C.J.E.U. (4th ch.), 17 October 2024, *Riverty GmbH c. MI*, C-409/23

Buy now, pay later – Consumer credit – Exploitation – Directive 2008/48/EC – Judicial inference

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Achetez maintenant, payez plus tard – Crédit à la consommation – Exploitation – Directive 2008/48/CE – Inférence judiciaire

In Riverty GmbH (C-409/23), the Court of Justice of the European Union (CJEU) answered a preliminary question on Directive 2008/48/EC (CCD2), in a case involving a provider of 'Buy Now, Pay Later' (BNPL) products, Riverty. In the case, Riverty seeks to claim default interest and out-of-court collection charges from a consumer, MI. The Supreme Court of the Netherlands asks the CJEU whether the interest and charges should be considered to determine if a credit agreement falls in scope of the exemption in Article 2.2.f CCD2.
The CJEU uses its well-settled literal, systematic and teleological interpretation methods to conclude that they should not be considered for that purpose. However, the interest and charges should be used to assess whether the creditor seeks to circumvent the CCD2, if the circumstances provide grounds for assuming that the liability for these charges forms part of the creditor's business model, i.e. if the creditor actually anticipates the consumer's non-performance to seek a financial advantage.
This annotation places the ruling in the economic context of the BNPL market and addresses the normative and practical issues raised by the CJEU's ruling. It argues that in its pursuit to address an 'exploitation thesis', the CJEU has rendered a judgment that is conceptually ambivalent and impossible to implement, hampering legal certainty and at odds with the aims of consumer protection, among other issues.

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Dans l'affaire Riverty GmbH (C-409/23), la Cour de justice de l'Union européenne (CJUE) a répondu à une question préjudicielle sur la Directive 2008/48/CE (CCD2), dans le cadre d'un litige impliquant un fournisseur de produits « Buy Now, Pay Later » (BNPL), Riverty. Dans cette affaire, Riverty cherche à réclamer des intérêts de retard et des frais de recouvrement extrajudiciaires à un consommateur, MI.
La Cour suprême des Pays-Bas interroge la CJUE sur la question de savoir si ces intérêts et frais doivent être pris en compte pour déterminer si un contrat de crédit relève de l'exemption prévue à l'article 2.2.f de la CCD2.
La CJUE applique ses méthodes bien établies d'interprétation littérale, systématique et téléologique pour conclure qu'ils ne doivent pas être pris en compte à cette fin. Toutefois, ces intérêts et frais doivent être utilisés pour évaluer si le créancier cherche à contourner la CCD2, notamment si les circonstances permettent de supposer que la responsabilité de ces frais fait partie de son modèle économique, c'est-à-dire s'il anticipe effectivement la défaillance du consommateur afin d'en tirer un avantage financier.
Cette note replace l'arrêt dans le contexte économique du marché du BNPL et aborde les enjeux normatifs et pratiques soulevés par la décision de la CJUE. Elle soutient qu'en cherchant à répondre à une « thèse de l'exploitation », la CJUE a rendu un arrêt conceptuellement ambigu et difficile à mettre en œuvre, compromettant la sécurité juridique et allant à l'encontre des objectifs de protection des consommateurs, entre autres problématiques.

In Case C-409/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 30 June 2023, received at the Court on 4 July 2023, in the proceedings

Riverty GmbH, legal successor of Arvato Finance BV,

v

MI,

THE COURT (Fourth Chamber),

[...]

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(2)(f) and of Article 3(g) 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 (OJ 2008 L 133, p. 66).

2 The request has been made in proceedings between Riverty GmbH, as the legal successor of Arvato Finance BV ('Arvato'), a provider of a deferred payment service, and MI, a consumer who opted for that service during an online purchase.

Legal context

European Union law

3 Recitals 10 and 13 of Directive 2008/48 state:

'(10) The definitions contained in this Directive determine the scope of harmonisation. The obligation on Member

States to implement the provisions of this Directive should therefore be limited to its scope as determined by those definitions. However, this Directive should be without prejudice to the application by Member States, in accordance with Community law, of the provisions of this Directive to areas not covered by its scope. A Member State could thereby maintain or introduce national legislation corresponding to the provisions of this Directive or certain of its provisions on credit agreements outside the scope of this Directive, for instance on credit agreements involving amounts less than EUR 200 or more than EUR 75 000.

[...]

(13) This Directive should not apply to certain types of credit agreement, 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.'

4 Article 2 of the directive, entitled 'Scope', provides as follows:

'1. This Directive shall apply to credit agreements.

2. This Directive shall not apply to the following:

[...]

(c) credit agreements involving a total amount of credit less than EUR 200 or more than EUR 75 000;

[...]

(f) credit agreements where the credit is granted free of interest and without any other charges and credit agreements under the terms of which the credit has to be repaid within three months and only insignificant charges are payable;

[...]

5 In accordance with Article 3 of that directive, entitled 'Definitions': 'For the purposes of this Directive, the following definitions shall apply:

[...]

(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...

[...]

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

[...]

(i) "annual percentage rate of charge" means the total cost of the credit to the consumer, expressed as an annual percentage of the total amount of credit, where applicable including the costs referred to in Article 19(2);

[...]

6 Under Article 5 of that directive, entitled 'Pre-contractual information':

'1. In good time before the consumer is bound by any credit agreement or offer, the creditor and, where applicable, the credit intermediary shall, on the basis of the credit terms and conditions offered by the creditor and, if applicable, the preferences expressed and information supplied by the consumer, provide the consumer with the information needed to compare different offers in order to take an informed decision on whether to conclude a credit agreement. Such information, on paper or on another durable medium, shall be provided by means of the Standard European Consumer Credit Information form set out in Annex II. ...

The information in question shall specify:

[...]

(g) the annual percentage rate of charge and the total amount payable by the consumer...

[...]

(l) the interest rate applicable in the case of late payments and the arrangements for its adjustment, and, where applicable, any charges payable for default;

[...]

7 Article 10 of Directive 2008/48, entitled 'Information to be included in credit agreements', provides in paragraph 2 thereof:

'The credit agreement shall specify in a clear and concise manner:

[...]

(g) the annual percentage rate of charge and the total amount payable by the consumer...

[...]

(l) the interest rate applicable in the case of late payments as applicable at the time of the conclusion of the credit agreement and the arrangements for its adjustment and, where applicable, any charges payable for default;

[...]

8 Under Article 19 of that directive, entitled 'Calculation of the annual percentage rate of charge':

'1. The annual percentage rate of charge, equating, on an annual basis, to the present value of all commitments (drawdowns, repayments and charges), future or existing, agreed by the creditor and the consumer, shall be calculated in accordance with the mathematical formula set out in Part I of Annex I.

2. For the purpose of calculating the annual percentage rate of charge, the total cost of the credit to the consumer shall be determined, with the exception of any charges payable by the consumer for non- compliance with any of his commitments laid down in the credit agreement and charges other than the purchase price which, for purchases of goods or services, he is obliged to pay whether the transaction is effected in cash or on credit.

The costs of maintaining an account recording both payment transactions and drawdowns, the costs of using a means of payment for both payment transactions and drawdowns, and other costs relating to payment transactions shall be included in the total cost of credit to the consumer unless the opening of the account is optional and the costs of the account have been clearly and separately shown in the credit agreement or in any other agreement concluded with the consumer.

3. The calculation of the annual percentage rate of charge shall be based on the assumption that the credit agreement is to remain valid for the period agreed and that the creditor and the consumer will fulfil their obligations under the terms and by the dates specified in the credit agreement.

[...]

9 Article 22 of that directive, entitled 'Harmonisation and imperative nature of this Directive', provides in paragraph 3 thereof:

'Member States shall further ensure that the provisions they adopt in implementation of this Directive cannot be circumvented as a result of the way in which agreements are formulated, in particular by integrating drawdowns or credit agreements falling within the scope of this Directive into credit agreements the character or purpose of which would make it possible to avoid its application.'

10 Annex II to that directive is entitled 'Standard European Consumer Credit Information'. That annex provides several items of information to be supplied to the consumer concerning, inter alia, the identity and contact details of the creditor or credit intermediary, the main characteristics of the credit product, as well as the cost of the credit and the related costs. The latter point includes the charges for which the consumer is liable in the event of late payment.

Netherlands law

11 The Burgerlijk Wetboek (Civil Code) provides in Article 57(1)(g) and (2) of Book 7: '1. For the purpose of this Title the following definitions shall apply:

[...]

(g) "total cost of the credit to the consumer": all the costs, including interest, commissions, taxes and any other kind of fees which the consumer is required to pay in connection with the credit agreement and which are known to the creditor except for notarial costs; ...

[...]

2. The total cost of the credit to the consumer, referred to in paragraph 1(g), shall also include costs in respect of ancillary services relating to the credit agreement, in particular insurance premiums, if the conclusion of a service contract is compulsory in order to obtain the credit or to obtain it on the terms and conditions marketed.'

12 Under Article 58(2)(e) of Book 7 of that code: '...

2. This Title does not apply to:

[...]

(e) credit agreements where the credit is granted free of interest and without any other charges and credit agreements under the terms of which the credit has to be repaid within three months and only insignificant charges are payable; [...]

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 Riverty is the legal successor of Arvato, which operated under the name AfterPay. AfterPay was the provider of the eponymous deferred payment service, offered on online purchases, in return for a payment fee of EUR 1.

14 According to the general payment terms used by Arvato, the decision to pay by means of that service presupposed that, after acceptance of the request to use that service, the trader assign to AfterPay the fees relating to the amount for which the customer was liable in respect of the order placed online. That customer could only pay AfterPay in full discharge of obligations and, to that end, received an invoice stating the amount due, separately from the delivery of that order. Payment was to

be made within 14 days of the date of invoicing, unless a different period was agreed in writing.

15 Failing payment within the prescribed period, the amount due was payable immediately without the need to send that customer a further formal notice. In that situation, Arvato reserved the right to charge administrative fees, the amount of which was increased with each payment reminder, monthly statutory interest on the amount due and all reasonable costs incurred in securing payment through judicial or extrajudicial means. The minimum amount charged for out-of-court collection costs was EUR 40.

16 On 27 February 2019 or a little before that date, MI purchased, as a consumer, three products from an online shop for a total amount of EUR 37.97 ('the purchase price of the goods'). On that occasion, she chose the AfterPay service as the method of payment.

17 On the same day, Arvato sent a payment summary to the email address provided by that consumer for an amount of EUR 38.97, consisting of the purchase price of the products and the payment fee of EUR 1, setting the deadline for payment at 13 March 2019. It also stated that failure to pay within that period would lead to an increase of EUR 40 in the amount due by way of out-of-court collection costs, in accordance with the applicable Netherlands legislation.

18 Between 15 March and 6 December 2019, six payment reminders were sent by Arvato to that consumer by email. Those emails indicated the obligation to pay the purchase price of the products and specified the administrative fees resulting from the failure to comply with that obligation, first, in the amount of EUR 9.50 and, subsequently, in the amount of EUR 12.50. By the last email, sent on 6 December 2019, Arvato claimed from the same consumer payment of the purchase price of the goods within 15 days of receipt of the latter email, without prejudice, in the event of non-payment, to invoice the consumer for an additional amount of EUR 40 in respect of collection costs.

19 Arvato brought an action before the Kantonrechter te Arnhem (District Court (Cantonal Sector), Arnhem, Netherlands) seeking an order requiring MI to pay a sum of EUR 80.20, plus statutory interest calculated on the amount of EUR 38.97, with effect from 9 October 2020. Arvato subsequently reduced the amount thus claimed, as it waived its fee of EUR 1.

20 In accordance with national law, the Kantonrechter te Arnhem (District Court (Cantonal Sector), Arnhem) referred several 'questions for a preliminary ruling' to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), which is the referring court. Those questions relate to whether default interest, that is to say interest other than that relating to remuneration for making the credit available, and out-of-court collection costs payable by a consumer in the event of non-performance of a credit agreement forms part of the credit costs or whether it is necessary to take that interest and other charges into account in order to assess whether the credit agreement in question is an agreement 'free of interest and without any other charges' or an agreement under the terms of which 'only insignificant charges are payable' within the meaning of Article 2(2)(f) of Directive 2008/48, or whether account must be taken, in the context of the examination of those questions, of the statutory or contractual nature of such interest and other charges and the amount thereof in relation to the statutory scales.

21 The referring court states that the concept of 'total cost of the credit to the consumer', provided for in Article 3(g) of Directive 2008/48, was transposed into Netherlands law 'as literally as possible' in Article 57(1)(g) and (2) of Book 7 of the Civil Code. According to that court, Article 58(2)(e) of Book 7 of that code reproduces the wording of Article 2(2)(f) of that directive concerning the exclusion of credit agreements 'free of interest and without any other charges' and of agreements 'under the terms of which the credit has to be repaid within three months and only insignificant charges are payable', within the meaning of the latter provision.

