

Consumer Education and Information Rights in Financial Services¹

In their article, Udo Reifner and his co-author wondered whether law can contribute to financial education. In particular, they questioned whether statutory information rights can ultimately contribute to consumer education and are an adequate means of combatting over-indebtedness, primarily caused by reduced state intervention and supervision.² Across Reifner's article *Consumer Education and Information Rights in Financial Services*, two key messages resonate: information does not amount to education and any form of legislative intervention need to take the needs of consumers into account.

Reifner has been a precursor, having developed an interest in consumer education back in the 1970s³, he revisited the issue numerous times through academic research⁴ and on the ground. His approach has always been multi-disciplinary at a time when few lawyers had any understanding of economics or sociology. When he first grappled with the notions, little European literature, if any, was available. Research on consumer education or financial literacy as it is often known⁵, was mostly conducted in the USA.⁶ Through the *iff*'s consumer oriented financial education programmes⁷, he directly contributed to the financial education of thousands of German students, focussing not so much on knowledge but on the role consumers can play in the economy and the pressures they can apply on the supply side to develop and provide better products.⁸ Reifner explains: *'Through the process of selection from the available products and through the process of making complaints, consumers can exercise pressure on providers and show them how their needs should be met.'*⁹ His work also contributed to equipping national organisations (grass roots and consumer associations)¹⁰ in the 27 Member States of the European Union, with the skills and

¹ Comments on Udo Reifner and Isabel Herwig, 'Consumer Education and Information Rights in Financial Services' 12 (2003) 2 Information & Communication Technology Law 125-142.

* I wish to extend my thanks and gratitude to Professor Reifner, whom I had the privilege to work with on several projects for the European Commission. I have learnt a great deal about how to approach legal problems from a variety of disciplines and this makes me a better researcher for it. Not to mention the knowledge of Roman law I have gained, violin rehearsals I had the chance to be privy to, the meals and good humor shared during my time spent in Hamburg. *Vielen Dank, Udo!*

² Udo Reifner and Isabel Herwig, 'Consumer Education and Information Rights in Financial Services' 12 (2003) 2 Information & Communication Technology Law 125, 126.

³ (1976) *Tatsachen zum Verbraucherschutz im Konsumentenkredit* (– see list of publications)

⁴ For example, Reifner, *Financial Literacy in Europe* (Nomos 2006); Reifner and Schelhowe, 'Financial Education' 9 (2010) 2 Journal of Social Science Education 32

⁵ Note that there is to date no agreement on what financial literacy is. It is described by the OECD as a combination of awareness, knowledge, skills, attitude and behaviour necessary to make sound financial decisions and achieve financial well-being, see Jana Valant, 'European Parliament Briefing: Improving the Financial Literacy of European Consumers' (May 2015), 2

⁶ See in particular, David Caplovitz, *The Poor Pay More* (The Free Press, Macmillan 1967) and George S. Day, 'Consumer Research and the Evaluation of Information Disclosure Requirements: The Case of Truth in Lending' (1974) 1 Journal of Consumer Research 21

⁷ The *iff* is a not-for-profit organisation offering multi-disciplinary research founded by Reifner in 1987. It has influenced German and European financial policies since its inception and continues to do so today. It also provides key assistance to consumer associations and runs a number of financial education programmes, including SchülerBanking, aimed at school children aged 14 to 17.

⁸ Udo Reifner and Anne Schelhowe, 'Financial Education' 9 (2010) 2 Journal of Social Science Education 32, 32-42

⁹ *ibid* 34

¹⁰ ConFinAd project financed by the European Commission. The project was developed to build the

knowledge required to empower consumers to take their own decisions with regard to their financial ability, the opportunities provided by the market and their legal rights. For the overall key message is that it is not just for the consumer to guard against the risks of financial services, but for financial services providers to act responsibly¹¹ and adapt their products to the needs of consumers.

