

MEASURES IN SOUTH AFRICAN CONSUMER CREDIT LEGISLATION AIMED AT THE PREVENTION OF RECKLESS LENDING AND OVER-INDEBTEDNESS: AN OVERVIEW AGAINST THE BACKGROUND OF RECENT DEVELOPMENTS IN THE EUROPEAN UNION

1 Introduction

In spite of the recent world wide recession and its influence on the South African economy statistics released by the South African Reserve Bank and the National Credit Regulator as well as press reports show that there is still a high incidence of consumer spending in South Africa. Press reports released in January this year stated that consumer spending rocketed during the festive season of 2009, with the concomitant result of many consumers being unable to pay their debts. The high incidence of consumer spending causes more and more consumers to become over-indebted.¹ Last mentioned fact is elucidated by the number of consumers who applied for debt review in terms of the National Credit Act 34 of 2005² in the relative brief period since the Act came in full effect on 1 June 2007.

In a report published by the consumer debt committee of the International Federation of Insolvency Practitioners (INSOL International) in May 2001,³ the view was held that the solution to overspending and over-indebtedness is *inter alia* to be found in the idea that prevention is better than cure.⁴ However, as mentioned earlier,⁵ the South African insolvency legislation is not equal to the task of combating overspending and over-indebtedness. The same held true for the consumer credit legislation⁶ that applied in this country for many years before its eventual repeal⁷ by South Africa's newest piece of consumer credit legislation, the National Credit Act.⁸

One of the purposes⁹ of the National Credit Act is to, *inter alia*, protect consumers.¹⁰ This purpose is attained by, amongst others, promoting responsibility in the credit market by avoidance of over-indebtedness by consumers and discouraging reckless

¹ See Kelly-Louw "The prevention and alleviation of consumer over-indebtedness" 2008 20 *SA Merc LJ* 204-205 for other causes of over-indebtedness. In terms of s 79 of the National Credit Act 34 of 2005 a consumer is over-indebted if that consumer, according to the preponderance of available information at the time a determination is made, is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party. Also see par 4 2 below.

² Hereafter the "National Credit Act" or the "Act".

³ INSOL International *Consumer Debt Report: Report of Findings and Recommendations* (2001) 29.

⁴ Also see *Report of the Committee on Consumer Credit* (chairperson lord Crowther) (1971) vol 1 Cmnd 4596 (hereafter the "Crowther Report") 377.

⁵ Roestoff and Renke "Solving the problem of overspending by individuals: international guidelines" 2003 *Obiter* 26. Also see paper by Roestoff and Renke entitled "A fresh start for individual debtors: the role of South African insolvency and consumer protection legislation" April 2004 *INSOL International Academics' Group Meeting* 11.

⁶ The Credit Agreements Act 75 of 1980, the Usury Act 73 of 1968 and the exemption notice in terms of the Usury Act.

⁷ In terms of s 172(4) of the Act which became effective on 2006-06-01.

⁸ See Kelly-Louw 2008 20 *SA Merc LJ* 204-205 for the problems that existed in terms of the previous legislation.

⁹ See in general Scholtz (ed) *Guide to the National Credit Act* (2008) par 2.3 and Kelly-Louw 2008 20 *SA Merc LJ* 208.

¹⁰ S 3.

credit granting by credit providers.¹¹ The Act also has as a related purpose to the above mentioned objective to wit the protection of the consumer by addressing and correcting the imbalances in negotiating power between consumers and credit providers by providing consumers with education about credit and consumer rights and with adequate disclosure of standardised information in order to make informed choices.¹² It is submitted that the purposes in section 3(c) and (g) could be achieved to a large extent by adherence to the objectives provided for in section 3(e).¹³

The aim of this paper is to provide an overview of the measures in the National Credit Act directly aimed at the prevention of reckless credit lending and over-indebtedness. Attention will also be paid to measures that may indirectly have a similar goal. This will be done against the background of recent developments in the European Union in this regard. However, an analytical and detailed comparison between the credit laws of South Africa and that of the European Union falls outside the stated purpose of this paper. It needs to be pointed out that the focus in this paper will not only fall on the National Credit Act's provisions having an influence on the incurrance of debt in the phase before conclusion of the particular credit agreement, but also on those provisions having an effect on the consumer's eventual debt burden.

A discussion of measures aimed at the alleviation of debt already incurred¹⁴ falls outside the scope of this paper. Though the same holds true for a discussion of the National Credit Act's field of application it needs to be pointed out that the Act, except for a few transactions specifically excluded from its ambit, applies to all credit agreements¹⁵ whether small or large and irrespective of their form, the type of movable goods (or services) or the amount of money involved.¹⁶ The National Credit Act therefore has a much wider scope of application than its predecessors, the relevance whereof lies in the fact that more consumers enjoy its protection, also with regard to the prevention of unnecessary consumer spending, reckless credit lending and over-indebtedness.

Paragraph 2 of this paper deals with recent European Union guidelines, paragraph 3 supplies an overview of the National Credit Act's indirect debt prevention measures and the direct measures receives attention in paragraph 4. Paragraph 5 contains the concluding remarks.

2 Developments in the European Union

¹¹ S 3(c)(i) – (ii) and (g).

¹² S 3(e)(i) – (ii).

¹³ Also see Renke and Roestoff “The Consumer Credit Bill – a solution to over-indebtedness” 2005 *THRHR* 116.

¹⁴ Eg the Act's provisions regarding debt review (ss 85-87), the *in duplum* rule (s 103(5)), settlement of the credit agreement (s 125), early payments (s 126) and surrender of goods (s 127).

¹⁵ This is especially true due to s 8(4)(f) which provides for a catch-all section covering credit agreements which fall outside the definitions of specific credit agreements. S 8(4)(f) provides that the Act applies to any other agreement (than a credit facility or credit guarantee) in terms of which payment of an amount owed by one person to another is deferred and a charge, fee or interest is levied by the credit provider. See Scholtz (ed) par 8.2.3.8.

¹⁶ As long as the credit agreement is concluded at arm's length and in South Africa (or has an effect in South Africa) – s 4(1). For a full exposition of the Act's field of application see Otto *The National Credit Act Explained* (2006) 15 ff; Renke, Roestoff and Haupt “The National Credit Act: new parameters for the granting of credit in South Africa” 2007 *Obiter* 229 ff and Scholtz (ed) ch 4 and 8.

2 1 General

Member States of the European Union had time until June 2010 to transpose the guidelines contained in the 2008 EU Consumer Credit Directive¹⁷ into their national laws¹⁸ and to repeal the previous Council Directive in this respect.¹⁹ The purpose of the 2008 Directive is to harmonise certain aspects of the laws, regulations and administrative procedures²⁰ of the Member States concerning credit agreements.²¹ It is thus logical that the 2008 Directive, except for a few specific exclusions,²² applies to all credit agreements.²³

Only a few of the broad guidelines or principles adopted by the European Parliament and the Council of the European Union that underlie the 2008 Directive will be mentioned in this paper.

2 2 European Union guidelines / principles

The first few guidelines pertain to pre-contractual disclosure. They *inter alia* provide that consumers should be protected against unfair or misleading practices, in particular with respect to the disclosure of information by the creditor. Provision is also made for specific provisions in the 2008 Directive on advertising concerning credit agreements as well as for certain items of standard information to be provided to consumers in order to enable them, in particular, to compare different offers.²⁴

Consumers should be enabled to make their decisions in full knowledge of the facts. They should therefore receive adequate information, which the consumer may take away and consider, prior to the conclusion of the agreement, on the conditions and cost of the credit and on their obligations.²⁵ The total cost of the credit to the consumer should comprise all the costs.²⁶

The second set of principles is of the utmost importance with reference to the topic of this paper. It places a responsibility on Member States to take appropriate measures to promote responsible practices during all phases of the credit relationship. Such

¹⁷ No 2008/48/EC of the European Parliament and the Council of the European Union of 2008-04-23 (hereafter the “2008 Directive”).

¹⁸ Member States, however, remain free to maintain or introduce rules on national level with regard to certain matters specified in the 2008 Directive.

