

Consumer Credit, Digitalisation and Behavioural Economics Are new protection rules needed?

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Policy Findings

In 2008, the Consumer Credit Directive (CCD) was significantly changed by adopting a targeted harmonisation approach that aimed at standardising information disclosure duties and imposing similar rights all around the EU. Ten years later, this new version of the CCD has increased consumer protection in some EU countries. At the same time, however, it has had limited impact on the emergence of a single market for consumer credit, as the volume of cross-border sales remains marginal. In this context, the European Commission recently launched an evaluation of the CCD to assess its interplay with other rules and whether its current provisions are still fit for purpose.

Over the last decade, consumer credit markets have been transformed markedly. On the one hand, the fast digitalisation of the sector has contributed to new services, new processes and new providers. On the other hand, expanding knowledge of the behavioural biases of consumers has been slowly challenging the status quo of how authorities should design consumer protection rules. Both phenomena present opportunities that should be exploited by a possible new CCD, as well as risks that must be addressed, as summarised in the following recommendations:

- *Overall, a possible revision of the CCD should ensure that the new rules are anchored in the Digital Single Market Strategy.*
- *The new CCD should contribute to unleashing the potential of digital tools in order to overcome barriers to cross-border sales of consumer loans.*
- *The revision should place some emphasis on digital interoperability, data privacy and the extension of the scope of the CDD to new fintech business models.*
- *In order to help mitigate the negative effects triggered by specific behavioural biases, personalised rather than standardised information disclosure should be encouraged.*
- *Given that the digital world is likely to accelerate the average speed of consumer decisions, the right of withdrawal should be maintained. The right of early repayment should be clearly communicated, as the decision to reimburse earlier often works against some key behavioural biases.*

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Introduction

In 2008, after several years of intense debates and two formal modifications, the original Consumer Credit Directive adopted in 1987 was significantly changed. Following a targeted harmonisation approach (that promotes full harmonisation for some options and leeway in others), EU regulators incorporated new elements such as the right of withdrawal and early repayment (Lannoo & Jentsch, 2007). In addition, they reinforced rules on information disclosure duties by integrating the European Standardised Information Sheet, which compels lenders to provide a large amount of information to their borrowers.

A first report on the implementation of the new CDD in 2014 revealed that several provisions were often not respected by creditors, namely those on advertisements and pre-contractual information, and those on the duty to inform consumers about their rights (European Commission, 2014b). Also, despite the targeted harmonisation approach that aimed at facilitating the emergence of a true single market for consumer credit, the market share of cross-border sales of consumer credit remained desperately low, at around 1% of the EU outstanding value.

In this context, the European Commission recently launched a full-fledged evaluation of the CCD, in line with better regulation principles. As presented by the European Commission (2018a), three of the stated objectives of this exercise are to assess “whether original objectives have been achieved”, “whether the tools of the Directive correspond to current needs” and “how the Directive works together with other legislation”. This seems to be the perfect timing to analyse what has changed since 2008 on the consumer credit market and to assess whether provisions contained in the latest CDD are still fit for purpose.

Over the last decade, EU consumer credit markets have been subjected to significant transformation. First, following the fast digitalisation of the demand for credit, supply chains and distribution channels of credit providers have been quickly adopting digital tools. On one hand, mainstream players have developed hybrid models combining both online and offline distribution channels. On the other hand, new actors entered the market by proposing new credit scoring methods and/or fully digitalised distribution models.

In the meantime, successive Nobel Prizes awarded to two prominent behavioural economists, Robert Shiller in 2013 and Richard Thaler in 2017, relaunched the debate over how and to what extent behavioural insights could be applied to the regulation of retail finance. In recent years, several national bodies have been attempting to use behavioural tools to improve regulation and questions remain over whether it is necessary for European regulators to integrate this approach.

