

Comment & Analysis

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From Information Provision to (Direct and Indirect) Product Intervention

Case Note on Soho Group (Case C-686/19)

I. Introduction

There is no doubt, credit is an integral part of our modern everyday living. Credit products are increasingly considered *essential* for consumers,¹ and access to these products is compared to services of general interest, services without which it is impossible to function in our contemporary society.² The number, type, and availability of credit products have developed over time. Today in Europe consumers can choose between a variety of products likely to meet their different needs, including the increasingly popular ‘high-cost credit’ products. These products are typically small amounts of unsecured credit provided at a high price for personal, household, or domestic purposes³ and are usually repaid over a short term. Typical examples of these products would be overdrafts, credit cards, and the so-called ‘payday loans’, loans traditionally repaid at the customer’s next payday.⁴

Due to the expensive nature of high-cost loans and the complex cost structure, the application of the general rules on the cost of consumer credit is not always straightforward. It is therefore not surprising that the Court of Justice of the European Union (CJEU) has been asked to interpret cost-related provisions of Directive 2008/48/EC on credit agreements for consumers⁵ exactly concerning high-cost credit.⁶ This case note will examine the contribution of case C-686/19 *Soho Group* v *Patērētāju tiesību aizsardzības centrs* to carving out the meaning of the ‘total cost of credit to the consumer’ in Article 3(g).⁷

The case note starts by discussing the judgment itself.⁸ It continues with the analysis of the ruling focused around three themes: the context of ‘high-cost credit,’ in particular, consumption patterns and the profile of consumers who are most likely to be clients of such credit; the importance of regulating ancillary charges for informed decision-making; and the function of Article 3(g) within the system of protection provided by the Consumer Credit Directive. The case note shows an important legacy of this judgment: including loan extension fees within the notion of the ‘total cost of credit’ not only makes the cost of credit more transparent (enabling consumers to make informed decisions) but it may also result in direct and indirect product intervention. Product intervention measures regulate the contractual rights and duties of the parties, or the terms of the contract by setting substantive standards of suitability and fairness for financial products.⁹ Unlike information provision, which aims to alert and inform consumers on the substantive standards and the terms of the contract; product intervention actually sets these substantive standards, e.g. by providing for a fair level of fees.¹⁰ Although the present judgment did not change the information purpose of Article 3(g) Consumer Credit Directive, it potentially enabled product intervention in two ways: 1) in an indirect way – by bringing loan extension fees within the

‘total cost of credit’ these charges became subject to competitive pressure that may force creditors to lower or even remove these fees; and 2) in a direct way – by enabling national legislators to use the ‘total cost of credit’ as a benchmark for a price cap. The comment ends with recommendations directed at legislators and regulatory authorities.

II. The Facts

Soho Group SIA is a Latvian high-cost short-term credit provider, specializing in loans between 70–425 euros for the duration of 30 days to 12 months.¹¹ In carrying out its supervisory function, the Latvian Consumer Rights Protection Centre (CRPC) analysed the website of Soho Group and discovered that it charged high fees for extending the duration of the

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- See e.g., World Bank, ‘Finance for All? Policies and Pitfalls in Extending Access’ (World Bank 2008) <http://siteresources.worldbank.org/INT/FINFORALL/Resources/4099583-1194373512632/FFA_book.pdf> accessed 15 May 2021; Elaine Kempson and Sharon Collard, ‘Developing a vision for financial inclusion’ (Friends Provident Foundation 2012) <www.fincan.co.uk/repository/uploads/sectionpdfs/95%20Developing%20a%20Vision%20for%20Financial%20Inclusion%20-%20Kempson%20&%20Collard%20March%202012.pdf> accessed 15 May 2021.
 - See e.g., Iain Ramsay, ‘Regulation of consumer credit’ in Geraint Howells et al (eds), *Handbook of Research on International Consumer Law* (Edward Elgar 2018) 347.
 - Olha O Cherednychenko and Jesse-M Meindersma, ‘Consumer Credit: Mis-selling of Financial Products’ (Parliament 2018) 5 <[www.europarl.europa.eu/RegData/etudes/STUD/2018/618997/IPOL_STU\(2018\)618997_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/618997/IPOL_STU(2018)618997_EN.pdf)> accessed 2 September 2021.
 - See for a recent study on high-cost credit in the EU *Ibid*; for an earlier, still relevant report see Udo Reifner et al, ‘Study on the interest rate restrictions in the EU’ (Publications Office of the EU 2010) <<https://op.europa.eu/en/publication-detail/-/publication/46a336d0-18a0-4b46-8262-74f0e0f47eb3>> accessed 2 September 2021.
 - Directive 2008/48/EC of the European Parliament and of the Council on credit agreements for consumers [2008] OJ L 133/08 (Consumer Credit Directive).
 - See e.g., Case C-290/19 *Home Credit Slovakia* EU:C:2019:1130; Joined Cases C-84/19, C-222/19 and C-252/19 *Profi Credit Polska* EU:C:2020:631; Case C-779/18 *Mikrokasa* EU:C:2020:236; and Case C-229/20 *K () and services accessoires* not yet reported.
 - Case C-686/19 *Soho Group* EU:C:2020:582. This case-note is prepared based on the Hungarian language version of the judgment and revised using the English language version thereof.
 - For a summary of the facts, the ruling and a short analysis see Andrea Fejős, ‘Loan extension fees are within ‘total cost of credit’ – the CJEU in C-686/19 *Soho Group*’ (Recent Developments in European Consumer Law blog 18 July 2020) <<https://recent-ecl.blogspot.com/2020/07/loan-extension-fees-are-within-total.html>> accessed 15 May 2021.
 - The United Kingdom’s Financial Conduct Authority has an even broader understanding of product intervention that includes ‘regulatory interventions focused on products, including greater supervisory focus earlier in the value chain and of ongoing product governance, rules targeting product features, rules limiting sales of products and setting down specific conditions of sale.’ See Financial Services Authority, ‘Product Intervention’ (DP 11/1 2011) 6 <www.fca.org.uk/publication/discussion/dp11_01.pdf> accessed 2 September 2021.
 - See e.g., Andrea Fejős, ‘Social Justice in EU Financial Consumer Law’ (2019) 24(1) *Tilburg Law Review* 68, 69 <<https://tilburglawreview.com/articles/10.5334/tilr.138/>> accessed 2 September 2021.
 - Soho Group* (n 7), para 14.

