Insights & Analyses

Credit Agreements for Consumers in the Event of Early Repayment

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Abstract

Consistent interpretation is one of the main obligations related to the interpretation of national law in accordance with the acquis communitaire of the European Union. The main aspects of the principle of consistent interpretation will be highlighted in this article in order to analyze its application and its impact in a specific field, namely in the field of consumer credit. After examining the institution of consumer credit, with particular reference to early repayment, the Author analyses the challenges and difficulties in the application of the aforementioned principle in this matter. There will be some focus on the implementation of the Directive on credit agreements for consumers,[1] with particular reference to the Italian legal system – taking into account the so called Lexitor case[2] – which constitutes an interesting illustration of the necessarily binding effect of Court of Justice's interpretation upon national courts.

I. Introduction

Individual complaints before the Court of Justice of the European Union (ECJ), and its preliminary rulings in particular, are a fundamental instrument for defining new interpretations of the European law. However, its case law often promotes a reflection on more classical issues. The recent and well-known Lexitor case decided by the Court of Justice produced an unexpected and disruptive interpretation of Art 16, para 1 of the Directive on credit agreements for consumers,[3] raising questions regarding the duty of consistent interpretation imposed on domestic courts. This seems to be particularly true for the Italian legal system, as following the European Court ruling there has been a significant increase of different judicial and doctrinal interpretations, followed by a – misguided – intervention of the legislator, on which the Constitutional Court has finally intervened to resolve any

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[1] European Parliament and Council Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers [2008] OJ L133/66.

[2] Case 383/18 *Lexitor sp. z o.o.* v *Spółdzielcza Kasa Oszczędnościowo – Kredytowa im. Franciszka Stefczyka, Santander Consumer Bank S.A., mBank S.A.* [2019] ECR 702.

[3] Art 16 'Early repayment' of the European Parliament and Council Directive 2008/48/EC: '1. The consumer shall be entitled at any time to discharge fully or partially his obligations under a credit agreement. In such cases, he shall be entitled to a reduction in the total cost of the credit, such reduction consisting of the interest and the costs for the remaining duration of the contract. […]'.

possible controversial issues.[4]

In order to ensure consistent interpretation of the relevant legislation, adaptation of national law requires a particular caution in transposing European directives. Generally, European legal texts which are not directly applicable in the domestic legal system must be transposed into national law, having themselves only an 'indirect effect' on the internal legal system.

To this lack of direct effect is added – almost to complicate the process of European integration – a well-established line of case law of the Court of Justice, which actively uses its doctrine of indirect effect to promote the notion of creating an ever-closer Union.[5]

Although the above-mentioned Directive provides for maximum harmonisation, it has actually been – in part – a catalyst for different interpretations of the scope of a given rule in various national legal systems. As a result, the Court of Justice has been often called on to intervene and resolve interpretative doubts about its scope.

In particular, reference is made to Art 16, para 1 of the Directive which gives the consumer the right to discharge at any time fully or partially his obligations under a credit agreement. The amount of reimbursement due to the consumer that results from his right to early repayment raises questions concerning the possible interpretation to be given to the measure of the total cost of the credit and costs for the remaining duration of the contract. These parameters are identified by the reference standard in order to quantify the refund due to the consumer.

As will be seen in the rest of this paper, the Court of Justice – in a preliminary ruling – clarified the meaning of Art 16, para 1, holding that the right of the consumer to a reduction in the total cost of the credit in the event of early repayment includes all the costs imposed on the consumer. The final and binding decision of the Court of Justice has overturned the established practice in Italy, whereby reimbursement in case of early repayment was calculated with reference only to the costs linked solely to the duration of the contract, and not the fixed costs related to obligations prior to granting of the loan.

However, interpretation of the European Directive – although clarified by a judgment of the Court of Justice – does not always follow a course that is in line with the intention of the European legislator (as it should be). As will be more fully described in the second part of the article, the holding of the Court of Justice has not been fully incorporated into the Italian legal system, since the legislator even intervened with a provision partly in contrast with the Court's decision. That means the judgment was not properly upheld in the Italian legal order in breach of the binding effect of the Court's rulings. Despite this, the Italian Constitutional Court has recently intervened to resolve any possible doubt, imposing an interpretation of the rule in accordance with the Lexitor case. Thus, the Constitutional Court held

[4] Corte Costituzionale 22 December 2022 no 263.

[5] T.M.J. Möllers, 'The Principle of Directive-Compliant Development of the Law and the Contra Legem Limit' 16 *European Review of Contract Law*, 465 (2020).

that the legislature, by introducing a rule which differed from the content of the judgment of the Court of Justice – and thereby undermining a consistent interpretation of European Union law – had failed to fulfill its obligations under the Community legal order.

In particular, as will be seen in the following sections, the Italian legislator introduced a differentiated framework for contracts concluded before the entry into force of a rule adopting the interpretation provided by the European Court, thus violating the principle of retroactivity of the Court of Justice's preliminary rulings.

The first part of this paper is dedicated to the principle of consistent interpretation, and highlights that, although it could seem to be an inherent characteristic of the doctrine of consistent interpretation, legal uncertainty is easily overcome. The next section focuses on the evolution of the law in the event of early repayment in Italy after the Court of Justice's judgment and the consequent breach of the obligations arising from the Community legal order by the Italian legislature, which led to the declaration of constitutional illegitimacy of the domestic rule.

II. The Principle of Consistent Interpretation

Before examining early repayment and the interpretation process that led to the submission of the question of constitutional legitimacy of the domestic rule before the Italian Constitutional Court, it is necessary to briefly analyze the principle of consistent interpretation, which would in itself have provided the solution to the controversial interpretation.

The harmonization process of national law in light of the European integration project requires a teleological approach to adapting the traditional categories of domestic law to supranational law. The use of the large-scale judicial instrument by the ECJ has always had the aim of establishing principles not codified within the European system that might eventually enjoy full and effective implementation.

The concept and effective application of a doctrine of consistent interpretation within the wider framework of alignment of the various national regulatory systems for an increasingly uniform European law, reflects its fundamental importance as a way of progressing to a form of a full harmonization.[6] For this reason, the so-called gap in horizontal third-party effect – since only a Member State is obliged to implement the Directive – is limited by the introduction of the obligation of national authorities to interpret the law in a manner consistent with the Directive.[7]

The principle of consistent interpretation[8] is an unwritten rule of conduct,

[6] G. Betlem, 'The Doctrine of Consistent Interpretation – Managing Legal Uncertainty' 22 *Oxford Journal of Legal Studies*, 397 (2002).

[7] T.M.J. Möllers, 'The Principle of Directive-Compliant Development' n 5 above.

[8] According to T.M.J. Möllers, the terms commonly used are 'principle of indirect effect' (P. Craig and G. de Búrca, 'EU Law' 6 *Oxford University Press*, 209 (2015)); L. Woods, P. Watson and M. Costa, 'Steiner & Woods EU Law' 13 *Oxford University Press*, 137 (2017), 'principle of harmonious interpretation' (P. Craig and G. de Búrca, 'EU Law' above) or 'principle of consistent interpretation'

primarily addressed to the national courts, aimed at resolving regulatory ordinary conflicts in a legal context characterized by heterogeneity of sources.[9] It creates both case law and an indirect form of primacy based on a direct dialogue between judges, where the national courts are subject to a systemic limitation,[10] whereby their autonomy in the interpretation of national law is inevitably influenced by the *acquis communitaire*.[11] Finally, it is an instrumental argumentative technique to ensure the effectiveness of the Union law, including – where appropriate – the fundamental rights protected by it, given that in this way domestic law, jointly and correctly interpreted, overcomes the aporia with that of the Union, by complying with it.

This obligation (to interpret national law in accordance with that of the Union) proceeds from the same proper functioning of the Union and – according to the Art 197 of the Treaty on the Functioning of the European Union (TFEU)[12] – is a matter of common interest. This is why national bodies – that is, national courts – cannot avoid this obligation; or better they can only avoid it by invoking the extreme hypothesis of 'counter-limits'.[13]

This obligation is also the result of a well-established line of case law promulgated by the European Court of Justice in its preliminary rulings:[14] on the one hand it

(L. Woods, P. Watson and M. Costa, 'Steiner & Woods EU Law' above); G. Betlem, 'The Doctrine of Consistent Interpretation – Managing Legal Uncertainty' 22 *Oxford Journal of Legal Studies*, 397 (2002) – see T. M.J. Möllers, 'The Principle of Directive-Compliant Development' n 5 above. Anyway, 'directive-compliant interpretation' seems to be the best term because it is close to the definition used by the ECJ. See F. Rossi Dal Pozzo, 'Obbligo d'interpretazione conforme al diritto dell'Unione europea e principi generali a tutela del contribuente: alla ricerca di un difficile equilibrio fra interessi (talora) contrapposti' *Rivista italiana di diritto pubblico comunitario*, 847 (2013); G. Conway, 'The Limits of Legal Reasoning and the European Court of Justice' 22 *Cambridge University Press*, 86 (2012); L. Woods, P. Watson and M. Costa, 'Steiner & Woods EU Law' above; G. Betlem, 'The Doctrine of Consistent Interpretation – Managing Legal Uncertainty' 22 *Oxford Journal of Legal Studies*, 397 (2002).

