

The Marketing of Consumer and Mortgage Credit as a Responsible Lending Tool: A Comparison of South African, European and Belgian Law: Part 2

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Abstract

The vulnerability of prospective credit consumers to over-committing their resources and the inherent dangers posed by credit advertising in particular necessitate the proper regulation of credit marketing. It is therefore not unsurprising that responsible marketing forms part of the responsible lending (and borrowing) measures of various jurisdictions – including South Africa and the Member States of the European Union – with the aim of preventing the extension of credit to consumers who cannot afford it. In this article the credit marketing laws that the South African, European (mainly in the Consumer Credit and Mortgage Credit Directives) and Belgian legislators have enacted are considered and compared, with a focus on the information to be included in advertising, prohibited advertising and prohibited marketing techniques. The ultimate aim is to determine whether South African law contains sufficient guarantees to protect consumers with respect to credit marketing and its consequences.

Keywords

Marketing; consumer credit; compulsory information; prohibited advertising; prohibited marketing techniques; civil remedies; administrative sanctions.

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1 European law

1.1 Introduction

In the European Union¹ several Directives have been adopted which are relevant in the context of the advertising of credit agreements to consumers. The harmonisation of these rules aims on the one hand at contributing to the realisation of the internal (credit) market, and on the other at protecting consumers.² Basically, the European legislator believes that consumers will be willing to conclude a cross-border (credit) agreement only when they can be certain that they will enjoy the same or at least a minimum level of protection in each Member State of the EU. Also, the argument is put forward (especially in order to justify maximum or full harmonisation, prohibiting the Member States from enacting or maintaining additional protection measures within the field harmonised by the Directive) that creditors³ will be prepared to offer cross-border credit agreements to consumers only when they do not incur the risk of additional protection measures applying in the consumer's country, to the consumer's benefit.⁴

In addition to some specific provisions on the advertising of consumer and mortgage credit agreements, which can be found in the Consumer Credit Directive, as well as in the Mortgage Credit Directive,⁵ the general provisions on unfair commercial practices⁶ have to be taken into account by

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¹ The European Union, hereafter the EU.

² Article 114 of the *Treaty on the Functioning of the European Union* (2008) determines that the measures for the approximation of national law which have as their object the establishment and functioning of the internal market must take into account a high level of consumer protection.

³ In this article the terms "creditor" and "credit provider" will be used interchangeably.

⁴ See for example consideration nr 9 of Directive 2008/48/EC of the European Parliament and the Council of 23 April 2008 on Credit Agreements for Consumers and Repealing Council Directive 87/102/EEC (the Consumer Credit Directive or the CCD); De Muynck 2009 *Tijdschrift Consumentenrecht* 8-9; and Vannerom 2015 *Eur J Consum L* 297.

⁵ Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on Credit Agreements for Consumers Relating to Residential Immovable Property and Amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (the Mortgage Credit Directive or the MCD).

⁶ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC)

creditors advertising credit to consumers.⁷ Further, the Electronic Commerce Directive⁸ contains some specific rules for consumer and mortgage credit advertised online. All these rules need to be applied together, since they complement one another.⁹ None of them contain any specific (civil) remedies to be applied when these rules on advertising are violated.

Before discussing the content of these rules, the concepts "advertising" and "consumer" are dealt with. Except for the ECD, all the Directives that we have mentioned apply only to advertising (or commercial practice) that is directed at consumers.

1.2 The concept "advertising" in the EU

Although both the CCD and the MCD require the creditor to include certain information in advertising for a credit agreement,¹⁰ they do not define the concept "advertising". The UCPD does not contain a definition of advertising either, since it uses the wider notion of commercial practices. "Commercial practices" means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers.¹¹ The ECD uses the notion of commercial communication, meaning any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession.¹² The latter definition will be used to define the concept of advertising in EU (and later Belgian) law in this article.

No 2006/2004 of the European Parliament and of the Council (the Unfair Commercial Practices Directive or the UCPD).

⁷ There are also specific rules on comparative advertising (Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 Concerning Misleading and Comparative Advertising), but, as has been stated above, these will not be discussed in this article.

⁸ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (the Electronic Commerce Directive or the ECD).

⁹ See in particular: art 4(4) of the CCD and art 11(7) of the MCD.

¹⁰ See para 1.4.3 below.

¹¹ Article 2(d) of the UCPD. See for example on the (broad) interpretation of the term "commercial practices": *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV* CJ 23 April 2009, C-261/07 and C-299/07 respectively, ECLI:EU:C:2009:244; *Nemzeti Fogyasztóvédelmi Hatóság v UPC Magyarország* CJ 16 April 2015, C-388/13, ECLI:EU:C:2015:225.

¹² Article 2(f) of the ECD.

Case law has shown that the meaning of the term “advertising” is very wide.¹³ The following can, for example, be considered as advertising: promotion in a newspaper, a commercial on television or on the radio, a website, a banner, a pop-up, a sponsored link on Google and public messages on social media. The fact that it is sufficient, in order for it to be considered advertising, that a communication promotes the image of a trader – and therefore it is not required that a specific credit is directly promoted – implies that even a banner or pop-up merely mentioning the creditor's name can be considered advertising in the meaning of all the aforementioned Directives.