Overall, this is the right timing to judge whether the ten-year-old CCD is well adapted to the digital and behavioural context. Below, analyses of the need to anchor a possible new CCD in the Digital Single Strategy are provided, with some focus placed on the questions of extending the scope of application to new fintech entrants and revising the obligation to assess the creditworthiness of consumers in the context of big data. Then specific behavioural biases that could apply to credit markets are analysed for the purpose of determining to what extent specific CCD provisions can restrain these biases in a digital environment.

1. The need to anchor the CCD in the Digital Single Agenda

1.1 What has changed since 2008? The digitalisation of the supply chain

Since the introduction of the CCD in 2008, digitalisation has been transforming the supply of consumer loans. On one hand, established players have digitalised their distribution channels, most of the time by developing hybrid distribution models combining both online and offline channels (see Figure 1 below). In the context of the ever rising volume of stored digital data, they have been slowly attempting to refine their processes for segmentation, creditworthiness and even recovery, notably by using data analytics. Nevertheless, given their rising priority of addressing reputation risk, the approach of mainstream financial providers to data remains prudent in most cases.

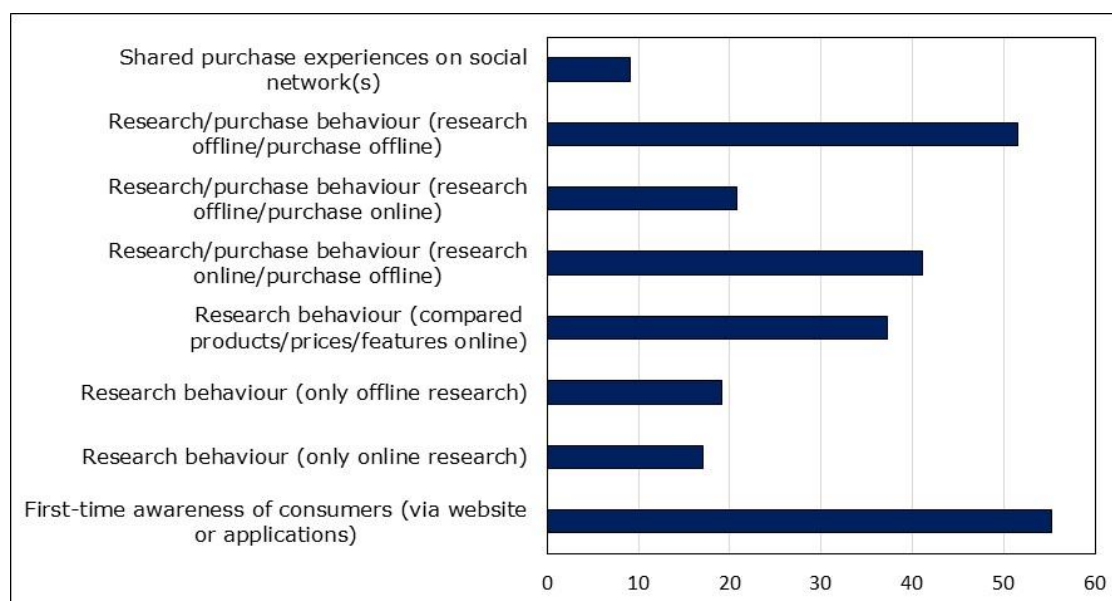
On the other hand, new entrants offering new types of products have emerged, particularly by making the best of consumers' rapid embrace of digitalisation. These new players have been essentially fintech start-ups. Some tech giants that have been traditionally active in other economic sectors are developing specific financial services such as current accounts, payment and savings, but in the EU no large tech company has thus far been involved in the large-scale supply of consumer loans.¹

Fintech start-ups integrated consumer credit markets by roughly following two types of business models. The first type is based on peer-to-peer platforms aimed at matching individual borrowers with individual lenders. Given that these P2P models use almost exclusively online channels, they typically benefit from lower overhead expenses than those of banks. Some of the most successful EU P2P platforms for consumer loans are Zopa and RateSetter in the UK, Auxmoney in Germany and Bondora in Estonia. Although their current cumulative market share remains limited, the total amount and number of loans contracted on these platforms have been growing at a steady pace and the market share is even becoming significant for specific niches of consumers. The EU recently adopted a proposal to better regulate these business models. However, the goal of the initiative is to increase the protection of agents investing on those platforms. Little is proposed for the protection of borrowers, which could be the objective of an amended CCD (European Commission, 2018b).