[9] T.M.J. Möllers, 'The Principle of Directive-Compliant Development' n 5 above.

[10] See P. Otranto, 'Note minime sulla riscrittura del rapporto libertà-autorità nel dialogo tra le corti' *Rivista italiana di diritto pubblico comunitario*, 719 (2013).

[11] Case 106/89 *Marleasing SA* v *La Comerical Internacional de Alimentaction SA* [1990] ECR 395; Case 91/92 *Faccini Dori* v *Recreb Srl* [1994] ECR 292.

[12] Art 197 of Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47: '1. Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest. 2. The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish the necessary measures to this end, excluding any harmonisation of the laws and regulations of the Member States.

3. This Article shall be without prejudice to the obligations of the Member States to implement Union law or to the prerogatives and duties of the Commission. It shall also be without prejudice to other provisions of the Treaties providing for administrative cooperation among the Member States and between them and the Union'.

[13] Case 212/04 *Adeneler* v *Ellinikos Organismos Galaktos* [2006] ECR 443; Case 441/14 *Dansk Industri* v *Nachlass des Karsten Eigil Rasmussen* [2016] ECR 278.

[14] See Art 267 of Consolidated Version of the Treaty on the Functioning of the European

proceeds directly from the Treaties[15] and, on the other hand, it is essentially identified with the judicial process of the Court of Justice. National authorities, within certain limits and conditions, are required to apply the letter and purpose of the Union rule – taking into account the system of values and principles from which the matter originates – as necessary benchmarks for defining the content of national law.

The Court has often moved towards a form of self-integration in the construction of new rules or in clarifying the content of certain rules characterised by indeterminacy. It is a well-known mechanism that if the system is lacking in precise normative declarations, jurisprudential activity takes over, specifying the duties imposed by the legal system and making concrete some elements of unwritten law.

At first glance, the examination of how this principle is applied at the European level may reveal some similarities with the general technique of consistent interpretation in national systems, where a conflict between the Constitution and another lower ranking norm is solved by construing the latter consistently with the former. In Italy, although there has recently been a recentralization of constitutional justice, consistent interpretation has always aimed at involving the Constitution in the legal system and has resulted in making the judiciary emerge as a third party alongside the legislative and executive power to fulfil the scope of application of the technique of consistent interpretation.[16] Indeed, the need to fill regulatory gaps is inherent in any legal system: and the Court of Justice thus, in the process of European integration, embodies a strictly constitutional concept of the legal system,[17] whose right becomes effective because it is legitimized by the respect of the norms of competence and strengthened by a set of elements and values that the same Court constructs.[18]

But on closer examination in the Union legal system the principle of consistent

Union [2012] OJ C326/47: 'The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.'

[15] Reference is made to the of Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 and the Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

[16] See G. Pitruzzella, 'L'interpretazione conforme e i limiti alla discrezionalità del giudice nell'interpretazione della legge' *federalismi.it*, 160 (2021).

[17] See P. Otranto, 'Note minime' n 10 above.

[18] See G. Betlem, 'The Doctrine of Consistent Interpretation' n 8 above.

interpretation has an additional peculiar *telos*: that is, tending to strengthen the Union's regulatory domain.[19] The reason for the very existence of this principle is to model national law on Union law; that is, in a manner of speaking, to 'communitarize' it. The national interpreter applies his own methods of interpretation,[20] which can sometimes be supplemented by methodological guidelines suggested by the Court, in an operation which essentially postulates two parameters: (i) the national provision, that – note well - must always be contextualized in its original legal order; and (ii) the rule of the Union, as specified and interpreted by the Court.

The complex interrelationships between the European Union and its Member States always required a pluralistic approach to understand the relationships between different regulatory systems: the principle of consistent interpretation in accordance with the *acquis communitaire* is one of the most significant expressions of the Court's efforts to do so. However, this is a line of case law that has attracted less attention than the classical principles of 'direct effect'[21] and 'primacy'.[22] To this end, it is enough to mention that direct effect and consistent interpretation are mutually exclusive approaches:[23] in the first, the supranational provision produces direct effects on the national system; in the second one, the internal norm must be applied correctly in the light of consistent interpretation. If the supranational provision is not able to directly affect the subjective legal sphere of the addressees, attention is shifted to the internal norm; consistent interpretation takes the role of complement to overcome the divergence.[24]

There are many rules that can benefit from application of the principle of consistent interpretation, but it is appropriate to say that this approach in particular calls for the implementation of 'directives'.[25] Indeed, such acts, as primarily intended for States, are structurally unsuitable – if not implemented or not properly

[19] See R. Baratta, 'L'interpretazione conforme all'acquis dell'Unione' *Rivista di diritto internazionale*, 28-48 (2015).

[20] C. Baldus and R. Becker, 'Haustürgeschäfte und richtlinienkonforme Auslegung – Probleme bei der Anwendung angeglichenen europäischen Privatrechts' *Zeitschrift für Europäisches Privatrecht*, 874, 882 (1997).

[21] Case 26/62 *Van Gend & Loos* v *Netherlands Inland Revenue Administration* [1963] ECR; in detail, L. Woods, P. Watson and M. Costa, n 8 above. See D. Gallo 'Effetto diretto del diritto dell'Unione europea e disapplicazione, oggi' *Osservatorio sulle fonti*, 1 (2019).

[22] W.H. Roth, 'Die richtlinienkonforme Auslegung' *Europäisches Wirtschafts- und Steuerrecht*, 385-386 (2005).

[23] See D. Gallo, 'Effetto diretto del diritto dell'Unione europea' n 21 above.

[24] See M. Castellaneta, 'All'assenza di effetti orizzontali della direttiva supplisce il rimedio dell'interpretazione conforme' *Guida al diritto*, 115 (2004).

[25] Art 288 of Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47: 'To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them. Recommendations and opinions shall have no binding force'.

implemented – to affect (negatively) the legal sphere of individuals in a horizontal and vertical sense. The application of consistent interpretation has often been demanded essentially as a means of overcoming this gap in the production of direct vertical and horizontal effects.[26]

However, such a rule of structure is not intended to assume a substantial character, as it is not protective in itself of a fundamental value. This essential characteristic explains the existence of some limits of the obligation to interpret national law in accordance with Union law. The Court of Justice itself has accepted that there are basically two types of restriction:[27] first, the duty of consistent interpretation is subject to the condition that national law confers on the authority a margin of discretion in the interpretation of national law: in particular, its interpretation cannot lead to a '*contra legem*'[28] result. Second, it cannot lead to a violation of the general principles of the Union, such as legal certainty and the non-retroactivity of legal rules (which has a particular relevance in criminal matters).[29]

In this regard – now partially crystallized in the Art 19 TEU – national courts play a decisive role in the protection of individual rights arising from the *acquis communitaire*.[30] The Court of Justice needs national courts in the event of interpretative doubts, so that a question is referred from a national court to the European Court of Justice for a preliminary ruling; and consequently, this ruling is applied according to the rule of consistent interpretation.[31]

III. Credit Agreements for Consumers

Before focusing on the intervention of the Court of Justice through a preliminary ruling on the interpretation of the right to early repayment, it is important to consider the context in which this rule operates. A credit agreement for

[26] Case 152/84 *Marshall I* v *Southhampton and South-West Hampshire Area Health Authority* [1986] ECR84; see G. Giacalone, 'Sull'efficacia "verticale" ed "orizzontale" delle direttive comunitarie' *Giustzia civile*, I, 1980 (1998).

[27] Case C-212/04 *Adeneler* v *Ellinikos Organismos Galaktos* [2006] ECR 443. See, also, P. Craig and G. de Búrca, 'EU Law' n 8 above: 'It would be very difficult to predict the outcome of any litigation, since the duty of harmonious interpretation demands that national courts consider all national law in deciding whether compatibility with the provisions of the directive can be attained'.