22 In answer to some of the questions addressed to it by the Kantonrechter te Arnhem (District Court (Cantonal Sector), Arnhem), the referring court considers that an agreement under the terms of which a deferred payment is stipulated constitutes a credit agreement where it satisfies the conditions laid down by the national legislation applicable for the purposes of such classification and that the concept of 'other charges', within the meaning of Article 58(2)(e) of Book 7 of the Civil Code, must be 'combined' with that of the 'total cost of the credit to the consumer' within the meaning of Article 57(1)(g) of Book 7 of that code.

23 However, the referring court considers that neither Directive 2008/48 nor the Court's case-law on that directive provides an answer to the question whether default interest and out-of-court collection costs must be regarded as credit costs and whether they must be taken into account in order to determine whether the agreement in question constitutes a credit agreement 'free of interest and without any other charges' or a credit agreement '[under the terms of which] only insignificant charges are payable' within the meaning of Article 2(2)(f) of that directive.

24 In this respect, as regards, in the first place, the national legal framework, the referring court states that the default interest and the out-of-court collection costs at issue in the main proceedings refer to interest and costs incurred by the creditor in obtaining payment of its claim out of court. It is apparent from the request for a preliminary ruling that, where the debtor is a natural person who is acting for purposes outside his or her trade or

profession, the Civil Code provides that the compensation claimed in respect of out-of-court collection costs corresponds to a percentage of the principal debt and may not be less than EUR 40 or more than EUR 6 775.

25 It is also apparent from that request that, in relation to credit agreements falling within the scope of Directive 2008/48, the Netherlands legislation prohibits the creditor from demanding a credit fee in excess of the maximum fee permitted by law and that that maximum fee includes default interest and out-of-court collection costs, the creditor being unable, consequently, to claim compensation in respect of out-of-court collection costs which has the effect of increasing the credit fee beyond the maximum permitted.

26 As regards, in the second place, the relevant provisions of Directive 2008/48, the referring court infers from a combined reading of Article 5(1)(l), Article 10(2)(l) of, and of Annex II to, that directive that the charges payable in the event of late payment, which include default interest and out-of-court collection costs claimed in the present case, must be included in the 'total cost of the credit to the consumer' referred to in Article 3(g) of that directive.

27 The referring court adds that although it follows from Article 19(3) of that directive that default charges payable in the event of non-performance of a contractual obligation are not taken into account in the calculation of the annual percentage rate (APR), that does not mean that those charges cannot be included in the total cost of the credit to the consumer.

28 However, the referring court states that it is also possible to take the view that those charges can be included in the 'total cost of the credit to the consumer' only if the conditions under which the credit was granted and the other circumstances present at the time when the agreement was concluded provide grounds for assuming that the liability for those charges forms part of the creditor's business model.

29 As regards the exception provided for in Article 2(2)(f) of Directive 2008/48, that court submits that it could be rendered meaningless if it were held that the interest and the other charges provided for in that provision had to include interest and out-of-court collection costs payable by law in the event of non- payment.

30 In those circumstances the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do default interest and out-of-court costs belong to the total cost of the credit to the consumer within the meaning of Article 3(g) of [Directive 2008/48], and must they be taken into account in the determination of whether there is a credit agreement where the credit is granted "free of interest and without any other charges" or one under the terms of which "only insignificant charges are payable" within the meaning of Article 2(2)(f) of [that directive]?

(2) Does the answer to Question 1 differ if the default interest and out-of-court costs are payable by law or stipulated by contract? If the default interest and out-of-court costs are stipulated, does it make any difference if that interest and those costs are higher than what would be payable by law in the absence of the stipulation?'

Consideration of the questions referred

Preliminary observations

31 As a preliminary point, it should be noted that it is apparent from the observations of the Netherlands Government that Directive 2008/48 was made applicable by Netherlands national law to credit agreements involving a total amount of credit of less than EUR 200.

32 It should also be noted that, in order to answer the questions referred by the national court, it is necessary to examine two aspects. The first concerns, in essence, the interpretation of the concepts of 'interest' and 'other charges' within the meaning of Article 2(2)(f) of Directive 2008/48 and the question whether the statutory or contractual origin of the default interest and the out-of-court collection costs claimed by the creditor in the event that the consumer defaults on his or her payment obligation under a credit agreement and, where appropriate, the amount thereof constitute useful criteria for the purposes of that interpretation. The second concerns the interpretation of the concept of 'total cost of credit to the consumer' provided for in Article 3(g) of that directive.

33 As is apparent from the request for a preliminary ruling, the referring court makes a link between the concept of 'other charges', within the meaning of Article 2(2)(f) of Directive 2008/48, and that of 'total cost of the credit to the consumer', within the meaning of Article 3(g) of that directive, the referring court querying whether default interest and out-of-court collection costs fall within the scope of both of those concepts.

34 That said, Article 2(2)(f) of Directive 2008/48 contributes to defining the scope of that directive and may, possibly, render it pointless to answer the question whether default interest and out-of-court collection costs fall within the concept of 'total cost of the credit to the consumer', within the meaning of Article 3(g) of that directive.

35 Consequently, it is necessary, first of all, to interpret Article 2(2)(f) of Directive 2008/48 and to examine the relevance of the statutory or contractual nature of the interest and default charges and, where appropriate, the amount thereof for the purposes of that interpretation, before then examining, if necessary, the scope of

the concept of 'total cost of the credit to the consumer', within the meaning of Article 3(g) of that directive.

The second part of the first question and the second question

36 By the second part of the first question and the second question, which it is appropriate to examine together and in the first place, the referring court asks, in essence, whether Article 2(2)(f) of Directive 2008/48 must be interpreted as meaning that the default interest and the out-of-court collection costs for which a consumer is liable in the event of late payment or non-performance of his or her payment obligation under a credit agreement fall within the concepts of 'interest' and 'other charges' within the meaning of that provision. That court also asks whether the statutory or contractual origin of that interest and other charges and the fact that, as the case may be, that interest and other charges arising under an agreement are higher than what would be payable by law constitute relevant information for the purposes of that interpretation.

37 In that regard, it must be stated that the default interest and out-of-court collection costs at issue in the main proceedings constitute, as the referring court states, interest and default charges.

38 Under Article 2(2)(f) of Directive 2008/48, credit agreements 'free of interest and without any other charges' and credit agreements 'under the terms of which the credit has to be repaid within three months and only insignificant charges are payable' are excluded from the scope of that directive.

39 In order to interpret that provision and, in particular, the concepts of 'interest' and 'other charges' contained therein, account must be taken, in accordance with settled case-law, not only of the wording of that provision, but also of its context and of the objectives and purpose pursued by the measure of which it forms part (see, to that effect, judgment of 11 January 2024, *Inditex*, C-361/22, EU:C:2024:17, paragraph 43 and the case-law cited).

40 As regards, in the first place, the wording of Article 2(2 (f) of Directive 2008/48, it should be noted that that provision merely refers to 'interest' and 'other charges' without defining those concepts and without referring to other concepts also used in the context of that directive, in particular those of 'default charges', 'costs in the case of late payments', 'costs', 'commissions' or 'taxes'.

41 The concept of 'interest', in its literal meaning, refers both to interest accrued or payable on invested or loaned capital and to compensatory or default interest and thus has several possible meanings.

42 The concept of 'other charges' is also a generic concept capable of covering several categories of expenditure, with the result that that concept varies in content depending on the context in which it is used.

43 That said, a comparison of the different language versions of Article 2(2)(f) of Directive 2008/48 provides some indications concerning the interpretation to be given to the concepts of 'interest' and 'other charges' within the meaning of that provision. In particular, those versions include those which, more succinctly, refer only to the absence of interest or other charges, such as the German version ('*zins- und gebührenfreie Kreditverträge*'), the Greek version ('*symvaseis pistosis oi opoies einai atokes kai choris alles epivarynseis*'), the French version ('*contrats de crédit sans intérêt et sans autres frais*') or the Dutch version ('*kredietovereenkomsten zonder rente en andere kosten*'). In other language versions, in particular in the Spanish version ('*los contratos de crédito concedidos libres de intereses y sin ningún otro tipo de gastos*'), the English version ('where the credit is granted free of interest and without any other charges'), the Croatian version ('*ugovore o kreditu prema kojima se kredit odobrava bez kamata i bez bilo kakvih drugih naknada*'), the Italian version ('*contratti di credito che non prevedono il pagamento di interessi o altre spese*') or the Romanian version ('*contractele de credit în baza cărora creditul este acordat fără dobândă și fără alte costuri*'), reference is made explicitly to the fact that credit is granted without interest or other expenses being provided for.

44 It is clear from the wording of those other versions that the applicability of Article 2(2)(f) of Directive 2008/48 must be examined taking into account the interest and other charges provided for at the time of conclusion of the credit agreement. The non-performance by a consumer of his or her payment obligation and the duration of any such non-performance are, in principle, unforeseeable at that time. Accordingly, interest and default charges do not form part of 'interest' and 'other charges' within the meaning of Article 2(2)(f) of Directive 2008/48, irrespective of whether the application and level of that interest and those charges are provided for by law or stipulated in the credit agreement.

45 That interpretation is supported by the context of that provision and by the objectives pursued by Directive 2008/48.

46 Thus, with regard, in the second place, to the context of that provision, it should be noted that, in accordance with Article 19(2) and (3) of Directive 2008/48, default charges are excluded from the calculation of the APR, that calculation being based on the assumption that the credit agreement will remain valid for the period agreed and that the creditor and the consumer will fulfil their obligations under the terms and within the time limits specified in that agreement. Therefore, it is necessary to start from that assumption in order to interpret Article 2(2)(f) of that directive.

47 In the third place, the interpretation set out in paragraph 44 of the present judgment is consonant with the objective pursued by Article 2(2)(f) of Directive 2008/48, which seeks, like the other provisions of that article, to define the scope of that directive. If interest and default charges were to be taken into account in order to establish whether a contract falls within the scope of that directive, that provision would be largely deprived of its substance and effectiveness, since it would apply only in very unlikely cases in which the delay or failure to pay would have no legal consequences for the creditor, namely neither the imposition of default interest nor other charges as a result of the non-performance of the payment obligation.

48 In the present case, Arvato claims payment of the purchase price of the products in the amount of EUR 37.97 plus statutory interest from 9 October 2024 and the payment of out-of-court collection costs of EUR 40, the amount of which falls within the lower limit of the range laid down by the Netherlands legislation. Such interest and charges do not, in principle, fall within the concepts of 'interest' and 'other charges' within the meaning of Article 2(2)(f) of Directive 2008/48 and must therefore not be taken into consideration in order to determine whether the credit agreement concerned falls within the scope of that directive.

49 The referring court and the Netherlands Government submit, however, that it cannot be ruled out that the circumstances present at the time when the agreement in question was concluded provide grounds for assuming that the liability for default charges forms part of the creditor's business model, a situation in which those charges should be taken into account when examining the applicability of Article 2(2)(f) of Directive 2008/48.

50 In that regard, it must be borne in mind that Article 22(3) of Directive 2008/48 requires the Member States to ensure that the provisions they adopt in implementation of that directive cannot be circumvented as a result of the way in which agreements are formulated (judgment of 11 September 2019, *Lexitor*, C-383/18, EU:C:2019:702, paragraph 30).

51 It will therefore be for the referring court to ascertain whether, in reality, the creditor is seeking to circumvent its obligations under Directive 2008/48 by anticipating, from the time the credit agreement is concluded, the non-performance by the consumer of the payment obligation in order to seek an economic advantage from the latter's liability for interest and default charges. To that end, it will be for that court to examine all the circumstances present at the time when the agreement in question was concluded and other relevant information, such as, inter alia, the statutory or contractual origin of the interest and default charges, the periods within which that interest and those charges become payable and the amount of that interest and those charges.

52 In the light of all the foregoing considerations, the answer to the second part of the first question and the second question is that Article 2(2)(f) of Directive 2008/48 must be interpreted as meaning that, save where the creditor anticipates, from the time the credit agreement is concluded, the non-performance by the consumer of the payment obligation in order to seek a financial advantage, the default interest and the out-of-court collection costs which a consumer is liable to pay in the event of late payment or non-performance of his or her payment obligation under a credit agreement do not fall within the concepts of 'interest' and 'other charges', within the meaning of that provision, irrespective, in principle, of whether such interest and other charges are statutory or contractual in origin and of whether, as the case may be, such interest and other charges arising under an agreement are greater than would be payable by law.

The first part of the first question

53 In the light of the answer given to the second part of the first question and the second question, there is no need to answer the first part of the first question.

Costs

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 2(2)(f) 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 save where the creditor anticipates, from the time the credit agreement is concluded, the non-performance by the consumer of the payment obligation in order to seek a financial advantage, the default interest and the out-of-court collection costs which a consumer is liable to pay in the event of late payment or non-performance of his or her payment obligation under a credit agreement do not fall within the concepts of 'interest' and 'other charges', within the meaning of that provision, irrespective, in principle, of whether such interest and other charges are statutory or contractual in origin and of whether, as the case may be, such interest and other charges arising under an agreement are greater than would be payable by law.