1.3 The concept “consumer” in the EU

A consumer is a natural person who acts for purposes which are outside his/her trade, business or profession.¹⁴ In European consumer law, juristic persons cannot be considered consumers, not even if they lack specific expertise with regard to the type of (credit) agreement they want to conclude.

In order to determine if a natural person can be considered a consumer, one must examine for what purposes the credit agreement will be concluded. If this is done for private purposes the debtor is considered a consumer. If it is done for professional purposes, he/she cannot be considered a consumer. The expertise or specific knowledge that a natural person acting for private purposes possesses is not relevant. This was acknowledged quite recently by the European Court of Justice in the *Costea* case, in which the Court decided that a lawyer concluding a credit agreement can be considered a consumer, even though he has specific knowledge and expertise in this regard, the only requirement being that the credit agreement is concluded for private purposes and not for professional purposes.¹⁵

¹³ See, for example: *Belgian Electronic Sorting Technology v Bert Peelaers and Visys* CJ 11 July 2013, C-657/11, ECLI:EU:C:2013:516, in which the ECJ decided that the notion advertising covers the use of a domain name and that of metatags in a website's metadata; Court of Cassation (Belgium) 2011 *Nieuw Juridisch Weekblad* 579.

¹⁴ Article 3(a) of the CCD and art 4(1) of the MCD, which refers to the definition in the CCD.

¹⁵ *Horățiu Ovidiu Costea v SC Volksbank România SA* CJ 3 September 2015, C-110/14, ECLI:EU:C:2015:538.

1.4 The EU Directives on consumer and mortgage credit

1.4.1 Harmonisation of credit law provisions

In the EU, consumer and mortgage credit are dealt with by two different directives, the Consumer Credit Directive and the Mortgage Credit Directive. Whereas the CCD is based on full harmonisation, the MCD is mainly based on minimum harmonisation (allowing the Member States to enact or maintain additional protection measures).¹⁶ As will be shown later, the fact that the CCD is based on maximum harmonisation does not mean that all rules on consumer credit advertising are identical in the EU. The European legislator chose to harmonise only the information that must be included in advertising *indicating an interest rate or any figures relating to the cost of a credit*. Other subjects, such as advertisements without figures, prohibited advertising and prohibited marketing techniques, have not been harmonised, leaving it to the Member States to regulate or not to regulate these matters (so-called targeted full harmonisation).¹⁷

1.4.2 Consumer and mortgage credit agreements

Both the CCD and the MCD define a credit agreement as an agreement whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, loan or other similar financial accommodation.¹⁸ The definition is very wide. All types of credit (for instance loans, overdraft facilities and credit sales) can be considered credit agreements in the meaning of the European Directives.

The broad definition of a credit agreement made it necessary for the European legislator to exclude several types of credit from the scope of the Directives.¹⁹ For example, the CCD excludes from its scope: credit agreements involving a total amount of credit less than EUR 200 or more than EUR 75 000; credit agreements in the form of an overdraft facility if the credit has to be repaid within one month; credit agreements where the credit is granted free of interest and without any other charges; and credit agreements which relate to the deferred payment, free of charge, of an

¹⁶ The MCD uses the concept of maximum harmonisation only with regard to the standard precontractual information to be provided and the standards for the calculation of the annual percentage rate of charge: art 2 of the MCD. Also see Vannerom 2015 *Eur J Consum L* 292-293; Verbiest 2017 *Tijdschrift voor Belgisch Handelsrecht* 847.

¹⁷ *SC Volksbank România SA v Autoritatea Națională pentru Protecția Consumatorilor* CJ 12 July 2012, C-602/10, ECLI:EU:C:2012:443 (however, not relating to advertising).

¹⁸ Article 3(c) of the CCD and art 4(3) of the MCD.

¹⁹ See art 2(2) of the CCD and art 3(2) of the MCD.

existing debt.²⁰ Although the CCD is based on the principle of maximum harmonisation, Member States of the EU can decide to apply the provisions of the CCD to credit agreements that are completely excluded from the scope of the CCD.²¹

The information that must be included in advertising indicating an interest rate or a figure relating to the cost of the credit differs slightly for consumer credit and mortgage credit. Therefore, it is important to mention briefly when the rules on consumer credit apply and when the rules on mortgage credit apply.

Basically, the provisions on consumer credit cannot apply if the credit agreement must be considered a mortgage credit.²² The following can be considered as a mortgage credit agreement:²³ every credit agreement that is secured by a mortgage²⁴ (independent of its purposes: a loan to buy or build a house, as well as a loan to buy a car, if secured by a mortgage); and every credit agreement the purpose of which is to acquire or retain property rights in land or in an existing or projected building (for instance, a loan for buying a house secured by the pledge of financial instruments). Therefore, and rather strangely, a credit agreement can be called a mortgage credit agreement even if there is no mortgage, simply because of its so-called immovable purpose. An important exception to the latter finding relates to credit agreements the purpose of which is to renovate residential immovable property. They fall under the scope of the MCD only if they are secured by a mortgage.

1.4.3 Information to be included in advertising indicating an interest rate or any figures relating to the cost of credit

The advertising of consumer credit agreements indicating an interest rate or any figures relating to the cost of credit (for instance, advertising mentioning an annual percentage rate of charge or an amount that must be paid monthly) must mention: the borrowing rate, fixed or variable or both, together with particulars of any charges included in the total cost of the credit to the consumer; the total amount of credit; the annual percentage rate of charge (in the case of a credit agreement in the form of an overdraft facility

²⁰ Article 2(2) of the CCD. Only certain provisions apply to some credit agreements: art 2(3) of the CCD.