[28] C. Baldus and R. Becker, 'Haustürgeschäfte' n 20 above; C. Höpfner, 'Voraussetzungen und Grenzen richtlinienkonformer Auslegung und Rechtsfortbildung' *Jahrbuch Junger Zivilrechtswissenschaftler*, 73 (2009).

[29] T.M.J. Möllers, 'The Principle of Directive-Compliant Development' n 5 above.

[30] See M. Ruvolo, 'Interpretazione conforme e situazioni giuridiche soggettive' *Europa e diritto privato*, 1407 (2006).

[31] Art 267 of Consolidated Version of the Treaty on the Functioning of the European Union provides that the Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning both the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

consumers[32] is a financing instrument – in such form as a deferred payment or a loan or other financial facility – for people acting for purposes unrelated to entrepreneurial or professional activities (consumers), whereby a creditor grants or promises to grant to a consumer credit, and the consumer pays for such services or goods for the duration of their provision by means of instalments. Born in the shadow of the ancient scheme of sale in instalments, consumer credit has taken on an identifying connotation of its own, obtained by adding to the contract of sale a special contract made between lender and buyer.

There are risks involved in the operation: the risk of pushing consumers to make purchases that are not conducive to their economic situation. There is also the risk of consumers accepting – perhaps without even realizing it – unfair financial conditions, meaning the cost of products may end up excessively high. This explains the European choice to regulate consumer credit transactions with rules protecting consumer interests. The lender is required to provide prior information on the contractual conditions, which allows the consumer to make a rational choice from the various offers on the market. The lender is also obliged to verify the creditworthiness of the consumer, to assess whether the credit claim is sustainable on the basis of their financial situation. The regulation of credit agreements for consumers is a set of rules which – starting from the identification of what is meant by consumer credit – aims to create a uniform legislation for the matter under consideration, specifying, for example, pre-contractual obligations, advertising obligations, the characteristics of the contract, and the consumer's right of withdrawal.

The European legislative choice to intervene in the matter reflects the wider Community objective of creating a single market and achieving a level playing field for consumer credits across the EU, in particular enabling the free movement of credit providers and users of financial services in an increasingly digitalized cross-border credit market. For its part, the Consumer Credit Directive provided the harmonization of measures which guarantee a reference standard on consumer credit. On one hand, national law should not exceed the terms of the Directive in the aspects regulated and Member States may not extend the scope of incompatible provisions in domestic law. On the other hand, some of the provisions[33] have been

[32] According to Art 3 of the European Parliament and Council Directive 2008/48/EC: '[…] (c) 'credit agreement' means 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, except for agreements for the provision on a continuing basis of services or for the supply of goods of the same kind, where the consumer pays for such services or goods for the duration of their provision by means of instalments; […]'.

[33] See recital no 9 of the European Parliament and Council Directive 2008/48/EC which provides a full harmonization in order to ensure that all consumers in the Community enjoy a high and equivalent level of protection of their interests and to create a genuine internal market, but also states: '[…] Where no such harmonized provisions exist, Member States should remain free to maintain or introduce national legislation. Accordingly, Member States may, for instance, maintain or introduce national provisions on joint and several liability of the seller or the service provider and

left optional. This legislative choice has led in some respects to different transposition of the directive in the individual Member States, which certainly may affect the goals of the Directive to create an efficient internal market.

However, a common thread in the texture of the entire piece of legislation governing consumer credit, to be found both in the wording of the Consumer Credit Directive and in its supporting structure in EU law, is the high level of political attention to consumer protection, which must be considered in a broader view of the whole of European law. Consumer protection is – in this area as in all areas of private regulatory law – one of the ultimate goals of transnational policies, but it is also the means of achieving the best in European interests and the proper functioning of the market.

Generally, the EU's decision to give Member States free choice on how to implement the Directive can – if this implementation is not done properly – have a negative impact on the efficacy of the Directive and, in particular, on the achievement of the objectives set by the European legislator, which in this case are the proper functioning of the market but also of consumer protection; the latter perhaps also serving as a means to achieve the former.

Consumer protection – a way of making the European internal market work effectively – becomes central to the regulation of credit agreements for consumers. In conjunction with this goal, competition is an additional central element in the regulation of consumer credit, in particular through the rule of early repayment. In particular, the rules on reducing the total cost of credit owed in the event of early repayment – as laid down in the Directive and subsequently interpreted by the Court of Justice – reveal the propensity of the European legislator to protect consumers' interests in advance repayments in the form of costs closely related to long-term credit and interest for the remaining duration of the contract.[34] In balancing the opposing interests, the priority of consumer protection against possible circumvention by credit institutions involves the choice of including – in the amount reimbursed to the customer in case of early repayment – all the costs that would have been incurred by the customer. Also, while the objective of consumer protection is a cornerstone for the proper functioning of the market, in the field of consumer credit, the right to early repayment constitutes – almost mainly – a means for consumers to change products in order to find the one which best meets their needs at any given time,[35] thus constituting a fundamental element of the

the creditor. Another example of this possibility for Member States could be the maintenance or introduction of national provisions on the cancellation of a contract for the sale of goods or supply of services if the consumer exercises his right of withdrawal from the credit agreement. In this respect Member States, in the case of open-end credit agreements, should be allowed to fix a minimum period needing to elapse between the time when the creditor asks for reimbursement and the day on which the credit has to be reimbursed'.

[34] According to Art 16 the consumer shall be entitled at any time to discharge fully or partially his obligations under a credit agreement, being entitled to a reduction in the total cost of the credit which consists of the interest and the costs for the remaining duration of the contract.

[35] See the Opinion of Advocate General Campos Sánchez-Bordona delivered on 29 September

enhancement of competition.

1. The Event of Early Repayment

The rules governing early repayment of loans have emerged gradually in EU legislation over the last few years. Now the consumer who makes an early repayment is entitled to be reimbursed for some of the costs of the loan.[36] The act of early repayment[37] has been regulated in order to help create a well-functioning internal market in consumer credit: the right to repay loans fully or partially at any time – with a high level of consumer protection – is certainly part of the goal of establishing a well-functioning market.

The rules allowing for the early repayment of loans are there primarily to protect consumers. Indeed, the asymmetry that characterizes credit agreements requires that certain guarantees are given to the consumer. The Directive on credit agreements for consumers provides mainly informative regulation,[38] which seeks to contain the risks of misleading information from credit institutions. The fact that the consumer may not be perfectly informed has led to the provision of a rule allowing the early repayment of loans as a binding requirement by the legal

2022, case 555/21 (*Unicredit Bank Austria Ag* v *Verein Für Konsumenteninformation*): '65. In that context, the right to early repayment pursues a specific objective, which recital 66 of Directive 2014/17 describes by reference to promoting competition, the free movement of citizens and financial stability. The advantages to consumers are treated as merely secondary and are described in terms of enabling consumers to change products in order to find the one which best meets their needs at any given time'.

[36] Whereas no 39 of the European Parliament and Council Directive 2008/48/EC provides: 'The consumer should have the right to discharge his obligations before the date agreed in the credit agreement. In the case of early repayment, either in part or in full, the creditor should be entitled to compensation for the costs directly linked to the early repayment, taking into account also any savings thereby made by the creditor. However, in order to determine the method of calculating the compensation, it is important to respect several principles. The calculation of the compensation due to the creditor should be transparent and comprehensible to consumers already at the pre-contractual stage and in any case during the performance of the credit agreement. In addition, the calculation method should be easy for creditors to apply, and supervisory control of the compensation by the responsible authorities should be facilitated. Therefore, and due to the fact that consumer credit is, given its duration and volume, not financed by long-term funding mechanisms, the ceiling for the compensation should be fixed in terms of a flat-rate amount. This approach reflects the special nature of credits for consumers and should not prejudice the possibly different approach in respect of other products which are financed by long-term funding mechanisms, such as fixed-rate mortgage loans'.

[37] See, for example, F. Mezzanotte, 'Il rimborso anticipato nei contratti di credito immobiliare ai consumatori' *Nuove leggi civili commentate*, 65 (2020); E. Battelli and F.S. Porcelli, 'Il diritto alla riduzione del costo totale del credito in caso di rimborso anticipato' *Giurisprudenza italiana*, 1597 (2020); G. De Cristofaro, 'Estinzione anticipata del debito e quantificazione della "riduzione del costo totale del credito" spettante al consumatore: considerazioni critiche sulla sentenza "Lexitor" ' *Nuova giurisprudenza civile commentata*, 287 (2020).