Observation note

'BUY NOW PAY LATER' DEFAULTS AND THE CJEU'S SUBOPTIMAL SOLUTION TO THE PERENNIAL PROBLEM OF CONDITIONAL CREDIT COSTS (*RIVERTY GMBH*, C-409/23)

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INTRODUCTION

On 17 October 2024, the Court of Justice of the European Union (CJEU) issued its preliminary ruling in *Riverty GmbH* (Judgment).[2] The Judgment concerns 'Buy Now Pay Later' (BNPL) products, the interest-free deferred payment products that have become immensely popular across the European Union (EU). BNPL products have allowed many consumers to smoothen their consumption and manage their finances, but have also caused financial difficulties for some consumers.[3] In the Judgment, the CJEU responds to the following question of the referring court, the Supreme Court of the Netherlands (paraphrased): should the Consumer Credit Directive of 2008[4] (CCD2) apply to BNPL products that are exempted from its scope under Article 2.2.f CCD2, by considering default interest and out-of-court costs in relation to these products, even if liability for those charges may form part of a BNPL provider's business model?

Practically speaking, this question is only of temporary relevance. The revised Consumer Credit Directive of 2023[5] (CCD3), which repeals the CCD2 and applies from 20 November 2026, does not feature the exemption of Article 2.2.f CCD2. Consequently, it has a wider material scope that covers more – but not all – BNPL products. However, the CJEU's surprising solution raises a more profound question: should national courts ignore the material scope of national rules transposing a Directive in *ad hoc* fashion, on the basis of an inferred economic motive of a creditor? Is this practicable and, more importantly, desirable on normative grounds? The solution targets a perennial problem of conditional credit costs. Every time an easily accessible credit product is introduced to the general public, some consumers are at risk of incurring significant conditional credit costs in the event of non-compliance; history is replete with examples.[6] Regulators tend to push back against these products on moral and prudential grounds, arguing that they incentivise (over)spending,[7] normalise debt usage, exacerbate consumer overindebtedness and cause bankruptcies.[8]

'Exploitation' is also a commonly cited reason: the thesis is that providers sell these credit products to some consumers in the expectation that these consumers will default on their payment obligations, but do so because the applicable default charges make those transactions profitable, at the financial expense of these consumers.[9] The CJEU's solution accommodates this thesis. In principle, the inference of a subjective state of mind is not completely new. It is effectively a *mens rea* condition, a requirement of knowledge or intent that

1. This article is written in the author's personal capacity and does not reflect the views of Leiden University or DLA Piper International. The research for this article was concluded on 28 February 2025.
2. Case C-409/23 *Riverty GmbH*, 17 October 2024, ECLI:EU:C:2024:895. The Court rendered its judgment without an opinion, which is quite unusual – a quick EUR-Lex query reveals that in 49 of 55 preliminary rulings regarding Directive 2008/48/EC, an opinion was published prior to the CJEU's judgment.
3. See for example Citizens Advice, 'Buy now, pay later: what happens if you can't pay later?', 2 September 2021, for a perspective on the United Kingdom.
4. 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. This note refers to this Directive as CCD2 because Council Directive 87/102/EEC could be considered the first EU Directive that sought to harmonise consumer credit regulation.
5. Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers and repealing Directive 2008/48/EC.
6. Section I.A.
7. Consumer Financial Protection Bureau, 'Buy Now Pay Later: Market trends and consumer impacts', September 2022, 64 ('overextension risks'); CPC Network, 'Information gathering for assisting the European Commission in complying with its obligations under Article 40 ("reporting") of Regulation (EU) 2017/2394 on Consumer Protection Cooperation – Case study on consumer credit', p. 6.
8. For example, Autoriteit Financiële Markten (AFM), 'Buy Now, Pay Later – A study of a new market trend', 2022, p. 23, in which it cautions against 'debt habituation', deferred payments becoming the norm, and debt accumulation; R. Relja, A. Lifen Zhao and P. Ward, 'Friend or Foe? How Buy-Now-Pay-Later Is Seeking to Change Traditional Consumer–Retailer Relationships in the UK', in K. Bäckström, C. Egan-Wyer and E. Samsioe (eds.), *The Future of Consumption*, Palgrave Macmillan 2024, 95–120, p. 98.
9. For an example of this argument, see T. Kinni, 'The Hidden Costs of Clicking the "Buy Now, Pay Later" Button', 2 February 2024, https://www.gsb.stanford.edu/ accessed 28 February 2025. This argument is not disputed, but the prevalence of this practice is often overstated without convincing supporting statistical data.

legislators use in various legal areas, such as EU criminal law or Dutch contract law.[10] However, this solution is suboptimal, for several normative and practical reasons discussed below.

This case note analyses the Judgment and its implications. To this end, it first discusses the economics of BNPL products, from their characteristics to typical consumers, as well as the financial benefits and risks to consumers (Section I). The next section sets out how the regulatory context of BNPL products, how they are regulated under the CCD2 and will be regulated under the CCD3, as well as a comparison with regulatory developments in the United Kingdom (UK) and United States (US) (Section II). The note then turns to the Judgment, starting with a discussion of the facts and national proceedings (Section III), followed by a critical discussion of the CJEU's considerations (Section IV), and concludes with the implications for BNPL providers and consumers (Section V).

I. ECONOMICS OF BNPL PRODUCTS

A. Product characteristics

A BNPL product is a credit arrangement offered to consumers at the point of sale of goods or services in e-commerce transactions, allowing consumers to defer the full payment of the purchase price to a later point in time.[11] It is a form of credit because, by concluding the purchase transaction, the consumer is legally obliged to pay the purchase price, and the deferment of the obligation creates a loan.[12] Deferred payment arrangements can come in various forms:

1. full postponement (deferment of the entire payment to a single point in time in the future, free of charge);
2. payment in instalments (the consumer pays the first instalment at the time of purchase and the payment of the remaining instalments is spread out over a short period, e.g. four instalments over four weeks starting two weeks after the purchase date, free of charge); or
3. instalment credit (deferred payment of the principal and remuneration, e.g. interest and service charges).[13]

The typical BNPL product is a form of payment in instalments, normally four instalments of 25%, where the consumer pays the first instalment upon purchase and subsequent instalments every fortnight.[14] This note exclusively focuses on this version of the BNPL product.

A typical BNPL product involves three parties: (1) the consumer, who purchases the goods from (2) the retailer (merchant), while simultaneously concluding the credit with (3) the BNPL provider, which can be a general financial institution or a specialised lender.[15] Each of the two professional parties has a different incentive to offer BNPL. For the retailer, BNPL products increase sales revenue, as they generally raise conversion rates (from offer to order) through greater customer convenience and a higher average order value.[16] For the BNPL provider, the retailer is both a necessary counterparty as it provides a channel to distribute its products and a source of income. Upon the conclusion of the purchase transaction, the retailer pays the BNPL provider a fee, normally a percentage of the order value (merchant fee).[17]

While the BNPL product may seem new, from the consumer's economic perspective it is a classic point-of-sale credit product. Some authors consider the product an evolution from other deferred payment arrangements, such as layaway services in the United States (with the difference that the good is not received until full payment) and in-store instalment loans (e.g. car loans offered by car manufacturers).[18] Those products share similarities with other credit products or solutions, such as credit cards and generally more costly payday loans.[19] As indicated, time and again the introduction of similar consumer credit products which are easily accessible to financially vulnerable consumers evokes criticism from regulators, which caution against overspending, over-indebtedness and high conditional costs in the event of non-compliance with the product's payment obligations,

10. See e.g. J.H. Blomsma, *Mens rea and defences in European criminal law,* doctoral thesis, Maastricht University 2012, referring to Article 1.1 Council Framework Decision 2008/913; Article 3.44.4 Dutch Civil Code: 'Abuse of circumstances is legally present when *someone who knows or should have known* that another person might be induced to perform a juridical act because he is under the influence of particular circumstances'.
11. G. Cornelli, L. Gambacorta and L. Pancotto, 'Buy now, pay later: a cross-country analysis', BIS Quarterly Review December 2023, pp. 62–63.
12. Similarly, Dutch Supreme Court, 30 June 2023, ECLI:NL:HR:2023:1006, para 3.2.9.
13. AFM, *op. cit.*, section 2.1.
14. *Ibid.*; Bank of America Institute, 'Consumer Morsel – Buy now, pay later: Spreading the pay(n)?', 2 May 2024.
15. AFM, *op. cit.*, section 2.1; US Office of the Comptroller of the Currency, 'Retail Lending: Risk Management of "Buy Now, Pay Later" Lending', OCC Bulletin 2023-37, 6 December 2023; Cornelli, Gambacorta and Pancotto, *op. cit.*, pp. 62–63.
16. Visa Consulting & Analytics, 'Buy Now Pay Later: a threat or an opportunity?', Study 2022, 4; Equifax, 'A not-so beginner's guide to Buy Now, Pay Later – What you need to know now and what's next', 2021, p. 5.
17. UK Financial Conduct Authority (FCA), 'The Woolard Review – A review of change and innovation in the unsecured credit market', 2 February 2021, 4.16. In practice, the BNPL provider engages in netting, i.e. it pays the retailer the purchase price minus the fee. See AFM, *op. cit.*, section 2.1; Equifax 2021, *op. cit.*, p. 3.
18. S. Soni, 'Regulating "Buy Now, Pay Later": Consumer Financial Protection in the Era of Fintech' (2023) 123(7) *Columbia Law Review* 2035–2076; Colleen E. Mandell & Morgan J. Lawrence, 'Expanding Access for the Credit Invisible with Just Four Easy Payments? The Unregulated Rise of Buy Now, Pay Later', 35 *Loyola Consumer Law Review* 275; T. Akana, 'Buy Now, Pay Later: Survey Evidence of Consumer Adoption and Attitudes', Federal Reserve Bank of Philadelphia, DP 22-02, June 2022, pp. 3–4.
19. Ehrentraud et al., *op. cit.*, 15 (considering 'novel credit products' such as BNPL and wage advance credit); OECD (2024), Consumer Finance Risk Monitor, OECD Publishing, Paris, p. 60-62.

and BNPL products are no exception.[20] The problem of significant conditional credit costs of mass-marketed consumer credit products, as perceived by regulators and commentators, is thus, indeed, perennial.

B. Product costs

While a BNPL product is normally offered cost-free, it is not always free of costs (for consumers). To understand the cost structure of a BNPL product, it is useful to distinguish between the following four cost categories.

1. *Transaction-related costs*. In most cases, the consumer does not pay any transaction-related costs. However, some BNPL providers do charge consumers a fee for using the BNPL product.[21]
2. *Default-related costs*. As long as the consumer complies with the payment obligations in a timely manner (i.e. pays the required amount of each instalment on time), the consumer typically does not incur any default charges.[22] If the consumer fails to do so, he or she 'defaults', and typically incurs (i) late payment fees from the BNPL provider and, (ii) if there are insufficient funds in the bank account indicated by the consumer, also an overdraft fee from the account-holding financial institution.[23] According to some reporting, the late fees may be punitive[24].
3. *Collection-related costs*. When the consumer fails to pay the amounts due after a series of missed payments and reminders from the BNPL provider, the consumer is generally exposed to collection-related costs. Practices vary: some providers write the debt off, while other providers transfer their claims against the consumer to a debt collection agency, and may charge the consumer debt collection fees in the process[25].
4. *Refinancing-related costs*. It is also worth noting that some consumers may incur costs indirectly, by borrowing money under non-interest-free alternatives to pay the instalments due under the BNPL product (e.g. by means of another credit product, such as a credit card).[26]

This overview shows that BNPL products may involve a range of conditional costs, depending on whether the borrower incurs default- or credit-related costs (*direct* conditional costs), or refinancing-related costs (*indirect* conditional costs).