¹⁹ Council Directive 87/102/EEC of 1986-12-22 which laid down rules at Community level concerning credit agreements – see 2008 Directive.

²⁰ In other words to establish common rules.

²¹ Art 1 2008 Directive.

²² Eg credit agreements that are secured by a mortgage or by another comparable security commonly used in a Member State on immovable property, credit agreements involving a total amount of credit less than €200 or more than €75 000 or credit agreements where the credit is granted free of interest and without any other charges or under the terms of which the credit has to be repaid within three months and only insignificant charges are payable.

²³ Art 2 2008 Directive.

²⁴ Guideline 18. Member States remain free to regulate information requirements in their national law regarding advertising which does not contain information on the cost of credit.

²⁵ Guideline 19. In general the pre-contractual information requirements should apply to credit intermediaries as well – guideline 24.

²⁶ Incl interest, commissions, taxes, fees for credit intermediaries and any other fees which the consumer has to pay in connection with the credit agreement. Only notarial costs are excluded – guideline 20.

measures may for instance include the provision of information to, and the education of, consumers, including warnings about the risks attaching to default on payment and to over-indebtedness.²⁷ In the expanding credit market, in particular, it is important that creditors should not engage in irresponsible lending and extend credit without prior assessment of creditworthiness.²⁸

Creditors should bear the responsibility of checking individually the creditworthiness of a consumer.²⁹ Member States must also ensure that creditors provide additional assistance to consumers to enable them to decide which credit agreement is the most appropriate for their needs and financial situation.³⁰ Where appropriate, the relevant pre-contractual information and the essential characteristics of the products proposed should be explained to the consumer in a personalised manner so that the consumer can understand the effects which they may have on his / her economic situation.³¹

Guideline 31 provides that credit agreements should contain all necessary information in a clear and concise manner to enable the consumer to know his / her rights and obligations under the credit agreement. In order to ensure full transparency, the consumer should be provided with information concerning the borrowing rate both at the pre-contractual stage and when the credit agreement is concluded.³²

3 Measures in the National Credit Act which may indirectly have an impact on consumer spending and the consumer's overall debt burden³³

3 1 Protection prior to entry into the contract: helping consumers to make informed choices

3 1 1 General

One of the main objectives of consumer credit legislation is to address the imbalance between the bargaining power of credit providers and consumers, *inter alia* by requiring the compulsory disclosure of the consumer's obligations.³⁴ The disclosure of such information forms the crux of consumer credit legislation and makes it

²⁷ Guideline 26.

²⁸ Guideline 26. The onus is on Member States to enact the necessary supervision to avoid such behaviour. Member States should also determine the necessary means to sanction creditors in the event of their doing so.

²⁹ To that end creditors should be allowed to use information provided by the consumer not only during the preparation of the credit agreement in question, but also during a long-standing commercial relationship – guideline 26.

³⁰ Guideline 27.

³¹ Guideline 27.

³² Guideline 32. During the contractual relationship, the consumer should be further informed of changes to the variable borrowing rate and changes caused thereby. National law which lays down conditions for, or prescribes the consequences of, changes in borrowing rates (eg that the consumer may terminate the contract should there be a change in the borrowing rate, is not prejudiced by these prescriptions.

³³ See in general Kelly-Louw 2008 20 *SA Merc LJ* 200 ff and Stoop “South African consumer credit policy: measures indirectly aimed at preventing consumer over-indebtedness” 2009 21 *SA Merc LJ* 365 ff.

³⁴ See the Crowther Report 146; 234; “The Usury Act and related matters” *South African Law Commission Working Paper 46 Project 67* (1993) (hereafter the “Law Commission Working Paper”) 62; Grové and Otto *Basic Principles of Consumer Credit Law* (2002) 2-3.

possible for the consumer to determine how much the proposed credit is going to cost.³⁵ This first of all enables a prospective cash buyer to know whether it is to his / her advantage, in terms of cost, to pay cash or to borrow on credit and invest his / her own funds in savings.³⁶ Secondly, it allows the consumer to make an informed choice between different credit providers.³⁷ Positive side-effects resulting from the aforementioned are a stimulation of competition which in turn helps to keep interest rates down³⁸ and the prevention of the consumer from overburdening him- or herself with debt.³⁹

It has already been pointed out⁴⁰ that the National Credit Act also has as aim the compulsory disclosure of the consumer's obligations. The salient points of the Act's provisions aimed at fulfilling this aim will now be addressed.

3 1 2 Credit marketing and advertising

The National Credit Act, in contrast with its predecessors, affords extended protection to the consumer with regard to undesirable advertising practices.⁴¹ This is laudable due to the inherent dangers advertising pose with regard to the incurring of debt. The following remark made in the Crowther Report⁴² serves as illustration:

“The stringent restrictions on advertising ... were designed to prevent intending borrowers from being gulled into burdensome loan contracts by attractive advertisements offering easy terms. Many necessitous individuals were thereby induced to take loans without any appreciation of heavy, if not penal, default provisions contained in the contract....”

The Act *inter alia* for the first time in the history of South African consumer credit legislation provides for the concepts “negative option marketing” and “opting out”.⁴³ Three forms of negative option marketing are provided for. A credit provider for instance must not make an offer to enter into a credit agreement or induce a person to enter into a credit agreement on the basis that the agreement will automatically come into existence unless the consumer declines the offer.⁴⁴ An agreement entered into as a result of this form of negative option marketing is unlawful and void to the extent provided for in section 89.⁴⁵ In terms of the “opting out” principle, the Act compels credit providers to present to consumers a statement with certain options, for instance

³⁵ Grové *Gemeenregtelike en Statutêre Beheer oor Woekerrente* (LLD-thesis Rand Afrikaans University 1989) (hereafter Grové 1989 LLD-thesis) 223.

³⁶ Crowther Report 146.

³⁷ Grové 1989 LLD-thesis 224.

³⁸ Goodwin-Groen (with input from Kelly-Louw) in a report prepared for FinMark Trust, South Africa *The National Credit Act and its Regulations in the Context of Access to Finance in South Africa* (2006) (hereafter the “Goodwin-Groen Report”) 10 puts it strongly as follows: “Evidence shows that competition is the single most effective way to reduce ... interest rates.”

³⁹ Grové 1989 LLD-thesis 224. Also see Grové and Otto 57 and Grové “Renteberekening, regshervorming en die Woekerwet 73 van 1968” 1990 *THRHR* 28 for a discussion of the legal political aim of the disclosure of finance charges and of the terms on which credit agreements are concluded.

⁴⁰ See par 1 above.

⁴¹ See in general with regard to advertising and marketing standards Scholtz (ed) ch 7; Kelly-Louw 2008 20 *SA Merc LJ* 211 ff and Stoop 2009 21 *SA Merc LJ* 377-380.

⁴² 258. Also see Kelly-Louw 2008 20 *SA Merc LJ* 211.

⁴³ S 74.

⁴⁴ S 74(1).

⁴⁵ S 74(4).

to be excluded from any telemarketing campaign. The consumer must then be afforded the opportunity to select any of the options, *inter alia* to opt out of all or some of them.⁴⁶

Section 75 of the National Credit Act affords important protection to consumers with regard to the marketing and sales of credit at home or at work. The underlying principle in this regard is that such marketing and sales is in order provided that the consumer initiated it.

Section 76 of the Act concerns certain advertising practices and applies to the provider of credit that is being advertised, or the seller of any goods or services that are being advertised for purchase on credit.⁴⁷ Section 76 has to be read together with regulations 21 and 22 of the National Credit Regulations, 2006.⁴⁸ Section 76(3) prohibits the advertising of the availability of credit, or of goods or services to be purchased on credit, by a person who is required to be registered as a credit provider, but who is not so registered. Advertisements of the availability of credit *etcetera* also have to contain statements required by regulation⁴⁹ and must not advertise a form of credit that is unlawful⁵⁰ or be misleading, fraudulent or deceptive.⁵¹ It may contain a statement of comparative credit costs to the extent permitted by law or industry code of conduct. The costs for each alternative being compared,⁵² rates of interest,⁵³ *etcetera*, have to be showed.

