

Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts

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Abstract

Directive 2008/48/EC aims to guarantee a high level of consumer protection and comparability of consumer credit offers, protecting consumers against over-indebtedness. In light of the ongoing review of this directive, it is important to consider whether the principle of transparency could not play a bigger role in ensuring that consumers are provided with understandable consumer credit information. The authors argue, therefore, that the assessment of the credit information's transparency should go beyond a mere compliance check with formal aspects of transparency, i.e. whether consumers had access to the information and whether it was legible. At least an equal amount of consideration should be paid to aspects of the substantive transparency, i.e. whether consumers ultimately understood the information. Moreover, the European Commission should strengthen the consumer credit transparency toolbox by explaining the meaning and significance of various transparency requirements, and re-check the effectiveness of the standardised credit information.

1. Introduction

In the majority of the Member States of the European Union the number of over-indebted households has significantly increased in the past five years.¹ Over-indebtedness entails the inability of individuals to meet their financial obligations and often is the result of consumers purchasing goods on credit.² For society as a whole, over-indebtedness of consumers has severe economic and social consequences, as it negatively impacts consumption, employment, and can lead to austerity

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¹ Civic Consulting of the Consumer Policy Evaluation Consortium, 'The over-indebtedness of European households: updated mapping of the situation, nature and causes, effects and initiatives for alleviating its impact – Part 1: Synthesis of finding' (Final report for DG SANCO 4 December 2013) <https://www.mabs.ie/downloads/reports_submissions/part_1_synthesis_of_findings_en.pdf> accessed 25 April 2019, 5-6, 75.

² Diana Valentina Cerini, 'Consumer Over-Indebtedness, Credit Contracts and Responsible Lending' (2017) 17(3) *Global Jurist* 1; Civic Consulting (fn 1) 150-156.

measures like social welfare cuts or an increase of taxes.³ With the aim of alleviating the problem of over-indebtedness, European consumer law has adopted a variety of preventive and corrective measures. These measures include inter alia information obligations, the duty of responsible lending, standardisation of the calculation of credit costs, the right of withdrawal and the early repayment of credit.⁴ Amongst these, information duties are the main consumer protection tool used by the European legislator in the area of consumer credit. This regulatory choice is based on the belief that, if given adequate information regarding consumer credit, consumers will be able to compare credit offers available on the market, decide whether they want to conclude a particular credit agreement⁵ and, after they have concluded it, know how to enforce their contractual rights.⁶

Aside tackling over-indebtedness, Directive 2008/48/EC (further: CCD)⁷ aims to ensure greater market competitiveness and promote confidence in the use of consumer credit, as well as to secure contractual fairness.⁸ In order to achieve these goals, it largely relies on the instrument of information obligations.⁹ This paper adds to the previous criticism of information obligations as an effective consumer protection measure,¹⁰ by stressing the importance of the proper interpretation and application of transparency requirements, in order for information obligations to even have a chance of fulfilling their goals. It identifies and presents solutions to three main inconsistencies in the current application of the principle of transparency in the consumer credit area: the lack of clarity as to the formal or substantive character of its requirements; the disconnected nomenclature

³ Civic Consulting (fn 1) 197-200.

⁴ Udo Reifner and Isabel Herwig, 'Consumer education and information rights in financial services' (2003) 12(2) *Information & Communications Technology Law* 128-129; Stefan Grundmann and Yesim M Atamer, *Financial Services, Financial Crisis and General European Contract Law: Failure and Challenges of Contracting* (Kluwer Law International 2011) 191-192, 383, 393-395; Cerini (fn 2) 1; Iris Benöhr, *EU Consumer Law and Human Rights* (OUP 2013) 116-119; Vandone is of the opinion that the CCD's objectives are aimed to be achieved through regulation of four areas – information, assessment of households' creditworthiness, rights concerning credit agreements, and creditors and credit intermediaries – see Daniela Vandone, 'Consumer Credit in Europe Risks and Opportunities of a Dynamic Industry' (2009) *Physica* 101-102.

⁵ See e.g. Recitals 18-19 Directive 2008/48/EC of the European Parliament and of the Council on credit agreements for consumers [2008] OJ L133/66 (Consumer Credit Directive or CCD); Vanessa Mak, 'The Myth of the 'Empowered Consumer' - Lessons from Financial Literacy Studies' (2012) 1(4) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 256; Martien Schaub, 'How to Make the Best of Mandatory Information Requirements in Consumer Law' (2017) 25(1) *European Review of Private Law* 28-29; Omri Ben-Shahar and Carl E Schneider, 'The Failure of Mandated Disclosure' (2011) 159(3) *University of Pennsylvania Law Review* 649-651.

⁶ Candida Leone, 'Transparency revisited – on the role of information in the recent case-law of the CJEU' (2014) 11(1) *European Review of Contract Law* 322-325.

⁷ Directive 2008/48/EC of the European Parliament and of the Council on credit agreements for consumers [2008] OJ L133/66 (Consumer Credit Directive or CCD).

⁸ Recitals 7-8 CCD. See also Iain Ramsay, 'Consumer credit regulation after the fall: International dimensions' (2012) 1(1) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 24-26.

⁹ Recitals 19, 24, 27, 31, 32 and Articles 4-6 and 10 CCD.

¹⁰ See e.g. fn 5.

of these requirements; and, the confused application of standardised information in credit disclosures.

As previous research has shown, many consumers do not read financial contracts and even if they do, they generally struggle to understand them.¹¹ In its Study on consumer vulnerability in the European Union, the European Commission (further: Commission) recognised that many consumers were vulnerable in the financial sector, including those who could be considered sophisticated in other sectors.¹² This is due to various reasons, such as consumers having difficulties processing complicated financial information, lacking financial literacy and experience in purchasing financial products.¹³ Furthermore, consumers are often provided with insufficient or misleading information and rarely given adequate explanations of the risk that certain financial products entail.¹⁴ In order to enable consumers to consider the information provided by credit providers, when choosing between credit offers available on the market, they have to (at least) be given information they can reasonably be expected to understand. Although scholars have heavily criticised the information paradigm,¹⁵ even its harshest critics have admitted that the way in which information is presented influences the ability of consumers to understand it.¹⁶ Moreover, even if it could be argued that consumers overwhelmingly do not read terms and conditions,¹⁷ they pay some attention to core terms, like the cost of credit.¹⁸ Therefore, it seems necessary to further explore whether adherence to the principle of transparency could increase consumers' chances of understanding at least the essential (pre-)contractual information.

Whilst information transparency is an important element of European consumer credit law, quite ironically, there is a significant lack of clarity as to what constitutes a transparent provision of the credit information, which is a gap this paper addresses. The authors' first main claim is that an

¹¹ See, e.g. Mak (fn 5) 256.

¹² European Commission, 'Consumer vulnerability across key markets in the European Union' (January 2016) <<https://publications.europa.eu/en/publication-detail/-/publication/d1af2b47-9a83-11e6-9bca-01aa75ed71a1/language-en>> accessed 25 April 2019.

¹³ Study on vulnerability (fn 12) 340-341.

¹⁴ Study on vulnerability (fn 12) 342-343.

¹⁵ Omri Ben-Shahar and Carl E Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press 2014); Johanna Niemi, Iain Ramsay and William C Whitford, *Consumer Credit, Debt and Bankruptcy* (Hart Publishing 2009); Iain Ramsay, 'From Truth in Lending to Responsible Lending', in André Janssen (ed), *Information Rights and Obligations: The Impact on Party Autonomy and Contractual Fairness* (Aldershot 2005) 47-66; Patricia A McCoy, 'Rethinking Disclosure in a World of Risk-Based Pricing' (2007) 44 *Harvard Journal on Legislation* 1-78; Lauren E Willis, 'Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price' (2006) 65(3) *Maryland Law Review* 707-840.

