



Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 11 September 2014¹

Case C-449/13

CA Consumer Finance SA
v
Ingrid Bakkaus,
Charline Bonato, née Savary,
Florian Bonato

(Request for a preliminary ruling from the Tribunal d'instance d'Orléans (France))

(Consumer protection — Consumer credit — Pre-contractual obligations of professional creditors — Duties to provide information and to assess the creditworthiness of consumers — Procedures for and burden of proving the performance of those obligations)

1. This request for a preliminary ruling concerns the interpretation of certain provisions of Directive 2008/48/EC² relating to the pre-contractual obligations of professional creditors. More specifically, the obligations at issue are those laid down in Articles 5 (obligation to provide information and explanations) and 8 (assessment of the creditworthiness of the consumer) of the directive.

2. It appears that the referring court, in essence, seeks clarification regarding the burden and methods of proving the performance of those obligations. As I shall set out in this Opinion, although the question *to whom* it falls, in principle, to establish that the contractual obligations to provide information and to conduct checks under Directive 2008/48 have been correctly fulfilled seems to me to follow logically from the directive, the *requirements* for proving such fulfilment appear to me to be governed to a large extent by the principle of procedural autonomy. It will therefore be necessary to address the questions put by the referring court with some care in order that a fair balance may be struck between the objective of consumer protection pursued by the directive and the need to ensure that the evidential requirements imposed on creditors should not be unrealistic.

¹ — Original language: French.

² — Directive 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, and corrigenda OJ 2009 L 207, p. 14, OJ 2010 L 199, p. 40, and OJ 2011 L 234, p. 46).

I – Legal context

A – EU law

3. Article 5 of Directive 2008/48, entitled ‘Pre-contractual information’, provides:

‘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 creditor shall be deemed to have fulfilled the information requirements in this paragraph and in Article 3, paragraphs (1) and (2) of Directive 2002/65/EC if he has supplied the Standard European Consumer Credit Information.

...

6. Member States shall ensure that creditors and, where applicable, credit intermediaries provide adequate explanations to the consumer, in order to place the consumer in a position enabling him to assess whether the proposed credit agreement is adapted to his needs and to his financial situation, where appropriate by explaining the pre-contractual information to be provided in accordance with paragraph 1, the essential characteristics of the products proposed and the specific effects they may have on the consumer, including the consequences of default in payment by the consumer. Member States may adapt the manner by which and the extent to which such assistance is given, as well as by whom it is given, to the particular circumstances of the situation in which the credit agreement is offered, the person to whom it is offered and the type of credit offered.’

4. Article 8(1) of Directive 2008/48, entitled ‘Obligation to assess the creditworthiness of the consumer’, provides:

‘Member States shall ensure that, before the conclusion of the credit agreement, the creditor assesses the consumer’s creditworthiness on the basis of sufficient information, where appropriate obtained from the consumer and, where necessary, on the basis of a consultation of the relevant database. Member States whose legislation requires creditors to assess the creditworthiness of consumers on the basis of a consultation of the relevant database may retain this requirement.’

5. Article 22 of the directive, entitled ‘Harmonisation and imperative nature of this Directive’, provides in paragraphs 2 and 3:

‘2. Member States shall ensure that consumers may not waive the rights conferred on them by the provisions of national law implementing or corresponding to this Directive.

3. 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.’

6. Article 23 of Directive 2008/48, entitled ‘Penalties’, provides:

‘Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.’

B – *French law*

7. Law No 2010-737 of 1 July 2010 on the reform of consumer credit,³ which is designed to transpose Directive 2008/48 into French domestic law, was incorporated in Article L. 311-1 et seq. of the Code de la consommation (Consumer Code).

8. Article L. 311-6 of the code, relating to the obligation to provide the standard European information form, provides:

- I. Before the conclusion of the credit agreement, the creditor or credit intermediary shall provide the borrower, in writing or on another durable medium, with the information needed to compare the different offers and allowing the borrower, in the light of his preferences, to have a clear understanding of the extent of his commitment. ...
- II. Where the consumer seeks to enter into a credit agreement at the place of sale, the creditor shall ensure that the information form mentioned in paragraph I is supplied to him at the place of sale.’

