



## OFFICE NOTARIAL DE SAINT-JEAN-CAP-FERRAT

## MEMORANDUM CLIENTS ET PARTENAIRES

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Real estate credit:  
Implementation of the APR reform in France,  
by the government order of 17 July 2019.

## Overview

Prior to the reform, the case law regime of inaccuracy or absence of the APR revolved around two situations, depending on whether they affected the private loan offer or the notarised deed itself. In the first case, the sanction is the forfeiture of the right to interest, in full or in the proportion determined by the court. In the second case, the sanction is the replacement of the contractual rate with the statutory rate.

Government order no. 2019-740 of 17 July 2019 on civil sanctions applicable in the event of the absence or inaccuracy of the annual percentage rate provides for a **single civil sanction** in the event of the absence or inaccuracy of the APR, i.e. forfeiture of the lender's right to interest "*in the proportion determined by the court, particularly in view of the **loss** to the borrower*".

Initially designed to reduce the volume of litigation relating to the APR, the text of the reform contradicts the case law of the CJEU and the Mortgage Credit Directive which, for the establishment of such a sanction, require it to be "effective, proportionate and dissuasive". The concept of "loss" put forward by the order is unknown in EU law. Such a contradiction suggests that disputes are ongoing, so that, on the contrary, the risk of the complete loss of contractual interest sustained by the lender in the event of the absence or inaccuracy of the APR will prevail.

In the end, all loans remain subject to the obligation to indicate an APR, but also to the obligation to present a duration period (for business loans and loans to private individuals) and a rate period (for loans to private individuals).

## Discussion

**The text of the reform carrying a "uniform" sanction for the absence or inaccuracy of the APR.** – A government order adopted on 17 July 2019 on the annual percentage rate (APR)<sup>1</sup> provides that the absence or inaccuracy in the presentation of the APR may henceforth give rise to only one sanction: forfeiture of the lender's right to interest "*in the proportion determined by the court, particularly in view of the loss to the borrower*". This text is the result of a report drawn up by Mr E. Constans<sup>2</sup> which made it possible to draw up article 55 of the Law of 10 August 2018 for a State serving a trustworthy society<sup>3</sup> (the so-called "ESSOC" Law) allowing the government to take measures, by Order, relating to APR-related civil sanctions.

**The new articles of the Consumer Code on the sanction for the absence or inaccuracy of the APR.** - The following articles have been amended as a result of the reform of the government order of 17 July 2019:

- article L. 341-1 (pre-contractual information on consumer credit);
- article L. 341-4 (content of the consumer credit offer);
- articles L. 341-25, L. 341-26 (pre-contractual information on real estate credit);
- article L. 341-34 (content of the real estate credit offer); and
- article L. 341-54 (information on life annuity mortgages).

Then, a first paragraph of **Article L. 341-48-1** was introduced and applies to the Consumer Code such that "in the event of the failure to refer to or the inaccurate reference to the annual percentage rate provided for in article L. 314-5, the lender may be deprived of the right to interest in the proportion determined by the court, particularly in view of the loss to the borrower".

In addition, article L. 313-4 of the Monetary and Financial Code is amended accordingly. It now refers to the civil sanction in article L. 341-48-1, referred to above, which makes it possible to apply the new sanction to **business loans** and "free sector" loans.

**Previous French case law relating to the sanction for the absence or inaccuracy of the APR, and "replacement by the statutory rate".** - Historically, for real estate loans, when the incorrect APR appears on the loan offer, the sanction is the forfeiture of the right to interest, in full or in the proportion determined by the court<sup>4</sup>. When reference to the inaccurate APR is made on the notarised deed following the offer, the sanction imposed on the basis of article 1907 of the Civil Code, which refers to "the borrower's lack of consent to the overall cost of the loan"<sup>5</sup>, is the invalidity of the clause providing for the contractual rate and its

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<sup>1</sup> Government order no. 2019-740 of 17 July 2019 on civil sanctions applicable in the event of the absence or inaccuracy of the annual percentage rate, published in the Official Journal [JO - *Journal Officiel*] of 18 Jul. 2019, text no. 23.

<sup>2</sup> E. Constans, Annual percentage rate (APR), report, Jul. 2017, published on the website of the Financial Sector Advisory Committee [CCSF - Comité consultatif du secteur financier], attached to the Banque de France, [ccsfin.fr/médias/documents](http://ccsfin.fr/médias/documents).