credit. The CRPC took the view that these charges formed part of the 'total cost of credit', given that the provision on extending the credit was part of the standard terms and conditions of the contract between the parties. Since these high extension fees raised the total daily cost of the credit above the legal limit provided by Article 8(2)(3) of the Consumer Protection Law,¹² the CRPC imposed 25.000,00 euros fine on the creditor.¹³ Soho Group challenged the decision and asked the courts to set it aside. The lower courts ruled in favour of the CRPC. Importantly, the Regional Administrative Court, the second instance court, held that when loans were extended, the costs associated with extensions became 'known costs' and as such, were brought under the relevant legal limit.¹⁴ Soho Group appealed. It argued that loan extension fees are not compulsory for obtaining or using loans. Soho Group explained that extensions are only one of the options available to consumers upon the maturity of their loan instalments. Consumers can either pay the instalment, choose to default (and pay default fees), or choose to extend the loan by paying the loan extension fee.¹⁵ Soho Group argued that these fees are not 'known fees'. This is because the use of these fees is uncertain at the time when the contract is concluded; and the 'total cost of credit' is determined and the annual percentage rate of charge (hereinafter: APRC) is calculated at the time when the contract is concluded.¹⁶ The case ultimately escalated to the Supreme Court, and the question was referred for a preliminary ruling to the CJEU.

III. The Legal Question(s)

In the request for a preliminary ruling, the CJEU was asked to interpret Article 3(g) Consumer Credit Directive, which reads:

“total cost of the credit to the consumer” means all the costs, including interest, commissions, taxes and any other kind of fees which the consumer is required to pay in connection with the credit agreement and which are known to the creditor, except for notarial costs; costs in respect of ancillary services relating to the credit agreement, in particular insurance premiums, are also included if, in addition, the conclusion of a service contract is compulsory in order to obtain the credit or to obtain it on the terms and conditions marketed.’

The referring national court asked: 1) whether the 'total cost of credit to the consumer' in Article 3(g) Consumer Credit Directive is an autonomous concept of EU law, and 2) whether, under the circumstances such as those at present, when the clause on extending the loan forms part of the terms and conditions of the contract between the creditor and the borrower, the loan extension fee falls within the 'total cost of credit' in Article 3(g) Consumer Credit Directive.

IV. The Ruling

The CJEU answered both questions together. Ruling in favour of the CPRC the CJEU found that the concept of the 'total cost of credit to the consumer' must be interpreted to include the costs of any extension of the duration of credit, provided that, first, the actual and precise conditions for the prospect of extension, including the duration of the extension, are laid down in the standard terms and conditions of the contract and, second, that the costs are known to the creditor.¹⁷ In reaching this conclusion, the CJEU was guided by four considerations.¹⁸

First, the CJEU took into account the broad nature of the definition,¹⁹ established in its previous case-law.²⁰ It then

specified that Article 3(g) Consumer Credit Directive provides that the 'total cost of credit' includes *all* costs, including interest, commissions and taxes, and any other fees which the consumer is required to pay.²¹ The concept includes all costs that are *known to* the creditor, including costs for ancillary services that are connected to the credit, in particular insurance premiums. The CJEU confirmed, the wording of the provision is clear, only notarial fees are explicitly excluded from the scope of the definition.²²

Second, the CJEU considered the temporal dimension of fees and charges. It noted that Article 3(g) Consumer Credit Directive does not specify that it is limited to fees that are necessary to obtain the credit or those payable at the time when the contract is concluded.²³ Moreover, the preamble of the Directive makes it clear that the 'total cost of credit to the consumer' should be comprised of all cost which the consumer has to pay *in connection* with the credit agreement.²⁴ From this broad determination, the CJEU concluded that the provision includes not only fees and charges that are due at the time when the contract is concluded, but also those that occur later, while the duration of the credit product or during the performance of the contract.²⁵

