

**REGULATORY CHOICES
OF RUSSIAN AND UKRAINIAN LEGISLATORS IN CONSUMER CREDITS:
A COMPARATIVE PERSPECTIVE**

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Russia and Ukraine have recently adopted complex statutes on consumer credit. Ukraine, unlike Russia, declared the aim of the new act, inter alia, harmonization of the legislation with international and EU standards. Prior to enactment, both countries had a fragmentary regulation of few aspects of consumer credit in general consumer protection laws. I consider peculiarities of the elimination of the contract disproportion of debtor and creditor rights in contracts on consumer credit under new Russian and Ukrainian regulations from a comparative perspective. EU law does not regulate some important issues covered by Russian and Ukrainian legislations, e.g. priority of payments. On the contrary, some useful concepts, which are applicable to consumer loans under EU law, like "linked credits," "open-end agreements" are absent in both Russian and Ukrainian laws. While comparing new Russian and Ukrainian consumer credit statutes, it is clear that in some aspects the Ukrainian one is pro-consumer, and in some other aspects the Russian one is more pro-consumer. Some provisions of both Russian and Ukrainian consumer credit statutes are very controversial and unclear; in some instances they could lead to debt slavery, so they must be corrected in the future.

Keywords: consumer credit; consumer rights; strong party to a contract; disproportion of rights of debtor and creditor; unilateral amendment of contract; termination of contract.

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Introduction

The article format allows studying the most important conceptual Ukrainian and Russian regulatory choices in consumer credit, leaving out some narrow technical aspects. The choice of the relevant issues and the exclusion of others are subject to the author's discretion. I largely excluded aspects related to informing of borrowers in order to focus on disproportion of contract terms and on the equalization of contract terms in their essence. However, I cover the problems of the informing of the consumer of the total cost of the credit, with a focus on its "ingredients," not to the technical issues of the informing of a borrower about them. I also will talk of informing of a borrower about variable interest rates, because in this case informing is firmly connected with a legal option to apply a new rate. In principle, the Constitutional Court of Ukraine underlines the importance of protection of the rights of citizens who take consumer credits in terms of such phases as contract conclusion and contract execution.¹

Respective provisions of the legislation are presented in brackets. Unless otherwise stated, notes on Russian legislation imply the current version of the Federal law of 21 December 2013 No. 353-FZ "On Consumer Credit (Loan)" (entered

¹ Рішення Конституційного суду України від 10.11.2011 No. 15-рп/2011 [Constitutional Court of Ukraine, Legal Opinion under A.N. Stepanenko petition, No. 15-rp/2011, 10 November 2011] (Oct. 10, 2018), available at <http://zakon.rada.gov.ua/laws/show/v015p710-11>.

into force on 1 July 2014). Notes on Ukrainian regulation, unless otherwise stated, refer to the Law of 11 November 2016 No. 1734-VIII "On Consumer Lending" (entered into force on 10 June 2017). Notes on EU law refer to the 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.

I believe it important to provide consumer credit statistics with three methodological reservations.

First, according to both Russian and Ukrainian laws, staff of central banks can accept consumer credits from their employer exclusively. Credits by central banks to their staff members are not disclosed in both Russia and Ukraine, but cannot change the general picture significantly due to insignificant volumes of such staff.

Second, the Russian Central Bank publishes official statistics of consumer credits issued by both banks and non-bank financial institutions, but an assignment of such consumer credits between mortgage and non-mortgage credits is disclosed for banks only. However, more than 98% of consumer credits in Russia are issued by banks. For both Russia and Ukraine I converted the sum of consumer credits issued in national currencies into Euro using the official central bank exchange rates on the relevant dates, so 1 January 2016, 1 January 2017 or 1 January 2018 respectively.

Third, the Russian non-bank financial institutions for credits in excess of 1 million Russian rubles (around EUR 14 000) do not disclose whether they are consumer or not. However, the portfolio of such undisclosed situations has never been above EUR 0.3 bln per year. I included all these undisclosed credits in my calculations, considering as nonessential the possible underestimation of the amount of the corresponding portfolio by EUR 0.3 bln in each year.

Table 1: Consumer Credit Market of Russia and Ukraine

| | 1 January 2016 | 1 January 2017 | 1 January 2018 |
|--|----------------|----------------|----------------|
| 1. Consumer credits portfolio of the financial institutions, Ukraine, total (mortgages + non-mortgages), EUR bln (1.1+1.2) | 6.7 | 5.6 | 5.2 |
| 1.1. Consumer credits portfolio of the financial institutions, Ukraine, non-mortgages only, EUR bln | 4.4 | 3.5 | 4.1 |
| 1.2. Consumer credits portfolio of the financial institutions, Ukraine, mortgages only, EUR bln | 2.3 | 2.1 | 1.2 |

| | | | |
|--|------|-------|----------------------------|
| 2. Consumer credits portfolio, both banks and non-bank financial institutions, Russia, total, EUR bln (2.1+2.2) | 74.6 | 114.3 | 135.7 |
| 2.1. Consumer credits portfolio of the banks, Russia, total mortgages + non-mortgages, EUR bln (2.1.1+2.1.2) | 73.6 | 113.0 | 134.1 |
| 2.1.1. Consumer credits portfolio of the banks, Russia, mortgages only, EUR bln | 29.7 | 55.1 | 68.4 |
| 2.1.2. Consumer credits portfolio of the banks, Russia, non-mortgages only, EUR bln | 43.9 | 57.9 | 65.7 |
| 2.2. Consumer credits portfolio of the non-bank financial institutions, Russia, EUR bln | 1.0 | 1.3 | 1.6* *on 1 October 2017 |

Source: the National Bank of Ukraine,² the Central Bank of Russia, my calculations.

The data demonstrates the significant growth of the Russian relevant market over 2016–2017 as well as its come-down in Ukraine for the same period of time.

1. What Is Not a Consumer Credit?

Russian law (1) considers as a criterion for the consumer credit the lack of its connectedness with the commercial activity of the borrower. Ukrainian approach (1.11) is as follows: a consumer credit should not be connected with commercial, independent professional activities or with the execution of the obligations of an employee. Under EU law (3.a) a consumer credit should pursue the “purposes which are outside his trade, business or profession” as a borrower. That is why formally a loan borrowed by an advocate or a notary for the decoration of their offices will not be considered under EU and Ukraine law to be a consumer credit, whereas under Russian law it will be one. There is a problem of a “mixed use” existing as well. Imagine that a small entrepreneur bought a car using a credit. This car is used to take a child to kindergarten in mornings and back again in the evenings, while in the

² Official title of the Ukrainian central bank.

mid-day it is used for commercial purposes. Is this credit a consumer one? Actually, Ukraine and Russian courts in the absence of other criteria will take into account, whether an entrepreneur status was formally designated in the credit contract and the sale agreement. However, it is preferable to regulate this situation in the statutes in the future. Perhaps, the above-mentioned criteria of a “consumer credit” is partly obsolete and should be reviewed, because in the modern world lot of goods and services could be used for both commercial and non-commercial purposes.

The Ukrainian act and EU Directive (2.2) exclude some credits from the scope of regulation. By means of finding the closest equivalent, I made the respective table. Russia is not included in the table due to the conceptual absence in the Russian statute for these exceptions.