The second business model type concerns providers that are typically funded by other companies and that notably use alternative data analytics to segment and score consumers. This group of providers typically focus on the underbanked, in particular consumers with thin credit files. Kreditech remains one of the most successful start-ups in this group and is increasingly serving consumers in emerging markets outside of the EU. Similar models such as CreamFinance are placing further emphasis on mobile devices as the main distribution model. It is noteworthy that both P2P platforms and other fintech start-ups are mostly providing unsecured personal loans, generally acknowledged as the most risky type of consumer loans.

¹ For example, Orange Bank was recently created in France to provide current accounts, payment means and deposits. Although they do not provide loans at the moment, they announced their intention to do so in the foreseeable future. See for example <https://www.orange.com/fr/Groupe/Activites/Services-financiers/Folder/Orange-Bank>.

Figure 1. Degree of digitalisation of distribution channels for personal loans, 2015 (%)



Note: Unweighted average of a sample of 10 EU countries (Belgium, Germany, Estonia, Finland, France, Ireland, Italy, the Netherlands, Poland and the UK).

Sources: Google Consumer Barometer Survey (2015), European Commission study (2016).

1.2 CCD revisions in line with the Digital Single Market Strategy

Over time, the landscape of consumer credit regulation has evolved from minimum harmonisation (87/102/EEC) to targeted harmonisation (2008/48/EC) in order to strengthen the comparability of credit agreements. The view of the European Commission was that a pan-EU approach to consumer law was needed in order to provide more equal forms of protection to consumers across all member states.

Revisions focused on modernising the scope of the directive to ensure that more types of consumer credit were included. Policy-makers assumed that the internal market for retail financial services would become increasingly integrated and wanted to reduce the vulnerability of consumers facing unfamiliar rules abroad (European Commission, 2002). Nevertheless, despite all of the emphasis on harmonised rules and integration, one may be surprised to find that cross-border lending is still sparse. Within the euro area, cross-border consumer loans still account for less than 1% of total lending activity (European Commission, 2016). The need for face-to-face interactions, consumers' language preferences and home biases greatly explain the tendency toward such a disjuncture.

Against the failure to develop a single market for retail financial services such as consumer credit, the European institutions should aim at unleashing as much as possible the potential of digitalisation with respect to cross-border sales. A specific study (European Commission, 2016) was conducted to identify the barriers which prevent cross-border sales and could be overcome by digitalisation. One of the main findings was that digitalisation allows firms to market, explain, score, sell and recover consumer credit without face-to-face interactions. Geographic distance is not an insurmountable barrier anymore in the digital era and could play in the favour of a single market for retail finance. As such,

the new CCD should build on the digital transformation of credit markets in order to make cross-border sales easier to carry out.

As for many new or revised pieces of legislation at EU level, the CCD should therefore be analysed and possibly revised within the prism of the Digital Single Market Strategy. This strategy defines a digital single marketplace as a competitive market environment where individuals can seamlessly access credit (European Commission, 2015). It also guarantees a high level of consumer and personal data protection regardless of nationality or place of residence. Against this background, accessibility, consumer protection, and data privacy are three of the chief issues that should be addressed in a revision of the CCD. Whereas consumer protection has remained at the core of the existing CCD, accessibility and data privacy are rather new topics. As analysed below, data privacy principles could be emphasised in existing articles that focus on information disclosure requirements and creditworthiness.

Accessibility is not mentioned in the current CCD. To a certain extent, accessibility pertains to the agenda of financial inclusion. But, in a digital context, the question of accessibility can take other forms. For example, it can imply that barriers related to unjustified geo-blocking, a practice used for commercial reasons by online sellers that result in the denial of access to websites in other states, should definitely be banned.