²¹ *SC Volksbank România SA v Autoritatea Națională pentru Protecția Consumatorilor* CJ 12 July 2012, C-602/10, ECLI:EU:C:2012:443.

²² Article 2 of the CCD.

²³ Article 3(1) of the MCD. Also see Blommaert and Algrain "Le champ d'application des différentes réglementations" 51-57; Vannerom and Cassier 2017 *Bank en Financieel Recht* 14-16.

²⁴ Or by another comparable security commonly used in a Member State on residential immovable property or secured by a right related to residential immovable property.

and where the credit has to be repaid on demand or within three months, Member States may decide that the annual percentage rate of charge need not be provided); if applicable, the duration of the credit agreement; in the case of credit in the form of deferred payment for a specific good or service, the cash price and the amount of any advance payment; and if applicable, the total amount payable by the consumer and the amount of the instalments.²⁵

The advertising of mortgage credit agreements indicating an interest rate or any figures relating to the cost of credit must contain more information: the identity of the creditor or, where applicable, the credit intermediary or appointed representative; where applicable, that the credit agreement will be secured by a mortgage or another comparable security commonly used in a Member State on residential immovable property or by a right related to residential immovable property; the borrowing rate, indicating whether this is fixed or variable or a combination of both, together with particulars of any charges included in the total cost of the credit to the consumer; the total amount of the credit; the annual percentage rate of charge, which must be included in the advertisement at least as prominently as any interest rate; where applicable, the duration of the credit agreement; where applicable, the amount of the instalments; where applicable, the total amount payable by the consumer; where applicable, the number of instalments; where applicable, a warning regarding the fact that possible fluctuations of the exchange rate could affect the amount payable by the consumer.²⁶

It is important to emphasise that this information must be included in every advertisement indicating an interest rate or any figures relating to the cost of a credit.²⁷ Therefore, if a banner or a pop-up advertising a consumer or a mortgage credit indicates an interest rate or any figures relating to the cost of a credit, the banner or pop-up itself will have to mention the information required by the Directive. The use of a hyperlink in the banner or pop-up, referring to the creditor's website containing the required information, will not be sufficient. Even more problematic is that every sponsored link on a search engine like Google or on social media should mention all the required information, insofar as it indicates an interest rate or any figures relating to the cost of a credit. Contrary to the UCPD,²⁸ the CCD or MCD does not make it possible to take into account any limitations of the communication technique used.

²⁵ Article 4(2) of the CCD.

²⁶ Article 11(2) of the MCD. Also see Verbiest 2017 *Tijdschrift voor Belgisch Handelsrecht* 851.

²⁷ Also see Blommaert, Bonnarens and Vannerom "Artikel VII.64 WER" 9-10; De Muyck "Consumentenkrediet" 28.

²⁸ See para 1.5 below.

Further, all the information must be easily legible or clearly audible as appropriate, depending on the medium used for advertising. It must be given in a clear, concise and a prominent way.²⁹ The information, which must be included, must be specified by means of a representative example.³⁰ The requirement of a representative example requires the creditor to use an example based on the average amount of the credit type advertised. Some authors doubt the added value of representative examples, taking into account the possibility of online simulations.³¹

Where the conclusion of a contract regarding an ancillary service, in particular an insurance service, is compulsory in order to obtain the credit or to obtain it on the terms and conditions marketed, and the cost of that service cannot be determined in advance, the obligation to enter into that contract must also be stated in a clear, concise and prominent way, together with the annual percentage rate of charge.³² In practice it can be hard to determine whether consumers are actually free to conclude a contract relating to certain ancillary services or are in reality obliged to do so.³³

1.5 Unfair Commercial Practices Directive

The general provisions on unfair commercial practices can be found in the UCPD. The Directive basically uses the principle of maximum harmonisation, prohibiting additional protection measures.³⁴ However, as far as financial services are concerned the UCPD contains an exception, implying that the UCPD itself does not prevent the Member States from introducing more stringent provisions.³⁵ However, further restrictions on the possibility of the Member States enacting rules on consumer credit can result from the Consumer Credit Directive.

The rules on unfair commercial practices aim at protecting consumers from misleading, aggressive and unfair commercial practices. The system is quite simple. On the one hand, the Directive contains a black list of practices that are *per se* prohibited (misleading or aggressive under all circumstances), and on the other hand the Directive contains some open norms prohibiting in general misleading, aggressive and unfair commercial

²⁹ Article 4(2) of the CCD and art 11(5) of the MCD.

³⁰ Article 4(2) of the CCD and art 11(3) of the MCD (except certain information mentioned in the MCD).

³¹ Davidts and Caulier "De la publicité à l'offre de crédit" 126.

³² Article 5(3) of the CCD and art 11(4) of the MCD.

³³ Rott "Consumer Credit" 193.

³⁴ *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV* CJ 23 April 2009, C-261/07 and C-299/07 respectively, ECLI:EU:C:2009:244.