It is necessary to mention, that the presence of the credit in the column “EU” means the absence of the consensus among members of EU on the matter whether the EU level consumer protection should cover respective credits. It does not imply, that a type of a credit denoted in the table is never to be regarded as a consumer credit in some countries of the EU with the granting of consumer protection of the respective national legislations. The idea behind the Directive is to determine the minimal standard of the consumer rights protection, so it is not prohibited to expand such a standard on issues that are not covered by the Directive. For instance, provisions on credits can be applied to the credit agreements which are only partly aimed at financing a contract for the supply of goods or provision of a service (cl. 10 of the Directive). I also do not consider it important to immerse in the “borderline area,” which is specifically loans with benefits for the specific categories of consumers, which are regarded to be consumer under very specific circumstances (2.5 of the Directive).

Table 2: Credits Are Not Regulated as Consumer
According to the EU and Ukrainian Laws

| Ukraine | EU |
|---|---|
| Credits that have to be repaid within one month | <p>Credit agreements under the terms of which the credit has to be repaid within three months and only insignificant charges are payable</p> <p>Deferred debit cards, under the terms of which the credit has to be repaid within three months and only insignificant charges are payable</p> <p>Credit agreements in the form of an overdraft facility and where the credit has to be repaid within one month. “Overdraft facility” means an explicit credit agreement whereby a creditor makes available to a consumer funds which exceed the current balance in the consumer’s current account (3.d)</p> |

| | |
|---|--|
| Not sanctioned in advance unforeseeable overdraft above the agreed credit limit amount (that is known in the EU law as overrunning) | _____ |
| Credit agreements without interest (it is also prohibited to declare in the advertisement of the consumer credits on the interest-free character) (7.3) | <p>Credit agreements where the credit is granted free of interest and without any other charges</p> <p>Credit agreements which relate to loans granted to a restricted public under a statutory provision with a general interest purpose, and at lower interest rates than those prevailing on the market or free of interest or on other terms which are more favorable to the consumer than those prevailing on the market and at interest rates not higher than those prevailing on the market</p> <p>Credit agreements where the credit is granted by an employer to his employees as a secondary activity free of interest or at annual percentage rates of charge lower than those prevailing on the market and which are not offered to the public generally</p> |
| Credits for the operations with financial market instruments involving professional participants of the securities market | Credit agreements which are concluded with investment firms as defined in Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on Markets in Financial Instruments (1) or with credit institutions as defined in Article 4 of Directive 2006/48/EC for the purposes of allowing an investor to carry out a transaction relating to one or more of the instruments listed in Section C of Annex I to Directive 2004/39/EC, where the investment firm or credit institution granting the credit is involved in such transaction |
| Credit agreements which are the outcome of a settlement reached in court | Credit agreements which are the outcome of a settlement reached in court or before another statutory authority |
| Credits within the framework of programs of state and municipal authorities | _____ |
| _____ | Credit agreements which relate to the deferred payment, free of charge, of an existing debt |
| Credit agreements involving a total amount of credit less than 1 minimal wage on the date of the conclusion of a contract (around EUR 110 now) | Credit agreements involving a total amount of credit less than EUR 200 |
| _____ | Credit agreements involving a total amount of credit more than EUR 75 000 |

| | |
|--|---|
| Credit agreements included pawnshops, if the item of a pledge is transferred to the pawnshops for storage and the consumer is limited to that pledged item | 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 |
| _____ | Credit agreements which are secured either by a mortgage or by another comparable security commonly used in a Member State on immovable property or secured by a right related to immovable property |
| _____ | Credit agreements the purpose of which is to acquire or retain property rights in land or in an existing or projected building |
| _____ | Hiring or leasing agreements where an obligation to purchase the object of the agreement is not laid down either by the agreement itself or by any separate agreement; such an obligation shall be deemed to exist if it is so decided unilaterally by the creditor |

It is interesting to note that the Russian statute considers interest-free loans as consumer credits (5.21 и 5.9.5-1). The table illustrates, that in Ukraine legislation actually implemented a lot of the EU Directive provisions. However, the Directive does not cover short-term loans (up to 3 months with insignificant charges). The Ukrainian legislator in a very strange way "converted" this construction of the EU altogether regarding all credits that have to be repaid in one month regardless of an interest rate. As a result, the poorest consumers who take payday loans with extremely high interest rates remained unprotected completely.

2. Mandatory Additional Contracts and Compulsory Payments to Creditors and Third Parties

Both Russian and Ukrainian statutes authorize the creditor to issue a loan on the condition of purchase of some additional services for the creditor and/or third parties. In the EU this is called "combined offers" (cl. 22 of the Preamble of the Directive). In some other cases such services could be traded as optional, i.e. not mandatory, purchased at the will of a consumer.

Russian legal provisions on additional services are as follows:

a) A debtor should be thoroughly informed about them, *inter alia*, whether it is possible to refuse from purchasing the particular service or not (5.4.16; 5.9.9; 5.9.15; 7.2; 11.7);

b) Such services should be prescribed by the individual contract terms; it is prohibited to include them in general contract terms (5.7). Here the point should be made that according to the Russian statute every contract on a consumer credit

consists of two parts: a) general terms which are unified by a creditor for all contracts of such kind concluded with different consumers; b) an individual part, which is specific for every particular consumer. Both parts are drafted by a creditor as his offer and then must be accepted or rejected by the consumer. The very controversial issue is how far the creditor can differentiate individual contract conditions in practice, because the competition law de facto demands similar contract offers for similar consumers. There is no such structural division of consumer credit contracts in Ukraine.

I believe, that since systems of dividing contract clauses into “general clauses” and “individual clauses” exist in Russia, it a system of mandatory transfer of former to the repository of the Central Bank of Russia should be implemented. It is necessary first and foremost to credibly fix their content for every moment of the time. Particularly it is important under real current market circumstances, where in some banks such “general terms” do not exist under this heading and are in the form of the single document. In practice, they might be diversified in several very large and complicated documents titled as “Banking Rules,” where they are mixed with other non-credit issues. Moreover, in reality they are not always presented to the consumer before the signing of the credit contract unless the consumer demands this directly. At the same time, in individual terms of credit contracts there is always a provision stating that a consumer had read all general terms and accepted them as well.

Another problem is the retroactive force of the general terms of a consumer credit agreement. Russian creditors amend them from time to time and automatically declare already existing debtors as adhered to the new general terms, which is not legal. On the other side, sometimes there should be an opportunity for creditors to amend general terms even for existing consumers, for example, for the elimination of the violations of consumer rights in the text of the general terms detected by the regulator. Apparently, such a retroactive amendment of general terms for existing borrowers should be subject to the individual authorization from the Central Bank of Russia. After such authorization, all amendments of general terms consistently should be deposited to the repository of the Central Bank of Russia;

c) While disclosure of such services, the right to refuse should be provided, *inter alia*, by conclusion of other agreements which a debtor is obliged to enter into due to the contract on consumer credit (7.2). In actuality, it is difficult to comprehend precisely what “other agreements” means in this context. Also, I will demonstrate in details below, that the consumer right to refuse additional services is limited;

d) The direct execution of a contract cannot be involved with an obligation of a debtor to pay for creditor services which are rendered entirely in the creditor’s own interests and as a result of rendering such services no separate benefit is created for a debtor (5.19; 6-1.2.2). For example, Russian case-law states that a banking fee for opening and closing a loan account is illegal.

