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## **The Transition from the Uniform Consumer Credit Code to the National Consumer Credit Protection Regime**

As Australia moves into the new Consumer Credit Protection regime<sup>1</sup> the Queensland University of Technology's Credit, Commercial and Consumer Law Program (CCCL) has been actively engaged in examining comparative regulatory models as part of its research into the 'short-term small-amount lending'<sup>2</sup> market.

In July 2010 the CCCL Program welcomed Eleonora Bazzo as a visiting PhD student from the University of Turin, Italy, for a two month research examination of the Consumer Credit regulatory regime in Australia. As part of her PhD research Eleonora sought, with the assistance of the academic and professional staff of the CCCL Program, to conduct a comparison between the Italian and EU Directives in relation to consumer credit with other jurisdictions and in particular Australia. The CCCL Program provided her with an ideal environment to study the recent and further proposed changes to the Australian regulatory environment relating to consumer credit particularly as the CCCL program was undertaking research related to Phase II of the Federal Government's National Credit policy agenda with a specific focus on regulatory mechanisms such as responsible lending and the development of public policy in relation to short-term small-amount lending.

One of the difficulties the CCCL Program experienced in its research related to consumer credit was the lack of any in depth literature relating to the recent EU Directives. Eleonora undertook to research the 2010 Directive changes on her return to Turin and will be publishing her Thesis in due course which will include her comparative analysis of the various consumer credit regimes including Australia. In the meantime we thank Eleonora for her summary of the new Italian Directives and the regulatory impact on the market in Italy and the effect on consumer protection.

The following article may provide those wishing to advance their knowledge of consumer credit regulation in the European Community and in particular Italy an insight into the market and its regulation. The reader will find some similarities to the Australian regulatory model such as the need for 'clear and concise information' however it will be seen that other issues such as 'linked credit agreements' are a unique regulatory tool used in the Italian market.

David Squire  
Research Development Manager  
Credit, Commercial and Consumer Law (CCCL) Program,

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<sup>1</sup> *National Consumer Credit Protection Act 2009 Cth*

<sup>2</sup> Chapter 5 of Green Paper on Phase Two of the COAG National Credit Reforms - *National Credit Reform - Enhancing confidence and fairness in Australia's credit law*, - July 2010

# THE ITALIAN SYSTEM FOR CONSUMER CREDIT

ELEONORA BAZZO\*

*The transposition of the European Directive no. 2008/48/EC on consumer credit in the Italian system officially came into force in Italy on 19 September 2010 with the Legislative Decree no. 141/2010. This measure aligns Italy to the correspondent European discipline and has also been the opportunity to reorganize financial institutions and their powers, to rule the topic of microcredit and to redesign roles and access to professions of independent brokers and business agents.*

## I. INTRODUCTION

The Legislative Decree no. 141 of 13 August 2010<sup>3</sup> has introduced many procedural and substantive changes, both for consumers and institutions, in the topic of consumer credit. On the one hand, consumers will have the right of reconsideration during the pre-contractual phase and the application of negotiation connection will improve their bargaining power. On the other hand, supermarkets and chain stores are banned from promoting revolving credit cards, a specific treatment is granted to the *ius variandi* in credit agreements and there is a reorganization of selective requirements of financial companies and of their supervision system<sup>4</sup>. Moreover, this legislative measure has introduced a clear regulation of microcredit, which allows loans up to twenty thousand euro without collateral for individuals, partnerships and cooperative companies in order to start a new business or to satisfy everyday needs. The full utilization of these measures has been gradual: some have been utilizable since the Legislative Decree came into force, while others have been applied since the beginning of 2011.

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\* LLM, PhD Candidate in Corporate Governance, Università di Torino, Italy. eleonora.bazzo@gmail.com. I would like to thank Prof. Michele Graziadei for his feedback on a draft of this article.

<sup>3</sup> *Decreto Legislativo n. 141 del 13 Agosto 2010, pubblicato sulla Gazzetta Ufficiale della Repubblica Italiana n. 207 del 4 Settembre 2010, sull'attuazione della direttiva 2008/48/CE relativa ai contratti di credito ai consumatori, nonché modifiche del titolo VI del testo unico bancario (decreto legislativo n. 385 del 1993) in merito alla disciplina dei soggetti operanti nel settore finanziario, degli agenti in attività finanziaria e dei mediatori creditizi* [Legislative Decree no. 141 of 13 August 2010, published in the Official Journal of the Italian Republic no. 207 of 4 September 2010, regarding the implementation of the Directive no. 2008/48/EC on consumer credit contracts and changes to the Title VI of the Bank Law Code (Legislative Decree no. 385/1993) on the discipline of operators in financial activities, business agents and independent brokers] (Italy) [author's trans].

<sup>4</sup> Carriero, *Il credito al consumo* [Consumer credit] reported in [2010] *I Studi in onore di Nicolò Lipari* (Milano) 365.