³⁵ Article 3(9) of the UCPD. Also see Micklitz "Unfair Commercial Practices and Misleading Advertising" 78.

practices.³⁶ Examples of blacklisted and *per se* prohibited misleading commercial practices are: (1) claiming to be a signatory to a code of conduct when the creditor is not; (2) displaying a trust mark without the necessary authorisation; (3) falsely stating that the terms of a certain credit (for instance, a lower interest rate) are available for a very limited amount of time only, in order to elicit an immediate decision; and (4) presenting rights given to the consumers in law as a distinctive feature of the creditor's offer.

In addition to the black list, there is a general prohibition on misleading commercial practices. The misleading of consumers can take place mainly by the provision of incorrect information (for instance, on the cost of the credit)³⁷ or by the omission of essential information.³⁸ It is important to understand that in order to constitute a misleading commercial practice, advertising must be likely to deceive the average consumer (within the group of consumers targeted by the advertising) and to cause a consumer to take a transactional decision that he/she would not have taken otherwise.³⁹ In this context, it is particularly interesting to note that the European Court of Justice decided that the prohibition of misleading commercial practices must be evaluated exclusively from the consumer's viewpoint, implying that it is irrelevant whether or not the creditor has acted in good faith.⁴⁰ Therefore, even a creditor acting in good faith will not be able to escape a conviction for misleading commercial practices if the advertising is likely to deceive the average consumer and impact on his/her economic behaviour.

When assessing whether the omission of certain information can deceive the consumer, the limitation of space or time of the means of communication used must be taken into account, as well as any measures taken by the creditor to make the information available by other means.⁴¹ More specifically, this implies that when the technique used for advertising does not allow the creditor to insert all the essential information (in the meaning of the UCPD), some of the information may be omitted if the creditor makes this information available by other means and informs the consumer about the accessibility of the information.⁴² However, as already mentioned, advertising indicating the rate of interest or any other figure relating to the

³⁶ See for example: Micklitz "Unfair Commercial Practices and Misleading Advertising" 61-118; Stuyck 2015 *CML Rev* 721-752.

³⁷ Article 6 of the UCPD.

³⁸ Article 7 of the UCPD.

³⁹ See *Trento Sviluppo and Centrale Adriatica v Autorità Garante della Concorrenza e del Mercato* CJ 19 December 2013, C-281/12, ECLI:EU:C:2013:859.

⁴⁰ *CHS Tour Services v Team4 Travel* CJ 19 September 2013, C-435/11, ECLI:EU:C:2013:574.

⁴¹ Article 7(3) of the UCPD.

⁴² *Konsumentombudsmannen v Ving Sverige* CJ 12 May 2011, C-122/10, ECLI:EU:C:2011:299.

cost of the credit must always mention all the information required by the CCD or the MCD.

1.6 *Electronic Commerce Directive*

The ECD contains some additional information requirements. Most important in the context of advertising credit agreements on the Internet are the natural or legal person on whose behalf the commercial communication is made must be clearly identifiable, and promotional offers must be clearly identifiable as such. The conditions which are to be met to qualify for them must be easily accessible and be presented clearly and unambiguously.⁴³

2 Belgian law

When implementing the CCD and the MCD the Belgian legislator has not limited itself to copying the provisions that are incorporated in the Directives. In addition to the information to be included in advertising indicating the interest rate or a figure relating to the cost of the credit, the Belgian legislator maintained/enacted several rules on prohibited advertising for consumer and mortgage credit and prohibited marketing techniques for consumer credit. Also, the Belgian legislator introduced some specific civil remedies.

2.1 *Information to be included*

In addition to the information that must be included in advertising indicating the interest rate or a figure relating to the cost of the credit (as determined by the CCD and the MCD), the Belgian legislator requires, in order to sensitise consumers, that all advertising relating to consumer credit (not mortgage credit) must include the caveat: "Be careful, credits also cost money".⁴⁴ It can be doubted whether this requirement, insofar it also relates to advertising indicating the rate of interest or a figure concerning the cost of the credit, is compatible with the maximum harmonisation character of the CCD (since it imposes an additional requirement for advertising, harmonised by the Directive).⁴⁵

2.2 *Prohibited advertising*

The Belgian legislator has decided to prohibit certain advertising for consumer and mortgage credit. These rules are not contrary to the CCD,

⁴³ Article 6 of the ECD.

⁴⁴ Article VII.65 of the *Code of Economic Law* of 2013 (CEL).

⁴⁵ However, the requirement to state "Be careful, credits also cost money" in advertising not indicating a figure relating to the cost of the credit is not contrary to the CCD, since the latter does not harmonise this type of advertising: Consideration nr 18 of the CCD; Blommaert and Bonnarens "Reclame in de Wet Consumentenkrediet" 76.

since the European legislator has not specified what advertising is prohibited (only the information that needs to be included in advertising indicating an interest rate or a figure concerning the cost of the credit has been harmonised).⁴⁶ Also, these additional prohibitions for consumer and mortgage credit are not contrary to the UCPD since, as far as financial services are concerned, the approach of minimum harmonisation is used in the UCPD.⁴⁷

With the exception of one additional prohibition relating to the advertising of mortgage credit, the prohibitions are identical for consumer and mortgage credit. More specifically, the Belgian legislator prohibits advertising that is specifically targeted⁴⁸ at:⁴⁹

- encouraging the consumer who cannot cope with his debts to apply for credit (for instance, advertising that credit can also be obtained if the consumer is on the so-called black list of the Central Credit Register indicating that a consumer has not met his/her obligations resulting from already existing credit agreements);
- emphasising the ease or speed with which the credit can be obtained (for instance, emphasising the possibility of obtaining credit within the hour or slogans like "fast" or "immediate" credit);
- encouraging the regrouping or consolidation of current credits or reflecting that current credit agreements do not play a role (or only a subordinate role) when assessing a credit application (for instance, a banner or pop-up which refers specifically to the possibility of consolidating existing credit agreements).⁵⁰

The objective of these prohibitions is mainly to protect the weakest consumers and to avoid over-indebtedness.