[38] See, for example, M. Maugeri, 'Omissione di informazioni e rimedi nel credito al consumo. La decisione della CGE 42/15 e la proporzionalità dell'apparato rimediale italiano' *Banca, borsa titoli di credito*, 134 (2018); A. Minto, 'Il nuovo documento denominato «informazioni europee di base» nell'ambito del rinnovato regime informativo dei contratti di *credito* ai consumatori' *Banca, borsa titoli di credito*, 98 (2012).

system.[39]

Despite this provision having – among others – the clear objective of protecting the interests of the consumer, the European implementation of this Directive in the individual Member States has led to significant interpretative uncertainties. Indeed, the refund of the total cost of the credit involves two conflicting interests: credit institutions tend to prefer a minimum reimbursement, unilaterally determining the different costs that the customer must bear in order to influence any future refund in the event of early repayment; the consumer, instead, has an interest in the total recovery of costs, where 'total' means the proportional reduction of all costs imposed on them.

The European intervention opted for a balance of these conflicting interests that favours the consumer, in line with the consumer protection policy of European law when considered as a whole. Notwithstanding the possible objections to the choice of full reimbursement of credit costs, a policy that favours consumer protection has been the rule since the first Consumer Credit Directive.[40] With the update to the Directive in 2008, the general concept of fair reduction is changed to the more precise one of reduction of the total cost of the credit: the aim is to ensure the consumer is not exploited when signing credit contracts.[41]

On the other hand, however, the existence of substantial differences between national principles and conditions under which consumers have the ability to repay their credit and the conditions under which early repayment is made may constitute an obstacle to the promotion of competition. As mentioned above, a consumer's capacity to repay the loan prior to the expiry of the credit agreement may play an important role in enhancing competition in the internal market. For this reason, a standardized approach to early repayment of credit is of fundamental importance at the Union level in order to ensure that consumers have the opportunity to fulfill their obligations in advance and to compare offers to find the best products to meet their needs.

2. The Lexitor Case: The Context and Reasons for a European Intervention

The application of a principle, as explained before, would seem not to leave scope for decisional autonomy to national courts. However, there are a number of different limits to the entry – thus conceived – of European legislation in national laws. This is explified by the approach to the Directive on credit agreements for consumers in the Italian legal system.

In September 2019 the European Court of Justice ruled on a preliminary request concerning the interpretation of Art 16, para 1 of the Directive in the so-

[39] E. Baffi and F. Parisi, n 39 above.

[40] European Parliament and Council Directive 87/102/EEC.

[41] G. Liace, 'Il diritto dei consumatori alla riduzione del costo totale del credito nel caso di estinzione anticipata del finanziamento: il caso Lexitor' *Giurisprudenza commerciale*, 1003 (2020).

called 'Lexitor case'.[42] Art 16 states that the consumer shall be entitled at any time to discharge fully or partially his obligations under a credit agreement. In such cases, the consumer shall be entitled to a reduction in the total cost of the credit,[43] such reduction consisting of the interest and the costs for the remaining duration of the contract.

The previous legislation[44] already gave the consumer the right to discharge in advance the obligations arising from his credit agreement, thereby providing for a fair reduction in the total cost of the credit. The rule under consideration has introduced important innovations providing that the consumer is entitled at any time to fully or partially discharge his debts, and that the reduction granted to him should include, more precisely, the interest and costs due for the remaining duration of the contract. This seems to be justified by the desire to prevent the quantification of the reduction in the total cost of the credit to be the result of the pure discretion of national legislators and courts and to base it, rather, on a harmonized and fundamentally objective basis.

Given the non-unique scope of the provision in question, the Court – on a basis not only of literal interpretation, but also in light of the goal of ensuring a high level of consumer protection (andusing a teleological argument)[45] – stated the following principle:

> 'Article 16(1) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC must be interpreted as meaning that the right of the consumer to a reduction in the total cost of the credit in the event of early repayment of the credit includes all the costs imposed on

[42] For an effective comment on the subject see A. Tina, 'Il diritto del consumatore alla riduzione del costo totale del credito in caso di rimborso anticipato del finanziamento ex art. 125 *sexies*, primo comma, t.u.b. Prime riflessioni a margine della sentenza della Corte di Giustizia dell'Unione europea' *Rivista di diritto bancario*, 155 (2019); A. Zoppini, 'Gli effetti della sentenza Lexitor nell'ordinamento italiano' *Banca, borsa titoli di credito*, 1 (2020); R. Santagata, 'Rimborso anticipato del credito e diritto del consumatore alla restituzione della quota parte dei costi indipendenti dalla durata del contratto (cd. *up-front*)' *Banca, borsa titoli di credito*, 18 (2020); G. Liace, 'Il diritto dei consumatori' n 41 above; De Cristofaro, 'Estinzione anticipata del debito' n 37 above, 287; M. Natale, 'Estinzione anticipata del credito ai consumatori, retrocedibilità dei costi e logica in apnea' *Giustizia civile*, 669 (2021); R. Santagata, 'Prime note sulla nuova disciplina del rimborso anticipato del credito ai consumatori (e del credito immobiliare)' *Banca, borsa titoli di credito*, 179 (2022); F. Gigliotti, 'Rimborso anticipato del finanziamento e riduzione dei costi del credito. Variazioni ermeneutiche sull'art. 125-*sexies* T.U.B. (tra sentenza "lexitor" e decreto sostegni *bis*)' *Banca, borsa, titoli di credito*, 198 (2022); A. Ricciardi, 'Il principio sancito dalla Corte di Giustizia nell'ambito del caso Lexitor e Decreto sostegni *bis*: problematiche applicative passate, presenti e future' *Banca, borsa titoli di credito*, 289 (2022).

[43] See G. Giordano, 'Brevi note in tema di costo totale del credito' *Giurisprudenza commerciale*, 1196-1206 (2021).

[44] Art 8 of the European Parliament and Council Directive 87/102/EEC.

[45] See T.M.J. Möllers, *Legal Methods* (München: Bloomsbury Academic, 1st ed, 2020).

the consumer'.[46]

Such an interpretation means that in the calculation of the reduction due to the consumer in the event of early repayment, all the costs previously charged must be included: the recurring costs (gradually accruing over the duration of the contract: for example, amounts paid as cover for credit risks, charges for managing collections, etc) and the up-front costs (fixed costs related to obligations prior to the granting of the loan, and therefore independent of the duration of the financing relationship).[47] This distinction, although it has been of fundamental importance in the event of early repayment (especially in Italy), loses its meaning since it is left to the simple choice of the bank.

The Court explained that

> 'the effectiveness of the right of the consumer to a reduction in the total cost of the credit would be reduced if the reduction of the credit could be limited to the taking into account of only those costs presented by the creditor as dependent on the duration of the contract, given that, as was noted by the Advocate General in point 54 of his Opinion, the costs and the breakdown thereof are determined unilaterally by the bank and the charging of fees may include a certain profit margin (...) In addition, as is emphasized by the referring court, limiting the possibility of reducing the total cost of the credit solely to costs expressly connected with the duration of the contract would entail the risk that the consumer would be required to make a higher one-off payment when concluding the credit agreement since the creditor could be tempted to reduce the costs depending on the duration of the contract to a minimum (...) Furthermore, as was emphasized by the Advocate General in points 53 and 55 of his Opinion, the degree of flexibility available to credit institutions in terms of invoicing and internal organization makes it very difficult in practice for a consumer or a court to determine which costs are objectively linked to the duration of the contract'.[48]

Thus the decision is based on a precise assumption: the distinction between fixed costs (up-front) and costs dependent on the duration of the contract (recurring) is determined unilaterally by the bank, and this can clearly affect the interests of the consumer. Furthermore, the charging of fees may include a certain profit margin and, therefore, it is difficult in practice for a consumer or a court to determine which costs are objectively linked to the duration of the contract.

[46] See Lexitor para 2 above.

[47] Recurring costs are the costs incurred by the lender while the loan is in progress. In other words, they are the costs that 'depend objectively on the duration of the contract' (Case C-383/18 para 24).

[48] Lexitor para 2 above.

3. Duties and Limits of the Principle of Consistent Interpretation: The Italian Reference Framework

The Italian reference framework is somewhat peculiar. The Directive was implemented in 2010[49] and, in particular, Art 16 was transposed with the (now old, after a recent reform)[50] formulation of Art 125-*sexies* TUB (Testo Unico Bancario),[51] that is the Consolidated Law on Banking. The (old) implementing provision stated that in the case of an early repayment, the consumer was entitled to a reduction of the total cost of the credit equal to the amount of interest and costs due for the remaining life of the contract.[52] On the basis of a literal analysis of the domestic provision, the transposition of the Directive was not a textual reproduction. Indeed, the domestic provision articulates a rule of reduction of the cost of the credit referring not – as Art 16 (1) of the Directive provides – to a sum that 'includes' some costs but, instead, a reduction equal to the amount of interest and costs due for the remaining life of the contract.