Accessibility entails that the EU can ensure consumers have seamless access to consumer credit in a digital environment, whilst enhancing an adequate level of cybersecurity. The CCD could for instance build on rules such as the eIDAS to enhance security of authentication processes and boost interoperability. In order to reinforce regulatory consistency across online and offline distribution channels, regulators could re-emphasise that electronic signature for credit agreements has the same value as an offline signatures. And this should be ensured on a cross-border basis as well.

1.3 Extension of scope to new entrants?

Specific desk research was conducted to better understand the number of consumer complaints involving fintech companies and whether these companies follow CCD rules. As highlighted by the UK Financial Ombudsman Service (2016), more complaints were submitted about “peer-to-peer lending” than about investment-based crowdfunding. In some cases, consumers stated that they were not aware of borrowing money from a P2P platform. In others, they were aware of borrowing from a P2P platform but had doubts about the recourse they have relative to the lender compared with different types of credit they used in the past.

Most fintech start-ups providing unsecured consumer loans that are remunerated should in principle be covered by the CCD, provided that the amount of the credit is more than €200 and less than €75,000. The scope defined in Article 2 and the definitions supplied in Article 3 *a priori* do not provide any reason to exclude loans supplied, for example, through peer-to-peer lending platforms. Given the appearance of all these new entrants, CCD Articles 2 and 3 should be revised to clearly ensure this fintech ecosystem complies with its rules.

In Article 2, point 5, paragraphs 3 and 4 state the following:

Member States may exempt from the application of this Directive credit agreements concluded by such an organisation where the total value of all existing credit agreements entered into by the organisation is insignificant in relation to the total value of all existing credit agreements in the Member State in which the organisation is based and the total value

of all existing credit agreements entered into by all such organisations in the Member State is less than 1 % of the total value of all existing credit agreements entered into in that Member State.

Member States shall each year review whether the conditions for the application of any such exemption continue to exist and shall take action to withdraw the exemption where they consider that the conditions are no longer met.

These two paragraphs can give national supervisors the opportunity to favour the development of new providers of consumer credit. This can be justified by the principle of proportionality. New business models with limited scale and capacity might have greater difficulties than established players when it comes to complying with some rules. And the regulatory burden for consumer finance can be a significant barrier to the entrance of new players. A level playing field guaranteeing that “everyone has an equal chance of succeeding” can therefore be applied. Enhancing the emergence of fintech start-ups is a key priority in the policy agenda of several national supervisors across the EU. The exemption from CCD rules, provided that specific conditions of business size are met, is a useful tool for national supervisors trying to promote financial innovation.

Nevertheless, the main objective of the CCD is to protect consumers, as well as to define the right balance between the rights and duties of borrowers and lenders. The use of exemptions and their impact on consumer protection should therefore be clearly understood. The collection of evidence might be needed for this purpose. A pan-European review of how and to what extent this exemption contained in Article 2 has been used, and of the consequences of this use in terms of consumer protection and fintech development, should be the starting point.

1.4 Revision of the obligation to assess the creditworthiness of consumers

The issues to be addressed in the context of creditworthiness are twofold. First, in recent years, the underwriting practices of a rising number of fintech companies include gathering consumers’ social networking and other personal information to run unconventional credit assessments. A proper regulatory response should consider the appropriateness of these credit-scoring methods, especially with regard to implicit demographic biases in the algorithms. The need to use pertinent and well-founded data in creditworthiness should be emphasised in a revision of the CCD.

Some additional principles should be re-emphasised in the design of algorithms for creditworthiness. In particular:

- Creditworthiness assessment should pursue its initial purpose: determining whether the consumer can comply with payment requirements within the duration of the credit, without particular hardship. The result of the assessment of creditworthiness is “Yes”, “No” or “More information is needed before completing the assessment”.
- As emphasised in the Mortgage Credit Directive (European Commission, 2014a), the assessment of creditworthiness should take into consideration all necessary and relevant factors that could influence a consumer’s ability to repay the credit over its lifetime.²

