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7 Consumer peer-to-peer lending and the promise of enhancing access to credit

Lessons from the Netherlands

*Martha Elisabeth Buit**

Introduction

Credit is indispensable for the modern consumer. Access to credit allows consumers to meet their basic needs and to enhance their social welfare, also enabling markets to function and stimulating economic growth.¹ However, access to credit is not as self-evident as it seems. Vulnerable consumers (such as low-income people, the unemployed, minorities or migrants, persons with disabilities, young people, and oftentimes women) are at risk of having only limited to no access, often being left with unsustainable options, such as payday lending with its exorbitant interest rates.² Furthermore, since the 2008 financial crisis, the opportunities for consumers to gain access to credit have become further limited, as traditional incumbent lenders, such as banks, tend to refuse credit to high-risk consumer groups despite their increased needs to obtain it.³

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- 1 O. O. Cherednychenko, 'The EU Charter of Fundamental Rights and Consumer Credit: Towards Responsible Lending?' in H. Collins (ed.), *European Contract Law and the Charter of Fundamental Rights* (Intersentia 2017), 139.
- 2 E. Macchiavello, *Microfinance and Financial Inclusion. The Challenge of Regulating Alternative Forms of Finance* (Routledge 2018), 7–9. See also Financial Conduct Authority, *Consumer Vulnerability* (Occasional Paper No. 8 2015).
- 3 Ibid., 17; C. R. Everett, 'Origins and Development of Credit-Based Crowdfunding' (2014), SSRN Electronic Journal <http://doi.org/10.2139/ssrn.2442897> accessed 30 June 2020, 1, 12; I. J. Galloway, 'Peer-to-Peer Lending and Community Development' (2009), 39 *Community Investments Center Working Contribution Federal Reserve Bank of San Francisco*, 1, 1; C. Corr, 'Alternative Financial Credit Providers' (2007) <https://www.semanticscholar.org/paper/Alternative-Financial-Credit-Providers-in-Europe-Corr/fd5c8a3125c53578954655199fc8e4e5fac84bab# citing-papers> accessed 30 June 2020; A. Schwienbacher and B. Larralde, 'Crowdfunding of Small Entrepreneurial Ventures', in D. Cumming (ed.), *Oxford Handbook of Entrepreneurial Finance* [Oxford University Press (forthcoming) 2010], 1, 20; I. Akkizidis and M. Stagers, *Marketplace Lending, Financial Analysis, and the Future of Credit. Integration, Profitability and Risk Management* (Wiley 2016), 30; Commission,

In response to this credit crunch, consumer-peer-to-peer lending (consumer P2PL) has become one of the biggest alternative financing methods in the EU consumer credit market. As the first platform, the British Zopa, started to operate in 2005, the post-crisis period has witnessed a significant growth of P2PL, which has been characterized as a sustainable and trustworthy alternative to bank finance.⁴ In particular, it is often observed by academics and the industry that consumer P2PL enhances access to credit for consumers who are not able to obtain it from a bank.⁵

This chapter focuses on the question of whether consumer P2PL has the potential to enhance access to credit. Based on the empirical research on the Dutch consumer P2PL platforms' business models and a legal analysis of the European and Dutch regulatory framework, this chapter will show that access to credit through P2PL is not as self-evident as it may seem at first sight. It is argued that, in order for consumer P2PL platforms to be able to meet the needs of consumers who cannot obtain credit from traditional lenders, the applicable regulatory framework should enable such platforms to do so.

The chapter is divided into three sections. Section 2 discusses the background of P2PL as well as the business models of the Dutch consumer P2PL platforms which provide unsecured consumer lending. Building on this empirical evidence, Section 3 examines whether the platforms are regulated as "credit providers" under the Consumer Credit Directive⁶ (CCD) and Dutch financial supervision law. It investigates whether the platforms are obliged to perform the

Proposal for a Regulation of the European Parliament and of the Council on European Crowdfunding Service Providers (ECSP) for Business ['COM(2018)113 final'] https://ec.europa.eu/info/law/betterregulation/initiatives/com-2018-113_en accessed 30 June 2020, 1.

- 4 R. Lenz, 'Peer-to-Peer Lending: Opportunities and Risks' (2016) 7 *European Journal of Risk and Regulation* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2912164 accessed 30 June 2020, 1, 3–4; B. Zhang a.o., *Sustaining Momentum: The 2nd European Alternative Finance Industry Report* (2016), Cambridge Centre for Alternative Finance <https://www.jbs.cam.ac.uk/faculty-research/centres/alternative-finance/publications/sustaining-momentum/#.Xvw8zudcLb0> accessed 30 June 2020, 14.
- 5 Macchiavello (n 2), 219; O. O. Cherednychenko and J. M. Meindertsmas, 'Irresponsible Consumer Credit Lending in the Post-Crisis Era: Is the Consumer Credit Directive Fit for its Purpose?' (2019) 42 *Journal of Consumer Policy*, 483, 498; H. Kim and L. De Moor, 'The Case of Crowdfunding in Financial Inclusion: A Survey' (2017), 26 *Strategic Change*, 193, 194; A. Bachmann a.o., 'Online Peer-to-Peer Lending – A Literature Review' (2016), 16 *Journal of Internet Banking and Commerce*, 1, 3. See also Commission, *Unleashing the Potential of Crowdfunding in the European Union, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* COM(2014)172 https://ec.europa.eu/info/publications/communication-crowdfunding_en accessed 30 June 2020, 2, where the Commission envisages the great potential of crowdfunding in general to complement traditional sources of finance.
- 6 Directive 2008/48/EC of the European Parliament and the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (Consumer Credit Directive).

creditworthiness assessment, which in turn may obstruct consumers' access to credit. Particular attention is given to the regulatory style of the Dutch Authority for the Financial Markets (*Autoriteit Financiële Markten*; AFM) and its influence on the platforms' substantive obligations towards consumers. In addition, the legal framework is analyzed, in particular in light of the empirical evidence concerning how the platforms deal with credit risk and consumer access to credit. Section 4 provides some final remarks on the potential of consumer P2PL to enhance financial inclusion.