1) Exploitation

Some commentators assert that BNPL providers exploit financially vulnerable consumers by aggressively targeting this segment and profiting from direct conditional charges, i.e. the aforementioned exploitation thesis[27]. More specifically, they point to the typical user and in particular the 'heavy' user who incurs significant direct conditional costs (see next section), claiming that BNPL providers engage in *predatory practices* by (1) targeting product marketing to these individuals while downplaying the credit nature of the product, (2) engaging in lax creditworthiness assessments, and (3) poorly disclosing the roster of applicable costs[28]. The thesis is often applied to credit providers serving risky consumers rejected by lenders offering mainstream products[29]. The thesis seems to assume, in surveillance capitalism fashion, that the BNPL provider is able to predict an individual consumer's non-performance and the associated amount of direct conditional costs with extreme precision[30]. That assumption is unrealistic, given the current state of predictive statistics and financial mathematics. Predicting consumer behaviour for credit underwriting decisions is a very resource-intensive, data-driven and statistically complex endeavour, which is far from error-free.[31] The data are generally analysed with multiple statistical algorithms to make those predictions, traditionally basic logistic regression models and nowadays (combinations of) more complex machine

20. Beyond the previously indicated sources, see for the introduction of credit cards in the United States, Donncha Marron, *Consumer credit in the United States: a sociological perspective from the 19th century to the present*, Palgrave Macmillan 2009, chapter 7.
21. According to the US Consumer Financial Protection Bureau (CFPB), some providers may charge origination fees. See CFPB, 'Buy Now, Pay Later Product FAQs', 13 December 2024, p. 1; Also, Arvato in the Judgment, see *infra* Section III.A.
22. E. de Haan, J. Kim, B. Lourie and C. Zhu, 'Buy Now Pay (Pain?) Later' (2024) 70(8) *Management Science* 4953–5625. Some providers charge low fixed fees for the service, see Australian Government Treasury, 'Regulating Buy Now, Pay Later in Australia – Options paper', November 2022, p. 7.
23. National Consumer Law Center, 'New Rights for Buy Now, Pay Later Purchases', December 2024. Note that this definition may deviate from regulatory definitions, such as set out in European Banking Authority, 'Final Report – Guidelines on the application of the definition of default under Article 178 of Regulation (EU) No 575/2013', EBA/GL/2016/07, 28 September 2016.
24. Patrick Jenkins, 'Buy now, pain later – the looming risks of BNPL', *Financial Times*, 20 October 2024.
25. Woolard Review, *op. cit.*, 4.43.
26. National Consumer Law Center, *op. cit.*; B. Guttman-Kenney, C. Firth and J. Gathergood, 'Buy now, pay later (BNPL)... on your credit card' (2023) 37 *Journal of Behavioral and Experimental Finance* 100788.
27. S.R. MITCHELL, 'Buy Now, Pay Later: How this Fintech Consumer Credit Product Preys on Unwary Borrowers and Evades Regulation' (2023) 49(1) Journal of Corporation Law 189–207; Good Shepherd, 'Safety net for sale: The role of Buy Now Pay Later in exploiting financial vulnerability', November 2022, p. 11. A light version of this position is that late fees exceed actual costs and are 'therefore profitable and a significant part of the revenue model', creating a 'perverse incentive', see AFM, *op. cit.*, 4.
28. See also Morgan E. Johnson, Regulate Now or Pay Later: A Late Start on Regulating the BNPL Industry Endangers Consumers, 27 N.C. BANKING INST. 454 (2023), 467-468; Laura Creech, Buy Now, Pay Dearly Later?: Minimizing Consumer Harm Under New Mexico's Small Loan Regulations, 55 N.M. L. Rev. 207 (2025).
29. Donncha Marron, *op. cit.*, p. 146 et seq.
30. Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, PublicAffairs; 1st edition (January 15, 2019), Part I.
31. For an introduction, please refer to R. Phillips, *Pricing Credit Products*, Stanford University Press 2018; S. Finlay, *Credit Scoring, Response Modelling and Insurance Rating: A Practical Guide to Forecasting Consumer Behaviour*, Palgrave Macmillan 2010.

learning models such as random forests, which require human oversight.[32] Instead of absolute individual-level predictions, lenders tend to make portfolio-level and segment-level predictions (aided with relative individual risk scores), which given the range of relevant external variables (e.g. life events[33]) and empirical within-segment variance, do not yield trustworthy individual predictions[34]. An example may illustrate the issue. Consider the case of Jordan, a twenty-something UK resident who fell behind on payments on clothes after losing his job, according to a news report.[35] Job loss and the time it takes an individual to find another job which pays a similar salary, are incredibly hard to predict[36]. So is the impact of the life event: for example, even a user with ample financial assets, may fail to comply with small instalments if such job loss creates more problematic individual circumstances.

The exploitation thesis also ignores that exploitation is not a viable business strategy for BNPL providers, for several reasons. One important reason relates to the funding of BNPL operations. BNPL providers use various ways to raise the funds used in their products, including equity[37], bank loans and deposits[38], but also securitisation[39]. Banks and investors in securitisations do not like sales to defaulting consumers, because it increases financial risk, for which they ask more compensation (read: higher interest rates). Neither do equity investors, as higher delinquency rates depress valuations of BNPL providers[40]. Another reason is that these conditional charges seem of relatively low importance vis-à-vis other income for profitability, especially merchant fees, consumer profiling data and cross-selling business leads[41]. Finally, there are bad actors in every consumer credit market, but structural exploitation would not work because an exploitation-focused strategy leads to bad word-of-mouth, which would damage the provider's reputation and therefore the ability to pursue the more profitable activities[42]. It is also inconsistent with the removal or capping of late fees, which some lenders have done, and low-and-grow strategies[43]. In addition, given that BNPL providers operate in a competitive market with fairly low profit margins,[44] pure exploitation seems an unlikely strategy for most of them.

2) Risk acceptance

It is submitted that the willingness of providers to serve financially risky consumer segments is not based on exploitation, but rather on a strategy to serve as many consumers as possible, achieving both economies of scale and a broad customer base for their business activities[45]. The essence of this risk acceptance thesis is that the willingness to serve these consumer segments is based on an economic assessment of the loss given such default, the impact on the overall profitability of the portfolio of loans, and the provider's appetite to accept that risk. That strategy may be supported with cross-subsidisation, in which case a provider incurs losses in these segments while generating profit margins in other segments or product lines that compensate those losses, such that the overall business activity remains profitable[46]. It should be noted that a similar risk acceptance strategy is not at odds with EU consumer law, which ultimately places the risk of non-compliance with the consumer. It imposes various safeguards to promote sound decision-making, such as disclosure obligations and creditworthiness assessments as well as forbearance obligations in case of arrears[47], but beyond those protections the consumer is free to purchase credit product and is responsible for complying with their terms. Certain BNPL providers may

32. For an overview of the techniques, see G. James, D. Witten, T. Hastie and R. Tibshirani, *An Introduction to Statistical Learning*, 2nd edn, Springer 2021. Regression models with smaller sets of variables, while more easy to interpret, fail to accurately the multidimensional complexity of the many factors that contribute to default. See for example Annette Vissing-Jørgensen, "Consumer Credit: Learning Your Customer's Default Risk from What (S)he Buys", working paper, 2021, https://www.bankofengland.co.uk/-/media/boe/files/events/2021/june/household-finance-and-housing/vissing-jorgensen-paper.pdf. For recent approaches, see Xiaoming Zhang and Lean Yu, 'Consumer credit risk assessment: A review from the state-of-the-art classification algorithms, data traits, and learning methods', Expert Systems with Applications, Volume 237, Part A, 1 March 2024, 121484.

33. For a definition of 'life event', see FCA, 'FG21/1 Guidance for firms on the fair treatment of vulnerable customers', February 2021, para 2.5.

34. Especially traditional statistical methods, not using machine learning approaches, provide lower levels of predictive accuracy. See e.g. Stefania Albanesi and Domonkos Vamossy, 'Predicting Consumer Default: A Deep Learning Approach', NBER Working Paper 26165, August 2019.

35. T. Espiner, 'Buy Now Pay Later: I'm stressed over debt', BBC News, 3 September 2021.

36. See e.g. the conclusions in UK Financial Conduct Authority (FCA), 'Can we predict which consumer credit users will suffer financial distress?', Occasional Paper No. 20.

37. Cornelli, Gambacorta and Pancotto, *op. cit.*, p. 64-66.

38. Yizhu Wang and Thomas Mason, Buy-now, pay-later platforms turn to interest-bearing lending via bank partners, 10 Mar, 2023, https://www.spglobal.com/market-intelligence/en/news-insights/articles/2023/3/buy-now-pay-later-platforms-turn-to-interest-bearing-lending-via-bank-partners-74223673; Abhinav Ramnarayan and Carmen Arroyo, Bloomberg, A warning sign for the buy-now-pay-later app Affirm, 7 june 2022

39. Bloomberg, 7 June 2024, Debt Markets Are Fueling Buy Now, Pay Later Resurgence; Buy Now, Pay Later Securitizations: What Are The Risks?, 9 March 2022, S*&p Global,

40. Mac Schwerin, 'The 'Buy Now, Pay Later' Bubble Is About to Burst', The Atlantic, 10 January 2023.

41. CFPB, Buy Now, Pay Later: Market trends and consumer impacts, September 2022, 4.2, for merchant fees.

42. https://www.businesswire.com/news/home/20240229862033/en/Buy-Now-Pay-Later-Customer-Satisfaction-Surges-but-Brand-Performance-Varies-Considerably-J.D.-Power-Finds

43. CFPB, Buy Now, Pay Later: Market trends and consumer impacts, September 2022, 3.3.2 and 5.3.1.

44. E. Lee, 'Buy Now, Pay Later: No Fees. No Credit Check' (2023) 13(1) *Seattle Journal of Technology, Environmental & Innovation Law* 7–8; Cornelli, Gambacorta and Pancotto, *op. cit.*, p. 64-66.

45. This thesis is motivated by the fact that BNPL platforms tend to have high fixed costs, see Cornelli, Gambacorta and Pancotto, *op. cit.*, p. 64-66, and depend on merchant fees for an important part of their revenue.

46. FCA, 'Price discrimination and cross-subsidy in financial services', September 2016, Occasional Paper No.22.

47. See e.g. Chapter II, Articles 18 and 35 CCD3.

be required to observe specific limits to the aggregate counterparty credit risk arising from these transactions, such as credit institutions under the Capital Requirements Directive (CRD), which reduces their appetite to bear this risk.[48]

C. Users and motives

To understand the benefits and risks of BNPL products, it makes sense to discuss which consumer segments use these products, and how they use them. Empirical studies of BNPL usage in the EU, the UK and the US are very useful for this purpose and paint a fairly consistent picture.[49]

Generally speaking, only a relatively small minority of consumers use (or have ever used) BNPL products.[50] These users vary significantly in terms of their traditional socio-economic characteristics: income (from low to high), education (from high school to university education), and age (from teenagers to pensioners).[51] However, typical users tend to be relatively young (under 35), earn a relatively low income, have lower educational attainments and generally carry more debts,[52] especially frequent or 'heavy' BNPL users.[53] They are also more likely to have recently experienced a life event, such as job loss or relationship breakdown.[54] Some authorities refer to these users as vulnerable or in financial difficulties[55].

BNPL products tend to be used to purchase a wide variety of goods and services: from clothing to consumer electronics, from gas to groceries, from small-ticket items to higher-cost purchases.[56] They are used for unplanned purchases and for planned daily expenses,[57] especially among those who use BNPL products to fill the income gap left by inadequate social security payments.[58] For this reason, the average amount of a BNPL product is fairly small, not exceeding a few hundred euros (respectively dollars or pounds).

Users of BNPL products report various motives. They often cite the convenience of use (as these products are integrated into the e-commerce process),[59] the ability to better manage their finances and their personal preferences.[60] But some users' motives indicate need, for example to fill a temporary financial gap[61] or lack of access to other credit products (e.g. due to credit checks).[62] Indeed, excessive usage patterns such as 'loan stacking' (discussed below) indicate that improper reliance on BNPL products to alleviate financial distress or engage in impulse buying, may be important motives for heavy users[63].

D. Benefits and risks

As one authority put it, 'if deployed and used responsibly, BNPL loans can provide consumers with a low-cost, short-term, small-dollar financing alternative to manage cash flow'.[64] Indeed, the main benefit of a BNPL product is that it enables consumers to engage in 'consumption smoothing' (continuing to consume goods and services without interruption by borrowing against future income)[65] for less money compared to other retail credit products. However, the literature points out that BNPL products may also pose risks for consumers.[66]