9. Article L. 311-8 of the Consumer Code, which relates to the pre-contractual duty to provide explanations, provides:

‘The creditor or credit intermediary shall provide explanations to the borrower enabling him to assess whether the proposed credit agreement is adapted to his needs and to his financial situation, in particular on the basis of the information contained in the form referred to in Article L. 311-6. It shall draw the borrower’s attention to the essential characteristics of the credit or credits proposed and to the consequences which those credits may have on his financial situation, including the consequences of default in payment. That information shall be supplied on the basis of the preferences, if any, expressed by the borrower.

...’

10. Article L. 311-9 of that code reads as follows:

‘Before concluding the credit agreement, the creditor shall check the borrower’s creditworthiness on the basis of sufficient information, including the information supplied by the borrower at the creditor’s request. The creditor shall consult the register provided for in Article L. 333-4, under the conditions provided for in the decree referred to in Article L. 333-5.’

11. The second and third paragraphs of Article L. 311-48 of the Consumer Code provide:

‘Where the creditor has not complied with the requirements laid down in Articles L. 311-8 and L. 311-9, it shall forfeit entitlement to interest, in whole or in such proportion as the court may direct. ...

³ — JORF (Official Journal of the French Republic) of 2 July 2010, p. 12001.

The borrower shall be required only to pay the principal in accordance with the schedule provided for and also, where appropriate, to pay the interest not forfeited by the creditor. Sums received by way of interest, which produce interest at the statutory rate from the date of their payment, shall be reimbursed by the creditor or set off against the principal remaining due.'

II – Facts, procedure and questions referred

12. The present request for a preliminary ruling was made in the context of two disputes involving (i) CA Consumer Finance SA ('CA CF') and Ms Bakkaus and (ii) CA CT and Mr and Mrs Bonato regarding requests for payment of sums outstanding, together with interest, on loans that that company had granted to them for the purchase of motor vehicles.

13. Those disputes having been brought before it, and, since the defendants in the main proceedings did not appear at the hearing, the referring court raised of its own motion,⁴ in view of the possible forfeiture of the creditor's entitlement to interest under the contract pursuant to Article L. 311-48 of the Consumer Code, issues as to, first, a lack of evidence to support the information contained in the pre-contractual information form to be supplied to the borrower, secondly, insufficient evidence that the duty to explain had been discharged and non-fulfilment by the creditor of its duty to warn the borrower pursuant to its duty to explain, and, thirdly, a failure to consult the register of individual credit repayment defaults (fichier des incidents de remboursement des crédits aux particuliers, 'FICP') as part of the creditworthiness check. In addition, in the dispute between Mr and Mrs Bonato and CA CF, the court also pointed to the lack of evidence that the duty to check the borrowers' creditworthiness had been discharged.

14. Taking the view that those disputes raised questions connected with the application and interpretation of EU law, the Tribunal d'instance d'Orléans decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- '(1) Must Directive 2008/48 be interpreted as meaning that the onus is on creditors to prove that they have correctly and fully performed their obligations under the national law transposing the directive when a credit agreement is entered into and performed?
- (2) Does Directive 2008/48 preclude a creditor from being able to prove that it has fulfilled its obligations correctly and in full solely by means of a standard term in the credit agreement, whereby the consumer acknowledges the fulfilment of those obligations, without that term being supported by documents issued by the creditor and supplied to the borrower?
- (3) Must Article 8 of Directive 2008/48 be interpreted as precluding the creditworthiness check from being carried out solely on the basis of information supplied by the consumer, without such information being effectively scrutinised against other evidence?
- (4) Must Article 5(6) of Directive 2008/48 be interpreted as meaning that it is not possible for a creditor to provide adequate explanations to the consumer if it has not checked the consumer's financial situation and needs beforehand?

Must Article 5(6) of Directive 2008/48 be interpreted as precluding a situation in which the explanations to be supplied to the consumer are deemed to be adequate where those explanations are provided only in the contractual information mentioned in the credit agreement, without a specific document being drawn up?'

4 — Under Article L. 141-4 of the Consumer Code, the court may raise of its own motion all the provisions of the code in disputes stemming from its application.

15. Written observations have been submitted by CA CF, the French, German and Spanish Governments and the European Commission.