Reifner's thesis

One important point raised by the article is the distinction between indebtedness (the result of borrowing) and over-indebtedness (financial hardship that results when the debtor is no longer able to meet the repayments). It is the personal circumstances of the borrower that makes credit dangerous.¹² According to Reifner, information providers should not caution against credit, but against the elements leading to over-indebtedness.¹³ Thus, warnings have to integrate personal information into the description of the effects of the product, which information rights are not designed to do.¹⁴ Consumer information is quite distinct from consumer education, although they are closely linked.¹⁵ Education involves the acquisition of skills and knowledge that enable the information to be applied. As a result, it is essential to consider basic patterns of behaviours and cognitive abilities as a way to assess the effect of rights to information on consumers.¹⁶ Reifner does not reject information as a method, but seeks to frame information in ways that will be useful to consumers and contribute to optimise the basis of their decisions. Indeed, there is a limit on how much consumers are able to process before reaching information overload, a point at which the information becomes confusing and starts to undermine the decision making process rather than facilitate it. The article therefore naturally focuses on the quality of the information delivered to consumers, for it is only when consumers have all the information they need that they can safely identify the financial product that is appropriate for their needs.¹⁷ The SALIS concept is used as a reference framework to assess the quality of the information each consumer receives. The *iff* developed this concept. Five criteria need to be taken into account in assessing quality:

- Security. Information as to risk must be adapted to the financial situation of the consumer and the consequences of a failure to maintain or make full payments ought to be taken into account.
- Access. Transparent information is important to consumers to assess if they are able to obtain the desired financial products.

capacity of the advisors of non-profit entities already providing or planning on providing general financial advice (GFA) to consumers in the various subject areas of consumer finance, consumer debt and money management matters. The Team at *iff*, led by Reifner, in collaboration with BEUC, wrote the training handbook and contributed to the roll out and training across Europe.

¹¹ As the chair of the European Coalition for Responsible Credit (ECRC), Reifner developed the principles of responsible credit drawn up by a coalition of grass root organisations and consumer associations. For more on the work of the ECRC, see <http://www.responsible-credit.net/index.php?id=1881>

¹² Reifner and Herwig (n 1) 127

¹³ *ibid*

¹⁴ *ibid*

¹⁵ *ibid* 128

¹⁶ *ibid* 129

¹⁷ *ibid* 130

- Liquidity. Information should be tailored to the consumer's individual financial circumstances and show the direct effect on the consumer's current and future cash position.
- Interest. Consumers should be given reliable and comparable information about charges and anticipated returns on investment products.
- Social responsibility. Information regarding the overall social implications of the agreement and ethical factors, although it is acknowledged that not many consumers may take those into account.

In addition to quality, the structure and presentation of the information plays a key role, but they do not guarantee that all consumers will necessarily understand the information. Thus, there is scope for manipulation by targeting the way information is presented at an average consumer, rather than taking into account the need of a less-educated consumer.¹⁸ Finally, the consumer's own limited cognitive abilities and rationality need to be taken into account, alongside level of education and pre-existing product knowledge, to conclude on the optimal way to provide information and ultimately offer protection. In particular, Reifner favours providing information to enable comparison between products on a separate leaflet, which content and layout is prescribed by law.¹⁹ It is clear that information rights cannot be the only means of consumer protection, but merely one tool. More coercive tools against extortionate credit, illegal transactions for example, right of withdrawal²⁰ and obligations to trade fairly also ought to come and assist consumers. The article concludes that information must meet certain minimum standards if it is to contribute to the process of educating consumers and that the information, specifically referring to the consumer's individual position, needs to be provided at the time or before the loan is granted if it is to help in preventing over-indebtedness. However, no matter how perfect information disclosure can be, they can never replace financial literacy programmes and other forms of consumer education. More specifically, those cannot be limited to simply teaching the 'rules of the road' but must extend to ensuring consumers are skilled to collectively become 'true masters of the economy'.²¹

In Reifner's view, it is not the consumer who should adapt to the financial system, but the financial system that should adapt to consumer needs.²² It is indeed now a well-known fact that a key factor in the financial crisis was one of suitability of the financial products to the needs of consumers.

Evolution of consumer credit legislation²³ to serve consumer needs

¹⁸ *ibid* 133

¹⁹ *ibid* 138

²⁰ Similarly, Reifner advocates that the exercise of the right to withdraw from financial transactions, when offered also should be facilitated by the use of prescribed forms. Reifner and Herwig (n 1) 138.

²¹ Reifner and Schelhowe (n 7) 32

²² *ibid* 33, para 1.2.