In Russia it is permitted to sell a “package” of credit and checking account, including the card one, but if so the opening and account operations directly related

to the repayment of a credit must be free of charge (5.17; 6-1.2.5). There is an internal contradiction in Russian statute: the latter pro-consumer provision (5.17) in case of credit cards use contradicts other provisions of the same statutes which allow fee for issue, servicing of an electronic means of payments during conclusion and execution of a contract on consumer credit, for suspension of operations with use of an electronic means of payment, other fees related to the use of an electronic means of payment (6.4.4; 6.6). I believe, that a credit card is simply a technical method of the access to the credit and accounts are only the technical way of recording of debt. That is why arguments of the Russian banks to justify charging fees about the legal difference between “opening and servicing of an account” and “opening and servicing credit cards” are unfounded. It is impossible to conduct credit card operations without account records, but this is just technique, nothing more. Unlike Russia, there is no such division in the Ukrainian law.

So, it is a mistake to think of credit card operations as something substantially different from account operations. I assess as a serious problem that Russian banks by manipulating these terms and contradictions in the legislation often charge fees for issuance and servicing of credit cards or impose conditions for exemption from this payment, e.g. requirement for the minimal amount of card payments in the sale points within a month. Since the credit card is necessary only for the use of a loan (for the use of personal savings a debit card is enough), fees for the issuance and servicing of credit cards in essence are fees for opening and servicing of a loan account. The latter are not legal.

It is important, that if a bank account, which is mandatory for a borrower to open, is used for the recording of a debt under a credit agreement, the debtor cannot demand the closure of the account until full repayment of his credit debt.³

Besides, the Russian statute requires from a creditor to ensure the opportunity for a borrower to repay the loan free in the area of the reception of the creditors' offer by a debtor, or in the area of the residence of the consumer determined in the consumer credit contract (5.4.12 и 5.9.8; 5.22). In reality, creditors usually offer free repayment of a loan by wire payment or by cash through ATMs or payment terminals. Repayment of a loan by cash through a cashier in the bank branch office often is an object of a fee. I believe that such fee is legitimate only if ATMs and payment terminals function in the respective branch and change is provided. If ATM and payment terminals do not function or do not provide change, then the fee for credit repayment through the cashier violates the rights of the consumer.

³ Определение Верховного Суда Российской Федерации от 07.03.2017 No. 7-КГ16-6 [Supreme Court of the Russian Federation, *A.M. Sharunov v. Bank VTB 24*, No. 7-KG16-6, 7 March 2017] (Oct. 10, 2018), available at <http://legalacts.ru/sud/opredelenie-verkhovnogo-suda-rf-ot-07032017-n-7-kg16-6/>; Определение Верховного Суда Российской Федерации от 06.02.2018 No. 67-КГ17-26 [Supreme Court of the Russian Federation, *T.N. Ruzavina v. PAO Sberbank Rossii*, No. 67-KG17-26, 6 February 2018] (Oct. 10, 2018), available at <http://legalacts.ru/sud/opredelenie-verkhovnogo-suda-rf-ot-06022018-n-67-kg17-26/>.

The Supreme Court of Russia in the “Observation of Court Practice on Civil Cases Related with the Resolving of Disputes Arising Out of the Performance of Credit Obligations” of 22 May 2013 states (4.2), that the creditors requirement addressed to a borrower about prescription of the particular insurance company is not based on the law.

In my opinion, the Ukrainian approach to the additional chargeable fees is more pro-creditor in comparison with a Russian one. Ukraine legislation explicitly listed some examples of such legally chargeable fees (evaluation of all consumer assets for the assessment of credibility, evaluation of those assets which serve as a security for a loan; insurance; opening and servicing of a bank account; notarial or other additional collateral services) (20.2). The Ukrainian creditor could be entitled to make a purchase of additional creditor’s or third parties’ services as one of the conditions for the issuance of a loan (8.2.2; 9.3.7; 20.1). If in Russia, as it was stated above, the legislation at least has contradictions, the Ukrainian legislator clearly permitted all of them (8.2.2.) The latter in my opinion is not correct.

Besides, according to the Ukrainian regulation, a creditor for each of the additional services is entitled to create a list of at least three persons who can render such services, and in this case, a borrower is obliged to choose the service provider only from these closed lists. Only regarding a lack of such list, the borrower can make his own choice of the additional service provider (20.3; 20.4). If for some reason the contract on such services with “listed” third party will be terminated in the future, a borrower has to conclude another one with another “listed” service supplier within 15 days from the date of termination; otherwise, a creditor has a right to demand early loan repayment. To my mind, a more fair and competitive approach would be to permit a consumer the choice between insurers with a prescribed credit rating. A minimal credit rating can be stipulated by on the condition that at least 10 insurance companies in the country obtain such rating. Otherwise, there is a high probability of a creditor’s prescription to the three insurance companies with overpriced services, beneficiaries of which are occurred to be beneficiaries of a creditor or at least to be “personally very friendly” with them.

Unlike Russia, the Ukrainian legislation does not differentiate creditor’s rights in the sphere of additional contracts between insurance and the related other services of third parties. The Russian legislative approach highlights services of insurers among other third parties services. I name it “insurance or worse terms on the sum, duration, and the interest rate.” The point is that a Russian creditor is not entitled to demand insurance as a mandatory requirement for the issuance of a loan. However, he has a right to offer the borrower a loan with insurance and “better” sum, duration, interest rate vs. a loan without insurance with worse sum, duration, interest rate. In different situations it might be economically more beneficial for the consumer to accept or reject insurance. In Russia, it is also permitted to conclude a consumer credit contract conditioned on the procurement of insurance in the future with

worsening of terms regarding the terms of a loan without insurance in the case of the borrower's failure to buy insurance (7.2;7.10; 7.11). So in the case of a 30-day delay of a borrower in the purchase of such insurance, a creditor also is entitled to terminate the credit contract and demand early repayment of a loan within a reasonable period of time, which cannot be less than 30 calendar days from the moment of sending to a borrower the respective notice (7.12).

3. Total Amount Payable by the Consumer

According to the EU law (3.h, 3.g, 3.l) "total amount payable by the consumer" means the sum of the total amount of the credit and the total cost of the credit to the consumer. In this context "total amount of credit" is actually a principal loan sum. "The total cost of the credit to the consumer" is actually the sum of all consumer payments, apart from a principal loan amount and notarial charges. Additional services (*inter alia*, insurance payments) can be included in the total cost of the credit to the consumer, if they are mandatory for the obtainment of a loan (see cl. 20 of the Preamble of the Directive as well). Apparently, that very flexible phrase can be explained by the lack of consensus among EU members on the matter of what kind of additional (insurance) services should be included and by the different practices of the EU member states.

In this line, I will start with differences in terminology. In the Russian law "total cost of a consumer credit" (called PSK) means an actual annual interest rate under the Ukrainian approach or annual percentage rate of charge (3.i) under the EU law. That is what is called in EU law as the "total amount payable by the consumer," in Ukraine as a "full value of a loan for a consumer," in Russia as a "total sum of borrower's payments within the period of duration of a contract on consumer lending determined on the basis of terms of a consumer credit contract acting on the date of conclusion of a consumer credit contract" (7.15). EU and Ukrainian wording looks more clear, because the concept of "an interest rate" is more visible, where the level of the interest rate is calculated.