## II. THE MARKET FOR CONSUMER CREDIT IN ITALY

The necessity for the European Commission to update rules on consumer credit contracts is strictly connected to the market growth and development in recent years throughout Europe. The latest economic crisis, which has affected all the Member States of the European Community, has been the major cause of the growth of the consumer credit market. In fact, consumer credit, on the one hand, allows consumers to satisfy their own needs for certain goods and services and, on the other hand, means that companies that operate in these fields manage to survive in the market.

In Italy, this trend was widely studied in a survey<sup>5</sup>, which clearly showed a propensity in increasing indebtedness of Italian families: among the data, it can be noticed that, in June 2009, the sum of outstanding loans, amounting to one hundred and nine billion euro, represented 28.6% of the total income of Italian families, with an annual increase of about 8.5%. The same survey also revealed that, in line with the market growth of consumer credit, the number of operators that offer these products has been booming: in addition to banks, banking groups and financial companies, in the last few years, many small intermediaries and financial promoters have begun operating, in particular independent brokers and financial agents<sup>6</sup>. This aspect is very critical for the Italian market of consumer credit for two basic reasons. Firstly, the significant use of external distribution channels, with small intermediaries, contributes to raise the cost of consumer credit in the Italian market, which is the highest among all other Member States. Secondly, before this reform, the Bank of Italy did not have effective and penetrating supervision powers, in particular towards most of these small operators, because controls were limited to the verification of requirements for market access and the compliance with industry rules.

In recent years, this situation has encouraged operators with low skills to enter the consumer credit market, with the specific intention of generating profit rather than setting up a correct and transparent relationship with consumers<sup>7</sup>. A further consequence is represented by a notable increase of special financial products, such as revolving credit cards and ‘assignments of the fifth’<sup>8</sup>. These products are mainly sold by independent brokers and financial agents and are often purchased by consumers, who do not have a clear understanding of costs and contractual obligations that derive from them<sup>9</sup>.

The intervention by the Bank of Italy and the new discipline of consumer credit are aimed at increasing fairness in dealings between intermediaries and consumers and

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<sup>5</sup> Survey held by the Forth Commission of Finance of the Chamber of Deputies of the Italian Parliament, approved on 23 February 2010.

<sup>6</sup> Berti De Marinis, *Il “credito al consumo” tra problematiche e innovazioni* [The “consumer credit” issues between problems and innovations] reported in [2010] *Rassegna diritto civile* 626.

<sup>7</sup> Modica, *Il contratto di credito ai consumatori nella nuova disciplina comunitaria* [The contract of consumer credit in the new European discipline] reported in [2009] *Europa e diritto privato* 743.

<sup>8</sup> The expression ‘assignment of the fifth’ is the translation of the Italian institute of ‘cessione del quinto’, which is a loan paid back through a deduction of one fifth of a person’s salary, as further explained in the paragraph.

<sup>9</sup> Ronchese, *Credito al consumo e diritti del consumatore nel rapporto con il finanziatore (nota a Trib. Milano 24 ottobre 2008)* [Consumer credit and consumer rights according to the lender (comment to Court of Milan of 24 October 2008)] reported in [2009] *I Nuova giurisprudenza civile* 440.

consequently the protection of the latter. Before the Legislative Decree no. 141/2010, the Bank of Italy had already introduced stricter rules in transactions involving ‘assignments of the fifth’ and revolving credit cards. The first product, typical of the Italian system<sup>10</sup>, consists in granting a loan to employees that is paid back through a deduction of a maximum of one fifth of their salary. In this topic, the Bank of Italy had found failures to comply with transparency and fairness rules and principles in dealings with customers, an excessive length of the supply chain, a significant impact on total costs charged to customers (included assurance policies required by law, where premia were often determined in a non-transparent way) and the widespread lack of controls in the distribution network. With the circular no. 192691/2009<sup>11</sup>, the Bank of Italy asked operators to refrain from abnormal practices and to avoid fraudulent activities against consumers. In so doing, the lender is responsible for the whole financial operation, although different agents can be involved, and is therefore required to avoid bias arising from these activities against consumers<sup>12</sup>.

The regulation adopted by the Bank of Italy in revolving credit is even stricter. This phenomenon consists of a consumer credit card, which can be used only in certain stores and which is associated with a revolving credit line that is paid back by instalment. In this way, consumers agree to repay what they spend with accrued interest, according to a minimum monthly instalment stated in the contract. The irregularities identified by the Bank of Italy in this topic with the statement no. 313116/2010<sup>13</sup> are the failure of the civil law discipline on the determination of interest rates and the breach of transparency and fairness rules (for example, by sending credit cards that are not expressly requested by customers). Another big related problem is the failure to comply with provisions on the promotion of financing contracts, in relation to the practice of using shopping centres in order to attract customers to sign contracts on revolving credit cards. Also in this case, banking and financial intermediaries have been required to have responsible conduct towards consumers, to maintain maximum transparency and fairness and to use comprehensible contractual terms for consumers.