²³ The article and Reifner's work span the whole of financial services. For our purposes, I shall focus primarily on credit (consumer credit and mortgages) but a similar observation can be made of other areas. The Market in Financial Instruments Directive for instance, mostly concerns and incorporates information requirements and provisions and only few provisions can be brought under the heading of responsible lending. See Vanessa Mak, '*Errare humanum est*: Financial Literacy in European Consumer Credit Law' (2012) 35 JCP 307, 311 and Veerle Colaert, 'Building Blocks of Investor Protection: All-Embracing Regulation Tightens Its Grip' (2017) 6 EuCML 229 for an up-to-date account of legislative changes in this area. Furthermore, it is clear that the main objective of the MiFID

EU consumer policy started out preferring ‘information provision over interventionist norms, both in legislation and in case law’.²⁴ ‘Information provisions seem to be too readily favoured as they appear to offer a win-win solution without thorough examination of whether they are likely truly to deliver the desired outcomes’.²⁵ The problem with such emphasis being placed on information requirements is that for this approach to be successful a high level of financial literacy is needed²⁶ and that it rests therefore on an imperfect standard. Much of European consumer policy is indeed built on the notion of the average consumer, who is ‘*reasonably well-informed, reasonably observant and circumspect*’.²⁷ But the reality is quite distinct. ‘*Consumers are a heterogenous bunch*’²⁸ and differ quite widely in their ability to digest and apply financial information. Behavioural economists have also debunked the myth that faced with information, consumers will act rationally, and make the best choices for themselves.²⁹

When first adopted, **Directive 87/102/EEC** on consumer credit³⁰ did not contain any references to consumer education, financial literacy or take into account consumer behaviours or needs. This can be easily explained by the fact that the ‘motives behind the Directive were not so much inspired by consumer protection objectives as by the objective of harmonising the distortions of competition in the Common Market’.³¹ It simply focussed on the fact that consumers should receive adequate information on the conditions and cost of credit and on their obligations. This was thought to lead them to savvy choices and encourage competition amongst players. One of the key provisions included that consumers receive a written copy of their credit agreement.³² Another important provision was the requirement that the APR charged to consumer or the amount that the consumer must pay for credit, be disclosed to consumers.³³

Yet, there are countless examples of cases where despite information, consumers fail to make ‘good’ financial decisions. The evidence points to a number of biases,

is to improve competitiveness of EU financial markets, the objective of ensuring a high degree of harmonised investor protection is only an addition to that objective., See European Commission, ‘Public Consultation – Review of the Markets in Financial Instruments Directive (MiFID)’ (8 December 2010) p 5
http://ec.europa.eu/finance/consultations/2010/mifid/docs/consultation_paper_en.pdf

²⁴ Geraint Howells, ‘The Potential and Limits of Consumer Empowerment by Information’ (2005) 32 *Journal of Law and Society* 349, 351

²⁵ *ibid*

²⁶ Vanessa Mak and Jurgen Braspenning, ‘*Errare humanum est*: Financial Literacy in European Consumer Credit Law’ (2012) 35 *JCP* 307, 309

²⁷ Case C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt* [1998] ECR I-4657, [37]

²⁸ Howells and Weatherill, *Consumer Protection Law* (2nd ed, Ashgate 2005) 5

²⁹ See for example, Bar-Gill, *Seduction by contract: Law, economics and psychology of consumer contracts* (OUP 2012); Geraint Howells, ‘The Potential and Limits of Consumer Empowerment by Information’ (2005) 32 *Journal of Law and Society* 349; Baisch and Weber, ‘Investment Suitability Requirements in the Light of Behavioural Findings’ in K Mathis (ed), *European Perspective on Behavioural Law and Economics* (2015 Springer).

³⁰ Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit [1987] OJ L42/48

³¹ Commission, ‘Report on the operation of Directive 87/102/EEC’ COM (95) 117 final, p 11 para 44

³² Directive 87/102/EEC, art 4. The written contract must include a statement of the annual percentage rate.