Starting from this point, the interpretation of the domestic provision until the *Lexitor* case was based – in a substantially uncontroversial way[53] – on the distinction between up-front costs, not subject to repayment, and recurring costs subject to the reduction of the total cost of credit.[54] Indeed, it was considered that the *prorata temporis* refund criteria could be allocated only to the costs referring to services capable of attributing utility to the customer, proportional to the duration of the contractual relationship; consequently, it was not possible to provide a refund for those complaints relating to services already expired at the time the contract was concluded. This understanding was shared in doctrine, ordinary jurisprudence and in the Alternative Dispute Resolution body of the Bank of Italy: Arbitro Bancario e Finanziario (ABF). What is most important, especially considering the recent reform of the national legislation, is that this interpretation has been substantially confirmed and endorsed by secondary legislation of the Bank of Italy, in accordance with the primary provision of Art 125-*sexies* TUB,

[49] Decreto legislativo no 141/2010.

[50] Legge 23 July 2021 no 106. Conversion into Law, with amendments, of Decreto legge of 25 May 2021 no 73, containing urgent measures related to the emergency by COVID-19, for businesses, work, youth, health and territorial services.

[51] Before this intervention the discipline was included both in the Decreto legislativo no 385/1993 and in the Decreto legislativo no 206/2005 (Codice del consumo). About the different system after the Decreto legislativo no 141/2010 see, for example, R. Giaquinto 'Il credito al consumo tra snodi teorici ed evoluzione della prassi: le nuove prospettive aperte a tutela del consumatore' *camminodiritto.it*, 2020.

[52] See the previous formulation of the Art 125-*sexies* of the Testo Unico Bancario (before the 2021 reform) which provided that the consumer may repay in advance at any time, in whole or in part, the amount due to the lender and in that case the consumer is entitled to a reduction in the total cost of the credit, equal to the amount of interest and costs due for the remaining life of the contract.

[53] See F. Gigliotti, 'Rimborso anticipato del finanziamento' n 42 above, 198.

[54] See Collegio ABF Napoli, 7 March 2017 no 2211; Collegio ABF Bari, 2 May 2017 no 4561. Also, Collegio di Coordinamento ABF 22 September 2014 no 6167.

namely the 'Disposizioni di Trasparenza dei Servizi bancari e finanziari' and 'Orientamenti di vigilanza. Operazioni di finanziamento contro cessione del quinto dello stipendio o della pensione'.[55]

On the basis of the above considerations concerning the principle of consistent interpretation, it must be considered that – since the EU Courts' judgments are fully binding on the national courts and constitute a rule of law which goes beyond the limits of the reference judgment, thus applicable by the national court in every state and grade of the judgment, even with retroactive effect56 – the interpretation of the domestic provision from before the Lexitor case must be reversed. Indeed, on the one hand, after the Lexitor case, the Bank of Italy – with its communication of 2019 – provided new guidelines in the event of early repayment suggesting that the domestic provision was not significantly different from that deriving from the interpretation of the Court of Justice. Consequently, the ABF provided for application of the rule under *Lexitor* to pending cases for which the customer had already requested are fund of up-front costs.[57] Accordingly, although the new guidelines did not address the retroactivity of the principle under Lexitor, the ABF extended its holding to pending cases. Of course, appeals that had already been decided (on pain of infringing the *ne bis in idem* principle), and those that had been prescribed, were therefore excluded from the application of the principle expressed in the *Lexitor* case. The ABF has also clarified the calculation criteria to be used for the reduction of the total cost of credit, which have not been specified by the ECJ: that is, the *prorata temporis* criteria should be used with regard to the recurring costs. As regards up-front costs, instead, it may be for the various parties to establish adequate calculation criteria (easily understood by the consumer) or, in the absence of agreement, it will be up to the court to integrate the contractual regulation in application of the criteria of supplementary equity[58] stipulated by Art 1374 code civil.

Despite the fact that Member States had an obligation to comply with directives,[59] including in proceedings before courts – part of the literature[60] invoked several arguments hoping to limit the implementation of the Court of Justice's dictum. These arguments included that, even if the directives could produce direct effects in vertical relationships, they could not affect horizontal ones.[61] According

[55] See Gazzetta Ufficiale, no 38, 16 February 2011 Supplemento Ordinario no 40.

[56] Case 231/96 *Edilizia Industriale Siderurgica Srl (Edis)* v *Ministero delle Finanze* [1998] ECR 401; Case 61/79 *Amministrazione delle finanze dello Stato* v *Denkavit italiana Srl* [1980] ECR 100; Corte di Cassazione – Sezione VI 11 September 2015 no 17994.

[57] See, in particular, Collegio ABF no 26525/2019.

[58] See R. Santagata, 'Rimborso anticipato del credito' n 42 above, 18-38.

[59] According to Art 288(3) Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, directives are binding upon each Member State: see Case 129/96 *Inter-Environnement Wallonie* v *Région Wallonnie* ECR 628.

[60] See A. Zoppini, 42 above.

[61] Case 41/74 *Van Duyn* v *Home Office* [1974] ECR 133; Case 148/78 *Public Prosecutor* v *Ratti* [1979] ECR 110; Case 8/81 *Ursula Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR

to this principle, *Lexitor* would be irrelevant in domestic proceedings based on the application of Art 125-*sexies* TUB, without prejudice to the eventual liability of the State for non-compliance with the Community obligation[62] – although in Italy the Directive 2008 has been formally transposed in the national system, so that a problem of non-compliance of the State cannot be said to be posed. At most, the incompatibility between the national legal order and the Directive allows the injured party to take action for the civil liability of the State for breach of obligations, which means for incorrect implementation of the Directive. From this point of view, it is interesting to consider whether or not it is possible to censor the conduct of banks which might adversely affect the individual and collective interests of consumers with regard to transparency and fairness, and to denounce – in this case – unfair commercial practices in relation to the preparation and use of clauses limiting the reduction of the cost of credit in the event of early repayment only to certain costs and commissions in proportion to the remaining duration of the contract. A second argument suggested that, if it is true that the duty of consistent interpretation applies to Directives governing relations between individuals, it is equally true that the national court should fulfil that obligation with the limit of not giving rise to an application of the rule *contra legem*:[63] part of the doctrine considered that a close reading on the wording of Art 125-*sexies* TUB should have led to the non-applicability of the principle set out above.[64] Namely, the domestic provision required that the reduction in the total cost of credit due to the consumer who has fulfilled it in advance should be quantified in an amount that is equal to (and not higher than) interest and costs due for the remaining life of the contract.

4. The Pragmatic Choice of the European Judge

Among several interpretations on the scope and subsequent application of the *Lexitor* holding in the Italian system, it is necessary to start from a single premise: it is certain that the interpretation given in the Court's judgment is of general scope[65] and it is binding in nature because it integrates the content of the European rule of law.[66] However, some have suggested that this assumption should not be confused with the issue of the domestic effect of the judgment, which should be evaluated on the basis of the specificities of the referenced system.[67]

7; M. Zöckler, 'Probleme der richtlinienkonformen Auslegung des nationalen Zivilrechts' *Jahrbuch Junger Zivilrechtswissenschaftler*, 141, 157 (1992).

[62] Case 6/90 *Francovich* v *Italian Republic* [1991] ECR 428; see F.M. Di Majo, 'Efficacia diretta delle direttive inattuate: dall'interpretazione conforme del diritto interno alla responsabilità dello Stato per la mancata attuazione delle direttive' *Rivista di diritto europeo*, 501 (1994).

[63] See A. Zoppini, 42 above.

[64] ibid

[65] See Case 53/76 *Benedetti* v *Munari F.lli sas* [1977] ECR 17; Case 126/81 *Wünsche Handelgesellschaft GmbH&Co.* v *Federal German Court*. About the general scope of the Court's judgments [1982] see R. Santagata, 'Rimborso anticipato del credito' n 42 above, 18-38.

[66] See Case 129/96 Inter-Environnement Wallonie v Région Wallonnie [1997] ECR 628.

[67] See A. Zoppini, 42 above; F. Gigliotti, 'Rimborso anticipato' n 42 avove, 198.