<sup>3</sup> L. No. 2018-727, 10 August 2018, Official Journal [JO - *Journal Officiel*] of 11 August 2018, text no. 1.

<sup>4</sup> L. 341-34 Consumer Code (former art. L. 312-33 of the Consumer Code). Civil Division, 1st Chamber, 16 Jan. 2013, no. 05-12.081, D. 2013. 890, note J. Lasserre Capdeville; AJDI 2013. 360; CCC 2013. Comm. 94, obs. G. Raymond. The judgment of the Civil Division, 1st Chamber states: "In so ruling, while the sanction [...] is not the automatic forfeiture of any right to interest, but the power which the law gives to the court to decide the loss of all or part of the right to interest in the proportion it determines, the court of appeal has breached [former article L. 312-33 of the Consumer Code]".

<sup>5</sup> Com. 12 Jan. 2016, No. 14-15.203, D. 2016. 196, 2305, obs. D. R. Martin, and 2017. 539, obs. H. Aubry; RTD civ. [Quarterly Journal of Civil Law] 2016. 356, obs. H. Barbier; RTD com. [Quarterly Journal of Commercial Law] 2016. 825, obs. D. Legeais; Civil Division, 1st Chamber, 12 Oct. 2016, no. 15-25.034, D. 2016. 2165, obs. V. Avena-Robardet.

<sup>6</sup> Court of Cassation, Civil Division, 1st Chamber, 18 Feb. 2009, No. 05-16.774: *JurisData* No. 2009-

replacement with the statutory rate<sup>6</sup>, without the court having to investigate whether the borrower's consent is in fact vitiated<sup>7</sup>.

**The inadequacy of the sanction of replacement with the statutory rate.** - Replacing the contractual interest rate with the statutory interest rate is ineffective in practice, as the statutory interest rate is currently 3.26% as of 1 July 2019<sup>8</sup>. However, this 3.26% rate is higher than the rate for real estate loans subject to the Consumer Code. In litigation concerning a consumer loan, a borrower had moreover referred the matter to the Court of Justice of the European Union (CJEU)<sup>9</sup>, which found that EU Member States must take **effective, proportionate and dissuasive** measures, referring the case to the Orléans District Court, which was forced to impose a far more stringent sanction on the bank.

**The foreseeable consequences of the case law of the CJEU.** - The said Orléans court, ruling on referral from the CJEU, had annulled the sanction consisting of the payment of statutory interest and finally ordered the borrower to repay only the principal amount of the debt, without any interest<sup>10</sup>. This position of the CJEU could very well be transposed into the area of real estate loans, given the "**dissuasive**" character that the sanction for the absence or inaccuracy of the APR should have under article 38 of the Mortgage Credit Directive<sup>11</sup>. Furthermore, as regards the proportionality of the sanction, the CJEU held that the total forfeiture of the right to interest and costs is proportionate if the information omitted is "liable to call into question the consumer's ability to assess the scope of their commitment". One author also points out in this connection that "the proportionate nature of the sanction is not measured by the borrower's loss, but by the intrinsic seriousness of the irregularity" and adds that "the reference to an exact APR is precisely one of the essential elements, as confirmed by this judgment (§ 70 and 71), the absence of which justifies a total forfeiture of the right to interest"<sup>12</sup>. The same author also points out that the additional criterion of the "loss" that the borrower would sustain, and which the court responsible for applying the 2019 government order will have to take note of and finally set aside, is not in conformity with EU law, which only retains the criteria of the Directive<sup>13</sup>, namely the criteria of article 38 of the Directive: the effective, proportionate and dissuasive nature of the sanction.

**Uncertainty about the application of the reform over time.**- Finally, the question is whether the new system applies to current credit agreements, or only to those formed after 17 July

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047131 cited by J. Lasserre Capdeville and M. Correia, *Droit du taux d'intérêt [Interest rate law]*: JCPE 8 March 2018, no. 10, no. 42. Civil Division, 1st Chamber, 22 Sep. 2016, no. 15-21.524, D. 2017. 539, obs. H. Aubry; RTD com. [Quarterly Journal of Commercial Law] 2016. 825, obs. D. Legeais.

<sup>7</sup> Civil Division, 1st Chamber, 14 Dec. 2016, no. 15-26.306, D. 2017. 443, note J. Lasserre Capdeville, and 539, obs. H. Aubry.