¹⁶ Ben-Shahar and Schneider (fn 5) 743-745; Omri Ben-Shahar and Adam S Chilton, 'Simplification of Privacy Disclosures: An Experimental Test' (2016) 45(2) *Journal of Legal Studies* 61-65.

¹⁷ See e.g. Yannis Bakos, Florencia Marotta-Wurgler and David R Trossen, 'Does anyone read the fine print? Consumer attention to standard-form contracts' (2014) 43(1) *Journal of Legal Studies* 1-35.

¹⁸ Matteo Dellacasa, 'Judicial review of 'core terms' in consumer contracts: defining the limits' (2015) 11(2) *European Review of Contract Law* 160-161.

assessment of the credit providers' compliance with the principle of transparent disclosure should always include both substantive and formal transparency requirements. The distinction between formal and substantive transparency has been recognised in legal scholarship as a differentiation between transparency of form and content in providing consumer information.¹⁹ This paper, re-assessing that distinction, argues in favour of a closer relationship between formal and substantive transparency requirements in consumer credit law. The authors achieve this through the careful consideration of when the principle of transparency could best contribute to the achievement of the European legislator's objectives, which supported the adoption of the CCD.

An example of foreign currency loans may demonstrate well the significance of consumers obtaining understandable information on credit conditions for ensuring contract fairness and preventing over-indebtedness, and thus the significance of substantive transparency. Such loans encompass borrowing money in or linked to a currency that differs from the one in which consumers receive their income, meaning that the exact amount of payable credit depends on the fluctuation of the foreign currency on the market. Thus, any appreciation of the foreign currency will increase the cost of the consumer credit. For this reason, the Court of Justice of the EU (further: CJEU) in the *Andriuc* case considered that credit providers did not satisfy the transparency requirement when they only informed consumers of the link between the foreign currency and the currency in which they receive their income, in the calculation of the amount of credit. Instead, the CJEU expects credit providers to illustrate the kind of risk consumers are taking on when borrowing in a foreign currency, by showing them the possible variations in the exchange rate and their economic impact.²⁰

The *Andriuc* case is just one of the recent examples of the CJEU's case law indicating that credit providers will not be considered to comply with the transparency requirements by giving consumers just any kind of credit information.²¹ However, the CJEU has not yet made express claims supporting the assessment of the substantive transparency on the basis of the CCD's provisions. Additionally, the European Commission has so far interpreted transparency requirements as

¹⁹ As far as we could establish the distinction between formal and substantive elements of transparency was introduced by F Brunetta d'Usseaux, 'Formal and substantive aspects of the transparency principle in European Private Law' (1998) *Consumer Law Journal* 320-338. See also Johanna Waelkens, 'Article 5 Unfair Terms Directive 93/13/EEC: Transparency and Interpretation in Consumer Contracts', in Ilse Samoy and Marco BM Loos (eds), *Information and Notification Duties* (Intersentia 2015) 47, 61-63; Martin Ebers, 'Unfair Contract Terms Directive (93/13)', in Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers (eds), *EU Consumer Law Compendium: The Consumer Acquis and its transposition in the Member States* (Sellier 2008) 245-246; Marco BM Loos, 'Double Dutch - On the role of the transparency requirement with regard to the language in which standard contract terms for B2C-contracts must be drafted' (2017) 6(2) *EuCML* 55, 59.

²⁰ Case C-186/16 *Andriuc and Others* EU:C:2017:703, paras 44-51.

²¹ It is, however, crucial to note from the start that this reasoning of the CJEU was given in the case concerning interpretation of the Directive 93/13/EEC on unfair terms in consumer contracts [1993] OJ L 95/29, rather than the CCD.

elements of the formal transparency test. The core of this paper is to present arguments for the revision of this policy line.

Moreover, the paper will explore various transparency requirements, requesting that the consumer information is of a certain quality – clear, concise and prominent.²² The authors make a second claim in this paper that whilst all these requirements currently represent either formal or substantive transparency, the European legislator has not identified their specific character, which weakens the coherency of the legislator’s toolbox and lowers legal certainty. At the moment, it is not easy to classify these concepts as requirements of either formal or substantive transparency.

The third claim pertains to the use of the standardised information form in consumer credit disclosures. The authors will appeal for more studies on the effectiveness of standardised disclosures to take place. If they would indeed confirm the positive impact of such disclosures on the consumers’ understanding of credit conditions and their consequences, then standardisation should become a pillar of consumer credit disclosures rather than its ornament. It should also then apply not only to the form of the credit information but also to its content.

To substantiate the claims presented here, the authors first discuss the objectives of the CCD (part 2), in order to then analyse in light of those objectives what information credit providers have to disclose (part 3), and how to convey this information in a transparent manner (part 4). The authors give examples of how to overcome the three above-mentioned inconsistencies of the principle of transparency: the lack of clarity as to the formal or substantive character of transparency requirements; their disconnected nomenclature; and, the confused application of the information standardisation (part 5). The critical analysis of the formal and substantive transparency requirements applicable to consumer credit agreements leads the authors to conclude with an appeal to the Commission to revise its guidelines on the application of the CCD²³ in the ongoing review of this directive.²⁴ The authors also address the CJEU, asking its judges in the meantime to carefully delineate between various transparency requirements and their relation to one another, not only in the case law interpreting provisions of the Directive 93/13/EEC (further: UCTD)²⁵.

2. Double assessment: formal and substantive transparency

The main objective of the CCD is twofold – contributing to the development of a more transparent and effective consumer credit market, and ensuring a high level of consumer protection in this

²² Recitals 18 and 31 CCD.

²³ European Commission, ‘Guidelines on the application of Directive 2008/48/EC in relation to costs and the Annual Percentage Rate of charge’ SWD(2012) 128 final.

²⁴ European Commission, ‘Evaluation of the Consumer Credit Directive’ (Staff Working Document) <https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-3472049_en> accessed 25 April 2019.

²⁵ Council Directive 93/13/EEC on unfair terms in consumer contracts [1993] OJ L 95/29 (Unfair Contract Terms Directive or UCTD).

area.²⁶ Interestingly, recitals to the CCD do not mention the fight against consumers' over-indebtedness as one of the aspects of the harmonised European consumer credit protection. The risk of over-indebtedness is only mentioned in Recital 26 CCD, which entitles the Member States to adopt additional information obligations and educational strategies to protect national consumers against such a risk. In this paper we will provide examples of how some Member States used the principle of transparency to improve the provision of credit information to consumers and give effect to the principle of responsible lending. However, we also stipulate that the CCD's objective of ensuring a high level of consumer protection could not be fully realised without accounting for the risk of over-indebtedness and that there is an implied link between the provision of credit information to consumers and that risk.