In Ukraine "full value of a loan for a consumer" is a principal amount of the loan which is issued or can be issued to a consumer plus "general loan costs" (1.2). General loan costs include in essence all sums which a consumer must pay to a creditor and a credit intermediary with some stipulated by law exceptions (8.1; 8.3; 12.1.9). In particular, payments to all other third parties, excepted credit intermediaries, for example to insurers, must be disclosed by a creditor to a debtor in a written form, but not included in general loan costs, even if mandatory (8.2.2; 9.3.7). The latter, in my view, is incorrect.

Besides, in Ukraine there are two types of payments which are not included in general loan costs: a) penalties for the breach of a contract; b) payments for goods or services which a consumer is obliged to make regardless of the fact whether the

transaction was concluded at the borrower's own cost or on consumer credit cost (8.2.2.). Unfortunately, I do not fully comprehend what exactly is implied under the last option.

In the same line with Ukraine, in Russia penalties for the breach of a contract are excluded from PSK. According to Russian law, PSK includes all payments that a debtor should pay to a creditor or to third parties, except insurers and exclusions explicitly stated by the law. Insurance payments in different situations are included in or excluded from PSK, this issue is considered below in detail (6.4; 6.5).

Payments based on the requirements of a federal law are excluded from PSK. To my mind, it is incorrect. It's legal to use a part of consumer credit to pay taxes and fees directly connected with the main transaction for which a loan was issued. So it is unclear why such costs are excluded from calculations. Moreover, sum of local taxes connected to such transactions are included into PSK if a credit is a source of their funding.

According to the Russian legislation, PSK is also not included concerning:

a) Payments of a borrower for servicing a credit which are prescribed by the consumer credit contract if sum or/and date of payments hinge on a consumer's decision or his behavior. On the one side, I understand incentives for such a provision which is the impossibility to foresee such cash flow at the moment of the conclusion of a contract. However, this issue is controversial, since in many actual cases it is possible to evaluate and include in calculation of at least a possible minimum of such sums in the future. Moreover, the Russian statute offers such a methodological approach for financial calculations in some other situations (6.7);

b) Non-mandatory services which do not influence the obtainment of a loan and an interest rate of a loan, if a borrower can terminate them for a future time within 14 days after obtainment of a loan with a payment for services only for the days of actual use. Apparently, it implies additional guarantee of technical servicing of goods which are subject to purchase on the credit cost. To my mind, it would be more correct to include such sums in PSK, but to recalculate PSK in case of borrower's termination within 14 days of the cooling-off period;

c) Charges for currency exchange, the inclusion of a card in "a stop-list" and other costs for the borrower connected with the use of electronic means of payment. Obviously these exceptions cover credit card operations. This question has already been studied above. My serious concern is caused by the very wide formulation of "other costs of a borrower connected with the use of electronic means of payment."

Rules of insurance premiums are the following. Insurance premiums are included to PSK, excepting three cases:

a) If the beneficiary under the insurance contract is a borrower or his/her close relative;

b) If the subject of insurance is the preservation of an item of the pledge which secures repayment of a loan;

c) If dates of repayments under consumer credit contract are dependent on the conclusion or non-conclusion of an insurance contract.

I negatively assess all these three exceptions. To start with, I have never seen in real life the requirement to conclude an insurance contract in favor of a borrower or his/her close relative exclusively, because there is no sense in this for both for a creditor and a borrower. Usually, insurance contracts are in fact mixed. It means that they are concluded partly in favor of a creditor and partly in favor of a borrower as an additional beneficiary after the economic interests of a creditor are fully granted.

Some prevalent practical situations fall under all above-mentioned cases simultaneously. Let us imagine a consumer credit on a purchase of a car with a term of interest rate decrease in the case of a conclusion of the insurance contract. The primary insurant is a bank, but the borrower himself/herself is a secondary insurant for part of recovery that exceeds the balance of credit debt. The price of the car and the sum of insurance is EUR 10 000. As a result of a car accident with no fault of the borrower the car is entirely written-off, irreparable. The current balance of the borrower's consumer credit debt is EUR 6000. So the bank receives from the insurer EUR 6000, the consumer gets EUR 4000 respectively. It is unclear why insurance payments under such a loan are not included to PSK. Non-inclusion of insurance payment sums artificially decreases PSK in the eyes of the consumer. Moreover, since 24 June 2018 in new contracts regarding consumer lending secured by a mortgage, PSK will include the sum of an insurance premium paid by a borrower under a contract on insurance of the mortgage item (6.1.3). It is a correct approach. But it remains unclear why the same rule is not applied to all insurance payments.

4. Floating (Variable) Interest Rates

Both Russian and Ukrainian laws permit application of floating (variable) interest rates. Two important points should be considered here:

- a) A correct calculation of a rate;
- b) Informing a consumer about a new level of a rate as a condition for its application.

The Russian law prescribes that variables should be irrespective of circumstances depending on the creditor or persons affiliated with him, and publication in public sources regularly. A creditor has to notify a borrower on a change of this interest rate within 7 days from the beginning of the lending period of application of this new interest rate and send to the borrower a refreshed schedule of payments under a contract (5.4.8; 9.4; 9.5).

In June 2018 a new regulation is going to enter into force (5.9.5.1) which is to include in a credit agreement a notion on a change of a sum of costs in the event of increase of contracted floating interest rate by 1 percentage point starting with the second payment, on the closest date after a presumable date of a conclusion of a contract.

Ukrainian law requires a creditor to notify a borrower, a guarantor and all other people obliged under a contract about a change of a floating interest rate at least 15 days prior its application. There is an obligation to disclose an index in the office where a creditor renders services. According to the law, a calculation of a variable interest rate should provide an opportunity to calculate accurately the interest rate in any moment within the duration of a credit contract (9.3.4; 11.4; 11.5; also Art. 1056-1 of the Civil Code of Ukraine). There are established following rules as well:

a) A credit contract should include the maximum level of interest rate increase within a period of the contract;

b) A current index should be periodically, at least once in a month, published in mass media or disclosed through the public regular sources of information. A credit contract should include a note to the sources of information about the respective index;

c) An index should be based on objective indicators of the financial environment which gives an opportunity to define a market price of credit resources;

d) An index should be established by an independent organization with an acknowledged reputation on the financial market.

To my mind, Ukrainian regulation in this particular issue is better compared to the Russian one. In Ukrainian law such obligations as periods of notices, notification of borrower, guarantor and all others obliged under a contract are more “pro-consumer,” and the mechanism of the index and interest rate determination is better elaborated. Shortcomings of both countries’ regulation are: lack of any consumer opportunity to influence on the elaboration of index as well as a way of notice about changes of an index; an opportunity of a creditor to include very complex formulae of index calculation that are difficult to be comprehended by a consumer. Ideally, an index should include a number of variables fixed on the legislation level (e.g. the key interest rate of a central bank, inflation rate). Components and formulas of index and interest rate calculation should be subject to the agreement between associations of creditors and central banks.