Before we can proceed with the analysis, however, some remarks as to the methodology are in order. First, it goes beyond the scope of this chapter to investigate who exactly the vulnerable consumers in the field of financial services are, specifically the ones who cannot gain access to bank credit. The chapter assumes such consumers exist and need credit, focusing on the issue of whether the CCD or Dutch financial supervision legislation enables them to engage in P2PL.⁷ Second, the empirical analysis involved the examination of the business models of the existing Dutch consumer P2PL platforms that provide unsecured consumer installment credit. In the Netherlands, up until April 2019, three platforms provided such credit, namely Lender&Spender, Lendex, and Geldvoorelkaar.nl. As of April 2019, Geldvoorelkaar.nl only allows small- and medium-sized enterprises to make use of their platform. Nonetheless, this platform has been included in this study because it uses a P2PL business model which is also common in other European countries. Further, some empirical evidence concerning consumer access to the investigated P2PL platforms is discussed, focusing on the publicly available evidence on their websites concerning the creditworthiness assessments as well as an interview conducted with Lender&Spender. In order to identify the business models of the three platforms, public information on their websites, general terms and conditions, and loan agreements were examined. In particular, the questions of which entity/entities (the lenders and/or the platform) fund(s) the loan amount and who the contractual counterparty of the consumer-borrower is have been considered. The analysis has identified two main business models: Model A (new; used by Lender&Spender and Lendex) and Model B (the client segregated account model; previously used by Geldvoorelkaar.nl). These business models – and thus not individual P2PL platforms – will be used for the legal analysis to answer the

⁷ See, e.g., IPSOS, *Consumer vulnerability across key markets in the European Union – Final Report* (European Commission 2016) <https://op.europa.eu/en/publication-detail/-/publication/d1af2b47-9a83-11e6-9bca-01aa75cd71a1/language-en> accessed 30 June 2020, 335 ff; Financial Conduct Authority, *Consumer credit and consumers in vulnerable circumstances* (2014) <https://www.fca.org.uk/publications/research/consumer-credit-and-consumers-vulnerable-circumstances> accessed 30 June 2020; CIVIC Consulting, *The Overindebtedness of European Households: Updated Mapping of the Situation, Nature and Causes, Effects and Initiatives for Alleviating its Impact* (European Commission 2013) https://ec.europa.eu/info/business-economy-euro/banking-and-finance/consumer-finance-and-payments/retail-financial-services/credit/consumer-credit_en accessed 30 June 2020.

question of whether the platforms using a particular business model can and should be seen as “credit providers.”

Consumer P2PL

Background

The post-crisis regulatory environment in the EU forced banks to reduce their credit risk.⁸ This, in combination with transaction costs incurred for processing small loans to low-income individuals, made it unappealing for banks to provide credit to such consumers.⁹ This meant that consumers with little to no credit history, low or fluctuating income, and sometimes even the middle-income consumer found it increasingly difficult to receive finance. Additionally, many households and other parties withdrew from the traditional financial markets, with the banks’ conventional role as credit providers being criticized and put in the spotlight of public opinion.¹⁰ Combined with a low-interest rate environment, both capital holders and capital seekers turned to alternative market infrastructures that enable consumers and businesses to enter into direct, disintermediated relationships with lenders without the need for a single point of control.¹¹ In turn, this led to the growing popularity of P2PL. In 2017, European consumer P2PL provided around €1,392 million worth of consumer loans, accounting for the largest share of European alternative finance (namely, 41% of the total volume).¹² These data do not include the United Kingdom which has the largest P2PL market in Europe, adding up to a total of £1.4 billion.¹³ At the same time, the Dutch consumer P2PL market remains significantly underdeveloped, with an estimation of around €6.1 million.¹⁴

8 Credit risk refers to the possibility of a loss resulting from a borrower’s failure to repay a loan or meet the contractual obligations. See T. van Gestel and B. Baesens, *Credit Risk Management. Basic Concepts: Financial Risk Components, Rating Analysis, Models, Economic and Regulatory Capital* (Oxford University Press 2009), xi.

9 S. Johnson, A. Ashta, and D. Assadi, ‘Online or Offline? The Rise of Peer-to-Peer Lending in Microfinance’ (2010) 8 *Journal of Electronic Commerce in Organizations*, 26.

10 L. Pelizzon, M. Riedel, and P. Tasca, ‘Classification of Crowdfunding in the Financial System,’ in P. Tasca, T. Aste, L. Pelizzon, and N. Perony (eds.), *Banking Beyond Banks and Money. A Guide to Banking Services in the Twenty-First Century* (Springer 2016), 6.

11 European Banking Authority, *Discussion Paper on the EBA’s Approach to Financial Technology (FinTech) (2/2017)* <https://www.eba.europa.eu/-/eba-publishes-a-discussion-paper-on-its-approach-to-fintech> accessed 30 June 2020, 6.

12 Ziegler a.o., *Shifting Paradigms. The 4th European Alternative Finance Benchmarking Report* (2019), Cambridge Centre for Alternative Finance <https://www.jbs.cam.ac.uk/faculty-research/centres/alternative-finance/publications/shifting-paradigms/#.Xvw8IedcLb0> accessed 30 June 2020, 16, 31.