Also prohibited is advertising that does not require that the credit be specifically targeted at and that:⁵¹

⁴⁶ De Muynck 2009 *Tijdschrift Consumentenrecht* 21-22; Rott "Consumer Credit" 193.

⁴⁷ Article 3(9) of the UCPD.

⁴⁸ See De Muynck "Consumentenkrediet" 29-30, who argues that the group of consumers targeted, as well as the content of the advertising, can indicate that advertising is specifically targeted.

⁴⁹ Article VII.66 (consumer credit) and art VII.123 (mortgage credit) of the CEL. Also see Blommaert, Nichels and Bonnarens "Artikel 6 Wet Consumentenkrediet"; Verbiest 2017 *Tijdschrift voor Belgisch Handelsrecht* 851.

⁵⁰ The consolidation of credit agreements is not prohibited as such.

⁵¹ Article VII.66 (consumer credit) and art VII.123 (mortgage credit) of the CEL. Also see Blommaert, Nichels and Bonnarens "Artikel 6 Wet Consumentenkrediet".

- refers to a licence or a registration as a creditor or credit intermediary;
- by referring to the maximum annual percentage rate of charge or to the legality of the applied cost percentages, gives the impression that they are the only ones that can be applied;
- indicates that a credit agreement can be concluded without information that would allow the consumer's financial situation to be verified (for instance, to obtain credit without a creditworthiness assessment);
- mentions an identity, address or capacity other than that specified by the advertiser in the context of his/her licence or registration;
- indicates a credit type but uses a name that differs from the one used by the law;
- indicates preferential rates without specifying the special or restrictive conditions to which the granting of these rates is subject;
- indicates through wording, signs or symbols that the credit amount is made available in cash;
- contains the indication "free credit" or a similar statement, other than the reference to the annual percentage rate of charge (it is therefore prohibited to state that credit can be obtained for free, but it remains possible to indicate in advertising that the annual percentage rate of charge equals 0%);
- promotes an act that must be regarded as a non-compliance with or an infringement of the rules on credit agreements incorporated in the CEL.

These prohibitions aim at preventing the consumer from being misled.

If the advertising relates to mortgage credit agreements there is an additional prohibition of creating wrong impressions concerning the availability or the cost of the credit.⁵²

⁵² Article VII.123 of the CEL.

2.3 Prohibited marketing techniques

Finally, it is interesting to note that the Belgian legislator prohibits certain ways of marketing consumer credit (these rules do not apply to mortgage credit).⁵³

Firstly, it is prohibited to conclude a consumer credit agreement (and even to hand over a credit application form) at the consumer's home or working place, except when the consumer has invited the creditor or credit intermediary explicitly and beforehand to visit him/her. The proof of such an invitation must be delivered by the creditor or the credit intermediary and can be delivered only via a separate durable medium (paper, e-mail,...), distinct from the consumer credit agreement, the credit offer and the credit application form drafted before the date of the visit. It is clear that an oral invitation or standard clause in the credit agreement or credit application form will not be sufficient.

Secondly, it is prohibited for the creditor and credit intermediary to approach the consumer in order to propose to him/her a visit at his/her home. This implies that creditors and credit intermediaries may not call, text or e-mail the consumer proposing to him/her to render him/her a visit. However, this rule does not prohibit creditors from calling the consumer and inviting him/her to the creditor's office. Neither is it prohibited for the creditor to send a credit application form to the consumer's home (inviting the consumer to fill in this form and eventually conclude the credit agreement at a distance). Only the direct sending of a credit offer is specifically prohibited. However, the latter prohibition does not apply when the consumer explicitly and previously requested the creditor or credit intermediary to send him/her the credit offer. (Once again, the proof of such a request can be delivered only on a durable medium, distinct from the credit offer or credit agreement.) The difference between a credit application form and a credit offer relates to the fact that an offer needs only the consumer's acceptance in order to become a credit agreement. Therefore, a credit offer requires that the consumer's creditworthiness has already been positively assessed.⁵⁴

Finally, consumers may not be approached in public in order to propose that they accept credit; neither can the creditor or credit intermediary organise excursions that aim at selling goods and services to consumers (unless the consumer was previously informed about the goal of this excursion).

⁵³ Article VII.67 of the CEL.

⁵⁴ Articles VII.77 and VII.133 of the CEL.

In addition, all creditors and credit intermediaries, as in all other undertakings, must take into account the general prohibition of sending unsolicited commercial communications by electronic mail.⁵⁵

First it is important to understand that the concept of electronic mail is not limited to traditional e-mails. Messages on chat boxes such as Messenger, Skype and WhatsApp, must also be considered electronic mail. Pop-ups and banners, and posts on the creditor's page on social media (for instance Facebook), on the contrary, are not to be considered electronic mail.