<sup>8</sup> Judgment 26 June 2019, Official Gazette [JO - Journal Officiel] of 27 June, text 21

<sup>9</sup> CJEU, 4th ch., 27 March 2014, case no. C-565/12, *Crédit Lyonnais (Sté) vs/ Kalhan*, D. 2014. 1307, and obs, note G. Poissonnier; RTD com. [Quarterly Journal of Commercial Law] 2015. 139, obs. D. Legeais; RTD eur. [Quarterly Journal of European Law] 2014. 724, obs. C. Aubert de Vincelles.

<sup>10</sup> Orléans District Court, 3 Jul. 2014, D. 2014. 1685, note G. Poissonnier.

<sup>11</sup> Dir. no. 2014/17/EU, 4 Feb. 2014, on credit agreements for consumers relating to residential immovable property, Official Journal of the European Union [JOUE - Journal Officiel de l'Union Européenne], no. L. 60, p. 34, and its article 38: "Article 38. – Sanctions: "1. Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted on the basis of this directive and shall take all measures necessary to ensure that they are implemented. **These sanctions shall be effective, proportionate and dissuasive.** 2. Member States shall provide that the competent authority may disclose to the public any administrative sanction that will be imposed for infringement of the measures adopted in the transposition of this Directive, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved. "

<sup>12</sup> G. Biardeaud, *op. cit.*

<sup>13</sup> CJEC 9 March 1978, Case No. 106/77, *Simmenthal*, Rec. 629.

2019. The government order of 17 July 2019 does not contain any transitional provisions on this point. Moreover, several authors have serious doubts as to whether it can be applied to current contracts<sup>14</sup>, in the light of the uncertainty, even confusion, raised by the report to the President of the Republic on this government order, which states that: "*Since the enabling order does not provide that the new system of sanctions should apply to legal proceedings instituted prior to the publication of the order, **the order does not include a provision on this point.** It is therefore up to the civil courts to assess, as the case may be, whether the new harmonised sanction is less severe than the sanctions currently in force and, if so, to apply it immediately to legal proceedings instituted prior to the publication of the order*"<sup>15</sup>. These remarks were reaffirmed at the Council of Ministers meeting of 2 October 2019<sup>16</sup>.

**The Civil Code settles the question of the application of the Law over time.**- In order to determine whether the uniform sanction provided for by the government order of 17 July 2019 could apply to current contracts, reference should be made to the rule of retroactivity of laws provided for by article 2 of the Civil Code, which dates from 1803, according to which "*The law provides only for the future; it has no retroactive effect*", unless otherwise provided for by the new Law<sup>17</sup>, and even if the new Law is a matter of public policy<sup>18</sup>. *A fortiori*, the same authors find it hard to imagine that a government order, i.e. a regulatory act providing in this case for a civil sanction<sup>19</sup>, could have a retroactive effect, and all the more so if the enabling legislation does not expressly so provide.

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**January, the 14th, 2020**

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<sup>14</sup> J. Salvandy, "Reform of APR civil sanctions: standardisation and simplification?", RDI 2019 p.604; G. Biardeaud, "Illusory success for the banks", Recueil Dalloz 2019 p.1613; J. Moreau and O. Poindron, "APR - APR reform or the misfortunes of virtue", *Revue de Droit bancaire et financier* [Banking and finance law review] no. 6, November 2019, study 16.

<sup>15</sup> Official Journal [JO - *Journal Officiel*] of 18 Jul. 2019, text no. 22

<sup>16</sup> Minutes of the Council of Ministers meeting, 2 Oct. 2019, Civil sanctions applicable in the event of the absence or inaccuracy of the annual percentage rate": "The court may henceforth order, including for legal proceedings instituted prior to the publication of the Order whereby it would consider the new harmonised sanction less severe than the previously implemented sanctions, the forfeiture of the right to interest for the lender in the proportion it determines, particularly in view of the loss to the borrower".

<sup>17</sup> Court of Cassation, Civil Division, 2nd Chamber, 27 Apr. 1988, no. 86-13.899. – Court of Cassation, Civil Division, 1st Chamber, 9 Dec. 2009, no. 08-20.570: JurisData no. 2009-050652. – Court of Cassation, Civil Division, 1st Chamber, 12 June 2013, no. 12-15.688: JurisData no. 2013-011834.

<sup>18</sup> Court of Cassation, Civil Division, 3rd Chamber, 7 Nov. 1968: Bull. no. 444.

<sup>19</sup> Civil Sanction, as recalled: Civil Division, 1st Chamber, 18 March 1997, no. 95-04.159, Bull. civ. I, no. 97, D. 1997. 97