be provided by the creditor to the consumer in a standard document called “Standard European Consumer Credit Information”, which must be prepared by the creditor in accordance with a model attached to the Provision (Annex 4 C of the Provision); the creditor can also provide the consumer with additional information that must be reported in a separate document; the consumer also has the right to obtain a copy of the contractual text from the creditor.³⁴

The section dedicated to advertising and pre-contractual information first of all defines what it is meant by advertising, i.e. all messages disseminated in any form, of promotional nature, and any other non-personalized documentation with the function of making known the conditions of the offer of one or more transactions or services to potential customers, thus advertising the conditions offered to the majority of customers.³⁵

³² Page 73 “Transparency of banking and financial transactions and services; fairness of relations between intermediaries and customers”.

³³ Page 77 “Transparency of banking and financial transactions and services; fairness of relations between intermediaries and customers”.

³⁴ Page 76 “Transparency of banking and financial transactions and services; fairness of relations between intermediaries and customers”.

³⁵ Page 72 “Transparency of banking and financial transactions and services; fairness of relations between intermediaries and customers”.

The provision clarifies that the information must be reported in a clear, concise and detailed form. In addition, it specifies that the information to be reported should include: the interest rate reported on an annual basis, specifying whether fixed or variable; expenses, however denominated, included in the total cost of the credit; the total amount of the credit; the annual percentage rate of charge; the need to sign contracts relating to one or more ancillary services associated with the credit agreement (this information should be included only if the costs relating to the ancillary services associated with the credit agreement have not been included in the annual percentage rate of charge because they are not determinable in advance); the duration of the credit agreement; the total amount payable by the consumer and the amount of the individual instalments any time this information can be determined in advance.

Among all this information, greater importance must be placed for the annual percentage rate of charge.³⁶

The importance that is attributed to the annual percentage rate of charge is also highlighted by the way in which the provision details this rate.³⁷ In fact, it is specified that the annual percentage rate of charge makes equal, on an annual basis, the discounted values of all existing or future commitments (withdrawals, reimbursements and expenses), subject to the agreement between the creditor and the consumer, specifying the algorithm used to calculate it. The rate must also include interests and all costs, including any fees of credit intermediaries, commissions, taxes and any other expenses that the consumer must pay in connection with the credit agreement and which the creditor is aware of. Exclusions are notary fees (if any), as well as costs of ancillary services (costs related to ancillary services may be excluded from the rate calculation, but in this case the difference must be clearly indicated). It includes the costs of managing the account on which payment transactions and withdrawals are recorded, as well as the costs related to the use of means of payment allowing payments and withdrawals and all other costs related to payment transactions.³⁸ The calculation of the rate excludes any penalties that the consumer is required to pay for the non-execution of any of the obligations established by the credit agreement, including default interest and interests on arrears. Likewise, the expenses that are charged to the consumer at the time of purchase, other than the purchase price, are excluded from the calculation regardless of whether it is the purchase of goods or services, by payment in cash or by credit.

³⁶ Giuseppe Versaci, *Credito al consumo: obblighi formali ed 'effettività' rimediabile nel canone della Corte di Giustizia* 4 I Contratti 432-438 (2017).

³⁷ Art. 3 of the Decree of the Ministry of the Economy and Finance states that it is the task of the Bank of Italy to define the methods for calculating the rate.

³⁸ Page 80 "Transparency of banking and financial transactions and services; fairness of relations between intermediaries and customers". As it concerns the inclusion in the rate of a voluntary insurance policy see Dario Farace, Francesco Macario and Francesco Mezzanotte, *Osservatorio dell'arbitro bancario finanziario* 6 I Contratti 669-672 (2017).

4. Full Harmonisation and Transposition and Legal Choice

An analysis of the transposing domestic laws of the UK and Italy portrays very diverse national frameworks in the regulation of consumer credit advertising.

On the one hand, it appears immediately apparent the difference in scope of the national provisions, where the UK shows a detailed and extended regulation of the multitude of aspects surrounding consumer credit advertising and consumer protection not covered by the Consumer Credit Directive, as well as its enforcement structure and centralised regulatory competencies.

On the other hand, even within the scope of the Consumer Credit Directive, there are substantial differences in its transposition due to the different legal choices made, as allowed by the Directive itself.

4.1. *Distortive Effects of Full Harmonisation*

The legitimacy of the extended scope and detailed regulation of consumer credit advertising in the UK derives from maximum harmonisation and it is supported by the case-law of the Court of Justice of the EU (CJEU). In *SC Volksbank România* – when asked to consider the scope of domestic transposition of maximum harmonisation of the Consumer Credit Directive – the CJEU held that the Consumer Credit Directive does not prevent Member States from extending its provisions to areas not covered by its scope, even where the Directive expressly excludes them from its scope.³⁹

Thus, to the extent that Member States are allowed to maintain or introduce national measures which are outside the scope of the Directive, the UK has gone as far as providing detailed and additional rules that the Consumer Credit Directive does not harmonise and that are clearly not incompatible with it.