The CJEU clarified, however, that although there is no time limitation on the fees and charges that form part of the 'total cost of credit', two conditions must be satisfied. First, it is imperative that the actual and precise conditions for the extension of the credit are specified in the contract, and second, these costs must be known to the creditor.²⁶ In cases such as the present, according to the CJEU, the fees were known to the creditor; they were identified in the contract or were identifiable based on the parameters provided in the contract. This conclusion was reached even though the creditor could unilaterally refuse to extend the loan, and the extension of the loan was conditioned upon the consumer's explicit request, the creditor's consent, and the consumer's payment of the associated fees.²⁷

Thirdly, the CJEU analysed the notion of the 'total cost of credit' in relation to other notions in the Consumer Credit Directive. To address the argument of Soho Group that loan extension fees are not part of the 'total cost of the credit' because when the contract is concluded and the APRC is calculated it is uncertain that they will be payable,²⁸ the CJEU turned to the APRC. It first noted that in calculating the APRC the notion of the 'total cost of credit' is closely linked with the notions of the 'total amount of credit' and the 'total amount payable by the consumer'.²⁹ Given that the Directive 'makes no reference to national law in respect of these con-

12 Ibid, para 13.

13 Case C-686/19 *Soho Group*, request for preliminary ruling, 3.

14 *Soho Group* (n 7), para 19.

15 Ibid, para 20.

16 Ibid.

17 Ibid, para 54.

18 Ibid, para 51.

19 Ibid, para 31.

20 *Mikrokasa* (n 6), para 39; Case C-143/13 *Matei* EU:C:2015:127, para 48; Case C-127/15 *Verein für Konsumenteninformation* EU:C:2016:934, para 35; Case C-383/18 *Lexitor* EU:C:2019:702, para 23.

21 *Soho Group* (n 7), para 28.

22 Ibid, para 29.

23 Ibid.

24 Ibid, para 32.

25 Ibid, para 33.

26 Ibid, para 34.

27 Ibid, paras 35-36.

28 Ibid, para 37.

29 Ibid, para 38.

cepts', according to the CJEU, these constitute autonomous concepts of EU law.³⁰

Since the 'total amount payable by the consumer' under Article 3(h) Consumer Credit Directive is comprised of the sum of the 'total amount of the credit' and the 'total cost of the credit' to the consumer, the CJEU concluded that the two notions, the notion of a 'total cost of credit' and the 'total amount of credit' are mutually exclusive concepts. Consequently, the 'total amount of credit' cannot contain any cost elements that form part of the 'total cost of credit'.³¹

Discussing the 'total amount of credit' the CJEU noted that the APRC is defined in Article 3(i) Consumer Credit Directive as the 'total cost of the credit to the consumer expressed as an annual percentage of the total amount of credit, where applicable including the costs referred to in Article 19(2) Consumer Credit Directive'.³² In addition to the costs listed in Article 3(g) Consumer Credit Directive, its Article 19(2) further specifies costs that are included and excluded from calculating the APRC. The APRC will exclude from the 'total cost of credit' *'any charges payable by the consumer for non-compliance with any of his commitments laid down in the credit agreement and charges other than the purchase price which, for purchases of goods or services, he is obliged to pay whether the transaction is effected in cash or on credit'*. By contrast, the APRC will include *'the costs of maintaining an account recording both payment transactions and drawdowns, the costs of using a means of payment for both payment transactions and drawdowns, and other costs relating to payment transactions'* unless *'the opening of the account is optional, and the costs of the account have been clearly and separately shown in the credit agreement or any other agreement concluded with the consumer.'* The CJEU concluded that since loan extension fees are not default charges under Article 19(2) Consumer Credit Directive, they are not excluded from the scope of the 'total cost of credit'. The CJEU reasoned that if loan extension costs are part of the 'total amount payable by the consumer', they cannot be considered within the 'total amount of credit' and as a result, they are included in the 'total cost of credit'.³³

The CJEU also addressed the temporal question of calculating the APRC. It first noted that the Consumer Credit Directive regulates both the conclusion of credit agreements and the manner in which they are amended.³⁴ Although based on Article 10(2)(g) Consumer Credit Directive, the APRC is to be calculated when the credit agreement is concluded, the provision continues that *'all the assumptions used to calculate that rate shall be mentioned'* in the contract at the time when it is concluded.³⁵ It follows that for credit contracts, such as the one at issue here, that are extendable and can therefore have more than one maturity date for ending the loan, the *assumption* that the loan can be extended could be included into the contract and thus be taken into account when calculating the APRC.³⁶

Finally, as the fourth aspect, the CJEU referred to the well-known aim of the Consumer Credit Directive to provide a high level of consumer protection and to facilitate the creation of the internal market in consumer credit. To this effect, the CJEU expressed its strong views on the importance of the APRC to be reliable and a true reflection of the costs included in the loan, not only for the provision of information within the Directive but also for the comparability of credit offers throughout the EU.³⁷

V. The Context: Consumption Patterns and the Profile of Consumers of High-Cost Credit

The 'consumer-friendly' approach taken by the CJEU makes a positive contribution to EU law on consumer credit. However, in addition to the above, when discussing 'high-cost credit' and the implications of the present judgment, it is important to understand the broader socio-economic circumstances in which these loans are consumed. 'High-cost credit' is normally requested by consumers who are vulnerable, and they often have no other option than to resort to these loans. High-cost credit is mostly consumed by less well-off consumers, who are less able to accommodate income or expenditure shocks, due to their low income or multiple outstanding debts. For these reasons, these loans are frequently extended.