16. The French and German Governments and the Commission presented oral argument at the hearing held on 10 July 2014.

III – Analysis

A – General observations on the pre-contractual obligations under Directive 2008/48 and on the rules as to evidence that those obligations have been fulfilled

17. In view of the fact that its primary purpose is to ensure that all consumers enjoy a high and equivalent level of protection and to create a genuine internal market,⁵ Directive 2008/48 requires Member States inter alia to take appropriate measures to promote ‘responsible’ practices during all phases of the credit relationship and by taking into account the specific features of their credit market.⁶

18. One of the fundamental elements of the harmonisation provided for in Directive 2008/48 thus concerns the pre-contractual obligations of creditors. Taken as a whole, those obligations can be broken down into, on the one hand, an obligation to provide a certain level of information and a certain number of explanations to the consumer⁷ so that the consumer is able to make an informed choice prior to committing to enter into a credit agreement, and, on the other hand, a requirement to assess the creditworthiness of the consumer, a requirement intended to ensure that both the borrower and the creditor act responsibly when deciding to take out and grant the credit.⁸

19. In the present case, two aspects harmonised by Directive 2008/48 are specifically called into question by the issues raised ex officio and mentioned in the questions put by the referring court. The first relates to the obligation to provide information and explanations laid down in Article 5(1) and (6) of Directive 2008/48. The second aspect concerns the duty to check the creditworthiness of the borrower laid down in Article 8 of that directive. Under French law, a failure to comply with those obligations, laid down in Articles L. 311-6, L. 311-8 and L. 311-9 of the Consumer Code, can have significant consequences for the defaulting creditor since such a failure is penalised under Article L. 311-48 of that code, the provision which seeks to transpose Article 23 of the directive, by the forfeiture, in principle in full, of the creditor’s entitlement to interest.⁹

20. It should be pointed out that the corresponding provisions of that directive were transposed into French law by the adoption of the ‘Lagarde’ Law of 1 July 2010,¹⁰ which means that, despite the wording of the questions referred for a preliminary ruling, it is possible to dispense with all discussion of any possible direct horizontal effect to be attributed to the directive.

5 — See recital 9 in the preamble to Directive 2008/48, under which ‘[f]ull harmonisation is necessary in order to ensure that all consumers in the Community enjoy a high and equivalent level of protection of their interests and to create a genuine internal market’.

6 — See recital 26 in the preamble to the directive.

7 — Articles 5 and 6 of the directive.

8 — Article 8 of the directive.

9 — In the judgment in *LCL Le Crédit Lyonnais*, C-565/12, EU:C:2014:190, paragraphs 46 to 54, the Court provided significant clarifications to be used for the purpose of determining the extent to which the national rules were compatible with Article 23 of Directive 2008/48.

10 — See points 7 to 11 of this Opinion.

21. It must also be noted that the referring court does not ask the Court whether it is entitled to apply, of its own motion, the provisions transposing Directive 2008/48 into national law. This can in all likelihood be explained both by the fact that that possibility is in any event afforded to it under national law (see Article L. 141-4 of the Consumer Code) and by the analogy which can unquestionably be drawn with the guidance provided in *Rampion and Godard*,¹¹ which afforded national courts the power to apply of their own motion certain provisions transposing Directive 87/102, the predecessor of Directive 2008/48, into national law.

22. The referring court is essentially asking about the burden of and the procedures for proving fulfilment of the pre-contractual obligations.

23. As I will set out in the remainder of this Opinion, while the question *to whom* it falls to prove that those obligations have been correctly fulfilled seems to me to follow implicitly from Directive 2008/48 and from the objectives that it pursues, the *requirements for proving* such fulfilment fall, in principle, within the scope of the national law of the Member States, in accordance with the principle of procedural autonomy.

24. First, with regard to the question to whom it falls to establish that the pre-contractual obligations have been correctly fulfilled, it is true — as the referring court has rightly pointed out — that none of the provisions of Directive 2008/48 contains clear and precise rules relating to the burden of proving that the pre-contractual obligations incumbent on creditors have been fulfilled. Accordingly, that directive does not of itself undermine the rules governing the proof of performance or non-performance of obligations laid down in the national legal systems.

25. The fact remains that it follows quite logically from the objective of consumer protection pursued by Directive 2008/48 that the burden of proving the fulfilment of the pre-contractual obligations to provide information and to conduct checks must, in principle, be borne by the professional creditor — I shall return to this point when I examine the first question referred for a preliminary ruling. Generally speaking, it appears to me that it should fall to the party owing a specific obligation to provide information and to conduct checks, here the professional creditor, to prove that that obligation has been fulfilled.