This could give rise to a certain amount of concern insofar as the judgement appears capable of undermining the full harmonisation character of the Consumer Credit Directive.⁴⁰ In principle, a system of maximum harmonisation should involve a full transfer of regulatory competence from the Member States to the EU in the field covered by the measure in question,⁴¹ in this case consumer credit advertising. Accordingly, in fact, harmonisation is meant to have the dual function of setting common rules for the EU market and making a choice of the appropriate standard of regulatory protection that will apply in common in the Member States.⁴²

³⁹ *SC Volksbank România SA v. Autoritatea Națională pentru Protecția Consumatorilor – Comisariatul Județean pentru Protecția Consumatorilor Călărași (CJPC)* (Case C-602/10), ECLI:EU:C:2012:443.

⁴⁰ Geraint Howells, Christian Twigg-Flessner and Thomas Wilhelmsson, *Rethinking EU Consumer Law* (London: Routledge, 2017), esp. Ch. 1 and Ch. 6; Kathleen Gutman, *The Constitutional Foundations of European Contract Law* (Oxford: Oxford University Press, 2014).

⁴¹ Stephan Weatherill, *EU Consumer Law and Policy* (Cheltenham: Edward Elgar, 2013).

⁴² *Ibid.* See in particular Norbert Reich, *From Minimal to Full to 'Half' Harmonisation* in James

However, to the extent allowed by the Unfair Commercial Practices Directive,⁴³ the limited scope of the Consumer Credit Directive means that a great amount of aspects relating to advertising remains within the sphere of domestic laws, if any.

As noted, the duty to provide standard information in advertising arises where there is an indication of an interest rate or other figure relating to the cost of credit. However, it can be common practice for lenders to avoid mentioning prices but rather concentrate on the friendliness, accessibility, flexibility, ease or rapidity of the advertised services. This may especially be the case of predatory, yet lawful, credit providers such as pay-day lenders in the UK or other high-cost specialist lenders outside the banking system. For example, as Howells et al point out, there are no provisions or controls in the Consumer Credit Directive on the use of attractive cartoons, comedy, upbeat feelings or trivialisation of taking out a loan in credit adverts.⁴⁴ Equally, the Unfair Commercial Practices Directive makes no provision in this respect.⁴⁵ Likewise, there are no EU rules on qualification criteria or the use of emotional terms such as ‘free’, flexible, ‘pre-approved’, ‘no need of credit history’ or similar wording in advertising.⁴⁶

In this respect, the law of the UK, going beyond the scope of the provisions of the Consumer Credit Directive and offering a capillary framework, denotes an approach attentive of consumer protection concerns. The same cannot be said about the Italian legal framework, which remains anchored to the limited scope stipulated by EU law and the narrow protection offered to consumers vis-à-vis the many threats of advertising beyond the cost of credit. All what the Italian legislator does is a reproduction of Article 4 of the Consumer Credit Directive.

To the extent that UK law offers a higher standard of consumer protection vis-à-vis Italian legislation within the rules governing maximum harmonisation, this already appears to frustrate the goals of the Consumer Credit Directive of creating a single market and achieving a level playing field for consumer credits across the EU. Such heterogeneity of national laws is capable of affecting the free movement of credit providers and users of financial services across the EU, leading to distortions of com-

Devenney and Mel Kenny (eds.) *European Consumer Protection*, 3-5 (Cambridge: Cambridge University Press, 2012); Norbert Reich, *Von der Minimal- zur Voll- zur Halbharmonisierung*, ZEuP 7-39 (2010). For case law see *Simone Leitner v. TUI Deutschland GmbH & Co. KG.* (Case C-168/00), ECLI:EU:C:2002:163.

⁴³ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’), OJ L 149, 11.6.2005, p 22-39.

⁴⁴ Howells et al, cit. *supra* at 40.

⁴⁵ Hans-Wolfgang Micklitz, *Unfair Commercial Practices and European Private Law* in Christian Twigg Flesner (ed.), *European Union Private Law*, 229-242 (Cambridge: Cambridge University Press, 2010).

⁴⁶ Howells et al, cit. *supra* at 40. See also ConPolicy Institut für Verbraucherpolitik, *Transparente Informationsdarstellung in der Werbung für Verbraucherkredite* (28 March 2018).

petition and unequal standards of consumer protection. The same occurs for the free movement of credit services cross-border, especially those in the digital domain where regulatory barriers accelerate, with the undesirable effect of jeopardising the creation of the Digital Single Market.

