

Regarding the assignment of claims, the assignment of contracts and the conclusion of instalment agreements under Act No. 257/2016 Coll., on Consumer Credit

Regulations

- Act No. 257/2016 Coll., on Consumer Credit.
- Directive 2008/48/EU of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (**CCD**)
- 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 (**MCD**)

Question 1

Assignment of claims and assignment of contracts

Do I need a licence to provide or intermediate consumer credit pursuant to the CCA where a consumer credit claim, a consumer credit contract or a claim other than a credit claim (electricity, gas or anything else) is assigned to me?

Provisions

- **Articles 2(1) and 3(1)(a) and (b) of the CCA**

Answer

Where a consumer credit claim or a claim arising from an obligation other than a credit obligation is assigned to another entity, that entity is not obliged to hold a licence pursuant to the CCA provided that its activities do not meet the characteristics of consumer credit provision laid down in Article 3(1)(a) of the CCA or the characteristics of consumer credit intermediation laid down in Article 3(1)(b) of the CCA.

The assignee (the person to whom the claim is assigned) who has become the creditor of a consumer credit claim or a claim arising from an obligation other than a credit obligation may administer and recover the assigned claim. This activity is not regarded as the provision of consumer credit provided that it does not involve the conclusion of agreements governed by the CCA (see the answers to questions 2–5). Pursuant to Article 3(1)(a)(5) of the CCA, the exercise of rights and the fulfilment of duties arising from a consumer credit contract fall within the definition of credit provision only where they are performed by the provider. Therefore, where assignees do not carry on the said activity in a manner meeting the legal definition of the provision or intermediation of consumer credit, they will not need the licence required by the CCA to carry on their activity.

It should be noted in this context that, where a consumer credit claim is assigned, such assignment does not affect the nature of the claim as a consumer credit claim, i.e. consumers have the same rights with respect to assignees as they have with respect to providers under the CCA. Pursuant to Article 3(2)(a) of the CCA, a creditor is a provider or person who has acquired a claim on a consumer arising from a consumer credit contract. In some of its provisions, the CCA refers directly to the creditor, for example, in the provision on early repayment of consumer credit under Article 117 of the CCA and in the provision on the limiting of payments related to the consumer's default under Article 122 of the CCA.

The approach to the assignee in the case of the assignment of contracts will be similar to that in the case of the assignment of claims. The deciding criterion in these cases will again be whether the activity carried on by the assignee meets the characteristics of a regulated activity under the CCA. In the case of the assignment of consumer credit contracts, one should also take into account whether or not the consumer credit provider had provided consumer credit to the consumer before the contract was assigned. Where assignees have the duty to provide consumer credit after the assignment of a consumer credit contract, they must be licensed to provide such credit pursuant to the CCA.

Question 2

Recovery of claims

Do I need a licence to provide or intermediate consumer credit pursuant to the CCA if I am recovering consumer credit claims or claims arising from other contracts on behalf of and for the account of the initial creditor?

Provisions

- **Articles 2(1) and 3(1)(a) and (b) of the CCA**

Answer

The simple recovery of claims (be they consumer credit claims or other claims, such as claims on gas or electricity consumers) on behalf of and for the account of the initial creditor consisting solely in sending reminders to consumers or enforcing claims in court without the conclusion of contracts governed fully by the CCA (see the answers to questions 3–5) is not a regulated activity pursuant to the CCA and the authorisation referred to in the CCA is not required.

Asset management consisting in the recovery of claims, including related interest and costs, cannot be regarded as a business activity requiring a licence to provide or intermediate consumer credit provided that it does not involve the conclusion of contracts governed fully by the CCA (see the answers to questions 3–5).

The same approach will be applied to persons who do not acquire authorisation pursuant to the CCA when their trade licence to provide or intermediate consumer credit ceases to be valid. The loss of a trade licence will not affect the rights to funds provided and the provider's duties towards the consumer, with the exception of any duty to provide further funds to the consumer under a consumer credit contract concluded earlier (the repeated provision of funds under revolving loans would thus no longer be possible after a trade licence ceases to be valid).

Question 3

Agreements on deferred payment where the existing debt does not increase further

Do I need a licence to provide or intermediate consumer credit pursuant to the CCA if I conclude an agreement on deferred payment with a consumer where the consumer does not pay anything for the deferral, nor do any other payments accrue during the deferral period?

Provisions

- **Articles 2(1), 5(1)(c) and 5(3) of the CCA**

Answer

The deferred payment of instalments payable now or in the future which does not lead to any increase in the total sum to be paid by the consumer (i.e. the consumer does not pay anything for the deferral, nor do any other statutory payments – contractual interest, default interest, recovery costs, contractual fees or anything else – accrue during the deferral period) constitutes an exception under Article 5(1)(c) of the CCA or Article 5(3) of the CCA.