³³ Directive 87/102/EEC, art 3 and art 5. Council Directive 90/88/EEC of 22 February 1990 concerning consumer credit [1990] OJ L61/14 introduced a harmonised method of calculating the APR rate.

including heuristics³⁴ and over-optimism.³⁵ Their assessment of financial products is also reliant on their levels of financial literacy.³⁶ The Commission report on the operation of Directive 87/102/EEC³⁷ recognised that ‘the fullest possible consumer information and education are important building blocks for the single market’³⁸ and took note of a number of projects aimed at educating and informing consumers about their rights.³⁹ Concerns for consumer education however, remain a supplement to information and not a substitute. For example, the Commission noted that Community measures should prevent phenomena such as indebtedness through consumer information and education.⁴⁰ Further, it recognised that consumers are entitled to equal levels of information and education on their rights throughout the EU⁴¹ but it did not envisage placing the onus on lenders to behave responsibly.

Directive 2008/48/EC introduced a more stringent regime, requiring where appropriate, that the lender explain the ‘*pre-contractual information provided, the essential characteristics of the products proposed and the specific effects they may have on the consumer, including the consequences of default in payment by the consumer.*’⁴² However, it remains for the consumer to assess if the agreement is adapted to their needs and financial situation, based on the adequate explanations provided. The Directive does not prescribe how detailed these adequate explanations should be or their substantial content, only that they should be “adequate”.⁴³ Nevertheless the Directive carries a number of features designed to assist consumers. It introduces a harmonised right of withdrawal, without penalty and with no obligation to provide justification⁴⁴ and the use of the Standard European Consumer

³⁴ Cass R. Sustein, Christine Jolls, Richard H. Thaler ‘A Behavioural Approach to Law and Economics’ 52 (1998) Stanford Law Review 1471.

³⁵ Information requirements also do not deal with the fact that consumers often do not take notice of the information provided due to lack of time, and the way in which the information and choices are being presented can be used to direct consumers towards a desired outcome. Consumers tend to be over-optimistic about their ability to avoid risk and to believe information which supports their own viewpoint and ignore information that does not. See Geraint Howells, ‘The Potential and Limits of Consumer Empowerment by Information’ (2005) 32 Journal of Law and Society 349, 356-65.

³⁶ Vanessa Mak and Jurgen Braspenning, ‘*Errare humanum est*: Financial Literacy in European Consumer Credit Law’ (2012) 35 JCP 307, 309. See also the study by Asta Zokaityte, ‘Financial Literacy and Numeracy of Consumers and Retail Investors’ (2016) 11 CMLJ 405.

³⁷ Commission, ‘Report on the operation of Directive 87/102/EEC’ COM (95) 117 final

³⁸ *ibid* p 34

³⁹ *ibid* p 35. In particular this includes the CLAS-CADAS project developed by the *iff* Hamburg.

⁴⁰ Commission, ‘Report on the operation of Directive 87/102 concerning consumer credit – summary report of reactions & comments’ COM (95) 117 final, p 27

⁴¹ European Parliament, ‘1996/1997 Session: Information and notices’ 17 March 1997 C85/1, p 139 para 20

⁴² Council Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] OJ L133/66, art 5(6). There is no obligation to lend responsibly in the Directive. The only obligation resting on the lender is to proceed with a creditworthiness of the consumer under Article 8. A similar mechanism is used by the Markets in Financial Instrument Directive 2004/39 (MiFID) [2004] OJ L145/1. Article 19 imposes that investment firms ask the client or potential client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered, to enable the investment firm to assess whether the investment service or product envisaged is appropriate for the client. It continues that in case the investment firm considers, on the basis of the information received, that the product or service is not appropriate to the client, the investment firm should warn the client.

⁴³ Department for Business, Innovation and Skills, ‘Guidance on the regulations implementing the Consumer Credit Directive’ (August 2010), Summary of Key Changes s 8 on Adequate Explanations

⁴⁴ Directive 2008/48/EC, art 14

Credit Information Sheet (SECCI).⁴⁵ The SECCI is reminiscent of Reifner's recommendations, paying attention to the quality of the information, its timeliness⁴⁶ and capitalising on the trust consumers will impart on information that is imposed by statute. The transparency obligation also covers the inclusion of a warning regarding the consequences of missing payments⁴⁷, the existence or not of a right to withdraw⁴⁸, and the requirement that the credit provider specifies *'the annual percentage rate of charge and the total amount payable by the consumer, illustrated by means of a representative example mentioning all the assumptions used in order to calculate that rate; where the consumer has informed the creditor of one or more components of his preferred credit, such as the duration of the credit agreement and the total amount of credit, the creditor shall take those components into account.'*⁴⁹ It leans towards more personalized information.