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<sup>10</sup> This institute is regulated in the *Decreto del Presidente della Repubblica n. 180 del 5 Gennaio 1950, pubblicato sulla Gazzetta Ufficiale della Repubblica Italiana n. 99 del 29 aprile 1950, recante l'approvazione del testo unico delle leggi concernenti il sequestro, il pignoramento e la cessione degli stipendi, salari e pensioni dei dipendenti dalle pubbliche amministrazioni, come successivamente modificato* [Presidential Decree no. 180 of 5 January 1950, published on the Official Journal of the Italian Republic no. 99 of 29 April 1950, constituting the code on seizures and assignments of the fifth of salaries, wages and pensions of government employees, as subsequently amended] (Italy) [author's trans].

<sup>11</sup> *Circolare n. 192691 della Banca d'Italia, emanata il 10 Novembre 2009 sulla cessione del quinto dello stipendio e operazioni assimilate: cautele e indirizzi per gli operatori* [Circular no. 192691 of the Bank of Italy, enacted on 10 November 2009, regarding loans paid back through a deduction of one fifth of salaries and related operations: precautions and guidelines for operators] (Italy) [author's trans].

<sup>12</sup> Mazzeo, *La verifica del merito di credito (Decreto Legislativo n. 141 del 13 agosto 2010)* [The verification of credit market (Legislative Decree no. 141 of 13 August 2010)] reported in [2010] *Obbligazioni e contratti* 863.

<sup>13</sup> *Comunicazione n. 192691 della Banca d'Italia, emanata il 20 Aprile 2010 sulle carte di credito revolving* [Statement of the Bank of Italy no. 313116, enacted on 20 April 2010, regarding revolving credit cards] (Italy) [author's trans].

### III. DEFINITIONS AND SCOPE

The Legislative Decree no. 141/2010 replaces the former discipline on consumer credit in the Bank Law Code<sup>14</sup> and provides a definition of the topic, which is wider than that in the European Directive no. 2008/48/EC<sup>15</sup>. According to art. 121 *bis* of the Bank Law Code, a credit agreement is a contract ‘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’<sup>16</sup>. Moreover, a financial operator is intended to mean a person that is authorized to provide funding in the territory of the Italian Republic and that offers or bargains credit agreements. The new discipline of consumer credit is applied to all credit agreements, however denominated, concluded by financial operators, except for the following cases:

- a) credit agreements involving a total amount of credit less than two hundred euro or more than seventy five thousand euro. For the purposes of this calculation, all the credits, whose total amount has been fractionated through several contracts, must be taken into consideration, if they can be grouped into a single operation economic;
- b) supply contracts<sup>17</sup> and contracted works<sup>18</sup>, according to the definition of the civil code;
- c) loans where the payment of interest or other charges is barred;
- d) loans where the consumer must pay only charges for an insignificant amount, if the credit has to be repaid within three months from the use of the funds;
- e) credit agreements the purpose of which is to acquire or retain property rights in land or in an existing or projected building;
- f) loans secured by a mortgage, which is longer than five years;
- g) loans granted by banks or investment firms, aimed to enter into a transaction regarding financial instruments<sup>19</sup>, provided that the lender is personally involved;
- h) credit agreements that are the outcome of a settlement reached in court or before another statutory authority;

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<sup>14</sup> *Decreto Legislativo n. 385 del 1 Settembre 1993, pubblicato sulla Gazzetta Ufficiale della Repubblica Italiana n. 230 del 30 Settembre 1993, recante il testo unico delle leggi in materia bancaria e finanziaria, come successivamente modificato* [Legislative Decree no. 385 of 1 September 1993, published in the Official Journal of the Italian Republic no. 230 of 30 September 1993, constituting the Bank Law Code, as subsequently amended] (Italy) [author’s trans].

<sup>15</sup> Directive no. 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive no. 87/102/EEC [2008] OJ L 133, 66.

<sup>16</sup> Mazzeo, above n 10, 860.

<sup>17</sup> ‘The supply contract is the agreement under which one party agrees, for a certain price, to execute, in favour of another person, periodic and ongoing performances of services’ *Codice Civile* [Civil Code] (Italy) art. 1559 [author’s trans].

<sup>18</sup> ‘The contracted work is the agreement whereby one party takes on the responsibility to successfully complete a work or a service for a certain price and at his own risk’ *Codice Civile* [Civil Code] (Italy) art. 1677 [author’s trans].

<sup>19</sup> *Decreto Legislativo n. 58 del 24 febbraio 1998, pubblicato nella Gazzetta Ufficiale della Repubblica Italiana n. 71 del 26 marzo 1998, recante il testo unico delle disposizioni in materia di intermediazione finanziaria, come successivamente modificato* [Legislative Decree no. 58 of 24 February 1998, published in the Official Journal of the Italian Republic no. 71 of 26 March 1998, constituting the Financial Law Code, as subsequently amended] (Italy) art. 1, paragraph 2 [author’s trans] provides the precise definition of financial instruments.