48. See for example the approach outlined in EBA, ' Final Report – Guidelines on loan origination and monitoring Guidelines on loan origination', EBA/GL/2020/06, 29 May 2020, for credit institutions regulated under Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.
49. As these are studies involving different geographical regions, different population samples and different methodologies, the discussion below is merely to illustrate some common aspects.
50. In Ireland the figure is 15%: see Central Bank of Ireland, 'Consumer Research Bulletin – Buy Now Pay Later Consumer Insights Update', November 2023, 8; in the US, 19%, see New York Federal Reserve (F. Aidala, D. Mangrum and W. van der Klaauw), 'Who Uses "Buy Now, Pay Later"?', Liberty Street Economics blog, 26 September 2023.
51. F. Aidala, D. Mangrum and W. van der Klaauw), *op. cit.*
52. Cornelli, Gambacorta and Pancotto, *op. cit.*, p. 67; Central Bank of Ireland, *op. cit.*; for a US perspective, see M. Lee, 'Buy now, pay later users: young and well-off but nearing a financial cliff, poll shows', USA Today News, 26 September 2023, citing a Morning Consult survey of 2,223 adults.
53. Bank of America, *op. cit.*; FCA, 'Making Buy Now Pay Later terms clearer as take-up increases', https://www.fca.org.uk/about/case-study/bnpl-terms-clearer, last accessed 23 November 2023; FCA, 'FCA secures contract changes for buy-now-pay-later customers as more consumers use the product', https://www.fca.org.uk/news/press-releases/fca-secures-contract-changes-bnpl-customers-more-consumers-use-product last accessed 31 October 2023.
54. Which?, 'Buy Now Pay Later: Understanding and Addressing the Risks to Consumers', 2021, https://www.which.co.uk/policy-and-insight/article/buy-now-pay-later-understanding-and-addressing-the-risks-to-consumers-aolP00d4cU48.
55. FCA, Dear CEO Letter 'Action: Review your financial promotions for Buy Now Pay Later (BNPL) agreements', 19 August 2022.
56. H. Lang, 'Who are buy now, pay later borrowers, and what are they buying?', Reuters, 10 October 2024; financially vulnerable consumers tend to use BNPL more often for smaller amounts, see New York Federal Reserve (F. Aidala, D. Mangrum, and W. van der Klaauw), 'How and Why Do Consumers Use "Buy Now, Pay Later"?', Liberty Street Economics blog, 14 February 2024.
57. Central Bank of Ireland, *op. cit.*, p. 9.
58. Good Shepherd, 'Safety net for sale: The role of Buy Now Pay Later in exploiting financial vulnerability', November 2022.
59. Philadelphia Federal Reserve (T. Akana and V. Zeballos Doubinko), '4-in-6 Payment Products – Buy Now, Pay Later: Insights from New Survey Data', Special Report, pp. 3–4.
60. *Ibid.*
61. Consumer Reports, 'Buy Now Pay Later: The Case for a Digital Finance Standard', 25 May 2023, p. 11.
62. Philadelphia Federal Reserve, *op. cit.*, pp. 3–4.
63. On poor use, see Aaron Gilbert and Ayesha Scott, 'Problem debt, over-indebtedness, and Buy Now Pay Later: The case of young adults in Aotearoa New Zealand: Report', Auckland Centre for Financial Research, August 2023.
64. US Office of the Comptroller of the Currency, *op. cit.*
65. M. Di Maggio, J. Katz and E. Williams, 'Buy Now, Pay Later Credit: User Characteristics and Effects on Spending Patterns', NBER Working Paper Series No. 30508, September 2022.
66. The focus is exclusively on risks to consumers. Risks to providers or financial stability, as discussed in e.g. Sveriges Riksbank (N. Svahn), 'Buy now, pay later – a threat to financial stability?', Staff Memo, September 2023, are beyond the scope of this note.

First, as discussed in Section I.B above, consumers may be faced with direct conditional costs in the event of non-compliance.[67] However, as the example of Jordan illustrates, predicting the amount of these costs for many consumers is hard, due to the unpredictability and variety of life events[68]. It is also extremely difficult to establish a clear causal link between the use of BNPL products and default for those consumers who carry multiple debts or experience income irregularities.[69]

Second, consumers may choose to use BNPL products due to an information failure.[70] They may not receive the information: in an early study, Citizens Advice found that in 74 checkouts with BNPL options, none warned customers (in the interface) that they could be directed to debt collectors and only eight warned customers that they were taking out a credit agreement.[71] They may fail to appreciate the credit nature of a BNPL product or have other misperceptions on the basis of provided materials, as some studies suggest.[72] In other cases, consumers may simply fail to read or understand the product terms.[73] In all these cases, there is a looming risk of a mismatch between the BNPL product and the consumer's needs.

Third, consumers may be exposed to deadweight transaction costs particular to the mechanics of the BNPL product arrangement. For example, a consumer may want to exercise his right of withdrawal from the purchase agreement against the merchant, while the BNPL provider still expects full payment of the purchase price[74]. Consumers may want to withhold payment in other merchant-related issues as well, such as in case of a dispute regarding the merchant's delivery costs; delivery of the wrong product, that has been returned but not in accordance with the merchants' policies)[75]; or failure to deliver the product to the consumer.[76] In these cases, the consumer does not have special statutory protection, but has to rely on rights stipulated in the BNPL product agreement and the general regime applicable to claims arising out of these credit agreements in the relevant EU Member State.

Fourth, consumers may use BNPL products inappropriately, and incur direct conditional costs as a consequence. Where the regulatory environment so permits, a consumer may use BNPL products in a manner that is inconsistent with rational consumption smoothing[77], such as by (1) increasing non-essential consumption beyond his budget ('overextension' or overspending),[78] or (2) relying on BNPL to plug persistent income-expense gaps, potentially leading to overindebtedness[79], by using multiple BNPL products at the same time ('loan stacking')[80]. Opponents of BNPL point to this phenomenon as a BNPL-specific issue, but it should be emphasised that this risk (as all other risks besides the cited merchant issues) are considered in the literature to be general risks of consumer credit products, not BNPL products in particular. In fact, due to their cost structure, BNPL products are less likely to be harmful, if at all[81]. At the same time, the EU legislators' case for regulating BNPL products under general consumer credit rules is built on the idea of "same risks, same regulation". The next section discusses this point, namely how the CCD2 applies, and the CCD3 will apply, to BNPL products.

E. Interim conclusion

In conclusion, a BNPL product is a credit product that generally involves fewer costs to consumers than other credit products, which is popular across all segments of the consumer population, but is most often used by financially vulnerable consumers excluded from other products. These products allow people to smooth their consumption and engage in efficient financial management, but may also expose users to the risk of paying conditional charges in case of default (which are virtually impossible to predict with precision), according to the literature.

BNPL providers are often portrayed as profiting from those conditional charges, on the basis of the exploitation

67. Section I.B.
68. See also the CJEU in the Judgment, para 44.
69. Similarly, Australian Government Treasury, *op. cit.*, pp. 11–12.
70. O. Bar-Gill, 'The Behavioral Economics of Consumer Contracts' (2008) 92 *Minnesota Law Review* 585.
71. Citizens Advice, 'Buy now, pay later: what happens if you can't pay later?', 2 September 2021.
72. A. Assad and Shard Financial Media, 'Most UK BNPL users don't think they can lead to debt', Credit Strategy, 3 August 2023, referring to a report by Creditspring: https://www.creditstrategy.co.uk/latest-news/news-top-stories/most-uk-bnpl-users-dont-think-they-can-lead-to-debt.
73. For example, in the Central Bank of Ireland 2023 study, 74% of respondents said that they had not entirely read the product terms.
74. See Article 9 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, for the right of withdrawal regarding distance contracts.
75. E.A.G. van Schagen, '"Buy Now, Pay Later" – wel of geen beroep op de uitzondering onder artikel 7:58 lid 2 sub e BW?' (2024/5) *Tijdschrift voor Consumentenrecht & handelspraktijken* 267, section 1.
76. Banking Stakeholder Group of the European Banking Authority, 'BSG Own-initiative paper on non-bank lending', 2022-011, 24 March 2022, 4.
77. See for example Laura, www.consumer.org.nz/articles/buy-now-pay-later-preys-on-poorest-consumers
78. BEUC, 'Fact sheet Buy Now Pay Later products', BEUC-X-2022-017, February 2022; Di Maggio, Katz and Williams, *op. cit.*; CFPB 2022, *op. cit.*; Verbraucherzentrale, 'Jetzt kaufen, später bezahlen. Entspannt in die Schuldenfalle mit "Buy now, pay later"', 18 December 2024, https://www.verbraucherzentrale.de/wissen/geld-versicherungen/kredit-schulden-insolvenz/jetzt-kaufen-spaeter-bezahlen-entspannt-in-die-schuldenfalle-mit-buy-now-pay-later-102366 last accessed 28 February 2025.
79. OECD (2024), Consumer Finance Risk Monitor, OECD Publishing, Paris, par 3.2.
80. Mitchell 2023, *op. cit.*
81. See for an empirical study. Lucinda O'Brien, Ian Ramsay, Paul Ali, 'Innovation, Disruption and Consumer Harm in the Buy Now Pay Later Industry: An Empirical Study', University of New South Wales Law Journal, Vol. 47, No. 2, 2024, 690-692.

thesis, which presupposes the intention to profit from targeted distribution to vulnerable consumers. However, the economics of BNPL products point to a risk acceptance thesis as a more likely *modus operandi* for most BNPL providers, which does not focus on the intention to profit from non-compliance.

II. CONSUMER CREDIT DIRECTIVE

A. Context

The current regulatory landscape applicable to BNPL products in the European Union can be conceptualised as spanning along three different vectors, which for convenience will be called *activity-based* regulation, *product-based* regulation and *party-based* regulation[82].

Activity-based regulation consists of rules that stipulate the initial and ongoing conditions entities must meet to carry out a regulated activity. For example, the CRD regulates access to the business of a credit institution, which includes granting consumer credit. It sets out internal governance and business conduct obligations that credit institutions must meet, which also apply when providing BNPL products.[83] The same goes for the Payment Services Directive[84] (PSD2), which regulates payment service providers and allows to extend credit as an ancillary service related to certain payment services,[85] and the E-Money Directive[86] (EMD), where credit is also an ancillary service.[87] In practice, BNPL providers are often entities licensed to provide credit or payment services.[88]

By contrast, the CCD2 is an instance of product-based regulation, as its primary function is to regulate a specific financial product sold by professionals to consumers, namely 'credit agreements'.[89] Since the first iteration of this framework (the first Consumer Credit Directive),[90] the EU has sought to regulate these products by imposing disclosure rules, conduct requirements and other obligations (see next section). With the CCD2 and the CCD3 iterations, the EU has gradually expanded the scope and granularity of the framework (such as by including data protection provisions), but its focal object remains the product, the 'credit agreement'.

Activity-based and product-based frameworks differ in subject matter and objectives, but they may complement each other or overlap. For example, a risk of overlap exists between the CCD3 and the draft Directive on payment services and repealing PSD2[91] (PSD3) in respect of BNPL product regulation, but EU legislators have sought to clarify the relationship between these frameworks. The recitals explain that the possibility of granting ancillary credit (which the PSD3 inherits from the PSD2) is 'without prejudice to' the CCD2 or other EU or national rules regulating consumer credit.[92] BNPL products have a 'principally lending nature', which are covered by the CCD3, and 'should not constitute a payment service'.[93] In other words, the PSD3 clarifies that the CCD3 regulates BNPL products, not the PSD3. However, if the BNPL provider *also* provides a payment service, it will be subject to the PSD3.[94] This assertion makes sense because, as explained above, the principal economic nature of these products (and their economic value to consumers) is the provision of credit.[95]

Finally, the system also features party-based regulation: as BNPL providers are professionals providing products to consumers, they must also respect general rules that apply because one of the parties is a consumer ('horizontal regulation'), beyond the CCD2, which is a sector-specific or 'vertical' regulation. Worth mentioning here are the Unfair Commercial Practices Directive,[96] which applies to all 'commercial practices' of BNPL providers (including disclosures), and the Unfair Contract Terms Directive,[97] which applies to the terms and conditions of BNPL products (such as fees). These rules apply concurrently with

82. See for example the 'Risk factors' section Klarna's registration statement submitted on 14 March 2025, https://www.sec.gov/Archives/edgar/data/2003292/000162828025012824/klarnagroupplcf-1.htm
83. Article 74.1 CRD (governance arrangements).
84. Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market.
85. Article 18.4 PSD2.
86. Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions.
87. Article 6.1 EMD.
88. For example, Klarna is authorised as a credit institution, https://www.klarna.com/de/uber-uns/corporate-governance/.
89. See Section II.B below. NB: the CCD2 does require Member States to adopt activity-based regulation for creditors and credit intermediaries, to the extent that they are not already regulated. See Article 20 CCD2 and Article 37 CCD3.
90. Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit.
91. 2023/0209/COD, COM (2023) 366: Proposal for a Directive of the European Parliament and of the Council on payment services and electronic money services in the Internal Market amending Directive 98/26/EC and repealing Directives 2015/2366/EU and 2009/110/EC.
92. Recital 35 of Proposal 2023/0209/COD.
93. *Ibid.*
94. *Ibid.*
95. *Ibid.* Similarly, N. Kalokyris and P. Berger, 'Le champ d'application de la reglementation applicable aux services de paiement', in J. Sad (ed.), *Les services de paiement en droit belge*, Limal, Anthemis 2024, pp. 17-106, para 184.
96. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.
97. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

the CCD2 and therefore, complement the relevant provisions of that Directive.

B. Current rules

The CCD2 has the dual aim of harmonising a high level of consumer protection and of promoting the integration of the Single Market – as will be discussed in Section IV.C.4 below, the CJEU's solution clashes with the latter aim.[98]

The CCD2 applies to 'credit agreements' as defined in Article 3.c CCD2, but it excludes a number of credit agreements from its material scope in Article 2.2 CCD2, which sets out the negative scope of the Directive. Relevant here are two provisions that, given their transaction-cost-free nature and the average transaction amount, exclude many BNPL products from the CCD's scope[99]. The first provision is the *de minimis* exemption, which removes credit agreements involving an amount of credit less than EUR 200 from the CCD2's scope.[100] The second exemption removes (1) credit agreements where the credit is granted free of interest (or any other charges), and (2) credit agreements with a repayment period of three months and where only insignificant charges are payable, from the CCD2's scope.[101] This second exemption is the subject of the Judgment.