A credit provider has to state or set out the interest rate and other credit costs in the prescribed manner and form in an advertisement concerning the granting of credit.⁵⁴ Section 77 determines that any solicitation by or on behalf of a credit provider for the purpose of inducing a person to apply for or obtain credit must include a statement with the prescribed information for the particular type of solicitation. Statements or phrases like “no credit checks required” and “free credit” may not form part of any advertisement or direct solicitation for credit.⁵⁵

Regulation 21 concerns the content for advertising practices whilst regulation 22 deals with the required format for advertising practices. If an advertisement discloses a monthly instalment, or any other cost of credit, it also has to disclose⁵⁶ the number of

⁴⁶ S 74(6).

⁴⁷ S 76(2). Section 76 does not apply to an advertisement that does not make reference to a specific credit product or provider, and of which the dominant purpose is to promote responsible credit practices or the use of credit generally – s 76(1)(a). S 76(1)(b) also excludes advertisements that generally promotes a specific credit provider, brand or type of credit agreement without making specific reference to product price, cost or availability of credit. Advertisements by the seller of goods or services, or on the premises of such person, are likewise excluded if that notice or advertisement merely indicates that the person is prepared to accept payment through a credit facility in respect of which another person is the credit provider – s 76(1)(c). The notice or advertisement indicates eg that credit cards are accepted to effect payment.

⁴⁸ GN R 489 in GG 28864 of 2006-05-31. See below.

⁴⁹ S 76(4)(b).

⁵⁰ S 76(4)(c)(i). S 89 deals with unlawful credit agreements.

⁵¹ S 76(4)(c)(ii).

⁵² S 76(4)(d)(i).

⁵³ S 76(4)(d)(ii).

⁵⁴ S 76(5).

⁵⁵ Reg 21(6).

⁵⁶ Reg 21(3).

instalments, total amount of all instalments,⁵⁷ including interest, fees and compulsory insurance, the interest rate and so forth. A statement of comparison of credit cost⁵⁸ must also contain such information for each alternative being compared.⁵⁹ The required format for advertising practices⁶⁰ ensures that important information regarding the cost of credit is not obscured in advertisements, *inter alia* by the use of small print.

It should be accentuated that the adequacy of enforcement of the statutory provisions is naturally an important element in the control of credit advertising.⁶¹ Without going into too much detail, it is submitted that the measures of the National Credit Act aimed at ensuring compliance with its advertising⁶² provisions, are inadequate. Non-compliance with the advertisement provisions in the Act was not considered serious enough to be elevated to the status of offence.⁶³ With the exception of negative option marketing,⁶⁴ non-compliance also has no influence on the validity and enforceability of the agreement. The consumer's only "remedy" is therefore to file a complaint with the National Credit Regulator.⁶⁵ However, in instances where an instalment agreement or lease was concluded at the consumer's private dwelling or place of work under circumstances that constitute a contravention of section 75, the consumer is entitled to make use of his / her cooling-off right.⁶⁶

3 1 3 Pre-agreement disclosure

It goes without saying that the disclosure of especially specified financial information before conclusion of the agreement enables a consumer to make informed choices. The National Credit Act⁶⁷ compels a credit provider to provide a consumer with a pre-agreement statement and quotation disclosing prescribed financial information, for instance the credit advanced to the consumer, the deposit⁶⁸ to be paid by the consumer and to be deducted and instalments payable. All credit quotations are binding on a credit provider for a period of five business days after the date on which the quotation is presented to the consumer.⁶⁹

3 2 Regulation of contract terms and protection during the existence of the contract

⁵⁷ Including interest, fees and compulsory insurance.

⁵⁸ As described in s 76(4)(d).

⁵⁹ Reg 21(4).

⁶⁰ Reg 22.

⁶¹ Crowther Report 261.

⁶² And many of the Act's other provisions.

⁶³ See the remark by Otto *The National Credit Act Explained* 99 that "[c]ertain conduct by persons was considered serious enough to be elevated to the 'status' of offences".

⁶⁴ See above.

⁶⁵ In terms of s 136 – see in general regarding the process that is followed upon receipt of such a complaint Scholtz (ed) par 13.4. The National Credit Regulator is established by s 12 of the Act. The Regulator is *inter alia* responsible to enforce the Act – s 15.

⁶⁶ In terms of s 121. See par 3 2 3 below.

⁶⁷ S 92 read with regulations 28 and 29. See Kelly-Louw 2008 20 *SA Merc LJ* 213.

⁶⁸ If applicable. The National Credit Act does not require the payment of a prescribed minimum deposit. However, the Act does not prevent a credit provider from requiring the payment of a deposit. See par 4 5 below.

⁶⁹ S 92(3)(a) and (b).

3 2 1 Disclosure in the contract document

Section 93 concerns the form of credit agreements.⁷⁰ Otto⁷¹ states that “[t]he word “form” used in the Act and regulations is somewhat misleading, because what is actually prescribed is a framework for the minimum contents of the agreement.” In the case of a small agreement,⁷² the parties’ personal particulars, financial detail of the agreement and certain statutory rights and duties of the consumer are required.⁷³ Regulation 31 prescribes the contents of intermediate and large agreements.⁷⁴ Comprehensive financial information and basically every conceivable right conferred on consumers in terms of the Act (if applicable in the particular circumstances) have to be included in the credit agreement. Otto⁷⁵ directs the following valid criticism:

“This will, no doubt, lead to very lengthy and verbose credit agreements. The underlying idea is a sound one, namely to disclose fully to consumers what they are letting themselves in for. By the nature of things, however, few people read these documents, particularly when they contain too much information.”

3 2 2 Standard contracts

The Policy Framework for Consumer Credit document⁷⁶ points out the dangers inherent to the use of standard form contracts. Consumers are for instance often confronted with unfamiliar contractual language and information which is incomprehensible to them. Their rights are furthermore often undermined by the inclusion of complicated and compromising clauses in contracts. The National Credit Act strives to counteract these dangers as follows:

- (a) Certain contract clauses are established as unlawful provisions of credit agreements.⁷⁷ Section 90(1) provides that a credit agreement must not contain an unlawful provision.⁷⁸ Any unlawful provision in a credit agreement is void as from the date that the provision purported to take effect.⁷⁹

⁷⁰ See in general Scholtz (ed) par 9.2.1 and Kelly-Louw 2008 20 SA Merc LJ 213-214.

⁷¹ *The National Credit Act Explained* 41.

⁷² For the classification of credit agreements into small, intermediate and large agreements, see ss 7(1)(b) and 9 read with the Threshold Regulations GN 713 in GG 28893 of 2006-06-01. Also see Scholtz (ed) par 8.7.

⁷³ See reg 30 read with prescribed form 20.2. Also see Otto *The National Credit Act Explained* 41 and Scholtz (ed) par 9.2.

⁷⁴ See above.

⁷⁵ *The National Credit Act Explained* 41.

⁷⁶ The Department of Trade and Industry South Africa *Consumer Credit Law Reform: Policy Framework for Consumer Credit* (2004) (hereafter “Policy Framework”) 26.

⁷⁷ S 90(2). See Stoop 2009 21 SA Merc LJ 382.

⁷⁸ S 91(a) furthermore prohibits a credit provider from requiring or inducing a consumer to enter into a supplementary agreement that contains a provision that would be unlawful had it been included in the (main) credit agreement.

⁷⁹ S 90(3). However, s 164(1) provides that nothing in the Act renders void a provision of a credit agreement that is prohibited or may be declared unlawful unless a court declares that provision to be unlawful.