Also the CJEU perceived the provision of adequate credit information as instrumental in the achievement of both above-mentioned goals at the EU level.²⁷ For example, with regards to standardisation, and more precisely, the role of the Annual Percentage Rate (further: APR), the CJEU explained that the APR is supposed to contribute to the openness of the market, by making it easier for consumers to compare credit offers, and to enable individual consumers to evaluate the extent of their obligations.²⁸ Whilst the CJEU did not refer in these cases directly to the consumers' need to understand a credit contract they are concluding and its consequences, such an inference could be drawn from the credit providers' obligation to facilitate the evaluation of the consumers' scope of contractual obligations.²⁹

The two goals mentioned by the CJEU will not be achieved by the provision of just any information, but only if the transparency principle is adhered to, in both its formal and substantive expression. Formal transparency refers to the availability and style of information. In principle, it requires that credit providers give consumers relevant information before the contract's conclusion and in a manner that enables them to actually read, understand and base their decision on this information. Therefore, credit providers should not hide information, by, e.g. drafting it in a small font or burying the information in other documentation.³⁰ Furthermore, the drafting style should not make it difficult for consumers to get an overview of the contract, by, e.g. frequent cross-referencing

²⁶ See Recitals 8, 23-24 and 43 CCD. See also Case C-76/10 *Pohotovost* EU:C:2010:685, para 67.

²⁷ Case C-449/13 *CA Consumer Finance* EU:C:2014:2464, para 21; Case C-377/14 *Radlinger and Radlingerová* EU:C:2016:283, para 61.

²⁸ *Radlinger and Radlingerová* (fn 27).

²⁹ This direct reference has so far only been made in case law interpreting provisions of the UCTD rather than the CCD, see e.g. Case C-26/13 *Kásler* EU:C:2014:282, paras 73-75; Case C-143/13 *Matei* EU:C:2015:127, paras 74-75.

³⁰ Chris Willett, 'The functions of transparency in regulating contract terms: UK and Australian approaches' (2011) 60(2) *International and Comparative Law Quarterly* 357; Reifner and Herwig (fn 4) 133.

or excessive length.³¹ The information is formally transparent if it draws consumers' attention. Substantive transparency seems to require consumers' comprehension, both of the credit contract terms, as well as of the foreseeable consequences arising from the contract's conclusion.³² The information is substantively transparent if it is drafted in a manner that facilitates consumers' understanding of their contractual rights and obligations. This will not be the case, e.g. when credit providers use complex, mathematical formulas to explain credit rates. The authors' understanding of the difference between formal and substantive transparency is, therefore, that, even if the credit information is formally transparent, consumers will not be able to understand it, unless it is also substantively transparent. Considering that insufficient financial literacy of consumers has been acknowledged as a problem at the EU level,³³ it is especially relevant that core terms of a credit agreement are simplified and transparent.

Moreover, it could be stipulated that more uniformity in the presentation of credit offers would facilitate further formal and substantive transparency. This was the Commission's reasoning behind the introduction of a standardised method of calculation of the APR, but also the introduction of the Standard European Consumer Credit Information (further: SECCI).³⁴ Such uniformity may aid consumers in comparing various credit offers and other credit information, advancing the consumers' understanding thereof, and it could also simplify the finding of certain information in a contract.³⁵

Scholars have already recognised the instrumental role that transparent disclosures and standardisation play in the creation of consumers' informed consent and ensuring greater market transparency.³⁶ Unfortunately, current guidelines of the Commission on how to interpret different transparency requirements, as well as the CJEU's case law in this area, blur the lines between the assessment of formal and substantive transparency. The following paragraphs discuss these inconsistencies and suggest how to remedy them.

³¹ Ebers (fn 19) 245-246.

³² Loos (fn 19) 55.

³³ European Commission, 'Financial Education' (Communication) COM(2007)808 final <<http://ec.europa.eu/transparency/regdoc/rep/1/2007/EN/1-2007-808-EN-F1-1.Pdf>> accessed 25 April 2019; European Banking Federation, 'Financial literacy – empowering consumers to make the right choices' (EBF Report on Financial Literacy April 2009) <https://www.ebf.eu/wp-content/uploads/2017/01/EBF_Financial_Education_-_rev7-26-9_webversion-2009-00831-01-E.pdf> accessed 25 April 2019. Addressing the problem of the lack of consumers' financial literacy is on the current European consumer agenda, see points 3.5. and 4.2. in European Commission, 'A European Consumer Agenda - Boosting confidence and growth' (Communication) COM(2012)0225 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2012:0225:FIN>> accessed 25 April 2019.

³⁴ See Recitals 18 and 43 CCD.

³⁵ See e.g. Willis (fn 15) 749-754; Mak (fn 5) 256.

³⁶ Catherine Garcia and Willem H van Boom, 'Information Disclosure in the EU Consumer Credit Directive: Opportunities and Limitations', in James Devenney and Mel Kenny (eds), *Consumer Credit, Debt and Investment in Europe* (Cambridge University Press 2012) 32-33, 51, 54-55.

3. Information requirements under the CCD – The What

One of the most prominent features of the CCD is its information model. The amount and content of disclosure duties of credit providers depend on the stage of the (pre-)contractual process.³⁷ We may distinguish three stages: advertising, the pre-contractual and the contractual stage.³⁸ For each stage, the European legislator prescribed a separate, minimum list of mandatory information that has to be disclosed to consumers.

In the advertising stage, Article 4 CCD stipulates the standard information that needs to be specified in any advertising of credit agreements, but only if this advertisement includes an interest rate or other figures regarding the cost of credit. In such a case the advertisement should include the information on: the borrowing rate, the total amount of credit, the APR, the cash price, the amount of advance payments in case of credit in the form of a deferred payment, the duration of the agreement, the total amount payable and the instalments' amount. It is important to note that the list of information that has to be included in the advertising of a consumer credit is not exhaustive and the Member States are allowed to regulate advertising requirements other than the cost of the credit. They could, e.g. choose to provide additional information in a way facilitating responsible lending.

In this initial phase of interesting consumers in a particular credit offer, the European legislator is mostly concerned with information requirements related to the credit's cost, since standardisation of this core information could increase the comparability of credit offers.³⁹ This, in turn, should contribute to the consumers' better informed decision-making. Therefore, one of the biggest achievements of the CCD is the introduction of a uniform formula for the calculation of the credit's cost – the APR. The APR is defined in Article 3 CCD as, 'the total cost of the credit to the consumer, expressed as an annual percentage of the total amount of credit.'⁴⁰

With regards to the pre-contractual information, Article 5 CCD prescribes pre-contractual information requirements for credit agreements in general, whilst Article 6 CCD contains information requirements for specific agreements, such as a credit in the form of an overdraft facility. Credit providers need to give consumers nineteen pieces of information on credit's terms and conditions, pursuant to Article 5(1) CCD. This information concerns the identity and contact details of a credit provider (and of a credit intermediary, where applicable), a description of the product's main

³⁷ Benöhr (fn 4) 117.

³⁸ Benöhr (fn 4) 117.

³⁹ Recital 18 and 19 CCD.

⁴⁰ The calculation details of the APR are laid down in Article 19 CCD, whilst the exact mathematical formula on the basis of which the APR is to be calculated is stipulated and explained in Annex I to the CCD.

features, the credit's cost and other important legal aspects.⁴¹ This list also has the minimum mandatory character, i.e. it enumerates the information that cannot be omitted in pre-contractual disclosures. Article 5(1) CCD allows credit providers to provide consumers with additional information.⁴²

Article 6 CCD separately regulates information requirements for credit agreements in the form of an overdraft facility and other specific credit agreements.⁴³ These credit agreements are subject to a lighter information model, supposedly limiting the burden on credit providers.⁴⁴ However, considering that credit providers still have to issue up to fourteen pieces of pre-contractual information,⁴⁵ the benefit seems to be minimal. This number slightly changes depending on the type of specific credit agreement that is offered.

Article 10(2) CCD regulates the provision of contractual information for credit agreements in general and requires disclosure of twenty-two pieces of information. Article 10(5) CCD regulates the provision of contractual information in cases of specific credit agreements, such as overdraft facilities, and mandates the disclosure of nine pieces of information. Here, the lower information burden for credit providers of specific credit agreements is easily noticeable.