If a credit agreement falls under the scope of the CCD2, the creditor must respect a host of obligations, including the following ones. *First*, it must comply with disclosure obligations that prescribe which information must be included in advertising materials and pre-contractual information documents, such as the total cost of credit to the consumer.[102] *Second*, it must carry out a creditworthiness assessment prior to concluding the agreement with the consumer.[103] *Third*, the CCD2 stipulates mandatory content elements for credit agreements, how those agreements can be modified, and other protective provisions, such as the right of withdrawal, the right of early repayment and importantly, the obligation of creditors to make efforts to exercise, where appropriate, reasonable forbearance in the case of arrears before enforcement proceedings are initiated.[104]

The CCD2 also stipulates key implementing measures, such as the imposition of sanctions in the event of non-compliance by creditors, and the non-circumvention provision that is also the subject of the Judgment.[105] As to sanctions, the principles-based provision of the CCD2 leaves Member States some discretion to determine the consequences of non-compliance with the transposed rules. It states that penalties applicable to infringements 'must be effective, proportionate and dissuasive'.[106] The application of these principles has been addressed in a recent decision of the CJEU. In *Lexitor II*, the CJEU decided that the CCD2 does not preclude national legislation which provides for a uniform penalty consisting of depriving the creditor of its right to interest and charges if the creditor breaches the obligation to include the information specified in Article 10.2 CCD2 in a credit agreement (regardless of the seriousness of the breach).[107] The CCD2's non-circumvention rule obliges Member States to 'ensure that the provisions they adopt in implementation of [the CCD2] cannot be circumvented as a result of the way in which agreements are formulated'.[108] The CCD3 contains a nearly identical provision.[109]

The CJEU has interpreted the non-circumvention rule in a number of rules, with respect to various cost provisions. In *Lexitor*, the CJEU considered whether the right to a reduction in the total cost of the credit in the event of early repayment (Article 16.1 CCD2) also includes costs which are not dependent on the duration of the contract.[110] As part of its teleological interpretation, more specifically the CCD2's objective to guarantee a high level of protection, it pointed out that the non-circumvention provision serves to guarantee that protection.[111] On that basis, it concluded that those costs must be included, as the effectiveness of the right in Article 16 would otherwise be reduced, among other reasons.[112] In *Profi Credit Bulgaria*, the CJEU asked whether the same concept of the 'total cost of the credit to the consumer' (Article 3.g CCD2) also includes costs relating to services ancillary to a consumer credit agreement that give priority to the examination of the credit application of the consumer purchasing those services and to the making available of the sum borrowed, as well as providing that consumer with the option of deferring the

98. Article 1 and recitals 3–9 CCD2.
99. It is worth noting that there is no clear evidence that the BNPL product generally, or this version in particular, was structured to circumvent existing credit regulations. For a different view, see J. Ehrentraud, S. Mure, E. Noble and R. Zamil, 'Safeguarding the financial system's spare tyre: regulating non-bank retail lenders in the digital era', FSI Insights on Policy Implementation 56, March 2024, p. 16.
100. Article 2.2.c CCD2.
101. Article 2.2.f CCD2.
102. Article 3.g and Chapter II CCD2.
103. Articles 3–7 CCD2.
104. Chapter IV CCD2.
105. Chapter VII CCD2.
106. Article 23 CCD2.
107. Case C-472/23 *Lexitor II*, 13 February 2025, ECLI:EU:C:2025:89, para 58.
108. Article 22.3 CCD2.
109. Article 43.2 CCD3.
110. Case C-383/18 *Lexitor*, 11 September 2019, ECLI:EU:C:2019:702, para 21.
111. *Ibid.*, paras 29–30.
112. *Ibid.*, paras 31–36.

repayment of the monthly instalments or reducing the amount thereof[113]. The Court employed the non-circumvention provision in the same teleological reasoning, referring to *Lexitor*, to come to the conclusion that those costs are included, where the purchase of the services proves to be compulsory in order to obtain the credit concerned or where the services are a contrivance to conceal the actual cost of that credit.[114] In other words, the CJEU has used the non-circumvention provision to interpret the notion of total credit costs in the CCD2 broadly, with the express objective of providing consumer protection.[115]

The Judgment differs from these rulings in a fundamental manner, because unlike the requalification of *contractual* elements (i.e. contractually agreed charges), it incorporates *extra-contractual* elements (statutory provisions on default charges and collection costs) to redress the CCD2's *scope*.

C. Future rules

The CCD3, which must be applied from 20 November 2026, pursues the same aims as the CCD2 and keeps of its regulatory aspects, but makes quite some fortifying changes.

First, its negative scope has changed, as the aforementioned exemptions in Article 2.2 subs c and f CCD2 have been removed. They have been replaced by a narrower exemption for deferred payments provided by a merchant in the sale of goods or services, without relying on a third party offering the credit.[116] Thus, the CCD3 exempts deferred payment solutions offered by merchants, but not by third parties (including BNPL providers), a distinction which some authors find questionable in light of the consumer protection aim.[117] In any event, the deletion of the exemptions means that more BNPL providers will have to comply with the CCD's provisions, even if Member States can create a 'light' regime for those previously excluded credit agreements.[118]

Second, creditors of in-scope credit agreements (including most BNPL providers) will face more detailed obligations than under the CCD2, bolstered to reflect developed market practices and new technologies.[119] For example, the advertising rules have become stricter to prevent over-indebtedness, by including a clear and prominent warning that borrowing costs money; disclosure obligations have been expanded and must be adapted to the device used by the consumer; the creditworthiness assessments must now be conducted in the interest of the consumer and follow granular prescriptions; and Member States must introduce measures to effectively prevent abuse and to ensure that consumers cannot be charged with excessively high borrowing rates, annual percentage rates of charge or total costs of credit to the consumer.[120] The CCD3 leaves some uncertainties, unfortunately. For example, it is also unclear how the CCD3 will sanction violations by BNPL providers of the different provisions, given that the principle-based sanctions provision of the CCD3 leaves room for different approaches between Member States, and thus room for arbitrage.[121] As discussed above, *Lexitor II* suggests the CJEU indeed gives Member States wide latitude in their transposition of this provision.

D. Comparison with UK and US

As discussed in Section I.E, based on their perceived similarities to other credit products, legislators have built the case for subjecting BNPL products to general consumer credit regulation. The EU is not the only jurisdiction which has sought to do so. In the UK and the US, where BNPL markets are more developed, regulatory changes point in the same direction.

The UK government has proposed a regulatory approach to BNPL based on principles that address the risks outlined in Section I.D above. These principles state that consumers (1) must have access to simple, clear, understandable and accessible information; (2) should have protection when things go wrong; and (3) should only be lent to if doing so is affordable.[122] In practical terms, this means that BNPL will be subject to a tailored framework that features disclosure obligations, key statutory rights for consumers, complaints handling, mandatory prior authorisation and ongoing supervision of BNPL firms, and affordability and creditworthiness assessments. Prior to this initiative, the UK Financial Conduct Authority (FCA) had already taken actions to regulate the marketing of BNPL products.[123]

In the US, the Consumer Financial Protection Bureau (CFPB) has adopted an interpretative rule that qualifies

113. Case C-714/22 *Profi Credit Bulgaria EOOD*, 21 March 2024, ECLI:EU:C:2024:263.
114. *Ibid.*, paras 40–46.
115. See also the Dutch Supreme Court, 30 June 2023, ECLI:NL:HR:2023:1006, 3.5.1–3.5.13, especially 3.5.6.
116. Article 2.2.h CCD3.
117. G.J. Feenstra and C.M.D.S. Pavillon, 'De herziene Richtlijn consumentenkrediet en achterafbetaaldiensten: meer bescherming en harmonisatie in het verschiet?' (2024/31) *Tijdschrift voor Consumentenrecht & handelspraktijken* 274-284, section 3.4, suggest that these deferred payments should not have been exempted.
118. Article 2.8 CCD3. It is not entirely clear whether BNPL arrangements can qualify under the light regime, see Feenstra and Pavillon, *op. cit.*, section 3.3.
119. Feenstra and Pavillon, *op. cit.*, section 2.1.
120. Articles 8, 10, 18 and 31 CCD3.
121. *Ibid.*, section 3.3.
122. HM Treasury, Regulation of Buy-Now, Pay-Later: Consultation on Draft Legislation', October 2024, para 1.9.
123. FCA, 'Dear CEO letter – Action: Review your financial promotions for Buy Now Pay Later (BNPL) agreements', 19 August 2022.

(1) BNPL products accessed via 'digital user accounts' (DUA) and not subject to a finance charge as 'credit cards' under existing credit card regulations, and consequently (2) BNPL providers as 'card issuers'.[124] The rationale for the application of those regulations to BNPL is that the DUAs used to access BNPL credit 'mimic conventional credit cards'.[125] Specifically, when a consumer can access the DUA from time to time and if the DUA is used to obtain credit in the course of completing transactions to purchase goods or services offered by the merchant or BNPL loan provider (such as when it is used as a payment method for websites, mobile applications, browser extensions or integrations), the product should be qualified as a credit card under Regulation Z.[126] Consequently, BNPL providers that offer such accounts are 'card issuers' and 'creditors' subject to certain but not all Regulation Z requirements – the key obligations are to investigate disputes, refund returned products or cancelled services, and provide periodic billing statements.[127] The application of these rules is uncertain, however, given the recent changes in US public policy.

In conclusion, similar to the EU, the UK and the US will adopt – respectively have adopted – rules to bring BNPL products under existing consumer credit rules to create a similar dedicated regime that mimics those rules.

E. Interim conclusion

The Consumer Credit Directive, in its current iteration (CCD2), is a product-based regulatory framework that applies to many BNPL products. The relevant exemptions are the *de minimis* exemption, the interest-free exemption and the short-term-and-insignificant-charges exemption, the latter being the subject of the Judgment. If the CCD2 is considered applicable to a particular BNPL product, the relevant provider must comply with a host of obligations, such as obligations to disclose information and to carry out creditworthiness assessments. Failure to meet those obligations exposes the provider to sanctions, which differ across Member States but may include deprivation of the right to claim interest and charges. In addition, Member States must avoid creditors circumventing the CCD2, which is also a subject of the Judgment.

The CCD3 will remove those exemptions, bringing most BNPL products in scope of general consumer credit regulation, a development similar to regulatory changes in the UK and the US. Yet, in the interim the CCD2 applies; perhaps the CJEU's reason behind its solution is that it anticipates the CCD3's regime and desires that national courts apply the CCD2 to exploitative BNPL transactions until the CCD3's application.[128]

III. FACTS OF THE CASE

This section sets out the facts of the case (A) and the national proceedings (B).

A. Business model

The appellant in the case, Riverty, is the legal successor of Arvato, a company which operated under the name AfterPay.[129] AfterPay provided a 'deferred payment service, offered on online purchases, in return for a payment fee of EUR 1' (i.e. the transaction-related costs).[130] Under its general payment terms, the customer's decision to use that service presupposed that, following AfterPay's acceptance of the customer's request, the trader (i.e. the counterparty of the online purchase) would assign the rights to the fees relating to the amount for which the customer was liable to AfterPay.[131] Following that assignment, the customer could only pay AfterPay to discharge the obligations, and in fact received an invoice from AfterPay (separate from the online order), stating the amount due and payable within 14 days of the invoice date (unless another date was agreed in writing).[132]

If the customer failed to pay within that period, the amount due was immediately payable without the need to send a formal notice.[133] Arvato reserved the right to charge administrative fees – the amount of which increased with each payment reminder – as well as monthly statutory interest on the amount due and all reasonable costs incurred in securing payment through judicial or extrajudicial means (i.e. default-related and collection related costs).[134] The minimum amount charged for out-of-court collection costs was EUR 40.[135] The Judgment does not mention any specific features that point towards an exploitation-oriented business model.

124. 12 CFR Part 1026, Truth in Lending (Regulation Z): Use of Digital User Accounts to Access Buy Now, Pay Later Loans. Given the shutdown of the CFPB by the Trump administration, the future of this framework is unclear at present.
125. Interpretative Rule 47069; Skadden Arps, 'CFPB Applies Credit Card Rules to "Buy Now, Pay Later" Lenders', 5 June 2024, https://www.skadden.com/insights/publications/2024/06/cfpb-applies-credit-card-rules.
126. CFPB, 'Buy Now, Pay Later Product FAQs', version 13 December 2024, pp. 3–4.
127. Skadden Arps, *op. cit.*; CFPB, 'CFPB Takes Action to Ensure Consumers Can Dispute Charges and Obtain Refunds on Buy Now, Pay Later Loans', 22 May 2024.
128. Interpreting a provision of law in light of the pending changes to that law can be considered a form of 'anticipating interpretation'. See A. Hartkamp, 'Civil Code Revision in the Netherlands: A Survey of its System and Contents, and Its Influence on Dutch Legal Practice', *Louisiana Law Review* 1975, 1059-1090, 1085.
129. Judgment, para 13.
130. *Ibid.*
131. Judgment, para 14.
132. *Ibid.*
133. Judgment, para 15.
134. *Ibid.*
135. *Ibid.*

B. Default of the customer

Around 27 February 2019, MI (acting as a consumer) purchased three products from an online shop for EUR 37.97 (the total purchase price), choosing AfterPay as the payment method.[136] On that same day, Arvato sent a payment summary for the purchase price and the payment fee, EUR 38.97, payable by 13 March 2019.[137] It also notified MI that failure to pay the invoice would lead to a EUR 40 increase.[138] Between March and December 2019, Arvato sent six payment reminders, each time specifying additional administrative fees resulting from the non-payment.[139] In the last email, Arvato also stated that it would invoice the consumer another EUR 40 for collection costs in the event of non-payment.[140] To sum up, MI incurred transaction-, default- and collection-related costs on a product that allowed him to defer the payment of the entire purchase price (type 1 in Section I.A). Unfortunately, the Judgment does not mention the reason for the non-compliance by MI, which would elucidate whether MI's default was caused by a particular life event or any other reason leading to an inability to pay[141].