- (b) Consumers have the right⁸⁰ to receive any document that is required in terms of the Act in an official language that the specific consumer reads or understands.⁸¹ They also have the right to information in plain and understandable language.⁸²

3 2 3 The consumer's right to rescind a credit agreement

The Crowther Report⁸³ had the following to say concerning doorstep sellers: “When an experienced salesman, dependent on his commission, is facing an inexperienced housewife on her doorstep, or in her sitting room, there is hardly an equality of bargaining power.” Safeguards are therefore necessary for transactions that take place elsewhere than at the credit provider's place of business.⁸⁴ Section 121 affords such protection, a right of rescission or a so-called cooling-off right to the consumer.⁸⁵ After termination of the credit agreement, restitution has to take place.⁸⁶

3 3 Protection after contract: post-contract disclosure⁸⁷

3 3 1 Copy of the credit agreement

A credit provider has to deliver to a consumer, free of charge,⁸⁸ a copy of the document that records their credit agreement.⁸⁹ The consumer may in writing request a replacement copy of the agreement.⁹⁰

⁸⁰ See in general Stoop 2009 21 *SA Merc LJ* 375-377.

⁸¹ S 63(1). Credit providers have to comply with this obligation only to the extent that is reasonable having regard to usage, practicality, regional circumstances *etc.* A credit provider that is, or is required to be, a registrant in terms of the Act (in other words the bigger role players in the market – see s 40) has to make a submission to the National Credit Regulator proposing to make documents available in two official languages. Such credit provider should thereafter offer each consumer the opportunity to choose from two official languages as determined in accordance with the proposal that has been approved by the National Credit Regulator – s 63(2).

⁸² S 64. Documents have to be provided to consumers in the prescribed form, or if no form has been prescribed for a document, in plain language – s 64(1). The document must in other words use language in such a manner that an ordinary consumer of the class of persons for whom the document is intended, with average literacy skills and minimum credit experience, could be expected to understand the document – s 64(2). According to s 64(3) the National Credit Regulator may publish guidelines for methods to assess whether a document is in plain language.

⁸³ 98.

⁸⁴ Crowther Report 99.

⁸⁵ See in general Scholtz (ed) par 9.5.2. The following requirements have to be adhered to in order for a consumer to avail him or herself of the protection afforded by the cooling-off right: (a) the particular credit agreement has to be a lease or an instalment agreement; (b) the agreement must have been entered into at any other location than the credit provider's registered business premises – s 121(1). Once these requirements are met, the consumer may terminate a credit agreement within five business days (see s 2(5)) after the date on which the agreement was signed by the consumer – s 121(2). Termination must be effected by means of a notice delivered to the credit provider in the prescribed manner – s 121(2). In terms of reg 37 the notice must be given in writing and delivered by hand, fax, e-mail or registered mail to an address in the credit agreement, alternatively to the credit provider's registered address.

⁸⁶ S 121(3)-(5).

⁸⁷ See in general Stoop 2009 21 *SA Merc LJ* 383-384.

⁸⁸ S 65(3) reiterates the fact that a credit provider must not charge a fee for the original copy of any document required to be delivered to a consumer in terms of the Act.

⁸⁹ S 93(1). The document that records the credit agreement has to be transmitted to the consumer in a paper form or in a printable electronic form. S 65 specifies the methods of delivery (transmission) of the agreement in a paper or printable electronic form to the consumer. It determines that any document that is required to be delivered to a consumer in terms of the Act has to be delivered in the prescribed

3 3 2 Statements of account

The National Credit Act contains detailed provisions⁹¹ on statements of account.⁹² It will suffice to mention that credit providers must deliver to consumers periodic statements⁹³ and is obliged on request by a consumer to furnish the consumer, free of charge, with a statement.⁹⁴ The financial information⁹⁵ provided in statements of account enables the consumer to effectively assess and manage his / her overall debt situation and in turn his / her decision whether to incur further debt or not.

3 4 Consumer education

The usefulness of consumer education programmes to counter the ignorance of the average consumer in respect of the legal and financial implications of the granting of consumer credit is not always welcomed with too much enthusiasm. The Law Commission Working Paper⁹⁶ remarked in 1993 that “[a]lthough such programmes are certainly not without value, experience has shown that they are of limited use.”⁹⁷ However, later on the remark is made that “[i]t is essential that, in addition to general information and educational programmes, there should be substantive legislation which –

(a) creates certain rights for consumers;

(b) requires that these rights be brought to the consumer’s attention; and

(c) requires disclosure of all the material clauses of the credit contract.”⁹⁸

The Policy Framework⁹⁹ that preceded the National Credit Act emphatically pointed out that specific provision should be made for consumer education and institutional and financial support for implementation should be provided. The reason stated is that improved disclosure of information and ensuring that the contract is in a standard format is not in itself sufficient to ensure that consumers will be able to convert this information into effective knowledge.¹⁰⁰ More discerning and knowledgeable

manner, if any – s 65(1). If no method has been prescribed for the delivery of a particular document, the person required to make the document available to the consumer has to do so (a) in person at the business premises of the credit provider (or at any other location designated by the consumer but at the consumer’s expense); (b) by ordinary mail; (c) by fax; (d) by email; or (e) by printable web-page – s 65(2)(a)(i)-(iv). The consumer may choose the manner of delivery of the document from the options made available in terms of s 65(2)(a) – s 65(2)(b).

⁹⁰ If the copy is requested within a year after the date of the original delivery of the document, the credit provider has to provide the consumer with a single replacement copy of the document without charge to the consumer – s 65(4)(a). The consumer is also entitled to other replacement copies, subject to prescribed search and production fees – s 65(4)(b).

⁹¹ Ss 107-115. Also see reg 35 with regard to small agreements.

⁹² See in general Otto *The National Credit Act Explained* 61.

⁹³ S 108(1).

⁹⁴ S 110(1).

⁹⁵ Eg the current balance of the consumer’s account, any amount currently payable and the date it became due – s 110(1).

⁹⁶ 64.

⁹⁷ Also see Kelly-Louw 2008 20 *SA Merc LJ* 211.

⁹⁸ Law Commission Working Paper 65.

⁹⁹ 27.

¹⁰⁰ Policy Framework 27.

consumers will increase competition in the credit industry and at the same time give rise to better levels of service.¹⁰¹

The National Credit Act fulfilled the need for legislative measures providing for education of the consumer concerning credit matters. The Act has as aim the correcting of imbalances in negotiating power between consumers and credit providers by providing consumers with education about credit and consumer rights.¹⁰² The Act also adheres to a proposal that consumer education should be incorporated in the mandate of the consumer credit regulator¹⁰³ and that the achievement of consumer education targets should be reported on.¹⁰⁴ Section 16 of the National Credit Act provides that the National Credit Regulator is responsible to increase knowledge of the nature and dynamics of the consumer credit market and industry.¹⁰⁵ It is also the task of the Regulator to promote public awareness of consumer credit matters by implementing education and information measures to develop public awareness of the Act's provisions.¹⁰⁶ In terms of section 18 the Regulator has to report to the Minister¹⁰⁷ annually on the volume and cost of different types of consumer credit products and on the implications for consumer choice and competition in the consumer credit market.¹⁰⁸

Other proposals were that new consumer credit policy must address consumer education at both the adult education and school learner levels, employers and trade unions could contribute to consumer education in the workplace and that industry should make contributions to consumer education programmes.¹⁰⁹ As a result it was foreseen that a mechanism has to be developed to allow for joint contributions by government and industry in order to provide for the joint determination and development of education campaigns.¹¹⁰ Though the extent of compliance to these proposals is difficult to assess, there is certainty with regard to the National Credit Regulator's duty to educate consumers.¹¹¹ In this respect there can be little doubt that since its establishment on 1 June 2006, the Regulator has walked the extra mile to fulfil its mandate.¹¹² With reference to the year 2008 and one of the Regulator's focus areas, namely to create public awareness of credit matters, Stoop remarks that the Regulator has for instance reached more consumers than previously.¹¹³

To conclude, certainly more could be done to educate our consumers. Though the National Credit Act's provisions regarding consumer education are to be welcomed, is it a pity that the National Credit Act does not render consumer education compulsory.¹¹⁴ But at the end of the day, to use the words of Otto and Grové,¹¹⁵

¹⁰¹ Policy Framework 27.

¹⁰² S 3(e)(i).

¹⁰³ And in the mandates of the provincial consumer protection agencies.

¹⁰⁴ Policy Framework 27.

¹⁰⁵ S 16(1).

¹⁰⁶ S 16(1).