² This principle can be found in the Mortgage Credit Directive, Recital 55. The objective of creditworthiness assessment with respect to Directive 2008/48/EC is clearly indicated in the Judgment of 27 March 2014 of the European Court of Justice C-565/12 in the following terms (para. 42): “since the creditor’s obligation, prior to conclusion of the agreement, to assess the borrower’s creditworthiness is intended to protect consumers

- Credit risk refers to the risk borne by the creditor and the probability and size of a loss due to an awarded credit. The creditor's expected loss may be reduced by personal guarantees. This is irrespective of the consumer's ability to repay.³

Secondly, Article 9 on cross-border access to databases for the purpose of creditworthiness should be re-examined. As highlighted in the "Consumer Financial Services Action Plan: Better Products, More Choice" (European Commission, 2017), one of the main barriers to cross-border creditworthiness is the different types of information provided. For example, in some countries, credit registers collect and report on all types of payments (i.e. positive reporting), whereas in others credit registers only report on missed payments (i.e. negative reporting). The Action Plan also mentions other issues, such as the lack of interoperability between credit registers, information not widely used across borders, etc.

These elements were identified in the consultation conducted for the European Commission in 2016. Also, the consultation revealed that the causality between demand and supply of cross-border credit data could not be clearly identified. Is the lack of standardised and consistent credit data across the EU a significant barrier to the development of cross-border credit scoring? Or does the low demand for foreign credit data by banks explain why credit registers have no business incentives to prioritise the harmonisation of their processes?

Whatever the answer, some initiatives could contribute to facilitating the cross-border exchange of relevant credit data. Action 9 in the Action Plan of the Commission proposes to work to develop a minimum set of data to be exchanged between credit registers in cross-border creditworthiness assessments. This is most likely the right starting point for facilitating cross-border credit scoring. But many other barriers would need to be addressed to enhance the development of a single market: generalisation and convergence in remote identification and KYC processes, remote recovery processes, etc. And while the CCD could somehow re-emphasise these elements, shaping the policy agenda for electronic signatures, anti-money laundering, etc., is way beyond its scope.

Recommendations

- Overall, a possible revision of the CCD should ensure that the new rules are anchored in the Digital Single Market Strategy.
- The new CCD should contribute to unleashing the potential of digital tools to overcome barriers to cross-border sales of consumer loans.
- The revision should place some emphasis on digital interoperability, data privacy and the extension of the scope to new fintech business models.

against the risks of overindebtedness and bankruptcy". The Judgment of the European Court of Justice C-449/13 of 18 December 2014 (Consumer Finance) confirms that the burden of proof of non-performance of creditworthiness assessment lies with the creditor and, moreover, the interpretation of Directive 2008/48/EC "precludes national rules according to which the burden of proving the non-performance of the obligations laid down in Articles 5 and 8 of Directive 2008/48 lies with the consumer".

³ According to FinCoNet, it is a risk to the credit provider of entering into a "bad loan", i.e. with the likelihood of a consumer defaulting or being unable to repay their loan obligation.

2. Applying behavioural insights

2.1 What has changed since 2008? Greater interest in behavioural economics

Behavioural economics typically is the study of the effect of social, cognitive, psychological and emotional factors on the economic decisions of individuals. The postulates behind this discipline directly challenge the neoclassical economic theory of rational consumers who are able to systematically choose the best option, no matter how imperfect the available information.

The core assumption of behavioural economics is that consumers weigh the costs and benefits of their options disproportionately due to cognitive limitations. As a result, many customers select credit products that are suboptimal for their financial situations. Specifically for consumer credit, some of the key biases that can prevent consumers from making decisions that best serve their interests are:⁴