In principle, sending commercial communication by electronic mail is allowed only when the creditor has obtained explicit and prior permission from the consumer to send him/her commercial communication by electronic mail. However, there are two exceptions to this general prohibition.⁵⁶ Important in the context of this article is the possibility of sending unsolicited commercial communication relating to similar services by electronic mail to existing clients whose electronic mail addresses the creditor has directly obtained in the past. More specifically, if the consumer has already obtained credit from the creditor and the creditor in the context of this relationship thus obtained the consumer's electronic mail address, the creditor is allowed to send commercial communication relating to other credits by electronic mail. However, the consumer must always be given the opportunity to "opt out", indicating that he/she no longer wants to receive such commercial communication.

2.4 Civil remedies and administrative sanctions

Where the creditor or the credit intermediary has violated the provisions prohibiting certain marketing techniques with regard to consumer credit, the courts will have the possibility either to declare the consumer credit agreement null and void, or to reduce the consumer's obligations to the amount borrowed, with the benefit of reimbursing the credit agreement in instalments.⁵⁷ Since the nullification of the agreement would not be beneficial to the consumer,⁵⁸ since it would entail the consumer having to reimburse the outstanding capital immediately, the consumer's obligations would in reality be reduced by the courts to the amount borrowed.⁵⁹ It is important to emphasise that the application of this remedy necessitates

⁵⁵ Article XII.13 of the CEL.

⁵⁶ Article 1 of the *Royal Decree Regulating Advertising by Electronic Mail* of 4 April 2003.

⁵⁷ Article VII.194 of the CEL.

⁵⁸ Also see *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank* CJ 30 April 2014, C-26/13, ECLI:EU:C:2014:282.

⁵⁹ See for example: Cantonal Court Mol 10 November 2009, *Jaarboek Kredietrecht* 116, Creplet note.

judicial intervention, but does not require the consumer to prove that s/he actually suffered damage (or the extent thereof).

Other violations of the provisions on advertising relating to consumer credit and the provisions on advertising concerning mortgage credit are not specifically sanctioned in Book VII of the CEL. However, one must take into account that the Belgian legislator, when transposing the UCPD in Book VI of the CEL, inserted a specific civil remedy which applies when the agreement has been concluded following an unfair commercial practice, implying that the consumer would not have to pay any interest or any other cost in relation to the credit agreement.⁶⁰ It can be argued that not including the information required by law in an advertisement constitutes a misleading commercial practice. (The omission of essential information might deceive the average consumer and cause him/her to take a transactional decision s/he would not have taken otherwise.)⁶¹ Also, advertising violating one of the specific prohibitions concerning consumer and mortgage credit advertisements may constitute an unfair commercial practice.

Finally, it can be stressed that the "Economic Inspectorate" within the state Department of Economic Affairs is quite active in sanctioning consumer credit advertising that is not in conformity with the law. More specifically, the Economic Inspectorate has the mandate to issue warnings and to propose sanctions that in reality function as administrative fines.⁶² There are also criminal sanctions for certain infractions,⁶³ but those are rarely used.

3 Comparative discussion, evaluation, suggestions and final conclusions

3.1 Introduction

The immediate impression is that the credit marketing laws of the EU⁶⁴ and South Africa afford almost similar protection to credit consumers, at least as far as the broad structure of the legislative frameworks involved is concerned. Both sets of laws address the information to be included in advertising, prohibited advertising and prohibited marketing techniques. In addition, both provide redress mechanisms for non-compliance with the marketing provisions. In the comparative discussion of the detail that follows, the Belgian consumer and mortgage credit laws as enacted in the country's legislation at present will be considered, irrespective of whether or

⁶⁰ Article VI.38 of the CEL. On art VI.38 of the CEL see Steennot 2015 *EuCML* 188-193.

⁶¹ Colaert and Terryn "Kredietpromotie" 72.

⁶² Articles XV.31 and XV.61 of the CEL.

⁶³ Article XV.87 of the CEL.

⁶⁴ Belgian law included.

not the Belgian legislature has correctly transposed the prescriptions of the EU Directives discussed above.⁶⁵

3.2 The legal frameworks involved, the scope of the fields of application, and the "consumer"

There are patent differences between the EU and South African credit (marketing) legal frameworks, the most obvious being that the South African laws are contained in legislative enactments that apply in South Africa only and that do not enjoy any cross-border application, and that in South Africa consumer and mortgage credit are dealt with in a "single, comprehensive Act".⁶⁶ Be that as it may, in order to form an overall picture of the credit marketing protection afforded to consumers in the respective jurisdictions, in each their individual set of laws must be read and applied together. The reason is that the South African laws complement one another and that the same holds for the laws in the EU.

Although there are important differences in the scope of the fields of application,⁶⁷ the EU and South African credit (and mortgage) laws correspond in the sense that both have a wide ambit, which of course is to be welcomed. In the words of Otto,⁶⁸ the scope of consumer credit legislation immediately determines the extent of its protection. Where the consumer in the EU is only a natural person acting for private purposes, the position differs in South Africa, where a purpose-of-credit approach is not followed and where protection is also afforded to a small group of juristic persons in their capacity as consumers.