The Advocate General's Conclusions[68] suggest that at the European level the calculation criteria in the case of early repayment have not been harmonized and that the Member States may (but do not need to) provide for conditions that guarantee the refund of costs not dependent on the duration of the contract. Art 16 of the Directive may be interpreted as requiring the repayment of an appropriate part of all costs directly or indirectly linked to the duration of the credit agreement.[69] Such interpretation would also be confirmed by the Observations of the EU Commission.[70] According to this interpretation it would follow that the judgment is not automatically applicable and, in this sense, there can be doubt as to what kind of harmonisation the European legislator wanted to pursue through the Directive.[71]

It is true that necessary attention to the specificities of individual Member States also seems to be evident from the consolidation in different systems of different interpretative solutions in primary legislation:[72] it has in part been considered that the judgment does not produce binding effects, for example in the Italian system, because it is based on legal conditions (like those of the Polish system) that are not specific to a system that guarantees high consumer protection and that – through strict obligations of prior information – does not leave the determination of credit costs to the arbitrary professional.[73] So, when interpreting the rule, the domestic provision must be contextualized in its original legal order. Moreover, given the many doubts that arise both in relation to applying the judgment and to the relevant procedures, it would also be possible to suggest a new reference for a preliminary ruling before the ECJ.[74]

However, it seems clear that the European judge wanted to opt for a pragmatic choice.[75] Namely, only allowing for the reimbursement of recurring costs would

[68] Conclusions of the Advocate General Gerard Hogan, 23 May 2019.

[69] See A. Zoppini, 42 above.

[70] EU Commission, 'Observations Écrites (G. Goddin, C. Valero, A. Szmytkowska)', Case 383/18.

[71] R. Santagata, 'Rimborso anticipato del credito' n 42 above, 18-38.

[72] For example, in Germany the interpretative solution has even been consolidated in civil code: BGB's rules on consumer credit were amended, again providing for a reduction of *recurring* costs only. Reference is made to the Art 501§ BGB, now modified by the *FinDLRAnpG* (2021). See, also, F. Ferretti and B. Bertarini, 'Consumer Credit Advertising in the United Kingdom and Italy: The Shortcomings of the Consumer Credit Directive and Scope for Review' 31 *European Business Law Review* 2, 243-264 (2020).

[73] A. Zoppini, 42 above.

[74] ibid

[75] E. Baffi and F. Parisi, n 39 above. Also, the Advocate General in his Opinion (Op AG, Case 383/18, Lexitor, paras 53, 55) stated that the rule establishing that up-front costs are not reimbursable while costs dependent on the duration of the loan are reimbursable may 'appear [...] at first sight to be relatively simple and therefore interesting, (but) its practical application will probably give rise to considerable difficulties of a practical nature. Indeed, as highlighted by the referring court in its request, credit institutions rarely specify which of the costs they incur are covered by the costs charged to consumers and, even when this occurs, the consumer would be entitled to dispute the accuracy of such specification. […] In the event of a dispute over the amount of the reduction to which the consumer is entitled in the event of early repayment, national courts (would) have to call on the services of accounting experts, even if, by their nature, the costs in question are relatively modest'. See, also, R. Santagata, 'Rimborso anticipato del credito' n 42 above, 18-38.

(or could) give rise to evasive behaviour by credit institutions, especially in a context of information asymmetries,[76] where the consumer may not be well-informed. Thus, the choice to grant consumers the right to early repayment can be said to be efficient in ensuring their protection. But it is also true that this choice could produce many inefficiencies. The consumer could be forced to pay more for the loan – by increasing, for example, the borrowing rate – and would probably not want to acquire it. Thus, the credit market would shrink.[77] There could also be an over-consumption of long-term credit, with the intent of the consumer to terminate the contractual relationship in advance and obtain a full reimbursement of costs.[78]

Given the arguments set out above, the Court stressed the desirability and necessity of going beyond the literal criterion, using the systematic and the teleological one, in accordance with an interpretative practice widely established in its case law. As regards the systematic criterion, the Court does indeed seem to be failing to carry out an internal assessment of the Directive and of the overall framework for early repayment arising from credit agreements;[79] but more confusion arises especially in the application of the teleological criterion. Indeed, the Court states that the Directive 'aims to ensure a high level of consumer protection', because the consumer is a weak part of the contractual relationship both in terms of negotiation power and level of information.[80] It is true that recital no 9 of the Directive states the need for a full – and not merely minimal – harmonization of national legislation on credit agreements, which guarantees all consumers a high and equivalent level of protection of their interests; but it is also true that this statement must be included in a much broader and more complex framework that justifies the intervention of the European legislator.[81]

The European legislator considers that a full and complete harmonization of national legislation on certain aspects of consumer credit agreements is fundamental to ensure a high and equivalent level of consumer protection in order to facilitate the establishment of an efficient internal market in consumer credit, but at the same time, to create a genuine internal market.[82] Therefore, the choice to identify mainly the effectiveness of protection of consumer rights as the justification for a hermeneutical option does not seem to be justified. Moreover, it has been stressed that the EU legislator's instruments for preventing the risk of circumvention are quite different from the hermeneutical parameters to be adopted to solve

[76] See M. Chiarella, *Contrattazione asimmetrica. Segmenti normativi e costruzione unitaria* (Milano: Giuffrè, 2016); A.M. Benedetti, 'Contratto asimmetrico' *Enciclopedia del diritto* (Milano: Giuffrè, 2012), V, 370.

[77] E. Baffi and F. Parisi, n 39 above.

[78] ibid 239.

[79] See G. De Cristofaro, 'Estinzione anticipata del debito' n 37 above, 284.

[80] Explicit reference is made to the judgment of Case 58/18 *Schyns* v *Belfius Banque SA* and the judgment of Case 377/14 *Radlinger and Radlingerova* v *Finway a.s.*

[81] See G. De Cristofaro, 'Estinzione anticipata del debito' n 37 above, 285.

[82] See whereas no 6-9 of the European Parliament and Council Directive 2008/48/EC.

interpretative doubts raised by the wording of EU provisions.[83] These include, among others: the principle that all clauses in contracts concluded by consumers with professionals must be formulated in a clear and comprehensible manner; the criterion of objective interpretation of the contract under which, in case of doubt, should be given the most favorable meaning to the consumer; the principle according to which clauses concerning economic aspects of the contractual transaction are subject to the control and assessment of abuse if they are not formulated in clear and comprehensible terms;[84] and the requirement that consumers may not waive the rights conferred on them by the national provisions transposing the Directive.

In this perspective, it is interesting to note that a preliminary ruling regarding the interpretation of Art 25, para 1 of the Directive 2014/17[85] (equivalent to Art 16 of the Directive 2008/48/EC) has recently been the subject of a ruling by the Court of Justice.[86] In that case the request concerned the use of a standard clause (inserted in a mortgage-backed credit agreement by the bank) which states that, in the event of early repayment of the credit by the consumer, 'the processing costs that are not dependent on the duration of the agreement will not be reimbursed (even proportionally)'. It should be stressed that the Directive at issue here has the same legal basis as the Directive on Consumer Credit, while being characterized by a different development and discipline. The Advocate General, in his Opinion,[87] already appeared to be very critical of the reasoning behind the Lexitor judgment, or at least did not consider it to be an essential element for the resolution of the present ruling. Indeed, in this case, the key point seems to be represented by the literal interpretation of the relevant Directive, a method that was not followed in the Lexitor case. That is, a literal interpretation is proposed first and then – possibly – the teleological-systematic criterion is applied. Although the teleological argument must be considered in the interpretation of the provision, on the subject of consumer protection it is necessary to assess the possibility of introducing certain limits by balancing different interests in order to enhance the internal credit market. The Advocate General, gave a different meaning to the 'remaining duration of the contract' – an essential and crucial issue – from that proposed in the *Lexitor* case, with the consequence that only overdue interests and costs related to the time element, represented by the remaining life of the contract, could be refunded. The decision, therefore, confirmed these latter considerations. Contrary to the holding of the *Lexitor* case, it outlined that Art 25, para 1 must be interpreted as

[83] See G. De Cristofaro, 'Estinzione anticipata del debito' n 37 above, 286.

[84] See European Parliament and Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in consumer contracts.

[85] European Parliament and Council Directive 2014/17/EU 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.

[86] Case 555/21 *UniCredit Bank Austria AG* v *Verein für Konsumenteninformation* [2023] ECR 78.