- Present bias: the tendency of consumers to assign greater weight to more immediate payoffs when considering trade-offs between two future moments (O'Donoghue & Rabin, 1999), even if this approach could be detrimental in the long run.
- Availability heuristics: the tendency of consumers to make judgments about the likelihood of an event based on how easily an example, instance, or case comes to mind. For example, investors may judge the quality of an investment based on information that was recently in the news, ignoring other relevant facts (Tversky & Kahneman, 1974).
- Overconfidence: the tendency of consumers' subjective confidence in their own ability to be greater than their objective (actual) performance. This could for example concern a situation where the lender asks consumers specific questions about their financial health and consumers answer with unreasonably favourable views.
- Loss aversion: the pain of losing is psychologically more powerful than the pleasure of gaining, and since consumers are more willing to take risks to avoid a loss, loss aversion can explain differences in risk-seeking versus aversion. It is encapsulated in the expression "losses loom larger than gains" (Kahneman & Tversky, 1979). This can have a significant impact on, for example, the decision-making process for loan fees: would you rather, for instance, receive a \$5 discount or avoid a \$5 surcharge?
- Status quo bias: the tendency of consumers to prefer things to stay the same, by doing nothing or sticking with a decision made previously (Samuelson & Zeckhauser, 1988). For instance, it could be in the interest of consumers to prepay their loans, but they prefer not to simply owing to the "comfort" of succumbing to inertia.

While the awarding of the 2017 Nobel Prize to Richard Thaler could be *a priori* perceived as a universal recognition of the merits of this discipline, interest in the topic had been growing for more than a decade. In 2002, the Nobel Prize in Economic Sciences was awarded to the psychologist Daniel Kahneman, a researcher often considered one of the main contributors to the creation of behavioural economics. A decade later, in 2013, behavioural economist Robert Shiller was awarded the Nobel Prize amid much praise and publicity. In the meantime, several bestselling books have been published on the topic, notably by Ariely (*Predictably Irrational: The Hidden Forces That Shape Our Decisions*, 2008),

⁴ The detailed definition and information on each bias builds on the analyses developed by the online behavioural science network known as the Behavioral Economics Group, at www.behavioraleconomics.com.

Thaler (*Nudge: Improving Decisions about Health, Wealth, and Happiness*, 2008) and Kahneman (*Thinking, Fast and Slow*, 2011).

Resulting in part from the popularity of the topic, several policy initiatives have been taken to better understand how behavioural insights could be calibrated to improve policy-making. At national level, the UK's setting up of the Behavioural Insight Team in 2010 to apply nudge theory in an effort to improve government policy and services has been one of the main achievements in this respect.

At EU level, the European Commission is paying greater attention to behavioural science as a tool for informing policy-makers of how people perceive, interpret, and react within different policy areas.⁵ The European Commission is even calling for greater exchange of good practices across member states.⁶ Specifically on financial services, the European Commission has published a few impactful studies on the application of behavioural insights to financial regulation. For instance, in 2017 it published the extensive "Study on consumers' decision-making in insurance services: A behavioural economics perspective".⁷

National financial authorities have been developing behavioural teams to better understand the topic and analyse how and to what extent it could be used to refine policies. Such units have been created at the UK Financial Conduct Authority, the Netherlands Authority for the Financial Markets, the US Consumer Financial Protection Bureau, etc.

Nevertheless, the rising popularity of the behavioural economics approach among policy-makers has sparked several criticisms regarding its soundness and foundations. More generally, the main criticism of behavioural economics concerns the attempt by its practitioners to formulate general laws of human behaviour, while problem-solving approaches are rather *ad hoc* and vary noticeably from one individual to another.⁸ As such, many critics conclude that behavioural economists can hardly provide consistent guidelines for policy design.

Some other ardent critics place the focus on the philosophical and political issues of applying behavioural insights to policy-making. These critiques denounce the paternalistic drift of such an approach, which in the end could pose a significant threat not only to the right of free enterprise but also to the freedom to choose and hence lead individuals "to err in making important decisions" (Wright et al., 2012).

2.2 Changes in the behaviour of consumers in the digital age

In the digital realm, consumers are less concerned with the whereabouts of their service providers. A recent study (PwC, 2015) showed that consumers seeking personal loans generally placed more

⁵ See for instance the 2016 JRC report on "Behavioural Insights Applied to Policy" at http://publications.jrc.ec.europa.eu/repository/bitstream/JRC100146/kjna27726enn_new.pdf.