13 B. Zhang a.o., *The 5th UK Alternative Finance Industry Report* (2018), Cambridge Centre for Alternative Finance <https://www.jbs.cam.ac.uk/faculty-research/centres/alternative-finance/publications/5th-uk-alternative-finance-industry-report/#.Xvw8hedcLb0> accessed 30 June 2020, 35.

14 Ziegler a.o. (n 12), 85.

Banks are still the world's largest supplier of credit.¹⁵ In comparison with the overall market volume of unsecured bank loans, the market share percentage of P2PL in 2015 has been estimated to be around 1% in Europe and 2–3% in the United Kingdom.¹⁶ However, P2PL shows extreme annual growth rates of 80% to 100% on average indicating that P2PL will become even more significant in the near future.¹⁷ The aforementioned is underwritten by the European Commission (EC) which, even though the P2PL market is still developing, has recognized P2PL as an important source of nonbank finance and made its continued growth part of the deeper and safer development of a European Single Market for consumer credit.¹⁸ On a systemic level, P2PL increases competition in the financing market and is a stimulus for further financial innovation. In consumer credit markets, P2PL may not only expand financing opportunities but also provide consumers with easier and faster access to credit on better terms and conditions than those of an incumbent institution.¹⁹

However, there are also risks involved in P2PL.²⁰ With respect to access to credit, the most immediate negative consequence is over-inclusion of consumers, which can result in overindebtedness. Not only does the expansion of lending mean that riskier loans are granted, but also that new, riskier borrowers from low economic groups enter the market.²¹ Furthermore, P2PL platforms can have perverse incentives to over-include borrowers as these platforms use a fee structure that aims to maximize the number of established loans between lenders

15 Akkizidis and Stagars (n 3), 30; Galloway (n 3), 1.

16 Lenz (n 4) 3–4.

17 Ziegler a.o. (n 12), 16; Zhang a.o. (n 4), 14.

18 Commission, *Consumer Financial Services Action Plan: Better Products, More Choice, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions* (COM(2017)139) https://ec.europa.eu/info/publications/consumer-financial-services-action-plan_en accessed 30 June 2020, 8–9; Commission, *Crowdfunding in the EU Capital Markets Union, Commission Staff Working Document SWD(2016)154* https://ec.europa.eu/info/publications/crowdfunding-eu-capital-markets-union_en accessed 30 June 2020, 30–31; COM(2014)172 (n 5), 11–12.

19 COM(2014)172 (n 5), 4–5, 9.

20 See, for an overview, E. Macchiavello, 'Financial-Return Crowdfunding and Regulatory Approaches in the Shadow Banking, FinTech and Collaborative Finance Era' (2017) 14 *European Company and Financial Law Review*, 662, 669–671; Lenz (n 4); SWD(2016)154 (n 18), 16; COM(2014)172 (n 5), 5–8.

21 G. Comparato, 'The Rationales of Financial Inclusion' (2015) 11 *ERCL*, 22, 33; Cherednychenko and Meindersma (n 5), 484; I. Domurath, 'A Map of Responsible Lending and Responsible Borrowing in the EU and Suggestions for a Stronger Legal Framework to Prevent Over-indebtedness of European Consumers' in H. W. Micklitz and I. Domurath (eds.), *Consumer Debt and Social Exclusion in Europe* (Taylor & Francis Ltd 2015), 155, 159–160; A. Rona-Tas, 'The Role of Credit Bureaus in Globalised Economies: Why They Matter Less Than We Think and How They Can Matter More' in H. W. Micklitz and I. Domurath (eds.), *Consumer Debt and Social Exclusion in Europe* (Taylor & Francis Ltd 2015).

and borrowers. In other words, the more loan agreements are concluded on a platform, the more fees the platform will collect.²²

At the same time, P2PL platforms depend on their reputation for further growth and the continuation of their activities.²³ As relative newcomers in the industry who are highly dependent on attracting new borrowers and lenders, these platforms need to make sure that their borrowers and lenders have trust in them and the P2PL industry in general. Hence, platforms need to be financially and operationally resilient, maintain their reputation, and build customer trust. All this is linked with the way they manage and lower their credit risk.²⁴ In general, the more financially vulnerable a consumer is, the higher the default risk. Developing an effective credit assessment plays an important role in preventing over-inclusion in the credit market.²⁵ The regulatory approach to P2PL with respect to the consumer's creditworthiness assessment is discussed below. But first the two identified business models, Model A and Model B, are described.

The empirical analysis of Dutch consumer lending platforms' business models

As mentioned earlier, three unsecured consumer lending platforms have been analyzed with respect to their business model features (specifically the money lending streams and contractual relationships), with the two models being identified. First, the characteristics of Model A platforms will be discussed, after which follows a similar analysis regarding Model B platforms.

The P2PL process at Model A platforms commences when a consumer submits an online loan application on the platform's website. During this phase, the borrower indicates the required amount and maturity of the loan and submits all required documents for the credit risk analysis. If the application is successfully submitted, the platform processes it and conducts its own assessment of the underlying credit risk. In case of approval, the platform finances the loan from its own funds and transfers the requested amount directly to the borrower. The platform then transfers the claims that arise from the loan agreement to the lenders through acts of assignment.²⁶ These lenders – who are mostly consumers – have gained

22 E. A. Omarini, 'Peer-to-Peer Lending: Business Model Analysis and the Platform Dilemma' (2018) 2 *International Journal of Finance, Economics and Trade*, 31, 40.

23 *Ibid.*, 38–39.

24 *Ibid.*, 40.