4. Transparency requirements under the CCD – The How

As shown above and in line with regulatory trends in other areas of consumer law,⁴⁶ the information requirements under the CCD are numerous, detailed and, in most cases, not exhaustive. Moreover, although a number of information obligations have been placed on credit providers, it is not particularly clear how they should disclose this information for it to be transparent. Generally, policymakers and scholars view transparency as an attribute of information, which results in consumer understanding, without the need for consumers to seek explanations from the credit provider or third parties, as to the meaning and relevance of the information received.⁴⁷

This section identifies three transparency requirements under the CCD. The discussed requirements are the standard modalities for transparent disclosures: clarity, conciseness and prominence.⁴⁸ As the CCD requires credit providers to give consumers a representative example of the credit they are interested in concluding, the authors analyse the role of these three transparency

⁴¹ This categorisation of information requirements is provided in the Standard European Consumer Credit Information form in Annex II to the CCD.

⁴² Below we further address the impact of leaving an option to provide consumers with additional information.

⁴³ These specific agreements are enumerated in Articles 2(3), (5) and (6) CCD.

⁴⁴ Recital 23 CCD.

⁴⁵ Information requirements for specific agreements are prescribed in Articles 6(1)-(3) CCD.

⁴⁶ Schaub (fn 5) 26-27.

⁴⁷ Akos Rona-Tas and Alya Guseva, 'Information and Consumer Credit in Central and Eastern Europe' (2013) 41(2) *Journal of Comparative Economics* 428.

⁴⁸ See e.g. Articles 4(3), 10(2) and (5) CCD.

requirements in such disclosures, as well. Finally, as the CCD promotes standardisation of disclosures as a means of increasing their transparency, the last paragraph in this section assesses the link between standardisation and the assessment of formal and substantive transparency.

4.1. *Clarity, conciseness and prominence*

According to the guidelines provided by the European Commission, credit information is said to be clear, when it is not difficult to find and not hidden among other information.⁴⁹ The same guidelines explain that credit information can be seen as concise, when it does not contain lengthy and rambling descriptions of credit products. It will be perceived as prominent, when it is not displayed in a font size, which is too small.⁵⁰ These three interpretations of the transparency requirements highlight the Commission's focus on ensuring that the presentation of the mandatory information to consumers is transparent. Consequently, the Commission did not interpret any of the transparency requirements imposed on the credit information under the CCD as demanding that said information is understandable to consumers. Thus, the Commission's guidance implies that the assessment of the credit providers' compliance with the above-mentioned transparency requirements could be limited to the formal transparency test. Credit providers aiming to comply with such an interpretation of transparency requirements would then not need to strive for the consumers' understanding of the provided information.⁵¹ On the one hand, the authors recognise the practical benefits of focusing on formal aspects of transparency, as this facilitates the implementation and enforcement of the principle of transparency in the Member States. On the other hand, only through the recognition and upholding of substantive requirements of transparency, may the objectives of ensuring contract fairness and tackling over-indebtedness be reached.

Besides the Commission's guidelines, no other official documents have further explored transparency's concepts. Moreover, the CJEU, when assessing the transparency of mandatory information issued by credit providers under the CCD, also did not provide any guidance on the relationship between various transparency requirements. The CJEU further neglected to classify them as either elements of substantive or formal transparency. Namely, in the *Home Credit Slovakia* case, the CJEU elaborated on a format of a document, in which the contractual credit information

⁴⁹ European Commission (fn 23) 11.

⁵⁰ European Commission (fn 23) 11.

⁵¹ Previously it has been argued that the benchmark of an average consumer as a reasonably well-informed, observant and circumspect consumer applies also in the area of financial services, therefore, we are expecting transparent terms to be understandable to such consumers, see e.g. Vanessa Mak and Jurgen Braspenning, 'Errare Humanum Est: Financial Literacy in European Consumer Credit Law' (2012) 35(3) *Journal of Consumer Policy* 328-329. The use of a consumer benchmark facilitates enforcement, even though the benchmark could be adjusted considering the evidence of high levels of financial illiteracy amongst consumers, see e.g. Mak (fn 5) 256; Jeffrey Davis, 'Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts' (1977) 63(6) *Virginia Law Review* 842-844.

had to be provided. In this case, the CJEU tied the requirements of clarity and conciseness together, and seemed to assess them only from the formal transparency perspective. It concluded that credit provisions, which were contained in more than one document, could still be considered clear and concise, as long as the cross-referencing between the documents did not impede the consumer's possibility of being 'genuinely apprised of all his rights and obligations'.⁵² The use of the word 'apprise' indicates that, to comply with requirements of clarity and conciseness, it might suffice for credit providers to ensure that consumers are simply aware of their rights and obligations. The notion does not seem to stretch so far as to require credit providers giving adequate explanations to consumers of their rights and obligations.

This limited scope given to the transparency of credit information seems to be in contrast with the CJEU's case law developed on the basis of the UCTD. The UCTD also imposes on traders an obligation to provide consumers with transparent contract terms, which means that these terms should be drafted in plain and intelligible language. The difference in the used transparency requirements, i.e. plain and intelligible, does not allow to easily transpose their meaning to the requirements of clarity, conciseness or prominence of credit information. However, it is crucial to observe that the CJEU interpreted transparency requirements of the UCTD as having to satisfy both formal and substantive elements of the transparency test. As the UCTD applies also in the area of consumer credit contracts, previously the CJEU had to consider whether credit providers adhered to their transparency obligations pursuant to the UCTD. The CJEU consistently emphasised in these cases that, in order to be considered transparent, a term of a credit contract must enable consumers to understand its economic consequences, both on its own and in combination with other contractual provisions.⁵³ As the CJEU stated, 'the requirement of transparency of contractual terms laid down by Articles 4(2) and 5 of Directive 93/13, which, moreover, have identical scope, cannot be reduced merely to their being formally and grammatically intelligible'.⁵⁴

This consideration has not been made in the *Home Credit Slovakia* case, where the CJEU focused on the style of the provision of information rather than its content. Moreover, in the latter case the CJEU failed to instruct the national court to also examine the substantive transparency of the credit information in cases, where formal transparency has been satisfied. Consequently, the CJEU did not instruct national courts to apply the transparency test developed under the UCTD, which sufficiently acknowledges the need for the substantive transparency of information. As the

⁵² Case C-42/15 *Home Credit Slovakia* EU:C:2016:842, para 34.

⁵³ Case *Kásler* (fn 29) para 34; case *Matei* (fn 29) paras 74-75; Case-96/14 *Van Hove* EU:C:2015:262, paras 40-50; Case C-348/14 *Bucura* EU:C:2015:447, paras 52-56; Case *Andriciuc and Others* (fn 20) paras 44-48; Case C-51/17 *OTP Bank and OTP Faktoring* EU:C:2018:303, paras 71-78; Case C-448/17 *EOS KSI Slovensko* EU:C:2018:745, para 61.

⁵⁴ See e.g. case *Matei* (fn 29) para 73.

(pre-)contractual information determines the scope of parties' rights and obligations similarly to standard terms and conditions, a difference in the assessment of the credit provider's adherence to the transparency test under provisions of the UCTD and the CCD does not seem to be justified.