- i) credit agreements that relate to the deferred payment, free of charge, of an existing debt and are granted by the existing contributor;
- l) credit agreements upon the conclusion of which the consumer is requested to deposit an item as security in the creditor's safe-keeping and where the liability of the consumer is strictly limited to that pledged item;
- m) hiring or leasing agreements, provided that an express clause exists to prevent at any time the lessee from obtaining the rented property, with or without consideration;
- n) microcredit funding<sup>20</sup> and other credit agreements that relate to loans granted to a restricted public under a statutory provision with a general interest purpose, and free of interest or at lower interest rates or on other terms which are more favourable to the consumer than those prevailing on the market;
- o) credit agreements in the form of encroachment on the current account.

From this list, it can be concluded<sup>21</sup> that:

- the loans secured by mortgages on real estate are never subjected to the regulation of consumer credit, if they last more than five years;
- the loans secured by mortgages on real estate are subjected to this discipline, if they do not exceed five years and if they are intended for a different purpose than acquiring or retaining property rights in land or in an existing or projected building;
- hiring or leasing agreements, with an express clause that allows the lessee at any time to obtain the rented property, are considered as consumer credit contracts.

#### IV. CLEAR AND CONCISE INFORMATION

One objective of the Legislative Decree is to guarantee clear and concise information for consumers<sup>22</sup>. In so doing, the discipline on consumer credit reorganizes the advertising of bids for funding and the pre-contractual and contractual disclosure duties for lenders and credit intermediaries. For this reason, there is a list of basic information that must be clearly reported to customers, with examples<sup>23</sup>, and that regards the interest rate, the total amount of the credit and its costs. It is important to underline that this kind of required information has been specified by the Bank of Italy, in accordance with the resolutions of the Interministerial Committee for Credit and Saving<sup>24</sup>.

The European Directive and, therefore, the Italian discipline want to stop the easy supply of finance to borrowers with a low level of financial literacy and,

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<sup>20</sup> Art. 111 of the Bank Law Code regulates the topic of microcredit, as analyzed in the last paragraph of this article.

<sup>21</sup> De Cristofaro, *La nuova disciplina comunitaria del credito al consumo: la direttiva 2008/48/CE e l'armonizzazione "completa" delle disposizioni nazionali concernenti "taluni aspetti" dei "contratti di credito ai consumatori"* [The new European discipline on consumer credit: the Directive 2008/48/EC and the "complete" harmonization of national provisions on "certain aspects" of "contracts of consumer credit"] reported in [2008] *Rivista diritto civile* 255.

<sup>22</sup> Di Donna, *La disciplina degli obblighi informativi precontrattuali nella direttiva sul credito al consumo* [The discipline of the pre-contractual disclosure requirements in the Directive on Consumer Credit] reported in [2010] *Giurisprudenza italiana* 241.

<sup>23</sup> Art. 123 of the Bank Law Code contains the whole list of required information.

<sup>24</sup> The 'Comitato Interministeriale per il Credito e il Risparmio' (CICR) [Interministerial Committee for Credit and Saving] is the supreme body for the supervision of the credit and saving market.

consequently, with a poor perception of their economic possibilities<sup>25</sup>. In order to protect them, lenders and credit intermediaries have to provide consumers with all the necessary information to make an informed decision, before being bound by any contract or credit offer. Before the signing of the contract, the lender must verify the reliability of the consumer in relation to banks and financial companies. In order to do this, according to art. 124 *bis* of the Bank Law Code, the lender is allowed to take personal information from the consumer and to consult specific databases. The new burden is closely linked to the new discipline of the ‘credit merit’, whose aim is to protect consumers from being exposed to undue risk in comparison with their economic means<sup>26</sup>.

The requirement of pre-contractual information is respected by the direct delivery to customers of a standard form, which has to be the same throughout the European Union. This form is called ‘Standard European Consumer Credit Information’ and the same Directive defines its content, although any additional information and adequate explanations can be added. Upon request, customers must receive a copy of the draft of the credit agreement for free and before signing. In addition to these pre-contractual duties, lenders and brokers have to respect additional disclosure obligations during meetings with their customer, where they are required to provide adequate explanations on the essential characteristics of their products. In this way, the consumer manages to acquire both a complete knowledge of the contract and his own financial capacity related to the contract<sup>27</sup>.

The new discipline determines the drafting procedures, according to the contents of consumer credit contracts and the informative duties of lenders and intermediaries<sup>28</sup>. Credit agreements always must be drawn up on paper or durable backups, must use clear expressions and must present information in a concise and understandable way. Durable backups are considered floppy disks, cd-roms, DVDs and emails. Connected to the obligation of delivery of a copy of the contract to the customer, when there are multiple contracts, the consumer’s consent must always be obtained separately for each contract. This is also the consequence of the principle that no amount of money can be charged to the client, unless on the basis of expressed provisions<sup>29</sup>.