5. The Full Prohibition of Some Consumer Credit Practices

Russian law prohibits three practices:

a) A transfer of a sum of a credit as a security (even partially) for a credit. Unfortunately, it is unclear, whether it is prohibited to transfer a sum of a credit for the security of the same credit, or other credits of the same creditor, or credits of other creditors. I believe, it would be also reasonable to explicitly prohibit the use of consumer credits for the financing of the initial payment of a borrower under a mortgage (including issued by other creditors) as mortgages without initial borrower payments at his own expenses are risky for a consumer and harmful for

the economy as a whole. Experts have reached consensus on the view that one of the reasons of the global financial crisis of 2008 was the decrease of requirements to the initial payment under a mortgage at the borrower's own expense;

b) A condition that in case of payment delay indebtedness will be paid by the way of refinancing without conclusion of a new contract. This rule is correct but insufficient. Permission of refinancing by conclusion of a new contract creates an essential risk of issuance for a new loan on materially worse conditions to a borrower. Besides, refinancing of a debtor by the same creditor artificially enhances banking balance sheets because bad credits magically turn into good credits, but in reality no improvements in the credit quality happens. That is why it is necessary to regulate refinancing by a more conservative way;

c) Conditions which oblige borrowers to use third parties services in connection with the execution of monetary borrower's obligations under a credit agreement for a separate payment. It has been already considered above.

Consumer credits in foreign currencies are prohibited according to the Ukrainian law (3.4). This prohibition is not absolutely new as it was introduced earlier, after the crisis of 2008. However, the Supreme Court interpreted this ban restrictively, authorizing some consumer credits in foreign currencies. The authors of the law clearly planned to fully remove the currency risks for the consumer. However, the ban's legislative technical flaws have led to the Supreme Court's finding that it is legitimate to express the consumer's obligations in the equivalent of foreign currency, if he or she repays in the Ukrainian national currency. So it is actually prohibited to use only foreign currency as a means of payment.⁴

Before fall 2008 it had been a widespread practice in Ukraine to lend in foreign currencies as their interest rate much was lower in comparison with the interest rate in the national currency, and currency exchange rate had been stable across 2000–2007. As a result of that crisis, devaluation of the national currency during 2008–2009 had occurred by 60%. This led to the increase of population indebtedness under consumer credits taken in foreign currencies by 60% calculated in the national currency. Even though in Russia there is no such prohibition, and the law has some regulatory stipulations concerning consumer credits in foreign currencies (5.4.17; 5.4.18; 5.9.5; 6.6), it should be mentioned that in Russia loans in foreign currencies are almost not issued now.

⁴ Постанова Верховного Суду України від 01.11.2017 No. 6-2864цс16 [Supreme Court of Ukraine, *X v. Kasa narodnoi doromogi LTD*, No. 6-2864тсс16, 1 November 2017] (Oct. 10, 2018), available at http://search.ligazakon.ua/l_doc2.nsf/link1/VS170732.html; also Постанова від 18.10.2017 No. 6-2024цс16 [Supreme Court of Ukraine, *Porsche Mobility LTD v. X*, No. 6-2024тсс16, 18 October 2017] (Oct. 10, 2018), available at <https://oda.court.gov.ua/sud1590/pravovipoziciivsu/6-2024cs16>. Unlike Russia, the Supreme Court of Ukraine as usual does not disclose the surnames of natural persons who participated in its solved disputes.

6. Priority of Payments

Unfortunately, in both Ukraine and Russia, the great proportion of “debt slavery” cases is caused by mistaken legislation of the priority of payments rules. The second reason which is related to Ukraine only is the lack of the personal insolvency law in that country.

In case of the inefficiency of borrower’s money to fully repay a loan the Russian legislation prescribes such priority of payments (20.5):

- 1) Arrears of interest;
- 2) Arrears of principal amount of a loan;
- 3) Penalties;
- 4) Interest for the current period of payments;
- 5) Principal amount for the current period of payments;
- 6) All other payments according to legislation or a contract.

Before 1 July 2014 there was another regulation of priority of payments for consumer credits according to the general provisions of Article 319 of the Civil Code of RF:

- 1) Creditor’s expenditures for receiving an execution;
- 2) All interests;
- 3) The principal amount of a loan.

This order of phases remains now for commercial credits. The Civil Code of Russia remains silent on penalties. However, even for old time credits the case-law stated that the condition of consumer credit contracts where penalties should be paid first was illegal.⁵ Subsequently, the Russian Supreme Court issued controversial interpretation.⁶ In latter, the Supreme Court confirmed that penalties should be paid after the principal amount of a loan and interest. On the other side, the Supreme Court at the same time stated that a creditor could claim for the penalty without claiming for the principal amount and interest when the latter are overdue. It is unclear how these two positions of the Supreme Court combine with each other. If the priority of the principal amount is higher than the penalty, then any sum of collection should be directed to the payment of the principal amount of the loan and only after that to the penalty. Thus, in case of the execution of the resolution on the collection of penalties, there are two options: a) to breach Article 319 of the Civil

⁵ Постановление Верховного Суда Российской Федерации от 10.12.2014 по делу No. 307-АД14-1846 [Supreme Court of the Russian Federation, *Citibank v. Department of Rospotrebnadzor in St. Petersburg*, No. 307-AD14-1846, 10 December 2014] (Oct. 10, 2018), available at <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=ARB002&n=413954#09865301681944278>.

⁶ Постановление Пленума Верховного Суда Российской Федерации от 24.03.2016 No. 7 «О применении судами некоторых положений Гражданского кодекса Российской Федерации об ответственности за нарушение обязательств» [Resolution of the General Meeting of the Supreme Court of the Russian Federation No. 7 of 24 March 2016. On Court Application of Some Provisions of the Civil Code of the Russian Federation Concerning the Liability for the Breach of Obligations], para. 49 (Oct. 10, 2018), available at http://www.consultant.ru/document/cons_doc_LAW_195783/.

Code of Russia or b) to redistribute the collected sum to repayment of the principal amount of a loan.

It is also important to consider that priority of phases of payments under the Civil Code of Russia is a default rule (it can be changed by contract), but priority under the new law on consumer credit is a mandatory rule. In my opinion, the new rule on priority of payments in comparison with the one prescribed by the Civil Code has both advantages and shortcomings for consumers. It is good for consumers that the principal amount of a loan got a higher priority than current interest; it is also reasonable, that enforcement expenditures of a creditor like legal fees were moved from the first phase to the last one. On the other side, it is unfounded that a penalty gets a priority over current (not overdue) payments for both interest and the principal amount.

Apparently, the Russian Government submitted to the Parliament a new bill (No. 287844-7), which is actually intended to return to the regulation of priority of payments for consumer credits to the rule of the Civil Code: the first phase is all interests; the second phase is all sums of principal amount of a loan; the third phase is penalty; the fourth phase is all other payments. However, under this regulation, the following issue can arise. Inside some phases both overdue and non-overdue sums are consolidated, for example, overdue and non-overdue sums of interests in the first phase. So it is unclear, what should be repaid first inside one particular phase if a payment of a borrower will be insufficient to full payment of the phase sums.

In Ukraine priority is the following (19.1):

- 1) Overdue principal amount and interests;
- 2) Current sum of a loan and current interests;
- 3) Penalties and all other payments.