Instead of at the EU level, laudable examples of an examination of both formal and substantive transparency of the credit information can be found at the national level, specifically in the case law of the German Supreme Court (further: BGH). For instance, the BGH held that the information on the right of withdrawal in consumer credit contracts could be provided by means of checkboxes. However, this would only apply if the information was marked sufficiently clearly to enable average, reasonably informed and observant consumers to understand it was relevant for them and engage with it.⁵⁵ Therefore, unlike the CJEU, the BGH linked an assessment of the appropriateness of the form of the credit information with an evaluation of the possibility of consumers to, not only be aware of the information, but also engage with it. At least in some Member States, therefore, national enforcement authorities might examine both the substantive and formal transparency of the credit information. However, if other Member States favour the mere compliance check with formal requirements of the transparency, this might create an uneven field in EU consumer credit law for both consumers and credit providers.⁵⁶

This concern brings us back to the interpretation of the three transparency requirements in the CCD. Namely, in order to ensure fair competition and consumer protection in European consumer credit market, it seems necessary that at least one of the three transparency requirements imposed by the CCD is expressly interpreted as a requirement of substantive transparency. Considering the meaning given to requirements of clarity, conciseness and prominence in the everyday language, the requirement of clarity seems most suitable to be interpreted as demanding substantive transparency of the credit information. Namely, according to the Oxford English dictionary, clear can be understood as, 'easy to understand, perceive, or interpret.'⁵⁷ Thus, the literal meaning of the requirement of clarity alludes more to the substantive rather than formal transparency.

This argument cannot as easily be made in relation to requirements of conciseness and prominence. Following the Oxford dictionary, conciseness embodies, 'giving a lot of information clearly and in a few words; brief but comprehensive'⁵⁸ and prominence means, 'situated as to catch

⁵⁵ See e.g. BGH 23 February 2016, XI ZR 101/15, NJW 2016, 1881; BGH 23 February 2016, XI ZR 549/14, BeckRS 2016, 7440.

⁵⁶ This argument is further developed by contrasting the CJEU's and Croatian case law on transparency of foreign currency loans in Mia Junuzović, 'The transparency of (pre-) contractual information in consumer credit agreements: Is consistency the missing key?' (2018) 14 Croatian Yearbook of European Law and Policy 89-98.

⁵⁷ Available at <<https://en.oxforddictionaries.com/definition/clear>> accessed 25 April 2019.

⁵⁸ Available at <<https://en.oxforddictionaries.com/definition/concise>> accessed 25 April 2019.

the attention; noticeable.⁵⁹ Consequently, credit providers could expect requirements of conciseness and prominence to represent formal transparency, as these two requirements suggest how information should be issued to consumers. This does not preclude a possibility to perceive these latter requirements as having an impact on the substantive transparency of the credit information, as well. For example, concise credit disclosures should be more easily readable, and, therefore, could enhance also the consumers' understanding of credit terms. After all, the Oxford dictionary's definition even links the notion of conciseness to clarity, warning against the danger of prioritising brevity over comprehensiveness. This could further highlight the association between formal (conciseness) and substantive (clarity) elements of transparency and the need to satisfy both of them.

As it has been previously observed, at the moment neither the Commission's guidelines nor the CJEU's case law distinguish between various transparency requirements and their significance for credit providers' obligations. A useful example of how and why the requirement of prominence could be distinguished from the requirement of clarity can again be found in the BGH's case law. The afore-mentioned court rightly noted that the requirement of prominence was not imposed on all mandatory credit information but only specific information,⁶⁰ concerning advertising of a consumer credit and overdrafts. Therefore, if the requirement of clarity similarly to the requirement of prominence would embody a visual emphasis, any potential benefit of differentiating between various pieces of the credit information on the basis of their prominence (or lack thereof) would be lost.⁶¹ This example outlines the usefulness of distinguishing between various transparency requirements. Namely, with a careful consideration of which credit information should be visually emphasised, which should be briefer and which needs more elaboration in order to be more understandable, one could possibly address at least some of the interdisciplinary criticism of the information paradigm.⁶²

Part 2 of this paper explained why it is necessary from the perspective of reaching the CCD's objectives to ensure that the evaluation of both formal and substantive transparency elements occurs in practice. The current paragraph shows that, regrettably, so far, the Commission and the CJEU have missed the opportunities to interpret transparency requirements under the CCD as demanding that consumers are provided with the comprehensible credit information. The Commission seems to have drafted its CCD's guidelines to facilitate an easy compliance check for

⁵⁹ Available at <<https://en.oxforddictionaries.com/definition/prominent>> accessed 25 April 2019.

⁶⁰ BGH 23 February 2016, XI ZR 101/15, NJW 2016, 1881.

⁶¹ BGH 23 February 2016, XI ZR 101/15, NJW 2016, 1881.

⁶² See for further tips on how to improve the design of transparent disclosures: Ognyan Seizov, Alexander J Wulf and Joasia Luzak, 'The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU' (2019) 42 *Journal of Consumer Policy* 149-173.

national enforcement authorities, whilst the CJEU limits its call for the substantive transparency to the application of the UCTD. The authors of this paper observed this gap and, on the basis of national examples, showed in this paragraph how it could be remedied in practice.

4.2. *Representative example*

This paper argues for adopting a European rather than national understanding of transparency requirements. To further shed light on the need for more detailed guidance on the European level on the principle of transparency, it is, however, necessary to give an example of complications arising on the national level from the lack of such a guidance. These are best visible when looking at the possibility of informing consumers through the use of a representative example. When credit providers advertise a consumer credit referring to the credit's cost, they need to provide all standard information, 'in a clear, concise and prominent way by means of a representative example.'⁶³ The CCD explains that a sufficiently representative example of cost should reflect such considerations as the average duration and the total credit's amount, the frequency of certain types of credit in a specific market or, as regards the borrowing rate, the frequency of instalments and the capitalisation of interest.⁶⁴ By using a representative example credit providers should give consumers an accurate indication of what their obligations under a credit agreement might be, considering that, until a specific consumer credit agreement is concluded and all of its terms and conditions are known, its exact costs cannot be determined.⁶⁵

The CCD attaches the three above-mentioned transparency requirements to the provision of credit information by means of a representative example. The Commission's guidelines on the implementation of the CCD further explain that the purpose of a representative example is to facilitate the consumers' understanding of the APR and the cost of credit.⁶⁶ Whilst the Commission does not attach the function of preserving the substantive transparency to any of the specific transparency requirements, it expects that the provided information will somehow achieve that objective. This strengthens our previous argument that at least one of the three transparency requirements should be interpreted as guaranteeing the substantive transparency.

Interestingly, the Commission has further specified certain transparency elements of a credit disclosure by means of a representative example, e.g., with respect to its prominence. And so, the representative example has to clearly mention that it is just a representation of potential credit costs, so as not to mislead consumers into thinking that presented costs reflect the actual credit's

⁶³ Article 4(1) CCD.

⁶⁴ Recital 19 Directive CCD.

⁶⁵ Recitals 18 and 19 Directive CCD.