C. National proceedings

Arvato then initiated proceedings before the District Court of Arnhem (Cantonal Sector) in the Netherlands, seeking to collect EUR 80.20 plus statutory interest calculated on the EUR 38.97, with effect from 9 October 2020.[142] The District Court stayed the proceedings and submitted several questions to the referring court (the Supreme Court of the Netherlands) in a national preliminary ruling procedure. Those questions relate to default interest (interest other than that relating to remuneration for making the credit available) and out-of-court collection costs payable by a consumer in the event of non-performance of a credit agreement. Specifically, the court asks whether:

1. the interest and costs are part of the credit costs; or
2. it is necessary to consider these costs for the qualification of the agreement in question, as (a) an agreement 'free of interest and without any other charges' or (b) an agreement under the terms of which 'only insignificant charges are payable', per Article 2.2.f CCD2; or
3. account must be taken, in the context of the examination of those questions, of the statutory or contractual nature of such interest and other charges and the amount thereof in relation to the statutory scales.

The referring court considers that the CCD2 and the CJEU's case law do not provide an answer to questions 1 and 2 above.[143]

In addition, the court sets out the particularities of the applicable statutory rules. *First*, the Dutch Civil Code states that, where the debtor is a consumer, the compensation claimed in respect of out-of-court collection costs corresponds to a percentage of the principal debt and may not be less than EUR 40 (setting a floor under the collection-related costs) or more than EUR 6,775.[144] *Second*, Dutch law prohibits the creditor from demanding a credit fee in excess of the maximum fee permitted by law, and this maximum fee includes default interest and out-of-court collection costs, the creditor being unable, consequently, to claim compensation in respect of out-of-court collection costs which has the effect of increasing the credit fee beyond the maximum permitted.[145]

Third, the default interest and the out-of-court collection costs claimed in the present case must be included in the notion of 'total cost of the credit to the consumer' in Article 3.g CCD2. At the same time, the court considers that those charges can be included in the 'total cost of the credit to the consumer' only if the conditions under which the credit was granted and the other circumstances present at the time when the agreement was concluded, provide grounds for assuming that the liability for those charges forms part of the creditor's business model. However, as the court submits, Article 2.2.f CCD2 could be rendered meaningless if it were held that the references to interest and other charges in that provision had to include interest and out-of-court collection costs payable by law in the event of non-payment.

On the basis of these considerations, the Court asks if default interest and out-of-court collection costs are included in the notion of 'total cost of the credit to the consumer' in Article 3.g CCD2 and if they must be considered in the determination of whether a credit agreement falls within the exemption of Article 2.2.f CCD2.[146]

136. Judgment, para 16.
137. Judgment, para 17.
138. *Ibid.*
139. Judgment, para 18.
140. *Ibid.*
141. MI did not appear before the court of first instance adjudicating her case, see Rechtbank Gelderland, 1 December 2021, ECLI:NL:RBGEL:2021:6428 and 4 May 2022, ECLI:NL:RBGEL:2022:2441; Supreme Court of the Netherlands, 30 June 2023, ECLI:NL:HR:2023:1006.
142. Judgment, para 19.
143. Judgment, para 23.
144. Judgment, para 24.
145. Judgment, para 25.
146. Judgment, para 30.

IV. ANALYSIS

The CJEU splits its answer to the question into two parts. The first part sets out the general rule of interpretation applicable to Article 2.2.f CCD2 (Section IV.A), and the second part discusses the application of CCD2 on the basis of the non-circumvention provision regardless of the outcome of the interpretation exercise in the first part (Section IV.B).

A. General rule of interpretation

According to the CJEU, the referring court essentially asks whether Article 2.2.f CCD2 must be interpreted as meaning that the default interest and the out-of-court collection costs for which a consumer is liable in the event of late payment or non-performance of his or her payment obligation under a credit agreement fall within the concepts of 'interest' and 'other charges' within the meaning of that provision.[147] According to the Court, these elements are interest and default charges.[148]

To interpret this provision, the CJEU applies the 'classical' methods of interpretation, i.e. literal, teleological, systematic and historical interpretation.[149] The CJEU applies these methods routinely. In the Judgment, the Court repeats its settled *dictum* that to interpret a provision of EU law, *casu quo* Article 2.2.f CCD2 (in particular, the concepts of 'interest' and 'other charges'), account must be taken not only of the wording of that provision (literal interpretation), but also of its context (systematic interpretation) and of the objectives and purpose pursued by the measure of which it forms part (teleological interpretation).[150] To complete this list: other key interpretation methods often used by the Court are the historical method and the comparative method. The historical method involves drawing from the preparatory documents of the EU legislature to clarify legislative intent.[151] The comparative method means using other legal acts to interpret the provision, such as acts of foreign law, the laws of the Member States, other legislative acts of the EU legislature, and other language versions of the same act.[152] The historical and comparative methods are generally not used independently, but to support the former three interpretation methods.

As to the literal meaning, the Court first notes that 'interest' and 'other charges' are not defined in the CCD2. The Court subsequently provides definitions, without mentioning any source or reference population. 'Interest' refers 'both to interest accrued or payable on invested or loaned capital and to compensatory or default interest and thus has several possible meanings',[153] and 'other charges' is 'also a generic concept capable of covering several categories of expenditure, with the result that the concept varies in content depending on the context in which it is used'.[154] The Court then compares different language versions of Article 2.2.f. CCD2 to narrow down the meaning of these terms.[155] It finds that some versions refer only to the absence of these costs, while other versions make explicit reference to the fact that credit is granted without interest or other expenses.[156] It concludes that, based on this linguistic comparison, the interest and other charges *provided for at the time of conclusion of the credit agreement* must be considered, to assess whether Article 2.2.f CCD2 applies. The Court adds that the non-performance of a payment obligation and the duration of any such non-performance are, in principle, unforeseeable at that time. Therefore, interest and default charges do not form part of 'interest' and 'other charges' within the meaning of Article 2.2.f CCD2, 'irrespective of whether the application and level of that interest and those charges are *provided for by law or stipulated* in the credit agreement' (italics: MT).[157]

The systematic method supports this reading, the CJEU continues. It reaches this conclusion by referring to the annual percentage rate of charge in Article 19 subs 2 and 3 CCD2, and observing that default charges are also excluded from the calculation of this measure[158]. The CJEU then reasons by analogy: the assumption underlying that calculation is 'that the credit agreement will remain valid for the period agreed and that the creditor and the consumer will fulfil their obligations under the terms and within the time limits specified in that agreement' – that

147. Judgment, para 36.
148. Judgment, para 37.
149. Quoting K. Lenaerts and J.A. Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', Academy of European Law, AEL Working Paper 2013/9.
150. Judgment, para 39. See also Case C-438/23 *Protéines France*, 4 October 2024, ECLI:EU:C:2024:826, para 86; Joined Cases C-795/21 P and C-796/21 P *WEPA Hygieneprodukte GmbH*, 26 September 2024, ECLI:EU:C:2024:807, paras 66–77. The Court also uses a historical method, which relies on using the preparatory works of the EU legislature to clarify legislative intent, to be taken into account in the teleological and contextual interpretations, see e.g. Joined Cases C-611/22 P and C-625/22 P *Illumina*, 3 September 2024, ECLI:EU:C:2024:677, para 129.
151. See e.g. *Illumina*, para 129.
152. Case C-76/23, *Cobult*, 21 March 2024, ECLI:EU:C:2024:253, para 25; Case C-623/22, *Belgian Association of Tax Lawyers*, 29 July 2024, ECLI:EU:C:2024:639, paras 39–41; Case C-508/12 *Vapenik*, 5 December 2013, ECLI:EU:C:2013:790, paras 24–25.
153. Judgment, para 41.
154. Judgment, para 42.
155. Judgment, paras 40, 43–44.
156. Judgment, para 43.
157. Judgment, para 44.
158. The annual percentage rate of charge is based on the 'total cost of credit to the consumer' *ex* Article 3.g CCD2.

assumption must also be the starting assumption for Article 2.2.f CCD2, per the Court[159].

Finally, the CJEU finds that the teleological method also supports the literal reading. Here, it focuses narrowly on the purpose of sub f as a cog in the scoping machinery of Article 2.2 CCD2. It recalls that this sub-provision, like the other sub-provisions of Article 2.2, seeks to define the scope of the CCD2. It subsequently posits that if interest and default charges are included as constituting elements of those agreements, the provision would essentially be rendered useless. In the CJEU's words:

> 'If interest and default charges were to be taken into account in order to establish whether a contract falls within the scope of that directive, that provision would be largely deprived of its substance and effectiveness, since it would apply only in very unlikely cases in which the delay or failure to pay would have no legal consequences for the creditor, namely neither the imposition of default interest nor other charges as a result of the non-performance of the payment obligation'.[160]

In conclusion, interest and default charges, *casu quo* statutory interest and collection costs claimed by Arvato, should not 'in principle' fall within the concepts of interest and other charges per Article 2.2.f CCD2[161]. More generally, the fact that default interest and fees are payable in the event of non-performance of a BNPL product that is otherwise free of interest (or any other charges), or only involves insignificant charges, does not cause that BNPL product to fall in the scope of the CCD2.[162] That conclusion is sound and understandable, as it follows directly from the triangulation of established interpretation methods.

B. Non-application in case of suspected circumvention

But what if 'it cannot be ruled out that the circumstances present at the time when the agreement in question was concluded provide grounds for assuming that the liability for default charges forms part of the creditor's business model', as submitted by the referring court and the Dutch government?[163]

The Court answers this hypothetical by concluding that in that situation, the charges should be taken into account when examining the 'applicability' of Article 2.2.f CCD2. Reading further, one understands that the CJEU intends to sidestep the negative scope of Article 2.2 CCD2, using the non-circumvention provision. Citing *Lexitor*, the CJEU states it must be 'borne in mind' that Article 22.3 CCD2 requires Member States to ensure that transposed provisions cannot be circumvented through the formulation of agreements.[164] *Without explanation or reference*, the Court subsequently holds that the referring court must 'ascertain whether, in reality, the creditor is seeking to circumvent its obligations under the CCD2 by anticipating, from the time the credit agreement is concluded, the non-performance by the consumer of the payment obligation in order to seek an economic advantage from the latter's liability for interest and default charges'.[165] The referring court must examine 'all the circumstances present at the time when the agreement in question was concluded and other relevant information, such as, *inter alia*, the statutory or contractual origin of the interest and default charges, the periods within which that interest and those charges become payable and the amount of that interest and those charges'.[166] At least, it is clear why the CJEU qualified its general rule of interpretation in the previous section with 'in principle'.

If after reading those considerations doubts still linger as to whether the CJEU actually tasks national courts with applying the CCD2 despite its negative scope following a case-by-case, unstructured and intuitive assessment of the BNPL provider's commercial motives, they should be quashed by the Court's final holding:

> 'Article 2(2)(f) of Directive 2008/48 must be interpreted as meaning that, save where the creditor anticipates, from the time the credit agreement is concluded, the non-performance by the consumer of the payment obligation in order to seek a financial advantage, the default interest and the out-of-court collection costs which a consumer is liable to pay in the event of late payment or non-performance of his or her payment obligation under a credit agreement do not fall within the concepts of "interest" and "other charges", within the meaning of that provision, irrespective, in principle, of whether such interest and other charges are statutory or contractual in origin and of whether, as the case may be, such interest and other charges arising under an agreement are greater than would be payable by law'.[167]

159. Judgment, para 46.
160. Judgment, para 47.
161. Judgment, para 48.
162. C. Leone, 'CJEU on Buy Now Pay Later (C-409/23): not consumer credit unless it is', 28 November 2024, http://recent-ecl.blogspot.com/2024/11/cjeu-on-buy-now-pay-later-c-40923-not.html?m=1.
163. Judgment, para 49.
164. Judgment, para 50.
165. Judgment, para 51.
166. Judgment, para 51.
167. Judgment, para 52.