Given the extensive UK research on 'payday loans', the sort of loans that formed the basis of the present judgment, it is useful to look at the UK context. For years, UK payday lenders were described as 'modern predators',³⁸ and payday loans as the 'worst symbols of this cost-of-living crisis'.³⁹ This pushed the then newly formed Financial Conduct Authority to make the regulation of payday loans its top priority⁴⁰. As part of this regulatory effort, significant research has been conducted in the UK on the profile of consumers and the consumption patterns of payday loans.

Researchers encountered a wide range of income, occupation, and educational levels and varying experiences, attitudes, and behaviours around these credit products⁴¹ that placed payday loans customers into several categories: the 'Living for Now' group includes low-income young working male that regularly pay off bills but tend to be disorganized with money and prone to risk-taking; the 'Striving and Supporting' group is comprised of female consumers with children living on low income that struggle with money management, often falling behind on payments and finding it difficult to meet unexpected expenses; the 'Starting Out' is a relatively low-income group of future young professionals that have a high level of education but are still studying and struggling to make ends meet; the 'Hard Pressed' is a low-income segment of mostly unemployed single consumers living with dependent children, with limited access to mainstream credit, they struggle to keep up with bills and to make ends meet; and finally, the 'Stretched but Resourceful' group included working families on relatively high incomes but with significant reliance on credit to finance their daily needs, and who would struggle to cope with an income or expense shock.⁴² Therefore, the

30 Ibid, para 39; referring here to Case C-255/18 *State Street Bank International* EU:C:2019:967, para 33.

31 Ibid, para 42; referring here to Case C-377/14 *Radlinger and Radlingerová* EU:C:2016:283, para 85.

32 *Soho Group* (n 7), para 41.

33 Ibid, para 44.

34 Ibid, para 45.

35 Ibid, para 46.

36 Ibid, para 47.

37 Ibid, para 48. See also *ibid*, paras 49-50.

38 John McDermott, 'We are now all part of the Wonga economy' (*Financial Times* 5 November 2013) <www.ft.com/content/c80def50-4646-11e3-a0c0-00144feabdc0> accessed 2 September 2021.

39 'Ed Miliband takes on the "Wonga economy"' (*Sky News* 5 November 2013) <<https://news.sky.com/story/ed-miliband-takes-on-the-wonga-economy-10429294>> accessed 15 May 2021.

40 See for the summary of the reforms: Andrea Fejős, 'Achieving Safety and Affordability in the UK Payday Loans Market' (2015) 38(2) *Journal of Consumer Policy* 181, 182-183.

41 Becky Rowe et al, 'Consumer Credit Research: Payday Loans, Logbook Loans and Debt Management Services' (Financial Conduct Authority ESRO 2014) 12 <www.fca.org.uk/your-fca/documents/research/esro-consumer-credit-research-payday> accessed 15 May 2021.

42 Ibid, 57.

vulnerability of payday loan customers is explained by different reasons such as low income, high indebtedness, or inability to sustain income and expenditure shocks.⁴³

Indeed, many payday loans consumers are dependent on this type of credit in their daily lives. Research found that loans were often used to cover basic living expenses such as grocery shopping or payment of utility bills.⁴⁴ The majority of consumers felt borrowing was necessary⁴⁵ and consumers primarily resorted to these loans because of an unexpected and temporary change in their financial circumstances, whether it was an increase in expenses or a decrease in income.⁴⁶ The vulnerability of payday loans customers was exacerbated by their commonality of having had previous experience with various credit products including the prior use of payday loans.⁴⁷ Payday lending customers frequently experienced financial problems such as bad credit rating or payment default,⁴⁸ and it was not uncommon to have payday loans along with other forms of expensive credit such as credit cards and overdrafts.⁴⁹ Many had therefore struggled with debt problems.

Given the above consumption patterns and the vulnerability of payday loans customers due to low income, high indebtedness, and a general inability to sustain financial shocks, it is not surprising that these loans are frequently extended to an extent that we could even say: *loan extensions are an important feature of payday loans*. In practice loan extensions are frequently motivated by need – consumers would have to extend the loan to avoid default. Loan extensions are certainly more favourable than the default, as explicitly acknowledged by the CJEU in this judgment;⁵⁰ default is likely to trigger even higher fees and other unwanted consequences such as an impact on the consumer's credit rating.