⁶⁶ European Commission (fn 23) 8.

costs, and also to distinguish it from other provided information.⁶⁷ Whilst the representative example needs to be prominent, the guidelines allow other information, unrelated to credit costs, to be equally or even more prominent, as long as this does not diminish the clarity of information provided by means of a representative example. For instance, a prominent display of the credit provider's logo should neither diminish the formal nor substantive transparency of the representative example.⁶⁸

Despite more instructions provided on the European level on how to draft a representative example, national authorities tasked with implementing the CCD have in some instances provided additional guidance to their credit providers on this issue. For example, in the United Kingdom, the Department for Business, Innovation & Skills (further: DBIS) emphasised that the offer must actually be accompanied by the words 'Representative example', specifying the requirement on distinguishing the example from other provided information.⁶⁹ The use of such a heading could enhance both formal and substantive transparency of the provided information, as it would be more visible but also avoid misleading consumers. The DBIS indicated that information should not be scattered around the advertisement but appear in the same place, e.g. in a box.⁷⁰ Additionally, it specifies that credit providers should present all mandatory information in an equally prominent manner.⁷¹ Interestingly, as the implementing measures allow credit providers to include additional information regarding the advertised credit, the DBIS suggests that they present this additional information in a less prominent way than the mandatory information. When elaborating on the requirement of prominence, the DBIS focused on the ability of information to stand out and be easily legible or clearly audible to a typical, not an average, consumer. It also emphasised that whether the requirement of prominence has been satisfied might depend on the nature and context of the medium through which the credit is advertised. Lastly, according to the DBIS the requirement of prominence does not require the use of any particular font size. Credit providers may perceive the above-mentioned additional instructions on the design of the representative example as elements ensuring formal transparency, as they focus on how to display credit information to consumers. However, considering the objective of the use of the representative example to enhance the consumers' understanding of credit costs and prevent misleading commercial practices, the authors

⁶⁷ European Commission (fn 23) 11.

⁶⁸ European Commission (fn 23) 11.

⁶⁹ Department for Business, Energy and Industrial Strategy (DBIS), 'Consumer Credit Regulation: Guidance on the Regulations Implementing the Consumer Credit Directive Updated for EU Commission Directive 2011/90/EU' (14 November 2012) <<https://www.gov.uk/government/publications/consumer-credit-regulation-guidance-on-the-regulations-implementing-the-consumer-credit-directive-updated-for-eu-commission-directive-2011-90-eu-effective-1-january-2013> 22-23> accessed 25 April 2019.

⁷⁰ DBIS (fn 69) 25.

⁷¹ DBIS (fn 69) 26.

expect the assessment to encompass substantive transparency, as well. It remains unclear, however, which elements the enforcement authorities would place the emphasis on.

The United Kingdom's example shows that the Member States could provide further requirements as to the understanding of transparency elements. Whilst the need to comply with these additional instructions could narrow down the credit providers' flexibility as to how to disclose information, it would guarantee that the assessment of the compliance with the principle of transparency would include both its formal and substantive elements. However, for this to occur, the national enforcement authorities would need to recognise the importance of both aspects of transparency requirements, which has not yet explicitly been done even on the European level.

4.3. *Standardisation*

Generally speaking, behavioural studies have widely recognised that standardisation increases the disclosures' transparency.⁷² Consumers benefit from the uniform information presentation, because it allows them to more easily compare available offers.⁷³ On the one hand, standardisation may embody formal transparency by prescribing a clear, concise and prominent way to disclose information to consumers. On the other hand, it facilitates comparison of various credit offers and thus enhances the consumers' understanding of an offered credit, which signifies the impact of standardisation on substantive transparency, as well. The European legislator embraced standardisation, aiming to reduce the information complexity in the area of consumer credit.⁷⁴

Under the CCD, the pre-contractual information generally has to be provided through the Standard European Consumer Credit Information form (SECCI).⁷⁵ This differs from the regime for specific credit agreements, where credit providers were allowed to decide in which form they would provide the pre-contractual information. They can choose to disclose the information either in another standardised notice called the European Consumer Credit Information form⁷⁶ or in another format, provided, however, that all mandatory information is equally prominently disclosed.⁷⁷ As only the SECCI form is mandatory, the following analysis is limited to implications of the standardisation in this form for transparency.

We could stipulate that the European legislator embraced standardisation of credit information as an instrument allowing to increase its transparency, inspired by various behavioural

⁷² David Horton, 'Flipping the Script: Contra Proferentem and Standard Form Contracts' (2009) 80(2) *University of Colorado Law Review* 473; Michael G Faure and Hanneke A Luth, 'Behavioural Economics in Unfair Contract Terms' (2011) 34(3) *Journal of Consumer Policy* 338.

⁷³ Rona-Tas and Guseva (fn 47) 428.

⁷⁴ Recitals 19 and 43 CCD; Garcia and van Boom (fn 36) 54-55.

⁷⁵ Article 5(1) CCD.

⁷⁶ Article 6(1) CCD.

⁷⁷ Article 6(1) CCD.

studies. However, this approach has not been adopted full-on, e.g. the length and format of the SECCI do not seem to be entirely compatible with lessons learned from behavioural economics. The SECCI form, included in an annex to the CCD, slightly surpasses three pages in length. However, this is a blank notice, not yet containing information on the credit agreement that parties will conclude. A credit provider still needs to fill these three pages with a relevant content, which will considerably expand the form's length. As an example, a completed notice, which consumers will receive when they consider getting a credit card with American Express in the UK, has the length of four pages.⁷⁸

A pre-contractual information notice of a minimum of three to four pages containing information on numerous aspects of consumer credit potentially creates an information overload for consumers. The information overload is arguably the most widely recognised and important problem consumers face when it comes to mandatory disclosures.⁷⁹ This, on its own, could pose questions as to the effective use of the SECCI form to increase the consumers' understanding of a credit. Furthermore, it is doubtful whether such a form could live up to transparency standards set by the European legislator, i.e. clarity, conciseness and prominence. Undoubtedly, the European legislator aimed for the SECCI form to be clear and concise, and to prominently display the credit information. This finding raises the question how much content credit providers could place in the form, and in what manner, to remain compliant with the EU transparency requirements.

Arguably, consumers could also benefit from the fact that the SECCI's length is not limited, as this might enable credit providers to explain the credit information to consumers in a more lengthy, but ultimately also more understandable way. Such an assumption disregards, however, studies showing that readers have a limited attention span.⁸⁰

The possibility of information overload is further heightened by the fact that credit providers are allowed to give consumers additional information alongside the mandatory information, as long as they issue it in a separate document, annexed to the SECCI form.⁸¹ This will further increase the documents' length. For example, the American Express' notice contains an additional page and a half

⁷⁸ The SECCI form becomes available once the consumer selects a credit card and starts the application process by clicking on the 'Apply now' button, through the website of American Express: <https://www.americanexpress.com/uk/content/credit-cards/?filter=credit&inav=gb_menu_cards_pc_creditcards>. The form in question was last accessed on 25 April 2019 and can be found here: <https://secure.cmax.americanexpress.com/Internet/Acquisition/GB_en/AppContent/common/static/Plat_CB_Fee_SECCI_422_64X_June_2016.pdf>.

⁷⁹ Faure and Luth (fn 72) 346, 348.

⁸⁰ See e.g. Better Regulation Executive and National Consumer Council, 'Warning, too much information' (November 2007) <https://www.regulation.org.uk/library/2007-Warning_Too_Much_Information_Can_Harm.pdf> accessed 25 April 2019; Sheena S Iyengar and Mark R Lepper, 'When Choice is Demotivating: Can One Desire Too Much of a Good Thing?' (2000) 79(6) *Journal of Personality and Social Psychology* 995-1006.