C. Commentary

The Judgment has the drama of a classic *telenovela*[168]. In the first scene, discussed in Section IV.A, the CJEU delivers a logically sound interpretation of Article 2.2.f CCD2, leading to the conclusion that the statutory default interest and collection charges are not included in that exemption. It supports this conclusion with its well-settled triangulation of literal, systematic and teleological interpretations. The second scene, discussed in Section IV.B, presents a surprising and shocking turn of events, akin to the 'poor and ugly' protagonist of a *telenovela* marrying her 'rich and handsome' boss[169]. The CJEU makes its conclusion conditional on the absence of anticipation by the creditor that the borrower will default on its obligations, and the financial advantage that such non-performance would bring the creditor. It supports this conclusion with a reference to the non-circumvention rule, putting the national courts in charge of assessing whether the creditor was not actually seeking to circumvent the application of the CCD2.

On its face, the Judgment indeed seems to continue the trend visible in *Lexitor* and *Profi Credit Bulgaria*, in which the CJEU also stretched the semantics of the CCD2's provisions to protect consumers. However, in this Judgment the Court embarks on a much more vigorous pursuit as it unchains itself from text, system and teleology and explores the unbridled inference of behavioural intent. As discussed in Section II.E, it is understandable that the CJEU wanted to reach this destination. By qualifying BNPL as credit agreements after the fact, it can already create the CCD3's protective ethos today – in the case of the Netherlands, Dutch courts may then be able to invalidate the BNPL agreement, such that the consumer no longer has to pay the default interest and charges following his default.[170] Dutch courts had already sought to do so, by interpreting these costs as part of the total cost of credit, such that the exemption of Article 2.2.f CCD2 does not apply.[171] However, the CJEU's solution is much more brazen, and raises several normative and practical issues.

1) Conceptual ambivalence

The most important issue is that the solution is conceptually ambivalent, because its terms are painfully unclear. When it comes to 'anticipates', the CJEU does not clarify whether the notion is subjective, objective or hybrid. A subjective notion would mean that the *provider in question* anticipates the default (state of mind), while an objective notion would mean that the court would determine whether *some normative archetype of a provider* would, could or should have anticipated the default[172]. In common parlance, anticipating means the subjective expectation of an individual regarding the occurrence of an event,[173] but the CJEU's guidance suggests that the notion must be interpreted objectively, with the possible inclusion of subjective elements (an examination of all the circumstances surrounding the conclusion of the contract *and* 'other relevant information'). A subjective approach would be preferable, as an objective one would untether the notion from the economic reality and affect the provider's autonomy, especially since the notion of 'relevant information' is not limited in any meaningful way.

A second issue with using anticipation, especially in an objective sense, is that the CJEU does not qualify the requisite likelihood of the non-performance: should a late payment or delinquency be 'somewhat likely', 'more likely than not', 'very likely' or 'almost certain' to rise to the level of anticipation? Without such clarity, experience with legal standards of proof teaches that these standards can create practical problems[174]. For example, simplistic intuitive approaches, such as relying on single variables like household liquidity or debt-to-assets ratio in the context of a legal procedure, are likely to suffer from hindsight bias because of the lack of data on loans with similar metrics in which the borrower complied with the payment obligations.

A third issue pertains to the economic motive of the provider. The Court's *dictum* states that the creditor *anticipates the non-performance* by the consumer of the payment obligation *in order to seek a financial advantage*, from the time the credit agreement is concluded. A literal interpretation of this rule suggests that the creditor establishes a causal link between the non-performance and the financial advantage, which means that the amount of the direct conditional charges due in that case is high enough to offset any costs to the provider. Unclear is which advantage the CJEU has in mind. The advantage could constitute direct conditional charges, following the exploitation thesis, if one takes the view that the provider is solely interested in the net income from the individual transaction[175]. However, this myopic view would ignore the economic reality of many BNPL providers as discussed

168. A *telenovela* is a TV soap opera produced in many Latin American countries, known for its melodramatic plots and characters (https://dictionary.cambridge.org/dictionary/spanish-english/telenovela).
169. This example is taken from 'Yo soy Betty, la Fea', a popular Columbian telenovela airing between 1999 and 2001.
170. Van Schagen, *op. cit.*, section 4; Leone, *op. cit.*
171. Van Schagen, *op. cit.*, section 4. The Attorney General shared this view in his conclusion of 30 November 2022, ECLI:NL:PHR:2022:1130, para 6.51.
172. See for a parallel from corporate law e.g. Rosemary Teele Langford and Ian Ramsay, 'Directors' Duty To Act in the Interests of the Company: Subjective or Objective?', Journal of Business Law 2015, 173-182.
173. https://dictionary.cambridge.org/de/worterbuch/englisch/anticipate.
174. See the problems around the definition of 'reasonable doubt', Jack B. Weinstein and Ian Dewsbury, 'Comment on the meaning of 'proof beyond a reasonable doubt', *Law, Probability and Risk*, Volume 5, Issue 2, June 2006, Pages 167–173.
175. See the AFM, *op. cit.*, p. 4, that income of late payment fees create *per se* risks of perverse incentives, for an example of this view.

in Section I.B. Since in reality, BNPL providers focus on higher-level decisions, the better view may be the overall business rather than the individual transaction or portfolio[176]. Yet, because the CJEU did not expand on the notion of 'business model' or the importance of the charges for the business model (e.g. a 'major part'), it is unclear whether it addresses the exploitation thesis – it is nevertheless assumed that it does.

In sum, the concepts in the CJEU's rule are very unclear and, consequently, the rule is conceptually ambivalent.

2) Practical implementation

In addition to conceptual ambivalence, the CJEU's solution is also hard to implement. *First*, how does one assess the anticipation of a lender? It is a difficult task which can lead to diverging approaches of national courts, as one author has observed in the case of the Netherlands: some assume that they can qualify BNPL products as credit agreements, some assume that they cannot, while others require further information about the business model or de-prioritise the cases awaiting the Dutch Supreme Court's final decision.[177] In practice, the Dutch courts have voided or annulled agreements constituting BNPL products on the ground that the provider failed to meet the Dutch rules transposing the CCD2.[178] It is submitted that accurately examining the provider's anticipation is not just difficult, but virtually impossible for courts to carry out with sufficient precision, given the resources at their disposal and the complexities of the task.[179] The idea that generalist national courts with resource constraints would be in the position to accurately assess the *creditor*'s anticipation of the consumer's *default* – indeed, *two* different predictions – is naïve at best. These courts will likely be inundated by expert opinions and *amicus briefs* setting out complex statistical evidence, which judges must then evaluate to essentially formulate a matter of general economic policy.

Second, BNPL providers will try to mitigate the risk that national courts impute anticipation to their decisions in case of defaults by financially vulnerable consumers by implementing good practices, but given the CJEU's conceptually ambivalent guidance, the required efforts will be onerous. For example, they could engage in requiring extensive disclosures from consumers and collect third party information, but such data gathering is likely to adversely affect their competitive position and may rub against data protection regulations and guidelines. In addition, providers will need to dedicate resources to the continuous assessment of the rules to ensure the right compliance approach, without having the certainty that the qualification risk is effectively mitigated.

3) Legal certainty

It is questionable whether this off-the-cuff judicial requalification of the provider's business model, in which the national courts can impute commercial predation to creditors with little oversight, sufficiently safeguards the principle of legal certainty and the freedom to conduct business as enshrined in Article 16 of the Charter of Fundamental Rights of the European Union. According to the CJEU, the principle of legal certainty 'requires that (1) the rules of law be clear and precise, and (2) their application be foreseeable for those subject to the law, in particular where they may have adverse consequences for individuals and undertakings'[180]. Specifically, 'those persons must be able to ascertain unequivocally their rights and obligations and take steps accordingly'[181]. Unfortunately, clarity and precision are woefully absent in the CJEU's solution. In addition, Article 16 of the Charter recognises the freedom to conduct a business in accordance with Union law and national laws. While it can be restricted on the grounds of consumer protection, it seems unlikely that the judicial inference of a particular state of mind regarding the economic benefit of relying on provisions of statutory law, meets the requirements for the consequential restriction of the contractual autonomy of providers[182]. Particularly problematic in this respect, is the conclusion that the credit agreement may be brought in scope of the CCD2 (1) *post hoc*, (2) without an *contractual* provision that justifies this inclusion, and (3) on the basis of – it must be repeated – an open-ended contextual inference of the provider's reliance on statutory provision for commercial gain.

4) Teleology

Furthermore, the Judgment creates friction with the CCD2's policy aims. On the one hand, since different national courts will likely apply the solution in diverging ways, the solution does not promote market integration as it will in fact complicate the cross-border activities of BNPL providers. On the other hand, it may – paradoxically – be harmful to the economic interests of consumers,

176. In particular, a significant number of defaults in the provider's portfolio may be (dis)advantageous as it affects the costs of funding and the value of the platform the provider provides to merchants.
177. Van Schagen, *op. cit.*, section 3, remarks that Dutch courts already considered BNPL agreements to be in scope of CCD2 prior to this judgment.
178. Van Schagen, *op. cit.*, 271–273.
179. See Section I.B again.
180. Joined Cases C-498/22 to C-500/22 *Novo Banco*, 5 September 2024, ECLI:EU:C:2024:686, para 95.
181. *Ibid.*
182. Case C-674/23 *AEON NEPREMIČNINE*, 27 February 2025, ECLI:EU:C:2025:113, para 83.

as it creates moral hazard[183]. If a BNPL product agreement can be voided by a court on the basis of inferred lender intent based on consumer characteristics, some consumers will have the incentive to enter into BNPL product agreements and voluntarily default on the payment terms, if the perceived benefits outweigh the costs.[184] From a teleological perspective, it seems unlikely that the CCD2 was conceived to prohibit the recovery of any costs, including statutory default costs, in those scenarios.[185]

Another teleological issue is that the CJEU's solution treats consumers unequally. More specifically, it creates an artificial distinction between consumers who are supposedly more likely to default on their obligations, and other consumers. The former group could benefit from the CCD2's applicability, while the rest of the consumers do not. There is no basis for such differential treatment in the text of the CCD2: it does not use personal traits or relative probability of default to create discrete levels of consumer protection. Moreover, once national courts establish through their jurisprudence how they will model the creditor's anticipation, they may inadvertently create perverse incentives for the 'non-financially vulnerable' consumers[186]. If those consumers respond to moral hazard, they may seek to meet those criteria such that they can benefit from the invalidation of the BNPL product. In response, the BNPL market may become a 'market of lemons', and BNPL providers may introduce or raise transaction-related fees for all consumers in order to deal with the greater financial losses.[187]

V. IMPLICATIONS

In this Judgment, the CJEU has upended the relative certainty of the CCD2's negative scope to address an issue of questionable magnitude, and in doing so has created a much greater issue. It has circumvented the Directive's negative scope by determining that the non-circumvention provision allows a national court to apply the CCD2 *post hoc*, where it believes that the creditor anticipates the consumer's liability for default and collection charges in order to seek a financial advantage. The conceptually ambivalent nature of this test and the open-ended nature of the national court's assessment, raises normative and practical issues.

In fact, the ruling puts BNPL providers in a tough spot, as they can choose to:

1. not comply with the CCD2 when distributing their products, exposing themselves to lawsuits from consumers arguing that they 'anticipated' their non-compliance, and risking litigation costs as well as loss of interest and charges;
2. comply with the CCD2 (and prepare for compliance with the CCD3), which will increase their operational costs, which may be (partially) passed on to consumers in the form of (higher) transaction-related costs; or
3. introduce more stringent eligibility requirements for the granting of applications from consumers, which will lower the availability of BNPL products for consumers presumed to be more likely to default.

This choice set shows that the Judgment could profoundly affect the supply side of the market for BNPL products, as the associated monitoring costs may make the continued presence of some providers no longer economically viable. In addition, as discussed in the preceding section, the Judgment may also affect the demand side, as consumers who respond to the incentives created by the Judgment may opt more often for BNPL products.

Finally, merchants who are looking forward to the new exemption under the CCD3 may also want to consider the 'anticipation rule'. Since the rule is based on two ingredients (an exemption that mentions 'charges' and the non-circumvention rule) that also appear in the CCD3, it may very well be the case that the national courts may construct the merchant's anticipation by analogy to the creditor's anticipation, and that the CJEU would support this reasoning.

With these issues, it is not unlikely that cases invoking the CJEU's ruling will follow. Needless to say, the next episode of this *telenovela* is highly anticipated.

183. Moral hazard may exist where the consumer has control over his default decisions and the benefits of default outweigh the costs, in which case the consumer-borrower has less economic incentive to comply with the terms. See Paige Marta Skiba and Will Dobbie, Information Asymmetries in Consumer Credit Markets: Evidence from Payday Lending, 5 American Economic Journal: Applied Economics. 256 (2013).

184. J. VAN POELGEEST, Annotation of Dutch Supreme Court, 30 June 2023, in *Jurisprudentie Onderneming & Recht* 2023/209, 2798–2799.

185. *Ibid*. See also FEENSTRA and PAVILLON, *op. cit*.

186. For simplicity, I ignore the debated position that every consumer can be vulnerable, or is always vulnerable to some degree.

187. G.A. AKERLOF, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84(3) *Quarterly Journal of Economics* 488–500.