Extensions of these high-cost credit products are very common. Soho Group extended around half of the loans in its portfolio.⁵¹ This made the referring national court to assert that loan extensions are not exceptional, rare, or unforeseeable.⁵² UK data shows that before the reform, around 35 % of loans were not repaid on time; and most of these were repaid late following at least one extension or 'rollover'.⁵³ Rollovers became one of the most significant features of payday loans.⁵⁴ Lenders gained substantial profit from rollovers and they actively encouraged consumers to roll over. But rollovers were particularly detrimental to consumers, who were often unaware of the practical implications especially the costs involved in a rollover. The costs that could have substantially increased the amount owed,⁵⁵ to an extent that consumers found it easier to roll over again rather than to repay the entire outstanding debt, thus creating a 'cycle of debt' that consumers struggled to exit.⁵⁶

Under these socio-economic circumstances, in addition to those discussed by the CJEU, we can see a strong justification for including loan extension fees within the regulatory scope of the Consumer Credit Directive.

VI. Ancillary Charges: Informed Decisions and the Power of the Market

The analysis of the socio-economic environment of 'high-cost credit' highlighted an important aspect of these loans: the inability of consumers to understand their total cost. This section shows that by bringing loan extension fees within the notion of the 'total cost of credit' and the APRC, consumers are now more likely to take this information into account in their borrowing decisions. It also shows that assuming com-

petition works, this intervention could influence creditors in their pricing decisions to lower or abolish loan extension fees, resulting in this intervention having a(n) (indirect) product intervention effect.

Consumer credit contracts are complex, not the least because of the great variety of potential cost elements. Even loans of a fairly low amount have a complex price structure.⁵⁷ In addition to the rate of interest, credit triggers additional fees and charges. These are present in a wide range of forms and schemes (set-up costs, maintenance costs, fees linked to payment transactions and drawdown, fees, and charges for ancillary services, etc.).⁵⁸ Many of the charges may be characterised as 'ancillary' to the main contractual obligation, in this case, the payment of the interest.

Yet the characterisation of charges as 'ancillary' could be misleading. Although 'ancillary' to the main contractual obligation, these charges are often very high. In *Mikrokasa*, a similar case involving high-cost credit, the consumer borrowed 4000 Polish zlotys (approximately 940 euros) at a 7 % annual rate of interest for an amount of 371.87 zlotys (approximately 86 euros). The consumer also paid 600 zlotys (approximately 139 euros) in arrangement fees and 3400 zlotys (approximately 790 euros) in administrative fees.⁵⁹ We can see therefore that ancillary fees came to be over 10 times more (i.e., 139+790=929 euros) than the main contractual obligation, the payment of the interest (i.e., 86 euros).

Unfortunately, at least without strong transparency, the market seems powerless to control ancillary charges. Consumers tend not to pay attention to ancillary charges in their borrowing decisions, and thus the competitive pressure is not sufficient to push these prices down. Research on high-cost credit has shown that consumers tend to underestimate the expense of fixed fees when comparing credits products, they see fees in isolation and do not think about how these can accumulate. They also tend to focus on only one part of the pricing structure even when it has several elements.⁶⁰ All the more with 'contingent charges', charges that are payable upon the occurrence of a particular event in the future, such as loan extension fees.⁶¹ These charges are even harder for consumers

43 Fejős (n 40), 186.

44 Competition and Markets Authority, 'Payday lending market investigation, Final report' (Competition and Markets Authority 2015) 2.26 <https://assets.publishing.service.gov.uk/media/54ebb03-bed915d0cf7000014/Payday_investigation_Final_report.pdf> accessed 2 September 2021.

45 Ibid, 2.27.

46 Ibid, 2.29.

47 Ibid, 2.43.

48 Ibid, 2.23.

49 Ibid, 5.27.

50 *Soho Group* (n 7), para 52.

51 *Soho Group* (n 13), 5.4.

52 Ibid.

53 Competition and Markets Authority (n 44), 2.52.

54 Fejős (n 40), 184.

55 See for an illustrative example: Ibid, 193.

56 Ibid, 187. See also Rowe et al (n 41), 4-5.

57 Financial Conduct Authority, 'High-cost Credit Review: Overdrafts' (CP 18/13 2018) 4.29 et seq. <<https://www.fca.org.uk/publication/consultation/cp18-13.pdf>> accessed 2 September 2021.

58 Reifner et al (n 4), 14.

59 *Mikrokasa* (n 6), para 23.

60 Atticus, 'Consumer research on overdrafts' (Financial Conduct Authority 2018) 54 <www.fca.org.uk/publication/research/consumer-research-on-overdrafts.pdf> accessed 15 May 2021.