26. Secondly, with regard to the requirements for adducing proof of fulfilment of those obligations, this should be a matter of national law in accordance with the principle of procedural autonomy, subject to compliance with the principles of effectiveness and equivalence. The Member States must ensure that evidential rules are, first, not less favourable than those that apply to similar domestic actions and, secondly, that they do not make it in practice impossible or excessively difficult for individuals to exercise rights conferred by EU law.¹²

27. The principle of equivalence is not at issue in the present case.

28. As for the principle of effectiveness, I take the view that that principle does not require a precise definition of the means of proof admissible for the purposes of demonstrating that the creditor's obligations under the measures transposing Directive 2008/48 have been correctly fulfilled. As the referring court appears to accept, *Rampion and Godard* (EU:C:2007:575) was concerned with the need, in order to ensure the effectiveness of consumer protection, for an 'external intervention', that is to say, to afford the court before which the matter had been brought the power to apply of its own

11 — C-429/05, EU:C:2007:575, paragraph 69.

12 — See, to that effect, judgments in *Arcor* (C-55/06, EU:C:2008:244, paragraph 191 and the case-law cited), and *Steffensen* (C-276/01, EU:C:2003:228, paragraphs 62 and 63).

motion the provisions transposing Directive 87/102. However, the referring court is of the view that intervention on the part of the court cannot guarantee the effectiveness of EU law without a rule governing the burden of proof and what must be proved. It explains that findings of failures to fulfil obligations will most often depend upon the evidence presented during the proceedings.

29. I do not find that line of argument entirely convincing.

30. First of all, I consider that taking the view that consumer protection requires a ‘rule’ governing the burden of proof and what must be proved as regards the obligations laid down under Directive 2008/48 would go too far. Laying down such a rule would run the risk of establishing a system of legal evidence, which would eliminate any principle of freedom vis-à-vis the production of evidence and is not without risks from the perspective of the effectiveness of judicial protection.

31. Secondly, that view fails to take into account the fact that, from the moment that it gives consideration to the existence of possible failures to fulfil the pre-contractual obligations laid down in Directive 2008/48, the court is in a position, and may be under a duty, to adopt all the procedural means necessary in order to establish that those obligations have been correctly fulfilled.¹³ As the Court of Justice has already stated, with regard to the assessment ex officio of the unfair nature of a term contained in a contract concluded between a consumer and a professional creditor and taking into account the analogy which may be drawn — as the Court of Justice did in *Rampion and Godard* (EU:C:2007:525) — between the level of protection conferred by the various directives on consumer protection, the court must, where appropriate, investigate of its own motion whether the pre-contractual duties of the creditor to conduct checks and to provide information have been correctly fulfilled.

32. It is in the light of all those considerations that I shall examine each of the questions referred for a preliminary ruling.

B – The first question: the burden of proving that the pre-contractual obligations of the creditor laid down in Directive 2008/48 have been correctly fulfilled

33. By its first question, the referring court asks whether Directive 2008/48 must be interpreted as meaning that the onus is on creditors to prove that they have correctly and fully fulfilled their obligations under the national provisions transposing the directive when a credit agreement is entered into and performed.

34. I take the view that the effectiveness of the exercise of the rights conferred by Directive 2008/48 does not preclude a national rule,¹⁴ such as that laid down in French law, which imposes on the creditor the burden of proving that the pre-contractual obligations to provide information have been correctly fulfilled.

35. On the contrary, following on from my preliminary remarks, the view may be taken that it follows quite logically from the objective of consumer protection pursued by Directive 2008/48 that the burden of proving that the pre-contractual obligations to provide information and to conduct checks laid down in that directive have been fulfilled must, in principle, lie with the professional creditor. The creditor may be required to provide the court with proof that those pre-contractual obligations have been duly fulfilled, which — as the French Government has indicated — requires the creditor to exercise a degree of diligence in the collection and retention of the evidence of its fulfilment of the obligations to provide information and explanations.

¹³ — See, to that effect, judgment in *VB Pénzügyi Lízing* (C-137/08, EU:C:2010:659, paragraph 56).