¹⁰⁷ The member of the Cabinet responsible for consumer credit matters (s 1), at present the Minister of Trade and Industry.

¹⁰⁸ S 18(1)(c).

¹⁰⁹ Policy Framework 27.

¹¹⁰ Policy Framework 27.

¹¹¹ Kelly-Louw 2008 20 *SA Merc LJ* 210.

¹¹² See Kelly-Louw 2008 20 *SA Merc LJ* 210 and Stoop 2009 21 *SA Merc LJ* 374 for detail.

¹¹³ 2009 21 *SA Merc LJ* 374.

¹¹⁴ See Stoop 2009 21 *SA Merc LJ* 373.

“...well-intended legislation will not necessarily raise the level of knowledge and information of all consumers, but the legislature can do no more than create the machinery. Once the horse has been brought to the water he must drink by himself.” Be that as it may, it remains important to realise that improved consumer awareness will exert an influence on competition in the credit market, which in turn may lead to a reduction in the cost of credit.¹¹⁶ In light of the topic of this paper the resultant impact on a consumer’s overall debt burden can only be a good thing.

3 5 The consumer’s liability, interest, charges and fees¹¹⁷

3 5 1 General

The National Credit Act, like its predecessors, amongst other things strives to protect consumers against the financial implications consequent upon the conclusion of a credit agreement. Last mentioned fact is of crucial importance for purposes of this paper as reduced credit costs at the end of the day logically means lower credit debt. The scheme or framework utilised in the National Credit Act to afford financial protection to the debtor in terms of a credit agreement is basically similar to the scheme used in the Usury Act 73 of 1968.¹¹⁸ Section 100 of the Act that prohibits certain charges serves as a point of departure.

3 5 2 Interest rate control

The National Credit Act first of all restricts credit providers with regard to the maximum interest rates that may be imposed.¹¹⁹ Though a debate¹²⁰ on the desirability and effectiveness of interest rate control as consumer protection measure falls outside the scope of this paper, the following needs to be stated:

(a) By imposing interest rate caps in the National Credit Act, the legislature continues with a long South African tradition in this regard.¹²¹ It is therefore highly unlikely that much will come of Goodwin-Groen’s¹²² plea that maximum interest rate ceilings should be abolished as soon as possible.¹²³

¹¹⁵ Law Commission Working Paper 65.

¹¹⁶ Grové 1989 LLD-thesis 224 and Grové and Otto 57.

¹¹⁷ See in general Scholtz (ed) ch 10 and Kelly-Louw 2008 20 *SA Merc LJ* 215-216.

¹¹⁸ One of the Act’s immediate predecessors.

¹¹⁹ See s 100(1)(c) (read with s 105(1)(a)) that prohibits a credit provider from charging an amount to, or imposing a monetary liability on, the consumer in respect of an interest charge under a credit agreement exceeding the amount that may be charged consistent with the Act.

¹²⁰ See in general Grové 1989 LLD-thesis 302 ff and Kelly-Louw 2008 20 *SA Merc LJ* 214-215.

¹²¹ See Grové 1989 LLD-thesis 350 and Law Commission Working Paper 205 ff.

¹²² Goodwin-Groen Report 30.

¹²³ Goodwin-Groen (with reference to countries that do make use of interest rate caps (eg Switzerland, France and some States in the US) and countries that don’t (eg Germany and the UK – in these countries, however, usury interest rates are forbidden by law) argues that South Africa should abolish interest rates caps based on the following grounds: (a) the rates prescribed in terms of the National Credit Act are so high that under normal conditions they are likely to be academic; (b) in practice maximum fixed interest rates cannot be enforced effectively; (c) sub-prime markets in the UK and US States without a ceiling became increasingly diverse and competitive – Goodwin-Groen Report 24-27.

(b) By prescribing maximum rates of interest consumer spending can be regulated.¹²⁴ Otto and Grove¹²⁵ go so far as to say that control over rates of interest is essential from a consumer's point of view to prevent debtors from incurring too much debt.

3 5 3 Defining the principal debt

Secondly, the debt amount used in order to do the interest calculations upon, in other words the concept "principal debt", or "deferred amount" is defined as well in order to prevent credit providers from inflating the amount of the principal debt to enable them to claim more interest.¹²⁶

3 5 4 The maximum amount recoverable

To protect the consumer only against "interest" would mean that credit providers could increase their return merely by claiming diverse items or amounts from the consumer. The items or amounts that may be recovered from consumers, in other words the maximum amount recoverable, are therefore specified as well.¹²⁷ For the same reason each individual item or amount so specified needs to be capped as well.¹²⁸

3 5 5 Miscellaneous

The National Credit Act¹²⁹ provides for variable interest rates. In terms of section 103(4) a credit agreement may provide for the interest rates to vary during the term of the agreement. The only provisos are that the variation should be by fixed relationship to a reference rate¹³⁰ stipulated in the agreement and that the reference rate must be the same as that used by that credit provider in respect of any similar credit agreements currently being used by it.¹³¹ A major shortcoming in the Act is that it does not render disclosure to the consumer of the dangers inherent to interest rate increases in the case of variable rates compulsory. It is suggested that the National Credit Act could be amended to lay down conditions for, or prescribe the consequences of, changes in interest rates.¹³² It should also be amended in order to render it compulsory for credit providers to take the consequences of interest rate hikes into consideration when assessing¹³³ whether a consumer can afford new credit.

¹²⁴ Law Commission Working Paper 56.

¹²⁵ Law Commission Working Paper 57.

¹²⁶ S 1 read with reg 39.

¹²⁷ S 100(1)(a) (read with ss 101 and 102 which deal with the cost of credit) that prohibits a credit provider from charging an amount to, or imposing a monetary liability on, the consumer in respect of a credit fee or charge prohibited by the Act is aimed at achieving this objective.

¹²⁸ The legislature caps the items or amounts listed in ss 101 and 102 in terms of s 100(1)(b) (read with s 105(1)(b)) that prohibits a credit provider from charging an amount to, or imposing a monetary liability on, the consumer in respect of an amount of a fee or charge exceeding the amount that may be charged consistent with the Act. Also see regs 42-48.

¹²⁹ As was the case in terms of the Usury Act 73 of 1968.

¹³⁰ The credit provider may eg use the prime lending rate used by the major financial institutions in South Africa as reference rate.

¹³¹ S 103(4).

¹³² Eg that the consumer may terminate the agreement should there be a change in the interest rate (see par 2 2 above). This should of course be subject to certain predetermined conditions.

¹³³ In terms of s 81 discussed in par 4 3 below.

Of importance is that section 106(4) makes it obligatory for a credit provider to grant the choice to the consumer to make use of the consumer's own policy of insurance in stead of purchasing a particular policy of credit insurance proposed by the credit provider. The consumer should also be informed regarding the choice he or she has.¹³⁴ The monopoly that existed in favour of credit providers and their insurance brokers which in turn had a negative influence on the insurance premiums consumers had to pay is thus ended in that consumers are now entitled to shop around for cheaper credit insurance.

3 5 6 Conclusion

The rand and cent impact of the National Credit Act's financial protection measures is not addressed in this paper. The same holds true for a comparison with the rand and cent effect of the National Credit Act's immediate predecessor, the Usury Act 73 of 1968. However, notice should be taken of Campbell's views regarding the excessive cost of smaller credit agreements, with resultant higher debt burdens for consumers in terms of such agreements.¹³⁵ His recommendations¹³⁶ aimed at the reduction of such costs should therefore be regarded in a serious light.

4 The Act's direct measures aimed at preventing over-indebtedness¹³⁷

4 1 General

With the coming into operation of the National Credit Act specific provision is now being made for the first time in the history of South African consumer credit legislation for measures to combat reckless credit lending and over-indebtedness. However, it should be pointed out that the Part¹³⁸ in the Act dealing with over-indebtedness and reckless credit lending only has limited application.¹³⁹

It needs to be pointed out from the outset that a credit agreement may be regarded to be reckless, irrespective of whether the conclusion of the agreement renders the consumer over-indebted or not.¹⁴⁰ On the other hand, as Vessio¹⁴¹ puts it, "[a] last-entered credit agreement may have the effect of precipitating a credit consumer into over-indebtedness."¹⁴² It should also be mentioned for the sake of completeness that a consumer may become over-indebted without reckless credit granting taking place at all. In what follows a brief overview of the direct measures will be provided followed by a discussion thereof.