The clauses on the costs remitted to consumers, which result in contrast to any legal provision or which are incorrectly advertised, especially if related to interests, must be considered void and be replaced or supplemented by legal standards, as stated in art. 125 *bis* of the Bank Law Code. In case of absence or invalidity of interest clauses, the interest itself is equalized to the minimum nominal rate of annual treasury bonds or other similar bonds listed in the financial market and issued in the twelve-month period preceding the conclusion of the contract. In this case, the consumer does not have to pay any other sum, including fees or other charges, and the duration of the contract is increased by law to thirty-six months. However, the consumer contract is completely void if it does not contain any essential information about the type of contract, the parties, the total amount of funding and the conditions for withdrawal and refund. In case of invalidity of the contract, the consumer is not required to return more than the received amount of money and can do this through installments, with the same frequency provided in the contract or, otherwise, in thirty six months.

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<sup>25</sup> Mazzeo, above n 10, 843.

<sup>26</sup> Mazzeo, above n 10, 860.

<sup>27</sup> Di Donna, above n 20, 224.

<sup>28</sup> The Bank Law Code provides the whole discipline in art. 117, 118, 119 and 125 *bis*.

<sup>29</sup> Berti De Marinis, above n 4, 616.

## V. THE RIGHT OF WITHDRAWAL

The previous discipline recognized the right of withdrawal only for those consumers that were subjected to unilateral changes in their contracts by lenders. On the contrary, the Legislative Decree guarantees consumers an effective right to reconsider the credit agreement, which they have concluded<sup>30</sup>. Consumers can now withdraw from these contracts within fourteen days from the date of their signing or the following date on which they actually get to know all the contractual conditions and information required by law in relation to this type of contract<sup>31</sup>. The only burden on consumers is to communicate as soon as possible their withdrawal to lenders, in a way that must be chosen from those specified in the second paragraph of art. 64 of the Consumer Code<sup>32</sup> and must be specifically provided in the contract. These means of communication can be registered letters with acknowledgment of receipt, telegrams, telexes, e-mails or faxes, whose contents must be confirmed within the following forty eight hours through a registered letter with acknowledgment of receipt. In all cases, although the acknowledgment of receipt is not essential to prove the assertion of the withdrawal, the date of dispatch of the registered letter is relevant for the terms of the withdrawal. If the execution of the contract has already begun before the assertion of the right of reconsideration, the consumer is released from any further obligation by returning the received amount of money and the already accrued interests to the lender within thirty days after the notification of the withdrawal. The interests are calculated on the basis of the agreed rate from the date of the withdrawal of the sum until the date of its repayment. At the same time, the consumer must pay back those unrepeatable amounts of money, which have been already anticipated by the financial institution, such as taxes and stamp duties. As a consequence of withdrawal, the effects of extinction of the contract are to be automatically extended to all contracts related to ancillary services, which may be connected to the credit agreement, such as insurance policies, even if the operators that perform them are different from the lender<sup>33</sup>.

Among the novelties of the withdrawal issue, the new Legislative Decree also contains some specific provisions for permanent credit agreements, from which ‘the consumer has the right of withdrawal at any time without penalty and without charge’, as provided in art. 125 *quater* of the Bank Law Code<sup>34</sup>. Banks and financial intermediaries may ask the client to reimburse expenses connected with withdrawal

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<sup>30</sup> Fachechi, *Credito al consumo: funzione economico-sociale e istanze di tutela* [Consumer credit: economic and social function and its role of protection] reported in [2009] *Rassegna diritto civile* 226.

<sup>31</sup> De Cristofaro, *Ius poenitendi del consumatore e contratti di credito della Direttiva 2008/48/CE* [Consumer’s *ius poenitendi* and credit agreements in the Directive 2008/48/EC] reported in [2010] *Giurisprudenza italiana* 232.

<sup>32</sup> *Decreto Legislativo n. 206 del 6 settembre 2005, pubblicato sulla Gazzetta Ufficiale della Repubblica Italiana n. 235 dell’8 Ottobre 2005 recante il codice del consumo* [Legislative Decree no. 206 of 6 September 2005, published on the Official Journal of the Italian Republic no. 235 of 8 October 2005, constituting the Consumer Code] (Italy) [author’s trans].

<sup>33</sup> Indraccolo, *Credito al consumo e principio di protezione effettiva del contraente debole. Prime considerazioni sulla direttiva 48/08/CE (nota a Corte Giustizia CE 4 ottobre 2007, n. C-429/05)* [Consumer credit and principle of effective protection of the weak party. First considerations on the directive 48/08/CE (note to the EC Court of Justice of 4 October 2007, no. C-429/05)] reported in [2010] *Rassegna diritto civile* 250.

