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☞ Consumer credit; Consumer protection; Credit facilities; Creditworthiness; EU law; Italy

Introduction: an overview to consumer finance in Italy

According to information reported by public sources, Italian families' indebtedness is still lower than the European average. In the speech made by the Associazione Bancaria Italiana (ABI) to the Italian Parliament in November 2009,¹ ABI reported that the average indebtedness of European families equals roughly 93 per cent of net income: more exactly, 130 per cent in Spain, around 90 per cent in Germany, around 80 per cent in France and only around 60 per cent in Italy.

ABI reported no news: the Italian cultural background, from the end of 20th century, has supported savings in all their forms, so much so that encouragement of savings is even included in the Constitution of the Republic of Italy.² According to ABI,³ 62 per cent of Italian families' indebtedness arises from loans and mortgages entered into in connection with the purchase of a house.

Nevertheless, in Italy, like in most other Western countries, consumer finance grew with an increasing trend over the last two decades, although slowing down after the financial crisis exploded between 2007 and 2008.

European and Italian legal framework

New European Directive 2008/48 and the Italian Decree reflecting it

European Directive 2008/48,⁴ issued in 2008 (the 2008 Directive) rules consumer finance and replaced the previous Directive 87/102 [1987] OJ L42/48, dating back to 1987. The 2008 Directive inter alia aims at increasing the level of consumer protection and cancelling differences among national laws, thus requiring all Member States to reach full harmonisation.⁵

In compliance with the 2008 Directive's contents, the Italian Government (delegated by the Parliament) has recently issued legislative Decree 141 of August 13, 2010 (the Decree) aimed at implementing the provisions dictated by the Directive within the Italian legal framework.

Scope of the 2008 Directive

The 2008 Directive expressly aims at keeping up with novelties that have changed the credit market over the last 20 years, and the increasing importance of consumer finance in everyday life.

In particular, the previous Directive did not consider globalisation and only aimed at keeping a minimum standard level of consumers' protection, leaving open the possibility that Member States set up more restrictive standards. In fact, further to the previous Directive, the set of provisions applied by each Member State were allowed to be sometimes materially different from one another and, more important, affected materially the rules of competition between states, restricting the consumers' ability to take advantage of the opportunities available from the cross-border credit market within the European Union.

As openly stated in recital (4) to the 2008 Directive:

"The *de facto* and *de jure* situation resulting from those national differences in some cases leads to distortions of competition among creditors in the Community and creates obstacles to the internal market where Member States have adopted different mandatory provisions more stringent than those provided for in Directive 87/102/EEC. It restricts consumers' ability to make direct use of the gradually increasing availability of cross-border credit. Those distortions and restrictions may in turn have consequences in terms of the demand for goods and services."

Contents of the 2008 Directive

In this regard, the 2008 Directive makes an effort to re-define certain issues already covered by previous provisions, meanwhile introducing new rules to increase consumers protection.

First, the 2008 Directive restates inter alia: (i) the information and practices which are preliminary to the conclusion of a credit agreement, including the pre-contractual information to be provided to consumers, etc.; (ii) the information to be included in a credit agreement; (iii) the termination of the credit agreement, including the consumer's right to withdraw; (iv) the obligations of creditors and credit intermediaries.

¹ ABI's General Director's speech to Italian Parliament (*Camera dei Deputati, Commissione Finanze*), November 10, 2009.

² See art.47 of the Constitution of the Republic of Italy.

³ ABI's General Director's speech to Italian Parliament (*Camera dei Deputati, Commissione Finanze*), November 10, 2009.

⁴ The English text of Directive 2008/48 on credit agreements for consumers and repealing Council Directive 87/102 [2008] OJ L133/66 is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:133:0066:0092:EN:PDF> [Accessed September 28, 2010].

⁵ See recital (9) to Directive 2008/48.

Secondly, the 2008 Directive *inter alia* introduces some concepts that were not covered by the previous Directive, such as: (v) the creditor's obligation to assess the creditworthiness of the consumer and the access to specific databases; and (vi) the consumer's right to terminate the credit agreement to the extent this is linked with a supply agreement affected by a material default, etc.