¹⁴ — It follows from Article 1315 of the French code civil (Civil Code) that a person who claims to be discharged from an obligation must prove that that is the case.

36. This means, in specific terms, that the national court which is called upon to settle the question whether the various pre-contractual obligations to provide information and to conduct checks laid down in Directive 2008/48 have been fully and correctly fulfilled, must, if it considers the evidence adduced before it to be insufficient, refer the matter to the professional creditor so that the latter may furnish the evidence found to be lacking.

37. That being the case, although — in order to ensure the effectiveness of Directive 2008/48 — the creditor must exercise due diligence with a view to providing evidence of the fulfilment of its pre-contractual obligations, that creditor cannot be required to produce documents which, by definition, only the borrower holds, such as the information which the creditor is supposed to have communicated, on paper or on another durable medium, to the consumer pursuant to Article 5(1) of Directive 2008/48.

38. I therefore take the view that the rule, which applies under French law, that it is in principle the creditor who has the burden of proving fulfilment of the pre-contractual obligations laid down in Articles 5 to 8 of Directive 2008/48 not only does not appear to me to undermine consumer protection as guaranteed by that directive, but seems to me to be fully consistent with the effectiveness of the directive.

39. It follows from those considerations that the first question referred for a preliminary ruling should be answered in the affirmative and Directive 2008/48 must be interpreted as meaning that the onus is on creditors to prove that they have correctly and fully fulfilled their obligations when a credit agreement is entered into and performed.

C – The second question: proof of the fulfilment of the creditor’s pre-contractual obligations by the insertion of a standard term

40. By its second question, the referring court asks the Court whether the insertion of a standard term, which is not supported by documents issued by the creditor and supplied to the borrower, can be sufficient to prove that the pre-contractual obligations of the creditor to provide information and to conduct checks have been correctly fulfilled.

41. In the present case, the order for reference states that the credit agreement entered into by one of the defendants in the main proceedings, namely Ms Bakkaus, contained a standard term by which she acknowledged having ‘received and taken note of the standard European information form’. The referring court asks whether such a clause, in addition to establishing that a pre-contractual information form has been given to the borrower, may also prove that the actual content of the pre-contractual information provided is consistent with the requirements of Directive 2008/48. The court refers in particular to Article 22 of Directive 2008/48, which requires Member States to ensure, first, that consumers may not waive the rights that they derive from national provisions transposing the directive and, secondly, that those provisions cannot be circumvented as a result of the way in which agreements are formulated.

42. I am of the view that that last question calls for a balanced response.

43. The final sentence of Article 5(1) of Directive 2008/48 does indeed provide that ‘[t]he creditor shall be deemed to have fulfilled the information requirements in this paragraph ... if he has supplied the Standard European Consumer Credit Information’ which is set out in Annex II. The insertion of a clause confirming receipt of the standard European information form thus attests to the performance of an act which, *if and only if* it were to prove consistent with the requirements laid down in Annex II to that directive, would confirm that the creditor has fulfilled its pre-contractual obligations to provide information.

44. However, I take the view that the clause at issue here can in no way be regarded as a clause implying the acceptance by the consumer/borrower that the professional creditor has fully and correctly fulfilled its pre-contractual obligations and, therefore, entailing a reversal of the burden of proving the fulfilment of those obligations which is liable to jeopardise the effectiveness of the rights conferred by Directive 2008/48.

45. By that clause, the borrower attests simply to the performance of an act (the provision of the 'standard European information' form) and not the full and correct fulfilment of an obligation (namely a standard information form satisfying the requirements laid down in Directive 2008/48). In other words, and unlike the situation at issue in *Rampion and Godard* (EU:C:2007:575), the insertion of a standard term such as that in question in the main proceedings does not have the effect of ousting the overriding provisions transposing the directive. I therefore take the view that, as a means of proving the fulfilment of an obligation, such a clause is not in itself contrary to Article 22 of Directive 2008/48, which seeks to prohibit the use of contractual terms that circumvent the obligations under that directive and the waiver of the rights that consumers derive directly or indirectly from the directive.