25 *Ibid.*, 40; see also A. Mehrotra, 'Financial Inclusion Through FinTech – A Case of Lost Focus' [2019] *International Conference on Automation, Computational and Technology Management*, 103, 105.

26 In the Netherlands, acts of assignment are defined as a way to transfer a registered claim to a third party. In case of P2PL, acts of assignment ex art. 3:84/94 Dutch Civil Code entail that the loan agreement between the borrower and platform remains. The only difference is that – after the acts of assignment – the lenders become the creditors of the claims that arise out of the loan agreement. The acts are undisclosed when the original creditor does not mention to the borrower that the lenders become the creditors of the claim. The consequences of this

access to the platform by signing a user agreement. Although lenders may determine the amount they want to invest through the platform (which varies from hundreds to thousands of euros), they are not able to choose to finance a particular loan as the transfer of the claims is executed on a pro rata basis, depending on the amount each lender lends out. The money flows through a third-party account (*Stichting Derdengelden*; TPA) set up by the platform, except for the pre-financing from the platform to the borrower.²⁷ Therefore, the lenders fund the loan even though the loan origination stems from the platform. This construction has consequences for the contractual relationships. As the platform is the entity that advances the loan amount to the borrower, the contractual relationship concerning the loan agreement is between the platform and the borrower. This contractual relationship continues to exist, even when the platform enters into separate agreements with the lenders.

Contrary to Model A, Model B has already been described in the academic literature and is called the “client segregated account model,” which is used by UK-based platforms such as Zopa.²⁸ When a borrower’s loan request is approved, the request is placed on a website where individual lenders can choose the loans they want to invest in. After a request is fully funded, the lenders pay the amount they want to lend to a TPA, which transfers the loan amount directly to the borrower. Consequently, Model B platforms neither prefinance nor fund the loan in any way. Moreover, borrowers and lenders face each other as contractual counterparties in the loan agreement.

form are not further discussed here. However, it is important to differentiate acts of assignment from “transfer of contract” ex art. 6:159 Dutch Civil Code (*contractsovername*) where the entire contractual position is transferred to another party. Under this article, the lenders would become the new contractual counterparty of the consumer-borrower (which would make the situation – after the transfer of contract – identical to that of Model B).

27 In general, a TPA is an independent foundation with its own board and bank account that exists to keep all the cash flows of third parties separated from that of the platform. When a platform goes bankrupt, the money stored at the TPA is not affected by the bankruptcy. In practice, the TPA can be seen as an extension of the platform, see Lenz (n. 4), 17; O. Havrylchyk and M. Verdier, ‘The Financial Intermediation Role of the P2P Lending Platforms’ (2018) 60 *Comparative Economic Studies*, 115, 119. Therefore, this chapter regards the TPA solely as an executive body that is used by the platform to transfer money from and to the lenders and borrowers. As the platform is fully responsible for the actions of the TPA under Dutch law, the legal status of the TPA is not discussed separately.

28 Lenz (n 4), 8. See for more information on other business models: E. Kirby and S. Worner, *Crowd-funding: An Infant Industry Growing Fast* (2014) International Organization of Securities Commissions Research Department Staff Working Paper 3/2014 [http://www.memofin.fr/uploads/library/pdf/Crowd-funding-An-Infant-Industry-Growing-Fast\[1\].pdf](http://www.memofin.fr/uploads/library/pdf/Crowd-funding-An-Infant-Industry-Growing-Fast[1].pdf) accessed 30 June 2020; 16 ff.; F. Brunetti, ‘Web 2.0 as Platform for the Development of Crowdfunding,’ in R. Bottiglia and F. Pichler (eds.), *Crowdfunding for SMEs. A European Perspective* (Macmillan Publishers Ltd. 2016), 64 ff.; S. Sharma and N. Lertnuwat, ‘The Financial Crowdfunding with Diverse Business Models’ (2016) 2 *Journal of Asian and African Social Science and Humanities*, 74, 82 ff.

As Section 3 will show, it matters when a platform uses a business model comparable or equal to Model A or Model B as platforms only have an obligation to assess a consumer's creditworthiness when they can be legally qualified as a "credit provider" in accordance with the CCD and Dutch financial supervision legislation.

Regulating access to credit in consumer P2PL: lessons from the Netherlands

In 2016, the EC declared that there was no strong case for EU level policy intervention as consumer P2PL is still a fast-developing market, operating on a predominantly local scale.²⁹ In 2017, an impact assessment led to the proposal of a regulation that introduces a European license for business P2PL and equity-based crowdfunding platforms to offer cross-border services in Europe.³⁰ However, (cross-border) lending services in relation to consumers are excluded from the scope of the proposal.³¹ Therefore, the CCD and Member States' legal frameworks regulate consumer P2PL. In both the CCD and Dutch financial supervision law, "credit providers" have an obligation to perform a creditworthiness assessment. Therefore, the legal definition of a credit provider will be discussed, followed by an assessment of whether Model A and Model B platforms fit into this definition (Section 3.1). Subsequently, the legal requirements of the creditworthiness assessment will be explained to examine the strictness of the assessment (Section 3.2). Finally, the credit risk standards used by the platforms are analyzed in light of the findings from the empirical analysis of their business models (Section 3.3).