¹³⁴ S106(4)(a).

¹³⁵ Campbell "The excessive cost of credit on small money loans under the National Credit Act 34 of 2005" 2007 19 *SA Merc LJ* 251 ff. Also see the Goodwin-Groen Report 22 and 28-30.

¹³⁶ Campbell 2007 19 *SA Merc LJ* 270-271.

¹³⁷ See in general Kelly-Louw 2008 20 *SA Merc LJ* 218 ff; Stoop 2009 21 *SA Merc LJ* 367 ff; Vessio "Beware the provider of reckless credit" 2009 *TSAR* 274 ff and Boraine and Van Heerden "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" accepted for publication in 2010 *THRHR* vol 4 (hereafter Boraine and Van Heerden).

¹³⁸ Ch 4 Part D.

¹³⁹ The Part does not apply to a credit agreement in respect of which the consumer is a juristic person. The provisions dealing with reckless lending do not apply to *inter alia* a temporary increase in the credit limit under a credit facility – s 78(1) and (2). See Vessio 2009 *TSAR* 277-279.

¹⁴⁰ See Boraine and Van Heerden par 2 2.

¹⁴¹ 2009 *TSAR* 274.

¹⁴² Also see Vessio 2009 *TSAR* 281.

4 2 Over-indebtedness

As mentioned earlier,¹⁴³ a consumer is over-indebted in terms of the Act if the consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which he / she is a party.¹⁴⁴ The determination concerning over-indebtedness is made on the preponderance of available information on the date upon which the determination is made.¹⁴⁵ When determining whether a consumer is over-indebted, regard must firstly be had to the consumer's financial means, prospects and obligations.¹⁴⁶ Regard should secondly be had to that consumer's probable propensity to satisfy in a timely manner all his obligations under all the credit agreements to which he is a party, as indicated by the consumer's debt repayment history.¹⁴⁷

4 3 The prevention of reckless credit lending

Section 81, probably one of the most important sections in the National Credit Act, compels a credit provider to first of all do a three part assessment before entering into a credit agreement with a consumer. Reasonable steps have to be taken to determine the proposed consumer's general understanding and appreciation of the risks and costs of the proposed credit, as well as of the rights and obligations of a consumer under a credit agreement.¹⁴⁸ In terms of the second part of the assessment, regard must be had to the proposed consumer's debt re-payment history under credit agreements.¹⁴⁹ Thirdly, the proposed consumer's existing financial means, prospects and obligations have to be assessed.¹⁵⁰

With reference to the section 81 assessment the legislature distinguishes between three instances of reckless credit granting.¹⁵¹ It is apt to mention immediately that the legislature placed a general prohibition on reckless credit granting.¹⁵² The first instance of reckless lending occurs if the credit provider failed to conduct the section 81 assessment.¹⁵³ It is irrelevant what the outcome of the assessment would have been.¹⁵⁴ The recklessness in the granting of the credit in instance two lies in the fact that having conducted the assessment, the credit provider entered into the credit agreement with the consumer despite the fact that the assessment indicated that the consumer did not generally understand or appreciate his / her risks, costs or obligations under the proposed agreement.¹⁵⁵

¹⁴³ See par 1 above.

¹⁴⁴ S 79(1).

¹⁴⁵ S 79(1) and (2).

¹⁴⁶ S 79(1)(a). In terms of s 78(3) "financial means, prospects and obligations" *inter alia* includes income, or any right to receive income.

¹⁴⁷ S 79(1)(b).

¹⁴⁸ S 81(2)(a)(i).

¹⁴⁹ S 81(2)(a)(ii).

¹⁵⁰ S 81(2)(a)(iii). Where the consumer applies for the credit for commercial purposes, it needs to be assessed whether there are reasonable grounds to conclude that such purpose would be successful – s 81(2)(b). See Kelly-Louw 2008 20 SA Merc LJ 221 with regard to provisions in the Act to improve the ability of a credit provider to do an affordability assessment.

¹⁵¹ Also see Boraine and Van Heerden par 2 2.

¹⁵² S 81(3).

¹⁵³ S 80(1)(a).

¹⁵⁴ S 80(1)(a).

¹⁵⁵ S 80(1)(b)(i). In the first two instances of reckless lending the agreement is therefore regarded to be reckless, irrespective of whether the conclusion thereof renders the consumer over-indebted or not.

The third case of reckless lending takes place if the credit provider, having conducted the assessment, entered into the credit agreement in spite of the fact that the preponderance of information available to him / her indicated that entering into that agreement would render the consumer over-indebted.¹⁵⁶

Section 80(2) provides that the person making the determination has to apply the criteria in terms of section 80(1) discussed above as they existed at the time the agreement was made. Regard must not be had to the consumer's ability to meet the obligations under the particular credit agreement at the time the determination is being made.¹⁵⁷ The same principle applies to the consumer's ability to understand or appreciate the risks, costs and obligations in terms of the proposed agreement.¹⁵⁸

It should be noted that the Act affords a complete defence to the credit provider to an allegation that a credit agreement is reckless.¹⁵⁹

4 4 Court orders with regard to reckless lending¹⁶⁰

4 4 1 General

If a credit agreement is declared reckless because of the credit provider's failure to conduct the required assessment¹⁶¹ or because he entered into an agreement despite the fact that there were indications that the consumer did not understand the nature of the risks, costs or obligations in terms of the proposed credit agreement,¹⁶² the court may make an order

- (a) setting aside all or part of the consumer's rights and obligations under that credit agreement, as the court determines just and reasonable in the circumstances;¹⁶³ or
- (b) suspending the force and effect of that credit agreement.¹⁶⁴

A court may only make the one or the other and not both of the above mentioned court orders.¹⁶⁵ The court in both instances is only empowered to make the court order in respect of the particular reckless agreement.¹⁶⁶

Where a court declares a credit agreement to be reckless because there were indications that the conclusion thereof would render the consumer over-indebted,¹⁶⁷ the court must further determine whether the consumer is over-indebted at the time of the particular court proceedings.¹⁶⁸ With this purpose in mind the court must consider

¹⁵⁶ S 80(1)(b)(ii). In this instance the recklessness of the credit agreement lies in the fact that the conclusion of the agreement causes the consumer to become over-indebted.

¹⁵⁷ S 80(2)(a).

¹⁵⁸ S 80(2)(b).

¹⁵⁹ In the case where a prospective consumer, when applying for a credit agreement, does not answer any requests for information made by the credit provider fully and truthfully – s 81(4). See Kelly-Louw 2008 20 SA Merc LJ 220-221 and Vessio 2009 TSAR 279 for more detail.

¹⁶⁰ See in general Boraine and Van Heerden par 2 1.

¹⁶¹ S 80(1)(a) reckless credit.

¹⁶² S 80(1)(b)(i) reckless credit.

¹⁶³ S 83(2)(a).

¹⁶⁴ S 83(2)(b). The suspension takes place in accordance with s 83(3)(b)(i) and its effects are discussed in par 4 4 2 below.

¹⁶⁵ The legislature uses the conjunction “or” between s 83(2)(a) and (b).

¹⁶⁶ S 83(2)(a) and (b) refers to “*that* agreement” and “*that* credit agreement” (my italics) respectively.

¹⁶⁷ S 80(1)(b)(ii) reckless credit. See Boraine and Van Heerden par 2 3 2.