Ukrainian approach is better than the Russian one in the issue that penalty is in the last phase. It is reasonable as well that principal amount (at least its overdue part) is in the first phase. On the other side, it is incorrect that both first and second phases contain two different in essence sums. It will inevitably lead to conflicts about what should be paid first inside the first phase in case of insufficient payments: the overdue principal amount or overdue interest (phase 1); the current sum of the loan or the current interest (phase 2)? It has already been noted above that it is methodologically incorrect to consolidate in one phase two different by nature sums. However, the Ukrainian legislator made the same mistake as the Russian one.

Unfortunately, the Ukrainian order of payments, as the Russian one, does not prevent new debts of consumer expansion even if it can actually be achieved. Also, a maximum interest ceiling matters. Indeed, in Ancient Rome, the law of which is often noted by scholars, interest could be paid before the principal amount, but there was a legislative threshold for interest rate (4–12% in different times and for different sorts of creditors). In the case of 6% or 8% interest per annum, I can accept a payment of interest before principal amount, but it's absolutely unacceptable for real Ukrainian and Russian markets where consumer credit interest is sometimes like 50%, 100% and

even more per annum. If so, the improper payment order, prescribed by the Parliament, leads to debtor slavery which could be avoided by the correction of the legislation.

So I believe, that diligent regulation should be prescribed in the first phase of repayment of the overdue principal amount to stop expansion of charge of interest; the second phase is not overdue principal amount of a loan to avoid initiating the charge of new interest; the third phase is current interests, then all overdue sums. Penalties should not be allowed as accrual of fines on interest, but it is permitted in both Russia and Ukraine now. The general principle of protection of consumer rights should be as follows: it is more important to preclude new debts, and then deal with older ones. There is nothing worse than when a consumer debt starts to grow astronomically only because of the legislator's fault.

7. Restriction of the Interest Rate

Russian law (6.8; 6.9; 6.10; 6.11) restricts the maximum interest rate for consumer credits, which should not exceed the market average interest rate under similar loans increased by a third. Technically it works like that: if the market average interest rate under the respective category of loans is 20% in the quarter 1, then the maximum permitted interest rate in the quarter 3 will be 26%. There is a technical time lag in one quarter due to the fact that the Central Bank of Russia needs some time to calculate average interest rate in the ended quarter. While the first days of the quarter 2 this information is not presented yet, still issuance of new loans on the market should not be stopped. Maximum permitted rates are calculated by the Central Bank of Russia separately for different sorts of consumer credits, technically there are several large tables. Differentiation is based on such parameters as loan sums ranges, credit term ranges, secured and non-secured credits, type of a creditor (there are 5 types of consumer creditors in Russia, calculations are made separately for each type based on 100 largest market companies of each type), goal of borrowing, use of electronic means of payments, existence of the credit limit scheme.

I believe in this context, there are no sufficient grounds for such criterion of differentiation as "use of electronic means of payments," because it does not impact on reasonability or justification of the interest rate.

From 1 June 2018, while calculations of the interest ceiling for consumer credits a new criterion will be applied, which is receiving by borrowers through account opened by his creditor of salaries, other regular payments, accrued in connection with the performance of employment duties, pensions, benefits and other social or compensatory payments. I have a controversial attitude to this new parameter because in the real current market situation receiving salaries on bank accounts does not impact or impacts little on the interest rate offered by the same bank. Each new parameter makes calculations more complex which are already heavy and difficult for understanding by borrowers without special financial skills. Besides, all thing being

equal, bank interest rates applied in Russian consumer credits now are much lower compared with other sort of creditors. Government should first of all fight against extreme interest rates of some non-bank creditors; this new parameter does not help it significantly. Consumers could win from the new regulation if banks will establish, for example, the sharp difference in interest rates between their clients who receive salaries/pensions on their bank account and for other clients. But it is not likely to occur as banks can do it right now if they want to, but this is not happening.

Based on analysis of the real Russian market situation, I suggest to introduce new parameters as “200% of the average market interest rate” as a substitute of existing “133% of the average market interest rate,” but to harmonize it for all types of consumer creditors. If to cancel such parameters as “type of a creditor” and to calculate maximum interest rate uniformly, the new harmonized maximum rate will be closer to the actual “banking” one. It can be explained by the fact that the largest banks issue relatively more sums of loans compared to non-bank organizations. It is abnormal when now for some of consumer credits the interest ceiling is around 30% per annum now, but and for some others it is around 500% per annum. Moreover, the latter is related to payday loans for the poorest citizens.

The most sensible question is the activity of such types of Russian consumer creditors as so-called “micro financial organizations” (MFOs). Since there are very high-interest rates under short-term payday loans (sometimes more than 500% per annum), restriction of the new law based on the principle “133% of the market average interest rate of the proper sort of creditors” did not help their consumers a lot, as extreme interest rates of such creditors remain legal. Amendments to the Russian Federal law “On Microfinance Activities and Microfinance Organizations” introduced new restrictions for this type of creditors only. The debt of their consumers in absolute figures should not be above some thresholds calculated as the principal amount multiplied by some coefficient and the overdue part of a loan multiplied by some coefficient. These coefficients prescribed by the federal law differ due to the moment of a conclusion of a credit agreement. The Central Bank of Russia reasonably pursues in the Parliament the policy of gradual reduction of such coefficients level. I think, that if the Central Bank of Russia chose such path of “coefficients based on sum of credit and sum of delay” instead of policy of cutting of permitted interest rates to the adequate level, then it would be nice to facilitate this process.

Speaking of the case-law, the Supreme Court of Russia fluctuates on the issue how better to protect consumers from extreme interest rates. Sometimes it acknowledges restriction of payments in the form of “coefficients” described above, therefore not interfering with interest rates.⁷ Sometimes the Supreme Court interferes with an

⁷ Определение Верховного Суда Российской Федерации от 06.06.2017 No. 37-КГ17-6 [Supreme Court of the Russian Federation, *MFO “Alex Invest” v. E.A. Smirnova*, No. 37-KG17-6, 6 June 2017] (Oct. 10, 2018), available at <http://legalacts.ru/sud/opredelenie-verkhovnogo-suda-rf-ot-06062017-n-37-kg17-6/>. In this case the credit agreement was concluded on 21 July 2015, at interest rate 1.5% per day.

interest rate by reducing it based on such considerations. Since high-interest rates under MFO's payday loans is explained by the short-term character of loans, they can be applied only to the very short period of time. So in the LLC "*Dostupno Dengi*" v. D.V. *Klygin* case⁸ the Court ruled that as the consumer credit was issued at 730% per annum for 15 days, this extreme interest rate can be applied only for 15 days period regardless of the fact of delay. If charging of interests is permitted for the period of several months, as the creditor demanded, then there is no such attribute as the "short term." So for the following period starting from the 16th day from issuing the credit (it was actually the first day of delay), the Supreme Court cut interest rate to 17.53% per annum, based on the market average interest rates of banks under similar loans. This particular consumer credit contract was concluded on 27 June 2014, i.e. 4 days prior of entering into force the new Federal law "On the Consumer Credit (Loan)." However, that was not an obstacle for the Supreme Court to ground his ruling on this Law and apply the not prescribed by law correction of loan issued by the distinctive creditor.

In Ukrainian law, unfortunately, there is no regulation concerning the ceiling of the interest rate under consumer credit contracts.