⁸¹ Article 5(1) CCD.

of disclosures. Separating the mandatory disclosure in the SECCI form from any non-essential information may help consumers prioritise their reading of contractual documents. However, the flexibility granted to credit providers in issuing additional explanations may also harm the consumers' interest. This is because empirical research shows that additional information might distract consumers from the information that is most relevant for their decision-making.⁸² Consequently, it might have been a better solution for consumers to be provided with different pieces of information at different phases of the contract's conclusion, instead of receiving a consolidated information pack on only one occasion.⁸³

Besides the length, the format – a table of information – in which credit providers disclose information in the SECCI form also deserves consideration. The SECCI form groups the information into five categories – the credit provider's identity and contact details; a description of the product's main features; the credit's cost; other important legal aspects; and, if applicable, additional information in the case of distance marketing of financial services.⁸⁴ Each category has its own list of mandatory information, displayed on the left side of the table, which credit providers need to answer on the right side of the table. The table contains additional explanations in relation to the meaning of certain terms, such as the total credit amount, the APR, sureties, and explanations on how to correctly fill in the table. If the European policymaker believed that the use of a table in the SECCI form would increase the disclosure's transparency, it is surprising that it did not oblige credit providers to disclose additional information in the same manner. Perhaps the difference could be explained by the varied importance of mandatory versus additional information and the European legislator attempting to ensure a more prominent display of the mandatory information through the use of the SECCI form. This difference in display could also allow consumers to more easily identify disclosures that credit providers make as required by law from disclosures they choose to add. The European legislator does not mention, however, that a display of the additional information should be less prominent than that of the mandatory information.

Moreover, it appears that the findings of the Commission's very own behavioural research were neglected when designing the SECCI form. Namely, the testing of the information notice drafted for the purposes of the European Common Sales Law showed that tables are considered 'significantly less clearly written and easy to understand'.⁸⁵ Furthermore, it was discovered that consumers are less likely to perceive information as presented, 'in logical order and sensibly

⁸² Davis (fn 51) 847-856.

⁸³ Davis (fn 51) 906.

⁸⁴ Annex II CCD.

⁸⁵ The Gallup Organisation, 'Testing of a Standardised Information Notice for Consumers on the Common European Sales Law' <http://ec.europa.eu/justice/contract/files/common_sales_law/cesl_gallup_consortium_final_report_en.pdf> 8 accessed 25 April 2019.

structured', when it was displayed in a text box.⁸⁶ There is nothing in the Commission's guidelines indicating that, despite of the results of its very own research, the text box format was not abandoned since other research confirms its effectiveness.

Lastly, although the CCD recognises that the use of certain distance communication measures, e.g. smartphones, does not support full disclosure, allowing credit providers in such cases to limit the amount of the disclosed information,⁸⁷ it does not regulate the particularities of transparent online disclosure. Behavioural research, rather unambiguously, suggests it should. Studies show that consumers display significantly less engagement and caution in the online environment.⁸⁸ Even if the European legislator prescribed the use of the table in the SECCI form in order to increase the disclosures' legibility, it ignored the question where on the credit provider's website it should be placed, when it should be presented, whether it should be in a browse-wrap or a click-wrap format, etc.

If we again take a look at the American Express notice on the UK website of the company, they disclose the SECCI form once consumers decide to apply for a credit card. Before consumers fill in their personal details, American Express presents them with an information box, on the right side of which five important documents are disclosed via a link, one of which is the SECCI form. Once consumers click on this link, they have to click on another link entitled 'View PDF' in order to access the SECCI form. Unfortunately, consumers have no obligation to click on any of the links and can proceed with their application without actually accessing the SECCI form, by simply clicking on the 'Get started' button. Thus, we may question whether the credit provider, American Express, has sufficiently drawn the consumers' attention to the SECCI form, ensuring a prominent display thereof. Especially, since the consumers' attention is not drawn to the existence and availability of the SECCI form in particular, let alone its relevance, but merely to the existence of several informative documents.

The European legislator perceives standardised information as transparent information.⁸⁹ Scholars often share this view and thus it is not particularly contentious.⁹⁰ However, as the authors have shown above, the standardised credit information notice envisaged under the CCD does not seem to incorporate findings of empirical research concerning the effective presentation of information to consumers. On the contrary, in some aspects, it might even run counter to them. Furthermore, what could be especially problematic in achieving greater transparency through

⁸⁶ The Gallup Organisation (fn 85) 23-24.

⁸⁷ Article 5(3) CCD.

⁸⁸ Jorna Leenheer et al, 'Study on the effects of online displays of sustainability' <<https://ec.europa.eu/digital-single-market/en/news/study-effects-consumer-behaviour-online-sustainability-information-displays-final-report-and-23-24>> accessed 25 April 2019.

⁸⁹ Recital 19 CCD.

⁹⁰ Garcia and van Boom (fn 36) 54-55.

standardisation is that the legislator does not rely on this tool in a consistent manner. As long as the European legislator does not oblige credit providers to disclose consumer information in the same manner at every stage of the (pre-)contractual process, does not give credit providers specific guidelines as to online disclosures, and allows them to impose additional information requirements, we can hardly expect meaningful standardisation of information in practice. Moreover, at the moment standardisation focuses on formal rather than substantive transparency, considering that it dictates credit providers in which form to relay the mandatory information to consumers, rather than its content.

A tool that could be used to ameliorate the possibly insufficient consideration of the substantive transparency within the realm of the SECCI form, but at the same time which further undermines the concept of information standardisation, is the credit provider's duty to provide adequate explanations of the (pre-)contractual consumer credit information. Article 5(6) CCD introduces this obligation with the aim of enabling consumers to evaluate the suitability of a proposed credit contract to their financial needs and situation. Unfortunately, the CCD does not further specify when and to what extent adequate explanations of the credit information have to be given nor how they impact the effectiveness of information standardisation. The CJEU related the credit providers' duty to provide adequate explanations to their obligation to assess the consumer's creditworthiness in the case *CA Consumer Finance*.⁹¹ Consequently, to provide adequate explanations of credit products to consumers, credit providers have to consider any relevant information stemming from the creditworthiness assessment.⁹² Whilst adequate explanations theoretically could be given to consumers before the creditworthiness assessment occurs, its results might require credit providers to adjust their content.⁹³ In practice, credit providers would then likely issue such explanations after the creditworthiness assessment had already been conducted, which, in any case, should take place in good time before the signing of a credit agreement.⁹⁴ The CJEU clarified, therefore, the moment of the provision of adequate explanations and the credit providers' obligation to make their content relevant for individual consumers. Further regulation of this obligation has so far been left entirely up to the Member States, including taking a decision on the form, in which credit providers should issue such adequate explanations to consumers.⁹⁵

The UK example illustrates how the duty to provide adequate explanations of (pre-)contractual credit information can be given a significant role in ensuring greater substantive transparency of said information. The regulation and enforcement of the duty at hand has been

⁹¹Case C-449/13 *CA Consumer Finance* EU:C:2014:2464.

⁹² *Idem*, paras 43-47.

⁹³ *Idem*, para 45.

⁹⁴ *Idem*, para 46.

⁹⁵ *Idem*, paras 47-48. See also Recital 27 CCD.

delegated to the Financial Conduct Authority (further: FCA), which introduced the obligation of credit providers to always adequately explain to consumers the mandatory (pre-)contractual credit information.⁹⁶ The FCA specified this duty, e.g. by obliging credit providers to advise consumers to take their time to consider the information and to enable them to ask questions.⁹⁷ It also provided guidance on how to establish the extent, to which credit information has to be explained, by considering characteristics of an agreement such as the type of credit, amount and duration, risks for the consumer, the level of the consumer's understanding of the agreement, etc.⁹⁸ Finally, the FCA obliged credit providers not to omit explaining the relevant credit information, even if consumers claimed there was no need for such explanations.⁹⁹

Whilst the UK approach to the regulation of the credit providers' duty to provide adequate explanations of consumer credit products might be used as an example of good practices, it remains problematic that such a regulation does not exist at the EU level. If consumers are given further explanations of credit products in one Member State and are simply provided with the SECCI form in another, it is doubtful whether they could meaningfully understand and compare credit products available in different Member States. This could lead to consumers opting for a less suitable product simply because they understand its characteristics better, as well as obfuscate the overall transparency of the consumer credit market.