¹⁶⁸ S 83(3)(a).

the consumer's current means and ability to pay his current financial obligations that already existed at the time the agreement was made.¹⁶⁹

If the consumer is over-indebted at the time of the court proceedings, the court may make an order suspending the force and effect of the reckless agreement until a date determined by the court when making the suspension order¹⁷⁰ and restructuring or re-arranging¹⁷¹ the consumer's obligations under any other credit agreements, in accordance with section 87.¹⁷² However, before making the order the court has to consider the expected date when any such suspended or restructured obligation under a credit agreement will be fully satisfied.¹⁷³

4 4 2 The effects of suspension¹⁷⁴

During the period that the force and effect of a credit agreement is suspended

(a) the consumer is not required to make any payment required in terms of the agreement;¹⁷⁵

(b) no interest, fee or other charge under the agreement may be charged;¹⁷⁶ and

(c) the credit provider may not enforce any of his rights under the agreement or under any law in respect of the agreement.¹⁷⁷

¹⁶⁹ S 83(4)(a). The court must in other words consider the consumer's financial ability at the time of the court proceedings to pay the consumer's financial obligations as they stand at the time of the said proceedings. However, only obligations that already existed at the time of conclusion of the agreement under investigation are considered. This makes sense because only those obligations had to be considered by the credit provider in order to avoid the third instance of reckless lending resulting in over-indebtedness.

¹⁷⁰ S 83(3)(b)(i). See par 4 4 2 below for the effects of suspension of a credit agreement.

¹⁷¹ It is submitted that the legislature uses the phrase "restructuring" and "re-arrangement" of obligations as alternatives and that the two concepts have a similar meaning. *Contra* Vessio 2009 TSAR 281 and 284 who is of the opinion that the concepts should be distinguished from each other.

¹⁷² S 83(3)(b)(ii). Restructuring of obligations is discussed in par 4 4 3 below. The conjunction between s 83(3)(b)(i) and (ii) is "and". A court may therefore suspend and restructure the consumer's obligations. However, it has to be accentuated that only the particular reckless agreement may be suspended. S 83(3)(b)(i) provides for "suspending the ... of *that* (my italics) credit agreement...", referring to the agreement that renders the consumer over-indebted due to the reckless lending. Note should further be taken that the consumer's obligations under his *other* (my italics) credit agreements may be restructured. It is submitted that credit agreements concluded with the particular credit provider who extended the reckless credit as well as with other credit providers are affected. S 87(1)(b)(ii) authorises the restructuring of an over-indebted consumer's obligations, irrespective of the procedure that was followed to bring the issue of over-indebtedness to the attention of the specific court. Provision is made for "an order re-arranging the consumer's obligations...", in other words in terms of all the consumer's credit agreements with all his credit providers. It is not clear whether a court may restructure the reckless agreement that caused the consumer to become over-indebted. Although based on the wording of section 83(3)(b) it appears not to be the case, it is submitted that courts ought to be able to restructure the reckless agreement as well. It may be argued that restructuring, due to the fact that the period of the contract may be extended (thereby reducing the amount of each instalment due accordingly) and that payment dates may be postponed, offers wider protection to the consumer than mere suspension of an agreement.

¹⁷³ Assuming that the consumer will make all required payments in accordance with any proposed order – s 83(4)(b).

¹⁷⁴ See Boraine and Van Heerden par 2 3 2.

¹⁷⁵ S 84(1)(a).

¹⁷⁶ S 84(1)(b).

¹⁷⁷ S 84(1)(c). The prohibition on the use of the credit provider's rights during the period of suspension applies despite any law to the contrary.

After suspension of the credit agreement ends, all the rights and obligations of the credit provider and the consumer under the agreement are revived and are fully enforceable.¹⁷⁸ No amount may be charged to the consumer by the credit provider with respect to any interest, fee or charge that was unable to be charged during the period of the suspension.¹⁷⁹

At the end of the day the only effect of suspension of a credit agreement for a specified period of time is that the duration of the agreement is extended with that period. The suspension thus affords the consumer more time to fulfil his obligations in terms of the suspended agreement.¹⁸⁰ However, the consumer's obligations in terms of the agreement, including interest, should remain the same as was originally agreed upon. Boraine and Van Heerden¹⁸¹ address the question whether a court may suspend a credit agreement that was found to be reckless more than once. They suggest that it seems possible in light of section 84(2)(a)(ii).¹⁸²

4 4 3 Restructuring of obligations

In terms of section 87¹⁸³ a consumer's obligations may be re-arranged or restructured in any manner contemplated in section 86(7)(c)(ii). The court may therefore extend the period of the agreement and thereby reduce the amount of each instalment due accordingly,¹⁸⁴ postpone during a specified period the dates on which payments are due under the agreement¹⁸⁵ or both.¹⁸⁶ In the case of contraventions of certain Parts in the Act the court may also recalculate the consumer's obligations.¹⁸⁷

In conclusion it is submitted that section 88, dealing *inter alia* with the effect of a re-arrangement order, is important due to the fact that it protects a consumer who is already over-indebted from additional debt. A consumer who has filed an application for debt review or who has alleged in court that the consumer is over-indebted¹⁸⁸ must *inter alia* not enter into any further credit agreement, other than a consolidation agreement,¹⁸⁹ with any credit provider until the matter has been finalised.¹⁹⁰

4 4 4 Discussion

¹⁷⁸ S 84(2)(a)(i) and (ii).

¹⁷⁹ S 84(2)(b).

¹⁸⁰ Boraine and Van Heerden par 2 3 2.

¹⁸¹ Par 2 3 2.

¹⁸² Which provides that after suspension of a credit agreement ends, all the rights and obligations of the parties under the agreement are fully enforceable, except to the extent that a court may order otherwise.

¹⁸³ S 87(1)(b)(ii).

¹⁸⁴ S 86(7)(c)(ii)(aa).

¹⁸⁵ S 86(7)(c)(ii)(bb).

¹⁸⁶ S 86(7)(c)(ii)(cc).

¹⁸⁷ S 86(7)(c)(ii)(dd). Recalculation of the consumer's obligations may only take place because of a contravention of Ch 5 Part A (unlawful agreements and provisions), Ch 5 Part B (disclosure, form and effect of credit agreements) or Ch 6 Part A (collection and repayment practices).

¹⁸⁸ In terms of ss 86(1) or 85(a) respectively.

¹⁸⁹ The Act does not define "consolidation agreement". It is submitted that a consolidation agreement is an agreement in terms whereof a consumer's debt is consolidated. It is submitted that the conclusion of such agreement is therefore permitted as it does not create any new debt for the consumer. See in connection with the consolidation of debts Otto *LAWSA* 24 par 172 (177).

¹⁹⁰ S 88(1). See Vessio2009 *TSAR* 287-288 for more detail.

As was seen above,¹⁹¹ section 83(2)(a) empowers a court to set aside all or part of the consumer's rights and obligations under the reckless credit agreement¹⁹² depending on what the court determines to be just and reasonable in the circumstances. It is therefore exclusively in the discretion of the court making the court order to decide which part of the credit agreement is to be set aside. However, no guidelines as to how a court should exercise its discretion in this regard is provided by the legislature.¹⁹³ The same holds true for a court's discretion whether to set the consumer's rights and obligations under the reckless credit agreement¹⁹⁴ aside¹⁹⁵ or whether to suspend¹⁹⁶ such credit agreement.¹⁹⁷

It is important to take note that it is not only the consumer's obligations (or part thereof) in terms of the reckless agreement that have to be set aside, but also the consumer's rights (or part thereof).¹⁹⁸ Setting aside all the consumer's rights and obligations under the reckless agreement in other words rids the consumer of the reckless agreement. The question is what happens to the rights and obligations of the credit provider under the same agreement? Due to the fact that credit agreements are reciprocal agreements (both parties to the contract are both debtor and creditor in terms of the contract) and therefore that every right of the consumer creates a corresponding obligation for the credit provider and *vice versa*,¹⁹⁹ it is submitted that the setting aside of the consumer's rights and obligations will result in the automatic setting aside of the credit provider's rights and obligations under the particular agreement.²⁰⁰

Last mentioned submission gives rise to the question of restitution of performances already received due to the fact that the parties' obligations in terms of the credit agreement come to an end.²⁰¹ In contrast with section 89²⁰² which deals with unlawful credit agreements,²⁰³ section 83(2)(a) does not prohibit or limit the rights of a credit provider to claim restitution.²⁰⁴ Section 83(2)(a) merely determines that the consumer's rights and obligations may be set aside.²⁰⁵

¹⁹¹ Par 4 4 1.