61 See e.g., Chris Willett, 'Re-theorizing consume law' (2018) 77 *The Cambridge Law Journal* 203-206; Financial Conduct Authority, 'Proposals for a price cap on high-cost short-term credit' (CP 14/10 2014) Annex 1, 1.15 <www.fca.org.uk/publication/consultation/cp14-10.pdf> accessed 2 September 2021.

to foresee. Not only may the fees be hidden in the contract in the creditor's standard terms and conditions,⁶² but behavioural biases might also play a role. Consumers may be overconfident about their ability to repay the loan, underestimating the likelihood of their future need for a loan extension.⁶³ As a result, the market can get out of control. For example, before the reform in the UK, a payday loan of 150 pounds for 18 days would trigger the interest amounting to 27.99 pounds and a comparatively high fee of 5.50 pounds, bringing the total cost of credit to 5853 % APRC.⁶⁴

Ancillary charges can be a significant source of income for creditors. In the UK, before the reform of the payday lending market, rollovers accounted for 29 % of profit from online and 36 % of profit from offline lending.⁶⁵ Indeed, in the present case, the substantial number of extensions provided Soho Group with 'several tens of thousands of euros' in a given financial year.⁶⁶

Having loan extension fees within the 'total cost of credit' is therefore a positive development for the protection of consumers. Although consumers are unlikely to take note of loan extension fees alone, these fees could influence consumers' decision-making through the APRC; consumers are informed on the 'total cost of credit' via the APRC.⁶⁷ The APRC is 'total cost of the credit to the consumer, expressed as an annual percentage of the total amount of credit.'⁶⁸ The APRC enables consumers to compare costs of various loans by reference to a single figure of percentage. Given the APRC's 'mission' to ensure the fullest possible transparency and comparability of offers within the internal market, the APRC is an important part of the Consumer Credit Directive's information approach, it is one of the key pre-contractual pieces of information.⁶⁹ The APRC is first communicated in advertising,⁷⁰ then it is part of the Standard European Consumer Credit Information sheet provided to the consumer before the conclusion of the contract,⁷¹ and it is finally included into the contract itself.⁷²

Considering the complex cost structure of credit products and the prevalence of additional charges and fees to the contractual interest, in order to achieve transparency, it is important that the APRC includes as many cost elements of the loan as possible. Although there might have been a tendency to exclude optional costs such as default and loan extension fees,⁷³ now the CJEU clarified, the APRC includes loan extension fees (provided the actual and precise conditions for the possibility of extension are specified in the contract and the costs are known to the creditor). Following this judgment and the general broad interpretation of Article 3(g) Consumer Credit Directive, European consumer credit law seems to go in the direction that the 'total cost of credit' should include all costs of the loan, except those explicitly excluded by the Directive.⁷⁴ Since the Directive does not 'contain substantive rules relating to the types of charges that the creditor may levy'⁷⁵ the Member States can allow creditors to decide on the introduction of new charges or they remain free to leave price structures to commercial decisions of creditors. However, when creditors first develop new charges, they should count on these being included within the definition of a 'total cost of credit' unless expressly falling under the narrow, explicit exemptions of notarial fees under Article 3(g) Consumer Credit Directive or default charges under Article 19(2).

The APRC has a prominent role for consumers' informed decision making in the system of protection provided by the Consumer Credit Directive, and as such, it also has a poten-

tial to impose competitive discipline over the cost of loans. Even if consumers do not fully understand what the APRC stands for and how it is calculated they usually find it helpful in comparing credit products.⁷⁶ Indeed, the APRC is frequently used by consumers in their borrowing decisions and the European Commission considers it to be one of the areas where the Consumer Credit Directive had a particularly positive impact.⁷⁷ Although it has been highlighted that the APRC might not be the best comparator for loans that are of different size and length, because a shorter loan that costs the same as a longer one would have a much higher APRC,⁷⁸ having the APRC as a point of comparison could still be useful. Unlike loan extension fees, consumers are likely to notice the APRC and can easily compare two or more single figures, even if the result of this comparison is not completely accurate. Moreover, given that the cost of small loans for a short duration is significantly 'boosted up' with (comparatively high) fixed charges, as seen in the above example, creditors might be incentivised to keep this cost low or not to have it at all to lower the APRC. Should this happen, should the competitive pressure work, including loan extension fees within the calculation of the APRC could even have an *indirect* product intervention effect.

VII. The Function of the 'Total Cost of Credit': Full Harmonization and Regulatory Choices

In addition to the above discussed indirect product intervention effect, the final important contribution of the present judgment to the protection of European consumers lies in the possible *direct* product intervention, i.e., the possibility of having the 'total cost of credit' capped by the Member States. The Consumer Credit Directive is overwhelmingly information oriented. It aims to enable consumers to make informed decisions. Article 3(g) Consumer Credit Directive on the 'total cost of credit' for consumers also serves this purpose. However, as the provision is not one of a full harmonization, when implemented into national law it can be used for *direct product* intervention, including to impose price caps. This way, as further shown below, the function of the 'total cost

62 See e.g., Ognyan Seizov et al., 'The Transparent Trap: a Multidisciplinary Perspective on the Design of Transparent Online Disclosure in the EU' (2019) 42 *Journal of Consumer Policy* 149.

63 See e.g., Michael G Faure and Hanneke A Luth, 'Behavioural economics in unfair contract terms, cautions and considerations' (2011) 34 *Journal of Consumer Policy* 337; Financial Conduct Authority (n 61), Section 2, 1.34.