Platforms as "credit providers" under the CCD and Dutch law

In order for the platforms to fall within the framework of the CCD, the models have to be regarded as "credit providers."³² In short, the CCD applies to credit agreements in which a creditor (i.e., a natural or legal person in the course of its trade, business, or profession) grants or promises credit to a consumer.³³ Evidently, the drafters of the CCD designed the legislation concerning the creditworthiness assessment with the conventional borrowing model in mind.³⁴ The standard P2PL business model (Model B) does not fit into this legal framework, insofar as these platforms do not act as lenders. Generally, they are not

29 SWD(2016)154 (n 18), 31.

30 COM(2018)113 final (n 3).

31 Ibid, 2, 13.

32 Article 3 CCD.

33 Article 3(b) CCD.

34 Cherednychenko and Meindertma (n 5), 506.

the counterparty of the borrower nor do they finance the loan, implying that they do not grant credit, nor promise it. The latter is a significant difference in comparison to traditional credit providers, as the loans do not enter the platforms' balance sheet. As a result, these platforms fall outside the CCD's scope of application when it comes to certain credit provision articles, such as the creditworthiness assessment.³⁵ On the other hand, Model A platforms do grant credit, even though they only prefinance the loan. This means that such platforms will most likely fall under the scope of the credit provision measures of the Directive.

As for the applicability of the Dutch standard of a "credit provider," the models can be qualified comparably to the standard of the CCD. Most rules on credit provision, including those on the consumer's creditworthiness assessment, are laid down in the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, Wft). According to the Wft, there has to be a "professional credit provider" who, in short, either makes a direct or indirect sufficiently determined proposal to enter into a credit agreement as the *counterparty* of a consumer, or takes over the claims under the credit agreement from the original credit provider.³⁶ Platforms with a business model structure as the one in Model A will qualify as professional credit providers. However, platforms under Model B do not, as they are neither the counterparty of the consumer nor the financier of the loan. Nevertheless, in practice, the AFM qualifies them as credit providers as well, preventing the provision of credit from being an unregulated activity and, potentially regulating the platforms stricter than required by law.³⁷

The regulatory approach of the AFM towards consumer P2PL

For consumer P2PL platforms, the AFM applies a uniform standard of consumer protection and access as – irrespective of the actual business model of a platform – the regulator regards all consumer P2PL platforms as the counterparty of the consumer-borrower. The AFM has not explicitly indicated the reasons for this (potential) expansion. In my view, Silverentand rightly points out that the AFM wanted to avoid the possibility that the provision of consumer credit would be an unregulated activity in the case of P2PL, and perceived P2PL platforms as the designated parties to burden with the requirements for licensed credit providers.³⁸ Otherwise, this obligation would fall on the lenders – a highly diverse

35 See also Cherednychenko and Meindertsmā (n 5), 506–507. However, as these platforms can be qualified as credit intermediaries under article 3(f) of the CCD, they would have to comply with certain obligations concerning, for example, the provision of information that are similar to those of credit providers.

36 Article 1:1 under "offering" sub a jo. 1:1 under "offeror" jo. 2:60 Wft.

37 This information was obtained through an interview the author conducted with the AFM. See also L. J. Silverentand a.o., *Hoofdlijnen Wft (Recht en Praktijk nr. FR6)*, (Kluwer 2018), 415–416.

38 *Ibid.*, 415–416.

group that can consist of tens to hundreds of retail and/or institutional entities.³⁹ Requiring each of them to obtain a license to provide credit would make P2PL impracticable. From the perspectives of ensuring a high level of consumer protection, legal certainty and uniformity of the law, it is a highly justifiable regulatory style. However, it is arguably one that conflicts with the rationale of maximum harmonization of the CCD as imposing stricter legal requirements other than those falling on credit intermediaries would be inconsistent thereto. Also, such regulation could hinder platforms in further innovating their business models and/or services let alone, as will be discussed below, influence the accessibility of them.⁴⁰

Regardless, in the Netherlands, both Model A and Model B P2PL platforms are subject to licensing requirements connected with the provision of credit and must comply with the substantive obligations resulting therefrom.⁴¹ The current regulation requires all platforms to comply with general reporting requirements towards the AFM, as well as far-reaching prudential and conduct of business rules, which could be perceived as burdensome by small and new credit providers. In terms of prudential rules, one can think of suitability, professional competence, and reliability requirements for directors or other personnel, as well as requirements concerning the business operations and control structure.⁴² Concerning rules of conduct, platforms have to introduce a method of complaint handling and comply with credit registration requirements, (pre-)contractual information and advertising requirements, a general duty of care, certain commission rules, as well as perform a creditworthiness assessment.⁴³ The latter will be discussed below in more detail.

The criteria of the creditworthiness assessment according to the CCD and Dutch law

The creditworthiness assessment aims to protect consumers against over-indebtedness and insolvency. More specifically, consumers must be protected against the irresponsible granting of credit agreements which are beyond their financial capacities.⁴⁴ Against this objective, it is surprising that article 8 of the CCD only imposes a general obligation on the lender. Before the conclusion of a

39 G. J. Brugman, 'Wijzigingen in de regeling inzake crowdfunding', [2016] *Beleggingsbelangen*, 31, 33.

40 However, other than briefly stating these problematic aspects, the chapter does not lend itself for an elaborate discussion. For more information, see M.E. Buit, 'Consumenten-peer-to-peer lending-platformen als kredietaanbieders. Een heroverweging noodzakelijk?' (2020), 6 *Tijdschrift Financieel Recht in de Praktijk*, 53-60.