In this piece of work we will examine the increased protection measures connected with issues (v) and (vi) above, which constitute actual novelties for European legislation and set forth new responsibilities for creditors, although leaving open certain material issues.

Creditor's obligation to assess the creditworthiness of the consumer

Article 8 of the 2008 Directive

One of the more interesting novelties brought by the 2008 Directive refers to the obligation to assess the creditworthiness of the consumer. The financial crisis struck the global markets practically at the same time as the 2008 Directive entered into force, and affected the global playground and the rules of the game in a way that was perhaps unexpected by those who drafted the 2008 Directive. Along these lines, Italian consumers associations have sometimes requested a stricter set of rules in order to protect consumers from irresponsible borrowing.⁶ Article 8 of the 2008 Directive has been seen as partially acknowledging such requests.

The concept of "irresponsible lending/borrowing"

A prohibition of "irresponsible lending/borrowing" had already been proposed in a former European act dating back to 2002, and had then been rejected because allegedly it would have caused uncertainty. Additionally, it had been noted that creditors are personally interested in assessing whether or not their debtor is worthy of financing, therefore an obligation in this respect would have been of little use.

Nonetheless, such issues were re-considered in 2008, when the financial crisis had already begun to hit global markets. This seems to be the reasoning of recital (26) to the 2008 Directive, according to which:

"Member States should take appropriate measures to promote responsible practices during all phases of the credit relationship ... Those measures may include, for instance, ... the education of consumers ... in particular, it is important that creditors should not engage in irresponsible lending or give out credit without prior assessment of creditworthiness ... creditors should bear the responsibility of checking

individually the creditworthiness of the consumer. To that end, they should be allowed to use information provided by the consumer not only during the preparation of the credit agreement in question, but also during a longstanding commercial relationship. ... Consumers should also act with prudence and respect their contractual obligations."

Creditworthiness of consumers, as opposed to entrepreneurs

A debtor's creditworthiness assessment made by creditors is no novelty: the so-called Basel II agreements also refer to such obligations even prior to the 2008 Directive, and so did Italian laws. However, as noted by some commentators, such assessment mostly regards the creditworthiness of entrepreneurs, with a view to ensure that banking facilities be preferably granted to worthy entrepreneurs, thus supporting market growth. From this standpoint, the "worthiness of the entrepreneur" is ultimately assessed in relation to the entrepreneur's capabilities and its business orientation or, in other words, its ability to make good use of the amount borrowed, and therefore attention should be paid *inter alia* to the entrepreneur's future prospects and growth expectations.

Credit worthiness of consumers instead has been regarded at as something different by Italian commentators. In this respect, Italian commentators have considered the consumer's worthiness as his or her ability to repay the debts, rather than his or her ability to make good use of the amount borrowed, taking into account that a facility granted to a consumer is something which automatically supports market growth, insofar as it is intended to increase consumption of goods or services. Such assessment should rather look at consumer's past behaviour (not to his or her future prospects); this also confirms the importance of establishing appropriate databases in each Member States to provide information on consumer's credit history, as required by art.9 of the 2008 Directive.

Consequences of breach

The 2008 Directive does not specify which consequences may be triggered by breach of the creditor's obligation to assess the customer's creditworthiness.

According to the 2008 Directive, the breach of the creditors' obligation to assess the customer's creditworthiness may involve in principle not only Member States, but also creditors themselves. In particular, recital (26) to the 2008 Directive specifies *inter alia* that, "creditors should bear the responsibility of checking individually the creditworthiness of the consumer".

⁶ As reported by the Italian consumers' association Assoutenti ("*Indagine conoscitiva sul credito al consumo—23.2.2010—Documento conclusivo dell'indagine conoscitiva della VI commissione della Camera dei deputati, approvato il 23 febbraio 2010 (Sintesi)*"), available at <http://www.assoutenti.it/articolo.asp?sez=113&art=274> [Accessed September 28, 2010], a prohibition has been considered, when implementing Directive 2008/48, in order to possibly prevent particularly weak categories of consumers from obtaining certain consumer finance facilities.