<sup>34</sup> De Cristofaro, above n 29, 247.

only in some exceptional cases, defined by the Interministerial Committee for Credit and Savings. Although the contract may require a certain period for the exercise of this right, this notice must not be longer than a month. On the other hand, lenders may withdraw from permanent contracts, but only if there is a specific clause that allows this and in compliance with a notice of at least two months. In this case, lenders must give appropriate communication to their customers with a written statement, which may also be contained in durable backups different from paper<sup>35</sup>. In this case, it is clear that the burden of communication for lenders is much less than that imposed on consumers, who always have to send a following confirmation in a registered letter with acknowledgment of receipt, regardless of the chosen means of communication. It should be remembered, however, that lenders are never allowed to terminate a permanent contract without notice, even if there is a valid reason. In such cases, they can only suspend the use of credit by consumers, who have the right to receive a communication before the suspension itself<sup>36</sup>.

In addition to the right of withdrawal for reconsideration and in permanent contracts, the new Legislative Decree regulates the right of withdrawal connected to an early termination of the contract<sup>37</sup>. Consumers can repay in advance at any time the received amount of money, in order to obtain an early termination of the credit agreement. If the reimbursement is only partial, they have the right to obtain a reduction of the total cost of the credit, corresponding to interests and additional costs that are still due in connection with the residual duration of the contract. In this case, lenders have the right to receive a fair compensation, which must not exceed the amount of interest that the consumer would have paid for the remaining length of the contract or the rate of 0.5 % if the contract lasts less than one year. On the other hand, compensation is not due if the refund represents the whole amount of the debt and it is less than ten thousand euro or if it concerns a contract of credit opening.

## VI. LINKED CREDIT AGREEMENTS

This discipline has also clarified the notion of a linked credit agreement, which are those credit contracts related to purchases. This topic has given rise to substantial doctrinal discussions and jurisprudential disputes for its complexity. In this system, the credit agreement linked to a purchase of consumer goods is automatically terminated without penalty, when the consumer exercises his right of withdrawal from the correspondent sale contract<sup>38</sup>. The importance of this topic is related to the fact that a consumer may purchase goods or services through a loan and, in the absence of a discipline that links the two legal relationships, in the event of default of the supplier, the consumer would have to pay the granted loan in absence of consideration<sup>39</sup>. The European legislator has always considered this a problem by providing a connection between the two legal transactions. The consideration of the credit agreement exists only in the presence of an effective sale contract and any

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<sup>35</sup> De Cristofaro, above n 19, 209.

<sup>36</sup> Indraccolo, above n 31, 267.

<sup>37</sup> Carriero, *Nuova disciplina comunitaria del credito al consumo: linee d'indirizzo, questioni irrisolte, problemi applicativi* [New European discipline on consumer credit: guidelines, unresolved issues, application problems] reported in [2009] *Rivista diritto civile* 509.

<sup>38</sup> This provision is contained in art. 67 of the Consumer Code.

<sup>39</sup> De Cristofaro, above n 29, 253.

alteration of this one undermines the reason of the credit itself, even if the lender is a separate and independent legal entity from the supplier. In the Italian system, this principle has been in force since 1992, when the Bank Law Code was enacted, and has always been more favorable for consumers than the European Directive<sup>40</sup>. In fact, the European legislation guarantees the consumer the right to pursue remedies against the creditor with the withdrawal from the primary relationship or the total or partial breach of contract of the supplier, only after the consumer has failed to obtain satisfaction through a judgment from the supplier. On the contrary, when there is a breach of the contract, the art. 125 *quinquies* of the Bank Law Code requires only the supplier's default, in order for the consumer to withdraw from the linked credit agreement. However, it has to be noticed that this difference of disciplines is justified by the fact that art. 15 of European Directive leaves to Member States the possibility to determine to what extent and under what conditions those remedies shall be exercisable.

Although the previous Italian discipline was more protective because it required only the existence of default by the supplier, it was considered difficult to be enforced<sup>41</sup> because its application was subordinated to the proof of the existence of an exclusive sales contract<sup>42</sup>. Under the European influence, in order to guarantee a total protection to consumers, the existence of an exclusive sales contract is no longer required. In this way, consumers have the right of cancellation of the credit contract, when there is a relevant breach of the sale contract from the supplier and after his default. However, the breach of the sale contract has to be relevant, not negligible, for the assertion of the right of withdrawal in a linked contract. In general, in case of withdrawal from a sale contract, the lender has to give back all the installments and any other charge, if applied, which have been already paid by the customer. The consumer does not have to return to the lender what the lender himself has anticipated from who has sold the relative goods or services. Moreover, in leasing contracts, the consumer may also request the lender to act for the resolution of the lease.