[87] Opinion of Advocate General Campos Sánchez-Bordona delivered on 29 September 2022, case 555/21 (*Unicredit Bank Austria Ag* v *Verein Für Konsumenteninformation*).

not precluding national legislation which provides that the consumer's right to a reduction in the total cost of the credit in the event of early repayment of that credit includes only interest and costs which are dependent on the duration of the contract. The decision stressed that the credit intermediary is required to provide the consumer with accurate pre-contractual information concerning the breakdown of charges payable by the consumer. This requirement significantly reduces the risk of abusive conduct on the part of the creditor and makes it possible for the consumer and the national court to ascertain whether a type of fee is objectively linked to the duration of the contract. Moreover, the decision provides an interpretation with a possible strong impact for the present case. That is, the possible risk of abusive conduct cannot justify costs that are independent of the duration of the agreement being included in the right to reduction in the total cost of the credit.

5. The National Legislator's Interpretation

Despite all the difficulties of interpretation encountered by doctrine and jurisprudence, the Italian legislator intervened to provide a solution, which possibly creates more complications. In July 2021, the rules laid down in Art 125-*sexies* TUB were amended by Art 11-*octies* of the law 106/2021, which substantially transposed the principle contained in the *Lexitor* judgment, stating that credit agreements should clearly include the criteria for the repayment of both recurring and up-front costs.[88] However, Art 11-*octies* also provided the introduction of a dual legal regime:[89] it was foreseen that the old regime, as clarified by secondary legislation (that means the Bank of Italy guidelines prior to the *Lexitor* case) would apply to early repayments relating to contracts signed before July 2021.

Thus the matter was complicated by issues arising from the different ways it was applied regionally, and also from the interpretation given to the old provision which, according to what the legislator said, must follow the old guidelines of the Bank of Italy and not be interpreted in the light of *Lexitor*.[90]

In this legislative chaos, the ABF determined that, considering the new legislative text, it could not comply with the duty of consistent interpretation because of a clear and unambiguous rule such as the one just described, nor could it disregard the domestic law since the 2008 Directive was not a self-executing

[88] Art 11-*octies* of the legge no 106/2021 provided that Art 125-*sexies* TUB should have been replaced by a new formulation which provides that the consumer may refund in advance at any time, in whole or in part, the amount due to the financier and, in that case, is entitled to the reduction in proportion to the remaining life of the contract, interest and all costs included in the total cost of the loan, excluding taxes.

[89] Art 11-*octies* of the legge no 106/2021 provided that Art 125-*sexies* TUB, as replaced by para 1, letter c) of the same article, applies to contracts signed after the date of entry into force of the conversion law of that decree. The provisions of Art 125-*sexies* continue to apply to early termination of contracts signed before the date of entry into force of the law of conversion of that decree with the secondary rules contained in the provisions of transparency and supervision of the Bank of Italy in force on the date of signing the contracts.

[90] See F. Gigliotti, 'Rimborso anticipato del finanziamento' n 42 above, 198.

one.[91] Therefore, the ABF reverted to differentiating between recurring and up-front costs in the event of early termination of contracts concluded before July 2021. Further, this interpretation was supported by a communication[92] from the Bank of Italy dated December 2021.

On the other hand, the Court of Turin declared relevant and not manifestly unfounded the question of the constitutional legitimacy[93] of Art 11-*octies* by contrast with Arts 3, 11 and 117 of the Constitution, thus transmitting the proceedings of the trial to the Constitutional Court. In particular, the Tribunal of Turin stressed that the decisions of the European Court of Justice referred for a preliminary ruling have (generally) a retroactive effect (unless the Court itself dictates *ex nunc* effect):[94] in the present case, the Court has not limited the effectiveness over time of the principles set out in that judgment.

The crucial question is the claimed impossibility to practice a consistent interpretation in the current legal framework,[95] given the univocal meaning of the new rule. If, therefore, prior to the 2021 reform, the duty of consistent interpretation – although with some doubts raised in parts of the doctrine – could be respected, thus applying the European law as interpreted by the Court of Justice, after the recent legislative intervention this road no longer seemed viable. Despite this, the ABF[96] – recalling an ordinary Court ruling[97] – considered it necessary to also interpret Art 11-*octies* in a manner consistent with the *Lexitor* case. Indeed, the non-retroactivity of the new rule and its formulation were designed so that it was impracticable to adopt a different interpretation without falling into the disapplication of the norm. The necessarily binding effect of the Court of Justice's interpretation upon national courts implies that the principle of non-retroactivity enshrined in Art 11-*octies* could only refer to the calculation criteria[98]

[91] Among all, see Collegio di Coordinamento ABF 15 October 2021, no 21676.

[92] Banca d'Italia, Dipartimento tutela della clientela ed educazione finanziaria servizio vigilanza sul comportamento degli intermediari (967) divisione vigilanza di tutela (003), no 1710613/21, 1 December 2021.

[93] Tribunale di Torino – Sezione I, Ordinanza 2 November 2021 available at dirittobancario.it. See U. Malvagna, 'La nuova disciplina dell'estinzione anticipata dei contratti di credito ai consumatori: tra legge, Abf e Corte Costituzionale' *Banca, borsa titoli di credito*, 1, 49-87 (2022).

[94] See also A. Zoppini, n 42 above which refers to the Conclusions of the Advocate General Tizzano in the case 292/04, *Meilicke e a.* v *Finanzamt Bonn-Innenstadt*, 41-63 and the Conclusions of the Advocate General Jacobs in the case 475/03, *Banca di Cremona* v *Agenzia Entrate Ufficio Cremona*, 75-88, to admit that the Court of Justice may limit the temporal effectiveness of an interpretation of EU law also by means of a judgment subsequent to the one previously rendered in relation to the relevant EU law.

[95] U. Malvagna, 'La nuova disciplina' n 93 avove, 49-87; A. Zoppini, n 42 above.

[96] Collegio di Coordinamento ABF 15 October 2021, no 21676. See U. Malvagna, n 93 above.

[97] Tribunale di Savona 09 March 2021 no 180, available at dirittobancario.it.

[98] According to paras 2 and 3 of the Art 125-*sexies* Testo Unico Bancario, credit agreements shall clearly indicate the criteria for the proportionate reduction of interest and other costs, indicating analytically whether the linear proportionality criterion or the amortized cost criterion is applied. Unless otherwise stated, amortized cost applies. Unless otherwise agreed between the lender and the credit intermediary, the lender shall have a right of recourse against the credit intermediary for the

outlined in paras 2 and 3 of Art 125-*sexies* TUB Accordingly, the principle mentioned cannot concern the interpretation of the event of early repayment, or the interpretation would be in conflict with European legislation.

IV. Final Reflections in the Light of the Judgments of the Courts

In order to enable consumers to make decisions in full knowledge of the facts, they should be provided with adequate information, which they can examine before the conclusion of the credit agreement.[99] The conditions, the cost of credit and the obligations which originate from the agreement should be provided to the consumer as clearly as possible to ensure the fullest transparency and comparability of offers. The latter condition for the conclusion of a credit agreement that respects the fundamental principles of clarity and transparency towards the consumer – the weak party to the agreement – is the premise of the protectionist choices of the European legislator towards the customer who decides to terminate the contractual relationship in advance. Provided that the credit institution is required to give adequate information and Member States must take appropriate measures to promote responsible practices at all stages of the credit relationship,[100]

proportion of the amount reimbursed to the consumer relating to the compensation for the credit intermediation activity.

[99] Whereas no 19 of the European Parliament and Council Directive 2008/48/EC provides: 'In order to enable consumers to make their decisions in full knowledge of the facts, they should receive adequate information, which the consumer may take away and consider, prior to the conclusion of the credit agreement, on the conditions and cost of the credit and on their obligations. To ensure the fullest possible transparency and comparability of offers, such information should, in particular, include the annual percentage rate of charge applicable to the credit, determined in the same way throughout the Community. As the annual percentage rate of charge can at this stage be indicated only through an example, such example should be representative. Therefore, it should correspond, for instance, to the average duration and total amount of credit granted for the type of credit agreement under consideration and, if applicable, to the goods purchased. When determining the representative example, the frequency of certain types of credit agreement in a specific market should also be taken into account. As regards the borrowing rate, the frequency of instalments and the capitalisation of interest, creditors should use their conventional method of calculation for the consumer credit concerned'.