46. However, the fact remains that acceptance by the consumer that he has indeed received that form may suggest, in the absence of challenges or evidence to the contrary, that the consumer was provided with information prior to the conclusion of the credit agreement. Nevertheless, this is merely a presumption which is fully compatible with the principle of effectiveness. Indeed, the consumer is always able to claim that he did not receive the document or that that document does not satisfy the creditor's pre-contractual obligations to provide information. The insertion of a standard term should, in my view, be prohibited only if it were to jeopardise the possibility, on the part both of the consumer and of the court, of putting in issue the question whether the creditor's pre-contractual obligations to provide information and to conduct checks have been correctly fulfilled.

47. In addition, as inter alia CA CF has pointed out in its written observations, short of requiring the intervention of a third party, in the absence of a clause whereby it is recognised that the pre-contractual information form has been supplied to the consumer, it appears difficult for the creditor to prove that it has duly fulfilled its duty to provide information and that it actually provided the borrower with the information document and to establish its content.

48. In the light of those considerations, I propose that the second question be answered to the effect that Directive 2008/48 does not preclude the insertion of a standard term by which the borrower acknowledges having received the standard European information form. However, a standard term of that kind does not necessarily prove that the obligations under that directive have been correctly and fully fulfilled.

D – The third question: the scope of the obligation on the part of the creditor to check the creditworthiness of the consumer

49. The third question referred for a preliminary ruling raises the issue of the extent to which a professional creditor is required, in the context of the checking of the consumer's creditworthiness prior to the conclusion of the credit agreement, to check the accuracy of the declarations made by the consumer.

50. I am of the view that a balanced response should be given to that question too.

51. First of all, it is difficult to determine to what extent CA CF based its decision, as it claims to have done, on supporting documents attesting to the defendants' income and financial standing, or whether it simply relied on mere unsubstantiated statements made by the defendants in order to find them to be creditworthy.¹⁵

52. Next, as is clear *inter alia* from recital 26 in the preamble to Directive 2008/48, the objective of Article 8(1) of Directive 2008/48 is to ensure that credit agreements are concluded responsibly, which means in particular that 'creditors should bear the responsibility of checking *individually* the creditworthiness of the consumer'.¹⁶ That objective requires the creditor to make sure that the applicant for the credit agreement is creditworthy by the method or methods that it deems to be the most appropriate. Those checks can be carried out on the basis of supporting documents attesting to the applicant's financial situation, such as pay slips, bank account extracts and statements and tax assessment notices. However, that is not the only way. It cannot be ruled out, for example, that a creditor who has a long-established commercial relationship with certain customers already has prior knowledge of the loan applicant's financial situation.

53. Nevertheless, in my view, Directive 2008/48 does not require credit institutions to verify systematically the truth of the information attesting to the income and expenditure of a consumer which that consumer has provided. As is clear from the wording of Article 8(1) of Directive 2008/48, the creditor is required solely to check the creditworthiness of the borrower 'on the basis of sufficient information, where appropriate obtained from the consumer and, where necessary, on the basis of a consultation of the relevant database'. As the German Government has quite rightly — in my view — pointed out in its written observations, that wording emphasises the discretion afforded to the creditor to decide whether the information in its possession is sufficient to demonstrate the creditworthiness of the loan applicant.

54. That analysis is supported to some extent by the fact that the proposal¹⁷ which sought to require creditors to make sure of the creditworthiness of the borrower prior to the conclusion of the credit agreement 'by any means at his disposal' was ultimately not included in Directive 2008/48.¹⁸

55. Without prejudice to the option available to the Member States to give instructions and guidelines to creditors (see recital 26 in the preamble to Directive 2008/48), it therefore falls to the creditor alone to make sure that it possesses 'sufficient information'. The extent to which that information is sufficient will necessarily vary depending on the circumstances in which the credit agreement was concluded and the amount in question. However, after receiving sufficient information attesting to the creditworthiness of the borrower, a creditor cannot be criticised for having failed to check the accuracy or the truth of that information.

56. It is important to note in this connection that the creditworthiness check represents a guarantee both for the consumer (in so far as it warns the consumer against entering into a commitment which he will be inherently unable to fulfil) and for the professional creditor (which runs the risk of the repayments agreed upon not being honoured).

15 — Although, in the case concerning Ms Bakkaus, CA CF produced before the national court an income and expenses form signed by Ms Bakkaus and accompanied by supporting documents, the situation does not appear to be the same in the case concerning Mr and Mrs Bonato.

16 — Emphasis added.