⁶ See for example the end of the first paragraph of the JRC's declaration at <https://ec.europa.eu/jrc/en/news/behavioural-sciences-policy-report-launch>.

⁷ For instance, in 2017 it published the extensive "Study on consumers' decision-making in insurance services: A behavioural economics perspective, at <https://publications.europa.eu/en/publication-detail/-/publication/b86d7fd-9e77-11e7-b92d-01aa75ed71a1/language-en/format-PDF/source-search>.

⁸ As a result, most of the empirical research on this topic considers a specific market and/or product, within a given economic, sociological and cultural environment, and produces findings that are hardly consistent with other markets or environments.

importance on features like fast end-to-end processes, low closing fees, and flexible terms, than on the lender's particular branch location. Home bias is losing its pull.

The demand for greater processing speed should be brought to the attention of policy-makers. It can be reasonably assumed that the risk of making suboptimal decisions is greater when consumers make quick financial decisions with a web-based lender or a mobile application, if sufficient protections are not in place. There is an important distinction between transactional fintech services such as PayPal, VenMo, and Apple Pay, and market entrants that provide intertemporal financial services, i.e. Funding Circle and Kreditech. Intertemporal fintech services involve lending, investment, and insurance services, which facilitate the exchange of money over time. In this arena, market participants assume credit risk, and rash consumer decisions could heighten the negative impact of specific cognitive limitations such as present bias or overconfidence.

2.3 Review of the rules on precontractual information disclosure

The CCD includes lengthy requirements in terms of information disclosure, for both advertisement (Article 4) and terms in credit agreements (Article 5). Two main limitations can be emphasised in this approach. First, consumers are increasingly combining offline and online interactions for the same product, and often different devices to do so: smartphones, computers, etc. As discussed in CEPS & ECRI (2017), the Distance Marketing of Retail Financial Services Directive (2002) needs amending, notably by integrating some elements of the Consumer Rights Directive (2011), such as the rules on adapting information requirements to technical constraints (for example, which rules to follow when there is less capacity to display the information: mobile telephone screens, SMS, etc.). These requirements could be directly integrated into a new CCD.

Secondly, still according to CEPS & ECRI (2017), the combination of three recent phenomena could result in a progressive transformation in the way precontractual information duties are designed: emergence of behavioural insights, fast growth in big data analytics and an overall consensus that standardised information disclosure policy that integrates a long list of requirements is not sufficiently efficient. The European Standardised Information Sheet of the CCD does provide a large amount of relevant information to the borrower. However, due to their behavioural biases, many consumers will not be able to select and understand adequately the shared information. Or they might simply not be interested in reading the information.

If effectively exploited, big data and machine learning could eventually contribute to more efficient precontractual information disclosure. One of the main limitations of the systematic application of behavioural insights to consumer protection policies was the lack of quantitative data on consumer behaviour. Most research experiences aimed at testing some of the well-known behavioural biases are conducted in “artificial” environments, with a carefully chosen sample of persons. At present, large amounts of consumer behaviour data are collected through digital platforms, IoTs, etc. Some of this data might contain information that might be valuable if analysed for the purpose of information disclosure. A much more refined understanding is possible regarding the behaviour of consumers: How do they budget their spending? What are their digital preferences? What is their digital behaviour? What framing of information corresponds to them best?, etc.

Against this backdrop, it might be possible to develop a model of “smart disclosure duties” that is personalised rather than standardised. Obviously, this approach should be followed by ensuring that GDPR rules concerning the “legitimacy” of data collection and data use are respected. Also, this new

model can be implemented only progressively. This entails that should a new CCD update its information disclosure requirements in this direction, smart disclosure could be done preferably on a voluntary basis and strongly encouraged. Overall, six specific challenges that will need to be addressed by policy-makers (CEPS & ECRI, 2017: 63–67) are:

1. Voluntary basis (ascent from both consumers and providers).
2. Review or continuation of some core concepts of the existing European rules (such as the notions of “average” and “vulnerable” consumers).
3. Difficulty of enforcing the new rules.
4. Continued risk of “over-disclosure” (notably regarding the “privacy statement”).
5. Complexity of products.
6. Risk of data discrimination.