[100] Such measures may include, for example, consumer information and education and also warnings about the risks of non-payment or over-indebtedness. In an expanding credit market, in particular, it is important that creditors do not grant loans irresponsibly or do not issue loans without prior credit assessment. See whereas no 26 of the European Parliament and Council Directive 2008/48/EC: 'Member States should take appropriate measures to promote responsible practices during all phases of the credit relationship, taking into account the specific features of their credit market. Those measures may include, for instance, the provision of information to, and the education of, consumers, including warnings about the risks attaching to default on payment and to over-indebtedness. In the expanding credit market, in particular, it is important that creditors should not engage in irresponsible lending or give out credit without prior assessment of creditworthiness, and the Member States should carry out the necessary supervision to avoid such behaviour and should determine the necessary means to sanction creditors in the event of their doing so. Without prejudice to the credit risk provisions of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit

taking into account the specificities of their credit markets, since the relationship is intrinsically characterized by an asymmetry of information, the European legislator is necessarily led to consider the possibility of a contractual imbalance and, consequently, to protect the interest of the weaker party. For this reason, as has been repeatedly pointed out, the reimbursement of all the costs imposed on the consumer, in the event of early repayment, reflects a pragmatic decision that – rather than considering several economic inefficiencies – values the practicality of identifying eligible costs and the pre-eminence of consumer interest.

Therefore, although it can be argued that this choice could ultimately hurt the consumer,[101] it cannot be disregarded that an interpretation consistent with the European legal order, a duty which derives from the same proper adherence to the supranational order itself, implies that the Member States are required to establish prior information obligations and adequate levels of consumer protection (charges which do not include the refund of the total cost of the credit in the event of early repayment being requested as a priority) and to adapt national legislation in the light of the Court of Justice's judgment. The different interpretative arguments which consider that the European derivative decision is not applicable in domestic law – which exploit the less incisive nature of the principle of consistent interpretation as compared to the more penetrating horizontal direct effect – seem to disregard that, even if the ECJ has negated the horizontal direct effect of Directives, it developed an obligation to interpret national law in a Directive-compliant manner both according to the requirements of such Directives and in particular with the preliminary ruling concerning – according to the Art 267 of TFUE – its interpretation.

The provision of certain extreme limits to the obligation of consistent interpretation – such as the *contra legem* result and the general principles of the Union – reveals the exceptional nature of the non-application of the principle, generally to be considered as a source of supranational legislation. Further, even if it was considered impossible to apply the principle of consistent interpretation for the reasons set out above, the opposition of the domestic provision to the European Directive, devoid of direct effect, opens up the way to initiatives aimed at verifying its legitimacy. Indeed, where there is domestic law in conflict with a Directive which is not directly applicable, it is always possible to check its compliance with 'Community law'.

The Constitutional Court therefore intervened to settle the issue: the recently published decision provides a conclusive (and absolutely predictable) interpretation.

institutions (1), creditors should bear the responsibility of checking individually the creditworthiness of the consumer. To that end, they should be allowed to use information provided by the consumer not only during the preparation of the credit agreement in question, but also during a long- standing commercial relationship. The Member States' authorities could also give appropriate instructions and guidelines to creditors. Consumers should also act with prudence and respect their contractual obligations'.

[101] E. Baffi and F. Parisi, n 39 above.

It articulates the constitutional illegitimacy of Art 11-*octies*, para 2, limited to the part in which it recalls the secondary legislation of the Bank of Italy. As expected, the Court stressed – in accordance with Arts 11 and 117, para 1 of the Constitution (therefore excluding the reference to the contrast with Art 3 Costitution proposed by the Tribunal of Turin) – that its capacity as guardian of compliance with those obligations requires a declaration of constitutional illegitimacy of a rule which conflicts with the content of a Directive, as interpreted by the Court of Justice in its reference for a preliminary ruling, with a judgment having retroactive effects. The contrast with constitutional principles lies in the connection with the specific secondary legislation evoked by Art 11-octies, para 2, since the previous formulation of Art 125-*sexies*, para 1 – applicable to contracts concluded before its entry into force in accordance to the 2021 reform – can only be interpreted in a way consistent with the *Lexitor* judgment.[102]

It has been rightly pointed out that the interpretation of a Community rule given by the Court of Justice can and must also be applied by the domestic court to legal relationships which arose and were constituted before the interpretive judgment, since the potential different temporal effects can be modulated only by the Court itself in its preliminary rulings.[103] Although the provision has been partially found to be contrary to European law, the intervention of the Constitutional Court is not necessarily conclusive, especially considering that a new Proposal for a Directive on consumer credit is under consideration by the European legislator.[104] The latter, part of the wider EU project to adapt EU legislation to the digitalization process, which has profoundly changed the decision-making process and the habits of consumers in general (the lending sector progressively getting digitalized, the new market players which offer credit agreements in different forms, new products, such as short-term high-cost credit, new ways of disclosing information) contains a clearer wording of the article on the event of early repayment which considers the *Lexitor* guidelines.[105]

[102] See also Tribunale di Monza – Sezione I, 4 January 2023 no 20 available at dirittobancario.it.

[103] See also Tribunale di Nocera Inferiore – Sezione I, Ordinanza 5 January 2023 available at dirittobancario.it.

[104] Proposal for a Directive of the European Parliament and of the Council on consumer credits COM (2021) 347 final. See F. Ferretti and B. Bertarini, n 72 above.

[105] See, in particular, Art 29 of COM (2021) 347 about the early repayment: '1. Member States shall ensure that the consumer is at any time entitled to early repayment. In such cases, the consumer shall be entitled to a reduction in the total cost of the credit, consisting of the interest and the costs for the remaining duration of the contract. When calculating that reduction, all the costs imposed on the consumer by the creditor shall be taken into consideration. 2. Member States shall ensure that the creditor, in the event of early repayment, is entitled to fair and objectively justified compensation for possible costs directly linked to the early repayment, provided that the early repayment falls within a period for which the borrowing rate is fixed. The compensation referred to in the first subparagraph may not exceed 1 % of the amount of credit subject to early repayment where the period of time between the early repayment and the agreed termination of the credit agreement exceeds one year. Where that period does not exceed one year, the compensation shall not exceed 0,5% of the amount of credit subject to early repayment. 3. Member States shall ensure that the

Accepting the clear will of the European legislator – as clarified in the letter of the decision just considered – it is unequivocal that the interpretation must refer to the rule governing the reduction in the total cost of the credit in the event of early repayment. In the light of the above considerations and, even more, of the preparatory revision of the Consumer Credit Directive, Member States are required to adopt an interpretation of the internal provision consistent with the European legal order.

In conclusion, on the one hand this is a dispute whose solution has been partially supplied: the Constitutional Court decision stressed that the Italian legislator, providing for a rule which crystallizes the regulatory content of the original wording of the Art 125-*sexies*, para 1, TUB, has integrated a breach of obligations arising from the Community legal order. The connection between the mentioned Art and the secondary legislation identified by the censored provision was groundbreaking, preventing the interpretation of the previous Art 125-*sexies*, para 1 (applicable to contracts concluded prior to the entry into force of the reform) in accordance with the *Lexitor* case and in conformity with the domestic case law which, after the Court of Justice's judgment, had adopted that interpretation. On the other hand, two variables at stake are still under development. The preliminary ruling of the Court of Justice on the interpretation of the event of early repayment of credit agreements for consumers relating to residential immovable property overturned the principles set out in the *Lexitor* case. The issue – if it is not identical – at least is based on the same logic and, therefore, a legal principle diametrically opposed from that established by the same Court could reopen the debate on early repayment of loans. Moreover, in accordance with the principle of legal certainty, the Union legal framework in the area of credit agreements – even if relating to residential immovable property and consumer credit agreements – should be consistent with and complementary one to the other. Finally, the

creditor is not entitled to the compensation referred to in paragraph 2 where one of the following conditions is fulfilled: (a) the repayment has been made under an insurance contract intended to provide a credit repayment guarantee; (b) the credit is granted in the form of an overdraft facility; (c) the repayment falls within a period for which the borrowing rate is not fixed. 4. By way of derogation from paragraph 2, Member States may provide that: (a) the creditor is only entitled to the compensation referred to in paragraph 2 on the condition that the amount of the early repayment exceeds the threshold set out in national law, which shall not exceed EUR 10 000 within any period of 12 months; (b) the creditor may exceptionally claim higher compensation if the creditor can prove that the loss suffered due to early repayment exceeds the amount determined in accordance with paragraph 2. 5. Where the compensation claimed by the creditor exceeds the loss actually suffered due to the early repayment, the consumer shall be entitled to a corresponding reduction. For the purposes of the first subparagraph, the loss shall consist of the difference between the initially agreed interest rate and the interest rate at which the creditor can lend out the amount subject to early repayment on the market at the time of that repayment, and shall take into account the impact of the early repayment on the administrative costs. 6. The compensation referred to in paragraph 2 shall not in any case exceed the amount of interest that the consumer would have paid during the period between the early repayment and the agreed date of termination of the credit agreement'.

forthcoming revision of the Consumer Credit Directive although its wording is not yet certain, will help to finalize or not the principles established by the Court of Justice.