17 — See Article 9 of the Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers [COM(2002) 443 final] (OJ 2002 C 331 E, p. 200).

18 — On this point, the requirements under Directive 2008/48 differ significantly from those recently laid down in Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ 2014 L 60, p. 34). Recital 22 in the preamble to the latter directive states in this respect: 'the provisions on the creditworthiness assessment should be strengthened in comparison to consumer credit, more precise information should be provided by credit intermediaries on their status and relationship with the creditors in order to disclose potential conflicts of interest, and all actors involved in the origination of credit agreements relating to immovable property should be adequately admitted and supervised'.

57. That creditworthiness check, in which both parties to the credit agreement have an interest, is based on reciprocal duties. On the one hand, the creditor must collect sufficient information attesting to the consumer's ability to pay. On the other hand, the consumer must cooperate sincerely and is presumed to be acting in good faith when he provides the documents requested.¹⁹

58. Although a creditor who is given cause to doubt the borrower's sincerity may perhaps undertake more or less extensive investigations in order to verify the accuracy of the documents provided by the loan applicant, it is by no means required to do so in all cases. The creditor may simply find that, in the light of the documentation supplied to it, the consumer must be regarded as being creditworthy.

59. Any other approach would risk significantly restricting the conditions for the grant of consumer credit and, therefore, threaten to call into question the creation of a common credit market which, I would point out, Directive 2008/48 likewise seeks to create.²⁰

60. It follows from those considerations that Article 8 of Directive 2008/48 requires a creditor to check the creditworthiness of the consumer by taking sufficient information as the basis for its assessment and not confining itself to mere unsubstantiated declarations made by the consumer. However, that provision does not require a professional creditor to conduct systematic checks of the truth of the information provided by consumers in order to determine that that information is accurate.

E – The fourth question: the scope of the creditor's duty to provide explanations and assistance to the consumer under Article 5(6) of Directive 2008/48

61. This question, which concerns the interpretation of Article 5(6) of Directive 2008/48, is divided into two parts.

62. The first part of the question concerns the issue whether the performance of the obligation on the part of the creditor to provide adequate explanations to the consumer must be preceded by a check of the consumer's financial situation and needs.

63. Here again, a literal reading of Article 5(6) of Directive 2008/48, which refers to the explanations relating to the proposed credit agreement and to that agreement's appropriateness to the consumer's needs, in conjunction with Article 8(1) of that directive, which relates to the assessment of creditworthiness, leads me to answer in the negative.

64. As is clear from the text of recital 27 in the preamble to Directive 2008/48, the purpose of the obligation to provide adequate explanations laid down in Article 5(6) of Directive 2008/48 is to enable the consumer to enter into any type of loan agreement in full knowledge of the facts. The aim is to provide consumers with 'additional assistance in order to decide which credit agreement, within the range of products proposed, is the most appropriate for his needs and financial situation'; this may require that the characteristics of those products 'be explained to the consumer in a personalised manner so that the consumer can understand the effects which they may have on his economic situation'. In the context of the creditor's duty to provide explanations, Article 5(6) of Directive 2008/48 makes no mention of an obligation on the part of the creditor to check the borrower's financial situation, let alone to check the creditworthiness of that borrower.

19 — Reference is made to these requirements of good faith and prudence in the proposal cited in footnote 17 above.

20 — See recital 9 in the preamble to Directive 2008/48 and, to that effect, judgment in *Rampion and Godard* (EU:C:2007:575, paragraph 59).

65. At this stage, as CA CF has pointed out, there is no question of conducting an assessment of creditworthiness, a procedure to which Directive 2008/48 refers only in Article 8, since the task of determining the appropriateness of the credit to the borrower's needs and financial situation is a matter for the borrower himself (the creditor is to provide '*adequate explanations ... in order to place the consumer in a position enabling him to assess whether the proposed credit agreement is adapted*'²¹), whereas the examination of creditworthiness is an initiative which is to be taken by the creditor.

66. Furthermore, that interpretation appears to me to be supported by the explanatory memorandum to the proposal for a Directive,²² which, with regard to the information to be provided to the consumer beforehand, states that '[t]he creditor and, where appropriate, the credit intermediary may only ask information of the consumer or guarantor that under the terms of Article 6 of [Directive 95/46/EC] is appropriate, relevant and does not exceed that which is required for the purpose for which the information is collected and processed. The consumer and the guarantor are required to answer sincerely the precise questions put by the creditor and, where appropriate, the credit intermediary'.