2.4 Right of withdrawal and early repayments: two rights well-suited to the digital and behavioural age

2.4.1 Right of withdrawal: a right well-suited to the digital age

In 2008, a new rule was added to the CCD that gives consumers the right to change their minds about a credit agreement up to 14 calendar days after signing the contract (CEPS & ECRI, 2017: 63–67). By allowing consumers time for second thought, Article 14 contributes to alleviating the effect of behavioural biases such as overconfidence, present bias, availability heuristics or even loss aversion. These biases can cause consumers to overestimate their future ability or willingness to repay a credit, or to underestimate the cost of the credit.

Some of these biases might have been heightened by specific product-framing that can work against a consumer’s rational decision-making. For example, successful interactions in direct sales or attractive marketing campaigns are expected to boost consumer confidence for any given financial product. But after the consumer signs the contractual obligations, having a short period of time to reconsider is likely to reduce the impact of overconfidence. The CCD anticipates this sort of thinking and helps reduce the effects of overconfidence in snap decision-making.

So far, only a limited number of consumers have invoked this right. However, as fintech innovators take their lending processes mobile, many lenders promise same-day loan disbursements. The right of withdrawal should be well-suited to supporting consumer protection in the digital age, because faster on-boarding processes are expected to decrease the amount of time most consumers spend when arriving at a financial decision, thus more mistakes are likely to be made. As such, this right needs to be systematically communicated to consumers.

2.4.2 Early repayment

Article 16 is one of the most valuable consumer protection rights provided in the CCD, yet it is difficult to invoke. This provision works against the insights of behavioural finance, because it encourages consumers to do something that is often against their nature. Most consumers lack the financial acumen to price the time value of money (present bias). This is evident in the case of consumers who leave compounding interest loans underserved while holding onto savings in a low-interest bearing account. Consumers feel a greater sense of financial strain at the moment that capital is lost, and this financial strain outweighs that of a larger value deferred loss.

This holds true when consumers are paying down a debt, as they ‘lose’ the total of each interest payment in the effort to reduce future costs. Timely repayments help consumers avoid the debt cycle, but loss aversion also reinforces the willingness of consumers to delay repayment. Loss aversion can be a costly bias for consumers who hold short-term high-interest debt or payday loans. This loss aversion can be reinforced by the status quo bias of some consumers who prefer not to act simply because they feel the need to be in control and want to avoid regret. The new CCD should ensure that the right of “early repayment” is clearly and systematically communicated to all consumers by all credit providers that have to comply.

Recommendations

- In order to help limit the negative effects triggered by specific behavioural biases, personalised rather than standardised information disclosure should be encouraged.
- The right of withdrawal should be maintained, especially as the digital world is likely to accelerate the average speed of consumer decision. The right of early repayment should also be clearly communicated, as the decision to reimburse earlier often works against some key behavioural biases.

3. Concluding remarks

The CCD overall seems to be well-equipped for ensuring consumer protection in the digital era. Specific dispositions also contribute to limiting the negative effect of behavioural biases on consumer decisions. Nevertheless, in the context of the Digital Single Market Strategy, further emphasis should be placed on accessibility and data privacy. The latter can pertain to both the agenda of financial inclusion and the agenda of digital interoperability (for instance by re-emphasising the need to ban geo-blocking). Data privacy should be emphasised in rules for information disclosure and creditworthiness, given the increasing use of personal data to segment and score consumers.

Also, a new CCD should clearly state whether new fintech business models must comply with its rules. In this respect, further clarifications will be needed for exemptions and their impact. A new CCD should also encourage the development of personalised information disclosure based on the use of personal data, provided that privacy rights are respected. As proposed by the Action Plan of the Commission for Consumer Finance (2017), a minimum set of data to be exchanged between credit registers for cross-border creditworthiness should be developed. Finally, the right of withdrawal and early repayment should be maintained in order to alleviate some negative effects triggered by behavioural biases.

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