41 Article 2:60 Wft.

42 Article 2:63 Wft.

43 Article 4:32-4:37a Wft.

44 Case C-565/12 *LCL Le Crédit Lyonnais SA vs. Fesih Kalhan*, para. 42-43; see also Domurath (n 21), 162.

credit agreement or subsequent credit increase, the lender has to assess the consumer's creditworthiness "(...) on the basis of sufficient information, where appropriate obtained from the consumer and, where necessary, on the basis of a consultation of the relevant database."⁴⁵ The Directive does not specify what has to be understood under the term *sufficient information* and when a consumer is *creditworthy*. In addition, how a consumer's creditworthiness can be determined is undefined, and the question of what the lender must do in case of a negative creditworthiness assessment is not addressed by the Directive. As far as the latter is concerned, the CCD contains no provision that obliges the lender to warn the consumer in case of the negative outcome of the assessment or to deny credit altogether. Accordingly, the Directive leaves Member States with a wide margin of appreciation to fill in these open-ended norms.⁴⁶

The Court of Justice of the European Union (CJEU) affirms that this margin of appreciation exists.⁴⁷ More specifically, the CJEU states that for the assessment of creditworthiness, credit providers have a margin of discretion to determine whether the information at their disposal is sufficient to assess the consumer's creditworthiness or whether it must check that information against other evidence.⁴⁸ The sufficiency of the information is to be determined on a case-by-case basis. Different factors can be considered, such as the circumstances in which the credit agreement is concluded, the loan amount, and the personal circumstances of the consumer.⁴⁹ The credit provider may carry out the assessment solely based on the information supplied by the consumer (provided that the information is sufficient). Yet, mere unsupported declarations by the consumer may not in themselves be sufficient. They must be accompanied by supporting evidence.⁵⁰ Therefore, while the credit provider does not have a structural obligation to verify all the information provided, it is obligated to perform further checks in the case of unsupported information.⁵¹

In the Netherlands, the creditworthiness assessment of article 8 of the CCD was transposed into financial supervision law, particularly the Wft and the Decree on the Conduct of Business Supervision of Financial Undertakings under the Wft (*Besluit Gedragstoezicht financiële ondernemingen Wft*; Bgfo). Based on this

45 Article 8(1) CCD; see also Cherednychenko and Meindertsma (n 5), 500.

46 Therefore, one may question to what extent the CCD actually achieves its goal of full harmonization. For more information, see Cherednychenko and Meindertsma (n 5), 507, specifically footnote 75; O. O. Cherednychenko and J. M. Meindertsma, 'Verantwoorde kredietverstrekking aan consumenten in een multilevel governancestelsel' (2014) 13 *Tijdschrift voor Consumentenrecht & Handelspraktijken*, 181, 183.

47 Case 449/13 *CA Consumer Finance SA/Bakkaus en Bonato* [2014] ECLI:EU:C:2014:2464, para. 36.

48 *Ibid.*, para. 36.

49 *Ibid.*, para. 37.

50 *Ibid.*, para. 39.

51 *Ibid.*, para. 39.

legislation, a professional credit provider must perform a creditworthiness assessment of the consumer-borrower prior to the conclusion of a loan agreement (or an increase in the credit amount) in order to prevent overindebtedness (*overkreditering*).⁵²

The process involves three steps. First, the provider has to obtain information concerning the borrower's financial position.⁵³ Second, the provider needs to assess whether the granting of (more) credit is responsible (*verantwoord*).⁵⁴ Third, the lender has to decide on the consumer's credit application. If the provision of (more) credit is irresponsible (*onverantwoord*), the provider is not allowed to enter into a credit agreement with the consumer-borrower (respectively grant more credit). This means that the credit provider must refuse to provide the credit (*weigeringsplicht*), which is one of the most far-reaching duties in Dutch law.⁵⁵ In the event a credit provider does not comply with these requirements, the AFM, depending on the severity of the act, may issue a warning, give instructions, impose a penalty payment (*last onder dwangsom*) or an administrative fine (*bestuurlijke boete*), revoke a license, or even report a criminal offence to the Public Prosecution Service (*Openbaar Ministerie*).⁵⁶

Whether or not the provision of credit is responsible remains an open standard that has to be applied by the credit provider. Yet, neither the Wft nor the Bgfo contain detailed legal rules as to how this should be done.⁵⁷ Concerning the first step of the assessment, the parliamentary history of the implementation of the CCD in Dutch law mentions that a proper assessment of the financial position of the consumer involves the following: The provider must gather information concerning the income of the consumer (such as the source and level of the income); certain fixed expenses (i.e., rent, mortgage, alimony, and health insurance); and the consumer's ability to repay the loan. Here, a weak or insecure position of the consumer (e.g. a young person with low income) increases the chance that the provision of credit would be irresponsible.⁵⁸

In the second step, the lender is required to formulate, document, and apply the criteria under which it assesses the consumer's creditworthiness.⁵⁹ However,

52 Article 4:34(1) Wft.

53 Article 4:34(1) Wft; see also Cherednychenko and Meindertma (n 46), 184. In addition, the Dutch meaning of the term "responsible" in relation to the creditworthiness assessment should not be confused with the *obligation of responsible lending* of which the creditworthiness assessment forms an important part. For more information concerning this obligation, see Domurath (n 21).

54 Article 4:34(1) Wft; See also Ibid, 184.

55 Article 4:34(2) Wft; See also Silverentand a.o. (n 37), 382.

56 S. H. L. Niessen and B. J. M. van de Wetering, 'De bijzondere bancaire zorgplicht bij overkreditering. N.a.v. HR 16 juni 2017, ECLI:NL:HR:2017:1107' [2017] *Nederlands Tijdschrift voor Handelsrecht*, 228, 234.