67. It follows from this that Article 5(6) of Directive 2008/48 must be interpreted as meaning that it does not require a professional creditor to check the creditworthiness of a consumer prior to discharging the duties to provide explanations and assistance.

68. As for the second part of the question, it concerns the stage at which the pre-contractual information must have been provided and whether, if necessary, it must have been provided in a specific document.

69. First, with regard to the stage at which both the information and the explanations referred to in Article 5(1) and (6) of Directive 2008/48 must have been provided, it appears to me to be sufficient to point out that those provisions relate to 'pre-contractual' obligations, which presupposes that the consumer was able to acquaint himself with that information prior to the conclusion of the agreement. I take the view that that requirement may be satisfied by inserting appropriate references into the draft credit agreement itself from the time that that draft agreement is handed over to the consumer and the latter is able to acquaint himself with the draft agreement before it is signed.

70. Secondly, with regard to the means of discharging the obligation to provide adequate explanations pursuant to Article 5(6) of Directive 2008/48, that provision does not lay down any particular formal requirements relating to the provision of the explanations which the professional creditor must provide to the consumer prior to the conclusion of a credit agreement. However, here again, in accordance with the principle of procedural autonomy, this is without prejudice to the possibility open to the Member States to define the means by which the duty to provide explanations laid down in Article 5(6) of Directive 2008/48 is to be discharged.

71. It follows from this that it is not necessary to produce a specific form or document in order to establish that such obligations have been properly fulfilled, that being a matter which will depend on the circumstances of the case (see recital 27 in the preamble to Directive 2008/48 and Article 5 thereof).

72. This involves considering the facts on a case-by-case basis, as is clear from recital 27 in the preamble to Directive 2008/48, which leaves it to the Member States to determine when and to what extent the explanations must have been provided to the consumer, 'taking into account the particular circumstances in which the credit is offered, the consumer's need for assistance and the nature of individual credit products'.

21 — Emphasis added.

22 — See the proposal cited in footnote 17 above.

73. It follows that Article 5(6) of Directive 2008/48 does not require a professional creditor to draw up a specific document setting out the explanations which it provided prior to the conclusion of the credit agreement.

74. In the light of all those considerations, I propose that the fourth question be answered to the effect that Article 5(6) of Directive 2008/48 must be interpreted as meaning that, first, a creditor is not obliged to check a borrower's financial situation or needs before providing the borrower with adequate explanations and, secondly, the adequate explanations which the creditor is required to provide cannot take the form of contractual information contained in the credit agreement. However, the creditor is not obliged to provide a borrower with a written document separate from the credit agreement in order to provide the borrower with adequate explanations.

IV – Conclusion

75. In the light of all the foregoing considerations, I propose that the questions submitted by the Tribunal d'instance d'Orléans (France) be answered as follows:

- (1) Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC must be interpreted as meaning that the onus is on creditors to prove that they have correctly and fully fulfilled their obligations when a credit agreement is entered into and performed.
- (2) Directive 2008/48 does not preclude the insertion of a standard term by which the borrower acknowledges having received the standard European information form. However, a standard term of that kind does not necessarily prove that the obligations under that directive have been correctly and fully fulfilled.
- (3) Article 8 of Directive 2008/48 requires a creditor to check the creditworthiness of the consumer by taking sufficient information as the basis for its assessment and not confining itself to mere unsubstantiated declarations made by the consumer. However, that provision does not require a professional creditor to conduct systematic checks of the truth of the information provided by consumers in order to determine that that information is accurate.
- (4) Article 5(6) of Directive 2008/48 must be interpreted as meaning that it does not require a professional creditor to check the creditworthiness of a consumer prior to discharging the duties to provide explanations and assistance.

Article 5(6) of Directive 2008/48 must be interpreted as meaning that, first, a creditor is not obliged to check a borrower's financial situation or needs before providing the borrower with adequate explanations and, secondly, the adequate explanations which the creditor is required to provide cannot take the form of contractual information contained in the credit agreement. However, the creditor is not obliged to provide a borrower with a written document separate from the credit agreement in order to provide the borrower with adequate explanations.