## VII. UNILATERAL CHANGES

Of significance is the news that the Legislative Decree is the *ius variandi* in consumer credit contracts, which is the ability of the bank to make changes to one or more clauses unilaterally, without consent of the counterparty. In the previous discipline, this ability could be bargained regarding all the conditions of the contract, but only if there was a valid reason. The new version of the rule introduces a difference between permanent contracts and long-term contracts. In both cases, the system recognizes that, in the case of contracts that have an indefinite or long-term length, a party can have the legitimate right to modify those clauses that, if justified in the historical

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<sup>40</sup> Macario, *Il percorso dell'armonizzazione nel credito al consumo: conclusione di un iter ultraventennale?* [The path of harmonization in the consumer credit: the conclusion of a twenty-year process?] reported in [2009] *Rivista diritto privato* 78.

<sup>41</sup> Tribunale di Chiavari [Court of Chiavari], 22 September 1998 (Italy); Tribunale di Torino [Court of Turin], 11 December 2007, no. 7797 (Italy); Cassazione civile [Italian Supreme Court], section III, no. 5966, 23 April 2001 reported in [2001] *Giustizia civile Massimario* 861, in [2001] *I Contratti* 1126 (with a comment of Perrotti), in [2002] *II Banca borsa titoli di credito* 388 (with a comment of Tarantino)

<sup>42</sup> Pagliantini, *Il contratto di credito al consumo tra vecchi e nuovi formalismi* [The contract of consumer credit between old and new formalisms] reported in [2009] *Obbligazioni e contratti* 295.

moment when they were stipulated, have become no more justifiable according to legislative changes or market conditions<sup>43</sup>. In permanent contracts, the customer might specifically approve a clause regarding the right to unilaterally change borrowing rates, pricing and other terms of the contract and this change must be connected to a valid reason<sup>44</sup>. Therefore, this *ius variandi* of the bank is limited only by the existence of a valid reason; for example, changes in interest rates adopted in anticipation or in consequence of monetary policy decisions can constitute a valid reason in order to unilaterally modify interest rates only if they are in regard to both borrowing and creditor rates. On the other hand, for long-term contracts, the possibility for unilateral changes can be bargained only on clauses that do not affect borrowing rates and it always requires the existence of a valid reason. The most important example of these types of contracts is represented by loans, whose hallmark is the predetermined time of execution of the contractual obligations of the debtor by an amortization schedule. The interest rate clauses, which can not be unilaterally changed, have regard for not only the parameter (e.g. Euribor<sup>45</sup> or Irs<sup>46</sup>) used as the basis for calculating interests, but also the so-called spread, which is the profit margin agreed to by banks in excess of the cost of borrowing money in the interbank market<sup>47</sup>.

Any unilateral change of conditions must be explicitly communicated to the customer in a manner so as to contain a certain specific formula<sup>48</sup>. Moreover, changes must be communicated in a written form or in another durable backup previously agreed with the customer and there must be a minimum of two-months notice. In this period, customers have the right to withdraw without charge. In so doing, the change is considered approved, if the customer does not withdraw from the contract by the due date for implementation of the change itself. On the contrary, if the customer does not agree to the proposed unilateral changes, he has the right of withdrawal from the contract and he is entitled to the liquidation of his relationship at the same conditions that the bank practiced before exercising its *ius variandi*, as provided in art. 120 *bis* of the Bank Law Code<sup>49</sup>. This strict discipline implies that any changes that are made in breach of the law are ineffective if they are unfavorable to consumers.

At the same time, the Legislative Decree introduces some changes regarding cancellation of mortgages and simplified subrogation of loans, as provided in art. 40 *bis* of the Bank Law Code. This represents an important protection for consumers, who have the right to change the lender of their loans, with the consequence that the new bank takes on all the guarantees of the previous one<sup>50</sup>. In this case, this right of subrogation must not cause any loss of tax benefits (for example, the deductibility of

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<sup>43</sup> De Cristofaro, above n 19, 259.

<sup>44</sup> Carriero, above n 2, 359.

<sup>45</sup> According to the *Investor Dictionary*, 'Euribor (Euro Interbank Offered Rate) is the benchmark rate at which euro interbank term deposits within the Eurozone are offered by one prime bank to another prime bank'.

<sup>46</sup> According to the *Investor Dictionary*, 'Irs (Internal Revenue Service) is the federal agency responsible for administering and enforcing the Treasury Department's revenue laws, through the assessment and collection of taxes, determination of pension plan qualification, and related activities'.

<sup>47</sup> Carriero, above n 35, 457.

<sup>48</sup> This formula is '*Proposta di modifica unilaterale del contratto*' [Proposal for unilateral changes of the contract] [author's trans], as provided in art. 118 of the Bank Law Code.

<sup>49</sup> Carriero, above n 2, 371.