57 Cherednychenko and Meindertma (n 46), 184.

58 See the Dutch parliamentary history referred to as *Kamerstukken II 2009/10*, 32 339, nr. 3, 36 (*MvT*).

59 See articles 113–115 Bgfo. Under article 113 Bgfo, a credit provider cannot enter into a

again, legislation does not further elaborate on the question of how the lender has to do this. The AFM has indicated that it considers the codes of conduct of branch organizations as the minimum requirements for a proper creditworthiness assessment.⁶⁰ This implies that credit providers have the option (not the obligation) to implement higher restrictions to the access to credit, but cannot lower the standards. The codes of conduct of the Dutch Banking Association (*Nederlandse Vereniging van Banken*; NVB) and the Dutch Association of Finance Companies (*Vereniging van Financieringsondernemingen in Nederland*; VFN) are applicable to P2PL.⁶¹ Both codes are a form of self-regulation to promote what the Dutch banking industry and other credit providers consider responsible lending practices regarding consumer credit, containing (among others) an elaboration of the creditworthiness requirements.⁶²

For the assessment of whether the granting of credit is responsible for a consumer, the basic principle of both codes of conduct is that the consumer always has sufficient resources to meet his or her basic needs and to pay his or her fixed costs. Both codes of conduct distinguish between four types of households: single, single with children, cohabiting/married, and cohabiting/married with children. As a general rule, at least 15% of the net income (after deduction of the

credit agreement (of €1000 or higher) when he has not obtained adequate written information concerning the financial position of the consumer in order to assess the creditworthiness of the consumer-borrower. Article 114 Bgfo states that a credit provider of a loan which exceeds €25,000 must consult the data registered at the National Credit Register. Therefore, the formulation of these articles is very open and does not contain specific instructions. See J. M. Van Poelgeest, 'Comments on art. 4:34 Wft', in H. M. Vletter-van Dort a.o. (eds.), *SDU Commentaar Wet op het financieel toezicht* (2015) [https://www.legalintelligence.com/documents/24577042?srcfrm=basic+search&docindex=0&stext=J.M.Van Poelgeest%2C 4%3A34 Wft&rid=18eb96a6-efd6-49ba-b4b4-8d8bd5da44ee](https://www.legalintelligence.com/documents/24577042?srcfrm=basic+search&docindex=0&stext=J.M.Van%20Poelgeest%2C%204%3A34%20Wft&rid=18eb96a6-efd6-49ba-b4b4-8d8bd5da44ee) accessed 30 June 2020.

- 60 J. M. Meindertsma, 'De kredietwaardigheidstoets in het privaatrecht' [2017] *Tijdschrift voor Consumentenrecht en handelspraktijken*, 115, 117; Silverentand a.o. (n 37), 382.
- 61 Meindertsma (n 60), 117; J. M. van Poelgeest, *Kredietverstrekking aan consumenten* (Kluwer 2015), 64–65; Cherednychenko and Meindertsma (n 46), 184–185. In short, the NVB consists of the heads of banks operating in the Netherlands and functions as the link between the banking sector, the government, and the public to achieve a strong, healthy, and internationally competitive banking system for the Dutch and foreign banks and credit institutions operating in the Netherlands. See NVB, *Dutch Banking Association (Nederlandse Vereniging van Banken)* (30 June 2020) www.nvb.nl/english/dutch-banking-association-nederlandse-vereniging-van-banken/ accessed 30 June 2020. The VFN is an overarching organization consisting of all sorts of credit providers. It looks after the common interest of their members and promotes a healthy development of the Dutch financial market in general. See VFN, *Wie we zijn* (30 June 2020) www.vfn.nl accessed 30 June 2020.
- 62 VFN, Normen en gedragscodes (30 June 2020) www.vfn.nl/gedragscodes/; NVB, Gedragscode consumptief krediet (30 June 2020) <https://www.nvb.nl/publicaties/gedragscodes/gedragscode-consumptief-krediet/>.

standard housing costs and basic income standard) must be available for repayments.⁶³ When assessing repayment capacity, both codes of conduct maintain a monthly repayment capacity of at least 2% of the amount of credit in the case of installment credit.⁶⁴ Lastly, to determine the maximum amount of credit, the net income of the consumer is seen as the starting point from which the costs of living, rent, and other fixed costs have to be deducted.⁶⁵

Overall, the creditworthiness assessment under Dutch law takes a borrower-focused approach.⁶⁶ This approach not only focuses on the question of *whether* the consumer can repay the loan (lender-focused), but also *how* the consumer can repay. This assessment requires the credit provider to stand in the shoes of the borrower and assess to what extent these obligations (could) harm the consumer's financial position.⁶⁷ For example, the credit provider is required to assess whether the consumer has the long-term ability to repay the loan in a sustainable way (e.g., not having to sell one's house or car, drastically change their household, or frequently default on paying fixed expenses).⁶⁸

In sum, it is not always easy for credit providers to implement the standards correctly, given the fact that they are applied in the circumstances of a specific case. However, the codes of conduct give credit providers further guidance as to the criteria to be used when assessing the consumers' creditworthiness. These are also the requirements that the platforms have to implement in their credit risk analyses. Through these requirements, an attempt is made to strike a balance between the prevention of overindebtedness and the inclusion of consumers in the Dutch credit market. Although credit providers have some leeway in determining the level of credit risk analysis, this leeway is limited. For example, the platforms can choose to enhance the monthly repayment capacity from 2 to 4% or demand that a higher percentage of net income is available for repayments. As such, in practice, room for differentiation seems to result in narrower access to the platforms for consumers rather than the broader one.⁶⁹

63 The net income is the net monthly income, without health care, holiday, school, and travel allowances; child benefits; and any tax refunds for medical expenses. At least the following sources of income may be taken into account when calculating the net income: income from permanent employment, a fixed 13th month, a partner's tax credit, and/or government benefits for young disabled persons, persons suffering from a long-term illness, or other similar schemes. Other allowances with a permanent nature may also be considered.