Pursuant to Article 5(1)(c) of the CCA, only selected provisions of the CCA – Articles 1–4, Articles 122–124 and Article 168 of the CCA – will apply to consumer credit in the form of deferred payment, free of charge, of an existing debt.

Pursuant to Article 5(3) of the CCA, only Articles 1–4, Articles 122–124 and Article 168 of the CCA will apply to consumer credit provided without interest or any charges other than actually incurred costs directly related to the securing of that credit.

In neither of these cases do the entities concluding such an agreement with the consumer need to be authorised to provide or intermediate consumer credit under the CCA, regardless of whether the deferred debt is credit debt or any other debt (debt on electricity, gas or anything else). The CCA will apply to such consumer credit in only a limited scope.

Question 4

Agreements on deferred payment where the existing debt continues to increase

Do I need a licence to provide or intermediate consumer credit pursuant to the CCA if I conclude an agreement on the deferred payment of an existing debt with a consumer where this debt continues to increase?

Provisions

- **Articles 2(1), 5(1)(c) and 5(4) of the CCA**

Answer

The cases in which costs arise for the consumer from a contract on deferred payment (i.e. agreements not falling within question 3) can be divided into two categories. The different circumstances of these cases will determine their legal qualification.

There is also a special category of agreements which, however, relate to the deferred payment of debt rising solely from loan agreements (see the answer to question 5).

The following paragraphs contain individual model situations and their legal qualification:

1. Debt increases are provided for in the initial contract

In line with the judgement of the Court of Justice of the European Union in case C-127/15,¹ agreements in which the consumer undertakes to repay the total amount of the debt and to pay the interest and costs provided for in the initial contract (contractual fines and recovery costs, for example) may also be regarded as the deferred payment, free of charge, of an existing debt within the meaning of Article 5(1)(c) of the CCA (or Article 2(2)(j) of the CCD and Article 3(2)(f) of the MCD).

The conclusion itself of an agreement on the deferred payment of an existing debt is not related to any special payments by the consumer. In such cases, the CCA would apply to these agreements in only a limited scope as stipulated in Article 5(1)(c), i.e. only Articles 1–4, Articles 122–124 and Article 168 of the CCA would apply, and the persons concluding these agreements with consumers would not need to hold a licence pursuant to the CCA.

However, the provision of only an option to charge interest and costs in the event of the consumer's default in the initial contract does not constitute the setting of such interest and costs. It should additionally be taken into account that a requirement to specify the consequences of the consumer's default in the initial contract is stipulated, in the case of consumer credit contracts, directly in Article 106(1)(l) of the CCA.

2. Debt increases are higher than they would have been under the initial contract

Where a person concludes an agreement with a consumer deferring the payment of an existing debt and the consumer is obliged under the new agreement to pay interest or costs not having been provided for in the initial contract, or the interest or costs are higher than those provided for in the initial contract, and where the agreement does not meet the conditions set out in Article 5(4) of the CCA (for more details see the answer to question 5), such an agreement should be regarded as completely new consumer credit governed fully by the CCA.

Persons who conclude or intermediate such agreements with consumers must hold the relevant licence pursuant to the CCA.

¹ In a judgment of 8 December 2016, the Court of Justice of the European Union stated that Article 2(2)(j) of the CCD must be interpreted as meaning that a credit rescheduling agreement, which is concluded, following the consumer's default, between that consumer and the lender through a debt collection agency, is not agreed to "free of charge", within the meaning of that article, where, by that agreement, the consumer undertakes to repay the total amount of that credit and to pay interest and costs that were not provided for by the initial contract under which that credit was granted.

Question 5

Agreements on the deferred payment of debt arising from the initial credit contract to avert proceedings on the creditor's claims where the existing debt continues to increase

Do I need a licence to provide or intermediate consumer credit pursuant to the CCA if I conclude an agreement on the deferred payment of an existing debt with a consumer to avert proceedings on the creditor's claims where the debt continues to increase?

Provisions

- **Articles 2(1) and 5(4) of the CCA**

Answer

In situations which preclude the application of Article 5(1)(c) or Article 5(3) of the CCA, i.e. the above-mentioned deferred payment of an existing debt, free of charge, or credit provided free of interest or any charges other than actually incurred costs directly related to the securing of that credit, and the related limited applicability of the CCA (for details see the answers to questions 3 and 4), it is possible to apply another provision laying down limited applicability of the CCA under certain conditions. This provision is contained in Article 5(4) of the CCA. However, it may only be applied to agreements amending initial credit contracts (the said provision transposes Article 2(6) of the CCD² and must be interpreted in line with the content of that article), so it does not affect the deferred payment of debt arising from contracts other than credit contracts.

Where an entity concludes a contract on the deferred payment of instalments payable now or in the future with a consumer in order to avert proceedings on the creditor's claims due to the default³ or impending default of that consumer and where the consumer undertakes to pay interest or costs not having been provided for in the initial contract, or the interest or costs are higher than those in the initial contract, the favourability of the initial credit contract shall be compared with such contract on deferred payment.