64 Fejős (n 40), 186.

65 Competition and Markets Authority (n 44), 2.56.

66 *Soho Group* (n 13), 5.3.

67 Recital 19 Consumer Credit Directive.

68 Article 3(i) Consumer Credit Directive.

69 Recital 19 Consumer Credit Directive.

70 Article 4 Consumer Credit Directive.

71 Article 5 Consumer Credit Directive.

72 Article 10 Consumer Credit Directive.

73 Financial Conduct Authority (n 61), Section 5, 5.3.

74 Soon the CJEU will have a chance to review this conclusion. In a currently pending case *K () and services accessoires* (n 6), the CJEU is asked whether fees relating to deferral or reduction of instalments are considered in the calculation of the APRC.

75 Case C-602/10 *SC Volksbank România* ECLI:EU:C:2012:443, para 65.

76 Atticus (n 60), 52; Financial Conduct Authority, 'Overdraft Pricing and Competition Remedies: Policy Statement' (PS 19/25 2019) 9 <<https://www.fca.org.uk/publication/policy/ps19-25.pdf>> accessed 2 September 2021.

77 Commission, 'Report from the Commission to the European Parliament and the Council on the implementation of Directive 2008/48/EC on credit agreements for consumers' COM (2020) 963 final, 5 <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1844-Evaluation-of-the-Consumer-Credit-Directive_en> accessed 2 September 2021.

78 Financial Conduct Authority (n 61), Executive summary, 1.15.

of credit' has a potential to 'transform' a pure information provision to a potential product intervention tool.

The Consumer Credit Directive is an excellent example of the European 'information paradigm'.⁷⁹ The European rules on consumer credit aim to target information asymmetries between creditors and consumers to enable consumers to make informed decisions. The ultimate decision-making is left to consumers, who are assumed to be able to make rational choices between various credit products.⁸⁰ The information approach to European consumer law is not without controversy. Whilst not all information has the same value for informed decision-making, and some information, such as the APRC as discussed above, may be driving consumer decision-making, research has raised limitations of the 'information paradigm'. Without having space to discuss it in detail, it could be summarized that consumers often fail to note the information that is communicated to them,⁸¹ they are often challenged in understanding of the complex information,⁸² and they are not rational decision-makers.⁸³ Informed decisions are all the more difficult to make with abstract, intangible financial products that can only be evaluated based on the information received.⁸⁴ Nevertheless, European financial consumer law continues to primarily focus on information provision, with gradual but still minor penetration of product intervention.⁸⁵

Article 3(g) Consumer Credit Directive is no exception from the general approach of the Directive that supports the information paradigm. However, the present case shows that, notwithstanding the full harmonisation nature of key aspects of the Directive, the Member States do in fact have an important degree of regulatory choice in implementing this provision, enabling them to go beyond what is provided in the Directive.

Consumer Credit Directive was among the first European consumer protection legal instruments that were based on full harmonization. Full harmonization means that the Member States should not maintain or introduce national provisions other than those laid down in the Directive⁸⁶. This approach was thought necessary for the high level of consumer protection that would not only provide high standards of protection but would also ease the existing regulatory differences in the Member States.⁸⁷ However, such restriction should only apply where there are provisions harmonised in the Directive. Where no such harmonised provisions exist, the Member States remain free to maintain or introduce national legislation.⁸⁸

In the present case, referring to Article 1 on the subject matter of the Consumer Credit Directive according to which the purpose of this Directive is to '*harmonise certain aspects of the laws, regulations and administrative provisions of the Member States concerning agreements covering credit for consumers* [emphasis added]', the CJEU noted that the Consumer Credit Directive only harmonizes *some aspects* of consumer credit contracts and it does not contain harmonized rules on the matter of credit extension.⁸⁹ Likewise, the Directive does not provide for the maximum possible cost of the loan.⁹⁰ These two issues that are of particular importance in the present case, are left outside of the regulatory scope of the Directive. In this area, according to Recital 9 Consumer Credit Directive, the Member States stay free to maintain or introduce national legislation. Hence, the approach of the Latvian legislator who capped the daily total cost of loans was compliant with the Directive.

This case shows an interesting twist to the regulatory approach and the ability of the Consumer Credit Directive to adjust to national preferences. It leaves regulatory space for national intervention that may enhance consumer protection by imposing a cap on the 'total cost of credit'. Placing a price cap on the 'total cost of credit' gives this notion an entirely different dimension: from a fairly weak information tool it gets converted to a more powerful product intervention tool.

VIII. Conclusion

This case note has analysed the contribution of the CJEU in the *Soho group* judgment to the interpretation of the notion of a 'total cost of credit to consumers' in Article 3(g) Consumer Credit Directive. Looking at the details of the judgment, the broader socio-economic context in which these loans operate, and the general tools of EU consumer protection law, the paper has highlighted two important aspects of the potential legacy of this judgment for the future of EU consumer credit law: the possible indirect and direct product intervention for which it provides.