¹⁹² S 80(1)(a) or s 80(1)(b)(i) reckless credit.

¹⁹³ Boraine and Van Heerden par 2 3 1.

¹⁹⁴ S 80(1)(a) or 80(1)(b)(i) reckless credit.

¹⁹⁵ In terms of s 83(2)(a).

¹⁹⁶ In terms of s 83(2)(b).

¹⁹⁷ As discussed in par 4 4 1 above. See Boraine and Van Heerden par 2 3 1.

¹⁹⁸ According to Boraine and Van Heerden par 2 3 1 it is conspicuous that s 83(2)(a) does not state that the a court may set the credit agreement aside as being voidable.

¹⁹⁹ See Nagel *et al Commercial Law* (2006) 24.

²⁰⁰ Also see Boraine and Van Heerden par 2 3 1.

²⁰¹ In the event of cancellation of a contract restitution has to take place as well due to the fact that all the obligations in terms of a contract come to an end – see Nagel *et al* 125.

²⁰² S 89(5) provides that all the purported rights of a credit provider in terms of an unlawful credit agreement to recover money paid or goods delivered to a consumer, are cancelled. However, if the court concludes that cancellation of such rights in the circumstances would unjustly enrich the consumer, the court must declare the rights of the credit provider forfeited to the State. See *Cherangani Trade and Investment 107 v Mason and Others* (unreported) case no 6712 / 2008 (OVS).

²⁰³ S 89(5)(a) renders unlawful credit agreements void. However, see s 164(1).

²⁰⁴ It is submitted that a reckless credit agreement is not unlawful and therefore not affected by the provisions of s 89(5). If the legislature had the intention to render such an agreement unlawful, he / she would probably have specified so. See the list of unlawful credit agreements in s 89(2). Also see the discussion by Boraine and Van Heerden par 3.

²⁰⁵ See Boraine and Van Heerden par 2 3 1.

4 5 Deposits and periods of payment

A discussion of the direct measures²⁰⁶ to prevent over-indebtedness would not be complete without mentioning the fact that, since the coming into operation of the National Credit Act, the legislature no longer requires the payment of prescribed minimum deposits or prescribes maximum periods of payment.²⁰⁷ It would be sufficient to make only a few comments in this regard as a discussion of the underlying policy considerations to and of the advantages versus the disadvantages²⁰⁸ of terms control²⁰⁹ falls outside the scope of this paper.

On the one hand, assuming that the debtor pays the deposit him-or herself, that the deposit requirement is not sidestepped by the parties to the credit agreement and that payment of the deposit is enforced effectively,²¹⁰ the payment of a deposit contributes towards the curtailment of consumer spending.²¹¹ Deposits serve to prevent rash purchases²¹² and also to prevent persons who cannot even afford to pay the deposit from incurring the debt.²¹³ Payment of a reasonable deposit also has an influence on the debtor's overall debt burden in that his / her outstanding debt is reduced by the amount of the deposit which, in turn, affects the amount of interest payable.²¹⁴ Similar results than those just mentioned could be achieved by laying down maximum periods of payment. Shortening the permitted period of repayment in terms of a credit agreement increases the weekly or monthly instalments payable throughout the life of the contract,²¹⁵ thus forcing a consumer to think twice before incurring the debt.²¹⁶ A shorter repayment period also reduces the total amount of interest payable and thereby the total cost of credit.²¹⁷

On the other hand it may be argued that nothing in the National Credit Act prohibits creditor providers from imposing terms control on a voluntary basis as part of their business practices.²¹⁸ It may also be argued that the section 81 assessment,²¹⁹ especially the part thereof assessing the consumer's financial ability to incur the debt, renders terms control superfluous.

²⁰⁶ Or for that matter the indirect measures.

²⁰⁷ By doing this the legislature abolished a longstanding South African consumer credit legislation practice – see in general Otto “Regspolitiese oorwegings by die voorskryf van deposito's en betaaltermyn vir kredietooreenkomste” 1990 *TSAR* 559 ff; Law Commission Working Paper 56-57 and 280-291; Grové and Otto 32 ff; Otto “Deposito's en betaaltermyn by kredietooreenkomste. Deugdelike oplossings uit Mozart se kontrei (1) 2005 *THRHR* 1 ff and (2) 2005 *THRHR* 181 ff.

²⁰⁸ See Otto 1990 *TSAR* 567 ff for arguments in favour of and against the regulation of deposits and periods of payment.

²⁰⁹ The collective noun used in the Crowther Report 346 ff for prescribed minimum deposits and maximum periods of payment.

²¹⁰ For criticism levelled at the provisions in the Act's predecessors in this regard see Law Commission Working Paper 283 ff; Grové and Otto 34-37; Otto 2005 *THRHR* 3-10.

²¹¹ Crowther Report 123, 359-360; Otto 1990 *TSAR* 562-564, 566; Law Commission Working Paper 57; Grové and Otto 32; Roestoff and Renke 2003 *Obiter* 17.

²¹² Otto 1990 *TSAR* 564 and 572.

²¹³ Otto 1990 *TSAR* 562-563 and 568.

²¹⁴ Otto 1990 *TSAR* 569 and 572.

²¹⁵ Crowther Report 352.

²¹⁶ Otto 1990 *TSAR* 569.

²¹⁷ Otto 1990 *TSAR* 572.

²¹⁸ Otto 1990 *TSAR* 570 mentions that, even in the absence of statutory provisions, the requiring of a minimum deposit is nothing unusual.

²¹⁹ Discussed in par 4 3 above.

Be that as it may, in light of the above mentioned advantages of terms control as far as the curtailment of consumer spending (and of a consumer's overall debt burden) is concerned and provided that terms control is also used as a consumer protection measure (and not only to achieve monetary or broad economic aims) to prevent debtors from overburdening themselves with debt, I am of the opinion that statutory term control should be reinstated.²²⁰ However, the proviso is that, if prescribed, terms control should be effectively enforced.²²¹

5 Concluding remarks

The aim of this paper was to provide an overview of the measures in the National Credit Act directly and indirectly aimed at the prevention of reckless credit lending and over-indebtedness. A further stated purpose was to have regard to the South African measures against the background of related recent developments in the European Union. Compared to the broad guidelines in the 2008 EU Consumer Credit Directive,²²² I am of the opinion that the National Credit Act does not have to take a back seat. I would dare to venture further and say that perhaps the National Credit Act is a step ahead of the 2008 Directive. Take for instance the new procedure introduced by the Act to directly prevent reckless credit lending and over-indebtedness from taking place.²²³ It is also submitted that our indirect measures²²⁴ compare favourably with the European Union standards. The Act for instance introduces or re-enacts provisions to ensure improved disclosure of standardised information to help consumers to make informed choices.

However, many aspects in the National Credit Act still require further attention. Compulsory consumer education regarding credit matters,²²⁵ the retention of interest rate control,²²⁶ the high costs of credit for small loans,²²⁷ the prescribed court orders with regard to reckless lending²²⁸ and the reinstatement of compulsory terms control²²⁹ are to mention but a few.

In conclusion, whether the direct and indirect measures in the National Credit aimed at the prevention of too much debt will in all respects attain its legislative objective, remains to be seen. However, it can be said with certainty that the Act, at least as far as the prevention side of debt is concerned, is a great improvement on its predecessors and something we could be proud of.

²²⁰ Also see Otto 1990 *TSAR* 572-575 for strong arguments in favour of terms control.

²²¹ Otto 2005 *THRHR* 186-191, with reference to consumer credit law in Austria, makes meaningful recommendations in this regard.

²²² See the discussion in par 2 2 above.

²²³ See the discussion in par 4 above.

²²⁴ Discussed in par 3 above.

²²⁵ See par 3 4 above.

²²⁶ See par 3 5 2 above.

²²⁷ See par 3 5 6 above.

²²⁸ See the discussion in par 4 4 above.

²²⁹ See the discussion in par 4 5 above.