However, Directive 2008/48/EC is not focused on consumer education nor built to directly cater for the needs of consumers. It does not mark a shift to responsible lending, where the onus is on the supplier to ensure consumers are protected against the risks of the products they are offering.⁵⁰ The EU legislator clings on to the information paradigm and delegates to member states the responsibility to ensure consumers are adequately educated to navigate the web of information. Responsibility is continually being put on member states to provide the measures to raise financial literacy amongst citizens.⁵¹ As member states are the party responsible for legislation on education, the EU takes the position that actions in the field of financial education at EU level can only take the form of incentive measures.⁵² Further, despite the introduction of a requirement to assess the creditworthiness of consumers⁵³, little more is said on the consequences of a lack thereof⁵⁴ and the Directive does not go any way near imposing a duty to deny credit to those applicants.⁵⁵

Unsurprisingly, the Commission report on the implementation of Directive 2008/48/EC highlighted several issues with such an approach. For example, it is acknowledged that the use of APR is likely to help a consumer only if sufficiently financially literate. This is problematic since the consumer credit market study found that levels of financial literacy remain rather low in the wake of the financial crisis,

⁴⁵ *ibid* art 5 and Annex 2 of the Directive

⁴⁶ Information should be given to the consumer prior to the conclusion of the contract. See Recital 19. Article 4 also regulates the standard information included in advertising.

⁴⁷ Directive 2008/48/EC, art 5(1)(m)

⁴⁸ *ibid*, art 5(1)(o)

⁴⁹ Directive 2008/48/EC, art 5(1)(g)

⁵⁰ On this point, see Peter Rott, Consumer Credit, in Hanz Micklitz, Norbert Reich and Peter Rott (eds), *Understanding EU Consumer Law* (Hart, 2009) 185. The only reference to responsible lending in the Directive is found in Recital 26, which states: *'Member States should take appropriate measures to promote responsible practices during all phases of the credit relationship, taking into account the features of their credit market. Those measures may include, for instance, the provision of information to, and the education of, consumers, including warnings, about the risk attaching to the default on payment and to over-indebtedness.'*

⁵¹ Jana Valant, 'European Parliament Briefing: Improving the Financial Literacy of European Consumers' (May 2015) p 4

⁵² *ibid* p 2

⁵³ Directive 2008/48/EC, art 8

⁵⁴ The Directive does not specify which consequences should be attached to the consumer's lack of creditworthiness, see BIS, 'Guidance on the regulations implementing the Consumer Credit Directive', p 29

⁵⁵ For the creation of such an obligation, see Vanessa Mak, Jurgen Braspenning, 'Errare humanum est: Financial Literacy in European Consumer Credit Law' (2012) 35 JCP 307, 327.

with 60% of respondents not understanding what an APR is or how to use it.⁵⁶ Besides, while the vast majority of stakeholders agree the SECCI has made a positive impact on consumer protection, it is ‘*clear that the SECCI form will become more effective if it is accompanied by measures aiming to improve the financial awareness of consumers*’.⁵⁷ Overall, the report accepts that “Consumers’ financial awareness remains insufficient”⁵⁸ and indicates that the Commission may consider further activities in the area of financial awareness based on the result of the evaluation of the information campaigns on the rights provided by the Directive and other evidence, including on the behaviour of consumers”.⁵⁹ While behavioural insights may come to inform policy in future, they have not, for the moment, been able to influence the consumer credit regulatory framework to any substantial extent.

The Mortgage Credit Directive 2014/17/EU by contrast, takes on board some of the evidence gathered, by academics and others, as to the limitations of information as a method of protection. The Directive reproduces the architecture of the Credit Directive with standardized APR calculation methods and the expectation that consumers will be provided with a European Standardised Information Sheet (ESIS) containing personalized information.⁶⁰ Some work was done, based on evidence collected by the Commission during empirical consumer testing in the member states, to revise the content and presentation of the ESIS ‘to ensure that it is clear, understandable and contains all information found to be relevant for consumers’.⁶¹ Recital 41 also notes that ‘*Consumer research has underlined the importance of using simple and understandable language in disclosures provided to consumers. For this reason, the terms used in the ESIS are not necessarily the same as the legal terms defined in this Directive but have the same meaning*’.