8. Unilateral Refusal from a Loan Within the Cooling-Off Period

Based on the concept of the cooling-off period, both Russian and Ukrainian legislation authorize a consumer to refuse from the consumer credit contract within 14 days. Starting point is determined differently so from the date of receiving of money in Russia, from the date of the contract conclusion in Ukraine. Both countries have provisions, that require from a consumer who is exercising the right to refuse, to return a loan and pay interest for the actual period of its use. If a loan was issued for the specific goal, under the Russian law duration prolongs to 30 days. Probably it was taken from the EU law concept of "linked credit agreements" but the Russian consumer credit contract for specific purposes is not the EU linked credit agreements, because in the Russian concept there is neither a special partnership between consumer creditors and traders, nor consumer creditor's responsibility for the trader.

Likely, the concept of cooling-off period had more sociable value in the period when there was no opportunity for early repayment of a loan free or with a small fee after the expiration of the cooling-off period. Expanding the right of consumers on early repayment objectively decreased the practical value of the cooling-off period concept.

According to Ukrainian regulation, refusal from a credit agreement within the cooling-off period leads to the refusal from additional (collateral) services (15.5).

⁸ Определение Верховного Суда Российской Федерации от 22.08.2017 No. 7-КГ17-4 [Supreme Court of the Russian Federation, LLC "*Dostupno Dengi*" v. D.V. *Klygin*, No. 7-KG17-4, 22 August 2017] (Oct. 10, 2018), available at <http://legalacts.ru/sud/opredelenie-verkhovnogo-suda-rf-ot-22082017-n-7-kg17-4/>.

Russian law does not have such direct provisions. The Supreme Court decided that if the consumer terminates his credit contract, additional insurance obligations are terminated as well based on the general provisions of the Civil Code of Russia (Art. 988).⁹ However, lack of clear rules on termination of contracts on additional services due to the termination of a credit contract is the obvious shortcoming of the Russian consumer law.

The Ukrainian law (15.6) excludes the right of a consumer to refuse from a loan agreement within the cooling-off period in two cases: a) the main agreement, for which a loan was issued, was a contract on rendering services and it has been already performed to the moment of the consumer refusal – it is quite a logical rule; and b) obligations under a consumer credit contract are secured by the notarized contract. The latter is definitely an absurd anti-consumer provision, which is impossible to accept for me, despite the fact that in a real market such contracts are as usual connected with real estate.

Overall, the expanding of consumer credit legislation on mortgages is a complex and controversial phenomenon. It requires additional study which is out of the scope of this article. Clause 14 of the Preamble of the EU Directive prescribes that

Credit agreements covering the granting of credit secured by real estate should be excluded from the scope of this Directive. That type of credit is of a very specific nature. Also, credit agreements the purpose of which is to finance the acquisition or retention of property rights in land or in an existing or projected building should be excluded from the scope of this Directive. However, credit agreements should not be excluded from the scope of this Directive only because their purpose is the renovation or increase of value of an existing building.

Specific features of the immovable property are so sufficient, that for such sort of credits it was necessary to approve a special Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on Credit Agreements for Consumers Relating to Residential Immovable Property and Amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No. 1093/2010.

9. Early Repayment of a Loan After the Expiration of the Cooling-Off Period

Both Russian (11) and Ukrainian (16.1; 16.2; 16.3) legislation have provisions on the opportunity of consumers for early repayment of a loan partially or entirely.

⁹ Определение Верховного Суда Российской Федерации от 31.10.2017 No. 49-КГ17-24 [Supreme Court of the Russian Federation, *Regional Social Organization of Protection of Consumer Rights "Fort-Yust" of the Republic Bashkortostan in the name of G.V. Islamova v. Public JSC Bank VTB*, No. 49-KG17-24, 31 October 2017] (Oct. 10, 2018), available at http://vsrf.ru/stor_pdf.php?id=1603454.

In case of early repayment, a schedule of payments in both countries is subject to recalculation based on the new decreased principal amount of credit. Ukrainian legislation technically is more pro-consumer in this aspect compared to the Russian one, as it establishes absolute free of charge early repayment (16.3). Whereas in Russia a creditor can charge interests to the date of the regular current payment under a loan schedule but no more than 30 days even if a borrower is ready to repay immediately (11.4; 11.5).

Before being taken into force the actual federal law in 2014, there was not an explicit provision for early repayment in the Russian parliamentary statutes. However, even for consumer credits issued in 2011, so the Supreme Court supported the consumer request addressed to the creditor to update a schedule of current payments as for early payment.¹⁰

Nevertheless, EU law authorizes some small fees for early repayment (16). Consumers of EU member states where high fees for early repayment had been permitted by national law (Cyprus) won from the new EU law, as the Directive *de facto* forced national legislators to reduce fees significantly. Also the consumers won if there had been specific conditions of charging fees if national legislation which became illegal due to the implementation of the Directive (Austria). However, consumers of EU member states where early repayment fees had been prohibited at all (Poland, Latvia), lost because creditors were entitled to charge them. The Russian approach is the following. The consumer who wishes to early repay a loan is obliged to notify a creditor prior to repayment (up to 30 days) and pay interest for this period. This is similar to the approach adopted in Portugal. The latter is criticized by the experts of the EU who research the implementation of the Directive by national legislators.¹¹ However, it must be added that a lot of the Russian banks refused to charge early repayment fees from their borrowers.

10. Penalty

Both Russian and Ukrainian legislation restrict the sum of a penalty in legal relations on consumer credit.

Ukraine approach is the following (21.1). Penalty rate should not exceed the double key rate of the National Bank of Ukraine within the period of delay and also, in the absolute figures, should not exceed 15% of the overdue sum. Besides, all penalties for the breach of the one consumer credit contract, connected with a delay or not, should not in sum exceed 50% of the issued loan (principal amount).

¹⁰ Определение Верховного Суда Российской Федерации от 01.03.2016 No. 51-КГ15-14 [Supreme Court of the Russian Federation, *I.V. Shichenko v. Altai Department of the Open JSC Sberbank Rossii*, No. 51-KG15-14, 1 March 2016] (Oct. 10, 2018), available at <http://www.garant.ru/products/ipo/prime/doc/71254772/>.

¹¹ European Parliament, Implementation of the Consumer Credit Directive, Directorate-General for Internal Policies, Internal Market and Consumer Protection, IP/A/IMCO/ST/2011-15, January 2012.

In Russian consumer credits, penalty should not exceed 20% of annual interest charged from the overdue sum or, if a loan is interest-free, 0.1% per day charged from the overdue sum (5.21). The unclear issue is how to apply penalties for the breach of the consumer credit contract, which is different from its delay?

Earlier according to the both Russian and Ukrainian civil Codes the courts had a discretion to reduce a fine for delay if they found it extremely high. The problem was that the court used their power arbitrarily. In 2013 the Constitutional Court of Ukraine examined on merit the claim against the possibility of charging of extreme fines in consumer credits, and ruled that imposing of ceilings for the fines for violation of the civil contracts is the parliamentary discretion, moreover, the courts have the power to reduce them on a case-by-case basis.¹² However, the Parliament did not impose a sharp ceiling. The problem was the extreme distribution in opinions of different local judges about the fair level of fine for delay in consumer credits. Unfortunately, the Constitutional Court refused to solve it in 2013. It has been solved by the Parliament for new consumer credits issues since 10 June 2017, but remains unsolved for the older consumer credits.