5. Addressing three transparency problems

The previous part has identified three major problems with the current application of the principle of transparency in the consumer credit area: the lack of clarity as to the formal or substantive character of its requirements; the disconnected nomenclature of the transparency test's requirements; and, the confused application of the information standardisation in credit disclosures.

The first major inconsistency that should be addressed is the disconnect between the CCD's objectives and the current interpretation of the transparency requirements by the Commission, as well as the CJEU. As we have illustrated in part 2, to reach the CCD's objectives national enforcement authorities would need to evaluate the credit providers' compliance with both formal and substantive transparency elements. As mentioned in part 4.1 of the paper, the three main transparency requirements, clarity, conciseness and prominence are elements of either formal or substantive transparency. The Commission's guidelines, erroneously in the authors' opinion, focus solely on their formal expression. Unfortunately, the CJEU has also not yet clearly defined

⁹⁶ Consumer Credit Sourcebook (CONC) 4.2.5.R <<https://www.handbook.fca.org.uk/handbook/CONC/1/>> accessed 25 April 2019.

⁹⁷ CONC (fn 91) 4.2.5.R.

⁹⁸ CONC (fn 91) 4.2.7.G.

⁹⁹ CONC (fn 91) 4.2.9.R.

transparency requirements under the CCD nor comprehensively interpreted them. Yet, its case law on consumer credit evaluated under the provisions of the UCTD suggests that, in order to be transparent, credit agreements would need to satisfy both formal and substantive elements of transparency. In order to provide a consistent and comprehensive interpretation of the principle of transparency, we would like to see the CJEU extend the understanding of this principle awarded under the UCTD's provisions also to case law interpreting the CCD's provisions. Furthermore, in the ongoing revision of the CCD, we implore the Commission to consider explicitly stating the double function of the principle of transparency. Only by assuring information transparency in both its formal and substantive meaning, the full effect may be given to the CCD's objectives.

Secondly, we are recommending the Commission and the CJEU to clarify the specific character of the three main transparency requirements, which should strengthen the coherency of the legislator's toolbox and increase legal certainty. First, the Commission and the CJEU could explicitly state that the requirements of clarity, conciseness and prominence are always to be jointly examined in the assessment of the credit provider's compliance with their obligation to provide transparent consumer disclosures. If we consider the dictionary meaning of the transparency requirements envisaged by the CCD, as presented in part 4, we can distinguish between formal and substantive aspects of transparency. For example, the requirement of prominence, which demands that information is noticeable, more easily corresponds to formal transparency. Contrarily, the requirement of clarity demands that information is easily understood, perceived and interpreted, which seems to represent substantive transparency.¹⁰⁰ Conciseness breaches this divide, as it demands brief and comprehensive disclosure of a large amount of information, which requires credit providers to draft and issue information in a particular manner, whilst still keeping it comprehensible to consumers. If conciseness was always to be examined jointly with clarity, then we would suggest that the Commission and the CJEU should perceive conciseness as a requirement of formal transparency and clarity – of substantive transparency. Despite the complex interaction of various transparency requirements, the Commission and the CJEU should attempt to separate them, whilst recognising their influence on one another. This would allow the relationship between formal and substantive elements of transparency to be determined more precisely and to acknowledge that compliance with only one side of the principle of transparency is insufficient for reaching the CCD's objectives.

Finally, the Commission should reconsider the use of standardised information obligations, such as the introduction of the SECCI form. In case their use is empirically confirmed to either increase the consumers' understanding of credit offers or to facilitate their comparison,

¹⁰⁰ In contrast to what the European institutions seem to suggest in their guidelines to the CCD, see European Commission (fn 23) 11.

standardisation should become a more streamlined and enhanced tool for the European legislator. This means it should not only apply to the form of the information credit providers issue to consumers, but also to the content of this information.

6. Conclusions

On the basis of the CCD, credit providers have various information duties with different transparency requirements imposed on them, depending on the stage of contracting. Whilst credit providers have to specify information in a clear, concise and prominent manner by means of a representative example in the advertising stage of consumer credit, in the pre-contractual stage, in most cases, they have to issue it on the SECCI form. Once the contract has been concluded, the information it contains has to be clear and concise. There are only general Commission's guidelines on various transparency requirements, many of which may have the same meaning. These guidelines do not address the relationship between the formal and substantive transparency elements but seem to recommend the assessment of the credit providers' compliance with only formal elements of transparency. Furthermore, the standardisation of information provision seems to be aimed at increasing the information transparency, but the European legislator has not been using it consistently and also designed it in a way facilitating mostly formal transparency.

On the basis of the above-presented analysis and with a view to the ongoing review of the CCD, the first point to be made is that it could be beneficial to use one transparency toolbox, i.e. to limit and explain the terminology of transparency requirements. If the European legislator continues to use a few modalities, such as, clear, concise and prominent, then it should define them separately and clarify whether they need to be satisfied cumulatively. Moreover, the Commission should then interpret them in line with the legislator's objectives, as the authors have done in this paper. This means that aside from the modalities for formal transparency, such as prominence and likely also conciseness, substantive transparency needs to be recognised in the requirement of clarity. This would allow to further delineate the relationship between the formal and substantive requirements of transparency. In the CJEU's case law on the provision of information in credit agreements such a clear delineation of formal and substantive aspects of transparency is, so far, missing, as well.¹⁰¹

The second point we make in this paper is that if scholars further prove standardisation to be an effective measure, which increases the disclosures' transparency, the European legislator should further attempt to standardise credit disclosures. Moreover, it should then be recommended to standardise not only the form of the credit information but also its content.

¹⁰¹ The CJEU has recently further elaborated on the difference between formal and substantive elements of transparency in the mortgage loan cases such as in Joined cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo* EU:C:2016:980, paras 48-50.

Coming back to the core question of this paper, the relationship between formal and substantive transparency requirements, it is without doubt insufficient to provide a concise and prominent disclosure but write it in an unclear, unintelligible manner, hindering the consumers' understanding thereof. There is less clarity as to consequences for credit providers who would provide a lengthy disclosure, lacking in consistency, but which would be nonetheless easily understandable to consumers. However, we have argued that due to the information overload consumers are less likely to read lengthy disclosures, which means that a simple breach of only formal transparency requirements would also likely harm consumers. Even if the objective of the CCD was only to increase consumer protection, then it still would be difficult to argue that substantive elements of transparency should prevail over the formal ones. Moreover, such a reasoning would ignore the other objective of the CCD, namely, of securing a transparent and effective credit market. The formalities around consumer credit disclosures have been designed to facilitate the ease of comparisons among various credit offers and to ensure fair competition in the credit market. This goal could be undermined if credit providers were allowed to deviate from the formal transparency requirements, knowing they could prove the consumers' understanding of credit terms. As long as the objectives of the CCD are kept in mind, it is easy to determine that credit providers need to satisfy both formal and substantive elements of transparency.

Therefore, it seems imperative to retain both the more formal elements of transparency, such as the requirement of a concise and prominent disclosure or the standardised disclosures, on the one hand, and the more substantive element of clarity, on the other hand. Fulfilment of the one set of transparency requirements would not seem to be able to excuse an infringement of the other type. It does not seem necessary to keep the lines blurred on the European regulatory level, which allows the credit market to continue to be shaped differently by national enforcement authorities, as presented in part 4 of this paper. Hence, we are asking for further transparency as to the meaning of the principle of transparency.