64 Article 6 Code of Conduct VFN and article 7 Code of Conduct NVB.

65 Cherednychenko and Meindertsmas (n 46), 185.

66 Cherednychenko and Meindertsmas (n 5), 488; Meindertsmas (n 60), 117.

67 *Ibid.*, 118.

68 *Ibid.*, 117; see also Van Poelgeest (n 61), 72–73; Cherednychenko and Meindertsmas (n 5), 6.

69 This information was obtained through an interview the author conducted with Lender&Spender.

The application of the creditworthiness assessment by the Dutch P2PL platforms

How the leeway available to P2PL platforms within the regulatory framework for the creditworthiness assessment has been used can be exemplified by the Model B platform when it still provided consumer credit. The latter operated risk categories, allowing the lenders to choose a higher rate of return combined with a higher default risk. The interest rate assigned to the borrowers depended on the risk category they were placed in [with 1 being the safest category and 6 being the one with the highest chance of default (corresponding with a start-up)]. These risk classifications represent the payment capacity of the borrower – that is, the maximum financial leeway a borrower has to repay the debt with interest. Almost all consumers were classified in categories 1–3 (the low-risk categories), although no statements can be made based on public information relating to the level of differentiation between these categories.

However, now only Model A platforms are available for consumers in the Netherlands. Such platforms apply a set interest rate which is derived from the chosen ratio between the amount and maturity of the loan and also operate an automated system that is used to select the “creditworthy” consumers at the gate. The platforms have determined a maximum of credit risk and will not allow borrowers to acquire a loan above this threshold. Concerning the strictness of the assessment, Lender&Spender indicated that it exclusively allows consumers who can obtain a bank loan, implying that only creditworthy consumers, as determined by the Dutch financial supervision law and self-regulation, can access the platform.⁷⁰ To be more precise, the platform estimates that 80% of the Dutch consumers are eligible to obtain credit from a bank, out of which Lender&Spender focuses on the top 20% only allowing access for consumers with a permanent employment contract or retired employees under the condition that they have never experienced repayment difficulties in the past.⁷¹ In doing so, the platform operates a stricter creditworthiness assessment than banks. According to the platform, the reason behind the exclusion of consumers who cannot turn to banks for credit is that the practice is too risky, for both lenders and borrowers.⁷² The maximum interest rate of 14%⁷³ on consumer loans in the

70 This information was obtained through an interview the author conducted with Lender&Spender.

71 J. van Weerd, *Vormen consumentleningen een aantrekkelijke belegging?* (29 April 2019) <https://www.participaties.nl/Feature/477834/crowdfunding/Vormen-consumentleningen-een-aantrekkelijke-belegging.aspx> accessed 30 June 2020.

72 Ibid.

73 Due to the COVID-19 pandemic, the maximum interest rate on consumer loans is temporarily lowered to 10% as of August 2020. The measure will apply until 1 March 2021 and can be extended for a maximum of 6 months. See Rijksoverheid (17 september 2020) <https://www.rijksoverheid.nl/onderwerpen/bescherming-van-consumenten/vraag-en-antwoord/wat-is-kredietvergoeding-en-wat-is-het-maximale-kredietvergoedingspercentage> accessed 17 september 2020.

Netherlands in relation to the credit risk makes the practice unsustainable. In addition, the platform also wants to prevent consumers from ending up in financial difficulties due to the loan. Due to the strict legislation concerning the provision of credit, combined with the focus on the upper segment of the market, the platform expects an annual default rate of 0.5% (compared to a general default rate in the Dutch consumer credit market that lies between 0.5 and 2.5%).⁷⁴

Consequently, the platform limits access further than legally required. As explained above, such a practice is allowed under European and Dutch law. Although the desire to protect the consumer underlies the aforementioned choices of the platform, the fact that only a specific group of consumers is allowed (which happens to be the one that poses the least risk of default) seems to be also driven by business-oriented motives, such as reducing the overall credit risk of the company and enhancing the trustworthiness of the platform. This raises concerns about consumer access to the P2PL market. If P2PL is indeed designed to serve the needs of less well-off consumers who cannot easily obtain credit from a bank, financial regulators should rather encourage their access to P2PL rather than restrict it.

Final remarks

That consumer P2PL expands financial access for consumers who cannot obtain bank financing is not as self-evident as it appears at first sight. Overall, consumers who cannot afford a loan from a bank will have difficulties obtaining one from the Dutch P2PL platforms. On the positive side, this may protect consumers against overindebtedness. After all, a credit request must not be granted if it is clear upfront that the consumer is not able to meet his or her repayment obligations. However, this does not mean that all consumers – except for the least risky ones – need to be shunned. Nevertheless, this is the current practice at one of the platforms investigated in this chapter. Even though default rates as low as 0.5% may inspire confidence in the market and enhance the reputation of the platform and the industry, the current approach does not contribute to financial inclusion. Instead of increasing the range of consumers who can obtain credit, it makes it a market for the most well-off consumers only, increasing competition for that specific group.

The way in which P2PL is regulated can obstruct or facilitate financial inclusion. If the platforms are regulated in the same way as traditional lenders, as under Dutch law, they will use the creditworthiness assessment criteria which are equal or even stricter than those used by traditional credit institutions and may even adopt other aspects of their business model.

Whether the current (or even a higher) level of inclusion is desired depends on the role the EU and Member States wish consumer P2PL to play in their credit market(s). However, the EU could provide guidance to Member States regarding the role of consumer P2PL and recommend an appropriate legal

74 Ibid.

response. In particular, it could shed light on the extent to which consumer P2PL platforms must have room to experiment with the level of inclusion so as to realize their full potential as a sustainable and trustworthy source of finance for less well-off consumers.

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