Some Ukrainian creditors included in their consumer credits provisions which authorized two application simultaneous fines for the same delay: fixed fine for the fact of delay as such plus a fine proportional to the duration of delay. The Supreme Court found that illegal based on the general provisions of Article 61 of the Constitution of Ukraine which prohibits double legal responsibility of the one sort of responsibility for one violation.¹³ It is important to mention that both Russian and Ukraine legislations authorize in case of delay the accrual penalties on interest, not only on principal amount on credit. I consider that to be an extremely negative phenomenon.

In June 2018 in Russia it will enter into force some new specific rules concerning consumer credits secured by mortgage (5.9.5-1). Penalty rate for the delay under such type of a loan will be reduced to the ordinary key rate of the Central Bank of Russia at the date of entering into the respective contract, or 0.06% per day from the overdue sum in case of the interest-free consumer credit.

11. Overdraft

Ukrainian law differentiates a special type of a consumer lending contract which is overdraft for the period from 1 to 3 months or no first demand. Some general consumer

¹² Рішення Конституційного суду України від 11.07.2013 No. 7-рп/2013 [Constitutional Court of Ukraine, Legal Opinion under D.O. Kozlov petition, No. 7-rp/2013, 11 July 2013] (Oct. 10, 2018), available at <http://zakon.rada.gov.ua/laws/show/v007p710-13>.

¹³ Постанова Верховного Суду України від 11.10.2017 No. 6-1374цс17 [Supreme Court of Ukraine, *PAO Commercial bank Privatbank v. X*, No. 6-1374ts17, 11 October 2017] (Oct. 10, 2018), available at <https://oda.court.gov.ua/sud1590/pravovipozicii/su/6-1374cs17>; also Постанова Верховного Суду України від 21.10.2015 No. 6-2003цс15 [Supreme Court of Ukraine, *Alex-Bank Ltd. v. X*, No. 6-2003ts15, 21 October 2017] (Oct. 10, 2018), available at http://search.ligazakon.ua/l_doc2.nsf/link1/VS150956.html.

guarantees are not applied to this contract, and a creditor has a right to demand a full repayment of such loan at any moment within a period established by a contract starting from the day of receiving the debtor of such notice from a creditor (3.3; 9.3.12; 12.4). In Russia there is not a similar specific legal concept. What kind of loans are considered to be of this type in Ukraine and why they are needed in Ukraine is unclear to me. My attitude towards this construction is negative. As I demonstrate below there is no equivalent in the EU law.

The EU Directive is not applied to some types of loans such as deferred debit cards, under the terms of which the credit has to be repaid within three months and only insignificant charges are payable (cl. 13 of the Preamble). But it does not correlate with the Ukrainian model, in the latter there is no such attribute as “insignificant charges.”

There is a concept of specific credit agreements in EU law to which only some provisions of this Directive are applicable (cl. 11 of the Preamble). It is the overdraft facility and where the credit has to be repaid on demand or within three months (2.3) and credit agreements in the form of overrunning (2.4). It is true, that under these agreements consumer protection is relatively lower. However, unlike the Ukrainian approach, excepted demand loans, there is no right of a creditor to demand a loan repayment at any moment within a period established by a contract from the day of receiving such notice from a creditor.

Besides, the EU Directive has provisions concerning open-ended agreements which can be terminated through the simplified procedure. Indeed, in the real market many loans are very long-term (e.g. credit lines under credit cards). There is the logic behind regulation, which allows unilateral termination of a contract because parties should not be forever bound by it. EU law permits such termination: a) at the will of consumer with a notice of a creditor (a default rule is 1 month before the termination); b) at the will of a creditor if it is agreed in a credit contract with a notice of a consumer 2 months prior the termination (cl. 33 of the Preamble; 13.1, 13.2).

Moreover, a creditor under this contract can stop future lending if it is specified in a contract for objectively justified reasons. As examples of such reasons the Directive lists suspicion of an unauthorized or fraudulent use of the credit or a significantly increased risk of the consumer being unable to fulfill his obligation to repay the credit. The creditor shall inform the consumer of the termination and the reasons for it unless the provision of such information is prohibited by other Community legislation or is contrary to objectives of public policy or public security. So, open-ended agreements are the long-term agreements which can be terminated by a borrower and, under certain circumstances, by a creditor, the latter is also entitled to stop performance of new credit sums. But this balanced model differs a lot from the Ukrainian model of the unlimited right of a creditor to terminate a contract.

In this EU concept, the key idea of special tools of the consumer of credit lines rights' protection is crucial. Neither Russia, nor Ukraine has such special protection

in the sphere of credit lines. It would be reasonable to impose the new rule, that no less than 50% of a credit line is guaranteed, i.e. a creditor is not entitled to cut a credit limit more than by half if the borrower diligently performs his obligations. Similarly, it is necessary to regulate the issue under which circumstances and how a creditor can totally annul a credit limit?

12. Early Demand for Repayment of All Loan and Interest or Termination of a Contract in the Event of Borrower's Delay

Under the Russian law a creditor is entitled to demand early repayment of all sum of a debt and interest or termination of a contract if the borrower delays: a) for credits issued for up to 60 days – in case of 10 days delay with granting to a borrower at least a 10 day period for the repayment; b) for credits issued for more than 60 days this additional period shall be increased from 10 to 30 days. Besides, in the case of such long-term credits, one or more delays in total should be at least 60 days within the last 180 days (14.1; 14.2; 14.3).

Ukrainian law (16.4) entitles the creditor (if it is specified in a contract) to demand early repayment of a debt and interest in the case of a 1-month delay. As an exception, for mortgages or credits for the purchase of apartments, this term of delay shall be at least 3 months. A consumer should within a 30 day period from the date of receiving for a creditor a notice (60 days for mortgages and any other credits for the purchase of real estate), to repay at least the sum of delay. Ukrainian law prescribes that in case of consumer's breach of obligations to pay a loan and interest, a creditor also is entitled to claim damages (21.1). This provision is absurd and very dangerous. It is crucial to prohibit the consumer creditor's claim for damages above the sums of interests and penalties.

Overall, it is necessary to mention that both Russian and Ukraine legislations share such shortcoming as the lack of clear rules on at least one mandatory prolongation of current payments for borrowers, who met objectively difficult life situations, for instance, or became seriously sick or lost their jobs. Ultimately, it should be noted as well that in reality loans in Russia and Ukraine are often sold by creditors with a great discount up to 95% under circumstances when creditors do not make significant concessions to borrowers. That is why it is necessary to add to the legislation a new provision on the right of a borrower to know the discount on his loan in case of assignment of rights as well the right to repay such loan to a new creditor proportionally to the percentage of discount with addition to the sum of the reasonable profit of the new creditor.

Conclusion

While comparing new Russian and Ukrainian consumer credit statutes, it is clear that in some aspects the Ukrainian one is pro-consumer, and in some other

aspects the Russian one is more pro-consumer. Some provisions of both Russian and Ukrainian consumer credit statutes are very controversial and unclear; in some instances they could lead to debt slavery, so they must be corrected in the future.

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