In such framework, a *risk of conflict between the creditor and the intermediary, if there is one*, could arise. In particular, when credit is granted through an intermediary, the intermediary's interest to grant financing might conflict with that of the creditor to assess the customer's creditworthiness.⁷

Possible consequences for creditors could range between invalidity of the credit agreement and a mere payment of damages.⁸ The possible application of the provisions regarding unfair competition⁹ cannot be excluded from applying to creditors who avoid assessing the customer's creditworthiness. In any event, such consequences are expected to be ruled by national laws in each Member State.¹⁰

Consumer's creditworthiness in the Decree

The Decree introduces new arts 124-bis and 125 in the Italian Banking Act, thus almost literally reflecting the contents of arts 8 and 9 of the 2008 Directive.

Although the Decree does not provide for any specific fines or penalties, it requests the Bank of Italy to implement the rules set forth by new art.124-bis of the Italian Banking Act (which, as mentioned above, is designed to reflect the contents of art.8 of the 2008 Directive), and Bank of Italy's implementing rules are yet to be issued. Bank of Italy's implementing provisions are expected to take care *inter alia* of the consequences of breach of the creditor's obligation to assess creditworthiness. In the meantime, applicable fines or sanctions are not easy to foresee.

Termination of the credit agreement in case of default affecting the supply agreement

Unlike previous European laws and regulations, the 2008 Directive openly acknowledges that the credit agreement, which is entered into by a consumer in order to borrow the money he needs to purchase a good or service, is materially linked with the corresponding agreement that the consumer enters into with the supplier of such good or service. In this respect, the 2008 Directive strengthens consumer protection by allowing consumers to no longer

be bound by the credit agreement, to the extent that the supply agreement is terminated by the withdrawing consumer (art.15 of the 2008 Directive).¹¹

The above provision is grounded on the definition of "linked credit agreement" (art.3(n) of the 2008 Directive), which is a brand new concept introduced by the 2008 Directive. The definition of "linked credit agreement" provided by art.3(n) of the 2008 Directive refers, *inter alia*, to an agreement where "the credit in question serves *exclusively* to finance an agreement for the supply of specific goods or the provision of a specific service" and "those two agreements form, from an objective point of view, a commercial unit".

Thus, the link between the credit agreement and the supply agreement is acknowledged by the 2008 Directive, which sets forth the consequences that will be shortly summarised below.

Structure of the link

The existence of a link between the credit agreement and the sale agreement is not news to the Italian legal framework and Italian case law. Such a link has often been acknowledged as particularly strong in certain instances when the creditor *is* the supplier, and therefore the consumer enters into just one agreement with a counterparty which is a seller and a lender at the same time.¹²

Nonetheless, nowadays (especially in the consumer finance market) lenders are qualified professionals, and the role of the seller and that of the creditor have become totally separate, so that the consumer usually enters into two separate agreements, which—even before the 2008 Directive—were considered by Italian case law as functionally linked with each other.¹³

In comparison with the judgments of Italian courts, Italian commentators have remarked that the provisions of the 2008 Directive, although for the first time acknowledging the importance of the link between the credit agreement and the agreement whereby the consumer purchases a good or a service, limit such importance to the minimum extent possible.

Namely, the 2008 Directive does not see the link as "bilateral" (i.e. so that, unless the parties expressly intend otherwise, the linked agreements depend on one another mutually, without the possibility of finding a predominant

⁷ A. Simionato, in AA.VV., *La nuova disciplina europea del credito al consumo*, (Torino 2009) p.193.

⁸ A. Simionato, in AA.VV., *La nuova disciplina europea del credito al consumo*, (Torino 2009) p.192.

⁹ G. De Cristofaro, *La nuova disciplina comunitaria del credito al consumo*, Riv. Dir. Civ. 2008, p.274.

¹⁰ Recital (30) to Directive 2008/48 reads as follows: "This Directive does not regulate contract law issues related to the validity of credit agreements." Additionally, recital (9) to Directive 2008/48 specifies: "Where no such harmonised provisions exist, Member States should remain free to maintain or introduce national legislation."