3.3 The concept "advertising"

The wide interpretation of the concept "advertising" in the EU, implying that basically all forms of advertising, even a banner or pop-up merely mentioning the creditor's name, can be considered as advertising, should be endorsed. The implication is once again that more consumers are receiving protection, in particular in regard to the advertising of credit. It is therefore to be welcomed that the definition of "advertisement" in the *National Credit Act*, the *lex specialis* on credit law in South Africa, seems to be wide enough to encompass the same ambit as the concept of advertising in Europe. The same holds for the definition of "advertisement" in the *Consumer Protection Act*, which seems to have an even wider ambit than the NCA's definition. The marketing provisions in the CPA,⁶⁹ which have to

⁶⁵ Paras 1.4, 1.5 and 1.6.

⁶⁶ Van Heerden and Steennot Part 2 2018 *PELJ* 22.

⁶⁷ For more particulars, see Van Heerden and Steennot Part 2 2018 *PELJ* 22, 23.

⁶⁸ Otto 1995 *TSAR* 384.

⁶⁹ The Act affording general protection to South African consumers.

be applied in conjunction with the NCA's measures, consequently enjoy a wide application, which is to the benefit of consumers.

3.4 Information to be included in advertising

In Europe advertising indicating an interest rate or any figures relating to the cost of credit must include the standard, prescribed information, which is aimed mainly at disclosing to the consumer the financial information of a prospective credit agreement. The situation under the *National Credit Act* is very much the same. The aim is naturally to enable the debtor to compare the cash and credit prices with each other, to make an informed financial decision whether or not to enter into the credit agreement, to compare different credit forms and to shop around for cheaper credit; and it therefore has the potential to make a meaningful contribution as a responsible lending tool, preventing the extension of credit to consumers who cannot afford it, or who can hardly afford it. The obligation on credit providers to provide financial information where qualitative statements such as "cheap credit" are used in credit advertising is an aspect in the *National Credit Act* which should be endorsed. The reader of the advertisement is enabled to ascertain the truth of the qualitative statement contained in the advertisement.

The requirement in European law that mortgage advertisements must contain a warning in respect of exchange rate fluctuations is invaluable, in particular in the case of consumers who can hardly afford the credit. The situation in South Africa in the mid-to-late nineties comes to mind, when many consumers who were not on a non-variable interest rate lost their properties as a result of rate increases. South African law should therefore make the use of a similar warning in advertisements obligatory. The same holds for the use of a representative example,⁷⁰ which in terms of European law must take place in mortgage credit advertisements to specify the information which must be included in such advertisements. In our opinion the use of such examples is still worth the effort, in spite of the possibility of using online simulations. Especially in those instances where online simulations, which are of course more accurate, are not available, or where the consumer for whatever reason cannot access the online simulation immediately, the representative example in the advertisement could provide an immediate view to the consumer of his/her estimated credit costs. The use of representative examples could even be considered in the advertising of other forms of credit.

The obligation on credit providers in terms of the European and South African law to disclose compulsory ancillary service contracts is to be

⁷⁰ Based on the average amount of the credit of the type advertised.

welcomed. As ancillary contracts will result in extra costs, the consumer has a right to be informed of such agreements.

Notice must also be taken of the Belgian law in terms of which all advertising relating to consumer credit must include the warning "Be careful; credit also costs money". This could help some prospective consumers to realise what seems to be the obvious and therefore to be circumspect.

In spite of the *National Credit Act's* broad definition of "advertisement", it is uncertain whether or not its advertising provisions apply to online consumer transactions. The "measure of protection" afforded to online consumers in terms of the *Electronic Communications and Transactions Act* is accordingly a plus point, the ECT Act's limited application to natural persons acting as the end-time users of the goods or services aside. The Act's protection of course includes the information that must be placed on a web-trader's website where the goods or services are offered. The consumer's right to cancel the agreement in the event of the web-trader's failure to comply with the information requirements provides the consumer with a solid redress mechanism.

Finally, the inclusion of provisions in European and South African law relating to the format of the information that must be given in an advertisement⁷¹ is significant. It ensures that important information relating to the cost of credit is not obscured in advertisements.

3.5 Prohibited advertising

Certain forms of advertising or provisions in advertising are prohibited, including the blacklisted and *per se* prohibited misleading commercial practices specified in the Unfair Commercial Practices Directive. An example of such a practice which should be singled out is falsely stating that the terms of a certain credit are available for only a very limited amount of time. Such a statement, due to its intended purpose to elicit a quick response from the consumer, is dangerous and accordingly correctly blacklisted. The UCPD's general prohibition on misleading commercial practices, *inter alia* by the provision of mainly incorrect information, or by the omission of essential information, is of equal importance. The *National Credit Act* similarly prohibits credit advertising that is misleading, fraudulent or deceptive and the *Consumer Protection Act* complements the NCA's provisions by prohibiting the role players in the supply chain from marketing any goods or services (for our purposes forming the subject of a credit agreement) in a misleading, fraudulent or deceptive way. The provisions of

⁷¹ For instance, that such information must be presented in a clear, concise and prominent way.

the CPA,⁷² which are more detailed than those in the NCA, are to be welcomed.