<sup>50</sup> Nappi, *Profili della disciplina del credito al consumo. La rinegoziazione dei mutui ex. art. 3 legge 24 luglio 2008 n. 126* [Profiles of the discipline of consumer credit. The renegotiation of loans according to art. 3 of the law no. 126 of 24 July 2008] reported in [2010] *I Banca borsa titoli di credito* 24.

interest expenses) and must not impose any additional tax, so that there must not be any cost for the borrower in this operation. In particular, the new rule specifies that the client must not be charged for the grant of the new loan and for the execution of the formalities associated with subrogation<sup>51</sup>. This discipline was changed again by the Legislative Decree no. 218/2010<sup>52</sup>, which intensified the protection of consumers with the introduction of administrative penalties to those who impose extra costs in subrogation operations.

## VIII. NEW FORMS OF CONTROL

One objective of the discipline is to ensure that operators in the financial market are characterized by unquestionable reliability and fairness requirements. In so doing, a unique register of all financial operators has been established requiring strict requirements for admission and high levels of efficiency, and the control on this system has been directly attributed to the Bank of Italy<sup>53</sup>. In detail, the most stringent controls on financial activities exercised by the Bank of Italy must be based on criteria of proportionality and inexpensiveness, with the aim to verify the adequacy of internal procedures adopted by operators to carry out their activities. Other kinds of controls have been introduced and consist in forms of consolidated supervision and in procedures for administrative management of crisis<sup>54</sup>.

Companies that are part of a financial group are also included by this reform, which has expressly regulated the consolidated supervision<sup>55</sup>. In so doing, the Bank of Italy is allowed to exercise supervisory powers in relation to financial and banking intermediaries and instrumental companies that are

- owned by a financial group or a financial intermediary for at least 20%;
- controlled by the same person or entity that controls a financial group or a financial intermediary;
- controlled by a financial intermediary or by one or more companies, even jointly, belonging to a financial group.

A more stringent supervision by the Bank of Italy has also been introduced for all financial promoters, who are required to pass a qualifying examination<sup>56</sup>. In fact, the Legislative Decree completely separates the two figures of business agent and independent broker<sup>57</sup>. The first is considered a distribution channel that operates in the name and on behalf of a company, whereas the second is a neutral and independent figure. Brokers need to guarantee the requirement of their solvency through financial

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<sup>51</sup> Ibid 27.

<sup>52</sup> Decreto Legislativo n. 218 del 14 dicembre 2010, *sulla Gazzetta Ufficiale della Repubblica Italiana* n. 295 del 18 Dicembre 2010 recante modifiche ed integrazioni al decreto legislativo n. 141 del 13 agosto 2010 [Legislative Decree no. 218 of 14 December 2010, published on the Official Journal of the Italian Republic no. 295 of 18 December 2010, amending the Legislative Decree no. 141 of 13 August 2010] (Italy) [author's trans].

<sup>53</sup> Indraccolo, above n 31, 288.

<sup>54</sup> Pagliantini, above n 40, 198

<sup>55</sup> Febbrajo, *La nuova disciplina dei contratti di credito "al consumo" nella Direttiva 2008/48 CE* [The new discipline of credit for consumers] reported in [2010] *Giurisprudenza italiana* 223.

<sup>56</sup> Macario, above n 38, 71.

<sup>57</sup> Carriero, above n 2, 322.

companies with a certain amount of capital, while agents must be bound by a unique mandate with only one company. The possibility of obtaining more mandates, with three companies at the maximum, is allowed only as long as the principal company has a restricted range of products and only with more stringent requirements of integrity. Agents and brokers are not allowed to be enrolled in both registers, which are held by two different supervisory bodies. The Minister of Economy and Finance, after consulting the Bank of Italy regarding what elements are to be considered, has to determine the objective criteria, related to the volume of financial activities, in order to be enrolled in the registers.

## IX. MICROCREDIT

According to the same European Directive, the Legislative Decree has also introduced a complete discipline of microcredit, a topic that is strictly related to consumer credit<sup>58</sup>. Microcredit can take two forms, namely microcredit for business or self-employment and social microcredit, as stated in art. 111 of the Bank Law Code<sup>59</sup>. In the first case, natural persons, partnerships and cooperative societies can receive loans up to twenty five thousand euro without warranties, in order to start a new business or enter the labor market. This type of loan must be accompanied by an ancillary service, in order to assist and monitor the beneficiaries<sup>60</sup>. In the case of social microcredit, instead, loans are granted for the unique benefit of people in particular economic or social vulnerability conditions, by lenders only as their non-prevalent activity, for a maximum amount of ten thousand euro, without requiring any collateral. Also these loans are supported by an ancillary service to support the family budget, in order to provide social and financial inclusion of the beneficiaries and more favourable conditions than those on the market<sup>61</sup>. Microcredit operators need to be listed in a special register, which requires specific professional and integrity qualifications.

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<sup>58</sup> Febbrajo, above n 53, 229.

<sup>59</sup> Modica, above n 5, 785.

<sup>60</sup> De Cristofaro, above n 19, 287.

<sup>61</sup> Fachechi, *Credito al consumo: funzione economico-sociale e istanze di tutela* [Consumer credit: economic and social function and its function of protection] reported in [2009] *Rassegna diritto civile* 264.