In addition, Recital 4 recognises that low levels of financial literacy is a driver for problems within mortgage markets within the Union in relation to irresponsible lending and borrowing. Several Recitals focus on responsible lending, a step up from the Credit Directive 2008/48/EC that only made the point that creditors should refrain from irresponsible lending or give out credit without prior assessment of creditworthiness.⁶² However, Directive 2014/17/EC remains an instrument that is not fully driven by consumer protection, but rather by stimulating competition. Protection is only a means to restore trust in the market in the wake of the financial crisis. As a result, the Directive continues to leave to Member states the responsibility to promote measures to support the education of consumers in relation to responsible borrowing and debt management to increase the ability of consumers to make informed decisions.⁶³ Member states can introduce national law, which might be useful for

⁵⁶ Commission, ‘Report on implementation of Directive 2008/48/EC’ COM (2014) 259 final, p 17 para 7.4.

⁵⁷ *ibid* p 9 para 4.4

⁵⁸ *ibid* p 19 s 8

⁵⁹ *ibid* p 20 s 8

⁶⁰ Directive 2014/17/EU of 4 February 2014 on credit agreements for consumers relating to residential immovable property [2014] OJ L60/34, Recital 44

⁶¹ *ibid*, Recital 40

⁶² Council Directive 2008/48/EC, Recital 26

⁶³ Directive 2014/17/EU, Recital 29: In order to increase the ability of consumers to make informed decisions for themselves about borrowing and managing debt responsibly, Member States should promote measures to support the education of consumers in relation to responsible borrowing and debt management in particular relating to mortgage credit agreements. It is particularly important to provide guidance for consumers taking out mortgage credit for the first time. In that regard, the Commission should identify examples of best practices to facilitate the further development of measures to enhance

purposes of financial education.⁶⁴ Perhaps the most important step forward is the introduction of Chapter 2 in the Directive on financial education although it remains brief, with only one article. The symbolism marks the recognition that the information paradigm cannot be sustained without improvements in levels of consumer education and financial awareness.⁶⁵ But while Article 6 of Directive emphasises responsible borrowing, the Directive does not contain corollary obligations of responsible lending, beyond an assessment of creditworthiness.⁶⁶ That assessment however is tighter than it was under Directive 2008/48/EC and Article 18(5)(a) indicates that credit can only be granted *‘where the result of the creditworthiness assessment indicates that the obligations resulting from the credit agreement are likely to be met in the manner required under that agreement.’*

Any real discussion on imposing responsible lending obligations is deferred in Article 45 under the title of ‘further initiatives on responsible lending and borrowing’. The article states: *‘by 21 March 2019, the Commission shall submit a comprehensive report assessing the wider challenges of private over- indebtedness directly linked to credit activity. It will also examine the need for the supervision of credit registers and the possibility for the development of more flexible and reliable markets. That report shall be accompanied, where appropriate, by legislative proposals.’*

Future of Consumer Education and Information Rights in Financial Services

There are several justifications, which serve to explain the lack of more stringent substantive provisions as a means of consumer protection. First and foremost, greater protection of vulnerable consumers is seen as a barrier to market access and market integration.⁶⁷ In Directive 2008/48/EC itself it is apparent that consumer protection is an important and crucial aim⁶⁸ but that this must be balanced with other aims relating to the integration of the internal market and market competitiveness.⁶⁹ In a similar vein, the European Commission stresses that there should be a balance between ensuring adequate level of consumer protection and placing a burden on the creditors in ensuring such protection.⁷⁰ In more practical terms it is only the borrower himself who can know his own, complicated circumstances and make a decision on whether an agreement is suitable for him.⁷¹ As the information paradigm is based on the assumption that information asymmetry is a market failure which cause suboptimal

consumers’ financial awareness.