The Belgian legislator prohibits advertising that is specifically aimed at inciting a consumer who is not able to pay his/her debt to take up credit or that accentuates the ease with which credit can be obtained or the speed at which it can be obtained. Also prohibited is advertising that indicates that credit can be obtained without a creditworthiness assessment or that uses the phrase "free credit", unless reference is made to an annual percentage rate of charge of nil per cent. The statement "free credit" could be misleading due to the fact that from an economic point of view credit is never free. The objectives of the Belgian prohibitions are twofold: to protect the weakest consumers and to avoid over-indebtedness; and to prevent the consumer from being misled.

The *National Credit Act* and its Regulations prohibit the phrases "no credit checks required", "blacklisted consumers welcome", "free credit", "loan guaranteed", "pre-approved" or any similar statements.⁷³ The NCA, in comparison with Belgian law, accordingly contains similar types of prohibitions aimed at similar types of practices. Although this is to be welcomed from the perspective of prevention, we submit that the NCA should contain more elaborate provisions in this regard, as the Belgian law does.

3.6 Prohibited marketing techniques

The Belgian legislator prohibits certain ways of marketing to the consumer. The first prohibition concerns the marketing and conclusion of a credit agreement at the consumer's home or place of work. This is also addressed by the South African legislator in the *National Credit Act*. The crux is that such marketing or the conclusion of such a credit agreement is in order only when it is initiated by the consumer. The NCA's provisions in regard to doorstep selling are accordingly very similar to those in terms of the Belgian law. However, in terms of the Belgian law, the direct sending of a credit offer to conclude an agreement to the consumer also constitutes doorstep selling. This form of doorstep selling is prohibited in the absence of a pertinent prior request by the consumer. We submit that the provisions of the *National Credit Act* should be amended to provide for a similar extended meaning of the concept "doorstep selling", as it will afford additional protection to

⁷² Section 29 read with s 41 of the *Consumer Protection Act* 68 of 2008.

⁷³ Except where a consumer such as a juristic person is not subject to a compulsory credit assessment.

consumers with respect to this form of marketing, where an element of surprise and coercive sales techniques could be involved.

There are three more prohibited marketing techniques under the Belgian law which are not addressed in the NCA. These are the prohibition on approaching consumers in public to propose credit to them, the organising of excursions that aim at selling goods and services to consumers, and the general prohibition on creditors and their intermediaries to send unsolicited commercial communication to consumers by e-mail. Once again, the South African legislature could consider addressing the first two instances. However, we submit that as far as the prohibition on the sending of unsolicited commercial communication by e-mail to consumers is concerned, the protection afforded by the *Consumer Protection Act* and the *Electronic Communications and Transactions Act* together is sufficient.

The introduction in the *National Credit Act* of the concepts "negative option marketing" and "opting out" are to be welcomed. The prohibition against negative option marketing *inter alia* puts to an end the marketing practice which was used by credit providers to extend credit to consumers who had never even requested or applied for such credit. The fact that the legislature spells out the consequences should any of the forms of negative option marketing occur is also commendable. Also, the idea behind the inclusion of the "opting out" provisions is good. If it is enforced effectively, the consumer is protected against harassment by certain advertisers.

3.7 Civil remedies and administrative sanctions

With the exception of negative option marketing, no particular sanctions are prescribed for contravening the advertising prescriptions of the *National Credit Act* and its regulations. The consumer's only options are therefore alternative dispute resolution or the filing of a complaint with the National Credit Regulator. We accordingly submit that specific sanctions with respect to the NCA's marketing provisions could be considered by the South African legislator – sanctions that will have an immediate deterrent effect. Cognisance could be taken in this regard of the sanctions prescribed under the Belgian law. The effectiveness of the marketing provisions in the Act depends on their effective enforcement, and that in turn depends *inter alia* on the sanctions which are prescribed.

3.8 Final conclusions

Although the attempts at self-regulation by a specific industry or sector by means of regulatory bodies and codes naturally contribute to its effective functioning and to ensuring that prescribed rules are complied with, self-regulation in itself, as a result of the voluntary element involved, is seldom

sufficient. Of course, the same holds for the self-regulation of advertising⁷⁴ and the extensive protection of consumers with regard to credit marketing in the *National Credit Act*, which is a vast improvement on the pre-*National Credit Act* position, is therefore of crucial importance.⁷⁵ We submit that the marketing provisions of the NCA compare favourably with those in the European laws considered and ought to go far towards achieving the objectives they were set out to achieve. We therefore endorse the *National Credit Act's* marketing measures. However, in the light of the importance of credit marketing as a responsible lending tool to sensitise consumers to the dangers of too much debt and the cost of credit, this is done subject to the submissions made above and the submissions we have made in respect to the provisions of section 75(2) of the NCA.⁷⁶ This is in addition to the protection in the *Consumer Protection and Electronic Communications and Transactions Acts*, which complement the NCA's provisions.

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List of Abbreviations

CCD	Consumer Credit Directive
CEL	Code of Economic Law
CML Rev	Common Market Law Review
CPA	Consumer Protection Act
ECD	Electronic Commerce Directive
ECT Act	Electronic Communications and Transactions Act
EU	European Union
EuCML	Journal of European Consumer and Market Law
Eur J Consum L	European Journal of Consumer Law
MCD	Mortgage Credit Directive
NCA	National Credit Act
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UCPD	Unfair Commercial Practices Directive