¹¹ Directive 2008/48 art.15 reads as follows: "Article 15 - Linked credit agreements - 1. Where the consumer has exercised a right of withdrawal, based on Community law, concerning a contract for the supply of goods or services, he shall no longer be bound by a linked credit agreement. 2. Where the goods or services covered by a linked credit agreement are not supplied, or are supplied only in part, or are not in conformity with the contract for the supply thereof, the consumer shall have the right to pursue remedies against the creditor if the consumer has pursued his remedies against the supplier but has failed to obtain the satisfaction to which he is entitled according to the law or the contract for the supply of goods or services. Member States shall determine to what extent and under what conditions those remedies shall be exercisable. 3. This Article shall be without prejudice to any national rules rendering the creditor jointly and severally liable in respect of any claim which the consumer may have against the supplier where the purchase of goods or services from the supplier has been financed by a credit agreement."

¹² This can be noted in the Italian Civil Code provisions ruling the *vendita con riserva di proprietà* (i.e. sale and purchase agreement with price paid in instalments and ownership transferred upon payment of last instalment; see arts 1523 et seq.). The Italian Civil Code (dating back to 1942) then tried to rule one of the first forms of consumer finance, whereby the creditor *is* the seller, and he enters into a single agreement (rather than two separate, although linked, ones) with the purchaser/debtor.

¹³ Predominant Italian case law confirms this view several times: among others, see the decision of the Tribunal of Milano dated October 24, 2008 (published in *Nuova Giur. Civ. Comm.*, 2009, I, p.436); and the decision of the Court of Cassation No.5966, dated April 23, 2001. See also G. Rossi, *La rilevanza del collegamento contrattuale nel credito al consumo* (Contratto e Impresa, 2010), p.26.

agreement) but only allows the consumer to be no longer bound by the credit agreements, if the consumer has exercised his right to withdraw from the supply agreement. In this case, no specific consequence is expressly provided in connection with any issues affecting the credit agreement, which are apparently not relevant to terminate the supply agreement. According to recital (35) to the 2008 Directive, termination of the credit agreement (not depending on the withdrawal from the supply agreement) is out of the scope of the 2008 Directive and, in such case, national laws shall apply.¹⁴

In conclusion, still under the 2008 Directive, the contractual link between the sale agreement and the credit agreement has not been stressed in the manner that commentators would have expected.

Italian law provisions regarding linked credit agreements

With specific reference to consumer finance, within the Italian legal framework prior to the 2008 Directive, art.42 of the Consumer Code (now abrogated by the Decree) allowed the consumer to *raise a claim* against the creditor in case of default of the supply agreement, only subject to an exclusive underlying agreement being in place between the creditor and the supplier (i.e. whereby the creditor had an exclusive on the supplier's customers).

As noted above, art.15 of the 2008 Directive provides that, where the consumer has exercised a right of withdrawal from the supply agreement, "he shall no longer be bound by a linked credit agreement". The wording of the 2008 Directive is blurred and seemed to

leave to national laws the choice as to the legal measure to apply in order to implement such rule. Mainly, the choice could have been between the automatic termination of the credit agreement, and its termination by initiative of the consumer (i.e. subject to the consumer filing a specific claim).

Article 3 of the Decree now *inter alia* cancels art.42 of the Consumer Code, and sets forth a new art.67 para.6 of Legislative Decree 206/2005, to rule termination of the credit agreement in case of consumer's withdrawal from the supply agreement (i.e. mirroring the provision of art.15 of the 2008 Directive). According to said new para.6, in case of consumer's withdrawal from the supply agreement, the credit agreement is "automatically terminated", *without any need for the consumer to raise any claim or action*. Therefore, said para.6 appears to be more precise than the correspondent 2008 Directive provision.

It is worth noting that, in addition to mirroring art.15 of the New Directive, the Decree also introduces a new provision to take care of another event of termination of the credit agreement, that can be triggered by the consumer in case of default by the supplier of the good or service, provided such default is material (see art.125-quinquies to the Italian Banking Act), irrespective of the consumer exercising the proper right to withdraw. Pursuant to new art.125-quinquies of the Italian Banking Act, in case of material default by the supplier of the goods or services, the consumer, after sending a notice of default to the supplier, is entitled to terminate the linked credit agreement.

¹⁴ Recital (35) Directive 2008/48 reads as follows: "Where a consumer withdraws from a credit agreement in connection with which he has received goods, in particular from a purchase in instalments or from a hiring or leasing agreement providing for an obligation to purchase, this Directive should be without prejudice to any regulation by Member States of questions concerning the return of the goods or any related questions."