⁶⁴ Directive 2014/17/EU, Recital 42

⁶⁵ Directive 2014/17/EU, art 6 states:

1. *‘Member States shall promote measures that support the education of consumers in relation to responsible borrowing and debt management, in particular in relation to mortgage credit agreements. Clear and general information on the credit granting process is necessary in order to guide consumers, especially those who take out a mortgage credit for the first time. Information regarding the guidance that consumer organisations and national authorities may provide to consumers, is also necessary.’*

2. *The Commission shall publish an assessment of the financial education available to consumers in the Member States and identify examples of best practices which could be further developed in order to increase the financial awareness of consumers.’*

⁶⁶ Directive 2014/17/EU, art 18

⁶⁷ Lisa Waddington, ‘Vulnerable and Confused: the Protection of “vulnerable” Consumers under EU Law’ (2013) EL Rev 757, 766

⁶⁸ See e.g. Directive 2008/48/EC, Recital 8-9 and 18

⁶⁹ *ibid*, Recital 7

⁷⁰ Commission, ‘Report on the implementation of Directive 2008/48/EC on credit agreements for consumers’ COM (2014) 259 final, p 6

⁷¹ BIS, ‘Guidance on the regulations implementing the Consumer Credit Directive’ (n 42) p 32 para 8.7

investment decisions, it is believed that mandatory disclosure of product information can mitigate that asymmetry and possible market failures⁷². Lastly, it seems that on an EU level it is far easier to achieve agreement on information requirements than on trade practices or liability rules⁷³ which could go some way in explaining the continuation of emphasis being put on information requirements. With this in mind, it seems difficult to see how a radical change of direction could be forthcoming. There are however some nuggets of hope found in recent activity.

Communications coming from the European institutions in recent years do reflect an emerging new approach, which acknowledges the need for financial literacy. The policy overview on consumer protection in the EU establishes that evidence suggesting that consumers lack knowledge or competences in a particular field can propose alternative policy remedies⁷⁴ and recalls that consumers do not form one single homogenous group.⁷⁵ The newest Regulation in place for the consumer programme spanning from 2014 to 2020 highlights the importance of enhancing consumer education, establishing consumer information and education as a life-long process as one of the objectives for future consumer protection policies which should have particular focus on vulnerable consumers and financial literacy.⁷⁶

In February 2017, the Council and the European Parliament reached agreement on a programme to promote the involvement of consumers in policymaking in financial services. But measures remain timid and take essentially the form of financial support to civil society organisations⁷⁷ and the work of the Financial Services User Group (FSUG)⁷⁸, a group that represents the interests of consumers, retail investors or micro-enterprises, and also includes experts in financial services (from the consumer perspective). In March 2017, the Commission released its Consumer Financial Services action plan: Better products and more choice for European Consumers.⁷⁹ While promising at first glance, the title fails to reveal that the measures proposed do not pertain to coxing providers towards developing better products for consumers, but rather hints at better access to products via new technology and access across borders. It is once again focused on achieving the internal market rather than truly serving the needs of consumers. Very little is said about consumer credit, but the action plan

⁷² Veerle Colaert, 'Building Blocks of Investor Protection: All-Embracing Regulation Tightens Its Grip' (2017) 6 EuCML 229

⁷³ Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 Journal of Law and Society 349, 350

⁷⁴ Jana Valant, European Parliament, 'Consumer Protection in the EU – Policy Overview' (September 2015), p 6 point 1.3.2.1.

⁷⁵ *ibid*, p 18 point 4.2.

⁷⁶ Council Regulation (EU) 254/2014 of 26 February 2014 on a multiannual consumer programme for the years 2014-20 and repealing Decision No 1926/2006/EC [2014] OJ L84/42, Annex 1, Objective 2(7). This tendency is echoed in the UK, where the concept of financial capability has emerged and arguably become a key part of UK government and regulatory thinking in recent years. The now abolished Financial Services Authority stated in 2006 that better informed, educated and more confident citizens are able to take greater responsibility for their financial affairs and play a more active role in the market for financial services. See (Chris Clark, 'Learning to Fail: Resilience and the Empty Promise of Financial Literacy Education' 18 (2015) Consumption Markets & Culture 257, 259-60)

⁷⁷ Better finance, <http://www.betterfinance.eu> and Finance watch, <http://www.finance-watch.org>.