4.2. *Distortions of the Legal Choice in Transposition*

Even within the scope of the Consumer Credit Directive, substantial differences emerge in the transposition of its rules into domestic law as a consequence of the legal choices that the Directive allows to Member States in the transposition.

As above introduced, Article 4(1) of the Consumer Credit Directive requires that only credit agreements that indicate an interest rate or otherwise cost of credit need to provide in the advertising the standard information prescribed by the Directive itself. At the same time, the second paragraph of Article 4(1) of the Directive gives Member States the legal choice to apply national law with no obligation to include standard information in advertising which do not indicate an interest rate or otherwise cost of credit, provided that such national law requires the indication of the APR.

Contrary to the legal choice made by the Italian legislator, the UK has used the legal choice permitted by the second paragraph of Article 4(1) of the Directive. Italy, by contrast, does not require information on APR to be provided in advertising of said credit agreements.

This legal choice adds to the consideration that the Consumer Credit Directive does not require that the advertised rates reflect the rate actually charged in a given application, where the screening of applicants may lead to different rates. The condition is that the example given has to be representative, but once again substantial differences emerge as Member States implement this requirement differently.⁴⁷ The comparison of the UK and Italian frameworks exemplify the large extent of such a discrepancy.

Arguably, where the legal choice is transposed in the national law, like in the UK, it enables to maintain a high level of consumer protection by regulating information requirements in the national law regarding advertising, which does not contain information on the cost of credit. As the comparative analysis also shows, consumers will always have information on the APR and a proper regulation of the representative example, and they will be better equipped to compare offers. Lenders, in turn, do not need to provide a long list of information, sparing the consumer with detrimental information overload. The advertisement becomes simpler, shorter and clearer vis-à-vis an advertisement where all standard information is necessary. Also, the legal choice better ensures the coherence of the Consumer Credit Directive with national legislation.⁴⁸

⁴⁷ Howells et al, cit. *supra* at 40.

⁴⁸ European Commission, *Report from the Commission to the European Parliament and the Council*

Arguably, all things considered, the issue of the legal choice not only impacts on the uneven standard of consumer protection offered in the Member States, but it also bears a negative impact on the internal market and the creation of a level playing field. Consumer protection appears much stronger in the UK, but stakeholders are faced with substantially different national rules that hardly integrate the markets of the Member States.

5. Conclusions

In view of the looming review of the Consumer Credit Directive, this paper has compared and examined the domestic laws of the UK and Italy in the transposition of the provisions on consumer credit advertising.

The results of the study indicate substantially different national regulatory frameworks as the result of the transposition of EU law. These hardly harmonise consumer credit advertising in the EU and achieve the goal of creating a single market characterised by a level playing field. Arguably, this is the outcome of the combination of the limited scope of the Consumer Credit Directive, its full harmonisation character as interpreted by the CJEU, and the transposition of the legal choice explicitly left to Member States by the Directive itself.

The comparative examination of the two jurisdictions signals how the UK legal framework provides for a much higher level of consumer protection, as well as a detailed standard of conduct of business rules. The UK's attention towards tighter consumer protection and conduct of business rules seems to derive from a more attentive legal culture on financial services brought by the FCA together with a modernized attention to the needs of consumers rather than the demands of EU law. This feature is likely to remain unaffected by Brexit (although, at the time of writing, any effect relating to this topic is a matter of speculation).

By contrast, Italy reproduces faithfully the provision of the Consumer Credit Directive that, as this work has shown, is too limited in scope and consumer protection remains minimal. Probably, this is due to the slower pace of financial innovation in Italy, fewer new business models and a market still largely dominated by the traditional banking system.

The transposition of the legal choice offered by the Directive reinforce said outcome. Moreover, the experience with consumer credit advertising suggests that it is not a viable legal technique for the creation of a level playing field across EU jurisdictions.

As a result, it is concluded that, as it stands, the Consumer Credit Directive fails to deliver its goals. Consumer protection remains scattered unevenly at national level and a matter for national legislators, which could hardly contribute to EU integration.

on the Implementation of Directive 2008/48/EC on Credit Agreements for Consumers, COM (2014) 259 final.

The upcoming review of the Consumer Credit Directive should identify and fix the problem, especially in light of the rapid digitalisation of financial services and the enhanced provision of cross-border credit to consumers, as envisaged by the Action Plan for a Capital Markets Union⁴⁹ and the Digital Single Market.⁵⁰

To the extent that the EU truly aims to achieve a single market in consumer credit the scope of the provisions of the Directive should be extended and legal choices eliminated.

⁴⁹ *Supra* note 2.

⁵⁰ The Digital Single Market denotes the strategy of the European Commission to ensure access to online activities for individuals and businesses under conditions of fair competition, and consumer protection. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review on the Implementation of the Digital Single Market Strategy. A Connected Digital Single Market for All, COM/2017/0228 final.