Bringing loan extension fees within the 'total cost of credit' serves the intended benefit of the Consumer Credit Directive of providing for a high level of consumer protection, as it better enables consumers to compare offers on the market and potentially thereby encourages competitive market discipline to reduce the cost of the loan. This is particularly significant given that consumers of high-cost credit are often vulnerable due to low income, high indebtedness, or inability to sustain income and expenditure shocks. With this, the CJEU confirmed its earlier approach to interpreting Article 3 (g) Consumer Credit Directive broadly as embracing all the costs of the credit, including loan extension fees. The message of the CJEU is therefore that in exercising their commercial freedom, creditors may develop new cost elements, but they should do this under the warning that these are likely to be included in the 'total cost of credit' and thus the APRC. Being part of the 'total cost of credit' and the APRC not only helps consumers to compare the costs involved in the loan, but ultimately, the potentially resulting competitive pressure might incentivise creditors to lower or (perhaps less plausibly) abolish these fees altogether. This way, the proper working of the information approach could result in indirect (market) product intervention. It might be advisable for national regulatory authorities to create guidelines for creditors explaining the implications of this decision and the regime more generally. These guidelines could explain the coverage of loan

79 See e.g., Olha O Cherednychenko, 'Freedom of Contract in the Post-Crisis Era: Quo Vadis?' (2014) 10 *European Review of Contract Law* 408.

80 Cherednychenko (n 3), 6.

81 See e.g., Omri Ben-Shahar, 'The Myth of the 'Opportunity to Read' in Contract Law' (2009) 5 *European Review of Private Law* 1; Ian Ayres and Alan Schwartz 'The no-reading problem in consumer contract law' (2014) 66 *Stanford Law Review* 545.

82 See e.g., London Economics et al, 'Consumer vulnerability across key markets in the European Union' (Commission 2016) 342-344 <https://ec.europa.eu/info/sites/info/files/consumers-approved-report_en.pdf> accessed 2 September 2021.

83 See e.g., Ibid, 340-342.

84 See e.g., David Llewellyn, 'The Economic Rationale for Financial Regulation' (Financial Services Authority Occasional Paper 1 1999) 32-40 <https://www.fep.up.pt/disciplinas/pgaf924/PGAF/Texto_2_David_Llewellyn.pdf> accessed 2 September 2021.

85 Fejós (n 10), 81-85.

86 Article 22 Consumer Credit Directive.

87 Recitals 2-8 Consumer Credit Directive.

88 Recital 9 Consumer Credit Directive.

89 *Soho Group* (n 7), para 27.

90 Ibid. See also *Mikrokasa* (n 6), paras 40 and 48.

extension fees and discuss other examples of existing and potential new charges expected to be counted as part of the ‘total cost of credit’ under Article 3(g) Consumer Credit Directive.

Not including Article 3(g) Consumer Credit Directive under the total harmonization scope of the Directive and therefore making national direct product intervention such as price caps compliant with EU consumer credit law, is also a positive development for the protection of consumers. High-cost credit, as the name suggests, is expensive by its very nature, these costs may be exacerbated by expensive loan extension fees unfairly burdening the already vulnerable consumers.

Indeed, in the future, national legislators and regulators may be required to introduce or maintain cost caps in their legal systems. In 2018 the European Commission embarked on the evaluation of the Consumer Credit Directive to assess its ‘effectiveness, efficiency, coherence, relevance, and EU added value’,⁹¹ and on 30 June 2021 it presented the new Proposal for a Directive on consumer credits.⁹² A highly positive development in the Proposal is its Article 31, which mandates direct product intervention. The Member States should cap the interest rate, the APRC or the ‘total cost of the credit’. The ‘total cost of credit’ is now therefore one of the expressions of the cost of the loan that can be subject to direct product intervention.

Despite this progress in direct product intervention in EU consumer credit law, the Proposal leaves more work to be done on indirect (market) product intervention. The notion of a ‘total cost of credit to the consumer’ that is now in Article 3(5) of the Proposal, almost verbatim repeats Article 3(g) of the Directive, failing to mention loan extension fees. The inclusion of loan extension fees is also left out from the costs that are to be considered when calculating the APRC under Article 30(2) of the Proposal. This approach is not surprising given that the total cost of credit got very little attention in the evaluation of the Consumer Credit Directive.⁹³ Consequently, the EU’s legislative process should be used to (re)assess the suitability of the proposed Article 3(5) to deliver a high level of consumer protection, and following the judgement discussed in this case-note, loan extension fees should be explicitly included within the concept of a ‘total cost of credit to the consumer’. ■

⁹¹ Commission (n 77), 2.

⁹² Commission, ‘Proposal for a Directive of the European Parliament and of the Council on consumer credits’ COM (2021) 347 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021PC0347&from=EN>> accessed 2 September 2021.

⁹³ It was only mentioned once in the context of the APRC. Commission, ‘Commission staff working document on the Evaluation of Directive 2008/48/EC on credit agreement for consumers’ SWD (2020) 254 final, 34 <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2020:0254:FIN:EN:PDF>> accessed 2 September 2021; see also Commission (n 77), 5.