⁷⁸ European Commission, 'Increasing consumer involvement in financial service policy-making' <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/consumer-finance-and-payments/consumer-financial-services/increasing-consumer-involvement-financial-service-policy-making_en>

⁷⁹ Commission, 'Consumer Financial Services Action Plan; Better Products, More Choice' (Communication) COM (2017) 139 final

notes: ‘While the increased availability and easier access to consumer credit create opportunities for business and result in lower costs for borrowers, there is also an increased risk of irresponsible lending and borrowing causing over-indebtedness. This risk needs to be mitigated.’⁸⁰ However, it continues by noting that ‘creditworthiness assessments foreseen in both the Consumer Credit Directive and the Mortgage Credit Directive seek to prevent irresponsible lending and borrowing’ and that debt advice together with financial education is effective in alleviating debt burdens and tackling excessive debt (despite some room for improvement).⁸¹

In policy circles, the debate seems to have shifted away from information and onto responsible lending, but with no immediate action being taken because of the belief that educating consumers for now is sufficient. The Opinion from the European Economic and Social Committee on the Communication⁸² does nothing to debunk this position. It explains that education and lifelong training are needed to combat financial illiteracy that can lead to over-indebtedness and financial and social exclusion.⁸³ There is still no indication of a revision of the 2008 Credit Directive. The last report on the implementation of the 2008 Directive concluded that there is no need to modify the Directive but that the point of focus should lie on the transposition and enforcement of the Directive by the member states.⁸⁴ A compulsory review of the 2008 Directive is looming⁸⁵ the outcome of which will be a significant point in establishing whether the inclusion of financial literacy in the debate will transfer into substantive provisions in the legislation.

Reifner’s message in *Consumer Education and Information Rights in Financial Services* was to move away from the over-reliance on information as a means of consumer education and relief from over-indebtedness. He advocated for taking consumers’ needs into account in legislative intervention and has campaigned for responsible lending and shaping products to consumer needs as viable methods of consumer protection. The legislator has failed to truly address concerns and shied away from imposing heavy duties on lenders past creditworthiness tests even in the wake of the financial crisis. A recognition that consumers must be partners in the economy and that more vulnerable⁸⁶ groups of consumers cannot forever be blamed for their own lack of financial literacy and understanding of the information given to them⁸⁷ seems today as pressing as it was when Professor Reifner first embarked on

⁸⁰ *ibid*, p 8 para 2.6

⁸¹ Commission, ‘Consumer Financial Services Action Plan; Better Products, More Choice’ (Communication) COM (2017) 139 final, para 2.6

⁸² Commission, ‘Opinion of the European Economic and Social Committee on the ‘Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions – Consumer Financial Services Action Plan: Better Products, More Choice’ [2017] OJ C434/51 (opinion on Communication)

⁸³ *ibid*, point 3.19. Point 4.12 (action 7): efforts to find ways to prevent consumer over-indebtedness – financial education and lifelong training should be key concerns, promote more ambitious and harmonised financial education.

⁸⁴ Commission, ‘Report on the implementation of Directive 2008/48/EC on credit agreements for consumers’ COM (2014) 259 final, p 19

⁸⁵ According to art 27(2) of Directive 2008/48/EC, the Commission must undertake a review every five years, the first was undertaken in March 2013.

⁸⁶ Another way to shift the balance towards more effective consumer protection may also be to urge to reconsider the average consumer standard and refocus on the notion on vulnerable consumers. On this, see Irina Domurath, ‘The case for vulnerability as the normative standard in European consumer credit and mortgage law – An inquiry into the Paradigms of consumer law’ 2 (2013) 3 *euivr* 124

⁸⁷ Udo Reifner and Anne Schelhowe, ‘Financial Education’ 9 (2010) 2 *Journal of Social Science Education* 32, 36

his research into consumer education. Irresponsible lending behaviors must be outlawed.⁸⁸ Fast!

Christine Riefa, Reader, Brunel University (London)*

⁸⁸ For further support for this position, see Vanessa Mak and Jurgen Braspenning, '*Errare humanum est*: Financial Literacy in European Consumer Credit Law' (2012) 35 JCP 307, 307-332. The authors call for extensive duties to warn and a duty to prevent particular consumers from entering into overly risky agreements.

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