Article 5(4) of the CCA may be applied where the contractual terms are at least as favourable overall for the consumer as those laid down in the initial credit contract. The CCA thus applies to such agreements in only a limited scope (only Articles 1–4, Article 84, Articles 88–91, Articles 94 and 97, Article 99(3), (4) and (6), Article 100(1)(b) and (2)–(4), Article 101(2), Article 102(1) and (4), Articles 104, 105, 108 and 109, Articles 112–117 and Articles 120–177 of the CCA apply). Here, the contractual provisions are assessed as a whole both in quantitative terms – a comparison of the APRC, the interest rate and the fees, for example – and in qualitative terms – additional collateral, the conclusion of an agreement with consent to enforcement, new types of contractual fees, etc.

Entities which conclude agreements meeting the requirements stipulated in Article 5(4) of the CCA with consumers need not hold a licence pursuant to the CCA for the purposes of concluding such agreements. However, they are obliged to prove that the agreements meet all the conditions necessary for the limited applicability of the CCA.

In cases where the conditions for limited applicability under Article 5(4) of the CCA

² "Member States may determine that only Articles 1 to 4, 6, 7, 9, Article 10(1), points (a) to (i), (l) and (r) of Article 10(2), Article 10(4), Articles 11, 13, 16 and Articles 18 to 32 shall apply to credit agreements which provide for arrangements to be agreed by the creditor and the consumer in respect of deferred payment or repayment methods, where the consumer is already in default on the initial credit agreement and where:

a) such arrangements would be likely to avert the possibility of legal proceedings concerning such default; and

b) the consumer would not thereby be subject to terms less favourable than those laid down in the initial credit agreement.

³ Article 5(4) of the CCA explicitly states only "due to default". The application of Article 5(4) of the CCA to cases of impending default is inferred from an interpretation taking into account the meaning and purpose of the CCA, and of the CCD directive as such, which are acts based primarily on the principle of responsible lending and responsible conduct by both contracting parties. Where consumers have not yet defaulted on the individual instalments but it is clear that they will probably do so soon due to a change in their situation (illness or job loss, for example), it is consistent with the CCD's objectives if they start to deal with the situation proactively themselves and agree with the creditor on deferred payment or lower instalments. Such active conduct by consumers on one side should be supported in relation to the creditor by the possibility of applying a more relaxed regime for arranging such contract on deferred payment, even where consumers have not yet defaulted but all the circumstances make it clear that they will do so soon.

This interpretation is consistent with the European Banking Authority's Guidelines on [arrears and foreclosure](#) (EBA/GL/2015/12).

are not met when contracts on deferred payment are concluded, i.e. the purpose of the contracts is not to avert proceedings on the creditor's claims or default is not imminent, or where the contractual terms are less favourable overall for the consumer than those laid down in the initial contract, the limited applicability of the CCA does not pertain to such contracts and the entities concerned must hold the relevant licence pursuant to the CCA.

As stated above, the limited applicability of the CCA provided for in Article 5(4) of the CCA only concerns agreements amending initial credit contracts. This provision thus does not affect the treatment of agreements on the deferred payment of debt arising from contracts for the provision of services on a continuing basis or on the supply of goods of the same kind under Article 4(1)(b) of the CCA (water, gas, electricity, etc.), as these are completely excluded from the applicability of the CCA, whereas agreements on the deferred payment of debt arising from this type of contract are not. Article 5(4) of the CCA may not be applied to the deferred payment of debt arising from such contracts.⁴ Neither does this provision affect other agreements on the deferred payment of debt arising from obligations other than credit contracts. These cases are not exempted from the applicability of the CCA and the entities concerned are obliged to hold the relevant licence pursuant to the CCA (where Article 5(1)(c) or Article 5(3) of the CCA cannot be applied, see the answers to questions 3 and 4).

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⁴ Although the beginning of Article 4 of the CCA might imply the contrary, this provision must be interpreted consistently with the relevant provisions of the CCD, which states in Article 3(c) that a "credit agreement" means an agreement whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, loan or other similar financial accommodation, except for agreements for the provision on a continuing basis of services or for the supply of goods of the same kind, where the consumer pays for such services or goods for the duration of their provision by means of instalments. Recital 12 of the directive states that "*Agreements for the provision on a continuing basis of services or for the supply of goods of the same kind, where the consumer pays for them for the duration of their provision by means of instalments, may differ considerably, in terms of the interests of the contractual parties involved, and the modalities and performance of the transactions, from credit agreements covered by this Directive. Therefore, it should be clarified that such agreements are not regarded as credit agreements for the purposes of this Directive. Such types of agreement include, for example, an insurance contract where the insurance is paid for in monthly instalments.*"